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**BACKGROUND PAPER:  
PUBLIC PROTECTOR SOUTH AFRICA**

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**1. INTRODUCTION**

The Public Protector (PP) is one of six Chapter 9 institutions established by section 181(1) (a) of the Constitution, 1996. These institutions were brought into being 'to strengthen constitutional democracy.'<sup>1</sup>

The PP is an institution as well as a person and is constitutionally mandated to be - independent, subject only to the Constitution and the law, impartial and to perform its functions without fear, favour or prejudice.<sup>2</sup> After serving a non-renewable term of seven years a new Public Protector must be appointed.<sup>3</sup>

Given the underlying principles of accountability, openness, freedom and equality enshrined in the Constitution, it becomes clear that, the PP is pivotal to the facilitation of good governance in South Africa's constitutional dispensation.<sup>4</sup>

The PP has jurisdiction over all organs of state, any institution in which the state is the majority or controlling shareholder and any public entity as defined in section 1 of the Public Finance Management Act, 1999. Therefore, the PP has a key role to play in ensuring that (i) public

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<sup>1</sup> Section 181 (1) of the Constitution, 1996

<sup>2</sup> Section 181(2) of the Constitution, 1996. The SCA noted in the case of the Public Protector v Mail & Guardian Ltd and Others (2011 (4) SA 420 (SCA) at para [8] that 'those words are not mere material for rhetoric, as words of that kind are often used. The words mean what they say. Fulfilling their demands will call for courage at times, but it will always call for vigilance and conviction of purpose.'

<sup>3</sup> Section 183 of the Constitution, 1996

<sup>4</sup> Pienaar G, (2000). The Role of the Public Protector in Fighting Corruption, African Security Review Vol 9 No 2 (Accessed at <https://www.issafrika.org/pubs/ASR/9No2/Pienaar.html>)



servants observe and uphold constitutional principles and directives; and that (ii) public sector institutions do not, in their functions, abuse their powers.

## 2. THREE PUBLIC PROTECTORS TO DATE

The Office of the Public Protector was established on 1 October 1995. To date three Public Protectors have been appointed to the position. Namely:<sup>5</sup>

Advocate Selby Baqwa	•In 1995, Adv Selby Baqwa (now a Judge of the North Gauteng High Court) was appointed by former President Nelson Mandela as the first Public Protector. He holds a BJuris and LLB.
Advocate Lawrence Mushwana	•In 2002 Adv Lawrence Mushwana (now Chairperson of the South African Human Rights Commission) was appointed as Public Protector by former President Thabo Mbeki. Prior to this he was a Member of Parliament for 8 years. Adv Mushwana holds an LLB.
Advocate Thuli Madonsela	•In 2009 Adv Madonsela was appointed as Public Protector by President Jacob Zuma. Prior to this she was a human rights and constitutional lawyer and served as a Commissioner on the South African Law Reform Commission. Adv Madonsela holds a BA Law degree and an LLB.

## 3. POWERS AND MANDATE

### 3.1 Constitutional Powers

Section 182 of the Constitution provides that:

- (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;

<sup>5</sup> Corruption Watch notes that by the time Adv Baqwa's term as Public Protector had ended in 2005 the organisation had grown from 8 staff members to 200 and had a presence in all nine provinces. Under Adv Mushwana the outreach programme was expanded; satellite offices were established further extending the reach of the Office; and the PP was receiving on average 13 000 complaints a year. Under Adv Madonsela the capacity and profile of the office has been raised significantly through a number of prominent investigations. This process of institution building is also reflected in the budget, increasing from approximately R15.4 million in 1999 to R263 million in 2016/17 (Accessed at <http://www.corruptionwatch.org.za/sas-public-protectors-the-legacies-part-three/>)



- (b) to **report** on that conduct; and
- (c) to **take appropriate remedial action**.<sup>6</sup>

(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**.<sup>7</sup>

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.

### 3.2 Legislative Powers and Mandates

There are two key pieces of legislation that regulate the operations of the Public Protector.

- (i) **The Public Protector Act 23 of 1994:** which provides that the Public Protector is assisted by a Deputy Public Protector and is empowered to:
  - Appoint a suitable person as Chief Administrative Officer and such staff as may be necessary.<sup>8</sup>
  - Investigate on his or her own initiative or on receipt of a complaint any alleged maladministration in connection with the affairs of government; abuse or unjustifiable exercise of power or unfair, discourteous or other improper conduct or undue delay; improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission; and any act or omission which results in improper prejudice.<sup>9</sup>
  - Resolve any dispute or rectify an act or omission by mediation, negotiation, conciliation or any other means which may be expedient in the circumstances.
  - At any time prior or during or after an investigation, if he or she is of the view that the facts disclose some form of criminal activity, bring the matter to the attention of the NPA.
  - Refer any matter to an appropriate public body or authority.

<sup>6</sup> The issue of determining the meaning and consequences of 'remedial action' was finally resolved in the Constitutional Court judgement of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11

<sup>7</sup> The significance of this provision has been recognised by the Constitutional Court which noted that, '*the tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly.*' (See *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 para [52])

<sup>8</sup> Section 3(1) of the Public Protector Act 23 of 1994

<sup>9</sup> Section 6(4) of the Public Protector Act 23 of 1994



- At any time prior to or during an investigation request assistance from any person at any level of government; performing a public function or otherwise subject to the jurisdiction of the PP.<sup>10</sup>
- Direct (through a subpoena) any person during an investigation to submit an affidavit or affirmed declaration or produce any document in his or her possession.<sup>11</sup>
- Enter any premises (through a warrant issued by a magistrate or judge) and seize anything which has a bearing on the investigation.<sup>12</sup>
- Report in writing on his or her activities to Parliament at least once a year.<sup>13</sup>
- At any time submit a report to the National Assembly in respect of any investigation: if the PP deems it necessary in the public interest; it requires the urgent attention of or intervention by the National Assembly; or is requested to do so by the Speaker of the National Assembly or Chairperson of the National Council of Provinces. These reports must be open to the public unless there are exceptional circumstances (for example if the publication is likely to endanger the security of South African citizens, prejudice an investigation or disturb the public order.)<sup>14</sup>

(ii) **Executive Members Ethics Act 82 of 1998 (EMEA):** the EMEA, provides for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils. The Public Protector is the sole agency with the power to hold the President to enforcement of breaches of the Act. In terms of the Act the PP:

- Must investigate any alleged breach of the Code of Ethics on receipt of a written complaint. The PP should report to the President in 30 days or notify the President of inability to report in 30 days. MPs, the President, Premiers and Members of provincial legislatures (MPL's) may initiate such an investigation through a complaint to the PP.<sup>15</sup>

The Public Protector is also empowered to:

- Investigate Corruption as mandated by section 6(4)(a)(iv) of the Public Protector Act read with the **Prevention and Combating of Corrupt Activities Act 12 of 2004.**
- Receive and address protected disclosures from whistle blowers as mandated by the **Protected Disclosures Act 26 of 2000.**
- Review decisions of the National Home Builders Registration Council (NHBRC) as mandated by the **Housing Protection Measures Act 95 of 1998.**

<sup>10</sup> Section 7(3) of the Public Protector Act 23 of 1994

<sup>11</sup> Section 7(5) of the Public Protector Act 23 of 1994

<sup>12</sup> Section 7A of the Public Protector Act 23 of 1994

<sup>13</sup> Section 8(2)(a) of the Public Protector Act 23 of 1994

<sup>14</sup> Section 8(2)(b), (2A)(a), (b) and (c) of the Public Protector Act 23 of 1994

<sup>15</sup> Section 3 and 4 of the Executive Members Ethics Act 82 of 1998



In addition, the following legislation either recognises the investigative powers of the PP or assigns the institution an administrative role.

- **Electoral Commission Act 51 of 1996.** The PP must serve as a member of a panel that recommends a list of candidates to a National Assembly committee which nominates Electoral commissioners.
- **National Archives and Record Services Act 43 of 1996.** The PP must be consulted on investigations into the unauthorised destruction of records otherwise protected under this Act
- **National Energy Act 40 of 2004.** The protection of people from civil or criminal liability, dismissal, disciplinary action, prejudice or harassment who make disclosures of health and safety risks; or failure to comply with a duty imposed by this Act to the Public Protector.
- **Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.** The PP is recognised as an alternative forum to resolve equality disputes.
- **Public Finance Management Act 1 of 1999.** The Public Protector must receive a certificate from an accounting officer of an organ of state which has received donor funds or sponsorship anonymously.
- **Lotteries Act 57 of 1997.** The PP may receive confidential disclosures in respect of publishing any information in connection with a grant application.
- **Special Investigating Units and Special Tribunals Act 74 of 1996.** Provides for referral of cases between the Public Protector and the SIU.
- **National Environmental Management Act 108 of 1999.** Records and annual reports on environmental conflict management referred to in the Act includes proceedings by the PP.

#### 4. INSTITUTIONAL OVERVIEW

The PP has a budget of **R263 million for the 2016/17 financial year**.<sup>16</sup> The current staff complement of the PP is 369 (including 39 assistant investigators).<sup>17</sup> There are 146 investigators – with an average case load of 90 files. Investigative and Appropriate Dispute Resolution (ADR) services are provided in 20 service centres.<sup>18</sup>

In the 2014/15 financial year the PP:<sup>19</sup>

- Finalised 20 231 cases
- Referred 2 740 cases to other institutions with advice
- Reported that 39 per cent of matters involved undue delay; 29 per cent maladministration and 10 per cent unlawful or improper prejudice

<sup>16</sup> It should be noted that the approved structure provides for 556 posts.

<sup>17</sup> Public Protector Presentation to the Portfolio Committee on Justice and Correctional Services (dated 7 April 2016)

<sup>18</sup> Ibid

<sup>19</sup> Public Protector Annual Report 2014/15



- Upheld 49 percent of complaints
- Resolved most complaints though (ADR) using conciliation, mediation or negotiation.
- Published 19 formal reports<sup>20</sup>
- Conducted an own initiative investigation concerning the South African Social Security Agency
- Acted as custodian of the African Ombudsman Research Centre (AORC) in Durban

## 5. RELEVANT COURT RULINGS

Consideration may be given to three key court rulings which have elaborated on the powers and functions of the PP.

In the matter of the *Public Protector v Mail & Guardian Ltd and Others* (2011 (4) SA 420 (SCA)) the Supreme Court of Appeal was of the view that the Public Protector 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.<sup>21</sup> His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances.<sup>22</sup> The function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth.<sup>23</sup> Nugent J stated the following:

"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 is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee."<sup>24</sup>

In *SABC v DA and Others* (2016 (2) SA 522 (SCA)) Supreme Court of Appeal Justices Navsa and Ponnann stated that the Public Protector: '*must be someone who is beyond reproach, a person of stature and suitably qualified.*'<sup>25</sup> The SCA highlighted the fact that the purpose of the office of the Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics and that government officials carry out their tasks effectively, fairly and without corruption or prejudice.<sup>26</sup> The court clarified the law in relation to the powers of the PP as follows.

"In modern democratic constitutional States, in order to ensure governmental accountability, it has become necessary for the guards to require a guard. And in terms

<sup>20</sup>PP Investigation Reports 2014/15

(Accessed at [http://www.publicprotector.org/library/investigation\\_report/investigation\\_report.asp](http://www.publicprotector.org/library/investigation_report/investigation_report.asp) 18)

<sup>21</sup> *Public Protector v Mail & Guardian Ltd and Others* (2011 (4) SA 420 (SCA)) para [9]

<sup>22</sup> *Ibid* para [9]

<sup>23</sup> *Ibid* para [19]

<sup>24</sup> *Ibid* para [6]

<sup>25</sup> *SABC v DA* (2016 (2) SA 522 (SCA)) para [30]

<sup>26</sup> *Ibid* para [26]



of our constitutional scheme, it is the Public Protector who guards the guards<sup>27</sup>.....The Public Protector cannot realise the constitutional purpose of her office if other organs of state may second-guess her findings and ignore her recommendations<sup>28</sup>.....To sum up, the office of the public protector ... is a venerable one.<sup>29</sup> .....Before us, all the parties were agreed that a useful metaphor for the public protector was that of a watchdog. As is evident from what is set out above, this watchdog should not be muzzled."<sup>30</sup>

In the case of *EFF v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 112 the Constitutional Court located the office of the Public Protector within the design of the Constitution and described it as:

*"One of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance."*<sup>31</sup>

The Court noted that the Public Protector was created to "strengthen constitutional democracy in the Republic". To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice.<sup>32</sup> The Court also stated that the Public Protector is a champion of anti-corruption and clean governance.<sup>33</sup>

The Court resolved decisively the uncertainty around the PP's powers of remedial action. The Court stated that the Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly. The power to take remedial action that is so inconsequential that anybody, against whom it is taken, is free to ignore or second guess, is irreconcilable with the need for an independent, impartial and dignified Public Protector and the possibility to effectively strengthen our constitutional democracy.<sup>34</sup>

The fact that the Constitution requires the Public Protector to be effective and identifies the need for her to be assisted and protected, to create a climate conducive to independence, impartiality, dignity and effectiveness, shows just how potentially intrusive her investigative powers are and how deep the remedial powers are expected to cut.<sup>35</sup> The remedial actions of the Public Protector are binding and anyone wishing to challenge the remedial action can only do so through a review by a court of law. Ultimately, as the Court stated, no decision grounded

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<sup>27</sup> Ibid para [3]

<sup>28</sup> Para [52]

<sup>29</sup> Para [53]

<sup>30</sup> Ibid

<sup>31</sup> *EFF v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 112 para [52]

<sup>32</sup> Para [49]

<sup>33</sup> Para [52]

<sup>34</sup> Para [67]

<sup>35</sup> Para [66]



on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help".<sup>36</sup>

## 6. CONCLUSION

To conclude it may of interest to note that the Public Protector recently highlighted some of the key challenges identified in the complaints that the institution deals with:<sup>37</sup>

- (i) Conduct failure. Many cases that are reported involve alleged abuse of power and abuse of state resources in the public sector. This includes for example, violations of the Executive Ethics Code , conflict of interest, unlawful enrichment, the flouting of procurement rules, poor due diligence on procurement matters and corruption.
- (ii) Service planning failure. This includes non-prioritisation of constitutional responsibilities as required by section 237 of the Constitution<sup>38</sup> as well as lack of adherence to plans such as Integrated Development Plans (IDPs) and Strategic Plans. This situation is compounded by an apparent culture of disregarding the principles of Batho Pele, where the public is treated with indifference,<sup>39</sup>

## 7. REFERENCES

Klug H, (2015). *Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions* 60 N.Y.L. Sch. L. Rev. 153 (Accessed at <http://www.nyslawreview.com/wp-content/uploads/sites/16/2016/02/Klug.pdf>)

Pienaar G, (2000). *The role of the public protector in fighting corruption*, African Security Review Vol 9 No 2 (Accessed at <https://www.issafrica.org/pubs/ASR/9No2/Pienaar.html>)

Public Protector Annual Report 2014/15

Public Protector Act 23 of 1994

Public Protector Presentation to the Portfolio Committee on Justice and Correctional Services (dated 7 April 2016)

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<sup>36</sup> Para [74]

<sup>37</sup>Madonsela T, (2016). *Address by Public Protector during the Werksmans Attorneys Directors* (Accessed at [http://www.publicprotector.org/media\\_gallery/2016/PPSPEECHWORKMANS200516ED.pdf](http://www.publicprotector.org/media_gallery/2016/PPSPEECHWORKMANS200516ED.pdf))

<sup>38</sup> Section 237 of the Constitution, 19916. Diligent performance of obligations  
237. All constitutional obligations must be performed diligently and without delay.

<sup>39</sup> Madonsela T, (2016). *Address by Public Protector during the Werksmans Attorneys Directors* (Accessed at [http://www.publicprotector.org/media\\_gallery/2016/PPSPEECHWORKMANS200516ED.pdf](http://www.publicprotector.org/media_gallery/2016/PPSPEECHWORKMANS200516ED.pdf))