Constitutionalism, Parliamentary Condemnation and the South African Public Protector

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Abstract: *The South African Constitution under chapter 9 establishes state institutions that are mandated with the obligation to strengthen the concept of constitutional democracy in the Republic. The Constitution requires that other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness. One such institution established under chapter 9 is the office of the Public Protector whose mandate includes the power to investigate any conduct of state affairs and to take appropriate remedial action. It has been very active in clamping down on the constitutional breaches of other organs of state including Cabinet members and the institutions they oversee. This paper explores the effectiveness and enforceability of the remedial actions of the Public Protector and further examines the preservation of various constitutional values surrounding its processes. It establishes that the current legislative framework falls short of rendering the institution fully effective within a constitutional context.*

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A. Introduction

Constitutionalism is the idea, often associated with the political theory that an authority wielding public power or purporting to represent the interest of the governed can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations.[1] The premise from which a constitutional democracy functions is such that all governance processes have to pass a constitutional muster in which the separation of powers, rule of law and independence of the judiciary are guaranteed. Constitutionalism and legality have thus developed to be ideals that complement each other. Since public officials and public institutions are tasked with exercising public power, good governance and social trust are premised at least partly on reasonable and responsive decision-

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1 See generally *Maurice John Crawley Vile*, Constitutionalism and the Separation of Powers, Oxford 1967.

making[2] within the parameters of section 237 which establishes a constitutional principle to perform diligently and without delay whenever an obligation arises. An obligation to perform, vary, reconsider or suspend a decision may arise for instance when a court, tribunal or forum with the requisite jurisdiction pronounces on a set of facts. The Office of the Public Protector established under section 181 of the Constitution[3] is a constitutional structure established to strengthen the idea of a constitutional democracy within the country.

The Public Protector Act[4] regulates the operations of this institution. It details, amongst others that it has the competence to investigate matters and to protect the public against matters such as maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function and an act or omission by a person performing a public function resulting in improper prejudice to another person.[5] There is no scarcity of cases as is evidenced from the annual reports that are submitted to the National Assembly in terms of section 181(5) of the Constitution. With reference to the legislative provisions that empower the office, this paper will attempt to establish the effectiveness and enforceability of the remedial recommendations in respect of matters investigated by such an office.

In order to determine the above, this work will have to develop arguments based on methodological foundationalism.[6] The first part of this paper will explain what legal effect, if any, the recommendations of the Public Protector have on an institution or public official whose decisions have fallen within the jurisdiction of the Public Protector. This will involve canvasing the literature and case law that already exists. The second part will illustrate how the *lacuna* in relation to compliance with reports of the Public Protector identified in the first part of the paper defeats the values of responsiveness and integrity that characterize the whole idea of constitutionalism in South Africa.

B. The enforceability of the decisions of the Public Protector

The Public Protector Act grants investigative powers to the Public Protector who may initiate such investigations either on his/ her own initiative or as a result of complaint or allegation. The Act further grants the office the powers to enter premises and seize articles or in-

2 See Minister for Justice and Constitutional Development v Chonco and Others 2010 (1) SACR 325 (CC) at para 45 and South African Police Service v Solidarity Obo Barnard 2014 (6) SA 123 (CC) at para 33.

3 Philippe C. Schmitter, Imagining the Future of the Euro-Polity with the Help of New Concepts in: Gary Marks, Fritz Scharpf, Philippe C. Schmitter and Wolfgang Streeck (Eds.), Governance in the European Union , London 1996, p. 121 (133).

4 Public Protector Act 23 of 1994.

5 See Preamble of the Public Protector Act.

6 *Richard Fumerton*, "Foundationalist Theories of Epistemic Justification", in: Edward N. Zalta (Ed.) The Stanford Encyclopedia of Philosophy (Summer 2010 Edition), http://plato.stanford.edu/archives/sum2010/entries/justep-foundational/ (last accessed 26 October 2015).

formation that may be relevant to the investigation upon the issuing of a warrant by a judge or magistrate.[7] Under section 8 of the Act, the Public Protector may make known to any person any finding, point of view, or recommendation in respect of any matter investigated by the office. Further, an annual report of all the activities of the Public Protector is submitted to the National Assembly and the National Council of Provinces. The first inquiry of this paper lies here, what legal force do the recommendations or viewpoints of the Public Protector have on the parties involved?

In the recent decision of *Democratic Alliance v South African Broadcasting Corporation Ltd and Others*[8] the Western Cape High Court had to settle the question whether the recommendations outlined in the report titled "*When Governance and Ethics Fail*"[9] in which the Public Protector recommended inter alia that disciplinary action be taken against the South African Broadcasting Corporation's Chief Operations Officer for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in appointment, salary increases, suspensions and dismissals of various officers in the SABC. Despite a well investigated report rooted in constitutional law as well as good corporate governance practices, the SABC did not adhere to the recommendations and remedial action as outlined in the report. The Corporation subsequently proceeded to recommend the appointment of Mr Motsoeneng by the Minister to the position of COO at its meeting on July 2014 reasoning that "it did so in order to secure the interests of the SABC, and in the knowledge that there was no reasonable basis to discipline him for any misconduct".

The Court in this case reasoned that unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of state but this does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject.[10] The Court further elaborated that the findings of the Public Protector where indeed valid and that the conduct of the SABC board and the Minister in rejecting the findings and remedial action of the Public Protector was arbitrary and irrational.[11] Further Schippers J stated that "it goes without saying that a decision by an organ of state rejecting the findings and remedial action of the Public Protector is itself capable of judicial review on conventional public law grounds".[12]

7 Sec 7 and 7A.

8 2015 (1) SA 551 (WCC).

9 *Thuli N Madonsela*, When Governance and Ethics Fail: 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), 2014.

10 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at para 51 and 59.

11 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at para 83.

12 *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC) at para 73.

In essence what this judgment clarified is the fact that a decision of the Public Protector is not enforceable on the parties affected. The decision to follow the recommendations of the Public Protector depends on the discretionary analysis in terms of rationality by the party upon whom the recommendation is directed. It is only upon a court of law finding that the decision by such a party to ignore the recommendations of the Public Protector was unreasonable and irrational that the court would make a declaration or order that the remedial actions be enforced. This then places the effectiveness of the remedial actions by the Public Protector below that of other institutions such as the CCMA[13] and the Competition Commission.[14] The decisions of these two institutions are enforceable as if they were decisions of a court of law whilst the decisions of the Public Protector are subject to acceptance by the parties involved. Despite the Constitution outlining that organs of state, through legislative and other measures must assist in ensuring the effectiveness of the Chapter 9 institutions, there is no legislative equivalent to section 141 of the Labor Relations Act or Section 64(1) of the Competition Act that complements the powers of the Public Protector.

Having identified the *lacuna* in the legislative framework and that there is an obligation on the party receiving the remedial recommendations to evaluate them with reasonableness and rationality, another challenge in terms of effectives arises. Placing the obligation to evaluate the rationality and reasonableness of the recommendations on the affected party is a defeat of the initial constitutional obligation placed on the Public Protector in terms of section 181 and 182 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. The Court in C*arephone (Pty) Ltd v Marcus No and Others*[15] concluded that, in order to establish whether an administrative action was justifiable, it had to be asked whether there was a rational, objective basis justifying the connection made by the decision-maker between the material properly available to him and the conclusion arrived at.[16] This involves a lot of subjective reflection and it would amount to an unnecessary delay to allow parties that have been granted the opportunity to present evidence and reasons of their decision during the investigative processes of the Public Protector, another opportunity to determine themselves if the findings of the Public Protector are "valid". The ideal position in this constitutional sphere would be to make the decisions of the Public Protector valid and enforceable pending a decision by a court of law setting aside or altering such a decision at the request of the affected parties.

13 Section 143(1) of the Labour Relations Act 66 of 1995 provides that an arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award.'.

14 Section 64(1) of the Competition Act 89 of 1998 provides that 'any decision, judgment or order of the Competition Commission, Competition Tribunal or Competition Appeal Court may be served, executed and enforced as if it were an order of the High Court'.

15 1999 (3) SA 304 (LAC).

16 *Carephone (Pty) Ltd v Marcus No and Others* 1999 (3) SA 304 (LAC) at para 37.

Further, it should be appreciated that in most instances the matters that are reviewed by the Public Protector are politically charged and intertwined with the exercise of public powers. In these instances, it would be very unusual for the political climate and partisan interests to not have an interest in influencing the determination of rationality. It is thus wise to place the obligation of pronouncing on these matters in an independent and impartial body that is subject only to the Constitution as envisaged in section 181(2).

C. The public interest implications

Having outlined the conundrums that surround the determination of rationality, it is tempting to seek compensation for this *lacuna* in the fact that the Constitution and the Public Protector Act require that the Public Protector must report on its activities and the performance of its functions to the Assembly at least once a year.[17] The Public Protector Act specifically enunciates that these reports have to be submitted on a half yearly basis but does not preclude the office to submit such reports when he she deems it necessary or on the request of the President or Speaker of the National Assembly.[18] The idea herein was that once a report or finding has been made available to Parliament, the novel idea of holding executive members accountable within a *trias politica* arrangement would come into realisation thus compelling Ministers to reconsider their policy positions or decisions within the ambit of the finding of the Public Protector.[19]

This arrangement has however also proven not be the most effective mechanism of supporting the findings of the Public Protector. The nature of our constitutional democracy arrangements has designed the composition of Parliament in such a way that the elected representatives are free to make decisions in a manner they deem fit, subject to the Constitution. This wide Parliamentary freedom has been a great advantage to the consolidation of democratic ideals in South Africa but has also bore what has become identified as partisan identification and voting patterns that are conceived from the beginning of election campaigns and are sustained even when one has already been sworn into office.[20] From a political science perspective, the formation of political parties is a critical step towards getting the civil society to participate in the construction of government and its policies. Additionally the fall of the apartheid state in South African and many other undemocratic regimes

17 Sec 181(5).

18 Sec 8(2).

19 See the reasoning outline in para 106-113 of the *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC). See also *Democratic Alliance v South African Broadcasting Corporation Ltd And Others* 2015 (1) SA 551 (WCC) at para 42 as an example of MP's putting questions to Ministers.

20 *Adam Habib and Rupert Taylor*, Political Alliances and Parliamentary Opposition Post-Apartheid South Africa, Democratization 8 (2001), p. 207 ff.

all over the world can be credited to the concerted efforts of the civil society[21] as such the legitimacy of partisan identities in parliament is intact.

Since the partisan nature of South African Parliament is an indispensable component of democracy, it then renders Parliament as not the best institution from which we society can wait for a determination on the validity or rationality of a finding of the Public Protector. Parliament provides one of the best forums for the scrutiny of decisions of public officials because it is "accepted that the National Assembly would not take their resolutions lightly, particularly because there may be considerable public outcry if it is perceived that the resolution has been wrongly taken".[22] It is however unwise to depend on public outcry as a safeguard to secure the enforcement of remedial action or any other recommendations of the Public Protector as depending on the strength of the partisan relations, one decision may be enforced with much openness and determination whilst other decisions may be subjected to silent accountability tactics until such a matter attract less interest from the civil society.

D. Delayed constitutional justice

The mandate of the Public Protector focuses on strengthening democracy by ensuring that all state organs are accountable, fair and responsive in the manner they conduct their affairs. The principles of integrity and general good governance in the exercise of public power to the benefit of all citizens are therefore some of the guiding pillars from which the recommendations of the Public Protector should be interpreted. It is submitted that the *lucuna* that has already been identified in the previous paragraphs leads to delays in dispensing the constitutional justice. These delays are a breach of the fair and responsive traits that should characterize any institution that is excising public power or performing a public function.

In the report titled "*When Governance and Ethics Fail*" which is discussed at the beginning of this paper, the recommendations of the Public Protector to the SABC directing the same amongst others to institute a disciplinary hearing and review various decisions related to the appointment and salary adjustments of the Chief Operations Officer (COO), the dismissal of various officers from the SABC and other related decisions did not receive the full compliance of the SABC Board. In fact after the report the Board proceeded to recommend to the Minister the same officer that was implicated in the report as their preferred permanent COO.[23] The Minister accepted this recommendation.

In another report, "Secure in Comfort" on an investigation conducted into allegations of impropriety and unethical conduct relating to the installation and implementation of security and related measures at the private residence of the President of the Republic of South

21 *Nancy L Clark and William H Worger*, South Africa: The Rise and Fall of Apartheid, New York, 2013.

22 Certification Judgment, note 19, at para 163.

23 *Democratic Alliance v South African Broadcasting Corporation Ltd And Others* 2015 (1) SA 551 (WCC) at para 14-19.

Africa, it was established amongst others that the implementation of the security measures failed to comply with the parameters set out in the laws in question for the proper exercise of public authority; that the expenditure incurred by the state in respect of the measures taken, including buildings and other items constructed or installed by the Department of Public Works at the request of the South African Police Service and the Department of Defence, many of which went beyond what was reasonably required for the President's security, was unconscionable, excessive, and caused a misappropriation of public funds; and that the excessive and improper manner in which the Nkandla Project was implemented resulted in substantial value being unduly added to the President's private property. The acts and omissions that allowed this to happen constitute unlawful and conduct improper conduct and maladministration.[24] The report was received with the much anticipated "public outcry". It then proceeded to recommend various remedial actions including that the President pay a reasonable percentage of the cost of the measures as determined as excessive and unrelated to the purpose of the upgrades.

The report was ultimately tabled before Parliament and an Ad Hoc Committee on the President's Submission in response to Public Protector's Report on Nkandla was established. Eight (8) months post the "*Secure in comfort*" report and after much debate in Parliament, the Ad Hoc Committee reported that "the matter of what constituted security and non-security upgrades at the President's private residence be referred back to Cabinet for determination by the relevant security experts".[25] With hindsight, this referral back to the cabinet basically amounts to referring back a matter for determination to the same person or institution that has been implicated in such a matter. Similarly, the same referral can be observed in the case of *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* wherein the court held that "as the findings *(of the Public Protector)* are not binding and enforceable, the organ of state must decide whether or not the findings should be accepted and the remedial action implemented".[26] Coincidentally, this judgment was also delivered eight (8) months after the Public Protector had made public her findings in relation to the decisions surrounding the SABC governance practices.[27]

Notwithstanding the meticulous and cautious investigative efforts of the Public Protector, the argument being established here is that there is a significant delay between the con-

24 See *Thuli N. Madonsela*, Secure in Comfort: Report on an Investigation into Allegations of Impropriety and Unethical Conduct Relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the Kwazulu-Natal Province, 2014.

25 National Assembly Committee Report on Report by President on Nkandla security upgrades: 11 Nov 2014.

26 *Democratic Alliance v South African Broadcasting Corporation Ltd And Others* 2015 (1) SA 551 (WCC) at para 72(a).

27 *Thuli N. Madonsela*, When Governance and Ethics Fail: 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), 2014.

clusion of an investigation and the commencement of tangible efforts by a public entity or officer to begin "considering" the recommendations contained in a report. This, it is argued that it is not in line with Constitution, particularly the requirement outlined in section 237 of the Constitution which requires that the exercise of public power performance of public functions should be done diligently and without delay whenever an obligation arises.

There is no doubt that the South African public as well the institutions involved in these cases have a great interest in reaching finality of the matters contained therein. Finality would ensure that public confidence and integrity is adequately restored as well as the putting into effect appropriate remedies as flowing from the finality of the matters. The undue delay, administratively, legally or otherwise is a miscarriage of the social trust embedded in the Constitution that the public machinery would always act in the best interest of justice. There have been instances wherein South African courts have emphasized the twin relationship between obligations and timeousness. In the cases of *Mahambehlala v MEC for Welfare, Eastern Cape*[28] and *Mbanga v MEC of Welfare Eastern Cape*[29] the Court relied on the fact when an entity tasked with a constitutional obligation fails to arrive to a fair administrative decision, either by conduct, negligence or omission and thus resulting in a delay, such delay was unreasonable and that the applicant's constitutional right to lawful and reasonable administrative action enshrined in s 33(1) of the Constitution thereby been infringed by such an entity. It is further argued that due to the philosophical underpinnings on how governments and their organs are constituted, the theory of a "social contract" lays the perspective from which these arguments should be interpreted.[30] Theoretically, the South African public has placed the power to run all spheres of their lives in the government, the government, in reciprocity, then has an obligation to ensure the smooth, responsive and accountable nature of their machinery. The above principle has been used in various case law such as *Khumalo and Another v MEC for Education, Kwazulu-Natal*[31] in which the court reiterated that public functionaries, as the arms of the state, are further vested with the responsibility, in terms of s 7(2) of the Constitution, to 'respect, protect, promote and fulfill the rights in the Bill of Rights'. As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.[32]

28 2002 (1) SA 342 (SE).

29 2002 (1) SA 359 (SE).

30 *Johnson David, Steve Pete, and Max Du Plessis*, Jurisprudence: A South African Perspective, Durban 2001, p.48.

31 2014 (5) SA 579 (CC).

32 *Khumalo and Another v MEC for Education, Kwazulu-Natal* at para 36. See also *Mazibuko No v Sisulu and Others NNO* 2013 (6) SA 249 (CC) at para 43-47 in which the Court noted that Section 102(2) of the Constitution confers on a member of the National Assembly the entitlement to give notice of and have a motion of no confidence in the President tabled and voted, the lacuna herein

Additionally under section 195, the Constitution enumerates various principles that should serve as a guide for governance in the public sphere. The two reports by the Public Protector illustrate, with evidence, that values such as a high standard of professional ethics, good human resource management, and efficient, economic and effective use of resources have been compromised. Ideally this should prompt swift and decisive action to rectify the elements of maladministration in an open, democratic and transparent manner but instead, the reports are subjected to much bureaucracy and delays. Having mentioned the idea of a social contract, this paper then re-introduces a party that all these processes and determinations have not placed much recognition on, the governed. The arguments presented in this paper illustrate that there is a type of harm that the governed are subjected to. This harm manifests itself in various forms such as loss of confidence in the government, feelings of betrayal, uncertainty about the truth or in years to come, voter apathy. The government then has a duty towards the people to bring within reasonable time certainty and finality of to all these matters that cloud the functioning of the government. Inference may be drawn from the statement of the Court in *Mokgatla v South African Municipal Workers Union* wherein the court observed that if victorious party suffers irreparable harm because of a pending appeal, then the very foundation of our social contract, the rule of law, will be seriously compromised. It bears the risk of people losing faith in the law and in the courts. Such a consequence is not to be treated lightly.[33]

E. Conclusion

South African democracy can only be protected if the rule of law is adhered to. In order for democracy to thrive, the institutions strengthening such an ideology need to be respected and rendered effective. This paper has articulated the legal infrastructure that allows the Public Protector to investigate and pronounce on matters related to the exercise of public power and the legal effect of its decisions. It has also highlighted the relationship between the Public Protector and the National Assembly and argued that this mechanism is not sufficient to compensate for the *lacuna* compelling organs of state to be responsive and accountable to the findings of the Public Protector. This paper has further established that although the Constitution and the Public Protector Act grants the Public Protector investigative powers, these pieces of legislation fall short of rendering the institution fully effective since they rely on the premise that public outcry and parliamentary condemnation is sufficient to sway public bodies or officers to act in congruence with the remedial recommendations of the Public Protector.

being that the law did not compel the Assembly to table and vote on such a motion within reasonable time.

33 2014 JDR 2488 (GJ) at para 13.