



The Public Protector

1. Introduction

The Public Protector is one of the six 'State Institutions Supporting Constitutional Democracy' provided for in Chapter 9 of the Constitution, and consequently known as 'Chapter 9 Institutions'. In many other countries, especially in Scandinavia, where the idea originated, the equivalent of our Public Protector is known as an Ombudsman. Although we commonly talk of 'the Public Protector' as if the institution was an individual (and in its early days the actual Public Protector was assisted by a very small staff), it is in fact an entity that now employs nearly 400 investigators, lawyers, administrators, fieldworkers, etc. A more accurate term for the institution is the Office of the Public Protector (OPP). This paper, however, focuses mainly on the head of the institution.

The Public Protector was established for the purposes of

'ensuring government accountability and providing remedies for maladministration and abuse of authority. It is up to the Public Protector to use his or her powers to investigate, report on and suggest remedial action for a wide range of improprieties in the public administration, including maladministration, the abuse or unjustifiable use of power, corruption, unlawful enrichment, and acts that unlawfully prejudice a citizen.'¹

Clearly, the Public Protector has wide-ranging powers and profound responsibilities. If the person concerned carries out their duties independently and impartially, they can make a significant contribution to good governance and democracy. On the other hand, a PP who is weak, or who acts in a biased manner, especially by favouring government or political figures, can do

great harm to the democratic project. Such concerns have been aired on occasion in the past, but they have become more pronounced during the tenure of the present PP, Adv Busisiwe Mkhwebane.

2. Background

South Africa has had four PPs since the inception of the office in 1995. The first, Adv Selby Baqwa, served until 2002. He has been credited with giving the institution a firm foundation in its early years, and with being willing to investigate, and make findings against, some highly-placed government officials and politicians. On the other hand, he has also been criticised for his failure to pursue allegations of corruption in the arms deal, and for possibly shielding the then Minister of Health, Nkosazana Dlamini-Zuma, from responsibility for misuse of public funds on the *Sarafina II* musical.²

Adv Lawrence Mushwana came to the post having served as a Deputy Chairperson of the National Council of Provinces, and as a member of the ANC's National Executive Committee. Although he did much to expand the reach and accessibility of the Office of the Public Protector (OPP), and to elevate its recommendations to the status of firm, enforceable remedies, he was widely seen as too sympathetic to government and ANC figures. In particular, his failure to carry out a proper investigation into the 'oilgate' scandal, in which taxpayers' money was paid to the ANC by the parastatal company PetroSA, was castigated by the High Court.³

Adv Thuli Madonsela was the third Public Protector, taking over in 2009, and it is generally acknowledged that she took the institution to a new level. She conducted numerous high-profile investigations, partly due to her own

industriousness, but also because her tenure coincided with the mushrooming of corruption and maladministration under the presidency of Jacob Zuma. It was her investigation into the use of public funds on President Zuma's private residence at Nkandla that eventually prompted the Constitutional Court's ruling that the recommendations of the Public Protector are as binding as a court order. On completion of her seven-year term, Adv Madonsela was replaced by the present incumbent, Adv Busisiwe Mkhwebane, in 2016.

3. Role and Powers

Section 182 of the Constitution sets out the functions of the PP, which are:

- 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;
- to report on that conduct; and
- to take appropriate remedial action.

It is further provided that the PP may not investigate court decisions, and that all PP reports must be open to the public, unless exceptional circumstances indicate otherwise.

The Public Protector Act 23 of 1994 sets out in more detail the types of matters into which the PP can enquire, as well as the procedures that need to be followed in such enquiries. Perhaps most significantly, the Act makes it clear that the PP can investigate matters "on his or her own initiative"; there is no need for anyone to lodge a complaint.

Over the years there was considerable uncertainty about the extent to which any recommendations made by the PP were binding. Taking advantage of this in the Nkandla matter, President Zuma effectively ignored Adv Madonsela's finding that he must pay a portion of the non-security costs of the upgrades, and instead went along with the Police Minister's finding that all the upgrade work was security-related, and that therefore Mr Zuma was not liable to pay anything. Likewise, in 2014 then Communications Minister Faith Muthambi ignored the PP's finding that SABC acting head Hlaudi Motsoaneng was unfit for office and instead – acting on the advice of an attorney's firm – made his appointment permanent.

This uncertainty was resolved in March 2016 when the Constitutional Court held that the PP's recommendations were indeed binding; and that Mr Zuma's only option, if he was not happy with them, was to challenge them in court.⁴ We now have complete certainty that the power given to the PP to 'take appropriate remedial action' means that his or her recommendations have a force equivalent to a court order, and must be carried out unless they are set aside legally.

4. Selection Process

The PP is formally appointed by the President, on the recommendation of the National Assembly. That recommendation must have the support of at least 60% of MPs, and is made after a committee including members of all the political parties represented in the Assembly has interviewed candidates and made a nomination. It is further provided that civil society 'may' be involved in the recommendation process.⁵

The process whereby Adv Mkhwebane was recommended was a very open and inclusive one. The committee was led by Dr Makhosi Khoza, then an ANC MP known for her independence and her commitment to constitutional values. Nominations were invited from the public, NGOs, political parties and professional bodies, and once a shortlist had been compiled, interviews were conducted in Parliament. Proceedings were televised and there was a good deal of public interest.

Civil society involvement was highlighted by the efforts of the NGO Corruption Watch, which compiled detailed dossiers on all the nominees and made these available to members of the committee. Dr Khoza also credited other engagements with civil society, including her participation in a roundtable discussion hosted by CPLO and the Hanns Seidel Foundation in June 2016, at which speakers examined both the process of selection and the characteristics that should be sought in a new PP.

Ultimately, all parties except the DA supported Ms Mkhwebane's candidacy. The DA noted its particular concern that she was a 'spy' (at the time of her nomination she had been employed for a few months by the State Security Agency) and that her appointment would further the project of 'state capture'.

It was not long before these reservations came to be very widely shared.

5. Track Record to Date

Criticism of Adv Mkhwebane's performance as Public Protector can be divided into three broad kinds.

5.1. Lack of experience and seniority

Speaking at CPLO/HSF roundtable discussion late in 2017,⁶ the executive secretary of the Council for the Advancement of the SA Constitution, Lawson Naidoo, suggested that one of the problems with Ms Mkhwebane was that she was not sufficiently senior. He noted that in her civil service career she had not worked above the level of Director, which was a middle-management position; someone in such a post would be "used to taking instructions". The journalist Janet Heard, reviewing Adv Mkhwebane's first year in office, put it this way: "[O]ur public representatives, in full view of all of us, the public, selected a public protector who at best is a lightweight and out of her depth..."⁷ A similar view has been put forward by the Director of Corruption Watch, David Lewis. Questioned by the *Sunday Times* regarding her report on the Vrede Dairy project, he was of the view that "she appears to be under the sway of those she is meant to be investigating."⁸

5.2. Lack of competence and understanding

It is gravely concerning if someone in charge of such an important constitutional office does not properly grasp and carry out her duties; and this is precisely what the Courts have found. "In the matter before us it transpired that the Public Protector does not fully understand her constitutional duty to be impartial and perform her functions without fear, favour and prejudice," said a full bench of the North Gauteng High Court earlier this year.⁹ And in the case that arose from her notorious recommendation that the Constitution be amended in order to alter the constitutional mandate of the Reserve Bank, Judge John Murphy warned that

"She risks the charge of hypocrisy and incompetence if she does not hold herself to an equal or higher standard than that to which she holds those subject to her writ. A dismissive and procedurally unfair approach by the Public Protector to important matters placed before her by prominent role players in the affairs of state will tarnish her

reputation and damage the legitimacy of the office. She would do well to reflect more deeply on her conduct of this investigation and the criticism of her by the Governor of the Reserve Bank and the Speaker of Parliament."¹⁰

It appears that these admonitions fell on deaf ears. In June this year the PP found that Western Cape Premier Helen Zille's controversial tweet on the 'benefits' of colonialism was a violation of the Bill of Rights and of the Executive Ethics Code. Ms Zille's comment had supposedly infringed section 10 (Human Dignity) of the Constitution and was not protected by section 16 (Freedom of Expression), since it was "offensive and insensitive to a section of the South African population which regarded it as re-opening a lot of pain and suffering to the victims of apartheid and colonialism..." The tweet was "not consistent with the integrity of her office and position."¹¹

It did not take long for commentators to point out the constitutional incoherence of these findings. The Centre for Constitutional Rights' Phephelaphi Dube was quoted as follows:

"While many South Africans were offended by Zille's tweets, the tweets certainly do not constitute the form of hate speech which the Constitution proscribes in Section 16 of the Bill of Rights. In terms of the Constitution and the Public Protector Act, the Public Protector is tasked with investigating improper conduct, in both state affairs and public administration. The Human Rights Commission in this regard is better suited to investigate alleged infringements of the Bill of Rights."

And Professor Pierre de Vos pointed out that

"[n]o Public Protector has ever attempted to rule that a member of the executive has breached a constitutional right and there is a good reason for this: the Public Protector does not have the power to make such a ruling as such investigations are beyond the jurisdiction of her office."¹²

Ms Zille has taken these recommendations on judicial review and it seems overwhelmingly likely that they will be overturned.

5.3. Lack of honesty and integrity

Criticisms regarding Adv Mkhwebane's level of experience and her poor grasp of what the Constitution requires of her are considerably more charitable than those that bring into question her honesty and integrity. Unfortunately, there are many of these.

In the full bench decision quoted above, the North Gauteng High Court delivered itself of an unusually harsh opinion:

“The Public Protector did not conduct herself in a manner which would be expected from a person occupying the office of the Public Protector... She did not have regard thereto that her office requires her to be objective, honest and to deal with matters according to the law and that a higher standard is expected of her. [...] We therefore conclude that it has been proven that the Public Protector is reasonably suspected of bias as contemplated in section 6(2)(a)(iii) of (the Promotion of Administrative Justice Act).”¹³

Many people in positions demanding the highest levels of trustworthiness, honesty and integrity, having been found by a court to have been biased and to have disregarded requirements of objectivity and honesty, would have resigned. Adv Mkhwebane has so far not seen this as necessary.

Commenting on her actions in the Reserve Bank case, the political analyst Mpumelelo Mkhabela went so far as to accuse her of “hollowing out the moral and constitutional authority of her office.” He noted, as did the Court, that she had met with state security officials and the then Minister of State Security, David Mahlobo, during the preparation of her report. These meetings, said the Court, “cannot be justified in any manner.”¹⁴

A further troubling example of what appears to be bias concerns the PP's investigation into the Vrede Dairy project in the Free State. Despite considerable evidence that senior politicians were involved in transferring money – intended to support emerging dairy farmers – to the Gupta family, Adv Mkhwebane failed to investigate this aspect, on the grounds that the original complaint (by a DA politician) had not mentioned these names. This, in Mr Mkhabela's opinion, was “an insult to the collective intelligence of South Africans. The Public Protector's Act makes it plain that she is entitled to institute an investigation even if there is no complaint.”¹⁵

5.4. Positive achievements

It would be unfair and inaccurate to suggest that everything that the current Public Protector has done has been suspect. A glance at the current list of reports shows that numerous investigations have been, and are being, carried out, which do not always make it into the headlines, or which are soon forgotten. For example,

- In February this year, the PP found that the former Minister of Public Enterprises, Lynne Brown, had misled Parliament, and thus violated the Executive Ethics Code, in a matter concerning an Eskom contract, and recommended that she be censured;¹⁶
- Also in February, she found that another favourite of ex-President Zuma, Des van Rooyen, the former Minister of Co-operative Governance and Traditional Affairs, had deliberately misled the National Assembly by denying that he had met with the Gupta family;¹⁷
- And in her latest report she has strongly castigated the Police Minister for his failure to provide adequate protection to certain whistle-blowers, and has recommended that the Minister be reprimanded by the President.¹⁸

These examples indicate that, despite the devastating criticism levelled at Ms Mkhwebane by the courts, and by some legal and constitutional experts, she and her office are still well capable of carrying out their mandate.

Some attention must also be given to other positive achievements. According to the PP's Annual Report for 2016/17,¹⁹ significant progress was made in reducing backlogs of cases. Two-year old cases were reduced by 62% and one year old ones by 77%. Some 803 clinics were held across the country as a way of improving the public's access to the services of the PP, and this resulted in a rise in the number of complaints received from communities.

6. The Parliamentary Enquiry

Section 194 of the Constitution provides that the Public Protector can be removed from office only on the grounds of a finding of misconduct, incapacity or incompetence, and that such a finding must have the support of two-thirds of the

members of the National Assembly. This stringent requirement – which is similar to that which applies to the removal of a judge from office – is designed to protect the independence of the PP.

In 2017 the DA called for a parliamentary enquiry into Adv Mkhwebane’s fitness for office, and the Portfolio Committee on Justice and Correctional Services was tasked with the matter. After some disagreement between the different parties, it was eventually decided that Adv Mkhwebane would be called to appear before the committee early in June this year. On the eve of the appearance, however, and citing an undisclosed family emergency, she withdrew from the meeting. Then, a week later, it was decided that she should be given an opportunity to respond to the DA’s complaints against her (mostly based on the unfavourable findings and remarks by various courts, as discussed above) before deciding whether or not to proceed with a formal enquiry.

At the time of writing Adv Mkhwebane had made written submissions as to why the committee should not begin the enquiry, but due a change of committee chairperson, the decision whether or not to go ahead had not been taken. Given the time of year, and the fact that the justice portfolio committee is usually one of Parliament’s busiest, it appears that this issue may not be dealt with in 2018.

7. Conclusion

It was inevitable that Adv Mkhwebane would be compared to her predecessor, Adv Madonsela. It was not inevitable, though, that the comparisons would be so uniformly unfavourable. Too many questions have arisen about her independence, her competence, and her integrity for them all to be dismissed as mere politicking. The court

findings, in particular, raise doubt as to whether Adv Mkhwebane really understands our Constitution, the rights it guarantees, and her role in upholding and enforcing it.

A year ago, at CPLO’s Roundtable, CASAC’s Lawson Naidoo ventured the opinion that, at the end of her seven-year term, Adv Mkhwebane might possibly turn out to have been a good public protector, but that “the jury is still out”. At roughly the same time, the Phephelaphi Dube of the Centre for Constitutional Rights commented as follows:

“The nation finds itself dealing with widespread allegations of state capture, with reported collusion from some parts of the private sector. South Africa needs robust independent institutions to tackle the deepening scourge, as well as a renewed hope in the abilities of bodies such as the Public Protector, to effectively deal with the malaise. As things stand, the Public Protector and her Office are failing to live up to that challenge.”²⁰

Another year later, there is unfortunately no reason to argue that Adv Mkhwebane’s performance has improved significantly, or that she has restored any of the damage she caused to the reputation and credibility of the Office of the Public Protector during her first year in charge. It is now up to Parliament – the institution to which the PP is accountable – to carry out its constitutional mandate of oversight and, by conducting a fair enquiry, to determine whether or not she should be allowed to complete her term of office.

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- ¹ Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, National Assembly, July 2007, p95. See <https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf>
- ² <http://www.corruptionwatch.org.za/sas-public-protectors-legacies-part-one/>
- ³ <http://www.corruptionwatch.org.za/sas-public-protectors-the-legacies-part-two/> See also <https://www.iol.co.za/news/politics/oilgate-judge-criticises-public-protector-453558>
- ⁴ <https://cdn.24.co.za/files/Cms/General/d/3834/24efe59744c642a1a02360235f4d026b.pdf>
- ⁵ See section 193(4)–(6) of the Constitution.
- ⁶ The Roundtable Discussion on ‘The New Public Protector: One Year On’ was held in Cape Town on 3rd November 2017. The other speaker was Dr Makhosi Khoza.
- ⁷ <https://www.dailymaverick.co.za/article/2017-08-16-analysis-it-is-time-to-review-the-appointment-of-busi-mkhwebane/>
- ⁸ <https://www.pressreader.com/south-africa/sunday-times/20180218/282226601197865>
- ⁹ <https://www.dailymaverick.co.za/article/2018-02-16-court-trashes-public-protector-busisiwe-mkhwebane-again/>
- ¹⁰ <http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPPHC/2017/443.html&query=%20Public%20Protector> at para [59].
- ¹¹ http://www.pprotect.org/sites/default/files/legislation_report/Premier%20Helen%20Zille%20Report.pdf
- ¹² Both quoted in <https://www.news24.com/Analysis/did-the-public-protector-misapply-the-law-on-zilles-tweets-20180612>
- ¹³ <https://www.dailymaverick.co.za/article/2018-02-16-court-trashes-public-protector-busisiwe-mkhwebane-again/>
- ¹⁴ Ibid.
- ¹⁵ https://www.news24.com/Columnists/Mpumelelo_Mkhabela/how-busisiwe-mkhwebane-is-hollowing-out-her-offices-moral-authority-20180419
- ¹⁶ http://www.pprotect.org/sites/default/files/legislation_report/Minister%20Lynne%20Brown%20report.pdf
- ¹⁷ http://www.pprotect.org/sites/default/files/legislation_report/Signed%20Formal%20report%20Minister%20Van%20Rooyen%20to%20Pres%20%20Zuma.pdf
- ¹⁸ http://www.pprotect.org/sites/default/files/legislation_report/Report%2012%20of%20201819.pdf The Minister has taken this report on review to the High Court.
- ¹⁹ http://www.pprotect.org/sites/default/files/Annual_report/Public%20Protector%20Annual%20Report%202016-2017.pdf
- ²⁰ <https://www.news24.com/Columnists/GuestColumn/impressions-are-everything-madam-public-protector-20170919>



This paper was made possible by funding from the Hanns Seidel Foundation.

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