

**TOWARDS THE SUSTENANCE OF AN ACCOUNTABLE AND CORRUPTION-FREE
CONSTITUTIONAL DEMOCRACY: A CRITICAL EXAMINATION OF THE LEGAL
NATURE OF THE PUBLIC PROTECTOR'S REMEDIAL POWERS IN LIGHT OF THE
CONSTITUTIONAL COURT'S INTERPRETATION IN *ECONOMIC FREEDOM
FIGHTERS V SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS* 2016**

BY

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in Constitutional Law degree**

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DECLARATION

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“As an ultimate objective, the ombudsman can bring the lamp of scrutiny to otherwise dark places, even over the resistance of those who would draw the blinds”.

Re Alberta Ombudsman Act [1970] 10 DLR. (3d) 47

CHAPTER ONE: INTRODUCTION

1. Background

The Constitution of the Republic of South Africa, 1996 (the Constitution) was assented to by the erstwhile President of South Africa, Nelson Mandela, on the 10th of December 1996 and came into effect on the 4th of February 1997.¹ Arguably, one of the most remarkable features of this Constitution is that it is not merely a formal document that seeks to regulate public power. Instead, much like the German Constitution, it also embodies an objective, normative value system within which the constitutional system has to operate.²

Some of these objective, normative values may be found in section 1 of the Constitution, which provides that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal and adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

As section 1(d) indicates, one of these objectives is democracy. Having emerged from a history of discrimination, oppression and the lack of accountability that characterized apartheid South Africa, it is hardly surprising that from the outset, the drafters of the Constitution were alive to the pressing need for the promotion and strengthening of the principle of democracy. Democracy was determined to be essential as a means of ensuring the growth or enhancement, efficacy as well as the long-term survival of South Africa's recent and as yet untested, constitutional dispensation.

¹ P de Vos and W Freedman *South African Constitutional Law in Context* (2014) 25.

² W Freedman *Understanding the Constitution of the Republic of South Africa* (2013) 22.

Apart from section 1(d), democracy is also referred to in sections 7(1),³ 36(1)⁴ and 39(1)⁵ of the Constitution, all of which form part of the Bill of Rights. The principle of democracy is also referred to in a wide range of provisions that deal with the powers and functions of Parliament, the provincial legislatures and the municipal councils. All of these provisions are aimed at ensuring that Parliament, the provincial legislatures and the municipal councils exercise their powers and functions in a manner that promotes democracy.⁶

Although the principle of democracy is aimed partly at ensuring that the political branches of government represent and give effect to the preferences of at least the majority of the voters in an open, transparent and accountable manner,⁷ the Constitution does not rely on the principle of democracy alone to achieve this goal. The principle of accountability can also be singled out, from among the foundational values and norms enshrined in section 1(d) of the Constitution, as a crucial means of fostering a culture of constitutional democracy within the Republic. This principle holds that “in a democracy, government officials; whether elected or appointed by those who have been elected, are responsible to the citizenry for their decisions and actions”.⁸

Just how central this principle is to the preservation of democracy within the Republic becomes evident when regard is had to the alarming levels of fraud and corruption that have been reported across all three tiers of government during the two decades following the dawn of democracy.⁹ This much is corroborated by a Corruption Perception Index report by Transparency International which indicates how South Africa (that currently holds a low score of 43 points on

³ Section 7(1) provides that the Bill of Rights is the “cornerstone of *democracy* in South Africa” and that it “enshrines the rights of all people in our country and affirms the *democratic* values of human dignity, equality and freedom”.

⁴ Section 36(1) provides that the “rights in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is justifiable in an open and *democratic* society based on human dignity, equality and freedom”.

⁵ Section 39(1) provides that when “interpreting the Bill of Rights a court must promote the values that underlie an open and *democratic* society based on human dignity, equality and freedom”.

⁶ See, for example, sections 57, 70 and 116.

⁷ I Currie and J de Waal *The New Constitutional and Administrative Law* (2001) 89.

⁸ Democracy Web *Accountability and Transparency: Essential Principles* Available at: <http://democracyweb.org/accountability-principles> (Accessed: 17 January 2018).

⁹ G Newham “Why is corruption getting worse in South Africa?” *Corruption Watch News* (27 January 2014) Available at: <http://www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa/> (Accessed: 23 February 2017).

Transparency International's Index last updated on July of 2018)¹⁰ scored 56,80 points in 1996¹¹ but dropped to a record low score of 41 points in 2011.¹² This time-frame is relevant for the fact that 2011 signalled exactly two years after Mr Zuma ascended into office and is shortly after the usage of public funds that, at the time, amounted to R215 million, towards the refurbishment of Mr Zuma's private Nkandla residence, became public knowledge.¹³ This would seem to suggest that the levels of corruption within the country escalated to perhaps the highest level they have been since the final years of apartheid under former President Jacob Zuma's government. The reality, however, is that the incidence of corruption is far from being a recent import of democracy. Former Speaker of Parliament, Frene Ginwala, has noted how

the country's post-apartheid government inherited an intrinsically corrupt system of governance; a system which did not just disappear into the night on the 27th of April 1994 but which had, at that point, so deeply entrenched itself that it inevitably served to corrupt the new order.¹⁴

The framers of the Constitution, fresh out of this corrupt apartheid government, clearly perceived the threat that both private and public sector corruption would pose on South Africa's emerging democracy. This is why "[t]he Constitution's scheme, as a whole, poses a duty on the state to set up concrete and effective mechanisms to prevent and root out corruption and cognate corrupt practices".¹⁵ It does this through putting in place an intricate system of checks and balances aimed at consolidating and sustaining democracy within the Republic by fostering accountability.

Habib points out in this respect that this, after all, is the essence of democracy as:

¹⁰ Trading Economics *South Africa Corruption Index: 1996 – 2018* Available at: <https://tradingeconomics.com/south-africa/corruption-index> (Accessed: 5 July 2018).

¹¹ A score is meant to represent the perceived levels of public sector corruption within a country or particular territory from a scale of 0 (highly corrupt) to 100 (very clean). See Trading Economics *South Africa Corruption Index: 1996 – 2018* Available at: <https://tradingeconomics.com/south-africa/corruption-index> (Accessed: 5 July 18).

¹² Trading Economics *South Africa Corruption Index: 1996 – 2018*. Available at: <https://tradingeconomics.com/south-africa/corruption-index> (Accessed: 5 July 2018).

¹³ The facts concerning the installation of non-security upgrades to Mr Zuma's private Nkandla residence at taxpayer's expense were brought to light in detail in a newspaper article by the Mail and Guardian published on the 11th of November 2011 titled: "Bunker bunker time: Zuma's lavish Nkandla upgrade".

¹⁴ H Klug "Separation of Powers, Accountability and the role of Independent Constitutional Institutions" 60 *New York Law School Law Review* (2015) 24.

¹⁵ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 175.

Democracy does not assume that responsiveness to citizens is a product of good politicians. Rather, it assumes that this may not always be the case, and establishes institutional mechanisms such as opposition parties, regular elections and others like the judiciary and the office of the Public Protector, that act as a check on elected leaders and ensure that all comply with the collectively determined social compact, the Constitution. How well these institutions do this is a measure of the strength of our democracy.¹⁶

Among the most experimental of these institutions are the so-called Chapter Nine Institutions,¹⁷ so named due to their textual location in Chapter Nine of the Constitution. These institutions include the Office of the Public Protector,¹⁸ the South African Human Rights Commission,¹⁹ the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities,²⁰ the Commission for Gender Equality,²¹ the Auditor-General,²² and the Electoral Commission.²³ Out of all of these Chapter Nine Institutions, perhaps the most prominent is the Office of the Public Protector. This is not only because it is placed first on the list of institutions established under Chapter Nine, but also because it has a more elaborate history than any of the other Chapter Nine Institutions.²⁴ Moreover, it plays an integral role in the ongoing struggle against corruption and maladministration in the state,²⁵ which has become a pervasive problem within all three spheres of government over the past 15 years.²⁶

In addition, the Office of the Public Protector has also stood out in recent years as a result of a number of high-profile investigations involving prominent institutions and individuals and which

¹⁶ A Habib *The Judiciary in South Africa* (2015) v.

¹⁷ S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 271.

¹⁸ Section 181(1)(a) read together with sections 182 and 183.

¹⁹ Section 181(1)(b) read together with section 184.

²⁰ Section 181(1)(c) read together with sections 185 and 186.

²¹ Section 181(1)(d) read together with section 187.

²² Section 181(1)(e) read together with sections 188 and 189.

²³ Section 181(1)(f) read together with sections 190 and 191. Section 192 also provides that “national legislation must establish an independent authority to regulate broadcasting in the public interest” and to ensure fairness and a diversity of views”. The national legislation referred to in this section is the Independent Communications Authority of South Africa Act 2 of 2014.

²⁴ The institution was first conceived during apartheid under a different name – as the office of the Advocate-General, in 1979.

²⁵ H van Vuuren “South Africa: Democracy, Corruption and Conflict Management” (April 2013) 1 Available at: <http://democracy.cde.org.za/wp-content/uploads/2014/05/democracy-works-south-africa-conference-paper-democracy-corruption-and-conflict-management-by-hennie-van-vuuren-pdf-.pdf> (Accessed on 23 February 2017).

²⁶ G Newham “Why is corruption getting worse in South Africa?” *Corruption Watch News* (27 January 2014) Available at: <http://www.corruptionwatch.org.za/why-is-corruption-getting-worse-in-south-africa/> (Accessed on 23 February 2017).

have received a great deal of media coverage. Among the most high profile investigations are the 2003 Arms Deal Investigation,²⁷ the 2005 PetroSA Investigation,²⁸ the 2010 SAPS Investigation,²⁹ the 2013 SABC Investigation,³⁰ and the 2014 Nkandla Investigation.³¹

From a constitutional law perspective, the most significant investigation has undoubtedly been the one into the installation and implementation of security measures by the Department of Public Works at the President's private residence in Nkandla in KwaZulu-Natal. This is because the legal nature of the remedy ordered by the Public Protector ultimately had to be determined by the Constitutional Court in its judgment in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*.³²

As mentioned above, this investigation was launched after the Public Protector received complaints about state expenditure on the installation and implementation of non-security measures by the Department of Public Works at the President's private residence. Following this investigation, the Public Protector issued a report in which she found that the President's failure to prevent state expenditure on what were clearly non-security measures at his residence had breached sections 96(1),³³ 96(2)(b)³⁴ and 96(2)(c)³⁵ of the Constitution as well as the Executive

²⁷ Public Protector *Report on an investigation by the Public Protector of a complaint by Deputy President J Zuma against the National Director of Public Prosecutions and the National Prosecuting Authority in connection with a criminal investigation against him* Report No. 26 of 2003.

²⁸ Public Protector *Report on an investigation into an allegation of misappropriation of public funds by the Petroleum Oil and Gas Corporation of South Africa, trading as PetroSA, and matters allegedly related thereto* Report No. 30 of 2005.

²⁹ Public Protector *Against the Rules: Report on an investigation into complaints and allegations of maladministration, improper and unlawful conduct, by the Department of Public Works and the South African Police Service relating to the leasing of office accommodation in Pretoria* Report No. 33 of 2010/11.

³⁰ Public Protector *When Governance and Ethics Fail: Report on an investigation into allegations of maladministration, systemic governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation* Report No. 23 of 2013/2014.

³¹ Public Protector *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No. 25 of 2013/14.

³² 2016 (3) SA 580 (CC) (hereafter "*Economic Freedom Fighters v Speaker of the National Assembly*").

³³ Section 96(1) provides that "Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation".

³⁴ Section 96(2)(b) provides that "Members of the Cabinet and Deputy Ministers may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests."

³⁵ Section 96(2)(c) provides that "Members of the Cabinet and Deputy Ministers may not use their position ... to enrich themselves or improperly benefit another person."

Members Ethics Act³⁶ and the Executive Ethics Code.³⁷ After making these findings, the Public Protector took remedial action against the President in terms of section 182(1)(c) of the Constitution.³⁸ In this respect, she instructed the President to:

11.1.1 Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW [Department of Public Works] at his private residence that do not relate to security, and which include [the] visitors' centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool.

11.1.2 Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also considering the DPW apportionment document.

11.1.3 Reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds abused.

11.1.4 Report to the National Assembly on his comments and actions on this report within 14 days.

Acting in terms of paragraph 11.1.4 of the remedial action, the President submitted a report to the National Assembly within the 14 day time limit. In this report, however, he denied that he had breached the Constitution, the Executive Members Ethics Act or the Executive Ethics Code and, consequently, argued that he was not obliged to comply with the remedial action. Apart from the report submitted by the President, the Minister of Police and an *ad hoc* committee appointed by the National Assembly also submitted reports, both of which supported the approach taken by the President and exonerated him from any liability.

Despite fierce opposition from the Economic Freedom Fighters and the Democratic Alliance, the Assembly itself endorsed all three reports and voted to absolve the President of all liability. As a result of this decision, the President did not comply with the remedial action taken by the Public Protector. The Economic Freedom Fighters and the Democratic Alliance then applied to the Constitutional Court for an order, *inter alia*, declaring that the Public Protector's remedial action was legally binding and compelling the President to comply with it.

³⁶ 82 of 1998.

³⁷ The Executive Ethics Code is issued under the Executive Members Ethics Act 82 of 1998 and prescribes standards and rules aimed at promoting open, democratic and accountable government through, *inter alia*, mandating Cabinet Members, Deputy Ministers and MECs to, at all times, act in good faith and in the best interest of good governance.

³⁸ Section 182(1)(c) provides that "The Public Protector has the power, as regulated by national legislation, to take appropriate remedial action."

The Constitutional Court (per Mogoeng CJ; Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring) unanimously granted the order. In arriving at this decision, the Court held that sections 181 and 182 of the Constitution do not simply confer the power on the Public Protector to make recommendations that may be ignored, unless there is a rational reason to do so.³⁹ Instead, it was the Constitutional Court's view that these provisions clearly indicate that the Public Protector's remedial action is legally binding and that when it is binding it may not be ignored by the organ of state at whom it is directed.⁴⁰ The Court felt this had to be so as, in its own words: "the Public Protector is one of the most invaluable constitutional gifts to the nation in the fight against corruption".⁴¹

From the above discussion, it can be seen how this judgment served to elevate the status of the Office of the Public Protector to emerge as the premier institution to strengthen democracy in the Republic by promoting accountability through fighting corruption. The institution's intensified efforts at rooting out corruption at the highest echelons of government since 2009,⁴² when Advocate Madonsela took office as the country's third Public Protector, are also illustrative of how the Public Protector has a wider reach or purview in terms of ensuring accountability in public administration in comparison with the other Chapter Nine Institutions. This is even more so when regard is had to how the Public Protector remains the only Chapter Nine Institution that is expressly empowered by the Constitution to take appropriate corrective action against an affected organ of state. The Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly* could thus have had this in mind when it interpreted section 182(1)(c) to mean that the Public Protector does, in fact, have binding remedial power.

This interpretation of the legal nature of the Public Protector's remedial power has not only served to dramatically enhance the authority of the Office of the Public Protector, but has also changed the manner in which the Public Protector interacts with other organs of state. Instead of

³⁹ 2016 (3) SA 580 (CC) at para 70.

⁴⁰ 2016 (3) SA 580 (CC) at para 74.

⁴¹ 2016 (3) SA 580 (CC) at para 52.

⁴² As shown through the examples of the high profile cases that the institution has investigated since 2009 given above.

having to convince other organs of state to co-operate by presenting well-reasoned arguments, the Public Protector may now simply instruct them to act. In other words, the Public Protector is no longer required to act co-operatively. It may now act coercively.

As Bishop and Woolman point out, however, the fact that the Public Protector had to convince other organs of state to be co-operative by presenting well-reasoned arguments was a strength and not a weakness. This is because the results would be “infinitely more powerful” if obtained through cooperation as opposed to coercion. In addition, it would also allow the National Assembly to exercise its oversight function more effectively and participate in and help shape the debate around corruption and maladministration.⁴³

The problem with the Constitutional Court’s finding, Bishop *et al* argue is that it changes the relationship between the Public Protector and other organs of state from a constructive to a conflictual one. They explain the flaw in the Court’s logic by stating that “if one were rather to adopt the approach that remedial action is not binding, but does require a lawful response”, the result, they argue, is that it “would avoid the inevitability of [her] decisions being taken on review”. On the Constitutional Court’s approach, the focus will be on the Public Protector’s decisions and not, necessarily, on the impugned conduct. On the alternative approach, the focus will be on the organ of state.⁴⁴ These criticisms appear to have been confirmed by subsequent developments, most notably an increase in the number of decisions being taken on review.⁴⁵

2. Statement of purpose

The purpose of this thesis is to undertake a critical assessment of the nature of the Public Protector’s remedial power in light of the Constitutional Court’s ruling in *Economic Freedom Fighters v Speaker of the National Assembly*. More particularly, this thesis seeks to set out and examine the judgment of the Constitutional Court in *Economic Freedom Fighters v Speaker of*

⁴³ M Bishop and S Woolman “Public Protector” in S Woolman et al (eds) *Constitutional Law of South Africa* 2ed (Original Service 12-05) at 24A-3.

⁴⁴ M Bishop, J Brickhill and K Moshikaro “Constitutional Law” 2016(1) *Juta’s Quarterly Review of Law* 2 at 2.1.

⁴⁵ See for example *South African Reserve Bank v Public Protector of the RSA* 2017 (6) SA 198 (GP); *Minister of Home Affairs v Public Protector of the RSA* 2017 (2) SA 597 (GP); *ABSA Bank Ltd v Public Protector of the RSA* [2018] 2 All SA 1 (GP); and *Minister of Home Affairs v Public Protector of the RSA* 2018 (3) SA 380 (SCA).

the National Assembly so as to identify and explore the implications of this judgment for the relationship between the Office of the Public Protector and other organs of state.

In addition, the purpose of this thesis is to constructively engage with the criticisms that have been levelled against the judgment by academic commentators, particularly those set out above. As indicated above, some of these criticisms appear to have been confirmed by subsequent rulings that have been taken on review. This thesis will however, argue that they are not necessarily valid, especially in the context of a dominant party democracy and in light of the scourge of corruption and the implications thereof on the sustenance and/or survival of the principle of democratic accountability within the Republic. In this regard, special attention shall be accorded to three important judicial decisions implicating the Public Protector. These decisions are: firstly, the Western Cape High Court's decision in *Democratic Alliance v South African Broadcasting Corporation Ltd and Others*⁴⁶ (where the court endorsed a co-operative approach between the Office of the Public Protector and organs of state). Thereafter, consideration will be given to the Supreme Court of Appeal's follow-up judgment to this ruling in *SABC v DA*⁴⁷ (in which the court was in favour of a conflictual approach instead). Finally, the Supreme Court of Appeal's ruling in *Minister of Home Affairs v Public Protector of the RSA*⁴⁸ where the Court was in support of the application of the principle of legality for the purposes of ascertaining the best approach to implement in the circumstances will be analysed.

3. The research question(s)

The key research question that this dissertation will seek to answer is to set out and examine the judgment of the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly*. This will be done to ascertain the extent to which the judgment has impacted the Public Protector's remedial powers under section 182(1)(c) of the Constitution.

Also flowing from this key research question, is the need to identify and explore the implications of this judgment for the relationship between the Office of the Public Protector and other organs

⁴⁶ 2015 (1) SA 551 (WCC).

⁴⁷ 2016 (2) SA 522 (SCA).

⁴⁸ 2018 (3) SA 380 (SCA).

of state. In so doing, this study will seek to determine whether the Constitutional Court's position that the Public Protector does in fact have the authority to take binding and legally enforceable remedial action under the Constitution, furthers, or hinders, the Public Protector's role in contributing to the promotion of accountability in the public administration through combatting corruption.

The study shall also set out and engage with the criticisms that have been levelled against the judgment by academic commentators – to the effect that non-threatening powers of persuasion⁴⁹ enhance the Public Protector's ability to get government to account for actions taken and decisions made – to determine whether they are necessarily valid. This is especially relevant in the context of a dominant party democracy, the scourge of corruption, and how these factors affect the principle of accountability. In so doing, the study shall also set out and examine jurisprudence that has developed around the institution of the Public Protector prior to, and following the handing down of the Constitutional Court judgment in *Economic Freedom Fighters v Speaker of the National Assembly*. The purpose of this is to establish how organs of state should respond to the Public Protector's findings and remedial action.

4. The rationale for the study

Given that the African National Congress (the "ANC") has won five consecutive national elections and with an overwhelming majority on each occasion, it is generally accepted among legal and political commentators that South Africa may be characterised as a dominant party democracy. Choudry defines a dominant party democracy as one:

which provides an entrenched framework for multiparty democracy through universal suffrage and regular elections, and which contemplates political competition and the alternation of political parties in power, but in which one party enjoys electoral dominance and continues to win free and fair elections that are not tainted by fraud or force.⁵⁰

⁴⁹ That is, rather than giving rise to a conflictual one as state organs would now have to litigate against the Public Protector if they disagree with her remedial action by contesting her findings by way of judicial review.

⁵⁰ S Choudry "He has a mandate: The South African Constitutional Court and the African National Congress in a dominant party democracy" 2009 *Constitutional Court Review* 11 at 12. See also S Friedman "No easy stroll to dominance, opposition and civil society in South Africa" in H Giliomee and C Simkins (eds) *The awkward*

It is also generally accepted that a dominant party democracy is usually accompanied by a number of pathologies. These include the subordination of the parliamentary wing of the dominant party to the non-parliamentary wing largely as a result of the principle of party-discipline; the capturing of important state institutions through mechanisms such as “cadre deployment”; and the blurring of the distinction between the state and the party by equating the state with the party.⁵¹ These pathologies are often accompanied by increasingly high levels of corruption and maladministration. As pointed out above, this has certainly been the case in South Africa. In this context the normal democratic process of regular elections and the alternation of political parties in government cannot be relied on to combat these pathologies. Instead, independent institutions such as the courts and, in the case of South Africa, the Chapter Nine Institutions and especially the Office of the Public Protector are required to play a more prominent role. The rationale for this study, therefore, is to locate the Constitutional Court’s judgment in *Economic Freedom Fighters v Speaker of the National Assembly* and the criticisms that have been levelled against it within this broader context.

5. The research methodology of the study

This is a desktop study which adopts a positivist approach to its subject. It is, therefore, based largely on a critical analysis of primary and secondary materials in order to identify contradictions, inconsistencies, lacunae and trends in the relevant field. The primary and secondary materials that will be analyzed in this study include law reports, statutes, journal articles, reports, textbooks and internet websites.

6. The structure of the study

The study is divided into four chapters. Chapter One will serve as an introductory chapter. Its main purpose is to put the study into perspective. It thus seeks to provide a contextual

embrace: One party domination and democracy (1999) at 97 and P du Toit and N de Jager *Friend or foe? Dominant party systems in Southern Africa: Insights from the developing world* (2013) at 7.

⁵¹ JW Jaftha *The role of the South African Constitutional Court in safeguarding democracy by ensuring the effective operation of the separation of powers* Unpublished LLM Thesis, University of Cape Town (2018) at 50.

understanding of the main subject matter of the thesis. This chapter briefly touches on the most important court ruling thus far on the Public Protector's powers while also stating the purpose and rationale for the study, given the Public Protector's far-reaching decisions and the judiciary's endorsement of the binding nature of these decisions.

Chapter Two will seek to locate the position, status and purpose of Chapter Nine institutions in general, and of the Office of the Public Protector in particular, within South Africa's current constitutional order in light of what the Constitution provides as well as with due regard to the statutory national legislative framework that has been put in place to regulate the Public Protector's powers. With regard to the latter, primary focus will be placed on the Public Protector Act. The Public Protector's investigatory procedures as set out under the Public Protector Act shall also be examined. Additional legislation that confers further powers on the Office of the Public Protector will also be considered.

Chapter Three will closely examine the jurisprudence of the courts that has developed around the Office of the Public Protector. This chapter essentially serves as a means of establishing jurisprudential background to proceedings that eventually culminated in the handing down of the Constitutional Court's ruling in *Economic Freedom Fighters v Speaker of the National Assembly*. It shall do so by first engaging in a brief discussion of the 2011 *Public Protector of the RSA v Mail and Guardian case*⁵² which is significant due to the remarks made by the Supreme Court of Appeal in this instance with regard to the proper interpretation of the institution's investigatory role under the Constitution. More importantly, the chapter seeks to closely examine the conflicting judgments around the legal nature of the Public Protector's remedial power and the review of the Public Protector's exercise of such power. Particular attention shall thus be paid to the Western Cape High Court's decision in *Democratic Alliance v South African Broadcasting Corporation* and the Supreme Court of Appeal decision in *South African Broadcasting Corporation v Democratic Alliance*. Special attention will be accorded to the *Economic Freedom Fighters v Speaker of the National Assembly* ruling as this was the first time that the highest court in the land gave a positive affirmation of the Public Protector's powers under the Constitution. Following that is yet another Supreme Court of Appeal decision in *Minister of*

⁵² 2011 (4) SA 420 (SCA).

Home Affairs v Public Protector of South Africa. This shall be done in order to establish the appropriate manner in which the institution should relate with organs of state in order to more effectively and efficiently ensure public accountability in daily administration.

Finally, Chapter Four will serve as the analysis and conclusion chapter. Essentially, this chapter will seek to engage with the criticisms that have been levelled against the Constitutional Court's ruling in *Economic Freedom Fighters v Speaker of the National Assembly*. It shall show that these criticisms are not necessarily valid in light of South Africa's current political landscape, which has been characterised by a dominant party dynamic since the advent of constitutional democracy. It shall also examine the means through which the betterment or strengthening of this institution, in so far as cementing its capacity to effectively tackle graft, can be achieved.

CHAPTER TWO: THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

1. Introduction

As we saw in Chapter One of this thesis, the constitutional principles of democracy and accountability are key characteristics of South Africa's post-apartheid constitutional order.⁵³ An important consequence of these principles is that the Constitution does not only seek to structure, but also to constrain, state power.⁵⁴ In order to achieve these goals, the Constitution contains structural, procedural and substantive mechanisms all of which regulate the manner in which public power may be exercised. Among the structural and procedural mechanisms encompassed by the Constitution are:

- the principle of the separation of powers;
- the principle of multi-sphere government; and
- the principle of co-operative government.

Although the Constitution does not expressly provide for the principle of the separation of powers, the Constitutional Court had held on several occasions that there is no doubt that it does form part of South Africa's system of constitutional governance and that law or conduct that is inconsistent with the principle is invalid.⁵⁵ A self-standing adjunct to the principle of the separation of powers doctrine is the principle of multi-sphere government. Somewhat similar to the separation of powers which requires a vertical division of power between the legislative, executive and judicial branches of government, multi-sphere government requires a horizontal division of power between the national, provincial and local spheres of government.⁵⁶

⁵³ H Klug "Separation of Powers, Accountability and the role of Independent Constitutional Institutions" 60 *New York Law School Law Review* (2015) 154.

⁵⁴ I Currie and J de Waal *The New Constitutional and Administrative Law* (2001) 10.

⁵⁵ In *SA Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at para 22 the Constitutional Court held that separation of powers is an unexpressed provision that is "implied" in or "implicit" to the Constitution and that its presence is based on the fact that the Constitution draws a distinction between the legislative, executive and judicial functions. In *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 37-38 the Court also held that "the constitutional principle of separation of powers is not merely an abstract notion but is reflected in the very structure of government as seen through the provisions entrusting and separating powers between the legislative, executive and judicial branches" and in *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) at para 28 that "[i]t is by now axiomatic that the doctrine of separation of powers is part of our constitutional design".

⁵⁶ A Mangu *Separation of Powers and Federalism in African Constitutionalism: A South African case* (1998) 7.

Unlike the principle of the separation of powers, the principle of multi-sphere government is expressly provided for by the Constitution. The most significant provision in this respect is section 40(1), which provides that “[i]n the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.”

It is important to note, however, that the term “government” in section 40(1) is employed in a somewhat unusual manner. This is because it refers only to the legislative and executive branches of government and not to the judicial branch. The horizontal division of power between the national, provincial and local spheres, therefore, applies only to the legislature and the executive. It does not apply to the judiciary, which remains a national institution.

Although legislative and executive power is divided among the national, provincial and local spheres of government, this division is not intended to promote competition among the three spheres, but rather co-operation. Section 40(2) of the Constitution thus provides that “[a]ll spheres of government must observe and adhere to the principles in [Chapter Three] and must conduct their activities within the parameters that the Chapter provides.”

The principles of co-operative government referred to in section 40(2) are contained in section 41(1)(a) to (h) that *inter alia*, provides that all spheres of government and all organs of state within each sphere must be loyal to the Constitution and the Republic.⁵⁷ This provision is qualified by the requirements that each sphere must not assume any power or function except those conferred on them by the Constitution;⁵⁸ and must provide effective, transparent, accountable and coherent government, and co-operate with one another in mutual trust and good faith.⁵⁹

Unfortunately, the structural and procedural restrictions imposed by these principles have been undermined by the fact that the South African political system has been dominated by the ANC

⁵⁷ Section 41(1)(a).

⁵⁸ Section 41(1)(e).

⁵⁹ Section 41(1)(h).

and that the ANC practices a form of strict party discipline.⁶⁰ As a result of these factors, Parliament's role as watchdog over the policies and practices of the executive has been weakened.⁶¹ Notable examples of the corrosive effect that the dominant party dynamic has on Parliament's role as a mechanism for fostering accountability in public administration have been illustrated in the manner in which Parliament dealt with "Travelgate".⁶² More recently, this has also been seen when ANC-aligned members of Parliament chose not to hold former President Jacob Zuma accountable for the manner in which state funds were abused in the installation of non-security comforts at his private Nkandla homestead.⁶³ In addition, it has been demonstrated

⁶⁰ The ANC currently occupies 249 out of a total of 400 seats in the National Assembly, which translates into a 62.25% majority in the more powerful "lower house" of Parliament. See: South African Government News Agency *2014 Elections: Seats in Parliament*. 10 May 2014 Available at: <http://www.sanews.gov.za/south-africa/2014-elections-seats-parliament> (Accessed: 8 August 2016).

⁶¹ H Klug "Separation of Powers, Accountability and the role of Independent Constitutional Institutions" 60 *New York Law School Law Review* (2015) 156.

⁶² In the "Travelgate" scandal, members of Parliament, most of them high ranking members of the ruling ANC party, were charged with abusing parliamentary travel warrants thereby defrauding Parliament of millions of rands. In August 2011, the Speaker Max Sisulu revealed that parliament had failed to recoup some R12 million owed to it by errant MPs and had decided to write the debt off on the basis that it would cost more to recover the misappropriated funds. Parliament's integrity was severely compromised as a result due to its failure to resolve the "Travelgate" saga through a speedy judicial process and to institute criminal proceedings against directly implicated MPs and to compel them to repay the money they owed. See: L Donnelly High flyers among "Travelgate" MPs *Mail and Guardian* 12 August 2014 Available at: <https://mg.co.za/article/2011-08-12-highflyers-among-travelgate-mps> (Accessed: 6 July 2018). On the opposite end of the spectrum was the ANC's response to the scandal. Despite the ANC National Executive Committee issuing a statement on 19 September 2004 indicating that the party would institute disciplinary proceedings against any of its MPs found guilty of wrongdoing with regards to "Travelgate", the party instead promoted 7 of its high ranking party members implicated in the scandal. One such notable example is Bathabile Dhlamini; one of "Travelgate's" biggest offenders – pleading guilty to fraud amounting to R254 000. Despite this, she was later elected first as deputy minister of social development in 2009 then as minister of social development after a dramatic cabinet reshuffle in October 2010. This granting of political protection to high ranking party officials found guilty of fraud and corruption through subsequent promotion to senior positions in government gives rise to the potential conflict between the exercise of Parliament's constitutional duty of scrutinizing and overseeing executive action and loyalty to the government as the relevant MP would then feel compelled to, at all times, toe the party line in order to keep their post. See G van Onselen "7 of the worst: How the ANC rewards corruption" *Inside Politics* 27 June 2012 Available at: <https://inside-politics.org/2012/06/27/7-of-the-worst-how-the-anc-rewards-corruption/> (Accessed: 7 July 2018).

⁶³ See, for example, Public Protector *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No. 25 of 2013/14. The Public Protector's subsequent report into allegations of corruption, maladministration, improper and unethical conduct relating to the handling of the Nkandla project essentially found that the President's conduct in this instance had been improper and flouted a number of his obligations under the Constitution. Parliament should have facilitated the enforcement of this report as per its constitutional mandate under section 42(3) of the Constitution which provides that: "[T]he National Assembly is elected to represent the people and to ensure government by the people under the Constitution ... by passing legislation" and, more significantly, "by scrutinizing and overseeing executive action". However, the National Assembly adopted and endorsed a parallel process to that of the Office of the Public Protector which essentially absolved the President of all wrongdoing concerning the excessive runaway costs of extending his private home. This, in turn, emboldened the President to ultimately not comply with any of the corrective steps prescribed in the Public Protector's report.

in the manner in which Mr Zuma survived several no-confidence motions against him during his tenure as President, largely due to the existence of pro-Zuma loyalists within Parliament.

Section 102 of the Constitution makes provision for the President's removal through the passing of a no-confidence motion by a majority of the members of Parliament where Parliament has lost confidence in the President's continued leadership of the Republic. During his time as President, Mr Zuma faced a total of six motions of no confidence; 2 of which were unsuccessful – one was amended and the other withdrawn.⁶⁴ The most recent vote of no confidence against Mr Zuma was on the 8th of August 2017 and was, for the first time, held by secret ballot.⁶⁵ He survived, having obtained a total of 198 votes against the motion, 177 votes for, and 9 abstentions.⁶⁶ Mr Zuma was thus able to once again remain in office despite his scandal-ridden Presidency.⁶⁷

It is against this backdrop that the need for, and utility of, independent institutions of governance that are not easily susceptible to capture by the executive or the ruling party, becomes evident. The revolutionary nature of South Africa's Constitution consequently lies in the constitutionalizing of a set of independent institutions under Chapter Nine of the Constitution, whose role is to uphold the progressive vision of the Constitution while simultaneously ensuring that there are multiple avenues for democratic and legal contestation.⁶⁸

⁶⁴ K Wilkinson "Fact Sheet: How many motions of no-confidence has Zuma faced?" *Eyewitness News* 29 June 2017 Available at: <http://ewn.co.za/2017/06/29/fact-sheet-how-many-motions-of-no-confidence-has-zuma-faced> (Accessed: 6 July 2018).

⁶⁵ K Wilkinson "Fact Sheet: How many motions of no-confidence has Zuma faced?" *Eyewitness News* 29 June 2017 Available at: <http://ewn.co.za/2017/06/29/fact-sheet-how-many-motions-of-no-confidence-has-zuma-faced> (Accessed: 6 July 2018).

⁶⁶ K Wilkinson "Fact Sheet: How many motions of no-confidence has Zuma faced?" *Eyewitness News* 29 June 2017 Available at: <http://ewn.co.za/2017/06/29/fact-sheet-how-many-motions-of-no-confidence-has-zuma-faced> (Accessed: 6 July 2018).

⁶⁷ This motion of no-confidence was held just months after Mr Zuma's surprise cabinet reshuffle that was dubbed as a "midnight ministerial massacre". Among those placed on the chopping block were former Finance Minister Pravin Gordhan and his deputy, Mcebisi Jonas who were unceremoniously sacked. This almost instantaneously caused the South African currency to plummet with many fearing that ratings agencies would downgrade the country to junk status. By that stage, Mr Zuma's government was being blamed for corruption spiralling out of control; unemployment reaching unprecedented levels; the politicization and weakening of independent state institutions as well as the attempted capture of the state as emerged from the Public Protector's State of Capture report. Yet despite these warranted concerns, and their implications on the efficacy of constitutional democracy within the Republic and on the continued survival of the country's broader constitutional project, loyal ANC members of Parliament, who constitute the majority of the members of the National Assembly, steadfastly stood by Mr Zuma.

⁶⁸ H Klug *Poverty, Good Governance and Achieving the Constitution's promise* Speech delivered at the Good Governance Conference held in Pretoria on 22 October 2013 Available at: <http://www.gov.za/speeches/view.php?sid=41558> (Accessed 26 May 16).

The purpose of this chapter, therefore, is to set out the legal framework governing these Chapter Nine Institutions in general and the Office of the Public Protector in particular by closely examining relevant constitutional and statutory provisions. Before doing so, however, it will be helpful to set out the background and history of the concept of an Ombudsman in order to analyse the Office of the Public Protector within its proper context.

2. The institution of the Ombudsman

As the Constitutional Court indicated in the *First Certification Judgment*, the Office of the Public Protector is “modelled on the institution of the ombudsman, whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice.”⁶⁹

Murray defines the ombudsman somewhat simplistically as a state institution located outside government with the power to investigate governmental affairs on behalf of citizens.⁷⁰ A more sophisticated and widely accepted definition is provided by the International Bar Association, which defines the institution as:

an office that receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action and issue reports.⁷¹

In light of these definitions, therefore, it may be said that the ombudsman institution commonly operates as an independent oversight mechanism charged with the receipt and investigation of complaints about administrative action and decisions in the delivery of government services.⁷² In this respect, the ombudsman operates as an agent or representative of the people, imbued with a

⁶⁹ *Ex parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the RSA*, 1996 1996 (4) SA 744 (CC) 161 (hereafter the *First Certification Judgment*).

⁷⁰ C Murray “The Human Rights Commission et al: What is the role of South Africa’s Chapter 9 Institutions” 6(2) *PELJ* (2006) 123.

⁷¹ L Reif (ed) *The International Ombudsman Yearbook: Volume 6* (2002) 79.

⁷² A Brock and A Devenish “Africa could lead the way on rights” *Sunday Tribune* 26 March 2017.

unique capacity to tackle wider problems of maladministration and poor governance and the resolution of injuries suffered by ordinary citizens as a result.⁷³

In order to achieve these goals, an ombudsman is frequently endowed with the power to embark upon an independent and impartial investigation and thereafter propose suitable remedies to redress the injustice that would have occurred. In addition, he or she can make recommendations to the relevant prosecuting authorities to take action against an official. Apart from these powers, an ombudsman is often given the power to negotiate or mediate between the parties as part of methods to resolve the problem.⁷⁴

The institution of the ombudsman, therefore, has a dual role: that of facilitator (through receiving and investigating complaints) and agent for change – through recommendations for change on policies and procedures.⁷⁵ It is in this light that the Asian Development Bank has described it as “the most popular contemporary innovation in the field of administrative accountability”.⁷⁶

Not surprisingly, the popularity of the ombudsman institution has increased exponentially over time due to the necessity and the obvious utility of the institution as illustrated above. Over the years, it has also moved away from its classical conception to a flood of new ombudsman offices whose jurisdiction ranges from the general (such as the Australian Commonwealth Ombudsman and the British Parliamentary Commissioner), to the specialist (such as the Canadian Commissioner of Official Languages and the military ombudsmen in Sweden, Norway and Germany).⁷⁷

⁷³ L Baxter *Administrative Law* (1984) 279.

⁷⁴ Namibia Ombudsman *Mandates of the Office of the Ombudsman* Available at: <https://www.ombudsman.org.na/mandates-of-the-office-of-the-ombudsman/> (Accessed: 13 October 2016).

⁷⁵ The role of the Ombudsman *The Ombudsmen Website* Available at: www.ombudsmen.co.za (Accessed: 7 April 2017).

⁷⁶ Transparency International *Best Practices for Ombudsmen* Available at: http://www.transparency.org/files/content/corruptionqas/Helpdesk_answer_Best_Practices_for_Ombudsman_Office_s.pdf (Accessed: 13 October 2016).

⁷⁷ L Baxter *Administrative Law* (1984) 282. In the South African context, a number of specialist ombudsman institutions have also emerged. These include the Office of the South African Military Ombud which serves as an independent, external mechanism to deal with grievances and complaints, either by members of the public regarding the official conduct of a member of the SANDF or by members and former members of the SANDF in respect of conditions of service (see South African Military Ombud Website Available at: <http://milombud.org/> (Accessed: 31 October 2016)); the Office of the Police Ombudsman whose role includes monitoring police conduct and overseeing the effectiveness and efficiency of the police service (see Western Cape Government *Western Cape Police*

The origins of the institution of the ombudsman are usually traced back to the abdication of King Gustav IV of Sweden on 29 March 1809 and the adoption of a new Constitution by the Swedish Parliament shortly thereafter. One of the goals of this Constitution was to give Parliament control over the executive and in order to help accomplish this goal the Constitution provided for the appointment of the Parliamentary Ombudsman (*Justitieombudsman*).⁷⁸ The function of this representative of Parliament was to monitor the manner in which all members of the executive complied with the law and to report back on this issue to Parliament. The Parliamentary Ombudsman therefore, served as a buffer between disgruntled citizens and the government, in support of Parliament.⁷⁹

From Sweden the concept of an ombudsman spread, first to other Scandinavian countries, starting with Finland in 1919,⁸⁰ and from there to various Commonwealth countries, starting with New Zealand in 1962.⁸¹ In Africa, the first country to appoint an ombudsman was Tanzania in 1966, followed by Mauritius in 1968 and Ghana in 1969.

In South Africa the first ombudsman was appointed in 1979 in terms of the Advocate-General Act⁸² and was known as the Advocate-General.⁸³ Section 4(1) of this Act was the enabling

Ombudsman Available at: <https://www.westerncape.gov.za/police-ombudsman> (Accessed: 31 October 2016)) and the Office of the Health Ombudsman which is intended to address, amongst others, complaints against health practitioners (See Health Professions Council of South Africa *About HPCSA: Organizational Structure* Available at: <http://www.hpcsa.co.za/OrgStructure/OmbudsmanOffice> (Accessed: 31 October 2016)). There are also numerous offices of the Ombud at various institutions of higher learning across the country.

⁷⁸ *South African Broadcasting Corporation v Democratic Alliance* 2016 (2) SA 522 (SCA) at para 26.

⁷⁹ Public Protector Address to the Law Society of South Africa during the Annual General Meeting of the Law Society at the Windmill Casino and Entertainment Centre in Bloemfontein on 29 March 2014 Available at: http://www.pprotect.org/media_gallery/2014/29032014_sp.asp (Accessed: 14 May 2016). See also L Reif *The Ombudsman, Good Governance and the International Human Rights System* (2004) 5 and L Reif, (ed) *The International Ombudsman Yearbook Volume 6* (2002) 79.

⁸⁰ See Parliament of the Republic of South Africa *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A report to the National Assembly of the Parliament of South Africa* (31 July 2007) Available at: <http://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf> (Accessed: 10 April 2016).

⁸¹ Parliament of the Republic of South Africa *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A report to the National Assembly of the Parliament of South Africa* (31 July 2007) Available at: <http://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf> (Accessed: 10 April 2016).

⁸² 118 of 1979.

provision and it conferred on the Advocate-General the power to investigate the improper or unlawful use of public money on receipt of a complaint.⁸⁴ Given these severely limited powers, the Office of the Advocate-General was no more than a specialist ombudsman.⁸⁵

The Advocate-General Act was repealed and replaced in 1983 by the Ombudsman Act.⁸⁶ Section 11 of this Act was the enabling provision and when it was first enacted it conferred the power on the Advocate-General to identify deficiencies in legislation and other official measures and to refer these deficiencies to Parliament or the appropriate authority together with recommendations as to how they could be remedied.⁸⁷ Section 11, however, was extensively amended in 1991 and the powers of the Ombudsman were extended to include matters in respect of which “the State of the public in general is being prejudiced by maladministration in connection with the affairs of the State”. At the same time, the name of the Office was officially changed from that of Advocate-General to that of Ombudsman.⁸⁸

⁸³ M Montesh *The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?* Available at: <http://www.rtsa.ro/tras/index.php/tras/article/view/34> (Accessed: 10 April 2016).

⁸⁴ M Montesh *The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?* Available at: <http://www.rtsa.ro/tras/index.php/tras/article/view/34> (Accessed: 10 April 2016). See also S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 274.

⁸⁵ AS Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* (1986) 168. See also G Barrie “The Public Protector” *De Rebus* (September 1995) 581. Available at: http://reference.sabinet.co.za/webx/access/journal_archive/02500329/8263.pdf (Accessed: 10 April 2016). The limited powers of the Advocate-General may be traced back to the fact that this Office was established in response to the so-called “Information Scandal” which broke out in the late 1970s. This scandal, which was also known as “Infogate”, “Rhodiegate” or “Muldergate”, arose out of the unlawful use of public money by the then Department of Information to fund secret projects, including the creation of the *Citizen Newspaper*. After these unlawful activities were publically revealed, the National Party Government agreed to establish a permanent structure to investigate the improper or unlawful use of public funds (see M Montesh *The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?* Available at: <http://www.rtsa.ro/tras/index.php/tras/article/view/34> (Accessed: 10 April 2016).

⁸⁶ 110 of 1983.

⁸⁷ M Montesh *The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?* Available at: <http://www.rtsa.ro/tras/index.php/tras/article/view/34> (Accessed: 10 April 2016). See also C Murray, “The Human Rights Commission et al: What is the role of South Africa's Chapter 9 Institutions?” 6(2) *PELJ* (2006) 123.

⁸⁸ M Montesh *The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?* Available at: <http://www.rtsa.ro/tras/index.php/tras/article/view/34> (Accessed: 10 April 2016). See also C Murray, “The Human Rights Commission et al: What is the role of South Africa's Chapter 9 Institutions?” 6(2) *PELJ* (2006) 123.

Following the transition to democracy, the Ombudsman Act was repealed and replaced in 1994 by the Public Protector Act.⁸⁹ This Act was passed in order to give effect to sections 110 to 114 of the Interim Constitution.⁹⁰ These sections were part of a suite of constitutional provisions located in Chapter Eight and aimed at creating several independent state institutions, including the Public Protector,⁹¹ the Human Rights Commission,⁹² the Commission on Gender Equality⁹³ and the Commission on the Restitution of Land Rights.⁹⁴

Apart from creating the Office of the Public Protector and regulating the appointment, independence and staff of the Public Protector, sections 110 to 114, and especially section 112, conferred wide powers on the Public Protector, including the power to investigate allegations of abuse of power, corruption, maladministration and even rudeness. Section 112(1)(a) provided in this respect that:

- (1) ... in addition to any powers and functions assigned to him or her by any law, [the Public Protector] shall be competent:
- (a) to investigate, on his or her own initiative, or on receipt of a complaint:
 - (i) allegations of maladministration 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 corruption, 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.⁹⁵

⁸⁹ 23 of 1994.

⁹⁰ Constitution of the Republic of South Africa, Act 200 of 1993 (hereafter, the “Interim Constitution”).

⁹¹ Sections 110 to 114. The drafters of the Interim Constitution chose the name Public Protector, rather than Ombudsman because of the gender connotations of the latter term (see M Montesh *The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?* Available at: <http://www.rtsa.ro/tras/index.php/tras/article/view/34> (Accessed: 10 April 2016).

⁹² Sections 115 to 118.

⁹³ Sections 119 and 120.

⁹⁴ Section 121 to 123.

⁹⁵ Section 112(1)(a) Available at: http://www1.chr.up.ac.za/chr_old/indigenous/documents/South%20Africa/Legislation/Constitution%20of%20South%20Africa%201993.pdf (Accessed: 13 April 16).

Besides these powers, section 112(1)(b) and (c) also conferred the power on the Public Protector to take a number of remedial steps. It provided in this respect that the Public Protector is empowered:

- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by:
 - (i) mediation, conciliation, or negotiation;
 - (ii) advising, where necessary, any complainant regarding appropriate remedies; or
 - (iii) any other means that may be expedient in the circumstances; or
- (c) at any time prior to, during or after an investigation:
 - (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions;
 - (ii) or if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.⁹⁶

Although the Interim Constitution instituted an Office with an expanded mandate, role and jurisdiction, the Public Protector's powers under the Interim Constitution could still be regarded as being essentially non-threatening. This is seen mostly in the types of remedies that were available to the Public Protector. In terms of section 112(1)(b) the Public Protector could only "endeavour" to resolve a dispute or to rectify any act or omission. The use of the word "endeavour" indicated that the Public Protector was not required to take an active or direct role, but merely to be seen to have made some sort of an effort as far as redressing the mischief contemplated under section 112(1)(a) of the Interim Constitution was concerned.

The Public Protector could endeavour to address such matters through the use of alternative dispute resolution mechanisms listed under section 112(1)(b). Accordingly, the Public Protector could render advice that could be used in ascertaining the appropriate remedy in the circumstances; refer any material findings of his or her investigations to the appropriate authorities as well as make appropriate recommendations, which, by virtue of them being mere

⁹⁶ Section 112(1)(b) Available at: http://www1.chr.up.ac.za/chr_old/indigenous/documents/South%20Africa/Legislation/Constitution%20of%20South%20Africa%201993.pdf (Accessed: 13 April 2016).

recommendations, were open to being disregarded or not being implemented at all. In short, the Public Protector could not take any binding remedial action on any person or organ of state.

The Interim Constitution fell away with the coming into force of the Constitution.⁹⁷ The provisions governing the Office of the Public Protector are now set out in sections 181 to 183 and 193 to 194. Apart from establishing the Office of the Public Protector and regulating the independence, appointment and removal of the Public Protector, these sections, and especially section 182, also confer wide investigatory and remedial powers on the Public Protector. Section 182 provides in this respect that:

- (1) 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.⁹⁸

3. The constitutional framework

3.1 Introduction

The constitutional provisions that govern the Office of the Public Protector may be divided into two categories: first, those that apply to all of the Chapter Nine Institutions;⁹⁹ and, second, those that apply specifically to the Public Protector.¹⁰⁰ The first category deal with the independence of the Chapter Nine Institutions and the appointment and removal of the Office-Bearers and Commissioners in question.¹⁰¹ The second category deals with the powers, functions and term of office of the Public Protector.¹⁰² Each of these different aspects will be discussed in turn, starting with the independence of the Chapter Nine Institutions.

⁹⁷ Constitution of the Republic of South Africa, 1996 (hereafter, the “Constitution”).

⁹⁸ Section 182(1) (a), (b) and (c).

⁹⁹ See sections 181, 193 and 194.

¹⁰⁰ See sections 182 and 183.

¹⁰¹ See sections 181, 193 and 194 respectively.

¹⁰² See sections 182 and 183 respectively.

3.2 The independence of the Chapter Nine Institutions

The independence of the Chapter Nine Institutions is governed by sections 181(2) to 181(4) of the Constitution. Section 181(2) begins in this respect by providing that “[t]hese institutions are independent and subject only to the Constitution and the law, and they must be impartial and exercise their powers without fear, favour or prejudice”. Section 181(3) goes on to impose an obligation on other organs of state, through legislative and other measures, to “assist and protect [the Chapter Nine Institutions] to ensure their “independence, impartiality, dignity and effectiveness” and, finally, section 181(4) prohibits persons and organs of state interfering with the functioning of any Chapter Nine Institution.

As Murray has pointed out, the Constitution asserts the independence of the Chapter Nine Institutions in strong terms, using language virtually identical to that used to declare the independence of the courts.¹⁰³ Given this fact, it is not surprising that the Constitutional Court has also asserted the independence of the Chapter Nine Institutions in strong terms. In *Independent Electoral Commission v Langeberg Municipality*,¹⁰⁴ for example, the Constitutional Court held that although the Independent Electoral Commission (the “IEC”) was clearly an organ of state as defined in section 239 of the Constitution,¹⁰⁵ it was not an organ of state located within the government and especially not within the national sphere of government, as was argued. Instead, it is located outside the government in much the same way as the courts are.¹⁰⁶

In arriving at this decision, the Constitutional Court relied heavily on the fact that there is nothing in the Constitution which indicates that the IEC is part of the national sphere of government. It further relied on the fact that the Constitution expressly describes the IEC as an independent institution. Finally, it held that it would be contradictory to regard an independent institution as forming part of the national sphere of government when the Constitution specifically provides that all three spheres are interdependent and interrelated.¹⁰⁷

¹⁰³ C Murray “The Human Rights Commission et al: What is the role of South Africa’s Chapter 9 Institutions” 6(2) *PELJ* (2006) 126-127.

¹⁰⁴ 2001 (3) SA 925 (CC).

¹⁰⁵ 2001 (3) SA 925 (CC) at para 22.

¹⁰⁶ 2001 (3) SA 925 (CC) at para 27.

¹⁰⁷ 2001 (3) SA 925 (CC) at para 27.

Apart from confirming that while the Chapter Nine Institutions are part of the state, they are not part of the government, the Constitutional Court has also held that the independent status of these institutions has certain practical consequences. One of these is that the Chapter Nine Institutions must have a certain degree of financial independence in order to operate exclusively and to be able to perform their duties without fear, favour or prejudice. In the *Langebaan Municipality* case, the Constitutional Court held that although this does not mean that they can set their budgets independently from Parliament, it does mean that they must be provided funding directly by Parliament and that the amount of funding allocated to them must be reasonable.¹⁰⁸

Another consequence is that the Chapter Nine Institutions must have a certain degree of administrative independence in order to operate effectively. In *New National Party v Government of the RSA*,¹⁰⁹ the Constitutional Court held that although the government is obliged to support the Chapter Nine Institutions, it is not entitled to interfere in the daily activities of these institutions, particularly in respect of the development and implementation of their programmes. In addition, the government is also not entitled to interfere in the employment and management of staff by these institutions.¹¹⁰ Most recently, in *Economic Freedom Fighters v Speaker of the National Assembly*, the Constitutional Court held that the “[c]hapter Nine Institutions were created to strengthen constitutional democracy in the Republic” and further that “[t]o achieve this crucial objective, they are required to be independent and subject only to the Constitution and the law; to be impartial and to exercise their powers and functions without fear, favour and prejudice”.¹¹¹

Finally, it is also important to note that the independence of the Chapter Nine Institutions is further guaranteed in the appointment and removal procedures of Chapter Nine office bearers. These are dealt with under sections 193 and 194 of the Constitution.

3.3 The appointment and removal of Chapter Nine Office-Bearers and Commissioners

¹⁰⁸ 2001 (3) SA 925 (CC) at para 29.

¹⁰⁹ 1999 (3) SA 191 (CC).

¹¹⁰ 1999 (3) SA 191 (CC) at para 29.

¹¹¹ 2016 (3) SA 580 (CC) at para 49.

The appointment and removal of the Chapter Nine Office-Bearers and Commissioners are governed by sections 193 and 194 respectively. Section 193(1) begins in this respect by providing that:

[t]he Public Protector and the members of [the Chapter Nine Commissions] must be men or women who:

- (a) are South African citizens;¹¹²
- (b) are fit and proper to hold the particular office;¹¹³ and
- (c) comply with any other requirements prescribed by national legislation.¹¹⁴

Apart from the appointment criteria set out above, sections 193(4) and 193(5) of the Constitution also set out the procedure that must be followed when the Public Protector, the Auditor-General and the members of the South African Human Rights Commission, the Commission for Gender Equality and the Electoral Commission are appointed.¹¹⁵ Section 193(4) provides in this respect that the President must appoint these Office-Bearers and Commissioners on the recommendation of the National Assembly, and section 193(5) provides that the National Assembly must recommend persons:

- (a) nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly;¹¹⁶ and
- (b) approved by the Assembly by a resolution with a supporting vote:
 - (i) of at least 60 percent of the members of the National Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or
 - (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a members of a commission.¹¹⁷

¹¹² Section 193(1)(a).

¹¹³ Section 193(1)(b).

¹¹⁴ Section 193(1)(c). Section 193(2) and (3) provide further that the members of the Chapter Nine Commissions must also reflect broadly the race and gender composition of South Africa and that the Auditor-General must have specialised knowledge of, or experience in, auditing state finances and administration. Neither of these provisions applies to the Public Protector.

¹¹⁵ The appointment of the members of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is governed by section 11 of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002. This section essentially provides that the members must be appointed by the President on the recommendation of the National Assembly.

¹¹⁶ Section 193(5)(a).

¹¹⁷ As can be seen from section 193(5)(b) cited above, a higher threshold is constitutionally prescribed only in respect of the appointment of the Auditor-General and Public Protector and not the other Chapter Nine's. The same

In other words, the person appointed as the Public Protector must be nominated by a committee of the National Assembly made up of all the parties in the Assembly in proportion to their strength and this recommendation must be approved by at least 60 percent of the members of the National Assembly. This person must then be appointed by the President as the Public Protector.

According to Murray, these special provisions were put in place to secure their independence. As she states: the Constitution (in requiring their appointment to only be upon the adoption of a unique parliamentary majority and further that the appointees be selected by a parliamentary committee comprised of members from all the political parties represented within the National Assembly), ensures that public officials command broad political support and are not merely the cronies of the governing party.¹¹⁸ This is even more relevant in respect of the “dominant party democracy” that South Africa is which inadvertently necessitates the need for these institutions to be seen as not being partisan.¹¹⁹

Insofar as the removal of the Chapter Nine Office-Bearers and Commissioners is concerned, section 194(1) provides that these persons may be removed from office only:

threshold applies for the removal of both office holders which in both instances can only be at the adoption of a two-thirds majority by Parliament as opposed to the support of a simple majority of National Assembly members for the other Chapter Nine institutions. It becomes useful to understand why this had to be so particularly in respect of the Public Protector Office which forms the main focus of this study. The two certification judgments by the Constitutional Court present a good starting point. Of note, among the reasons why the first draft of South Africa’s post-apartheid constitution was rejected by the Constitutional Court in *the First Certification judgment* was that it failed, in respect of the Public Protector, to provide adequately for the independence of this institution as contemplated by Constitutional Principle XXIX whose emphatic wording was such that the independence and impartiality of the Public Protector must not only be provided for, but must also be safeguarded by the Constitution in the interests of the maintenance of effective administration and a high standard of professional ethics in the public service. In considering the amended text in *the Second Certification judgment (Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC))* at para 142 it was asserted that “[i]nherent in the functions of the Public Protector is the investigation of sensitive and potentially embarrassing affairs of government *which requires its independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution*” (emphasis added). It is thus in the nature of the functions that this institution has to perform through the delicate nature of the matters open to investigation by the Public Protector due to the political clout of the individuals that can find themselves the subject of such investigations – whose first instinct may not necessarily be that of cooperating with the institution where adverse or unfavorable findings have been made; that it becomes easy to see why the office of the Public Protector cannot be expected to function optimally, nor its findings to be taken seriously, where it exists and operates within a weak constitutional or statutory framework.

¹¹⁸ C Murray “The Human Rights Commission et al: What is the role of South Africa’s Chapter 9 Institutions” 6(2) *PELJ* (2006) 126-127.

¹¹⁹ C Murray “The Human Rights Commission et al: What is the role of South Africa’s Chapter 9 Institutions” 6(2) *PELJ* (2006) 127.

- (a) if a committee of the National Assembly has found such a person to be guilty of misconduct, incapacity or incompetence; and
- (b) the National Assembly has adopted a resolution calling for that person's removal from office.

Section 194(2) provides further that a resolution of the National Assembly calling for the removal from office of the Public Protector or the Auditor-General must be adopted by a two-thirds majority of its members;¹²⁰ while a resolution calling for the removal of a member of a Chapter Nine Commission must be adopted by a majority of the members of the Assembly.¹²¹ Finally, section 194(3) goes on to provide that the President must remove a person from office if the National Assembly has adopted a resolution calling for the person's removal.¹²² In addition, the President may also suspend a person from office at any time after the start of proceedings of a committee of the National Assembly for the removal of that person.¹²³

The requirements for the removal from office of Chapter Nine office holders indicates how the Constitution seeks to guarantee the independence of Chapter Nine Institutions. This is because the phrase "may be removed" shows how the Constitution, in this instance, does not make use of the same emphatic language as is used in respect of the appointment of Chapter Nine office holders. It can be argued that this was a deliberate oversight aimed at ensuring the security of tenure of these institutions. As this is not a peremptory or mandatory constitutional provision, it thus takes away the possible temptation to invoke this section to insist upon the removal of Chapter Nine office holders and commissioners at whom which would in turn impede the effective discharge of their respective constitutional mandates.¹²⁴

The Constitution further stipulates that the President *may* suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and must remove a person from office upon adoption by the National Assembly

¹²⁰ Section 194(2)(a).

¹²¹ Section 194(2)(b).

¹²² Section 194(3)(b).

¹²³ Section 194(3)(a).

¹²⁴ Had the phrase "must be removed" been used instead, politicians or public functionaries would thus have had a desperate straw to clutch at in attempting to exert their clout or influence to secure the removal of a non-partisan office bearer via the courts.

of a resolution to that effect.¹²⁵ Use of the word “may” here again shows that the President has no general authority to suspend a Chapter Nine office bearer from office, which serves to reinforce section 181(4) of the Constitution which affirms that “[n]o person or organ of state may interfere with the functioning of these institutions” (emphasis added). The cumulative implication of these constitutional provisions therefore is that Chapter Nine Institutions are intended to be independent and impartial institutions – not only outside government, but also outside partisan politics, and therefore from interference from other organs of state, presumably so as to depoliticize the issues with which they deal.¹²⁶

3.4 The constitutional powers and functions of the Public Protector

As pointed out above, the investigatory and remedial powers of the Public Protector are set out in section 182(1) of the Constitution which 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.¹²⁷

Section 182(2) of the Constitution provides further that these powers may be supplemented by national legislation. Apart from conferring powers upon the Public Protector, the Constitution also imposes an important limit. Section 182(3) provides in this respect that the Public Protector may not investigate court decisions. The national legislation envisaged in section 181(2) of the Constitution, is the Public Protector Act,¹²⁸ which was extensively amended in 1998 in order to bring it in line with the Constitution.

4. The statutory framework

¹²⁵ Section 194(3)(a).

¹²⁶ C Murray “The Human Rights Commission et al: What is the role of South Africa’s Chapter 9 Institutions” 6(2) *PELJ* (2006) 127.

¹²⁷ Section 182(1) (a), (b) and (c).

¹²⁸ 23 of 1994.

The primary source of the Public Protector’s investigatory and remedial powers is the Constitution. Statutory framework further confers a wide range of additional and supplementary powers on her Office.

4.1 The Public Protector Act

(i) Introduction

According to its long title, the purpose of the Public Protector Act is to “provide for matters incidental to the Office of the Public Protector as contemplated in the Constitution ..., and to provide for matters connected therewith”. The Act itself is divided into seventeen sections. These deal, *inter alia*, with the establishment, appointment, remuneration and conditions of employment of the Public Protector and Deputy Public Protector;¹²⁹ the staff, finances and liabilities of the Public Protector;¹³⁰ and the powers, functions and remedies of the Public Protector.¹³¹ For the purposes of this thesis, it is necessary to deal only with the sections that deal with the powers, functions and remedies of the Public Protector.

(ii) The powers, functions and remedies of the Public Protector

Insofar as the powers and functions of the Public Protector are concerned, the most significant section of the Public Protector Act is section 6, which deals with two issues: first, the manner in which complaints can be lodged with the Office of the Public Protector; and, second, the additional powers of the Public Protector. The sub-sections dealing with the additional powers of the Public Protector also make provision for additional remedies.

¹²⁹ Section 1A, section 2 and section 2A.

¹³⁰ Section 3, section 4 and section 5.

¹³¹ Section 6, section 7, section 7A and section 8.

The additional powers of the Public Protector are set out in section 6(4)(a) of the Public Protector Act. This section provides that the Public Protector has the power to investigate, on his or her own initiative¹³² 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 Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 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.

Apart from the additional powers listed above, section 6(5) of the Public Protector Act also provides that the Public Protector has the power to investigate the same allegations (except those listed in paragraph (c)) when they have been levelled, not against the government at any level or a person performing a public function, but rather against any institution in which the state is the majority or controlling shareholder or of any public entity defined in section 1 of the Public Finance Act.¹³³

Besides setting out the additional powers of the Public Protector, section 6(4) of the Public Protector Act also provides for additional remedies by imposing a duty on the Public Protector to try and resolve any dispute or rectify any act of omission by:

- (a) conciliation, mediation and negotiation;
- (b) advising the complainant of appropriate remedies; or

¹³² Unlike the Auditor-General, the Public Protector may investigate a matter on his or her own initiative. He or she does not have to wait for a member of the public to lodge a complaint with him or her (see *Public Protector v Mail and Guardian Ltd* 2011 (4) SA 420 (SCA) at para 9).

¹³³ 1 of 1999. Section 6(7) of the Public Protector Act confers the power on the Public Protector to investigate attempts to commit the types of misconduct listed in section 6(4) and 6(5).

- (c) using any other means that may be effective.¹³⁴

Finally, it must be noted that even if a complaint made to the Public Protector falls within her jurisdiction, she may refuse to investigate the complaint in certain circumstances. Section 6(3) provides in this respect that:

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.

As the Supreme Court of Appeal indicated in its judgment in *Public Protector v Mail and Guardian Ltd*, unlike the Advocate-General, the Public Protector's powers are not only wide, but are also intended to be proactive. In this regard, in order to trigger an investigation, the Public Protector does not have to wait for matters to be referred to him or her; instead, he or she can initiate investigative proceedings. In some instances, this can be done on no more than on the mere basis of information that has come to his or her own knowledge.¹³⁵ The powers of the Public Protector thus require more than the passive adjudication of disputes between individuals and the government.¹³⁶

It is for this reason that the means through which the Public Protector can obtain information and conduct investigations is considerably more flexible than those available to the courts. As a starting point section 6(1) provides that “[a]ny 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 ... or, (b) *by such other means*

¹³⁴ Section 6(4)(b).

¹³⁵ Section 7(1)(a).

¹³⁶ Corruption Watch *Importance of the Public Protector* Available at: <http://www.corruptionwatch.org.za/wp-content/uploads/2016/03/Bua-Mzansi-Importance-of-the-Public-Protector.pdf> (Accessed: 8 August 2016).

as the Public Protector may allow ...”¹³⁷ (emphasis added). The use of wide terms such as “by any person” indicates that there is no circumscription of the persons from whom, and the bodies from which, information may be sought by the Public Protector in the course of an investigation.¹³⁸ The phrase “by such other means” also indicates how the Public Protector is conferred with wide-sweeping powers of obtaining information.¹³⁹

The Public Protector Act goes on to prescribe additional discretionary powers of investigation on the Public Protector. In that regard, the Public Protector may request any person at any level of government, performing a public function or otherwise subject to the jurisdiction of the Public Protector to render him or her with assistance with regard to a particular investigation or investigations in general.¹⁴⁰ Specifically, he or she may, by way of a subpoena, call for the production of documents by any person;¹⁴¹ may request an explanation from any person;¹⁴² may require any person appearing as a witness to give evidence on oath or after having made an affirmation;¹⁴³ and he or she (or any person so delegated) may administer an oath to or accept an affirmation from any such person.¹⁴⁴

In addition, the Public Protector can, upon the issuance of a warrant by a magistrate or judge, conduct a search of any building or premises for the purposes of making such investigation or inquiry that he or she may deem necessary and may there and then proceed to seize anything on those premises which, in his or her opinion, has a bearing on the investigation.¹⁴⁵ It is clear then that the Public Protector is not to be inhibited, undermined or sabotaged in the exercise of his or her investigative powers.¹⁴⁶ Notably, however, the proactive nature of the Public Protector’s powers of investigation does not accord an unfettered discretion in this respect as such powers

¹³⁷ Section 6(1)(a) and (b).

¹³⁸ *South African Broadcasting Corporation v Democratic Alliance* 2016 (2) SA 522 (SCA) at para 11.

¹³⁹ In addition, the format and procedure to be followed in conducting any investigation, including preliminary investigations, is left to the Public Protector to determine. The Public Protector can also direct that any persons, whose presence is undesirable, should not be present during any proceedings that form part of an investigation (see sections 7(1)(b) (i) and (ii)).

¹⁴⁰ Section 7(3)(a).

¹⁴¹ Sections 7(4)(a) and 7(5).

¹⁴² Section 7(4)(b).

¹⁴³ Section 7(6).

¹⁴⁴ Section 7(7).

¹⁴⁵ Section 7A(1) and (2).

¹⁴⁶ 2016 (3) SA 580 (CC) at para 54.

have to be exercised within the framework of the Public Protector’s jurisdiction as found within the Constitution and the law.¹⁴⁷

4.2 Additional legislation regulating the Public Protector’s powers

(i) Introduction

Besides the Constitution and the Public Protector Act, further powers are conferred upon the Public Protector by a number of other statutes. These include the Executive Members Ethics Act,¹⁴⁸ Housing Consumers Protection Measures Act,¹⁴⁹ the Promotion of Access to Information Act,¹⁵⁰ the Protected Disclosures Act,¹⁵¹ and the Prevention and Combating of Corrupt Activities Act.¹⁵²

As Malunga notes, an important consequence of the proliferation of statutes conferring powers on the Public Protector is that the Office has become a multiple mandate agency with various key mandate areas.¹⁵³ These different mandates shall now be discussed in turn.

(ii) *The Executive Members Ethics Act*

According to its long title, the purpose of the Executive Members Ethics Act (the “EME Act”) is to “provide for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of the provincial Executive Councils and to provide for matters connected therewith”.¹⁵⁴

¹⁴⁷ Corruption Watch *Importance of the Public Protector* Available at: <http://www.corruptionwatch.org.za/wp-content/uploads/2016/03/Bua-Mzansi-Importance-of-the-Public-Protector.pdf> (Accessed: 8 August 2016).

¹⁴⁸ 82 of 1998.

¹⁴⁹ 95 of 1998.

¹⁵⁰ 2 of 2000.

¹⁵¹ 26 of 2000.

¹⁵² 12 of 2004

¹⁵³ K Malunga “Twenty years of South African constitutionalism: An assessment of the role and challenges of the Office of the Public Protector asserting South Africa’s transformative constitutionalism” *New York School Law Review* (2014) 3.

¹⁵⁴ In order to achieve its purpose, section 2 of the EME Act imposes an obligation on the President, after consulting with Parliament, to publish a code of ethics prescribing standards and rules aimed at promoting open, democratic

The Public Protector is accorded exclusive jurisdiction to investigate any alleged breach of the Code of Ethics under section 3(1) of the EME Act. However, the Public Protector can only conduct an investigation where a complaint has been lodged to this effect. Section 4(1) provides in this respect that the Public Protector may only investigate:

- (a) a complaint against a Cabinet member, a Premier or Deputy Minister, if it has been submitted by the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces;¹⁵⁵ and
- (b) a complaint against an MEC of a province, if it has been submitted by the Premier or a member of the provincial legislature of the province.¹⁵⁶

The Public Protector has at least 30 days to conduct an investigation on the complaint he or she has received and must submit a report on the alleged breach of conduct within that period.¹⁵⁷ If the complaint is against a Cabinet member, a Premier or a Deputy Minister, the Public Protector must submit the report to the President. If the complaint is against an MEC, the Public Protector must submit the report to the Premier of the province concerned.¹⁵⁸

After the President or the Premier has received the report, he or she must, within 14 days, submit the copy of the report and any comments on it together with any report on any action that will be taken against it to the National Assembly (in the case of a complaint against a Cabinet member or Deputy Minister),¹⁵⁹ the National Council of Provinces (in the case of a complaint against a Premier),¹⁶⁰ or the Provincial Legislature (in the case of a complaint against an MEC).¹⁶¹ When investigating any complaint in terms of the EME Act, the Public Protector has the same powers that are vested in him or her in terms of the Public Protector Act.¹⁶²

and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.

¹⁵⁵ Section 4(1)(a).

¹⁵⁶ Section 4(1)(b). Section 4(2) provides that the complaint must be in writing and must contain: (a) the name and address of the complainant; (b) the full particulars of the alleged conduct of the Cabinet member, Deputy Minister or MEC; and (c) such other information as may be required by the Public Protector or prescribed in the code of ethics.

¹⁵⁷ Section 3(2).

¹⁵⁸ Section 3(2).

¹⁵⁹ Section 3(5)(a).

¹⁶⁰ Section 3(5)(b).

¹⁶¹ Section 3(6).

¹⁶² Section 3(4).

(iii) The Promotion of Access to Information Act

According to its long title, the purpose of the Promotion of Access to Information Act (the “PAIA Act”) is to “give effect to the constitutional right of access to any information held by the State ... and that is required for the exercise or protection of any rights”. Section 91 of the PAIA amended section 6 of the Public Protector Act. This section now provides that the Public Protector may investigate an act or failure to act in terms of the PAIA, if a person lodges a complaint in this respect with the Office of the Public Protector.¹⁶³

(iv) The Protected Disclosures Act

According to its long title, the purpose of the Protected Disclosures Act (the “PD Act”) is to establish “provisions for employees to report unlawful or irregular conduct by employers and fellow employees, while at the same time providing protection for employees who blow the whistle”.

Section 8(1)(a) of the PD Act mandates the Public Protector with the protection of the confidentiality of information disclosed by an employee regarding any impropriety (by their employer or other employees in the employ of their employer) which falls within the description of matters ordinarily dealt with by the Public Protector. In addition, section 8(2) of the PD Act provides that the Public Protector must also render necessary assistance to the employee where he or she is of the view that the matter would be more appropriately dealt with by another person or body tasked with protecting information under the PD Act.

(v) The Prevention and Combating of Corrupt Activities Act

According to its long title, the purpose of the Prevention and Combating of Corrupt Activities Act (the “Corruption Act”) is to *inter alia*, “provide for the strengthening of measures to prevent and combat corruption and corrupt activities”. Under section 6(4) of the Public Protector Act, the Public Protector has the competency to investigate, on his or her own initiative, or on receipt of a

¹⁶³ See also section 6(4)(d) of the Public Protector Act.

complaint: improper or dishonest acts, or omissions or offences in so far as they relate to the offences referred to in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money.

(vi) The Housing Consumers Protection Measures Act

According to its long title, the purpose of the Housing Consumers Protection Measures Act (the “Housing Protection Act”) is “To make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration Council; and to provide for matters connected therewith”. Section 22(4) of the Housing Protection Act provides that a housing consumer or a home builder may refer a decision to the Public Protector for review in terms of the Public Protector Act.

5. Conclusion

What emerges from the above discussion is that the Legislature took the regulation of the powers, duties and functions of the Public Protector very seriously. Not only can a case be made for the Public Protector Act as an extensive statutory instrument that sets out various procedural and administrative guidelines regarding, inter alia, the appointment, remuneration and investigative procedures concerning the office of the Public Protector;¹⁶⁴ but, and more importantly, additional legislation that has served to expand the Public Protector’s mandate areas is not only indicative of the pliability of the institution but of its increased relevance in guaranteeing that the promotion of accountability; an essential component of sustainable democracy, reaches down to all spheres of public administration.

¹⁶⁴ AS Yakoob “Ambiguity surrounding the powers of the public protector – a threat to the rule of law” (2015) Available at: http://www.up.ac.za/media/shared/10/ZP_Files/salrc-essay-aadelah-shaik-yakoob.zp95040.pdf (Accessed: 14 June 2016).

CHAPTER THREE: THE JURISPRUDENCE OF THE COURTS

1. Introduction

Prior to the appointment of Advocate Thuli Madonsela as the Public Protector in 2009,¹⁶⁵ the manner in which the Office of the Public Protector exercised its investigatory and remedial powers was taken on review on only one significant occasion and culminated in the judgment of the Supreme Court of Appeal in *Public Protector of the RSA v Mail and Guardian Ltd.*¹⁶⁶ In this judgment the Supreme Court of Appeal (per Nugent JA; Ponnann, Snyders and Tshiqui JJA and Plasket AJA concurring) reviewed and set aside the Public Protector's report into the misappropriation of public funds by PetroSA on the grounds that his "investigation was so scant as to not have been an investigation at all".¹⁶⁷

In arriving at this decision, the Supreme Court of Appeal held that "although the functions of the Public Protector include those that are usually associated with an ombudsman, they go far beyond that" seeing as "[T]he Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances".¹⁶⁸ In addition, the Court held further, the Public Protector must carry out his investigatory tasks with an "open and enquiring mind" and, further that: "investigation that is not conducted with an open and enquiring mind is no investigation at all".¹⁶⁹

Following the appointment of Advocate Madonsela (and subsequently the appointment of Advocate Mkhwebane), the number of review applications increased significantly. Apart from

¹⁶⁵ The first person appointed to the Office of the Public Protector was Advocate Selby Baqwa in 1995. After his seven year term ended in 2002, he was replaced by Advocate Lawrence Mushwana. When Advocate Mushwana seven year term ended in 2009, he was replaced by Advocate Thuli Madonsela. When Advocate Madonsela's seven year term ended in 2016, she was replaced by Advocate Busiswe Mkhwebane. Advocate Mkhwebane is the current Public Protector,

¹⁶⁶ 2011 (4) SA 420 (SCA).

¹⁶⁷ 2011 (4) SA 420 (SCA) at para 141.

¹⁶⁸ 2011 (4) SA 420 (SCA) at para 9.

¹⁶⁹ 2011 (4) SA 420 (SCA) at para 21.

the investigation into the appointment of Mr Motsoneng by the SABC,¹⁷⁰ the investigations into the installation of security measures at Nkandla,¹⁷¹ the failure by the Reserve Bank to recover misappropriated funds¹⁷² and the conduct of certain employees of the Department of Home Affairs were also taken on review.¹⁷³

As Calland and Pienaar point out, this increase may be traced back to a number of different factors. Among these is that Advocate Madonsela herself displayed a strong sense of independence and adopted a rigorous approach towards her powers. At the same time, pathologies associated with a dominant party democracy and especially the problem of corruption manifested themselves more strongly. In order to address the pathologies the Constitutional Court also sought to strengthen the authority of independent institutions such as the Public Protector.¹⁷⁴

Unlike the litigation in *Public Protector of the RSA v Mail and Guardian Ltd*, the review applications referred to above did not focus on the manner in which the Public Protector should carry out an investigation, but rather the manner in which she should exercise her powers and

¹⁷⁰ See Public Protector *When Governance and Ethics Fail: Report on an investigation into allegations of maladministration, systemic governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation* Report No. 23 of 2013/2014. The remedial action taken in this investigation was reviewed initially by the Western Cape High Court in *Democratic Alliance v South African Broadcasting Corporation* 2015 (1) SA 551 (WCC) and subsequently by the Supreme Court of Appeal in *South African Broadcasting Corporation v Democratic Alliance* 2016 (2) SA 522 (SCA).

¹⁷¹ See Public Protector *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No. 25 of 2013/14. The legal nature of the Public Protector's remedial action had initially been reviewed by the Western Cape High Court and the Supreme Court of Appeal and was subsequently confirmed by the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

¹⁷² See Public Protector *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* Report No. 8 of 2017/2018. The remedial action taken in this investigation was reviewed by the Gauteng North High Court in *South African Reserve Bank v Public Protector of South Africa* 2017 (6) SA 198 (GP) and *ABSA Bank Ltd v Public Protector of South Africa* [2018] 2 All SA 1 (GP).

¹⁷³ See Public Protector *Unjust Forfeiture: Report on an investigation into an alleged unfair labour practice by the Department of Home Affairs* Report No. 7 of 2013/14. The remedial action in this investigation was reviewed initially by the Gauteng North High Court in *Minister of Home Affairs v Public Protector of South Africa* 2017 (2) SA 597 (GP) and subsequently by the Supreme Court of Appeal in *Minister of Home Affairs v Public Protector of South Africa* 2018 (3) SA 380 (SCA).

¹⁷⁴ R Calland and G Pienaar "Guarding the guardians: South Africa's Chapter Nine Institutions" in D Platjies et al (eds) *State of the Nation* (2016) 65 67.

especially on the legal nature of her remedial power. The most significant judgments in this respect, however, are the following:

First, the judgment of the Western Cape High Court in *Democratic Alliance v South African Broadcasting Corporation*. In this case the Court held that remedial action taken by the Public Protector is not legally binding, but that any decision not to comply was reviewable on the grounds of rationality. Given that this approach requires the Public Protector to convince the relevant organ of state to comply with its remedial action by force of reasoning, it may be referred to as *the co-operative approach*.¹⁷⁵

Second, the judgment of the Supreme Court of Appeal in *South African Broadcasting Corporation v Democratic Alliance* and the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*. In these cases both courts essentially held that remedial action taken by the Public Protector is legally binding. Given that this approach does not require the Public Protector to convince the relevant organ of state by force of reasoning, but rather gives the Public Protector the authority to compel that organ of state to comply, this approach may be referred to as *the conflictual approach*.¹⁷⁶

Third, the judgment of the Supreme Court of Appeal in *Minister of Home Affairs v Public Protector of South Africa*. In this case the Supreme Court of Appeal held that legally binding remedial action taken by the Public Protector can be reviewed, but only on the grounds that it infringes the principle of legality and not on the grounds that it infringes the constitutional right to just administrative action¹⁷⁷ or the Promotion of Administrative Justice Act.¹⁷⁸ This may be referred to as *the legality approach*.¹⁷⁹ Each of these respective approaches will be discussed in the section that follows.

¹⁷⁵ Emphasis added.

¹⁷⁶ Emphasis added.

¹⁷⁷ The right to just administrative action is guaranteed in section 33 of the Constitution which provides, inter alia, that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair”.

¹⁷⁸ 3 of 2000.

¹⁷⁹ Emphasis added.

2. The co-operative approach

2.1 Introduction

As pointed out above, the co-operative approach was adopted by the Western Cape High Court in its judgment in *Democratic Alliance v South African Broadcasting Corporation*. The substance and consequence of this judgment is elaborated upon hereunder.

2.2 *Democratic Alliance v South African Broadcasting Corporation*¹⁸⁰

(i) *The facts*

The facts, as stated here, appear from the case and from the Public Protector's report. Between November 2011 and February 2012 three former employees of the South African Broadcasting Corporation (the "SABC") lodged complaints with the Office of the Public Protector in which they alleged that the Acting Chief Operation Officer ("COO") of the SABC, Mr Hlaudi Motsoeneng, had been irregularly appointed.¹⁸¹ In addition, they also alleged that there had been maladministration at the SABC relating to human resources, financial mismanagement and governance failures and that the Minister of Communication had improperly interfered in the affairs of the SABC.

Following a detailed investigation into these complaints, the Public Protector issued a report in which she found that the complaints were valid and took remedial action against the Minister and the Board of the SABC.¹⁸² In her remedial action, the Public Protector directed the Minister and the Board to take a number of steps. Among these were the following:

- First, the Board had to ensure that the long-standing vacant position of COO was filled with a person who possessed the requisite qualifications.

¹⁸⁰ 2015 (1) SA 551 (WCC).

¹⁸¹ T Madonsela *When Governance and Ethics Fail: A Report on an investigation into allegations of maladministration, systemic governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation* Report No 23 of 2013/2014.

¹⁸² *Ibid.*

- Second, the Board had to ensure that all monies that were irregularly and unlawfully spent were recovered from the relevant persons.
- Third, the Board had to ensure that disciplinary proceedings were taken against Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power, improper conduct in the irregular appointments and salary increases of employees and for himself as well as for the purging of staff.¹⁸³

Instead of implementing the Public Protector’s remedial action, however, the Board appointed Mr Motsoeneng as the permanent COO and the Minister approved this appointment.¹⁸⁴ In addition, the Board appointed a firm of attorneys to investigate the veracity and findings of the Public Protector and to assist the Board and the management of the SABC to respond to the Public Protector’s report.¹⁸⁵ The decision to appoint Mr Motsoeneng as the permanent COO was based partly on the fact that this firm of attorneys absolved Mr Motsoeneng of any wrongdoing.

After the Minister approved the appointment of Mr Motsoeneng as the permanent COO, the Democratic Alliance (the “DA”) applied to the Western Cape High Court for an order, *inter alia*, immediately suspending Mr Motsoeneng from his position as COO; instructing the Board to institute disciplinary action against him; instructing the Board to appoint a suitably qualified person as the acting COO pending the appointment of a suitably qualified permanent COO; and reviewing and setting aside the decision of the Board to appoint Mr Motsoeneng as the permanent COO as well as the Minister’s decision to approve his appointment.¹⁸⁶

(ii) The legal question

The key legal question that the Western Cape High Court had to deal with in this application was whether the Public Protector’s remedial action is legally binding and enforceable.¹⁸⁷

(iii) The reasoning of the court

¹⁸³ Ibid.

¹⁸⁴ Id at para 13.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Id at para 45.

The High Court (per Schippers J) found in favour of the DA and granted the orders it had applied for. In arriving at this decision, the High Court began its analysis by stating that in her submissions the Public Protector argued that, properly interpreted, sections 182(1)(c) of the Constitution¹⁸⁸ and section 6(4)(b) of the Public Protector Act¹⁸⁹ provided that remedial action taken by the Public Protector was legally binding and enforceable unless successfully challenged on review and that any other interpretation would render the Public Protector toothless.¹⁹⁰

This argument, the High Court stated, is not correct. Its reasoning was that: “[U]nlike the courts, the Public Protector does not hear and determine causes as this is because her powers and functions are primarily investigative and not adjudicative”.¹⁹¹ In addition: “[u]nlike a court order, her findings are not binding on persons or organs of state, as such, if the drafters of the Constitution intended the findings of the Public Protector to be binding and enforceable, then the Constitution would have explicitly said so.”¹⁹² Instead, the power to take remedial action in section 182(1)(c) is linked to the power to investigate corruption and maladministration in section 182(1)(a).¹⁹³

It was also important to note, the High Court then stated, that in the *First Certification Judgment* the Constitutional Court held that the Office of the Public Protector was modelled on the institution of the ombudsman, which, according to the court, was significant for two reasons. First, like the Public Protector, the ombudsman is normally independent from the other branches of government and subject only to the law.¹⁹⁴ Second, in contrast to its investigatory powers, the ombudsman does not ordinarily possess legally binding and enforceable remedial powers.¹⁹⁵ This

¹⁸⁸ Section 182(1)(c) of the Constitution provides that “[t]he Public Protector has the power, as regulated by national legislation, to take appropriate remedial action”.

¹⁸⁹ Section 6(4)(b) of the Public Protector Act provides that the Public Protector is competent, *inter alia*, to “endeavor in his or her sole discretion, to resolve any dispute or rectify any act or omission by: (i) mediation, conciliation or negotiation; (ii) advising, when necessary, any complainant regarding appropriate remedies; or (iii) any other means that may be expedient in the circumstances”.

¹⁹⁰ 2015 (1) SA 551 (WCC) at para 49.

¹⁹¹ 2015 (1) SA 551 (WCC) at para 50.

¹⁹² 2015 (1) SA 551 (WCC) at para 51.

¹⁹³ *Ibid.*

¹⁹⁴ 2015 (1) SA 551 (WCC) at para 55.

¹⁹⁵ *Ibid.*

is because the ombudsman is usually required to rely on the logical force of its findings and the power of persuasion – these same principles were said to apply to the Public Protector.¹⁹⁶

The fact that remedial action taken by the Public Protector is not legally binding and enforceable, however, the High Court stated further, does not mean that her findings and remedial actions are mere recommendations, which the implicated organ of state may accept or reject.¹⁹⁷ Before it may reject the findings and the remedial action taken by the Public Protector, the implicated organ of state must have “cogent reasons for doing so, that is, for reasons other than a mere preference for its own view”.¹⁹⁸

A similar approach, the High Court stated, was adopted by the English Court of Appeal in *R (on the application of Bradley & others) v Secretary of State for Work and Pensions*.¹⁹⁹ In this case, the Court of Appeal held that the test for determining whether the Secretary of State for Work and Pensions was entitled to reject the findings and recommendations made by the ombudsman (as he had done) was not “whether the Secretary himself considered that there was maladministration, but whether in the circumstances his rejection of the ombudsman’s findings was itself rational”.²⁰⁰

Given that a decision whether or not to accept the findings or the remedial action taken by the Public Protector can be classified as an exercise of public power, the High Court stated further, that it follows that such a decision must comply with the principle of legality, in general, and with the requirement of rationality, which is a minimum threshold applicable to the exercise of all public power, in particular. This means that a decision to reject the Public Protector’s findings or remedial action must be rationally related to the purpose for which the power was given.²⁰¹

When the Public Protector makes a finding or takes remedial action, the High Court concluded, the steps that must be taken by the implicated organ of state are as follows:

¹⁹⁶ 2015 (1) SA 551 (WCC) at para 57.

¹⁹⁷ 2015 (1) SA 551 (WCC) at para 59.

¹⁹⁸ 2015 (1) SA 551 (WCC) at para 66.

¹⁹⁹ [2008] 3 All ER 1116 (CA).

²⁰⁰ 2015 (1) SA 551 (WCC) at para 67.

²⁰¹ 2015 (1) SA 551 (WCC) at para 71.

- (a) The organ of state must properly consider the findings and remedial action. As the findings are not binding and enforceable, the organ of state must decide whether or not the findings should be accepted and the remedial action implemented. That is the purpose of the power.
- (b) The process by which that decision is made and the decision itself, must be rational, having regard to the underlying purpose of the Public Protector – to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice.
- (c) In a case where a dispute arises because the organ of state decides not to accept the findings or implement the remedial action, it obviously has to engage the Public Protector. Contrary to the contention by counsel for the first to third respondents, such engagement, in my view, does not take place pursuant to the provisions of s 41 of the Constitution – the Public Protector is not an organ of state *within a sphere of government* as contemplated in s 41(1). (It is thus hardly surprising that the Intergovernmental Relations Framework Act 13 of 2005 does not apply to the Public Protector.)
- (d) Ultimately the relevant organ of state may apply for judicial review of the Public Protector’s investigation and report.

Essentially therefore, the court’s position here was that it is not really necessary for the Public Protector’s remedial action to be binding for this institution to effectively discharge its constitutional mandate. As a result, “the plain wording and context of section 182(1)” in this instance was interpreted to mean that the power to take appropriate remedial action means no more than that: “[t]he Public Protector may take steps to redress improper or prejudicial conduct, and not that the findings of the Public Protector are binding and enforceable”.²⁰²

In application of these principles to the facts, the Court was able to determine that the exercise of public power in the permanent appointment of Motsoeneng by Minister of Communications, Ms Muthambi, could not be said to be rationally related to the purpose for which that power was given; (namely, to ensure the operational efficacy of the SABC by filling the long-vacant post with a permanent appointee),²⁰³ given that the person so appointed lacked the requisite

²⁰² 2015 (1) SA 551 (WCC) at para 58.

²⁰³ The respondents contended that Motsoeneng was permanently appointed to the position of COO “in the interests of the SABC – to achieve its stability going forward” *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at para 15.

qualifications necessary to effectively attain this purpose. As such, the court declared, “[t]he conduct of the board and the minister in rejecting the findings and remedial action of the Public Protector was arbitrary and irrational and, consequently, constitutionally unlawful”.²⁰⁴

(iv) Comments

Although the Western Cape High Court’s judgment was welcomed by academic and political commentators, especially those aligned with the ANC, it also gave rise to some concerns. One of these is that it incorrectly compared the binding and enforceable nature of the remedies taken by the Public Protector to orders of the courts rather than to decisions of administrative bodies. Another was that it wrongly compared the Office of the Public Protector to other ombudsmen institutions in comparable jurisdictions without investigating these institutions in any particular depth and without giving sufficient consideration to the experimental and unique role of the Public Protector as an independent institution supporting constitutional democracy. Both of these criticisms were referred to with approval by the Supreme Court of Appeal in its subsequent judgment and which is discussed below.

3. The conflictual approach

3.1 Introduction

As pointed out above, the conflictual approach was adopted by the Supreme Court of Appeal in its judgment in *South African Broadcasting Corporation v Democratic Alliance*. It was subsequently adopted by the Constitutional Court in its judgment in *Economic Freedom Fighters v Speaker of the National Assembly*. These judgments are discussed below.

3.2 *South African Broadcasting Corporation v Democratic Alliance*²⁰⁵

(i) The facts

²⁰⁴ 2015 (1) SA 551 (WCC) at para 83.

²⁰⁵ 2016 (2) SA 522 (SCA).

After the Western Cape High Court set aside the Minister and the Board's decision to appoint Mr Motsoeneng as the permanent COO and, thus, effectively ignored the Public Protector's findings and remedial action on the grounds that they were irrational, the Minister and the Board appealed to the Supreme Court of Appeal.

(ii) The legal question

As was the case in the Western Cape High Court, the key legal question that the Supreme Court of Appeal had to deal with was whether the Public Protector's remedial action is legally binding and enforceable.²⁰⁶

(iii) The reasoning of the court

The Supreme Court of Appeal (per Navsa and Ponnann JJA; Mpati P, Swain and Dambuza JJA concurring) dismissed the appeal and found in favour of the DA. In arriving at this decision, the Supreme Court of Appeal began its analysis by setting out and examining both the history and the purpose underlying the Office of the Public Protector and the constitutional and statutory framework governing her investigatory and remedial powers.²⁰⁷ This examination, the Court stated, clearly showed that the powers conferred upon the Public Protector by the constitutional and statutory framework are not only very wide, but also "far exceed those of similar institutions in comparable jurisdictions".²⁰⁸

Given, the Supreme Court of Appeal emphasised, that corruption threatens both the principles upon which the Constitution is based, and especially the principle that government must be accountable responsive and open, as well as the rights guaranteed in the Bill of Rights and, given further, that the Constitution itself imposes an obligation on the state to combat corruption through the use of efficient anti-corruption mechanisms, it is not surprising that the powers conferred on the Public Protector by section 182(1)(c) of the Constitution and section 6(4)(b) of

²⁰⁶ 2016 (2) SA 522 (SCA) at para 3.

²⁰⁷ 2016 (2) SA 522 (SCA) at paras 23-32.

²⁰⁸ 2016 (2) SA 522 (SCA) at para 43.

the Public Protector Act go far beyond those which are conferred on ombudsmen in other countries.²⁰⁹

In its judgment, the Supreme Court of Appeal then stated that the High Court had relied heavily on two considerations. First, the High Court appeared to have compared the powers of the Public Protector with those of a court and, second, it relied on the judgment of the English Court of Appeal in *R (on the application of Bradley & others) v Secretary of State for Work and Pensions*.²¹⁰

The first consideration was wrong because the Public Protector cannot accurately be compared with a court. In addition, it was confusing for the High Court to state that the Public Protector's powers and remedial actions are not legally "binding and enforceable".²¹¹ This is because it is well-established in South African law that, until it is set aside on review, a decision taken by an administrative body exists in fact and has legal consequences that cannot be overlooked.²¹² Irrespective of whether the Public Protector was an administrative body or not, there was no doubt that the same principle applied to her findings and remedial action given the unique position she occupies in our constitutional order.²¹³

The second consideration was wrong because the judgment dealt with the powers of an entirely different institution with different powers, namely the Parliamentary Commissioner established in terms of the Parliamentary Commissioner Act, 1967.²¹⁴ Unlike the Public Protector, the Parliamentary Commissioner does not have any remedial powers; instead, the Parliamentary Commissioner Act merely requires her to report on her investigation to the Member of Parliament who laid the complaint, to the implicated Department of State and, if any injustice was done, to the Houses of Parliament. The powers of the Parliamentary Commissioner,

²⁰⁹ 2016 (2) SA 522 (SCA) at para 44.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² 2016 (2) SA 522 (SCA) at para 45.

²¹³ Ibid.

²¹⁴ 2016 (2) SA 522 (SCA) at para 46.

therefore, were confined to simply reporting and did not include the power to take remedial action.²¹⁵

Apart from the fact that the considerations that the High Court relied on were wrong, the Supreme Court of Appeal stated further, it was important to note that the Public Protector would not be able to realize the constitutional purpose of her office if implicated organs of state could simply second-guess her findings and ignore her recommendations.²¹⁶ Section 182(1)(c), therefore, must be taken to mean what it says, that is: “[T]he Public Protector may take remedial action herself. She may determine the remedy and direct its implementation”.²¹⁷ The language, history and purpose of section 182(1)(c) make it clear that the Public Protector has the power to provide an effective remedy for state misconduct.²¹⁸

However, the confusion went beyond the effect of her remedial powers. A core issue that also fell to be determined was whether impugned conduct found by the Public Protector to be improper could simultaneously be declared by another institution to be proper. In a move geared to ensure the dignity and effectiveness of this institution, the court declared that:

[a]n individual or body affected by any finding, decision or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation process to that of the Public Protector, and adopt the position that the outcome of that parallel process trumps the findings, decision or remedial action taken by the Public Protector.²¹⁹

Thus, whilst it may have been permissible for the SABC to have appointed a firm of attorneys to assist it with the implementation of the Public Protector’s findings and remedial measures, it was quite impermissible for it to have established a parallel process to that already undertaken by the Public Protector and to thereafter assert privilege in respect thereof.²²⁰

The Supreme Court of Appeal then summed up its findings in the following terms:

²¹⁵ Ibid.

²¹⁶ 2016 (2) SA 522 (SCA) at para 52.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ 2016 (2) SA 522 (SCA) at para 44.

²²⁰ 2016 (2) SA 522 (SCA) at para 47.

To sum up, the office of the Public Protector, like all Chapter Nine institutions, is a venerable one. Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance as prescribed by s 41 of the Constitution. Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector ... A mere power of recommendation of the kind suggested by the High Court appears to be more consistent with the language of the Interim Constitution and is neither fitting nor effective, denudes the office of the Public Protector of any meaningful content, and defeats its purpose. The effect of the High Court's judgment is that, if the organ of State or State official concerned simply ignores the Public Protector's remedial measures, it would fall to a private litigant or the Public Protector herself to institute court proceedings to vindicate her office. Before us, all the parties were agreed that a useful metaphor for the Public Protector was that of a watchdog. As is evident from what is set out above, this watchdog should not be muzzled.²²¹

The Supreme Court of Appeal then turned to apply these principles to the facts of the case. After doing so it also came to the conclusion that the Board and the Minister had implicitly rejected the Public Protector's findings and remedial action when Mr Motsoeneng was appointed as the COO.²²² Given that the Public Protector's findings and remedies were legally binding and enforceable, they were not entitled to do so. As such, the court declared their decisions to be unconstitutional and invalid.²²³

(iv) Comments

In asserting that the Public Protector is an entity aimed at guarding the guards; that it should not be muzzled; that a parallel process cannot be undertaken and given precedence over that already initiated by the Public Protector; that the Public Protector's remedial action, once stipulated, cannot be ignored and significantly that the Public Protector constitutes an important defense against maladministration and corruption, the Supreme Court of Appeal seemed to be taking the view that a conflictual approach, where the Public Protector can compel organs of state to

²²¹ 2016 (2) SA 522 (SCA) at para 53.

²²² 2016 (2) SA 522 (SCA) at para 59.

²²³ 2016 (2) SA 522 (SCA) at para 61.

comply with his or her directives is preferable in terms of getting senior public functionaries to be accountable to the public for decisions made and actions taken.²²⁴The conflictual approach adopted by the Supreme Court of Appeal in this instance was confirmed by the Constitutional Court soon thereafter in its judgment in *Economic Freedom Fighters v Speaker of the National Assembly*.

3.3 *Economic Freedom Fighters v Speaker of the National Assembly*

(i) The facts

(a) The background

Litigation culminating in *the EFF judgment* arose out of allegations of impropriety and unethical conduct relating to the installation and implementation of security and related features at President Jacob Zuma's private Nkandla residence in KwaZulu-Natal.²²⁵ The first storm clouds started brewing with *the Mail and Guardian's* 2009 publication of an article titled: "Zuma's R65m Nkandla splurge". In it, *the Mail and Guardian* alleged that the president was renovating his remote homestead at a staggering cost of R65 million and that the taxpayer was footing the largest chunk of this bill.²²⁶ Of major concern was the justifiability of such extreme opulence being displayed amidst the impoverished Nkandla community in particular (made up of 13 000 people, many of whom had no access to electricity and for whom in-house water was a rarity) and in the face of a state that was struggling to meet the needs of its people in general.²²⁷

²²⁴ Although the criticisms that the Supreme Court of Appeal levelled against the two considerations that the Western Cape High Court relied on in its judgment appear to be correct, it is unfortunate that the Court did not engage with the argument made by Bishop and Woolman and which the High Court also relied on, namely that a co-operative approach is a strength and not a weakness.

²²⁵ T Madonsela *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No. 25 of 2013/14.

²²⁶ M Rossouw "Zuma's R65m Nkandla splurge" *Mail and Guardian Online* 4 December 2009 Available at: <http://mg.co.za/article/2009-12-04-zumas-r65m-nkandla-splurge> (Accessed: 23 August 2016).

²²⁷ *Ibid.*

Concern was also expressed as to how future presidents would benefit from this development given that state money was being used in the renovation of a personal homestead.²²⁸

In a subsequent newspaper article titled: “Bunker bunker time: Zuma’s lavish Nkandla upgrade” published on the 11th of November 2011, *the Mail and Guardian* went on to allege that there were now new additions to the initial project that had commenced in 2009.²²⁹ Such additions were said to include three sets of underground living quarters with about 10 air-conditioned rooms.²³⁰ Additional facilities were said to include a clinic for the President and his family, a gymnasium, underground parking, a helicopter pad, twenty houses for security guards that are above ground, playgrounds and a visitors’ centre.²³¹

Not surprisingly, the cost of the project, which had initially been pegged at R65 million in 2009, had, by the time of the publication of this article, escalated significantly. The additions to the ongoing renovations had brought the cost to a staggering R215 million while the Department of Public Works indicated that it was spending R36 million on security related construction thereby bringing the envisaged total cost to R246 million.²³²

Apart from the release of a statement by the Presidency on 3 December 2009, denying that government was footing the bill, nothing seems to have been done by government to verify the 2009 allegations or attempt to arrest the costs which the article predicted would continue to rise.²³³ Concerns began to mount due to the blatant excessive cost of the extensive renovations being conducted and also, as to where such funds were stemming from.

Sometime in 2011, a complaint was lodged with the Public Protector requesting an investigation into the veracity of the allegations published by the Mail and Guardian.²³⁴ Between 13 December

²²⁸ Ibid.

²²⁹ M Letsoalo and C Molele “Bunker bunker time: Zuma’s lavish Nkandla upgrades” *Mail and Guardian Online* 11 November 2011 Available at: <http://mg.co.za/article/2011-11-11-bunker-time-for-zuma> (Accessed: 23 August 2016).

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Report No. 25 of 2013/14 at 6.

²³⁴ Report No. 25 of 2013/14 at 5.

2011 and November 2012, the Public Protector received a total of seven complaints lodged in terms of the Public Protector Act and the Executive Members' Ethics Act relating to the opulence of the upgrades at Nkandla.²³⁵ The outcome of the Public Protector's investigation into these allegations was subsequently released by way of a report aptly titled: "Secure in Comfort".

(b) The Public Protector's report

The report into allegations of impropriety and unethical conduct in respect of the installation and implementation of non-security features at the President's private Nkandla mansion at state expense is arguably the most controversial report to have been released by a Public Protector to date. Subject to scrutiny was the conduct of Jacob Zuma; by far no ordinary individual. Rather, as was aptly noted by the Constitutional Court, as Head of State and of the National Executive, he is, ultimately, the highest calling to the highest office in the land; the image of South Africa and the first to be remembered at its mention on any global platform.²³⁶

It is in this light that the graveness of the allegations becomes glaringly clear; not only due to the seriousness of the issues subject to investigation and their possible political ramifications (seeing as material infringements of the constitution and ethical violations were being alleged),²³⁷ but also due to the high public visibility of the key actors in the matter. Worth noting is how those who wield public power have a duty to make judicious or prudent use of the resources made available to them for the collective good of those on whose behalf such resources are controlled. According to Govender, the drafters of the Constitution correctly concluded that the state is best placed to effectively deliver on the promise of social upliftment which is why a direct, concomitant obligation was placed on the state to use its resources to meaningfully address poverty and inequality.²³⁸ It is in this vein that the Constitution in section 195(1)(b) prescribes that: "[E]fficient, economic and effective use of resources must be promoted".

²³⁵ Ibid.

²³⁶ 2016 (3) SA 580 (CC) at para 20.

²³⁷ Applicant's written submissions in the matter between The Economic Freedom Fighters and the Speaker of the National Assembly, Republic of South Africa (1st Respondent), President Jacob Gedleyihlekisa Zuma (2nd Respondent), The Public Protector (3rd Respondent) at 23.1. Available at: <http://constitutionallyspeaking.co.za/wp-content/uploads/2016/02/EFF-App-Heads.pdf> (Accessed: 31 October 2016).

²³⁸ K Govender "Nkandla report underlines drift from constitutional duty" *Sunday Times* 30 March 2014 Available at: <http://www.prof-karthy->

The President and government should thus have been eager to more carefully manage taxpayers money. Instead, more than R200 million of taxpayers' money was lavished on the private home of a person who – in less than six years – would again become a private citizen.²³⁹ Public funds that could have been utilised in the furtherance of more substantial projects²⁴⁰ were instead channelled towards the grand scheme that was the extensive refurbishment of President Jacob Zuma's private Nkandla mansion.

It is against these weighty considerations that the following general observations and specific findings were made in the report, *inter alia* that:

- while authority to facilitate security upgrades at the home of the President did exist,²⁴¹ there was no evidence to indicate that the trigger mechanism for the state to get involved financially in covering the costs for the security measures, in respect of any law, was complied with²⁴² and that even if one were to proceed from the premise that authority for the cost of post April 2010 renovations to the President's homestead being borne by the state existed by virtue of its declaration as a National Key Point on the 8th of April 2010 (despite renovations having commenced in 2009 before this was the case), that nonetheless, such authority had been exercised improperly and beyond its scope by officials in the Nkandla project²⁴³ seeing as;
- additional items in the form of a swimming pool, visitors' centre, amphitheatre, cattle kraal, marquee area, extensive paving and new houses for relocated relatives were included as security upgrades despite not having been identified as security measures in the list compiled by security experts in pursuit of security evaluations.²⁴⁴

govender.co.za/Media%20Articles/Karthy%20nkandla%20report%20Sunday%20Times.pdf (Accessed 26 August 2016).

²³⁹ Ibid.

²⁴⁰ Funds were found to have been reallocated from other much needed projects namely from the Inner City Regeneration and the Dolomite Risk Management Programmes of the DPW.

²⁴¹ In the form of the Cabinet Policy of 2003 – the key policy instrument that regulates security installations at the private residences of Presidents; prescripts guiding the DOD Doctrines which regulated the installations made relating to transporting and providing medical services to the President as well as the National Key Points Act 102 of 1980 that was added into the legal framework permitting and regulating security measures at the President's Nkandla residence due to its declaration as a National Key Point on the 8th of April 2010.

²⁴² Report No. 25 of 2013/14 at 19.

²⁴³ Report No. 25 of 2013/14 at 53.

²⁴⁴ Report No. 25 of 2013/14 at 41.

In the result, the report found that this excessive expenditure had added substantial value to the President's private property at the state's expense.²⁴⁵ Consequently, the President and his immediate family were found to have been unjustifiably enriched in perpetuity through the installation of non-security comforts ostensibly implemented in the name of security.²⁴⁶

The Public Protector proceeded to prescribe the remedial action to be taken in order to soften the impact of the Nkandla project. The President was directed to take steps to determine, with the assistance of the National Treasury and the SAPS, the reasonable cost of the non-security measures implemented at his private Nkandla residence and to then pay a reasonable percentage of such costs.²⁴⁷ The President also had to reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds abused.²⁴⁸

This report was submitted to the President and also to the National Assembly, "[p]resumably to facilitate compliance with the remedial action in line with its constitutional obligations to hold the President accountable".²⁴⁹ However in a purported exercise of its oversight function, Parliament chose to endorse a report by the Minister of Police stemming from a parallel investigation to that of the Public Protector which essentially absolved the President of all liability as well as a report to the same effect by its last Ad Hoc Committee.²⁵⁰ It was this absolution that ultimately prompted the President to not comply with the remedial action taken by the Public Protector.²⁵¹

Aggrieved with this turn of events, the EFF and the DA launched simultaneous applications asking for an order: (i) affirming the legally binding effect of the Public Protector's remedial action; (ii) directing the President to comply with such remedial action and (iii) declaring that

²⁴⁵ Report No. 25 of 2013/14 at 57.

²⁴⁶ Report No. 25 of 2013/14 at 57.

²⁴⁷ 2016 (3) SA 580 (CC) at para 68.

²⁴⁸ Ibid.

²⁴⁹ 2016 (3) SA 580 (CC) at para 3.

²⁵⁰ 2016 (3) SA 580 (CC) at para 12.

²⁵¹ Ibid.

both the President and the National Assembly acted in breach of their constitutional obligations.²⁵²

(ii) The legal questions

The complexity of the facts gave rise to equally complex legal questions:

- The major issue lying at the heart of the application was whether the President was bound to comply with the remedial action taken against him?²⁵³
- Another key issue flowing from the core legal question was the meaning of “remedial action” which the President and National Assembly did not implement, ostensibly in the belief that it was a mere recommendation.

Also arising for consideration was whether the conduct of the President, in knowingly deriving undue benefit from the irregular deployment of State resources in the form of non-security upgrades installed at his private Nkandla residence; and of Parliament, in failing to facilitate the enforcement of the Public Protector’s report which contained unfavourable findings (in respect of the President’s aforementioned conduct) and the remedial action taken against the President in the instance, constitute a breach of their respective obligations under the Constitution?

(iii) The reasoning of the court

(a) In respect of the President’s conduct

In ascertaining whether or not President Jacob Zuma ought to have complied with Thuli Madonsela’s remedial action, the Constitutional Court did not just engage in a mechanical analysis of the relevant constitutional provisions that imposed such an obligation on the President. Rather, it was as though the Court felt the President had forgotten, and thus had to be reminded, of who he was. Consequently, several pertinent remarks were made on how the

²⁵² 2016 (3) SA 580 (CC) at para 13.

²⁵³ 2016 (3) SA 580 (CC) at para 40.

President ought to have conducted himself in the circumstances. Of significance, the President, (as Head of State and of the National Executive) was seen as “occupying a position indispensable to the effective governance of a democratic South Africa.”²⁵⁴ The court described him as “a constitutional being and a national pathfinder upon whom the nation places its hopes of accelerating towards a peaceful, just and prosperous destination and ultimately, of being the personification of the country’s constitutional project.”²⁵⁵ It was indicated that it was specifically in light of this that the duty to uphold, defend and respect the Constitution as the supreme law of the Republic was expressly imposed on the President alone.²⁵⁶

This obligation, as cited in terms of section 83(b) of the Constitution, was seen as imposing an obligation on the President *in particular* (emphasis added) to do all he can in ensuring that South Africa has a thriving constitutional democracy.²⁵⁷ One of the ways through which he would be expected to do so was by providing support to all institutions or measures designed to strengthen constitutional democracy within the Republic; one of those institutions being the office of the Public Protector.²⁵⁸

The question that immediately arises in light of these observations was whether, in these circumstances, Jacob Zuma had conducted himself in a manner that embodies how the quintessential President of the Republic ought to behave? The Constitutional Court was ultimately of the view that he had not.

In assessing his conduct, and, in particular whether he had, through his conduct, failed to defend, uphold and respect the Constitution as the highest law in the land, it was asserted that the President would be found to have been in breach of this President-specific obligation where an entity, with powers conferred under the Constitution, exercises those powers against the President, in order to get the President to comply with his obligations under the Constitution, only for the President to deliberately flout the attempted exercise of those powers.²⁵⁹

²⁵⁴ 2016 (3) SA 580 (CC) at para 20.

²⁵⁵ *Ibid.*

²⁵⁶ 2016 (3) SA 580 (CC) at para 26.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ 2016 (3) SA 580 (CC) at paras 27-37.

In essence therefore, the Constitutional Court was of the view that the Public Protector, in taking remedial action directing the President to personally bear a reasonable cost of the non-security installations at his Nkandla residence, was exercising constitutional powers conferred in terms of section 182(1)(c) of the Constitution, in order to get the President to comply with his obligations under section 96 of the Constitution,²⁶⁰ and that the President, in preferring the outcome of a parallel process (in the form of the report by the Minister of Police) over the investigatory process initially started and concluded by the Public Protector, had consequently breached his constitutional obligations under sections 83(b), 96, 181 and 182(1)(c) of the Constitution.²⁶¹

Granted, the question as to the precise legal effect of the Public Protector's remedial action, was, at the time the President so acted, still uncertain. However, as the EFF correctly contended in its heads of argument: the President was nonetheless obliged to comply for a reason independent of the status of the Public Protector's report; namely, the President-specific constitutional obligations flowing from the provisions of section 83(b) of the Constitution, buttressed also by the constitutional values of the rule of law and accountability.²⁶²

As such, the fact that the President may have been under a genuine belief that such powers were not binding is irrelevant. What is important is that a duty to repay the money had been specifically imposed on him through the Public Protector's constitutional power.²⁶³ Thus, in failing to heed a directive issued in terms of a constitutionally-sourced power, the President had, ultimately, disobeyed the Constitution itself.

(b) In assessing the role of the National Assembly

²⁶⁰ In terms of this constitutional provision, the President must act in accordance with a code of ethics prescribed by national legislation as stipulated by section 96(1) and may not expose himself to a situation involving the risk of a conflict between his official responsibilities and private interests or use his position to enrich himself or improperly benefit any other person.

²⁶¹ 2016 (3) SA 580 (CC) at para 83.

²⁶² Applicant's written submissions in the matter between The Economic Freedom Fighters (Applicant) and The Speaker of the National Assembly, Republic of South Africa (1st Respondent), President Jacob Gedhleyihlekisa Zuma (2nd Respondent) and The Public Protector (3rd Respondent) Available at: <http://constitutionallyspeaking.co.za/wp-content/uploads/2016/02/EFF-App-Heads.pdf> (Accessed: 31 August 2016).

²⁶³ "Our Constitutional Democracy at work: Nkandla Constitutional Court Ruling" Available at: <http://ddp.org.za/information-material/articles/Nkandla%20Constitutional%20Court%20Ruling%20DDP.pdf> (Accessed: 01 October 2016).

It has been said that the Constitutional Court, in delivering its judgment in respect of the matter of *Economic Freedom Fighters v Speaker of the National Assembly*, was not just at its most united and unrelenting but in so doing, exercised the full extent of its power.²⁶⁴ The latter is in reference to how the bench was forced, in determining answers to the legal questions raised, to tread so far deeply into the political realm; an aspect that brought into play the delicate issue of possible encroachment upon the separation of powers doctrine.

The Constitutional Court was highly mindful of this. By its own admission, the President and Parliament bear very important responsibilities and each play a crucial role in the affairs of the country and thus deserve the space to discharge their constitutional obligations unimpeded by the Judiciary.²⁶⁵ One gets the sense, when seeing the Court's concern at the possibility of encroaching upon the separation of powers (as can be gleaned from its somewhat extensive discussion at paragraphs 89 to 93 of the judgment), that had it had a choice in the matter, it would have preferred to not have to be in this position. However, it was adamant that it owes its allegiance only to the Constitution and that barring clear language *from the Constitution itself* (emphasis added) it would stop at nothing in ensuring that Parliament acts in accordance with, and within the limits of, the Constitution.²⁶⁶

As the Constitutional Court significantly noted:

[t]he National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people ... In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.²⁶⁷

²⁶⁴ S Grootes "Analysis: The Judgment at the end of the Nkandla Road" *Daily Maverick*. Available at: <http://firstthing.dailymaverick.co.za/article?id=75583#.WA4AwfS7qa4> (Accessed: 15 September 16).

²⁶⁵ 2016 (3) SA 580 (CC) at para 90.

²⁶⁶ 2016 (3) SA 580 (CC) at para 92.

²⁶⁷ 2016 (3) SA 580 (CC) at para 22.

Thus while “[I]t falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action”,²⁶⁸ the Court felt:

[t]here was everything wrong with the National Assembly stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and “remedial action”. This, the rule of law is dead against. It is another way of taking the law into one’s hands and thus constitutes self-help.²⁶⁹

The National Assembly’s resolution in which it absolved the President of compliance with the Public Protector’s remedial action was consequently found to be constitutionally invalid. It was set aside as a result.²⁷⁰

(c) In respect of the Public Protector

1. Introduction

What is interesting to note about the Court’s reasoning above is how logically possible it is to arrive at the conclusion that the President had breached the Constitution without even having to consider the question as to whether or not the Public Protector’s remedial action is binding on persons and organs of state. This is so as it was determined that the President was obliged to comply with the Public Protector’s remedial action based on the supremacy of the Constitution, the rule of law and considerations of accountability.

The enquiry into the constitutionality of the President’s conduct could thus have been limited to a consideration of sections 1(c), 2, 83(b), 96 as well as 181(3) of the Constitution. After all, the President’s legal team had already, during a hearing in February, conceded that the Public Protector’s findings were binding and that the President was willing to reimburse the state.²⁷¹

²⁶⁸ 2016 (3) SA 580 (CC) at para 93.

²⁶⁹ 2016 (3) SA 580 (CC) at para 98.

²⁷⁰ 2016 (3) SA 580 (CC) at para 105.

²⁷¹ “Constitutional Court rules on Nkandla” *News24* 31 March 2016 Available at: <http://www.news24.com/SouthAfrica/News/full-text-constitutional-court-rules-on-nkandla-public-protector-20160331> (Accessed: 1 October 2016). It was suggested here that in making this concession, the President could

The Constitutional Court was however leaving no stone unturned. It noted that the President's aforementioned concession seemed to only be in respect of the present proceedings and was not meant as a general proposition.²⁷² The Court was sceptical that this would open the door for those against whom remedial action is taken to essentially become judges in their own cause as they could then make a judgment call as to whether the decision to reject the findings or remedial action is itself irrational, and subsequently proceed to reject the remedial action taken on the basis of its perceived irrationality.²⁷³ To the Chief Justice, this, on its own, was a worrisome possibility which was further compounded by being at odds with the rule of law.²⁷⁴ The Court thus could not pass by the golden opportunity to vindicate the office of the Public Protector that had presented itself in the matter of *Economic Freedom Fighters v Speaker of the National Assembly*.

2. The court's location of the Public Protector's role

The Court began its discussion on the Public Protector at paragraph 47 by posing the question: "[W]hy do we have the office of the Public Protector?" What followed was an extensive discussion in which the Court went on to locate the role of this institution and the importance of its existence within South Africa's constitutional democracy. It was indicated that: "[t]he institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation".²⁷⁵ This much is evident from the institution's title-specific assignation as "Public Protector". According to the Constitutional Court: "that carefully selected nomenclature alone speaks volumes of the role meant to be fulfilled by this institution, especially in the constitutional democracy that South Africa is today", namely how: "[I]t is supposed to protect the public from any conduct in State affairs or in any sphere of government that could result in any impropriety or prejudice".²⁷⁶

have been hoping to avert the devastating effect, to his office, of a declaratory order declaring that he had failed to fulfil his constitutional obligations and violated his oath of office.

²⁷² 2016 (3) SA 580 (CC) at para 72.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ 2016 (3) SA 580 (CC) at para 50.

²⁷⁶ 2016 (3) SA 580 (CC) at para 51.

The Court noted how in appreciation of the high sensitivity and importance of its role, and with regard also being had to the kind of complaints, institutions and personalities likely to be investigated, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate.²⁷⁷ Accordingly, this institution's independence was taken to mean that the Public Protector is thus meant to not be inhibited, undermined or sabotaged in the execution of her investigative, reporting or remedial powers.²⁷⁸ Of further significance, the impartiality of the institution was interpreted to mean that the Office of the Public Protector is accordingly not meant to bow down to anybody, not even in the highest chambers or throne-rooms of raw executive power.²⁷⁹

However, the protection accorded by the Constitution does not necessarily translate into practice. As the court astutely noted, just the mere allegation and investigation of improper or corrupt conduct; where such allegations and investigations are in respect of powerful public office-bearers, will most likely be met with an antagonistic response.²⁸⁰ This observation naturally extended to a consideration of the question lying at the core of the case, namely: what should the legal status or effect of the Public Protector's remedial powers be?²⁸¹

3. Legal status and/or effect of Public Protector's remedial action

The starting point in this regard is section 182(1) of the Constitution. This section declares that after the Public Protector has investigated allegations of prejudice, impropriety and improper conduct in state affairs or any spheres of government and reported on that conduct, she can, in addition, take appropriate remedial action.

As has been mentioned however, the likelihood of unfavourable findings, coupled with biting remedial action, being readily welcomed by those investigated, especially where room exists to question and even avoid compliance with such remedial action, is highly improbable. Room to

²⁷⁷ 2016 (3) SA 580 (CC) at para 50.

²⁷⁸ 2016 (3) SA 580 (CC) at para 54.

²⁷⁹ 2016 (3) SA 580 (CC) at para 55.

²⁸⁰ 2016 (3) SA 580 (CC) at para 55.

²⁸¹ 2016 (3) SA 580 (CC) at para 63.

do so existed due to the lack of an express stipulation as to what the legal status and effect of the Public Protector's remedial action should be. It now fell to the country's highest court to clarify and confirm the precise nature of the Public Protector's powers under the Constitution.

Mogoeng CJ, reading for a unanimous Constitutional Court, began by noting that it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of constitutional democracy where her remedial action was, by design, never to have binding effect.²⁸² To support this contention, the Court then proceeded to identify key factors which, in the court's view, all gave an indication as to the effect the Constitution intended the Public Protector's remedial action to have. What follows are the general observations made by the Constitutional Court in this regard.

Firstly, Mogoeng CJ opined that the constitutional safeguards in section 181 would be meaningless if institutions purportedly established to strengthen constitutional democracy lacked even the remotest possibility to do so.²⁸³ Accordingly: "that the Public Protector is required under section 181(2) to be independent and subject only to the Constitution and the law, to be impartial and exercise her powers and perform her functions without fear, favour or prejudice, was found to be quite telling".²⁸⁴

Further, that the Constitution requires the Public Protector to be effective and identifies the need for her to be assisted and protected, to create a climate conducive to independence, impartiality, dignity and effectiveness, was found to indicate just how potentially intrusive her investigative powers are and, significantly, just how deep the remedial powers are expected to cut.²⁸⁵ It was argued that this obligation under section 181(3) of the Constitution, to assist and protect the Public Protector so as to ensure her dignity and effectiveness, was relevant to the enforcement of her remedial action in that the Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly.²⁸⁶

²⁸² 2016 (3) SA 580 (CC) at para 56.

²⁸³ 2016 (3) SA 580 (CC) at para 65.

²⁸⁴ *Ibid.*

²⁸⁵ 2016 (3) SA 580 (CC) at para 66.

²⁸⁶ 2016 (3) SA 580 (CC) at para 67.

The Court also noted that, under section 182(1) of the Constitution, complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles.²⁸⁷ Mogoeng CJ noted that the Office of the Public Protector in particular was constitutionally empowered to address these specific types of complaints as it was constitutionally conceived with the view to facilitating the observance of the constitutional values and principles necessary to ensure that efficient, economic and effective use of resources is promoted; that accountability finds expression; and also that high standards of professional ethics are promoted and maintained.²⁸⁸ As the observance of these constitutional prescripts is crucial to the preservation of constitutional democracy, the Public Protector's effective discharge of her mandate in these areas, would, according to the Chief Justice, consequently require a difference-making and responsive remedial action.²⁸⁹ In making its final general observations on the matter, with a view to shedding light on what difference-making and responsive remedial action would entail, the Court then focused its attention on interpreting the meaning of to "take appropriate remedial action".

The Court engaged in a contextual approach in interpreting section 182(1)(c) of the Constitution. In terms of this approach, a statutory provision is not just interpreted strictly based on its textual location or literal meaning but in light of its context, which includes taking into account external factors such as surrounding constitutional provisions.²⁹⁰ As it is a purpose-oriented approach, it is more suited to give rise to an interpretation that gives effect to, and is in line with, the purport and objects of the Constitution.

The Court accordingly interpreted section 182(1)(c) in conjunction with section 181 (in particular with section 181(3)) which asserts that, organs of state must, among other things, seek to protect the effectiveness of Chapter Nine institutions. Mogoeng CJ asserted in this respect that: "take appropriate remedial action" and "effectiveness" are operative words essential for the fulfilment of the Public Protector's constitutional mandate as one cannot really talk about

²⁸⁷ 2016 (3) SA 580 (CC) at para 65.

²⁸⁸ Ibid.

²⁸⁹ 2016 (3) SA 580 (CC) at para 65.

²⁹⁰ F J de Sloovere "Contextual Interpretation of Statutes" Vol 5 (2) *Fordham Law Review* (1936) 235. Available at: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1085&context=flr> (Accessed: 4 October 2016).

effective remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.²⁹¹

According to the Constitutional Court, this entails taking remedial action that is much more significant than making a mere endeavour to address complaints or that is so ineffectual as to put its implementation at the mercy of those against whom such remedial action is taken. Rather, it connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate.²⁹² Ultimately, the Court averred that remedial action can only be effective if it is binding.²⁹³

The Court was however not prepared to make this a hard and fast rule. Such a finding presupposes the notion that whoever assumes office as Public Protector can be relied upon to be prudent in exercising such an unfettered discretion. As this cannot be completely guaranteed, a pronouncement to this effect would have placed the implementation of section 182(1)(c) at the subjective whim of whoever is the Public Protector at the time, thereby opening room for the taking of binding remedial action in circumstances where doing so would be highly unwarranted.

Also flowing from this is the even more ominous possibility of the destructive and regressive effect that the unbridled exercise of the power to take binding remedial action would have where such authority cannot be challenged once taken. It would leave the Public Protector with ultimate power as the investigator, the jury and final judge. This would have resulted in the worsening of the same situation that this institution is constitutionally tasked to avoid; through having an unchecked Public Protector ironically tasked with checking the unchecked exercise of state power.

What now fell to be determined was just how deeply this power to take binding and enforceable remedial action should be allowed to run. Accordingly, the Court reassuringly asserted that the

²⁹¹ 2016 (3) SA 580 (CC) at paras 65 and 67.

²⁹² 2016 (3) SA 580 (CC) at para 68.

²⁹³ *Ibid.*

Public Protector's power is not absolute as it is limited in the same manner that any exercise of public power is limited, in that the remedial action is always open to judicial scrutiny.²⁹⁴

Ultimately, the Court held that though wide, the Public Protector's remedial action is certainly not unfettered, and neither is it inflexible in its application. Instead, it is situational.²⁹⁵ What legal effect remedial action (appropriately taken) will have in a particular case would depend on the nature of the issues under investigation and the findings made.²⁹⁶

It was however specified that where binding remedial action is appropriately taken, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness because the country's constitutional order hinges also on the rule of law which means that no binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly.²⁹⁷

As the rule of law dictates that obedience with decisions made by those clothed with the legal authority to make them is mandatory (short of such decisions being successfully challenged vis-à-vis a judicial process), the remedial action that was taken against the President was consequently held to have binding effect.²⁹⁸ It thus fell to the President to comply through the taking of concrete and specific steps in line with the remedial action taken against him as much more than a mere preference for his own view was required.²⁹⁹ In this instance, a branch of government vested with the authority to resolve disputes by the application of the law should have been approached; and that is the Judiciary.³⁰⁰

As has been mentioned, the President did not challenge the report through a judicial process but instead mandated the Minister of Police to investigate and report on the correctness of the remedial action taken against him by the Public Protector.³⁰¹ This report, which was

²⁹⁴ 2016 (3) SA 580 (CC) at paras 71.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ 2016 (3) SA 580 (CC) at paras 73 and 74.

²⁹⁸ 2016 (3) SA 580 (CC) at para 76.

²⁹⁹ 2016 (3) SA 580 (CC) at para 81.

³⁰⁰ *Ibid.*

³⁰¹ 2016 (3) SA 580 (CC) at paras 79 and 80.

subsequently endorsed by the National Assembly, essentially exonerated the President from the already determined liability through its (incomprehensible) finding that elements of the upgrades identified by the Public Protector as non-security features, were in fact security features for which the President did not have to pay. As a result, the President proceeded to consider himself lawfully absolved of all liability.³⁰² To this, the Constitutional Court significantly remarked:

[A]nd this is where and how the Public Protector's remedial action was second-guessed in a manner that is not sanctioned by the rule of law³⁰³ in that only after a court of law had set aside the findings and remedial action taken by the Public Protector would it have been open to the President to disregard the Public Protector's report.³⁰⁴

These observations resulted in the Court making a specific finding to the effect that the President failed to uphold, defend and respect the Constitution as the supreme law of the land. This was manifest firstly, from the substantial disregard for the remedial action taken against him by the Public Protector in terms of her constitutional powers; and secondly, from his failure to act in terms of his obligations, in terms of section 181(3) in respect of which he was duty bound to, but did not, assist and protect the Public Protector so as to ensure her independence, impartiality, dignity and effectiveness by complying with her recommendations regarding appropriate remedial action.³⁰⁵

(iv) Comments

Where the Supreme Court of Appeal stopped short of explicitly finding that non-compliance with the Public Protector's remedial action by the Minister of Communications *et al* amounted to a constitutional breach, the unanimous finding of the Constitutional Court was that the President's actions were inconsistent with his duty towards the Constitution as the supreme law of the country. An order was made in the result, namely that the President's failure to comply with the remedial action taken against him by the Public Protector in her 19 March 2014 report

³⁰² 2016 (3) SA 580 (CC) at paras 80 and 81.

³⁰³ 2016 (3) SA 580 (CC) at para 82.

³⁰⁴ 2016 (3) SA 580 (CC) at para 81.

³⁰⁵ 2016 (3) SA 580 (CC) at para 83.

was inconsistent with the Constitution and invalid.³⁰⁶ The message was simple but clear: yes, you may be the President but the Constitution applies to you too.

3.4 Commentary

The findings made by the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly* show the corrosive effect of misconceived notions of political invincibility and the resulting disdainful disregard for the rule of law which has very damaging and far-reaching negative consequences especially upon a state whose existence is predicated upon the maintenance of, and respect for, the rule of law.³⁰⁷ The Constitutional Court has itself noted that the continued survival of South Africa's democracy rests squarely upon specific core values of accountability, supremacy of the Constitution and the rule of law, which were adopted as foundational values in order to make a decisive break from the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era.³⁰⁸

The question does come to mind however (particularly in light of the reasoning employed by the Western Cape High Court in *Democratic Alliance v South African Broadcasting Corporation* which was in sharp contrast with that of the Supreme Court of Appeal and the Constitutional Court in *South African Broadcasting Corporation v Democratic Alliance* and in *Economic Freedom Fighters v Speaker of the National Assembly*) concerning the need for and utility of binding and legally enforceable remedial power in getting senior public functionaries to be accountable for their decisions.

In her affidavit filed in respect of the Western Cape High Court's hearing into allegations of corporate governance failures, maladministration and undue political interference in the affairs of the SABC, Advocate Madonsela not only asked the court to refrain from pronouncing on the correctness of her findings or the remedial action contained in the report but also to assess the matter on the basis that her report is legally valid, binding and enforceable.³⁰⁹ This request was

³⁰⁶ 2016 (3) SA 580 (CC) at para 105.

³⁰⁷ 2016 (3) SA 580 (CC) at para 1.

³⁰⁸ *Ibid.*

³⁰⁹ 2015 (1) SA 551 (WCC) at para 3.

made despite the lack of an express stipulation at that point (either in law or by the courts), as to whether the Public Protector's findings and remedial action were actually binding. The question that arises therefore is: had the Public Protector been acting beyond her powers due to a misinterpretation of the nature of her office's powers under the Constitution? This study shall, in seeking to answer this question, turn to considering whether such powers should be reviewed in terms of the principle of legality instead.

4. The legality approach

4.1 Introduction

As has been pointed out above, the legality approach was adopted by the Supreme Court of Appeal in its judgment in *Minister of Home Affairs v Public Protector of South Africa*.³¹⁰ This judgment is discussed below.

4.2 *Minister of Home Affairs v Public Protector of South Africa*

(i) The facts

The facts as they appear from the case are as follows: Mr Marimi, who was an employee of the Department of Home Affairs and who had been stationed at the South African embassy in Cuba as the first secretary, lodged a complaint with the Office of the Public Protector. In his complaint Mr Marimi alleged that the Department had engaged in acts of maladministration when it recalled him from Cuba back to South Africa. These acts of maladministration, Mr Marimi alleged further, arose out of the fact that while he was stationed in Cuba, the Cuban government had submitted a written complaint about his behaviour to the South African ambassador. Although the Cuban government did not insist that action should be taken against Mr Marimi, he was recalled to South Africa and informed that disciplinary action would be taken against him. In addition, his cost of living allowance was withdrawn.

³¹⁰ 2018 (3) SA 380 (SCA).

Despite the fact that the Department informed Mr Marimi that disciplinary action would be taken against him and that his attorney wrote several letters to the Department requesting it to finalise the matter, the Department did not do so. In the face of this lack of action on the part of the Department, he turned to the Office of the Public Protector and lodged his complaint. In his complaint, Mr Marimi argued that the Department had acted unfairly when it recalled him; that it had acted improperly when it withdrew his cost of living allowance; and that the delays in finalising his disciplinary matter had prejudiced his reputation.

After receiving Mr Marimi's complaint, the Public Protector carried out an investigation and found that his complaints were valid. Apart from finding that Mr Marimi's complaints were valid, the Public Protector also took remedial action against the Department. In this respect, the Public Protector directed the Director-General of the Department to: (a) ensure that Mr Marimi's cost of living allowance was paid, together with interest thereon, from the date of his recall from Cuba; (b) investigate the reasons for Mr Marimi's disciplinary hearing not being dealt with timeously; and (c) ensure that a written letter of apology was sent to Mr Marimi.

Instead of complying with the remedial action taken by the Public Protector, however, the Minister of Home Affairs and the Director-General applied to the Gauteng North High Court to review and set aside the Public Protector's report, her findings and the remedial action she took.³¹¹ This application, however, was dismissed by the High Court and the Minister and Director-General then appealed to the Supreme Court of Appeal.

(ii) The legal question

The key legal question that had to be decided by the Supreme Court of Appeal was whether the remedial action taken by the Public Protector should be reviewed on the grounds that it infringed the PAJA or the principle of legality.³¹²

³¹¹ It is worth noting at this point that at the time the application was launched and argued, the legal effect of the Public Protector's power to order remedial action to be taken by errant organs of state had not yet been definitively decided as the SCA and Constitutional Court decisions in *South African Broadcasting Corporation v Democratic Alliance* and *Economic Freedom Fighters v Speaker of the National Assembly* had as yet not been handed down (at para 4).

³¹² 2018 (3) SA 380 (SCA) at para 6.

(iii) *The reasoning of the Court*

The Supreme Court of Appeal (per Plasket AJA; Lewis JA, Majiedt, JA, Willis JA and Mothle AJA concurring) dismissed the appeal. In arriving at this decision, the Court began by stating that review in terms of both PAJA and the principle of legality stem from the principle of the rule of law.³¹³ While the right to administrative justice in the Constitution and PAJA give effect to the rule of law in respect only of administrative action, the principle of legality gives effect to the rule of law in respect of every other exercise of public power.³¹⁴

It is important to note, however, the Supreme Court of Appeal stated further, that an applicant for judicial review does not have a choice as to which route to follow. If the decision which is being challenged falls into the definition of “administrative action”, then the application must be made in terms of PAJA; if, however, the challenged decision does not fall into the definition of “administrative action”, then the application must be made in terms of the principle of legality.³¹⁵

In its earlier decision in *South African Broadcasting Corporation v Democratic Alliance*, the Supreme Court of Appeal went on to state, it was not required to decide whether remedial action taken by the Public Protector fell into the definition of “administrative action” and the question was left open.³¹⁶ In *South African Reserve Bank v Public Protector of South Africa* and in *ABSA Bank Ltd v Public Protector of South Africa*, however, the Gauteng North High Court had held that remedial action taken by the Public Protector did fall into the definition of “administrative action” and, therefore, had to be reviewed in terms of PAJA.³¹⁷

In order to determine whether the approach adopted in these judgments was correct, the Supreme Court of Appeal stated, it was necessary to determine whether remedial action taken by the Public Protector satisfied all of the elements of “administration action” as that concept is defined in section 1 of PAJA. These elements are, namely: (a) a decision of an administrative nature, (b)

³¹³ 2018 (3) SA 380 (SCA) at para 27.

³¹⁴ *Ibid.*

³¹⁵ 2018 (3) SA 380 (SCA) at para 28.

³¹⁶ 2018 (3) SA 380 (SCA) at para 29.

³¹⁷ *Ibid.*

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.³¹⁸

A careful examination of the constitutional status of the Office of the Public Protector as well as the source and effect of her remedial powers, the Supreme Court of Appeal stated, clearly showed that it did satisfy elements (b) to (e) of the definition of “administrative action”. This is because the Public Protector is an organ of state that exercises public power in terms of both the Constitution and legislation. In addition, any adverse finding made by the Public Protector coupled with a decision to take remedial action will usually adversely affect the right of the implicated body or person and have a direct external affect.³¹⁹

The key question, therefore, the Supreme Court of Appeal went on to declare, was whether a decision by the Public Protector to take remedial action was of an administrative nature. Insofar as this question was concerned, the Court held that while it was prepared to accept “public administration in a modern state encompasses an extremely wide range of activities, including investigative functions and the exercise of powers of compunction”, it was not prepared to accept that the decision of the Public Protector was of an administrative nature. The Court advanced a number of reasons for this position, as follows:³²⁰

- First, the Office of the Public Protector was an independent institution aimed at strengthening constitutional democracy in South Africa. It was not, therefore, part of the executive or the public administration.
- Second, given its unique role as an independent institution aimed at strengthening constitutional democracy in South Africa, it was not accountable to the executive, but only to the National Assembly.
- Third, although the State Liability Act applied to the Office of the Public Protector, it is not a department of state. The only reason it falls into the definition of an organ of state

³¹⁸ 2018 (3) SA 380 (SCA) at para 30-32.

³¹⁹ 2018 (3) SA 380 (SCA) at para 33-35.

³²⁰ 2018 (3) SA 380 (SCA) at para 36.

in section 239 of the Constitution is because it exercises constitutional and statutory powers.

- Fourth, the function of the Office of the Public Protector is not to carry out the day-to-day administrative tasks of the state, but rather to investigate, report and remedy maladministration among other organs of state (excluding the courts).
- Lastly, the Office of the Public Protector is given broad discretionary powers as to what complaints to accept, what complaints to investigate, how to investigate them and what remedies to take.³²¹

Given that decisions made by the Public Protector do not fall into the definition of administrative action, the Supreme Court of Appeal, then concluded that her decision to take remedial action could not be reviewed in terms of PAJA. Instead, it had to be reviewed in terms of the principle of legality.³²² After having come to this conclusion, the Supreme Court of Appeal then turned to review the Public Protector’s decision to take remedial action against the Director-General. In this respect it found that there were no grounds on which to set aside the Public Protector’s decision.

(iv) Comments

As Murcott and Van der Westhuizen have pointed out, it is difficult to find fault with the Supreme Court of Appeal’s “careful characterisation of the Public Protector's powers as not administrative in nature, and thus falling to be reviewed in terms of legality as opposed to PAJA”.³²³ Apart from correctly classifying the Public Protector’s remedial power as non-administrative and thus subject to review in terms of the principle of legality, another important benefit of this judgment is that it has now brought much needed clarity to this area of the law.

5. Conclusion

³²¹ 2018 (3) SA 380 (SCA) at para 37.

³²² 2018 (3) SA 380 (SCA) at para 37.

³²³ M Murcott and W van der Westhuizen “Administrative Law” 2018(1) *Juta’s Quarterly Review* 2.1 at 2.1.1

What emerges from the above discussion is that the Public Protector moves and functions as an administrative body.³²⁴ Among other factors, the Office of the Public Protector must comply with the constitutional and statutory obligations that deal with just administrative action in that the Public Protector's actions and conduct must be lawful, reasonable and procedurally fair.³²⁵ However, care must be taken to not glibly regard the Public Protector's exercise of her powers under section 182(1) of the Constitution as strictly entailing administrative action or being administrative in nature in terms of PAJA. The recently appointed Public Protector, Advocate Busisiwe Mkhwebane, when quizzed³²⁶ indicated that: to say that whenever the Public Protector performs her constitutional mandate, she is performing what is called an "administrative action" would severely limit the office. Clearly, such a strict or narrow categorization does not factor in the pliability of the institution. It also does not take into account the fact that it is multi-faceted through being a multiple mandate agency with various key mandate areas.³²⁷

³²⁴ The Supreme Court of Appeal in *South African Broadcasting Corporation v Democratic Alliance* when rebutting the claim by the respondents that the findings of the Public Protector were not "binding and enforceable" on the basis that the principle that a decision has legal consequences that cannot simply be overlooked until set aside by a court in proceedings for judicial review applies only to the decision of an administrative functionary or body, (which they argued, the Public Protector is not) indicated at 44 paragraph that: "[i]f such a principle finds application to the decisions of an administrative functionary then, given the unique position that the Public Protector occupies in our constitutional order, it must apply with at least equal or perhaps even greater force to the decisions finally arrived at by that institution". It was indicated further at paragraph 45 that: "[A]fter all, the rationale for the principle...that the proper functioning of a modern State would be considerably compromised if an administrative act could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports".

³²⁵ G Piennar "The little words in law that give the Public Protector clout" *The Sunday Independent* 9 November 2014 Available at: <https://www.pressreader.com/south-africa/the-sunday-independent/20141109/281921656332514>. (Accessed: 31 October 2016).

³²⁶ When I ambushed her on the 3rd of November 2016 at the Garden Court Marine Parade Hotel for an impromptu interview during the African Ombudsman and Mediators Association 5th General Assembly which was hosted by the PPSA.

³²⁷ K Malunga "Twenty years of South African constitutionalism: An assessment of the role and challenges of the Office of the Public Protector in asserting South Africa's transformative constitutionalism" *Public Protector South Africa* (2014) 3.

CHAPTER FOUR: ANALYSIS AND CONCLUSION

1. Introduction

In South Africa's current constitutional dispensation, courts have emerged as vital fora for buttressing constitutional democracy within the Republic. The Constitutional Court in particular has, over the years, handed down seminal rulings that affirm its centrality in ensuring that constitutional guarantees reach down to all as well as in enforcing the rule of law over all executive action.³²⁸

More recently, the Constitutional Court's ruling in *Economic Freedom Fighters v Speaker of the National Assembly* marked a sombre moment in the country's recent political history with its finding that the first citizen of the country had disobeyed the highest law in the land by refusing to comply with directives issued by the Public Protector in terms of the institution's powers under section 182(1)(c) of the Constitution. Corruption Watch, who joined the proceedings as *amicus curiae*, have since described the judgment as:

[a] stunning show of judicial independence in which the Constitutional Court sent out a strong message that being politically powerful – even being the president of a country – will not get you off the hook if you abuse your position and public resources.³²⁹

Of particular significance was the mastery of the language and legal poetry that characterised the judgment as seen, for example, in the very first paragraph of what was a unanimous judgement where the Constitutional Court noted how accountability, the rule of law and the supremacy of the Constitution were adopted as foundational values of South Africa's constitutional democracy. It was asserted, significantly, that:

³²⁸ Examples of this have been shown in rulings such as the *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) where the court had to consider if it has the power to review and set aside a decision by the President to bring an Act of Parliament into force. Here the President had issued a Proclamation purporting to bring the South African Medicines and Medical Devices Regulatory Authority Act, 132 of 1998 into operation without the regulatory base necessary for the operation of the Act having been made. In its judgment setting aside the President's decision, the Court asserted the importance of the Constitution and the rule of law, and held that the exercise of all public power must comply with the Constitution which is the supreme law of the land.

³²⁹ D Lewis "Speak Up, South Africa: The Impact of the Nkandla Ruling" *Corruption Watch* 3 May 2016 Available at: <http://www.corruptionwatch.org.za/speak-south-africa-impact-nkandla-ruling/> (Accessed: 10 September 2016).

[A]s such, public office-bearers ignore their constitutional obligations at their peril because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.³³⁰

It was this use of prose bordering on poetry that illuminated the irrefutable facts concerning “Nkandlagate” in a manner that was to leave the gory details permanently imprinted upon the nation’s psyche in what has been described as: “[t]he worst indictment of the head of state in a democratic South Africa”.³³¹ The Court’s vivid description of the Public Protector, giving the impression that South Africa’s constitutional order cannot afford to have an ineffectual Public Protector, is remarkable. The Court, in considering the centrality of this institution to the consolidation and sustenance of constitutional democracy within the Republic averred, firstly, that “[T]he Public Protector is one of the true crusaders and champions of anti-corruption and clean governance” and, even more significantly, that: “[S]he is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are”.³³²

The language used by the Constitutional Court here was clear, deliberate and unequivocal. It shows how the Constitutional Court, under the leadership of Chief Justice Mogoeng Mogoeng, has become more robust in challenging and reprimanding flagrant contraventions of the Constitution and how accordingly, it will not bow down to pressure from anybody in ensuring respect for, and adherence to, the dictates of the Constitution. More specifically for the purposes of this study, it is also indicative of the court’s increased concern with the pathologies associated with a dominant party democracy as mentioned in Chapter One and Two of this study and how these pathologies create a climate conducive for rampant corruption.

The Constitutional Court, in cognizance of these factors, was thus indicating in this instance, that it becomes imperative to have formidable independent institutions of governance (other than the

³³⁰ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) at para 1.

³³¹ R Munusamy “Goodbye democracy, so long accountability, hello Zumocracy” *Daily Maverick* 3 April 2014 Available at: <http://www.dailymaverick.co.za/article/2014-04-02-goodbye-democracy-so-long-accountability-hello-zumocracy/#.WazPwvS7qa4> (Accessed: 26 August 2016).

³³² 2016 (3) SA 580 (CC) at para 52.

courts), such as the Public Protector, in order to more effectively tackle these pathologies. Towards this end, it held that the Public Protector does, in fact, have the power to make binding remedial orders and confirmed that her decisions cannot simply be disregarded by asserting that absent a review, an errant organ of state is obliged to comply with her directives once the Public Protector had finally spoken. This judgment thus elevated the status of the institution of the Public Protector by singling it out as arguably the most visible constitutionally backed institution that is aimed at assisting in strengthening democracy in the Republic by dealing with various forms of official misconduct, including corrupt practices.³³³

It would seem therefore that the Constitutional Court's ruling on Nkandla was a sound judgment on the basis of public policy. This is especially so when taking into account the loud hue and cry when "Nkandlagate" broke. The public's vociferous rejection of the huge expenditure on a private residence that was not even going to remain state property at the end of the President's tenure, resulting in the hashtags #Zumamustpay and #Zumamustgo trending on various social media platforms in the country, is evidence of this fact.

A finding to the contrary could thus have had far-reaching negative consequences as it would have most likely triggered an unprecedented wave of protest marches and unrest within the country. This possibility is not far-fetched seeing as this case was considered at a time when the country was still reeling from a string of protests such as the "Rhodes must fall" movement and the recent "Fees must fall" movement which burst out at various tertiary institutions across the country sometime in October 2015 and which even saw violent clashes between students and riot police. In short, this case could not have been decided at a more sensitive and politically charged time in South Africa's recent history.

It therefore behoves one to ask: did the bench surreptitiously bow down to public opinion in handing down its judgment so as to save the reputation of the Constitutional Court?³³⁴ Was the

³³³ OF Adetiba *The Challenges of curbing corruption in a democracy: The case of the Public Protector and Nkandla* (2016) 2.

³³⁴ See L Louw "SA courts make popular judgments at the expense of law" *Business Day Live* (27 April 2016) Available at: <http://www.bdlive.co.za/opinion/columnists/2016/04/27/sa-courts-make-popular-judgments-at-the-expense-of-law> where it is argued that the Nkandla, Oscar Pistorius, AgriSA, AfriForum, Renate Barnard, Humphreys and other judgments legitimize popular sentiment at the expense of law (Accessed: 20 February 2016).

Constitutional Court correct in finding that the President's conduct in refusing to comply with the remedial action taken against him by the Public Protector was illegal given that there was legal uncertainty concerning this aspect at the time that the President so acted? As Deputy Minister of Justice and Constitutional Development John Jeffrey stated: prior to that determination, there was no legal certainty on the matter of whether the Public Protector's remedial action was binding or not and it was upon this legal uncertainty that events unfolded exactly as they did.³³⁵ This study shall, in this vein, now set out to engage with the criticisms that have been levelled against the *Economic Freedom Fighters v Speaker of the National Assembly* judgement.

2. Academic commentary: A different perspective

(a) Consensus before *Economic Freedom Fighters v Speaker of the National Assembly*

Prior to the handing down of the Supreme Court of Appeal's decision in *South African Broadcasting Corporation v Democratic Alliance* and the Constitutional Court's subsequent confirmation of that ruling in *Economic Freedom Fighters v Speaker of the National Assembly*, academic consensus was that the Public Protector's remedial power was essentially non-binding.

The widely accepted definition of an ombudsman (on whose role and model the South African Public Protector is based), as provided by the International Bar Association in a resolution adopted in August 1974, is that the ideal ombudsman is characterised by, *inter alia*, the following factors: it is an official office; whose investigations are officially sanctioned and enforced; *with the exception that the ombudsman does not take remedial action himself*, but instead makes recommendations and reports (emphasis added).³³⁶

Baxter adds in this respect, albeit that he was writing in 1984, that one of the main reasons for the ombudsman's success is that he takes no remedial action himself but rather relies on his

³³⁵ M Maimane and J Jeffrey "How "serious" was the Nkandla ruling?" *City Press Online* Available at: <http://city-press.news24.com/Voices/how-serious-was-the-nkandla-ruling-20160408> 10 April 2016 (Accessed: 20 April 2016).

³³⁶ L Baxter *Administrative Law* (1984) 283. See also L Reif (ed) *The International Ombudsman Yearbook* Volume 6 (2002) 79.

independence, objectivity and prestige.³³⁷ The Western Cape High Court in *Democratic Alliance v South African Broadcasting Corporation Ltd and Others*³³⁸ confirmed this academic consensus by asserting that ombudsmen ordinarily do not possess any powers of legal enforcement; rather, the key technique of the ombudsman is one of intellectual authority (making logically consistent and defensible findings) and powers of persuasion.³³⁹

While one would expect this to have the adverse effect of weakening the institution, Woolman notes that: “[I]n point of fact, the ability of the Public Protector to investigate and report effectively – *without making binding decisions* – is the real measure of its strength (emphasis added)”.³⁴⁰ The argument is that the fact that he does not pose a direct threat enhances the mutual understanding and co-operation between him and the public administration, which is so essential to the ombudsman’s work.³⁴¹

This view also had support from political figures. The point arose for consideration at a colloquium on the Public Protector held on the 4th of February 2016 at the University of Pretoria. On the panel was retired Justice of the Constitutional Court, Zak Yacoob who began his speech by clarifying that nowhere in the world are the ombudsman’s powers binding, therefore the words “take appropriate action” should be taken to mean that the Public Protector has the right to decide what the appropriate action to be taken is and not that such action is necessarily binding and enforceable.³⁴²

Justice Yacoob’s sentiments were shared by the Deputy Minister of Justice and Constitutional Development, John Jeffrey who questioned the need for the Public Protector’s powers to be binding as government, by Madonsela’s own concession, implemented an extremely high percentage of her recommendations anyway.³⁴³ The Honourable Minister’s view was that the

³³⁷ L Baxter *Administrative Law* (1984) 286.

³³⁸ 2015 (1) SA 551 (WCC).

³³⁹ 2015 (1) SA 551 (WCC) at para 57.

³⁴⁰ S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013) 271.

³⁴¹ L Baxter *Administrative Law* (1984) 286.

³⁴² N Manyathi-Jele “Public Protector’s findings not legally binding” *De Rebus* (2016) 2 Available at: http://journals.co.za/docserver/fulltext/derebus/2015/550/derebus_n550_a3.pdf?expires=1476623360&id=id&accname=guest&checksum=1FBF70A8C6DF3D4ADA58320A63895448 (Accessed: 16 October 2016).

³⁴³ *Ibid.*

institution is not a quasi-judicial body and its decisions should therefore not hold the same weight as the courts.³⁴⁴ In effect, he stated that if the Public Protector's decisions were to be binding then not only would there be no need for the courts, but the Public Protector would wield too much power as she would then essentially be an investigator, prosecutor and judge all rolled into one.³⁴⁵

Essentially, the general sentiment, particularly among senior government officials was that the Public Protector's findings were merely recommendations that did not create a binding legal obligation on them to act. This has been largely due to a gap in the law in the form of the lack of a clear and decisive enunciation on the legal status and effect of the Public Protector's remedial power. Reliance was placed on the fact that the word "binding" did not accompany the Public Protector's right to take appropriate remedial action under section 182(1)(c) of the Constitution. Further reliance was placed on the fact that the Public Protector Act is silent as to whether or not the Public Protector's findings and remedial action are binding on persons and organs of state. The phrase "appropriate remedial action", which has since been described by the Constitutional Court as operative words essential for the fulfilment of the Public Protector's constitutional mandate,³⁴⁶ is in fact, not elaborated on at all throughout the Act. This significant loophole has rendered the Act susceptible to manipulative interpretations by those wishing to evade responsibility especially where unfavourable findings of impropriety or maladministration have been made.³⁴⁷

As shown in Chapter Three of this study, there has now been a remarkable reversal of this position in the form of the Supreme Court of Appeal's judgment in *South African Broadcasting Corporation v Democratic Alliance* as well as the Constitutional Court's subsequent confirmation of this judgment in *Economic Freedom Fighters v Speaker of the National*

³⁴⁴ M Maimane and J Jeffrey "How "serious" was the Nkandla ruling?" *City Press Online* Available at: <http://citypress.news24.com/Voices/how-serious-was-the-nkandla-ruling-20160408> 10 April 2016 (Accessed: 20 April 2016)..

³⁴⁵ N Manyathi-Jele "Public Protector's findings not legally binding" *De Rebus* (2016) 3 Available at: http://journals.co.za/docserver/fulltext/derebus/2015/550/derebus_n550_a3.pdf?expires=1476623360&id=id&accname=guest&checksum=1FBF70A8C6DF3D4ADA58320A63895448 (Accessed: 16 October 2016).

³⁴⁶ 2016 (3) SA 580 (CC) at para 67.

³⁴⁷ AS Yakoob "Ambiguity surrounding the powers of the public protector – a threat to the rule of law" (2015) Available at: http://www.up.ac.za/media/shared/10/ZP_Files/salrc-essay-aadelah-shaik-yakoob.zp95040.pdf (Accessed: 14 June 2016).

Assembly. In both instances, it was found that the Public Protector’s remedial orders are legally binding. The Constitutional Court’s vindication of the binding nature of the Public Protector’s remedial power on one hand, came across as a watershed moment in South Africa’s recent constitutional democratic history and, on the other hand, as a dramatic change to the country’s political and legal landscape. Not surprisingly, this opened the judgment to a fair amount of criticism.

The view shared by Baxter and Woolman cited above (that the Public Protector’s remedial power is, and should remain non-binding) also found support in scholars such as Bishop, Brickill and Moshikaro following the handing down of the *Economic Freedom Fighters v Speaker of the National Assembly* judgment. According to Bishop *et al*:

treating the remedial action of the Public Protector as binding shifts the role of the Public Protector and her relationship with organs of state into a conflictual rather than constructive dynamic. If one were rather to adopt the approach that remedial action is not binding but does require a lawful response – which must be rational, reasonable and not infringe constitutional rights – one would avoid the inevitability of such decisions being taken on review.³⁴⁸

In adopting the stance that remedial action ought to be non-binding but must be met with a lawful response that is rational and reasonable, Bishop *et al* essentially echoed the sentiments of the Western Cape High Court in *the DA v SABC case*. To be clear, on the facts of the Nkandla matter this would have meant that President Zuma was required to respond to the remedial action with a concrete decision, albeit that it might subsequently be subject to review.³⁴⁹ In this regard, Schippers J asserted that:

before rejecting the findings or remedial action of the Public Protector, the relevant organ of state must have cogent reasons for doing so, that is, for reasons other than a mere preference for its own view”³⁵⁰ [and further that:] “there can be no question that a decision whether or not to accept the findings or remedial

³⁴⁸ Bishop *et al* “Constitutional Law” Vol 1 *Juta’s Quarterly Review* (2016) 2.1 Available at: <http://ipproducts.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (Accessed: 29 January 2018).

³⁴⁹ Bishop *et al* “Constitutional Law” Vol 1 *Juta’s Quarterly Review* (2016) 2.1 Available at: <http://ipproducts.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (Accessed: 29 January 2018).

³⁵⁰ 2015 (1) SA 551 (WCC) at para 66.

action of the Public Protector constitutes the exercise of a public power of which rationality is a minimum threshold.³⁵¹

Notably, in levelling criticism against the Constitutional Court's Nkandla ruling, Bishop *et al* note that just days before the hearing, President Zuma seemingly saw the writing on the wall and submitted a draft order to the parties (subsequently revised), conceding large parts of the relief sought, a capitulation which they believe encouraged the Court to reach the decision that the Public Protector's remedial action was binding.³⁵²

In this regard, Mogoeng CJ had noted that the President's concession that the Public Protector's powers are binding seemed to only be in respect of the present proceedings and was not meant as a general proposition.³⁵³ As was indicated in Chapter Three, the Chief Justice was sceptical that this would open the door for those against whom remedial action is taken to essentially become judges in their own cause as they could make a judgment call as to whether the decision, findings or remedial action is irrational, and subsequently proceed to reject the remedial action taken on that basis.³⁵⁴ Mogoeng CJ highlighted that this was a worrisome possibility, further compounded by being at odds with the rule of law.³⁵⁵

Bishop *et al*, however, reject this view by taking the opinion that based on the Court's approach:

the focus will now tend to be on the process and substantive content of the Public Protector's decision, when taken on review whereas on the alternative approach,³⁵⁶ all eyes – including those of a court if litigation did follow – would be on the organ of state against whom the remedial action was directed.³⁵⁷

³⁵¹ 2015 (1) SA 551 (WCC) at para 71.

³⁵² Bishop *et al* "Constitutional Law" Vol 1 *Juta's Quarterly Review* (2016) 2.1 Available at: <http://ipproducts.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (Accessed: 29 January 2018).

³⁵³ 2016 (3) SA 580 (CC) at para 72.

³⁵⁴ *Ibid.*

³⁵⁵ "Constitutional Court rules on Nkandla" *News24* 31 March 2016 Available at: <http://www.news24.com/SouthAfrica/News/full-text-constitutional-court-rules-on-nkandla-public-protector-20160331> (Accessed: 1 October 2016).

³⁵⁶ That of remedial action being non-binding but still requiring a lawful response that is rational and reasonable.

³⁵⁷ Bishop *et al* "Constitutional Law" Vol 1 *Juta's Quarterly Review* (2016) 2.1 Available at: <http://ipproducts.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (Accessed: 29 January 2018).

In making their final remarks on the matter, Bishop *et al* contend that, as such:

the finding that remedial action may be binding and therefore subject to judicial review is wrong having regard both to the text of the Constitution and the purpose and role of the institution of the Public Protector as there is nothing in the text of the Constitution that requires ‘remedial action’ to connote an effective remedy akin to the judicial remedies to which persons whose constitutional rights are violated are entitled under s 38 of the Constitution.³⁵⁸

(b) The position after *Economic Freedom Fighters v Speaker of the National Assembly*

(i) *Introduction*

In the fledgling constitutional democracy that South Africa is (by African and to some extent, international standards), it is inevitable that “challenges posed by economic transformation (within a racially polarized capitalist economy which creates opportunities for careerism, personal enrichment and corruption) will continue to exist.”³⁵⁹ This has served to thrust the role of the institution of the Public Protector into deepening democracy through, *inter alia*, efforts at uprooting the cancer of corruption within the country, into the spotlight. One of the ways through which the effectiveness of the Public Protector’s office in discharging this role is measured is through the implementation rate of its recommendations given in exercise of the Public Protector’s remedial power.³⁶⁰ While it has been noted that “recommendations given in respect of ‘small cases’ are often implemented without much difficulty,”³⁶¹ the institution has, oftentimes, faced great difficulty in getting its recommendations followed upon, particularly where remedial action would have been taken against high ranking public officials in respect of cases involving serious allegations of public misadministration.³⁶² It is in this light that this study

³⁵⁸ Ibid.

³⁵⁹ R Southall “How the ANC’s path to corruption was set in the 1994 political transition from apartheid” *Mail and Guardian* 7 September 2016 Available at: <https://mg.co.za/article/2016-09-07-how-the-ancs-path-to-corruption-was-set-in-the-1994-transition-from-apartheid> (Accessed: 26 September 2017).

³⁶⁰ P H Munzhedzi “Fostering public accountability in South Africa: A reflection on challenges and successes” Vol. 12 No. 1 *The Journal for Transdisciplinary Research in Southern Africa* (2016) 339.

³⁶¹ Ibid.

³⁶² Two years after the Supreme Court of Appeal’s *SABC* ruling and the publication of Madonsela’s “When Corporate Governance and Ethics fail” report for example, one finds Advocate Mkhwebane still fighting to get the SABC to implement her predecessor’s recommendations with the Public Protector indicating, while addressing Parliament’s ad hoc committee looking into the fitness of the SABC board, that the public broadcaster ignored six

rejects the criticisms levelled against the *Economic Freedom Fighters v Speaker of the National Assembly* judgment. The specific reasons for this are set out below.

(ii) *A case for binding remedial power*

The first major premise upon which this study rejects the arguments from academic commentators, is based upon Bishop *et al*'s contention that the Public Protector's remedial action cannot be binding and therefore subject to judicial review, as "[t]here is nothing in the text of the Constitution that requires 'remedial action' to connote an effective remedy akin to judicial remedies of the courts".³⁶³ As the Supreme Court of Appeal itself has noted: a court is an inaccurate comparator for the Office of the Public Protector.³⁶⁴ It is worth noting that there have been contrasting views as to whether Chapter Nine Institutions are state institutions separate from government or constitute a fourth arm of government incorporated to aid the *trias politica* framework in preventing abuses of power. Proponents of this argument such as Klug³⁶⁵ are of the view that only their location within the realm of the separation of powers secures their potential as an essential part of the constitutional system of accountability established by the Constitution.

Judgments handed down by the Constitutional Court, particularly the *Independent Electoral Commission* case, have provided clarity in this respect. Here the Constitutional Court held that under section 181(2) of the Constitution, these institutions are independent and subject only to the Constitution and the law; independence cannot exist in the air and it is clear that Chapter Nine intends independence to refer to independence from the government.³⁶⁶ Regarding Chapter Nine Institutions as a fourth arm of government is misleading as it is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally

(out of a total of eight) of her predecessor's remedial actions. See in this regard P Herman "SABC ignored Public Protector's remedial actions – Mkhwebane" *News 24 Online* 7 December 2016 Available at: <http://m.news24.com/news24/SouthAfrica/News/sabc-ignored-public-protectors-remedial-actions-mkhwebane-20161207> (Accessed: 25 January 2017).

³⁶³ Bishop *et al* "Constitutional Law" (2016) 1 *Juta's Quarterly Review* para 2 at para 2.1 Available at: <http://ipproducts.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (Accessed: 29 January 2018).

³⁶⁴ *SABC v DA* 2016 (2) SA 522 (SCA) at para 45.

³⁶⁵ H Klug "Separation of Powers, Accountability and the role of Independent Constitutional Institutions" 60 *New York Law School Law Review* (2015-2016) 24.

³⁶⁶ 2001 (3) SA 925 (CC) at para 72.

interdependent and interrelated in relation to all other spheres of government.³⁶⁷ As such, it can be concluded that although these institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions at least once a year to the Assembly, they do not constitute an additional arm of government. Identifying them as an intrinsic part of the separation of powers framework would be erroneous as doing so defeats the purpose of their existence. As the Constitutional Court has itself noted, it is therefore essential, not just for them to actually be outside of government, but also that they should manifestly be seen to be, outside of government.³⁶⁸ It would therefore be erroneous to attempt to glean the legal nature of the Public Protector's powers by weighing it against an institution that constitutes a branch of government.

More significantly, the South African Public Protector cannot be regarded as an ordinary ombudsman as was contended by the High Court in arguing that the Public Protector's powers are not binding and enforceable since ombudsmen ordinarily do not possess any powers of legal enforcement. This premise is based on a fundamental misunderstanding of the history that necessitated the need for the Public Protector's office and other Chapter Nine Institutions and consequently, of the Public Protector's place in South Africa's democracy.

It has been noted that the meaning, roles, and functions associated with ombudsmen and ombudsmen-like institutions will vary in accordance with the environment in which the office is established and operates.³⁶⁹ As such, what the Public Protector means to South Africa is markedly different from what a similar institution in a different jurisdiction would mean. Regarding the Public Protector as an ordinary ombudsman who should only have mere powers of recommendation therefore totally discounts the political climate in which the South African Public Protector currently exists and operates.

³⁶⁷ 2001 (3) SA 925 (CC) at para 22.

³⁶⁸ 1999 (3) SA 191 (CC) at para 31.

³⁶⁹ V Ayeni *et al* *Strengthening Ombudsman and Human Rights Institutions in Commonwealth, Small and Island States: the Caribbean Experience* (2000) 4.

According to Adetiba, neo-patrimonialism best defines the existing leadership structure in South Africa³⁷⁰ wherein state institutions such as the NPA, SASSA, ESKOM and the SABC among others, are “captured” by senior government officials for the purposes of furthering their personal interests as well as of those who provide them with financial backing. In such a system of patronage, it is imperative for the Public Protector to be seen as having teeth as this system on one hand, creates an avenue for corruption, and on the other, makes it difficult to address the problem.³⁷¹

The second premise upon which this study rejects the submissions made by academic commentators cited above is based on their contention that: “[t]reating the remedial action of the Public Protector as binding shifts the role of the Public Protector and her relationship with organs of state into a conflictual rather than constructive dynamic”.³⁷² Regarding this view, the Public Protector’s investigations into Mr Motsoeneng’s permanent appointment as the Chief Executive Officer of the SABC as well as her investigations into non-security upgrades at Mr Zuma’s private Nkandla residence at taxpayer’s expense have shown how senior public functionaries almost always have a disdainful regard of the Public Protector’s remedial action. This is so particularly where they hold the view that it is non-binding which fosters the sentiment that they are therefore not compelled to comply rather than resulting in any “constructive dynamic”. This study accordingly submits that the Constitutional Court’s position is to be preferred as it places the initiative on the party found guilty of maladministration to take the remedial action on judicial review. The implicated party will thus have to take the risk of paying for litigation as well as taking the chance of possibly losing the case and then having to meet the costs of counsel for both parties. Placing the onus on the implicated party or organ of state may thus promote accountability as it could coerce them to comply with the remedial action in order to avoid the uncertain outcome associated with resorting to litigation.

³⁷⁰ O F Adetiba *The Challenges of curbing corruption in a democracy: The case of the Public Protector and Nkandla* (2016) ii.

³⁷¹ O F Adetiba *The Challenges of curbing corruption in a democracy: The case of the Public Protector and Nkandla* (2016) ii.

³⁷² Bishop *et al* “Constitutional Law” Vol 1 *Juta’s Quarterly Review* (2016) 2.1 Available at: <http://ipproducts.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> (Accessed: 29 January 2018).

On the alternative approach, the burden would have to be on civil society, private individuals or on the Office of the Public Protector itself to take the guilty party to court in order to force them to comply with remedial action taken against them and get them to account for their actions. Such a situation is clearly untenable in light of the delay or lengthy duration that court proceedings are often prone to. Ultimately, it does not foster respect for the Public Protector's remedial power since, in terms of this approach guilty parties have to be taken to court first for them to comply, whereas where remedial action is binding, public functionaries found guilty of maladministration and corruption have to comply with the remedial action the instant it is taken as it binds and stands until reviewed and set aside in judicial proceedings.

(iii) On reviewing the Public Protector's binding remedial orders

There has been a reversal of the general consensus regarding the nature of the Public Protector's remedial power and the basis upon which the Public Protector's power should be reviewed. This reversal came in the form of the Supreme Court of Appeal's decision in *Minister of Home Affairs v Public Protector of South Africa*.³⁷³

Prior to the handing down of this decision, the general consensus seemed to be that the exercise of the Public Protector's power under section 182(1)(c) of the Constitution is administrative in nature and thus falls to be reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). This much is corroborated by previous decisions that all found that remedial orders by the Public Protector constitute administrative action. The court a quo³⁷⁴ in the matter between the Minister of Home Affairs and the Public Protector found that the Public Protector's powers were reviewable under the PAJA. The North Gauteng High Court in *South African Reserve Bank v Public Protector and Others*³⁷⁵ ("the SARB decision") also reviewed and set

³⁷³ 2018 (3) SA 380 (SCA) at para 29.

³⁷⁴ *Minister of Home Affairs & another v Public Protector & another* 2017 (2) SA 597 (GP) 47. See also *Minister of Home Affairs v Public Protector of South Africa* 2018 (3) SA 380 (SCA) at para 29.

³⁷⁵ 2017 (6) SA 198 (GP). Litigation giving rise to the *SARB* decision began with the lodging of a complaint, (when Advocate Madonsela was in office), by Paul Hoffman (Director of the Institute of Accountability in Southern Africa) who alleged that government had failed to recoup R3,2 billion that had been offered to Bankorp (now Absa Bank) by the Reserve Bank "in the guise of a distressed life boat". This complaint stemmed largely from the contents of a report furnished by CIEX, "a covert UK-based asset-recovery agency" that had been contracted by the government to look into monies that could have been lost by the South African government due to alleged apartheid era looting or illicit activities. The Public Protector's office did not proceed further with the matter until newly-

aside the Public Protector's remedial action in terms of the PAJA.³⁷⁶ Finally, in *Absa Bank Limited & others v Public Protector & others*,³⁷⁷ it was also found that remedial action by the Public Protector is subject to review under the PAJA.³⁷⁸ However, as shown in Chapter Three of this study, it was the Court's finding in *Minister of Home Affairs v Public Protector of South Africa* (at paragraph 37) that "the PAJA does not apply to the review of exercise of power by the Public Protector in terms of s 182 of the Constitution and s 6 of the Public Protector Act" but that the principle of legality applies instead.

appointed Public Protector, Advocate Mkhwebane issued a report on 19 June 2017 of her investigation into government's alleged failure in 1999 to recover misappropriated funds and implement the CIEX report. The report essentially found that the government had failed to recoup R1 125 billion as opposed to the R3.2 billion initially mooted in the CIEX report. The non-recovery of any repayment of the "lifeboat" was seen as being irregular and unjust on the basis that the Reserve Bank had a responsibility to apply public funding to the benefit of the South African economy and its people. The Public Protector, pursuant to section 182(1)(c) of the Constitution, then recommended the alteration of the Reserve Bank's mandate under section 224 of the Constitution from protecting the value of the currency to that of "promoting balanced and sustainable economic growth in the Republic while ensuring the protection of the socio-economic well-being of the citizens through regular consultation with Parliament as opposed to regular consultation between the Bank and the Minister of Finance". See also: B Mkhwebane "*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*" Report No. 8 of 2017/2018.

³⁷⁶ In this instance, the Public Protector's remedial action was reviewed and set aside in terms of: (I) section 6(2)(a)(i) of the PAJA on the ground that the Public Protector was not authorised by section 182(1) of the Constitution (the empowering provision), to take such remedial action as the remedial power had been exercised in respect of an aspect that had not been identified for investigation in the report; (II) section 6(2)(i) of the PAJA on the basis that the remedial action taken was unconstitutional seeing as the Public Protector's order in not only directing Parliament to amend the Constitution, but in also going as far as prescribing the wording of that amendment was seen as offending the separation of powers principle; (III) sections 6(2)(f)(ii) of the PAJA for irrationality and section 6(2)(h) of the PAJA for unreasonableness on the basis that it was not rationally related or connected to the evidence and information before the Public Protector and the reasons given for it and unreasonable in that no other reasonable person would have taken it; and finally, (IV) on the ground of procedural unfairness in terms of section 6(2)(c) of the PAJA as the Public Protector had not disclosed that that she was considering remedial action that would amend the primary object of the Reserve Bank and also because she had amended the scope of the investigation and the remedial action in the final report without notice to any person likely to be adversely affected.

³⁷⁷ [2018] 2 All SA 1.

³⁷⁸ Here the South African Reserve Bank had brought an application for the review and setting aside of paragraph 7.1 of Advocate Mkhwebane's *Alleged failure to recover misappropriated funds* Report No. 8 of 2017/2018 in which the Public Protector inter alia instructed the Special Investigating Unit to re-open the investigation into alleged misappropriated public funds unlawfully given to ABSA Bank in the amount of R1 125 billion. Absa Bank Ltd and the Reserve Bank (1st and 2nd applicant respectively) had brought the application in terms of the PAJA or alternatively, for the remedial order to be reviewed in terms of section 1(c) of the Constitution under the principle of legality. The Public Protector submitted that the impugned remedial action is not administrative action as it did not materially affect the rights of the applicants neither did it have a direct external effect on their rights as it was a mere recommendation. However, it was asserted at paragraph 50 of this judgment that it is clear that the decision and remedial action set out in the report by the Public Protector is administrative action which falls squarely in the definition of administrative action, according to the provisions of PAJA . The court accordingly reviewed and set aside the remedial action in terms of section 6(2)(a)(i) of the PAJA which deals with lawfulness and in terms of section 6(2)(c) of the PAJA which deals with procedural unfairness.

Although overlaps are to be found in judicial review in terms of the PAJA and in terms of the principle of legality, as “the grounds of review that apply in respect of both pathways to review ultimately derive from the same source – the common law”,³⁷⁹ this study agrees with the approach adopted by the Supreme Court of Appeal in this instance. This is so as firstly, review in terms of the principle of legality is more lenient than review in terms of the PAJA,³⁸⁰ which means it will not be easy to set aside the Public Protector’s decision in terms of the legality approach. More importantly, this study agrees with the court’s approach in this instance due to its reasoning in paragraph 37 of its judgment (discussed under section 4.2 above). Of particular significance is the court’s assertion that: “the office of the Public Protector is a unique institution designed to strengthen constitutional democracy”.

The manner in which the Court was at pains to emphasize that the Public Protector stands apart from other institutions of public governance has an even more significant implication, that being: there could actually be a fourth category of public power – one that is not executive, legislative or administrative but one that is *sui generis* in nature. This additional category of public power could (as it is in relation to the exercise of the Public Protector’s power in terms of section 182(1)(c) of the Constitution), be labelled as “corrective” power since it entails the issuance of corrective or remedial steps to be taken in instances where improper or prejudicial governmental conduct is found to have occurred.³⁸¹ The approach by the Court in *Minister of Home Affairs v Public Protector of South Africa* accordingly finds support in this study as it rightfully illustrates how the Public Protector: “[i]s a special institution, indigenous to South Africa, whose functions and the nature of its powers reflect the unique DNA of South Africa’s nascent democracy”.³⁸²

3. Suggestions and Recommendations

³⁷⁹ 2018 (3) SA 380 (SCA) at paras 27 and 38.

³⁸⁰ In this regard, Plasket AJA asserted in footnote 25 of the Minister of Home Affairs decision that “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”. In other words, it is only the grounds of review in terms of the PAJA that have been codified – they are strictly categorized under section 6(1) and (2) of the PAJA.

³⁸¹ In addition, as indicated above, this judgment subjected the exercise of this category of power (like executive, legislative and judicial power) to a more lenient standard of review under the principle of legality.

³⁸² LC Reif *The Ombudsman, Good Governance, and the International Human Rights System* (2004) 238.

This study has shown how (in light of high rising levels of corruption in South Africa) it is imperative for anti-corruption enforcement agencies such as the Office of the Public Protector to be adequately capacitated such that they are able to operate freely and devoid of any inhibitions. There is thus a clear need to formulate feasible strategies for the South African Public Protector aimed at curbing grand scale corruption in an equitable and apolitical manner that will more likely ensure accountability of the highest-ranking members of government and set an example, starting from the top – that graft will not be tolerated.³⁸³

(a) On enhancing the Office of the Public Protector

Accordingly, in order to safeguard the independence and dignity of the institution as well as to ensure its efficiency and effectiveness in the fight against corruption it is suggested firstly that: the Office of the Public Protector needs a champion or strong ally in Parliament.³⁸⁴ One of the ways it can do so is for Parliament to seriously and very urgently engage in meaningful debate of the contents of the 2007 Asmal Report.³⁸⁵ Of particular significance with regard to the Office of the Public Protector are the following concerns raised and observations made in the Asmal report namely that: Financial independence is an important indicator of true independence.³⁸⁶ However, it has emerged that: (i) the Public Protector (and the Commission for Gender Equality) consult

³⁸³ “Uganda: High Level Corruption” *The Independent (Kampala)* 31 October 2013 Available at: <http://allafrica.com/stories/201311040071.html> (Accessed: 27 September 2017).

³⁸⁴ Instances such as when Parliament chose to endorse a report by the Minister of Police stemming from a parallel investigation to that of the Public Protector which essentially absolved the President of all liability in respect of the Nkandla matter for example, do nothing to assist and protect the institution so as to ensure its independence, impartiality, dignity and effectiveness as intended under section 181(3) of the Constitution. Rather, they foster a severely disdainful regard of the institution and its recommendations as shown by the President’s subsequent non-compliance with the Public Protector’s remedial action due to this absolution by Parliament.

³⁸⁵ On the 21st of September 2006, Parliament adopted a resolution in respect of which a multi-party ad hoc committee was appointed to assess the extent to which society had been transformed and human rights entrenched through the operation of Chapter Nine and associated institutions. This Parliamentary ad hoc committee, led by the late Kader Asmal, proceeded to embark on the first ever parliamentary review of a set of institutions at the core of consolidating, growing and sustaining South Africa’s hard-won democracy. The final report detailed weaknesses and made recommendations with the primary purpose of strengthening these institutions and enhancing their efficiency and effectiveness. Ten years later, its recommendations have still not been implemented. Any serious discussion about the enhancement of Chapter Nine and associated institutions in general and of the Public Protector in particular can only begin with revisiting the 2007 Asmal Report and its recommendations. See Parliament of the Republic of South Africa *Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions: A report to the National Assembly of the Parliament of South Africa* (31 July 2007) (hereafter “Asmal Report”) Available at <http://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf> (Accessed: 24 August 2017).

³⁸⁶ Asmal Report at xi.

the Minister of Finance when appointing staff³⁸⁷ and significantly that, (ii) budget allocations for the Public Protector are found in the budget vote of the Department of Justice and Constitutional Development.³⁸⁸

It was conceded in respect of (i) above that such an arrangement could very well be for pragmatic reasons, that is, confirmation of financial resources.³⁸⁹ The Asmal investigatory committee was however mindful of how crucial it is for this institution to manifestly be seen to be outside of government and such arrangements thus impact negatively on the perceived independence of the Public Protector and create the false impression that the institution is accountable to the respective government department for the use of its finances.³⁹⁰ This impression may not only arise in the mind of the public but in that of an incumbent as well, which may result in the very real possibility of the Office not pursuing certain grievances brought against government or in favourable findings being made out of fear of funds being withheld. Consideration therefore ought to be seriously given to the Asmal committee's recommendation for the location of the Public Protector's budget in the budget vote of Parliament (as opposed to direct allocation from a government department) in recognition of the fact that this institution is accountable only and directly to the people's democratically elected representatives in the National Assembly.³⁹¹ This suggestion is actually in line with the original concept for the ombudsman's office, which was for it to be linked to the legislature. The Ugandan Inspectorate of Government is a noteworthy example. Its financial independence is buttressed by the provisions of Article 229(1) of the 1995 Ugandan Constitution, which declares that:

[T]he Inspectorate of Government shall have an independent budget appropriated by Parliament, and controlled by the Inspectorate.³⁹²

³⁸⁷ Asmal Report at 12.

³⁸⁸ Asmal Report at 106.

³⁸⁹ Asmal Report at xi.

³⁸⁹ Asmal Report at 12.

³⁹⁰ Asmal Report at 12.

³⁹¹ Asmal Report at ix.

³⁹² The Constitution of the Republic of Uganda, 1995 Available at: <http://www.wipo.int/edocs/lexdocs/laws/en/ug/ug023en.pdf> (Accessed: 2 August 2017).

This is commendable as independence is an important attribute that most clearly underpins a national institution's legitimacy and credibility and hence its effectiveness.³⁹³ In sharp contrast, South Africa's Public Protector, despite constitutional and legislative guarantees of political autonomy, is currently almost entirely financially dependent on the executive.³⁹⁴

It is thus suggested that urgent implementation of this recommendation in particular should be effected as the office of the Public Protector occupies a very politically sensitive position due to its wide ranging powers to investigate the workings of government. This, in turn, necessitates more vigorous protection of its independence to ensure the legitimacy of this institution in the eyes of the public.³⁹⁵ Parliament's oversight role thus needs to be fully maximized to lobby the formulation of policy that solidifies the Public Protector's independence.

The 2007 Asmal Report also found that the Office of the Public Protector conducted very few proactive investigations with a total of only forty one own-initiative investigations being conducted by the office from 2002 to 2007 during Advocate Lawrence Mushwana's tenure.³⁹⁶ Things essentially remained the same under the country's third Public Protector. The 2010 investigation into the improper procurement in the leasing of office accommodation for the SAPS was conducted only after complaints were lodged by Paul Hoffman of the Institute for Accountability in Southern Africa and Pieter Groenewald of the Freedom Front Plus.³⁹⁷ These complaints originated from a newspaper article published by the Sunday Times on 1 August 2010 alleging improper conduct and maladministration by police National Commissioner Bheki Cele and the Department of Public Works.³⁹⁸

³⁹³ Office of the United Nations High Commissioner for Human Rights *Assessing the effectiveness of National Human Rights Institutions* (2005) 12 Available at: <http://www.ohchr.org/Documents/Publications/NHRIen.pdf> (Accessed: 13 August 2017).

³⁹⁴ JC Mubangizi "The South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: a comparative review of their roles in good governance and human rights protection" Vol 45 No. 3 *The Comparative and International Law Journal of Southern Africa* (2012) 304-323.

³⁹⁵ Asmal Report at 14.

³⁹⁶ Asmal Report at 100.

³⁹⁷ N Bauer "Thuli Madonsela: a timeline" *Mail and Guardian* 15 July 2011 Available at: <https://mg.co.za/article/2011-07-15-thuli-madonsela-a-timeline> (Accessed: 2 November 2016).

³⁹⁸ *Ibid.*

Further, the 2011 investigation into various corporate governance failures at the SABC was also only conducted by the Public Protector following the lodging of a complaint on the 11th of November 2011.³⁹⁹ Again, the Public Protector's investigation into the opulent upgrades at the President's private Nkandla residence at taxpayer's expense was conducted only after the Public Protector received a total of seven complaints between 13 December 2011 and November 2012.⁴⁰⁰ Worth noting is how these complaints were lodged after the publication of a series of articles by the Mail and Guardian newspaper. The above cases were not only of grave public importance, but tellingly, received considerable coverage in the media. It is only fair to deduce from the latter that the Public Protector's office was aware of unfolding events yet the office only acted after having been approached by concerned individuals, in some instances more than once.

This study accordingly recommends the amendment of enabling legislation to make it mandatory for the Public Protector to act, particularly in cases where a matter is of great public importance, and immediately or reasonably soon after the facts of such cases are in the public domain. Such an approach would enhance respect for the office as an institution seriously committed to curbing grand scale corruption. This measure would also ensure the effective discharge of this institution's constitutional obligation to be impartial and to exercise its powers and perform its functions without fear, favour or prejudice regardless of the office holder at any given time.

It is posited that this approach, or rather its feasibility, is worth looking into considering (the yet to be overturned) 2011 Supreme Court of Appeal decision in which the Public Protector's mandate under the Constitution was held to be investigatory which means that:

the Public Protector is different from an ordinary Ombudsman as the office's function goes beyond that of a passive adjudicator between citizens and the State but is one *requiring proactiveness in appropriate*

³⁹⁹ T Madonsela *When Governance and Ethics Fail: A Report on an investigation into allegations of maladministration, systemic governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motselempeng by the South African Broadcasting Corporation* Report No 23 of 2013/2014 Available at: http://www.pprotect.org/library/investigation_report/201314/WHEN%20GOVERNANCE%20FAILS%20REPORT%20EXEC%20SUMMARY.pdf (Accessed: 12 August 2016).

⁴⁰⁰ T Madonsela *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No. 25 of 2013/14 at 5 Available at: http://www.gov.za/sites/www.gov.za/files/Public%20Protector's%20Report%20on%20Nkandla_a.pdf (Accessed: 23 August 2016).

circumstances and significantly that this proactiveness is required *whenever the Public Protector becomes aware* of maladministration, malfeasance and impropriety in public life (emphasis added).⁴⁰¹

(b) On the constitutionality of the Public Protector Act

While the thoroughness of the research conducted and the richness of the findings contained in the Asmal Report cannot be denied, there is still one crucial aspect that it sidestepped. Essentially, the Committee shied away from seriously looking into any possible gaps in the legal framework regulating the Office of the Public Protector, despite being mandated (in the terms of reference contained in the resolution by the National Assembly which established the multiparty ad hoc committee) to assess whether the current (and intended) legal instruments governing the respective institutions were suitable in light of the political environment they operated in.⁴⁰² Rather, it ultimately recommended that the Office should continue without any substantive changes to either its mandate or its powers and functions.⁴⁰³

As events turned out however, particularly those that gave rise to the *Economic Freedom Fighters v Speaker of the National Assembly* judgment, the current legal framework under which this institution operates is not sufficiently suitable for the political environment in which it exists. This serves to underscore the crucial need to tackle an important issue that needs to be put to rest: the constitutional status of the Public Protector Act in the wake of the Constitutional Court's ruling on Nkandla. Although the long title of the Act indicates that it was enacted to provide for matters incidental to the office of the Public Protector *as contemplated in the Constitution* (emphasis added) one finds that the definition section of the Act is devoid of key phrases found in section 182(1) of the Constitution.⁴⁰⁴ Further, the Public Protector has no power to take any binding corrective action against persons or organs of state under the Public Protector Act which is completely silent on this issue – indeed, the phrase “appropriate remedial action” is not expounded upon anywhere in the Act. The Act has been amended five times; each time without any of these issues being addressed. It is averred in this respect that the Act needs to provide

⁴⁰¹ 2011 (4) SA 420 (SCA) at para 9.

⁴⁰² Asmal Report at 5.

⁴⁰³ Asmal Report at 106.

⁴⁰⁴ AS Yakoob “Ambiguity surrounding the powers of the public protector – a threat to the rule of law” (2015) Available at: http://www.up.ac.za/media/shared/10/ZP_Files/salrc-essay-aadelah-shaik-yakoob.zp95040.pdf (Accessed: 14 June 16).

clarity in respect of matters that cannot be dealt with comprehensively under section 182(1) of the Constitution and essentially, mirror the objective of the Constitution, which is the primary source of the Public Protector's powers.

As subordinate legislation cannot, due to the constitution's supremacy, have the effect of watering down the powers already conferred by the Constitution on the Office of the Public Protector,⁴⁰⁵ it is accordingly asserted that the Public Protector Act 23 of 1994, is inconsistent with the meaning and purpose of sections 182(1) and (2) of the Constitution, and consequently does not pass constitutional muster. It is suggested firstly that the definition section of the Public Protector Act should be amended to incorporate important terminology found, or necessarily implied, under section 182(1) of the Constitution. To begin with, the phrase "take appropriate remedial action" should be reflected in the definition section of the Public Protector Act possibly as follows:

In this Act, unless the context otherwise indicates -

appropriate (in respect of remedial action) means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case;⁴⁰⁶

binding means the legal effect of recommendations made, or remedial measures taken, against persons and/or organs of state; by the Public Protector in terms of his or her constitutionally allocated remedial powers under section 182(1) (c) of the Constitution of the Republic of South Africa, 1996; such remedial measures having the effect, absent judicial review, of creating a positive legal obligation and/or obligations, against those on whom it is taken;⁴⁰⁷

non-binding means the legal effect of recommendations made, or remedial measures taken, against persons and/or organs of state; by the Public Protector pursuant to section 182(1) (c) of the Constitution; which do not result in the creation of a positive legal obligation and/or obligations; but in respect of which those against whom it is taken are required to properly consider, in order to determine the course to follow.⁴⁰⁸

⁴⁰⁵ 2016 (3) SA 580 (CC) at para 64.

⁴⁰⁶ 2016 (3) SA 580 (CC) at para 71.

⁴⁰⁷ 2016 (3) SA 580 (CC) at paras 73-75.

⁴⁰⁸ 2016 (3) SA 580 (CC) at para 69.

It is suggested further that the phrase “appropriate remedial action” should be elucidated upon in the Act especially as it is a key pointer in relation to the powers of the Public Protector. To illustrate, section 6(4) of the Act could proceed as follows:

The Public Protector shall be competent to take appropriate remedial action which shall include the power -

- (a) to determine and stipulate legally binding recommendations and/or remedial measures:
 - (i) which shall stand and bind until reviewed and set aside in a court of law and must be complied with the instant such remedial measures are taken or recommendations given;
 - (ii) only against those that he or she is constitutionally and statutorily empowered to investigate; and
 - (iii) only when it is appropriate or practicable to effectively remedy or undo the complaint...⁴⁰⁹
- (e) For the purposes of this section, what constitutes “appropriate remedial action”
 - (i) is, at all times in the Public Protector’s sole discretion;
 - (ii) who shall have the power to determine and stipulate the remedy as well as direct and/or prescribe its implementation.⁴¹⁰
- (f) Whether a particular action or measure employed by the Public Protector is binding or non-binding:
 - (i) is a matter of interpretation;
 - (ii) aided by context, nature and language; and
 - (iii) which shall at all times be informed by the nature of the issues under investigation; the appropriateness of the remedial measure to deal properly with the subject matter of the investigation, and in line with the findings made.⁴¹¹

Finally, the study posits further that there is a need to militate against current and future office holders from misinterpreting the scope or reach of their powers, as appears to have been the case with Advocate Mkhwebane’s report into the Absa Bank apartheid-era loan from the Reserve Bank in which she sought to change the Constitution to remove the Reserve Bank’s central mandate of keeping inflation under control. This study accordingly recommends that section 6(6) of the Public Protector Act should also be amended to expand the list of matters that would fall outside the purview of the Public Protector's powers. The legislature could, for instance, expressly indicate that nothing in the Act shall be construed as empowering the Public Protector to make economic policy or amend the Constitution, that is, in addition to not being able to investigate the performance of judicial functions by any court of law.

⁴⁰⁹ 2016 (3) SA 580 (CC) at para 71.

⁴¹⁰ Ibid.

⁴¹¹ Supra note 410.

4. Concluding remarks

In closing, it can be asserted that the facts that collectively make up the Nkandla matter, have been, without doubt, the most telling in terms of revealing the sharp decline in ethical governance and the subsequent corrosive effect on key constitutional principles particularly accountability, transparency and the rule of law. The Public Protector's "Secure in Comfort" report as well as the Constitutional Court's subsequent ruling on the matter have been very significant in the corruption discourse in South Africa since the facts of the case became public knowledge⁴¹² and are regarded as a litmus test of the effectiveness of efforts to ensure public accountability and curb public corruption in South Africa.⁴¹³

It is in this light that the Supreme Court of Appeal's approach in *Minister of Home Affairs v Public Protector* gains more meaning. As mentioned above, a significant implication of this judgment is that there could, in fact, be a fourth category of public power. A case could thus be made for the consideration of the Public Protector (and possibly other Chapter Nine institutions) as a fourth, but separate, arm of government that exercises corrective power. This is even more so as in the wake of *the Economic Freedom Fighters v Speaker of the National Assembly* judgment, the Public Protector's office has emerged as a formidable and tenacious force in terms of getting public functionaries to account for decisions made and as an important addition to the armoury of mechanisms that are employed to create the substance of accountable constitutional governance.⁴¹⁴

However, the institution's woes are far from over. It has been shown how there are certain shortcomings in the legislature's regulation of the Public Protector's powers which, if left as is, will most likely contribute to the hindrances that prevent the office from functioning to its full potential in curbing corruption within government and enforcing the rule of law; further, how its optimal functioning continues to be hampered by lack of cooperation and support from state

⁴¹² O F Adetiba *The Challenges of curbing corruption in a democracy: The case of the Public Protector and Nkandla* (2016) 52.

⁴¹³ O F Adetiba *The Challenges of curbing corruption in a democracy: The case of the Public Protector and Nkandla* (2016) 56.

⁴¹⁴ Asmal Report at 95.

organs, and from senior government officials and how, in reality, the efficacy of this vital institution remains heavily reliant on the character or moral convictions of the individual at the head of this institution.

Suggestions can be given as to how, for instance, the requirements for appointment should not turn so heavily on legal qualifications and experience in the administration of justice but more on a proven track record or demonstrable passion, commitment and enthusiastic engagement in matters relating to, among other things: the promotion of accountability, transparency and openness in public administration; the advancement of human rights; in fostering respect for and adherence to the rule of law and in combatting corruption and who would thus be more likely to execute their duties with courage and conviction of purpose; or as to how enabling legislation should be amended to clearly reflect the Public Protector's competence to take binding remedial action. However, these suggestions, even if taken seriously, will remain ineffectual in the face of a deep-rooted lack of political will to address corruption at the highest levels of government.

It is in this vein that Stanley F. Anderson has warned that not too much must be expected from ombudsmen; they are not Don Quixotes who will solve problems of poverty, prejudice and corruption in public administration. Neither can they change the very climate of society.⁴¹⁵ The preservation of democracy in South Africa consequently requires the active participation of all the various stakeholders: the media, the judiciary, Parliament, civil society groups as well as that of ordinary South African citizens. Ultimately, it rests on the genuine desire, on the part of government, to curb (rather than instigate and exacerbate) corruption as well as to protect and ensure the dignity and independence of established anti-corruption institutions so as to guarantee their effectiveness.

The Constitution has already laid the foundation through its intricate system of checks and balances aimed at constraining the exercise of public power for the purposes of consolidating and sustaining democracy within the Republic and also through being a progressive blueprint for

⁴¹⁵ G Barrie "The Public Protector (Fiat Ombudsman!)" *De Rebus* (1995) at 583 Available at: http://reference.sabinet.co.za/webx/access/journal_archive/02500329/8263.pdf (Accessed: 30 August 2017).

addressing the legacies of apartheid.⁴¹⁶ The Public Protector, as an independent state institution meant to strengthen constitutional democracy in the Republic, will, in the process of doing so, swat a few mosquitoes but it still remains up to government to drain the swamps.⁴¹⁷

⁴¹⁶ H Klug “Separation of Powers, Accountability and the role of Independent Constitutional Institutions” 60 *New York Law School Law Review* (2015-2016) 7.

⁴¹⁷ G Barrie “The Public Protector (Fiat Ombudsman!)” *De Rebus* (1995) at 583 Available at: http://reference.sabinet.co.za/webx/access/journal_archive/02500329/8263.pdf (Accessed: 30 Aug 17).

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