

**REFLECTION ON THE PROSPECTS AND CHALLENGES OF THE OFFICE OF
THE PUBLIC PROTECTOR IN SOUTH AFRICA IN ACHIEVING ITS
CONSTITUTIONAL MANDATE**

by

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Masters of Laws in the Faculty of Law at the North-West University
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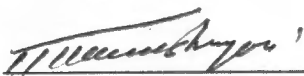
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SOLEMN DECLARATION

I duly declare that this research entitled, "*Reflections on the Prospects and Challenges of the Office of the Public Protector in South Africa in Achieving its Constitutional Mandate*", for the degree of Masters of Laws at the North West University (Mafikeng Campus) hereby submitted, has not been previously tendered by me for a degree at this institution or any other university. I further declare that this research study is my own work in design, structure and execution and that all materials and resources contained herein have been acknowledged.

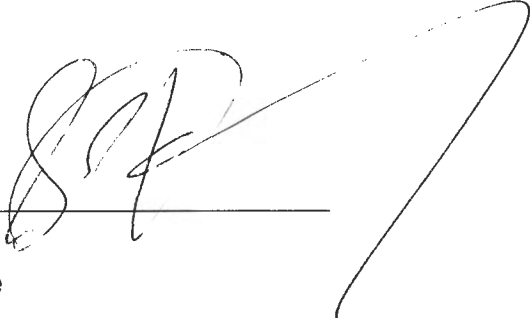


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DECLARATION BY SUPERVISOR

I, Professor Samuelson Freddie Khunou, do hereby declare that this dissertation by Dalton Ntendeleni Tshinyani, for the degree of LLM, should be accepted for examination.



Signature

10-10-2012
Date

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DEDICATION

This research study is dedicated to my late father, Kennedy Khaukanani Tshinyani.

LIST OF ABBREVIATIONS

ANC	African National Congress
AWB	Afrikaner Weerstandsbeweging
BOSS	Bureau of State Security
CIA	Central Intelligence Agency
COO	Chief Operating Officer
CBP	Carol Bower Production
CODESA	Convention for a Democratic South Africa
COPE	Congress of the People
COSAG	Concerned South Africans Group
COSATU	Congress of South African Traders Union
CP	Conservative Party
DA	Democratic Alliance
DTI	Department of Trade And Industry
EFF	Economic Freedom Fighters
IDASA	Institute for Democratic Alternative for South Africa
IEC	Independent Electoral Commission
IFP	Inkatha Freedom Party
MEC	Members of the Executive Council
MPNF	Multi-Party Negotiating Forum
NCC	National Consumer Commission
NCOP	National Council Of Provinces
NEC	National Executive Commission
NIS	National Intelligence Service
NP	National Party

NPA	National Peace Accord
PAC	Pan Africanist Congress
PAIA	Promotion of Access to Information Act
PEC	Provincial Executive Council
PMU	Project Management Unit
PRASA	Passenger Rail Agency of South Africa
SABC	South African Broadcasting Corporation
SACP	South African Communist Party
SADTU	South African Democratic Teachers Union
SANEF	South African National Editor's Forum
SCA	Supreme Court of Appeal
SIU	Special Investigation Unit
TBVC	Transkei, Bophuthatswana, Venda And Ciskei
UP	United Party
WPTPS	White Paper on the Transformation of the Public Service
YCL	Young Communist League

TABLE OF CONTENTS

SOLEMN DECLARATION	i
DECLARATION BY SUPERVISOR	ii
ACKNOWLEDGEMENTS	iii
DEDICATION	iv
LIST OF ABBREVIATIONS	v
TABLE OF CONTENTS	vii
CHAPTER 1: INTRODUCTION	1
1.1 INTRODUCTION	1
1.2 PROBLEM STATEMENT	1
1.3 AIMS AND OBJECTIVES	2
1.4 BACKGROUND PERSPECTIVE	3
1.5 RESEARCH METHODOLOGY	7
1.6 CHAPTER OUTLINE	7
1.7 SIGNIFICANCE OF THE STUDY	8
1.8 CONCLUSION	9
CHAPTER 2: HISTORICAL BACKGROUND AND DEVELOPMENT	10
2.1 INTRODUCTION	10
2.2 OFFICE OF THE OMBUDSMAN AND THE UNION DISPENSATION 1910-1948	10
2.3 OFFICE OF THE OMBUDSMAN UNDER APARTHEID, 1948-1994	12
2.3.1 THE ERASMUS COMMISSION	17

2.3.2 THE ADVOCATE-GENERAL AND THE OFFICE OF THE OMBUDSMAN	19
2.4 OFFICE OF THE OMBUDSMAN IN THE TBVC STATES	20
2.4.1 BOPHUTHATSWANA	20
2.4.2 TRANSKEI AND CISCHEI	21
2.4.3 VENDA	22
2.5 MAHLABATINI DECLARATION OF FAITH	23
2.6 CONCLUSION	24
CHAPTER 3: NEW CONSTITUTIONAL SETTLEMENT	27
3.1 INTRODUCTION	27
3.2 TOWARDS THE NEW CONSTITUTIONAL SETTLEMENT	27
3.2.1 GROOTE SCHUUR MEETING	29
3.2.2 THE CONVENTION FOR A DEMOCRATIC SOUTH AFRICA (CODESA I)	30
3.2.3 WHITES ONLY REFERENDUM	31
3.2.4 CONVENTION FOR A DEMOCRATIC SOUTH AFRICA (CODESA II)	32
3.2.5 RESUMPTION OF NEGOTIATIONS	33
3.2.6 THE MULTI-PARTY NEGOTIATING FORUM (MPNF)	34
3.3 INTERIM CONSTITUTION AND THE OFFICE OF THE PUBLIC PROTECTOR	35
3.3.1 ESTABLISHMENT AND THE APPOINTMENT OF THE PUBLIC PROTECTOR	37
3.3.2 REQUIREMENTS FOR THE APPOINTMENT OF THE SOUTH AFRICAN PUBLIC PROTECTOR	37

3.3.3	THE INDEPENDENCE AND IMPARTIALITY OF THE PUBLIC PROTECTOR	38
3.3.4	CONSTITUTIONAL POWERS AND FUNCTIONS OF THE PUBLIC PROTECTOR	39
3.4	THE 1996 CONSTITUTIONAL SETTLEMENT	40
3.4.1	INDEPENDENCE AND IMPARTIALITY OF THE PUBLIC PROTECTOR	40
3.4.2	THE IMPORTANCE OF HAVING THE OFFICE OF THE PUBLIC PROTECTOR	44
3.5	CONCLUSION	45
	CHAPTER 4: LEGISLATION FRAMEWORK	46
4.1	INTRODUCTION	46
4.2	SCOPE OF LEGISLATION	47
4.2.1	THE PUBLIC PROTECTOR ACT 23 OF 1994	47
4.2.1.1	INVESTIGATION PROCEDURE	47
4.2.1.2	PUBLICATION OF FINDINGS	49
4.2.1.3	CONFIDENTIALITY	50
4.2.1.4	INTERACTION WITH OTHER INSTITUTIONS	51
4.2.1.5	RULES OF THE PUBLIC PROTECTOR	52
4.2.2	EXECUTIVE MEMBER ETHICS ACT 82 OF 1998	60
4.2.2.1	THE EXECUTIVE ETHICS CODE	63
4.2.3	PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT 12 OF 2004	64
4.2.4	PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000	64

4.2.5	PROTECTED DISCLOSURE ACT 26 OF 2000	65
4.2.6	NATIONAL ARCHIVES OF SOUTH AFRICA SERVICE ACT 43 OF 1996	65
4.2.7	PUBLIC FINANCE MANAGEMENT ACT 1 OF 1999	65
4.2.8	SPECIAL INVESTIGATING UNIT AND SPECIAL TRIBUNAL ACT 74 OF 1996	66
4.2.9	GOVERNMENT WHITE PAPER	66
4.3	CONCLUSION	67
CHAPTER 5:	COMPARATIVE ANALYSIS AND INTERNATIONAL PERSPECTIVES	68
5.1	INTRODUCTION	68
5.2	INTERNATIONAL STANDARDS AND PERSPECTIVES	68
5.2.1	INTERNATIONAL VIEWPOINTS OF THE OMBUDSMAN	68
5.3	OFFICE OF THE OMBUDSMAN IN SWEDEN	72
5.3.1	POWER AND FUNCTIONS OF THE SWEDISH OMBUDSMAN	74
5.3.2	LIMITATIONS: POWERS OF THE SWEDISH OMBUDSMAN	76
5.4	CONCLUSION	77
CHAPTER 6:	CHALLENGES AND IMPEDIMENTS OF THE OFFICE OF THE PUBLIC PROTECTOR	78
6.1	INTRODUCTION	78
6.1.1	FINANCIAL PROBLEMS: LACK OF FUNDS AND RESOURCES	79
6.1.1.1	THE SCOPE OF ALLEGATIONS PROBED: ON-POINT ENGINEERING	79
6.1.1.2	PUBLIC PROTECTOR'S FINDINGS	80

6.1.2	LACK OF CO-OPERATION BY ORGANS OF THE STATE AND PUBLIC AUTHORITIES	85
6.1.3	THE UNNECESSARY INTERFERENCE AND ATTACK OF THE PUBLIC PROTECTOR'S OFFICE	87
6.1.4	LEAKING OF PROVINCIAL REPORTS	93
6.1.5	THE CONFLICT BETWEEN THE OFFICE OF THE PUBLIC PROTECTOR AND OTHER STATUTORY BODIES	98
6.1.6	THE OFFICE OF THE PUBLIC PROTECTOR VIS-À-VIS THE PARLIAMENT	99
6.1.7	THE NEW PUBLIC PROTECTOR	100
6.1.8	RESHUFFLING AND RESIGNING OF STAFF	105
6.1.9	STATE CAPTURE REPORT	106
6.2	CONCLUSION	115
	CHAPTER 7: THE SUCCESSES AND PROSPECTS OF THE OFFICE OF THE PUBLIC PROTECTOR	117
7.1	INTRODUCTION	117
7.2	SUCCESSES AND ACHIEVEMENTS	117
7.2.1	REPORTS OF THE OFFICE OF THE PUBLIC PROTECTOR	120
7.2.2	TRIUMPH IN A COURT BATTLE: A CONFIRMATION OF THE PUBLIC PROTECTOR'S POWERS	134
7.2.3	AWARDS RECEIVED AND DONATIONS MADE BY THE PUBLIC PROTECTOR	136
7.3	CONCLUSION	138
	CHAPTER 8: RECOMMENDATIONS AND POSSIBLE SOLUTIONS	140
8.1	INTRODUCTION	140

8.2	LEGITIMACY OF THE REMEDIAL ACTIONS	140
8.3	MANDATE OF THE PUBLIC PROTECTOR'S OFFICE	140
8.4	ECONOMIC, SOCIAL AND CULTURAL RIGHTS	141
8.5	DECISIONS OF THE PUBLIC PROTECTOR	141
8.6	APPOINTMENT OF STAFF IN THE OFFICE OF THE PUBLIC PROTECTOR	142
8.7	FINANCIAL AND HUMAN RESOURCES	142
8.8	ACCESSIBILITY	143
8.9	ACCOUNTABILITY	143
8.10	CIVIL SOCIETY INVOLVEMENT	143
8.11	LEAKING OF PUBLIC PROTECTOR'S REPORTS	144
8.12	CONCLUSION	144
	CHAPTER 9: GENERAL CONCLUSIONS	145
	BIBLIOGRAPHY	148

CHAPTER 1

INTRODUCTION

1.1 Introduction

The primary objective of this research study is to discuss the prospects and challenges faced by the Office of the Public Protector in achieving its constitutional mandate in South Africa. The legal constitutional powers and authority of the Office of the Public Protector, which are meant to support democracy in South Africa, will also be examined. It is important to note that the Office of the Public Protector has been in the spotlight recently in South Africa because it has been required to investigate the conduct of the state.

As a result, the office experienced a great deal of criticism in so far as its constitutional and statutory mandates are concerned. This research study will further examine and discuss the legislative framework of the Office of the Public Protector. The pressing challenges and successes of this office will also be discussed, while possible solutions and recommendations in this regard will be explored.

1.2 Problem statement

The Office of the Public Protector was established by the *Constitution*¹ for it to perform its tasks properly and efficiently. The very same agency ought to be independent and obliged to remain autonomous at all times. However, its independence should not negatively impact the performance and integrity of public and private officials. The Office of the Public Protector should perform its duties without fear or favour.

However, recently in South Africa the Public Protector was put under constant pressure when it was called upon to investigate high ranking officials. There has been an allegation of interference by both the government and political parties which therefore hindered the functioning and challenged the powers of this institution. Juvenal,² the great Roman satirist, once asked the question as far back as the time

¹ *Constitution of the Republic of South Africa, 1996.*

² Anon 2009 *Ancient Rome Juvenal* <http://www.ancient-literature.com>:

of the Roman Empire: "Who watches the watchmen?" or "Who guards the guards?" More prosaically, it means: "Who protects the rights and interests of the individual against possible abuse by persons in public office?" This question exemplifies the challenges and interferences that the Office of the Public Protector faced during the Nkandla saga and other investigations implicating government officials that have been undertaken.

Indisputably, such interference has deliberately been designed to influence the decisions taken by this institution. For example, the Security Cluster, the Special Investigation Unit (SIU) and Parliament have through a number of *ad hoc* committees interfered with the Public Protector, especially on the Nkandla report. Nevertheless, the Office of the Public Protector has obstinately displayed its independence on this matter specifically and refused to be influenced by its detractors. As a consequence, the questions that immediately arise and which this research study attempts to address are whether this institution is discharging its constitutional and legislative mandates adequately and whether those interferences were justified.

1.3 Aims and objectives

The aims and objectives of this research study are to:

- provide a detailed historical account and background perspectives of the Office of the Public Protector;
- discuss the constitutional provisions of the Office of the Public Protector;
- discuss and examine the legislative arena of the Office of the Public Protector;
- examine the functions, powers and authority of the Office of the Public Protector;

Decimus Iunius Iuvenalis, in English known only as Juvenal, was born in Aquino, in Lazio, Italy. Juvenal was a Roman poet of the Silver Age of Latin literature, the last and most powerful of all the Roman satirical poets. His other job included one as an officer in the army and as a first step towards a career in the administrative service of the Emperor Domitian. Juvenal is credited with 16 poems; the last which was unfinished or at least poorly preserved was divided into five books. They are all in the Roman genre of "*satura*" or satire, wide-ranging discussions of society and social mores in dactylic hexameter. Accordingly, Juvenal's "Satires" are the source of many well-known maxims as well as "*panem et circenses*" ("bread and circuses," with the implication that these are all that common people are interested in), "*mens sana in corpore sano*" ("a sound mind in a sound body"), "*rara avis*" ("rare bird", referring to a perfect wife) and "*quis custodiet ipsos custodes?*" ("who will guard the guardians themselves?" or "who will watch the watchers?").

- investigate and highlight the powers *vis-à-vis* Parliament and other statutory bodies;
- examine the prospects and impediments faced by this office; and
- formulate possible solutions and recommendations on how this institution can better perform its function.

1.4 Background perspective

The institution of the Ombudsman ostensibly owes its origins to Sweden in the 16th century.³ It should be clear that corruption in our society takes many forms and that many tactics are therefore necessary to be taken into consideration as part of the strategy to combat this global scourge effectively. It will be clear from what will be discussed below that the ombudsman is an institution that plays a crucial role in this regard.⁴ The Office of the Public Protector was created in terms of section 181⁵ of the *Constitution* of the Republic of South Africa. Section 181⁶ of the *Constitution* reads as follows:

- (1) The following state institutions strengthen constitutional democracy in the Republic:
 - (a) The Public Protector.
 - (b) The Human Rights Commission.
 - (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
 - (d) The Commission for Gender Equality.
 - (e) The Auditor-General.
 - (f) The Electoral Commission.

³ Gammeltoft-Hansen "The Introduction and Development of the Swedish *JustitieOmbudsman* in Denmark".

⁴ Pienaar "The Role of the Public Protector in Fighting Corruption" *African Security Review*.

⁵ *Constitution of the Republic of South Africa, 1996*.

⁶ *Constitution of the Republic of South Africa, 1996*.

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

Previously, during the era of *apartheid* and colonialism, the democracy supporting institutions were not catered for by the 1961 *Constitution*⁷ of South Africa. Instead, this *Constitution*⁸ re-enforced *apartheid* in the country. These *Constitutions*⁹ did not include the democracy supporting institutions. Rather, it gave the right to vote for the white minority in South Africa. Nonetheless, the first South African Ombudsman (then known as the Advocate-General) was appointed in 1979 in terms of the *Advocate-General Act*¹⁰ that was amended by the *Advocate-General Amendment Act*.¹¹

The need for the Office of the Ombudsman was apparent after the facts emerged about the "information scandal"¹² that transpired. The Office of the Advocate-General could be compared to that of the Special Prosecutor of the United States, which was also instituted in a similar fashion in the wake of the "Watergate Scandal".¹³ Quite

⁷ 32 of 1961.

⁸ *South African Act of Henry VII of 1909; Constitution of the Republic of South Africa Act 32 of 1961.*

⁹ *South African Act of Henry VII of 1909; Constitution of the Republic of South Africa Act 32 of 1961.*

¹⁰ 118 of 1979.

¹¹ 55 of 1983.

¹² Anon 2012 *Information Scandal* <http://www.sahistory.org.za>.

¹³ Anon 2012 *Information Scandal* <http://www.sahistory.org.za>:

The Watergate scandal occurred in the United States in the 1970s as a result of the June 17, 1972 break-in at the Democratic National Committee (DNC) headquarters at the Watergate office complex in Washington, D.C. and President Richard Nixon's administrations attempted

evidently, the primary reason for the creation of the Office of the Advocate-General was to maintain honest public administration and orderly government. Nonetheless, the office was replaced by the Ombudsman in 1983 after amending the *Advocate-General Act*¹⁴ with the *Ombudsman Amendment Act*.¹⁵ Similarly, after the new democratic dispensation in South Africa in 1994 and the subsequent adoption of the new *Constitution*¹⁶ of 1996, the interim *Constitution*¹⁷ was ultimately repealed and the final *Constitution*¹⁸ paved the way for the promulgation of the *Public Protector Act*,¹⁹ which made provision for the establishment of the Office and the governing principles of the Public Protector.

The interim *Constitution*²⁰ was the first *Constitution* in South Africa that brought about or established the democracy supporting institutions including the Public Protector's Office. These institutions, which were initially contained in Chapter 8 of the interim *Constitution*,²¹ included the following as listed below:

- The Public Protector;
- Human Rights Commission;
- Commission on Gender Issues; and
- Restitution of Land Rights.

Following adoption of the interim *Constitution*²² and the establishment of the Independent Electoral Commission,²³ the first democratic elections were held in

cover-up of this incident which shook the American politics. This was no ordinary robbery since the motive of the intruders was associated with the re-election campaign of President Richard Nixon and they were caught while trying to bug phones and snip top-secret documents of the American government. Till today, people are not certain if Nixon knew about the Watergate operation but took steps to cover it up after raising "hush money" for the burglars and trying to stop the Federal Bureau of Investigation (FBI) from investigating the crime. In the process, he destroyed evidence and fired uncooperative staff members. Consequently, his role in what was to be called the "Watergate scandal" conspiracy was finally revealed and he resigned.

¹⁴ 118 of 1979.

¹⁵ 61 of 1983.

¹⁶ *Constitution of the Republic of South Africa*, 1996.

¹⁷ 200 of 1993.

¹⁸ *Constitution of the Republic of South Africa*, 1996.

¹⁹ 23 of 1994.

²⁰ 200 of 1993.

²¹ 200 of 1993.

²² 200 of 1993.

South Africa in 1994. The 1994 elections were then crowned with the drafting of the final *Constitution*²⁴ of South Africa which came into operation in 1996. After the 1994 elections and the adoption of the 1996 *Constitution*,²⁵ changes in Chapter 8 of the interim *Constitution*²⁶ were inevitable and finally the interim *Constitution*²⁷ became Chapter 9 of the final *Constitution*²⁸ of the Republic of South Africa.

The 1996 *Constitution*²⁹ created the democracy supporting institutions mentioned above including the Act that recognised the appointment of the Ombudsman. These institutions are found in Chapter 9 of the *Constitution*³⁰ of the Republic of South Africa. Assorted legislations³¹ were enacted to regulate the scope and duties of the Chapter 9 institutions. However, the above institutions have a number of challenges when it comes to their operations and public functions. Fortunately, the *Constitution*³² of the Republic of South Africa is the supreme law of the country and the backbone of the democracy supporting institutions as well as protecting such institutions.

Burns³³ states clearly that these institutions are independent and subject merely to the *Constitution*³⁴ and the law. It is against this background that the Office of the Public Protector must remain impartial and exercise its powers and perform its functions without fear, favour or prejudice. Furthermore, it must be assisted and protected by other appendages of the state to ensure its independence, impartiality, dignity and effectiveness.

²³ *Independent Electoral Commission Act 73 of 1998.*
The interim *Constitution* of 1993 enacted the *Independent Electoral Commission Act 150 of 1993*. With the adoption of the final *Constitution* of 1996, a newly constituted Parliament drafted a new *Constitution* for South Africa in 1996 which replaced the interim *Constitution* of 1993. Eventually, the *Constitution* of 1996 instituted the *Electoral Commission Act 51 of 1996*. The Independent Electoral Commission has since successfully conducted national elections in 1994, 1999, 2004, 2009 and 2014 in South Africa.

²⁴ *Constitution of the Republic of South Africa, 1996.*

²⁵ *Constitution of the Republic of South Africa, 1996.*

²⁶ 200 of 1993.

²⁷ 200 of 1993.

²⁸ *Constitution of the Republic of South Africa, 1996.*

²⁹ *Constitution of the Republic of South Africa, 1996.*

³⁰ *Constitution of the Republic of South Africa, 1996.*

³¹ *Public Protector Act 23 of 1994; Independent Electoral Commission Act 73 of 1998; South African Human Rights Commission Act 54 of 1994; Auditor-General Act 12 of 1995.*

³² *Constitution of the Republic of South Africa, 1996.*

³³ Burns and Beukes *Administrative Law under the 1996 Constitution*.

³⁴ *Constitution of the Republic of South Africa, 1996.*

Hoexter³⁵ agrees with Burns that the Office of the Public Protector has a number of well-established characteristics. According to Hoexter,³⁶ this is not a private office but an official one and therefore a constitutional mechanism designed to monitor the use of government power. Hoexter³⁷ further indicated that its incumbent is an independent, high level public official who is responsible to the legislature and not the executive. With the above references, the author agrees about the origin and the function of the democracy supporting institutions and has based his arguments on the 1996 *Constitution*³⁸ of the Republic of South Africa.

1.5 Research methodology

This research study constitutes a combined analysis of the relevant material including textbooks, publications, journal articles, concluded cases, case laws and speeches relating to the Office of the Public Protector. This research study will further incorporate internet sources and other relevant materials. It is worth noting that there is insufficient information of official records of the Ombudsman under the colonial era as many of the official records were destroyed prior to 1994, and this therefore poses a huge challenge to this research.

1.6 Chapter outline

Chapter 1 deals with the introduction of the research study and outlines the scope of the study, and includes the aims, objectives, problem statement, literature review and the research methodology. The chapter also discusses the historical background of the origins and development of the Office of the Ombudsman (or Public Protector) in other countries and during the colonial and *apartheid* epochs in South Africa.

Chapter 2 explores the historical background and the advancement of the Ombudsman in South Africa, focussing on the evolution of the political landscape from 1910 through the *apartheid* era to the current constitutional dispensation.

Chapter 3 explains the comparative analysis and international perspectives of the Ombudsman. This chapter further attempts to examine how the Ombudsman

³⁵ Hoexter *Administrative Law in South Africa* 57.

³⁶ Hoexter *Administrative Law in South Africa* 57.

³⁷ Hoexter *Administrative Law in South Africa* 57.

³⁸ *Constitution of the Republic of South Africa, 1996.*

operates in other countries of the world and also discusses the evolution of South Africa's political scene, which ultimately paved the way for the negotiated settlement and the drafting of the interim and final *Constitutions*. Furthermore, the recognition of the Office of the Public Protector in the interim *Constitution* is deliberated.

Chapter 4 discusses the constitutional arena, interim *Constitution* and the final *Constitution* of the Republic of South Africa.

Chapter 5 explicates the legislative framework and policies impacting on the Office of the Public Protector.

Chapter 6 explains the challenges and the impediments that the Public Protector experiences during the delivery of his or her duties.

Chapter 7 discusses the successes and prospects of the Office of the Public Protector.

Chapter 8 highlights the recommendations and possible solutions to the challenges faced by the Public Protector in its endeavours to deliver constitutional obligations.

Chapter 9 provides a general conclusion on all aspects raised in the research study.

1.7 Significance of the study

This research study seeks to address any misunderstanding encountered by the state, political parties and the public regarding the Office of the Public Protector in South Africa. As a result of this study, officials of government departments, political parties and the community at large will benefit through greater knowledge about this institution and the outcomes will prevent the unnecessary interference with the Public Protector's functions. The democracy supporting institutions are the pillars of democracy and it is therefore expected that the South African society will benefit more from these institutions, particularly the Office of the Public Protector, if the office receives the necessary support to properly execute its duties. These institutions should be empowered to function properly and there should be no unnecessary interference with their mandated duties. This research study will also be of great value and importance to law students, lawyers, prosecutors, magistrates and judges.

1.8 Conclusion

In this chapter, reference has been made to the study generally, the location and confines of the study area including the study problem, the background of the study, the significance of the study, study methodology and objectives of the study. As noted above, the chapter outlined the study structure and how the study will unfold in its narration of the story. The background perspective of this study is premised on the history of the Public Protector and how the political and constitutional landscape of South Africa evolved from the colonial, *apartheid* and the new constitutional dispensation of 1994. Furthermore, this chapter briefly discussed the creation of the institutions related to and supporting the Public Protector's Office and its responsibilities. The next chapter therefore discusses the historical background and the development of the Office of the Public Protector.

CHAPTER 2

HISTORICAL BACKGROUND AND DEVELOPMENT

2.1 Introduction

This chapter examines the historical background and perspectives of the Office of the Ombudsman (later "Office of the Public Protector") in South Africa. The history of the Ombudsman will be provided in accordance with the various political regimes of South Africa starting with the 1910 dispensation and the subsequent *apartheid* era as a predecessor of the current democratic dispensation. The term "ombudsman" refers to the government officials appointed to investigate citizens' complaints against government officials, large public and private corporations and the print and broadcast media.

On the other hand, the Office of the Public Protector is a new term that came to be used in South Africa in the new democratic dispensation after the drafting of both the interim and the final *Constitutions*.³⁹ It is also important to note that the word "ombudsman" has some connotations of gender bias and therefore it was fitting for the *Constitution* of South Africa to adopt the more gender neutral term of "Public Protector", as is the case in this country where the Public Protector is currently a woman. Generally, the Ombudsman has wide-ranging investigative powers with only few punitive powers.

2.2 Office of the Ombudsman and the Union Dispensation, 1910–1948

South Africa was colonised by the English and Dutch in the seventeenth century. The colonial era started some years before 1910; however, this research study will focus on the part commencing from 1910 with the formation of the Union of South Africa. During this period, there was no Ombudsman in South Africa and British rule applied.⁴⁰

³⁹ 200 of 1993; *Constitution of the Republic of South Africa*, 1996.

⁴⁰ Anon Date Unknown *Formation of the Union of South Africa 1910* <http://www.stephen-stratford.co.uk>:

The Union of South Africa is the forebear to the present day Republic of South Africa. It was established in 1910 with the unification of four formerly distinct British colonies: the Cape Colony, the Natal Colony, the Transvaal Colony and the Orange River Colony. The Union of South Africa was founded as a dominion of the British Empire and was governed under a

The English domination of the Dutch descendants known as *Boers* or *Afrikaners* resulted in the Dutch establishing the new Republics of the Orange Free State and Transvaal.⁴¹ However, the discovery of diamonds and gold in these lands around 1900 resulted in an English invasion which then sparked the *Boer War*.⁴²

Following the independence from England, an uneasy power sharing between the groups held sway until the 1940s, when the Afrikaner National Party (NP) was able to gain a strong majority. However, the new government of the National Party excluded the black majority who were the land owners. The *South African Act*⁴³ passed by the British Parliament in 1909 combined the self-governing British colonies of Natal, the Cape, the Transvaal and the Orange Free State into the Union of South Africa. The Act,⁴⁴ which served as the Union's *Constitution* until 1961, created a parliamentary government along the lines of the Westminster Model consisting of a directly elected House of Assembly and indirectly elected Senate.

It is important to note that strategists in the National Party created *apartheid* as a means to cement their control over the economic and social system in South Africa. Initially, the aim of the *apartheid* system was to maintain white domination while extending racial separation. Starting in the 1960s, the Grand *Apartheid* Plan was executed, emphasising territorial separation and police repression. Evidently, this event marked the beginning of the suppression of non-white peoples' rights. During this period, the African National Congress (ANC)⁴⁵ came up with a defiance campaign⁴⁶ in 1952 and its leadership was repeatedly arrested for seditious activities, though the prosecution in this regard was unsuccessful. The defiance

method of constitutional monarchy with the British monarch represented by a Governor-General.

⁴¹ *The South African Act of Henry VII of 1909.*

⁴² Stratford 2008 *British Military & Criminal History in the Period 1900 to 1999* <http://www.stephen-stratford.co.uk>:

The Boer War started in 1899 and was fought between Great Britain and the two *Afrikaner* (*Boer*) Republics, the Transvaal and the Orange Free State. Apparently the war was caused by the refusal of the Transvaal President Paul Kruger to award political rights to the English population in the mining areas of the Witwatersrand. The *Boer War* was finally concluded with the signing of the Treaty of Vereeniging in May 1902.

⁴³ *The South African Act of Henry VII of 1909.*

⁴⁴ *Constitution of Union of South Africa*, 1910.

⁴⁵ African National Congress is a political party in the Republic of South Africa.

⁴⁶ The defiance campaign was aimed at defying unjust laws that discriminated against black people. This campaign was adopted at the 1951 ANC National Conference in Bloemfontein.

campaign against unjust laws was presented by the African National Congress at a conference in Bloemfontein.

In this campaign the national action based on non-cooperation was implemented. Initially, the political parties committed to non-violent protest. The African National Congress together with the South African Communist Party (SACP)⁴⁷ cofounded the militant *Umkhonto we Sizwe* (MK)⁴⁸ in 1969, which then led to a series of sabotage campaigns against the *apartheid* government. Subsequently in 1962, Nelson Mandela⁴⁹ and other Rivonia trialists were arrested and convicted of conspiracy to overthrow the government and were sentenced to life imprisonment in the Rivonia trial.⁵⁰

As mentioned above, there are minimal records in this era about the functions of the Ombudsman in South Africa. It is now safe to say that South Africa did not have a democratic government, as the rights of the citizens were not protected from any infringement by the government. The majority of the people of South Africa did not want this government and were against the *Constitution*⁵¹ of the Republic of South Africa that led to the establishment of the *apartheid* government, which even then was still not democratically elected.

2.3 Office of the Ombudsman under apartheid, 1948–1994

Racial segregation in South Africa began in colonial times under the Dutch empire, and continued until when the British took over the Cape of Good Hope and beyond this era.⁵² *Apartheid* as an officially institutionalised policy was introduced after the general elections of 1948 with the enactment of the *apartheid* laws.⁵³ Subsequent to the elections victory by the National Party, which epitomised the demise of the Union government, the ruling party opted for total autonomy from the British government by

⁴⁷ The South African Communist Party is a political party in the Republic of South Africa.
⁴⁸ *Umkhonto we Sizwe* (MK), which basically means "The Spear of the Nation", was a militant wing of the ANC that was aimed at fighting oppression by the *apartheid* government.
⁴⁹ Nelson Mandela is the first democratically elected President of South Africa (1994 –1999), affectionately known as Madiba.
⁵⁰ The Rivonia Trial was a trial that took place in South African between 1963–1964.
⁵¹ *Constitution of the Union of South Africa*, 1910.
⁵² Du Toit and Giliomee *Afrikaner Political Thought: Analysis and Documents* 6.
⁵³ *Group Areas Act* 36 of 1966; *Black Land Act* 27 of 1913; *Development Trust Land Act* 18 of 1936; *Black Communities Development Act* 4 of 1984.

declaring the country a republic and adopted a new *Constitution*⁵⁴ in 1961. However, the new *apartheid* regime also did not have the Office of the Public Protector. Race laws touched every social and economic aspect of the lives of the ordinary oppressed South Africans, except of course the white ruling minority who were the perpetrators behind this.

Among others, these racial laws included the prohibition of marriage between non-whites and whites and reservations of jobs for whites.⁵⁵ Under *apartheid*, the rights, associations and movements of the majority groups were curtailed and the *Afrikaner* minority rule was maintained. Similarly, in 1950, the *Population Registration Act*⁵⁶ was enacted to racially classify South Africans along the colour continuum into five categories: white, black (African), coloured (of mixed decent), Indians and Asians. Justice in South Africa was selective by colour and injustices were committed against non-white groups. During this period, there were no institutions such as the Ombudsman to promote the rights and ensure the dignity and interests of the oppressed.⁵⁷

In 1951, another development, namely the *Bantu Authorities Act*⁵⁸ established a basis for ethnic government in African reserves, known as the "homelands". From 1976 to 1981, four of these homelands attained 'independence', denationalising nine million South Africans in the process. However, the self-governing territories⁵⁹ refused nominal independence. The homelands were 'independent' states to which each African was assigned by the government according to their record of origin. All political rights, including voting by Africans, were restricted to the designated

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32 of 1961;

In 1960, the *Afrikaner*-dominated right-wing National Party, which had come to power in 1948, held a referendum on whether the then Union of South Africa should become a Republic. The vote, which was restricted to whites, was narrowly approved by 52.29% of the voters. The subsequent victory in the referendum by implication declared the former Union of South Africa a Republic. Under the terms of the *Constitution* South Africa left the Commonwealth and became a Republic.

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Separate Amenities Act 49 of 1952.

56

30 of 1950.

57

Population Registration Act 30 of 1950.

58

68 of 1951.

59

Some of the legislation in support of the *apartheid* government and which helped establish the homelands included, among others, the *Group Areas Act* 36 of 1966, the *Black Land Act* 27 of 1913, the *Development Trust Land Act* 18 of 1936, the *Bantu Homelands Citizenship Act* 26 of 1970 and the *Black Communities Development Act* 4 of 1984.

homeland.⁶⁰ The idea was that they would be citizens of the homeland, thereby losing their citizenship in South Africa and any right to involvement with the South African Parliament which held complete hegemony over the homelands.

During that era, a South African was not considered white if one of his or her parents were a non-white. The determination that a person was obviously white would take into account their habits, education and speech. The black people would be accepted as a member of a particular African tribe or race, while a person would be considered a coloured if he or she is neither black nor white but a blend of the two.⁶¹ All black people were required to carry pass books containing fingerprints, a photo and information on access to "non-black areas".⁶²

Non-compliance with the race laws were dealt with harshly. In addition, in 1953, the *Public Safety Act*⁶³ and the *Criminal Law Amendment Act*⁶⁴ were passed. These pieces of legislation empowered the government to declare a stringent state of emergency and increased penalties for protesting against or supporting the repeal of a law. The penalties included fines, imprisonment and whippings. Wielding the *Public Safety Act*⁶⁵ and the *Criminal Law Amendment Act*,⁶⁶ the white regime had no intention of changing the unjust laws of *apartheid*. Quite evidently, egregious *apartheid* laws could be applied with persistent impunity. These *apartheid* laws were

⁶⁰ *Group Areas Act* 36 of 1966; *Black Land Act* 27 of 1913; *Development Trust Land Act* 18 of 1936; *Black Communities Development Act* 4 of 1984.

⁶¹ Anon Date Unknown *Population Registration Act No 30 of 1950* <https://www.nelsonmandela.org>:

Population Registration Act 30 of 1950 provided for the collation of a register of the entire South African population where it could be divided into three racial groups: white, black (African, Native and/or Bantu) and Coloured; the last group being a combination of the Cape Malay, Griqua, Indian, Chinese and the Cape Coloured.

⁶² Du Toit and Giliomee *Afrikaner Political Thought: Analysis and Documents* xxv.

⁶³ *Public Safety Act* 3 of 1953 was passed in direct retort to the Defiance Campaign of 1952 which was initiated by Nelson Mandela, Walter Sisulu and others within the ANC. It included a provision that empowered the government to declare a state of emergency in any or every part of the country. According to section 3 of the Act "the Governor-General [later, State President] may... make such regulations as appear to him to be necessary or expedient for providing for the safety of the public, or the maintenance of public order and for making adequate provision for terminating such emergency or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency".

⁶⁴ 8 of 1953.

⁶⁵ 3 of 1953.

⁶⁶ *Criminal Law Amendment Act* 8 of 1953 including the *Public Safety Act* 3 of 1953 were passed in direct response to the Defiance Campaign organised by the African National Congress and the South African Indian Congress in 1952 in defiance the six suppressive *apartheid* laws.

deliberately enacted to perpetuate inequality among the races and further advance human rights violations.⁶⁷

During the state of emergency which continued irregularly until 1989, anyone could be detained without a hearing by a lower level police official for up to six months.⁶⁸ Thousands of individuals died in custody, frequently after gruesome acts of torture. Those who were prosecuted were sentenced to death, banished or imprisoned for life, like Nelson Mandela. The *apartheid* policy was highly effective in achieving its goal of preferential treatment for whites.

Another case that might have warranted the intervention of the Public Protector during the *apartheid* era was the "Information Scandal" of the 1970s. South Africa then was rocked by a major political scandal involving the Department of Information, which was allegedly misappropriating state funds for secret projects. The "Information Scandal" (or Infogate or Rhodiegate or Muldergate), as it came to be known, culminated in the resignation of Cabinet Minister Dr Connie Mulder and the Prime Minister, Balthazar Johannes Vorster.⁶⁹

According to Rees,⁷⁰ Eschel Rhodie, the former Press Officer of the South African Embassy at the Hague, secretly negotiated an agreement with a Dutch publisher by the name of Hubert Jussen whereby Jussen allegedly agreed to help with the establishment of a new magazine, which was to be secretly financed by the South African government and with the intention to counter some of the unfavourable press coverage South Africa was receiving overseas.⁷¹

Apparently, that secret scheme had the approval of the Prime Minister B J Vorster, the Chief of the Intelligence Services, General Hendrik van den Berg, the Minister of Information, Dr Connie Mulder and Mr Gerald Barrie, Head of the Department of

⁶⁷ *Criminal Law Amendment Act 8 of 1953* including the *Public Safety Act 3 of 1953* were passed in direct response to the Defiance Campaign organised by the African National Congress and the South African Indian Congress in 1952 in defiance the six suppressive *apartheid* laws.

⁶⁸ Anon Date Unknown *States of Emergency in South Africa: The 1960s and 1980s* <http://www.sahistory.org.za>.

⁶⁹ Rees and Day *Muldergate: The Story of the Info Scandal* 84–88.

⁷⁰ Rees and Day *Muldergate: The Story of the Info Scandal* 84–88.

⁷¹ Roherty *The State Security in South Africa: Civil-Military Relations Under P W Botha* 5.

Information.⁷² From 1973 onwards, by which time Rhodie was working in close cooperation with the power behind the throne, General Hendrik van den Bergh, the then Head of the Bureau of State Security (BOSS), new schemes and projects were constantly being introduced and they were all run by Eschel Rhodie's Department of Information and were all paid for with government money. Due to the clandestine nature of the situation, money was often handed over in cash without any receipt.⁷³

However, by July 1977, rumours and speculation concerning financial malpractice in the Department of Information emerged and an audit of the department's books was ordered. When the information reached crisis proportions in the autumn of 1978, the Minister of Finance, Owen Horwood, instituted an inquiry under the auspices of Judge Anton Mostert to probe exchange control violations, among others.⁷⁴ Consequently, on 2 November 1978, despite protestations from the new Prime Minister, Pieter Willem Botha and Minister Owen Pieter Faure, Judge Anton Mostert called a press conference to divulge details of the scandal.⁷⁵

In that press conference, Judge Mostert released evidence which showed beyond doubt that *The Citizen* newspaper was financed through state funds.⁷⁶ In evidence under oath, Louis Luyt named the former Prime Minister, B J Vorster, the then Minister of Plural Relations, Dr Connie Mulder and General Hendrik van den Bergh, as key figures in the secret project to finance the newspaper.⁷⁷ Dr Eschel Rhodie was eventually charged with seven counts of fraud, alternatively theft, involving a total of R63 205 of government money.

Despite the fact that it was shown during the trial that he controlled a series of slush funds in Switzerland, Holland and Great Britain to finance the Department of Information's secret project for a total of between R18 to R20 million, of which not a cent was missing, he was found guilty on 8 October 1979 of five charges of fraud and sentenced to an effective six years imprisonment.⁷⁸ In October 1980, Dr Eschel

⁷² Montesh "The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?" 196.

⁷³ Barron "The Judge was a Pawn in PW's Cover up Bid" *Sunday Times* 4.

⁷⁴ Montesh "The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?" 196.

⁷⁵ De Beer *Who Did What in South Africa?* 60.

⁷⁶ Rees and Day *Muldergate: The Story of the Info Scandal* 70.

⁷⁷ Rees and Day *Muldergate: The Story of the Info Scandal* 70.

⁷⁸ De Beer *Who Did What in South Africa?* 46.

Rhoodie was acquitted on all counts involving state moneys by the Appeal Court in Bloemfontein.⁷⁹

It was estimated that the South African government had spent almost R500 000 to establish that Dr Eschel Rhoodie was innocent of the fraud charges brought against him.⁸⁰ As a result, in March 1982, Dr Eschel Rhoodie and his wife Katie immigrated to the United States. Subsequently, in his book "The Real Information Scandal" which was published in October 1983, Dr Eschel Rhoodie maintained allegations of big name involvement in the secret information projects.⁸¹

Dr Eschel Rhoodie further maintained that dozens of senior government officials were aware of the secret projects his department actively pursued, and that R 75 million had been allocated over a five-year period to finance these projects.⁸² Obviously, after the "Information Scandal", the South African Parliament appreciated the fact that there would always be an obligation to investigate matters of a similar nature and maybe also a need for an institution similar to the Office of the Ombudsman or Public Protector as we know it today. The thinking was that there were no guarantees that another scandal would not take place in the future.⁸³

2.3.1 The Erasmus Commission

Following the result of the "Information Scandal", the South African government took a decision to establish the Erasmus Commission in 1978 under Judge R P Botha Erasmus.⁸⁴ The Commission was given a broad mandate but only a short period to

⁷⁹ Barron "The Judge was a Pawn in PW's Cover up Bid" *Sunday Times* 25 April 1999 4.

⁸⁰ Barron "The Judge was a Pawn in PW's Cover up Bid" *Sunday Times* 25 April 1999 4.

⁸¹ Brynard *The Advocate General: The South African Ombudsman*.

⁸² Rees and Day *Muldergate: The Story of the Info Scandal* 49.

⁸³ Montesh "The Functioning of Ombudsman (Public Protector) in South Africa: Redress and Checks and Balances?" 197.

⁸⁴ Anon 7 December 1978 *The Erasmus Commission's Report Implicates Rhoodie, Mulder and van den Bergh in South Africa's Infamous Information Scandal* <http://v1.sahistory.org.za>: The Erasmus Commission was appointed by B J Vorster, the State President of South Africa to investigate, among others, Minister Connie Mulder's Department of Information and the Bureau of State Security (BOSS), as well as South Africa's Intelligence formation headed by General Hendrik van den Bergh. Dr Eschel Rhoodie, an administrator in the Department of Information dedicated a great share of the Department's budget towards countering the bad publicity and promoting the image of the *apartheid* South Africa internationally. He did this with the support of Mulder, van den Bergh and Vorster. Rhoodie intended to purchase persuasive newspapers in Europe and the United States to depict South Africa in a good light. The Department of Information fronted Louis Luyt and launched the *Citizen Newspaper* for using it as a government mouthpiece. Regrettably, the strategy to acquire newspapers in the

conduct the investigation on the "Information Scandal". As a result, the findings of the Commission implicated former Prime Minister John Vorster and Dr Connie Mulder for the misuse of funds by the Department of Information. Consequently, the findings of this report destroyed the political careers of these two individuals.⁸⁵

Similar to the shenanigans that unfolded between the Public Protector and some political parties and government bureaucrats, it was clear that the Erasmus Commission did not undertake its work without intimidation from the likes of Van der Berg, the then head of the Bureau of State Security who did not mince his words when appearing before the Commission by stating the following:

I really want to tell you... that I can do the impossible... I have enough men to commit murder if I tell them... to kill. I do not care who the prey is or how important they are. These are the types of men I have. And if I want to do something like that to protect the security of the state, nobody would stop me. I would stop at nothing.⁸⁶

Although Commissions of Inquiry are meant to signal the beginning of attempts to tackle issues such as abuse of power, maladministration, corruption and graft by those in higher ranks of government and some officials tasked with the responsibility of running public activities as symbolised by the "Information Scandal", the attempts to investigate this scandal indicated, in reality, the end of any effort at probing countless numbers of secret accounts that would grow under the tenure of Prime Minister P W Botha's presidency.

After the results of the Commission were published, the South African government recommended that a permanent structure in the mould of the Office of the Ombudsman should be established to serve as a protector of authentic public administration and rational government.⁸⁷ The government of South Africa cherished the idea of establishing an Advocate-General as a replacement of the Erasmus Commission was announced in September 1978.

United States, France and Britain were unsuccessful. Apparently, the Info Scandal was exposed before these deals could be concluded.

⁸⁵ Van Vuuren "Apartheid Grand Corruption" 31.

⁸⁶ Van Vuuren "Apartheid Grand Corruption" 31.

⁸⁷ Rees and Day *Muldergate: The Story of the Info Scandal* 49.

2.3.2 The Advocate-General and the Office the Ombudsman

The Office of the Advocate-General was established as an attempt by the *apartheid* government to establish an institution to deal with the abuse of office by public officials. This institution was established in terms of section 4(1)⁸⁸ of the *Advocate-General Act*. In terms of this section, the Advocate-General had the power to act if approached by any person who had a reasonable suspicion that public money was being dealt with dishonestly, or that a person was being enriched or was receiving an advantage in an improper or unlawful manner at the expense of any institution dealing with public money, or as a result of any act or omission by any employee of the state or public institution or in connection with the affairs of the state or any such institution.

Due to the fact that this agency was quickly assembled, the government realised that a mistake was made in the mandate by including black people.⁸⁹ As mentioned above, it was apparent that the government of South Africa could not then extend the functions of the Advocate-General to the black people due to the fact that it was the same government that was perpetuating gross human rights violations against the se people. The *apartheid* government realised that black people and other races that were denied human rights and deprived of basic rights could use this window of opportunity to fight the *apartheid* government through the *Advocate-General Act*.⁹⁰

Subsequently, in 1983, a new *Constitution*⁹¹ was promulgated to replace the 1961 *Constitution*.⁹² This *Constitution*⁹³ formally classified the South African population into four groups, namely blacks, coloureds, Indians and whites. It was after the promulgation of the Act⁹⁴ that the government of South Africa decided to exclude blacks from the services of the Advocate-General.⁹⁵ The Office of the Advocate-General was then replaced by the Ombudsman when the *Ombudsman Amendment Act*⁹⁶ was promulgated in 1983 and, in terms of section 11⁹⁷ of the Act, the institution

⁸⁸ 118 of 1979.

⁸⁹ *Advocate General Act* 118 of 1979.

⁹⁰ 118 of 1979.

⁹¹ 110 of 1983.

⁹² 32 of 1961.

⁹³ 110 of 1983.

⁹⁴ *Advocate General Act* 118 of 1979.

⁹⁵ Akpomuvire *The Ombudsman Phenomenon in African States Public Services* 13.

⁹⁶ 61 of 1983.

of the Ombudsman was empowered to act as a remedy to deficiencies in the legislation.

The Ombudsman was empowered to represent such circumstances to the South African Parliament or the government, if in the implementation of the Ombudsman's guiding powers it transpired that there were grounds for initiating a change in the statutes or some other official measure.⁹⁸ More often, an Ombudsman of this era would submit decisions to the appropriate authority or parliamentary committee when the office was mandated to indicate legislative deficiencies that the legislature should be aware of. In 1995, the Office of the Public Protector replaced the Ombudsman. This is how the "Information Scandal" influenced the establishment of the Erasmus Commission, which in turn led to the establishment of the Advocate-General, until it was hastily replaced by the *Ombudsman Amendment Act*⁹⁹ in 1983.

2.4 Office of the Ombudsman in the TBVC states

The *apartheid* government of South Africa established especially designated homelands for blacks, namely Transkei, Bophuthatswana, Venda and Ciskei (TBVC). All these homelands had their own *Constitutions*¹⁰⁰ and were considered independent states only by the South African government. Their style of rule epitomised the *apartheid* system of repression in that there were a gamut of human rights violations within these homelands that guaranteed the intervention of an Ombudsman's office, as is the case in the new democratic dispensation in South Africa, but these were never properly investigated.

2.4.1 Bophuthatswana

This is the homeland that was situated in the area known as the North West Province since 1994. As indicated above, this homeland had a full functioning government like any country in the world. Although this state was independent, its

⁹⁷ 61 of 1983.

⁹⁸ *Ombudsman Amendment Act* 61 of 1983.

⁹⁹ 61 of 1983.

¹⁰⁰ *Bophuthatswana Constitution Act* 18 of 1977 as amended by *Act* 1 of 1978, *Act* 21 of 1979, *Act* 54 of 1979, *Act* 14 of 1980, *Act* 42 of 1980, *Act* 52 of 1980, *Act* 55 of 1980, *Act* 12 of 1981, *Act* 26 of 1981, *Act* 31 of 1982, *Act* 3 of 1983 and *Act* 16 of 1984; *Transkei Constitution Act* 48 of 1963; *Republic of Ciskei Constitution Act* 20 of 1981; *Republic of Venda Constitution Act* 9 of 1979.

*Constitution*¹⁰¹ did not have the provisions of a Public Protector. In Bophuthatswana, incidents that warranted the services of an Ombudsman included the fight for the mining royalties between the Mangope government and the Bafokeng community. In a move to unsettle the Bafokeng traditional authority, Mangope chose to expel Chief Molotlegi of the Bafokeng traditional community from the homeland of Bophuthatswana and imposed his own choice of leader among the Bafokeng community.

Similarly, forced removal of the Bakwena ba Mogopa from Pachsdraai in the Ventersdorp area to Madikwe marked one of the acute human rights violations by both the Bophuthatswana and the South African governments. In addition, the forced incorporation of the people of Braklaagte and Leeuwfontein near Zeerust resulted in a bloodbath which culminated in many people being killed. These are some of the cases which, if the Office of the Ombudsman was in existence then, could have been dealt with appropriately.¹⁰²

2.4.2 Transkei and Ciskei

These two homelands were founded in the Eastern Cape Province, where the majority of the people are Xhosa speaking. These homelands also had their *Constitution*,¹⁰³ which did not have the provisions for government supporting institutions such as the Ombudsman's office as they too were controlled by the South African government. Indeed, there were incidents by the government of Ciskei that were against the people's rights and would need the intervention of the Office of the Ombudsman if it existed then. Some of these incidents involved people who were forced to become members of the ruling party.¹⁰⁴ The government employees were forced to contribute a certain amount of money to the funds that made the ruling party viable. If they did not possess a membership card of the ruling party, or if they had one but were not in good standing with the ruling party, they would not receive any service from the government. When the government visited certain areas in the Ciskei, each and every house in that area would contribute money to cater for the government visits.

¹⁰¹ *Bophuthatswana Constitution Act 18 of 1977.*

¹⁰² Anon 2003 *Bophuthatswana* <http://richardknight.homestead.com>.

¹⁰³ *Transkei Constitution Act 48 of 1963; Republic of Ciskei Constitution Act 20 of 1981.*

¹⁰⁴ The Ciskei Independent Party was the ruling political party in the homeland.

During any celebration of the ruling party, the government employees were forced to attend such celebrations, and whoever failed to attend would have disciplinary steps taken against them. In addition, on Easter weekends, no one was allowed to go to their church. Instead, all Ciskei citizens were forced to go to a place called *Ntabakandoda*.¹⁰⁵ This was a gross infringement of the people's right to association and would warrant the Ombudsman's intervention if such were in place at the time. Similarly, the then President of Transkei, Mr Matanzima was alleged to have accepted US\$500 000 as a kickback for housing contracts and made advance payments to a Lebanese businessman amounting to tens of millions of dollars.¹⁰⁶

2.4.3 Venda

The Republic of Venda, which was also a surrogate of the *apartheid* regime, was situated in the present Limpopo Province and the majority of its people were Venda speaking. It had its own President and the Parliament seating was in Thohoyandou. It also had its own *Constitution*¹⁰⁷ which governed the government of Venda. This *Constitution*¹⁰⁸ did not make provision for the Office of the Public Protector, even though there were incidents taking place that needed the intervention of this office. For example, there were many ritual murders in which the suspects were Ministers of the Venda government.¹⁰⁹

As a result, those cases were not attended to because the suspects were high officials of the government. Service delivery was also a serious problem as there were no institutions watching the maladministration of government officials. The Ministers were also the chiefs and headmen of the Venda communities. They therefore had enormous powers to direct service delivery to their villages and where the headman of a certain village was considered to be against the government, there would be no service delivery in his village. It was simple for those Ministers to instead redirect such service delivery to their own villages as opposed to where they were intended.

¹⁰⁵ This is the place that the government of Ciskei considered to be holy.

¹⁰⁶ Battersby "Six Cabinet Ministers Resign in Transkei Scandal" *New York Times*.

¹⁰⁷ *Republic of Venda Constitution Act 9 of 1979*.

¹⁰⁸ 9 of 1979.

¹⁰⁹ Munthali *Traumatic Rituals in Venda: A Challenge to Pastoral Care*.

For example, building of schools, clinics and road construction were prioritised and constructed better in their village than other villages. If these things occurred in the presence of the Office of the Ombudsman, such office would have intervened. The President and the Ministers also had powers to delay the rightful heir to their chieftaincy if he or she was not favoured. Sometimes they would appoint somebody they preferred to be the chief even though that person was not the rightful heir. The family and the community would then complain but such complaints fell on deaf ears. Quite evidently, if the Office of the Ombudsman existed then with its present powers and functions, such incidents would have been dealt with through this office and no doubt curtailed.

This occurrence plainly demonstrates the power of the *apartheid* government over the TVBC states. These four homelands had their *Constitutions* but were still controlled by the *apartheid* government of South Africa. People did not have any opportunity to complain against the maladministration of the homeland governments. As there was no Office of the Ombudsman, even complaints by members of the public against the government were entertained by neither the homeland governments nor the South African regime, a situation which clearly displayed the repressive nature of the *apartheid* and homeland regimes.

As it will be discussed in chapter 3 of this study, the secret meetings were held between the African National Congress and the *apartheid* government in trying to find solutions for creating a new South Africa. Some of those secret meetings were held before the unbanning of political parties and the release of political prisoners. The study reflects on one of those secret meetings.

2.5 Mahlabatini Declaration of Faith

On 4 January 1974, Harry Schwarz, leader of the liberal reformist wing of the United Party (UP) met with Mangosuthu Buthelezi, leader of the Inkatha Freedom Party (IFP) who was also the Chief Executive Councillor of the black homeland of KwaZulu, and signed a five point plan for racial peace in South Africa, which came to be known as "The Mahlabatini Declaration of Faith".¹¹⁰ The declaration stated that

¹¹⁰ The Mahlabatini Declaration of Faith was a statement of core principles jointly laid down by Mangosuthu Buthelezi of the Inkatha Freedom Party and Harry Schwarz of the United Party which was signed in Mahlabatini, KwaZulu-Natal, hence its name.

the situation of South Africa on the world scene as well as the internal community relations required review, and acceptance of certain fundamental concepts for economic, social and constitutional development.¹¹¹

The declaration's determination was to provide a blueprint for the South African government in attaining racial peace. It called for negotiations involving all peoples in order to draw up constitutional proposals stressing opportunity for all with a *Bill of Rights*. It further suggested that the federal concept was the appropriate framework for such changes to take place. Equally so, the declaration also affirmed that political change must occur through non-violent means.¹¹² The declaration was the first of such agreements approved by black and white political elites in South Africa that affirmed these principles.

Ironically, the commitment to the peaceful pursuit of political change was declared at the time when neither the National Party nor African National Congress was anticipating peaceful solutions. The declaration was heralded by the English-speaking press as a breakthrough in race relations in South Africa. After it was issued, the declaration was endorsed by several Chief Ministers of the black homelands including Cedric Phathudi of Lebowa, Lucas Mangope of Bophuthatswana and Hudson Ntsanwisi of Gazankulu.¹¹³ Despite considerable support from black leaders, the English-speaking press and liberal figures such as Alan Paton, the declaration received staunch opposition from the National Party, the *Afrikaans* press and the conservative wing of Harry Schwarz's United Party.¹¹⁴

2.6 Conclusion

This chapter outlined the evolution of the Office of the Ombudsman during the formation of the Union of South Africa by the English and the *Afrikaners* from 1910 to 1948 until the demise of this ideology in 1994. The Office of the Ombudsman during the Union dispensation did not exist. It can be argued that there was no need for the existence of this office during this era since both the English and *Afrikaners*

¹¹¹ The Mahlabatini Declaration of Faith was a statement of core principles laid down by South African political leaders, Mangosuthu Buthelezi and Harry Schwarz on 4 January 1974.

¹¹² Mitchell *Indispensable Traitors: Liberal Parties in Settler Conflicts* 147.

¹¹³ The Mahlabatini Declaration of Faith was a statement of core principles laid down by South African political leaders, Mangosuthu Buthelezi and Harry Schwarz on 4 January 1974.

¹¹⁴ The Mahlabatini Declaration of Faith was a statement of core principles laid down by South African political leaders, Mangosuthu Buthelezi and Harry Schwarz on 4 January 1974.

organised themselves to oppose the inclusion of other races in South Africa in the affairs of running the country.

This situation was intensified when the National Party won the elections in 1948 and institutionalised *apartheid*, thereby enacting the *apartheid* laws that entrenched segregation of blacks and other races. During this period, black people, who formed the majority of citizens, suffered the most from the policy of *apartheid* since they were denied the right to complain and be heard by the authorities as there were no institutions available to receive and address transgressions perpetrated by the state or government functionaries.

However, reality had to surface in the face of the *apartheid* regime when in the early 1970s it was hit by a shocking political scandal involving the Department of Information. Be that as it may, it should be emphasised that the establishment of the Erasmus Commission was a face saving act for the *apartheid* government. Obviously, the Commission was in the mould of the Public Protector's office in that it investigated issues of abuse of power, maladministration, corruption and graft by those in higher ranks of government.

Following the Erasmus Commission and the Information Scandal, the *apartheid* government established the Office of the Advocate-General. It was further outlined that black people and other races who were denied human rights and deprived of basic rights could use this window of opportunity to fight the *apartheid* government through the *Advocate-General Act*.¹¹⁵ Consequently, the Office of the Advocate-General was then replaced by the Ombudsman when the *Ombudsman Amendment Act*¹¹⁶ was promulgated in 1983 and, dichotomous to the present legislation, the Ombudsman then was empowered to act as a remedy to deficiencies in the legislation.

Finally, the chapter highlighted the operation (or lack thereof) of the Ombudsman in the TVBC states created by the *apartheid* regime. Quite clearly, this institution was dysfunctional in as far as addressing the overall discrepancies of the government and its officials. It could be said that the office was non-existent in these

¹¹⁵ 118 of 1979.

¹¹⁶ 61 of 1983.

"independent" states. As adumbrated above, there were incidents in these homelands that warranted the intervention of the Ombudsman and were not addressed. Be that as it may, the following chapter discusses the road to the new constitutional development in South Africa and the concomitant meetings held towards its attainment.

CHAPTER 3

NEW CONSTITUTIONAL SETTLEMENT

3.1 Introduction

This chapter discusses and outlines the constitutional settlement between the *apartheid* government and the political parties in South Africa. The meetings that were held by the *apartheid* government, the African National Congress and other political parties in South Africa will be discussed. Likewise, the coming into operation of the 1993 interim *Constitution*¹¹⁷ and the eventual adoption of the 1996 *Constitution*¹¹⁸ of the Republic of South Africa and how this new constitutional dispensation created the Office of the Public Protector will be dealt with in this chapter.

3.2 Towards the new constitutional settlement

The road to democracy in South Africa started long ago with the secret meetings held between the National Party government and the African National Congress, or Nelson Mandela to be precise. The ultimate release of the political prisoners such as Walter Sisulu, Raymond Mhlaba, Andrew Mlangeni, Elias Matsoaledi and Ahmed Kathrada in 1989 was the culmination of such meetings. Moreover, the eventual unbanning of the liberation movements and the release of Nelson Mandela transformed the political landscape of South Africa from the *apartheid* system to the new democratic dispensation.¹¹⁹

Ironically, there are two diverse sides to this political coin of South Africa's road to democracy. On the one side, it was the concerted international pressure that made the *apartheid* government realise that *apartheid* could neither be sustained by force indefinitely nor overthrown by the opposition without considerable suffering. As will be demonstrated below, the political trajectory navigated towards the constitutional settlement in South Africa was therefore a long and winding one that was worth traversing.

¹¹⁷ 200 of 1993.

¹¹⁸ *Constitution of the Republic of South Africa, 1996.*

¹¹⁹ Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* 88.

The first meetings between the South African government and Nelson Mandela were arranged by the National Intelligence Service (NIS) under the leadership of Neil Barnard and his Deputy Director General, Mike Louw. Unsurprisingly, these meetings were secretive in nature and were designed to develop an understanding about whether there were sufficient common grounds for future peace talks. As these meetings evolved, a level of trust developed between the key actors, namely: Barnard, Louw and Nelson Mandela.¹²⁰

To facilitate future talks while preserving the secrecy needed to protect the process, Barnard arranged for Mandela to be moved from Robben Island to Pollsmoor prison in 1982. This opportunity provided Mandela with more comfortable lodgings, but also gave him easier access in a way that could not be compromised. Barnard therefore brokered an initial agreement in principle about what would become known as "talks about talks".¹²¹

The first tentative meeting between Mandela and the National Party government came about while P W Botha was the President of South Africa. In November 1985, Minister Kobie Coetsee met Mandela in the hospital where Mandela was being treated for prostate cancer. Over the next four years, a series of tentative meetings took place, laying the groundwork for further communication and future negotiations, but little real progress was made and the meetings remained secret until several years later.¹²²

As the secret talks bore fruit and the political engagement started to take place, the National Intelligence Service withdrew from centre stage in the process and moved to a new phase of operational support work. The operational objective of the meeting conducted by the National Intelligence Service was not to understand the opinions of the actors themselves but to gauge public opinion about a movement away from the previous security stance of confrontation and repression to a new department based on engagement and accommodation.¹²³

¹²⁰ Jacobs *Shaking Hands with Billy*.

¹²¹ Mandela *Long Walk to Freedom*.

¹²² Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution 88*.

¹²³ Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution 88*.

In reality, when F W de Klerk became President of South Africa in 1989, he continued to build on the previous secret negotiations with the imprisoned Mandela.¹²⁴

Central to this planning was an initiative that became known in security force circles as the "Dakar Safari", which saw a number of prominent *Afrikaner* opinion makers engage with the African National Congress in Dakar, Senegal and Leverkusen, Germany at events organised by the Institute for Democratic Alternative for South Africa (IDASA) under the leadership of Dr Van Zyl Slabbert.¹²⁵ It was at this stage that the process was elevated from being known as a secret engagement to a more public engagement.

As will be demonstrated below, the secret negotiations culminated in a new democratic dispensation in South Africa in 1994. This was evidenced when in his speech at the opening of Parliament; F W de Klerk announced the unbanning of the African National Congress and the other banned organisations. This was the first tangible step towards formal negotiations. Similarly, the eminent release of the African National Congress leader Nelson Mandela after 27 years in prison was also announced on that day. Quite clearly, this was a great victory for South Africans and the commencement of negotiations that would lead to the birth of the democratic dispensation in 1994.

3.2.1 *Groote Schuur meeting*

In May 1990, the first meeting between the African National Congress and the South African *apartheid* government after the unbanning of liberation movements and the release of the esteemed political prisoners was held at the presidential residence known as Groote Schuur, Cape Town. The meeting resulted in the "Groote Schuur Minute" being adopted by both the African National Congress and the National Party government and inexorably included a commitment between the two parties towards the resolution of the existing climate of violence and intimidation, as well as the

¹²⁴

Anon Date Unknown *Negotiations and the Transition* www.sahistory.org.za.

¹²⁵

Adam and Moodley *The Opening of the Apartheid Mind: Options for the New South Africa* 8.

removal of practical obstacles to negotiation including immunity from prosecution for returning exiles and the release of the remaining political prisoners.¹²⁶

Later on, the South African government and the African National Congress extended the agreement to include several new points in the Pretoria Minute.¹²⁷ Those points included, among others, the suspension of the armed struggle by the African National Congress and its military wing *Umkhonto we Sizwe* (MK).¹²⁸ Furthermore, a critical step towards formal negotiations was taken by the parties with the signing of the National Peace Accord (NPA) in September 1991. The National Peace Accord was signed by 27 representatives of the political organisations including the homeland governments and thus paved the way for the Convention for a Democratic South Africa (CODESA)¹²⁹ negotiations to commence.

3.2.2 The Convention for a Democratic South Africa (CODESA I)

What came to be known as CODESA I was the first plenary of the formal negotiations that were held at the World Trade Centre in Kempton Park on 20 December 1991, almost two years after the unbanning of the liberation movements following the release of Nelson Mandela in February 1990. CODESA was under the

¹²⁶ Anon Date Unknown Population Registration Act No 30 of 1950
<https://www.nelsonmandela.org>:
 The Pretoria Minute was agreed upon by the government and the African National Congress concerning release of political prisoners, return of exiles, obstacles in the Internal Security Act and suspension of violence by the African National Congress and was signed on 6 August 1990 between the two parties.

¹²⁷ Anon Date Unknown Population Registration Act No 30 of 1950
<https://www.nelsonmandela.org>:
 The Pretoria Minute was a continuation of negotiations between the National Party led government of South Africa and the National African Congress that took place on 6 August 1990 in Pretoria. This was a solemn commitment between the two prominent political parties to reach a peaceful political settlement in the background of political violence that was taking place in South African then. The Pretoria Minute followed on the Groote Schuur Minute. The most important milestones of the Pretoria Minute were the covenant of the African National Congress to suspend its armed struggle and also the government's agreement to bring the state of emergency to an end.

¹²⁸ Anon Date Unknown Population Registration Act No 30 of 1950
<https://www.nelsonmandela.org>:
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¹²⁹ Greenberg et al Words over War: Mediation and Arbitration to Prevent Deadly Conflict 237-258.

chairmanship of the following judges: Michael Corbett, Petrus Shabort and Ismail Mahomed.

Amongst the parties that participated in the CODESA I negotiations were the following:¹³⁰

- the South African government;
- the National Party;
- the African National Congress; and
- the Inkatha Freedom Party.

The right wing white Conservative Party (CP) and the left wing Pan Africanist Congress (PAC) did not participate in the negotiations.

3.2.3 Whites only referendum

The credibility of President de Klerk's government among whites was uncertain. Among other things, the town of Ventersdorp was a white right wing stronghold at the time and the home town of then *Afrikaner Weerstandsbeweging* (AWB) leader Eugene Terre'Blanche, and was very against any form of negotiation. To make matters worse, during this period of CODESA in early 1992, the ruling National Party lost three by-elections to the Conservative Party. It is important to note that the referendum was a necessary but potentially risky move for De Klerk and his government taken to test white opinion on the negotiations' way forward after the collapse of CODESA I. The implication of the referendum was that if his opinion was not supported by his own white constituency, the negotiations could not work.¹³¹

At the same time, the National Party had to caution the white voters that a "no" vote would mean continued tough international sanctions and civil war. It was amidst this

¹³⁰

Allen *Globalization, Negotiation and the Failure of Transformation in South Africa* 98:

The Inkatha Freedom Party leader, Mangosuthu Buthelezi did not personally participate as his demands for additional delegations of the KwaZulu Bantustan and the Zulu King Goodwill Zwelithini were declined. The Inkatha Freedom Party was therefore represented by its founder member, Frank Mdlalose. Other parties represented in the CODESA I were: the Democratic Party, the South African Communist Party, the South African Indian Congress, the Coloured Labour Party, the Indian National People's Party, the solidarity Party and the leaders of independent Bantustans of Transkei, Ciskei, Bophuthatswana and Venda.

¹³¹

Anon Date Unknown *Negotiations and the Transition* www.sahistory.org.za.

backdrop that big business leaders in South Africa collected funds to promote the "yes" vote. Equally so, the white sports lovers, who were normally conservative, desperately wanted to re-enter the international competitive sport arena and therefore also overwhelmingly supported the "yes" vote. On the other side, the Conservative Party played on white racial prejudices with the threat of the old "*swart gevaar*" propaganda and tried to scare whites into voting "no".¹³²

The African National Congress recognised the importance of the whites -only referendum and the fact that it was clear that the "no" vote would be disastrous to the negotiations and therefore actively supported the "yes" vote.¹³³ Eventually, the results of the referendum were a landslide "yes" and De Klerk had the mandate he needed.¹³⁴ Through the referendum, whites had exhibited their willingness to give up their domination of political power. This manifestation therefore allowed F W de Klerk to proceed to the second round of negotiations known as CODESA II.¹³⁵

3.2.4 *Convention for a Democratic South Africa II (CODESA II)*

Following the overwhelming "yes" victory of the National Party in the whites-only referendum, CODESA II was the second plenary session of formal negotiations that took place in May 1992 and was also held at the World Trade Centre in Kempton Park. These negotiations did not last long. In June 1992, violence exploded in Boipatong, a township near Vanderbijlpark. As a result of the Boipatong massacre, 45 residents were allegedly killed by mainly hostel occupants.¹³⁶ Incidentally, in the aftermath of this incident, Mandela accused De Klerk 's government of complicity in the attack and withdrew the African National Congress from negotiations, which led to the end of CODESA II. The African National Congress instead took to the streets with the programme of rolling mass action. That mass action ended in the tragic Bisho massacre¹³⁷ in September 1992, which occurred when the army of the nominally independent homeland of Ciskei opened fire on protest marchers killing 29

¹³² Federico and Fusaro *Constitutionalism and Democratic Transitions: Lessons from South Africa* 111.

¹³³ Anon Date Unknown *Negotiations and the Transition* www.sahistory.org.za.

¹³⁴ Anon Date Unknown *Negotiations and the Transition* www.sahistory.org.za.

¹³⁵ Anon Date Unknown *Negotiations and the Transition* www.sahistory.org.za.

¹³⁶ Mzolo *Fractured Hope: Celebrating 20 Years of Democracy Amid Poverty and Despair* 6.

¹³⁷ Mnookin *Bargaining with the Devil: When to Negotiate, when to Fight* 132.

people in the process.¹³⁸ This also brought a new urgency to the search for political settlement in South Africa.

3.2.5 Resumption of negotiations

Following the collapse of the CODESA II bilateral negotiations between the African National Congress and the National Party government, two key negotiators – Cyril Matamela Ramaphosa of the African National Congress and Roelf Meyer of the National Party – formed a close working relationship that was to be important for the continuance of the negotiations and the realization of a democratic dispensation in South Africa.¹³⁹ During the negotiations, De Klerk's government pushed for a two-phase transition with an appointed transitional government led by a rotating presidency. On the other hand, the African National Congress pushed instead for a transition in a single stage to majority rule.

Other contentious points included minority rights, decisions on a unitary or federal state, property rights and indemnity from prosecution for politically motivated crimes. In the midst of the negotiations impasse, the leader of the South African Communist Party, Joe Slovo recommended the breakthrough "sunset clause"¹⁴⁰ for a coalition government for five years following a democratic election. In the course of the negotiating and reshaping process, the government under De Klerk also allowed prisoners who were classified as political prisoners to be released.

Following the tedious collaboration efforts of Cyril Ramaphosa, then Secretary General of the African National Congress and Roelf Meyer, the then Minister of Constitutional Development in the government of the National Party, eventually on

¹³⁸ Mnookin *Bargaining with the Devil: When to Negotiate, when to Fight* 132.

¹³⁹ Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* 88.

¹⁴⁰ Anon Date Unknown *Negotiations and the Transition* www.sahistory.org.za:

In modest public policy jargon, a sunset provision or clause is a measure within a decree, ruling or any other law that offers that the law shall come to an end after a specified time. In the negotiations towards a mutually discussed political settlement in South Africa, De Klerk's government had been pushing for a two-phase transition government an appointed transitional government with a rotating presidency. On the other side, the African National Congress instead pushed for a majority rule government. However, the African National Congress bargained with the National Party's demands by agreeing that the Government of National Unity (GNU) would include all parties which obtained over 5% of the vote in the anticipated democratic elections for the first five years. This was an agreement that was allowed to stand for the gradual phasing out of white rule rather than one dramatic handover of power. The term "sunset clause" was used for this compromise in the negotiations.

26 September 1992 the government and the African National Congress agreed on a "Record of Understanding".¹⁴¹

This Record of Understanding dealt with Constitutional Assembly, an interim government, the release of political prisoners, the issue of the hostels, dangerous weapons and mass action and resumed the process of negotiations after the collapse of CODESA II.¹⁴²

3.2.6 The Multi-Party Negotiating Forum (MPNF)

On 1 April 1993, the Multi-Party Negotiating Forum (MPNF) convened for the first time. Unlike CODESA, the white right wing, the Pan Africanist Congress, the KwaZulu homeland government and delegations of traditional leaders participated for the first time in the Multi-Party Negotiating Forum. As a result of the "Record of Understanding", the two main negotiating parties – the African National Congress and the National Party – agreed to reach bilateral consensus on issues before taking them to the other parties in the forum. This put pressure on the other parties to agree with the consensus or be left behind.¹⁴³

The Inkatha Freedom Party, through its leader Mangosuthu Buthelezi, initially protested when he felt side-lined by the two parties (the African National Congress and the National Party) and withdrew the Inkatha Freedom Party from the Multi-Party Negotiating Forum. This occurrence consequently led to the formation of the Concerned South Africans Group (COSAG), which was later called the Freedom Alliance. The parties involved here were the Inkatha Freedom Party, the traditional leaders, some of the homeland leaders and the white right wing groups. However, negotiations did not halt as a result of this protest.

¹⁴¹ O'Malley 26 September 1992 *The Heart of Hope: Record of Understanding: 26 September 1992* <https://www.nelsonmandela.org>:

The Record of Understanding signed by the government of South Africa then and the African National Congress among others included a need for the establishment of a democratic constitution assembly/constitution-making body and that for such a body to be democratic it must: be democratically elected, draft and adopt the new constitution, implying that it should sit as a single chamber; be bound only by agreed constitutional principles; have a fixed time frame; have adequate deadlock breaking mechanisms; function democratically i.e. arrive at its decisions democratically with certain agreed to majorities; and be elected within an agreed predetermined time period.

¹⁴² Stones *Socio-Political and Psychological Perspectives on South Africa* 33.

¹⁴³ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* 92.

Another incident that set back the negotiations and nearly brought the country to a civil war was that on 10 April 1993, Chris Hani, the leader of the South African Communist Party, Chief of Staff of MK and a senior African National Congress leader was assassinated by white right wingers and this brought the country to the edge of catastrophe. However, a turning point was reached in the process following which the main parties pushed for a settlement, which increased their determination to succeed. The assassination of Chris Hani is considered an event that led the shift of powers to the African National Congress because of the way Nelson Mandela handled the situation.¹⁴⁴

Once again, the negotiations were dramatically interrupted in 1993 when the right wing *Afrikaner Weerstandsbeweging* group stormed the World Trade Centre in Kempton Park. The *Afrikaner Weerstandsbeweging* broke through the glass front of the building with an armoured vehicle and briefly took over the negotiations chamber.¹⁴⁵ Subsequently, the negotiations continued thereafter and the *Constitution of the Republic of South Africa Act*¹⁴⁶ was finally drafted and ratified by the Multi-Party Negotiating Forum in the early hours of 18 November 1993.

3.3 Interim Constitution and the Office of Public Protector

The interim *Constitution*¹⁴⁷ was the first democratic *Constitution* of South Africa. It was here that the *Bill of Rights* was included for the first time in any South African *Constitution*. As a result of the interim *Constitution*,¹⁴⁸ all the people of South Africa voted for the first time on 27 April 1994. The interim *Constitution*¹⁴⁹ eventually created the nine provinces of the "new South Africa" as well as the national, the provincial and the local governments of South Africa. It further established a single independent national judiciary.¹⁵⁰ Eventually, following the success of the

¹⁴⁴ Mnookin *Bargaining with the Devil: When to Negotiate, When to Fight* 132.

¹⁴⁵ Bottaro and Stanley *History for the IB Diploma Paper 2 Evolution and Development of Democratic States 1848 - 2000* 237.

¹⁴⁶ 200 of 1993.

¹⁴⁷ 200 of 1993.

¹⁴⁸ 200 of 1993.

¹⁴⁹ 200 of 1993.

¹⁵⁰ Sections 96(2) and (3) of the *Constitution of the Republic of South Africa Act* 200 of 1993:

(2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.

(3) No person and no organ of state shall interfere with judicial officers in the performance of their functions.

negotiations and the adoption of the interim *Constitution*,¹⁵¹ it was agreed that South Africa should have an Ombudsman.

Most importantly for this research study, the interim *Constitution*¹⁵² created the democracy supporting institutions. These democracy supporting institutions are indicated in Chapter 8 of the interim *Constitution*¹⁵³ and one of them was the Office of the Public Protector. The use of the name Public Protector was seriously considered by the committee on the Public Protector and there were different views on what name to call this institution. The names that the committee deliberated about at great length were the Public Protector and the Ombudsman.¹⁵⁴ According to the report of the committee, on 25 May 1995, the majority of the political parties represented preferred the name "Public Protector" as it was already used in the interim *Constitution*.¹⁵⁵

The motivation advanced was that protecting the public came closer to what the office was created for, while the name "Ombudsman" had sexist connotations within the context of the gender equality mindfulness within South Africa.¹⁵⁶ Therefore, it is patently clear that this debate measured the name of the institution within the context of the imagined South Africa as a gender equality and public oriented democracy. This debate was further informed by the functions and powers of this institution. The sub-theme committee further argued that the Public Protector was not meant to protect but act as an impartial mediator. Hence the African National Congress canvassed for such a democracy.¹⁵⁷

The final position in this regard was taken by the constitutional committee representing all political parties as adopted by the Constitutional Assembly on 19

¹⁵¹ 200 of 1993.

¹⁵² 200 of 1993.

¹⁵³ 200 of 1993.

¹⁵⁴ 200 of 1993.

¹⁵⁵ 200 of 1993.

¹⁵⁶ Cetywayo Date Unknown *International Comparative Study: The Mandate and Reporting and Accounting Obligations of the South African Human Rights Commission and the Public Protector* <http://www.parliament.gov.za>.

¹⁵⁷ Cetywayo Date Unknown *International Comparative Study: The Mandate and Reporting and Accounting Obligations of the South African Human Rights Commission and the Public Protector* <http://www.parliament.gov.za>.

November 1995.¹⁵⁸ The constitutional committee decided that this office will remain the Public Protector. This should be interpreted to mean that the legislator deliberately named this office Public Protector to the exclusion of any other name including Ombudsman as South Africa is a unique democracy.¹⁵⁹

3.3.1 Establishment and the appointment of the Public Protector

The 1993 interim *Constitution*¹⁶⁰ provides that the President shall, whenever it becomes necessary, appoint as the Public Protector a person nominated by the joint committee of the House of Parliament composed of one member of each party represented in Parliament, and who is willing to serve on the committee and is approved by the National Assembly and the Senate by a resolution adopted by a majority of at least 75 per cent of the members present and voting at a joint meeting.¹⁶¹ It further provided that the first appointment of a person as a Public Protector after the commencement of this *Constitution*¹⁶² shall be made within 60 days of the first sitting of the Senate under this *Constitution*.¹⁶³

3.3.2 Requirements for the appointment of the South African Public Protector

The *Constitution*¹⁶⁴ provided that a Public Protector shall be a South African citizen who is a fit and proper person to hold such office and who is a judge of the Supreme Court of South Africa, or is qualified to be admitted as an advocate and has a

¹⁵⁸ Cetywayo Date Unknown *International Comparative Study: The Mandate and Reporting and Accounting Obligations of the South African Human Rights Commission and the Public Protector* <http://www.parliament.gov.za>.

¹⁵⁹ Anon Date Unknown *History and Background to the Office of the Public Protector* <http://www.pprotect.org>:

In South Africa, the Public Protector is appointed by the President on the recommendation of the National Assembly and in terms of Chapter 9 of the *Constitution*, 1996. The Public Protector must be a South African citizen who is appropriately qualified and knowledgeable and possess values of honesty and integrity. Section 181 of the *Constitution* warrants that the Public Protector shall be subject only to the *Constitution* and the law. He or she must be impartial and must exercise his or her powers and perform his or her functions without "fear, favour or prejudice". Furthermore, no person or organ of state may inhibit the functioning of the Public Protector's office.

¹⁶⁰ 200 of 1993.

¹⁶¹ Section 110(2) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁶² 200 of 1993.

¹⁶³ 200 of 1993.

¹⁶⁴ 200 of 1993.

cumulative period of at least ten years after having qualified. The Public Protector shall hold the office for a period of seven years.¹⁶⁵

The *Constitution*¹⁶⁶ further states that the Public Protector is not allowed to perform other remunerative work outside his or her official duties. Accordingly, the President may remove the Public Protector from the office only on the grounds of misbehaviour, incapacity or incompetence determined by the joint committee in terms of the House of Parliament. The *Constitution*¹⁶⁷ further gives the President the powers to suspend the Public Protector if he or she is under investigation.

3.3.3 *The independence and impartiality of the Public Protector*

The interim *Constitution*¹⁶⁸ of the Republic of South Africa indicates that the Public Protector shall be independent and impartial and shall exercise and perform his or her powers and functions subject only to this *Constitution*¹⁶⁹ and the law. In addition, the Public Protector has such immunities and privileges as may be assigned to him or her by an act of Parliament for the purpose of ensuring the independent and impartial exercise and performance of their powers and functions.¹⁷⁰ According to the interim *Constitution*,¹⁷¹ no organ of state and no member or employee of an organ of state or any other person shall interfere with the Public Protector in the exercise and performance of his or her powers and functions.¹⁷²

The *Constitution*¹⁷³ also provides that all organs of state shall accord such assistance as reasonably required for the protection of the independence, impartiality, dignity and effectiveness of the Public Protector in the exercise and performance of his or her powers and functions.¹⁷⁴ As a matter of fact, the first Public Protector of South Africa was Advocate Selby Alan Masibonge Baqwa SC. Baqwa took office on 1 October 1995. He was appointed for a seven years term that was non-renewable.

¹⁶⁵ Section 110(4)(a)-(b) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁶⁶ 200 of 1993.

¹⁶⁷ 200 of 1993.

¹⁶⁸ 200 of 1993.

¹⁶⁹ Section 111 of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁷⁰ Section 110 of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁷¹ 200 of 1993.

¹⁷² Section 111(3) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁷³ 200 of 1993.

¹⁷⁴ Section 111(4) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

3.3.4 Constitutional powers and functions of the Public Protector

Section 112(1)¹⁷⁵ of the *Constitution* of the Republic of South Africa states that the Public Protector shall, in addition to any powers and functions assigned to him or her by any law, be competent-

- (a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged-
 - (i) maladministration in connection with the affairs of government at any level;
 - (ii) abuse or unjustifiable exercise of powers or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
 - (iii) improper or dishonest act, or omission or corruption with respect to public money.
- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by-
 - (i) mediation, conciliation or negotiation;
 - (ii) advising, where necessary, any complaint regarding appropriate remedies; or
 - (i) any other means that may be expedient in the circumstances.
- (c) at any time prior to, during or after an investigation-
 - (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the relevant authority charged with prosecutions; or
 - (ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.¹⁷⁶

Furthermore, recourse to or exercise and performance of any powers and functions of the Public Protector shall not oust the jurisdiction of a court of law to hear any matter or cause whatsoever. Therefore, the Public Protector shall report in writing on his or her activities to Parliament at least once every year.¹⁷⁷ In terms of the *Constitution*,¹⁷⁸ the Public Protector reports to Parliament and nothing else.

¹⁷⁵ 200 of 1993.

¹⁷⁶ Section 112(1) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁷⁷ Section 112(6) of the *Constitution of the Republic of South Africa Act 200 of 1993*.

¹⁷⁸ 200 of 1993.

3.4 The 1996 constitutional settlement

The interim *Constitution*¹⁷⁹ was eventually replaced by the *Constitution*¹⁸⁰ of the Republic of South Africa in 1996. It is stated that the *Constitution*¹⁸¹ is the supreme law of the country and any legislation or conduct that is inconsistent with the *Constitution*¹⁸² is regarded as invalid. This is the *Constitution*¹⁸³ that replaced the interim *Constitution*¹⁸⁴ of the Republic of South Africa. It also created the Chapter 9 institutions that are commonly known as the democracy supporting institutions.

3.4.1 Independence and impartiality of the Public Protector

The basis for the independence of the Public Protector is once again found in the *Constitution*¹⁸⁵ where it provides that the institution is independent and subject only to the *Constitution*¹⁸⁶ and the law. The *Constitution*¹⁸⁷ further prescribes that the Public Protector must be impartial and must exercise his or her powers and perform his or her functions without fear, favour or prejudice.¹⁸⁸ It is within this context that section 181(4)¹⁸⁹ prohibits any person or organ of state to interfere with the functioning of the Public Protector and further enjoins other organs of state to assist and protect the Office of Public Protector to ensure its independence, impartiality, dignity and effectiveness.¹⁹⁰

As demonstrated above, the Public Protector is the independent investigative arm of Parliament, hence the *Constitution*¹⁹¹ holds the Public Protector accountable to the National Assembly by way of having to report to the National Assembly.¹⁹² The Public Protector is appointed by the President (in his or her capacity as head of state, and not head of government) on the recommendation of the National

¹⁷⁹ 200 of 1993.

¹⁸⁰ *Constitution of the Republic of South Africa, 1996.*

¹⁸¹ Section 2 of the *Constitution of the Republic of South Africa, 1996.*

¹⁸² *Constitution of the Republic of South Africa, 1996.*

¹⁸³ *Constitution of the Republic of South Africa, 1996.*

¹⁸⁴ 200 of 1993.

¹⁸⁵ *Constitution of the Republic of South Africa, 1996.*

¹⁸⁶ Section 181(2) of the *Constitution of the Republic of South Africa, 1996.*

¹⁸⁷ *Constitution of the Republic of South Africa, 1996.*

¹⁸⁸ Section 181(2) of the *Constitution of the Republic of South Africa, 1996.*

¹⁸⁹ *Constitution of the Republic of South Africa, 1996.*

¹⁹⁰ Section 181(3) of the *Constitution of the Republic of South Africa, 1996.*

¹⁹¹ *Constitution of the Republic of South Africa, 1996.*

¹⁹² Section 181(5) of the *Constitution of the Republic of South Africa, 1996.*

Assembly.¹⁹³ The *Constitution*¹⁹⁴ contains details on the procedures the National Assembly must follow when making such recommendation to the President.

Nonetheless, the recommended candidate requires a supporting vote of at least 60 per cent of the members of the National Assembly to be considered for occupying the demanding Public Protector's office. The tenure of seven years is non-renewable¹⁹⁵ and the removal from office is only possible on the grounds of misconduct, incapacity or incompetence.¹⁹⁶ Once again, the President as the head of state can only remove the Public Protector when the National Assembly has adopted a resolution for such removal, in this case with a supporting vote of at least two thirds of the members of the Assembly.¹⁹⁷

Another traditional safeguard for the independence of the Public Protector is found in the *Public Protector Act*¹⁹⁸ where it provides that the remuneration and other terms and conditions of employment of the Public Protector shall be determined by the National Assembly and cannot be reduced or adversely altered during the Public Protector's term of office.¹⁹⁹ Accordingly, the Public Protector appoints staff, or can have staff seconded to the office. When appointing and determining the remuneration of staff, the Public Protector must do so in consultation with the Minister of Finance and the *Public Protector Act*.²⁰⁰

Since the Minister of Finance is responsible for the state finances and the Public Protector is funded by the state, the above provision is deemed appropriate. In view of the Public Protector's independency, the Minister of Justice is only empowered to intervene in the instance of appointing the deputy Public Protector in consultation with the Public Protector as provided by the Act.²⁰¹ Even though such appointment must be done after consultation with the Public Protector, it could be perceived to place the executive in a position of control over the office.

¹⁹³ Section 193(4) of the *Constitution of the Republic of South Africa, 1996*.

¹⁹⁴ Section 193(5) of the *Constitution of the Republic of South Africa, 1996*.

¹⁹⁵ Section 183 of the *Constitution of the Republic of South Africa, 1996*.

¹⁹⁶ Sections 194(1) and 193(5) of the *Constitution of the Republic of South Africa, 1996*.

¹⁹⁷ Sections 194(2) and (3) of the *Constitution of the Republic of South Africa, 1996*.

¹⁹⁸ 23 of 1994.

¹⁹⁹ Section 2 of the *Public Protector Act* 23 of 1994.

²⁰⁰ Section 2(10) of the *Public Protector Act* 23 of 1994.

²⁰¹ Sections 3(13) and 3(14) of the *Public Protector Act* 23 of 1994.

Furthermore, the impartiality of the staff in the Office of the Public Protector is prescribed by the *Public Protector Act*.²⁰² This Act²⁰³ prohibits a staff member from conducting an investigation where the member has any interest in the matter that might preclude him or her from performing in a fair, unbiased and proper manner. It would be more correct to interpret the name "Public Protector" to mean the protector of the public interest. Although the Public Protector entertains complaints from individuals, the first step in the investigation in typical Ombudsman fashion is to objectively find on the facts of the matter.

If the finding is in favour of the complainant, the Public Protector will come to the complainant's assistance to have what is wrong rectified. However, if the finding is that the state is in the clear, the Public Protector will uphold the state's position. This would happen for example in the case where a complainant has acted upon a misunderstanding, inaccurate information or a malevolent motive. In such cases, the Public Protector will be obliged to say as much and dispel the cloud hanging over the state institution or state employee in question.

It is therefore useful to view the Public Protector as a referee in a dispute, or a catalyst for change where appropriate, rather than an advocate for either the complainant or the state. The *Constitution*²⁰⁴ gives the essence of the functions of the Public Protector where it provides as follows:

- (1) The Public Protector has the power, as regulated by national legislation-
 - (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,
 - (b) to report on that conduct, and
 - (c) to take appropriate remedial action.
- (2) The Public Protector has the additional powers and functions prescribed by national legislation.

This gives the Public Protector wide powers to investigate national, provincial and also local governments. The only restriction the *Constitution*²⁰⁵ contains is to prohibit

²⁰² 23 of 1994.

²⁰³ Sections 3(13) and 3(14) of the *Public Protector Act* 23 of 1994.

²⁰⁴ Sections 182(1) and (2) of the *Constitution of the Republic of South Africa*, 1996.

²⁰⁵ Section 182(3) of the *Constitution of the Republic of South Africa*, 1996.

the Public Protector from investigating court decisions. In such a case an aggrieved litigant will have to follow review or appeal procedures in a higher court.

Section 6(5)²⁰⁶ of the *Public Protector Act* broadens the jurisdiction of the Public Protector to also include any institution in which the state is the majority or controlling shareholder, or any public entity as defined in section 1 of the *Reporting by Public Entities Act*.²⁰⁷

This Act²⁰⁸ was replaced by the *Public Finance Management Amendment Act*.²⁰⁹ The latter Act²¹⁰ defines a public entity as a government business enterprise or an entity established by legislation, accountable to the legislature and fully or substantially funded by the taxpayers. Such institutions include the major providers of electricity, telecommunications and postal services.

The jurisdiction of the Advocate-General lives on in the *Public Protector Act*²¹¹ where it allows the investigation of:

- Improper acts or corruption with respect to public money; and
- Improper enrichment or the receipt of any improper advantage at the expense of the state.

The *Public Protector Act*²¹² embroiders on the *Constitution*²¹³ by spelling out that maladministration, abuse of power, improper conduct, undue delay and an act resulting in improper prejudice to a person may be investigated. The policy of the Public Protector in the case of personal grievance is that a complainant should first follow avenues available to that complainant to redress the grievance; the Public Protector should be seen as a last resort. This approach prevents the Public Protector from having to investigate matters that may easily be resolved by the other authority in the state.

²⁰⁶ 23 of 1994.

²⁰⁷ Section 1 of the *Reporting by Public Protector Entities Act* 93 of 1992.

²⁰⁸ Section 1 of the *Reporting by Public Protector Entities Act* 93 of 1992.

²⁰⁹ 29 of 1999.

²¹⁰ 29 of 1999.

²¹¹ Sections 6(4) and (5) of the *Public Protector Act* 23 of 1994.

²¹² 23 of 1994.

²¹³ *Constitution of the Republic of South Africa*, 1996.

This policy is possible since the *Public Protector Act*²¹⁴ allows the Public Protector to refuse to investigate a complaint of a state employee where the employee has not taken all reasonable steps to exhaust the remedies available in terms of the public service legislation. The Act²¹⁵ also allows the Public Protector to refuse to investigate if the complainant who was prejudiced by the state has not taken all reasonable steps to exhaust the legal remedies available.

3.4.2 *The importance of having the Office of the Public Protector*

The Office of the Public Protector exists for the following reasons:

- Discrimination: the state institutions were not always readily available to the poorest of the poor. There was also fear of reprisal if one complained.
- Geographical location: vast geographical rural areas of South African make it impossible to reach each and every individual.
- Ignorance of basic Human Rights: Human Rights cannot be properly excised if not known by the people; the majority of the people in South Africa are blacks and are located in rural area. As victims of oppression, they were deprived of any knowledge of their rights.
- Abuse of power: abuse of power and chronic maladministration practiced by the *apartheid* regime and to put an end to it.
- Constitutional democracy: there is a need to maintain and sustain constitutional democracy.

Arising from the above-mentioned reasons, one can say today that the Office of the Public Protector makes people and communities aware of their rights and that steps are taken to protect and sustain them. Similarly, government is always made aware to observe and respect basic human rights as well as bring the office closer to the people.²¹⁶

²¹⁴ Section 6(3) of the *Public Protector Act* 23 of 1994.

²¹⁵ 23 of 1994.

²¹⁶ Mazizi "Management of the Public Relations Functions in the Office of the City Ombudsman for the City of Cape Town, South Africa".

3.5 Conclusion

In view of the above, the study has clearly demonstrated the stages that the Office of the Ombudsman went through during the journey to democracy in South Africa. It was further deliberated that negotiations were held in an attempt to create this institution to support democracy. The research study further outlined that the interim *Constitution*²¹⁷ was agreed upon by both the *apartheid* government and the political parties involved in the negotiations.

In the same way, the final *Constitution*²¹⁸ was adopted and also gave birth to all Chapter 9 institutions, with the Office of the Public Protector playing a major role in protecting, respecting and fulfilling all the obligations that are imposed by this final *Constitution*.²¹⁹ Subsequently, this event led to the birth of the Office of the Public Protector.

The provisions that cover the office in the *Constitution*²²⁰ of the Republic of South Africa were also highlighted. The following chapter illustrates the legislation that works with the Public Protector, as in how they work and engage each other in dealing with public complaints.

²¹⁷ 200 of 1993.

²¹⁸ *Constitution of the Republic of South Africa, 1996.*

²¹⁹ *Constitution of the Republic of South Africa, 1996.*

²²⁰ *Constitution of the Republic of South Africa, 1996.*

CHAPTER 4

LEGISLATIVE FRAMEWORK

4.1 Introduction

The primary objective of this chapter is to discuss various legislations that impacts directly or indirectly on the powers and the functions of the Public Protector. The Public Protector is a constitutional institution; it is one of several institutions established by Chapter 9 of the *Constitution*²²¹ of the Republic of South Africa. The *Constitution*²²² as the supreme law of the country was created by legislation to govern the functioning of the Public Protector.

It is important to note that even though a gamut of other legislation contained in the *Constitution* are related to the functioning of the Office of the Public Protector, some play just a complementary role and only those that are directly associated with the cases in this research study will be discussed in detail.²²³ However, there are two key pieces of legislation that regulate the operations of the Public Protector and these are the *Public Protector Act*²²⁴ and the *Executive Members Ethics Act*.²²⁵

²²¹ *Constitution of the Republic of South Africa*, 1996.

²²² *Constitution of the Republic of South Africa*, 1996.

²²³ The legislation that seek to give effect to s182 of the *Constitution* and have expanded the Public Protector's mandates are as follows: the *Executive Members Ethics Act* 82 of 1998, the *Prevention and Combating of Corrupt Activities Act* 12 of 2004, the *Promotion of Access to Information Act* 2 of 2000, the *Electoral Commission Act* 51 of 1996, the *Protected Disclosures Act* 26 of 2000, the *National Archives and Record Service Act* 43 of 1996, the *National Energy Act* 40 of 2002, the *Housing Protection Measures Act* 95 of 1998, the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, the *Public Finance Management Act* 1 of 1999, the *Lotteries Act* 57 of 1997, the *Special Investigating Unit and Special Tribunals Act* 74 of 1996 and the *National Environmental Management Act* 108 of 1998. Furthermore, the Public Protector's mandate is wide enough to cover private citizens and corporations as well as our public service personnel and public office bearers. The *Executive Members Ethics Act* 82 of 1998 empowers the Public Protector to investigate all allegations of violations of the Act and code by the members of the executive, namely ministers, premiers, MECs etcetera. Other pieces of legislation, which include Anti-Corruption legislation and the *Protected Disclosures Act* 26 of 2000, recognise the role of the Public Protector with regard to investigating state action and taking remedial action.

²²⁴ 23 of 1994.

²²⁵ 82 of 1998.

4.2 Scope of legislation

The enabling legislation of the Public Protector is indicated in Chapter 9 of the *Constitution*²²⁶ of the Republic of South Africa. National regulation regulating the office is found in the *Public Protector Act*.²²⁷ The *Constitution*²²⁸ describes the Public Protector as one of the institutions that strengthens constitutional democracy in South Africa. Consequently, the *Constitution*²²⁹ establishes the following institutions to support constitutional democracy and ensure that the *Bill of Rights* is contained therein:²³⁰

- the Public Protector;
- the Human Rights Commission;
- the Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Communities;
- the Commission for Gender Equality;
- the Auditor-General; and
- the Electoral Commission.

4.2.1 The Public Protector Act 23 of 1994

4.2.1.1 Investigation procedure

This is the empowering legislation that is also worded in a way which suggests that the Public Protector in South Africa has always been perfectly within her rights to cast her net widely, as she has done. Section 6(4)²³¹ of the Act, passed by the very same Parliament that criticises the activities of the Public Protector, sets out in great detail the scope of the work of this office. It further provides the Public Protector with the powers to investigate maladministration, abuse of powers, improper or dishonest

²²⁶ Sections 181, 182, 183, 193 and 194 of the *Constitution of the Republic of South Africa*, 1996.
²²⁷ 23 of 1994.

²²⁸ *Constitution of the Republic of South Africa*, 1996.

²²⁹ *Constitution of the Republic of South Africa*, 1996.

²³⁰ Chapter 9 of the *Constitution of the Republic of South Africa*, 1996.

²³¹ 23 of 1994.

acts, unlawful enrichment and receipt of improper advantage within government structures.²³²

Additionally, the Public Protector can further report any criminal activities to the prosecuting authority if his or her investigations establish any wrongdoing that attracts criminal liability. He or she can also endeavour to resolve any dispute within the government structures through mediation, conciliation and negotiation. Similarly, section 7(1)²³³ provides the Public Protector with powers to conduct preliminary investigations for the purpose of determining the merits of the complaint. In terms of section 7(4) to (7)²³⁴ of the *Public Protector Act*, the Public Protector has power to subpoena any person to appear before him or her to give evidence or to produce any documentation that has a bearing on the matter under investigation.

Furthermore, the Public Protector may require any person appearing as witness before him or her to give evidence under oath or affirmation. Equally, section 7(a)²³⁵ provides for the entering of premises for the purpose of investigation or seizure of documents by virtue of a warrant. In view of the good cooperation that the Public Protector experiences from state institutions, it is seldom necessary to use these powers to compel collaboration.

Besides, the Office of the Public Protector may designate any person to conduct an investigation or part thereof on its behalf and report to it. Section 7(3)(b)²³⁶ provides that under certain circumstances it may be more efficient and cost and time effective to refer complaints or parts of complaints to other institutions. Such institutions are usually requested to keep the Office of the Public Protector advised of the progress and finalisation thereof, thereby allowing the office to comply with the oversight responsibility given to it. It is within this context that the Public Protector can at any time prior to, during or after an investigation, bring a matter to the notice of the relevant prosecuting authority or refer the matter to an appropriate authority.²³⁷

²³² Marumoagae "Condemning the Leaking of Public Protector's Provisional Reports" *De Rebus* 33.

²³³ 23 of 1994.

²³⁴ 23 of 1994.

²³⁵ 23 of 1994.

²³⁶ 23 of 1994.

²³⁷ Section 6(4)(c) of the *Public Protector Act* 23 of 1994.

In a situation where the Public Protector has investigated the conduct concerned, he or she makes a finding on that conduct. If the Public Protector finds the complaint to be justified, he or she can take appropriate remedial action. For example, recommendations can be made on how the situation in question should be rectified and how recurrence should be prevented. In serious matters that require the attention of Parliament, the Public Protector can approach Parliament for assistance by means of a report.²³⁸ The Act²³⁹ further provides for the appointment of a committee by the National Assembly for the purposes of considering matters referred to it in terms of the Act.²⁴⁰

This creates a direct link between the Public Protector and Parliament for dealing with problems regarding the implementation of recommendations. In practice, however, the Public Protector follows up on recommendations and through logic and reason requests the state to follow such recommendations. In most instances, it is only in unusual cases where Parliament has to be approached in this regard.²⁴¹ The Public Protector issues provisional reports in terms of section 7(9),²⁴² which states that a provisional report should be issued on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents.

Section 7(9)(a)²⁴³ indicates that during the course of investigation, if any person is implicated in the matter under investigation, and if such implication may be to the detriment of that person or if an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.²⁴⁴

4.2.1.2 Publication of findings

Once an investigation is concluded, the Public Protector makes his or her findings and recommendations available to the complainant, any person implicated and the government agency involved.²⁴⁵ Section 8(2)(a)²⁴⁶ provides that the Public Protector

²³⁸ Section 6(4)(c)(ii) of the *Public Protector Act* 23 of 1994.

²³⁹ 23 of 1994.

²⁴⁰ 23 of 1994.

²⁴¹ Section 2 of the *Public Protector Act* 23 of 1994.

²⁴² 23 of 1994.

²⁴³ 23 of 1994.

²⁴⁴ Section 7(9) of the *Public Protector Act* 23 of 1994.

²⁴⁵ Section 8(1) and (3) of the *Public Protector Act* 23 of 1994.

shall report annually on the activities of the office to the National Assembly. These annual reports are also tabled in the National Council of Provinces (NCOP).²⁴⁷

Furthermore, the Public Protector must submit a report to the National Assembly on the findings of a particular investigation if he or she deems it necessary or in the public interest; if it requires the urgent attention of or an intervention by the National Assembly; or if the Public Protector is requested to do so by the Speaker of the National Assembly or by the chairperson of the National Council of Provinces.²⁴⁸

Section 182(5)²⁴⁹ of the *Constitution* provides that any report issued by the Public Protector must be open to the public, except for exceptional circumstances as determined in terms of national legislation which requires that a report be kept confidential. In this regard, the Act²⁵⁰ provides that the Parliamentary Committee must concur that exceptional circumstances require that a report be kept confidential and the report will then be dealt with as a confidential document in terms of the rules of Parliament. Exceptional circumstances exist if the report is likely, among others, to endanger the security of citizens, to prejudice any other investigation or to disturb public order.²⁵¹

4.2.1.3 Confidentiality

The *Public Protector Act*²⁵² provides that the Public Protector or members of his or her staff is competent but not compellable to answer questions in proceedings before a court of law, or anybody or institution established under a law, in connection with any information relating to the investigating which in the course of his or her investigation has come to his or her knowledge. In addition, the *Public Protector Act*²⁵³ provides that no person is allowed to disclose the contents of any document in

²⁴⁶ 23 of 1994.

²⁴⁷ The National Council of Provinces (NCOP) embodies the representatives of the provinces to safeguard their provincial interests and as considered by the National Assembly.

²⁴⁸ Section 8(2)(b) of the *Public Protector Act* 23 of 1994.

²⁴⁹ *Constitution of the Republic of South Africa*, 1996.

²⁵⁰ 23 of 1994.

²⁵¹ Section 182(5) of the *Constitution of the Republic of South Africa*, 1996.

²⁵² 23 of 1994.

²⁵³ 23 of 1994.

the possession of a member of the office, including records of evidence, without the permission of the Public Protector.²⁵⁴

This means that the complainants can be assured of confidentiality if they so require, including their identity as well as sources and detail of information. However, section 5²⁵⁵ of the *Promotion of Access to Information Act* (PAIA) overrides section 7(2)²⁵⁶ of the *Public Protector Act* when it comes to a request for information by a third party. This effect is tempered by section 37²⁵⁷ of the former Act, which allows the office to refuse to supply information requested by the third party where such information has been supplied in confidence to the Public Protector.

4.2.1.4 Interaction with other institutions

Various institutions have been created in South Africa with investigative powers. Here, one can name the office of the inspecting judge, or dealing with prisoners' complaints about prison conditions and treatment. In this regard, the Public Protector often acts as a clearing house; canalising complaints to the appropriate institution in furtherance of the policy of the Public Protector to only investigate an institution as a last resort. Alternatively, the Public Protector would utilise such other institutions when after a preliminary investigation it is found that action needs to be taken for which the Public Protector does not have the necessary power.

For example, the *Public Protector Act*²⁵⁸ provides that the Public Protector, when of the opinion that the facts disclosed are indicative of an offence, brings the matter to the notice of the relevant authority charged with prosecutions.

Another example would be the Special Investigating Units mainly responsible for the speedy recovery of misappropriated state monies. Instead of recommending civil steps to recover state monies that are in the wrong hands, the Public Protector may

²⁵⁴ Section 5 of the *Public Protector Act* 23 of 1994.

²⁵⁵ 2 of 2000.

²⁵⁶ Section 7(2) of the *Public Protector Act* 23 of 1994:

Notwithstanding anything to the contrary contained in any law, no person shall disclose to any other person the contents of any document in the possession of a member of the Office of the Public Protector or the record of any evidence given before the Public Protector, a Deputy Public Protector or a person contemplated in (3)(b) during an investigation, unless the Public Protector determines otherwise.

²⁵⁷ *Promotion of Access to Information Act* 2 of 2000.

²⁵⁸ 23 of 1994.

recommended that a proclamation be issued for such a special investigative unit to do so.²⁵⁹

In some instances, the Office of the Public Protector often finds itself working *in tandem* with another institution, such as the Auditor-General. The two institutions would work together on an investigation falling on the terrain of both, or with the one supporting the other in areas where the other is more apt to deal with the situation. It also happened that the Auditor-General seconded an auditor to the staff of the Public Protector to assist with an investigation.²⁶⁰ In areas where more than one institution might have jurisdiction, the approach is therefore to find the most efficient way to investigate and not to duplicate efforts.

In addition, the Public Protector is committed to improve transparency and accountability in public administration and to enhance fairness and efficiency in the provision of state services. This is usually achieved through the recommendation of corrective action after investigating the allegations of wrongdoing by the administration. There is, however, also another way of achieving this end and that is to work with other state institutions. An example would be the cooperation between the Department of Public Service and Administration and the Public Protector in the implementation of the Code of Conduct for civil servants.²⁶¹

4.2.1.5 Rules of the Public Protector

The *Public Protector Act*²⁶² empowers the Public Protector with authority to develop the rules which govern the day to day running of the office. As it is a practice in South Africa, majority of the governmental and non-government institutions including private sectors develop rules and regulations of their institutions independently, in order to operate according to their legislations and initial mandate. Those rules are created to ensure that institutions do not deviate from their mandate, scope of duty and fundamental functions. The rules exist to maintain order and to guard against abusive of state resources and exploitation of human resources.

²⁵⁹ Section 6(4)(c)(i) of the *Public Protector Act* 23 of 1994.

²⁶⁰ *Public Protector Act* 23 of 1994; Draft Rules Relating to Investigations by the Public Protector and Incidental Matters (Notice 1085 of 2010).

²⁶¹ *Public Protector Act* 23 of 1994; Draft Rules Relating to Investigations by the Public Protector and Incidental Matters (Notice 1085 of 2010).

²⁶² 23 of 1994.

According to the Public Protector, purpose of rules is to determine:

- a) Procedures for the lodging of complaint with the Public Protector;
- b) Procedures for the resolution of disputes;
- c) Service standards application to the Public Protector in conducting investigation and resolving disputes;
- d) Timeline for taking of action dealt with in these rules;
- e) Time frames for organs of state to respond to a report or findings of the Public Protector; and
- f) The steps the Public Protector may take if the organs of state fail to adhere to stipulated timelines.

It is important for the Public Protector to follow the rules that guide his or her scope of duty, in order for him or her to avoid investigating matters that are beyond or below his or her duty. Without the rules initiated by the Public Protector's rules, many of the public, politicians would abuse the Public Protector's powers and use him or her to push personal agendas.

– Conducting of hearing:

Circumstances under which Public Protector conducts hearings:²⁶³

The Public Protector may on own initiative or receipt of a written request by one of the parties, under the circumstances he or she deems fit, including the following, holding a hearing:

- a) If a complaint cannot be resolved by any other means referred to in the rules and the public is of the opinion that a hearing will enable her or him to obtain an appropriate resolution of the complaint;
- b) If a hearing will enable the Public Protector to reach an appropriate conclusion regarding the complaint;

- c) If the Public Protector deems it in the public interest to hold a hearing;
- d) If the Public Protector's opinion the complaint cannot be fairly decided only on the basis of documentary evidence or written statements submitted by the parties or any other person having information relevant to the complaint; or
- e) If a party requesting a hearing supplies reasonable grounds for a hearing.

– Procedure when requesting hearing:

A party requesting a hearing must do so in writing setting out:

- a) The reason why a hearing is necessary; and
- b) The material issue that the party wishes to raise during the hearing.

– Notice of hearing:

- 1) The Public Protector shall give the parties notice of hearing on a form which substantially corresponds with the form provided for Annexure F.
- 2) The notice shall be given at least 15 days before the date of the hearing unless the parties agree to another period.
- 3) The notice must contain the following information:
 - a) the place where the hearing will be held;
 - b) the time and date of the hearing;
 - c) the aspects in respect of which evidence will be required;
 - d) the names of the other persons who will attend the hearing and give evidence;
 - e) an invitation to the parties to bring any person who has personal knowledge about the matters in respect of which evidence is to be given to the hearing;

- f) an indication of the Public Protector's views about allowing the parties to be assisted by legal representative, and if not explain the reasons;
- g) an indication whether or not a person who will attend the hearing must bring any book or document to the hearing; and
- h) any other information which the Public Protector deems fit.

4) a) if the Public Protector is of the view that a party should to be allowed to be assisted by legal representative, a party who does not agree with this view must within 5 days after receipt of the notice, indicate in writing why legal representative is necessary.

b) the Public Protector must within 5 days after receipt of the response of the party, make a decision about legal representation and inform the party write of the decision.

5) The notice referred to in sub rule (1) and any other information to be submitted in terms of this rule, may be submitted to the person concerned in any manner-

a) Having regard of the date of the hearing; and

b) Ensuring that the person received the notice or information.

6) The Public Protector must keep proof of receipt of the notice referred to in sub rule (1) by a party.

7) The Public Protector shall give notice to a person, other than a part, required to attend the hearing and sub rule (1), (2), (3), (5) and (6) and with the necessary changes to this notice.

– Attendance of hearing by complainant:

21. A party to a complaint must attend the hearing irrespective of whether or not that party is represented.

– Failure of party to attend hearing:

22. 1) The Public Protector may if a party is absent at a hearing but represented by a legal representative –

- a) Continues with the hearing;
- b) Postpone the hearing; or
- c) Issue a subpoena, in terms of section 7 of the Act, to compel the party to give evidence or to produce a document during the hearing.

2) The Public Protector shall, if a person, who has been notified to be present at a hearing party, is absent at a hearing, continue with the hearing and issue a subpoena, in terms of section 7 of the Act to compel the person to attend the hearing and give evidence or to produce a document during the hearing.

– Persons allowed to attend a hearing:

23. The following persons may attend a hearing:

- a) A person who reported a complaint or matter to the Public Protector in terms of section 6(1) of the Act;
- b) A person required to provide assistance to the Public Protector;
- c) A person authorised to conduct an investigation on behalf of the Public Protector in terms of section 7(3)(b)(i) of the Act,
- d) A person required to give evidence or disclose the contents of any document or record to the Public Protector; and
- e) Any other person having a vested interest in the matter before the hearing: Provided that the Public Protector may, in terms of section 7 (1)(b)(ii) of the Act, in respect of a particular case, direct that any of the above persons may not be present at the hearing.

– Nature of hearing:

24. 1) A hearing is an informal procedure which is inquisitorial in nature.

2) The Public Protector must conduct the hearing in an informal manner.

3) The Public Protector or any person designated by him or her may at any stage of a hearing in addition to anything provided for in the Act -

a) Put any question to a witness;

b) Rephrase a question put a witness a person or a party;

c) Clarify any uncertainties in respect of any evidence given; and

d) Elicit information from any witness.

– Procedure at hearing:

25. 1) The Public Protector shall, before the commencement of the hearing, explain –

a) The purpose of the hearing;

b) The inquisition nature of the hearing; and

c) The produce which will be followed,

to the parties and witnesses.

2) The Public Protector shall commence the hearing by summarising the complaint and the issues to be decided during a hearing.

3) The Public Protector shall determine the order for the leading of the evidence.

4) The Public Protector shall make a determination about any document or information to be disclosed at the hearing.

- 5) The Public Protector shall give directions on any other aspect of the hearing.
- 6) The Public Protector may receive evidence from any person at any office of the Public Protector or any other place he or she deems fit.
- 7) The Public Protector may receive evidence in any manner he she deems fit, including by teleconference.
- 8)
 - a) The parties must be given a reasonable opportunity to respond to the evidence given at the hearing.
 - b) A party may, in responding to the evidence given at the hearing –
 - i. Give evidence;
 - ii. Call witnesses to give evidence on his or her behalf;
 - iii. Hand in document;
 - iv. Hand in written submissions;
 - v. Through his or her legal representative or personally put questions through the Public Protector to a witness; and
 - vi. Make statement personally or through his or her legal representative.
 - c) The Public Protector will conduct the hearing in a fair and impartial manner.
- 9) The Public Protector must take any steps necessary to establish the truth and correctness of any statement, submission or evidence given.
- 10) The Public Protector may administer an oath or accept an affirmation from any person appearing as a witness if the Public Protector deems it necessary.

11) a) The Public Protector may take evidence behind closed doors if he or she is of the opinion that it is in the interest of the hearing to do so.

b) Before deciding on taking evidence to address the Public Protector behind closed doors in this regard.

c) The Public Protector may give any directions in respect of the disclosure or publication or prohibition thereof of any information or evidence obtained behind closed doors.

12) a) The parties must be given a reasonably opportunity to make closing statements.

b) A party may make a statement personally or through his or her legal representative.

– Admissibility of evidence at hearing:

26. 1) the rules evidence shall not apply in respect of hearing and Public Protector may ascertain any relevant fact in a manner he or she deems fit.

2) the Public Protector shall decide whether sufficient evidence has been given in which a finding can be made and to order that o further evidence shall be given.

– Conclusion of hearing:

27. The Public Protector must conclude the hearing by –

a) Evaluating the evidence submitted at the hearing in conjunction with all the available information and evidence obtained otherwise; and

b) Making a finding on the facts sand, if necessary, take remedial action.

4.2.2 Executive Members Ethics Act 82 of 1998

The Act²⁶⁴ governs the conduct of Cabinet members, Deputy Ministers and members of the Provincial Executive Council (PEC). As indicated above, this Act²⁶⁵ also governs the functions of the Office of the Public Protector. The President must, after consultation with Parliament, by proclamation in the *Gazette*, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and stating which Cabinet members, Deputy Ministers and Members of the Executive Council (MECs) must comply in performing their official responsibilities.²⁶⁶ Sections 2(2)²⁶⁷ of the Act states that the code of ethics must-

- (a) include provisions requiring Cabinet members, Deputy Ministers and Members of the Executive Council -
 - (i) at all times to act in good faith and in the best interest of good governance; and
 - (ii) to meet all the obligations imposed on them by law.
- (b) include provisions prohibiting Cabinet members, Deputy Ministers and Members of the Executive Council from-
 - (i) undertaking any other paid work;
 - (ii) acting in a way that is inconsistent with their office;
 - (iii) exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
 - (iv) using their positions or any information entrusted to them to enrich themselves or improperly benefit any other person; and
 - (v) acting in a way that may compromise the credibility or integrity of their office or of the government.

²⁶⁴ 82 of 1998.

²⁶⁵ 82 of 1998.

²⁶⁶ Section 1 of the *Executive Members Ethics Act* 82 of 1998.

²⁶⁷ 82 of 1998.

- (c) require Cabinet members and Deputy Ministers to disclose to an official in the Office of the President designated for this purpose and Members of the Executive Council to disclose to an official in the Office of the Premier concerned designated for this purpose-
 - (i) all their financial interests when assuming office; and
 - (ii) any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel, pensions, hospitality and other benefits of a material nature received by them or by such persons having a family or other relationship with them as may be determined in the code of ethics.
- (d) prescribe that the financial interests to be disclosed in terms of paragraph (c) must at least include the information, and be under the same conditions of public access thereto, as is required by Members of the National Assembly as determined by that House from time to time, but may prescribe the disclosure of additional information.²⁶⁸

Section 2(3)²⁶⁹ of the Act further states that the code of ethics may prescribe any matter that may be necessary for the effective implementation of the code of ethics. Moreover, section 3²⁷⁰ of the Act gives the Public Protector the powers to investigate all the breaches of this Act²⁷¹ by the Members of the Executive Council. Section 3(1)²⁷² provides that the Public Protector must investigate any alleged breach of the code of ethics on receipt of complaint contemplated in section 4.²⁷³ Section 3(2)²⁷⁴ states that the Public Protector must submit a report to the President, if the complaint on alleged breach of the code of ethics is against a Cabinet Member, Premier or Deputy Minister.

If the complaint on alleged breach of the code of ethics is against Members of the Executive Council of the Provinces concerned, a report should be submitted to the

²⁶⁸ Section 2 of the *Executive Members Ethics Act* 82 of 1998.

²⁶⁹ 82 of 1998.

²⁷⁰ 82 of 1998.

²⁷¹ 82 of 1998.

²⁷² 82 of 1998.

²⁷³ 82 of 1998.

²⁷⁴ 82 of 1998.

Premier of that province. These reports should be submitted within 30 days of receipt of the complaint. If the Public Protector reports at the end of the 30 day period that the investigation has not yet been completed, he or she must submit another report as to when the investigation will be completed.²⁷⁵ The Public Protector has all the powers vested on him or her in terms of the *Public Protector Act*²⁷⁶ when he or she is conducting investigation in terms of this section.²⁷⁷

Section 3(5)²⁷⁸ of the *Executive Members Ethics Act* states that:

- (a) The President must within a reasonable time, but not later than fourteen days after receiving a report on a Cabinet member or Deputy Minister referred to in subsection 2(a), submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
- (b) The President must within a reasonable time, but not later than fourteen days after receiving a report on a Premier referred to in subsection (2)(a), submit a copy of the report and any comments thereon to the National Council of Provinces.

Section 3(6)²⁷⁹ of the Act indicates that the Premier must within a reasonable time, but not later than fourteen days after receiving a report referred to in subsection 2(b),²⁸⁰ submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature. In terms of the Act,²⁸¹ the Public Protector must investigate in accordance with section 3²⁸² an alleged breach of code of ethics after receiving a complaint by the following people:²⁸³

²⁷⁵ Section 3(3) of the *Executive Members Ethics Act* 82 of 1998.

²⁷⁶ 23 of 1994.

²⁷⁷ Section 3(4) of the *Executive Members Ethics Act* 82 of 1998.

²⁷⁸ 82 of 1998.

²⁷⁹ 82 of 1998.

²⁸⁰ 82 of 1998.

²⁸¹ 82 of 1998.

²⁸² 82 of 1998.

²⁸³ Section 4 of the *Public Protector Act* 23 of 1994.

- (a) The President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister; or
 - (b) The Premier or a member of the provincial legislature of a province, if the complaint is against Members of the Executive Council of the province.
- (2) The complaint must be in writing and must contain-
- (a) the name and address of the complainant;
 - (b) the full particulars of the alleged conduct of the Cabinet member, Deputy Minister or members of the Executive Council; and
 - (c) such other information as may be required by the Public Protector or prescribed in the code of ethics.
- (3) Nothing in this section may prevent the Public Protector from investigating any complaint by a member of the public in accordance with the *Public Protector Act*.²⁸⁴

The *Executive Members Ethics Act*²⁸⁵ discussed above works hand in hand with the Executive Ethics Code. The Code is governed by the Act, which implies that, if the executives do not conduct themselves according to Code, the Office of the Public Protector will get involved.

4.2.2.1 The Executive Ethics Code²⁸⁶

This Code refers to the register of financial interests and reflects as follows:

Each secretary must keep a register of all financial interests disclosed by members. The register must have a confidential part and a public part. The following financial interests must be recorded in the confidential part of the register:

- (a) The value of interest in any corporate entity or public company;

²⁸⁴ 23 of 1994.

²⁸⁵ 82 of 1998.

²⁸⁶ Reg 6853 in GN 41 in GG 21399 of 28 July 2000.

- (b) The details of foreign travel when the nature of those details are to be confidential;
- (c) The details, including the address of any private business ventures;
- (d) The value of any pension;
- (e) Details of the financial interests of a member's spouse, permanent companion or dependent child; and
- (f) The member's liabilities.

This Code further indicates that only the President or Premier, as the case may be, the Public Protector, the secretary concerned and staff designated by the secretary have access to the confidential part of the register. It further indicates that no person who has access to the confidential part of the register disclose particulars of any entry in that part to any other member concerned or another person who does not have such access, except when a court or the Public Protector so orders. This Act further indicates that a member must assist the Public Protector in the performance of the Public Protector's functions under the Act.

4.2.3 *Prevention and Combating of Corrupt Activities Act 12 of 2004*

Section 6(4)(a)(iii)²⁸⁷ of the *Public Protector Act* states that the Public Protector shall be competent to investigate any improper or dishonest act, or omission or offence referred to in part 1–4 or section 17, 20 or 21 (in so far as it related to the aforementioned offences) of Chapter 2 of the *Prevention and Combat of the Corrupt Activities Act*²⁸⁸ with respect to public money.

4.2.4 *Promotion of Access to Information Act 2 of 2000*

Section 6(4)(d)²⁸⁹ of the *Public Protector Act* states that the Public Protector shall be competent on his or her own initiative, on receipt of a compliant or any request

²⁸⁷ 23 of 1994.

²⁸⁸ 12 of 2004.

²⁸⁹ 23 of 1994.

relating to the operation or administration of the *Promotion of Access to Information Act*,²⁹⁰ and shall endeavour, in his or her sole discretion to resolve any dispute by-

- (i) mediation, conciliation or negotiation;
- (ii) advising, where necessary, any complaint regarding appropriate remedies; or
- (iii) any other means that may be expedient in the circumstances.

4.2.5 Protected Disclosure Act 26 of 2000

Section 8²⁹¹ of this Act provides for the protected disclosure to certain persons or bodies as follows:

- (i) Any disclosure made in good faith to the Public Protector in respect of which the employee concerned reasonably believes that the relevant impropriety falls within any description of matters which, in the ordinary course, are dealt with by the person or body concerned and the information disclosed is substantially true.

4.2.6 National Archives Record Service Act 43 of 1996

Section 4²⁹² of the above Act states the functions of the council, among others, are to consult with the Public Protector on investigations into the unauthorised destruction of records otherwise protected under this Act.

4.2.7 Public Finance Management Act 1 of 1999

This Act deals with the treasury regulations. Section 21(4)²⁹³ refers to the identity of donors and sponsors and states that when a donor or sponsor requests to remain anonymous, the accounting officer must submit to the relevant treasury a certificate from both the Public Protector and the Auditor-General which states that the identity of the donor or sponsor has been revealed to them, that they have noted it and have no objection. The above provision in no way limits the Auditor-General or the Public

²⁹⁰ 2 of 2000.

²⁹¹ 26 of 2000.

²⁹² 43 of 1996.

²⁹³ 1 of 1999.

Protector from supplying this information to their staff if they deem it in the public interest to report on this.

4.2.8 Special Investigating Unit and Special Tribunal Act 74 of 1996

Section 5²⁹⁴ of this Act refers to the powers of the Special Investigating Unit:

- (1) Subject to this Act and the regulations, the head of the Special Investigating Unit may determine the procedure to be followed in conducting investigation.

Section 6(a)²⁹⁵ of the above Act states that upon the establishment of the Special Investigating Unit the head of such unit must provide the Public Protector with a copy of the proclamation. Section 6(b)²⁹⁶ of the Act states that the head of the Special Investigating Unit may refer any matter that in his or her opinion could best be dealt with by the Public Protector, to the Public Protector and the Public Protector may, if he or she deems it appropriate, refer any matter which comes to his or her attention and which falls within the terms of the Special Investigating Unit, to such unit.

4.2.9 Government White Paper

According to the Public Protector, the principal indicator for the level of productivity in the public sector would be more relevant to the impact that the availability or unavailability of efficient and effective public service delivery would have on the lives of the ordinary people of this country. Productivity should be regarded as timely delivery of quality and respective services at a minimum cost in case of money and other resources.

In support of this statement, the White Paper on the Transformation of the Public Service (WTPPS) sets out eight transformation priorities among which Transforming Service Delivery is significant. In this instant, a transformed South African public service will be judged by its effectiveness in delivering services which meet the basic needs of all South African citizens.

In addition, public sector leadership and good governance should yield the upholding of the principles of public administration in Chapter 10 of the *Constitution*. This is a

²⁹⁴ 74 of 1996.

²⁹⁵ 74 of 1996.

²⁹⁶ 74 of 1996.

precedent from productivity, service excellence and ultimately delivery on the constitutional dream. Accordingly, section 195²⁹⁷ of the *Constitution* provides that the public administration must fulfill the following:

- a high standard of professional ethics be promoted and maintained;
- services be provided impartially, fairly, equitably and without bias;
- resources be utilised efficiently, economically and effectively;
- people's needs be responded to, and the public be encouraged to participate in policy-making; and
- it be accountable, transparent and development-oriented.

It is further important to note that institutions supporting democracy such as the Public Protector exist to ensure that the people of South Africa enjoy the better life promised by the country's *Constitution*. The constitutional mandate to strengthen democracy has an added responsibility to constantly and continuously strive to contribute to the transformation of government, in terms of its accountability and sensitivity to individual rights and administrative justice.²⁹⁸

4.3 Conclusion

This chapter outlined the legislation that governs the institution of the Office of the Public Protector. It further demonstrated a number of legislations that work hand in hand with the Public Protector. These legislations were all discussed in detail as to how they work with this particular office. The chapter also highlighted the functions and responsibilities of this office, which are guided by the stipulated legislation. As all legislation has now been discussed, the next chapter focuses on the comparative analysis and international perspectives of the Public Protector.

²⁹⁷ *Constitution of the Republic of South Africa*, 1996.

²⁹⁸ Anon Date Unknown *Address by Public Protector Adv. Thuli Madonsela during the Government Leadership Summit in Pretoria* <http://www.gov.za>.

CHAPTER 5

COMPARATIVE ANALYSIS AND INTERNATIONAL PERSPECTIVES

5.1 Introduction

The primary objective of this chapter is to discuss the international perspective of the Office of the Ombudsman. This research study further articulates the development of this office in Sweden and some international countries. Furthermore, its powers and functions in Sweden are also discussed in this chapter, along with the limitations of the Ombudsman's powers in Sweden.

5.2 International standards and perspectives

5.2.1 International viewpoints of the Ombudsman

The idea of the Office of Ombudsman originated in Sweden, but did not spread to other countries until the 20th century when it was adopted in Scandinavian countries, with the newly independent Finland adopting the office in its 1920 *Constitution*.²⁹⁹ Available literature shows that the Offices of the Ombudsman in each country take on a different direction based on the prevalent public policy or governance objectives, usually flowing from particular historical circumstances.

The popularity of the public sector Ombudsman accelerated in the 1960s and, as noted, it was the Danish and Norwegian version of the office that was adopted in other nations. Over the past 40 years, the model has been adopted by a majority of the Commonwealth's members, with New Zealand being the first Commonwealth country to create an Ombudsman in 1962. Numerous other Commonwealth nations in the America, Africa, Asia and the Pacific region also established classical or hybrid Ombudsmen in the mid-1960s.³⁰⁰ For example, Ombudsmen have been established

²⁹⁹

³⁰⁰

Gregory and Giddings *Righting Wrongs: The Ombudsman in Six Continents*.

Tanzania (permanent Commission of Inquiry, 1966, replaced by Commission for Human Rights and good governance, 2001, in operation 2002); Guyana (Ombudsman 1966, in operation 1967); United Kingdom (Parliamentary Commissioner for Administration, 1967); Mauritius (Ombudsman 1967-1968, commenced activities in 1970); Some state level offices in India (*Lok Ayukta* commencing in 1971, in operation in 1972); Australia (starting at the state level in 1972, commenced Wealth Ombudsman in 1976, commenced operations in 1977); Fiji (ombudsman, 1970, appointed 1972); Zambia (Commission for Investigations, in 1974); Papua New Guinea (Ombudsman Commission 1975); Nigeria (Public Complaints Commission, 1975, also at the state level); Trinidad and Tobago (Ombudsman 1976);

in five states and two dependencies in the United States of America (commencing in 1969), France (1973), Italy (in operation in 1982), Ireland (1980, commenced operations 1984), Iceland (1988), Greenland (1994, in operation in 1995), South Korea (1994), Belgium (Federal Office in 1995, also Flemish Community and Wallon Community offices), various Francophone nations in Africa (Office of Mediateur) and Morocco (2002).³⁰¹

The Ombudsman was also increasingly established and adapted in other countries, starting in the same period and continuing to the present as the institution became more widely recognised. The states that have created an Ombudsman have ranged from established democracies reforming their governance structures to states in various stages of democratisation. Moreover, while the Ombudsman is not traditionally seen as a tool organised by government to fight corruption, the office may take on that route when a need arises. One scholar recently noted that:³⁰²

Although not originally designed to combat corruption, but rather to address grievances relating to administrative issues, the institution of the ombudsman, with its unique tools and competencies, has proven itself to be a useful ally in the struggle against this worldwide scourge.

Be that as it may, most democratic countries today have a rational institution analogous to that of the Public Protector, although it is called by different names;

Jamaica (Parliamentary Ombudsman, 1978, replaced by Public Defender, 2000); St Lucia (Parliamentary Commissioner 1978, started operations in 1981); Ghana (Ombudsman, 1980, replaced by Commissioner on Human Rights and Administrative Justice, 1992 in operation 1993); Solomon's Island (Ombudsman 1980), Zimbabwe (Ombudsman, 1982); Barbados (Ombudsman 1980 commenced activities in 1987); Sri Lanka (Parliamentary Commissioner for Administration, 1981); Pakistan (*Wafaqi Mohtasib*, 1983); Uganda (Inspectorate of Government, 1985, commenced activities in 1986); Cook Island (Ombudsman 1985); Samoa (*Komesina O Sulafu Faiga*, 1988, in operation 1990); Namibia (Ombudsman, 1990); Cyprus (Commissioner for Administration, commenced activities in 1991); Seychelles (Ombudsman, 1993, commenced activities in 1994); Lesotho (Ombudsman, 1993); Malawi (Ombudsman, 1994, commenced activities 1995); Botswana (Ombudsman, 1995, in operation December 1997); Antigua and Barbuda (Ombudsman, 1981, commenced activities 1995); South Africa (Public Protector, 1995); Malta (Ombudsman, 1995); Vanuatu (Ombudsman, 1995); Belize (Ombudsman 1994, commenced activities in 1999); The Gambia (Ombudsman, 1999); Sierra Leone (Ombudsman 1991 Constitution, 1997 Law, in operation 2002); An Ombudsman operated in Swaziland 1983 to 1987. An Ombudsman for the overseas British territory of Gibraltar was appointed in 1999 and a Bermuda Ombudsman was included in 2003 Constitutional Amendments. In Bangladesh, legislation was considered in 2003 for an Ombudsman. In 2003, the Kenya draft Constitution provided for an Ombudsman; Hatchard *National Human Rights Institutions in the Common Wealth*; Hatchard *Some Reflection on the Role of the Common Wealth in the Development of National Institutions* 25.

³⁰¹ Ekhlundh *Human Rights Commissions and Ombudsman Offices*.

³⁰² Pienaar "The Role of the Public Protector in Fighting Corruption" *African Security Review*.

among others, Ombudsman, Mediate Commissioner and Public Advocate, all of which are empowered by legislation to assist in establishing and maintaining efficient public administration. For instance, in Latin America many offices accentuate human rights as a historical response to military dictatorships in the region.³⁰³

Conversely, the Supreme Court of Canada stated that "the powers granted to the Ombudsman allow him or her to address administrative problem that the courts, the legislative and the executive cannot effectively resolve". Most Ombudsmen's offices have been established in states with democratic forms of government. Hence, in South Africa today, it forms part of the Chapter 9 institutions which support democracy. In those governments the Ombudsman operates as another check on the power of the executive administration branch, in addition to the control exercised by the legislature, the courts and other public sector institutions.³⁰⁴

Nevertheless, duties similar to that of the modern Ombudsman have been seen in different cultures throughout history. In situations where the Ombudsman is functioning as a compliment or supplement to courts and administrative tribunals, some advantages of the Ombudsman relative to other public sector dispute resolution mechanisms are its formality, speed and accessibility. A significant element of its accessibility is that the uses of the institution are free of charge to complainants.

It is important to note that the Ombudsman is usually appointed by the government or by Parliament but with a significant degree of independence.³⁰⁵ Among others, the Ombudsman is charged with representing the interests of the public by investigating and addressing complaints of maladministration and violation of rights. Accordingly, the Office of the Ombudsman may be oriented and utilised differently from country to country. However, certain basic and crucial features typically apply to the activities, jurisdiction and powers of the office. Congruently, the Ombudsman is a public office whose mission is to probe the way in which government bodies and their staff have conducted themselves in the performance of their duties *vis-à-vis* members of the public and to give judgement about these actions.

³⁰³ Pienaar "The Role of the Public Protector in Fighting Corruption" *African Security Review*.
³⁰⁴ *BC Developmentcorp v Friedman* 1985 1 (W) W R 193 (SCC) 206.
³⁰⁵ Heckenberg *The Wrong Man* 122.

Moreover, the Ombudsman's possible interventions are, among others, grounded towards helping in individual cases and also to resolving problems in the relations between citizens and the public authorities. The Ombudsman should therefore be seen as a mechanism that enhances transparency in government and democratic accountability, with the result that it assists in building good governance of the state. Numerous Ombudsmen are also competent to conduct investigations on their own authority.

Nonetheless, the Ombudsman's core duty is to deal with complains submitted by members of the public, who have the right, preferably a right enshrined in law, to submit complaints about the actions of government bodies to the Office of the Ombudsman. Thus, the basic trademark of the Ombudsman institution is that it is complaint-driven. This also applies to countries such as France and the United Kingdom where members of the public cannot (or not yet, at any rate) apply directly to the Ombudsman, but have to do so through a Member of Parliament probably as "whistle-blowers".³⁰⁶

Be that as it may, the traditional Ombudsman model that has proved most popular is based on the offices established in the western countries of Denmark and Norway, which do not have the power to investigate the judiciary or prosecute official s.³⁰⁷ A common definition that is accepted today says that a public or parliamentary Ombudsman is a public official appointed by the legislature to receive and investigate citizen complaints against administrative acts of government.

Generally, the objectives of the Ombudsman are to improve the performance of the public administration, and this improvement of government accountability does not discriminate on colour, gender or position held in the government, as was the case in South Africa where the constitutional landscape of the country was biased towards the oppressed majority. As mentioned earlier, the *Advocate-General Act*³⁰⁸ was amended after it was realised to have had loopholes that the oppressed majority could exploit.

³⁰⁶ Oosting "Protecting the Integrity and Independence of the Ombudsman Institution" *The Global Perspective* 13-31.

³⁰⁷ Reif *The Ombudsman, Good Governance and the International Human Rights System* 82.

³⁰⁸ 118 of 1979.

5.3 Office of Ombudsman in Sweden

The word Ombudsman is a Swedish term dating back to the 1800s.³⁰⁹ The translation of Ombudsman means "a person who has an ear to the people, who listens to the community in every crisis they have which need s legal attention". The phrase "ombudsman" is used worldwide to designate impartial, confidential and independent officers that receive queries and concer ns from society and work to achieve fair solutions.³¹⁰

Furthermore, the term "ombudsman" is used to communicate the good administration of government as well as any maladministration to the widest feasible community and it is not intended to dispirit others from using alternate forms of this word, such as "ombudsperson" or "ombuds". The same political encyclopaedia from which this statement is drawn also notes that due to varying political cultures, constitutions and government structures, there is no specific or uniform nature to an Ombudsman office.

Between the years 1766 and 1772, the estates (*Riksdag* or Parliament) in Sweden took over the function of electing the Chancellor Justice, with the monarch regaining this power in 1772.³¹¹ Consequently, a new *Constitution* was adopted which divided supremacy between the crown and the Parliament, giving the latter the ability to place some checks on the exercise of executive power after the king was deposed in 1809.³¹² The *Justitiekanslern*³¹³ was empowered to initiate legal proceedings against

³⁰⁹ Howard *The Organizational Ombudsman: Origins, Roles and Operations: A Legal Guide* 2.

³¹⁰ Kurian *World Encyclopaedia of Parliaments and Legislatures* 829:

The proliferation of Ombudsman systems, providing a facility for extra-judicial investigation of citizens' complaints against the administration by an independent expert, and an impartial citizen's defender, has been a notable feature of political development, almost a worldwide phenomenon, since the mid-1950s.

³¹¹ Kurian *World Encyclopaedia of Parliaments and Legislatures* 829:

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³¹³ The *Justitiekanslern* is a Swedish government agency representing the government of Sweden in many legal matters as the government's Ombudsman. The office of the *Justitiekanslern* was initially created through a decree given out by King Charles XII in 1713.

recalcitrant officials. This was and still is an executive appointment as the Chancellor of Justice continues to exist as the government's Ombudsman.

At some point in the year 1697, when Charles XII was only 15 years of age, Charles XII became King of Sweden. For the next 17 years, however, Charles was out of the country fighting wars, mostly against Russia. During this time, because he was away from the country, Charles signed a law creating an office called the King's Highest Ombudsman. The job of the King's Highest Ombudsman was to ensure that while the King was away, the government workers, judges and the military were acting properly and following the rules that the King had left for them.³¹⁴

With reference to a hundred years later, in the year 1809, Sweden had a different King. However, Sweden was still fighting a battle with Russia, which was not pleasant and not in favour of the Swedish residents because Sweden was losing. The Swedish King Charles XII had in fact been taken to prison as a convict by the Russian Territorial Army. Devoid of a King to construct ultimate decisions and settle disputes, the Swedish Parliament brought back the idea of the Ombudsman.³¹⁵

After a military defeat by Russia, the Swedish King, Charles XII, fled to Turkey for some years.³¹⁶ As a result of the long absence of the monarch, the administration in Sweden deteriorated. Consequently, in the sovereign King appointed a diplomat to scrutinise the behaviour of the Swedish government and judiciary, following which the executive's behaviour of maladministration was exposed.³¹⁷

The Ombudsman who was chosen during the year 1809, known as Lars Augustin Mannerheim, was accountable for parliament and his trade was solely to protect the constitutional rights of residents in opposition to unmerited or oppressive decisions of the bureaucracy.³¹⁸ The appointment of this parliamentary Ombudsman in Sweden during the year 1809 is generally regarded as the birthdate of the modern

³¹⁴ Anon Date Unknown *The History of the Ombudsman* <http://www.ombudsman.wa.gov.au>.

³¹⁵ Akpomuvire *The Ombudsman Phenomenon in African States Public Services* 7.

³¹⁶ Reif *The Ombudsman, Good Governance and the International Human Rights System* 82.

³¹⁷ Ekhlundh *Human Rights Commissions and Ombudsman Offices*.

³¹⁸ Ekhlundh *Human Rights Commissions and Ombudsman Offices*.

ombudsman. It is within this context that most of the public or parliamentary Ombudsmen around the world are modelled today.³¹⁹

The modern pedigrees of the Ombudsman are found in the Swedish *Justitie* Ombudsman (Ombudsman for Justice) established in 1809. The role of the parliamentary Ombudsman then was to defend the rights of the citizens by establishing a supervisory organisation independent of the executive branch.³²⁰ Hence, the Ombudsman received and investigated complaints from the public concerning the conduct of the government officials in administering the affairs of the public sector. Quite evidently, this is one of the functions that this office is expected to perform in South Africa today and is contained in the *Constitution*³²¹ of the country.

A hybrid version of Ombudsmen has been established in many more states. However, as already indicated above, the root of this institution is in Sweden, and it is therefore of great importance for this study to highlight briefly the powers, functions and limitations of the Swedish Ombudsman. This will bring clarity and understanding of the functions of this institution based on from where it originated.

5.3.1 Powers and functions of the Swedish Ombudsman

An important function of the Ombudsman is to protect the rights and freedom of citizens and, needless to say, it is primarily for this purpose that the post of Ombudsman was instituted. In the 19th and 20th centuries there was autocracy in Sweden. The Ombudsman had another function then which was to supervise the general civil administration. On this point, the duty of the Ombudsman is closely connected with the duties of the public administration. This is because the protection of freedom and execution of policies falls within the jurisdiction of the public administration, and whether these are properly performed or not requires examination, which is the Ombudsman's job.³²²

³¹⁹ Ekhlundh *Human Rights Commissions and Ombudsman Offices*.

³²⁰ Akpomuvire *The Ombudsman Phenomenon in African States Public Services* 13.

³²¹ *Constitution of the Republic of South Africa, 1996*.

³²² Anon Date Unknown *Ombudsman* <http://www.ombudsman.org.mt>.

The Swedish Ombudsman is an agent acting under Parliament, according to the Swedish Parliament and Ombudsman's websites.³²³ The office forms part of the Parliament and its duty is to monitor and review the public administration. In terms of South African terminology, it is akin to the Parliament Oversight Authority. It therefore assists Parliament to oversee the implementation of laws and other regulations in the public sector. However, in South Africa this would be referred to as complementary oversight functions. Besides the above-mentioned powers and functions of the Swedish Ombudsman, the following are the general functions of the said institution in Sweden:³²⁴

- To safeguard the rights of the individuals against maladministration, abuse of power or violations of fundamental human rights by the public authorities subject to his jurisdiction;
- To investigate and form opinions on complaints of defective public administration;
- To promote fairness, justice and equality in administrative action;
- To promote improved relationships between instruments of government at all levels, and the people;
- To promote the educative role of the Office of the Ombudsman;
- To promote awareness on the role or function of the Ombudsman;
- To identify and advise on how laws and regulations could be improved to render them more just and equitable; and
- To undertake own initiative investigations where it is in the public interest to do so.

Furthermore, the authority of the Swedish Ombudsman is not provided for in the *Constitution* but in terms of their *Constitution*, in Chapter 13 article 6, it requires

³²³ Cetywayo Date Unknown *International Comparative Study: The Mandate and Reporting and Accounting Obligations of the South African Human Rights Commission and the Public Protector* <http://www.parliament.gov.za>.

³²⁴ *Act with Instructions for the Parliamentary Ombudsman* (lag 1986:765).

Parliament to prescribe rules for the authority of the Ombudsman.³²⁵ Both the *Riksdag Act*³²⁶ and the *Act with Instructions for the Parliamentary Ombudsman*³²⁷ provide that the Ombudsman has the responsibility of supervising the application of laws and other statutes in public activities.

Accordingly, ombudsmen have the responsibility to ensure that public authorities, including courts and commissioned army officers with the rank of second lieutenant and above, comply with the laws and fulfil their obligations. They must ensure that these public authorities observe the principles of impartiality and objectivity as required by the *Constitution*, and they must guard against the infringement of the basic freedoms and rights of the citizens.

The Act³²⁸ empowers the Ombudsman, in consultation with the Chief Ombudsman, to investigate on their own initiative and in response to public complaints, though the outcomes of their investigations are not legally binding. The investigated authority however does have to comply with such outcomes ; though in such instances, they are merely recommendations. Additionally, the Act³²⁹ empowers them to conduct regular inspection visits of public authorities and courts with the purpose of reviewing files and relevant documents. Fundamentally, they can issue guiding statements to promote uniform and appropriate application of law. They have powers to prosecute any criminal violation of the law and are viewed as extraordinary prosecutors.

5.3.2 Limitations: powers of Swedish Ombudsman

There are limitations in terms of the jurisdictional authority of the Swedish Ombudsman. In terms of the Act³³⁰ with instructions for the Ombudsmen, the powers and authority of the Ombudsmen do not extend to the following institutions:

- Members of Parliament, its structure and the Clerk of the House;

³²⁵ *Act with Instructions for the Parliamentary Ombudsman* (lag 1986:765).

³²⁶ *Riksdag Act SFS 1974.*

³²⁷ *Act with Instructions for the Parliamentary Ombudsman* (lag 1986:765).

³²⁸ *Riksdag Act SFS 1974.*

³²⁹ *Riksdag Act SFS 1974.*

³³⁰ *Riksdag Act SFS 1974.*

- The government or Ministers except prosecuting them on behalf of the Parliament and its Committees Assembly when the Committee decides to initiate legal proceedings;
- The Chancellor of Justice (government Ombudsman); and
- Members of policy-making municipal bodies.³³¹

5.4 Conclusion

As outlined above, this chapter deliberated on the international perspectives of the Office of the Ombudsman. The position of this office in other international countries was also highlighted. The research study further demonstrated how this office operated in Sweden, and its powers and functions were discussed as well. The study also found that in Sweden there are specific limitations to the powers and functions of the Ombudsman. It was further revealed that although the Ombudsman originated in Sweden, some other countries of the world adopted the institution of the Ombudsman and used it based on their prevalent public policy or governance objectives. The next chapter deliberates on the challenges and impediments of the Public Protector's office in South Africa.

³³¹

Riksdag Act SFS 1974.

CHAPTER 6

CHALLENGES AND IMPEDIMENTS OF THE OFFICE OF PUBLIC PROTECTOR

6.1 *Introduction*

The primary objective of this chapter is to examine the challenges and impediments of the Office of the Public Protector when executing its duties. These challenges are discussed by way of looking into some of the concerns raised by the Public Protector herself as hindering the performance of her office. Lack of funds and resources for the Public Protector are also highlighted. The research study further discusses the findings of this office and lack of cooperation by some organs of the state and public authorities. The unnecessary interference and the attack of the Public Protector's office are also explained in this chapter. Furthermore, the leaking of provincial reports to the media, the conflict between the Public Protector and other statutory bodies, and the disagreement about the powers this office possesses by some Members of Parliament are discussed as well.

As a result of these circumstances, the conflict between this office and other bodies or Chapter 9 institutions hinders the Office of the Public Protector from performing its duties and also causes confusion among the community. Therefore, these incidences pose a serious challenge for this office. Notably, there is a need to clarify the extent of the boundaries of this office and where it is to share its work in a professional and legal way. As a result of this lack of clarification, there are many complaints from this office and also from the government, political parties and members of the community when it comes to the way this office serves them formally.

These challenges occurred in a number of reports that the Public Protector had to release. The jurisdiction of this office is also challenged when it comes to who must be investigated or not investigated by the Office of the Public Protector in any of the above-mentioned contentions. Fortunately, a report published by the Office of the Public Protector also stipulates some of the above issues as the challenges faced by

the Office of the Public Protector.³³² This chapter therefore aims to discuss these in detail.

6.1.1 Financial problems: Lack of funds and resources

6.1.1.1 The scope of allegations probed: On-Point Engineering

When dealing with investigations of corruption against the former African National Congress' Youth League President, Julius Malema who is the current President of the Economic Freedom Fighters (EFF), the Office of the Public Protector made it clear that lack of funds halted Malema's investigation. It was after receiving three complaints that Madonsela (the current Public Protector in South Africa) investigated allegations that the Limpopo Department of Roads and Transport awarded On-Point Engineering a tender through corrupt means and that the former African National Congress' Youth League leader Julius Malema had used his political position to influence the awarding of the tenders by the department and the Limpopo government in general. Consequently, the issues that Thuli Madonsela had to probe included the following:

- Whether the awarding of the Project Management Unit (PMU) tender by the Limpopo Roads and Transport Department was improper and in violation of the provisions of the *Prevention and Combating of Corrupt Activities Act*?³³³
- Was On-Point involved in any corruption in its dealings with other service providers appointed by the department in its management of the Project Management Unit?
- Did the Ratanang Family Trust and / or Malema benefit improperly from the tender awarded to On-Point?
- Was the awarding of the tender to other companies referred to in the allegations, Zizani Builtit and Arandi Trading Enterprise, improper?

³³²

Madonsela "Challenges Faced by the Office of the Public Protector" 4.

³³³

Prevention and Combating of Corrupt Activities Act 12 of 2004 provides for the strengthening of measures to prevent and combat corruption and corrupt activities, to provide for the offence of corruption and offences relating to corrupt activities.

Consequent to the several allegations probed by the Public Protector, including that of the then African National Congress' Youth league President Julius Malema, the office reported that it had been stalled due to lack of funds. This was reported by the Public Protector, Madonsela. Madonsela further stated that members from her office met with the National Treasury to apply for R30 million in emergency funding in order to cover salaries and operational expenses for more investigators. In addition, Madonsela said that while service delivery investigators were going ahead, a number of corruption probes were on hold due to resource constraints.

6.1.1.2 Public Protector's findings

After perusing relevant documents relating to the procurement of the tender, interviewing officials, going through newspaper reports, consulting with the National Treasury and analysing relevant laws and records, Madonsela (Public Protector) found that:

- The awarding of the tender by the department to On-Point was unlawful, improper and constituted maladministration; and
- The bid that was presented by On-Point in respect of the Project Management Unit tender consisted of a deliberate and fraudulent misrepresentation of facts in respect of the profile, composition, experience and therefore the functionality of the company.

Furthermore, it was presented to the department that On-Point was an established and experienced establishment with management teams and professional staff that complied with the requirements of the request for proposal even though, at the time of the bid, the company had existed for only a month and had neither employees nor several of the purported key management and staff.³³⁴

Equally, the *Public Protector Act*³³⁵ allows this office to request help from other state bodies such as the Special Investigations Unit, the South African Police Service (SAPS) and the Hawks. However, these state bodies always indicate that they are also low on funds. Unfortunately, in such instances, the Treasury invariably indicates

³³⁴

Anon Date Unknown *Lack of Funds Halts Malema's Investigation* <http://m.news24.com>.

³³⁵

23 of 1994.

that it will not discuss allocation requests and indicates that adjustments would be announced following the report of the nation's crime statistics.³³⁶

In response to this situation, Mike Smith³³⁷ in an article wrote:

Do you think the government is poor? I mean just a few weeks ago they had money to lend the brutal King Mswati the 3rd in Swaziland R2.4 billion. In this money the King demands R 400 million as commission for himself. Further, the government has just spent R180 million on luxury houses for ministers and deputies. Last year they spent billions to fix houses that they have already built for the poor ... and [which were] falling apart after six months.

This comment by Mike Smith implies that the government refuses to give more funds to these institutions when the culprit is one of its own.

Consequently, the Public Protector lamented the lack of funding for Chapter 9 institutions as a serious problem when she was addressing students on their role in the democratic South Africa at Port Elizabeth's Nelson Mandela Metropolitan University. Madonsela further indicated that she is concerned as more than 13 000 cases have not been dealt with due to lack of funds. She further said that if they are not attended to, they will cripple the public spheres. In addition, Madonsela claimed that of the 40 000 cases her office is dealing with, just 32 per cent of them remain unattended.³³⁸

It was under these conditions that the Public Protector had to request additional staff to deal with the financial discrepancies facing her office. This is an indication that she wanted to use whatever money was given to her office for a good course. In this address, the Public Protector also indicated that she had requested funds for additional resources and, according to her, it was not for the first time that this was done. The above deliberations bring this study to the view that the Office of the Public Protector must have its own budget from the Minister of Finance so that it functions without glitches due to lack of funds.

³³⁶ Smith August 2011 *No Money to Dig into Malema's Corruption Rabbit-Hole* <http://mikesmithspoliticalcommentary.blogspot.co.za>.

³³⁷ Smith August 2011 *No Money to Dig into Malema's Corruption Rabbit-Hole* <http://mikesmithspoliticalcommentary.blogspot.co.za>.

³³⁸ Anon Date Unknown *Lack of Funds Halts Malema's Investigation* <http://m.news24.com>.

The Public Protector further lamented that the pending cases are not only affecting the general public, but also impinging on the operations of business while they are waiting for their investigations to get underway. For example, where one is owed money by the municipality and the Office of the Public Protector is busy trying to facilitate a dialogue between the municipality and such a person, that person can wait for three years while the dialogue facilitation is underway. Incidentally, in the case of *Van Rooyen and Others v The State and Others*,³³⁹ the Constitutional Court based the test of independence of the Public Protector and other Chapter 9 institutions on the following facts:³⁴⁰

- i. Financial independence;
- ii. Appointment procedure and security tenure of appointed office bearers; and
- iii. Institutional independence.

The decision by the Constitutional Court clearly supports the idea of this study that the Office of the Public Protector must have financial freedom. Financial independence is an important indicator of the independence of the institution supporting democracy. Therefore, one of the biggest challenges relates to the current funding processes and the allocation of the Public Protector's budget from the public revenue fund. Currently, the budget of the Public Protector is determined after a process of consultation by the National Treasury and is distributed through the budget of the Department of Justice and Constitutional Development.

³³⁹ 2002 (8) BCLR 810 (CC). In this case, the Constitutional Court held that the conception of institutional judicial independence is not subject to any restraint. In particular, the requirements that judicial officers have security of tenure, a basic degree of financial security, and institutional independence regarding matters that relate directly to the implementation of the judicial function, as well as judicial control over administrative resolutions 'that bear directly and immediately on the exercise of the judicial function'. According to this assertion, the Constitutional Court has held that judicial independence necessitates that the Judiciary be and be seen to be institutionally, financially and administratively independent.

³⁴⁰ Anon Date Unknown *The South African Judiciary* <http://www.judiciary.org.za>: During the delivery of his speech at the Stellenbosch University, 2013 Annual Human Rights Lecture, Chief Justice Mogoeng wa Mogoeng further emphasized the values of judicial independence as charted by the Constitutional Court as follows: "Institutional independence concerns the day-to-day operations of courts and is required to ensure that they are not directly or indirectly controlled or seen to be controlled by other arms of government. It is to this end that the phased transformation of court administration is directed, and this underscores the urgency and critical importance of judicial self-governance".

Meanwhile, the *ad hoc* Committee on the Chapter 9 and associated institutions observed in its report submitted to Parliament on 31 July 2007 that the location of budgets for Chapter 9 institutions within the government departments impacts negatively on the perceived independence of the institutions and creates a false impression that they are accountable to the respective government departments for the use of their finances.³⁴¹

In terms of the current process, the Portfolio Committee on Justice and Constitutional Development is responsible for engaging with the allocations to the Systems Committee Chairperson, Mathole Motshega. The Economic Freedom Fighters' Mbuyiseni Ndlozi was the first to make reference to Madonsela when he said the only way to strengthen the *Constitution* and the rule of law was to properly fund offices such as that of the Public Protector. He further stated that the department was misdiagnosing the problems of the justice system.³⁴²

Ndlozi continued by saying that if you undermine the Office of the Public Protector or if you go to the committee and harass it, you are not promoting it: "you cannot come here and tell us about transformation in terms of the indigenous system rule of law ". In support of the statement of Ndlozi, Inkatha Freedom Party MP, Themba Msimang said that to many citizens of this country, the current Public Protector was the first to actually demonstrate the meaning of the term Public Protector.³⁴³

Meanwhile, all this happened when the Public Protector was asking for an extra R200 million to complete her work. Evidently, for her to go and request extra money was a valid indication that the current budget she was allocated was inadequate to complete her work relative to the myriad of complaints her office was receiving. Conversely, for an opposition party to protect her is because the ruling party was attacking her and accusing her of misusing funds, and because she is susceptible to not receiving sufficient money ostensibly because most of her investigations are complaints against government officials who are also members of the ruling party.³⁴⁴

³⁴¹ Malunga "The Challenges Faced by the Office of the Public Protector" 5.

³⁴² Makinana "ANC Launches Scathing Attack on Thuli Madonsela" *City Press*.

³⁴³ Malunga "The Challenges Faced by the Office of the Public Protector" 5.

³⁴⁴ Makinana "ANC Launches Scathing Attack on Thuli Madonsela" *City Press*.

The main encumbering problem is that Parliament never debates the specific budget of the Office of the Public Prosecutor. This budget is passed as part of the Department of Justice and Constitutional Development budget. There is a general consensus that if the current arrangements are to satisfy the constitutional framework and protect the independence of Chapter 9 institutions, the consultation process needs to be revamped and made transparent. In such circumstances, National Treasury must acknowledge the legitimate requirements of the Public Protector and Parliament must also know and be involved in the determination of the reasonable resource requirements of the Public Protector, as was the implication in the Constitutional Court case of the *New National Party of South Africa v Government of the Republic of South Africa and Others*,³⁴⁵ which dealt with the funding of the Independent Electoral Commission (IEC).³⁴⁶ As a result, the failure to extend the ruling to the other Chapter 9 institutions established in terms of the same chapter of the *Constitution* creates a legal anomaly.

Noticeably, this process had led to a situation where the Public Protector is amazingly under-funded to such an extent that it is difficult for the Office of the Public Protector to comply with its constitutional imperatives and to meet its strategic objectives. Hence, current staff members are working under increasing strain as a result of the extra case load in their quest to achieve the objectives of the office and comply with the Public Protector's promise to expedite remedial action.

Quite obviously, under these circumstances the Public Protector cannot comply with the timeframe prescribed for investigations in terms of the *Executive Members Ethics Act*³⁴⁷ and cannot allocate recourses required to discharge its functions in terms of the *Promotion of Access to Information Act*.³⁴⁸ In reality, there are simply not enough staff members to ensure that these cases are attended to as required in terms of the mandate and strategic objectives of the Public Protector and her constitutional obligations.

³⁴⁵ (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489.

³⁴⁶ The Independent Electoral Commission is one of the Chapter 9 institutions.

³⁴⁷ 82 of 1998.

³⁴⁸ 2 of 2000.

6.1.2 Lack of cooperation by organs of state and public authorities

As noted by some of our international counterparts, the expansion of governmental functions has inevitably resulted in the rise of bureaucracy. Bureaucracy in turn has led to:³⁴⁹

Maladies which include, inter alia, an excessive sense of self-importance on the part of officials, an indifference towards the feelings of individuals, a failure to recognise the relationship between the governors and the governed as an essential part of the democratic process, and a strict adherence to rules and regulations (i.e. rigidity, a quest to maintain the status quo, a passion for routine in administration and a resistance to change.

The Ombudsman institution such as the Public Protector is intended to operate as a cure for these deficiencies; to protect citizens by bridging the rift between them and the bureaucracy and bringing the bureaucratic experience closer to the ideals of democracy. Hence, the principal aim of the Public Protector is to protect the rights and interests of the public against injustices caused by maladministration.

These obligations can be accomplished by undertaking the impartial investigation of the complaints submitted to the Public Protector, through honest and good faith attempts at resolving disputes and rectifying improper acts and omissions, and through the issuing of findings to the administration and demanding compliance with the remedial action that is required to remedy the actions and the consequences thereof. These powers and functions of the Public Protector are regulated by the *Constitution* and the *Public Protector Act*,³⁵⁰ which also place corresponding obligations on the organs of state and public bodies to cooperate with the Public Protector to ensure its efficiency.

Furthermore, the Public Protector can achieve its purpose in this regard if there is a willingness and readiness on the part of the public and private administrative agencies to cooperate with the Public Protector in the investigation and resolution of complaints, which include complying with its findings and remedial actions. Be that as it may, the levels of awareness of the role and functions of the Public Protector and its profile among government institutions and public bodies have increased significantly over the last number of years. Consequently, there are areas of

³⁴⁹ Sifiso "The Challenges Faced by the Office of the Public Protector" 17.

³⁵⁰ 23 of 1994.

cooperation by specific departments and officials that show an understanding and commitment to the principles of sound administration and accountability.

On the other hand, the Public Protector has emphasised the fact that the lack of cooperation, besides the issue of capacity constraints, is the biggest obstacle in achieving its targets. Equally so, this manifestation could significantly constrain and protract the office's investigative powers and capacity. Hence it is that access to information and genuine timely cooperation are decisive and central to the success of the Public Protector's investigations, reports and remedial actions.

Some of the challenges relate to the fact that state institutions-

- a) Do not show a willingness to take responsibility for findings of maladministration and to reverse the consequences as indicated in the remedial action;
- b) Try their best to provide justification, using their information and resources to find support from experts and legal advisors, to avoid compliance with the findings and remedial action of the Public Protector;
- c) Do not understand the constitutional imperative of the Public Protector in terms of section 182³⁵¹ of the *Constitution* for providing remedial action for prejudice resulting from improper administrative action;
- d) Confuse lawfulness and fairness. Fairness involves considering both legal and non-legal issues. Appropriate weight should be given to broad questions of reasonableness, the effect of decisions and the ethical obligations of fairness and accountability; and
- e) Do not live up to the principles and values contained in section 195³⁵² of the *Constitution*. These ethical principles for public sector agencies, including the

³⁵¹ *Constitution of the Republic of South Africa, 1996.*

³⁵² Section 195 (1) of the *Constitution of the Republic of South Africa, 1996* provides that public administration must be governed by the democratic values and principles enshrined in the *Constitution*, including the following principles: A high standard of professional ethics must be promoted and maintained; efficient, economic and effective use of resources must be promoted; public administration must be development-oriented; services must be provided impartially, fairly, equitably and without bias; people's needs must be responded to and the public must be encouraged to participate in policy-making; public administration must be accountable; transparency must be fostered by providing the public with timely, accessible and accurate information; good human-resource management and career-development

"*Batho Pele Principles*", are consistent with a redress framework which provides that when people are unfairly or unreasonably affected by decisions, the agencies should take all fair and reasonable steps to make good the situation.

In another interesting incident, in May 2013, foreign guests of the wedding of Vega Gupta landed at the Waterkloof Air Force Base without going through customs of immigration. In bizarre manner, the guests were escorted out of the military airport by the police flying squad and the VIP unit protection cars. The Guptas who are said to be close friends of President Jacob Zuma said they had permission to use the Waterkloof base. Consequently, in July 2013, the Office of the Public Protector received a complaint from Lieutenant Colonel Christine Anderson and accepted to assess the complaint even though investigation about the whole issue was still underway.

Subsequently, in May 2015, Madonsela subpoenaed an inter-ministerial task team set up to probe the Gupta landing after they had refused to cooperate with the Public Protector. This made it difficult for her office to conduct her investigation as there was initially no cooperation. Later, the Public Protector decided that a private hearing would be held with everyone from the task team in order to uncover what really happened. This lack of cooperation led to the delay in releasing the report by the Public Protector about the Gupta landing.³⁵³

6.1.3 The unnecessary interference and attack of the Public Protector's Office

The Office of the Public Protector is always attacked and in many occasions accused of bias when it releases reports that are against government officials or high ranking officials of the ruling party. This type of behaviour therefore creates a bad impression for the members of the community who do not understand the political shenanigans prevalent in the country today. Some people end up undermining this office and believe that the office is not performing its work properly.

practices to maximise human potential must be cultivated; public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation. Equally so, section 195 (2) further provides that the above principles must apply to administration in every sphere of government; organs of state and public enterprises.

353

Anon Date Unknown *Marvellous Madonsela: Five Cases that Put the Public Protector in the Spotlight* <http://www.thedailyvox.co.za>.

The Office of the Public Protector conducted the investigations about the complaints against the Chief Operating Officer (COO) of the South African Broadcasting Corporation (SABC), Hlaudi Motsoeneng in November 2011. Initially, the Office of the Public Protector received a request from former senior executive member in the South African Broadcasting Corporation, Phumelelo Ntombela Nzimande to conduct investigation into financial mismanagement. Following the request by Ntombela, more complaints were brought by other senior South African Broadcasting Corporation employees alleging that Motsoeneng was appointed without having proper qualifications. In other words, it was suspected that he lied about his qualifications. The employees alleged that in his application, Motsoeneng claimed that he matriculated at Matsimantsho High School in QwaQwa Free State, when he was 23 years old.

As a matter of fact, the report of the Public Protector revealed that Motsoeneng would not have been appointed in 1995 if he did not lie about his qualifications and that he repeated the same lie in 2003 when he applied for the post of executive producer. The report also found that the former South African Broadcasting Corporation chairman Ben Ngubane acted erratically when he ordered that the qualification requirements for the Chief Operating Officer position be changed to remove certain qualification requirements so that the position should suit Motsoeneng's appointment. Despite these glaring accusations, the Chief Operating Officer challenged the report in court. Further details of the court case will be discussed when this research study deals with the issue of successes of the Office of the Public Protector.

Following the release of the report by the Public Protector, there were mixed reactions in the public and media arenas. The South African Broadcasting Corporation news reported that more than 200 protesters, mainly youth, picketed outside the Office of the Public Protector in Pretoria in support of Motsoeneng. They claimed that the report was not balanced and misinterpreted the facts. Additionally, they were demanding that Madonsela must resign. The crowd further claimed that the Public Protector's report used a *modus operandi* by using the word "omission"

and "institution" to indicate without stating directly that she wanted the Office of the Public Protector to be left with a particular impression.³⁵⁴

Astonishingly, Christian religious leaders also joined the fray and attacked the Public Protector. These 'men of God' indicated that their main bone of contention was that the Public Protector was poisoning the political atmosphere of the country by her general demeanour in the execution of her duties, particularly in the matter of Advocate Pansy Tlakula and the South African Broadcasting Corporation's Chief Operating Officer Hlaudi Motsoeneng, as stated by Bishop Pule Mokgethi when informing the journalists in Johannesburg of their position in this regard.

These religious leaders claimed that they represented African independent churches. The Christian religious leaders further claimed that they came together to stand against demonic forces that planned to derail the revolution and the freedom of our people. In her report released in August 2013, Madonsela consequently found that the Chairwoman of South Africa's Electoral Commission, Advocate Pansy Tlakula acted irregularly in the procurement of the Independent Electoral Commission building in Centurion, south of Pretoria.

The report titled "When Governance and Ethics Fail"³⁵⁵ found Motsoeneng's appointment to be irregular, as was his salary progression. In this case, Madonsela was accused of deliberately giving the impression that Motsoeneng was a corrupt and uncontrollable person. On the matter of Tlakula, it was said that she used insinuations to poison the thinking of the public so that it could lose confidence in her (Tlakula's) ability to lead the Independent Electoral Commission. This was just another unnecessary attack on the Office of the Public Protector. In the end, Tlakula challenged this report in court, failed and ended up resigning since the President

³⁵⁴ Mbanjwa "Hlaudi Judgment Upset" *City Press* 7.

³⁵⁵ Madonsela "When Governance and Ethics Fail" released in terms of section 182(1)(B) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the *Public Protector Act*, 1994, 17 February 2014. The report recommended that the SABC board should institute remedial actions against the "dishonest" Motsoeneng. The report further recommended that the SABC board institute corrective action against the "dishonest" Motsoeneng. In this report, the Public Protector suggested that: "The SABC board should ensure that all monies are recovered which were irregularly spent through unlawful and improper actions." In addition, she further indicated to the board that they should take punitive action against Motsoeneng for his untruthfulness relating to the misrepresentation of his qualification, abuse of power and improper conduct which involved the appointments and salary raises of Sully Motsweni, Thobekile Khumalo, Hannes du Buisson and certain freelancers without following parts of the SABC personnel regulations.

was left with no options but to fire her. On the other hand, Motsoeneng challenged this report even though he lost the first battle at the Western Cape High Court and in the Supreme Court of Appeal (SCA).³⁵⁶

Gareth van Onselen in his article titled, "Adding up the ANC 's attacks on Madonsela", pointed out that the African National Congress and its alliance partners have repeatedly attacked the Office of the Public Protector and its incumbent. He further stated that the hostility peaked when Deputy Defence Minister Kees Maphatsoe claimed that Madonsela was a United States Central Intelligence Agency (CIA) plant. Maphatsoe further lamented that these Chapter 9 institutions were created by the African National Congress but were now being used "against us", which he again blamed on the Central Intelligence Agency. Looking at the above statement, it is very clear that because the ruling party created the Chapter 9 institutions they do not expect these institutions to release the reports against them, and this therefore creates serious challenges for the Public Protector.³⁵⁷

These attacks were the latest in the long list of attacks on the Office of the Public Protector by members of the African National Congress, none of which were withdrawn. In 2015 the African National Congress and its alliance partners repeatedly attacked this office and its incumbent, Thuli Madonsela. The hostility peaked when, as mentioned above, deputy Defence Minister Kees Maphatsoe claimed that Madonsela was a United States Central Intelligence Agency plant. During that week Maphatsoe denied to Parliament that he had said this, only to then retract what he had said. His attack was the latest in a long line against Madonsela by the African National Congress.

On 2 February 2014, former National Police Commissioner and member of the African National Congress National Executive Committee (NEC) Bheki Cele, when attacking the Public Protector said: "Anywhere else, you are innocent until proven guilty. With the Public Protector, you are guilty until you can prove your innocence".³⁵⁸ This was after a leaked letter allegedly showed that Cele had failed to stop the excessive and wasteful expenditure at Nkandla.

³⁵⁶ Mbanjwa "Hlaudi Judgment Upset" *City Press* 7.

³⁵⁷ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁵⁸ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

On 23 March 2014, in a press statement titled: "Adv Thuli Madonsela is not God", Young Communist League (YCL) National Secretary, Buti Manamela said:³⁵⁹

Adv Madonsela has in the past committed serious legal mistakes in relation to the procedure and on the substantive issues of her investigations. The same applies to her investigations of Nkandla. This was a trial through the media, and so are many of her investigations. She is driven by the political agenda of the media and of the DA.

Manamela ended by saying: "I appeal to you comrades, let's not attack her personally".

On 26 March 2014 in a media statement, the African National Congress' Chief Whip Stone Sizani argued that Madonsela was undermining Parliament.³⁶⁰ He said: "We express our concern at certain utterances she directed at the government and parliament, which borders on political posturing and condescending language." Elsewhere he accused her of being 'scornful'.³⁶¹

On 7 April 2014, speaking at an election rally in Mamelodi, Bheki Cele again attacked Madonsela by saying: "She must stop acting like she is God". He said: "Thuli Madonsela is just a person. People are going on like she is Jesus of Jerusalem. She isn't."³⁶²

On 12 April 2014, the South African Communist Party (SACP) General Secretary, Blade Nzimande described Madonsela's Nkandla report as 'white people's lies'. He said that: "Papers are the lies of a white man. We are not told the truth about Nkandla. It is being used as a political tool". On 25 August 2014, Nzimande accused Madonsela of consciously or unconsciously trying to overthrow the government, saying that her constant over-reaching wittingly or unwittingly plays into an anti-democratic regime change agenda.³⁶³

On 25 August 2014, speaking in the National Assembly, African National Congress MP Zet Luzipho was ruled out of order for saying that Madonsela's letter to President Jacob Zuma seeks to undermine Parliament. Luzipho, in defending Zuma in

³⁵⁹ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁶⁰ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁶¹ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁶² Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁶³ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

September 2008, also said: "If the Scorpions bite the wrong people we will kill them like a dog when it starts biting relatives at your home, you get rid of it. We will do the same to the Scorpions".³⁶⁴

On 26 August 2014, in response to media questions about the attacks on the Public Protector, ANC Secretary-General, Gwede Mantashe said: "That is why we are not attacking the Public Protector or her office, but we are attacking the behaviour that is wrong".³⁶⁵ Later, he said the Office of the Public Protector leaks every report she writes and blames that on the divisions within the African National Congress.

On 26 August 2014, ANC Deputy Secretary-General, Jessie Duarte described Madonsela as a Public Protector who is very populist in her orientation and sometimes does not present the full picture to the public about the leaks, adding that each leak is glibly explained away. Duarte further retorted: "Who is that senior official who leaked the letter? There is nothing unfortunate about the leaks, they are timed and deliberate".³⁶⁶

On 31 August 2014, in an open letter to the Public Protector, Thami ka Plaattjie, the ANC's head of research and adviser to the then Minister of Defence and Military Veteran, Lindiwe Sisulu, wrote: "you act like a spoilt brat who cries when her toys are thrown on the floor". He accused her of pandering to self-righteousness and cheap demagoguery and described her attitude as malevolent and her conduct as salacious and said she was becoming an activist of some sort going around ordering people 'as though they are at your behest'.³⁶⁷

On 1 September 2014, the South African Democratic Teachers Union (SADTU) indicted her in this way: "Advocate Thuli Madonsela has clear systematic signs planned to create anarchy and divisions within our society and the ANC in particular". The union accused Madonsela's office of calling press conferences to engage with government when guidelines are clear as to where she needs to account to.³⁶⁸ Looking at the above attacks from the members of the ruling party, most of whom are also in the government administration with the duty to protect this

³⁶⁴ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁶⁵ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁶⁶ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁶⁷ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁶⁸ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

office; this is clearly a very serious challenge to the Public Protector as she cannot even run to the ruling party for protection and support.³⁶⁹

The ruling party is not the only champion in attacking this office. The leader of the Democratic Alliance (DA), Helen Zille also accused the Public Protector of protecting the ANC.³⁷⁰ Gary Pienaar said that the continued attacks on the Public Protector following her report on President Jacob Zuma's Nkandla upgrade are disturbing and misguided. They are based on a fundamental misunderstanding of the Public Protector's constitutional mandate and powers.³⁷¹

Adding to the attack of the office, it was also suggested that Thuli Madonsela, and even Malema and Matunjwa are spies. These actable allegations against this office destroy the respect and the dignity of the Office of the Public Protector, and this study considered this to be a serious challenge as these allegations were issued by no less than the State Security Agency. It is very clear that they were trying to disturb the focus of the Public Protector in the investigation she was conducting against President Zuma.

6.1.4 *Leaking of provincial reports*

The *Public Protector Act*³⁷² provides that a member of the Office of the Public Protector shall serve impartially and independently and perform his or her functions in good faith and without fear, favour or bias for prejudice. This means that all the officers of the Office of the Public Protector must be faithful. In addition, they must be able to keep the secrets of the Office of the Public Protector by not leaking any information about the various investigations or upcoming reports on any cases. However, the reality is rather different: there are many complaints from members of the public, people being investigated and political parties about the leaking of provisional reports by the Office of the Public Protector to the media.

The Public Protector herself is worried about these challenges. The ruling party is of the view that the Public Protector herself is the one who leaks information to the

³⁶⁹ Van Onselen "Adding up the ANC's Attacks on Madonsela" *Sunday Times* 14.

³⁷⁰ Anon Date Unknown *Zille Slams the Public Protector: DA Leader Accuses Mushwana of Conducting 'Vendetta against Opposition MP'* <http://www.moneyweb.co.za>.

³⁷¹ Pienaar "The Role of the Public Protector in Fighting Corruption" *African Security Review* 87.

³⁷² 23 of 1994.

media, trying to test what the people will say about it before her release of the final one. They further allege that she is doing this because she is working with the opposition parties. The reasons for such allegations stems from the fact that a lot of these reports that are leaked are about members of the ANC or government employees.

However, the Public Protector alleges that these leaks are not from her office. She is of the opinion that the people investigated might be the ones leaking the reports to the media, because she gives such reports to them before she receive the final one for them to comment on. On the other hand, the opposition parties feel that when the reports against them leak, the Public Protector is working with the ruling party. This remains a serious problem for the Office of the Public Protector and is not something that started only recently.

As a result, when these reports are leaked to the media, the media does not waste time in publishing them. In her address during the quarterly media briefing session at the Court Classique Hotel in Pretoria on 28 September 2011, the Public Protector said:³⁷³

I must, however, express my disappointment at one national daily newspaper for going against my repeated calls on the media not to publish leaked reports. I am equally saddened by parties who share confidential information such as this with the media.

The study will now focus on the reports leaked to the media and the reactions of the parties concerned. To start with, the Office of the Public Protector investigated the Minister of Traditional Affairs, Sicelo Shiceka on the allegations of misuse of funds. The Public Protector issued provisional reports to allow those against who the complaints were lodged an opportunity to respond to her findings. This report was leaked to *Business Day* which published it. Thuli Madonsela reacted to such conduct by saying that the publication of a leaked provisional report from her office had not served the public interest and that such action also undermines the integrity of her

³⁷³

Masibi 2 December 2013 *Public Protector Announces a New Measure to Stem Report Leaks*
<http://www.pprotect.org>.

office. She further said the decision amounted to pure self-interest and contravened section 7(2) of the Act.³⁷⁴

Subsequently, in 2011, a report about the police 's intentions to secure a controversial building lease leaked to the media. This was pronounced by the Chief Executive Thembisa Mthethwa as illegal. He further described the *Sunday Times* decision to publish the above-mentioned leaked report as unethical. Mthethwa also said that the Public Protector, Thuli Madonsela was considering taking the matter up with the South African National Editor's Forum (Sanef). The Office of the Public Protector also indicated that they are of the view that the decision to publish this leaked report was unethical. Even the newspaper in question acknowledged the fact. In terms of the Act, it is unlawful to disclose information related to an investigation by the Public Protector unless she had given specific permission for its disclosure.³⁷⁵

As an indication of her great concern about this problem, the Public Protector always warns those who leak information and tries to come up with measures to curb the problem. On 2 December 2013, she raised her concern regarding the phenomena of publishing information based on leaked provisional investigation reports. The Public Protector further announced new measures to address the problem and indicated that parties would no longer receive full provisional reports. Instead, they will be furnished with information or parts of the reports that relate to them for the purpose of eliciting their comments.

To substantiate this fact she indicated that her office works with sensitive information for months without any leakage and it cannot be a coincidence that the so -called leaks occur only after the reports leave her office and find their way into the hands of other parties. She reiterated the point that publishing the reports was at odds with section 7(2) of the Act, which states that no person shall disclose to any other person the contents of any document in the possession of a member of the Office of the

³⁷⁴ Anon 28 September 2011 *Madonsela Slams Publication of Leaked Shiceka Report* <http://mg.co.za>.

³⁷⁵ Anon Date Unknown *Lack of Funds Halts Malema's Investigation* <http://m.news24.com>.

Public Protector, Deputy Public Protector or any person during investigation unless the Public Protector determines otherwise.³⁷⁶

On 4 December 2013, the ANC spokesperson, Jackson Mthembu issued a statement condemning the leaks of the Public Protector reports as prejudicing the Public Protector's office. He said leaks of incomplete reports from the Public Protector's office not only undermine and prejudice the integrity and the work of this office, but are also harming the image and the standing of those who are being investigated. He further welcomed the fact that the Public Protector agreed that as the ANC, they have every right to be gravely concerned with the leaks regarding her investigation into the security upgrade at Nkandla and other investigations undertaken by her office before they are finalised.

Mthembu also referred to another three incomplete reports that were leaked recently. These included the Independent Electoral Commission's chairperson, Pansy Tlakula, former Communications Minister, Dina Pule and Agriculture Minister, Tina Pieterse's reports. However, Madonsela defended her office by stating that she had no reason to suspect that the leaks were from her office.

The investigation about the former Minister of Communications, Dina Pule's case entailed allegations of maladministration, corruption and a potential conflict of interest against her in connection with the appointment of service providers to render event management services for the hosting of the ICT Indaba held in Cape Town, from 4 to 7 June 2012. This report was consequently named "unsolicited donation".

The findings of this report were as follows:

- (i) Regarding the lawfulness and propriety of appointment of Carol Boucher Productions (CBP) by the Department of Communications to coordinate the 2012 ICT Indaba, there was accordingly no unlawfulness on the part of the Department of Communications.
- (ii) Regarding the lawfulness of the alleged issuing by Dina Pule of the endorsement letter under the authority of the Department of Communications

³⁷⁶

Masibi 2 December 2013 *Public Protector Announces a New Measure to Stem Report Leaks*
<http://www.pprotect.org>.

for private companies to support and sponsor the hosting of the 2012 ICT Indaba, Dina Pule did solicit sponsorship support for the ICT Indaba but such conduct was not unlawful.

This goes back to the question of who is leaking these reports. Recently, the Office of the Public Protector was supposed to have received the report on the investigation of the Passenger Rail Agency of South Africa (Prasa). This report was also leaked to the media and the Public Protector was unimpressed by such leak. Speaking to *Power FM*, Madonsela voiced her disapproval about the leaked Passenger Rail Agency of South Africa report, called "Missing Tracks". She further said that she took a dim view of what happened. When she was asked to comment on the contents of the leaked report, she replied that her office does not comment on leaked reports.³⁷⁷

As indicated above, the opposition parties also have a problem with the leakage of the reports and criticised the Office of the Public Protector because of it. This study will refer to the report leak of the Western Cape Province, the only province governed by the opposition party, the Democratic Alliance. The investigation was about the controversial communication contract award to the advertising agency TBWA Hunt Lascaris. It was stated that the report was leaked to the media a week before the deadline for the province's response. In response to the leakage, Premier Zille said that the leak was irregular and prejudiced the province's right to rectify the material legal errors in the draft report before the report was finalised.³⁷⁸ As is evident from these examples, the Office of the Public Protector has experienced leakages of a number of reports, which is cause for concern for all the parties thereby affected.

The previous Public Protector, Thuli Madonsela was criticised by some institutions and the ruling party for a trend of her provisional reports leaked to the media. However, the first report by the new Public Protector, Advocate Busisiwe Mkhwebane was also leaked to the media. Recently, on 13 January 2017, the *Mail and Guardian* newspaper reported the leak of her first report. According to the report of the *Guardian* newspaper, the report revolves around a leaked report from the

³⁷⁷ Mashego 10 August 2015 *Public Protector Unimpressed by Leak of Prasa Report* <http://www.bdlive.co.za>.

³⁷⁸ Phakathi 14 May 2012 *DA Threatens Public Protector with Court* <http://www.bdlive.co.za>.

Office of the Public Protector where the Public Protector makes recommendations that Absa Bank repay a R2.25 billion bailout it received during the *apartheid* era.³⁷⁹

This incidence was criticised by many South Africans and also the opposition parties. Some labelled it as "politically motivated" as the leaked report favour President Jacob Zuma and his friends, the Guptas. This occurrence is a continuous challenge to this institution. However, the recommendations will be provided in this research study on how this challenge can be curbed.

6.1.5 The conflict between the Office of Public Protector and other statutory bodies

Institutions are increasingly raising objections on the issues of jurisdiction and the powers and functions of the Office of Public Protector in response to the Public Protector's enquiry or in the general course of an investigation and dispute resolution processes. Institutions that raise jurisdictional concerns are often under the impression that they could be excluded from cooperating with or participating in an investigation if, in their opinion, there is no basis for an investigation, or that the Public Protector is not empowered to investigate the allegations or a complaint or some aspects thereof, or that the Public Protector is not authorised to pursue a specific option or avenue in order to resolve a complaint. Such a perception would, however, not reflect a proper picture of the Public Protector's investigative powers and processes.

Section (1)(a)³⁸⁰ of the *Public Protector Act* provides that the Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the grounds of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5)³⁸¹ of this Act, to conduct preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with. The format and procedure to be followed when conducting any investigation shall be determined by the Public Protector with due regard to the

³⁷⁹ Pillay "Busisiwe Mkhwebane's First Leaked Report is on its Way—and may Finally Tell us where her Loyalties Lie" *Mail and Guardian*.

³⁸⁰ 23 of 1994.

³⁸¹ 23 of 1994.

circumstances of each case. Therefore, the *Constitution* requires the Public Protector to perform her or his functions without fear, favour or prejudice.

After the release of the report against the Independent Electoral Commission's chairperson, Patsy Tlakula, she responded to that report and indicated that the report lacked findings that she benefited from a lease deal. Tlakula further indicated that if Thuli Madonsela's report remained unchallenged it could damage the credibility of the Independent Electoral Commission. She further said that the report of the Public Protector into the Independent Electoral Commission lease had the potential to damage the credibility of the important institution in which she had worked for more than ten years.

Tlakula added that she had respect for the Office of The Public Protector as a Chapter 9 institution, but she was duty bound to point out that the investigation and report was fraught with procedural and substantive irregularities. Consequently, she did not accept the findings of the Public Protector as correct when the Public Protector said her participation in the evaluation process pertaining to the awarding of the tender for the Independent Electoral Commission lease gave rise to a conflict of interest on her part.

Be that as it may, Tlakula further indicated that conflict of interest in relation to the Independent Electoral Commission was a matter that is expressly regulated by a policy of the Commission itself. The policy prohibits any employee from making any personal gain at the expenses of or as a result of their employment in the Independent Electoral Commission. She proceeded by saying that no finding had been made that she had derived any personal gain or obtained any financial or other interest in the company. Therefore, she asserted that she did not breach the policy as it stands. The decision to award the tender was not made by her; it was made by the Commissioners after two bidders were recommended to them without indicating any preference for either bidder.

6.1.6 The Office of the Public Protector vis-à-vis the Parliament

Since the publication of the 'Secure in Comfort' report, or Nkandla report as it is commonly known, the Office of the Public Protector has faced many challenges from Parliament. After submitting her report to the Speaker of Parliament, that report was

subjected to a number of *ad hoc* committees to investigate a recommendation and remedial actions from the Public Protector. Quite evidently, this report was submitted to Parliament to implement remedial actions and not for Parliament to further investigate the matter.

When the Public Protector realized that Parliament was delaying the implementation of her remedial actions, she subsequently wrote to the Speaker of Parliament, Baleka Mbete, requesting Parliament to comply with her recommendations. Consequent to the request of the Public Protector, she was told by the Speaker of Parliament that Madonsela cannot give instructions to Parliament. Mbete further indicated that Parliament cannot "rubberstamp" her findings. Moreover, Madonsela was told by the Speaker of Parliament that her findings and remedial actions were not prescriptive but advisory. In the spat between the two, the Speaker of Parliament further asserted that Madonsela does not have prescriptive constitutional powers over the National Assembly.³⁸²

This is indisputably one of the many challenges that confront the Public Protector in completing her obligations. Parliament, as one of the organs of state that should be assisting the Public Protector in accomplishing her duties, appears to be failing her in this regard. Based on this and other reactions, it seems evident that such conduct by certain members of Parliament has political connotations. This contention is premised on the dichotomous relationship of the political parties with the Office of the Public Protector and becomes evident when the Public Protector is investigating matters affecting either side. In such instances, depending on which side the member of the political party being investigated is from, the other party plays a role in defending the Public Protector.

6.1.7 The new Public Protector

As will be discussed in chapter 7, the procedure used for the appointment of the new Public Protector was a great success for the constitutional democracy of this country. However, the conduct of the person appointed poses a serious challenge to the Office of the Public Protector. The current Public Protector's behaviour or her

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Sidimba "Mbete Tells Thuli: Back Off: Parliament 'cannot rubber-stamp your findings'" *Sowetan 2*.

respond to some of the issues in some way show that she will not maintain the standard set by her predecessor.

Since the new Public Protector took office on 15 October 2016, she was in the media almost every day while not addressing the issues of her new office but attacking political parties which were against her appointment. In her first speech when she was accepting the post, she demanded that the Democratic Alliance bring the proof that she was a spy as they alleged.³⁸³

This event created a very bad impression to the political parties and some of the South African public at large. Due to these allegations, some of the people in the public arena started to feel that she is there to represent the ruling party.³⁸⁴ The public felt that the Public Protector should have kept quiet and avoided media by all means. By so doing, she would have had enough time to get used to the office and built confidence of her staff.

Following her appointment, she was called to the parliament to brief it on the annual report. On her arrival at the Parliament she was praised by the chairperson of the Justice Committee, Dr. Mathole Motshekga as the perfect candidate for the post of a Public Protector whereas the previous Public Protector never received such a reception from the committee. The report Mkhwebane presented to the Parliament was the last one Madonsela submitted to Parliament. In the report, Mkhwebane indicated that during 2015 / 2016 financial year, the Public Protector's office handled 17 374 cases, of which 12 735 were finalised and 4 251 carried over to the new financial year.³⁸⁵ Evidently, that was a good and impressive report.

Mkhwebane further outlined her vision as the new Public Protector. Accordingly, her vision is to empower people on the grassroots level so that they can be able to hold the leaders to account.³⁸⁶ This vision is a brilliant to a person holding that office. However, her further address destroyed the vision when she echoed that "contrary to popular belief, this does not mean I am going to give high profile matters. I intend

³⁸³ Anon 6 October 2016 *Listen: I'm no Spy, says new PP* <http://www.news24.com>.

³⁸⁴ Davis and Sefularo 07 September 2016 *National Assembly Endorses Busisiwe Mkhwebane as new Public Protector* <http://ewn.co.za>.

³⁸⁵ Anon Date Unknown *Address by Public Protector Adv. Thuli Madonsela during the Government Leadership Summit in Pretoria* <http://www.gov.za>.

³⁸⁶ Anon Date Unknown *Address by Public Protector Adv. Thuli Madonsela during the Government Leadership Summit in Pretoria* <http://www.gov.za>.

instilling a culture of resolving disputes and people's concern through negotiations and speedily."³⁸⁷

Clearly, this statement is in contrast with what the Public Protector's office advocates for. The Public Protector's office deals with more serious cases that are not easily mediated. For example, maladministration and corruption cannot be mediated. The most serious challenge her appointment brought to this office is when she highlighted to parliament that she is coming with more changes from how the previous Public Protector operated.

Evidently, the Office of the Public Protector is well set and does not need these changes as she indicated. Following this statement, Gaye Davis, parliamentary correspondent for *Eyewitness News* described Mkhwebane's briefing to Parliament Justice Portfolio Committee as "throwing shade" at her predecessor.³⁸⁸ According to Hayden, among the things that Mkhwebane declared she will not use as the previous Public Protector was that she would no longer accept donor funding.

This came after she indicated to the committee that the Office of the Public Protector received US\$ 500 000 from government agency, USAID during Madonsela's term.³⁸⁹ Her announcement was well accepted by the ruling party MPs as they alleged that the occurrence compromises the independence of the institution. Fate fully, it was revealed that this money did not go straight to the Office of the Public Protector but was received via the Department of Justice.³⁹⁰

Ironically, the very same people who attacked Thuli Madonsela and her team for asking Parliament for more money are the ones who were saying that she must use what is allocated to her office to do her work. They denied her office money and when her office got donor funds, they criticised her.³⁹¹ It is very clear that when her office dealt with a number of cases where members of the ruling party were the

³⁸⁷ Anon Date Unknown Address by Public Protector Adv. Thuli Madonsela during the Government Leadership Summit in Pretoria <http://www.gov.za>.

³⁸⁸ Hayden "This is what New Public Protector Busisiwe Mkhwebane want to Change' *Eyewitness News*.

³⁸⁹ Hayden "This is what New Public Protector Busisiwe Mkhwebane want to Change' *Eyewitness News*.

³⁹⁰ Hayden "This is what New Public Protector Busisiwe Mkhwebane want to Change' *Eyewitness News*.

³⁹¹ Hayden "This is what New Public Protector Busisiwe Mkhwebane want to Change' *Eyewitness News*.

culprits, they impeded her office with financial challenges. Hence, they made sure that they sabotage every move to get more money.

The new Public Protector in her briefing indicated that she will need more money and support. The question to be asked is why the new Public Protector should receive support in this aspect whereas Thuli Madonsela never received any financial support? The answer is simple and is that the new Public Protector might be their person even though this would not be good for the office she is holding. For her to raise the financial problem shows that she understood the problem of that office but she just wanted to discredit her predecessor by raising the issue of donor.

To be more specific, the financial problem of the Office of the Public Protector did not start with Thuli Madonsela but was also raised by Selby Baqwa who was the first Public Protector long before Madonsela. In 2011, Selby Baqwa approached parliament complaining that he is not given enough funding to do his job. By then, he was allocated R29 million which he said is not enough and he proposed that R50 million will be needed to make a dent in the backlog of cases sitting with his office and to open offices in the more distant part of the country.³⁹²

Nevertheless, this research study does not support the idea of doing away with the donor funds unless the government will give enough money to this institution and be available to always help when the need arise. Be that as it may, the issue of foreign funding was described by Advocate Thuli Madonsela as blatant lies. Madonsela further indicated that no government institution received foreign funding directly. According to Madonsela, the South African government received the money and allocated it to Chapter 9 institutions such as the Public Protector, Human Rights Commission and the Auditor General among others.³⁹³

In response to this issue, the USAID in its statement said that there was nothing untoward about its relationship with the Public Protector. The organisation further indicated that the money was meant for training of investigators, especially in

³⁹² Anon 14 April 2016 *The Highlights and Lowlights of being Public Protector* <http://citypress.news24.com>.

³⁹³ Gallens "Foreign Funding Claims a 'Blatant Lie' – Madonsela" *City Press*.

corruption and fraud detection, alternative dispute resolution and report writings with the aim of increasing their effectiveness.³⁹⁴

The spokesperson of the US embassy in South Africa, Cynthia Harvey also clarified the issue by explaining that the money was donated following discussions with Treasury and the Department of Justice to provide "technical assistance" to key areas of the Public Protector's five year strategic plan.³⁹⁵ Incidentally, this research study already indicated above that as a result of the financial problem, the Office of the Public Protector is unable to fill a number of vacancies most of which are those of experts; for example, forensic investigators and accountants, hence the use of more experienced private consultants' companies.

Therefore, the idea of a new Public Protector does not hold water. If she stops the use of consultants, who will do the work done by these consultants? The only solution was to strengthen the rules about the appointment of consultants, the terms and agreements to avoid the leaking of information. The new Public Protector further contradicted herself by saying she will do away with the use of consultants when dealing with the nuclear report.³⁹⁶

This matter would be impossible since she will need the help of experts. Why she cannot use the employees of the Office of the Public Protector to compile such report? This occurrence points to lack of capacity and expertise in her office and thus the need to outsource some of the tasks to consultants. Evidently, it will be difficult for her to run this office if she concentrates on criticising her predecessor than building her own integrity.

When the new Public Protector briefed the Parliament, she kept on telling them about the failure of Madonsela instead of telling them of her future plans and strategies to deal with such shortcomings. She went to an extent of telling the Parliament that she will re-open and re-investigate the case where Madonsela's son was involved in an accident while using the Public Protector's office car. Furthermore, the fact that all staff members will be screened to a secret level is an obvious issue which anyone working as Public Protector will ensure that it's done.

³⁹⁴ Gallens "Foreign Funding Claims a 'Blatant Lie' – Madonsela" *City Press*.

³⁹⁵ Gallens "Foreign Funding Claims a 'Blatant Lie' – Madonsela" *City Press*.

³⁹⁶ Masondo "Busi Hate on Thuli" *City Press*.

It is apparent that Thuli Madonsela put the Office of the Public Protector in a high position and now it seems the new Public Protector instead of continuing where Madonsela left, she is setting a new office to fulfil her agenda which will lead to the down fall of the Public Protector's office.³⁹⁷ This emerged after the new Public Protector banned Madonsela from the Ombuds Conference held in Durban where she threatened to cancel the conference if her predecessor attended the conference.³⁹⁸

Public Protector Busisiwe Mkhwebane disliked her predecessor so much that she threatened to withdraw South Africa's hosting of the African Ombuds Conference if Madonsela is invited. She further told the Secretariat of the African Ombudsman and Mediators Association (AOMA) that the country along with the African Ombudsman Research Centre based at the University of Kwa-Zulu Natal would not host the organisation's conference if it invites Madonsela.³⁹⁹ Instead of the new Public Protector making use of the experienced Madonsela to improve the work of the Public Protector's office, she is causing more problems by fighting and criticising her predecessor.

6.1.8 Reshuffling and resigning of staff

The coming into power of the new Public Protector further frustrated this institution and its employees. Advocate Busisiwe Mkhwebane promised that her focus would be to improve staff moral which she claimed is very low. She further explained that issues affecting staff relate to performance management and development system as well as specific dispensation. However, contrary to that, a number of employees who were holding strategic positions during the reign of Madonsela resigned. Some were expelled while others were moved to lower positions.

Among those expelled by the new Public Protector is the "former" Chief of Staff Bonginkosi Dhlamini who worked in Madonsela's private office after he had a direct email confrontation with the new Public Protector. According to Masondo, Advocate Mkhwebane argued that Dhlamini's post did not match his expertise. Subsequently, three other members of the Office of the Public Protector who worked on the former

³⁹⁷ Masondo "Busi Hate on Thuli" *City Press*.

³⁹⁸ Masondo "Busi Hate on Thuli" *City Press*.

³⁹⁹ Masondo "Busi Hate on Thuli" *City Press*.

Public Protector, Thuli Madonsela's "State Capture" report were moved to other units within the office.⁴⁰⁰

To strengthen the conduct of the new Public Protector on the staff, the CEO, Advocate Louisa Zondo resigned after the appointment of the new Public Protector. The resignation of the CEO gave support to what other employees like Dhlamini who was expelled are alleging against the new Public Protector. Dhlamini accused Mkhwebane of being "heartless", "cruel" and "unreasonable." He further accused her of having "little" regard for other human beings and their legitimate rights.⁴⁰¹

Mkhwebane was also accused of using the old *apartheid's* system of 'forced removals and job reservations'. However, initially the CEO claimed to have been offered a position somewhere as a reason for his resignation. A month after the CEO's resignation, the CFO, Dumisani Dhlamini also resigned citing the same reasons.⁴⁰² The resignation of the CEO raised questions. This resignation came three weeks into the appointment of the new Public Protector, Busisiwe Mkhwebane's seven year term. There is a lot of speculation that Zondo resigned due lack of faith in Mkhwebane.

6.1.9 State Capture Report

The State Capture report followed the investigation of three complaints from the public figures and a member of the public. First, Father S Mayebe of the Dominican Order of Catholic Priests asked the Public Protector to investigate the alleged involvement of the Guptas in the offerings of Cabinet positions to Mcebisi Jonas and Vytjie Mentor. Mcebisi Jonas is the Deputy Minister of Finance and Vytjie Mentor is a Member of the South African Parliament and a former senior ANC MP and chairperson of the Portfolio Committee on Public Works.

The complaints stemmed from the fact that Mcebisi Jonas alleged that the Guptas offered him the position of Minister of Finance then held by Nhlanhla Nene and Vytjie Mentor purported that she was asked by the Guptas to drop the SAA route to India and give it to the Gupta family. Mmusi Maimane, the DA leader came with the

⁴⁰⁰ Masondo "Busi Hate on Thuli" *City Press*.

⁴⁰¹ Masondo "Busi Hate on Thuli" *City Press*.

⁴⁰² Masondo "Busi Hate on Thuli" *City Press*.

second complaint where he requested an investigation into President Jacob Zuma's conduct and involvement in the first complaint and alleged that Zuma had violated the Executive Ethics Code⁴⁰³ by allowing the Guptas to have a say in the appointment of Cabinet Ministers.

The final and third complaint emerged from an unnamed member of the public who was concerned with the government's attempt to broker the impasse of the banks' refusal of offering services to companies owned by the Guptas. Subsequently, the complaint by Mmusi Maimane was given priority over others by the Office of the Public Protector due to the fact that it invoked contentious provisions of the *Executive Members' Ethics Act*.⁴⁰⁴ Karim apprise us that apparently due to the magnitude of Maimane's complaint and others, Madonsela requested additional funds to enable her to run a special investigation and received little cooperation from the Parliament. However, notwithstanding the urgency of the matter, only a small amount of money was apportioned after a long delay.⁴⁰⁵

Quite evidently, without the financial support and cooperation denied to the Public Protector's office, the investigation was limited in scope and thus the recommendation of the Public Protector's office for a judicial inquiry to be constituted.⁴⁰⁶ It is important to note the analogy of lack of financial support and cooperation from the President with the above -mentioned insinuation of the new Public Protector that her predecessor received money from donors.

In such situations, the Office of the Public Protector could use the alleged money received from donors to fund the expensive task of investigating cases of this magnitude when it did not receive financial support from government. Despite all the difficulties encountered by the Office of the Public Protector, she managed to complete her investigation in the matter. In her investigations she looked into the following:

⁴⁰³ Anon Date Unknown *Inside Madonsela's Final Report on Zuma, The Guptas And State Capture* <https://businesstech.co.za>.

⁴⁰⁴ Anon Date Unknown *Inside Madonsela's Final Report on Zuma, The Guptas And State Capture* <https://businesstech.co.za>.

⁴⁰⁵ Anon Date Unknown *Inside Madonsela's Final Report on Zuma, The Guptas And State Capture* <https://businesstech.co.za>.

⁴⁰⁶ Anon Date Unknown *Inside Madonsela's Final Report on Zuma, The Guptas And State Capture* <https://businesstech.co.za>.

- Whether President Jacob Zuma improperly, and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son to be involved in the process of removal and appointment of the Minister of Finance in December 2015. Madonsela further eluded that: "it was worrying that the Gupta family was aware or may have been aware that Minister Nene was removed 6 weeks after Deputy [Finance] Minister Mcebisi Jonas advised him that he had been allegedly offered a job by the Gupta family in exchange for extending favours to their family business". Equally worrying, according to Madonsela was the fact that Cooperative Governance and Traditional Affairs Minister Des Van Rooyen, who briefly replaced Nene, could be placed in the Saxonworld area on at least seven occasions.
- Whether Zuma improperly, and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son to engage or be involved in the process of removal and appointing of various members of Cabinet.
- Whether Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son to engage or be involved in the process of removal and appointing members of the Board of Directors of state owned enterprises (SOEs). The SOE's investigated included Eskom, Transnet, Denel, SAA and the SABC.
- The report questioned the relationship between Eskom CEO Brian Molefe and the controversial Gupta family.

After all the investigations, the Public Protector indicated that she is ready to release her report before the end of her term in office. The Office of the Public Protector was supposed to meet the President before the release of the report as agreed. However, instead of meeting the Public Protector, the President served the Public Protector with a notice to apply for court interdict against the release of such report.

Later on, Des van Rooyen, the Minister of the Department of Cooperative Governance and Traditional Affairs (COGTA) also applied for the interdict against the release of the report. Both the President and the Minister of the Department of

Cooperative Governance and Traditional Affairs raised the following reasons to interdict the release of the report:

- The President and the Minister of the Department of Cooperative Governance and Traditional Affairs alleged that were not consulted by the Office of the Public Protector to give their side of story in the matter; and
- They were not afforded enough time to respond to the Public Protector's questions.

Later on, the Minister of the Department of Mineral Resources, Mosebenzi Zwane also joined the President and the Minister of the Department of Cooperative Governance and Traditional Affairs in application for an interdict against the release of the report citing the same reasons. Ultimately, the date was set for the hearing of all the applications in court. The date which was set was after the term of Thuli Madonsela, the then Public Protector.⁴⁰⁷

Although Madonsela was opposing these applications, the new Public Protector, Advocate Busisiwe Mkhwebane, however, later indicated that she is not going to oppose the application for interdict by the President. Consequently, opposition parties such as the DA, EFF, COPE, UDM and other civil society organisations opposed the application by the President and his two Ministers. Nonetheless, the application by Zwane was postponed to the following week and that of the President and Des van Rooyen was set for hearing.⁴⁰⁸

Incidentally, after the date for the hearing was set, Minister Des van Rooyen withdrew his application and the court remained only with the application by the President. Nevertheless, the following day when the court was ready to hear the matter, Minister van Rooyen brought the application to re-instate his application for interdict which was turned down by the court. On the other hand, the President, through his legal representative indicated that he is no longer proceeding with his application to interdict the report.⁴⁰⁹

⁴⁰⁷ Madia "Now Minister Zwane Applies to Interdict 'State Capture' Report" *City Press*.

⁴⁰⁸ Madia "Now Minister Zwane Applies to Interdict 'State Capture' Report" *City Press*.

⁴⁰⁹ Madia "Now Minister Zwane Applies to Interdict 'State Capture' Report" *City Press*.

In the ultimate end, the court made an order that the report be released immediately. Indeed the report was released and the findings and recommendations were summarily as follows:

- There is no evidence indicating that Zuma as head of the executive did anything to investigate claims made by Deputy Finance Minister Mcebisi Jonas that the Guptas had offered him the Finance Minister post in December last year before Nhlanhla Nene was sacked from his position. This is despite the fact that the allegations were in the public domain.
- Eskom's CEO Brain Molefe is friends with members of the Gupta family, according to the report's evidence and information obtained. In his interview with Madonsela, Ajay Gupta admitted that Molefe was a "very good friend" and often visited his home in Saxonwold, Johannesburg. Molefe previously confirmed their friendship in a media interview and has always said he sees nothing wrong with the state doing business with the Guptas.
- Zuma and ANC Secretary-General Gwede Mantashe, the report shows, "took interest in the appointment of [parastatal] board members. President Zuma took an interest in the appointment of board members at Eskom and Transnet, whereas Mr Mantashe was interested in the appointment of board members at Transnet".
- Former Public Enterprises Minister Barbara Hogan told Madonsela in her interview that Zuma made it "very difficult for her to perform her job". It adds: "At a certain point he would not even allow her to appoint a Director-General in her department". All of this is related to her time as the Minister of Public Enterprises before she was sacked by Zuma in one of his numerous Cabinet reshuffle.
- Jonas, in his discussion with Finance Minister Pravin Gordhan about the Guptas offering him Nene's job, "stated that they [the Guptas] informed him they made R6 billion from the State and wanted to increase it to R8 billion". The family apparently also said they can report Ministers who refuse to take their orders to their superiors to deal with them.

- The report confirmed that Cooperative Governance Minister Des van Rooyen was at the Guptas' Saxonwold compound the night before he was appointed Finance Minister on 9 December 2015, according to cell phone evidence. However, Ajay denied this in his interview with Madonsela.
- Ajay Gupta apparently said Treasury was a stumbling block; he needed to get rid of its Director-General Lungisa Fuzile and other key officials.
- Molefe received more mentions in the report; it appears the conduct of the Eskom board was at one point solely to the benefit of Tegeta, a Gupta-controlled company, which is in in severe violation of the *Public Finance Management Act*.
- From 2 August 2015 to 22 March 2016, Molefe called Ajay Gupta a total of 44 times and he called Molefe 14 times.
- Mineral Resources Minister Mosebenzi Zwane flew to Zurich, Switzerland and then proceeded to Dubai, UAE then Delhi, India. He then went back to Dubai, then Johannesburg, at a cost of R96 630. It appears Zwane acted in his personal interests on this trip and, if not contradicted or fully explained, it amounts to fruitless and wasteful expenditure.

In her recommendation, Madonsela opined that because the President was implicated in the matter, he could not afforded the liberty to appoint a person to head the Commission and instead, the Chief Justice, Mogoeng Mogoeng should recommend a judge to head the commission and 180 days were put aside for the Commission to present its findings. In all fairness, this was a proper and suitable recommendation because President Jacob Zuma was implicated in the matter. Therefore, he could not be allowed to be a referee and a player in the matter.

The issue of the "State Capture" created a very serious challenge to the Office of the Public Protector due to the fact that the President, who is supposed to implement the remedial actions, is at the same time the one fighting the Office of the Public Protector on the matter. In a number of gatherings where the President showed his antagonism to implementing remedial actions, he indicated that 'no one can tell him how to do his job'. He reiterated on many occasions that he is the one who has the power to appoint the Judicial Commission and not the other way round. Instead of

implementing the remedial actions, the President decided to take the "State Capture" report on review.⁴¹⁰ The President raised the following reasons for review:

- President Jacob Zuma is accusing Madonsela of trying to frustrate the grounds for review by people affected by the State of Capture report.
- He further cited the principle of separation of powers between the legislature, judiciary and the executive, insisting that Madonsela's remedial actions fell foul of this cornerstone of any democratic state.
- According to the President, the nature of the remedial action straddles the separation of powers doctrine which is the rule of law. He further argued that the Public Protector is directing remedial action in areas which the *Constitution* has left to the executive and accused Madonsela of trying to take his discretionary powers away.
- Furthermore, in his affidavit, the President argued that this remedial action was unlawful and would result in him abdicating his powers to another person and amounted to being instructing as to when he should exercise his executive power. According to the President, the resultant consequences would be that the establishment of that judicial inquiry, under these circumstances, would be invalid and a nullity.
- The President furthermore argued that the remedial actions of the Public Protector violated the *Ethics Act*, the *Public Protector Act*, the *Commissions Act* and the *Constitution*.
- Zuma asked the court to set aside the "State of Capture" report on the grounds that it is inconsistent with the *Constitution* and unlawful.
- Zuma further said in court papers that remedial action is legally binding whereas a Commission of Inquiry makes recommendations merely for advice for the President who may or may not act in terms of its recommendations. He said Madonsela had offered no cogent reasons as to why the probe must be outsourced to a Commission of Inquiry.

⁴¹⁰ Van Niekerk "Zuma to Take State Capture Report on Review" *Moneyweb*.

- The President opined that following Madonsela's remedial actions, he would be acting as judge and jury in his own cause since the Commission of Inquiry would be reporting to him for any action or inaction on its recommendations.

The above-mentioned reasons given by the President for the review of the "State Capture" report does not hold water. He is just playing delaying tactics to implement the remedial actions. However, as the matter will be before the court, the court will give clarity on the matter.

On more similar reasons like the one presented by the President, the report and the remedial actions of the Public Protector were dealt with in the case of *Minister of Home Affairs, Director-General of Home Affairs v The Public Protector of South Africa and Reginald Marimi*.⁴¹¹ In that case, on 25 July 2013, the applicants sought an order reviewing and setting aside the final response by the Public Protector on an investigation into certain alleged conduct of employees of the Department of Home Affairs.

In this case, the court gave a clear distinction between appeal and review as follows: the court stated that appeal and review can best be understood by distinguishing between the manners in which these two words are used; as a process and as a remedy. According to the analogy of the court:

The process of review, judicial scrutiny of administrative action, is sometimes harmless in itself – provided it is not taken further. The danger lies not in careful scrutiny but in 'judicial overzealousness in setting aside administrative decisions that do not coincide with the Judge's own opinions'. Judges will be less likely to usurp administrative powers if they remember that review for reasonableness does not demand perfection (or what the court regards as perfection), but ought indeed to give scope for legitimate diversity. The important thing, then, is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision.⁴¹²

Furthermore, the court stated that:

In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the "merits" in some way or another. As long as the Judge determining the issue is

⁴¹¹ (76554/2013) [2016] ZAGPPHC 921; [2017] 1 All SA 239 (GP).

⁴¹² (76554/2013) [2016] ZAGPPHC 921; [2017] 1 All SA 239 (GP).

aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.⁴¹³

Evidently, it was for reasons mentioned by the court that the judge was satisfied that the result of the Public Protector's investigation were rationally justifiable and that her decisions and the remedial action taken were within the bounds of reasonableness and in that case the judge was not persuaded to believe that a proper case was made out by the applicants and the review application had to fail. Finally, the judge had to make the following order: the application by the applicants was dismissed and the applicants were jointly ordered to pay the costs which included the costs flowing from preparation of additional heads of argument after judgment was reserved and also consequent upon the employment of two counsels.

Other challenges faced by the Public Protector's office included the allegations regarding Denel, Transnet and the South African Airways. In addition, contracts awarded by the SABC to the Gupta-owned New Age newspaper and TNA media, Eskom's contract with Tegeta which is an Oakbay company (the Gupta family's investment company) were also investigated by the Office of the Public Protector during Advocate Thuli Madonsela's term in office.

As a result of the "State Capture" report, Eskom CEO, Brian Molefe who was also implicated resigned alleging that he wanted to deal with the "State Capture" report and clear his name. Initially the report lamented the close relationship that Brian Molefe had with the Gupta family evidenced by his regular visits to the family's premises in Saxonworld. This started at the media briefing called by the Eskom Board and the Chairperson of the Board, Dr Ben Ngubane. Dr Ngubane criticised the report in the media and uttered the following:

She (Madonsela) did not call us in as a board. She committed to doing that, but she never did. No one should be allowed to tear this country on the basis of speculation.⁴¹⁴

Evidently, this report created a very serious tension between the Office of the Public Protector under the supervision of Advocate Thuli Madonsela and the people implicated. After the release of this report, it emerged that the allegation by the

⁴¹³ (76554/2013) [2016] ZAGPPHC 921; [2017] 1 All SA 239 (GP).

⁴¹⁴ Vermaak "Statecapturereport: Eskom's Chair Stands with Molefe, Hits out at Public Protector" *City Press*.

President of the country Mr Zuma that he was not asked questions was not true. This appeared on the report and also the audio recordings released by the then Public Protector, Advocate Thuli Madonsela which showed that the President refused to answer questions, always claiming that he needed legal advice before he answers any questions from the Public Protector. This further vindicated the previous Public Protector, Advocate Thuli Madonsela.⁴¹⁵

The release of the audio recordings fuelled the fight between the new Public Protector and the former Public Protector, Thuli Madonsela. The release of the audio records led to the opening of a criminal case against Advocate Thuli Madonsela by the new Public Protector Advocate Busisiwe Mkhwebane for distributing a recording of President Jacob Zuma during her "State Capture" investigation. Advocate Mkhwebane indicated that she opened a criminal case against Thuli Madonsela because according to her, the leak of such video contravenes the *Public Protector Act*.

6.2 Conclusion

This chapter demonstrated that due to the seriousness of the scope of investigations dealt with by the Office of the Public Protector, this office experienced many challenges from the various political parties, government and members of the public. This chapter further dealt with some of those challenges which included the recommendations for remedial actions suggested by the Public Protector. In such instances, this chapter has also revealed that the Public Protector is justified in suggesting appropriate remedial actions and the implementations of these actions should be followed. As adumbrated above, despite the challenges faced by this office, it has always triumphed over them and the investigations conducted were proven to be apposite and within the confines of the Public Protector's duties as required by the *Constitution*.

High profile investigations involving the political elites of South Africa by this office include among others the investigation of the former President of the African National Congress Youth League, Julius Malema; the Chief Operating Officer of the

⁴¹⁵ Vermaak "Statecapture report: Eskom's Chair Stands with Molefe, Hits out at Public Protector" *City Press*.

South African Broadcasting Corporation, Hlaudi Motsoeneng; the Independent Electoral Commission's chairperson, Pansy Tlakula; the former Minister of Communications, Dina Pule; and the late Mr Sicelo Shiceka. Despite the hostility of some government and political elites, it has been shown in this chapter that the Office of the Public Protector acted in good faith in all investigations with no fear, favour or prejudice. The next chapter deals with the achievements and prospects of the Office of the Public Protector.

CHAPTER 7

THE SUCCESSES AND PROSPECTS OF THE OFFICE OF THE PUBLIC PROTECTOR

7.1 Introduction

This chapter discusses the successes and prospects of the Office of the Public Protector. Besides many challenges that this office is experiencing on a daily basis which affect its performance, there are also many successes achieved. Since the coming into operation of this office, numerous complaints have been lodged and investigated thoroughly. Good suggestions and remedial actions have been recommended after investigation by this office and have been implemented by the relevant authorities. This chapter also highlights a number of cases investigated and the outcomes of such investigations which show the important work of the Public Protector.

7.2 Successes and achievements

The Office of the Public Protector has achieved a lot since its establishment in South Africa. Despite all the challenges inherent in such a role, significant successes have been attained. This research study focused on the achievements of the present Public Protector as there was not much achieved by the previous incumbent. This office has conducted a number of investigations and her findings and remedial actions have been implemented by several authorities thereby affected. It is worth noting that in performing her duties, the Public Protector displayed her impartiality towards both the ruling party and the opposition parties.

Moreover, the Public Protector also displayed a sense of humanity by contributing towards some needy students by giving donations to their school, a gesture that will be discussed hereunder. Successes of our democracy through the works of this office have been achieved despite a number of court challenges and interference by some of the institutions in her findings. However, the courts cleared the works and the position of this office and such cases will also be discussed in this study.

The greatest success in the history of the Office of the Public Protector was when the remedial action and its recommendations were clarified by the highest court in the country. This happened in the Nkandla⁴¹⁶ case where there were many criticisms and questions about whether the remedial actions of this office were binding or not. Over the past few years, in politics and academia, there have been critiques of the judiciary and its purposive interpretation of the law, as they argue that it fails to recognise the separation of powers between the legislator and the judiciary. The legislator is responsible for creating the law, while the judiciary is responsible for interpreting the law. The lines were never clearer though than those drawn up in the unanimous Nkandla Constitutional Court ruling.⁴¹⁷

In a unanimous judgment written by Chief Justice Mogoeng, this Court held that the power of the Public Protector to take appropriate remedial action has legal effect and is binding. Therefore, neither the President nor the National Assembly is entitled to respond to the binding remedial action taken by the Public Protector as if it is of no force or effect, unless it has been set aside through a proper judicial process.⁴¹⁸

The court thus held that the National Assembly's resolution, based on the Minister's findings exonerating the President from liability, was inconsistent with the *Constitution*⁴¹⁹ and unlawful. The court also held that, by failing to comply with the Public Protector's order, the President failed to 'uphold, defend and respect' the *Constitution*⁴²⁰ because a duty to repay the money was specifically imposed on him through the Public Protector's constitutional power.⁴²¹

The court further declared the conduct of the President and the National Assembly inconsistent with their constitutional obligations. Accordingly, the Economic Freedom

⁴¹⁶ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

⁴¹⁷ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

⁴¹⁸ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

⁴¹⁹ *Constitution of the Republic of South Africa*, 1996.

⁴²⁰ *Constitution of the Republic of South Africa*, 1996.

⁴²¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

Fighter and Democratic Alliance's claims fell within the exclusive jurisdiction of the court. The court ordered the National Treasury to determine the reasonable portion that the President must pay for the five non-security items listed above and report back to the court within 60 days. The court ordered the President to make payment 45 days thereafter. The President was also ordered to reprimand the Ministers involved in the expenditure at Nkandla. Finally, the court declared that the remedial action taken by the Public Protector is binding. The President, Minister and Speaker were ordered to pay the applicants' costs, including those of two counsels.⁴²²

The above judgment led to changes and partiality when it comes to the appointment of the Public Protector. That was demonstrated during the search for a new Public Protector who will replace the current Public Protector, Advocate Thuli Madonsela. The public or the citizens of South Africa were given an opportunity to nominate whoever they think is a suitable candidate for the job, as were civil society organisations.

To avoid bias in the appointment of the Public Protector, the opposition parties were given an opportunity to participate in the process of screening the CVs of the applicants and shortlisting of the candidates for interview. The panel to interview the candidates was composed of members of the ruling party and also the representatives of all opposition parties in Parliament. That in itself shows that the country respects the work of this office and would like to maintain the impartiality and integrity of this office.

The process of interviewing the candidates was completed and the recommended candidates' names were sent to Parliament for approval. Finally, on 7 September 2016 the committee tasked with the duty of appointing the new Public Protector met and deliberated on the recommended candidate to replace the present Public Protector. All political parties, except the Democratic Alliance voted in favour of Advocate Busisiwe Mkhwebane as the suitable candidate. Her name was handed over to the President of the Republic of South Africa for appointment.⁴²³

⁴²² *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

⁴²³ Section 193 (4) of the *Constitution of the Republic of South Africa, 1996*.

7.2.1 Reports of the Office of the Public Protector

During the reign of Selby Baqwa as a Public Protector, the Office of the Public Protector was requested to investigate the causes of delay in communication in the public administration. Professor Kader Asmal (MP), the then Minister of Education was concerned about the delays that occurred in the communication between members of the public and government departments and ministries. According to Professor Asmal, the matter was premised on what could be said to amount to maladministration and needed a ruling to be made as a matter of general principle.

The initial fact findings investigation of the Public Protector revealed the causes of shortcomings of the department to include the following in his report:

- Lack of proper communication between the Director-General and the regional offices of the department was caused among others by the long distances and poor infrastructure of regional offices;
- Some of the matters that have to be responded to require in depth research, which causes a delay in the eventual response to the complainant;
- The information required is not immediately available, the person dealing with it might not be available or the information required is of a confidential nature and needs someone's approval before it can be made available;
- A lack of "openness" in the public service and the secretive attitude of some officials lead to a lack of responsiveness;
- A lack of will and commitment on the part of some public servants to do their work on time;
- Public servants are ignorant of their constitutional responsibilities to ensure access to information by the public;
- A lack of capacity in departments, poor registries, record management and supervision;
- A lack of financial and personnel resources;

- Lack of knowledge on the part of the public of the legislation governing the actions of departments, in some cases, causes fruitless appeals and re-appeals to be lodged that lead to duplication in that the same tasks have to be repeated;
- A member of the public who is making enquiries from the department causes some of the subsequent delay by providing inadequate and sometimes incorrect information. Additional information then has to be obtained before a decision can be taken;
- The exodus of trained and experienced staff in the public service over the past years and the considerable inflow of new employees who do not have the full background knowledge, training and experience to deal with the tasks at hand as well as the focus on greater accountability that came about as a result of our new democracy, have a substantial effect on the delays that occur in respect of the decision making process;
- The deterioration of complaint handling mechanisms, as procedures in this regard were often not documented and new incumbents had to find their own way when dealing with complaints and enquiries;
- Employees' lack of knowledge of and / or their failure to adhere to the applicable prescripts such as the Public Service Regulations, the Code of Conduct for Public Servants;
- Lack of diligence and commitment to service delivery on the part of employees;
- Lack of control over feedback in respect of enquiries;
- Lack of proper follow-up systems in order to identify the officials responsible for delays;
- Lack of proper and up to date incoming and outgoing documentation registers;
- Lack of proper information technology facilities and trained staff to operate the facilities that are available is another cause of delays;
- Lack of discipline and under performance by staff members are also areas of great concern;

- Imbalances in the allocation of work leading to situations where certain officials simply have too much to do and cannot meet deadlines while there are other officials who are not fully engaged;
- The absence of a computerized correspondence tracking system makes it difficult to monitor the progress of correspondence; and
- The skills level of officials in drafting appropriate responses is also a cause of delays.

Following the investigation of the Public Protector's office, the following findings were revealed and recommendations made as follows:

- Parliament and the provincial legislatures have the responsibility for effective and efficient service delivery in the public administration; and
- It is primarily in the domain of these structures to effectively address the issue of improving service delivery in the public administration on a continuous and permanent basis where institutions such as the Office of the Public Protector play a supportive role and can assist Parliament in ensuring that the accountability principle is properly observed within the public sector.

Furthermore, the Office of the Public Protector recommended among others that:

- The modern technology such as e-mail facilities which helps supervisors to make changes to drafts of correspondence and reports should be utilized since this approach will save time;
- Departments should adhere to the *Batho Pele* Principles;
- Fully implement the principles contained in the *Batho Pele* White Paper;
- Capacity should be enhanced at management level;
- There should be a complaints office within every department;
- Senior staff / supervisors should be seen to be leading by example, as it will positively influence subordinates;

- Ministers, Members of Executive Councils, Directors-General of national government departments and provincial administrations take urgent steps to introduce urgent measures to address the cause of the problem and to prevent a recurrence, where shortcomings still exist; and
- Ensure proper compliance by employees with the provisions of the Code of Conduct for Public Servants and implement disciplinary measures where failure of such compliance occurs.

Clearly in this, report the Public Protector advocated for proper, efficient and effective communication because it is the cornerstone of efficient service delivery in the public administration. A change of attitude in regard to efficiency in communication, from the highest to the lowest levels of the public administration should be of fundamental importance in addressing the shortcomings of the report which should be carried in a regulated and disciplined manner while motivating all employees of the public.⁴²⁴

In the Western Cape Province governed by the Democratic Alliance, there was an allegation raised by the African National Congress and its alliance partner, the Congress of South African Trade Unions (COSATU) against Premier Helen Zille. The allegation was about the awarding of the province's communication tender without following proper procedure. Madonsela was investigating, among other things, whether Zille had a personal stake awarding the tender. The provisional report showed that there was an irregularity in the awarding of the tender. However, the report was sent to parties concerned to comment before the final report.⁴²⁵ In their comments, the parties were also required to clarify some of the issues raised by the Public Protector to assist her office before she released the final report.

The final report released in this issue exonerated Zille and the Western Cape government. This is one of the reports where the Public Protector could have ruled in favour of the ruling political party to frustrate the Democratic Alliance which is in charge of the Western Cape government. However, she instead exercised her duty

⁴²⁴ Report in terms of the *Public Protector Act* on an investigation into the causes of delays in Communication in the Public Administration.

⁴²⁵ Zille Date Unknown *Draft Public Report on Western Cape Communications Tender: The Facts: Media Statement* <http://www.gov.za>.

as mandated by the *Constitution*.⁴²⁶ The ANC and its alliance partners complained and started accusing the Office of the Public Protector as working with the opposition party to destroy the ANC.⁴²⁷

Similarly, in 2011, a complaint against the Midvaal Municipality was lodged with the Office of the Public Protector. This was the only municipality run by the Democratic Alliance in the Gauteng Province. The allegation was that this municipality had been appointing one legal firm for a period of 30 years without going through the correct procedure. The very same legal firm was alleged to have been awarded another tender by the municipality. Subsequently, Madonsela found that the Midvaal Municipality breached financial and administrative policies. She further said that the municipality violated the preferential procurement policy framework. She recommended that the legal firm owner Andre Odendaal, who is also a Democratic Alliance leader in the Midvaal Municipality be investigated by the Law Society of the Northern Province.⁴²⁸

The above-mentioned report and its recommendation was welcomed by the ANC and its alliance partners in Gauteng, who said that the report confirmed the views of Midvaal residents that there was endemic and institutional maladministration in the municipality and they demanded remedial action. The Congress of the People (COPE) political party also welcomed the report and described it as an "eye catching revision". The allegations that the Office of the Public Protector was protecting the Democratic Alliance disappeared. The mere fact that the opposition parties also welcomed the report shows the independence of the Office of the Public Protector. This affirms the fact that the Public Protector's office carries out its duties without fear, favour or prejudice. As mentioned above, the notion of bias is only raised when the ruling is not in favour of a particular political party.

Meanwhile, in May 2012, a complaint about abuse of power by the former National Consumer Commission (NCC) member, Mamodupi Mohlala Mulaudzi was submitted against the Department of Trade and Industry's (DTIs) Director General, Lionel October. The National Consumer Commission is South Africa's consumer watchdog

⁴²⁶ *Constitution of the Republic of South Africa*, 1996.

⁴²⁷ Zille Date Unknown *Draft Public Report on Western Cape Communications Tender: The Facts: Media Statement* <http://www.gov.za>.

⁴²⁸ Anon 08 November 2011 *Public Protector Report Blasts DA's Midvaal* <http://mg.co.za>.

which is administratively located within the Department of Trade and Industry. Mohlala Mulaudzi requested the Office of the Public Protector to investigate the abuse of power, direct interference in matters concerning the National Consumer Commission and harassment in her case against Mr October.⁴²⁹

As was expected, the Office of the Public Protector decided to accept and probe the allegations. However, this resulted in hesitation from the ANC MP, John Jeffery who questioned Madonsela's move. He believed that the matter between Mohlala and October was one for the Labour Court and not the Public Protector's office. Madonsela's reply to Jeffery was that "it is her, and her alone who decides on what to probe". She further indicated that if Jeffery thinks she is wrong, it is not for him to call it but for the court of law to do so.⁴³⁰

Madonsela then proceeded with the investigation and found that there was indeed abuse of power and maladministration by Director General October which affected the independence of the National Consumer Commission. Her recommendation was that both parties sit down to clarify each other's roles and other roles they may share within the administration of both the National Consumer Commission and the Department of Trade and Industry. Looking at this report, it was both successful and not against anyone, as in either the complainant or respondent. It merely entailed the smooth operation of the department and therefore showed her role in bringing the disputing parties together to resolve the matter rather than going the long legal route. She named this report 'There are no heroes'.⁴³¹

Another challenge that the Public Protector dealt with successfully and which showed that no one is above the law involved the investigation of the former African National Congress Youth League President, Julius Malema. The complaint about Malema was lodged with the Public Protector by a certain Mr Kekana, the Head of Communications in the Limpopo Province, and Mr Roets, the National Chairperson of Afri-Forum Youth, to investigate allegations that the awarding of tenders to an

⁴²⁹ Anon Date Unknown *DTI vs Mamodupi Mohlala Mulaudzi: Public Protector's Findings*
<http://www.politicsweb.co.za>.

⁴³⁰ Anon Date Unknown *DTI vs Mamodupi Mohlala Mulaudzi: Public Protector's Findings*
<http://www.politicsweb.co.za>.

⁴³¹ Anon Date Unknown *DTI vs Mamodupi Mohlala Mulaudzi: Public Protector's Findings*
<http://www.politicsweb.co.za>.

entity referred to as SGL Engineering Projects by nine municipalities in the Limpopo Province and one municipality in the North West Province were irregular.⁴³²

The complaints were lodged with the Public Protector on 22 February 2010 and 2 March 2010 respectively. These allegations were based on a newspaper report which suggested that such municipality awarded tenders to SGL Engineering due to the political influence of Malema, the then President of the African National Congress Youth League who had an interest in the company. In this investigation, the Public Protector came up with the following findings and recommendations:

The investigation did not find many irregularities when it comes to tenders as there is no proper keeping or filing of the records. However, this research is less concerned about findings than about indicating the ability of the Public Protector's office to function independently and in this case it was a great success.⁴³³

Another achievement of the Public Protector, in dealing with her challenges and impediments was on 2 August 2010, when she was requested to probe the R1 .6 billion procurement of the lease for office accommodation for the South African Police Service in the Sanlam Middestad building in the Pretoria Central Business District. These complaints originated from a newspaper article published on 1 August 2010 alleging improper conduct and maladministration by the National Commissioner of South African Police Service and the Department of Public Works.⁴³⁴

The Public Protector investigated the complaints with the cooperation of the Special Investigating Unit. On 3 August 2010, the Public Protector requested the National Commissioner of the South African Police Service and the Director General of the Department of Public Works not to proceed with the implementation of the lease pending the finalisation of the investigation. The investigation of the Public Protector was conducted over a period of five months and included interviews with officials of the South African Police Service, the National Commissioner, officials of the

⁴³² Rampedi Date Unknown *Malema Case: What the Public Protector Found* <http://mini.iol.co.za>.

⁴³³ Rampedi Date Unknown *Malema Case: What the Public Protector Found* <http://mini.iol.co.za>.

⁴³⁴ Report of the Public Protector in Terms of Section 182(1) of the *Constitution of the Republic of South Africa*, 1996 and section 8(1) of the *Public Protector Act*, 1994 on an Investigation into Complaints and Allegations of Maladministration, Improper and Unlawful Conduct by the Department of Public Works and the South African Police Service Relating to the Leasing of Office Accommodation in Pretoria, Report No. 33 of 2010/11, 22 February 2011.

Department of Public Works and Mr Roux Shabangu, who was the owner of the property to be leased.⁴³⁵

Eventually, the Public Protector found that the then Public Works , Minister Gwen Mahlangu-Nkabinde and the National Commissioner of the South African Police Service, Bheki Cele were guilty of maladministration. In her report, Madonsela recommended that remedial action be taken by the state to correct the wrongdoings of all involved. In the end, the National Commissioner of the South African Police Service, Bheki Cele, was suspended from his position by the President of the country, Jacob Zuma and Mahlangu -Nkabinde was dismissed during the 2011 cabinet reshuffling. This was a great achievement by the Office of the Public Protector in performing her duty without fear or favour.⁴³⁶

Similarly, on 26 March 2007, the Office of the Public Protector received a grievance from a complainant against the South African Police Service where it was alleged that the South African Police Service had failed to reward an informer after undertaking to do so. The complainant alleged that he testified in the South African Police Service case number 36/07/1998 of Bansvlei (Bloemfontein) police station, involving armed robbery, murder and attempted murder.⁴³⁷

There was allegedly a reward of R75 000 that would be offered to anyone who would help the South African Police Service and the National Prosecuting Authority in arresting and convicting the culprits. The said amount was paid to the South African Police Service by Khulani Security. The complainant alleged that he assisted the

⁴³⁵ Report of the Public Protector in Terms of Section 182(1) of the *Constitution of the Republic of South Africa*, 1996 and section 8(1) of the *Public Protector Act*, 1994 on an Investigation into Complaints and Allegations of Maladministration, Improper and Unlawful Conduct by the Department of Public Works and the South African Police Service Relating to the Leasing of Office Accommodation in Pretoria, Report No. 33 of 2010/11, 22 February 2011.

⁴³⁶ Report of the Public Protector in Terms of Section 182(1) of the *Constitution of the Republic of South Africa*, 1996 and section 8(1) of the *Public Protector Act*, 1994 on an Investigation into Complaints and Allegations of Maladministration, Improper and Unlawful Conduct by the Department of Public Works and the South African Police Service Relating to the Leasing of Office Accommodation in Pretoria, Report No. 33 of 2010/11, 22 February 2011.

⁴³⁷ Report of the Public Protector in terms of section 182(1)(b) of the *Constitution of the Republic of South Africa*, 1996 and section 8(1) of the *Public Protector Act*, 1994. Report on an Investigation into Allegation that the South African Police Service Failed to Pay to an Informer after undertaking to do so. Report No. 29 of 2008/09.

police in arresting the above-mentioned criminals, wherein convictions were subsequently secured. He allegedly even testified against the culprits.⁴³⁸

The complainant further alleged that the above-mentioned case was finalised during 1999 and the investigating officers made the necessary arrangements for his payment. Accordingly, the complainant was also supposed to testify in another case in Siyabuswa. As a result, the state prosecutor requested that the payment be suspended until the Siyabuswa case was finalised. Eventually, when the Siyabuswa case was finalised, the complainant requested payment of the R75 000 but was allegedly sent from pillar to post.⁴³⁹

Following the investigation that was conducted in terms of section 7⁴⁴⁰ of the *Public Protector Act*, the South African Police Service could not deny the evidence presented and accepted the fact that Khulani Security paid the money into its account. By the time of the investigation, however, Khulani Security was no longer in existence.

As a result, its side of the story could not be obtained. Fortunately for the informer though, it was revealed that he was registered as an informer and was allocated a registration number. Congruently, the investigating officer confirmed that he was aware that the South African Police Service was supposed to pay the complainant. In the end, the Public Protector found that the South African Police Service should pay the complainant the sum of R75 000, which the South African Police Service finally paid.⁴⁴¹

Additionally, in February 2006 a complainant, a certain Mr Khumalo approached the Office of the Public Protector complaining that he had never received any report from

⁴³⁸ Report of the Public Protector in terms of section 182(1)(b) of the *Constitution of the Republic of South Africa*, 1996 and section 8(1) of the *Public Protector Act*, 1994. Report on an Investigation into Allegation that the South African Police Service Failed to Pay to an Informer after undertaking to do so. Report No. 29 of 2008/09.

⁴³⁹ Report of the Public Protector in terms of section 182(1)(b) of the *Constitution of the Republic of South Africa*, 1996 and section 8(1) of the *Public Protector Act*, 1994. Report on an Investigation into Allegation that the South African Police Service Failed to Pay to an Informer after undertaking to do so. Report No. 29 of 2008/09.

⁴⁴⁰ 23 of 1998.

⁴⁴¹ Report of the Public Protector in terms of section 182(1)(b) of the *Constitution of the Republic of South Africa*, 1996 and section 8(1) of the *Public Protector Act*, 1994. Report on an Investigation into Allegation that the South African Police Service Failed to Pay to an Informer after undertaking to do so. Report No. 29 of 2008/09.

the Germiston Magistrate Court regarding the progress of an appeal that he had lodged in 2003. At that time, Khumalo was still in custody at the Kutama Sinthumule Correctional Centre. The Office of the Public Protector investigated the matter and it was established that the complainant's appeal succeeded on 14 September 2004 where the convictions were set aside and the Public Protector concurred that he should have been released. Through the intervention of the Public Protector, the complainant was released on 17 March 2006.⁴⁴²

In another success story of the Office of the Public Protector, Madonsela rapidly turned into South Africa's 'messiah' and 'champion' after she ordered that payment be made to ex-Venda government employees whose pension monies were swallowed by the amalgamation of the former Venda Pension Fund and the First Privatization Scheme before the emergence of Government Employees Pension Fund (GEPF). Madonsela came to the aid of the helpless pensioners, who were in the former Bantustan after they wailed about their missing pensions on their retirement.

Some of the complainants, who had approached Madonsela's office for intervention, had worked for government in Venda homeland for more than 20 years, only to forfeit their pension monies upon retirement where appointment date back as far as 1950. According to Madonsela, there was maladministration in the manner in which the fund was handled and she ordered a review of the payment method. On the other hand, spokesman for the former Venda homeland employees, Samuel Ramuhashi, expressed their eagerness to see Madonsela's report implemented. Ramuhashi said they have been made to wait for a long time and they suffered while their money were hanging in there.⁴⁴³

One of the Public Protector's success stories of helping the public involves the case in which the utility (Eskom) and a member of the public who was wrongfully disconnected from her pre-paid electricity meter. The Khumalo family, which lives in Khayelitsha in Cape Town, were disconnected and fined a R12 000 tampering fee by the utility. However, in this debacle, Eskom was asked to fix and reconnect the pre-paid meter pending the findings of the Public Protector but it refused to do so until

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Anon Date Unknown *Public Protector Don't Suffer in Silence* <http://www.vukuzenzele.gov.za>.

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Osondu Date Unknown *Madonsela Orders GEPF to Pay up Former Venda Homeland Workers* *Post* <http://buzzsouthafrica.com>.

the release of the provisional report in September 2016. Eventually, the Khumalo family was reconnected after Madonsela's report was finalised.⁴⁴⁴

Another success story of the Public Protector dealing with community and public complaints involves the case of the Ntekelelo Junior Secondary School in the Eastern Cape. The Public Protector investigated allegations of failure by the Eastern Cape Provincial Department of Education (ECDoE) to provide additional classrooms and toilets structures for use by learners at Ntekelelo Junior Secondary School. The case was lodged by a member of the community, Mr. Khathazile who is also in the School Governing Body (SGB) in December 2006 through the Mqanduli Advice Office who alleged that the school is a mud structure with only one toilet structure.

The usual and normal procedure in the Office of the Public Protector demanded that upon a case being lodged, the office must do an evaluation of fact and evidence on the matter. The office discovered the following facts about the case: the school had two permanent classroom structures built with face bricks, three mud structures *rondawels* which are used as class rooms and one building for the toilet structure. According to the Public Protector's office, the environment in which classes were conducted was not conducive to learning. There was no staff room and Office of the Principal, water supply for the school was inadequate.

As is procedural, the findings of the Office of the Public Protector enjoined it to take remedial actions that will ensure the redress of the matter as required by section 182(1)(b)(c) of the *Constitution* and section 6(4)(c)(ii) of the *Public Protector Act*, 1994. The remedial actions provided that the department must build additional classrooms and as an urgent interim measure construct temporary classrooms, an Office of the Principal and a staff room. Furthermore, as a matter of extreme urgency provide temporary toilet structures to avoid possible outbreaks of diseases.

Concerning the above matter and a way forward for addressing these problems, the Office of the Public Protector received assurance from the provincial Department of Education to effect changes as required by the office and appropriate statutory. In the process, the Office of the Public Protector would monitor the undertaking of the ECDoE on a monthly basis until the planning cycle is confirmed.

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Nicolaides Date Unknown *Madonsela Releases Final Report into Eskom-Khumalo Electricity Dispute* <http://ewn.co.za>.

Thuli Madonsela as the Public Protector then had to deal with a matter that involved the distribution of food parcels allegedly by Mr Julius Malema who was then the President of the ANC Youth League in the areas of Heinz Park and Phillipi in Cape Town.

The complaint was lodged by the DA's Shadow Minister of Social Development, Ms Patricia Kopane who alleged that the distribution of food parcel by Mr Malema as President of the Youth League of the governing party, the ANC to the communities of Heinz Park and Phillipi in Cape Town in December 2009. The incident was irregular and created an impression that the food parcels were distributed by a political party, the ANC in this case and not an organ of state, SASSA.

Key responsibilities of this investigation were to find out whether those imposing responsibilities and specific standards were complied with regarding the proper use of public power and resources in terms of section 6(4) of the *Public Protector Act*⁴⁴⁵ which prohibits maladministration within the affairs of the government and section 96 of the *Constitution*.⁴⁴⁶

However, the findings of the Office of the Public Protector were that the allegation that SASSA organised the event where food parcels were distributed were unsubstantiated. The improper handling of the food parcels and distribution were the faults of SASSA and not Mr Malema. Therefore, the conduct of the SASSA officials was not consistent with section 195 of the *Constitution*⁴⁴⁷ which requires public services to be delivered impartially and fairly and accordingly maladministration and improper conduct.

Remedial actions as demanded by section 182(1) of the *Constitution*⁴⁴⁸ was a policy is developed and circulated in all government institutions to set out a clear separation between state and party activities at all times. In addition, the allegations that Mr Malema was allowed to distribute SASSA food parcels during the event were unsubstantiated. The Director General of the Social Development had to submit within 30 days an implementation plan that that detailed the remedial action taken by the Office of the Public Protector.

⁴⁴⁵ 23 of 1994.

⁴⁴⁶ *Constitution of the Republic of South Africa, 1996.*

⁴⁴⁷ *Constitution of the Republic of South Africa, 1996.*

⁴⁴⁸ *Constitution of the Republic of South Africa, 1996.*

The Office of the Public Protector was involved in an investigation of a complaint by the Communication Workers Union on maladministration by the South African Post Office (SAPO) in September 2012. The complaints were lodged by the Communication Workers Union which alleged maladministration by the South African Post Office (SAPO) in leasing the Eco Point Office Park in Centurion, Gauteng Province to accommodate its Head Office, the procurement of the services of a catering company, the procurement and utilization of labour brokers and possible corrupt relations between some of its employees and certain external service providers.

Upon investigation of the report "Postponed Delivery", the Office of the Public Protector found that SAPO failed to ensure proper demand management before the acquisition of the Eco Point Office Park and the Business Case on which the Board relied included misrepresentation of facts. In addition, SAPO did not capture the relocation of the Eco Point Office Park in its Strategic Plan and therefore violated the *Public Finance Management Act* (PFMA).⁴⁴⁹

The Office of the Public Protector in its investigation discovered among others that the procurement of the Eco Point Office Park was irregular and was substantiated. The acquisition of the ten year lease was tainted by procurement irregularities and corruption. Consequently, remedial actions echoed by the Office of the Public Protector included among others that SAPO recover money paid to Centurion Vision Development, end the use of external service providers to procure another service provider for a project and ensure that the recommendations of the KPMG and SIU reports are fully implemented,

The Office of the Public Protector was also called to investigate a complaint by a retired member of the South African National Defence Force relating to allegations of undue delay by the department of Defence and Military Veterans in the implementation of the revised non-statutory forces pension dispensation. The report was termed "A Costly Delay".

The complainant in this matter was Mr M, a former member of the South African Defence Force and former member of Umkhonto we Sizwe (MK). Mr M approached

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the Office of the Public Protector in July 2010 with a complaint relating to allegations of undue delay by the then Department of Defence for delaying the implementation of Revised Non-Statutory Forces Pension Dispensation that was approved by Cabinet in April 2009.

The Office of the Public Protector found out that the Department and the National Treasury did not fulfil its responsibilities in relation to the implementation of the revised NSF Pension Dispensation approved by the Cabinet to ensure compliance with their constitutional obligations. Therefore, among its remedial recommendations, the Office of the Public Protector suggested that the Department reimburse the complainant with the expenditure he incurred since the loss of his house and accommodation which he rented, provide the complainant with a consolatory compensation to address the distress and trauma he experienced as a result of the matter.

The Office of the Public Protector investigated allegations of maladministration by the Board of the Estate Agency Affairs Board (the EAAB) when it terminated the contract of employment of Mrs Nomonde Tantaswa Mapetla, former Chief Executive Office of the EAAB without instituting a disciplinary hearing. The complainant was allegedly suspended on the pretext of a pending investigation into the running of the affairs of her office. She was later dismissed without a disciplinary hearing for the initial allegations for which she was suspended.

In its findings, the Office of the Public Protector found the allegation that the complainant was improperly dismissed by the EAAB Board was substantiated. The reason for the dismissal was at odds with the letter of suspension that she said to have violated. The failure by the Chairperson and the Board to follow due process when dismissing the complainant was inconsistent with paragraph 4.1.3.4 of the EAAB's Human Resource Manual and that the conduct of the Chairperson constituted maladministration, improper conduct and abuse of power as envisaged in section 182(1) (a) of the *Constitution*⁴⁵⁰ and section 6(5) (a) and (b) of the *Public Protector's Act*.⁴⁵¹

⁴⁵⁰ *Constitution of the Republic of South Africa, 1996.*

⁴⁵¹ 23 of 1994.

The remedial action taken by the Office of the Public Protector in terms of section 182(1) (c) of the Constitution among others demanded that the EAAB publicises an apology in the media for the wrongful dismissal of the complainant, the EAAB considers the report and renders an apology to the complainant for the improper termination of her contract of employment.

7.2.2 Triumph in a court battle: A confirmation of the Public Protector's powers

As indicated above in this research study, the challenging of the Public Protector's powers through the courts was made evident by the report of the Public Protector against the South African Broadcasting Corporation's Chief Operating Officer, Hlaudi Motsoeneng. This was a great success by the Public Protector as she won back her powers in court after her powers had been challenged by the Chief Operating Officer. The Minister of Communications had permanently appointed Motsoeneng after ignoring the Public Protector's recommendations to implement remedial actions.

It was in view of these events that the Democratic Alliance advanced the issue to the Western Cape High Court requesting Motsoeneng's suspension. Initially, Madonsela was not part of the court action, but eventually filed an affidavit in the matter. It was clear that the central matter of the case was to discredit the Public Protector's report. In addition, the Western Cape High Court judge, Ashton Schippers equated the Public Protector's role to that of the Ombudsman in western law. In his assertion, Judge Schippers held that her powers were not the same of those of a court or judge and found her findings not binding and enforceable.⁴⁵²

He further claimed that the findings of the Public Protector could not be rejected for arbitrary explanations. Judge Schippers indicated in this case that the South African Broadcasting Corporation had overruled the findings of the Public Protector for illogical motives when ordering that Motsoeneng should be subjected to disciplinary proceedings instead of implementing the recommendations of the Public Protector. As a result, the Public Protector publicly voiced her discontent with Schipper's verdicts. Madonsela claimed the comparison of her role to that of an ordinary Ombudsman was imprecise and ambiguous. She further maintained that the

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Davis "Supreme Court of Appeal Judgment: A Confirmation of the Public Protector's Powers" *Daily Maverick* 2.

*Constitution*⁴⁵³ bestowed her with adequate powers to make commendations which cannot be overlooked.⁴⁵⁴

Following the resultant judgment⁴⁵⁵ of the Western Cape High Court, the Deputy Minister of Justice and Constitutional Development, John Jeffery also disapproved of the powers of the Public Protector in what he termed an effort to turn this office into a 'quasi-judicial' organisation with enormous supremacies. Jeffery further lamented that the Public Protector would exercise too much authority if her findings were to be obligatory. He further said "if [her] findings are binding, maybe we need to do away with a lot of the courts". The above debate took place during an address by the Law Society of South Africa at the University of Pretoria. In direct retort to these utterances, Madonsela steadfastly contended that the Public Protector's findings were binding, unless set aside by a court of law.⁴⁵⁶

Eventually, Motsoeneng's matter was taken to the Supreme Court of Appeal by the Democratic Alliance. The verdict of the Supreme Court of Appeal in this matter was that the Court agreed with the Public Protector and pointed to the germane legislation phrasing:⁴⁵⁷

Instead of empowering the Public Protector to endeavour to resolve a dispute or rectify any act or omission by simply advising a complainant of an appropriate remedy as under the interim *Constitution*, the final *Constitution* empowers the Public Protector to take appropriate remedial actions.

These were virtuous utterances since they show that it will be immature to superficially accept that organs of state and public officials found by the Public Protector to have been guilty of corruption and malfeasance of public office will meekly accept her findings and implement her remedial measures. The Supreme Court of Appeal agreed with Chippers that the Public Protector's powers are not that of a court. Nonetheless, it is said that that was the wrong comparison and that all the

⁴⁵³ *Constitution of the Republic of South Africa*, 1996.

⁴⁵⁴ Davis "Supreme Court of Appeal Judgment: A Confirmation of the Public Protector's Powers" *Daily Maverick* 2.

⁴⁵⁵ *Democratic Alliance v The South African Broadcasting Corporation COP Limited and Others* 2015 (1) SA551 (WCC).

⁴⁵⁶ Masombuka and Skelton "Who Made Thuli God?" *The Times* 3.

⁴⁵⁷ Davis "Supreme Court of Appeal Judgment: A Confirmation of the Public Protector's Powers" *Daily Maverick* 2.

debate of whether all her findings were binding and enforceable was terminologically inaccurate.⁴⁵⁸

The judgment of the Supreme Court of Appeal determined that it was appropriate to find that the powers of the Public Protector should be at least equivalent to those of the administrative bodies, whose conclusions cannot be unpretentiously ignored until a court sets them aside. It further said that if the South African Broadcasting Corporation disapproved of Mandonsele's outcomes, it should have confronted them by way of reviews and that the Public Protector is autonomous.⁴⁵⁹

According to the Supreme Court of Appeal:⁴⁶⁰

Any individual or body affected by any finding decision or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation to that of the Public Protector and adopt the position that the outcome of that parallel investigation triumphs the findings, decision or remedial actions taken by the Public Protector.

The involvement of the police in the Nkandla saga reflects negatively on the government and the Supreme Court of Appeal ruling.

7.2.3 Awards received and donations made by the Public Protector

In recognition of her efforts, the Public Protector, Thuli Madonsela received awards from internationally recognised organisations. Due to her gesture of compassion that extends to altruism, the Public Protector donated some of these awards and prizes to needy communities and schools. In her recognition, the Public Protector was awarded a R100 000 cash prize as the winner of the ANN7 South African of the year award in 2014.

Meanwhile, during that time she was invited by Aurora Girls High School in Zola Soweto to motivate learners. She found that they did not have a hall and had to gather in the sun for her lecture. She then donated R30 000 towards the building of a hall. She called on society to invest in education as a way of insuring that there were

⁴⁵⁸ Davis "Supreme Court of Appeal Judgment: A Confirmation of the Public Protector's Powers" *Daily Maverick* 2.

⁴⁵⁹ Davis "Supreme Court of Appeal Judgment: A Confirmation of the Public Protector's Powers" *Daily Maverick* 2.

⁴⁶⁰ Davis "Supreme Court of Appeal Judgment: A Confirmation of the Public Protector's Powers" *Daily Maverick* 2.

study opportunities for everyone. She further indicated that education was the only way out of poverty. This shows that the Public Protector has the interest of the public at heart.⁴⁶¹

Once again, in 2013, the Public Protector was awarded a prize for being newsmaker of the year by the *Rapport* newspaper, for which she received an amount of R5 000. During that period, a fire swept through 350 shacks and left 1 400 people without accommodation at the *Agstelaan* informal settlement in Valhalla Park, Cape Town. Madonsela decided to donate the money to the Valhalla Park community and indicated that they needed the money more than any charity at the time. She further indicated that the work being recognised is the outcome of the collective efforts of the entire Public Protector team.⁴⁶² This displays both the meaning and the understanding of good leadership. The donations she gave were prizes given to her in acknowledging the good work her office is performing in fighting corruption and maladministration in South Africa.

It did not come as a surprise therefore that in 2014, during a ceremony held in Berlin, Germany, the global movement known as Transparency International , which was formed in 1993 with the mission to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society, awarded the Public Protector with its Integrity Award. The Integrity Award was created in 2000 to recognise the courage and determination of the many individuals and organisations fighting corruption in the world. This was a great achievement for our Public Protector to be nominated and win this international award.⁴⁶³

Eventually, in November 2011, the Rotary Club of Johannesburg on behalf of Rotary International conferred the Public Protector with a Paul Harris Fellows award. This is the highest honour that the Rotary can bestow on an individual. When she received this award, Thuli Madonsela said that she and her team were humbled by the solid public support they were receiving. She further stated that it showed that the people

⁴⁶¹ Kobedi 06 August 2015 *Madonsela Encourages Soweto School Girls to have a Sense of Purpose* www.sabc.co.za.

⁴⁶² Anon Date Unknown *Madonsela Donates Prize to the Needy* <http://mobi.iol.co.za>.

⁴⁶³ Cronje 17 October 2014 *Madonsela Wins Global Award for Integrity* <http://mg.co.za>.

of South Africa approve their efforts in protecting them against excesses in the exercise of public power.⁴⁶⁴

Further to her recognition, in August 2016 the Public Protector received an award and honorary doctorate for leader of the year from Lead SA, which the Public Protector then dedicated to her staff. This award came after she received two other accolades, namely South Africa's Institute of Internal Auditors Chairman's Guardian of Governance Award and the Lifetime Achievement Award conferred at the Top Women Awards 2016.⁴⁶⁵

Similarly, on 2 September 2016, the Public Protector was awarded an honorary membership of the Law Society of Botswana.⁴⁶⁶ An inscription on the award states that advocate Madonsela has been recognised for her unwavering and courageous defence of strong independence public institutions. This demonstrates the respectful recognition of the Office of the Public Protector in South Africa by foreign institutions. Furthermore, this shows the importance of the Public Protector's office and the respect it commands beyond the borders of South Africa.

On 7 September 2016, the Public Protector again received the Law Society of South Africa's Inaugural Truth and Justice Award, dedicated to both her staff and to her role model of old, lawyer and freedom fighter Priscilla Jana. In receiving the award, the Public Protector appealed in her speech to legal practitioners to consider rendering their services on a pro-bono basis to the needy for protecting the rights of the vulnerable.⁴⁶⁷

7.3 Conclusion

It is evident from the deliberations of this chapter that the Office of the Public Protector has successfully dealt with the challenges it faced. However, the greatest success in the history of the Office of the Public Protector was when the remedial action and its recommendations were clarified by the highest court in the country, the

⁴⁶⁴ Anon Date Unknown *Rotary Club Honoured Thuli Madonsela* <http://northglennnews.co.za>.

⁴⁶⁵ Anon 21 August 2016 *Public Protector Dedicates Guardian of Governance and Leadership Award to Staff* <http://www.pprotect.org>.

⁴⁶⁶ Anon 04 September 2016 *Botswana Law Society Honours Public Protector* <http://www.pprotect.org>.

⁴⁶⁷ Anon 04 September 2016 *Botswana Law Society Honours Public Protector* <http://www.pprotect.org>.

Constitutional Court. The unanimous judgment written by Chief Justice Mogoeng put into perspective critiques of the judiciary and its purposive interpretation of the law. The Court clarified the power of the Public Protector to take appropriate remedial action and indicated that its action has legal effect and is binding.

It has been demonstrated above that the Office of the Public Protector has successfully accomplished its mandate of serving the people of South Africa equitably. In this manner, this office has palpably set the precedence for the incoming Public Protector. The manner in which the Office of the Public Protector executed its duties has left both her integrity and that of the office intact. Furthermore, contributions of this office to the needy community through a number of donations were also discussed in this chapter and thus proved the benevolent intentions towards those in need. Be that as it may, this research study will provide some recommendations to the challenges indicated above in the following chapter.

CHAPTER 8

RECOMMENDATIONS AND POSSIBLE SOLUTIONS

8.1 Introduction

The aims and objectives of this chapter are to provide recommendations, suggestions and possible solutions based on the outlined challenges and impediments stipulated in the above chapter. Understandably, there were some challenges that this office came across and made decisions about that proved unpopular with some institutions, individuals and the general public. It is within this context that this chapter attempts to put those challenges into their proper perspective and suggest further recommendations and possible solutions.

8.2 Legitimacy of the remedial actions

Generally, the binding of the remedial action of this office and recommendations should be incorporated in the *Constitution*⁴⁶⁸ and also in the *Public Protector Act*⁴⁶⁹ to avoid any argument on whether they are binding or not. This is the single legal measure most likely to guarantee the public legitimacy of this office as it will appear to be based on the *Constitution*⁴⁷⁰ or the Act.⁴⁷¹ Therefore, it is recommended for the legislature to return to the drawing board to reemphasise the consequences of not cooperating or destructively challenging or objecting to the Public Protector's authority.

8.3 Mandate of the Public Protector's office

Judging by the challenges and confusion surrounding the role of the Public Protector in South Africa today, it is therefore recommended that the scope of this office should be tantamount to the challenges that it is confronted with. In such circumstances, it is important that the scope should be adequately comprehensive so as to make it available to the Public Protector's complete authority to effectively deliver on its constitutional obligations.

⁴⁶⁸ *Constitution of the Republic of South Africa, 1996.*

⁴⁶⁹ 23 of 1994.

⁴⁷⁰ *Constitution of the Republic of South Africa, 1996.*

⁴⁷¹ 23 of 1994.

The above deliberations therefore call for the Public Protector, as a law expert, to appear in court to defend his or her decisions. Furthermore, it is imperative to extend the powers of the Public Protector to be able to monitor government's accomplishment of international and regional accords and commitments under existing domestic law.

8.4 Economic, social and cultural rights

Most of the challenges faced by ordinary South Africans today are premised on the past *apartheid* regime's economic, social and cultural deprivations, no more so than the black majority. It is within this context that the Office of the Public Protector's mandate should be broadened to further cover civil and political rights. Economic, social and cultural rights should be explicitly stated in the *Constitution*⁴⁷² to further develop and recognise these rights. It is also clear that the socio-economic rights of South Africans are central to problems existing in many communities in this country. The Public Protector should therefore have the power to adopt pioneering methods to monitor the implementation and progress of these rights.

Where this office deals with specific issues of socio-economic rights such as discrimination, as has been the case recently in South Africa, this office should contemplate expanding its mandate to address any systematic issues pertaining to these rights. To conclude, the Office of the Public Protector in general should create greater awareness among people for bringing complaints about socio-economic rights to its attention so it can thereby act accordingly.

8.5 Decisions of the Public Protector

In the past, the Office of the Public Protector has made some revealing decisions that involved this country's political elites. Her decisions have been put under stringent scrutiny by those in power, some of the media and also the public. The office's authority and capacity to make binding decisions has however been mostly questioned by those on the wrong side of the law. This office should therefore be able to make decisions and recommendations confidently and without any

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Constitution of the Republic of South Africa, 1996.

persuasion. Remedial actions of the Public Protector should be implemented immediately.

If the decisions of the Public Protector are recognised by the courts, they should therefore be registered in courts and executed in the same way as court judgments. Moreover, the government should commit to undertake an obligation to respond, within a reasonable time, to the outcomes, conclusions and recommendations made by the Public Protector. Timely response in such matters will clearly improve the effective functioning of the office. However, aggrieved parties should be afforded an opportunity to appeal the findings of the Public Protector in circumstances where there is uncertainty.

8.6 Appointment of staff in the Office of the Public Protector

Only suitably intellectual members with appropriate qualifications should be considered to occupy positions in this office. Independent staffers with necessary skills should therefore be carefully chosen on the basis of proven expertise, acquaintance and familiarity in strategic positions so as to deal with the variety of challenges facing the office.

8.7 Financial and human resources

Funding and resourcing the Office of the Public Protector is crucial for the proper and efficient functioning of the institution. It should be recalled that this is a Chapter 9 institution tasked with carrying out the functions that support democracy as enshrined in the *Constitution*.⁴⁷³ Therefore, governing traits of allocation of resources that are free of bureaucracy should be expedited for the proper functioning of this institution. Moreover, the Office of the Public Protector should have the financial means to employ professionally competent staff capable of carrying out the tasks of the office. In sum, funding should be secured with the long-term view to empower the Office of the Public Protector to strategise and advance its actions and long-term plans with adequate resourcefulness.

⁴⁷³ *Constitution of the Republic of South Africa, 1996.*

8.8 Accessibility

South Africa is a predominantly rural country, with many of the inhabitants being blacks located in rural settings. In such places, poverty and lack of knowledge prevent these people from accessing many important services, including the Office of the Public Protector. A strong and respectable relationship should exist between this office and the media in order to make its operations known and easily accessible to the general public.

It is within this context that recommendations are made for the establishment of similar smaller offices in the vicinity of or within rural settings, which will certainly improve its accessibility to the public. Moreover, mechanisms should allow local offices a positive role in following up cases. In this manner, the Public Protector will guarantee effective communications between its office and potential complainants. It is recommended that the Office of the Public Protector issues quarterly circulars to the heads of governmental departments and all entities under its authority, to remind them of the authority and significance of this office.

8.9 Accountability

The Public Protector should endeavour to keep to their reporting obligations and regular reports should be issued monthly, quarterly, half-yearly or yearly as far as possible. Regular communication with the legislature on their operations should be standard procedure in order to assist with compliance with prescripts of the legislative obligations. Furthermore, the Public Protector's office should publicise its findings in a way that will be easily accessible to the public.

8.10 Civil society involvement

A standard procedure that will help improve relations between NGOs and vulnerable groups such as organisations of women, children, HIV-positive persons or persons with disabilities and the Public Protector should be developed. The consultation process between these groups and the Public Protector should be transparent, adequate, effective and properly resourced to ensure proper consultation with these vulnerable groups. The office should be able to access these people regularly and timeously to inform them about the institution's priorities and daily operations.

8.11 Leaking of Public Protector's reports

This leaking occurs predominantly with preliminary reports of this office with regard to the complaints or cases investigated. These preliminary reports are sent to those behind the complaints and the people investigated for them to comment or raise any disputes before the final report is released. This study recommends that the Office of the Public Protector ceases this practice and introduces the following instead: The party concerned should be called to the Office of the Public Protector, whether regionally, provincially or nationally for consultation and briefings about the findings in the respective cases or complaints. This will hopefully avoid the leaking of preliminary reports before the Office of the Public Protector releases the final report.

8.12 Conclusion

As it has been demonstrated above, the Office of the Public Protector can function effectively if the recommendations were made on how the financial problems can be dealt with to ease the office's performance. These recommendations included, among others, how the appointment of employees in this office can be done in such a way as to employ only suitably knowledgeable and qualified candidates for the proper functioning of the office. Furthermore, the adequate funding of this office was recommended in order to improve its financial stability and ability to adequately carry out its mandate. On the other hand, the accessibility, accountability and civil society involvement of this office and its public awareness were also emphasised. The following chapter gives a general conclusion of the significance and results of this research study.

CHAPTER 9

GENERAL CONCLUSION

It is evident from the above that the South African Parliament initiated the Office of the Public Protector to uphold the South African *Constitution*⁴⁷⁴ and eradicate exploitation of public and state resources. Based on the above study, it has been proven that this office executes its duties regardless of the external pressure and punitive criticism from the officials who are investigated along with their allies.

The Office of the Public Protector has a number of offices in South Africa that are accessible to the public. The office has admitted and investigated cases at a local, provincial and national level. Based on this research study, a deduction can be made that the Public Protector's office has not only investigated high profile cases, but has also investigated cases at all levels. It is unfortunate, however, that the high profile officials who were investigated are those whose supporters have critically challenged and disrupted this office from undertaking investigations. Nevertheless, the office did not succumb to their pressure and distractions and continued with its investigations and reports without fear or favour.

Subsequent to outlining and clarifying the services, functions, authority and jurisdiction of the Office of the Public Protector, it is clearly understood that there are certain cases and fraudulent maladministration reported that neither the police nor other corruption fighting institutions are able to investigate and handle in the manner that the Public Protector does. It is this that sets the institution aside from other offices and provides it with powers that other institutions do not possess, but without making it above the law.

This research study proved that there are no factors that give reason to doubt the Office of the Public Protector and its authority. It has indicated that even though the Public Protector's main function is to fight corruption and maladministration, it does not result in duplication of services rendered by other institutions. Rather, the institution protects the public interests by mitigating the functions of governmental officials towards the public. It has been clarified that the office does not take sides

⁴⁷⁴ *Constitution of the Republic of South Africa, 1996.*

between the public and governmental officials, but upholds the *Constitution*⁴⁷⁵ instead while keeping its ear open to any complaints that arise from South African citizens.

Quite evidently, there is no doubt with regard to the functions, ethics and credibility of the Public Protector, as the office has proved its moral backbone by not being biased and dropping the investigations that were brought to the office concerning influential politicians and governmental officials, including individuals that service resources crucial for South African citizens. Be that as it may, people must not be oblivious to any errors and wrongdoings by the Office of the Public Protector.

This research study concludes that the cases of negative conduct and destructive opposition towards the Public Protector were not justified and did not serve the public interest or the government administration. Based on the above-mentioned challenges faced by this office, it is clear that future Public Protectors will continue to encounter problems in this regard.

In addition, this research study has discovered that the Public Protector's office began to have problems and issues when she started to objectively investigate cases reported against political elites. Once these high profile cases are taken on and investigated by the Office of the Public Protector, each individual that is investigated together with their supporters must therefore be given stringent warning not to interfere with the investigations at hand.

Based on the above, the questions that arise are these: Will the future Public Protector be assertive, self-assured and insistent enough to execute the office's duties and investigate political power houses, leaders and governmental officials without fear or favour, bearing in mind the office's role in protecting the public's interest and protection of governmental resources?

Who is going to watch over the Public Protector to ensure that the office is used well and is not exploited, and to ensure that the office does not abuse its powers? With respect to the last point, who are those who are supposed to be watching the watchdog doing its part? These are some of the questions that need to be answered

⁴⁷⁵ *Constitution of the Republic of South Africa, 1996.*

with respect to ensuring that this institution remains a bulwark against corruption and oppression and a bastion of moral rectitude for the people of South Africa.

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