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POWERS OF THE PUBLIC PROTECTOR:
ARE ITS FINDINGS AND RECOMMENDATIONS LEGALLY BINDING?

by

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SUMMARY

In this study, I evaluate the powers of the Public Protector, in light of the controversies that have been caused by the release of reports recently and in the past, with a selected number of reports being brought to the fore.

I proceed from the premise that there has not always been agreement regarding the legal effect of the remedial actions taken by the institution. In order to highlight the issues, I discuss past controversies, which have often created attention from various sectors of society, from the media, politicians, lawyers as well as the rest of the citizenry. I will therefore discuss the broader implications of the so-called *EFF* judgment in light of past and current issues, which have been or are presently the cause of disagreement. In chapter 1 of this study, broader issues are discussed and the aims of the study are set out. Chapter 2 discusses constitutional and statutory provisions regulating the office of the Public Protector (“hereinafter the Public Protector”). My primary focus is on the Constitution of the Republic of South Africa, 1996 and the Public Protector Act, with a brief discussion of other relevant pieces of legislation. Chapter 3 discusses different controversies, which have existed in the past, as well as the legal position before the ruling in the *EFF* judgment. A build-up of cases mainly involving the South African Broadcasting Corporation (SABC) have been brought before the High Court and the Supreme Court of Appeal for adjudication, with the two respective courts adopting two different approaches on the issue of the legal effect of the Public Protector’s remedial actions. There was thus a need for clarity on the matter, as continued lack of clarity would have led to lack of compliance with the recommendations of the institution being perpetuated. Chapter 4 takes a critical look at the facts and decision of the court in the *EFF* judgment.

Issues that remain unclear even after the ruling in the *EFF* judgment are discussed in chapter 5. This chapter highlights the fact that, even after the ruling in the *EFF* judgment, there are still matters which are unclear and therefore require definitive rulings by the courts, for the sake of legal certainty. I conclude the discussion in chapter 6.

LIST OF ABBREVIATIONS

1. ANC: African National Congress
2. CC: Constitutional Court
3. EFF: Economic Freedom Fighters
4. DA: Democratic Alliance
5. IEC: Independent Electoral Commission
6. NA: National Assembly
7. NNP: New National Party
8. NPA: National Prosecuting Authority
9. PP: Public Protector
10. PPA: Public Protector Act
11. PRASA: Passenger Rail Agency
12. SABC: South African Broadcasting Corporation
13. SARB: South African Reserve Bank
14. SARFU: South African Rugby Football Union
15. SCA: Supreme Court of Appeal
16. SIU: Special Investigation Unit

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I also wish to thank the two women in my life, one deceased and one still alive. These are my late grandmother and my mother. I wish to thank my late grandmother for teaching us the value of education, despite the fact that she herself did not get an opportunity to get an education, due to the tough economic conditions in Botswana during the time. I thank my mother for having been there for me, right from the time I was born up until now, supporting me emotionally and financially. It was growing up around her that exposed me to academia, as she herself is a lecturer by profession. So I can actually say that I was introduced to the art of writing at a very young age. It is also through her that I got to know the difference between an undergraduate Degree and the different postgraduate programmes one can undertake from a very young age of ten years old. I remember growing up, at the age of seven years old, and she asked me; what do you want to be when you grow up? I then looked her in the eyes and replied, a lawyer. I must add though that at the time I did not even know what being a lawyer was all about, and the rest as they say, is history.

That is however where my interest in the legal profession was planted, coupled with my love for writing. I thank her for the invaluable contribution she has made in my life, especially in my professional development as an individual, not only as her son. I also wish to thank my brother for the moral support and the guidance he has given me as a brother. This dissertation is also dedicated to my two nephews. My wish is for them to grow up in a world where leaders know the value of accountability and respecting and valuing human rights.

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CHAPTER 1
INTRODUCTION

The Constitution establishes a number of state institutions to assist in curbing and controlling the excessive use of public power.¹ These are otherwise known as Chapter Nine Institutions, or “*state institutions supporting constitutional democracy*”. The discussion at hand is limited to the Public Protector. What follows is a brief introduction to the institution.

In years following the establishment of the Public Protector, many academics and legal practitioners have held the view that remedial measures made by the Public Protector are not legally binding, meaning therefore that the affected party may either choose to accept or ignore them. Differing views have existed regarding the legal effect of such remedial measures.²

Until recently, it was generally believed that the powers of the Public Protector are limited to making mere recommendations that the affected party could choose to accept or ignore. However, the Constitutional Court in the EFF judgment seems to have clarified the matter. The court in effect held that the recommendations made by the Public Protector are legally binding against implicated parties.

However, there are still issues which remain open as practical implications of remedial measures taken by the Public Protector continue to materialise. The issues which remain open particularly have to do with the legal effect of the remedial action taken by the Public Protector in various investigations. In this dissertation, I will consider the EFF judgment and its potential shortcomings critically, and consider how the power to recommend remedial

¹ Y. Burns *Administrative Law Under the 1996 Constitution* (2003) 273.

² M. Mhango (Professor of Constitutional Law, formerly with University of Witwatersrand) and J. Yacoob (retired Justice of the Constitutional Court of South Africa), *Law Society of South Africa: Position Paper: The Extent and the Limits of the Powers of the Public Protector*, (2015) (15): www.lssa.org.za expressed the view at a colloquium held by the Law Society of South Africa, 4 February 2015, in consultation with the Centre for Human Rights, University of Pretoria. He was of the view that the Public Protector’s findings and recommendations are not binding. According to him, the only exception to this rule is when a government institution rejects the findings on the basis of irrationality, or for an irrational reason. He adds that it is unclear how it will be determined if it was rejected on an irrational basis or not, and to whom it will fall to make this determination. Mhango distinguishes between findings and recommendations in that the former are issues of fact, that is, the question whether there was maladministration or not, while the latter, according to him, refers to steps suggested to remedy the maladministration and can thus never be binding (see M Mhango “Public protector’s powers: What law says” *Sunday Independent*, 21 September 2014).

action may feature in a number of other matters that the Public Protector has dealt with or that are currently pending before that office.

1.1 THE PUBLIC PROTECTOR AS A CHAPTER NINE INSTITUTION

The Public Protector is one of the state institutions established to assist government in curbing maladministration in the use of public power, particularly in state institutions.³ The Public Protector has the constitutional mandate to carry out such functions in terms of Chapter 9 of the Constitution.⁴

Section 181 of the Constitution makes provision for the existence of the Public Protector. Subsection (2), among others state the following:

- (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice;
- (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions;
- (4) No person or organ of state may interfere with the functioning of these institutions;
- (5) These institutions are accountable to the National Assembly, and must report to their activities and the performance of their functions to the Assembly at least once a year.

Section 182(1) of the Constitution states that; “The Public Protector has the power, as regulated by national legislation to

- (a) 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 impropriety or prejudice;
- (b) report on that conduct and
- (c) take appropriate remedial action”.

³ See Burns at note 1 above.

⁴ Constitution of the Republic of South Africa, 1996, hereinafter “*the Constitution*”.

These two provisions are important as they inform the basis upon which the aim of this study is based, that is, the legal effect of the recommendations of the Public Protector.

1.3 AIMS AND OBJECTIVES OF STUDY

The aim of this study is to evaluate the powers of the Public Protector to recommend remedial action, specifically in view of the fact that in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*⁵ (“the EFF judgment”) the Constitutional Court held that remedial actions taken by the Public Protector are legally binding.

1.4 RESEARCH METHODOLOGY

This study will consist of a theoretical and conceptual engagement with primary and secondary sources on the topic – what is otherwise referred to as ‘desk-top’ research.

My approach is constitutional in nature and in particular I bear in mind the concept of transformative constitutionalism.¹² The aim is to consider the legal effect of recommendations of the Public Protector with a view to determining as to what extent their current interpretation gives effect to the transformative mandate of the Constitution.¹³ In a nutshell, this study examines the remedial powers of the Public Protector to make recommendations and the legal status of those powers.

⁵ 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

¹² See in this regard KE Klare “Legal Culture and Transformative Constitutionalism” 1998 (14) *SAJHR* 146 at 147 where he states in reference to Mureinik E, that the “democratic transition in South Africa post 1994, was intended to be a bridge from authoritarianism to a new culture of justification, a culture in which every exercise of power is expected to be justified”. See in addition P Langa (2006) 17 *Stellenbosch L. Rev* 351, who at a prestige lecture delivered at Stellenbosch University on 9 October 2006 in regard to transformative constitutionalism, refers to what was known as the Postamble to the Interim Constitution which was to the effect that: “The Constitution (Interim Constitution) provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice.....and a future founded on human rights, democracy and peaceful co-existence”.

¹³ Constitution of the Republic of South Africa, 1996.

1.5 RESEARCH QUESTIONS

In this study, I will critically examine the following research questions:

- What exactly is the status of the Public Protector's powers of making findings and recommendations after the judgment in *EFF*?
- What are the obligations of those against whom the Public Protector makes findings and recommendations? What is the legal relationship between the Public Protector and those against whom adverse findings and recommendations are made?
- How far does the Constitutional Court in its ruling in *EFF* answer the question as to whether the findings of the Public Protector are legally binding?

1.6 LIMITATIONS

I will not engage in a discussion of the other statutory provisions related to the everyday functioning of the Public Protector. Instead, the discussion focuses on what happens once an investigation has been finalised. How are those implicated in various reports by the Public Protector supposed to respond to remedial action taken by the Public Protector, especially in view of the different constitutional obligations which arise as a result?¹⁶ I also examine the question of: what legal basis are different state functionaries constitutionally mandated to ensure that remedial action taken by the Public Protector is given effect to?

1.7 CHAPTER OUTLINE

Apart from the Introduction (Chapter 1), my dissertation will consist of the following substantive chapters:

Chapter 2

The constitutional and statutory provisions governing the operations of the Office of the Public Protector will be set out. This will be a discussion of the different constitutional and

¹⁶ That is, in order to give effect to the remedial action by the Public Protector.

other statutory provisions relevant to the office of the Public Protector, including the powers given to her office in accordance with the Public Protector Act,¹⁷ among others. In addition, the processes the Public Protector engages in to make findings and recommendations will be discussed.

Chapter 3

The various debates as well as the controversies surrounding the powers of the Public Protector leading up to the Constitutional Court ruling in the *EFF* case¹⁸ will be examined.

Chapter 4

The *EFF* judgment: A critical analysis and evaluation will be undertaken in order to highlight all the relevant issues.

Chapter 5

This section will focus on the issues which remain unclear after the ruling in the *EFF* case.¹⁹ It is a chapter aimed at discussing the remaining issues which remain unclear after the Constitutional Court judgment,²⁰ particularly in light of the remedial action in the State of Capture report.²¹

Chapter 6

Conclusion: This section will contain findings made and concluding remarks.

¹⁷ 23 of 1994.

¹⁸ *Supra*.

¹⁹ *Supra*.

²⁰ *Ibid*.

²¹ The President argues in his application for judicial review of the report that it is unconstitutional for the Chief Justice to nominate a Judge for the purpose of the enquiry, as he is the only one who is constitutionally empowered to carry out such a task.

CHAPTER 2

CONSTITUTIONAL AND STATUTORY PROVISIONS GOVERNING THE OPERATIONS OF THE OFFICE OF THE PUBLIC PROTECTOR

2.1 INTRODUCTION

As mentioned in chapter 1 above, the overall purpose of this study is to discuss the legal status of findings and the legal effect of remedial measures that the Public Protector may take subsequent to an investigation. In this chapter, I discuss relevant constitutional and statutory provisions governing the operations of the Office of the Public Protector. The aim here is to explore the constitutional mandate of the Public Protector, and the nature and extent of the relevant powers as identified in the Constitution and in relevant pieces of legislation. This forms the basis on which, the legal status of the remedial measures taken by the Public Protector will be discussed in subsequent chapters. I begin, with a discussion of the relevant constitutional provisions regulating the Office of the Public Protector. I then proceed to describe and analyse the Public Protector's mandate and powers as gleaned primarily from the Public Protector Act.²⁵ The discussion that unfolds in this chapter is pertinent to the focus of the study as a whole as it informs the legal foundation from which the Public Protector derives its powers when it takes remedial action.

I also discuss other statutory instruments that are applicable to the functioning as well as the imposition of remedial action by the Public Protector. Lastly, I compare the different constitutional and statutory provisions, particularly with regard to the power to take remedial action. The powers of the Public Protector are found in different sources, with the Constitution and the Public Protector Act being the primary legal instruments of.²⁶ There are various other pieces of legislation, which give the Public Protector its mandate, and some of which are also discussed briefly below.

²⁵ Act 23 of 1994.

²⁶ This in accordance with the principle of constitutional supremacy.

2.2 CONSTITUTIONAL AND STATUTORY PROVISIONS REGULATING THE OFFICE OF THE PUBLIC PROTECTOR

2.2.1

THE CONSTITUTIONAL PROVISIONS

In this section, I examine the constitutional provisions establishing the Office of the Public Protector. The first part of the discussion broadly deals with the independence of Chapter 9 institutions such as that of the Public Protector. I focus more on the constitutional place the Public Protector occupies vis-à-vis other Chapter 9 institutions, without discussing them in detail. I then discuss the constitutional mandate as well as powers of the Public Protector to take remedial action.

Section 182 of the Constitution asserts the independence²⁹ of all Chapter 9 institutions.³⁰ The subsequent provision elaborates on the functions of the Public Protector.³¹ This is the part of the Constitution that gives the institution its mandate, including the power to take remedial action.

In the discussion that follows, I will specifically deal with section 181(2) - section 181(5), which are the general provisions establishing Chapter 9 institutions and, most importantly, deal with the issue of their independence.³² In Chapter 9 of the South African Constitution, there are six independent state institutions established, all of which have the purpose of supporting constitutional democracy.³³ One of these is the Office of the Public Protector. The relevant constitutional provisions regarding the extent of the Public Protector's powers to take remedial actions are to be found in section 181 subsection (2) - subsection (5), as well as section 182 subsection (1) - subsection 3. The latter section deals with the investigatory

²⁹ Section 181 of the Constitution of the Republic of South Africa, 1996.

³⁰ Murray. C "The Human Rights Commission et al: What is the role of South Africa's Chapter 9 Institutions?" (2006) 9 *PER/PELJ* fn 18.

³¹ Section 182 of the Constitution.

³² Sections 181 (2) – (3) expressly refer to the independence of Chapter Nine institutions. On a closer reading of section 181 (4), a deduction can be made that it may be read together with section 41 (1) (g) of the Constitution, dealing with co-operative governance, which states that: "All spheres of government and all organs of state within each sphere must; (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere". This basically reiterates, as mentioned in the other provisions in the first part of Chapter 9, that the institutions are also shielded against interference of any kind, including political interference.

³³ Murray (note 18 above) at 122.

powers of the Public Protector and in addition contains the provisions of the Constitution dealing with the power of the office to take remedial action.

As indicated earlier, section 181 of the Constitution makes provision for the independence of Chapter 9 institutions.³⁴ This section provides as follows:

(2) These institutions are independent,³⁵ and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality and dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions.

The Constitution³⁶ thus expressly guarantees the independence of the Public Protector.³⁷ On a closer reading of section 181(2) of the Constitution, it is clear that in carrying out its constitutional mandate, the Public Protector must not be inhibited. Inhibition in this context could include actions taken by those implicated in reports of the Public Protector to frustrate effective implementation of any form of remedial action. In addition, relevant state functionaries constitutionally mandated to assist the Public Protector in carrying out its task may also be reluctant to assist the office.³⁸

³⁴ Section 181. Other Chapter 9 institutions as listed in the first section to the chapter (section 181 (1)), are not relevant for our present purposes as they go beyond the scope of this work.

³⁵ The notion of the independence of Chapter 9 institutions is evident on a closer reading of the entire section 181 (2) - (5).

³⁶ In section 182 (2) – (5).

³⁷ Section 181 (2).

³⁸ I take the view that section 181 (2), (3) and (4) may be read together as they all seem to place an obligation on all the relevant stake holders to desist from engaging in any act or omission which might result in the Public Protector not being able to fully perform its tasks as mandated by the Constitution. One can however reasonably pose the question as to what is the exact meaning of the phrase; “subject only to the Constitution and the law”, as found in subsection (2)? The implication here is that, in line with the principle of constitutional supremacy, the institution that is the Public Protector answers only to the Constitution and no other functionary. However, that would bring the accountability of the office itself to the fore. Section 181 (5) states *inter alia* that, Chapter Nine institutions are accountable to the National Assembly. In accordance with the principle of constitutional supremacy as stated above, Parliament derives its powers from the Constitution. Therefore, when parliament makes use of the accountability provision regarding the Public Protector and other Chapter Nine institutions, it breathes life into the phrase “subject only to the Constitution and the law”. There is therefore a correlation between the phrase and the accountability mechanisms accorded Parliament *vis-à-vis* the Public Protector and other Chapter Nine institutions. The answer then becomes, the Public Protector is directly subject to the Constitution and the law, but indirectly accountable to Parliament, in the sense that, the latter has to meet constitutional requirements in section 181 (5), relating to accountability.

One can read the principle of co-operative governance into the constitutional provisions establishing the Public Protector.³⁹ Section 181 (3)⁴⁰ deals with this aspect in full. An obligation is placed on other organs of state to assist the Public Protector in ensuring the independence, impartiality, dignity and effectiveness of the institution. The principle is relevant for purposes of enquiring as to the nature of the legal obligation that mandates the National Assembly, or Parliament, as the case may be, to assist the Public Protector in ensuring that its remedial actions are complied with. Could this legal obligation be located within constitutional principles related to co-operative governance? On this aspect however, the matter is not that cut and dried.⁴¹ Chapter 3 of the Constitution, which establishes provisions related to co-operative governance is not that clear as it only refers to the three traditional spheres of government.⁴² To explain this, a brief explanation of the principle of co-operative governance by one author suffices: According to Bekink: “the aim of the principles of co-operative governance is to emphasise and facilitate inter-governmental co-operation and co-ordination between all levels of government, rather than competitive political conduct.”⁴³

I am of the view that section 181(3) should be interpreted to mean that when organs of state and various public functionaries desist from frustrating the implementation of remedial actions taken by the Public Protector, they must conform to the standards set by co-operative

³⁹ Section 181 (3) of the Constitution refers to the obligation to assist the office of the Public Protector through various mechanisms including but not limited to legislative measures.

⁴⁰ See note 16 above.

⁴¹ Section 40 of the Constitution states that; (1) “In the Republic, government is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated”. Subsection (2) further states that all spheres of government must observe and adhere to the principles in this Chapter and must conduct their activities within the parameters that the Chapter provides.

⁴² Authors such as R. Venter in “Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs” (2016) 10(6) *International Science Index, Law and Political Sciences* have described the Public Protector as a fourth-tier independent branch of government: “One of the ways in which society can be protected against the state is by establishing institutions outside the traditional legislative, executive and judicial organs. In this way an independent fourth-tier of government is created which acts as a watchdog over the other organs of state”. I however do not agree with the inclusion of the judiciary in this case as the Public Protector, as shall be seen below, has no jurisdiction over decisions or rulings of the judiciary. Furthermore, in *Ex Parte Chairperson of the Constitutional Assembly: In Re-Certification of the Constitution of the Republic of South Africa 1996* (10) BCLR 1253 (CC), at para 470, the court refers to the duty to co-operate in mutual trust and good faith by fostering friendly relations and avoiding legal proceedings against each other. At par 161, the court touches on the notion of remedial action to be taken by the Public Protector as an important component of the institution. The court stated that the independence of and impartiality of the office would be vital to ensuring effective, accountable and responsible government (as quoted in the fourth respondent’s written submissions, in the *EFF* case at page 13).

⁴³ B. Bekink *Principles of South African Constitutional Law* (2012) 198.

governance as mandated by the Constitution.⁴⁵ The legal standing of the Public Protector regarding co-operative governance, as it stands currently, is, in other words, not that clear.

The Constitutional Court has held that the purpose of the office of the Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics.⁴⁶ The office is granted the power to investigate grievances of members of the public into any conduct of state affairs.⁴⁷

Having made findings,⁴⁸ the Public Protector has the power in the normal course of events and as mandated by the Constitution, then to proceed to make recommendations.⁴⁹

Section 182(1) states 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.

In addition, subsections 2 and 3 determine that the Public Protector has the additional powers and functions prescribed by national legislation, but may not investigate court decisions.

⁴⁵ See the ruling of the Supreme Court of Appeal in the *SABC matter (Democratic Alliance v South African Broadcasting Corporation Limited and Others 2015 (1) SA 551 (WCC)*, discussed fully in Chapter 3 below), where the court at para 52 stated that: "The Public Protector cannot realise the constitutional purpose of its office if other organs of state may second-guess its findings and ignore its recommendations". This statement implies that through co-operation, effective implementation of recommendations by the Office of the Public Protector can be achieved. See further para 37, where the Public Protector in the case highlighted the need for the various parties involved in the litigation to engage one another, in accordance with the principles of co-operative governance.

⁴⁶ See the *Certification* case (note 25 above), as cited by the respondents in their written submissions in the *EFF* case at para 3.

⁴⁷ As above.

⁴⁸ The legal status of findings made by the Public Protector is not the focus of this discussion.

⁴⁹ See section 182 (1) (b) of the Constitution, which deals with the power of the Public Protector to report on conduct involving state affairs.

2.2.2.2 MEANING OF APPROPRIATE REMEDIAL ACTION AS CONTAINED IN THE CONSTITUTION

Regarding this latter provision, what suffices at this point is what constitutes “appropriate remedial action”. Section 182(1)(b) as well as section 182(1)(c) should be read together in the sense that, the Public Protector takes remedial action based on reporting on conduct as identified in the investigation as mentioned. This is where one might locate the power of the Public Protector to make findings pursuant to an investigation.

The taking of appropriate action must of course not transgress acceptable constitutional norms and must thus be exercised within the legally permissible constitutional boundaries. For instance, it must not transgress the principle of separation of powers, and must be in line with among others, the principle of the rule of law. It is thus crucial that section 181(1)(c) as well as section 181(3) should be reconciled.⁵⁰ The latter prohibits the Office of the Public Protector from enquiring into decisions made by courts of law, as that would transgress the separation of powers and thus be unlawful.

In the case of *Fose v Minister of Safety and Security*,⁵¹ the Constitutional Court elaborated on what could constitute “appropriate relief” for a court to issue once a violation of the Bill of Rights has been established. The court states that⁵² appropriate relief will in essence be relief that is required to protect and enforce the Constitution. The Constitutional Court has had other opportunities to deal in this context with what constitutes an appropriate remedial action.⁵³ To my mind the basic principle established in these cases, namely that appropriate

⁵⁰ The latter is to the effect that the Public Protector may not investigate court decisions.

⁵¹ 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC);

⁵² At par 19. The court further states that; “depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights”. This statement confirms the fact that the meaning of “appropriate relief” may differ from case to case, depending on the peculiarity of each case. If one accepts that these principles can apply also to the Public Protector and to not only courts, then the Public Protector seems to have a wide discretion in fashioning remedial action in each case.

⁵³ *The case of Wild and Another v Hofert NO and Others* 1998 (3) SA 695 (CC) in which the Constitutional Court held, in relation to what could possibly constitute an appropriate remedy, that a stay of prosecution would not be granted pertaining to the delay of a particular case, unless there was prejudice or extraordinary circumstances respectively. Of importance for our purposes is the averment by the court that an appropriate remedy ought to be determined in the context of the peculiarity of each set of circumstances. Section 6 of the Public Protector Act is to the effect that alternative dispute resolution measures may at times be utilised as appropriate remedies, once again depending upon the facts involved in the specific case. See in this regard the *Hofert* case as discussed

relief is whatever is required to protect and enforce the Constitution, can also be used as the starting point to determine what “appropriate remedial action” is for the Public Protector.

Other constitutional provisions, which ought to inform the office of the Public Protector in carrying out its constitutional mandate, are contained in section 195 of the Constitution, which details the basic values and principles governing public administration. This is so in two ways First, the Public Protector is itself bound in its activities to operate according to these basic values and principles; and second, these basic values and principles are an important set of standards against which the Public Protector can evaluate the conduct of other public entities in the exercise of its investigative, reporting and remedial powers.

2.3 STATUTORY PROVISIONS REGULATING THE OFFICE OF THE PUBLIC PROTECTOR

There are various pieces of legislation regulating the operations of the Public Protector. These include the Public Protector Act, which is the primary piece of legislation regulating the activities of the Public Protector; as well as others, which may be preliminary in nature. As far as the Public Protector Act is concerned, I discuss section 6, which deals with the reporting and additional powers of the institution; section 7, which has to do with investigatory matters of the office; and lastly section 8, which details what happens once an investigation has been finalised and what happens regarding publication of the report containing findings made by the Public Protector.

2.3.1 SECTION 6 OF THE PUBLIC PROTECTOR ACT 23 OF 1994

Section 6 of the Act deals with the reporting and additional powers of the Public Protector. The powers of the Public Protector are specifically contained in section 6(4), which provides that the Public Protector shall be competent to endeavour to resolve any dispute or rectify

in *Bekink* at 421. *Sanderson v Attorney-General* 1998 (2) SA 38 (CC) provides another example of where the court has had to elaborate on what could potentially inform the notion of an appropriate remedy. The court asks the question whether the relief sought would vindicate the Constitution and serve as a deterrent against future violations. I should add that, though the rulings by the Constitutional Court on what constitutes an appropriate remedy in these and other cases did not relate to Chapter 9 of the Constitution, the jurisprudence developed by the court therein should inform the Public Protector in the process of taking appropriate remedial action pursuant to an investigation.

any act or omission by mediation, conciliation or negotiation, advising complainants about appropriate remedies, or any other means that may be expedient in the circumstances.⁵⁶ Neither the Constitution nor the Act expressly provides for the direct enforcement of the Public Protector's decisions and recommendations in clear and unambiguous terms. Sections 6 and section 7 of the Public Protector Act are applicable provisions for purposes of discussing issues related to the power of the Public Protector to take remedial action. In particular, they expand upon the broader constitutional powers, which the Public Protector has in order to take appropriate remedial action. For instance, section 6 deals with "reporting and additional powers of the Public Protector". Section 7 further refers to investigative matters related to the institution as a whole. For purposes of this enquiry, I shall only discuss those aspects of the Public Protector's powers which have a direct correlation with the legal effect of the institution's remedial action.

Section 6 of the Public Protector Act⁵⁷ as follows:

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

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

- (i) The nature of the matter in question;
- (ii) The grounds on which he or she feels that an investigation is necessary;
- (iii) All other relevant information known to him or her; or

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

(1) A member of the office of the Public Protector shall render the necessary assistance, free of charge, to enable any person to comply with subsection (1).

(2) 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,⁵⁸ are applicable and has, in connection with such matter, not taken all reasonable steps to exhaust all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Act; or

⁵⁶ R. Venter "The Executive, the Public Protector and the Legislature: The Lion, the Witch and the Wardrobe" 2017 TSAR 176.

⁵⁷ As above.

⁵⁸ 103 of 1994.

- (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.

Section 6 (4) states that:

The Public Protector shall, be competent-

- (a) To investigate, on his or her own initiative or on receipt of a complaint, any alleged-
- (i) Maladministration in connection with the affairs of government at any level;
 - (ii) Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
 - (iii) Improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money;
 - (iv) Improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or;
 - (v) Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;
- (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 complaint regarding appropriate remedies; or
 - (iii) Any other means that may be expedient in the circumstances;
- (c) At a 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; or
 - (ii) 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; and
- (d) On his or her own initiative, on receipt of a complaint or on request relating to the operation or administration of the Promotion of Access to Information Act, 2000, endeavour, in his or her sole discretion, to resolve any dispute 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.

Subsection (5) contains other provisions that gives the Public Protector further powers of investigation. It states that;

In addition to the powers referred to in subsection (4), the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any alleged-

- (a) Maladministration in connection with the affairs of any institution in which the state is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999;
- (b) Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);
- (c) 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 connection with the affairs of an institution or entity contemplated in paragraph (a); or
- (d) Act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.

Section 6(6) further provides that: - “nothing in subsections (4) and (5) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law”.⁵⁹ However, it is worth noting that the Public Protector has on occasion entertained complaints related to delays in judicial decision-making.⁶⁰ In addition, the Public Protector has in the past carried out an investigation into the affairs of another Chapter 9 Institution.⁶¹ The investigation by the former Public Protector in this matter brought to the fore the fact that the jurisdiction of the Public Protector transcends across a wide spectrum, provided that the matters involved entail the exercise of public power.

⁵⁹ This should be read in conjunction with section 182 (3) of the Constitution, which notes the fact that the Public Protector is not competent to investigate court decisions.

⁶⁰ For example, see Complaint 03/92 in 2004–2005 Annual Report at 46-47 (Delay by Magistrate’s Court in setting aside interdict; In addition, see Complaint 1643/03 in 2004-2005 Annual Report at 66 (Delay by Magistrate’s Court in finalising Appeal) and Complaint 1996/04 in 2004-2005 Annual Report at 70 (Delay by Labour Court of over two years in delivering judgment).

⁶¹ N. Ntlama “Brewing Tug of war between South Africa’s Chapter Nine Institutions” (2015) 10 (1) *J/CLT* 13. The author here examines the report into allegations of maladministration at the Independent Electoral Commission (IEC), by then IEC Chairperson Advocate Pansy Tlakula (see report titled “Inappropriate Moves”: An investigation into allegations of maladministration and corruption in the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission: Report No. 13 of 2013/2014: ISBN 978-1-920692-0205). Without going further into the details of the allegations, after a thorough investigation into the matter, the Public Protector found that the process of acquiring the head offices was grossly irregular and Advocate Tlakula, by her own admission, violated her own procurement policies: See discussion at page 18 of the article.

Section 6 of the Public Protector Act⁶² largely deals with the jurisdiction of the Public Protector. It is important to note that its jurisdiction is limited,⁶³ with respect to both the entities it may investigate and the type of conduct it may investigate.⁶⁴ The following provides an overview of the bodies over which the Public Protector has jurisdiction.⁶⁵ The Public Protector may investigate the following bodies;

- government at any level;
- any institution in which the State is the majority or controlling shareholder;
- any public entity; and;
- persons performing a public function.

On the basis of section 6(4) of the Act,⁶⁶ the following signify types of complaints often referred to the Public Protector.⁶⁷ These are inter alia:

- insufficient reasons given for a decision;
- the interpretation of criteria, standards, guidelines, regulations, laws, information or evidence which was wrong or unreasonable;
- processes, policies or guidelines were not followed or were not applied in a consistent manner;
- adverse impact of a decision or policy on an individual or group;
- unreasonable delay in taking action or reaching a decision;
- failure to provide sufficient or proper notice;
- due process denied.

⁶² As above.

⁶³ Bekink (note 31 above) at page 1.

⁶⁴ See Report No.30 of 2005; Report on an investigation into an Allegation of Misappropriation of Public Funds by the Petroleum and Gas Corporation of South Africa, trading as PetroSA, and Matters Allegedly Related Thereto.

⁶⁵ As above.

⁶⁶ As above.

⁶⁷ As above.

2.3.2 SECTION 7 OF THE PUBLIC PROTECTOR ACT 23 OF 1994

This provision deals with matters pertaining to investigations by the Public Protector. Section 7 (1) (a) of the Act⁶⁸ provides that;

“The Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6 (4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with”.

On a proper construction of this provision, it is evident that there are two main categories of investigations:

- investigations based on receipt of a complaint;⁶⁹ and
- investigations undertaken at the Public Protector’s own initiative.⁷⁰

When dealing with investigations by the Public Protector, confidentiality is critical. The institution is dedicated to transparency and accountability.⁷¹ However, its effectiveness as a watchdog, and the risk attached to whistleblowing, demands that the identity of complainants and the information they disclose be kept confidential.⁷²

Of importance here is section 7(3)(a), which states inter alia that;

“The Public Protector may, at any time prior to or during an investigation, request any person-

- (i) At any level of government, subject to any law governing the terms and conditions of employment of such person;
- (ii) Performing a public function, subject to any law governing the terms and conditions of the appointment of such person; or
- (iii) Otherwise subject to the jurisdiction of the Public Protector,

to assist him or her, under his or her supervision and control, in the performance of his or her functions with regard to a particular investigation or investigations in general”.

⁶⁸ As above.

⁶⁹ See section 7 (1) (a) of the Public Protector Act.

⁷⁰ As above.

⁷¹ As above.

⁷² As above.

Section 7 of the Public Protector Act regulates the investigative processes carried out by the Public Protector.⁷³ It is a fundamental principle of our law that investigations should be conducted in a manner that is not biased, without fear, favour or prejudice, thus leaving no room for doubt regarding their efficacy.⁷⁴

In conducting an investigation the Act allows the Public Protector to follow such procedure as the Public Protector considers appropriate in the circumstances of each case.⁷⁵ There are institutions whose mandates are strikingly similar to those of the Public Protector.⁷⁶ The Public Protector may direct that certain persons whose presence is not desirable at a particular investigation may not be present at the proceedings of that particular investigation. The office may further request any person at any level of government, or any person who is performing a public function, or who is otherwise subject to the jurisdiction of the Public Protector, to assist it in an investigation.

The Public Protector may request the assistance of any person at any level of government, or anyone who is performing a public function, or who is otherwise subject to the jurisdiction of the office. In addition, the Public Protector may designate any person to conduct an investigation on its behalf.

In conducting an investigation, the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him to give evidence or to produce documents relevant to the investigation, and may examine such person. There are certain

⁷³ As above.

⁷⁴ Early on in *Public Protector v Mail and Guardian* (2011 (4) SA 420 (SCA) the Supreme Court of Appeal, when setting aside the so-called Oil-gate report, (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, (2005) remarked *obiter* that: "The minimum that is required for an investigation of any kind is that it must be approached with an open and enquiring mind; In this case, according to the court, there was no evidence of that state of mind in the investigation in this case. The hallmark of the investigation was that responses were sought from people in high office and recited without question as if they were fact." Supreme Court of Appeal media summary: Published in www.justice.gov.za.

⁷⁵ Section 7 (1) (b) (i) of the Public Protector Act 23 of 1994.

⁷⁶ See *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 88 (CC), where the court briefly touches on the mandate of the Special Investigating Unit. The court, referring to the long title of the Special Investigating Units and Special Tribunals Act 74 of 1996, states that its purpose is to; "provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of state institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigation Units; and to provide for matters incidental thereto."

cases where the Public Protector may feel that another public institution would be the appropriate authority to conduct an investigation and may then simply refer the case to that institution, subject to being kept informed on an ongoing basis.

The Public Protector Amendment Act⁷⁸ provides that if it appears to the Public Protector during an investigation that any person is being implicated in the matter being investigated, that person must be afforded an opportunity to respond in any manner that may be expedient in the circumstances. The implication must however be of such a nature that it may be to the detriment of the person concerned or may result in an adverse finding pertaining to that person. When the Public Protector does decide that an investigation should proceed on a formal or quasi-judicial basis, special care is taken to ensure that the basic rights of those investigated are respected. These rights may be the right to a proper hearing, the right to representation and the right to be heard, which is otherwise referred to as the so-called *audi alteram partem* rule.⁷⁹

2.3.3 SECTION 8 OF THE PUBLIC PROTECTOR ACT 23 OF 1994

This provision deals with the publication of findings by the Public Protector after an investigation has been conducted. Accordingly, it reads as follows:

(1) The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

(2) (a) The Public Protector shall report in writing on the activities of his or her office to the National Assembly at least once every year.

The section further states that:

The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if-

- (i) He or she deems it necessary;

⁷⁸ 113 of 1998.

⁷⁹ C. Hoexter *Administrative Law in South Africa (2007)* at 326: “the principle of *audi alteram partem* is concerned with giving people an opportunity to participate in the decisions that will affect them, and-crucially-a chance of influencing the outcome of those decisions”.

- (ii) He or she deems it in the public interest;
- (iii) It requires the urgent attention of, or an intervention by, the National Assembly;
or
- (iv) He or she is requested to do so by the Chairperson of the National Council of Provinces”.

(2A)

- (a) Any report issued by the Public Protector shall be open to the public, unless the Public Protector is of the opinion that exceptional circumstances require that the report be kept confidential.
- (b) If the Public Protector is of the opinion that exceptional circumstances require that a report be kept confidential, the committee must be furnished with the reasons therefor and, if the committee concurs, such report shall be dealt with as a confidential document in terms of the rules of Parliament.
- (c) For the purposes of this section, ‘exceptional circumstances’ shall exist if the publication of the report concerned is likely-
 - (i) To endanger the security of the citizens of the Republic;
 - (ii) To prejudice any other investigation or pending investigation;
 - (iii) Disturb the public order or undermine the public peace or security of the Republic;
 - (iv) To be prejudicial to the interests of the Republic; or
 - (v) In the opinion of the Public Protector to have a bearing on the effective functioning of his or her office.

Regarding the application of section 8 of the Public Protector Act, of importance is section 8(2) of the Act. This section makes provision for the Public Protector to submit a report to the National Assembly, taking into consideration the factors as listed in the provision. This is a particularly crucial factor, considering that upon submission by the Public Protector of a report to the National Assembly, there are various constitutional obligations that arise, which are related to the issue of the binding nature of the recommendations as contained in the remedial action.⁸⁰ In other words, the Public Protector’s submission of a report to the National

⁸⁰ Such as section 55(2) of the Constitution which deals with powers of the National Assembly and provides that; “The National Assembly must provide for mechanisms-

- (a) To ensure that executive organs of state in the national sphere of government are accountable to it; and
- (b) To maintain oversight of-
 - (i) The exercise of national executive authority, including the implementation of legislation; and
 - (ii) Any organ of state”.

Assembly, legal obligations for the National Assembly automatically arise by operation of law.⁸¹

In the section that follows, I briefly examine other pieces of legislation that may assist the Public Protector in carrying out its constitutional mandate from time to time. As already mentioned, the jurisdiction as well as the constitutional mandate of the Public Protector may differ from case to case depending on the facts and circumstances of each case.

2.4 OTHER STATUTORY PROVISIONS REGULATING THE OFFICE OF THE PUBLIC PROTECTOR

There are other enabling pieces of legislation which may make it possible for the Public Protector to have jurisdiction, depending on, among other factors, the functionaries involved and the particular subject matter. Such legislation should be read together with the provisions of the Public Protector Act, in any enquiry as to whether the Public Protector has jurisdiction in a matter. They are briefly as follows:

- The Executive Members' Ethics Act.⁸² This regulates the power of the Public Protector to investigate and make findings in instances where allegations of impropriety against a member of the executive branch of government are being levelled, owing or arising from their official duties.
- The Promotion of Administrative Justice Act,⁸⁴ deals with issues related to procedural and substantive fairness.⁸⁵ In the case of Administrator, Transvaal v Traub,⁸⁶ reference is made to procedural and substantive fairness in the context of the doctrine of legitimate expectation. The court states in this case that: *"the two forms of expectation may be interrelated and even tend to merge. Thus the person concerned may have a legitimate expectation that the decision by the public authority will be*

⁸¹ As above.

⁸² Act 82 of 1998.

⁸⁴ Act 3 of 2000.

⁸⁵ This Act gives effect to section 33 of the Constitution, which guarantees the right to fair administrative action. In conducting an investigation, the Public Protector should adhere to these fairness guarantees as contained in the Constitution.

⁸⁶ 1989 (4) SA 731 (A).

*favourable, or at least that before an adverse decision is taken he will be given a fair hearing”.*⁸⁷

- Anti-corruption mandate in terms of the Prevention and Combating of Corrupt Activities Act⁸⁹ read with the Public Protector Act.⁹⁰ This mandate is shared with other agencies.⁹¹ Section 6 (4) (a) (iii) of the Public Protector Act⁹² states that the institution has jurisdiction to investigate alleged misappropriation of public money as identified in chapter 2 of the Combating of Corrupt Activities Act.⁹³
- Whistle-blower protection mandate in terms of the Protected Disclosures Act.⁹⁴ This mandate is shared with the Auditor-General as well as other relevant agencies.⁹⁵ Section 8(1) of the Act states that any disclosure made in good faith to the Public Protector is a protected disclosure.
- Regulation of information mandate in accordance with the Promotion of Access to Information Act.⁹⁶ Section 6 (4) (d) of the Public Protector Act⁹⁷ states the institution shall in his or her sole discretion endeavour to use alternative dispute resolution measures in any dispute arising from the administration from the former Act.
- The power to review decisions of the Home Builders’ Registration Council in terms of the Housing Protection Measures Act.⁹⁸ Section 22(4) of the latter Act enables an aggrieved housing consumer or builder to approach the Public Protector to review a decision taken by the National Home Builders Registration Council.

In addition, other global legal instruments inform the existence of institutions similar to the Public Protector. For instance, the United Nations General Assembly has in the past adopted what is known as the Principles Relating to the Status of National Institutions (“Paris

⁸⁷ See Hoexter note 79 above at 381.

⁸⁹ Act 12 of 2004.

⁹⁰ Note 67 above.

⁹¹ Such as the Special Investigation Unit in terms of the Special Investigating Units and Special Tribunals Act 74 of 1996.

⁹² As above.

⁹³ Act 12 of 2004.

⁹⁴ Act 26 of 2000.

⁹⁵ Act 2 of 2000.

⁹⁶ Act 2 of 2000.

⁹⁷ As above.

⁹⁸ Act 95 of 1998.

Principles”), which detail the competence, responsibilities, composition, guarantees of independence, and methods of operation for these institutions.⁹⁹

2.5 POWER OF THE PUBLIC PROTECTOR TO TAKE REMEDIAL ACTION

As already alluded to above,¹⁰⁰ section 182(1)(c) of the Constitution provides that: “the Public Protector has the power, as regulated by national legislation,¹⁰¹ to take appropriate remedial action”.

As we have already seen above,¹⁰³ the Public Protector has a discretion in as far as resolving a dispute is concerned. The institution has the power to utilise mediation, conciliation as well as negotiation in order to endeavour to resolve a dispute. Similar to the Constitution, the Act,¹⁰⁴ also refers to the discretion given to the Public Protector to give advice regarding ‘appropriate remedies’¹⁰⁵ or to use any other means that may be expedient in the circumstances.

In accordance with the principle of constitutional supremacy, the Constitution¹⁰⁶ and the values as well as the principles articulated take precedence over the Act when it comes to the legal effect of the findings and the remedial action taken by the Public Protector. From the provisions of the Act, it is clear that the legislature attempted to give detailed guidance as to what would constitute an appropriate remedy. For instance, section 6(4)(c)(i)-(ii), and 6(4)(d)(i)-(ii) of the Public Protector Act state provide that the Public Protector may among others, refer the matter to the appropriate institution charged with prosecutions. The Act also

⁹⁹ T. Thipanyane “Strengthening Constitutional Democracy: Progress and Challenges of the South African Human Rights Commission and Public Protector” (2015-2016) 60 *N.Y.L SCH.L.REV.*125.

¹⁰⁰ As above.

¹⁰¹ Specific national legislation referred to in this regard is the Public Protector Act 23 of 1994, already discussed above.

¹⁰³ See further the discussion on section 6 of the Public Protector Act 23 of 1994 above, dealing with the power of the Public Protector to undertake alternative dispute resolution measures in order to resolve a complaint.

¹⁰⁴ As above.

¹⁰⁵ In the case of *Fose v Minister of Safety and Security* 1997 (3) SA 786 the court touched on the issue of as to what would entail appropriate remedies and thus held that; “the latter means an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. The court further states that, particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated”. See further the *EFF* case at par 67.

¹⁰⁶ As above.

allows the Public Protector to resolve a dispute by any other means that may be expedient in the circumstances.¹⁰⁷ In taking remedial action, the Public Protector should thus be guided by the provisions in the Act. However, the provisions are worded in such a way that they are not couched in mandatory terms, hence the Public Protector has a discretion. The type of remedial action taken by the Public Protector thus depends upon the facts and circumstances of each case.¹⁰⁸ In as far as the Act and the legal provisions contained in the section regulating the powers of the Public Protector are concerned, to that extent it is constitutional.

The power of the Public Protector to take remedial measure is primarily sourced from the Constitution,¹⁰⁹ but made effectively functional by the Public Protector Act.¹¹⁰

However, above all else, in exercising its discretion, the Public Protector should be informed by the broader principles of the rule of law, transparency, and rationality¹¹¹ among others.

2.6 CONCLUSION

It is important that in interpreting legal provisions related to the Public Protector, one should not do so in isolation. One should always be mindful of the fact that the powers of the Public Protector to take remedial measures are not absolute. They are limited by among others, procedural fairness rights, and most importantly, the broader constitutional values.¹¹² However, these and other issues are looked at in more detail at a later stage.

As stated above, the Constitution and the Public Protector Act are the two primary sources where the jurisdiction of the Public Protector may be found. In light of the supremacy of the Constitution, it is therefore important that all other pieces of legislation that regulates the

¹⁰⁷ See section 6(4)(d)(iii) of the Public Protector Act.

¹⁰⁸ In the *EFF* case at par 69, the court points out the fact that what legal effect the appropriate remedial action has in a particular case, depends on the nature of the issues under investigation and the findings made. It further states that as common sense dictates and section 6 of the Act suggests, mediation, conciliation or negotiation may at times be the way to go. In addition, it becomes apparent from the judgment that there are times when remedial action might not be binding. At par 71, sub-par (g) it points out that: "Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of the investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken".

¹⁰⁹ As above.

¹¹⁰ As above.

¹¹¹ Discussed fully below.

¹¹² See section 1(d) of the Constitution which lists among others, the principles of the rule of law as already mentioned, transparency and openness among others.

operations of the Public Protector must pass constitutional muster as far as possible. The provisions of the Constitution, the Public Protector Act and other relevant legislation must always be harmonised in any investigation by the Public Protector.

In this chapter, we have seen that the Constitution is the main backdrop against which the Public Protector conducts its investigations. It is also clear that human rights also play a role in any investigation conducted by the Public Protector. This is evident when taking into consideration the provisions of section 33 of the Constitution, that is, the right to fair administrative action.

It is clear from the discussion that, there may be cases where the assistance of the Public Protector may be sought, even though the functionaries involved are not necessarily organs of state. The discussion above shows that, as long as there is any wrongdoing involving improper use of public money or public power, then the Public Protector has jurisdiction to conduct an investigation in such a matter.

CHAPTER 3

PRE-ECONOMIC FREEDOM FIGHTERS V SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS: UNCERTAINTIES REGARDING THE LEGAL EFFECT OF THE REMEDIAL ACTIONS TAKEN BY THE PUBLIC PROTECTOR

3.1 Introduction

There are many issues regarding the legal effect of the remedial actions taken by the Public Protector over the years, which have surely been the subject of debate among scholars, legal practitioners and politicians alike. These issues largely have to do with the fact that there has not always been consensus on the true nature of such remedial actions. The questions centre on the constitutional obligations of those implicated in various investigations, in relation to how they should respond to adverse findings made against them and remedial action taken against them. We now know that, post the *EFF* judgment,¹¹⁴ no one can simply ignore the remedial action taken against them by the Public Protector, based on one's own subjective view. There has been some confusion on the legal nature of the steps that the institution might take against the individuals or state institutions.

The chapter takes a broader view at the differing views pertaining to the Office of the Public Protector. This gives one an idea of the factual and legal basis on which past legal uncertainty existed regarding the binding nature or otherwise of the Public Protector's recommendations. Furthermore, it also informs the legal basis on which the different parties had to make an application to the Constitutional Court on the matter.¹¹⁵ This chapter also discusses the differing views of scholars on matters related to the legal effect of recommendations of the Public Protector.

The chapter also discusses how state functionaries have handled reports coming from the Public Protector, before the *EFF* judgment.¹¹⁶ As a point of departure, I wish to point out that, the historical views are still relevant in any discussion or forum involving the Public Protector,

¹¹⁴ *Above*.

¹¹⁵ That is, the *EFF* judgment.

¹¹⁶ See full discussion of the case in Chapter 4 *infra*.

as they help us understand the evolution of the Office of the Public Protector as an institution. They also show what mechanisms can be put in place to improve the effectiveness of the Public Protector after the *EFF* judgment. In addition, historical views can potentially assist the relevant stakeholders in the process of finding out new and innovative ways of further reforming the office. As legal practitioners and constitutional scholars alike, we should always be mindful of the fact that as the state develops and the executive thus assumes more power, institutions such as that of the Public Protector should be regularly reformed to keep up with the pace and the increase in such power.

The chapter further delves into the various debates by various stakeholders pertaining to the inability of the Public Protector to impose binding remedial actions. I will discuss the views of various academics who have weighed in on the subject and related matters. The view that the Public Protector's remedial actions merely amount to mere recommendations is also discussed. This is followed by a discussion of the contentious issues that arose in the respective reports issued by the Public Protector. This is undertaken in section 3.5. Different cases relating to the so-called SABC matter, right from the ruling by the Western Cape High Court to that of the Supreme Court of Appeal and the approaches followed by the two courts respectively are also considered. Lastly, the chapter undertakes a critical analysis of all the issues raised in general.

Although there are various contentious issues which have arisen as a result of the Public Protector taking remedial action in pursuit of its constitutional mandate, some of the issues will not be discussed here fully in this chapter, as they go beyond the scope of this study. Of particular importance in this chapter is to note the past controversies that eventually culminated in the *EFF* judgment as we know it.

3.2 PAST DEBATES ON THE PUBLIC PROTECTOR

As a starting point, I wish to emphasise the point that, when one is faced with adverse findings against them by a constitutional body such as the Public Protector, it is rather convenient and easy to come up with arguments which might prompt the rest of the citizenry into believing that the said institution is not credible. In this discussion, issues are highlighted objectively in a scholarly manner without indulging into politics .

As already mentioned in chapter 1 above, until recently,¹¹⁸ many scholars and commentators have viewed the legal effect of the findings and remedial actions made by the Public Protector as limited to mere recommendations, which the affected parties could choose to either accept or ignore.¹¹⁹ Part of the debate has to do with the fact that, in global terms, we have always become accustomed to what is known as the Office of the Ombudsman, which largely only has the power to make recommendations. In many countries with an Office of the Ombudsman, compliance generally takes place as a natural consequence of showing courtesy to the Ombudsman institution itself. As a result, most authors subscribe to this view.¹²⁰ One must also take into account the historical framework in which the different views and opinions have been expressed on the Office of the Ombudsman and ultimately the Office of the Public Protector. The institution of the Public Protector as we have come to know in South Africa today and its eventual evolution have existed against the backdrop of a political system that was oppressive in nature, when one takes into account the democratic transition South Africa underwent from 1994 up to the new constitutional dispensation.

The establishment of the Office of the Public Protector as well as other Chapter 9 institutions, had to be carried out with the income inequalities, and the human rights violations of the past, among other relevant factors. There are different authors who have debated on the issue of the legal effect of the remedial actions of the Public Protector.¹²¹ The varying

¹¹⁸ That is, pre-the *EFF* judgment.

¹¹⁹ *Democratic Alliance v The South African Broadcasting Corporation Limited and Others* 2015 (1) SA 551 (WCC) (24 October 2014); The court held that a definitive judgment regarding the correct interpretation relating to the extent of the powers of the Office of the Public Protector and the legal effect of the remedial action is necessary for the effective functioning of our democracy (para 6). The court also granted leave to the respondents to appeal to the Supreme Court of Appeal for interpretation and a definitive judgment. In an address by the Deputy Minister of Justice and Constitutional Development, Honourable John H. Jeffrey, at the Annual General Meeting of the Black Lawyers Association Student Chapter, held at the University of Kwa-Zulu Natal, Howard College October 4 2014, it was said that: "The Public Protector is not a court of law". When the Constitutional Court certified the text of the Constitution (Constitution of the Republic of South Africa, 1996) in the First Certification judgment 1996 (CCT 23/96 (1996) ZACC 26; 1996 (4) SA 744 (CC); 1996 (10), It held that the Public Protector is an office modelled on the institution of the Ombudsman". See Yacoob J at note 1 above.

¹²⁰ See Govender K (note 103 below). Article also cited in the Southern African Public Law Journal (SAPL): At 352, referring to the police lease report issued by the Public Protector, (infra at fn 102); Expresses the view that; "at a symbolic level, the manner in which government deals with the findings would be an indication of whether there is the discipline to govern within the confines of the Constitution and the rule of law". The author was here referring to Report No 33 of 2010/2011, titled "Against the Rules", involving adverse findings made against former Police Commissioner Bheki Cele. The manner in which government dealt with such findings illustrated the fact that, effective implementation of the Public Protector's remedial action depends on the willingness of other state institutions to assist the office in doing so, and thus comply with the rule of law. See note 104 below.

¹²¹ Govender K: "Appraising the constitutional commitments to accountable, responsive and open governance and to freeing the potential of all- A Tribute to Dr Beyers Naude"; Lecture in honour of Dr Beyers Naude": at

interpretations relating to the true legal implications have in addition often arisen because of investigations carried out by the institution.¹²²

It is not quite clear what the lack of consensus can be attributed to. Whether it is a case of different interpretations pertaining to the relevant legal provisions of the institution itself is up for debate.

There are three broad aspects that informed the various debates relating to the Office of the Public Protector, namely:

- whether the remedial actions of the Public Protector are legally binding.
- whether such remedial actions are mere recommendations: and
- whether the Public Protector is an equivalent of an Ombudsman, as alluded to above.

All these factors, are actually different aspects of the same issue, but for the sake of convenience, they shall be discussed separately.

3.3 THE PUBLIC PROTECTOR AND ITS INABILITY TO MAKE BINDING DECISIONS

As mentioned above, there was a view that the Public Protector could not issue legally binding remedial actions.¹²³ Those who often found themselves implicated in wrongdoing by the Public Protector were by implication, under the impression that they were legally entitled

page 14: Published in www.prof-karthy-govender.co.za: Delivered by Professor Karthy Govender, Professor at Law, UKZN at the University of Johannesburg on the 12th May 2011; Opines (See fn 131 infra) that the Public Protector cannot make binding findings and order that the lease agreement be set aside. In addition, he states that other organs of state now have to take up the cudgels (at page 15). Also see Woolman S: Bishop: Constitutional Law of South Africa (Ed) (Chapter 24A); At 24A-3: "One of the most common criticisms levelled against the Office of the Public Protector is that the institution lacks the power to make binding decisions. They further allude that, the real strength of the office lies in the power to investigate and report effectively". They base their view point on Owen S; (Owen S; 'The Ombudsman: 'Essential Elements and Common Challenges' in Linda C. Reif (Ed) The International Ombudsman Anthology (1999) at 51, 54-5). Owen is of the view that: "Through the application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause a reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future".

¹²² Report of the Public Protector in terms of Section 182 (1) of the Constitution of the Republic of South Africa, 1996, and Section 8 (1) of the Public Protector Act 23 of 1994, 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 police accommodation in Pretoria; a report titled; "Against the Rules, Report No 33 of 2010/2011.

¹²³ See Govender (note 103 above).

to simply ignore the findings made against them by the Public Protector, as well as any resulting remedial action.¹²⁵

There are different authors who have expressed views in the past on the question of the binding nature or lack thereof, pertaining to the legal effect of the Public Protector's remedial actions.¹²⁶ Often some have incorrectly equated the Public Protector with a court of law, as they held the view that if the Public Protector's findings are legally binding, then it is nothing different from a court of law, which would be untenable.¹²⁷

The fact is that the Public Protector is not a court of law. This is clear from legislative provisions establishing courts of law, as well as Chapter 9 Institutions. Courts of law have a much broader mandate, when compared to Chapter 9 institutions such as the Public Protector. The Public Protector has a much narrower mandate, which is aimed at curbing excesses in the exercise of state power, among others.¹²⁸ On the other hand, courts of law are there for the adjudication of disputes. However, constitutionally speaking, and taking into account the various branches of government, courts of law fulfil a function that assists institutions such as the Public Protector.¹²⁹ Both the courts of law and the Public Protector are therefore constitutionally required to observe the other's competence, in view of the principle of separation of powers.¹³⁰

¹²⁵ In the *EFF* case at par 72, the court, quoting a passage from the judgment in *Democratic Alliance v South African Broadcasting Corporation Limited and Others* [2014] ZAWCHC 161: 2015 (1) SA 551 (WCC) (*DA v SABC*) states that: "For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational".

¹²⁶ See Yacoob J at note 1 above. See *DA v SABC* (note 101 above). The High Court states that: "when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational". See Further the *EFF* case at par 73, where the Constitutional Court states that, when remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. Further that the remedial action taken against those under investigation cannot be ignored without any legal consequences". Yacoob J points out the fact that it remains unclear as to "who is supposed to make a judgement call whether the decision to reject the findings or remedial action is itself irrational"; (Views expressed at the colloquium stated above at note 1). I wish to point out at this point that the use of rationality is indicative of legality as one of the standards, which have to be looked at, in any enquiry pertaining to whether the relevant public functionary was correct in ignoring remedial action taken against them by the Public Protector.

¹²⁷ See Honourable John H. Jeffrey's address (note 101 above).

¹²⁸ See Chapter 9 of the Constitution as well as the Public Protector Act.

¹²⁹ See section 181 (3) of the Constitution.

¹³⁰ To be discussed fully in Chapter 5 below.

A brief reading of Chapter 8 of the Constitution shows that, compared to the Public Protector, the enabling provisions of the courts expressly grant them the power to make binding orders. Chapter 9 is different in the sense that it does not state expressly that the findings of the Public Protector are legally binding. There are also other organs of state which assist courts in the enforcement of their orders,¹³¹ in the event of non-compliance, as opposed to the Public Protector. There is a similarity in this regard in the sense that, just as with the courts of law, the dignity of the person of the Public Protector is shielded from those who may be the subject of an investigation or any other person.¹³² This is in the form of contempt of the Public Protector, as envisaged by the provision in the Act.¹³³

To support the argument that the Public Protector is not a court of law, Chapter 8 of the Constitution is relevant. Section 165 of the Constitution states as follows;

1. The judicial authority of the Republic is vested in the courts.
2. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
3. No person or organ of state may interfere with the functioning of the courts.
4. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
5. An order or decision issued by a court binds all persons to whom and organs of state to which it applies.
6. The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts”.

Bekink¹³⁴ also refers to some commentators who express the fact that the judiciary has two critically important functions in terms of the law.¹³⁵ The first function is to adjudicate on the division of powers and functions between the three spheres of government. The second is to interpret and apply the law, including the Constitution. The two mentioned functions point to mainly the operational aspects of, the courts of law in general.

¹³¹ In terms of the various rules of court. These include for example, the Sheriff of Court.

¹³² Section 9 (1) (a) and (b) of the Public Protector Act 23 of 1994 state that:- “no person shall, insult the Public Protector or the Deputy Public Protector”. Furthermore, it is prohibited of any person to engage in anything that in connection with an investigation which if the said investigation had been proceedings in a court of law, would have constituted contempt of court.

¹³³ Note 114 above.

¹³⁴ Note 31 above.

¹³⁵ Devenish GE “Constitutional Law” in Joubert WA (ed) *The Law of South Africa* (LAWSA) (2004) at 343.

Those who have equated the Public Protector with a court of law may have had section 165 (5) in mind. This section, expressly points to the binding nature of orders and decisions issued by courts of law. However, the fact that in Chapter 9 of the Constitution¹³⁶ there is no express provision dealing with the binding nature or otherwise of decisions made by Chapter 9 Institutions, does not mean that their decisions or recommendations are not binding, as we now know. This is not only on account of the *EFF* judgment. In order to further elucidate upon this fact, one must take into account two approaches to constitutional law.¹³⁷ They are broadly described as follows:

- the descriptive approach, holding that constitutional law is purely a combination of constitutional principles and rules and it is merely a codification of constitutional information without providing a foundation for critical or normative evaluation:¹³⁸ and
- the value-orientated approach or normative approach, in terms of which the constitutional law of a state is studied critically and evaluated against higher legal values within that state.¹³⁹ In a value-orientated system, the government is bound by the basic values underlying that system, which in turn ensures that the exercise of governmental authority is justified.¹⁴⁰ Such values include among others, basic justice, human dignity, freedom and equality before the law.¹⁴¹

South Africa follows the latter approach and the state is therefore bound by the values as mentioned above.¹⁴² In view of this state of affairs therefore, one should not read and interpret constitutional provisions as they are and must take into account the values which the state in South Africa is duty-bound to uphold. It was therefore wrong in law to make the deduction that the Public Protector did not have the power to issue binding remedial actions.

¹³⁶ Chapter 9 of the Constitution, detailing State Institutions supporting Constitutional Democracy.

¹³⁷ See Bekink (note 31 above) at 2.

¹³⁸ As above. In this regard, he refers to D. Basson and HP. Viljoen *South African Constitutional Law* (1988) at 1.

¹³⁹ Basson and Viljoen (note 120 above).

¹⁴⁰ Bekink (note 31 above).

¹⁴¹ As above.

¹⁴² As above.

In addition, the comparison was made on a wrong interpretation of constitutional provisions establishing the Public Protector.¹⁴³

The correct approach to be utilised in interpreting Chapter 9 of the Constitution is therefore to take heed of the values underlying the new constitutional dispensation within the South African legal system. There are therefore vast differences between the courts of law and the Public Protector.¹⁴⁴ It is however incorrect to make the comparison between this institution and a court of law, as they are both meant to achieve different objectives. In other words, those who stated that, due to the fact that the Public Protector is not a court of law and, thus unable to make legally binding decisions, based their conclusions on an incorrect comparison. I do however concede that there are some operational similarities between the two constitutional structures. Both must comply with important values such as the rule of law, accountability and transparency, among others. What differentiates them from one another is how they operate in order to achieve compliance with these principles.

3.4 LEGAL EFFECT OF THE PUBLIC PROTECTOR'S REMEDIAL ACTIONS

South Africa has a long history of political oppression. This is because of the system of apartheid, which resulted in racial segregation between a large majority of the black population and the white minority. Against the backdrop of such an oppressive regime, the Public Protector was established in order to protect the public from abuse by state machinery. From the Advocate-General, to the Ombudsman and then finally now the Public Protector, it is quite evident that the three institutions were established to perform a similar mandate, at different historical times.¹⁴⁵ It is thus inconceivable, cognisant of the horrible economic as

¹⁴³ One should have read into section 181-183 the binding nature or otherwise of remedial action taken by the Public Protector, based on the historical background surrounding the establishment of the institution. Furthermore, clearly the institution plays a pivotal role in upholding the values as mentioned. Therefore, it is almost inconceivable that one can interpret the constitutional provisions dealing with the office of the Public Protector without taking them into account.

¹⁴⁴ See *DA v SABC* (note 101 above). The Western Cape High Court held that “[t]he powers of the Public Protector are not adjudicative. Unlike courts, the Public Protector does not hear or determine causes” (at para 50).

¹⁴⁵ The Advocate General Act 118 of 1979, was the legislative provision dealing with the office of the Advocate-General. This office was created in 1979, its mandate being to investigate and report on complaints made in respect of financial maladministration within state organs. See par 24 of the EFF’s heads of argument in the *EFF* case. Act 118 of 1979 was later changed to the Ombudsman Act in 1991, when Parliament promulgated the Advocate-General Amendment Act 104 of 1994, thus establishing the Ombudsman office. This office had a

well as political crimes that the new political dispensation could have ushered in a Public Protector whose core mandate was simply to make findings, which in my view could have rendered them merely of academic interest. That would have been a travesty of justice.

It is correct to say that the Public Protector makes findings, and then consequent to the findings, follows through with recommendations, which in the view of the institution can then remedy the wrong. Those who held the view that the steps taken by the Public Protector amounted to mere recommendations¹⁴⁶ failed to recognize the legal effect of the very recommendations taken by the institution. Thus, while it is true that the Public Protector makes recommendations, it is what legal effects are brought about by the said recommendations, it is what legal effects are brought about by the said recommendations that are important.

There are different interpretations of the word “recommendations”.¹⁴⁷ In any discourse about what the legislature could have intended, it is possible that those involved might engage in a literal interpretation of the particular wording as used in a particular legal provision. It is therefore possible that prior to the ruling in the *EFF* judgment, that was the case. I refer to South Africa’s political history at the beginning of the discussion on recommendations, in order to highlight the importance of having taken the country’s socio-political context into account, when discussing the issue of the Public Protector’s recommendations.

Legal provisions should not be read in isolation. Rather, they should be read in conjunction with other factors that might inform the reader’s own conclusions. These factors include, but are not limited to, the unique drafting history, which could possibly have led to a country’s constitutional structure. The transformative mandate of South Africa’s constitution should, in addition, not be lost sight of. Chapter 9 institutions, in performing their various constitutional

much broader mandate, which was to “investigate any maladministration”, as long as affairs of the state were being prejudiced.

¹⁴⁶ N. Melville “Has Ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution” (2010) *SA Merc LJ* 50 avers that, traditionally, the Ombudsman makes recommendations regarding appropriate remedial steps. The recommendations are not binding, but are normally followed because of the status of the office and political pressure (at page 54). De Vos (note 218 below) suggests that if the remedial actions imposed by the Public Protector were to amount to mere recommendations, then that would destroy the effectiveness of its office.

¹⁴⁷ For example, in www.oxforddictionaries.com, the word is defined as “a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body”. Of course there are other meanings which are not important for our purposes. Furthermore, at www.merriam-webster.com, recommendations are defined as a “suggestion as to what should be done”.

mandates, should also play a role in the process of transforming the country. The application of the word 'recommendations', in as far as its application vis-à-vis the Public Protector is concerned, must be carried out with the socio-political conditions of the country in mind.

3.5 THE CONTENTIOUS ISSUES AS GLEANED FROM THE VARIOUS INVESTIGATIONS AND SUBSEQUENT REPORTS BY THE PUBLIC PROTECTOR

There are various investigations which the Public Protector has had to undertake in order to carry out its constitutional mandate as a Chapter 9 Institution. The Public Protector has the potential to play a very crucial role in fighting corruption and maladministration in the public service.

In years following the establishment of the Public Protector,¹⁴⁸ there were often doubts whether it was truly independent and thus effective in handling allegations of maladministration.¹⁴⁹ Scholars expressed the sentiment that the Public Protector had at times been viewed as politically driven, thus deviating from its core mandate.¹⁵⁰ As the years went by, the Public Protector was even nicknamed as the 'ANC Protector', as many African National Congress (ANC) members were being cleared of wrongdoing.¹⁵¹

Of relevance for our purposes is a number of investigations which have seen the Public Protector's mandate being given more attention, due to the controversies often brought about by these investigations. Thus one of the most prominent periods in the existence of the office is the so-called 'oil gate' investigation.¹⁵² This involved allegations of public funds having been syphoned from a state owned company, otherwise known as PetroSA, to a private company called Invume Management, the latter reportedly acting as a front for the ANC. The then Public Protector, Lawrence Mushwana, after seemingly having conducted an

¹⁴⁸ C. Hoexter *Administrative Law in South Africa* (2nd Edition 2012) at page 91.

¹⁴⁹ Hoexter (note 148 above).

¹⁵⁰ J. Sarkin 'Current Developments' (1999) 15 *SAJHR* 587 at 601-2, as discussed in Hoexter (note 129 above) at p 91.

¹⁵¹ K O'Grady "Mushwana Letting 'ANC Petticoat Show' " *The Weekender* 11-12 November 2006 (as discussed in Hoexter (note 129 above) at p 91). Highlighting the fact that since the year 2003, in only three of sixteen investigations into reported alleged wrongdoing into activities involving the ANC members had those members been found to be in the wrong.

¹⁵² 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 (2005).

investigation, concluded that there had been no impropriety as alleged by the complainants. After an application for judicial review into the matter to the High Court,¹⁵³ and then subsequently to the Supreme Court of Appeal,¹⁵⁴ the report was set aside. The Supreme Court of Appeal stated among other things that; “the minimum that is required for an investigation of any kind is that it must be approached with an open and enquiring mind¹⁵⁵... An investigation that is not conducted with an open and enquiring mind is no investigation at all”.¹⁵⁶

The oil gate investigation and the subsequent report highlights one of the most controversial periods in the history of the institution. This is because that the independence of the office was in doubt, as the then Public Protector was often viewed as partisan. The period under discussion also illustrates the relationship between law and politics, in the sense that if a healthy relationship is not promoted between the two, there will often be a conflict between those who wield political power and those perceived to be close to such levers of powers. The judicial review application pertaining to this report is indicative of what is required for an investigation to be viewed as having been conducted in a fair manner.¹⁵⁷

The investigation at hand is not the only one that brought controversy. The Public Protector has previously conducted investigations into the South African Broadcasting Corporation (SABC),¹⁵⁸ the Passenger Rail Agency of South Africa (PRASA),¹⁵⁹ and the so-called “police lease deal scandal” involving former South African Police Services Commissioner (SAPS),¹⁶⁰ among others.

¹⁵³ *Mail and Guardian v Public Protector* 2009 (12) BCLR 1221 (GNP).

¹⁵⁴ *Public Protector v Mail and Guardian Ltd* 2011 (4) SA 420 (SCA).

¹⁵⁵ At par 21.

¹⁵⁶ See note 101 above.

¹⁵⁷ The leading English case of *R v Sussex, Ex Parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep (233), is authority for the precedent that the mere appearance of bias is sufficient to overturn a judicial decision. It is also commonly associated with the often quoted principle: “Not only must justice be done; it must also be seen to be done”.

¹⁵⁸ A report titled: “When Governance and Ethics Fail, Report No 23 of 2013/2014: Report on an Investigation into Allegations of Maladministration, System Corporate Deficiencies, Abuse of Power and the Irregular Appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)”.

¹⁵⁹ A report titled: “Derailed, Report No 3 of 2015/2016: A Report into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA)”.

¹⁶⁰ A report titled: “Against the Rules, Report No 33 of 2010/2011: A 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 police accommodation in Pretoria”.

There are several issues highlighted by the controversies brought about because of the reports into the above-mentioned investigations. However, the common theme has been lack of compliance with the remedial actions taken by the Public Protector. Before the *EFF* judgment, it would seem that the Public Protector often depended on the willingness of other state organs to ensure effective implementation of its recommendations. There has prior to the Constitutional Court ruling there has often been concomitant lack of compliance, and this has often led to lack of respect for the Office of the Public Protector. The lack of compliance has often been presented because of the above-mentioned belief that the findings and recommendations of the Public Protector are not legally binding.

This is clear from the (mistaken) sentiments, which have often been expressed by state functionaries in reaction to reports by the Public Protector in the past. The sentiment was that the lack of explicit enforcement mechanisms in the Constitution¹⁶¹ as well as in the Public Protector Act¹⁶², indicate that they were not legally obliged to comply with the recommendations of the Public Protector. What follows is a brief look at how the courts in the past have often approached the issue of the binding nature or otherwise of the Public Protector's findings and recommendations, leading up to the judgment by the Constitutional Court in the *EFF* case.

3.6 THE FACTS AND DECISIONS INVOLVED IN THE SO-CALLED SABC MATTER: THE BUILD-UP

Between November 2011 and February 2012, the Public Protector received complaints from former employees of the South African Broadcasting Corporation ('SABC'). These ranged from alleged irregular appointment of Mr Hlaudi Motsoeneng, who was then acting chief operations officer (COO) of the SABC, to other incidences of maladministration.¹⁶³

In terms of its constitutional mandate, the Public Protector then undertook to carry out an investigation into the allegations as per the complaints. Following the investigation, a report was then released¹⁶⁴ which concluded among other things, that there had been incidences of

¹⁶¹ As above.

¹⁶² As above.

¹⁶³ See Venter (note 44 above) at 3.

¹⁶⁴ See note 174.

pathological corporate governance deficiencies at the SABC, irregular salary increases by Mr Hlaudi Motsoeneng, and further that his appointment was irregular.¹⁶⁵ The Public Protector further found that the then Minister of Communications, Ms Faith Muthambi, had aided and abetted the acting chief operations officer and unduly interfered with the operational affairs of the SABC.¹⁶⁶

Consequent to the findings, the Public Protector then made various recommendations, which included *inter alia* the institution of disciplinary action against Mr Motsoeneng; urgent steps in order to ensure that the position of acting COO was filled; and ensuring the recovery of public monies irregularly expended on all the relevant persons.¹⁶⁷ However, instead of implementing these recommendations as directed by the Public Protector, the then SABC board appointed a law firm (Mchunu Attorneys), reportedly to assist the SABC Board in investigating and considering the report by the Public Protector into affairs at the SABC. Investigation by the latter subsequently cleared Mr Motsoeneng of any wrongdoing.¹⁶⁸ What follows is a discussion of the approaches as followed regarding the legal effect of the remedial actions as issued by the Public Protector.

3.6.1 THE APPROACH FOLLOWED BY THE WESTERN CAPE HIGH COURT

Following a report by Mchunu Attorneys detailing its findings into the veracity of findings and remedial action taken by the Public Protector, the Democratic Alliance then launched an application to the Western Cape High Court, seeking the suspension and setting aside of Mr Motsoeneng's appointment,¹⁶⁹ on the basis that the latter was both unlawful and irrational.¹⁷⁰ In addition, the DA sought the institution of disciplinary steps against Mr Motsoeneng, and the appointment of a suitably qualified person for the position of COO.¹⁷¹ The Western Cape High Court decision became the first case to deal with the actual question

¹⁶⁵ See Venter (note 44 above) at 3.

¹⁶⁶ As above.

¹⁶⁷ As above.

¹⁶⁸ As above.

¹⁶⁹ As above.

¹⁷⁰ As above.

¹⁷¹ As above.

of the binding nature or otherwise of the Public Protector's findings and recommendations.¹⁷² The Applicants in a nutshell sought the intervention of the court in order to effect compliance with the remedial actions taken by the Public Protector.

The application was brought in two parts.¹⁷³ Among others, part B of the application sought relief as follows;

1. reviewing and setting aside the decision taken by the SABC board, to recommend the appointment of Mr Motsoeneng as COO;
2. reviewing and setting aside the decision taken by the Minister, to approve the recommendation made by the board to approve Mr Motsoeneng as COO;
3. directing the board to recommend the appointment of, and the Minister to appoint, a suitably qualified COO within sixty (60) days of the date of the court's order; and
4. declaring that, the decisions to recommend and appoint Mr Motsoeneng as COO before responding to the report of the Ninth Respondent (the Public Protector) dated 17th February 2014 and titled 'When Governance and Ethics Fail', the Board and the Minister were inconsistent with the Constitution, particularly section 181 (3)¹⁷⁴ of the Constitution,¹⁷⁵ and invalid;

¹⁷² I further wish to state the fact that, despite the fact that the Public Protector made adverse findings against the then Minister of Communications, the institution did not act on these findings. The same applies to Mr Hlaudi Motsoeneng. The Public Protector only sought the correct exercise of an executive power, which was in the hands of the Minister. A distinction is hereby made at this point between findings on the merits by the Public Protector as well as findings on the law, especially in as far as it relates to the due process of law. Importantly, the Public Protector has the power to make findings into both aspects. However, it is the extent of how far the findings can go that is of utmost importance in this regard. The correct exercise of state power, having been directed by the Public Protector, seems to border more on following proper procedure. Furthermore, the issue of the rule of law is brought to the fore here. It is important to emphasize the point that the Public Protector, in directing the SABC Board to do things in accordance with the confines of the rule of law, by reconsidering the appointment of Mr Motsoeneng, was effectively ensuring legality, which is an incidence of the rule of law. It is also pertinent to note the fact that, even the courts have on occasion been quick to point out the importance of the court's role in the adjudication of disputes involving other branches of government. The courts have on occasion often pointed out the fact that it is not its role to substitute its own decision to that of the decision maker. These and other issues, including those related to the separation of powers are discussed at a later stage (chapter 5 below). For now, it suffices to say that the matters thus far are symbolic of how the principles of constitutional as well as administrative law might at times coincide, in order to curb the incorrect or the excessive use of state power.

¹⁷³ See the discussion by the Supreme Court of Appeal in the *SABC* matter, at par 10 of the judgment (par 3.6.2 below).

¹⁷⁴ As above.

¹⁷⁵ As above.

In opposing the matter, the then Chairperson of the SABC Ms Ellen Tshabalala and then Minister of Communications Ms Faith Muthambi,¹⁷⁶ denied that the Public Protector's findings and remedial action had been ignored or that Mr Motsoeneng's permanent appointment was irregular.¹⁷⁷ On the other hand, the Public Protector expressed the view that the principles of co-operative governance contemplated in the Constitution¹⁷⁸ required the Minister and the SABC to have submitted an implementation plan to the office, which they failed to do.¹⁷⁹

In delivering judgment, the court formulated the primary question as follows: Are the findings of the Public Protector binding and enforceable?¹⁸⁰ The court *inter alia* reasoned as follows:¹⁸¹

1. The powers and functions of the Public Protector are not adjudicative. Unlike courts, the Public Protector does not hear and determine causes. The report itself states that in the enquiry as to what happened the Public Protector relies primarily on official documents such as memoranda and minutes, and less on oral evidence. In the enquiry as to what should have happened, the Public Protector assesses the conduct in question in the light of the standards laid down in the Constitution, legislation, policies and guidelines.
2. Further, unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of State.¹⁸² If it were intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so. Instead, the power to take remedial action in section 182 (1) (c) of the Constitution is inextricably linked to the Public Protector's investigatory powers in section 182(1) (a). Having regard to the plain wording and context of section 182(1), the power to take remedial action in the court's view, means no more than that the Public Protector may take steps to redress improper or prejudicial conduct. But that is not to say that the findings of the Public Protector are binding and enforceable, or that the institution is ineffective without such powers.

¹⁷⁶ At par 14 (SCA decision).

¹⁷⁷ They averred that; "Reasonably soon after receipt of the Public Protector's Report, and in addition to internal considerations, the Board procured the services of Mchunu Attorneys, a firm of attorneys, to assist in considering and investigating the veracity of the findings and recommendations by the Public Protector, as well as to assist the Board and management to respond the Public Protector. Mchunu Attorneys reviewed the Public Protector's report and investigated its findings and recommendations for purposes of advising the Board. Mchunu Attorneys prepared a report in respect of its task and gave advice to the Board".

¹⁷⁸ See Chapter 2 above.

¹⁷⁹ As discussed in the SCA judgment at para 18.

¹⁸⁰ SCA judgment at para 19.

¹⁸¹ At para 50; SCA judgment at para 19.

¹⁸² See my criticism above on how the Public Protector has in the past wrongly been equated to a court of law.

3. However, the fact that the findings of and remedial action taken by the Public Protector are not binding does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject.¹⁸³

The Western Cape High Court then concluded by saying that; “the 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. They have not provided cogent reasons to justify their rejection of the findings by the Public Protector of dishonesty, maladministration, improper conduct and abuse of power on the part of Mr Motsoeneng”.

The High Court stated, as per Schippers J, that the real question before the court was whether the findings of the Public Protector were binding and enforceable.¹⁸⁴ It further held that if it were intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so.¹⁸⁵ However, in rather contradictory terms, it then concluded that this does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject.¹⁸⁶ The court held that if an organ of state were to reject such findings or remedial action proposed by the Public Protector, that decision itself must not be irrational.¹⁸⁷

It is submitted that the court a quo misdirected itself on this point, in that the criteria it sets are not what is required by the Constitution.¹⁸⁸ State organs do not have the authority to ignore the Public Protector’s findings when they have a good reason to do so.¹⁸⁹ The court here applied the administrative law principles of rationality to the issue.¹⁹⁰ However, the real question to pose is to enquire into the true purpose of the Public Protector and the correct interpretation of the constitutional and legislative provisions with regard to the status and enforceability of the Public Protector’s decisions and recommendations.¹⁹¹ The ruling by the Western Cape High Court was incorrect, taking into account the fact that the office of the Public Protector derives its powers directly from the Constitution, meaning that the

¹⁸³ At para 19, as discussed in the SCA judgment.

¹⁸⁴ As above.

¹⁸⁵ At para 51.

¹⁸⁶ At para 59.

¹⁸⁷ At para 74.

¹⁸⁸ See Venter (note 44 above) at 3.

¹⁸⁹ As above.

¹⁹⁰ As above.

¹⁹¹ As above.

importance of the office can potentially be negated if the legal position as stated by the court in this regard were to prevail. However, the High Court concluded that the decision by the SABC board to appoint Mr Motsoeneng and to ignore the Public Protector's report was arbitrary and irrational. In view of the ruling by the High Court, the Minister, Mr Motsoeneng, and the SABC applied to the Supreme Court of Appeal for leave to appeal.

3.6.2 THE APPROACH FOLLOWED BY THE SUPREME COURT OF APPEAL IN THE SABC MATTER

With the leave of the court below,¹⁹² the SABC, the Minister, and Mr Motsoeneng, made an appeal to the Supreme Court of Appeal¹⁹³ against the judgment.¹⁹⁴ The Public Protector then instructed counsel to file heads of argument and address the court on the status and effect of its findings and remedial action.¹⁹⁵ In addition, Corruption Watch also intervened in the matter as *amicus curiae* and agreed with the views of the Public Protector that, on a proper interpretation of section 182 of the Constitution,¹⁹⁶ the institution does have the power to take remedial action, which cannot be ignored by organs of State.¹⁹⁷

The court engaged on a contextualisation of the position and purpose of the Public Protector within South Africa's constitutional framework,¹⁹⁸ and considered its powers in terms thereof.¹⁹⁹ The court referred to the fact that section 181(3) imposes a positive obligation on the state.²⁰⁰ The court in addition refers to the fact that these institutions themselves are accountable to the National Assembly.²⁰¹ Reference was made by the court to two cases

¹⁹² The decision of the Western Cape High Court.

¹⁹³ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA (SCA) (08th October 2015).

¹⁹⁴ As above.

¹⁹⁵ SCA judgment at par 22.

¹⁹⁶ As above.

¹⁹⁷ As above.

¹⁹⁸ At par 23.

¹⁹⁹ The court referred to section 181 (1) as well as section (2) of the Constitution, which have already been discussed fully in Chapter 2 above.

²⁰⁰ As stated in Chapter 2 above, section 181 (3) is to the effect that: "Other organs of state, through legislative and other measures, must assist and protect Chapter Nine Institutions to ensure their independence, impartiality, dignity and effectiveness". Furthermore, section 181 (4) of the Constitution specifically prohibits any person or organ of State from interfering with the functioning of these institutions. I am of the view that, by implication, the latter is a form of a negative obligation imposed on the relevant functionaries, due to the fact that it is couched in wording that implies that it must refrain from engaging in any form of conduct that hinders the effective functioning of Chapter Nine Institutions.

²⁰¹ Section 181 (5) of the Constitution.

important for the concept of independence of Chapter Nine Institutions, namely that of *Independent Electoral Commission v Langeberg Municipality*,²⁰² and the *New National Party v Government of the Republic of South Africa and Others*.²⁰³

The Supreme Court of Appeal in the SABC matter then held that the purpose of the Public Protector is “to ensure that there is an effective public service which maintains a high standard of professional ethics and that government officials carry out their tasks effectively”.²⁰⁴ The court also engages in a thorough discussion of the Public Protector Act²⁰⁵ and the relevant legal provisions. The court relies on section 7(2) of the Constitution.²⁰⁶ The court then creates a nexus between this provision and the obligation imposed on the state to create efficient anti-corruption mechanisms. Such mechanisms will however not be efficient if the state undermines their independence.²⁰⁷

The Supreme Court of Appeal here alludes to the fact that the important question to pose is to consider the extensive powers that have been afforded to the South African Public Protector, when equated to similar institutions in comparable jurisdictions.²⁰⁸ The court expressed the importance of the efficiency and enforceability of the decisions of the

²⁰² [2001] ZACC 23; 2001 23; 2001 (3) SA 925 (CC) at par 27 where the Constitutional Court described “Chapter Nine Institutions [as] independent and subject only to the Constitution and the law” and further that it was a contradiction to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government, and that independence cannot exist in the air. The court held in view of this state of affairs that it was clear that independence is intended to refer to independence from the government. “Thus, even though these institutions ... perform their functions in terms of national legislation, they are not organs of State within the National Sphere of government. Nor are they subject to national executive control. Accordingly, they should be, and must manifestly be seen to be, outside government”. (Emphasis added) (At para 31).

²⁰³ [1999] (3) SA 191 (CC) at paras 98-99. The court quotes the Constitutional Court in this case where the latter court held that: “In dealing with the independence of the Independent Electoral Commission, it is necessary to make a distinction between two factors, both in my view related to independence. The first is ‘financial independence’. This implies the ability to have access to funds to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. The second factor is that of ‘administrative independence’. This implies that there will be no control over those matters directly connected with the function which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the assistance requires to ensure its independence, impartiality, dignity and effectiveness”. The Supreme Court of Appeal states that even though the Constitutional Court as per Langa DP was elaborating on the independence of the Independent Electoral Commission (IEC), the considerations as mentioned apply with equal force to the office of the Public Protector.

²⁰⁴ At par 26.

²⁰⁵ As above.

²⁰⁶ This provision places a duty on the State to respect, protect and promote the rights in the Bill of Rights.

²⁰⁷ The court notes the answering affidavit deposed to by the Public Protector where concern is expressed that “[t]his matter represents yet another example of what would appear to have become a trend among politicians and organs of State to simply disregard reports issued and remedial actions taken by the Public Protector”.

²⁰⁸ Venter above at note 56.

institution. According to the court; “it would be naive to assume that organs of state and public officials, found by the Public Protector to have been guilty of corruption and malfeasance in public office, will meekly accept its findings and thus implement the remedial measures. That is not how guilty bureaucrats in society generally respond”.²⁰⁹ The court then held that the court a quo based its conclusion on two incorrect considerations; namely that the powers of the Public Protector were comparable to those of a court; and; that the court a quo’s reliance on an English case R (*on the application of Bradley*) v *Secretary of State for Work and Pensions*.²¹⁰

Regarding the first consideration, the Supreme Court of Appeal held that the Public Protector and a court of law are incomparable. It held that, although the Public Protector is not an administrative body, it was well-established law that a decision taken by an administrative body had binding legal effect and could only be set aside by means of judicial review. The court based its reasoning on the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*.²¹¹ The court then held that: “If this was the case with administrative bodies, then it should apply equally with the Public Protector (or even with greater force) to the findings of the office.²¹² If the decisions of administrative bodies could not simply be ignored, then those of the Public Protector should be equally binding”.²¹³ The court held that the rationale for the principle in the administrative law context, namely, “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, should at least apply as much to the institution of the Public Protector and to the conclusions contained in its published reports”.²¹⁴

The court then went on to make an assessment of the second consideration relied on by the court a quo. It then held that the case relied on by the high court in the *Bradley* case²¹⁵ was about the powers of the Parliamentary Commissioner, which is an institution similar to the office of the Public Protector. Quite correctly, the court pointed out the fact that the former

²⁰⁹ At par 44; also see Venter above at note 56.

²¹⁰ 2008 EWCA Civ 36; 2009 QB 114 (CA); See *SABC judgment* at par 45.

²¹¹ [2004] ZASCA 48; 2004 (6) SA 222 (SCA); at par 26.

²¹² Par 45; as discussed in Venter above at 56.

²¹³ Par 45; as discussed in Venter above at 56.

²¹⁴ *Oudekraal* case at par 26.

²¹⁵ Note 192 above.

only has a reporting function, meaning therefore that it has no power to take remedial action.²¹⁶ In this regard, the court then concluded that it was not of any assistance in the interpretation and understanding of the South African Public Protector.²¹⁷ The court alluded that: “*Bradley* concerned a different institution with different powers, namely the powers of the Parliamentary Commissioner under the Parliamentary Commissioner Act, 1967”.²¹⁸

The conduct of the SABC board in the matter was then considered. The court considered the legal obligation it had to comply with, in view of the findings by the Public Protector. It held that there was no evidence that the SABC intended to abide by the findings of the Public Protector. The court in addition looked at the principal reasons advanced by both the SABC and the Minister for ignoring the Public Protector’s remedial action. It stated that there was no suggestion that the Public Protector had exceeded its powers or acted corruptly.²¹⁹ The main reason advanced by both the SABC and the Minister was that the two had appointed Mchunu Attorneys to investigate the veracity of the findings and recommendations of the Public Protector.

It also referred to what it termed a “parallel process” by the SABC, whereby the latter had appointed Mchunu Attorneys to critically assess the findings and recommendations of the Public Protector.²²⁰ The court held that while it may have been permissible for the two to appoint a firm of Attorneys to assist it with implementation of the Public Protector’s remedial measures, it was prohibited for it to have established a parallel process to that already undertaken by the Public Protector and to thereafter assert privilege in respect thereof.²²¹

²¹⁶ Para 46, as discussed in Venter (note 44 above) at 4.

²¹⁷ As above.

²¹⁸ Accordingly, this institution undertakes investigations at the request of Members of Parliament and does not have any remedial powers. The function of the Parliamentary Commissioner appears to be confined to a reporting function, which is merely one of the functions of the South African Public Protector, as specified under section 182(1)(b) of the Constitution. The court thus concludes that the court a quo’s reliance on this case was misplaced.

²¹⁹ At para 47.

²²⁰ The court condemned the conduct of the SABC in this regard, in that after having appointed Mchunu Attorneys, they then asserted privilege in respect of the Mchunu Report.

²²¹ See para 47 of the judgment. The court further notes that: “if indeed it was aggrieved by any aspect of the Public Protector’s report, its remedy was to challenge that by way of a review. It was not for it to set up a parallel process and then adopt the stance that it preferred the outcome of that process and was thus free to ignore that of the Public Protector. The Public Protector is better suited to determine issues of maladministration within the SABC than the SABC itself”. It further added that absent a review, once the Public Protector had finally spoken, the SABC was obliged to implement its remedial measures.

The Supreme Court of Appeal then concluded that the Public Protector could not effectively realise its constitutional mandate if other organs of state may second-guess its findings and further ignore the recommendations put forward by the office.²²² According to the court, the findings of the Public Protector entails that the office may decide on a remedy and direct its implementation and that public bodies are not entitled to ignore its findings.²²³ In addition, the Public Protector's findings may only be challenged by means of review and no parallel investigative proceedings can trump the findings of the Public Protector.²²⁴

The court adds²²⁵ that, with regard to recommendations issued 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".²²⁶ It adds that the effect of the High Court's judgment is that, if organs of state or a state official concerned simply ignored the Public Protector's remedial measures, it would fall to a private litigant or the Public Protector itself to institute court proceedings to vindicate its office. Such a phenomenon is undesirable in view of the fact that South Africa is a constitutional democracy.

However, at this point one should note the submissions made by the SABC and the Minister at paragraph 58 of the judgment, whereby they argue that the court did not have the power to direct the suspension of Mr Motsoeneng in the matter.²²⁷

After concluding that the consideration that lead to the court *a quo's* finding was clearly incorrect, the Supreme Court of Appeal proceeded to consider the SABC board's irregular

²²² Para 52, as discussed in Venter (note 44 above).

²²³ As above.

²²⁴ Par 53, as discussed in Venter (note 44 above).

²²⁵ At para 53.

²²⁶ As above.

²²⁷ The court refers to section 15(1) of the Broadcasting Act 4 of 1999, which deals with removal from office of a 'member'. It was submitted in this regard that only the President acting on the advice of the National Assembly had such a power. The submission was such that, it was for the President to suspend or remove permanently and not for a court to direct a suspension. However, the court rejected this argument on the basis that the Constitution requires that public power vested in the Executive and other public functionaries should be exercised in an objectively rational manner. (See also the case of *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex-Parte President of the Republic of South Africa and Others* 2000(2) SA 674 (CC) at par 89.

actions and disregard for the Public Protector's reports and the findings and recommendations contained in the reports.²²⁸

The Supreme Court of Appeal judgment is thus more in line with the ideals of South Africa's constitutional democracy in that its pronouncements regarding the true nature of the legal effect of the Public Protector's recommendations resonate well with the rule of law. Furthermore, a brief overview of state-owned entities in South Africa reveals lack of good corporate governance.²²⁹ An institution of the nature of the Public Protector is thus better suited to investigate any allegation of maladministration in these entities, as reports of financial mismanagement continue to emerge in the various newspaper reports. However, the Public Protector cannot fulfil its mandate effectively if its proper role in the country's constitutional democracy is not put into proper perspective.

Venter²³⁰ avers that the case failed to address the role of the legislature in the enforcement of the Public Protector's reports.²³¹ The following are some of the other controversies which

²²⁸ Venter (note 44 above) at 5. The court held that the Minister of Communications was not entitled to prefer the report by Mchunu Attorneys above that of the Public Protector. The only way to challenge and set aside the findings of the Public Protector was by means of a review and no parallel investigative proceedings can trump the findings of the Public Protector. Venter (above), is of the view that even though the ruling of the Supreme Court of Appeal should be welcomed, the court did not fully address the role that should be played by the legislature in ensuring that remedial actions taken by the Public Protector are implemented. This is in view of the fact that the Public Protector, as per section 181 (1) (5) of the Constitution, as with all other Chapter Nine institutions, is accountable to the National Assembly. The author argues that, in view of this case, it would seem that the National Assembly should therefore address issues of non-compliance with recommendations issued by the Public Protector. In this case both the relevant Parliamentary Portfolio and the Minister of Communications were reluctant to effect compliance with the report of the Public Protector; at par 3.2 of the article.

²²⁹ See www.thenewage.co.za; "Eskom admits financial crisis", November 2014.

²³⁰ As above.

²³¹ To be discussed fully in Chapter 5 below. The author expresses the view that, since the Office of the Public Protector is accountable to the National Assembly, the latter is better suited to address non-compliance with the recommendations of the Public Protector when such instances occur. I also wish to add at this point the fact that the correct legal relationship between the National Assembly and the Public Protector should be properly analysed, in view of the fact that the latter accounts to the former. I am of the view that what gives rise to this necessity is that, when one looks at some of the reports by the Public Protector, it directs Parliament to do one thing or the other, in order to ensure compliance with its recommendations (as happened in the so-called Nkandla report). However, there are instances where Parliament may fail to fulfil its constitutional mandate as directed by the Public Protector. One must then ask, what is the nature of the directive that the Public Protector gives to Parliament in order to fulfil the task of ensuring compliance with the institution's findings? Just how obligatory is that finding? Can't it be that perhaps the Public Protector should be given express enforcement mechanisms in legislation, other than the general legal obligations of the rule of law as well as that of accountability? There are other issues at play, which include the principle of co-operative governance (to be discussed fully in Chapter 5 infra). For now it suffices to refer to Section 181(3) of the Constitution, which states that organs of state must, by means of legislative and other measures, assist and protect institutions created by chapter 9.

have often followed non-compliance with the recommendations by the Public Protector. These include among others the PRASA Report.²³²

There are many other controversies affecting the office of the Public Protector. As mentioned in the preceding paragraph, the difficulties the institution of the Public Protector has had to grapple with largely relates to issues of non-compliance with the findings and recommendations of the office. It is evident from a historical perspective that non-compliance with the findings and recommendations of the Public Protector undermines the independence of the institution as a whole, and broadly speaking, the very fabric that establishes South Africa's constitutional democracy. The following are some of the practical examples that have often highlighted lack of non-compliance with the various reports undertaken by the Office of the Public Protector, and the implications they have for the country as a whole. Among others, they include the following:

- The so-called PRASA report.²³³ This is a clear example of how lack of political will to implement the remedial measures often taken by the Public Protector can hamper the effectiveness as well as the efficiency of the office. Following the release of the report into allegations of corruption and maladministration at the Passenger Rail Agency of South Africa (PRASA), the only real consequence that flowed from the report was the dismissal of the then PRASA Chief Executive Officer Lucky Montana. Sight was lost of the fact that, up to date, the relevant state organs involved in the transport portfolios have not taken any real steps to ensure that the Public Protector's recommendations as contained in the report are complied with.²³⁴ The report into allegations of maladministration at PRASA highlights the fact that the effectiveness of the recommendations and remedial measures by the Public Protector depends hugely on implementation by leadership of the relevant functionaries who may be implicated in investigations. Enforcement of the Public Protector's findings and recommendations

²³² Above.

²³³ See note 175 above.

²³⁴ I must however point out that, the PRASA Board has at least on the face of it, demonstrated a willingness to implement some of the remedial measures as directed by the Public Protector. See Fin24, 03/09/2015, where the previous Chairman of the now dissolved PRASA Board, Popo Molefe, indicated that the board was impelled to take the necessary measures with regards to the irregularities as pointed out in the Public Protector's report titled 'Derailed'.

is left to other state organs, to give practical effect to the directives issued by the office.²³⁵

- In both the SABC and the PRASA matter, the two Ministers handling the particular portfolios had been instructed by the Public Protector to submit implementation plans indicating how the two reports would be implemented, a step which according to the Public Protector was to be carried out in thirty days. This was not done.
- Issues of non-compliance with the findings and recommendations of the Public Protector are not the only challenges the institution has had to deal with in the past. As shall be seen later,²³⁶ there is a challenge whereby the remedial measure taken against a Member of the Executive branch of government and the facilitation of such a step depends on the very functionary's co-operation, despite the said functionary expressing their willingness to implement the remedial measures.²³⁷ In this case, we now have from time to time a potential conflict of interest. It is thus crucial in the event that such is the case that whatever decisions are made, they be taken in line with the dictates of the Constitution, in order to avert a constitutional crisis.

3.7 A CRITICAL ANALYSIS OF THE LEGAL POSITION PRE-EFF JUDGMENT

The issues as well as the debates discussed above highlight the fact that there has not always been consensus regarding the legal effect of remedial action taken by the Public Protector. In this section, I analyse some of the viewpoints raised above by various academics, as well as the varying approaches followed by different courts of law on the matter.

I am of the view that some of the viewpoints raised above failed to take into account the fact that South Africa is a constitutional democracy with a value-based constitutional framework. Such values include, among others, that of accountability as well as the rule of law. Differing interpretations regarding the legal effect of remedial actions of the Public Protector merely

²³⁵ The PRASA Board has since been dissolved by the Minister of Transport. The now dissolved Board was in the process of carrying out the Public Protector's remedial measures. It is evident that the step taken by the Minister of Transport will go a long way in undermining the efforts aimed at effecting compliance with the findings and recommendations of the Public Protector in this particular report. The report serves as testament to the fact that leadership is part and parcel of how different factors may conspire to undermine the effectiveness of institutions such as that of the Public Protector.

²³⁶ Chapter 5 below.

²³⁷ As seen in the State of Capture report (See full discussion in Chapter 5 below).

focused on a literal interpretation of the founding provisions of the institution as found in the Constitution²³⁸ as well as the Public Protector Act.²³⁹ Prior to the SCA judgment on the *SABC* matter, there were no definitive pronouncements relating to the Public Protector. From the time it was established, and based on its founding provisions in Chapter 9, the Public Protector is meant to hold those who are tasked with exercising public power accountable. One may then ask, what is this accountability in this context?

The principle of accountability is important in any discussion related to the constitutional mandate such as that of the Public Protector.²⁴⁰ Taking into account the role that the Public Protector plays in holding public functionaries to account, it is important that the principle of accountability among others, even prior to the ruling in the *EFF* judgment, should have been ascribed to the founding provisions establishing the Public Protector. However, I agree with Venter²⁴¹ that the ruling of the Supreme Court of Appeal at the time should be welcomed. There was consensus that the ruling of the court gave the Public Protector the necessary legal boost needed to enable it to carry out its constitutional mandate effectively.

I also disagree with the comparison by different authors between the Office of the Public Protector and courts of law.²⁴² The proper approach is to read in the binding nature or not of

²³⁸ As above.

²³⁹ As above.

²⁴⁰ R Jenkins: *The Role of Political Institutions in Promoting Accountability* (Public Sector Governance and Accountability Series; Performance Accountability and Combating Corruption); Edited by Shar A (2007); Chapter 5 of the series: Research conducted by staff of the International Bank for Reconstruction and Development and The World Bank; (at p 136). Refers to the concept as encapsulating the idea that one person or institution is obliged to give account of his or her, or its activities to another. The author further denotes the fact that it includes the capacity to demand that someone justify his or her behaviour and the capacity to impose a penalty for poor performance. At 139, the author discusses two aspects of the concept of accountability. The first one is answerability and the second one is enforceability. The latter one is relevant for our purposes. According to the author, enforceability can further be sub-divided into two components which are briefly;

- (a) Adjudication of the power holder's performance: Determining the persuasiveness of his or her explanation in light of available information and prevailing standards of public conduct; and
- (b) Sanctioning; the enforcing agency must then decide on the nature of the penalty to be applied based on the circumstances of each case. This process further involves three sub-components which are;
 - (i) Assessing the future deterrent effect of competing sanctions;
 - (ii) Considering whether the public will believe that justice has been done; and
 - (iii) Calculating the capacity of the sanctioning authority effectively to carry out the chosen form of enforcement.

²⁴¹ Above.

²⁴² Pierre De Vos in an opinion piece published in *The Daily Maverick* on 08th October 2015 poses the very question as to whether: Based on the application to the Supreme Court of Appeal at the time, what is the legal status of the findings and remedial action imposed by the Public Protector? Are they similar to court judgments? (He then adds that if that is the case, that would be difficult to accept because the Public Protector is not a judge and does not operate as a court of law). Interestingly, he further asks as to whether its decisions could be binding

remedial actions taken by the Public Protector, despite the fact that there is no provision to that effect in Chapter 9 of the Constitution. This argument ties in with treating remedial actions imposed by the Public Protector, in a manner similar to that imposed by the Ombudsman in other countries, forgetting that the background of its establishment in the South African constitutional landscape is different from that in other countries.

3.8 CONCLUSION

In this chapter, we have discussed different viewpoints on the legal effect of recommendations of the Public Protector.

The different debates discussed in this chapter show that, prior to the *EFF* judgment, there was no legal certainty on the matter. There are two main approaches which characterised the debates, which were followed by both the Western Cape High Court and the Supreme Court of Appeal. The latter adopted the approach, which was later supported by the *EFF* judgment.

The debates as we have seen in this chapter, show that, the Public Protector was modelled on the institution of an Ombudsman. For those who held the view that the Public Protector is an Ombudsman, they were not entirely incorrect. Even though the Public Protector is modelled on the Ombudsman, its existence, and its founding legal provisions, have been shaped up by political events in South Africa. It therefore has a unique character. This is also supported by the fact that; it is unheard of to have an institution similar to the Public Protector making findings against the highest office in the land. After an assessment of the views expressed above, it is clear that any future dialogue relating to the Public Protector will to a large extent have the Western Cape High Court judgment as a starting point, in order to properly understand the legal position related to the legal effect of recommendations of the Public Protector.

Investigations discussed above also show that, accountability has an aspect of enforceability which should normally follow, in any democratic dispensation. For instance, we saw how following the police lease scandal, a Cabinet Minister was dismissed. These, and many

in a similar way to the decisions of administrative bodies, the approach preferred by the Supreme Court of Appeal.

measures, should follow as a matter of law, should an institution with a mandate similar to that of the Public Protector find against a public official.

CHAPTER 4

A CRITICAL ANALYSIS OF THE *EFF* JUDGMENT IN THE *EFF* CASE

4.1 INTRODUCTION

As already alluded to above,²⁴⁴ there has not always been consensus on the legal effect of remedial actions imposed by the Office of the Public Protector pursuant to making findings after an investigation. However, the Constitutional Court has now finally pronounced on the matter in the *EFF* judgment. The court has held that the recommendations of the Public Protector as per its remedial actions are legally binding.

The aim of this chapter is to discuss fully the facts and decision of the Constitutional Court in the *EFF* judgment comprehensively. A detailed discussion of this case is crucial as it was in this very decision after a prolonged lack of clarity regarding the legal effect of the Public Protector's remedial actions, that the Constitutional Court finally put the debate to rest, at least in as far as such legal effect in a general sense is concerned. In the *EFF* judgment, the Constitutional Court discussed in broader detail what constitutional obligations of the various state organs and functionaries entail in order to facilitate compliance with recommendations contained in the so-called "Nkandla Report".²⁴⁵

In order to delve into the issues, I start by examining the report of the Public Protector on the upgrades to President Jacob Zuma's private homestead in Nkandla, and how it was dealt with by those who were directed by the Public Protector to take action, as per the latter's remedial action. This is followed by a discussion of the facts of the *EFF* judgment, the legal questions, the various arguments raised by the different parties in the application as well as the eventual decision. The constitutional obligations, which the court held that the relevant state organs and functionaries failed to comply with are also discussed. The court's reasons for the decision is also briefly considered. Lastly, a discussion of the principle of separation of powers as discussed by the court in the *EFF* judgment is also undertaken.

²⁴⁴ Chapter 1 above.

²⁴⁵ "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 Kwa-Zulu Natal Province: Report No 25 of 2013/2014".

Once can persuasively argue that, in as much as the Office of the Public Protector has had to deal with numerous controversial issues in the past,²⁴⁶ the report detailing upgrades to President Jacob Zuma's Nkandla private homestead was the most controversial. This is because it related to the President in his individual capacity, specifically in light of the constitutional obligations he has to meet as head of South Africa's national executive authority. What follows is a brief background to the issues that eventually culminated in the Constitutional Court application.

4.2 THE REPORT OF THE PUBLIC PROTECTOR ON THE NKANDLA SECURITY UPGRADES: A BRIEF BACKGROUND

As part of its constitutional mandate, the Public Protector, as part of its constitutional mandate²⁴⁷ was requested to investigate allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President of the Republic of South Africa.²⁴⁸ Several members of the public lodged complaints with the Public Protector concerning aspects of the said security upgrades at the private residence of the President's Nkandla home.²⁴⁹ Consequently, the Public Protector made a finding to the effect that the President failed to act in line with his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of state resources.²⁵⁰ The Public Protector found that the President had violated his constitutional obligations as required in terms of sections 96(1), 2(b) and (c) of the Constitution.²⁵¹ The Public Protector further found that the President had fallen short of his constitutional obligations in terms of the Executive Members Ethics Act²⁵² and the Executive Ethics Code.²⁵³

²⁴⁶ See Chapter 3 above.

²⁴⁷ In terms of Section 182 of the Constitution.

²⁴⁸ "Secure in Comfort; Report No 25 of 2013/2014 (March 19 2014): 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 and in respect of the private residence of President Jacob Zuma at Nkandla (KwaZulu-Natal Province)".

²⁴⁹ *EFF* case para 5.

²⁵⁰ See *EFF* case at para 2:

²⁵¹ As above.

²⁵² 82 of 1998.

²⁵³ *EFF* case at para 7. See (note 3 above).

The security upgrades of the President's private residence are subject to guidelines as contained in various policies.²⁵⁴ Among the said policies is the Cabinet Policy of 2003, which requires the following.²⁵⁵

- A request by the President for security measures;
- A security evaluation by the South African Police Service (SAPS) and State Security Agency;
- A proposal to the Inter-Departmental Security Co-ordinating Committee for technical evaluation;
- A cost estimate prepared by the Department of Public Works;
- The South African Police Service (SAPS) to advise the Minister of Police on the proposed security measures including the cost;
- Communication to the President on the approved security measures for his consent; and
- Implementation by the Department of Public Works.

The residence of the President was declared a National Key Point in accordance with the National Key Points Act.²⁵⁶ The President's Nkandla homestead was only declared as a national key point on 08th April 2010, although the upgrading commenced in 2009.²⁵⁷ According to the Public Protector's report, there was no evidence that the state was under an obligation to become involved financially in terms of any law of the country.²⁵⁸ Furthermore, no evidence could be found that the President had requested the South African Police Service (SAPS) or the State Security Agency (SSA) to consider securing his private residence.²⁵⁹ The Nkandla Report dealt with many other issues. However, for our purposes, it is sufficient to state that, the Public Protector found that the President had failed to meet his constitutional obligations concerning curbing the irregular deployment of state resources.²⁶⁰

In the report, the Public Protector found that several improvements were non-security features.²⁶¹ The State was only legally obliged to provide security to the President, and any installation that was unrelated to security measures had to be paid for by him.²⁶²

²⁵⁴ Thornhill C "Public Protector: Fearless defender of ethical conduct - A seven-year campaign" (2016) 9 (3) *African journal of Public Affairs* 129 at 136.

²⁵⁵ As above at 137.

²⁵⁶ Act 102 of 1980.

²⁵⁷ Thornhill (note 234 above) at 137.

²⁵⁸ See note 234 above at 137

²⁵⁹ See note 234 above at 137.

²⁶⁰ At para 2.

²⁶¹ At para 6.

²⁶² As above.

Exercising its constitutional powers, the Public Protector instructed the President, assisted by the functionaries named in the report, to work out and then pay a portion fairly proportionate to the undue benefit that had accrued to him and his family.²⁶³ The President was also instructed to reprimand the Ministers involved in the project for certain improprieties as indicated in the report.²⁶⁴ In furtherance of its constitutional mandate, the Public Protector then submitted the report not only to the President, but also to the National Assembly.²⁶⁵ This was done with a view to facilitating compliance with the remedial action contained in the report, objectively aimed at achieving the constitutional imperative to hold the President accountable.²⁶⁶ For a period amounting to a little over a year, neither the President nor the National Assembly met the requirements as set out by the Public Protector's remedial action.²⁶⁷

After finding that the President was unduly enriched as a result of the non-security features to his private residence, the Public Protector then took remedial action in terms of section 182(1)(c) of the Constitution.²⁶⁸ These included among others:

- Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the Department of Public Works (DPW) at his private residence that do not relate to security, and which include the visitor's centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool;
- Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also concerning the DPW apportionment document;
- Reprimand the Ministers for the appalling manner in which the Nkandla Project was handled and state funds were abused; and

²⁶³ At para 2.

²⁶⁴ As above.

²⁶⁵ At para 3.

²⁶⁶ Bear in mind Section 181(5) of the Constitution, which is to the effect that the Public Protector and other Chapter 9 institutions are accountable to the National Assembly. The question that arises here is therefore on what constitutional basis can the Public Protector direct the National Assembly to facilitate compliance with the remedial action it takes, bearing in mind the fact that the institution on its own is accountable to the National Assembly. How can one bypass the mechanisms, which may, from time to time be employed by the National Assembly, in order to frustrate efforts aimed at implementing the Public Protector's report? See further section 181(3), which directs other state organs through various measures to among others, ensure the effectiveness of the Public Protector and other Chapter 9 institutions. The proviso is couched in mandatory terms (use of the word must is indicative to that fact), meaning therefore that other state organs are constitutionally mandated and obliged to take the said steps in order to ensure that Chapter 9 institutions are not frustrated in carrying out their tasks of supporting constitutional democracy.

²⁶⁷ At para 3.

²⁶⁸ At para 10.

- Report to the National Assembly on his comments and actions on this report within 14 days.²⁶⁹

Regarding the last part of the remedial action, the President submitted the response to the National Assembly as directed within fourteen days.²⁷⁰

As indicated above, the report of the Public Protector's investigation was also submitted to the National Assembly in order to enable it to facilitate compliance with the remedial action, in terms of its constitutional obligations to hold the President accountable.²⁷¹ However, both the President and the National Assembly did not take the necessary steps to comply with the remedial measures as directed by the Public Protector. After receiving the report from the Public Protector, the National Assembly then took steps to set up an adhoc committee, to carry out an examination of the report.²⁷² The National Assembly's attitude was that it was not legally obliged to facilitate compliance with the Public Protector's report.²⁷³ It was of the view that the Public Protector cannot prescribe to it what to do.²⁷⁴ The National Assembly's approach was to take steps in terms of section 42(3) of the Constitution,²⁷⁵ which as it puts it, were intended to ascertain the correctness of the conclusion reached and the remedial action

²⁶⁹ Remedial actions as discussed at para 10.

²⁷⁰ At para 11.

²⁷¹ At para 3.

²⁷² At para 11: There is another AD Hoc Committee which was set up to look into other reports compiled, such as the President's report alongside other reports compiled by the Special Investigating Unit, that of the Public Protector, Joint Standing Committee on Intelligence, among others. There was also a report compiled by the Minister of Police to look into the same matter pertaining to the report of the Public Protector. All these reports exonerated the President from liability, thus undermining the remedial action imposed by the Public Protector. See further fn 15 of the *EFF* case at para 12 of the judgment. The court however does add at par 78 that there is no absolute bar to what some may see as a parallel investigative process regardless of its intended end-use. It further notes that it cannot be correct that, upon receipt of the report by Public Protector with its unfavourable findings and remedial measures, all that the President had to do was comply even if he had reason to doubt its correctness. The court avers on this point that the President was entitled to inquire into the correctness of parts of the report he disagreed with. And it is possible that at conclusion of such enquiry, different findings to those reached by the Public Protector could be reached. According to the court, the key question on this basis then becomes how the President deals with the Public Protector's report and the remedial action taken therein, in light of other reports commissioned by him. I should also add that, the President should not only consider other reports commissioned by him, but also the constitutional status of the Public Protector.

²⁷³ At para 85

²⁷⁴ At para 85.

²⁷⁵ As above.

taken in terms thereof.²⁷⁶ In this regard, it was indeed legally permissible for the National Assembly to test the correctness or lack thereof of the Public Protector's report.²⁷⁷

According to the court, there are two legal provisions which the National Assembly may employ in order to fulfil its constitutional obligations, namely, in terms of sections 42 (3) and 55 (2) of the Constitution.²⁷⁸ Briefly, it has been given the leeway to determine its own internal rules and processes. Despite the presence of such discretionary powers however, as pointed out by the court, both sections 42(3) and 55(2) are couched in broad terms, as they do not specify how the National Assembly is to go about achieving the objective of fulfilling its mandate as per the Constitution. A qualification is however added in this respect by the court that in the process of exercising its discretion, it should not undermine the mandate of the Public Protector.²⁷⁹

There are many legal principles, which should inform the National Assembly in carrying out its constitutional mandate of holding the executive and other public functionaries accountable, without having to undermine the authority of the Public Protector. In its judgment, the court refers to the fact that there was nothing wrong in the National Assembly deploying measures in order to satisfy itself as to the correctness of the Public Protector's report, as with the President.²⁸⁰ In support of this averment, the court refers to cases such as that of *Democratic Alliance v President of South Africa and Others*,²⁸¹ where the court relied on the example where people and bodies with a material interest in the outcome of a matter have on occasion been allowed to challenge the constitutionally validity of certain conduct.²⁸² There are other instances that are worth mentioning by way of example, which render the argument that indeed the National Assembly was entitled to deploy measures lawfully in

²⁷⁶ At para 85. The court points out that, as required by section 42(3) of the Constitution, the National Assembly is legally obliged to, inter alia, oversee and scrutinize executive action. In this regard, the court held that the National Assembly in a broader sense was correct, as "scrutinize" means more than just merely rubberstamping the report of the Public Protector. According to the court, at the time, the Public Protector's report relates to executive conduct that had to be subjected to scrutiny.

²⁷⁷ At para 86. The court further stresses that: "In principle there is nothing wrong with wondering whether any unpleasant finding or outcome is correct and deploying all the resources at one's disposal to test its correctness".

²⁷⁸ As above.

²⁷⁹ At para 86.

²⁸⁰ At para 87.

²⁸¹ 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

²⁸² In the *DA v President of the RSA* (note 261 above), reference to challenging the constitutional validity of a law or conduct of the President, constitutional institutions or Parliament in one form or another is made by the court at para 88.

order to test the correctness of the Public Protector's report valid. These include, but are not limited to: -

- a challenge to the Constitutional Court being made to contest the appointment of the National Director of Public Prosecutions;
- the extension of term of office of the Chief Justice;²⁸³
- the constitutional validity of proceedings of the Judicial Service Commission;²⁸⁴ and
- the proceedings of rules of Parliament.²⁸⁵

In relation to the above examples, the averment as put forward by the court was that, "it would be incorrect to suggest that a mere investigation by the National Assembly into the findings of the Public Protector is impermissible on the basis that it trumps the findings of the Public Protector".²⁸⁶ As a result, the two major opposition parties, namely the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA) lodged an application to compel the President and the National Assembly to comply with their constitutional obligations arising from the remedial action.²⁸⁷ They requested the Constitutional Court to confirm that the remedial action taken by the Public Protector as per its recommendations are legally binding.²⁸⁸

I wish to add that the judgment marks an important milestone in our country's constitutional jurisprudence in the sense that, it is instructive as headway towards achieving the much

²⁸³ *Justice Alliance v President of the Republic of South Africa and Others; Freedom Under Law v President of Republic of South Africa and Others; Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* [2011] ZACC 23; 2011 (5) SA 388 (CC); 2011 (10) BCLR 1017 (CC).

²⁸⁴ *Helen Suzman Foundation v Judicial Service Commission and Others* [2014] ZAWCHC 136; 2015 (2) SA 198 (WCC); [2014] 4 All SA 395 (WCC).

²⁸⁵ *Mazibuko v Sisulu and Another* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) and *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC).

²⁸⁶ See par 88.

²⁸⁷ EFF case *ibid* at par 3; The court notes at par 22 that the National Assembly's broader constitutional obligations arose from the fact that it bears the responsibility to play an oversight role over the Executive and State Organs and ensure that constitutional and statutory obligations are properly executed. This should be contrasted with the remark made by the court at par 12 of the judgment, whereby after setting two Ad Hoc that saw the President being absolved from liability to pay as directed by the Public Protector in the recommendations thereof, the President consequently did not comply accordingly. This highlights the fact that, the internal rules and processes of the National Assembly may at times be used by the governing party in order to frustrate efforts aimed at improving democratic processes in any country's constitutional democracy.

²⁸⁸ EFF judgment above at par 13.

needed transformation in the country.²⁸⁹ This is due to the fact that, those in political power should be constantly reminded that, power should be used to advance the interests of the disadvantaged communities, bearing in mind the income equality gaps that exist as a result of among others, the country's oppressive past. It is rather unfortunate that it had to take the Constitutional Court judgment to remind the President of the very oaths of office he took when he assumed the Presidency.

In now turn to the facts, legal question as well as the judgment by the Constitutional Court in the *EFF* case.

4.3 THE LEGAL PRINCIPLES AND DECISION OF THE CONSTITUTIONAL COURT IN THE *EFF* CASE

As a point of departure, I wish to consider the matters that the court was asked to determine:²⁹⁰

- based on the principles of constitutional supremacy, the rule of law and accountability, the President should be ordered to comply with the remedial action taken by the Public Protector by paying a reasonable percentage of the reasonable costs expended on non-security features at his private residence;
- the President must reprimand the Ministers under whose watch state resources were expended wastefully and unethically on the President's private residence;
- the Court was asked to declare that the President had failed to fulfil his constitutional obligations in terms of sections 83, 96, 181 and 182;
- the report of the Minister of Police and the resolution of the National Assembly that sought to absolve the President of liability, must be declared inconsistent with the Constitution and invalid and that the adoption of those outcomes amount to a failure by the National Assembly to fulfil its constitutional obligations, in terms of sections 55 and 181, to hold the President accountable to ensure the effectiveness, rather than subversion, of the Public Protector's findings and remedial action;

²⁸⁹ Transformation is important in many other sectors of South African society. Among the reasons underlying the importance of transformation is the need to account to the electorates by those wielding political power. The Public Protector, in carrying out its constitutional mandate, plays a huge role in this regard.

²⁹⁰ *EFF* judgment above at par 4.

- the Public Protector’s constitutional powers to take appropriate remedial action must be clarified or affirmed; and
- the matter of costs, which is not important for our purposes.

The court pointed out the finding by the Public Protector to the effect that the President had acted in breach of his constitutional obligations in terms of section 96 (1), 2(b) and (c) of the Constitution, which provide that:

- (1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation
- (2) Members of the Cabinet and Deputy Ministers may not-
 - a) 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; or
 - b) Use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.²⁹¹

Similarly, the court alluded to the Public Protector’s finding on the President having violated the provisions of the Executive Members’ Ethics Act²⁹² and the Executive Ethics Code.²⁹³ The court pointed out a potential conflict of interest²⁹⁴ on the part of the President. The court stated that the potential conflict resides in the fact that the President has the duty to ensure that state resources are used only for the advancement of state interests. It also referred to the fact that, on the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference.²⁹⁵ The court further set a standard that has to be met in order to find that a conflict of interest exists, namely that all that has to be proven is a risk (the risk does not even have to materialise).²⁹⁶

The court then dealt with the issue of the remedial action taken by the Public Protector,²⁹⁷ as the latter had reached the conclusion that the non-security features unduly enriched the

²⁹¹ At para 7.

²⁹² Act 82 of 1998.

²⁹³ Chapter 1 of the Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers (7 February 2007) at pages 7-15.

²⁹⁴ At para 9. See discussion in Chapter 5 *infra* in relation to the State of Capture report and the pending judicial review application.

²⁹⁵ At para 9.

²⁹⁶ As above.

²⁹⁷ In terms of section 182 (1) (c) of the Constitution.

President and his family. In a nutshell, the President and the National Assembly did not comply with the remedial action, as directed by the Public Protector.

The court also dealt with the issue of the Constitutional Court's exclusive jurisdiction in constitutional matters.²⁹⁸ The issue of the court's jurisdiction is important in as far as it relates to certain constitutional obligations, which the President and the National Assembly was alleged not to have met, as they have failed to comply with remedial measures taken by the Public Protector. According to the court the issue of jurisdiction involves two considerations; namely that; it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled; and that obligation must be closely examined to determine whether it is of the kind envisaged by section 167(4)(e).²⁹⁹

The court further noted the fact that whenever a constitutional provision is construed, that must be done with due regard to other constitutional provisions that could be materially relevant to the one being interpreted.³⁰⁰

On a proper reading of the constitutional provisions as well as the jurisprudence related to the Public Protector,³⁰¹ a deduction is made that, when the institution takes remedial action against those implicated in maladministration, there is thus a direct obligation placed on them to comply with the said obligation, in accordance with the binding nature of the Public Protector's findings and recommendations. This obligation is thus primary in nature. However, that is not the end of the matter. There is what I'd like to refer to as a secondary obligation which then flows from the initial obligation placed on those directly implicated in alleged wrongdoing. There is thus an indirect obligation placed on such state organs or public functionaries as the case may be. This form of obligation is placed on state organs endowed with the constitutional powers to facilitate compliance with the remedial action/s as directed by the Public Protector. This may then require the assistance of, among others, the National Assembly, as well as state institutions such as the Special Investigation Unit (SIU).³⁰²

²⁹⁸ See Section 167(4) (e) of the Constitution which reads that: - "only the Constitutional Court may- (e) decide that Parliament or the President has failed to fulfil a constitutional obligation".

²⁹⁹ At para 15.

³⁰⁰ At para 17.

³⁰¹ The legislative provisions not relevant for this part.

³⁰² See the discussion supra in previous chapters on the issue of co-operative governance. See further section 181 (3) of the Constitution.

The court declares that an alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President as an individual and on Parliament as an institution.³⁰³ The court then states that an obligation shared with other organs of state will always fail the section 167 (4) (e) test. According to the court, even if it is an office-bearer or institution-specific constitutional obligation that would not necessarily be enough.³⁰⁴ The court finds support for its reasoning in the case of *Women's Legal Trust v President of the Republic of South Africa and Others*.³⁰⁵ A discussion on constitutional obligations is highly pertinent and relevant for our purposes as it gives insight on the legal question posed above,³⁰⁶ regarding the matter of against whom are the recommendations of the Public Protector legally binding.³⁰⁷

The court³⁰⁸ alludes to a constitutional obligation specifically imposed on the President or Parliament. There is a distinction between constitutional obligations, which may be primary in nature as well as those, which may be secondary in nature.³⁰⁹ As already, indicated, primary obligations on the part of the President flew from the report as specifically mentioned by the

³⁰³ The court further expresses at para 23 that, "such an obligation must have a demonstrable and inextricable link to the need to ensure compliance with the remedial action taken by the Public Protector".

³⁰⁴ This statement from the court does not offer much help or guidance as now one has to wonder; if the Public Protector's recommendations are indeed legally binding, they obviously create certain legal obligations (that is indisputable). However, the question is not clear as to the obligation types imposed on the President as well as Parliament. On what basis do they arise? For now, we know that the President is legally obliged as the party directly implicated in wrongdoing. This basically means that the President is liable both in his personal capacity, by virtue of having unduly benefitted from the irregular deployment of state resources. Now, we have to deal with how he is to respond to the report of the Public Protector. He was supposed to have reported to the National Assembly on his comments and actions pertaining to the report within 14 days. This he does in his capacity as the party directly implicated in wrongdoing. The President duly complied with this directive as issued by the Public Protector. It is also indisputable that the report on the Nkandla matter specifically refers to the President's failure to ensure that state resources are not expended wastefully. Confusion is however created by the lack of clarity on whereby the President is legally obliged to facilitate compliance with the Public Protector's recommendations, with the assistance of the National Assembly. I am of the view that, in as much as the Constitutional Court is correct in stating that the President and the National Assembly failed to comply with certain of their constitutional obligations, it however incorrectly relied on the dictum as put forward by the court in the *Women's Legal Trust v President of the Republic of South Africa 2009 (6) SA 94 (CC)*. The question on against whom are the recommendations of the Public Protector's legally binding should thus be put into proper context. I should however be quick to point out the fact that the court adds a qualification which is to the effect that, where the Constitution imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute its mandate, then crucial political questions are likely to arise which would entail an intrusion into sensitive areas of separation of powers. I am of the view that the obligation of Parliament, which the court held it was supposed to have met, arises from the broader principles of the rule of law as well as considerations of accountability.

³⁰⁵ Note 283 above.

³⁰⁶ Chapter 1 above.

³⁰⁷ See full discussion in Chapter 6 below.

³⁰⁸ At para 18.

³⁰⁹ To be discussed fully below.

Public Protector. There are other legal obligations, which in law may give rise to a legal duty to take action of some sort. These may also be further contained in a statute. It is my view that, the report of the Public Protector, in addition triggered the operation of section 96(2)(b) of the Constitution. It also triggered the relevant provisions of the Executive Members Ethics Act³¹⁰ as well as the Executive Ethics Code.³¹¹ There is thus a need for the court to have distinguished the President's and the National Assembly's constitutional obligations on this basis, in as far as primary obligations are concerned. In other words, the legal provisions pertaining to the findings and recommendations of the Public Protector should not be read in isolation but must be read in the context of other applicable statutory provisions, in order to correctly distinguish between the correct constitutional obligations.

The issue of the Constitutional Court's exclusive jurisdiction is central to the issue of the binding nature or otherwise of the Public Protector's findings and recommendations: In *Doctors for Life International v Speaker of the National Assembly and Others*,³¹² the court (per Ngcobo J), as he then was, held that "obligations that are readily ascertainable and are unlikely to give rise to disputes do not require a court to deal with a sensitive aspect of the separation of powers and may thus be heard by the High Court". I am of the view that though the court was correct in its observation, this is too much of a blanket statement. It seems that such cases may depend upon the facts and circumstances of each case (whether it is unlikely that issues of separation of powers may arise). Guidance is thus needed on this aspect, in order to try to curb those who may be eager to engage in delaying tactics by manipulating the justice system.

Although it is desirable that the judiciary should also have the benefit of adding to the constitutional jurisprudence,³¹³ it is possible that those implicated by the Public Protector in wrongdoing may frustrate implementation of its remedial actions by abusing judicial review processes. This is so taking into account the right to procedural fairness in accordance with section 33 of the Constitution.³¹⁴ Public interest should thus play a major role in this exercise.

³¹⁰ Note 271 above.

³¹¹ Note 272 above.

³¹² 2006 (6) SA 416 (CC); (*Doctors for Life*) at par 19; as discussed in the *EFF* judgment at para 18.

³¹³ As hinted by the court in the *EFF* case at para 17.

³¹⁴ The right to just administrative action.

By way of example, the State of Capture report³¹⁵ provides a good illustration of how implicated parties may frustrate the wheels of justice by abusing judicial review processes. It is in the interest of justice that the matter be brought to finality so that the remedy pertaining to the setting up of a judicial commission of enquiry can be attained without further delay.

The court³¹⁶ also referred to section 83 of the Constitution. In terms of this section:

“the President

is the Head of State and head of the national executive;

must uphold, defend and respect the Constitution as the supreme law of the Republic;

promotes the unity of the nation and that which will advance the Republic”.

The essence of the court’s reasoning in the *EFF* judgment is that state functionaries have different constitutional obligations with which they must comply with.³¹⁷ The court further indicates that there is a primary obligation that flows directly from section 182(1)(c) of the Constitution³¹⁸ imposed upon only the President to take specific steps in fulfilment of the remedial action taken by the Public Protector.³¹⁹ With reference to section 183(1) of the Constitution, the court alludes to the fact that even though the provision is relevant, it does not impose a President-specific obligation but applies to a wide range of potential actors.³²¹

³¹⁵ Report No 6 of 2016/2017.

³¹⁶ At para 26.

³¹⁷ The court notes at para 35, that; “*the requirement that the President failed a constitutional obligation that is expressly imposed on him is best satisfied by reliance on both sections 83 (b) and 182 (1) (c) of the Constitution.*” Further down, the court states that section 182 (1) (c) imposes an actor-specific obligation: “Although section 182 leaves it open to the Public Protector to investigate state functionaries in general, in this case the essential link is established between this section and section 83 by the remedial action actually taken in terms of section 182 (1) (c). In the exercise of that constitutional power, the Public Protector acted not against the Executive or State organs in general, but against the President himself. He was the subject of the investigation and is the primary beneficiary of the non-security upgrades and thus the only one required to meet the demands of the constitutionally-sourced remedial action”.

³¹⁸ As above.

³¹⁹ At para 36. Further, that the President’s alleged disregard for the remedial action taken against him, does seem to amount to a breach of a constitutional obligation.

³²¹ The court is of the view that it was not and could not have been relied on by the Public Protector to impose any constitutionally-sanctioned obligation on the President which could then create the crucial link with section 83 (b) and further that the remarks apply with equal force to the National Assembly. This seems to be the closest

On the matter of constitutional obligations, the court eventually does hold that the Economic Freedom Fighters did make out a case that failure by the President to comply with remedial action taken by the Public Protector, and further to uphold the Constitution,³²² does relate to constitutional obligations that are specifically imposed on the President. It further notes that such obligations require that the President had to comply with the remedial action taken by the Public Protector.

4.4 CONSTITUTIONAL OBLIGATIONS OF THE NATIONAL ASSEMBLY TO HOLDING THE PRESIDENT ACCOUNTABLE

The court also refers to the fact that there is an actor-specific obligation imposed on the National Assembly in that it was legally obliged to hold the President accountable. The allegation by the Applicants in the case was that the National Assembly failed to comply with sections 55 (2) and 181 (3) of the Constitution.³²³ The National Assembly in the matter resolved to absolve the President of any form of liability. After completing the investigation and reporting on the outcome, the Public Protector furnished the National Assembly with it in order to facilitate compliance with the remedial action. The National Assembly however set-up various ad-hoc committees aimed at looking into the veracity of the findings stated in the report by the Public Protector.

Similar to the President, the National Assembly thus also failed to comply with the obligations imposed on it by the Constitution to hold the President accountable.³²⁴ There are similarly specific obligations which were imposed on the President as well as the National Assembly in as far as fulfilling compliance with the remedial action taken by the Public Protector in the

indication of the existence of a secondary obligation by different state functionaries by the court in this regard, as I have pointed out above in section 4.3.

³²² As above.

³²³ Section 55 (2) of the Constitution of the Republic of South Africa, 1996, provides that; "The National Assembly must provide for mechanisms- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of-

- (i) The exercise of national executive authority, including the implementation of legislation; and
- (ii) Any organ of state."

³²⁴ The court importantly for purposes of reporting on misconduct by those who are the subject of an investigation notes that the Public Protector primarily reports to the National Assembly. At para 44, the court finds that when the report was received by the National Assembly, it effectively operationalized the House's obligations in terms of sections 42(3) and 55(2) of the Constitution.

Nkandla report is concerned. The following section discusses the distinction mentioned above³²⁵ between primary obligations and secondary obligations which the National Assembly failed to comply with in holding the President to account. For now, it suffices to state that, when the Public Protector carried out an investigation into alleged improprieties in the Nkandla upgrades and thus took remedial action, it effectively breathed life into the constitutional provisions related to the constitutional obligations to hold of the relevant stakeholders to hold the President accountable.

In a nutshell, the court in the *EFF* judgment held that the President failed to maintain, uphold and respect the Constitution. It further held that the National Assembly failed to fulfil its constitutional responsibilities to hold the President accountable.

4.5 DISTINCTION BETWEEN PRIMARY AND SECONDARY OBLIGATIONS IDENTIFIABLE IN THE EFF JUDGMENT

As a starting point, the court in its ruling refers to primary obligations specifically imposed on both the President and the National Assembly, and that they both failed to comply with them.

For purposes of our present discussion, there is no dispute regarding the exact nature of the primary obligations that came as a direct result of the Public Protector taking remedial action in terms of its constitutional powers.³²⁶ There is thus no uncertainty in this regard. However, I am of the view that the court did not adequately discuss the exact content of secondary obligations, which arise naturally as a direct result of, among other principles, the rule of law as well as accountability. At this point, I wish to refer to section 237 of the Constitution,³²⁷ which the court refers to in the judgment. Section 237 of the Constitution provides that:- “all constitutional obligations must be performed diligently and without delay”.³²⁸

³²⁵ See section 4.3 above.

³²⁶ At para 36, the court alluded to the fact that there is a primary obligation, that flows directly from section 182(1) (c) of the Constitution, imposed only upon the President to take specific steps in fulfilment of the remedial action.

³²⁷ As above.

³²⁸ Bekink (note 31 above) at page 545 states that this provision must be read inter alia with sections 1, 2, 7 and 165 of the Constitution.

The wording as used in this section suggests that, drafters of the Constitution envisaged an all-encompassing approach in its interpretation and application. This therefore means that all constitutional obligations, including the constitutional obligation to comply with the remedial action taken by the Public Protector, apply with equal force. Based on this, I am therefore of the view that, various constitutional principles such as the rule of law, accountability among others, form the cornerstone of secondary obligations.³²⁹ The court in the *EFF* case also did not adequately discuss the link between certain provisions in the Constitution and the inaction on the part of the President and the National Assembly.

A question arises whether there is any link between the President's failure to comply with the Public Protector's remedial action and section 8(3) of the Constitution? Put differently: is there a causal link between the two? On closer examination of the above-mentioned question, a deduction can be made that it is in the interests of good governance and the country's constitutional democracy that the state must be seen to encourage respect for the rule of law. No one can forget the fact that South Africa comes from an unfortunate past in which government acted with impunity and did as it pleased without any proper regard for the rule of law and most importantly, human rights.

In distinguishing between primary and secondary obligations, the primary distinguishing feature is the fact that primary obligations in this case were characterised by specific obligations flowing from the Public Protector's report on Nkandla. What follows is a discussion of the some of the reasoning by the court in its judgment on the Nkandla matter.

4.5 EFF JUDGMENT: REASONS FOR THE DECISION

The court dealt with a variety of issues in its judgment, some of which are discussed broadly below. Bearing in mind the scope of this study, some of the issues dealt with by the court are not relevant for our purposes. What suffices at this point are the facts and the legal questions the court had to address as well as the eventual ruling.³³⁰

³²⁹ Bekink (note 31 above) at page 545 avers that the suggestion is made that the obligation is applicable to the entire constitutional text and not only to the Bill of Rights.

³³⁰ Other matters such as the history and evolution of the office of the Public Protector were dealt with fully by the Supreme Court of Appeal in the *SABC* matter and do not suffice at this stage.

(a) The legal effect of remedial action -

Reference is made here to section 182(1)(c) of the Constitution,³³¹ which is the enabling provision on the power of the Public Protector to take remedial action. Primarily, the court held in this regard that the power to take remedial action is sourced from the Constitution itself.³³² Furthermore, the court identified the legal authority for the obligation to assist the Public Protector by stating that; “the obligation to assist and protect the Public Protector so as to ensure its dignity ... is relevant to the enforcement of its remedial action”.³³³ The court further expresses the fact that taking appropriate remedial action is much more significant than a mere endeavour to address complaints.³³⁴

In view of the above, it is important to note that the court qualifies that the power of the Public Protector is wide but certainly not absolute.³³⁵ This is in accordance with the principles of South African administrative law, where such power is always open to judicial review, and also the general principle that no power may be exercised unless it is sanctioned by law.³³⁶ In addition, the principles of rationality demands that the Public Protector should not exceed the limits of its authority. The court the nature, exercise and legal effect of remedial powers of the Public Protector as follows:

- the primary source of the power to take appropriate remedial action is the Constitution itself,³³⁷ whereas the Public Protector Act³³⁸ is but a secondary source;
- it is exercisable only against those it has jurisdiction over, constitutionally speaking;
- the words “take action” imply that the Public Protector itself is empowered to decide on and determine the appropriate measure. “Action presupposes concrete or meaningful steps”. There is the nothing in the words that may point to an indication

³³¹ *EFF* case at para 63. The court poses the question, “what is the legal status or effect of the totality of the remedial power vested in the Public Protector?”

³³² At para 64.

³³³ In this regard, reference is made by the court to section 181(2) of the Constitution.

³³⁴ At para 68. According to the court “appropriate remedial action connotes a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate”. See detailed discussion on what constitutes appropriate remedial action in chapter 2 *supra*.

³³⁵ At para 71.

³³⁶ As above.

³³⁷ As above.

³³⁸ As above.

that the legislature intended that the exercise of the power to take remedial action should be left to other institutions;³³⁹

- the Public Protector has the power to determine the appropriate remedy and determine the manner of its implementation;
- “appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in any given case;
- only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken;
- also informed by the appropriateness of the remedial measure to deal properly with the subject matter of the investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken; and
- whether a particular action taken or measure employed by the Public Protector is binding or not, or what its legal effect is, would be a matter of interpretation aided by the context, the nature and the language.

(b) Remedial action may not be ignored-

The court then held that those against whom adverse findings have been made, and those constitutionally obliged to assist in implementing the remedial measures imposed by the institution may not ignore remedial actions imposed by the Public Protector. Similarly to the High Court in the so-called *SABC* matter,³⁴⁰ the court also deals with certain aspects of rationality. In this regard the court held that when an organ of state rejects the findings or remedial action of the Public Protector, that decision itself must meet the requirements for rationality.³⁴¹

³³⁹ As above.

³⁴⁰ The court in the *DA v SABC* matter (decision of the Western Cape High Court) (at par 74 of the judgment), held that when an organ of state rejects the findings or the remedial action of the Public Protector, that decision itself must not be irrational.

³⁴¹ The court adds at par 72 that, by implication, “whomsoever the Public Protector imposes remedial action against, the said individual or entity may justifiably and in law disregard the remedy either out of hand or after own investigation”. The court further notes that, “it is not clear who is supposed to make a judgment call whether the decision to reject the findings or remedial action is itself irrational”. See further on this point Yacoob J at note 1 above. Quite rightly, so, the court also points out the fact that the statement is not only worrisome but at odds with the rule of law. I agree with the court in this regard, but on additional different grounds other than the ones already mentioned by the court. The High Court in dealing with the issue of rationality only refers

The court here affirms the ruling of the Supreme Court of Appeal in the *SABC* matter,³⁴² where it was held that the Public Protector's remedial action might, at times, have a binding effect.³⁴³ It states that, "when remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness". Therefore, according to the court, remedial action may not be ignored without any legal consequences.³⁴⁴

The court bases its findings on the case of *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*.³⁴⁵ In this case, the court held that:

"the fundamental notion-that official conduct that is vulnerable to any challenge may have legal consequences and may not be ignored until properly set aside-springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality...The rule of law obliges an organ of state to use the correct legal process. For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help and further invites a vortex of uncertainty, unpredictability and irrationality".

Thus, prior to and after the decision in the *EFF* judgment, the legal position is such that it is unlawful to ignore a decision taken by an institution lawfully established for a specific constitutional mandate. In order to do so lawfully, one should lodge an application for judicial review.³⁴⁶ Of importance is the ruling by the court that, upon receipt of the Public Protector's report, if the President had reason to doubt its correctness, he should approach a competent body such as a court of law. In this regard, the court refers to the authority of such a body, which is by law vested with such competence.³⁴⁷ The fact that the court pronounces on the

to organs of state in its statement. It does not refer to a situation whereby the Public Protector may have investigated someone in his or her own personal capacity. For instance, if the Public Protector carries out an investigation against the President in his personal capacity, it is important that his status as Head of the National Executive, Head of State and his personal capacity be clearly demarcated. Similarly, if the Public Protector investigates a Cabinet Minister, the same principle applies. This is because, when dealing with the principle of responsibility by Members of the Cabinet, one should distinguish between individual ministerial responsibility as well as collective ministerial responsibility. See discussion in chapter 6 below.

³⁴² As above.

³⁴³ At para 73.

³⁴⁴ According to the court, this is because the constitutional order in South Africa is based on the rule of law (at para 74). The principle of the rule of law dictates that decisions taken by lawfully established bodies should not be ignored. It is important that the Public Protector be taken seriously, as it is inevitable that, from time to time, it may take up politically sensitive investigations. If it now happens that those in power ignore such reports, such a phenomenon has the potential to plunge the country into a constitutional crisis of great magnitude.

³⁴⁵ 2014 (5) BCLR 547 (CC).

³⁴⁶ This accords with the holding by the court that the Public Protector's remedial actions are legally binding until set aside by a court on judicial review.

³⁴⁷ At para 81; the court is of the view that the two adhoc Committees set up by Parliament in response to the Public Protector's report were mutually destructive. This is, as he appears to have been content with the

judiciary being the only competent structure to adjudicate on whether the President is legally permitted to ignore the remedial actions imposed by the Public Protector should not come as a surprise as courts of law are legally competent to do so by virtue of section 165 of the Constitution.³⁴⁸ It also does not mean that the President would have been prejudiced in any way, as according to the Constitutional Court, and as common sense dictates, “even findings and an order of court may themselves be subject to further interrogation or research”,³⁴⁹ at the instance of the affected party.

The essence of the court’s reasoning is that, holistically, and in light of the issues discussed above, the President failed to uphold, defend and respect the Constitution as the supreme law of the land.³⁵⁰ It stresses that, such failure is manifest from the disregard for the remedial action imposed by the Public Protector.³⁵¹ The court further points to the President’s shared constitutional obligations in terms of section 181(3) of the Constitution.³⁵²

The significance of the court’s reasoning in the *EFF* judgment is such that specific constitutional obligations were identified and discussed by the court in more detail. While it bears similarities to the ruling by the Supreme Court of Appeal in the *SABC* matter,³⁵³ its approach focuses extensively on the elucidation of various constitutional obligations, which have to be met by different state functionaries regarding the duty to assist the Public Protector in implementation of the latter’s remedial actions. This therefore means that, in any adjudication involving the legal effect of the Public Protector’s remedial actions, there are many pieces of legislation, which have to be reconciled in order to arrive at the true purpose of the constitution.

vindication by the Minister’s report, absolving him of liability. It further adds 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”.

³⁴⁸ As above.

³⁴⁹ At para 86.

³⁵⁰ At para 83.

³⁵¹ As above.

³⁵² The court adds that the President was duty-bound to assist the Public Protector in order to ensure the latter’s independence, impartiality, dignity and effectiveness by complying with the remedial action taken. This obligation is so manifestly important in the sense that, in spite of the fact that a public functionary might be personally implicated in a report by the Public Protector, absent a judicial review application, they are legally obliged to put their legal rights and interests aside and ensure that the institution effectively contribute to its constitutional mandate of ensuring that it supports constitutional democracy as per Chapter 9 of the Constitution.

³⁵³ Chapter 3 above.

4.6 THE EFF JUDGMENT'S PERSPECTIVE ON SEPARATION OF POWERS

Separation of powers as a doctrine is also discussed in the EFF case.³⁵⁴ This principle is important in as far as, its relationship to the constitutional mandate of the National Assembly to hold the executive to account is concerned. The court in its reasoning quotes the *First Certification* case,³⁵⁵ where the Constitutional Court in attempting to certify the Constitution expanded upon the practical implications of the doctrine.³⁵⁶ Therefore, the court does not have the jurisdiction to prescribe to the National Assembly how to conduct its own internal processes.³⁵⁷ In terms of the principle of separation of powers, the court has been given the leeway to determine what mechanisms to utilise in order to, among others, fulfil its constitutional mandate of holding the executive accountable, in terms of section 42(3) of the Constitution.³⁵⁸ Regarding accountability by the Executive, it is also important to bear in mind section 92 of the Constitution, which also relates to certain obligations imposed on the Executive.³⁵⁹

Regarding the principle of separation of powers in the *EFF* judgment, it was held that parliament usurped its role by setting aside the Public Protector's report on the basis of the

³⁵⁴ At paras 89-99.

³⁵⁵ As above.

³⁵⁶ Whereby the principle was explained as follows: "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation". The court also notes the importance of the judiciary to be sensitive to the need to refrain from interfering with the competence of other branches of government (at para 92). The court also highlighted the fact that courts are the guardians of the principle of legality, in that other branches of government such as the legislature, must act within and in accordance with the law. Failure to do so invites intervention by a court of law.

³⁵⁷ At para 93.

³⁵⁸ This point is further emphasised in the case of *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC) 21, where the court at para 1 of the judgment, states, in reference to the principle of separation of powers, that "there shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness". This principle, which came to the fore during the Constitution making process, highlights the fact that, as per the court's averment at para 10, "it thus falls on Parliament to oversee the performance of the President and the rest of Cabinet and hold them accountable for the use of State power and the resources entrusted to them". Going back to the issue of the binding nature of the remedial nature of the Public Protector's remedial action, note should be taken of section 181 (5) of the Constitution, which establishes a link between Chapter Nine Institutions and the National Assembly as a branch of government. This case dealt with the motion of no confidence proceedings against the President.

³⁵⁹ As above.

findings made by the Minister of Police. It accorded to itself authority, which the judiciary only has the competence to carry out.³⁶⁰

There is a link between the exercise of constitutional obligations and the exercise of public power, or the performance of a public function in a general sense. Whenever a public functionary has to fulfil a particular constitutional obligation, they should be empowered to do so by a legal provision either in the Constitution³⁶¹ or in legislation. On a proper construction of the *EFF* judgment, one can easily conclude that the National Assembly had to fulfil its constitutional obligations of holding the executive accountable. In order to do so, they had to be legally empowered by sections 42(3), 55(2) and 92 of the Constitution, all of which are discussed in full in Chapter 5 below. Holding the executive to account in this way entails the exercise of a public power in the broader sense, and is subject to legality review.

On the other hand, the performance of a public duty in the general sense, may not directly be linked to the fulfilment of a particular constitutional obligation. It may be that, for instance, when one takes a decision, which may or may not be administrative in nature, the particular functionary must generally meet the requirements of lawfulness. In the end, the court held that the President's failure to comply with the remedial action taken against him is inconsistent with his obligations to uphold, defend and respect the Constitution³⁶² as the supreme law of the Republic.³⁶³ Similarly, the court found that the National Assembly failed in its duty to hold the President accountable by ensuring that he complies with the remedial steps imposed on him by the Public Protector.³⁶⁴ According to the court, this is inconsistent with the obligation imposed on the National Assembly by the Constitution to scrutinise and oversee executive action.³⁶⁵

³⁶⁰ At para 94.

³⁶¹ As above.

³⁶² Section 83(b) of the Constitution of the Republic of South Africa, 1996.

³⁶³ *EFF* case *ibid* at par 103; the court further refers to the President's obligation to assist the Public Protector and protect the office in order to ensure its independence, impartiality, dignity and effectiveness.

³⁶⁴ *EFF* case at par 104.

³⁶⁵ Section 55(2) (a) and (b) of the Constitution.

4.7 CONCLUSION

It is without doubt that the controversies which have arisen in the past with regard to the Public Protector have indeed provided room for debate on the role played by institutions other than courts of law in the country's constitutional democracy. It is because of this fact that Chapter 9 institutions must be taken heed of by those wielding political power. The *EFF* ruling has a much broader implication for the powers of other Chapter 9 institutions.

The *EFF* judgment is by no means a panacea on the legal effect of recommendations made by the Public Protector. However, it goes without saying that, it provides a solid foundation for any debate or forum related to the Public Protector. The judgment is to be welcomed as it put to bed the legal uncertainty that had prevailed, relating to the Public Protector. The Constitutional Court in this judgment has provided guidance on important aspects related to the Public Protector. It however falls to the relevant stakeholders to ensure that future remedial actions taken by the Public Protector are complied with. As the following chapter shows, there are matters which are still unclear regarding the extent of the Public Protector's recommendations.

The *EFF* judgment confirmed the approach followed by the Supreme Court of Appeal in the *SABC* matter,³⁶⁶ that the remedial actions of the Public Protector are legally binding. This finding is in contrast to the stance adopted by the Western Cape High Court in the *SABC* matter, that Public Protector's remedial actions are not legally binding. The decision of the court in the *EFF* judgment consequently means that, should any party find themselves being implicated in wrongdoing by the Public Protector, any remedial actions taken by the Public Protector against them should as a matter of law result in compliance.

The *EFF* judgment also confirms a long standing principle of law that, judicial review is still open to those who may feel aggrieved by findings made against them by the Public Protector. As South Africa is a constitutional democracy, that is the preferable route to take by those who wish to challenge any legal processes that make adverse findings against them. This is also in line with the rule of law.

³⁶⁶ As above.

CHAPTER 5

ISSUES WHICH REMAIN UNCLEAR AFTER THE DECISION OF THE CONSTITUTIONAL COURT IN THE *EFF* JUDGMENT

5.1 INTRODUCTION

In this chapter I critically examine issues that remain unclear even after the *EFF* judgment. Despite the fact that in the *EFF* judgment the court has made a pronouncement as to the binding nature of the remedial actions imposed by Public Protector post an investigation, some subsequent investigations arose with other legal uncertainties. Some of these reports produced as a result of such investigations are currently the subject of judicial review. This chapter is relevant in exploring issues which remain unclear, now that the Constitutional Court has clarified the question of the legal effect of remedial actions taken by the Public Protector. In light of the issues discussed in this chapter, relevant stakeholders should have an idea as to how implementing future remedial actions by the Public Protector should be undertaken.

Now that we have a hindsight of the *EFF* judgment, there are still pertinent questions that need to be answered, as already mentioned above. Following the *EFF* case, there are two reports that the office has recently produced, the remedial actions of which have caused some controversy. In this chapter, I discuss the practical implications of the *EFF* judgment in light of current matters. I also compare and contrast the remedial actions taken in the two reports, and the basis on which they have been criticised. I mention the views of various authors, on the matters raised, what the law says and lastly, I engage in a critique of some of the views as put forward by the authors as well as, among others, politicians and legal practitioners alike. This includes an assessment of the current on-going judicial review application relating to the so-called State of Capture Report.³⁶⁷ The point of departure in this chapter is that, though the Constitutional Court prior the *EFF* judgment held that the National Assembly failed in its duty to hold the executive accountable, it did not state definitive ways in which it would go about in specific terms fulfilling that constitutional mandate. However

³⁶⁷ To be discussed fully in below.

the Constitutional Court had an opportunity to clarify definitively on how the National Assembly could hold the President accountable. In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*,³⁶⁸ the court, (per Zondo J) though quick on the need to observe the separation of powers, directed the National Assembly to formulate rules relating to impeachment.³⁶⁹ The court has thus given guidance on what constitutes practical steps for the National assembly to hold the President accountable.

The question that now arises at this point is just how far can various organs of State go in achieving a balance between the need to observe the functional independence of one branch of government on the one hand, and making use of checks and balances on the other, in order to hold it accountable? This and other questions, is what the chapter aims to look into.

I firstly start by discussing in general, the pertinent legal issues that remain unclear after the *EFF* judgment. I then discuss the historical facts of the two contentious reports released by the Public Protector after the *EFF* judgment as well as concomitant remedial action. the remedial action. It is at this stage that a juxtaposition of the two is carried out. An examination of the views of various authors regarding the issues which are not clear, the relevant legal principles and their application to the current matters is also carried out. The relevant principles are also discussed with a brief reference to preceding case law as well as previous reports by the Public Protector. I also assess the State of Capture judicial review application. I then conclude the chapter.

5.2 ISSUES WHICH REMAIN UNCLEAR AFTER THE EFF JUDGMENT

The following is an outline of the relevant issues, which after the decision of the court in the *EFF* case still remain unclear:

³⁶⁸ [2017] ZACC 47.

³⁶⁹ See *par 8* of the order, where the court held that: - “the failure by the National Assembly to make rules regarding the removal of a President in terms of section 89(1) of the Constitution constitutes a violation of this section and is invalid”. Mogoeng CJ, in a dissenting judgment, at *par 224*, held that: - “it is at odds with the dictates of separation of powers and context-sensitive realities to prescribe to the National Assembly always to hold an inquiry, and to never rely only on readily available documented or recorded evidential material, to determine the existence of a ground of impeachment”. He further adds that: - “It is even more so when the consequential order then directs the Assembly to make rules that would effectively regulate the process as so prescribed”.

- In view of the *EFF* judgment, should the Public Protector take remedial action against the President, compliance will generally be required from him as the implicated party.³⁷⁰ However, in the State of Capture Report, when one takes account of the direction issued by the Public Protector, the matter is not that clear, as the direction effectively takes away some of the President’s constitutional powers.³⁷¹ The issue then becomes whether in this instance the President is entitled to withhold compliance, in spite of the binding nature of the Public Protector’s findings?³⁷²
- The court in the *EFF* judgment discussed the issue of separation of powers.³⁷³ In view of such separation, it is not clear as to what empowers the Chief Justice to nominate a judge for purposes of a judicial commission of enquiry, in accordance with the remedial action in the State of Capture report.

³⁷⁰ *Above*.

³⁷¹ State of Capture: Report No 6 OF 2016/17. The power of the President in terms of Section 84 (2) of the Constitution to fully exercise his powers regarding the appointment of a commission of enquiry is taken away by the recommendation that he should appoint a commission of enquiry but that the power to nominate the judge who will be chairing the commission should be the responsibility of the Chief Justice of the Constitutional Court.

³⁷² This is crucial when one looks at the ruling by the court in the *EFF* case that the President failed to uphold, defend and respect the Constitution as required by Section 83 respectively (an obligation expressly imposed upon him) (para 33: Section 83(b) of the Constitution imposes an obligation on the President to uphold, defend and respect the Constitution). This is therefore pertinent as it highlights the fact that the obligations imposed on the President as well as the prerogatives, which enable him to exercise certain powers are primarily sourced from the Constitution. There is therefore a balance that needs to be carried out in as far as the President’s power to nominate a judge for the purpose of a judicial commission of enquiry on the one hand, and complying with the directive as issued by the Office of the Public Protector to grant that power to the Chief Justice on the other, is concerned. One must keep in mind the fact that the President is in this instance directly involved in the matter, which raises the question whether if indeed he is allowed by the court to nominate the judge as directed, does it not amount to him directly participating in the adjudication of his own matter?

³⁷³ *EFF* paras 89-89. In relation to the doctrine of separation of powers, see further; Mojapelo DJP (Deputy Judge President of the South Gauteng High Court) “The Doctrine of Separation of Powers” (A South African perspective); Paper delivered at the Middle Temple South Africa Conference, September 2012. He opines, in reference to the case of *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) at page 298: that the Constitutional Court, as per Langa CJ, has held that separation of powers is part of the South African constitutional design. He further states that Chapters 4-8 of the Constitution states in express terms that, there is clear separation of powers between the three spheres of government. However, it is also important to note the difference between spheres of government as well as branches of government. The Public Protector’s competence to make remedial action is to be determined in accordance with separation of powers principle primarily related to branches of government.

- One of the controversies that has plagued the Public Protector is the police lease scandal,³⁷⁴ involving former Police Commissioner Bheki Cele.³⁷⁵ Before the ruling by the Constitutional Court in the *EFF* judgment,³⁷⁶ it would seem that the Public Protector depended on the willingness of other organs of state to give practical effect to its recommendations in order to ensure that they are complied with.³⁷⁷ It is unclear whether the binding nature of the Public Protector's powers and functions compels only those directly implicated in investigations or also those mandated in terms of the Constitution to assist other organs of state, in accordance with the principle of co-operative governance.
- When can it be said that the Public Protector has acted *ultra vires*?³⁷⁸
- Following the release of the Public Protector report into allegations of maladministration at the South African Broadcasting Corporation (SABC),³⁸⁰ the court remarks in the *Democratic Alliance v the South African Broadcasting Corporation SOC Ltd and Others; Democratic Alliance v Motsoeneng and Others*³⁸¹ that the future setting aside of the Public Protector's report would not retrospectively legitimise or render rational decisions taken by the SABC at a time when the report was binding on it.³⁸² The SABC was legally required to "respect" such determinations. It is not clear

³⁷⁴ Report of the Public Protector in terms of Section 182(1) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act 23, 1994 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 police accommodation in Pretoria; a report titled Against the Rules, Report No 33 of 2010/2011.

³⁷⁵ Note 103 above.

³⁷⁶ Note 3 above.

³⁷⁷ K Govender "Appraising the constitutional commitments to accountable, responsive and open governance and to freeing the potential of all- A Tribute to Dr Beyers Naude" Lecture in honour of Dr Beyers Naude, at page 14 (Published in www.prof-karthy-govender.co.za: Delivered by Professor Karthy Govender, Professor at Law, UKZN at the University of Johannesburg on the 12th of May 2011). Govender states that the Public Protector cannot make binding findings and order that lease agreement be set aside. In addition, he opines that other organs of state now have to take up the cudgels (at page 15). Even after the decision in *EFF*, this is still the case, as seen in the parliamentary proceedings against the SABC board following the latter's failure to comply with the remedial actions by the Public Protector into irregularities at the entity.

³⁷⁸ See in also in relation to this the report by Public Protector titled: "Report of the Public Protector In terms of Section 182 (1)(b) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act 23 of 1994: Report No 8 of 2017/2018: Alleged Failure to Recover Misappropriated Funds".

³⁸⁰ When Governance and Ethics Fail: Report No 23 of 2013/2014: "Report on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)".

³⁸¹ [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC).

³⁸² At para 92: In reference to the fact that the SABC was required to respect the Public Protector's report until it is set aside.

what “respect” means in this regard. Does it mean in theory accepting the legal consequences of the Public Protector’s report? Or does it mean practically complying with the remedial actions as directed by the Public Protector from the immediate time the report is released? What would then be the effect of compliance in the event that the report is set aside by the court at a later stage? This becomes transparent from some of the arguments raised in the judicial review application related to the State of Capture Report, whereby one of the parties involved in the matter (the Democratic Alliance) have raised the argument that the President is in the meantime legally obliged to comply with the Public Protector’s remedial action as he did not apply for a stay of execution in order to suspend implementation of the Public Protector’s remedial action.³⁸³

5.3 THE PRACTICAL IMPLICATIONS OF THE *EFF* JUDGMENT

In this section I discuss the two reports which have since been released by the Public Protector, since the *EFF* judgment. There are of course many other reports that the institution has released, but these two merit discussion as the remedial actions imposed by the Public Protector resulted in controversy, despite the fact that the highest court in the land has already pronounced on the binding nature of the Public Protector’s remedial actions. The contention is that, in imposing remedial action in the two reports,³⁸⁴ the Public Protector as an institution exceeded the limits of the authority imposed on it by the Constitution.³⁸⁵ The aim of the discussion at hand is therefore to assess the legal issues raised critically, and to evaluate whether they have any basis in law.

³⁸³ The Northern Gauteng High Court dismissed the Democratic Alliance’s application to compel the President to comply with the Public Protector’s remedial action to set up a judicial commission of enquiry, and granted him a stay of execution. The court among others, reasoned that it would not be the interest of justice to compel compliance from the President at this stage. (See note 471 below). Article published in www.news24.com, 29th September 2017.

³⁸⁴ See notes 347 and 354 regarding the two reports by the Public Protector.

³⁸⁵ As above.

5.4 SEPARATION OF POWERS: HAS THE PUBLIC PROTECTOR ACTED BEYOND THE SCOPE OF ITS POWERS?

In this section, I discuss the legal principles pertaining to when it can be said that the Public Protector has usurped its authority. The recent reports released by the Public Protector relating to the so-called State Capture Report³⁸⁶ and the CIEX Report³⁸⁷ are examined, to assess the legality of the remedial actions taken in the two reports.

5.5 THE STATE OF CAPTURE REPORT

The circumstances that led to the eventual release of the report are as follows:

- the report investigated, among others, alleged breaches of the Executive Members' Ethics Act³⁸⁸ and the awarding of certain contracts to various organs of state to Gupta family linked companies, detailing alleged violations of certain laws of the Republic of South Africa;³⁸⁹
- the laws alleged to have been breached by among others, the President and members of the Gupta family include the Income Tax Act,³⁹⁰ National Environmental Management Act,³⁹¹ the Public Finance Management Act (PFMA)³⁹² and the Prevention and Combating of Corrupt Activities Act;³⁹³
- the report found, *inter alia*, that President Jacob Zuma breached the Executive Ethics Code³⁹⁴ through his links to the members of the Gupta family. This is due to the fact that the relationship between him and the family created the likelihood of a potential conflict of interest between his official responsibilities and private interests;³⁹⁵

³⁸⁶ As above.

³⁸⁷ As above.

³⁸⁸ As above.

³⁸⁹ P Dube "State Capture Report Highlights Gaping Hole in Political Leadership-CFCR" Article published in www.politicsweb.co.za (3 November 2016): "Statement on the State Capture Report".

³⁹⁰ 58 of 1962.

³⁹¹ 107 of 1998.

³⁹² 1 of 1999.

³⁹³ 12 of 2004.

³⁹⁴ As above.

³⁹⁵ As above.

- One of the Cabinet Ministers, Mr Mosebenzi Zwane, was also found to have breached certain provisions of the PFMA.³⁹⁶ His colleague, Minister Des Van Rooyen, was found to have had an improper relationship with the Gupta family in that, through his cell phone records, he was placed at their residence the night before Former Minister of Finance, Mr Nhlanhla Nene, was dismissed on unconvincing grounds;³⁹⁷ and
- another cabinet minister, Ms Lynne Brown was found to have appointed the Eskom Board that eventually approved certain transactions favouring the Gupta family. The findings were that the Minister was blameworthy in that she failed to hold the parastatals accountable, in line with the constitutional obligations expected of her as a cabinet minister.³⁹⁸

Following the release of its report into alleged state capture,³⁹⁹ the Public Protector then took remedial steps accordingly. The following recommendations were made:

- the President must appoint a commission of inquiry within thirty days, headed by a judge solely selected by the Chief Justice who shall provide one name to the President;
- the National Treasury must ensure that the Commission is adequately resourced;
- the judge must be given the power to appoint his or her own staff and to investigate all the issues using the record of this investigation and the report as a starting point;
- the commission of inquiry must be given powers of evidence collection that are no less than that of the Public Protector;
- the commission of inquiry must complete its task and to present the report with findings and recommendations to the President within one hundred and eighty days (180) days; the President shall submit a copy with an indication of his or her intention regarding the implementations to Parliament within fourteen (14) days of releasing the report;
- Parliament to review, within 180 days, the Executive Members' Ethics Act⁴⁰⁰ to provide better guidance regarding integrity, including avoidance and management of conflict of interest. This should clearly define responsibilities of those in authority regarding a proper

³⁹⁶ As above.

³⁹⁷ As above: One of the allegations levelled against members of the Gupta family was that they had an unwarranted influence over the appointment and dismissal of Cabinet Ministers through the links they had with the current President Jacob Zuma.

³⁹⁸ As above.

³⁹⁹ As above.

⁴⁰⁰ As above.

response to whistle blowing and whistle blowers. Consideration should also be given to a transversal code of conduct for all employees of the State;

- The President to ensure that the Executive Code of Ethics⁴⁰¹ is updated in line with the review of the Executive Members' Ethics Act;⁴⁰²
- The Public Protector, in terms of section 6(4)(c)(i) of the Public Protector Act,⁴⁰³ brings to the notice of the National Prosecuting Authority (NPA) and the Directorate for Priority Crimes Investigation (DPCI), those matters identified in this report where it appears crimes have been committed;

MONITORING:

- The Public Protector will monitor the implementation of the remedial action;
- The Secretary of Parliament and the Director-General in the Presidency are to provide periodic implementation reports to the Public Protector.

Regarding the binding nature or otherwise of the remedial action in the report, the legal question as to whether there is continuous flouting of the authority of the office remains.⁴⁰⁴ There is legal uncertainty on the remedial action⁴⁰⁶ directing the President to set up a judicial commission of inquiry to further probe the issues identified by the Public Protector. The main legal question is whether the Public Protector can take away the power of the President to nominate a judge in terms of section 84(2) of the Constitution,⁴⁰⁷ a power which in law is only available to the President.

Following an application by the President to the North Gauteng High Court to set aside the Public Protector's remedial action, the matter has since been taken on appeal. In the case of *President of the Republic of South Africa v Office of the Public Protector and Others*,⁴⁰⁸ the court was asked by the Applicants to set aside the above remedial action, relating to the nomination of a judge for purposes of a judicial commission of inquiry. In this case, the court referred to the provisions of section 84(2)(f) of the Constitution, which confers upon the

⁴⁰¹ As above.

⁴⁰² As above.

⁴⁰³ As above.

⁴⁰⁴ See note 359 above where the question arises as to whether the President should have in the meantime applied for a stay of execution: Dube above raises the point that, "as was made apparent in the EFF case, the Report may still be taken on review, but until a court arrives at a different conclusion from that of the report, then its contents and remedial actions will stand".

⁴⁰⁶ As above.

⁴⁰⁷ As above.

⁴⁰⁸ [2017] ZAGPPHC 747 (13 December 2017).

President the power to appoint a commission of inquiry. The court stated that, the primary issue in the matter was whether the President’s constitutional power can be limited by remedial action taken by the Public Protector.

The court,⁴⁰⁹ referred to the case of *President of the Republic of South Africa v South African Rugby Football Union and Others*.⁴¹⁰ In this case,⁴¹¹ the Constitutional Court observed as follows:-

“The constraints upon the President when exercising powers under section 84(2) are clear: the exercise of the powers does not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.”

The court, similar to other cases dealing with the powers of the Public Protector,⁴¹² also discussed the constitutional and legislative provisions regulating Public Protector.⁴¹³ It held that:-⁴¹⁴ *“that the President does not enjoy untrammelled powers is to be inferred from the wording of section 84 of the Constitution”*. The President’s application was then dismissed as the Public Protector’s remedial action in the State of Capture Report was found to be legally binding.

What follows is another report of the Public Protector released in 2017, regarding alleged misappropriation of funds by the parties named therein,⁴¹⁵ (otherwise known as the ‘CIEX report’).

5.6 THE CIEX REPORT: ALLEGATIONS OF MISAPPROPRIATION OF FUNDS (APARTHEID ERA BAILOUT BY THE SOUTH AFRICAN RESERVE BANK AND ALLEGED FAILURE TO RECOVER SUCH FUNDS)

⁴⁰⁹ At par 65.

⁴¹⁰ 2000 (1) SA CC.

⁴¹¹ At par 148.

⁴¹² As above.

⁴¹³ At par 72.

⁴¹⁴ At par 68.

⁴¹⁵ See note 354 above.

The causes of complaint, which gave rise to the report are to the effect that, from 1985 to 1995, the then apartheid government, through the South African Reserve Bank (SARB), assisted Bankorp with bailouts in order to enable the latter to offset certain loans that at the time posed a danger to the bank's survival.⁴¹⁶ A brief outline of the remedial actions imposed by the Public Protector, as contained in the report, in no particular order, suffices:

- the Public Protector found that ABSA Bank and its predecessor, Bankorp, allegedly benefited from what the report terms an illegal donation from the South African Reserve Bank to the value of R1.125 Billion, and then recommended that the Special Investigation Unit (SIU) assist in the recovery of the funds;
- the government, twenty years ago allegedly contracted a United Kingdom based asset recovery agency, CIEX, to recover public funds and assets allegedly misappropriated during the apartheid era;⁴¹⁷
- the Public Protector found that failure by government to recover the said funds from ABSA,⁴¹⁸ was inconsistent with constitutional obligations imposed on it by virtue of section 195 of the Constitution;⁴¹⁹
- the Public Protector also referred the report to the Special Investigating Unit (SIU), in terms of section 6(4)(c)(ii) of the Public Protector Act,⁴²⁰ to take steps in accordance with applicable legislation to recover the amounts alleged to have been unlawfully expropriated;⁴²¹ The direction was also to the effect that the South African Reserve Bank was to assist the SIU in carrying out the mandate as required by the Public Protector;⁴²² and
- lastly, the Portfolio Committee on Justice and Correctional Services was directed to initiate a process that would result in the amendment of section 224 of the Constitution,⁴²³ which makes provision for the constitutional mandate of the SARB.

⁴¹⁶ Article published in www.citizen.co.za (19 June 2017): "Mkhwebane finds ABSA Should Pay Back the Money": By unnamed Citizen Reporter and ANA: Abstract reads as: "The Public Protector has recommended the Special Investigating Unit should recover public funds from the apartheid era".

⁴¹⁷ As above.

⁴¹⁸ As above.

⁴¹⁹ As above: The obligation which requires high professional ethics from public administration.

⁴²⁰ As above.

⁴²¹ Pro Bono Matters: www.probonomatters.co.za; "The Public Protector in Her Own Words on the Bankorp/ABSA matter", 19 June 2017.

⁴²² As above.

⁴²³ As above.

Regarding the CIEX Report, I will mainly focus on, as it has broader legal implications for the principle of separation of powers, the remedial action. The common thread that cuts across both the two reports seems to be the contention that the institution in its entirety acted beyond the scope of its powers permitted by the Constitution⁴²⁴ as well as in legislation.⁴²⁵ What follows is a discussion on what the doctrine of separation of powers entails in South African constitutional law context and its application to the issues raised as per the remedial actions imposed in the two respective reports.

5.3 CRITIQUES AGAINST THE REMEDIAL ACTION TAKEN BY THE PUBLIC PROTECTOR IN THE STATE OF CAPTURE REPORT AND THE CIEX REPORT

DEFINITION OF THE DOCTRINE OF SEPARATION OF POWERS

The principle of separation of powers essentially means that specific functions, duties and responsibilities are given to specific institutions with a defined means of competence and jurisdiction.⁴²⁶ The three main branches of government that is the legislature, the executive and the judiciary each perform certain specific constitutionally mandated tasks.⁴²⁷ Mojapelo D.J.P,⁴²⁸ briefly describes the functions as follows;

- the legislative authority which: refers to the power to make, amend and repeal rules of law;
- the executive authority: which is the power to execute and enforce rules of law and;
- the judicial authority which: refers to the power to determine what the law is and how it should be applied in the event of a dispute.

It is highly pertinent that as a first step towards the ideal of the separation of powers, the Constitution should clearly entrench such separation so that clear and definite lines of authority are demarcated in the constitutional dispensation.⁴²⁹ The principle of separation of

⁴²⁴ As above.

⁴²⁵ As above.

⁴²⁶ PM Mojapelo (Deputy Judge President of the South Gauteng High Court) “*The Doctrine of Separation of Powers (A South African Perspective)*” *The Advocate* April 2013.

⁴²⁷ As above.

⁴²⁸ As above.

⁴²⁹ P Olivier P “Constitutionalism and the New South African Constitution” in B De Villiers (ed) *Birth of a Constitution* (Ed) (1994) at 59.

powers also has as a corollary, been known as that of checks and balances.⁴³⁰ The latter simply refers to the fact that each government institution is vested with the power to exercise control over the other, so that abuse of powers or unreasonable conduct can be curbed.⁴³¹ It is generally accepted within the constitutional framework in South Africa that a complete separation of powers is not possible.⁴³² Generally, the doctrine is discussed with reference to three main branches of government.⁴³³

Seedat⁴³⁴ also refers to the tension that arises from time to time whenever one branch of government is seen as encroaching upon the jurisdiction of another.⁴³⁵ The author is of the view that such a tension is permissible and warranted, for as long as it results in a constitutionally compliant and healthier state.⁴³⁶

There are various constitutional provisions that give practical effect to the principle of separation of powers.⁴³⁷ The general provisions contained in the Constitution, which have broader implications for separation of powers, should be read in conjunction with other pieces of legislation. Therefore, this means that the context in which it is applied may vary from case to case, depending upon the peculiarity of each case. The need to observe the independence of other institutions by different branches of government, is important in order

⁴³⁰ As above.

⁴³¹ Seedat (note 402 below) at 59.

⁴³² Seedat S: "The South African Parliament in 2015": Edited by Lawson Naidoo: A paper commissioned by the Council for the Advancement of the South African Constitution (CASAC): May 2015; The author here is of the view that, this is due to the complex functioning of modern democracies and also as a result of the fact that, from time to time, the respective branches of government will often be called upon to examine the conduct of the other branches (at page 5). Paper published in www.casac.org.za.

⁴³³ As above.

⁴³⁴ Note 402 above.

⁴³⁵ Note 402 above, at page 6.

⁴³⁶ As above.

⁴³⁷ See Constitutional Principle 5 of the Interim Constitution which stated inter alia that: "There shall be separation of powers between the legislature, the executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness": The Constitution of the Republic of South Africa, 1996, gave effect to this principle (see note 402 above). Furthermore, the principle of constitutional supremacy builds upon principles relevant to the country's democracy and several constitutional provisions protect such supremacy. Section 2 of the Constitution states inter alia that; "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid; obligations imposed by it must be fulfilled". Other constitutional provisions which are of relevance in as far as separation of powers is concerned include but are not limited to section 83, 92(3), 165 (2) dealing with the independence of the courts as well as legal provisions contained in Chapter 9 of the Constitution, which expresses the importance of the need to observe the independence of such institutions: As above. Also see *First Certification* case discussed above.

to ensure effectiveness of governance within the broader constitutional framework of the country.⁴³⁸

As a consequence of the practical application of separation of powers, the principle of legality becomes important. It is important that, in carrying out their constitutional mandate, institutions such as that of the Public Protector, must not exceed the permissible legal limits which the Constitution has prescribed for them. The principle of legality has been discussed in cases such as *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*,⁴³⁹ where it was held that public officials should not perform functions beyond that conferred upon them by law.

There are other constitutional principles that apply as a natural consequence of the separation of powers. These include the notion of judicial deference. Constitutional Court cases such as that of *Bato Star Fishing v Minister of Environmental Affairs*,⁴⁴⁰ provides some guidance on what the principle of entails. The Court states, as per O'Regan J, that;

“Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function.... The use of the word “deference” may give rise to misunderstanding as to the true function of a review court. This can be avoided it is realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental principle of separation of powers itself”.⁴⁴¹

O'Regan J adopted a two-stage enquiry for determining the extent to which judicial deference may apply in a given case.⁴⁴² They are briefly as follows:

- the importance of recognition of the proper role of the executive and legislature within the Constitution (the requirement of democratic principle).⁴⁴³ According to the description thereof, the decisions of these arms of state ought to be respected in so far they are clothed with democratic legitimacy; and

⁴³⁸ Jenkins R above states among others the fact that, how different organs of State within a country's democracy functions will inevitably affect the other.

⁴³⁹ 1999 (1) SA 374 (CC); at par 56.

⁴⁴⁰ 2004 (4) SA 490 (CC) at par 45.

⁴⁴¹ See quote as cited by L Kohn. “The Burgeoning Requirement of Rationality and the Separation of Powers: Has Rationality Gone Too Far?” (2013) 130 *SALJ* 823.

⁴⁴² As above.

⁴⁴³ As above.

- comparative institutional competence, otherwise known as the polycentricity concern. This refers to the fact that a court should not allocate to itself superior wisdom entrusted to other branches of the State.⁴⁴⁴ Hlophe J, echoes sentiments to the effect that, “a court cannot be a jack of all trades”.⁴⁴⁵

Even though the court in this case was referring to the process of judicial review, it is important to note that the legal principles as elucidated by the court apply across the board, in any situation involving the need for state institutions to respect each other’s jurisdiction. This equally applies to the office of the Public Protector in that, as a state institution, it should be cognisant of the need to respect the jurisdiction afforded to other state institutions, during the process of taking remedial action. In any investigative conduct undertaken by the office of the Public Protector, the underlying principle is that, its conduct is constrained by among others, principles such as that of legality and rationality.

I wish to point out that the legal principles discussed above have to do with separation of powers in the general sense. As the executive and other organs of state assume more power due to various factors, new and innovative ways may be required which may necessitate the need to curb excessive use of public power. In the section that follows I take a look at the legal principles discussed above in the context of the binding nature of the Public Protector’s remedial actions.

5.4 THE LEGALITY OF THE PUBLIC PROTECTOR’S REMEDIAL ACTION IN THE STATE OF CAPTURE AND THE CIEX REPORTS.

Can the Public Protector take away some of the President’s powers to nominate a judge for the purposes of establishing a Commission of Inquiry in terms of section 84(2) of the Constitution? Generally, the Public Protector does not have the power to direct the way in which a commission of inquiry will be carried out by the President. In order to give a clear answer to this question, an examination of certain powers exercised by the President, and referred to as presidential prerogatives suffices. This simply means that, there are certain

⁴⁴⁴ As discussed in Kohn (note 410 above) at 824.

⁴⁴⁵ Hlophe J “Judicial Control of administrative action in a post-apartheid South Africa-Some Realities”: 1993 *Acta Juridica* 105.

powers available to the President in terms of the Constitution,⁴⁴⁶ which only the President has the power to exercise.⁴⁴⁷To expand on the above principle, there are powers which the President may exercise as head of the national executive authority and as head of state.⁴⁴⁸ As head of state, the President can perform certain functions without having to consult his or her cabinet. In this instance, the President has a measure of discretion. These powers include among others, the setting up of a judicial commission of inquiry. The President can bypass cabinet on certain matters.⁴⁴⁹As head of the national executive, the President exercises his powers in consultation with cabinet. The latter powers are exercised in terms of section 85 of the Constitution.

In *President of the Republic of South Africa v South African Rugby Football Union* (hereby the “SARFU case”),⁴⁵⁰ the Constitutional Court dealt with the legal considerations involved in any evaluation involving the powers of the President under section 84(2) of the Constitution;⁴⁵¹ They are as follows:

- 1) the President is responsible for exercising the powers under section 84(2) of the Constitution. He/she may seek advice, but is finally responsible for taking a decision;
- 2) an exercise of section 84(2) power does not constitute administrative action, but narrow constitutional responsibility;
- 3) powers exercised under section 84(2) are regulated by the Constitution through the separation of powers principle, the Bill of Rights, and through specific provisions of the Constitution.

As a general rule, where the exercise of discretionary powers such as Presidential prerogatives are concerned, the responsibility for the exercise of discretionary powers rest with the

⁴⁴⁶ As above.

⁴⁴⁷ Rautenbach and Malherbe: *Constitutional Law* (Fifth Edition) 2009: 54: They for instance state by way of example that, the President has the prerogative to appoint Cabinet Ministers.

⁴⁴⁸ Bekink (note 31 above) at 292 notes in this regard that, in terms of section 92(2) of the Constitution, the President is individually and collectively, with the other members of his Cabinet, accountable to Parliament for the exercise of all his or her powers and functions.

⁴⁴⁹ A. Butler *The State of the South African Presidency* (Journal of the Helen Suzman Foundation) Issue 71 (November 2013)

⁴⁵⁰ 2000 (1) SA 1 (CC) (“The SARFU case”).

⁴⁵¹ As above. See also Bekink (as above) at 294.

authorised body and no one else.⁴⁵² Unlawful dictation, or “taking directions”, may take place whereby a decision appears on the face of it to have been taken by the authorised administrator while in fact it was made at the dictation of an unauthorised administrator.⁴⁵³ The Public Protector has the constitutional mandate to issue take binding remedial actions as already discussed above.⁴⁵⁴ The language used in such directions as well as the nature of the remedial action taken in every case involved.

The nature of the President’s powers, especially in relation to section 84(2) of the Constitution, or the prerogative powers of the President, as the case may be, was also at issue in other cases. In South Africa’s transition phase to democracy, the Constitutional Court had an opportunity to rule on the legality of such powers in *President of the Republic of South Africa v Hugo*.⁴⁵⁵ In a separate but concurring judgment, Mokgoro J, as she then was, expanded upon the legal nature of prerogative powers in South African law,⁴⁵⁶ on the reasons as to why the judicial review application in that case should fail. She stated *inter alia*, that: “a Presidential Act is not conventional legislation in the ordinary sense of the word. The remaining question concerns its origin as executive rule making rather than as legislation”; there are numerous instances of delegated legislation drafted by the Executive, which legislation would undoubtedly be accepted as law. She also held that the difference between a Presidential Act and standard instances of executive rulemaking in the form of delegated legislation, is the absence of a parent statute in the former case. According to Mokgoro J, in standard cases of executive rule making therefore, at least the parent statute has undergone the rigours of the legislative process. That difference justifies different treatment for the Presidential Act, which represents an exercise of public power derived directly from the Constitution. The legitimacy which attaches to delegated legislation by reason of the parent statute must attach with equal force to rules representing a direct exercise of power granted by the Constitution. The Constitution after all, was a rigorously negotiated document. The

⁴⁵² Hoexter (note 129 above) at 273.

⁴⁵³ Hoexter (note 129 above) at 274. The author cites the case of *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C), where prison authorities were found to have taken directions from the security police in deciding to keep an emergency detainee in isolation.

⁴⁵⁴ Chapter 3 above.

⁴⁵⁵ 1997 (6) BCLR 708 (CC).

⁴⁵⁶ From par 89.

Presidential Act is an exercise of constitutional power in the form of general, publicly accessible rules which affect the rights of individuals.⁴⁵⁷

5.5 THE RULE AGAINST BIAS

The President in the State of Capture Report finds himself in a peculiar position, in that as head of state as well as of the national executive, he is directly implicated. He is personally (in his official capacity) responsible for putting mechanisms in place in order to kick-start the commission of inquiry as directed by the Public Protector. Many other legal considerations should be taken into account in any evaluation of the remedial action of the kind found in the State of Capture Report.⁴⁵⁸ When one takes into account the administrative law principles of natural justice, it becomes evident that the rules pertaining to the exercise of prerogative powers are not as clear as one may assume, and may thus lead to complexities in their practical application. In this respect one should not lose sight of the rules of natural justice. The principles of natural justice include

Being given a reasonable opportunity to be heard (the “fair hearing” rule); and

Having a decision made by a decision-maker who is free from actual bias or the appearance of bias (the “bias” rule).⁴⁵⁹

For the purpose of this discussion, I shall limit myself to the latter. However, it is important to first note the fact that the rule against bias finds application in all types of decisions.⁴⁶⁰ On a proper examination of the peculiarity of the situation the President finds himself in the State of Capture Report, it becomes quite apparent that the rule against bias finds application in

⁴⁵⁷ In this case, the then President of the Republic of South Africa, Nelson Mandela, had taken a decision to pardon women prisoners in view of the fact that their children needed the nurturing role of those prisoners in their capacity as their mothers. The President, in making that decision, took into account the special roles that mothers play in society. An application was thus made to court on the basis that the particular Presidential Act unfairly discriminated against Fathers. In the end, the Constitutional Court dismissed the application by virtue of the fact that in as much as there was ex facie existence of discrimination, the discrimination was fair given the circumstances respectively.

⁴⁵⁸ Ibid.

⁴⁵⁹ Hoexter (above) at 451.

⁴⁶⁰ Hoexter (above) at 452, refers to the fact that in the pre-democratic era, there were many cases which an allegation of the possible existence of bias proved ineffective due to the courts’ insistence on labelling certain decisions as purely administrative. See the case of *Hack v Venterspost Municipality* 1950 (1) SA 172 (W). In *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC), the court clarified that the rule against bias applies to all types of decisions: See par 35.

this case. The Constitutional Court has also decided on matters that may border on principles relating to the rule against bias. The court refers to possible conflict of interest on the part of the President.⁴⁶¹ Applying this to the factual situation at hand, the President consequently finds himself in an apparent conflict of interest as already alluded to above.

Mureinik⁴⁶² also discussed the concept of bias, albeit in a different context. This is in reference to the common law approach used in the past to determine the possible existence of bias. Hoexter⁴⁶³ refers to the case of *City and Suburban Transport (Pty) Ltd v Local Board Road Transportation, Johannesburg*.⁴⁶⁴ The court in this case referred two possible tests to be used in order to determine the possible existence of bias. One required a “real likelihood of bias”, the other something less, a “reasonable suspicion”. However, following decades of uncertainty, courts opted for the less stringent approach of a reasonable apprehension of bias.⁴⁶⁵ It is also worth noting that, the Constitutional Court has opted to use the term: “apprehension” instead of “suspicion”, in explaining that there should be a “real apprehension of bias”.⁴⁶⁶

Also worth mentioning is the fact that there are different situations which may lead to the possible existence of bias. These range from financial interest, bias on the subject matter, as well as official or institutional bias. However, for our purposes, I shall limit the discussion to the fact that, concerning the State of Capture Report⁴⁶⁷, President Jacob Zuma has a personal

⁴⁶¹ At par 9, the court avers that: “On the one hand, the President has the duty to ensure that state resources are used only for the advancement of state interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference”. The court adds further that, “to find oneself on the wrong side of section 96, *all that needs to be proven is a risk*. It does not even have to materialise”. In view of the latter, it is also important to note the provisions of the latter (that is, section 96), which state that:”Section 96(2), in relevant part reads that:

“Members of the Cabinet and Deputy Ministers may not- (b) 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 and private interests; or

(b) Use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person”.

⁴⁶² E Mureinik “*Administrative Law*” 1992 *Annual Survey of South African Law* 730, s cited by Hoexter (note 129 above) at 453, refers to the nested or combined approach proposed by L Baxter *Administrative Law* (1984). Reference is also made by Hoexter at 453 to *S v Roberts* 1999 (4) SA 915 (SCA) where the court opted for the “real suspicion” test.

⁴⁶³ As above.

⁴⁶⁴ 1932 WLD 100.

⁴⁶⁵ See case of *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers’ Union* 1992 (3) SA 673 (A).

⁴⁶⁶ Hoexter above, at 453, states that, as per the court’s ruling in the *SARFU* case at para 38, the term apprehension is preferred as the use of the word ‘suspicion’ may lead to negative connotations.

⁴⁶⁷ As above.

interest in the matter. Not only is the President directly mentioned in the Report, but his own son, Mr Duduzane Zuma, is also placed at the centre of the issues identified in the report. The *SARFU* case also provides an example of the possible existence of appearance of bias, whereby allegations of bias were raised, based on friendships and professional relationships between certain judges and the appellants in the matter.⁴⁶⁸

5.6 SECTION 84(2) (F) OF THE CONSTITUTION: CAN THE PRESIDENT'S DISCRETION BE FETTERED IN THE EXERCISE OF THE POWERS THEREOF?

As already mentioned above, there are many issues, which have arisen because of the remedial action imposed by the Public Protector following the release of the State of Capture Report. This section discusses the question whether it is legally permissible for the Public Protector to take away the power of the President to nominate a judge for purposes of setting up a commission of inquiry in terms of section 84(2)(f) of the Constitution.

Except for a few cases, among them the *SARFU*⁴⁶⁹ and *Hugo*,⁴⁷⁰ there is not enough jurisprudence in South African law dealing with the exercise by the President of section 82(4) (f) powers, particularly in a case where the President is directly involved in his or her personal capacity. As a matter of fact, there has never been an instance where a potential conflict of interest has arisen regarding the exercise by the President of prerogative powers in South African law. The issues identified and discussed above regarding what is otherwise known as "state capture" therefore represent a new phenomenon.

Various legal opinions have been expressed regarding the legal implications of the remedial action taken by the Public Protector. The general theme centres on whether the remedial action will pass constitutional muster, now that the matter, after the judgment by the North Gauteng High Court, has been taken on appeal by the President. There is no legal certainty on the subject pending clarity by courts of law on the matter. However, what follows are the views as expressed by the relevant stakeholders, ranging from constitutional law scholars to those involved in civil society.

⁴⁶⁸ Hoexter as above.

⁴⁶⁹ As above.

⁴⁷⁰ As above.

De Vos,⁴⁷¹ alludes to the fact that, in the case of a commission of inquiry, it would normally be President Jacob Zuma who is constitutionally authorised to appoint it and who will further set the terms of reference. In addition, he points out the fact that the President has a direct interest in the matter and is therefore conflicted.

Reference is also made by De Vos to the ruling in the *SARFU* case, where the court, held that the President cannot lawfully exercise his powers under dictation from another person. He is further of the view that there is a possibility that the judicial review application by the President to have the Public Protector's remedial action set aside will be successful. There is however an important question which he raises, in the event that the judicial review application is successful. This relates to the question as to what happens if the court reviews and sets aside the remedial action ordering the President to appoint a commission of inquiry into state capture. Theoretically, according to De Vos, the President is in the strict sense of the word in a position to establish the commission of inquiry and further determine its terms of reference.

The resultant state of affairs is that is as De Vos puts it, any judge who is likely to be appointed following the President's successful application, in the event that he does succeed in his quest, would have to recuse him or herself. He provides two reasons for this eventuality, namely:

- (a) in the *SARFU* case, the court held *inter alia* that, "a judge who sits in a case in which he or she is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such judge might be biased, acts in a manner that is inconsistent with section 34 of the Constitution, and in breach of the requirements of section 165(2) and the prescribed oath of office".
- (b) In the case of *South African Personal Injury Lawyers v Heath and Others*,⁴⁷² the court held that it would be permissible for judges to head commissions of inquiries in appropriate circumstances. However, the court was quick to point out the fact that a judge should not accept appointment to a commission of inquiry if this may threaten the separation of powers. The court mentioned three guiding principles

⁴⁷¹ De Vos P: Why President should not appoint a commission of inquiry into State Capture? An opinion piece published in the Daily Maverick on the 27th September 2017.

⁴⁷² (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000).

which are briefly that, should a judge decide to accept being appointed to head a commission of inquiry, he or she should be wary of whether the performance of the function:

- (1) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law;
- (2) the risk of judicial entanglement in matters of political controversy; and
- (3) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.

It is worth noting that, as De Vos puts it, any judge who decides to accept being appointed to head the commission of inquiry, will most certainly enter the muddy waters of political controversy.⁴⁷³ This is due to the sensitivity of the issues involved in the matters discussed by the Public Protector in the State of Capture Report as well as all other allegations related to state capture that continue to suffice on a regular basis in the media.⁴⁷⁴

Complex as the matters discussed above by De Vos might be, the author points to a possible way out - a more lawfully permissible way that a commission of inquiry might be able to be established and thus in the end have a measure of credibility. Mention is made of section 90(1) of the Constitution.⁴⁷⁵ There is an argument to the effect that, as President Jacob Zuma is conflicted, he should step aside in order for the Deputy President, in this case Cyril Ramaphosa, to be the one to establish a commission of inquiry into state capture.

The argument put forward by De Vos in regard to section 90(1) of the Constitution⁴⁷⁶ resonate with the views of Advocate Paul Hoffman, who echoes exactly the same sentiments.⁴⁷⁷ Advocate Hoffman in this respect refers to among others, section 96⁴⁷⁸ of the Constitution, which deal with cases of conflict of interest by members of the cabinet. He states, *inter alia*,

⁴⁷³ My emphasis.

⁴⁷⁴ See www.timeslive.co.za (28 May 2017) “Here they are: the mails that prove the Guptas run South Africa”: In reference to allegations of email correspondence between various public officials and members of the Gupta family, where improper relationships are alleged to exist. This email correspondence points to what is seemingly amounts to wrongdoing and unlawfully allowing members of the Gupta family to influence appointments at state owned entities and in cabinet.

⁴⁷⁵ Section 90(1) of the Constitution states that; “when the President is absent from the Republic or otherwise unable to fulfil the duties of President, the Deputy President acts as President”.

⁴⁷⁶ As above.

⁴⁷⁷ Hoffman P. SC; in an opinion piece published in the Daily Maverick on the 26th September 2017 “A commission of inquiry into state capture: to be or not to be? An Editorial opinion”.

⁴⁷⁸ See note 446 above.

that: “the President is clearly unable to act to appoint the necessary, and desired, commission of inquiry due to his conflict of interest. The provisions of section 90⁴⁷⁹ of the Constitution⁴⁸⁰ empower the Deputy President to act in his place. This is an original power conferred by the Constitution itself and not by the President or anyone else for that matter”. He also states that: “the Deputy President is legally free to make his wish for a commission of inquiry come true by appointing a retired judge or judges to unravel the material in the State of Capture Report”.⁴⁸¹

Other authors are of the view that, public interest could outweigh the President’s prerogative⁴⁸² in terms of section 84(2) (f) of the Constitution.⁴⁸³ In addition, the question further remains whether it would be appropriate for the President to appoint a commission of inquiry on himself.⁴⁸⁴

It is noted that, when the Public Protector imposed the remedial action, it had the exercise of section 84(2) powers in mind; that only someone constitutionally authorised to do so can exercise such powers; and that the incumbent President is directly implicated in the matters as identified in the report. There is as yet no authoritative jurisprudence on any legal dispute that has arisen in the past in South African law, regarding the prerogative power to appoint a judge for purposes of a commission of inquiry, in instances where there is perceived conflict of interest. What follows is therefore a discussion of a similar case which was recently decided by the courts in the neighbouring country of Botswana, which also had to do with the exercise of prerogative powers by the President.

⁴⁷⁹ As above.

⁴⁸⁰ As above.

⁴⁸¹ As above.

⁴⁸² Dube. P “Did the State of Capture Report Usurp the President’s Powers?” Politics Web 4 November 2016.

⁴⁸³ As above.

⁴⁸⁴ Govender K. IOL News, 3rd November 2016. See further P De Vos “Review of State Capture Report: The Legal Issues: Constitutionally speaking” (Opinion piece in the Daily Maverick, 26th November 2016). He poses the question as to whether the special circumstances this case renders the fettering of the President’s powers constitutionally valid or not?

5.7 WHAT DOES “APPOINTMENT” ENTAIL IN THE CONTEXT OF SECTION 84(2)(F) OF THE CONSTITUTION?

In order to carry out an evaluation of the President’s prerogative powers under section 84(2) (f) of the Constitution, reference to relevant constitutional provisions is important. Section 84(1) of the Constitution states that, “the President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of head of state and head of the national executive”. Section 84(2)(e) of the Constitution further states that, “the President is responsible for making any appointments that the Constitution or legislation requires the President to make, other than as head of the National Executive”. Section 85(2)(e) of the Constitution states that, the President, exercises executive authority, together with other members of the Cabinet, by; “performing any other executive function provided for in the Constitution or in national legislation”. One other comparable constitutional provision is to be found in section 174(3) of the Constitution, dealing with the appointment of Chief Justice.⁴⁸⁵

I refer to these constitutional provisions in a general sense, bearing in mind that the President’s prerogative powers in the constitutional framework is settled law. It is, however, the implementation of such powers that has given rise to legal disputes. Of importance for purposes of the present discussion is the legal meaning of the term ‘appointment’ as in South African law. It is submitted that it is simply a case of the President trying to have full control of the entire process.

In the Botswana case of *Law Society of Botswana and Another v The President of Botswana and Others*,⁴⁸⁶ the Court of Appeal had to consider the nature and extent of the power conferred upon the President under section 96(2) (prerogative powers) of the Constitution of Botswana, in the process of appointment of a Judge of the High Court.⁴⁸⁷ In this case, legal

⁴⁸⁵ Section 174(3) of the Constitution of the Republic of South Africa, 1996, states that; “The President of the National Executive, after consulting the Judicial Service Commission, and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Chief Justice, and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal”.

⁴⁸⁶ Case No: CACGB-031-16(A Court of Appeal of the Republic of Botswana, being an Appeal from the High Court, Case No: MAHGB-000383-15).

⁴⁸⁷ As per Judge of Appeal’s Lesetedi at par 1. The learned Judge further states that the second leg of the enquiry was whether the courts have a power to prescribe to the Judicial Service Commission the manner and the way in which it should carry out its constitutional mandate more particularly whether the courts can prescribe to the

questions arose as to whether the President was legally entitled to reject a Judge of the High Court who had been recommended by the Judicial Service Commission. The respondents in the matter argued that, because the power of the President under section 96(2) of the Constitution is of a prerogative nature, it is a power of which the exercise thereof involves matters of high policy with which the court is not equipped to deal.

The principal argument put forward by the respondents centred on the fact that the President enjoys a measure of discretion to decline to appoint, as judges, persons who have been recommended by the Judicial Service Commission. The appellants on the other hand argued that the President's role in the appointment of judges is merely a formal one, and that the real appointment is carried out by the Judicial Service Commission.⁴⁸⁸ They described the President's role in the process as more of a ceremonial role. The Court of Appeal held that President Sir Seretse Khama Ian Khama was legally bound to follow the recommendations put forward by the Judicial Service Commission.

Going back to the issue of President Jacob Zuma's role in the establishment of a commission of inquiry as per the Public Protector's remedial action, it becomes important to compare and contrast the constitutional status of the Judicial Service Commission in Botswana, and that of the Public Protector in South Africa.⁴⁸⁹

The two institutions serve two similar mandates, in that the Public Protector is described as an institution that is there to assist in the strengthening of constitutional democracy. The Judicial Service Commission in Botswana also plays a major role in strengthening the country's

Judicial Service Commission that after conducting its interviews or applicants for judicial office it should make public the outcome of its deliberations on such applications.

⁴⁸⁸ In the case cited in note 462 above, the court also refers to the phrase "acting in accordance with", which was one of the constitutional provisions whose interpretations gave rise to dispute.

⁴⁸⁹ I here wish to pause and mention that, Botswana has an equivalent of a Public Protector, which is known as an Ombudsman. However, a comparison is made between Botswana's Judicial Service Commission, and South Africa's Public Protector, in view of the nature of the powers involved in relating with the two constitutional bodies, which gave rise to disputes. I critically examine the nature of the legal acts involved in the two cases, and not the nature of the institutions. This is also supported by South African administrative law, which is to the effect that, in order to determine whether a particular act amounts to administrative action, one must inquire not on the nature of the institution performing the act, but factors such as the source of the legal power involved. There is no reason why such a principle should not apply in this instance. I am of the view that it is legally permissible in South African law, that the constitutional mandate of the Special Investigation Unit (SIU), be compared with that of the Public Protector. In Botswana, there is the Ombudsman office, which is similar to the one that existed in South Africa prior to 1994. Comparing and contrasting it with the South Africa should be conducted cautiously, taking into account the views of those who previously withheld compliance from the Public Protector, as they viewed its role as that of an Ombudsman.

democracy, though its role is not to investigate alleged wrongdoing. Both the Constitutional Court in the *EFF* judgment, and Botswana's Court of Appeal, which is the highest court structure in Botswana, held that the Presidents were bound by the recommendations put forward by the institutions involved. In addition, the two cases both involved the exercise of prerogative powers. They are therefore comparable in the legal sense of the word, and better assist in the interpretation of how far the Public Protector can go in issues pertaining to the role played by the President as far as commissions of inquiry are concerned. The effect of the judgment by the court in Botswana is that it places the eventual appointment of a High Court Judge squarely in the hands of a constitutional body such as the Judicial Service Commission. In South Africa, in terms of section 174(3) of the Constitution, "*as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly; appoints the Chief Justice and the Deputy Chief Justice*". This shows that, in neither of the two countries is a prerogative power vested in the President, regarding the appointment of judges, unless it is a matter of setting up a judicial commission of inquiry.

However, it is important to note that one should not lose sight of the fact that, the permanency involved in being appointed to the High Court differs from being appointed to a commission of inquiry, which is more *ad hoc* in nature. The interpretational problems lie in the nature of the power exercised by the President to effect such appointments. In the case of a commission of inquiry, one would already have been a High Court Judge, while that is not the case in the case of being appointed to the Bench for the first time.

I therefore agree with the views put forward by Advocate Paul Hoffman that section 90 of the Constitution can provide a solution, as the person directed to exercise a prerogative power in this case would be doing so in their official capacity, meaning that, as President Jacob Zuma is clearly conflicted, the Deputy President can act in his place to establish the commission of enquiry. In other words, there would have been proper appointment in the legal sense.

5.8 PRACTICAL IMPLICATIONS OF THE EFF CASE IN LIGHT OF THE CIEX REPORT: THE LEGAL ISSUES

In the case of *South African Bank v Public Protector and Others*,⁴⁹⁰ the High Court set aside the Public Protector's remedial actions into what is now known as "the CIEX Report".⁴⁹¹ The Public Protector, by unlawfully dictating to Parliament to effect a change to the South African Reserve Bank's constitutional mandate, acted *ultra vires* and thus in breach of the principle of legality.

5.9 PRACTICAL IMPLICATIONS OF THE EFF CASE REGARDING THE SABC MATTER AND THE PUBLIC PROTECTOR'S REPORT INTO THE INSTITUTION

Following the release of the Public Protector report into allegations of maladministration at the South African Broadcasting Corporation (SABC),⁴⁹³ the court remarked in the *Democratic Alliance v the South African Broadcasting Corporation SOC Ltd and Others; Democratic Alliance v Motsoeneng and Others*,⁴⁹⁴ that the future setting aside of the Public Protector's report would not retrospectively legitimise or render rational decisions taken by the SABC at a time when the report was binding on it.⁴⁹⁵ The SABC was legally required to "respect" such determinations. It is not clear what "respect" means in this regard. Does it mean in theory accepting the legal consequences of the Public Protector's report? Or does it mean practically complying with the remedial actions as directed by the Public Protector from the immediate time the report is released? What would then be the effect of compliance in the event that the report is set aside by the court at a later stage?

In light of the binding nature of the Public Protector's recommendations, one can apply the latest ruling of the North Gauteng High Court regarding the questions raised above.⁴⁹⁶ The

⁴⁹⁰ (43769/17) [2017] ZAGPPHC 443; [2017] 4 All SA 269 (GP) (15 August 2017).

⁴⁹¹ See discussion above.

⁴⁹³ When Governance and Ethics Fail: Report No 23 of 2013/2014: "Report on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)".

⁴⁹⁴ [2017] 2 BLLR 153 (WCC); [2017] 1 All SA 530 (WCC).

⁴⁹⁵ At para 92: In reference to the fact that the SABC was required to respect the Public Protector's report until it is set aside.

⁴⁹⁶ See *Democratic Alliance v President of the Republic of South Africa and Another* ("The Public Protector") 21029/2017) ZAGPPHC 612 (29 September 2017).

applicants in the matter sought an order from the High Court seeking relief in the following terms:

- declaring that the remedial action taken by the Public Protector in paragraph 8.4 of the State of Capture Report⁴⁹⁷ against the President in terms of section 182(1) of the Constitution are binding unless and until paragraph 8.4 of the Report is set aside by court of law;
- directing the President to comply with the remedial action set out above within thirty (30) days of the date of the court order; and
- declaring that the President's failure to comply with the remedial action referred to above is inconsistent with Section 83(b) read with section 181(3) and 182(1)(c) of the Constitution and is invalid;

On the other hand, the President sought an order staying implementation of the remedial action as contained in the State of Capture Report.⁴⁹⁸ The issues to be decided by the court centred on the following;

whether the President's judicial review application to set aside the Public Protector's remedial action⁴⁹⁹ has the automatic effect of staying implementation of the remedial action; and

in the event that the court finds that the review application does not have the effect of automatically putting on hold or suspending implementation of the remedial action whether the President is entitled to the relief in the conditional counter application for a stay of the implementation of the remedial action pending the outcome of the review application.

The court in delivering judgment refers to the case of *City of Tshwane Metropolitan Municipality v Afriforum and Another*,⁵⁰⁰ where after multiple appeals, the Constitutional Court held that, in as far as an interdict is concerned, the interim interdict should not prevent it from carrying out its decision to effect name changes. Furthermore, in reference to the case

⁴⁹⁷ As above.

⁴⁹⁸ As above.

⁴⁹⁹ Case No 91139/16: Judgment will be delivered on the 17th December 2017.

⁵⁰⁰ 2016 (6) SA 279.

of *MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd*,⁵⁰¹ the court held that when administrator errs those decisions exist and have legal effect until set aside on review. The court raises the following important points;

that the review application raises important legal and constitutional issues and is a matter of great public interest on which it still has to pronounce itself and accordingly to “compel the President at this stage will not only be tantamount to denying him a hearing or his day in court but it may also be understood to mean that the Public Protector’s remedial actions are unassailable irrespective of the content of the decisions by the institution thereof”,⁵⁰² That, according to the court, cannot be correct;

the court further adds the following dictum; “I have kept in mind that in deciding this application it would be inappropriate for this court to express a view or usurp the functions of the review court. What is of prime importance is the considerable constitutional issues that have been raised one of which is an aspect of separation of powers”.⁵⁰³ and;

the court refers to the ruling of the court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,⁵⁰⁴ where it was held by the court that since the interdict had the effect of curtailing executive power to formulate and implement trade policy by causing irreparable harm, through maintaining anti-dumping duties which would otherwise have ended, leave to appeal had to be granted. The court in that case strongly resisted judicial intrusion into Executive domain.⁵⁰⁵

5.10 CONCLUSION

Most of the issues which have raised controversy regarding compliance with the Public Protector’s remedial actions centre largely around the belief held by those implicated that, in

⁵⁰¹ 2014 (3) SA 481 (CC).

⁵⁰² See par 36 of the judgment.

⁵⁰³ See par 40 of the judgment.

⁵⁰⁴ 2010 (5) BCLR 457 (11).

⁵⁰⁵ See para 41 of the judgment: The court further refers to the averment by the President where he is of the view that the Public Protector in taking the remedial action in par 8.4 of the State of Capture Report is intruding on his Executive domain.

taking the remedial action, the Public Protector exceeded the constitutional mandate accorded the institution in terms of the Constitution.⁵⁰⁶ I am of the view that the remedial action taken in the State of Capture Report can pass constitutional muster, taking into account the President's precarious position in the facts involved.

In assessing the matter, it is important that the courts of law bear in mind among others, the rule of law and whether it would be in the public interest to allow the President some say in ancillary matters relating to the establishment of the commission of inquiry into state capture. The courts should also evaluate the matter taking into account the aims and values of the Constitution, in view of the country's historical background. The Public Protector, as a Chapter 9 institution, has indeed been endowed with a very important task of holding those in power to account. It is therefore important that those implicated in wrongdoing should not use the courts to hamper the effectiveness of the institution in order to evade political accountability.

In view of the issues that remain unclear after the *EFF* judgment, the general prevailing theme is that, whenever the Public Protector takes remedial action against those implicated in wrongdoing, it will no longer be possible to simply ignore the recommendations thereof. The rule of law, dictates that the correct legal process be used, such as taking the Public Protector's recommendations on judicial review in order to ascertain their correctness.

⁵⁰⁶ As above.

CHAPTER SIX

CONCLUSION: FINDINGS

6.1 INTRODUCTION

In the preceding chapters, we have seen how the legal uncertainty surrounding the legal effect of the Public Protector's remedial action pursuant to the institution's investigations, has largely been shaped by political developments in the country.

Importantly, a discussion of the legal effect of the Public Protector's remedial actions reveals how certain pre-conceived ideas about how the office would fit into the country's constitutional framework resulted in a lack of compliance with its recommendations, thus affecting its effectiveness as a constitutional institution. In this chapter, I state broadly two aspects in conclusion, namely, an evaluation of the legal position before and after the *EFF* judgment. I will do that by referring to a summary of my findings based on a discussion pertaining to the previous chapters. I have already alluded to the fact that, previously, the following points of view prevailed regarding the legal effect of remedial actions imposed by the Office of the Public Protector: that the recommendations of the Public Protector are not legally binding, on the basis that; they are mere recommendations of which an organ of state may either accept or ignore;⁵⁰⁷ that the Public Protector has often been equated to an Ombudsman. One might also add the fact that in the past the Public Protector has incorrectly been equated to a court of law.

The factors highlighted above have in the past informed how those implicated in wrongdoing by the Public Protector, academics and their counterparts in various circles would react to remedial action imposed by the Public Protector. As I conclude my discussion on the legal effect of the recommendations both before and after the *EFF* judgment, I also propose a recommendation, now that other issues are still the subject of adjudication, specifically relating to President Jacob Zuma's judicial review application against the State of Capture Report.⁵⁰⁸

⁵⁰⁷ See chapter 3 above.

⁵⁰⁸ See Chapter 5 above at note 471.

6.1 A SUMMARY OF THE LEGAL POSITION AND ITS IMPLICATIONS FOR THE REMEDIAL POWERS OF THE PUBLIC PROTECTOR PRIOR TO THE *EFF* JUDGMENT: WHAT DOES THIS MEAN FOR THE INSTITUTION AS A WHOLE GOING FORWARD?

I have already alluded to the fact that, in the past, there was legal uncertainty regarding the legal effect of the remedial actions imposed by the Public Protector.

Chapter 2 highlights the powers of the Public Protector, right from the Constitution, down to the relevant legislation that governs the institution. Generally, there has not been much uncertainty on this aspect. Regarding the statutory powers of the Public Protector, it is worth mentioning that the office may not investigate court decisions. By implication, it may also not pronounce on decisions by a court of law.⁵⁰⁹

I will therefore confine myself to the issues discussed and identified in Chapter 3. The latter deals with the controversies prior to the *EFF* judgment.⁵¹⁰ Having discussed these controversies in detail, I now go on to summarize my stance briefly as to their legal implications for the Office of the Public Protector in this section.

The views of academics, and those who held the above-mentioned views⁵¹¹ on the subject of the binding nature of the remedial actions imposed by the Public Protector, do not hold water, in light of the *EFF* judgment. As already seen above,⁵¹² the above matters are therefore rendered invalid by that fact alone. However, the matter does not end there. The question that arises is, what all these represent for the functioning of the Office of the Public Protector currently and going forward. South Africa's constitutional democracy dictates that the recommendations of an institution such as that of the Public Protector be given due consideration. The *EFF* judgment has indeed given the institution the necessary impetus needed in order to exercise its constitutional mandate effectively to hold those in power accountable. The fact that there was a point of view to the effect that the recommendations of the Public Protector could be ignored depending upon the view the subject of the

⁵⁰⁹ See Chapter 2 above: I read here that, this is to prevent the institution from violating the principle of separation and thus usurping the courts' authority.

⁵¹⁰ See Chapter 3 above.

⁵¹¹ See Chapter 3 above at page on the various controversies that existed prior to the judgment in the *EFF* case.

⁵¹² See Chapters 4 and 5 above.

investigation takes upon them is at odds with the rule of law, and its attendant principle of legality.⁵¹³

A discussion of the various controversies and the legal principles thereof, and after the ruling by the Constitutional Court in the *EFF* case, makes clear that what has become the norm in the past is now settled law, that judicial review was and is the only way in which to set aside the findings and recommendations of the Public Protector.

Similarly, the Office of the Public Protector, as the court pointed out in the *EFF* judgment, cannot be equated to an Ombudsman. This is largely to the fact that South Africa, unlike other countries, is a constitutional democracy in which the principle of constitutional supremacy prevails.⁵¹⁴

Chapter 4 discusses in detail the judgment of the Constitutional Court in the *EFF* case. In a nutshell, the court, as previously stated, held that the recommendations of the Public Protector are legally binding.⁵¹⁵ The court however does not explain the two main points that are the subject of this discussion, namely: to what extent are they legally binding and; against whom are they legally binding? (clarity is needed as to how far the Public Protector's remedial actions can go in holding those implicated in wrong doing to account; the extent of the binding nature of the Public Protector's remedial actions may differ depending on the facts of each case).

Consequently, chapter 5 of this work is dedicated to answering these two points, by looking at the issues which remain unclear after the *EFF* judgment. The common theme is that, in the various reports issued by the Public Protector, in taking remedial action, the institution has exceeded the limits of the authority it has in terms of the Constitution.⁵¹⁶

In making these findings, I take into account the following two considerations;

in the State of Capture Report,⁵¹⁷ the Public Protector has directed the President to establish a commission of inquiry, for the further investigation of the issues involved in the matter, but took away the power to nominate a judge for such

⁵¹³ See the *EFF* case above in Chapter 3.

⁵¹⁴ See the *EFF* case above in Chapter 3.

⁵¹⁵ See Chapter 4 above.

⁵¹⁶ See the State of Capture Report and the CIEX Report supra in Chapter 5.

⁵¹⁷ See Chapter 5 above.

enquiry from the President, owing largely to the complexities involved. The factual situation involved is such that the depository of the function in whom the power vests is directly implicated in the findings by the institution. In addition, Parliament is to carry out a review of the Executive Ethics Act⁵¹⁸ and the Executive Ethics Code⁵¹⁹ dealing with conflict of interest by Members of the Executive: However; in the so-called CIEX Report, after making a finding on the relevant issues, the current Public Protector, Advocate Busisiwe Mkhwebane, instructed Parliament to effect constitutional amendment in order to change the constitutional mandate of the South African Reserve Bank.⁵²⁰ In this investigation, there are no exceptional factual circumstances justifying the taking of such remedial action by the Public Protector.

De Vos⁵²¹ alludes to the irony that exists between the two sets of remedial action taken by the Public Protector in the two reports, whereby Parliament is directed to effect certain changes to the law, except that in the CIEX Report such law is the Constitution, which is impermissible legally speaking. On this point, it becomes evident that there are instances in which it may become permissible for the Public Protector to take remedial action that, on the face of it, takes away a public functionary or state institution's power, owing to the peculiarity of the facts involved.⁵²²

I therefore find that the Public Protector erred in the CIEX Report, as the institution does not have the legal authority to dictate to Parliament for the latter to effect constitutional amendments.⁵²³ There is already jurisprudence in South African law to the effect that, the holder of public power cannot act under dictation.⁵²⁴ While the afore-mentioned in the *SARFU*

⁵¹⁸ Above.

⁵¹⁹ Above.

⁵²⁰ Section 224 of the Constitution of the Republic of South Africa, 1996, deals with the mandate of the South African Reserve Bank.

⁵²¹ Note 440 above.

⁵²² The *EFF* judgment at par 69: the court adds that what the appropriate remedial action has in a particular case, depends on the nature of the issues under investigation and the findings made. It further holds that "the legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow".

⁵²³ This is also in line with the holding by the Constitutional Court in the *SARFU* case *ibid*, where the court held that a public functionary cannot act under dictation: De Vos *ibid* also alludes to this holding by the court. See Chapter 5 above.

⁵²⁴ See Chapter 5 above.

case holds true for the CIEX Report, the same can however not be said for purposes of the State of Capture Report. I thus find that, in order to critically assess the constitutionality of the remedial action taken by the Public Protector on this point, one needs to examine the source of the dictation, and the fact that it was issued by a constitutionally mandated body or institution for such purposes. This approach should however not derogate from the general principle that, the focus should fall on the nature of the power being exercised or the function being performed and not the nature of the entity itself.⁵²⁵ The latter has to do with a determination of what makes a power or a function public.⁵²⁶

In the event that the direction by the Public Protector to the President on this aspect passes the constitutionality test, I wish to pose the questions as to whether: could it then be seen as a dictation in the strict sense of the word in light of its constitutionality (perhaps it could be seen as something more permissible in terms of the Constitution, such as a lawful instruction from a body or institution tasked with such authority) or: can it then be held that, there are exceptions to the general rule that the holder of public power cannot act under dictation?

Whichever of the two might be the case, I am of the view that, unlike the CIEX Report, the facts in the State of Capture Report justify the imposition of such remedial action. The law should not be used to achieve unconstitutional ends, and further to promote a possible conflict of interest situation. It could not have been the purpose of the Constitution that a holder of public power should also be involved in the adjudication or investigation of matters emanating from such power, whether the source of the power is the Constitution or legislation, as the case may be. That, as Chief Justice Mogoeng pointed out in the *EFF* case,⁵²⁷ “the rule of law is dead set against”.⁵²⁸

6.2 A SUMMARY OF THE LEGAL POSITION POST THE EFF JUDGMENT

After a proper analysis of the relevant issues, I find that the decision by the Constitutional Court in the *EFF* judgment are to the effect that the recommendations of the Public Protector are binding until set aside by a court on judicial review was correct in law. This

⁵²⁵ Hoexter (note 129 above) at 3.

⁵²⁶ Hoexter (note 129 above) at 3.

⁵²⁷ See Chapter 4 above.

⁵²⁸ See Chapter 4 above.

therefore means that, as long as there is no pending judicial review application relating to particular remedial action taken by the Public Protector, its recommendations legally stand and must be implemented. This evidently has to do with proper recognition of the constitutional status of the office of the Public Protector. Furthermore, I found that there exists a legal duty on other state functionaries, both in their individual and official capacity, and other organs of state, to help ensure compliance with the recommendations of the Public Protector. This is in accordance with the principle of co-operative governance. Therefore, as the court pointed out, the recommendations of the Public Protector are binding to such an extent that the following is instructive, as per Chief Justice Mogoeng's dictum: "when remedial action is binding, compliance is not optional".⁵²⁹

The finding is that, the recommendations of the Public Protector bind any public functionary, state organ, or private individual for as long as they are exercising public power. The latter finds support in the case of *South African Association of Personal Injury Lawyers v Heath and Others*,⁵³⁰ where the court referred to the Preamble to the Road Accident Fund Act.⁵³¹ The conclusion pertaining to who is to comply with the remedial actions of the Public Protector is three-fold;

The remedial actions bind those who are directly implicated in wrongdoing or maladministration by the Public Protector, and who therefore have to correct the alleged wrongdoing;

They also bind other state institutions such as the Special Investigation Units (SIU), who may from time to time be enlisted by the Public Protector to assist it in ensuring compliance with its remedial actions. Other state organs are obliged to ensure compliance by virtue of the relevant constitutional obligations they may have to fulfil in order to ensure the effectiveness of the office. Parliament plays a central role in this regard. The remedial step taken by the

⁵²⁹ EFF case (note 1 above) at par 73.

⁵³⁰ 2001 (1) BCLR 77 (28 November 2000) at par 54. The court in this case refers to the purpose of the Long Title to the Road Accident Fund Act, which reads in relevant part as follows; "To provide for mechanisms for the investigation of serious malpractices or maladministration in connection with the administration of State Institutions, state assets and public money as well as any conduct which may seriously harm the interests of the public"

⁵³¹ Act 56 of 1956.

Public Protector to recommend the setting up of a judicial commission of inquiry into allegations of state capture to further probe the issues is one such example.

With regard to members of the executive branch of government, I am of the view that, after a consideration of the issues discussed above, the remedial actions of the Public Protector bind members of cabinet both individually and collectively, in accordance with the principle of individual and collective ministerial responsibility. The two give guidance on consequences that can follow if a Minister has been implicated by a constitutional body such as the Public Protector. The President is legally bound in his capacity as head of the national executive and as head of state and in his personal capacity, should he be found to be directly implicated in wrongdoing. I am however, of the view that, after a careful evaluation of the relevant issues, including the President's section 84(2) powers, if the Public Protector takes remedial action, which directly implicates the President based on the said powers, compliance might prove problematic. Clarity from the courts is needed on this point, and hopefully the on-going application by the President to have the remedial step in the State of Capture report set aside will provide some guidance on this aspect. The principle does, however remain that the remedial actions of the Public Protector are legally binding, and compliance is not optional.

I am also of the view that, findings of the Public Protector are authoritative in the sense that, there is no issue of whether they should be complied with, but rather, those wishing to take them up with the courts of law will be doing so in order to challenge their correctness.

6.3 CONCLUSION

As the country develops, the executive arm of state will consequently assume more power. This therefore means that, state institutions in the position of the Public Protector should be better equipped and given more protection in order to preserve their place in the greater scheme of things, constitutionally speaking. No one should be allowed to get away with ignoring the recommendations of an institution as important as the Public Protector. The institution is central to ensuring that the broader constitutional project of the country is realised. Therefore, with it comes to ensuring proper respect for recognising the omnipotent role the institution plays in holding those in power to account. Furthermore, reform is needed

in order to give the office more independence. The financial and administrative independence of the institution is crucial if it is to function efficiently without fear, favour or prejudice.

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H. PUBLIC LECTURES

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2. Govender K “Lecture in honour of Dr Beyers Naude; Appraising the constitutional commitments to accountable, responsive and open governance and to freeing the potential of all; A tribute to Dr Beyers Naude”. Lecture delivered at the University of Johannesburg on the 12th of May 2011 (www.prof-karthy-govender.co.za).