IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
HELD AT BLOEMFONTEIN

CASE NO: 393/2015
CASE NO. *A QUO*: WCHC 12497/2014

In the matter between:

THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	First Appellant
THE MINISTER OF COMMUNICATIONS	Second Appellant
HLAUDI MOTSOENENG	Third Appellant

and

DEMOCRATIC ALLIANCE	First Respondent
THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	Second Respondent
THE CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD	Third Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fifth Respondent
THE PORTFOLIO COMMITTEE FOR COMMUNICATIONS OF THE NATIONAL ASSEMBLY	Sixth Respondent
THE PUBLIC PROTECTOR	Seventh Respondent

HEADS OF ARGUMENT ON BEHALF OF THE PUBLIC PROTECTOR

TABLE OF CONTENTS

INTRODUCTION

1 The appellants appeal against the whole of the judgment and order of Schippers J in the Western Cape High Court dated 24 October 2015 ("the High Court judgment").

2 The Public Protector's involvement in the proceedings on appeal is limited to the following interrelated issues:

2.1 Whether the findings and remedial action of the Public Protector are binding and enforceable.

2.2 The extent and scope of the powers afforded to the Public Protector by section 182 of the Constitution and the Public Protector Act 23 of 1994 ("the Public Protector Act").

2.3 The correctness of the test set by the Court *a quo* in terms of which an organ of state may choose not to follow the findings and remedial action taken by the Public Protector.

3 The facts of this matter demonstrate areas of concern regarding the state of constitutionalism in South Africa. The concept of constitutionalism requires an appreciation by both State and individuals, that the Constitution and the rule of law limit the powers of Government and provide avenues for the enforcement of such limitation. This protects citizens from arbitrary rule. However, constitutionalism also requires that Government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations.

4 Chapter 9 institutions are some of the avenues created by the Constitution to ensure that Government is accountable and responsible. In this way, Chapter 9 institutions strengthen and support democracy.

5 In the context of the Public Protector, the debate regarding the extent of the institution's powers against organs of State, and the enforcement of remedial action taken in terms of Sec 182 of the Constitution, raises core issues in South African jurisprudence on accountability and the rule of law.

6 The failure by the SABC and, the Minister, to challenge the report of the Public Protector in Court by instituting review proceedings, and instead disregarding it, is not consistent with the principle of accountability and the concept of constitutionalism. The belated attempt to justify non-adherence in the answering affidavits, as though by means of a collateral defence, is equally inappropriate. It infringes the principle of legality for an organ of State to resort to the shield of a collateral challenge against a Chapter 9 institution.[1]

7 In these submissions, we address the following issues in turn:

7.1 The legislative history to the Public Protector Act;

7.2 The importance of Chapter 9 institutions in the constitutional framework and the proper interpretation of the powers of the Public Protector;

7.3 The manner in which findings of the public protector may validly be set aside;

7.4 The findings of the High Court; and

[1] *Merafong City Local Municipality v Anglo Gold Ashanti Ltd* [2015] ZASCA 85 (28 May 2015), par [17]

7.5 The right of the Public Protector to participate in these proceedings.

8 We deal with each of the above issues in turn.

THE LEGISLATIVE HISTORY OF THE PUBLIC PROTECTOR ACT

9 In the pre-constitutional era, the South African Ombudsman, referred to as the Advocate-General[2] operated in a legal system characterised by Parliamentary sovereignty.

10 When the interim Constitution came into effect, this changed. The interim Constitution became the supreme law binding on all organs of State at all levels of Government.[3] The office of Public Protector was established by means of Sec 110 of the Interim Constitution.[4] The powers of the Public Protector under Sec 112 of the Interim Constitution were more limited than those under the final Constitution. Such powers were essentially to investigate complaints of Government malfeasance, to mediate disputes or to refer matters to the Prosecuting Authority.[5]

11 Sec 112(1) of the interim Constitution provided that the Public Protector shall *"in addition to any powers and functions assigned to him or her by any law, be competent"* to investigate, resolve or refer complaints of Government malfeasance.

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[2] Act 118 of 1979

[3] Constitutional Principle IV, Schedule 4, Interim Constitution, Act 200 of 1993

[4] The interim Constitution took effect on 27 April 1994

[5] Sec 112 of Act 200 of 1993

12 Up to 25 November 1994 the powers of the Public Protector were therefore determined by the provisions of the Interim Constitution, read with the Ombudsman Act, 118 of 1979, as amended by Act 55 of 1983 and Act 104 of 1991.

13 On 25 November 1994 the Public Protector Act, No. 23 of 1994 came into effect. The powers of the Public Protector therein contained were, and are, more consistent with the investigative and conciliatory role played by the Public Protector under the interim constitution. This however changed when the final Constitution was passed, in which the powers of the Public Protector were extended not only to investigate and report on malfeasance, but to take remedial action.

14 The Public Protector's powers are not to be equated with that of an ombudsman. They "*go much beyond that*".[6]

15 The Constitution envisages that "*members of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action*".[7]

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[6] *Public Protector v Mail and Guardian Ltd and Others* 2011 (4) SA 420 SCA at para 9

[7] *Ex parte Chairperson of the Constitutional Assembly: In re Certificaton of the Constitution of the Republic of South Africa, 1996* 1996 (6) SA 744 (CC) at para 161

THE CHAPTER 9 INSTITUTION'S PARTICULAR IMPORTANCE IN OUR DEMOCRACY AND THE PROPER INTERPRETATION OF THE PUBLIC PROTECTOR'S POWERS

16 The Public Protector is one of the State institutions that "*strengthen constitutional democracy in the Republic*".[8] In terms of the Constitution, the Public Protector (and the other Chapter 9 Institutions) -

16.1 are independent;[9]

16.2 must be assisted and protected by other organs of state "*to ensure [its] independence, impartiality, dignity and effectiveness*".[10]

17 The office of the Public Protector is one of the mechanisms of constitutional control aimed at establishing and maintaining an "*efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public*".[11]

18 The Public Protector (and other Chapter 9 Institutions) provides a "protective framework for civil society" to ensure accountability, responsiveness and openness.[12]

19 In *Public Protector v Mail & Guardian Ltd and Others,*[13] this Court was required to consider the powers of the Public Protector. With respect to the importance of the institution, it held:

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[8] Section 181(1) of the Constitution

[9] Section 181(2) of the Constitution

[10] Section 181(3) of the Constitution

[11] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at paras 133 – 134

[12] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) at para 25 ("the second certification judgment")

> *"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]

20 The Public Protector's powers and functions are set out in section 182(1) of the Constitution. They are:

> *"(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."*

21 Importantly, the Constitution envisages that the Public Protector may investigate, report and take appropriate remedial action.

22 Section 182(2) provides that the Public Protector has the additional powers and functions prescribed by national legislation. There are various pieces of legislation that provide additional powers to the Public Protector.[15] However, for present purposes the Public Protector Act is the most relevant. The

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[13] 2011 (4) SA 420 (SCA)

[14] at para 6

[15] See for example:
Protected Disclosures Act 26 of 2000 – Sec 8(1)(a);
Promotion of Access to Information Act, No. 2 of 2000 – Sec 83(3)(h) and Sec 84(b)(x);
Commission for Gender Equality Act 39 of 1996 – Sec 11(1)(e);
Executive Members' Ethics Act 82 of 1998 – Sec 3 and Sec 4;
Electoral Commission Act 51 of 1996 – Sec 6(3)(d);
Special Investigating Units and Special Tribunals Act 74 of 1996 – Sec 5(6)(b);
National Archives and Records Service of South Africa Act 43 of 1996 – Sec 6(4)(e);
National Nuclear Regulator Act 47 of 1999 – Sec 51(5)(a)(ii);
National Environmental Management Act 107 of 1998 – Sec 31(5);
Housing Consumers Protection Measures Act, No. 95 of 1998 – Sec 22.

Preamble to that Act makes clear that the powers in the Act are ancillary to those in the Constitution:[16]

23 Section 6(4) of the Public Protector Act further provides that the Public Protector shall be competent:

> *"to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by-*
>
> *(i) mediation, conciliation or negotiation;*
>
> *(ii) advising, where necessary, any complainant regarding appropriate remedies; or*
>
> *(iii) any other means that may be expedient in the circumstances"*

24 What is clear from the above, is that the powers of the Public Protector to investigate, report and take remedial action are original constitutional powers which are required to be respected by organs of State, spheres of Government and the Executive. The notion of remedial action being taken by the Public Protector was referred to as an important component of the institution in the Certification of the Constitution.[17] It is the only Chapter 9 institution empowered by the Constitution to take remedial action.

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16 "WHEREAS sections 181 to 183 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provide for the establishment of the office of Public Protector and that the Public Protector has the power, as regulated by national legislation, 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;

AND WHEREAS sections 193 and 194 of the Constitution provide for a mechanism for the appointment and removal of the Public Protector;

AND WHEREAS the Constitution envisages further legislation to provide for certain ancillary matters pertaining to the office of Public Protector;" (emphasis added)

[17] *Certification of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly* 1996 (4) SA 744 (CC) at para 161, p 823.

25 Moreover, the breadth of the powers of the Public Protector is referred to by this Court in the *Mail and Guardian* case referred to above:

> *"[9] 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. The Public Protector is not a passive adjudicator between citizens and the State, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring proaction in 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' of maladministration, malfeasance or impropriety in public life.*
>
> *[10] ...*
>
> *[11] But, although the conduct that may be investigated is circumscribed, I think it is important to bear in mind 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; he or she may require any person to appear for examination; he or she may 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. Those powers emphasise once again that the Public Protector has a proactive function. He or she is expected not to sit back and wait for proof where there are allegations of malfeasance, but is enjoined to actively discover the truth."*[18] (emphasis added)

The Binding Effect of Remedial Action

[18] At paras 9-11

26 On a proper construction of the Constitution and the Public Protector Act, it is submitted that it is clear that the findings and remedial action prescribed by the Public Protector are binding and enforceable.

27 Our Constitution requires a purposive approach to statutory interpretation.[19] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others,*[20] Ngcobo J stated:

> *"The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights."*

28 A purposive approach would establish that the institution of the Public Protector is a constitutional safeguard of clean government. If the findings and remedial action contained in a report of the Public Protector could be ignored or second guessed by government or organs of State, this would undermine this safeguard and the rule of law.

29 The fact that the remedial action of the Public Protector has binding legal effect is further supported by a proper construction of section 182 of the Constitution read with section 6 of the Public Protector Act.

30 The power of the Public Protector under the Constitution, to take remedial action is not to be conflated with the power under the Public Protector Act to

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[19] *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at paras 21, 25, 28 and 31; *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at paras 22 – 23. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paras 17 – 26

[20] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 91

make recommendations. The Public Protector clearly enjoys both the power to recommend and the power to take remedial action.[21]

31 A construction of the Constitution and the statute which finds otherwise, would, it is respectfully submitted, render the institution of the Public Protector ineffective as a constitutional bulwark against government malfeasance. The Public Protector Act must be read consistently with the Constitution.[22]

32 An interpretation of the Public Protector's powers as imposing a binding remedy, is -

32.1 in accordance with the ordinary meaning of "to take appropriate remedial action" which connotes the active imposition of a remedy to correct an identified problem;

32.2 consistent with the constitutional principle of accountability;[23]

32.3 consistent with the constitutional principle of effectiveness and the need to be responsive to people's needs;[24]

32.4 in accordance with the purpose served by the Public Protector as being a pro-active investigator (and not a "passive adjudicator") who provides a "protective framework for civil society".[25]

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[21] A recommendation in terms of the Public Protector Act merely constitutes a species of remedial action as envisaged in Sec 182(1)(c) of the Constitution

[22] *Van Rooyen and Others v The State and Others* (Federal Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) at para 180

[23] *Minister of Safety and Security v Von Duivenboden* 2002 (6) SA 431 (SCA) at para 20; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at paras 77 – 78 ("Metrorail")

[24] *Metrorail* (supra) at para 78; Sections 41(11)(c) and 195(11)(b) of the Constitution read with Section 181(3)

THE MANNER IN WHICH FINDINGS OF THE PUBLIC PROTECTOR MAY VALIDLY BE SET ASIDE

33 To the extent that the Appellants wish to challenge the findings in the Report or the remedial action contemplated therein, they ought to have sought to review and set aside the Report. They have not done so. Instead, they simply alleged that the factual findings in the Report are incorrect.

34 In a judgment of the Constitutional Court,[26] Cameron J, on behalf of the majority held that it was not open to government to "*take shortcuts*" in relation to invalid administrative action. Instead, government is required to challenge what it considers to be an invalid administrative act and seek to have it set aside.

> *"When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed."*

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[25] *Public Protector v Mail and Guardian* (supra) at para 9; Second Certification judgment (supra) at para 25

[26] MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC) at para 65; See also Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para 37

35 Cameron J also held that it was not open to government to delay in challenging what it thought to be an invalid administrative act. In *Kirland*, the period of delay before government sought to set an invalid administrative act aside was seven months. In the present proceedings, the Appellants chose to do nothing to set the Report aside for six months until the DA sought to enforce the Report. This simply does not comply with the standard that government must be held to, as made clear by the Constitutional Court.

36 The obligation on government directly to challenge invalid administrative action is equally applicable to public authorities and organs of State such as the SABC. It is an incident of the rule of law.[27] A failure to approach the Court to set aside the Public Protector's report and in fact ignoring it, is in breach of the principle of legality.[28]

37 The fact that the Appellants seek to discredit the Public Protector's Report in their answering affidavit in the High Court rather than through a formal review application, contributes to a culture of undermining the effectiveness and independence of the Public Protector. This undermines the Constitution, which requires active steps by organs of State to strengthen the effectiveness of the Public Protector. Moreover, it precludes the Public Protector from defending her findings in the proper manner. It is therefore submitted that this Court ought not to countenance the Appellants' attempts to indirectly "review" the findings and remedial actions taken in the Report.

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[27] In *Oudekraal*, par [37] the SCA stated: "*And this case illustrates a further aspect of the rule of law, which is that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: it is required to take action to have it set aside and not simply to ignore it*."

[28] *Merafong City Local Municipality v Anglo Gold Ashanti Ltd* (20265/2014) [2015] ZASCA 85 (28 May 2015) at par [17]

38 An organ of State may not resort to a collateral challenge against another organ of State.[29] Even if a collateral challenge by organs of State is permissible against the Public Protector (which we contest), no proper case is made out for a collateral challenge to the findings and remedial action in the report.

39 The report of the Public Protector is binding on the parties affected by it unless set aside by the Court. Absent a direct challenge to the report by means of review, the legal effect of the report cannot be impugned by disagreement regarding its content. It would therefore be inappropriate for this Court to make findings on the factual disputes between the parties insofar as they relate to factual findings contained in the report.

40 It is therefore submitted that this Court should proceed on the basis that the report is not subject to legal challenge at this stage and is fully enforceable. To do otherwise would lend credence to any disregard of the Public Protector's reports, at dire cost to an institution created with the specific purpose of strengthening our democracy. If a report of the Public Protector could be ignored by government and organs of State, it would undermine the rule of law and would deprive the public of an indispensable constitutional guarantee.

THE FINDINGS OF THE HIGH COURT

41 The Court made a series of findings in relation to the nature of the powers of the Public Protector. These are as follows:

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[29] *Merafong supra* at par [17]

41.1 The powers of the Public Protector are not adjudicative. Unlike courts, the Public Protector does not hear and determine cases, nor are her findings binding on persons or organs of state[30].

41.2 If it was intended that the findings of the Public Protector were to be binding, it would have been expressly provided for in the Constitution.[31]

41.3 The power to take remedial action is linked to the Public Protector's investigative powers in section 182(1)(a) of the Constitution.[32]

41.4 The power to take appropriate remedial action means no more than that the Public Protector may take steps to redress improper or prejudicial conduct.[33]

41.5 This facilitates less an investigative process which is less legally and procedurally rigorous than that demanded of courts.[34]

41.6 The Office of the Public Protector is akin to that of an ombudsman-with no powers of legal enforcement.[35]

41.7 However, the fact that the findings of and remedial action taken by the Public Protector are not binding decisions does not mean that these findings and remedial actions are mere recommendations which an organ of state may accept or reject.[36]

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[30] Vol 5, p 791; Judgment para 50-51
[31] Judgment para 51
[32] Ibid
[33] Ibid
[34] Judgment para 52
[35] Judgment para 54-55
[36] Judgment para 59

41.8 An organ of state may not ignore the findings of the Public Protector.[37]

41.9 The intervention of the National Assembly is not an appropriate remedy in the present case.[38]

42 The High Court therefore held that the findings of the Public Protector were neither binding nor enforceable. However, an organ of state could not ignore such findings because "*disregarding the findings and remedial action subverts the Public Protector's powers under section 182 of the Constitution.*"[39]

43 The High Court made much of the fact that the Public Protector is not a Court of law. However, this is not necessary for her findings and remedial action to be binding. The binding effect is akin to a binding directive.[40]

The High Court erred in relying on Bradley

44 At the core of the reasoning adopted by the High Court is the assumption that the Public Protector is akin to an ombudsman. It is submitted that while it is correct that the Public Protector does perform a function which may be akin to that of an ombudsman, it is also a function which goes further and is unique to the South African Constitution.

45 The Public Protector is an institution created in the Constitution as an independent and impartial institution to strengthen constitutional democracy. This is fundamentally distinct from ombudsmen in most other jurisdictions. The High Court's reliance on *R (on the application of Bradley and Others) v*

[37] Judgment para 60
[38] Judgment para 61
[39] Judgment at para 63
[40] E.g., a directive of the Registrar of Medical Schemes to a medical scheme

Secretary of State for Work and Pensions [2008] 3 All ER 1116, CA., a decision of the Court of Appeal in the United Kingdom, is therefore misplaced.

46 In *Bradley*, the court was tasked with assessing whether the findings of the Parliamentary Commissioner for Administration ("the Parliamentary Commissioner") were binding on the Secretary of State for Work and Pensions.

47 The Office of the Parliamentary Commissioner is established by statute in the United Kingdom and is intended as a mechanism to ensure that constituents can voice their grievances to their representatives. Therefore the Parliamentary Commissioner is only entitled to investigate complaints about government departments and institutions, which are first received and approved of by a member of parliament.

48 The conclusion of the Court of Appeal that the Secretary of State was entitled to rationally reject the finding of the Parliamentary Commissioner is therefore inextricably linked to the genesis of the institution of the Parliamentary Commissioner, as described in the White Paper to the Act which gave rise to the institution. Of particular relevance, the White Paper records that:

> *"We do not want to create any new institution which would erode the functions of Members of Parliament in this respect, nor to replace remedies which the British Constitution already provides."*[41]

49 The Public Protector, by contrast, is an institution created by the Constitution as an independent and impartial institution and specifically empowered by section 182 of the Constitution to:

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[41] Bradley para 38

49.1 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;

49.2 report on that conduct; and

49.3 take appropriate remedial action.

50 Moreover, in relying on the *Bradley* decision, the High Court simply adopted the rationality standard of review, without any meaningful engagement of why this is more appropriate than a reasonableness enquiry. A rationality standard prescribes a low threshold of scrutiny and hence validity for executive or administrative action. It is the minimum threshold requirement applicable to the exercise of all public power.[42]

51 In the circumstances, it is respectfully submitted that the High Court's reliance on *Bradley* was misplaced and incorrect.

The High Court erred in failing properly to interpret section 182(1)(c)

52 Section 182(1)(c) of the Constitution provides that the Public Protector has the power to take appropriate remedial action. It is respectfully submitted that the High Court erred in failing to consider the meaning of the word "take" in its interpretation of the powers of the Public Protector.

[42] *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund Intervening)* 2013 (2) SA 583 (GSJ) at para 40

53 No consideration was given by the High Court as to what the Constitutional drafters intended by the use of the words "*take appropriate remedial action*" or to the legislative purpose behind the use of the words "*any other means that may be expedient in the circumstances*" in section 6(4)(b)(iii) of the Public Protector Act. The legislative history detailed above supports an argument that these words must be given the meaning of a binding remedy if the institution is to be effective.

54 It is submitted that on a proper construction, the provisions referred to above empower the Public Protector to make findings which are more than simply recommendations, and which are binding on the subject of investigation. The word remedial implies a process of correcting or remedying a defect - not simply making a recommendation which is open to an organ of state to accept or reject.

The Practical Implications of the Court's findings

55 The High Court judgment sets out a complicated process in terms of which an organ of State must proceed when the Public Protector issues a report. This is as follows:

55.1 The organ of State must first consider the findings and decide whether or not to accept them. The process of making this decision must be rational having regard to the underlying purpose of the Public Protector.

55.2 In the event of a dispute because the organ of State decides not to accept the findings, it is required to engage with the Public Protector.

55.3 The organ of State may apply for judicial review of the Public Protector's report. It is unlikely that an organ of state would do so in circumstances where the report is not regarded as binding on it.

55.4 A decision by an organ of State rejecting the findings and remedial action of the Public Protector is itself capable of judicial review on conventional public law grounds.

56 The practical implications of this are as follows:

56.1 An organ of state need only meet the low threshold of showing a rational basis for refusing to follow the findings of the Public Protector's report.

56.2 This effectively places on onus on the Public Protector to prove that the decision by the organ of state was irrational rather than that her own decision was rational. If there is scope for a rational difference of opinion as to whether the findings of the Public Protector ought to be implemented, the organ of state's decision to refuse to implement the decision will stand.

56.3 Moreover, the Public Protector will effectively bear the onus to prove both that her decision was rational and that the organ of state's decision to refuse to implement her decision was irrational.

57 This, it is respectfully submitted, is a test formulated by the Court without basis in either the Constitution or the Public Protector Act. It is instead, a test formulated on the basis of the reasoning in the English Court of Appeal

decision in *Bradley*, a decision distinguishable from the South African context for the reasons set out above.

58 The formulation by the High Court of the effect of the Public Protector's findings and remedial action in her report relegates such findings and remedial action to a less binding form than even ordinary administrative action:

58.1 There is no positive obligation on the subject of the findings to review the report before a Court; and

58.2 The test as to whether or not to comply with the findings and remedial action (i.e. rationality) is less than that of ordinary administrative action; and

58.3 The Public Protector would then carry the additional onus, in seeking compliance with her report, of having to review non-compliance with her report.

59 In order to seek compliance with her report, the Public Protector will then have an onus to litigate. The Public Protector is therefore saddled with an onus to litigate in order to strengthen the effectiveness of her office.

60 It is submitted that this defeats the purpose of the relevant provisions of the Constitution.

THE THIRD APPELLANT'S ARGUMENT THAT THE PUBLIC PROTECTOR IS PRECLUDED FROM PARTICIPATING IN THESE PROCEEDINGS

61 The third appellant contends that the Public Protector is precluded from participating in this appeal because the High Court did not grant her leave to do

so.[43] He accordingly mischaracterises the Public Protector's participation in this appeal as "*a belated attempt to intervene*." This is incorrect both in fact and law. The Public Protector is not attempting to intervene in this appeal. Instead, the Public Protector was a participating respondent in the court below and is therefore entitled to participate in these proceedings. The Public Protector was cited as a respondent in the High Court due to the institution's direct and substantial interest in the matter. That interest continues in the present appeal.

62 The Public Protector has indicated from the outset, that her participation in these proceedings stemmed not from a desire to defend her report, but rather from the fact that the appellants made certain inaccurate statements in their answering affidavits before the High Court which required a factual response from the Public Protector [44]

63 Moreover, the appellants themselves had, in their answering affidavits contended that the powers of the Public Protector were neither binding nor enforceable. The participation of the Public Protector was an attempt to correct any inaccuracies and to assist the Court in determining such issues.

The Third Appellant conflates an order and a judgment

64 The Third Appellant appears to conflate an order with a judgment. The Public Protector does not seek to appeal the order of the High Court. Instead, she

[43] Third Appellant's Heads of Argument, page 5-6

[44] Vol 4, p 738, Affidavit of the Public Protector dated 14 August 2014, para 3-13

seeks to support the Order of the High Court for reasons other than those relied on by Schippers J, as she is entitled to do.

65 In this regard, this Court has held:

> *"An appeal lies against an order that is made by a court and not against its reasons for making the order. It follows that on appeal a respondent is entitled to support the order on any relevant ground and is not confined to supporting it only for the reasons given by the court below."* [45]

66 Moreover, the authority cited by the third appellant in support of its argument that the Public Protector may not participate in these proceeding, is misplaced.

66.1 This Court in *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd*[46] made clear that its jurisdiction on appeal, is confined to the issues on appeal and where the High Court has limited the grounds of appeal, this Court has no jurisdiction to entertain an appeal on grounds which have been specifically excluded.[47]

66.2 However, in the present case, the High Court did not exclude the question of the nature of the powers of the Public Protector from its decision to grant leave to appeal to this Court. On the contrary, the nature and effect of the powers of the Public Protector is an issue at the heart of this case- as is clear from the heads of argument and practice notes filed by all the appellants in this matter.

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[45] *SA Reserve Bank v Khumalo* 2010 (5) SA 449 (SCA) at para 4

[46] *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) at paras 11-14 at 40E - 41F

[47] Ibid. at para 14

66.3 This Court is therefore entitled to determine that issue. The third appellant's reliance on the dicta in *Newlands Surgical Clinic* to support its contentions that the Public Protector is not a party before this Court, is therefore misplaced.

67 The Public Protector was the ninth respondent in the High Court. As a respondent it is entitled to participate in this appeal, once leave to appeal was granted. Of importance, the written submissions submitted on behalf of every party to this appeal, address the issue of the nature and extent of the powers of the Public Protector. It cannot properly be contended, in such circumstances, that the Public Protector is precluded from participating in this appeal.

GILBERT MARCUS SC

ETIENNE LABUSCHAGNE SC

NASREEN RAJAB-BUDLENDER

Counsel for the Public Protector
Chambers, Sandton and Pretoria
12 August 2015

LIST OF AUTHORITIES

Cases

1. African Christian Democratic Party v Electoral Commission and Others 2006(3) SA 305 at paras 21, 25, 28 and 31;

2. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 91;

3. Certification of the Constitution of the Republic of South Africa, 1966: In re: Ex parte Chairperson of the Constitutional Assembly 1996(4) SA 744 (CC) at para [161], p 823;

4. Daniels v Campbell NO and Others 2004(5) SA 331 (CC) at paras 22 – 23;

5. Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (6) SA 744 (CC) at para 161;

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7. MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014(3) SA 481 (CC) at para 65;

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9. Minister of Safety and Security v Von Duivenboden 2002 (6) SA 431 (SCA) at para 20;

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13. Public Protector v Mail and Guardian Ltd and Others 2011 (4) SA 420 SCA at para 9;

14. R (on the application of Bradley and Others) v Secretary of State for Work and Pensions [2008] 3 All ER 1116 (CA);

15. Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC) at paras 77 – 78;

16. SA Reserve Bank v Khumalo 2010(5) SA 449 (SCA) at par 4;

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18. Van Rooyen and Others v The State and Others (Federal Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) at para 180.

Legislation

1. Ombudsman Act 118 of 1979;

2. Constitution of the Republic of South Africa, Act 200 of 1993**;**

3. Constitution of the Republic of South Africa, Act 108 of 1996;

4. Protected Disclosures Act 26 of 2000, Section 8(1)(a);

5. Promotion of Access to Information Act, No. 2 of 2000, Section 83(3)(h) and Section 84(b)(x);

6. Commission for Gender Equality Act 39 of 1996, Section 11(1)(e);

7. Executive Members' Ethics Act 82 of 1998, Section3 and Section 4;

8. Electoral Commission Act 51 of 1996, Section 6(3)(d);

9. Special Investigating Units and Special Tribunals Act 74 of 1996, Section 5(6)(b);

10. National Archives and Records Service of South Africa Act 43 of 1996, Section 6(4)(e);

11. National Nuclear Regulator Act 47 of 1999, Section 51(5)(a)(ii);

12. National Environmental Management Act 107 of 1998, Section 31(5);

13. Housing Consumers Protection Measures Act, No. 95 of 1998, Section 22.