UNIVERSITY OF KWAZULU-NATAL

PUBLIC PROTECTOR OR PAPER TIGER? PERSONALITY, POLITICS AND PERFORMANCE: AN ANALYSIS BASED ON PRECEDENT

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DECLARATION

I, Reece Renae Kisten, hereby declare that: -

1. The research reported in this dissertation is my original work, except where otherwise indicated;

2. This dissertation has not been submitted for any degree or examination at any other university;

3. This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted:

    3.1. their words have been re-written but the general information attributed to them has been referenced; and

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REECE RENAE KISTEN[1]

26 August 2021

[1] Signed electronically

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ABBREVIATIONS

The following abbreviations have been used in the course of this dissertation. Hereunder is an exhaustive list of such in the order in which they appear.

No	Full description	Abbreviation
1.	African National Congress	ANC
2.	Constitution of the Republic of South Africa, 1996	Constitution
3.	*Minister of Home Affairs and Another v Public Protector of the Republic of South Africa (308/2017) 2018 ZASCA 15; [2018] 2 ALL SA 311 (SCA); 2018 (3) SA 380 (SCA) (15 March 2018)*	*Minister of Home Affairs* case
4.	Selby Baqwa	Baqwa
5.	Lawrence Mabedle Mushwana	Mushwana
6.	Thulisile Nomkhosi Madonsela	Madonsela
7.	Busisiwe Mkhwebane	Mkhwebane
8.	*Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)*	*First Certification judgment*
9.	Public Protector Act 23 of 1994	PP Act
10.	*The Public Protector v Mail and Guardian Ltd and Others 2011 (4) SA 420 (SCA) [2011] ZASCA 108; 422/10 (1 June 2011)*	*Mail and Guardian* case
11.	Report in Terms of Section 8 (2) of the Public Protector Act 23 of 1994, Report No2 (Special Report) Investigation Concerning the Sarafina II Donor (11 September 1996)	Sarafina II report
12.	Democratic Alliance	DA
13.	A Report to the National Assembly of the Parliament of South Africa (2007)	Asmal report
14.	Petroleum, Oil and Gas Corporation of South Africa	PetroSA

15.	Report on an Investigation into an allegation of Misappropriation of Public funds by the Petroleum Oil and Gas Corporation of South Africa *trading as* PetroSA and matters allegedly related thereto	PetroSA report
16.	Jacob Gedleyihlekisa Zuma	President Zuma
17.	President Zuma's homestead in KwaZulu-Natal, Nkandla	Nkandla residence
18.	Secure in Comfort, Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of the President Jacob Zuma at Nkandla in the KwaZulu-Natal Province	Nkandla report
19.	Department of Public Works	Public Works
20.	State of Capture, Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to an alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses (Report No 6 of 2016/17)	State Capture report
21.	President Matamela Cyril Ramaphosa	President Ramaphosa
22.	Report on an investigation into allegations of a violation of the Executive Ethics Code through an improper relationship between the President and Africa Global Operations (AGO), formerly known as BOSASA	BOSASA report
23.	*Public Protector and Others v President of the Republic of South*	BOSASA case

	Africa (CCT 62/20) [2021] ZACC 19 (1 July 2021)	
24.	*Democratic Alliance vs Public Protector; Council for the Advancement of the South African Constitution and the Public Protector (11311/201); 13394/2018) [2019] ZAGPPHC 132; [2019] All SA 127 (GP); 2019 (7) BCLR882 (GP) (20 May 2019)*	*Vrede* case
25.	*President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC).*	*Sarfu* case

KEYWORDS

1. Accountability

2. Anti-Corruption

3. Cadres' deployment

4. Public Protector

5. Political influence

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Abstract

Since the inception of the post-Apartheid era, the Public Protector has found its root of empowerment in legislation (the Constitution and the Public Protector Act), which primarily constructs it as an independent and purpose-built watchdog.[2] [3] [4] According to the Public Protector Act, the "Public Protector has the power 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 have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic".[5] [6] This dissertation aims to examine critically the office of the Public Protector through a lens focused on incumbents to the office and the underlying circumstances of their appointments. An analysis seeking to establish whether a pattern of ineffectiveness has developed will be conducted. Further, there will be a specific focus on cadres' deployment, which has been defined as *"the appointment by government, at the behest of the governing party, of a party-political loyalist to an institution or body, independent or otherwise, as a means of circumventing public reporting lines and bringing that institution under the control of the party as opposed to the state,"* and its role in adding to the ineffectiveness of the office as aforementioned.[7] Since the inception of the office of the Public Protector, each appointed Public Protector has been closely linked with the African National Congress ("ANC"): Baqwa (ANC

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2 The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "*Constitution*")

3 The Public Protector Act (as amended) 23 of 1994

4 *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* (308/2017) 2018 ZASCA 15; [2018] 2 ALL SA 311 (SCA); 2018 (3) SA 380 (SCA) 15 March 2018), paragraph 37

5 The Public Protector Act, Preamble

6 The Public Protector Act, Preamble

7 G van Onselen 'South African Political Dictionary: Cadre employment or cadre deployment" 30 August 2012, available at https://inside-politics.org/2012/08/30/south-african-political-dictionary-cadre-employment-and-cadre-deployment/, accessed 11 August 2020

member), Mushwana (ANC Limpopo Provincial Executive), Madonsela (ANC member) and Mkhwebane (alleged affiliations with Zuma faction of the ANC).[8] [9] [10] [11] Save for Madonsela (3rd incumbent), each Public Protector has either made decisions that were favourable to the ANC (Mushwana and Baqwa) or made errors in their investigations that have resulted in adverse costs orders in matters that had come before the court and in findings in their investigation reports which seemed biased towards a particular faction of the ANC, if not the ANC as a whole. The aforementioned conduct naturally resulted in the office and the appointments being brought into question. Examples of such include Baqwa in respect of the Sarafina II report, Mushwana regarding the PetroSA report, and Mkhwebane in light of the *Absa* judgment which arose from the Bankorp report.[12] [13] [14] It is the contention of the author that proper selection and appointment is indispensable for the proper functioning of the Public Protector. The influence of politics and the system of cadre deployment must be jettisoned. It is further submitted that, if these elements (politics and cadre deployment) are removed, thereafter a theory which highlights the importance of choosing the correct person for the job, namely the Human Capital theory, applied, then the result will be that

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[8] 'Curriculum vitae of Mr. Baqwa' undated, available at https://capebar.co.za/attachments/Baqwa.pdf, accessed 25 June 2017

[9] South Africa The Office of the Public Protector *Annual Report 1 April 2008 - 31 March 2009 (2009)* 3 available at http://www.publicprotector.org/sites/default/files/Annual_report/Annual%20Report%201%20April%202008%20-%2031%20March%202009.pdf, accessed 26 February 2022

[10] 'No, I would not return to the ANC - Madonsela' *News24* 8 November 2016, available at https://www.news24.com/News24/no-i-would-not-return-to-the-anc-madonsela-20161108 , accessed 26 February 2022

[11] S Evans, K Cowan 'Analysis Insurgent or Independent: The many lives of Busisiwe Mkhwebane" *News24* 13 March 2020, available at https://www news24.com/news24/analysis/analysis-insurgent-or-independent-the-many-lives-of-busisiwe-mkhwebane-20200312, accessed 26 February 2022

[12] S Baqwa *Report in Terms of Section 8 (2) of the Public Protector Act 23 of 1994, Report No 2 (Special Report) Investigation Concerning the Sarafina II Donor* (11 September 1996) (hereinafter "Sarafina II report")

[13] R Southall 'The ANC for Sale? Money, Morality & Business in South Africa' *Review of African Political Economy* (2008) 35(116) 281-299

[14] T Niselow 'Request for Mkhwebane to be struck off advocates roll for 'lying under oath' *Fin24* 22 July 2019, available at https://www news24.com/fin24/Economy/just-in-request-for-mkhwebane-to-be-struck-off-advocates-roll-for-lying-under-oath-20190722, accessed 26 February 2022

the appointment of the Public Protector will be made from an appropriate and specific category of persons.[15] As submitted by the author, the appointment of the Public Protector should be made from the ranks of the Supreme Court of Appeal and Constitutional Court judges. In terms of effecting this change to the current selection process, an amendment of section 1(A) of the Public Protector Act can be effected. This is practical as it will be unnecessary for the involvement of Constitutional Court direction to amend the Constitutional provisions, but rather a simple amendment of the said legislation. The result will be that the office will have the ability to operate in a manner as one would envisage based on the Constitution's provisions, which will also be discussed in detail.

Chapter 1 – Introduction and Outline of the Subject Matter

Introduction

The Constitution reads primarily as transformative in nature and this is seen in the provisions which cater for establishing a balance through, *inter alia,* the establishment of the separation of powers, parliamentary oversight, and Chapter 9 Institutions.[16] These provisions are necessary to support and nurture a functional democracy. The Public Protector is the primary anti-corruption watchdog on behalf of the State who focuses on improper actions on the part of public administrative bodies or executive offices, and is

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[15] S Bazana, T Reddy 'A critical appraisal of the recruitment and selection process of the Public Protector in South Africa' (2021) 19(0) *SA Journal of Human Resource Management,* 1207-1223 in respect of Human Capital Theory

[16] T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference' (2009) 20(2) *Stellenbosch Law Review* 258-285. Karl Klare's celebrated article, 'Legal Culture and Transformative Constitutionalism' is critiqued by Roux. One aspect of Klare's article supports the idea that the South African constitution should be read as a 'transformative' constitution, and this has been cited and accepted by numerous other legal academics. While this article discusses different theories of interpreting the constitution (Klare' reliance on a 'postliberal' theory and Roux stating that the theory of Ronald Dworkin is more appropriate since the former results in too a narrow definition of transformative constitutionalism), it is widely accepted that the Constitutional is transformative in nature.

governed by a handful of pivotal sections in the Constitution. Section 181 prescribes the establishment provisions of the office of the Public Protector.[17] Section 182 provides for the functions of the Public Protector and, lastly, section 183 stipulates the provisions relating to the tenure of the Public of Protector. These sections collectively provide for the establishment, mandate, and tenure of the Public Protector. The Supreme Court of Appeal in the matter of *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* ("*Minister of Home Affairs* case"), listed several features which relate to the office.[18] [19]

A first feature highlighted by the court was that the office "is a unique institution designed to strengthen constitutional democracy".[20] The court then stated that the office "does not fit into the institutions of public administration but stands apart from them".[21] The office was thereafter described as "a purpose-built watchdog that is independent and answerable not to the executive branch of government but to the National Assembly".[22] The office was further identified as finding application "with the State Liability Act 20 of 1957 which enables the Office of the Public Protector to sue and be sued".[23] The court further held that the office "is not a department of state and is functionally separate from the state administration".[24] The court identified the office as being "only an organ of state because it exercises constitutional powers and other statutory powers of a public nature".[25] The court went on to state that the office's function is "not to administer but to investigate, report on and remedy maladministration".[26] Finally, the court specifically stated that the office "is given broad discretionary powers as to what complaints to

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17 Constitution (note 2 above; sections 181-194)
18 *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa (308/2017) [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) (15 March 2018)*
19 I Currie and J De Waal *The Bill of Rights Handbook* 6 Ed (2013) 8
20 *Minister of Home Affairs* supra note 18 at para 37
21 ibid para 37
22 ibid para 37
23 ibid para 37
24 ibid para 37
25 ibid para 37
26 ibid para 37

accept, what allegations of maladministration to investigate, how to investigate them and what remedial action to order – as close as one can get to a free hand to fulfil the mandate of the Constitution".[27]

These eight features from the *Minister of Home Affairs* case will collectively be referred to as the Public Protector principles.

The legislative framework that governs this body is the Public Protector Act 23 of 1994 (hereinafter the "PP Act"), sections 1, 1A, 2A, 5, 7, and 13 and the Constitution, Chapter 9, sections 181, 182, 183, 193 and 194.[28] [29] It is through this legislative framework, together with the Public Protector principles outlined in the *Minister of Home Affairs* case and other relevant reports, that the Public Protector will be scrutinised and critiqued in order to ascertain whether it functions in the required manner. Further examination will be conducted with a focus on the appointment, performance, and effectiveness of the Public Protector in light of the role it is supposed to fulfil as South Africa's anti-corruption watchdog. The aforementioned analysis will be conducted from the inception of the office until the present day.

No exercise with this purpose would be complete without discussing the report titled, 'A Report to the National Assembly of the Parliament of South Africa' (hereinafter the "Asmal report"), which states: -[30]

The Public Protector is an important addition to the armory [sic] of mechanisms that are employed to create the substance of a fair and stable constitutional government. In

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27 ibid para 37

28 PP Act (note 3 above): Sections 1 Definitions, 1A Establishment and appointment, 2A Appointment, salary, allowances and benefits, vacancies in office and removal from office of Deputy Public Protector, 5 Liability of the Public Protector, 7 Investigation by Public Protector, 13 Application of Act

29 Constitution (note 2 above) Chapter 2 State Institutions supporting Constitutional Democracy: Sections 181 Establishment and governing principles, 182 Functions of Public Protector, 183 Tenure, 193 Appointments, 194 Removal from office

30 A K Asmal *Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa* (2007) available at https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf, accessed 26 February 2022

furtherance of this ideal, appointments to this office require an experienced public officer to monitor the implementation of policy and the provision of services to ensure administrative justice and fair treatment of all the people.[31]

It is submitted that the sentiments expressed in the Asmal report are compelling. Accordingly, this report will be used in support of the submissions made in this dissertation. In addition to the quote above, the Asmal report puts forward the notion that the characteristics of the "person" who is appointed to hold office has a significant impact on the effectiveness of the office. This is a crucial point in respect of this dissertation since one of the endeavours of this work is to highlight the importance of the human resources element applicable to the appointment of a particular person. In essence, the proposition of the argument put forth in this dissertation is that sourcing the most appropriate, suitable person for the office of the Public Protector is of vital importance for the success of the office.

The author's purpose is to argue cogently that the Public Protector is not consistently performing its intended function. Furthermore, it will be argued that the reason for this state of affairs is that unsuitable persons are appointed to the position more often than not. As a result, the office tends often to be a 'paper tiger.' In its definition, a paper tiger is something that seems menacing but when challenged, is weak and ineffectual.[32] In light of that, do the empowering provisions come across as menacing and powerful, yet the office itself is practically impotent?

Research problem and objective

The research objective is to evaluate the office of the Public Protector and its effectiveness in the performance of its functions, to identify the major source of any dysfunction and to provide practical suggestions in respect of the

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31 Asmal report (note 30 above; 95)

32 'Paper tiger' *Grammarist* undated, available at https://grammarist.com/idiom/paper-tiger/, accessed 26 February 2022. The term comes from the Chinese idiom 'zhilaohu.'

appointment process. Effectiveness will be determined by identifying the required standard as described above. In order to do so, reference will be made to the following four main factors: mandate; jurisdiction; the appointment of the incumbent; and performance in office during the respective incumbent's tenure.

The required standard of the Public Protector highlighted above will be the litmus test by which the conduct of each serving Public Protector will be determined. The identified deficiencies, together with the underlying reasons, will be examined. Recommendations relating to measures that might be employed to correct and/or prevent such deficiencies will be made thereafter. For this purpose, significant failures, relating either to an unconstitutional approach to the mandate and/or incompetence in execution on the part of the Public Protector personally, will be canvassed. Operational deficiencies arising from inadequate funding or staff incompetence will be omitted.[33]

Research questions and objective

In determining the standard for effectiveness of the Public Protector as described in the research problem and objective, the following research questions will be interrogated, and such form the arena for the evaluation: -

1. What is the nature of the office of the Public Protector, its origins, legislative environment, mandate and jurisdiction?

2. What is the tenure of the Public Protector (term), and the positive and negative effects of the current tenure length?

3. Are the powers and mandate of the Public Protector properly defined?

[33] This limitation is in place in order to narrow the scope of this dissertation to the foundational and glaring deficiencies currently faced by the office. This is further elaborated upon in the Limitations section.

4. Flowing from its mandate, what may be defined as effective performance of the duties of office? In what way and under what circumstances, if any, has the Public Protector failed to act effectively in relation to the mandate?

5. What has been the cause or causes of failure of the Public Protectors to act effectively thus far? Can the causes be related to the personal political allegiances or ability of the individual Public Protectors?

6. In what manner is the Public Protector appointed and what are the weaknesses, if any, inherent in this process? Investigation of this issue will include matters such as the possibility of insulating the appointment from undue political influence, as well as the effect and constitutionality of the policy of cadre deployment.

7. Are there measures which can be taken to solve or, at the very least, ameliorate any failures in performance?

8. How have the following Public Protectors performed during their respective terms given their Constitutional mandate as contemplated by Chapter 9 of the Constitution: -

   - Selby Baqwa ("*Baqwa*")
   - Lawrence Mabedle Mushwana ("*Mushwana*")
   - Thuli Madonsela ("*Madonsela*")[34]
   - Busisiwe Mkhwebane ("*Mkhwebane*")

9. Performance as contemplated above will be evaluated according to the effect of ability, *bona fides*, experience and allegiances (if any) of the

[34] Gqubule, T *No longer Whispering to Power The Story of Thuli Madonsela* (2017*)* 3

Public Protector on the execution of the mandate of the Public Protector.

Research methodology

The methodology that will be employed is the use of both primary and secondary sources obtained by means of desktop research. The sources are inclusive of certain legislation and case law related to the office of the Public Protector. The aforementioned, with specific reliance on precedent, will form the foundation for the submissions made in this dissertation.

Human Capital theory ("*HCT*") will then be applied to the current state of the office of the Public Protector. According to Bazana and Reddy, HCT is a theory that was conceived and presented during the 18th century by Adam Smith.[35] [36] The authors further explain that HCT stipulates that the knowledge and skill of an individual allow him or her to propel an organisation in the right direction.[37] It advances the concept that the most qualified people need to be hired for the job for an organisation to function.[38] Further, HCT finds value in people, which are regarded as fixed capital, because they possess skills and useful abilities that yield genuine profits to an organisation i.e. results. The theory places heavy emphasises on the need for the best people to be selected for a certain job.[39] Skills, abilities and experience are recognised as significant contributors to organisational success and, as a result, great importance is given to the issue of recruiting and selecting the best candidates for optimum results.[40] Within the ambit of this theory, two possible hypotheses are proposed.[41] The first hypothesis is that the recruitment and selection criteria have a significant effect on the performance

35 S Bazana, T Reddy (note 15 above)
36 ibid
37 ibid
38 ibid
39 ibid
40 ibid
41 ibid

of the organisation. Essentially, this means that if the correct candidates are recruited and selected, there is a high likelihood that the organisation will perform as intended. The second hypothesis is that the more objective the recruitment and selection process is, the better the organisation's performance will be.[42] By application of this theory, adequate suggestions and or solutions will be found in order to address the problems that are identified.

Limitations

As abovementioned, the discussion on effectiveness will not deal with the limitations of the Public Protector as it pertains to issues of funding i.e. the amount of funding the office receives or requires to conduct its processes. While it is acknowledged that the amount of funding is impactful on the functioning of the office, the focus is on the characteristics of the person appointed as Public Protector. Further, a detailed analysis of the volume of cases conducted by the Public Protector, namely an enquiry into whether each Public Protector has finalised a sufficient number of cases reported to the office during their respective tenures) will also be excluded from the ambit of this dissertation. However, the topic of investigations that were self-initiated by the individual Public Protectors will be examined since such has a bearing on the approach and personality of each Public Protector.

Chapter 2 – Historical Origin and the PP Act

This chapter examines the historical origins of the office of the Public Protector. The areas which have application in this dissertation are: the establishment of the office, the tenure of the incumbent, the appointment to office, the purpose of the office, and its function. In addition, the manner in which the Public Protector conducts investigations and appropriate remedial

[42] ibid

action therefor will also be scrutinised, insofar as such relates to the independence and impartiality of the Public Protector.

Ombudsman & Legislative origin

The term ombudsman has been defined as "an official appointed to investigate individuals' complaints against a company or organization, especially a public authority".[43] It is Swedish in origin and translates to 'representative.'[44] The term is often modified to 'ombudsperson' or 'ombuds' office.[45] The historical roots lie in the Swedish Parliamentary ombud, intended to counterbalance the rule of an authoritarian King.

In an African context, a well-worded description of the term states that the ombud can be viewed as as the "ears" of the people because "it serves as a mechanism of redressing the grievances of citizens in a democratic system".[46] In a South African context, the *Certification of the Constitution of the Republic of South Africa* ("*First Certification judgment"*), made mention of the origins of the Public Protector as follows: -[47]

The historical roots of the office of ombudsman are considerable. The first such office was established in 1809 in Sweden. However, since the Second World War the institution has been adopted in a wide variety of democracies: in Denmark in 1953, in Norway and New Zealand in 1962 and in the United Kingdom in 1967 (where the institution is known as the Parliamentary Commissioner for Administration).[48]

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43 'Ombudsman' *Lexico Powered by Oxford* undated, available at https://en.oxforddictionaries.com/definition/ombudsman, accessed on 26 February 2022

44 ibid

45 ibid

46 KO Osakede, Ijimakinwa S.O 'Role of Ombudsman as a means of Citizen Redress in Nigeria' (2014) 3(6) *Review of Public Administration and Management* 121

47 *Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)*

48 ibid 161

In the South African context, the Public Protector finds its origins in the office of the Advocate General, which was created in terms of the Advocate General Act and formed part of the Department of Justice. [49] Thereafter, the change of name came about with the promulgation of the Advocate General Amendment Act.[50] The amendment granted the Ombudsman powers of search and seizure. This amendment further widened the responsibility of the Ombudsman's oversight role to include financial maladministration wherein reasonable grounds existed for such a conclusion. The amendment marked an important milestone for Constitutionalism, as prior to that time, the office of the Ombudsman as it was, fell within the ambit of a statutory body under the umbrella of the Department of Justice.

The establishment of the Public Protector in the Constitution

The Public Protector is a 'Chapter 9 Institution' established in terms of section 181(1)(a) of the Constitution. As abovementioned, it is one of six institutions which are intended to strengthen constitutional democracy in South Africa.[51] [52] In terms of the empowering legislation, the Public Protector may hold the position for a non-renewable term of seven years.[53]

Establishment and appointment

The President, acting "on the recommendation of the National Assembly" must, must whenever necessary, appoint a Public Protector.[54] [55] The Public Protector is required to be a fit and proper person to hold such office, and who: -

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49 118 of 1979
50 104 of 1991
51 Constitution (note 2 above; s181(1)(b)-(f)) The other institutions are the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, and the Electoral Commission.
52 Constitution (note 2 above; s181(1))
53 ibid s183
54 ibid s193(4)
55 PP Act (note 28 above; s1A(2))

- is a judge of a High Court;[56]

- is an admitted advocate or attorney and has for a cumulative period of at least ten years after having been so admitted, practised as an advocate or an attorney;[57]

- is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at university;[58]

- has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance;[59]

- has for a cumulative period of at least 10 years, been a member of Parliament;[60]

- has acquired any combination of experience mentioned in respect of areas mentioned above, for a cumulative period of at least 10 years.[61]

Function of the Public Protector

The Public Protector is a state institution established primarily to combat the abuse of public power as provided by the Public Protector Principles *supra*. The office identifies its role as being "a purpose-built watch-dog" in the

[56] PP Act (note 28 above; s1A(3)(a))
[57] PP Act (note 28 above; s1A(3)(b))
[58] PP Act (note 28 above; s1A(3)(c))
[59] PP Act (note 28 above; s1A(3)(d))
[60] PP Act (note 28 above; s1A(3)(e))
[61] PP Act (note 28 above; s1A(3)(f))

country which focuses on improper actions on the part of public administrative bodies or offices. [62]

Section 182 of the Constitution provides that the Public Protector has the power to be regulated by national legislation; to investigate any conduct in state affairs, in the public administration or in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and take remedial action.[63] [64] [65] Apart from the aforementioned powers afforded by the Constitution, additional powers are granted in terms of further legislation described hereunder.[66] While it is clear from the aforementioned that the Public Protector has a wide set of powers, there are certain exclusions, one of which is that the Public Protector may not investigate court decisions.[67]

Another important provision is that the Public Protector must be accessible to all persons and communities.[68] Any report issued by the Public Protector must be open to the public unless exceptional circumstances, which require that a report be kept confidential, exist. Circumstances that require a report be kept confidential are to be determined in terms of national legislation.[69]

Section 6(4)(a) of the PP Act makes provision for additional powers and functions delegated and assigned to the Public Protector.[70] Such powers include investigating and reporting on maladministration in connection with the affairs of government at any level; abuse or unjustifiable exercise of

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62 *Minister of Home Affairs* supra note 18 at para 37
63 Constitution (note 2 above; s182(1)(a))
64 ibid s182(1)(b)
65 ibid s182(1)(c)
66 ibid s182(2)
67 ibid s182(3)
68 ibid s182(4)
69 ibid s182(5)
70 PP Act (note 28 above)

power or unfair, capricious, discourteous or other improper conduct; an improper or dishonest act, or omission or other offences as referred to in the Prevention and Combating of Corrupt Activities Act 12 of 2004; improper or unlawful enrichment, or receipt of any improper advantage as a result of an act or omission in the public administration or in connection with the affairs of government at any level; or an act of or omission by a person in the employ of government at any level or a person performing a public function.

Another power granted in terms of this section is that that the Public Protector may, at his or her sole discretion, endeavour to resolve a dispute by mediating, conciliating, negotiating and advising where necessary regarding appropriate remedies and/or adopting any other means that may be expedient in the circumstances.

Finally, this section deals specifically with investigation and provides that the Public Protector may disclose either that a commission of an offence was discovered or bring such to the attention to the relevant authority or institution charged with the prosecution of the relevant offence. The Public Protector may make this disclosure during or after the conclusion of such investigation. Further, in terms of section 6(4)(c) of the Act, if the Public Protector deems that it is advisable, he or she may refer the matter to the appropriate body or authority affected, alternatively, make representations regarding redress or any other appropriate recommendation that he or she deems expedient to the affected public body or authority. Investigation of an allegation does not render guilt or wrongdoing.

Investigations by the Public Protector

In terms of section 7(1)(a) of the PP Act, investigations conducted by the Public Protector fall within two distinct categories: investigations that are undertaken at the Public Protector's own initiative; or investigations that are conducted on the receipt of a complaint.[71]

It is submitted by the author that the investigations initiated by the Public Protector of his or her own volition gives insight into the said Public Protector's attitude and personality. This is in line with the judgment handed down in the Supreme Court of Appeal in *The Public Protector v Mail & Guardian Ltd and Others* ("*Mail & Guardian* case"), wherein it is stated as follows: -[72]

> The national legislation that is referred to in s 182 is the Public Protector Act 23 of 1994. The Act makes it clear that while the functions of the Public Protector include those that are ordinarily associated with an ombudsman, they also go much beyond that. [73]

The Public Protector is not a passive adjudicator between citizens and the state, and thus is not restrained to rely solely upon evidence that is placed before him or her before acting. The mandate is an investigatory one, requiring proactiveness in the appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an enquiry, and on no more than 'information that has come to his or her knowledge' insofar as it relates to maladministration, malfeasance or impropriety in public life. The Act repeats, in greater detail, the constitutional jurisdiction of the Public Protector over public bodies and functionaries, and it also extends that jurisdiction to include other persons and

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71 PP Act (note 3 above)

72 *2011 (4) SA 420 (SCA)) [2011] ZASCA 108; 422/10 (1 June 2011)* at para 9 to 11

73 The case refers to the Concise Oxford Dictionary meaning of 'ombudsman': 'An official appointed to investigate individuals' complaints against maladministration, especially that of public authorities'

entities under certain circumstances. In broad terms, the Public Protector may investigate, *inter alia*, any alleged improper or dishonest conduct with respect to public money, any alleged offence created by specified sections of the Prevention and Combating of Corrupt Activities Act 12 of 2004 with respect to public money, and any alleged improper or unlawful receipt of improper advantage by a person as a result of conduct by various public entities or functionaries.[74] [75] Although the conduct that may be investigated is circumscribed, the author submits that it is imperative to be cognisant of the fact that there is no circumscription of the persons from whom and the bodies from which information may be sought in the course of an investigation. The Act confers upon the Public Protector sweeping powers to discover information from any person at all. He or she may call for explanations, on oath or otherwise, from any person; require any person to appear for examination; call for the production of documents by any person; and premises may be searched and material seized upon a warrant issued by a judicial officer.[76] [77] Those powers once again emphasise that the Public Protector has a proactive function. The Public Protector is not expected to sit back and wait for proof but must actively make a concerted effort to uncover the truth.[78]

It is evident that, in order for there to be efficacy in the office, the Public Protector is required to act and take steps to fulfil its mandate as contemplated by *inter alia*, section 181 of the Constitution and the *Mail & Guardian* case. In the event of a failure to act, it is submitted that effectiveness will be lacking.

The case of *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector*

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74 PP Act (note 3 above; s6(4)(a)(iii))

75 ibid s6(4)(a)(iii). The offences are those referred to in 'Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2' of the Act.

76 ibid s7(4)

77 ibid s7A(1)

78 *Mail & Guardian* case (note 72 above) at para 11

(hereinafter "*DA v PP* case") has numerous noteworthy points which support this submission. [79]

Firstly, the case states that when the Public Protector receives complaints of impropriety or abuse of public office, she is obliged to use the powers vested in her.[80]

Secondly, it was explained that the powers include the power to call for assistance from organs of state, or to refer matters to other appropriate authorities, and to ensure that the complaint is properly and effectively addressed.[81]

Thirdly, the court highlighted that, in the event that an investigation is required, it should be conducted as comprehensively as possible in order to inspire public confidence that the truth has been discovered, that her reports are accurate, meaningful and reliable, and that the remedial action that she takes is appropriate.[82] That means, as held in the Constitutional Court in *Nkandla "nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case".*[83] Naturally, if the remedial action does not meet these criteria, it will not be appropriate.[84]

Another important point found in judicial precedent regarding the Public Protector's office is, in general terms, "to ensure that there is an effective public service which maintains a high standard of professional ethics, and that

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[79] *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector (11311/2018; 13394/2018) [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019)*
[80] ibid para 36
[81] ibid
[82] ibid
[83] ibid
[84] ibid

government officials carry out their tasks effectively, fairly and without corruption or prejudice."[85]

The failure to have regard to relevant facts and considerations can result in the irrationality of a decision. The case of *Democratic Alliance v President of South Africa* is relevant to this topic.[86] In this matter, the Constitutional Court devised a three-part test to determine when the ignoring of facts or considerations leads to irrationality: "whether the factors ignored are relevant"; "whether the failure to consider the material concerned is rationally related to the purpose for which the power was conferred"; and "whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."[87] [88] [89]

Appropriate remedial action as contemplated by the Constitution

The author submits that taking the appropriate remedial action is an indispensable function of the Public Protector. The specific action chosen by a particular incumbent and the manner in which said incumbent reacts to the scenario, especially within the context of an investigation, is highly telling of their ability to carry out the mandate of the office. Sections 182(1)(c) of the Constitution specifically empowers the Public Protector to take appropriate remedial action.[90] This provision is rationally linked to section 182(1)(a) and

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85 *South African Broadcasting Corporation Soc Ltd and others v Democratic Alliance & Others (39320/15)[2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522(SCA) (8 October 2016)* at para 26

86 *Democratic Alliance v President of South Africa* 2013(1) SA 249 at para 38

87 ibid

88 ibid

89 ibid

90 Constitution (note 2 above; s182)
Section 182 Functions of Public Protector. (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. (3) The Public Protector may not investigate court decisions. (4) The Public Protector must be accessible to all persons and communities. (5) Any report issued by the Public Protector must be open

(b) of the Constitution. This is so because, without an investigation as per section 182(1)(a) and the report of the improper conduct as contemplated by section 182(1)(b), the appropriate remedial action cannot exist beyond being a non sequitur. Therefore, these provisions work in harmony. It is also important to note that the use of remedial action is circumscribed by constitutional limitations and the boundaries of the Rule of Law. The Public Protector may not use these powers to infringe on the separation of powers. As previously highlighted, as legislated in terms of section 182(3), court decisions are outside the realm of the Public Protector's reach for this reason. The remedial action must provide a solution for an identified nuisance or problem. Therefore the onus falls upon the Public Protector to identify conduct that falls outside the Constitutional parameters and thereafter provide binding direction and/or directives as how such must be cured. The Public Protector, however, is not tasked with the issuing of sanctions but serves more of a problem-solving purpose. For example, the report titled, 'Secure in Comfort, Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of the President Jacob Zuma at Nkandla in the Kwazulu-Natal Province' ("Nkandla report") bears relevance.[91] [92] In this report, President Jacob Gedleyihlekisa Zuma (hereinafter "President Zuma") was found to be enriched by virtue of the upgrades that were implemented at his private residence. He was eventually ordered by the Constitutional Court in the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (hereinafter referred to as "the *Eff* case") to make payment of certain monies in accordance with a finding of inappropriate and/or unlawful spending.[93] The

to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

91 T Madonsela *Report No 25 of 2013/14* (2014)

92 ibid

93 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11*

function is one of *check,* rather than sanctions. This specific report will be discussed in further detail in the section dealing with Thuli Madonsela.

Independence and Impartiality

Section 181(2) of the Constitution seeks to protect the independence and impartiality of the Public Protector. This section provides that Chapter 9 institutions are independent and must act in a manner that is impartial. It further highlights that the institutions are only subject to the Constitution and the law, and emphasises that the institutions must perform functions without fear or prejudice.[94]

Chapter 3 – The Public Protectors

The following chapter will examine each Public Protector since the inception of the office until present day.[95] In doing so, their notable actions and victories, together with their failures, will be highlighted and critiqued.

Thereafter, their personality and ability will be examined to establish whether these factors affected their performance of the mandate. The examination of these elements will assist in determining how the personality of a particular Public Protector impacts upon the office and its effectiveness.

The analysis of certain incumbents is more detailed than that of others, however, this is line with the relevant contributions, negative or positive, of each Public Protector.

The following quote by Johnston sets a good foundation for the discussion of each incumbent to the office: -

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94 Constitution (note 2 above; s181(2))

95 From Baqwa (1st incumbent), Mushwana (2nd incumbent), Madonsela (3rd incumbent) and Mkhwebane (4th and present incumbent)

The office of the Public Protector also highlights the importance of appointments in politics... Since 1995 four public protectors have been appointed and served under this system, leaving strikingly different public impressions. The first two, Selby Baqwa (1995-2002) and Lawrence Mushwana (2002-9), were both former MPs and were criticized for being too embedded in the movement and too lenient on ANC figures against whom complaints were made (Mushwana more than his predecessor).

Thuli Madonsela (2009-16) had been an ordinary member of the ANC but declined political office after 1994, preferring public service. Her reports on Nkandla and state capture… gave her the status of rallying point for anti-corruption activists, and in the eyes of the constitution-supporting South Africans, whether the opposition, civil society or the ANC itself, she became a national heroine.

It is evidenced by this quote that politics is inextricably linked to the appointments that have thus far been made to the office. Accordingly, politics will be a focus in executing the exercise of analysing each incumbent. [96]

It is also apparent from this quote that the characteristics of the person who is appointed to the position is something that must be considered, hence the application of HCT to support the suggestions to follow in this dissertation.

Selby Baqwa[97]

Selby Baqwa was the first Public Protector of the country and was appointed by President Mandela. He held the position from 1995 until 2002.[98]

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[96] A Johnston *In the Shadow of Mandela: Political Leadership in South Africa* (2020) 246-247

[97] CV Baqwa (note 8 above)
His academic qualifications include, B. Juris, LLB Degree, Diploma in Maritime Law, a certificate in Constitutional Law, MBA Degree, Advanced Banking Diploma and an Advanced Management certificate from Harvard Business School as sourced from his Curriculum Vitae found in his application to the appointment of the Constitutional Court

[98] ibid

In Baqwa's own words in the Sarafina II report: -

A Public Protector can be described as an 'Officer of Parliament' and is appointed by the President on the recommendation of a joint sitting of both houses of Parliament for a term of seven years. In discharging the role, the Public Protector is required to act independently and impartially in a non-adversarial way. The Public Protector is neither an advocate for the complainant nor for the public authority concerned. He ascertains the facts of the case and reaches an impartial and independent conclusion on the merits. It has become necessary to emphasise the latter point because it would appear from what has happened in practice that there is a misconception in some people's minds that unless the Public Protector finds "in favour" of the complainant then his decision becomes questionable or he is plainly wrong. This is clearly incorrect because if the Public Protector's Office were to act in that manner then his independence would be academic or alternatively non-existent. This has particularly become clear from statements of those who are "aggrieved" when they say that because the findings of the Public Protector are not in accordance with their wishes then his credibility becomes questionable in their eyes. [99]

These sentiments from Baqwa captured the perspective of the office of the Public Protector and are an apt description of the office. However, Baqwa, despite his eloquence in describing the office, did not act in line with what was expressed in the Sarafina II Report. This conclusion is supported by Baqwa's legacy being one of mixed reviews. One such review describes him as "a decorated lawyer and a gentleman who was failed by soft nature who could not make miscreants sit up and listen".[100] Another review refers to him as "articulate, open urbane, inspiring confidence among staff, complainants and the general Public".[101]

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[99] Sarafina II Report (note 12 above)

[100] 'The nemesis of the crooked' *University of the Witwatersrand, Johannesburg* 26 July 2012, available at https://www.wits.ac.za/news/news-migration/home/alumni/news--events/alumni-news-items/alumni-2012-07/the-nemesis-of-the-crooked/, accessed 11 August 2020

[101] B Ka-Soko 'Shall we trash a top-class legacy and let public office rot?' *News24* 23 July 2019, available at https://www news24.com/citypress/voices/shall-we-trash-a-top-class-legacy-and-let-public-office-rot-20190723, accessed 11 August 2020

Baqwa's notable actions & victories

Being the first Public Protector, Baqwa faced inherent difficulties since there was a lack of precedent to provide him with guidance in carrying out this significant role. However, Baqwa nonetheless endeavoured to establish the office. One such endeavour is referred to by Gary Pienaar, a chief investigator at the Office of the Public Protector from 1997 to 2002, who stated that Baqwa had initiated an outreach program to raise awareness of the office, as well as expanded his investigative skills.[102]

According to the curriculum vitae Baqwa submitted when he applied for the position of Constitutional Court Judge in 2012, this forms part of his main achievement in his career since commencement in 1976, since he "*successfully developed the institution (Public Protector) from a city-based institution (8 employees) to a fully operational national organization with more than 200 employees with offices in all nine provinces*".[103] According to Baqwa, he can be credited with creating awareness and access to justice as it pertains to the Public Protector.

This is in line with the Asmal report which states that the Constitution requires that the Public Protector should be accessible to all persons and communities, and Baqwa achieved that considering the exponentiality of the growth.[104] His success is found in the delineated area of access to justice. The presence of the Public Protector in all the provinces provided a steady foundation for growth of the office and its ability to carry out its functions. This is a triumph and cannot be refuted, despite the shortcomings and/or failures by Baqwa which are discussed hereunder.

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[102] 'SA Public Protectors – The Legacies Part 1' *Corruption Watch* 14 April 2016, available at https://www.corruptionwatch.org.za/sas-public-protectors-legacies-part-one/, accessed 9 August 2020

[103] CV Baqwa (note 8 above, para 4 Main Achievements)

[104] Asmal report (note 30 above)

Baqwa's failures

During Baqwa's tenure, he received three complaints from Radio 702, the Sunday Times and the Democratic Party respectively. All of the complaints involved the failure to disclose the identity of the donor of R 10.5 million to the Department of Home Affairs in connection with the sequel of a well-renowned South African play, Sarafina II. The play and the Department had become interrelated due to the former's strong anti-Aids message aimed at the youth.[105]

The report had two primary objectives: discovering the name of the donor and establishing whether there was any legally acceptable justification for the unwillingness to disclose the name of the donor on the part of the Minister of the Department of Health (Nkosazana Dlamini-Zuma ("*Ms. Dlamini Zuma*")). [106] [107]

In response to the issues, Baqwa stated "I have looked at the law, including the relevant treasury regulations and there is nothing illegal that has been done by the Minister of Health." Baqwa has been criticised for his pandering to the executive, and in the process, to the ruling party. This response from him is supportive of such criticism. Arguably, the reason for leaning in its favour could be attributed to his membership of the ANC.[108] This conclusion is supported by comment from Professor Richard Calland of the University of Cape Town, who deemed Baqwa to be a "canny operator".[109]

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[105] 'Letter: Rot began with Sarafina' *Business Day* 8 December 2019, available at https://www.businesslive.co.za/bd/opinion/letters/2019-12-08-letter-rot-began-with-sarafina/, accessed 8 August 2020 accessed 20 August 2020

[106] Sarafina II report (note 12 above)

[107] ibid

[108] CV Baqwa (note 8 above)

[109] 'The highlights and lowlights of being Public Protector' *News24* 14 April 2016, available at https://www.news24.com/citypress/news/the-highlights-and-lowlights-of-being-public-protector-20160414, accessed 24 August 2020

One can see that Baqwa's personality, which included a disposition to pander to the political party he supported, caused him to fail in his performance of the mandate of the office of the Public Protector. Had HCT been applied to the application process with a focus on both hypotheses canvassed above, he most likely would have not been appointed to the position of Public Protector.

Effect of the character and ability of the Public Protector on the performance of the mandate

As aforementioned, Baqwa's hard work during his tenure developed the office in terms of reach and improved access to justice.[110] Despite the positive impact Baqwa achieved in this respect, his deferential approach to the executive as found in the Sarafina II report saw the office operate in a manner that pandered to the executive's interests. This is evidence of the importance of the application of HCT since a hardworking individual who was committed to developing the office still had major shortcomings. It is not sufficient for one to only consider a person for a position based on their diligence, without taking their personal traits into account.

It is therefore submitted that Baqwa's tenure, albeit successful in a procedural sense since he helped the office to establish a national footprint, he failed to

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[110] M Nyenti 'Access to justice in the South African social security system: Towards a conceptual approach' (2013) 46(4) *De Jure (Pretoria)* 901-916
"The concept of access to justice has evolved over the years from a narrow definition that refers to access to legal services and other state services (access to the courts or tribunals that adjudicate or mediate) to a broader one that includes social justice, economic justice and environmental justice. (Open Society Foundation for South Africa Access to Justice Round-Table Discussion (Parktonian Hotel, Johannesburg 2003-07-22). This broadening of concept was due to the belief that its confinement to the courts or tribunals that adjudicate or mediate was considered to be too narrow a definition, although courts or tribunals that adjudicate or mediate were a very important component of access to justice. It is argued that (in the case of South Africa): Justice is not the exclusive preserve of the courts. The Constitution … is designed to achieve justice in the broader sense including social justice and various functionaries including government, independent institutions, the private sector and indeed civil society take on a special responsibility for the achievement of justice and thus access to justice is more, much more than simply access to courts (Kollapen "Access to Justice within the South African context" Keynote Address to Access to Justice Round-Table Discussion)".

uphold the true nature of the Public Protector, in that he did not make a clear finding of wrongdoing in the Sarafina II report.

Lawrence Mabedle Mushwana[111]

Lawrence Mabedle Mushwana was appointed by President Mbeki.[112] He took office in 2002 and served until October 2009. Prior to his appointment as the Public Protector, he served as a member of the ANC Limpopo Provincial Executive from 1994 to 2002. In addition, he served as a member of the National Executive from 1999 until 2002, and was also the Deputy Chair of the National Council of Provinces.[113]

His appointment to the office of Public Protector was widely criticised, and particularly heavily by the Democratic Alliance ("*DA*").[114] Bazana and Reddy[115] state that Mushwana was criticised due to the fact that he held the position of Deputy Chairperson of the National Council of Provinces which caused opposition parties to question whether Mushwana's alliance with the ANC would bring the independence of the office in question, and whether Mushwana would not be able to act independently due to the said relationship.[116] [117] [118]

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[111] Profile L. Mushwana (note 9 above)
Mushwana holds a Bachelor of Laws from the University of Zululand, which he attended from 1972 to 1975. He further practised as an attorney for his own account under the name and style of Mushwana Attorneys.

[112] ibid

[113] ibid

[114] The DA was the official opposition to the ANC at the time.

[115] S Bazana, T Reddy (note 15 above)

[116] ibid

[117] ibid

[118] ibid

Mushwana's notable actions & victories

Mushwana continued to build on the outreach programme that had been implemented by his predecessor, Baqwa. This programme resulted in the provincial offices sending two (2) investigators out to small towns and townships for period for up to four (4) days at a time.[119] The community-based system accorded with the public awareness recommendations in the Asmal report, which stated the following, "*The Public Protector should actively explore ways and means of interacting with community-based organisations in order to gain access to the most disadvantaged and poor, especially in rural areas*."[120]

Mushwana's failures

According to the Asmal report, during the tenure of Mushwana, the office of the Public Protector conducted a very small number of proactive investigations. A total of forty-one initiatives were conducted in the five-year period from 2002 to 2007. The report further states that during 2006/2007, seven cases were finalised and a further eighteen cases carried to the following financial year. The increasing number of cases that were carried over to the following year was cited as a "cause for concern".[121]

In addition to the deficiencies described above, Mushwana's legacy is associated with incompetence, corruption and cronyism. Calland and Pienaar state that the installation of Mushwana as the Public Protector was an obvious attempt to weaken the institution. The staff appointments within the office of

[119] *News24* (note 109 above)
[120] Asmal report (note 30 above)
[121] ibid

the Public Protector which followed were ANC "old guards" who adopted a deferential approach to the executive.[122] [123]

Mushwana adopted a lenient approach towards the executive and this caused a culture shift towards being less independent and less predictable in the office of the Public Protector. This attitude transferred to his findings and his functions as the Public Protector. It is submitted in this work that such is evident from the Oilgate or Petrogate scandal (hereinafter referred to as "*Oilgate*"). The investigation stemmed from the *Mail and Guardian* case wherein the Mail and Guardian newspaper reported the story of how public funds were syphoned to the ANC.[124] After the news broke, the ANC was placed under a microscope regarding allegations relating to their financial dealings with energy company, Petroleum, Oil and Gas Corporation of South Africa ("*PetroSA*") and Imvume Management ("*Imvume*"). The allegations concerned an eleven million rand (R11 000 000.00) donation made by Imvume to the ANC in 2003. The payment was drawn directly from an advance payment of fifteen million rand (R15 000 000.00) made by PetroSA to Imvume for the purchase of oil condensate. Thereafter in January 2004, the company Glencore required payment for its supply of condensate which was allegedly paid for the second time by PetroSA. The payment to PetroSA had been duplicated. Effectively, the condensate was the product that had been paid for twice. In the circumstances, Imvume transferred the first payment to the ANC instead of utilising such for the payment to Glencore.[125] The conclusion that public funds had been used to possibly finance the ruling party

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[122] 'Old guards' *Merriam-Webster* undated, available at https://www.merriam-webster.com/dictionary/old%20guards, accessed 21 August 2021
Defined as "the conservative and especially older members of an organization (such as a political party)" or "a group of established prestige and influence".

[123] R Calland, G Pienaar 'Guarding the guardians: South Africa's Chapter Nine institutions' in D Plaatjies et al (ed) *State of the Nation: South Africa 2016 Who is in charge?* (2016) 65-91

[124] R Southall (note 13 above)

[125] R Davies 'DA complains about conflicting Oilgate reports' *Mail and Guardian* 29 March 2006, available at https://mg.co.za/article/2006-03-29/da-complains-about-conflicting-oilgate-reports/, accessed 22 August 2020

sparked debate in the country and eventually led to the Public Protector investigating the claim.

Two quotes of Poswa J in *M & G Media Limited and Others v Public Protector* that are noteworthy are as follows: -[126]

> Regarding the respondent (the Public Protector) declaring the affairs and conduct of Imvume as being outside his jurisdiction, I am similarly of the view that he misconstrued the manner in which he was approached to investigate those affairs. Although it is not disputed that Imvume is a private company, the applicants aver that it was being used by PetroSA as a front for the ANC.[127]

> In the current matter the very basis on which PetroSA made payment to Imvume was challenged by the applicants, contending that it was an improper siphoning of State funds from PetroSA to the ANC, via Imvume. Seeing that these are State funds the respondent was obliged to investigate that complaint.[128]

On review, the Supreme Court of Appeal found that the judgment of the North Gauteng High Court (per Poswa J) had correctly ruled that there was "no proper investigation" and set aside the report, '*Report on an Investigation into an Allegation of Misappropriation of Public Funds by the Petroleum, 0il and Gas Corporation of South Africa, trading as PetroSA, and matters allegedly related thereto*' ("*PetroSA* report").

At this juncture, a background of the *Mail and Guardian* case must be considered in order provide a complete view of the matter. In summary, during 2005, a national newspaper, namely the Mail and Guardian, published a series of articles which detailed various transactions and events in the scandal now called Oilgate.

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[126] *(2263/06) [2009] ZAGPPHC 98; 2009 (12) BCLR 1221 (GNP) ; [2010] 1 All SA 32 (GNP) (30 July 2009)*
[127] ibid para 39
[128] ibid para 41

The articles were written by two journalists employed by the Mail and Guardian, namely Mr. Steefaans Brummer ("*Mr. Brummer,*" who was the third respondent in the Mail and Guardian case) and Mr. Sam Sole ("*Mr. Sole,*" who was the fourth respondent in the Mail and Guardian case), assisted by Mr. Wisani Wa ka Ngobeni ("*Mr. Ngobeni*").

In respect of the articles, Nugent J stated that, "there can be no gainsaying that the revelations that were made in the article raised matters of profound public importance if they were true".[129] When the first article in the series was published, it was raised in the National Assembly. Consequently, the series of articles prompted the official opposition to the ANC in Parliament, namely the DA, to request on two separate occasions that the Public Protector expand its investigation to include further revelations detailed in said articles.

Mushwana acceded to the requests and thereafter produced a report within a short time frame. Mushwana called a press conference and released the report. The report was put together by Mushwana who had been assisted by Adv. C. Fourie ("*Fourie*").[130] According to Mushwana, the assistance had been necessitated by the importance and enormity of the matter. According to the office, it was the second most important report of the office. The report was tabled in the National Assembly and sparked debate, however, it was adopted by the majority of its members.

In considering the time taken to provide the report, Nugent J noted that it is meritorious for public functionaries to complete a task timeously, however, this is not the case if a speedy completion was effected at the cost of neglecting the actual task. He stated that the paucity of the investigation is the reason that the report was completed so expeditiously. He goes onto state that a greater part of the report focuses on why the issues did not fall within the Public Protector's mandate, and what remained was decided upon very

[129] *Mail and Guardian* case (note 72 above; para 1)
[130] ibid para 2

narrowly. The investigation was effectively undertaken as a formality and no impropriety was uncovered.[131]

The Mail & Guardian and its then editor, Ms. F. Haffajee who was cited as the first respondent in the case, together with Brummer and Sole, brought review proceedings against the Public Protector in the North Gauteng High Court. They sought orders setting aside the report and ordering the Public Protector to investigate and report afresh. The orders were granted by Poswa J.

It is submitted in those proceedings that there was no investigation of the primary complaint. Insofar as the Public Protector purported to investigate and report on associated matters, the investigation was so scant that it could not have reasonably been considered to have been an investigation at all. Further, there were no proper bases for any of the findings that were made.

Effect of personality and ability of the Public Protector on the performance of the mandate

After due consideration of the above case, it is submitted that the Oilgate scandal and PetroSA report confirm that Mushwana had a personality that was beholden to the ANC when it came to the position he held as Public Protector. *Prima facie,* the lack of objectivity evident from the PetroSA report is evidence that Mushwana was non-suited to hold the position. The consequences of Mushwana's approach and conduct is a clear example of how weak leadership can render the office of the Public Protector a paper tiger.

It is submitted that, despite Mushwana's efforts to expand public access, he cannot be considered an effective Public Protector. This is so as, when it came

[131] ibid para 3

time to hold those in power accountable, namely the ANC in its role as the executive, along with its cadres, Mushwana marched in lockstep with the agenda of the ANC and sought to sweep wrongdoing under the carpet. His personality as a lapdog, clearly caused the office to become ineffective.

It is clear that he was more interested in protecting the ANC than in his position as Public Protector, since he did not engage in launching many self-initiated investigations. He also seemed to have put together a report simply because he was required to do so, and not to actually uncover the truth of the matter. This is an indication of the importance of selecting the correct person for the job, and once again supports application of HCT.

Thulisile Nomkhosi Madonsela

Thulisile Nomkhosi Madonsela is a South African advocate and professor of law.[132] She was appointed by Zuma and she served as the Public Protector from 19 October 2009 to 14 October 2016.[133] She was the first woman to be appointed as the Public Protector. Her elevation to the office came by virtue of a unanimous vote by all the parties within Parliament.[134] She was an ordinary member of the ANC.[135]

Madonsela's notable actions & victories

Madonsela is decorated with the international and national acclaim of an ever-growing list of accolades and awards. Such include several honorary

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[132] 'Thuli Madonsela: Professor, Stellenbosch University; former Public Protector of South Africa' undated *World Justice Project*, available at https://worldjusticeproject.org/world-justice-forum-vi/thuli-madonsela, accessed 26 February 2022

[133] 'Thulisile Nomkhosi Madonsela' *South African History Online* undated, available at https://www.sahistory.org.za/people/thulisile-nomkhosi-madonsela, accessed 26 February 2022

[134] X Mbanjwa 'I will not be intimidated – Madonsela' *IOL* 23 October 2009, available http://www.iol.co.za/news/politics/i-will-not-be-intimidated-madonsela-1.462448#.U_8YUMWSyyg, accessed 26 February 2022

[135] *News24* (note 10 above)

doctorates of law from various universities including but not exhaustively from the University of Stellenbosch, the University of Cape Town, University of Fort Hare, Rhodes University, University of KwaZulu-Natal; South African Person of the Year, Daily Maverick, 2011; 100 Most Influential People in the World, Time Magazine, 2014; Integrity Award, Transparency International, 2014; Forbes African Person of the Year, 2016; Woman of Courage, Glamour Woman of the Year, 2014; FW De Klerk Goodwill Award, 2016; and Knight of the Legion of Honour, France's highest honour. [136] [137] [138]

In her role as Public Protector, Madonsela targeted and challenged corruption head on. She investigated complaints that were lodged regarding alleged use of public funds at President Zuma's private homestead situated in the town of Nkandla in KwaZulu-Natal, (the homestead is commonly referred to as Nkandla, and will therefore be hereafter referred to as "Nkandla residence"). The relevant report is the Nkandla report.[139]

In this Nkandla report, Madonsela found *inter alia* that: -[140]

- The implementation of the security measures installed by President Zuma failed to comply with the requirements and/or parameters as contemplated by the National Key Points Act 102 of 1980 ("*Key Points Act*") and the Cabinet Policy of 2003.

- The expenditure incurred by the State including *inter alia* buildings constructed and installed by the Department of Public Works at the

[136] 'Thuli Madonsela – Biography and Awards of a Renowned South African Advocate' *Entrepreneurs.ng* undated, available at https://www.entrepreneurs ng/thuli-madonsela/, accessed on 26 February 2022

[137] 'France bestows Knight of Legion of Honour on Professor Thuli Madonsela' *IOL* 21 April 2021, available at https://www.iol.co.za/capeargus/news/france-bestows-knight-of-the-legion-of-honour-on-professor-thuli-madonsela-a05c934d-cb9c-424f-a170-dd7470a45204, accessed on 26 February 2022

[138] 'UKZN confers honorary doctorate on former Public Protector' *University of KwaZulu-Natal* undated, available at https://ukzn.ac.za/news/ukzn-confers-honorary-doctorate-on-former-public-protector/, accessed 26 February 2022

[139] Nkandla report (note 91 above)

[140] ibid

request of the South African Police Services ("*SAPS*") and the Department of Defence ("*DOD*") went beyond what was reasonably required for President Zuma's security and was unconscionable, excessive and caused a misappropriation of Public Funds.

- The failure to properly utilise state funds is a contravention of section 195(1)(b) of the Constitution and the Public Finance Management Act 1 of 1999 ("*PFMA*").[141]

- The allegations that the excessive expenditure added substantial value to President Zuma's Nkandla residence at the expense of the State was substantiated and found to be true.

- President Zuma's immediate family was found to have benefitted improperly from the upgrade to the Nkandla residence. The clinic on the family's doorstep was found to be a benefit in perpetuity, as were the non-security comforts such as the swimming pool and an amphitheatre. The acts and omissions that allowed the upgrades constituted unlawful and improper conduct and maladministration.

- The conduct of the Department of Public Works ("*Public Works*") that led to the failure to resolve the issue of the items that had been highlighted for the owner's cost i.e. President Zuma's cost, including the failure to report back on the swimming pool question after the meeting held on 11 May 2011, and the further issue of the disappearance of the letter proposing an apportionment of costs, constituted improper conduct and maladministration.

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[141] Constitution (note 2 above; s195) Basic values and principles governing public administration. (1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: (a) A high standard of ethics must be promoted and maintained (b) Efficient, economic and effective use of resources must be promoted

- Public Works, Defence and SAPS officials failed to acquaint themselves with the authorising instruments relating to the implementation of the Nkandla projects. In addition, they failed to apply their minds and adhere to the supply chain management policy framework in respect of the procurement of goods and services for the Nkandla projects. These failures constituted improper conduct and maladministration.

- Funds were reallocated from the Inner City Regeneration and the Dolomite Risk Management Programmes of the Public Works. Service delivery programmes of the department were negatively affected. This was in violation of section 237 of the Constitution and constituted improper conduct and maladministration.[142]

- President Zuma must pay a percentage of the costs of the non-security comfort items.

- President Zuma failed to apply his mind to the contents of the Declaration of his private residence as a National Key Point and failed to implement certain measures at his own cost as directed and/or failed to approach the Minister of Police for a variation of the Declaration.

It is submitted that the Nkandla report is a success for the office of the Public Protector as it is a clear indication that anyone can be held accountable, even a President.[143] In making the finding, remedial action contemplated by the report provided four main directions in respect to President Zuma. Firstly, President Zuma was directed to take steps with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures

[142] Constitution (note 2 above; s237) Diligent performance of obligations – All constitutional obligations must be performed diligently and without delay.

[143] Nkandla report (note 91 above; para 11) This paragraph of the report provides that in addition to the remedial action binding the President, the Secretary of the cabinet, the National Commissioner of the SAPS, the Director General of the Department of Public Works and the Secretary of Defence were all equally bound by the remedial action provided by the Public Protector

implemented by Public Works at the Nkandla residence that do not relate to security, and which included the Visitors' Centre, the amphitheatre, the cattle kraal, chicken run, and swimming pool. Secondly, he was directed to pay a reasonable percentage of the cost of the measures as determined with the assistance of National Treasury, while ensuring that the Public Works apportionment document was taken into account. Thirdly, he was directed to reprimand the Ministers involved for the appalling manner in which the Nkandla project was handled and state funds were abused. Fourthly, he was further directed to report to the National Assembly with his comments and actions on the report within fourteen (14) days.

It is evident from the Nkandla report, which specifically targeted the President and effectively the ANC, that Madonsela did not shy away from performing the functions of the Public Protector based on any political affiliations, as no leniency or dusting of important information under the rug was evident in the report.

In addition to the Nkandla report and at the end of her tenure in October 2016, Madonsela issued her final report titled, 'State of Capture, Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to an alleged improper relationship and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses' (hereinafter "State Capture report").[144]

The State Capture Report was a consequence of a complaint submitted by Father Stanslause Muyebe (a Catholic Priest).[145] The report described *inter*

[144] T Madonsela *Report No. 6 of 2016/2017* (2016)

[145] C Collision 'Friars fall out over public protector' *Mail and Guardian* 20 October 2016, available at https://mg.co.za/article/2016-10-20-friars-fall-out-over-public-protector/, accessed 17 January 2021

alia widespread state capture.[146] This included evidence of the Gupta family having improper influence over President Zuma. The Gupta family were a wealthy, Indian-born family with business interests in South Africa, whose most prominent members are brothers Ajay, Atul, Rajesh "Tony" Gupta, and Atul's nephew Varun.[147]

Consequently, Madonsela directed President Zuma to appoint a judicial commission of inquiry which was to be headed by a Judge appointed by the Chief Justice, Mogoeng CJ. In response to the direction from Madonsela, President Zuma criticised the report by calling it "*Political Propaganda"*.[148] President Zuma challenged the matter in the Pretoria High Court and the matter was subsequently dismissed in December 2017.[149] Consequently, an inquiry into State Capture was launched wherein Judge Raymond Zondo (DCJ) had been appointed as the Chairperson by President Matamela Cyril Ramaphosa ("*President Ramaphosa*"). The commission of inquiry has come to be known as the Zondo Commission.[150]

The fact that Madonsela is responsible for two exceptionally significant reports is testament to her dedication to the impartiality and proper running of the office. It is this dedication and impartiality that makes someone suitable for the position. It is therefore submitted that, in applying HCT, these are the

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[146] J Crabtree, F Durand *Peru: Elite Power and Political Capture* (2017) 1 State capture is the illicit control of the state for personal gain by corporations, the military, politicians, through the corruption of public officials.

[147] L Prinsloo 'Inside the Guptas' uranium mine empire' *Sunday Times* 6 September 2015, available at https://www.timeslive.co.za/sunday-times/business/2015-09-06-inside-the-guptas-uranium-mine-empire/, accessed on 26 February 2022

[148] 'State capture report a 'political tool' – Zuma' *News24* 13 November 2017, available at http://www.news24.com/news24/SouthAfrica/News/state-capture-report-a-political-tool-zuma-20171113, accessed 17 January 2021

[149] *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)* para 1 to 3

[150] The Zondo commission is ongoing at the time of writing of this work. It will be further elaborated upon under the next section dedicated to Mkhwebane, considering that she is the present incumbent.

characteristics which an ideal candidate must have in order for optimum functioning of the office.

Madonsela's failures

Madonsela's tenure as Public Protector is far from synonymous with failure or negativity. It is of significance that, save for the criticism that she received from those identified in the Nkandla report and State Capture report, she is free from noteworthy criticism or shortcomings.

This aside, Madonsela is her own harshest critique. Piet Rampedi and Candice Bailey have reported that Madonsela admitted that she failed to "follow up on crucial recommendations made in her report in irregularities in the DA run Midvaal Municipality in Gauteng," and "instruct the Law Society to probe the lawyer (Andre Odendaal) she identified in her report."[151] [152] [153]

According to a whistle-blower from Midvaal, Mr. Kobus Hoffman, Madonsela allegedly withheld the release of the report for three (3) months to protect the DA in the local government elections and that she failed to follow up on the recommendations she made in her report. One such recommendation was that she was to forward the report to the Law Society of the Northern Provinces to investigate Odendaal, the attorney for Midvaal Municipality and debt collector for 30 years.[154]

While these shortcomings are noted, such are not of a gravity which is comparable to that of the other incumbents to the office.

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[151] P Rampedi, C Bailey, 'Protector admits errors' *IOL* 21 October 2021, available at https://www.iol.co.za/news/politics/protector-admits-to-errors-1407510, accessed on 2 February 2021

[152] ibid

[153] ibid

[154] ibid

Effect of personality and ability of the Public Protector on the performance of the mandate

It is submitted that Madonsela remained true to the office of the Public Protector. The Nkandla report and the State Capture report prove that an independent, motivated, and fearless public protector is required. It is further submitted that the said characteristics embody the ethos of the Public Protector and is in line with the Public Protector principles. Madonsela is the archetypal Public Protector.

Having regard to HCT, it is submitted that her ability for self-criticism is a commendable quality for a person holding such an office. Accordingly, this is an important attribute to consider when appointing a person to a position of such responsibility.

Busisiwe Mkhwebane

Busisiwe Mkhwebane is the fourth Public Protector and was appointed by President Zuma. She took office in 2016 and currently holds the position. Prior to joining the office of the Public Protector, she was a Prosecutor (1994), and she served legal administrative officer of the international affairs directorate (1998) thereafter. [155] In 1999, she joined the office of the Public Protector until 2005.[156] Thereafter, she joined the Department of Home Affairs as the director of refugee affairs, where she later became the chief director of asylum seekers manager in 2009.[157] From 2010 to 2014, she

[155] 'CV for Busisiwe Mkhwebane' *Parliamentary Information Centre, Parliament of the Republic of South Africa* undated, available at https://www.parliament.gov.za/storage/app/media/PRandNews/content/B_Mkhwebane 1.pdf, accessed 21 January 2021
Mkhwebane matriculated from Mkhephula Secondary School. She graduated with a BProc and then an LLB from the University of the North (now the University of Limpopo). Subsequently, she obtained a diploma in corporate law and a higher diploma in tax from the Rand Afrikaans University (now the University of Johannesburg). In 2010, she completed a Masters of Business Leadership at the University of South Africa.

[156] ibid

[157] ibid

worked as a counsellor in the Immigration and Civic Services in South Africa's embassy in China.[158] In 2014, Mkhwebane returned to South Africa to serve as a director on country information and cooperation management at the Department of Home Affairs. Thereafter, she worked as an analyst for the State Security Agency from July 2016 to October 2016, before she was finally appointed as the Public Protector. Her relationship with President Zuma was widely reported to be close and raised issues as to her appointment which was effectively the appointment of a civil servant with no experience in the functions of the Public Protector.[159]

Mkhwebane's notable actions & victories

Mkhwebane has no notable actions during her tenure as the Public Protector. Her tenure is better characterised by her failures and questionable conduct, which is dealt with under the section directly hereunder.

Mkhwebane's failures

Corruption before office

Prior to Mkhwebane taking office as the Public Protector, allegations were made by the Organised Crime and Corruption Reporting Project ("*OCCRP*") that Mkhwebane's bank account was flagged by the Hong Kong and Shanghai Banking Corporation Limited ("*HSBC*") for receiving a payment from the Gupta family in connection with a controversial railway contract with China South Rail.[160]

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[158] 'A profile of Adv Busisiwe Mkhwebane' *Politicsweb* 16 June 2019, available at https://www.politicsweb.co.za/documents/profile-of-advocate-busisiwe-mkhwebane, accessed 21 January 2021

[159] S Mkhwankazi 'How PP Busisiwe Mkhwebane went from 'nowhere' to centre of political storm' *IOL* 28 July 2019, available at https://www.iol.co.za/news/politics/how-pp-busisiwe-mkhwebane-went-from-nowhere-to-centre-of-political-storm-29983638, accessed on 21 January 2021

[160] A Hogg 'HSBC joins dots from Gupta-friendly public protector to Chinese rail company kickbacks' *BizNews* 31 July 2019, available at

The Ramaphosa report

Amongst the alleged blunders of Mkhwebane is her investigation and report titled, 'Report on an investigation into allegations of a violation of the Executive Ethics Code through an improper relationship between the President and Africa Global Operations (AGO) which was formerly known as BOSASA' ("Ramaphosa report").[161] This report tarnished the office of the Public Protector, as will be gleaned from the discussion which follows.

In the matter of *Public Protector and Others v President of the Republic of South Africa* ("*BOSASA* case"), litigation arose from a question that was posed to President Ramaphosa in Parliament by DA leader at the time, Mr. Mmusi Maimane ("Mr. Maimane").[162] Mr. Maimane raised issue with a payment of R 500 000.00, which was allegedly made to the President's son, Mr. Andile Ramaphosa ("Ramaphosa Junior"). The payment was allegedly made by the late Mr. Gavin Watson, who was Chief Executive Officer of Africa Global Operations ("*AGO*"), formerly known as BOSASA.[163]

President Ramaphosa responded by explaining that his son, Ramaphosa Junior, was involved in business with AGO, and that the payment was related to work which he had conducted for that company. A week later, the President wrote a letter to the Speaker of Parliament to explain that the answer he had given in response to the question which was posed to him was incorrect. He further explained that the payment was in fact made on behalf of the late Mr. Watson to the CR17 campaign.[164]

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https://www.biznews.com/global-citizen/2019/07/31/hsbc-joins-dots-from-gupta-friendly-public-protector-to-chinese-rail-company-kickbacks, accessed 21 January 2021

161 B Mkhwebane *Report No. 37 of 2019/2020 (2019)*

162 *(CCT 62/20) [2021] ZACC 19 (1 July 2021)*

163 'Ramaphosa Jr admits Bosasa paid him R2m' *Mail and Guardian* 27 March 2019, available at https://mg.co.za/article/2019-03-27-ramaphosa-jr-admits-bosasa-paid-him-r2m/, accessed 21 January 2021

164 ibid

Thereafter, two complaints were directed to the Public Protector. The first complaint was from Mr. Maimane regarding the relationship between President Ramaphosa and AGO. The second complaint was lodged by Mr. Floyd Shivambu, the Deputy President of the EFF. The said complaints pertained to an alleged breach of the Executive Ethics Code (Code) by the President. By virtue of the complaints, Mkhwebane was tasked with launching an the investigation into whether the President misled Parliament and breached the Executive Members' Ethics Act (Members Act) and the Code when he had given an incorrect answer to the question directed at him in Parliament. Consequent to the investigation, she concluded *inter alia* that the President deliberately misled the National Assembly in her Ramaphosa report.

Further, Mkhwebane found that the President exposed himself to a situation which involved the risk of a conflict between his official duties and his private interests, or used his position to enrich himself and his son through businesses owned by AGO. In consideration of the findings, the Public Protector took remedial action which had a direct effect on the President. The Public Protector directed the Speaker and the National Director of Public Prosecutions ("*NDPP*") to comply with the orders, which included *inter alia* that the Speaker of the National Assembly referred President Ramaphosa's violation of the Code of Ethical Conduct and Disclosure of Members' interest for Assembly and Permanent Council Members to the Joint Committee on Ethics and Members' interest within 30 days of receipt of the Ramaphosa report. The aforementioned bodies were to consider President Ramaphosa's conduct in terms of the provisions of paragraph 10 of the Code of Ethics.[165] Another recommendation made was put forth as a demand for publication of all donations received by President Ramaphosa because he was bound to declare such financial interests into the members registrable interests register

[165] Ramaphosa report (note 161 above; para 8.1.2, page 103)

in the spirit of accountability and transparency.[166] Such demand was also to be made within 30 days of receipt of the Ramaphosa report.

In response to the findings by Mkhwebane, President Ramaphosa launched an application to review and set aside the Public Protector's report in the High Court (Gauteng Division, Pretoria), wherein the court made the following important findings: -[167]

- the court had difficulty in accepting that the Ramaphosa report was correct. Further it found, *inter alia*, that the President had not misled Parliament;

- the court also found that Mkhwebane failed to understand the law on which the complaint was based and misapplied it. The question was whether the President violated the Code by wilfully misleading Parliament;

- the court also noted that Mkhwebane had replaced the word "wilfully" with "deliberately or inadvertently" in her report. In respect of Mkhwebane's view that the President had breached the Code by failing to disclose donations to the CR17 campaign, the court found that this was irrational on the part of the Public Protector and held that the legal prescripts upon which she drew her conclusion on the issue of money laundering was incorrect;

- As it pertains to the issue of remedial action, the High Court noted that, given its serious implications, the President's right to just administrative action placed an obligation on the Public Protector to forewarn the President, and to be given an opportunity to make representations, such being premised on the *audi alteram partem* rule.

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[166] ibid para 8.1.3, page 103.

[167] *President of the Republic of South Africa and Another v Public Protector and Others (55578/2019) [2020] ZAGPPHC 9*

Mkhwebane appealed the decision and filed an application for direct leave to appeal to the Constitutional Court in *Public Protector and Others v President of the Republic of South Africa*. The majority judgment by Jafta J confirmed *inter alia* that it was wrong to conclude that the President deliberately misled Parliament, and also incorrect to use "wilful" and "inadvertent" interchangeably when the two are mutually exclusive. The same applies to aspects of her remedial action, some of which were marked by overzealousness.[168] The majority judgment went on to confirm that the Public Protector "misconstrued the empowering legislation" as it relates to Prevention and Combating of Corrupt Activities Act (PCCA).[169] [170] The judgment stipulated that the Public Protector had "based her crucial findings on the e-mails which were delivered by anonymous persons at her offices, without disclosing them to the President and affording him the opportunity to make representations. Notably, the authenticity of those e-mails was not established. In relying on them in the circumstances of this case, the Public Protector violated the *audi* principle and her findings, based on the e-mails, and must be set aside."[171]

South African Reserve Bank

Apart from the error by Mkhwebane in respect of the Ramaphosa report, she was also levied criticism in respect of the South African Reserve Bank (SARB). In June 2017, Mkhwebane drafted proposed changes to the Constitution. The amendment sought to nationalise and remove the independence of the SARB, together with its mandate to keep inflation in control. The decision to draft the changes as described was carried out by Mkhwebane without considering the opinions or even consulting the relevant Government appointed economists and/or legal scholars. It is apparent that

[168] BOSASA case (note 162 above; para 202)
[169] 12 of 2004
[170] *BOSASA* case (note 162 above; para 112)
[171] ibid para 131

Mkhwebane effectively wanted to take control of SARB. Consequent to her drafting the changes, Mkhwebane ordered Parliament to effect certain changes to the Constitution.[172] Consequently, SARB instituted proceedings against Mkhwebane. The court found in favour of SARB in August 2017. Mkhwebane was found to have violated the separation of powers, which Mkhwebane challenged on appeal, which was dismissed.[173]

Absa Bank

In 2017, Mkhwebane created further issues for the office of Public Protector in the report titled "Alleged Failure to Recover Misappropriated Funds" ("*Bankorp* report"), which concerned Absa Bank.[174] [175] Consequent to the Bankorp Report, the High Court in Pretoria set aside the Public Protector's Order that directed Absa to refund R 1 125 000 000.00 to the government, which was a refund for financial assistance (or the bailout) that Bankorp Group, Absa's predecessor, had received from the government.[176]

According to the *Absa Bank Limited and Others v Public Protector and Others* ("*Absa judgment*"), the Public Protector's final report included findings to the effect that the Government and the Reserve Bank failed to recover R3,2 billion from Bankorp Limited/ABSA. [177] The report effectively made the conclusion that the public had been prejudiced by such.[178]

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[172] P De Wet 'The Holocaust denier, the public protector and the Reserve Bank' *Mail and Guardian* 21 June 2017, available at https:/mg.co.za/article/2017/2017-06-21-the holocaust-denier-the-public-protector-and-the-reserve-bank, accessed 21 January 2021

[173] L Omarjee 'SA Reserve Bank wins court bid against Public Protector' *Mail and Guardian* 15 August 2017, available at https://mg.co.za/article/2017-08-15-sa-reserve-bank-wins-court-bid-against-public-protector, accessed 21 January 2021.

[174] Mkhwebane, B Alleged Failure to Recover Misappropriated Funds, *Report No. 8 of 2017/2018* Pretoria: The Office of the Public Protector, (2017)

[175] *Mail and Guardian* (note 183 above)

[176] Y Groenewald 'Public Protector's ABSA bailout report set aside' *Mail and Guardian* 16 February 2018, available at https://mg.co.za/article/2018-02-16-public-protectors-absa-bailout-report-set-aside, accessed 21 January 2021

[177] *Absa Bank Limited and Others v Public Protector and Others* (48123/2017; 52883/2017; 46255/2017) [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP) (16 February 2018)

[178] ibid para 1

The court further found that Mkhwebane was dishonest when she was under oath and further that she acted in bad faith in the context of the Bankorp Report.[179] [180] The court even found that Mkhwebane did not conduct herself in a manner befitting of the Public Protector and that the proceedings were warranted in the circumstances. The court specifically stated that she did not have regard to her duties of office to be objective and honest, further stating she failed in adequately explaining the reasoning for her conduct.[181]

The court also made the definitive finding that the Public Protector had failed to make full disclosure. In her answering affidavit, she pretended to rely on economics averments when it was not the case. The court stated, that it was "displeasure with the unacceptable way in which she conducted her investigation as well as her persistence to oppose all three applications to the end."[182]

Consequently, Mkhwebane was ordered to pay a portion of the costs personally, *de bonis propriis*. The principle of awarding costs *de bonis propriis* is applicable only where a person acts or litigates in a representative capacity.[183] An order for such costs is not made without good reasons, and is made where conduct is improper or unreasonable or a party lacks *bona fides.*[184] [185] Insofar as it pertains to how the court dealt with the question of what is reviewable, it is noteworthy to emphasise that the principle of review in this instance sought to determine whether the functionary (the Public Protector) performed the function as required (the entrusted function), rather than whether such was correct. It is submitted that this is essential as it

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[179] ibid
[180] *News24* (note 14 above)
[181] *ABSA judgment* (note 177 above; para 120)
[182] ibid para 128
[183] *Moller v Erasmus* 1959 (2) SA 465 (T) 467; *Zalk v Inglestone* 1961 (2) SA 788 (W) 795
[184] *Janse van Rensburg and Others v The Master and Others* 2001 (3) SA 519 (W) 17
[185] *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679 at 691. See also *Estate Orr v The Master* 1938 AD 336; *Gangat v Bejorseth* 1954 (4) SA 145 (D)

correlates directly to a parties intention to *do the right thing*, which links to moral consideration and personality, which in turn links to the Human Capital theory and choosing the correct person for the position of Public Protector.

Vrede Dairy Project

In May 2019, Mkhwebane was criticised for her conduct in respect of the her report titled, "Allegations of maladministration against the Free State Department of Agriculture – Vrede Integrated Dairy Project"[186] ("*Vrede Report*") in the matter of *Democratic Alliance vs Public Protector and Council for the Advancement of the South African Constitution and the Public Protector* ("*Vrede* case"). [187] As per the presiding Judge Tolmay J, he found that the Public Protector had failed in her duties to investigate the project.[188] As a result, Tolmay J reviewed, set aside and declared the Vrede Report unlawful, unconstitutional and invalid."[189] Yet again, the court ordered Mkhwebane to pay a portion of costs due to her conduct.[190]

Pravin Gordhan

On 24 May 2019, the Public Protector released a report on an investigation into allegations of maladministration and impropriety in the approval of Mr. Ivan Pillay's early retirement with full pension benefits and subsequent

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[186] B Mkhwebane *Report No. 31 of 2017/2018* (February 2018)

[187] *Democratic Alliance vs Public Protector; Council for the Advancement of the South African Constitution and the Public Protector (11311/201); 13394/2018) [2019] ZAGPPHC 132; [2019] All SA 127 (GP); 2019 (7) BCLR882 (GP) (20 May 2019)*

[188] N Seleka, J Chabalala 'Vrede dairy farm project: Gauteng High Court rules Public Protector's report is unconstitutional' *News24* 20 May 2019, available at https://www news24.com/news24/SouthAfrica/News/vrede-dairy-farm-project-gauteng-high-court-rules-public-protectors-report-is-unconstitutional-20190520, accessed 21 January 2021

[189] *Vrede* case (note 187 above; para 152)

[190] J Chabalala 'Vrede dairy farm project: Public Protector's office and Mkhwebane to pay costs' *News24* 15 August 2019, available at https://www news24.com/news24/SouthAfrica/News/vrede-dairy-farm-project-public-protectors-office-and-mkhwebane-will-have-to-pay-costs-20190815 accessed 21 January 2021

retention by the South African Revenue Service ("*SARS report*").[191] According to the SARS report, Mkhwebane found that finance Minister, Pravin Gordhan, was guilty of violating the Constitution due to his alleged improper conduct as it relates to the early payment to Mr. Pillay, the former SARS commissioner.[192]

Consequent to the SARS report, proceedings were launched by Minister Gordhan, George Magashula and Visvanathan Pillay in *Gordhan and Others v Public Protector and Others.*[193] The SARS report recommended that the President take disciplinary action against Minister Gordhan and this is what was challenged in the aforementioned case.[194] Mkhwebane, however, denied that the SARS report was part of a politically motivated plot to discredit Minister Gordhan.[195] [196] [197]

Eventually, the court ordered *inter alia* that:-

(1) The Public Protector's decision to exercise jurisdiction over the complaint in terms of section 6(9) of the *Public Protector Act* is declared unlawful and invalid, and is thereby reviewed, and set aside.

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[191] B Mkhwebane *Report on allegations of an irregularity in the approval of early retirement with full pension benefits, Report No. 24 of 2019/2020* (2019)

[192] U Nkanjeni 'Pravin Gordhan vs Busisiwe Mkhwebane: what you need to know' *Sunday Times* 27 May 2019, available at https://www.timeslive.co.za/politics/2019-05-27-pravin-gordhan-vs-busisiwe-mkhwebane-what-you-need-to-know/, accessed 21 January 2021

[193] *(36099/2098) [2020] ZAGPPHC 777 (17 December 2020)*

[194] *News24* (note 188 above)

[195] S Lowman 'Trying to pin Gordhan, Mkhwebane sets her sights on four further compliants' *BizNews* 5 June 2019, available at https://www.biznews.com/leadership/2019/06/05/gordhan-mkhwebane-four-complaints, accessed 21 January 2021

[196] C Bhengu 'Busisiwe Mkhwebane takes aim at Pravin Gordhan in four telling quotes' *SowetanLive* 4 January 2019, available at https://www.sowetanlive.co.za/news/south-africa/2019-06-04-busisiwe-mkhwebane-takes-aim-at-pravin-gordhan-in-four-telling-quotes/, accessed 21 January 2021

[197] C Manyatela 'Mkhwebane pre-empts 'backlash' as she issues Gordhan with notice' *Eye Witness News* undated, available at https://ewn.co.za/2019/06/03/mkhwebane-pre-empts-backlash-as-she-issues-gordhan-with-notice, accessed 21 January 2021

(2) The Public Protector's Report No 24 of 2019/20, dated 24 May 2019, including the findings in paragraph 6 and the remedial action in paragraph 7, is declared unlawful and invalid and is thereby reviewed and set aside.[198]

Fitness to Hold Office

In November 2020, NA Speaker Thandi Modise ("*Speaker Modise*") appointed Nkabinde J, Dumisa Ntsebeza SC and Johan de Waal SC to an independent panel to consider and make findings as to whether there was *prima facie* evidence to suggest that Mkhwebane should be removed from office.

The report was presented to parliament in February 2021. The parliamentary spokesperson commented that "the panel concluded that there is substantial information that constitutes *prima facie* evidence of incompetence and examples of this included *prima facie* evidence demonstrating the Public Protector's overreach and the exceeding of the bounds of her powers in terms of the Constitution and the Public Protector Act as well as repeated errors of the same kind, such as incorrect interpretation of the law."[199]

Consequently on 15 March 2021, the NA voted that a committee should be set up to inquire into her fitness to hold office.[200] This is the preliminary step in a possible impeachment. She is the first head of a Chapter 9 institution to be subject to such a process, which is indicative of her inability to hold the office of Public Protector.[201]

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[198] (note 195 above; para 255)

[199] S Omphemetse "It's high noon for Busisiwe Mkhwebane, but don't be surprised if she survives' *Daily Maverick* 2 March 2021, available at https://www.dailymaverick.co.za/opinionista/2021-03-02-its-high-noon-for-busisiwe-mkhwebane-but-dont-be-surprised-if-she-survives/, accessed 17 March 2021

[200] B Phakathi 'Busisiwe Mkhwebane: first round goes to Ramaphosa' *Business Day* 16 March 2021, available at https://www.businesslive.co.za/bd/national/2021-03-16-busisiwe-mkhwebane-first-round-goes-to-ramaphosa/, accessed 17 March 2021

[201] J Gerber 'Mkhwebane is the first Chapter 9 head to face impeachment, after National Assembly vote' *News24* 16 March 2021, available at

Effect of personality and ability of the Public Protector on the performance of the mandate

It is evident from the conduct of Mkhwebane during her tenure as Public Protector and even before her appointment, that she is incompetent, biased and beholden to the Zuma faction within the ANC. She represents a completely unsuitable type of individual for the office of the Public Protector and her appointment is further evidence of the inherent weakness in the office as it pertains to the uniform application cadre deployment when making appointments. Her personality and/or choices have brought the office into disrepute, made it impotent, and tarnished the good reputation built by her predecessor, Madonsela. Mkhwebane, by comparison to her predecessor, is incompetent. Only time will tell if her incompetent practices will be replicated.

The example of her tenure in office highlights the necessity of the selection process to be urgently reviewed. Had HCT been applied, the fact that there were accusations of corruption against her would have been taken into account, especially since such related to the President. Further, her inexperience with the duties relating to the office would also have disqualified her from being considered for the position. It is clear from the judgments discussed above that a clear and concise understanding of the law is required or investigation reports will be off the mark in applying the relevant law. Therefore, it is submitted that a person who has a legal degree, yet has most of their experience in the realm of civil service, is not the most appropriate person for the office.

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https://www news24.com/news24/southafrica/news/mkhwebane-is-first-chapter-9-head-to-be-impeached-after-national-assembly-vote-20210316, accessed on 17 March 2021

Chapter 4: Public Protector, strengths and weaknesses

In this chapter, the strengths and weaknesses of the Public Protector will be examined and criticised in relation to how such impacts the effectiveness in carrying out of the mandated functions. In doing so, access to the Public Protector, infrastructure, ability to conduct process and cadres' deployment will be focal points.

Strengths of the Public Protector

Access to the Public Protector

Given the strides made by Baqwa, and to a certain extent, Mushwana, the Public Protector has national footprint. Therefore, *prima facie* access to the Public Protector is found in the establishment of offices in each province. Despite a building or centre being present, such is not tantamount to access to justice. Access is found by the policies in place and the ability of members of the public to seek redress.

Infrastructure to be effective

As demonstrated by Madonsela, the Public Protector has the ability to be effective. A motivated and independent person can be effective. Her tenure, in comparison to that of her counterparts, proves that the personality of the Public Protector plays a vital role in the effectiveness of the office. Thus, the selection process has been identified as the key element in ensuring effectiveness of the office.

Weaknesses of the Public Protector

Financial dependence

According to Woolman, the financial dependence of the Public Protector on the executive has been cited as the most dangerous threat to the efficacy of the Public Protector.[202] [203] This point has been recognised both in the South African and international context. [204] [205] The present reliance on the executive for funding is inconsistent with the independence that the Public Protector is supposed to have as contemplated by the Constitution.[206] Albeit that Woolman's submission is of great import to the extent that financial dependence is a real stumbling point for the Public Protector, the issue of selection and appointment requires closer oversight to ensure the effectiveness of the office, given the potential for cronyism and influence of the policy of cadres deployment.

In the judgment of *New National Party v Government of the Republic of South Africa & Others* ("*New National Party* case"), the Constitutional Court identified two essential elements that must be satisfied to ensure the financial independence of Chapter 9 Institutions such as the Public Protector. [207] Firstly, Chapter 9 Institutions must have sufficient funding to fulfil their constitutional mandate, and secondly, the funds must come from Parliament and not from the executive. [208]

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[202] M Bishop, S Woolman 'Public Protector' in S Woolman, M Bishop (ed) *Constitutional Law of South Africa* (2013) 24A-1 - 24A18

[203] ibid 24A-5

[204] H Corder *Report on Parliamentary Oversight and Accountability, Report to the Speaker of the National Assembly* (1999), available at www.pmg.org.za accessed 11 August 2020

[205] M Oosting "The Ombudsman and His environment: A Global View" in L Reif (ed) *The International Ombudsman Anthology* (1999) 1-13

[206] M Bishop, S Woolman (note 202 above; 24A-5)

[207] *New National Party v Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999) para 98

[208] ibid para 99

Woolman further states that the court's language in the aforementioned case suggests apprehension over the ability of Chapter 9 Institutions to discharge their oversight responsibilities if the executive retains the discretion to decrease (or increase) funding.[209] When questions of sufficiency of funds do arise, whether the executive is in fact the source of such funds will be considered in the court's assessment of the independence of the institution.[210]

It is for reasons of political autonomy and institutional independence that, in the *New National Party* case, the court found that Chapter 9 Institutions, such as the Public Protector, should be funded directly by Parliament.[211]

Procedural confusion and inability to implement policy

The Public Protector is empowered in terms of section 7(11) of the PP Act to make rules in respect of any matter referred to in section 7. The rules, however, are subject to the requirement that they must be published in the government gazette and tabled in the National Assembly. Procedurally, the prescribed rules are in the form of the General Notice 1085 in Government Gazette 33807 of 29 November 2010 (Draft Rules Relating to Investigations by the Public Protector and Incidental Matters) ("*Draft Public Protector Rules*") and the belated final version of the Rules, namely the Rules Relating to Investigations by the Public Protector and matters incidental thereto, 2018 ("*Final Public Protector Rules*").[212] [213] It is submitted that despite the

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[209] M Bishop, S Woolman (note 202 above; 24A-5)

[210] *Freedom of Expression Institute & Others v President, Ordinary Court Martial, & Others 1999 (2) SA 471 (C), 1999 (3) BCLR 261 (C)* at paras 23–25
The test for independence is whether the relevant body 'from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence.'

[211] H Corder (note 204 above; para 7.2) The report proposes that each Chapter 9 Institution's budget should be subject to a separate vote and that genuine independence requires the creation of a parliamentary oversight committee that takes responsibility for their efficacy.

[212] Provisionally approved by the EXCO on 31 March 2011

[213] Government Gazette 41903 of 14 September 2018 Government Notice 945 of 108 Rules Relating to Investigations by the Public Protector and matters incidental thereto, 2018

promulgation of the Final Public Protector Rules, the Public Protector at the time was incompetent in the sphere of rulemaking as contemplated by section 7 of the PP Act. Such is evident from the time line related to the Rules. The Public Protector was established on 1 October 1995.[214] The draft Public Protector Rules were published on 29 November 2010, some fifteen (15) years later.[215] A further seven (7) years thereafter, the final Public Protector Rules were gazetted.[216] The Public Protector took twenty-two (22) years to finalise the Rules that would govern its processes, which the office required by its own admission.[217] In the circumstances, a period of twenty – two (22) years is not acceptable nor a positive indication of competence in creating a highly necessary regulatory framework.

Cadre Deployment

The following sections deals with the issue of cadre deployment and how the practice impacts upon the Public Protector. The cadre policy in the ANC can

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[214] 'Background Paper: Public Protector South Africa' *Parliament of the Republic of South Africa* 20 May 2016, available at https://static.pmg.org.za/160601BackgroundPaperPublicProtectorSA.pdf, accessed on 26 February 2022

[215] 15 years, 1 month and 29 days

[216] 7 years, 9 months and 17 days

[217] T Madonsela, M Shai *Presentation to the Portfolio Committee on Justice and Constitutional Development* 28 February 2011, available at https://pmg.org.za/files/docs/120228Presentation_0.ppt accessed on 26 February 2022 In this presentation, Madonsela and Deputy Public Protector M. Shai proffer that the Draft Public Protector Rules seeks *inter alia* to:-

- promote consistency, transparency and collaboration and the provision of information with a view to ensure cooperation with organs of stated as contemplated by section 239 of the Constitution
- to facilitate support of remedial action
- enhance the relationship between the State/Public Protector and the Public
- to create a transparent, standardised procedure as it pertains to complaints to the Public Protector (with standardised time lines)
- to enhance accountability as it pertains to organs of state
- prevent secondary prejudice to complaints due to procedural delays and to place emphasis on resolving complaints
- to remove the perception that the Public Protector only investigates high profile matters
- to promote an understanding of findings

be traced back to the 1985 Kabwe conference.[218] [219] The National Deployment Committee was first formally established in 1998, implementing the 50th conference resolution.[220] The resolution called for the establishment of deployment committees throughout the ANC organisational hierarchy.[221]

According to Booysen, cadres deployment is strategic deployment of ANC cadres to specific positions, which played a vital role in the ANC taking control of the post liberation state and contributing to the deracialising of the public service. [222] [223] [224] Further, Boysen provides that cadre deployment was used to head key operations. The ANC's deployment committees on national and regional level played an important and critical role in the transformation of the South African State. The rationale by the ANC was to ensure that bureaucratic sabotage by reactionary forces intent on undermining the democratic order would be minimised. Centrally controlled deployment also helped the ANC as a neo-patrimonial gatekeeper over access to positions of state employment and promote a process in which ANC top structures would be widely recognised as the lawful and legitimate performers in these roles.

In the present context, all the incumbents to the office of Public Protector have been cadres. It is submitted that it is likely that the ANC used the policy to appoint their members to key positions, which policy has infiltrated the office of the Public Protector, wherein incumbents like Baqwa, Mushwana

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[218] '3rd National Consultative Conference, 16-25 June 1985, Kabwe, Zimbawe' *African National Congress website* undated, available at https://www.anc1912.org.za/national-consultative-conference_1985/, accessed on 26 February 2022. See Commission on Cadre Policy and Ideological Work at the National Consultative Conference at Kabwe, June l985 in which key elements of a cadre policy were identified.

[219] S Booysen *The African National Congress and the Regeneration of Political Power* (2011) 373

[220] ibid

[221] '50th National Conference, Resolutions, Role of State and Governance' *African National Congress website* 22 December 1997, available at https://new.anc1912.org.za/50th-national-conference-resolutions-role-of-state-and-governance/, accessed on 26 February 2022

[222] S Booysen (note 219 above)

[223] ibid

[224] ibid

and Mkhwebane who were sympathetic or biased in favour of the ANC or certain factions within the ANC.

As submitted above, Baqwa's response in the Sarafina II report favoured Ms. Dlamini Zuma and/or Zuma faction within the ANC, in light of his failure to make a clear finding on wrongdoing as to the donation of R10.5 million, which led to Calland calling Baqwa "a canny operator".[225]

It is put forth that Mushwana acted in a similar fashion, having bias and/or acting in a manner which showed that he was beholden to the ANC in respect of the Oilgate scandal. This is particularly true when regard is had for the fact that ANC members were not held accountable or cited to have syphoned money from the State, when such was clear (see section, Mushwana failure).

Further, it is submitted that Mkhwebane is perhaps the most appropriate example of a person who is unsuitable for the role of Public Protector. Firstly, she has shown bias in favour of the Zuma administration in the Ramaphosa Report, which was an outright failure. Further, given the number costs order granted against her in a personal capacity, it is quite apparent that she is unable to conduct her duties in an effective fashion. It is pertinent that she was a civil servant without the proper legal and/or investigative experience to head such an office. The courts comment on her reasoning is proof of this. Even though this is true, she still technically met the minimum requirements to hold office. Clearly, there is an issue with the selection process if the standard is not difficult to meet.

Selection of the Public Protector and influence of Politics

After due consideration, it is submitted that, save for Madonsela, each Public Protector marched in lockstep with the ANC to protect their interests. Baqwa protected Ms. Dlamini Zuma in the Sarafina II scandal due to his bias in

[225] *News 24* (note 109 above)

favour of the Zuma faction as aforesaid. Mushwana swept the PetroSA scandal under the rug, and Mkhwebane is unfit to hold office and guilty of flying her pro-Zuma flag, which is evidence of support of a specific faction within the ANC.

It is further submitted that only Madonsela acted in the manner prescribed and contemplated by the empowering legislation. Another point of note is that it is possible for the ANC or any ruling party to muster the necessary leverage by using cadre deployment to manipulate the selection and appointment process Public Protector. Since inception of the office, three of the four office bearers have provided examples of their questionable conduct and bias as described above.

It is submitted that this element of control in the form of cadre deployment must be removed, as this will then allow a better suited person to take office. Albeit that there are no guarantees that the person would not become a minion beholden to those in power after he or she has been elected, there is no solution to such a potential future problem.

Lack of performance measurement barometers

There is no formal process to measure the performance of the Public Protector, save for the account of the statistics of complaints received and cases finalised. The position is such that the actual effect and impact of the conduct of the Public Protector is largely unknown. While this is not a primary focus of this work, having mechanisms of this nature in place may assist in improving the effectiveness of the office in the long term.

Chapter 5: Solutions & Recommendations

In this chapter, solutions and recommendations will be proposed in pursuit of curing the present issues within the office of the Public Protector as its relates to the issues of selection and appointment, together with cadre deployment and the influence levied by politics. The contention submitted is that, if these latter-mentioned elements can be removed, the office will likely be more effective.

Human Capital theory & Appointment of Judges as the Public Protector

Human Capital theory

As mentioned in the methodology section, the application of HCT will be employed to find a solution for the problems that have been discussed. HCT emphasises the need for a thorough, objective recruitment and selection process in respect of the Public Protector. This theory states the importance of people's skills and overall competencies in a given task.[226] This in turn brings about the potentially overlooked importance of recruitment and selection.[227] If this theory is applied to the circumstances of the office of the Protector, the appointment of judges as the Public Protector is found as the solution to the present problem facing the office insofar as it pertains to the selection and/or appointment process.

The theory is also relevant since it is apparent that qualities such as impartiality and the ability to remain objective, which Madonsela had, is desirable for an appointee. Similarly, accusations of corruption suggest that a person will not be appropriate for a the role of anti-corruption watch-dog, such as in the case Mkhwebane. Since there are specific character traits that affect the efficacy of the office, HCT is an appropriate theory to apply.

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[226] S Bazana, T Reddy (note 15 above)
[227] ibid

Solution: Appointment and selection of the best suited Public Protector

At first blush, the HCT may appear as a common sense approach, without any ground breaking contribution to the selection and appointment of the Public Protector. However, if consideration is given to points hereunder, it is evident that a common sense approach and application of HCT to the selection process utilised by the office is required.

The Public Protector is required to be a fit and proper person. In addition and as discussed earlier, legislation identifies several categories that a person is required to fall under before they may be considered for the position of Public Protector.

With that taken into account, it is submitted that the present criteria for selection (human capital) leaves room for cadre deployment, political influence, and the appointment of incompetent people.

Firstly, the category allowing for an admitted attorney or advocate practising for ten years to take the position sets a low bar. There is no defined criteria to ensure that a person applying for the appointment has had the specific experience in areas that will suit the role of the Public Protector. For example, a person who had been practising in a Magistrates Court litigation practice may be appointed without due consideration of whether they will have the requisite skills.

The very same problem that exists with lawyers of a certain standing as described above, exists equally in application to the appointment of lecturers. An example would include those from a public administration/finance background and members of Parliament who may not have the relevant background in the forensic activities and/or investigations as required by the Public Protector.

Therefore, it is submitted that the issue of political connections and cadre deployment are more likely to be exploited at the level of advocates, attorneys, law lecturers, members of public administration and/or public finance. It is submitted that this is so due to access to these individuals being easier to attain when compared to serving judges, who serve away from the grasp of the public. As set forth above, and save for the third incumbent, Madonsela, each Public Protector has made decisions that were favourable to the ANC and this is therefore an important consideration.

It is important to note that the requirement that the overarching requirement for all of the categories from the PP Act is that the person appointed must be a fit and proper person.[228] Generally speaking, a fit and proper person is considered someone who has integrity, honesty, the possession of knowledge and technical skills, the capacity for hard work, respect for legal order, and a sense for equality and fairness.[229] However, the exercise into determining whether a person is fit and proper forms part of the selection process of judges, which requires that the candidate be fit and proper.[230] One may correctly propose the argument that legal practitioners (which would fall under the category of attorneys and advocates as per the PP Act) must also be fit and proper to be admitted and remain on the roll in terms of the governing legislation.[231] However, there are numerous legal practitioners who have been struck off the roll as can be seen from a cursory glance at the list of practitioners that are struck off or suspended that is published by the Legal Practice Council.[232] Conversely, the removal of judges from their positions is largely unheard of and no judge has been impeached since the dawn of democracy in South Africa.[233]

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[228] PP Act (note 28 above; s1A(3))

[229] *General Council of the Bar of South Africa v Jiba & Others 2017 (2) SA 122 (GP) (15 September 2016)* para 3

[230] Constitution (note 2 above; s174(1))

[231] Legal Practice Act 28 of 2014, s24(2)(c)

[232] Untitled *Legal Practice Council* undated, available at https://lpc.org.za/members-of-the-public/list-of-struck-off-lps/, accessed 26 February 2022

[233] Seleka, N 'Here is why the JSC voted for Hlophe to be impeached' News24 27 August 2017, available at https://www.news24.com/news24/southafrica/news/here-is-why-the-jsc-voted-for-hlophe-to-be-impeached-20210827, accessed 26 February 2022

Accordingly, the only suitable category is that of a High Court Judge. However, such should be further restricted to the extent that only judges who have held a position in the Supreme Court of Appeal or the Constitutional Court should qualify for the position of Public Protector.

This recommendation is based on the reasoning that, once judges are appointed to the said higher courts, they have been vetted by the Judicial Service Commission ("*JSC*") at least once, for their initial appointment and thereafter for the elevation to the higher court, be it the Supreme Court of Appeal or the Constitutional Court. It is acknowledged that cadre deployment may be an element when appointing judges through the JSC, however, it is submitted that, given the public scrutiny and consultative process involved, such is less likely. Further, it is submitted that after judges have served in their positions, they have presided over a plethora of matters, and their ability to reason, weigh evidence and make objective decisions increases, all while under public scrutiny and upholding their office.

As aforesaid in the section dealing with Madonsela, one quality that was identified as a requirement if HCT is applied is the ability to recognize when one is wrong. This was a quality found in Madonsela since she had criticized herself in that she had not followed up on certain tasks. Similarly, one can expect to find this quality among judges, since they have their matters taken on appeal. Since the judges in question, namely those of the higher courts, would most likely have had their decisions taken on appeal at some point in their career, and further, they then adjudicated over similar matters of appeal, they are appropriate for the position.

One criticism of the proposed solution is the fact that, while no judge has been impeached, there still stands the issue of the fact that recusal is a matter which

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At the time of writing, Judge Hlophe stood to potentially be the first judge impeached under the new dispensation, however, that matter is currently not finalised.

is allowed for in the South African context of our courts. The foundation for recusal has a constitutional basis which places the onus on the courts to apply the law impartially, and without fear, favour or prejudice.[234] It naturally flows therefrom that our law acknowledges that judges may potentially be biased under certain circumstances.

The case of *President of the Republic of South Africa v South African Rugby Football Union (''Sarfu* case") has direct application in addressing this criticism.*[235]* A brief background of the case is required to contextually understand the application. A judgment of the High Court set aside the decision of the President of South Africa at the time to appoint a commission of enquiry into certain financial aspects of South African Rugby Football Union.[236] The President, together with the other related parties, launched an application for leave to appeal with the Supreme Court of Appeal, however, before such could be heard, also lodged a late notice of appeal with the Constitutional Court.[237] Before the appeal was to be heard, the fourth respondent, Dr Louis Luyt, made an application for recusal to five members of the court, however, he had reasonable apprehension that all members of the court were biased against him, but he said he would nonetheless leave the recusal of the other judges to their own consciences. [238] [239]

What makes this case so relevant to the abovementioned proposed solution, is that the reasons for which the fourth respondent put forth for recusal is congruent with the current concerns that has been identified with the Public Protectors that have served thus far. The fourth respondent *inter alia* provides the following reasons for the recusal because of potential bias of the judges: two of the opposing litigants were leaders of opposing political parties, the

[234] Constitution (note 2 above; section 165(2) read with Schedule 2, Item 6)
[235] *1999 (4) SA 147 (CC)*
[236] ibid para 2
[237] ibid para 4
[238] ibid para 6. The five members were the President and Deputy President of the court, Kriegler J, Sachs J, and Yacoob J.
[239] ibid para 6

individual members of the court had been appointed by the President himself, and there was personal contact between the President and certain members of the court.[240] The respondent has a wide-ranging host of reasons against all the members collectively, as well each individual member of the bench.[241]

In respective of the judges collectively, the fourth respondent *inter alia* claimed that the impression had been created that the President had decided to launch the appeal in the higher Constitutional Court instead of the Supreme Court of Appeal because he believed it would be in his interests to be heard in a court in which he had appointed the bench; the court had ordered the respondents' heads of argument to be filed at a time that was impossible for the respondents to do so and which the court was well aware of; the condonation of the late filing of the President's and related parties' notice of appeal was opposed on good ground, yet the court still ordered the respondents to pay their own costs; the members of the bench would be adverse to finding against the President who was responsible for appointing them to such an honoured position; apart from Kriegler J, the remaining four had extremely close ties with the ANC.[242]

In respect of Chaskalson J, the fourth respondent *inter alia* claimed that the judge had responded to a letter of the respondent's attorney in a manner which illustrated bias in favour of the President; had represented the President's wife at the time on several occasions; had a private dinner with the President; had made the President a guest of honour at his son's wedding; his elder son had been added to the legal team of the President for the appeal; acted as advisor to the ANC.[243] In respect of Langa DP, the allegations were *inter alia* that the judge was an active member of the ANC; a founding member of the Release Mandela Committee KwaZulu-Natal; had previous served as an ANC representative; may have attended private dinners with the President.[244] In

[240] ibid para 11
[241] ibid para 16
[242] ibid para 17
[243] ibid para 18
[244] ibid para 19

respect of Sachs J, the respondent claimed that he held a position of leadership in the ANC; was on the National Executive Committee and the Constitutional Committee of the ANC; was a close friend of the late ANC President Oliver Tambo. Regarding Yacoob J, the fourth respondent claimed that he had played a pivotal role in assisting the ANC in the transition to democracy; involved in the defence of numerous political trials; was a member of the ANC's Technical Committee on Fundamental Rights leading up to the acceptance of the interim Constitution.[245] The averments made against Kriegler J are of no relevance at the respondent withdraw the recusal application in respect of this judge.[246]

As can be easily gleaned from the above discussion, the reasons which were put forward by the fourth respondent is congruent with the reasons for failure of the public protectors thus far, namely the political affiliations of the incumbent to the office with the ruling party. It is also important to note that, while a judge hears his or her own application for recusal, such can be taken to appeal in higher court. However, in this specific case, the Constitutional Court is the highest court and therefore the outcome could not be taken on appeal.[247] This is similar to the predicament we find ourselves in with the Public Protector, in that, if there is bias with the Public Protector, there is no higher person that could hear the matter. Further, the same conundrum that, if the judge does recuse him or herself, or hypothetically the public protector, the next appointee will just be hand-picked once more by the President, exists, since an acting judge will be appointed, in which the JSC will not have involvement.[248]

The court identified the test for recusal as a reasonable apprehension of bias which was comprised of the consideration of two factors, namely the nature of the judicial officer and the character of the bias.[249] Just from this alone, one

[245] ibid para 20
[246] ibid para 25
[247] ibid para 31
[248] ibid para 47
[249] ibid para 37-39

gauges that the HCT is something that is very important in South African courts, as these two considerations do in fact satisfy the purport of the theory. In respect of the first consideration, this case recognised that, while there is a presumption in favour of a judges bias and that judges are assumed to be people of conscience, such can be disproved with cogent evidence.[250] In respect of the second consideration, namely the character of bias, the court noted that absolute neutrality of an officer most likely cannot be achieved, however, it is appropriate for judges to bring their own life experiences to bring diverse perspectives to the table.[251] That being said, when it comes to judgment itself, "the reasonable person does demand that judges achieve impartiality in their judging."[252]

In applying the test to the circumstances of the case at hand, the court made several findings which have application to the topic of this dissertation.[253] In respect of choosing dates for filing of heads of argument that made it practically impossible for the respondents to file timeously, the court noted that the appellants had asked the court to assign dates at the courts convenience, and not at the convenience of the representative counsel. The fourth respondent did not object to this nor advise of a period which they would not be available.[254] The order that each party pay their own costs for the condonation application was well-reasoned in the unanimous judgment that was handed down, however, the fourth respondent failed to deal with the reasoning contained in that judgment.[255] In relation to the judges being unwilling to make adverse findings against the President who had bestowed the honour of holding such a position upon them, the court found that this was

[250] ibid para 40 - 41
[251] ibid para 42
[252] ibid para 42 - 43
[253] ibid para 45. The court identified two objective aspects for the test of apprehended bias, namely the person considering the alleged bias must be reasonable, and that the circumstances of the bias itself must be reasonable.
[254] ibid para 58
[255] ibid para 59

not necessarily true in that both the concurrence of the Cabinet and the Chief Justice was necessary in making certain appointments.[256]

Based on those findings, the court found that the apprehension of bias was unreasonable. Further, the court stated that: -

> Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them.[257]

This is noteworthy, as we can clearly see that the Public Protectors which have been criticised have not made findings that are sound in law.

Of special pertinence is the court's response to the political affiliations of the judges. The court found that it has never been seriously suggested that judges don't have such inclinations, and that one may not be fit to be a judge if he or she is too removed from society.[258] The Constitution itself conferred exclusive jurisdiction over certain political areas.[259] It can be gleaned from this that the judges appointed are trained specifically for this, whereas the other categories from which the Public Protector may be appointed, are not. The court specifically states that the drafters of the Constitution envisaged the highest court adjudicating on matters that would have political consequences, and that accordingly there are special provisions when appointing such a person when the JSC provides a list of nominees to the President.[260] The court definitively finds that a reasonable apprehension cannot be based on political activities prior to appointment.[261]

While the court goes onto to deal with each allegation against the specific judges, there are a couple which are noteworthy for this discussion. [262] One

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[256] ibid para 61 - 63
[257] ibid 68
[258] ibid para 70
[259] Constitution. Note 2 above, section 167(4) including deciding the constitutionality of a Bill, amendment of the Constitution and conduct of the President.
[260] *Sarfu* case. Note 246 above, para 73.
[261] ibid para 76
[262] ibid para 78 - 101

such finding is that it is not uncommon for leading members of the political and legal profession to be in contact.[263] Herein lies the direct difference between the other categories of persons from which the appointment may be made, and the judges of the highest court. The judges of the court are in the spotlight regarding such interactions, and are trained to deal and manage such relations. While most people, of course, have opinions, judges are trained by the nature of their very position to put these opinions aside and be objective. It was also highlighted that in respect of a judges son being part of the counsel, such person had appeared many times before the court, and it is an accepted practice for family members to do so historically.[264]

Accordingly, the application for recusal was dismissed. If in a case with such heavy allegations, the highest court of the land still finds that such members are not biased, this is the highest standard available for one to decide on. While the actual appeal was upheld, the judgment was well-discussed and made on sound legal arguments.[265]

Lastly, as final supporting evidence of judges not being biased in their judgments, it is important to note that the High Court recently dismissed an application by a judge who was found guilty of gross misconduct.[266] If judges are able to rule against their own, it is an indication that they are indeed unbiased and impartial.

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[263] ibid para 80
[264] ibid para 84
[265] *President of the Republic of South Africs and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11*
[266] K Maughan 'High Court dismisses Hlophe's misconduct challenge, paving the way for impeachment' *News* 24 5 May 2022, available at https://www news24.com/news24/southafrica/news/just-in-high-court-dismisses-hlophes-gross-misconduct-challenge-paving-the-way-for-impeachment-20220505, accessed 6 May 2022

Conclusion

After due thought, consideration and the weighing of various factors, it is submitted that selecting a Public Protector from a preselected group as described above is an apt solution for issues in the selection and appointment of the Public Protector. As discussed in this work, it is submitted that such is the solution despite the fact that Madonsela was effective. The present system of appointment and its weaknesses clearly yield *hit and miss* results displayed by the incumbents of the office to date, which had three public protectors, (Baqwa, Mushwana and Mkhwebane) representing the negative results stemming from the selection process, with Madonsela as the only positive and appropriate incumbent as detailed above.

Once appointed to the judiciary, appointees become more isolated and less accessible by the public and/or politics and are therefore less like to fall into the system and/or policy of cadre deployment. Judges not only need to be objective and without question to their integrity, but must actively demonstrate these characteristics to uphold the sanctity of the office. These values will be useful and appropriate for fulfilling a role as the Public Protector.

In essence, the HCT stipulates that the hiring of the best people for the job is necessary for an organisation to thrive. By selecting people from the apex courts, there is a greater likelihood of selecting people that have the necessary skills, qualifications, experience, moral compass and/or ethics to serve as a Public Protector. The individuals selected from these courts have spent years developing and utilizing a plethora of skills that are also suited to the role of Public Protector. This will benefit the country in that the office will be able to function as envisioned by the Constitution and the PP Act.

Bibliography

Fundamental Law

The Constitution of the Republic of South Africa, 1996

Statutes

Public Protector Act 23 of 1994
s1
s1A
s2A
s5
s7
s13
s181
s182
s183
s193
s194

Advocate General Act 118 of 1979

Legal Practice Act 28 of 2014
S24(2)(c)

Books

Levitas, R 'The future of thinking of the future,' in J Bird et al (ed) *Mapping the Futures: Local Cultures, Global Change* London: Routledge, (1995)

Currie, I, De Waal, J *The Bill of Rights Handbook* 6 ed Cape Town: Juta, (2013)

Gqubule, T *No Longer Whispering To Power The Story of Thuli Mandonsela* Johannesburg: Jonathan Ball Publishers, (2017)

Johnston, A *In the Shadow of Mandela: Political Leadership in South Africa* London: I.B. Tauris, (2020)

Calland, R, Pienaar, G 'Guarding the guardians: South Africa's Chapter Nine institutions,' in D Plaaitjies et al (ed) *State of the Nation: South Africa 2016 Who is in charge?* Cape Town: HSRC Press, (2016)

Crabtree, J, Durand, F *Peru: Elite Power and Political Capture* United Kingdom: Zed Books Ltd, (2017)

Bishop, M, Woolman, S 'Public Protector,' in S Woolman, M Bishop (ed) *Constitutional Law of South Africa* 2nd ed Cape Town: Juta Law, (2013)

Booysen, S *The African National Congress and the Regeneration of Political Power* Johannesburg: Wits University Press, (2011)

Oosting, M 'The Ombudsman and his environment: A Global View' in L Reif *The International Ombudsman Anthology* The Netherlands: Kluwer Law International, (1999) 1-14

Journal Articles

Southall, R 'The ANC for Sale? Money, Morality & Business in South Africa' (2008) 35(116) *Review of African Political Economy* 281-299

Osakede, KO, Jimakinwa, SO 'The Role of Ombudsman as a means of Citizen Redress in Nigeria' (2014) 3(6) *Review of Public Administration and Management* 120-128

Nyenti, M ‘Access to justice in the South African social security system: Towards a conceptual approach’ (2013) 46(4) *De Jure (Pretoria)* 901-916

Bazana, S, Reddy, T ‘A critical appraisal of the recruitment and selection process of the Public Protector in South Africa’ (2021) 19(0) *SA Journal of Human Resource Management, 1207*

Roux, T ‘Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference’ (2009) 20(2) *Stellenbosch Law Review* 258-285

Reports

Baqwa, S *Report in Terms of Section 8 (2) of the Public Protector Act 23 of 1994, Report No 2 (Special Report) Investigation Concerning the Sarafina II Donor* Pretoria: The Office of the Public Protector, (11 September 1996)

South Africa: The Office of the Public Protector *Annual Report 1 April 2008 – 31 March 2009* Pretoria: The Office of the Public Protector, (2009)

Asmal, AK *Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions: A Report to the National Assembly of the Parliament of South Africa* Cape Town: Parliament of South Africa, (2007) available at https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf

Madonsela, T *Secure in Comfort Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province, Report No. 25 of 2013/2014* Pretoria: The Office of the Public Protector, (March 2014)

Madonsela, T *State of Capture, Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to an alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses, Report No. 6 of 2016/2017* Pretoria: The Office of the Public Protector, (October 2016)

Mkhwebane, B *Report on an investigation into allegations of a violation of the Executive Ethics Code through an improper relationship between the President and Africa Global Operations (AGO) which was formerly known as BOSASA, Report No. 37 of 2019/2020* Pretoria: The Office of the Public Protector, (July 2019)

Mkhwebane, B Alleged Failure to Recover Misappropriated Funds, *Report No. 8 of 2017/2018* Pretoria: The Office of the Public Protector, (2017)

Mkhwebane, B *Report on allegations of an irregularity in the approval of early retirement with full pension benefits, Report No. 24 of 2019/2020* Pretoria: The Office of the Public Protector, (2019)

Mkhwebane, B *Allegations of maladministration against the Free State Department of Agriculture – Vrede Integrated Dairy Project, Report No. 31 of 2017/2018* Pretoria: The Office of the Public Protector, (February 2018)

Corder, H *Report on Parliamentary Oversight and Accountability, Report to the Speaker of the National Assembly of the Parliament of South Africa* Cape Town: Parliament of South Africa, (199) available at https://gsdrc.org/document-library/report-on-parliamentary-oversight-and-accountability/

Case Law

Minister of Home Affairs and Another v Public Protector of the Republic of South Africa (308/2017) 2018 ZASCA 15; [2018] 2 ALL SA 311 (SCA); 2018 (3) SA 380 (SCA) (15 March 2018)

Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)

The Public Protector v Mail and Guardian Ltd and Others 2011 (4) SA 420 (SCA) [2011] ZASCA 108; 422/10 (1 June 2011)

Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector (11311/2018; 13394/2018) [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019).

South African Broadcasting Corporation Soc Ltd and Others v Democr atic Alliance and Others (393/2015) [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (8 October 2015)

Democratic Alliance v President of South Africa 2013(1) SA 249

Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11

M & G Media Limited and Others v Public Protector (2263/06) [2009] ZAGPPHC 98; 2009 (12) BCLR 1221 (GNP) ; [2010] 1 All SA 32 (GNP) (30 July 2009)

President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)

Public Protector and Others v President of the Republic of South Africa (CCT 62/20) [2021] ZACC 19 (1 July 2021)

Absa Bank Limited and Others v Public Protector and Others (48123/2017; 52883/2017; 46255/2017) [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP) (16 February 2018)

Moller v Erasmus 1959 (2) SA 465 (T) 467

Zalk v Inglestone 1961 (2) SA 788 (W)

Janse van Rensburg and Others v The Master and Others 2001 (3) SA 519 (W)

Vermaak's Executor v Vermaak's Heirs 1909 TS 679

Estate Orr v The Master 1938 AD 336

Gangat v Bejorseth 1954 (4) SA 145 (D)
Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector (11311/2018; 13394/2018) [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (20 May 2019)

Gordhan and Others v Public Protector and Others

New National Party v Government of the Republic of South Africa and Others (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999)

Freedom of Expression Institute & Others v President, Ordinary Court Martial, & Others 1999 (2) SA 471 (C), 1999 (3) BCLR 261 (C) at paras 23–25

General Council of the Bar of South Africa v Jiba & Others 2017 (2) SA 122 (GP) (15 September 2016)

President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 (CC)

President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11

President of the Republic of South Africa and Another v Public Protector and Others (55578/2019) [2020] ZAGPPHC 9

Internet/online sources

Van Onselen, G 'South African Legal Dictionary: Cadre employment or cadre deployment" (30 August 2020), *Inside Politics*, available at https://inside-politics.org/2012/08/30/south-african-political-dictionary-cadre-employment-and-cadre-deployment/, accessed 11 August 2020

'Curriculum vitae of Mr. Baqwa' (no date), *Cape Bar Society of Advocates* available at https://capebar.co.za/attachments/Baqwa.pdf, accessed 25 June 2017

‘No, I would not return to the ANC - Madonsela’ *News24*, 8 November 2016, available at https://www.news24.com/News24/no-i-would-not-return-to-the-anc-madonsela-20161108, accessed 26 February 2022

‘Paper tiger’ *Grammarist* undated, available at https://grammarist.com/idiom/paper-tiger/, accessed 26 February 2022

Evans, S, Cowan, K ‘Analysis Insurgent or Independent: The many lives of Busisiwe Mkhwebane” *News24* 13 March 2020, available at https://www.news24.com/news24/analysis/analysis-insurgent-or-independent-the-many-lives-of-busisiwe-mkhwebane-20200312, accessed 26 February 2022

Niselow, T ‘Request for Mkhwebane to be struck off advocates roll for ‘lying under oath’ *Fin24* 22 July 2019, available at https://www.news24.com/fin24/Economy/just-in-request-for-mkhwebane-to-be-struck-off-advocates-roll-for-lying-under-oath-20190722, accessed 26 February 2022

‘Ombudsman’ *Lexico Powered by Oxford* undated, available at https://en.oxforddictionaries.com/definition/ombudsman, accessed on 26 February 2022

‘The nemesis of the crooked’ *University of the Witwatersrand, Johannesburg*, 26 July 2012, available at https://www.wits.ac.za/news/news-migration/home/alumni/news--events/alumni-news-items/alumni-2012-07/the-nemesis-of-the-crooked/, accessed 11 August 2020

Ka-Soko, B ‘Shall we trash a top-class legacy and let public office rot?’ *News24* 23 July 2019, available at https://www.news24.com/citypress/voices/shall-we-trash-a-top-class-legacy-and-let-public-office-rot-20190723, accessed 11 August 2020

‘SA Public Protectors – The Legacies Part 1’ *Corruption Watch* 14 April 2016, available at https://www.corruptionwatch.org.za/sas-public-protectors-legacies-part-one/, accessed 9 August 2020

‘Letter: Rot began with Sarafina’ *Business Day* 8 December 2019, available at https://www.businesslive.co.za/bd/opinion/letters/2019-12-08-letter-rot-began-with-sarafina/, accessed 8 August 2020 accessed 20 August 2020

‘The highlights and lowlights of being Public Protector’ *News24* 14 April 2016, available at https://www.news24.com/citypress/news/the-highlights-and-lowlights-of-being-public-protector-20160414, accessed 24 August 2020

‘Old guards’ *Merriam-Webster* undated, available at https://www.merriam-webster.com/dictionary/old%20guards, accessed 21 August 2021

Davies, R ‘DA complains about conflicting Oilgate reports’ *Mail and Guardian* 29 March 2006, available at https://mg.co.za/article/2006-03-29-da-complains-about-conflicting-oilgate-reports/, accessed 22 August 2020

‘Thuli Madonsela: Professor, Stellenbosch University; former Public Protector of South Africa’ undated *World Justice Project*, available at https://worldjusticeproject.org/world-justice-forum-vi/thuli-madonsela, accessed 26 February 2022

‘Thulisile Nomkhosi Madonsela’ *South African History Online* undated, available at https://www.sahistory.org.za/people/thulisile-nomkhosi-madonsela, accessed 26 February 2022

Mbanjwa, X 'I will not be intimidated – Madonsela' *IOL* 23 October 2009, available http://www.iol.co.za/news/politics/i-will-not-be-intimidated-madonsela-1.462448#.U_8YUMWSyyg, accessed 26 February 2022

'Thuli Madonsela – Biography and Awards of a Renowned South African Advocate' *Entrepreneurs.ng* undated, available at https://www.entrepreneurs.ng/thuli-madonsela/, accessed on 26 February 2022

'France bestows Knight of Legion of Honour on Professor Thuli Madonsela' *IOL* 21 April 2021, available at https://www.iol.co.za/capeargus/news/france-bestows-knight-of-the-legion-of-honour-on-professor-thuli-madonsela-a05c934d-cb9c-424f-a170-dd7470a45204, accessed on 26 February 2022

'UKZN confers honorary doctorate on former Public Protector' *University of KwaZulu-Natal* undated, available at https://ukzn.ac.za/news/ukzn-confers-honorary-doctorate-on-former-public-protector/, accessed 26 February 2022

Collision, C 'Friars fall out over public protector' *Mail and Guardian* 20 October 2016, available at https://mg.co.za/article/2016-10-20-friars-fall-out-over-public-protector/, accessed 17 January 2021

Prinsloo, L 'Inside the Guptas' uranium mine empire' *Sunday Times* 6 September 2015, available at https://www.timeslive.co.za/sunday-times/business/2015-09-06-inside-the-guptas-uranium-mine-empire/, accessed on 26 February 2022.

Rampedi, P, Bailey, C 'Protector admits errors' *IOL* 21 October 2021, available at https://www.iol.co.za/news/politics/protector-admits-to-errors-1407510, accessed on 2 February 2021

‘CV for Busisiwe Mkhwebane’ *Parliamentary Information Centre, Parliament of the Republic of South Africa* undated, available at https://www.parliament.gov.za/storage/app/media/PRandNews/content/B_Mkhwebane_1.pdf, accessed 21 January 2021

‘A profile of Adv Busisiwe Mkhwebane’ *Politicsweb* 16 June 2019, available at https://www.politicsweb.co.za/documents/profile-of-advocate-busisiwe-mkhwebane, accessed 21 January 2021

Mkhwankazi, S ‘How PP Busisiwe Mkhwebane went from ‘nowhere’ to centre of political storm’ *IOL* 28 July 2019, available at https://www.iol.co.za/news/politics/how-pp-busisiwe-mkhwebane-went-from-nowhere-to-centre-of-political-storm-29983638, accessed on 21 January 2021

Hogg, A ‘HSBC joins dots from Gupta-friendly public protector to Chinese rail company kickbacks’ *BizNews* 31 July 2019, available at https://www.biznews.com/global-citizen/2019/07/31/hsbc-joins-dots-from-gupta-friendly-public-protector-to-chinese-rail-company-kickbacks, accessed 21 January 2021

‘Ramaphosa Jr admits Bosasa paid him R2m’ *Mail and Guardian* 27 March 2019, available at https://mg.co.za/article/2019-03-27-ramaphosa-jr-admits-bosasa-paid-him-r2m/, accessed 21 January 2021

De Wet, P Phillp; Steyn, Lisa ‘The Holocaust denier, the public protector and the Reserve Bank’ *Mail and Guardian* 21 June 2017, available at https:/mg.co.za/article/2017/2017-06-21-the holocaust- denier-the public-protector- and- the reserve- bank, accessed 21 January 2021

Groenewald, Y 'Public Protector's ABSA bailout report set aside' *Mail and Guardian* 16 February 2018, available at https://mg.co.za/article/2018-02-16-public-protectors-absa-bailout-report-set-aside, accessed 21 January 2021

Seleka, N, Chabalala, J 'Vrede dairy farm project: Gauteng High Court rules Public Protector's report is unconstitutional' *News24* 20 May 2019, available at https://www.news24.com/news24/SouthAfrica/News/vrede-dairy-farm-project-gauteng-high-court-rules-public-protectors-report-is-unconstitutional-20190520, accessed 21 January 2021

Chabalala, J 'Vrede dairy farm project: Public Protector's office and Mkhwebane to pay costs' News24 15 August 2019, available at https://www.news24.com/news24/SouthAfrica/News/vrede-dairy-farm-project-public-protectors-office-and-mkhwebane-will-have-to-pay-costs-20190815 accessed 21 January 2021

Nkanjeni, U 'Pravin Gordhan vs Busisiwe Mkhwebane: what you need to know' *Sunday Times* 27 May 2019, available at https://www.timeslive.co.za/politics/2019-05-27-pravin-gordhan-vs-busisiwe-mkhwebane-what-you-need-to-know/, accessed 21 January 2021

Omphemetse S "It's high noon for Busisiwe Mkhwebane, but don't be surprised if she survives' *Daily Maverick* 2 March 2021, available at https://www.dailymaverick.co.za/opinionista/2021-03-02-its-high-noon-for-busisiwe-mkhwebane-but-dont-be-surprised-if-she-survives/, accessed 17 March 2021

'3rd National Consultative Conference, 16-25 June 1985, Kabwe, Zimbawe' *African National Congress website* undated, available at

https://www.anc1912.org.za/national-consultative-conference_1985/, accessed on 26 February 2022

'50th National Conference, Resolutions, Role of State and Governance' *African National Congress website* 22 December 1997, available at https://new.anc1912.org.za/50th-national-conference-resolutions-role-of-state-and-governance/, accessed on 26 February 2022

Untitled *Legal Practice Council* undated, available at https://lpc.org.za/members-of-the-public/list-of-struck-off-lps/, accessed 26 February 2022

Seleka, N 'Here is why the JSC voted for Hlophe to be impeached' News24 27 August 2017, available at https://www.news24.com/news24/southafrica/news/here-is-why-the-jsc-voted-for-hlophe-to-be-impeached-20210827, accessed 26 February 2022

Maughan, K 'High Court dismisses Hlophe's misconduct challenge, paving the way for impeachment' *News 24* 5 May 2022, available at https://www.news24.com/news24/southafrica/news/just-in-high-court-dismisses-hlophes-gross-misconduct-challenge-paving-the-way-for-impeachment-20220505, accessed 6 May 2022

Ethical clearance

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

29 June 2017

Adv Reece Renae Kisten (208508132)
School of Law
Howard College Campus

Dear Adv Kisten,

Protocol reference number: HSS/0931/017M
Project title: "Public Protector" or Paper Tiger? An analysis of the Public Protector's effectiveness in South Africa in the context of selected judgements

Approval Notification – No Risk / Exempt Application

In response to your application received on 27 June 2017, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

[redacted]
Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Mr David Hulme and Dr Stephen Pete
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

24 March 2022

Adv Reece Renae Kisten (208508132)
School of Law
Howard College Campus

Dear Adv Kisten,

Protocol reference number: HSS/0931/017M
Project title: "Public Protector" or Paper Tiger? An analysis of the Public Protector's effectiveness in South Africa in the context of selected judgements
Amended title: Public Protector or paper tiger? Personality, politics and performance: An analysis based on precedent

Approval Notification – Amendment Application

This letter serves to notify you that your application and request for an amendment received on 23 March 2022 has now been approved as follows:

- Change in title

Any alterations to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form; Title of the Project, Location of the Study must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

All research conducted during the COVID-19 period must adhere to the national and UKZN guidelines.

Best wishes for the successful completion of your research protocol.

Yours faithfully

[redacted]
.....
Professor Dipane Hlalele (Chair)

/dd