

The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa

CJ Tchawouo Mbiada*



P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Carlos Joel Tchawouo Mbiada

Affiliation

Labour Appeal Court, South Africa

Email cmbiada@gmail.com

Date published

28 May 2017

Editor Prof C Rautenbach

How to cite this article

Tchawouo Mbiada CJ "The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa" *PER / PELJ* 2017(20) - DOI <http://dx.doi.org/10.17159/1727-3781/2017/v20n0i1382>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2017/v20n0i1382>

Abstract

This paper is premised on the concept of political accountability which aims to hold accountable government for its action and or omission. Political accountability encompasses a number of mechanisms such as the judiciary and the ombudsman. Courts have been instrumental in enforcing the realisation of the right to access to adequate housing in South Africa. This paper argues, however, that the judiciary is not the only enforcing avenue because other mechanisms of political accountability may also contribute to the realisation of the right to housing. The paper, therefore, explores the extent of the Public Protector's contribution to the realisation of the right to access to adequate housing. The paper then argues that it is through its functions that the Public Protector exercises its accounting role in the realisation of the right to access to adequate housing. The paper, however, cautions that the Public Protector is not an alternative dispute resolution institution parallel to courts. But that the Public Protector complements the role played by courts by offering another medium through which such right may be realised.

Keywords

Right to access to adequate housing; political accountability; judiciary; ombudsman; Public Protector; accountability; enforcement and realisation.

.....

1 Introduction

The realisation of the right to access to adequate housing (the right to housing)¹ is replete in the literature, with the role played by the judiciary in holding government accountable. It is undeniable that the judiciary has played a significant and pivotal role in the realisation of the right to housing by laying down general principles for the adjudication of the right to housing, which is noticeable in many socio-economic rights cases.² It is prudent at this junction to state that one should not conflate judicial accountability with judicial enforcement. These two terms should be placed in the whole context of political accountability. Judicial enforcement triggers the judicial accountability of those against whom judgment is passed. It is not the judiciary that accounts, but the judiciary that holds accountable public officials. The judiciary champions the development of a judicial approach to adjudicating and thereby enforces the right to housing. However, as argued elsewhere,³ the judiciary has imposed a self-limitation by deferring the enforcement of the realisation of the right to housing to other spheres of government. By deferring to other branches of government to decide on issues, courts feel they might avoid step into the terrain of other branches of government, but they then fail in their transformative duty to guarantee judicial and constitutional accountability.⁴ It is undeniable that this deferential approach to socio-economic rights adjudication in general is rooted in the doctrine of the separation of powers. The courts view themselves as being constrained in their enforcement role by the separation of powers.⁵

* Carlos Joel Tchawouo Mbiada. LLM LLD (North-West University, Mafikeng Campus, South Africa). Law Researcher, Labour Appeal Court. Email: cmbiada@gmail.com.

¹ This paper is confined to housing, initially, because my whole thesis (entitled *Strengthening the Role of Political Accountability in the Realisation of the Right to Housing in South Africa*) from which this paper is extracted, dealt with the realisation of this right. The powers of the Public Protector are thereafter examined in the light of the right to housing.

² See for instance, in *Re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC), which lays down the principles for the adjudication of socio-economic rights; *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC).

³ For a discussion on judicial limits in realising the right to housing, see Brand 2011 *Stell L Rev* 614-638; Pillay 2002 *ESR Review* 16-18 and Tchawouo Mbiada *Strengthening the Role of Political Accountability* 195-199, 207-208 and all the authors cited therein.

⁴ Tchawouo Mbiada *Strengthening the Role of Political Accountability* 200.

⁵ See De Vos *et al South African Constitutional Law* 687. The paper later deals with the question whether the separation of powers extends to the Public Protector.

Regardless of the courts' deferential approach, this paper argues that by focusing exclusively on the judiciary's role in enforcing the realisation of the right to housing, other mechanisms of political accountability that also play a part in the realisation of the right to housing have either been ignored or dealt with in isolation and/or in a piecemeal fashion. Accountability suggests the obligation of individuals to provide information about and to justify their action to others, along with the imposition of sanctions for a failure to comply.⁶ Indeed, accountability is the cornerstone upon which the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) is built. Accountability is the pillar that drives the whole new constitutional dispensation. To this effect section 1(d) provides that the Republic of South Africa is a sovereign, democratic state founded *inter alia* on universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, the purpose of which is to ensure accountability, responsiveness and openness. All of these values entrench a culture of justification and explanation of one's action.⁷

Political accountability, which encompasses the founding values and principles of the Constitution, is supported by the following mechanisms: elections, the judiciary, the ombudsman, decentralisation, public participation, constitutional limitations, information and transparency.⁸ All of these mechanisms ensure in one way or another that a person has to account for his/her actions. Put differently, political accountability entails that a person justifies his or her action. It is within this context that this paper critically investigates the extent to which the South African Public Protector, as a mechanism of political accountability, ensures the realisation of the right to housing. The requirement for the establishment of the office of an ombudsman is to improve the performance of public administration in order to enhance government's accountability to the public.⁹

⁶ See Tchawouo Mbiada *Strengthening the Role of Political Accountability* 26-30. Also see Davis 2012 *PER/PELJ* 1-14.

⁷ As Mureinik 1994 *SAJHR* 32 puts it, the *Constitution* promotes "a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion". The principle of accountability is found in some sections of the *Constitution* eg s 32, right to access to information; s 33, right to just administrative action and more importantly, s 195(1)(e)-(g) in relation among other things to the basic values and principle governing public administration and accountability.

⁸ Tchawouo Mbiada *Strengthening the Role of Political Accountability* 21.

⁹ Tchawouo Mbiada *Strengthening the Role of Political Accountability* 68.

It is now fashionable for many countries in the world to have a constitutionally established ombudsman as a mechanism to enforce accountability by checking and monitoring public administration in the exercise of its duties.¹⁰ South Africa is no exception to this new trend. The *Constitution* has established some institutions in its Chapter 9¹¹ with the primary objective of supporting and strengthening democracy.¹² Of relevance is the role of the Public Protector, which is examined in this paper.¹³ Although the scope of their respective mandates differs, these institutions have the general mandate to check on government.¹⁴

This article is divided into two parts: The first part provides a brief account of the ombudsman worldwide and the challenges ombudsmen face. The second part critically analyses, in the light of the Public Protector's reports, how it holds the government accountable.

2 The exercise of the accounting functions of the Public Protector in the realisation of the right to housing

In order to understand how the Public Protector holds the government accountable, it may be helpful to describe the origin of the institution as it has evolved over time and been shaped into its modern form.

2.1 A brief account of the origin and evolution of the ombudsman

Despite the choice of the title "Public Protector" in the *Constitution*, this institution falls into the general category of the ombudsman. It follows, therefore, that the evolution of the role of the ombudsman is of relevance to that of the Public Protector from which it is derived. The origin and evolution of the role of the Public Protector should be located within that of the ombudsman. The ombudsman, in its "classical" form, has its roots in the office of *justitie ombudsman* (ombudsman for justice) created in Sweden in 1809. Before this date, there was a kind of ombudsman appointed by King

¹⁰ Tchawouo Mbiada *Strengthening the Role of Political Accountability* 228. Countries such as Finland, Sweden, Norway, Denmark and New Zealand have all established ombudsmen with the powers to investigate maladministration.

¹¹ These institutions are: the Public Protector, the SAHRC, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission.

¹² Section 181(1) of the *Constitution*.

¹³ For an examination of the role played by the South African Human Rights Commission, see Tchawouo Mbiada *Strengthening the Role of Political Accountability* 229-238.

¹⁴ Murray 2000 *PER/PELJ* 1-26.

Charles XII. After the military defeat to Russia in 1709, the Swedish king fled to Turkey for some years. As a result of the absence of the king, the administration of the country deteriorated.¹⁵

In 1713, the king appointed an official to monitor the conduct of the Swedish administration and the judiciary and named the official *Justitiekanslern* (chancellor of justice). The *Justitiekanslern* was empowered to initiate legal proceedings against anyone who violated the law in the exercise of his/her functions.¹⁶ When the then king was deposed in 1809, the new Constitution divided the powers between the crown and the parliament, giving parliament some powers to check on the exercise of the executive power. The 1809 Constitution included the office of the *justitie ombudsman*, an official appointed by parliament with the authority to supervise the public administration and the judiciary and to prosecute those who failed to carry out their duties. With the evolution of the institution, its function changed from being a purely legislative monitor to a public complaints-driven process.¹⁷

It took more than a century from the inception of the office of the ombudsman in the Swedish Constitution of 1809 to expand beyond Sweden.¹⁸ The institution spread throughout Scandinavia in the early to mid-twentieth century. Finland became the second Scandinavian country to establish its ombudsman, which was empowered to investigate complaints of official misconduct, military and prison complaints.¹⁹ The third country to set up the office of an ombudsman was Norway, which appointed a military ombudsman in 1952, followed by a general ombudsman in 1962. Denmark followed suit in 1955. The establishment of the office started to proliferate in the 1960s with the extensive spread of government bureaucracy in many nations. The model of the ombudsmen in Denmark and Norway, who does not have the powers to investigate the judiciary, was copied by other countries.²⁰ New Zealand established an ombudsman based on the Danish

¹⁵ See Jane "Ombudsman in Denmark and Norway" 145.

¹⁶ See Tchawouo Mbiada *Strengthening the Role of Political Accountability* 68-70 and the authors cited therein: Reif *Ombudsman, Good Governance and the International Human Rights System* 5; Jane "Ombudsman in Denmark and Norway" 145; Wieslander *Parliamentary Ombudsman* 11-14; and Howard *Organizational Ombudsman* 3-4.

¹⁷ Wieslander *Parliamentary Ombudsman* 17.

¹⁸ Howard *Organizational Ombudsman* 4-7.

¹⁹ Howard *Organizational Ombudsman* 4.

²⁰ Reif *Ombudsman, Good Governance and the International Human Rights System* 2.

format in 1962, followed by a long wave of the creation of new offices in other countries around the world.²¹

As it stands, the establishment of the ombudsman in many developing Commonwealth countries has been instrumental in the establishment of the institution internationally, beyond Scandinavia.²² Since its inception, the role of the ombudsman has been to monitor and regulate the administrative activities of the executive branch of government. The ombudsman is a complaint-handling mechanism tasked with improving the accountability of government. The ombudsman serves as a vertical and horizontal accountability mechanism by receiving complaints from the people against the government, thereby serving as a check on government activities.²³ The ombudsman is therefore, an instrument of democratic accountability between individuals and the administration of the state.²⁴ Despite its origin, the ombudsman has evolved so that it now incorporate a number of activities such as the following: the human rights ombudsman assumes the protection of human rights (the South African Human Rights Commission falls under this category); the classical ombudsman deals with maladministration in the public sector; and other ombudsmen deal with a range of services (such as anti-corruption, leadership code enforcement and/or environmental protection functions).²⁵ As stated above, the focus of this paper is on the office of the Public Protector, which falls within the office of the classical ombudsman.²⁶

Concerning the Public Protector, its predecessors were the Advocate-General and the Office of the Ombudsman. Both the Advocate-General and the Office of the Ombudsman had the power under the *Ombudsman Act*²⁷

²¹ See in general Reif "Introduction" xxiv and Reif *Ombudsman, Good Governance and the International Human Rights System* 6-7.

²² Ayeni "The Ombudsman around the World" 5.

²³ Reif *Ombudsman, Good Governance and the International Human Rights System* 17-18. Vertical accountability, also known as traditional accountability, refers to instances where political leaders are held accountable for their actions through periodic elections. Also falling under this category are the constitutional limitations designed to hold accountable spheres of government. Horizontal accountability refers to internal procedures set by professional or institutional bodies to monitor the work of public officials. In this case, civil servants are accountable to political leaders through standards set by various institutions. The ombudsman, decentralisation, public participation, information and transparency fall under this category. See Goetz and Jenkins *Reinventing Accountability* 15. Tchawouo Mbiada *Strengthening the Role of Political Accountability* 27-30.

²⁴ Owen "The Ombudsman: Essential Elements" 51.

²⁵ Reif *Ombudsman, Good Governance and the International Human Rights System* 2.

²⁶ For an overview of the various ombudsmen, see Reif *Ombudsman, Good Governance and the International Human Rights System* 9-10, 20-23.

²⁷ *Ombudsman Act* 118 of 1979.

to investigate reports of maladministration, but not to take remedial action directly. Their remedial powers were expressly limited only to referring findings to other institutions for remedial action.²⁸

Notwithstanding the above, the role of the ombudsman is to uphold government accountability. However, one of the concerns about the capacity of the ombudsman to discharge its mandate is the issue of its independence. To this end, it is argued that the independence and impartiality of the ombudsman is a prerequisite for its effectiveness.²⁹ In order to discharge its functions, the ombudsman must be independent, impartial, fair and confidential.³⁰ However, the issue of the ombudsman's independence in the South African context does not arise. This is because the *Constitution* secures the independence of the Public Protector through its establishment and appointment, removal from office and allocation of budgets and powers.

The Public Protector is established by section 181(a) of the *Constitution*. The supreme law of the country that governs the conduct and organisation of the nation, therefore, creates the Public Protector. Its independence derives from the fact that the *Constitution* creates it. This is why the *Constitution* in unambiguous terms provides that the Public Protector is independent and subject only to the *Constitution* and the law, and it must be impartial and must exercise its powers and perform its functions without fear, favour or prejudice.³¹ Moreover, in terms of section 181(3) of the *Constitution*, organs of state are enjoined through legislative and other measures to assist and protect the Public Protector so as to ensure its independence, impartiality, dignity and effectiveness.

Since a motion to amend the constitutional provision establishing the Public Protector requires an unlikely supporting vote of at least two-thirds in the National Assembly and a supporting vote of at least six members of the National Council of Provinces, it is unlikely that the independence of the Public Protector will be restricted. In any event, the more difficult it is to change the legal foundation of the Public Protector's office, the more likely

²⁸ *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* 2015 4 All SA 719 (SCA) (*SABC v DA*) para 31.

²⁹ Matshekga 2002 *AHRLJ* 70. Although referring to the human rights ombudsman, Matshekga's statement is also relevant to the Public Protector, which is a variant of the ombudsman.

³⁰ Gottehrer and Hostina "Classical Ombudsman Model" 403; Johnson "Ombudsman – Essential Elements" 786-787.

³¹ Section 181(2) of the *Constitution*.

it is that the tenure of the office will be secured.³² Security of tenure creates stability and increases public confidence in whoever fills the office of the Public Protector. Besides the independence of the ombudsman arising from the constitutional guarantees, such independence also arises from manner of the appointment.

In terms of section 193 of the *Constitution*, the President on the recommendation of the National Assembly appoints the Public Protector. The National Assembly makes a recommendation from persons nominated by a committee proportionally composed of members of all parties represented in the National Assembly. The nomination must be approved by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. This ensures that the candidate is a person who has wide respect among the different political parties represented in the legislature.³³ It is argued, however, that the appointment process is flawed because of the composition of the *ad hoc* selection committee and the interview process.³⁴ In respect of the composition of the panel, Bazana argues that a committee made up of politicians representing their various party and obviously their interests compromises the professional ethics of recruitment and selection.³⁵ Regarding the interview process, he argues that a mere interview is inadequate to identify behavioural characteristics like integrity, honesty and reliability, which are crucial to the integrity of the office. He suggests the use of a more competency-based assessment selection method. In his view, a proper job analysis would provide a more specific and detailed account of these key behavioural competencies. Competency-based assessment relates directly to the job instead of assessing broader behavioural characteristics and scrutinising past events that are not related to the job. He further suggests that Parliament should use scientific recruitment methods by engaging recruitment professionals to manage the recruitment process.

Regardless of this concern, the existing selection and recruitment process has been in place since the inception of democracy in South Africa. The

³² Gottehrer and Hostina "Classical Ombudsman Model" 403; Johnson "Ombudsman – Essential Elements" 404.

³³ Gottehrer and Hostina "Classical Ombudsman Model" 403; Johnson "Ombudsman – Essential Elements" 404.

³⁴ Bazana 2017 <https://mg.co.za/article/2016-08-31-south-africa-should-use-a-more-scientific-approach-to-appoint-its-public-protector>.

³⁵ He raises concerns about the recent interviews conducted by the *ad hoc* committee. He expresses the opinion that they were disrespectful and demeaning of some candidates' characters and professional statures. Some were subjected to unwarranted personal attacks and some were subjected to inquisitions about their ideological positions with no relevance to the requirements of the job.

former Public Protectors have upheld the independence of the institution. The outgoing Public Protector Adv Thuli Madonsela's integrity and courage during her term of office bear testimony to the fact that notwithstanding the concerns raised about the appointment process, maintaining the independence of the Public Protector is a matter that depends chiefly on the characteristics of each appointee. It is therefore incumbent on the appointed Public Protector to prove that he/she is capable of maintaining the independence of the office.

The independence of the Public Protector is also secured through constitutional provisions regarding its removal from office and sufficient allocation of budget. Concerning the removal from office, in terms of section 194 of the *Constitution* the Public Protector may be removed from office only on account of misconduct, incapacity or incompetence, after a finding to that effect by a committee of the National Assembly and the adoption by the National Assembly of a resolution calling for its removal from office. This resolution of the National Assembly concerning the removal of the Public Protector from office must be adopted with a supporting vote of at least two-thirds of the members of the National Assembly.³⁶ Once the resolution is adopted, the President must remove the Public Protector from office. The lengthy process and the high threshold set for the removal of the Public Protector³⁷ consolidates its independence. The Public Protector cannot be removed for political reasons or because the results of investigations implicate those in power.³⁸

Another significant factor in the independence of the Public Protector is the allocation of the budget. It is common cause that financial autonomy plays a significant role in the efficiency of any institution in that without adequate resources it will be unable to carry out its activities.³⁹ The Public Protector remains predominantly dependent on the legislature for the allocation of funds. It is argued in this respect that an inadequately funded office will not be able to perform the duties required by law and will thus lack independence.⁴⁰ The Public Protector spends the funds allocated to the office and accounts directly to the legislature.⁴¹ This means that it has no

³⁶ Section 194(2)(a) of the *Constitution*.

³⁷ *SABC v DA* para 30.

³⁸ Gottehrer and Hostina "Classical Ombudsman Model" 403; Johnson "Ombudsman – Essential Elements" 405.

³⁹ Matshekga 2002 *AHRLJ* 84.

⁴⁰ Gottehrer and Hostina "Classical Ombudsman Model" 403; Johnson "Ombudsman – Essential Elements" 405.

⁴¹ Section 181(5) of the *Constitution*.

control to decide on the allocation of its budget as Parliament determines and allocates its budget.

The tendency is for Parliament to reduce the budget in order to fund what are perceived as being more urgent needs, such as the provision of housing and health-care services. When this happens, the Public Protector struggles to achieve its objectives. Recently, the Public Protector, while interacting with Nelson Mandela Metropolitan University students, expressed concern over her office's lack of sufficient funding. Similarly, while presenting her annual report to the Portfolio Committee on Justice and Correctional Services, she reiterated her call for more funding proportional to the workload.⁴² One can infer that with a reduced budget, the Public Protector will not be able to carry out all its activities, thus reducing its effectiveness. The provision of inadequate resources does not help in establishing and maintaining the office of the Public Protector as an effective, independent and impartial institution. Under financial constraints it may unduly defer to political organs in the quest to obtain additional funds and thereby compromise its integrity and independence.

Concerning the powers and functions of the Public Protector, it is argued that another way in which the ombudsman manifests its independence is through its powers to freely investigate complaints and issue findings and recommendations without interference.⁴³ In South Africa, however, the functions of the Public Protector are found to go beyond those of the ombudsman in other jurisdictions.⁴⁴ In the *Mail & Guardian* case the Supreme Court of Appeal (SCA) held that the Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before it before acting, but that its mandate is an investigatory one, requiring pro-action in appropriate circumstances.⁴⁵ This signifies that the office of the Public Protector is given extensive powers in carrying out its functions. It is pro-active in discharging its investigative functions such

⁴² Public Protector 2014 <http://www.gov.za/public-protector-thuli-madonsela-calls-funding-proportional-workload>. The new Public Protector, Adv Busisiwe Mkhwebane recently pleaded with the Parliament's Justice Committee for an increase of her budget in order that she may discharge her work efficiently. See Gqirana 2017 <http://www.news24.com/SouthAfrica/News/we-need-r1bn-to-do-our-job-public-protector-20170330>.

⁴³ Gottehrer and Hostina "Classical Ombudsman Model" 403, 404; Johnson "Ombudsman – Essential Elements" 786.

⁴⁴ *The Public Protector v Mail & Guardian Ltd* 2011 4 SA (SCA) (*Mail & Guardian*) para 9. Also see *SABC v DA* para 43.

⁴⁵ *Mail & Guardian* para 9.

as entering premises, requesting written submissions, and interviewing parties to a dispute. These powers and functions are dealt with below.

2.2 The effect of recommendations of the office of the Public Protector

While the ombudsman does not have the power to make decisions which are binding on the administration, it makes recommendations that are complied with on a voluntary basis and through the mercy of other governmental structures. If they choose to ignore them, the whole purpose for which it is established would have little effect.⁴⁶ This was the case in South Africa when there were divided views on whether the findings and remedial actions of the Public Protector were binding. The debate was brought to court and it was left to the judiciary to clarify the authority of the remedial actions of the Public Protector.

A case that warrants examination on this issue arises out of the failure by the South African Broadcasting Corporation (SABC) to implement the Public Protector's remedial action issued in Report No 23 of 2013/2014 (dealing with the investigation into allegations of maladministration, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the SABC). After investigation, the Public Protector directed in her report that the SABC board takes disciplinary action against Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in appointments and salary increases of Motsweni, and for his role in purging senior staff members. Instead of implementing the remedial action of the Public Protector, the SABC Board appointed Mr Motsoeneng permanently to the position of Chief Operations Officer, in which he had been acting. This prompted the Democratic Alliance (DA) to apply for the setting aside of the appointment.⁴⁷

The Public Protector then filed an affidavit in which she requested the court to assess whether her report on the matter was legally valid, binding and enforceable; and to refrain from pronouncing on the correctness of her findings or the remedial action contained in the report. Rejecting the Public Protector's contention that the findings and the remedial action of the Public Protector were binding and enforceable unless properly and successfully reviewed, the court held that because the Public Protector is modelled on

⁴⁶ Reif *Ombudsman, Good Governance and the International Human Rights System* 18.

⁴⁷ The case is reported as *Democratic Alliance v South African Broadcasting Corporation Limited* 2015 1 SA 551 (WCC) (*DA v SABC*).

the institution of the ombudsman, her findings and remedial actions are not binding or enforceable.⁴⁸

Dissatisfied with the High Court's decision that disciplinary proceedings be brought against Mr Motsoeneng, the SABC appealed to the SCA. For the present purpose, the decision of the SCA is limited to its finding in relation to the extent of the remedial action of the Public Protector. Distancing itself from the finding of the High Court, the SCA in *SABC v DA* made a crucial finding. The court took the view that in holding that the Public Protector's findings were not binding and enforceable the court *a quo* was comparing the powers of the Public Protector to that of a court. It found that it was unsound and inaccurate to do that because "the phrase 'binding and enforceable' is terminologically inapt and in this context, conduces to confusion".⁴⁹ Relying on the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town*⁵⁰ to the effect that an administrative decision stands until set aside on review, the SCA held that the principle also finds application to the findings of the Public Protector. According to the court, because of the unique position that the Public Protector occupies in the *Constitution*, that principle must apply "with at least equal or perhaps even greater force to the decisions finally arrived at by that institution".⁵¹ This signifies that without a review application to set aside the remedial action of the Public Protector, the official or the organ of state against whom the remedial action is issued is obliged to implement these findings and remedial measures. In other words, the Public Protector's findings must not be overlooked and should be implemented until reviewed and set aside.

The Constitutional Court recently reiterated this position in *Economic Freedom Fighters v Speaker of the National Assembly* as well as *Democratic Alliance v Speaker of the National Assembly (Economic Freedom Fighters)* case.⁵² In the judgment, the Constitutional Court

⁴⁸ *DA v SABC* paras 49-63.

⁴⁹ *SABC v DA* para 45.

⁵⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 26.

⁵¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 45.

⁵² *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 5 BCLR 618 (CC) (*Economic Freedom Fighters*). The case arose from the Public Protector's report on the upgrade of the President's home in Nkandla. The Public Protector found that several improvements were non-security features and concluded that the President and his family were unduly enriched as a result of the non-security features. She then took remedial action against the President by enjoining him *inter alia* to take steps with the assistance of the National Treasury and the South African Police Services to determine the reasonable cost of the measures not related to security and the President to pay a reasonable percentage of such cost. In the meantime, after the President had submitted his response to the National Assembly, the latter set up two *ad hoc*

concluded with the SCA's view that the Public Protector's remedial action had a binding effect.⁵³ To this effect, the Constitutional Court held that when remedial action is binding, compliance is not optional and that remedial action taken against those under investigation cannot be ignored without any legal consequences.⁵⁴

It is, therefore, not open to anyone to ignore the Public Protector's remedial action based on holding a different view or to choose which part(s) of the remedial action to implement.⁵⁵ Doing so would be contrary to the rule of law, that requires that law-abiding people obey decisions made by those clothed with legal authority to make such laws or to approach a court for the setting aside of such decisions.⁵⁶ This is why the Constitutional Court, contrary to the SCA, was vehemently critical of the use of parallel investigations and processes in order to assess the veracity of the findings and recommendations of the Public Protector.⁵⁷ It stated in no uncertain terms that the National Assembly was wrong in passing a resolution that nullified the Public Protector's remedial actions.⁵⁸ According to the court, there is nothing wrong in seeking to ascertain the veracity of the finding of the Public Protector, but the court made it clear that the National Assembly actually flouted its obligations by passing a resolution nullifying the Public Protector's findings and replacing them with its own findings, because the Public Protector's remedial actions are binding until set aside through a proper judicial process.⁵⁹

From the above it emerges that unlike ombudsmen in other jurisdictions, the Public Protector is established on a solid foundation that guarantees its independence so as to enable it to carry out its functions impartially. In so doing, the Public Protector may hold government accountable on various

committees comprising of its members to examine the Public Protector's report, as well as other reports, including the one compiled the Minister of Police. After endorsing the report by the Minister exonerating the President from any liability and a report to the same effect by its last *ad hoc* committee, the National Assembly resolved to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the Public Protector. This prompted the Economic Freedom Fighters to seek clarity on the binding effect of the Public Protector's remedial action.

⁵³ *Economic Freedom Fighters* para 73.

⁵⁴ *Economic Freedom Fighters* para 73.

⁵⁵ *Economic Freedom Fighters* para 75.

⁵⁶ *Economic Freedom Fighters* para 75.

⁵⁷ *Economic Freedom Fighters* para 47.

⁵⁸ *Economic Freedom Fighters* para 98.

⁵⁹ *Economic Freedom Fighters* para 99.

service delivery issues such as the progressive realisation of the right to housing.

2.3 The accountability functions of the Public Protector in the progressive realisation of the right to housing

The classical function of all ombudsmen is to investigate complaints by citizens concerning the administrative actions of the state. The primary functions of the ombudsman are to receive complaints from aggrieved citizens against government officials or agencies, investigate them, where necessary recommend corrective measures in order to remedy the grievances, and issue reports. The Public Protector is provided with similar powers to investigate *inter alia* any maladministration or undue delay in state affairs on its own initiative or on receipt of a complaint or an allegation or on the grounds of information that has come to its knowledge.⁶⁰ The accounting role of the Public Protector towards the government is exercised through its functions as set out in section 182(1) of the *Constitution* as follows:

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 the light of the provision of section 182 above, the Public Protector is constitutionally mandated to investigate and report any maladministration on the part of the government and to take any remedial action it deems appropriate. The power of the Public Protector is also provided for in sections 6, 7 and 7A of the *Public Protector Act*,⁶¹ which give the Public Protector additional rights, among others to subpoena, enter premises and exercise seizure. Matters which fall within the investigative jurisdiction of the Public Protector are provided for in section 6(4)(a)(i)-(v) of the *Public Protector Act*. That section mandates the Public Protector to investigate the following improper conducts: any abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function; any improper or dishonest act or omission; any 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

⁶⁰ Section 7 of the *Public Protector Act* 23 of 1994.

⁶¹ *Public Protector Act* 23 of 1994.

function; or any act or omission by a government employee at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.

It is clear that the Public Protector may investigate any improper act or omission in the running of state affairs on its own initiative or on receipt of a complaint. With regard to an investigation arising from its own initiative, for instance, it is reported in the Public Protector 2009-2010 Annual Report that the Public Protector conducted three investigations relating to the alleged undue delay on the part of the Western Cape Education Department to attend to conditions at Duneside Primary School; the allegations from a newspaper that the North-West Department of Transport, Roads and Community Safety failed to pay Mr K for providing transportation to learners of Calvyn Primary School; and a report by the South African Broadcasting Corporation regarding an incident where a trench was dug for the purpose of constructing a storm-water pipeline in Block 17, Moloto village, but was allegedly left unfilled by Thembisile Local Municipality.⁶² Three investigations initiated by the Office of the Public Protector were also reported in the 2010-2011 Annual Report.⁶³ It is in the exercise of its functions that the Public Protector could hold accountable the government in the realisation of the right to housing. For the Public Protector to be able to hold government accountable for its omission or act in relation to the right to housing, there first needs to be a complaint about either the violation or the promotion of the right to housing. It is the receipt of a complaint, or an investigation by the Public Protector on its own volition, that triggers the accounting role of the Public Protector, which is investigating, reporting and taking appropriate measures to cease the violation or to promote the realisation of a right. It is expected that the investigation should be proper. Meetings with affected complainant/s and/or community members may be held, interviews with responsible government officials and visits/inspections *in loco* may be carried out to assess the validity of the allegation/s. Once the investigation is completed, the Public Protector should report on the alleged improper act/omission. The reporting power of the Public Protector takes the form of a finding as to the veracity of the alleged act or omission. These findings would be the outcome of the investigations to establish the veracity of the complaints or allegations. The findings would be incorporated into the report and form the third phase of that report.

⁶² Public Protector Annual Report 2009-2010 38-41.

⁶³ Public Protector Annual Report 2010-2011 7.

The power to investigate would be meaningless without any remedial power. The remedial power enables the Public Protector to take corrective measures that redress the act or omission by making recommendations to that effect.⁶⁴ To this end, the Public Protector is enjoined in section 182(1)(c) of the *Constitution* to take appropriate remedial action to solve the issue under investigation. This remedial action is incorporated into the report of the investigation. The remedy granted by the Public Protector takes the form of recommendations aimed at resolving alleged improper conduct in the light of the findings.⁶⁵ These recommendations generally refer the matter to the appropriate public body, which would take the steps necessary to address the issue.⁶⁶ These three core functions of the Public Protector are illustrated below in the light of its reports.

2.4 The Public Protector and the investigation of the right to housing

Before examining investigations relating to the right to housing, it is worth noting that section 6(4)(b)(i)-(iii) of the *Public Protector Act* enjoins the Public Protector to endeavour in its sole discretion to resolve any dispute or rectify any act or omission through mediation, conciliation or negotiation as well as expressing an advisory opinion or any process that may be expedient in the circumstances. In this respect the Public Protector has established the Early Resolution Unit to resolve speedily any complaint received. In its 2009-2010 Annual Report, the Public Protector credited itself that many complaints and disputes regarding state maladministration and other forms of improper conduct and related prejudice or injustice were resolved through conciliation, mediation and negotiation, which contributed to expediting and finalising investigations, cases and the delivery of remedial action in appropriate circumstances.⁶⁷ The use of mediation, conciliation and negotiation resulted in the early resolution of some of the cases brought, and granted speedy redress to some victims of maladministration and other forms of improper conduct by state actors.⁶⁸

⁶⁴ Section 182(1)(c) of the *Constitution*.

⁶⁵ Section 8 of the *Public Protector Act* 23 of 1994.

⁶⁶ Bishop and Woolman "Public Protector" 24A-16.

⁶⁷ Public Protector's Annual Report 2009-2010.

⁶⁸ In the 2013-2014 annual report, the Public Protector reported that it received complaints regarding allegations of maladministration of RDP housing (incomplete and defective) in Mpumalanga. The Public Protector visited the affected communities, took photographs of the houses and forwarded them to the Provincial Department of Human Settlement. A memorandum of understanding was entered into between the Public Protector and the Department which undertook to repair a total of 401 houses. An action plan monitored by the Public Protector was put in place indicating the different timelines for implementation (59).

This is consonant with the general aim of mediation, which is to encourage contending parties to settle their dispute.⁶⁹ Mediation and conciliation are conducted under the auspices of a third party whose role is to facilitate the consent of the parties. Unlike in adjudication proceedings where the third party involved imposes a solution upon the litigants and does not require consent,⁷⁰ most people prefer mediation because the parties control the dispute and its resolution.⁷¹ Mediation improves communication between parties, thereby enhancing harmonious relationships which may have deadlocked in a formal adjudication process. In this sense, mediation and or conciliation boosts parties' confidence, resulting in a speedy resolution of a dispute. In addition, a mediator or a conciliator can encourage parties to think about the relative costs and advantages of choosing one or another course of action.⁷² Moreover, mediation may be used as a supplement to having recourse to the courts.⁷³

Despite the benefits attributed to conciliation and/or mediation, these processes do not often yield the expected result. Hence litigation has been known to ensue thereafter, or investigations have had to be performed in the case of the Public Protector. Although the Public Protector received a number of complaints, few of such complaints relate to the right to housing. Four complaints variously related to housing are examined below.

2.4.1 Complaint relating to poor service delivery against Senqu Local Municipality

This complaint lodged against the Senqu Local Municipality in the Eastern Cape relates to allegations of poor service delivery to residents of New Location and Khwezi Townships in Lady Grey, and to the communities of Walaza, Khasalala, Mfityi, Ndefela, Mbhobho and Hinana villages in Sterkspruit. Residents complained about the lack of a water supply, sanitation, road maintenance and electricity, among other issues.

This complaint is the subject of an investigative report numbered 34 of 2010/11. After investigations into the veracity of the complaint, the Public Protector found that the communities indeed had problems regarding the delivery of services by the municipality and that there was inadequate sanitation infrastructure in all the affected villages, which posed a health risk

⁶⁹ McEwen and Maiman 1984 *Law & Soc'y Rev* 12.

⁷⁰ McEwen and Maiman 1984 *Law & Soc'y Rev* 15.

⁷¹ McEwen and Maiman 1984 *Law & Soc'y Rev* 45.

⁷² McEwen and Maiman 1984 *Law & Soc'y Rev* 15.

⁷³ See Bryant and Lane 2013 *Franchise LJ* 261-277.

to the community. Also, it was found that the road infrastructure needed improvement and upgrading as this posed a challenge to the community, particularly during rainy seasons.⁷⁴

Having found that there was inadequate service delivery in the areas, the Public Protector made recommendations to the effect that the Municipal Managers concerned should take steps to ensure that municipal services are rendered in compliance with the *Batho Pele* principles; to fast-track the implementation of water and sanitation projects; to provide interim relief for the provision of water; to attend to the upgrading of roads; to explore options to make land available for low-cost housing projects; and to implement systems to deal with the capturing and processing of applications for low-cost housing.

2.4.2 Complaint against the failure of Steve Tshwete Local Municipality to assist with the acquisition of a title deed⁷⁵

The complaint against the Steve Tshwete Local Municipality arose out of two complaints lodged by Mr PA Phoku and Mr MJ Mthembu. Both complainants alleged that they were allocated low-cost subsidy houses (stand No 4292 and stand No 2876 located in Extensions 6 and 4 respectively). Both complainants alleged that since they had been allocated their houses they had unsuccessfully approached the Municipality for their title deeds. In the case of Mr Mthembu, however, it was alleged that another person had already registered his stand in his name.

As part of its investigation into the complaints, the Public Protector held meetings and exchanged correspondence with municipal officials. About Mr Phoku's complaint, the Public Protector sent a written enquiry to the Municipal Chief Housing Officer, and when he failed to respond, it followed this up with letters and telephonic calls to the Chief Housing Officer. This led to a response (although almost six months later) by Ms FE Phiri, the Municipal Executive Manager of Public Services, to the effect that Mr Phoku's name was on the list that had been forwarded to the service provider, Sisonke Development Planner, appointed to register housing beneficiaries in Kwazamokuhle Extension 6.

⁷⁴ Public Protector's Annual Report 2010-2011 12. The examination into this complaint is limited to what was incorporated into the final report due to the difficulty in obtaining the report from the Public Protector's office.

⁷⁵ The findings about this complaint are embodied in report No 3 of 2010/11 dated 14 June 2010.

Regarding Mr Mthembu's case, in a letter dated 6 May 2008 Ms Phiri explained that there had been a misallocation of houses by the service provider (Grinaker Ltd and the Birman & Serfontein Attorneys). She also stated that although the attorneys had advised the Municipality that all of the beneficiaries involved should visit their offices to resolve the problem, the process did not proceed due to a lack of cooperation by one of the affected beneficiaries.

Subsequent to this letter, and to speed up the investigation, the Public Protector held a meeting with Ms Phiri on 13 August 2008 to clarify the report received from the Municipality. It appeared in the case of Mr Phoku that the service provider had failed to discharge the mandate to register the title deeds not only of Mr Phoku but of all other beneficiaries of low-cost subsidy houses residing in Kwazamokuhle Extension 6. Concerning the case of Mr Mthembu, all parties agreed that the cases of all of the beneficiaries whose houses were incorrectly registered in somebody else's name in Kwazamokuhle Extension 4 be tabled at a Mayoral Committee scheduled for 14 August 2008. After Mr Andries Masilela had failed to convey the resolution of the Mayoral Committee to the Public Protector, Ms Phiri sent another letter to the Public Protector reiterating that they had held a meeting with the affected beneficiaries and that they had sent recommendations to the council for consideration. The Mayoral Committee meeting, which took place on 20 November 2008, considered the recommendations received from Ms Phiri. The Mayoral Committee adopted the recommendations, and Mr Masilela sent the resolutions to the Public Protector. The Municipality decided, among other things, that the affected beneficiaries in Kwazamokuhle Extension 4 should remain in the houses they were occupying and that it would instruct at its own costs its attorneys to immediately rectify the error concerning the title deeds of houses whose accounts were up-to-date.

Subsequent to the investigation, the Public Protector found that the Steve Tshwete Local Municipality had failed to assist Mr Phoku timeously in acquiring a title deed for his stand and to address the Department of Local Government and Housing on the issue of stands that had been incorrectly allocated in Kwazamokuhle extension 4. The Public Protector then recommended that the Municipal Manager take steps to attend to the registration of Mr Phoku's title deed and implement the resolution of the Mayoral Committee of 20 November 2008. The Public Protector also recommended that the Municipal Manager should ensure that the beneficiaries of low-cost subsidy houses should get assistance to obtain title

deeds for their properties within a reasonable time after taking lawful occupation.

2.4.3 Complaint against the City of Tshwane relating to its failure to implement an undertaking to transfer a property to Mr and Mrs Zondi⁷⁶

In this matter Mr and Mrs Zondi, the complainants, alleged that they had purchased a property marked Erf 11521 from the Municipality at the cost of R17 286.45. During 2004 the complainants found that a structure had been erected on property occupied by someone else. The occupier alleged having bought the stand from the Municipality. After a complaint was lodged with the Municipality, the complainants alleged that the Municipality confirmed that a councillor had sold the stand without prior consultation and authorisation. The Municipality is alleged to have undertaken to compensate the complainants with another stand and to install basic services on the stand but did not fulfil its undertaking.

In investigating the complaint, the Public Protector corresponded with officials of the Municipality and held meetings with the General Manager, Housing, and the Deputy Director: Development Law, Alienation and Acquisition services. A letter dated 28 July 2004 was sent to the Municipality requesting information and documentation regarding the complaint. In response, and in a letter dated 4 August 2004, Mr FM Fenyane of the Informal Settlement, Land Invasion Management and Community Liaison Department confirmed that the complainants had indeed purchased the queried stand and that the stand had been allocated to a third party.

The Municipality then resolved to provide an alternative property in the same area and to sell the subject property to the occupant on the basis that the latter had already erected a structure on it. Subsequent to this letter, the Public Protector held a meeting with Municipal officials in December 2004. The officials reported that they had referred the matter to the Municipality's Legal Department for finalisation, that the Municipality had allocated an alternative property, portion 2 of stand 9684, Mamelodi East, to the complainants, and that the process of installing services on the alternative property was underway. This process did not, however, materialise because the Municipality later discovered that the alternative property had been registered in the name of the Seventh Day Adventist Church (the Church) and could therefore not be registered in the complainants' name. However,

⁷⁶ This complaint is the subject of Report No 2 of 2010/11.

the Church moved to another stand, and the complainants were allocated the alternative property. The Public Protector made a further enquiry about the reasons why the alternative property had not been registered, and why water and electricity had not been installed. The Municipality responded in a letter dated 17 June 2008 stating that it had reached an agreement with the Church that the alternative property be transferred back to the Municipality to enable the Municipality to transfer it to the complainants.

At the end of its investigation, the Public Protector found that the Municipality had allocated the complainants' stand to a third party, and it had failed for 10 years to honour its undertaking to facilitate the transfer of the alternative property to the complainants as compensation for the property paid by the complainants. To ensure that the alternative property be transferred to the complainants, the Public Protector requested the City Manager of the Municipality to compensate the complainants for any loss suffered and ensure that within 180 days, Portion 2 of Erf 9684 situated in Mamelodi East be transferred to them. In the alternative, it requested the Municipality to provide them with a property of equivalent value. It further recommended that the City Manager should institute internal proceedings to establish the causes of the failures, identify the persons responsible, and take further action in terms of the *Public Finance Management Act*⁷⁷

*2.4.4 Alleged omission to provide low-cost housing by the Northern Cape Department of Cooperative Governance, Human Settlement and Traditional Affairs*⁷⁸

In this complaint the Public Protector was requested to investigate allegations of maladministration and improper prejudice relating to an omission by the Northern Cape Department of Cooperative Governance, Human Settlement and Traditional Affairs (the Department) to provide a low-cost housing subsidy. Mr MJ Dikolomela, the main complainant and his wife, Mrs DJ Notywala, (hereafter the complainants), alleged that during February 2009 they jointly applied for a low-cost subsidy house. However, they were informed that their application was unsuccessful because it appeared from the Housing Subsidy System (HSS) that Mr Dikolomela was already a recipient of a People's Housing Process subsidy, commonly known as the Self-Help Housing Subsidy, in Limpopo Province, Lulekani Township. They further alleged that the Department allocated their site, number 1068, which

⁷⁷ 1 of 1999

⁷⁸ The finding of this complaint is titled "Without a Roof" and appears in report 14 of 2013/2014.

they had occupied for more than five years, to the next person on the waiting list.

In order to consider the complainants' allegation the Public Protector requested a printout from the HSS database. The HSS database evinced that the site occupied by the complainants was registered in the name of Mr B C Mahlane. Upon consultation with the complainants on 2 July 2010, they requested an urgent intervention. To this effect, on 27 July 2010 an email raising the matter was sent to Mr M Mdunge, Senior Manager, Frances Baard Regional Office of the Department, requesting the Department to put in abeyance the allocation process until the finalisation of its investigation. On 29 July 2010 the matter was further discussed telephonically with Ms J Moloto of the Department of Local Government and Housing in Limpopo and Mr P Komamo of the Department. Ms Moloto consulted the Limpopo's HSS database and found that the particulars of Mr Dikolomela did not appear on their system. She advised that if Mr Dikolomela had previously benefited from a low-cost property in any province in the country, the HSS database would detect it. She found that six digits of Mr Dikolomela's identity number (ID) matched those of another person' who had previously benefited from the housing scheme. According to her, this might have been the reason why the complainants' application was unsuccessful.

Through a correspondence dated 23 September 2010, the matter was raised once more with the Acting Head of the Department, Mr Swartland, wherein he was advised about the steps taken so far to resolve the matter. He was also requested to put the allocation of the house on hold until the finalisation of the matter. On 30 September 2010, and in response to an e-mail sent on the 13th of the same month, Ms Moloto phoned the Public Protector advising that they had visited the purported house no 1332 allocated to Mr Dikolomela, as it was the only house on the HSS database owned by someone who had an ID with six digits similar to those of Mr Dokolomela. She confirmed that the house had been registered on 4 July 1997 in Mr B Mahlane's name and also that Mr B Mahlane and Mr Dikolomela's months of birth, date of birth and first two ID digits were similar.

Based on this confirmation, the Public Protector wrote to the Department's Regional Manager, Ms Mogodi and Mr Mfeya, Sol Plaatje Municipality Housing Manager, on 6 July 2011, proposing a joint meeting to resolve the matter through the Alternative Resolution Dispute (ADR) process. The ADR meeting took place, and all parties reached an in-principle agreement. They agreed that since Mr Dikolomela had been the first to apply for the house, the house should have been allocated to him. They could not, however,

implement the agreement since the Department had in 2011 approved Mr Dikolomela's application for the same house, but the National Department of Human Settlements (the National Department) had revoked their decision because the Department no longer had the power of deletion on the HSS database. Nevertheless, they identified site number 23929, Homelite, Kimberly as an alternative site to be allocated to Mr Dikolomela. After the identification, an inspection *in loco* was conducted with the complainants on the new site. They were advised, however that the construction of the house would commence only once the National Department had performed the override or the deletion.

On 12 November 2010, a meeting was held with the Executive Manager of the Department, Ms Soodeyal, and on 13 July 2011 a joint meeting took place with Ms Soodeyal and the Manager of the Frances Baard District Municipality, Ms Mogodi. It was agreed during the meetings that the Department should proceed with the overriding or deletion process which would allow Mr Dikolomela to qualify for low-cost housing. On 2 July 2013 the Department confirmed telephonically that a verification process would be carried out on the HSS database.

Subsequent to this investigation, the Public Protector found that the Department had acted wrongfully in concluding that Mr Dikolomela had previously benefitted from a low-cost house and then continued to consider the next person on the waiting list, and that the Department's action and omission to verify the outcome of the HSS constituted maladministration. The action of the Department was found to have prejudiced Mr Dikolomela and his wife in that they had to continue staying in a shack as a result of the error. The Public Protector also found that although certain acts and omissions amounted to maladministration, the Department had taken steps to rectify the maladministration by allocating an alternative site where Mr Dikolomela could build a house. It lastly found that there had been no rectification of the erroneous statement that indicated that Mr Dikolomela was already the recipient of a housing subsidy.

In the light of its findings, the Public Protector directed the Director-General of the National Department to ensure that Mr Dikolomela be assisted with the overriding or deletion process within one month from the date of the report to link Mr Dikolomela's application to site number 23929, Homelite, Kimberly. The Department was directed to make funds available for the construction of the house within one month from the date of the deletion or overriding process, and to ensure that construction commenced at the same time as funds were made available. The Department was also requested to

avoid future errors and first to review the HSS results before considering applications for low-cost subsidies and to send a letter of apology to the complainants.

It is evident from the above that the Public Protector has the power to investigate, report and take appropriate remedial action or resolve disputes through mediation, negotiation or conciliation. The Public Protector exercises its mandate to hold public officials accountable through its functions. The Public Protector's investigative role into maladministration in the provision of services enables it to expose officials or organs of state who fail to provide services, thereby holding them accountable for their actions.

By directing the government to provide services or to cease the violation of the right to housing, the Public Protector exercises its accounting powers towards the government and organs of state. These accounting powers find expression not only in the Public Protector's investigation but also in its remedial action. Concerning the role played by the Public Protector in holding government accountable during its investigation, this paper submits that government accounts to the Public Protector when it engages with the Public Protector during the investigation. It is because of the recognition of the accounting role of the Public Protector in enforcing the realisation of the right to housing that various government entities correspond and hold meetings with the Public Protector to justify their actions and or omissions. The Provincial Department of Human Settlement in Mpumalanga even signed a memorandum of understanding with the Public Protector⁷⁹ in order to avoid unnecessary investigations. In so doing the Department does not only acknowledge the need to account to the Public Protector but also acknowledged the role of the Public Protector as a vector of accountability enshrined in the *Constitution*. Moreover, the undertaking to provide alternative stands in two of the above cases demonstrates that the role played by the Public Protector in enforcing the right to housing cannot be disputed. The Public Protector's remedial actions also reinforce its accounting role.

Concerning the Public Protector's remedial action, it is argued in this paper that notwithstanding the binding effect of the remedial action, it determines

⁷⁹ Public Protector Annual Report 2013/14, 57. The agreement was entered into to solve numerous complaints regarding allegations of maladministration in respect of RDP houses in Mpumalanga. Most of the complaints related to incomplete and defective houses. As part of the agreement, the department undertook to repair 401 houses. An action plan was put together to indicate the different timelines of implementation. The Public Protector continues to monitor the implementation.

the extent to which the Public Protector may hold government accountable. The accounting function of the Public Protector is in turn dependent on government's compliance with the remedial action. This means that the Public Protector's role in holding government accountable depends to a large extent on whether its remedial actions have been complied with. This is so because remedial actions are not always fully implemented.⁸⁰ It, would be however, presumptive to generalise about the implementation or non-implementation of the remedial actions as only an examination of the remedial actions in the four reports above may determine the extent of the Public Protector's role as an accounting institution as far as the right to housing is concerned.⁸¹

In Report 14 of 2013/2014 examined above, the Public Protector directed the Department to effect five actions to rectify its omission to provide a low-cost housing subsidy to Mr Dikolomela. It is reported that the Department has complied with four of the remedial actions.⁸² Concerning the non-implementation of the remedial action relating to the inclusion of the complainant's name on a list of beneficiaries, it is reported that Sol Plaatje Municipality undertook to finalise the provision of the house of the complainant before the end of December 2014. However, this had not yet been done as at the receipt of the compliance report on 13 October 2015.

This signifies that there has been almost full compliance with the Public Protector's remedial action. By complying with four of the remedial actions and by undertaking to include the complainant's name on the list of beneficiaries, the Department was accounting to the Public Protector. The compliance report above demonstrates that the Public Protector, as an accounting institution established to support elected institutions, through its findings and remedial actions ensures that government carries out its constitutional mandate of providing sustainable services to its communities, thereby rendering government accountable not only to it but also to communities. The Public Protector's accounting functions are even greater when government complies with the Public Protector's remedial actions. Compliance with the Public Protector's remedial action enhances its accounting role in enforcing the realisation of the right to housing. By holding government accountable through its remedial actions, the Public Protector ensures that its' role is consonant with the purpose of political accountability,

⁸⁰ There are instances where the government has not implemented the Public Protector's remedial actions, the *DA v SABC* case being one such instance.

⁸¹ It is worth noting that the author could obtain only one compliance report from the Public Protector, despite making numerous written requests since September 2015.

⁸² Compliance report received from the Public Protector's office. Document with author.

which is to hold accountable, government and or organs of state for their actions and or omission.⁸³

It follows that since the purpose of political accountability is to hold public officials accountable, the Public Protector, as one of its mechanisms, also fulfils the same purpose. This paper, therefore, posits that there is no need to focus solely on courts in seeking to enforce the realisation of the right to housing. The Public Protector is another avenue or forum through which one can enforce the realisation of the right to housing. With almost full compliance with the Public Protector's remedial actions by the government, the enforcement of the right to housing may be done through the Public Protector. Moreover, and in accordance with the findings in the cases involving the *SABC* and the *Economic Freedom Fighters*, the government should comply with the Public Protector's remedial actions until they are reviewed and set aside. Until such time that these remedial actions are reviewed, they stand and should be complied with. This is because the Public Protector is considered as an institution whose decisions, even if unreasonable, are binding until set aside on review.

In the event that the government does not comply with the remedial actions and has not set them aside on review, the paper suggests that the remedial actions be made an order of court. Any aggrieved party or even the Public Protector may apply to the court for the remedial actions to be made an order of court. To this end, the constitutional provisions and the legislation relating to the Public Protector should be amended to reflect this suggestion. This in clear entails including in section 182(1)(c) and section 6(4)(c)(ii) of the *Public Protector Act 23 of 1994* that the Public Protector's remedial actions may be made an order of court if not complied with.

The amendment to the above sections to the effect that the Public Protector's remedial actions be made orders of court would strengthen the accounting power of the Public Protector. Court's judgments have more weight than remedial actions and making them orders of court would definitely enhance the Public Protector's remedial powers. This is because orders of court, by virtue of section 165(5) of the *Constitution*, bind all persons. Since remedial actions made orders of court are binding

⁸³ It would be presumptuous of the author to discuss the factors taken into account by the Public Protector in conducting its own initiative investigation. Perhaps one may venture to say that the Public Protector does not prioritise housing issues despite the existence of the wide-spread housing crisis because due to the wide scope of its functions the Public Protector cannot solely investigate housing issues.

documents, they have the force of law and can be enforced through the legal process.

This paper therefore argues that the Public Protector is an institution that may be used to enforce the right to housing. However, it should not be seen as an alternative dispute resolution institution operating parallel to courts but as an institution that complements the role played by courts in the enforcement of the right to housing. The Public Protector is therefore the most invaluable constitutional gift in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs, and for the betterment of good governance,⁸⁴ which is the only guarantee that citizens may enjoy the benefits associated with the attainment of democracy.⁸⁵

The paper also submits that unlike the courts, which are constrained by the separation of powers, the Public Protector is not a sphere of government which should be concerned with the separation of powers. It should be emphasised that because the adjudication of socio-economic rights in general gives rise to positive entitlement, it is argued that the courts do not have the institutional and technical capacity to deal with these rights. It is further argued that the courts do not have the legitimacy to question the policy decision-making of elected representatives and that the involvement of the courts in such cases would result in a violation of the separation of powers. This is because socio-economic rights litigation often has a policy and budgetary implication.⁸⁶ Unlike the courts, the Public Protector has the necessary expertise to investigate complex policy or technical issues and to issue remedial actions. To this end, the Public Protector may employ professionals across any fields of expertise to carry out its duties. In the event, if the Public Protector lacks the human resources to engage in a particular investigation, it may well outsource the investigation.

It is submitted that a lack of institutional and technical capacity do not affect the functions of the Public Protector. The Public Protector is free from any constraints and exercises its function impartially and without fear or favour. This is so because the concern about trespassing on the domain of other spheres of government does not apply to it. Indeed, the Public Protector is constitutionally established to investigate any maladministration and to hold accountable anyone found to have failed to carry out his/her duties according to the prescripts. Therefore, any alleged maladministration is

⁸⁴ *Economic Freedom Fighters* para 52.

⁸⁵ *De Vos et al South African Constitutional Law* 264.

⁸⁶ Nolan, Porter and Langford 2009 *CHRGJ Working Paper* 13; Brennan 2009 *QUTLJJ* 72.

sufficient to trigger the Public Protector's investigating and holding accountable the faulty party, regardless of the spheres of government in which the incident occurred.

The paper further submits that it would be beneficial to enforce the right to housing through the Public Protector because it is cost effective to do so. It is common cause that court proceedings are usually expensive, and having an institution through which one may enforce the same right free of charge is a welcome addition to the legal route.⁸⁷ Moreover, because housing-related complainants are often indigent and cannot afford legal costs, the Public Protector appears as a panacea, because it only requires the lodging of a complaint for the Public Protector to commence investigations. As clearly articulated by the Chief Justice in *Economic Freedom Fighters*, the Public Protector is the constitutional instrument that gives "the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly".⁸⁸ The Public Protector "is the embodiment of a Biblical David who fought the most powerful and very well resourced Goliath, that impropriety and corruption by government officials are".⁸⁹ The Public Protector is, therefore, another available constitutional option through which the marginalised and poor may exercise their right to housing. It is through the Public Protector that the voiceless may hear their voices penetrate the deafness of a dysfunctional bureaucracy and may receive justice, which has become an increasingly rare gift. The Public Protector is in a position to assist underprivileged people to realise and enforce their right to housing to a certain extent, and may thus complement the excellent role played by the judiciary. It is an institution which fulfils its role as a mechanism of political accountability. In addition, in order to be cost effective, the enforcement of the right to housing through the Public Protector will go a long way to easing the backlog in the courts where litigants may have to wait for a long time for their matters to be adjudicated.⁹⁰ It then follows that by electing to pursue

⁸⁷ In *Economic Freedom Fighters*, it was held that the tentacles of poverty run far, wide and deep in our nation and that litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen.

⁸⁸ *Economic Freedom Fighters* para 52.

⁸⁹ *Economic Freedom Fighters* para 52.

⁹⁰ The case of *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue* 2009 1 SA 470 (W) is illustrative of how the prosecution of a matter may be delayed. The case number in the matter was issued in 2006. The matter was heard only some three years later on 17-18 June 2009 and 22 July 2009. Judgment was delivered some six months later on 4 February 2010. The Supreme Court of Appeal heard the matter a year later on 18 February 2011 and the Constitutional Court in the same year ie 11 August 2011, and in the following year on 30 March 2012. In total, it took some six years to reach finality in this matter.

the enforcement of their right to housing through the Public Protector, complainants would also be vindicated and could receive the right to which they are entitled.

3 Conclusion

This paper is premised on the broader concept of political accountability, which is to hold government accountable for its failure to realise the right to housing. It has been argued that the realisation of the right to housing is being enforced solely through the courts, which are only one of the existing mechanisms of political accountability. It has further been argued that by focusing only on courts, other mechanisms of political accountability that may play a role in the realisation of the right to housing have been ignored and or used only occasionally. This paper has examined the role of the Public Protector as a mechanism of political accountability in the realisation of the right to housing. To this effect, this paper posits that the Public Protector is another avenue through which the realisation of the right to housing may be enforced. The role of the Public Protector supplements that played by the courts and should not in any way be viewed as a substitute for the litigation process or a means of stripping the courts of their adjudicative role in enforcing the realisation of the right to housing. The paper has argued that because courts as a mechanism of political accountability as explored above have some limitations, the Public Protector is a welcome addition to the mechanisms for realising the right to housing. It should, however, be emphasised that the Public Protector is not an alternative but a complement to courts in the realisation of the right to housing. The use of the Public Protector as a complementary institution to enforce the realisation of the right to housing proves that a non-adjudicative method is also useful to enforce that right. Perhaps it may for a future purpose not be presumptive to advocate or suggest a policy shift that compels housing litigants first to approach the Public Protector and then the court only as a last resort.

Bibliography

Literature

Ayeni "The Ombudsman around the World"

Ayeni OV "The Ombudsman around the World: Essential Elements, Evolution and Contemporary Issues" in Ayeni OV, Reif LC and Thomas H (eds) *Strengthening Ombudsman and Human Rights Institutions in*

Commonwealth Small States: The Caribbean Experience (Commonwealth Secretariat London 2000) 1-19

Bishop and Woolman "Public Protector"

Bishop M and Woolman S "Public Protector" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (Juta Cape Town 2014) ch 24A

Brand 2011 *Stell L Rev*

Brand D "Judicial Deference and Democracy in Socio-Economic rights cases in South Africa" 2011 *Stell L Rev* 614-638

Brennan 2009 *QUTLJJ*

Brennan M "To Adjudicate and Enforce Socio-Economic Rights: South Africa Proves that Domestic Courts are a Viable Option" 2009 *QUTLJJ* 64-84

Bryant and Lane 2013 *Franchise LJ*

Bryant TJ and Lane ME "Companion Dispute Resolution: Three-dimensional Thinking and the Effective Use of Mediation with Traditional Litigation of Franchise Disputes" 2013 (fall) *Franchise LJ* 261-277

Davis 2012 *PER/PELJ*

Davis DM "The Relationship between Courts and the Other Arms of Government in Promoting and Protecting Socio-Economic Rights in South Africa: What about Separation of Powers?" 2012 *PER/PELJ* 1-14

De Vos *et al South African Constitutional Law*

De Vos P *et al* (eds) *South African Constitutional Law in Context* (Oxford University Press Cape Town 2014)

Goetz and Jenkins *Reinventing Accountability*

Goetz AM and Jenkins R *Reinventing Accountability: Making Democracy Work for Human Development* (Palgrave Macmillan New York 2005)

Gottehrer and Hostina "Classical Ombudsman Model"

Gottehrer DM and Hostina M "The Classical Ombudsman Model" in Gregory R and Giddings PJ (eds) *Righting Wrongs: The Ombudsman in Six Continents* (IOS Press Amsterdam 2000) 403-414

Howard Organizational Ombudsman

Howard CL *The Organizational Ombudsman: Origins, Roles, and Operations - A Legal Guide* (ABA Cleveland, Ohio 2010)

Jane "Ombudsman in Denmark and Norway"

Jane JE "The Ombudsman in Denmark and Norway" in Gregory R and Giddings PJ (eds) *Righting Wrongs: The Ombudsman in Six Continents* (IOS Press Amsterdam 2000) 143-154

Johnson "Ombudsman – Essential Elements"

Johnson H "Ombudsman – Essential Elements" in Hossain K *et al* (eds) *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Kluwer Law The Hague 2000) 785-790

Matshekga 2002 *AHRLJ*

Matshekga J "Toothless Bulldogs? The Human Rights Commissions of Uganda and South Africa: A Comparative Study of their Independence" 2002 *AHRLJ* 68-91

McEwen and Maiman 1984 *Law & Soc'y Rev*

McEwen CA and Maiman RJ "Mediation in Small Claims Court: Achieving Compliance through Consent" 1984 *Law & Soc'y Rev* 11-49

Murray 2000 *PER/PELJ*

Murray C "The Human Rights Commission *et al*: What is the Role of South Africa's Chapter 9 Institutions?" 2000 *PER/PELJ* 1-26

Mureinik 1994 *SAJHR*

Mureinik E "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 *SAJHR* 31-48

Nolan, Porter and Langford 2009 *CHRGJ Working Paper*

Nolan A, Porter B and Langford M "The Justiciability of Social and Economic Rights: An Updated Appraisal" 2009 15 *CHRGJ Working Paper* 1-36

Owen "The Ombudsman: Essential Elements"

Owen S "The Ombudsman: Essential Elements and Common Challenges" in Reif LC *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (Kluwer Law The Hague 1999) 51-72

Pillay 2002 *ESR Review*

Pillay K "Implementing Grootboom: Supervision Needed" 2002 *ESR Review* 16-18

Reif "Introduction"

Reif LC (ed) "Introduction" in Reif LC *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (Kluwer Law The Hague 1999) xxii-xxxviii

Reif *Ombudsman, Good Governance*

Reif LC *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Leiden 2004)

Tchawouo Mbiada *Strengthening the Role of Political Accountability*

Tchawouo Mbiada CJ *Strengthening the Role of Political Accountability in the Realisation of the Right to Housing in South Africa* (PhD-thesis North-West University 2014)

Wieslander *Parliamentary Ombudsman*

Wieslander B *The Parliamentary Ombudsman in Sweden* (Bank of Sweden Tercentenary Foundation Stockholm 1994)

Case law

Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue 2009 1 SA 470 (W)

Democratic Alliance v South African Broadcasting Corporation Limited 2015 1 SA 551 (WCC)

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016 5 BCLR 618 (CC)

Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC)

Minister of Health v Treatment Action Campaign 2002 10 BCLR 1033 (CC)

Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 6 SA 222 (SCA)

Re: Certification of the Constitution of the Republic of South Africa 1996 10 BCLR 1253 (CC)

South African Broadcasting Corporation Soc Ltd v Democratic Alliance 2015 4 All SA 719 (SCA)

The Public Protector v Mail & Guardian Ltd 2011 4 SA 420 (SCA)

Legislation

Constitution of the Republic of South Africa, 1996

Ombudsman Act 118 of 1979

Public Finance Management Act 1 of 1999

Public Protector Act 23 of 1994

Reports

Public Protector, Annual Report 2010-2011

Public Protector, Annual Report 2009-2010

Public Protector, Annual Report 2013-2014

Public Protector, Report No 3 of 2010-2011

Public Protector, Report No 2 of 2010-2011

Public Protector, Report No 14 of 2013-2014

Internet sources

Bazana 2016 <https://mg.co.za/article/2016-08-31-south-africa-should-use-a-more-scientific-approach-to-appoint-its-public-protector>

Bazana S "How to Fix the Deeply Flawed Public Protector Appointment Process" *Mail and Guardian* (31 August 2016) <https://mg.co.za/article/2016-08-31-south-africa-should-use-a-more-scientific-approach-to-appoint-its-public-protector> accessed 25 April 2017

Gqirana 2017 <http://www.news24.com/SouthAfrica/News/we-need-r1bn-to-do-our-job-public-protector-20170330>

Gqirana T 2017 *We Need R1bn to do our Job - Public Protector* <http://www.news24.com/SouthAfrica/News/we-need-r1bn-to-do-our-job-public-protector-20170330> accessed 31 March 2017

Public Protector 2014 <http://www.gov.za/public-protector-thuli-madonsela-calls-funding-proportional-workload>

Public Protector 2014 *Media Statement: Public Protector Repeats Calls for Funding Proportional to Workload* <http://www.gov.za/public-protector-thuli-madonsela-calls-funding-proportional-workload> accessed 9 February 2015

List of Abbreviations

ADR	Alternative Resolution Dispute
AHRLJ	African Human Right Law Journal
DA	Democratic Alliance
Franchise LJ	Franchise Law Journal
HSS	Housing Subsidy System
Law & Soc'y Rev	Law and Society Review
PER/PELJ	Potchefstroom Electronic Law Journal / Potchefstroomse Elektroniese Regsblad
QUTLJJ	Queensland University of Technology Law and Justice Journal
SABC	South African Broadcasting Corporation
SAJHR	South Africa Journal on Human Rights
SCA	Supreme Court of Appeal
Stell L Rev	Stellenbosch Law Review