THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case 393/2015

In the matter between:

HLAUDI MOTSOENENG	First Appellant
THE MINISTER OF COMMUNICATIONS	Second Appellant
THE SABC	Third Appellant

and

THE DEMOCRATIC ALLIANCE	First Respondent
THE BOARD OF THE SABC	Second Respondent
THE CHAIR OF THE SABC	Third Respondent
THE PRESIDENT OF THE RSA	Fourth Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Fifth Respondent
THE PORTFOLIO COMMITTEE FOR COMMUNICATIONS	Sixth Respondent
THE PUBLIC PROTECTOR	Seventh Respondent

and

CORRUPTION WATCH	*Amicus curiae*

CORRUPTION WATCH'S HEADS OF ARGUMENT

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THE PUBLIC PROTECTOR'S REMEDIAL POWER

1. Section 182 of the Constitution confers the following powers on the 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."*

2. Corruption Watch submits that, on a proper interpretation of s 182(1)(c), the Public Protector has the power to make remedial orders binding on organs of state whenever it is appropriate to do so. We emphasize that this power is subject to the following limitations:

2.1. The Public Protector may only make remedial orders, that is, orders designed to remedy state misconduct.

2.2. She may only make remedial orders binding on organs of state. She does not have the power to make orders binding on anybody else.

2.3. She may only make a remedial order when it is "*appropriate*" to do so, that is, when the order is a fitting remedy for the state misconduct at which it is aimed.

2.4. The Public Protector also has the power to make non-binding recommendations. Whether a particular directive is a binding order or a non-binding recommendation, depends on its proper interpretation.

2.5. Parliament may regulate the exercise of the Public Protector's remedial power by national legislation. It has, however, not yet done so.

3. The proper interpretation of the Public Protector's remedial power depends, as always, on its language, context, history and purpose.

THE LANGUAGE AND CONTEXT OF THE POWER

4. The Constitution itself directly confers powers on the Public Protector in s 182(1). It does not merely require national legislation to do so. It says, on the contrary, that the Public Protector's constitutional powers may be "*regulated by national legislation*". It goes on to say in s 182(2) that the Public Protector "*has the additional powers and functions prescribed by national legislation*".

Parliament may thus regulate the exercise of the Public Protector's constitutional powers and supplement them by national legislation. But the primary source of her powers is the Constitution itself.

5. Section 182(1) confers three powers on the Public Protector: to investigate, to report and to remedy. There is no suggestion in the language of the section that any of them enjoys primacy over the others. All three are of equal status.

6. The mischief at which all three powers are directed is state misconduct, that is, *"any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice"*. The Pubic Protector may investigate state misconduct, report on her findings and take remedial action pursuant to her report.

7. Section 182(1)(c) entitles the Public Protector *"to take appropriate remedial action"*. It is in the first place a power to take action. The Public Protector has the power to take remedial action herself, that is, to provide the remedy. It goes much further than a mere power to recommend to others that they take remedial action. The Public Protector may determine the remedy and order its implementation.

8. She may take *"appropriate"* remedial action. It has the following implications:

8.1. An "*appropriate*" remedy is one that is suitable, proper or fitting.[1]

8.2. A remedy for the state misconduct must normally be effective to be appropriate. The Constitutional Court has often held that,

> "*An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.*"[2]

8.3. The Public Protector's power to take appropriate remedial action accordingly entitles her to determine a remedy and order its implementation. Once the Public Protector establishes state misconduct, she has the power to provide a remedy for it. Without the power to make binding orders on the state institutions involved, she cannot do so. She can investigate and report, but she cannot remedy or combat the wrongdoing. Mere recommendation is accordingly not appropriate. On the contrary, it renders the Public Protector ineffective to fight "*against bureaucratic oppression, and against corruption and malfeasance in public office*".[3]

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1 Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 97; Pharmaceutical Society of SA v Tshabalala-Msimang 2005 (3) SA 238 (SCA) para 76; Rustenburg Platinum Mines v CCMA 2007 (1) SA 576 (SCA) para 45(ii).

2 Fose v Minister of Safety and Security 1997 (3) SA para 69; Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC) para 74; Nyathi v MEC for Department of Health, Gauteng 2008 (5) SA 94 (CC) para 14; Mvumvu v Minister for Transport 2011 (2) SA 473 (CC) para 48.

3 Public Protector v Mail & Guardian 2011 (4) SA 420 (SCA) para 6.

9. This case vividly illustrates why it is necessary for the Public Protector to have the power to determine the remedy and order its implementation. A mere power of recommendation of the kind suggested by the High Court is neither fitting nor effective:

9.1. It is naïve to assume that organs of state and public officials, found by the Public Protector to have been guilty of corruption and malfeasance in public office, will meekly accept her findings and implement her remedial recommendations. That is simply not how guilty bureaucrats in our society respond. The defiance of the SABC and Mr Motsoeneng is more typical.[4]

9.2. The effect of the High Court's judgment is that, if the organ of state or state official rejects or ignores the Public Protector's remedial directions, the burden falls on the private litigant or the Public Protector to review the decision. In other words, non-compliance with the order of the Public Protector is the default position unless the High Court says otherwise.

9.3. The burden to enforce compliance with the Public Protector's remedial directions cannot be left to private litigants, who in many cases may

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4 The Public Protector confirms in her Answer vol 4 p 749 para 24 that *"This matter represents yet another example of what would appear to have become a trend amongst politicians and organs of state to simply disregard reports issued and remedial actions taken by the Public Protector"*.

have insufficient resources to litigate effectively against the state. It also cannot be left to the Public Protector, whose resources have not been allocated to cater for such an eventuality.[5]

9.4. In order for the office of the Public Protector to be effective it must have the power to take remedial action that is, in the first instance, binding on the organ of state or state official concerned. The burden of reviewing and setting aside the Public Protector's remedial directions must fall on the organ of state or state official.

10. The Public Protector's remedial power may be contrasted with that of the Human Rights Commission. Whereas the Public Protector may *"take appropriate remedial action"*, s 184(2)(b) merely allows the HRC *"to take steps to secure appropriate redress where human rights have been violated"*. The Public Protector has the power to take remedial action. The HRC, on the other hand, may merely *"take steps to secure"* appropriate redress.

11. The Public Protector is given the power to take remedial action pursuant to her investigation of and report on state misconduct.[6] It is backed-up by the duty imposed on all other organs of state by s 181(3) of the Constitution to *"assist*

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5 Record: Vol 5, p 887, para 28.8, Public Protector's affidavit filed in support of her application for leave to appeal.

6 that is, *"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"*.

and protect" the Public Protector[7] to ensure her *"independence, impartiality, dignity and effectiveness"*. This duty reinforces the understanding of the Public Protector's remedial power to allow her to make orders binding on all organs of state.

12. It does not confer judicial powers on the Public Protector. She merely operates as the *"complaints office"* of the state. Citizens may complain to her of state misconduct. She investigates the complaint and reports on it. If she finds malfeasance, she has the power to take appropriate remedial action, that is, to put it right on behalf of the state. She determines the remedy and orders its implementation. She does so as the state institution mandated by the Constitution to investigate, report on and cure malfeasance in the state.

13. The Public Protector's remedial power may seem wide and open-ended but s 182(1) renders it subject to regulation by national legislation. Our courts have held that, where a public authority is given the power to "regulate" an activity, it may organise that activity in any way it sees fit, short of prohibiting the activity altogether.[8] This means that, short of prohibiting the Public Protector's power to make binding orders pursuant to a finding of maladministration, parliament may regulate any aspect of the exercise of her remedial powers.

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7 and the other Chapter 9 institutions.

8 Lawrence Baxter *Administrative Law* p.406; R v Williams 1914 AD 460; Gründlingh v Phumelela Gaming and Leisure 2005 (6) SA 502 (SCA) para 1.

THE HISTORY OF THE POWER

14. The history of the Public Protector's remedial power under s 182(1)(c) of the Constitution reinforces our interpretation.

15. The predecessors of the Public Protector are the Advocate General and the Ombudsman. The office of the Ombudsman, like the Advocate General that came before it, had the power under the Ombudsman Act 118 of 1979 to investigate reports of maladministration, but not to take remedial action directly. In other words, the legislature expressly limited the Ombudsman's remedial powers. He had to refer his findings to other institutions for remedial action.[9]

16. The office of the Public Protector was established by s 112(1)(b) of the Interim Constitution. That section, echoing the Ombudsman Act and the Attorney General Act before it, merely stated that it was competent for the Public Protector, pursuant to an investigation:

> *"to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by –*
>
> *(i) mediation, conciliation or negotiation;*

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9 Section 5(4) provided that the Ombudsman could, whether or not he or she held an inquiry, and at any time before, during or after such inquiry:

(a) if he is of the opinion that the facts disclose the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions;

(b) if he deems it advisable, refer any matter which has a bearing on mismanagement to the institution, body, association or organization affected by it or make an appropriate recommendation regarding the redress of the prejudice referred to in section 4 (1) (d) or make any other recommendation which he deems expedient to the institution, body, association or organisation concerned.

(ii) advising, where necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances."

17. Sections 6(4)(b), (c) and (d) of the Public Protector Act, which was enacted pursuant to the Interim Constitution, mirror the language of s 112(1)(b) of the Interim Constitution.[10]

18. The Final Constitution, however, conferred different and harder remedial powers on the Public Protector. Instead of empowering the Public Protector to *"endeavour"* to resolve a dispute, or *"rectify any act or omission"* by *"advising"* a complainant of an appropriate remedy as under the Interim Constitution, the Final Constitution empowers the Public Protector to *"take appropriate remedial action"*.

19. This is a deliberate and significant shift in language. It changes the Public Protector's role from an advisory one into an active and direct one. Unlike her predecessors, the Public Protector does not merely report and recommend that other institutions take action following an investigation. The Public Protector has an express additional power - she takes remedial action. The judgment a quo says that "*the scheme of ss 181 and 18s of the Constitution contains no provision that the findings and remedial action required by the Public Protector*

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10 The Interim Constitution was enacted on 27 April 1994. The Public Protector Act was enacted on 25 November 1994.

are binding and enforceable…". Viewed in the context of its legislative history, the contrary is true.

20. After the adoption of the Final Constitution, parliament amended the Public Protector Act to bring it into line with the Final Constitution.[11] However, the provisions relating to the Public Protector's remedial powers remained unchanged. In other words, s 6(4) of the Public Protector Act reflects the language of s 112(1)(b) of the Interim Constitution rather than s 182(1)(c) of the Final Constitution.[12]

21. The critical change that s 182(1)(c) heralded is a useful aid to its proper interpretation. The meaning the court *a quo* accords to s 182(1)(c) seems more appropriate to 112(1)(b) of the Interim Constitution.

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11 See, in this regard, the Public Protector Amendment Act, 113 of 1998. The Public Protector Act was also later amended by the Public Protector Amendment Act 22 of 2003.

12 The Public Protector Amendment Acts did not amend s 6(4) at all.

THE PURPOSE OF THE POWER

22. The Public Protector's constitutional mandate is aimed at state misconduct.[13] It is fitting that this should be so because the Constitution sets high standards for the exercise of public power by state institutions and officials:

22.1. The founding values of the Constitution include accountability, responsiveness and openness in government in s 1(d).

22.2. Section 7(2) obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

22.3. Section 33(1) requires administrative action to be lawful, reasonable and procedurally fair.

22.4. Section 41 requires all organs of state to respect and co-operate with one another and *inter alia* to "*provide effective, transparent, accountable and coherent government for the Republic as a whole*".

22.5. Section 195 requires all organs of state and public officials to adhere to high standards of ethical and professional conduct.

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13 *"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"*.

22.6. Section 217 provides that all procurement in the public sector must be done in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

23. This is the context in which s 182 mandates the Public Protector to investigate, report on and remedy state misconduct. As this court observed in Mail & Guardian,

> *"The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee."*[14]

24. This objective of policing state conduct to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat corruption as the Constitutional Court noted in Glenister[15]:

> *"Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and*

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14 Public Protector v Mail & Guardian 2011 (4) SA 420 (SCA) para 6.

15 Glenister v President of the RSA 2011 (3) SA 347 (CC).

effective manner. As it serves the public, it must seek to advance development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of state contract for goods and services."[16]

"Section 7(2) (of the Constitution) casts an especial duty upon the State. It requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. It is uncontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The State's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms."[17]

25. The purpose of the Public Protector's powers is thus to provide "*what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office*". The Public Protector is empowered to protect the public against malfeasance in public office by investigating complaints of state misconduct, reporting on it and providing remedies for it.

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16 Glenister para 176.

17 Glenister para 177.

26. To achieve this purpose, the Public Protector must have the power to determine the remedy and order its implementation. She cannot realise the constitutional purpose of her office if other organs of state may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action itself. She may determine the remedy and order its implementation. All organs of state are bound by her orders.

THE HIGH COURT'S INTERPRETATION

27. The High Court interpreted s 182(1)(c) to mean that the Public Protector "*may take steps to redress improper or prejudicial conduct*".[18] But that, with respect, begs the question. The question is what steps she may take and whether they are binding on others. The High Court concluded that the Public Protector cannot take any remedial action. She may merely recommend to others what action they should take. They are not bound by her recommendations and may ignore them as long as they have some rational basis for doing so. The High Court seems to have based this conclusion on the following considerations.

28. First, it said that the Public Protector's functions are not adjudicative. Unlike courts, she does not hear and determine causes.[19] That is of course so. We accept that the Public Protector cannot make orders binding on anybody other

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18 High Court judgment para 51.

19 High Court judgment para 50.

than organs of state. But her mandate is to act as the complaints office of the state and, when she finds malfeasance, *"to take appropriate remedial action"* on behalf of the state. She thus has the power to determine the remedy on behalf of the state.

29. Second, the High Court noted that, unlike an order of court, a finding by the Public Protector is not binding on others. *"If it were intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so".*[20] But the Constitution does say that the Public Protector has the power *"to take appropriate remedial action"* on behalf of the state. It necessarily entitles her to determine a remedy and order its implementation. The power to take appropriate remedial action would be denuded of any content if it allowed the Public Protector to do no more than to recommend to others what remedial action they should take.

30. The High Court said in the third place that the Public Protector's power to take appropriate remedial action *"is inextricably linked"* to her investigatory powers. That may be so but there is no suggestion that the one is merely an ancillary adjunct to the other. The Public Protector has the power and duty to investigate, to report and to remedy.

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[20] High Court judgment para 51.

31. Fourth, the High Court likened the Public Protector to an ombudsman and said that "*ombudsmen ordinarily do not possess any powers of legal enforcement*".[21] But the comparison breaks down at s 182(1)(c) of the Constitution. It says that, whatever the functions of ombudsmen might otherwise be, our Public Protector has the power and duty "*to take appropriate remedial action*". Other ombudsmen might not be vested with such a power. But the appropriate inference, if any, is that our Constitution intends our Public Protector to have remedial powers beyond those of ordinary ombudsmen.

32. Fifth, the High Court said that the Public Protector Act "*contains no provision that the findings and remedial action required by the Public Protector are binding and enforceable*". But the relevant provisions of the Public Protector Act gave effect to the Interim Constitution which did not authorise the Public Protector to take appropriate remedial action. Section 182(1)(c) of the Constitution conferred a new remedial power on the Public Protector. The fact that the Public Protector Act has not been amended to recognise and regulate the exercise of this new power does not detract from its constitutional underpinning.

33. After it had concluded that the Public Protector does not have the power to make binding remedial orders,[22] the High Court followed the judgment of the

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21 High Court judgment paras 54 to 57.

22 High Court judgment para 58.

English Court of Appeal in Bradley[23] in holding that an organ of state may disregard a recommendation of the Public Protector only if it does so rationally.[24] But Bradley does not in any way assist in the interpretation of our Public Protector's constitutional power *"to take appropriate remedial action"*. It concerned the powers of the Parliamentary Commissioner under the Parliamentary Commissioner Act 1967. The Parliamentary Commissioner undertakes investigations at the request of members of parliament. It does not have any remedial powers. Section 10 of the Parliamentary Commissioner Act merely requires it to report on its investigation to the member of parliament who laid the complaint, the department of state against whom the complaint was laid and, if any injustice has been done, to the Houses of Parliament.[25] The function of the Parliamentary Commissioner is in other words confined to the reporting function of our Public Protector under s 182(1)(b) of the Constitution. The Parliamentary Commissioner does not have any equivalent of our Public Protector's power to take appropriate remedial action in terms of s 182(1)(c) of the Constitution. The Bradley judgment is consequently not of any assistance in the interpretation and understanding of our Public Protector's remedial powers.

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23 R (Bradley) v Work and Pensions Secretary [2009] QB 114 (CA).

24 High Court judgment paras 66 to 73.

25 Section 10 of the Parliamentary Commissioner Act 1967; Bradley paras 46 to 49.

CONCLUSION

34. We submit with respect that the High Court's interpretation of the Public Protector's remedial power denudes it of any meaningful content and defeats its purpose. The language, history and purpose of s 182(1)(c) make it clear that the Constitution intends the Public Protector to have the power to provide an effective remedy for state misconduct. It includes the power to determine the remedy and order its implementation.

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19 August 2015