



## **Response**

**14<sup>th</sup> September 2023**

### **Protecting the Public from the Public Protector**

Yesterday's removal from office of the Public Protector marks an important, if regrettable, constitutional milestone. It is the first time in our democratic era that the head of one of the State Institutions Supporting Constitutional Democracy (the 'Chapter 9 Institutions') has been investigated by the National Assembly, found guilty of misconduct, and dismissed.

Amidst the huge damage that Adv Busisiwe Mkhwebane inflicted on the office of the Public Protector, a number of positive points emerge. Firstly, the process for removing the head of a Chapter 9 body has been put to the test and clarified. The so-called section 194 committee of the National Assembly – named for the section of the Constitution that deals with removal from office of Chapter 9 office-bearers – did its work methodically and rigorously, if at times with painful slowness. In the unfortunate event that further such removals are required in future, the rules and mechanisms ought to be clear and a result should be reached more quickly.

Secondly, the numerous cynical attempts by Adv Mkhwebane and her legal team to delay and divert the investigation so that it might stretch out unresolved to the point where her term of office would come to its natural end in mid-October, failed. She will now not get her reported R10-million golden handshake. This may make the next subject of such an investigation think twice about whether it is worthwhile putting so much effort into trying to avoid the inevitable.

(Such 'Stalingrad tactics' have become commonplace recently, and there seems to be no sense of shame on the part of the clients, or of professional pride on the part of the lawyers involved, that prevents them from indulging in all sorts of spurious procedural challenges and baseless applications. It is time that the legal professional bodies stopped ignoring such ethically questionable, and of course highly lucrative, behaviour by some of their senior members.)

Thirdly, the nation was able to see accountability in action. This is a governance value that has generally been in short supply; any number of politicians and public servants have been able to escape the consequences of their incompetence or misconduct simply by resigning or by virtue of enjoying political protection. For once, the constitutional scheme whereby independence and accountability are held in the correct balance has been seen to work.

To all this there is an important caveat. As a number of commentators have noted, it suited the governing party to press the investigation against Adv Mkhwebane. It would be naïve to think that, if she had not set her sights against the current leadership of the party, or if she had not sought to protect members of the Zuma/RET faction, its MPs would have proceeded as they did merely on the objective facts of her misconduct and incompetence.

But even so, a precedent has been set that will be hard to ignore. If a future Public Protector or other Chapter 9 head behaves equally improperly, but in a way that happens to please the governing party, it will be difficult for Parliament to turn a blind eye to it.

There has already been some criticism of Adv Mkhwebane's designated successor, Adv Kholeka Gcaleka, relating to her past career in the executive branch and to the way she handled her part of the investigation into President Ramaphosa's infamous Phala Phala business transaction. Whether or not these criticisms are valid, it is to be hoped that the process through which Adv Mkhwebane's tenure was ended will serve as a strong incentive to the new incumbent to do what her job description entails – to protect the public, rather than to end up as someone from whom the public needs protecting.

---

**Mike Pothier**  
**Programme Manager**  
[mike@cplo.org.za](mailto:mike@cplo.org.za)



The Democracy & Governance Project of the CPLO is supported by the Hanns Seidel Foundation (HSF).  
The opinions and statements contained in CPLO's publications do not necessarily reflect  
the views of the HSF.

This Response, or parts thereof, may be reproduced with acknowledgement.