**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO.: 143 / 15**

In the application of:

|  |  |
| --- | --- |
| **THE PUBLIC PROTECTOR** | Applicant for leave to intervene as respondent alternatively as *amicus curiae* |

In the matter between:

|  |  |
| --- | --- |
| **THE ECONOMIC FREEDOM FIGHTERS** | Applicant |
| and  |  |
| **THE SPEAKER OF THE NATIONAL ASSEMBLY** | First Respondent |
| **PRESIDENT JACOB GEDLEYIHLEKISA ZUMA** | Second Respondent |

|  |
| --- |
| FOUNDING AFFIDAVIT  |

I, the undersigned –

**THULISILE NOMKHOSI MADONSELA**

do hereby state under oath as follows:

# I am the Public Protector of the Republic of South Africa (“**the Public Protector**”), an institution established by section 181 of the Constitution of the Republic of South Africa, 1996 (“**the final Constitution**” or “**the Constitution**”) and the sole body given power under the Executive Members’ Ethics Act, 1998 (“**the Ethics Act**”), to make a determination on alleged violations of the Executive Members Ethics Code (“**the Ethics Code**”).

# The facts to which I depose are within my own knowledge, save where otherwise indicated, and are true and correct. Where I make legal submissions, I do so on the advice of the attorneys and counsel acting for me.

# **INTRODUCTION AND OVERVIEW**

# I have read the founding papers in the application of the applicant (to whom I shall refer herein as “**the EFF**”). In its application, the applicant seeks an order from this Court declaring that –

## the second respondent (“**the President**”) is bound to comply with, and give effect to, remedial action that is contained in my report entitled “*Secure in Comfort*” (“**the Report**”), dated 19 March 2014, which concerns my investigation into “*Allegations of Impropriety and unethical Conduct relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of the Private Residence of President Jacob Zuma at Nkandla in the Kwazulu-Natal Province*”; and

## in not ensuring that the President does so comply, the National Assembly has failed to fulfil its obligation under sections 55(2) and 181 of the Constitution to ensure that all executive organs of state in the national sphere of government are accountable.

# The EFF has not cited me as a respondent to its application. Although it seeks no relief against me, the relief that the EFF seeks in its application is fundamentally premised on the remedial action set out in the Report. The content of the Report and its proper interpretation are both matters in which I am advised and submit that the Public Protector has a direct and substantial interest. At the least, I respectfully submit that the Public Protector is sufficiently interested in this application to justify its intervention as an *amicus curiae* in the abovementioned proceedings. I accordingly apply to intervene as respondent, alternatively to be admitted as an *amicus curiae*. In either event –

## I seek to advance argument on the proper interpretation of my powers to be heard through counsel when this matter is set down; and

## I ask that this affidavit stand for purposes of both the application for intervention, alternatively, the application for admission as an *amicus*, and, if either application is granted, that it is admitted as an affidavit in these proceedings

# The central thrust of my submissions is that the remedial action taken in the Report in terms of section 182(1)(c) read with section 181(2) and other relevant provisions of the Constitution cannot simply be ignored or otherwise diluted by the findings of another organ of state. I will explain the reasons why I submit that the remedial action contained in the Report must be regarded as both binding and of legal effect, until it is successfully challenged in a court of law.

# In making these submissions, I point out that I take no position on the merits of the relief sought in the EFF’s application, and, save to the extent that it is inconsistent with the submissions advanced concerning the legal effect of the remedial action taken by me in the Report, I shall neither support nor oppose it. In this affidavit, I shall address the following issues:

## First, I shall address the nature of the Public Protector’s interest in these proceedings;

## Second, I shall explain the position to be adopted, and the submissions to be advanced by the Public Protector if admitted as a party, alternatively as an *amicus curiae*;

## Third, I shall explain the reasons why my submissions would be of value to the this Court in its determination of the matter in the event that I am admitted as an *amicus curiae*; and

## Finally, I shall explain the other parties’ attitudes to the admission of the Public Protector.

# I shall deal with each of these issues in turn.

# **THE PUBLIC PROTECTOR’S INTEREST IN THIS APPLICATION**

# My investigation, as the Report records (at paragraph 1.2 thereof), was conducted in terms of –

## the provisions of section 182 of the Constitution;

## sections 6 and 7 of the Public Protector Act 23 of 1994 (“**the Public Protector Act**”); and

## partly, in terms of sections 3 and 4 of the Ethics Act.

# It is important to note that Section 182(2) of the Constitution provides that the powers granted to me under the Ethics Act, the Public Protector Act and the other laws that confer power to the Public Protector, are “*additional*” to the Public Protector’s original constitutional powers.

# The facts relevant to the EFF’s application are set out fully in the Report. They are further summarised in the Executive Summary that is attached thereto. To avoid unduly burdening the Court, I do not repeat the contents of the Report here. However, it is important, in my respectful view, that I briefly set out the issues considered in the Report that are relevant to the present application, and what my finding was in each instance:

## The first issue was whether the measures taken and the buildings and items that were constructed and installed by the Department of Public Works (“**DPW**”) at the President’s private residence go beyond what was required for the President’s security. I concluded that some of these improvements did indeed exceed what was needed.

## The second issue that is relevant to the present application is whether the expenditure incurred by the State in regard to the improvements was excessive, or amounted to opulence on a grand scale. I concluded that this complaint was also established.

## The third relevant issue was whether the President’s family and/or relatives improperly benefited from the measures taken at the President’s private residence. I concluded that the President and his immediate family improperly benefited from the measures taken in so far as they resulted in the addition of substantial value to the President’s private property.

## The fourth issue was whether the President should be liable for some of the costs incurred. I found in the affirmative in this regard.

## On the fifth issue, the central question was whether the President‘s conduct was in violation of the Ethics Code in respect of the project. I note that towards the end of my investigation, a contention was raised that the Report might be invalid under section 3(4) of the Ethics Act if it were not delivered within 30 days of the relevant complaint being lodged (see paras 3.2.4 to 3.2.13 of the Report). I considered this contention and found it to have no merit. I found moreover that, even if the point did have merit, “*it would not have any impact on the validity of my investigation in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, that covered the very same issues*” (para 3.2.12 of the Report). I thus proceeded to find, *inter alia*, that the President had indeed failed to act in the protection of state resources, which constituted a violation of paragraph 2 of the Executive Members’ Ethics Code and amounted to conduct inconsistent with the President’s office as a member of Cabinet, as contemplated by section 96 of the Constitution.

# In the Report, the remedial action that I took in terms of section 182(1)(c) of the Constitution was as follows:

## The President should take steps, with the assistance of National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW at the President’s private residence that did not relate to security;

## The President should pay a reasonable percentage of the costs of the measures as determined with the assistance of National Treasury;

## The President should reprimand the Ministers involved for the manner in which the Nkandla project was handled and in which state funds were abused; and

## The President should report to the National Assembly on his comments and actions in respect of the Report within 14 days.

# The EFF seeks relief that is premised upon the presumption that the respondents were required to comply with the remedial action that I prescribed in my Report. It follows that this Court will inevitably be required to consider the legal status and effect of the Report and remedial action taken therin, regardless of whether the EFF’s application succeeds or fails. A decision from this Court on the issue will also have a profound effect on the manner in which I exercise my powers in all future matters.

# I respectfully submit that the Public Protector’s direct and substantial interest in the nature and ambit of the institution’s powers arises plainly from these facts and from the relief sought by the EFF. I submit moreover that granting me leave to intervene as a respondent in the application would be in the interests of justice.

# I would add that the binding nature of the Public Protector’s reports and remedial action in terms of section 182(1)(c) of the Constitution forms the subject of other litigation, including an appeal which has recently served before the Supreme Court of Appeal (“**SCA**”). In all such other matters, the Public Protector has been cited as a respondent and has participated by making submissions on the nature of her powers, without becoming embroiled in the broader merits of the matters in question.

# It is important that I draw specific attention to the appeal matter referred to above and particularly the ongoing effect of the High Court’s order which was the subject of the appeal. The High Court judgment is reported as *Democratic Alliance v South African Broadcasting Corporation Limited and Others* 2015 (1) SA 551 (WCC) (“**the SABC matter**”). The appeal to the SCA was heard on 18 September 2015 under Appeal Case No 393/2015. I was present at the appeal. I do not wish to anticipate the outcome of the appeal save to draw attention to the possibility that it may not result in a determination of the ambit and effect of the Public Protector’s powers. This is because the three appellants all agreed to accept paragraphs 1 to 3 of the Order, namely:

# “*1. The Board of the South African Broadcasting Corporation Limited (SABC) shall, within fourteen (14) calendar days of the date of this order, commence, by way of serving on him a notice of charges, disciplinary proceedings against the eighth respondent, the Chief Operations Officer (COO), Mr George Hlaudi Motsoeneng, for his alleged dishonesty relating to the alleged misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increases of Ms Sully Motsweni; and for his role in the alleged suspension and dismissal of senior members of staff, resulting in numerous labour disputes and settlement awards against the SABC, referred to in paragraph11.3.2.1 of the report of the Public Protector dated 17 February 2014.*

# *2. An independent person shall preside over the disciplinary proceedings.*

# *3. The disciplinary proceedings referred to in paragraph 1 above shall be completed within a period of sixty (60) calendary days after they have been commenced. If the proceedings are not completed within that time, the Chairperson of the Board of the SABC shall deliver an affidavit to this court: (a) explaining why the proceedings have not been completed; and (b) stating when they are likely to be completed. The applicant shall be entitled, within five (5) calendar days of delivery of the affidavit by the Chairperson, to deliver an answering affidavit.*”

# The Democratic Alliance, however, also wished to retain paragraph 4, namely:

# “*4. Pending the finalisation of the disciplinary proceedings referred to in paragraph 1, and for the period referred to in paragraph 3 above, the eighth respondent shall be suspended from the position of COO of the SABC, on full pay.*”

# If the SCA agrees with the approach suggested by the appellants in that matter, it is possible that the Court will not reach the issue of the proper interpretation of the powers of the Public Protector. As was pointed out on my behalf, the approach of the High Court in the SABC matter has severely compromised the functioning of the office of the Public Protector in the following ways (borne out of my personal experience):

## It has resulted in what is now a trend among politicians and organs of state against whom findings have been made, simply to disregard reports issued and remedial action taken by the Public Protector;

## Potential complainants are reluctant to come forward because there is a belief that findings of the Public Protector need not be given effect to. It is thus increasingly regarded as a waste of time to lodge a complaint with the Public Protector; and

## The capacity to reject the findings of the Public Protector by advancing a rational basis to do so can easily be achieved by, for example, the affected party saying it disagrees with the evidence or weight to be attached to the evidence. This is because the requirement of rationality poses a threshold which is very low and relatively easy to meet.

# In summary, in the SABC matter, Schippers J interpreted the Public Protector’s powers in the following way:

## The Public Protector’s findings and remedial action (taken in terms of section 182(1)(c) of the Constitution) are not binding and enforceable (para 58);

## 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 action are mere recommendations, which an organ of state may accept or reject*” (para 59); and

## Before an organ of state rejects a finding of the Public Protector, there must be a rational basis for doing so (para 72).

# For the reasons set out below, I respectfully submit that the approach of the High Court concerning the ambit and effect of the powers of the Public Protector in terms of section 182(1)(c) of the Constitution is wrong in law. This error, moreover, arises in respect of an issue of public importance. In my respectful submission, these same concerns are confirmed in Schippers J’s own judgment on leave to appeal:

# “*(a) First, a definitive judgment in relation to the Public Protector’s powers and the legal effect of the remedial action taken by the Public Protector is critical to the effective functioning of our democracy.*

# *(b) Second, the lack of clarity regarding the binding effect of the findings of and remedial action taken by the Public Protector has a significant effect on both organs of state and ordinary South Africans. The latter look to the office of the Public Protector for protection against the abuse of public power. … If the impression is created that reporting misconduct in state affairs, public administration or in any sphere of government to the Public Protector can have no material effect, the office of the Public Protector will be fundamentally and irreparably undermined.*

# *(c) Third, clarity and certainty as to the nature and extent of the Public Protector’s powers will provide much-needed guidance for future holders of that office and organs of state in the exercise of their constitutional obligations; and will protect and guarantee the integrity of the office of the Public Protector.*” (My emphasis)

# (*Democratic Alliance v South African Broadcasting Corporation SOC Ltd and Others* [2015] ZAWCHC 46 at para 6)

# In my submission, it has become critical for the proper functioning of the Public Protector for clarity finally to be obtained on this issue. As Schippers J himself foreshadowed, the High Court judgment in the SABC matter, which is the prevailing law on the issue, has detrimentally impacted on the proper functioning of the office of the Public Protector.

# The practical implications of this are as follows:

## The Public Protector’s decisional power is denuded of the authority conferred by sections 181(2) and 182(1)(c) of the Constitution, and other relevant legislation. The relationship between the Public Protector and Parliament is uniquely created by the Constitution and other relevant legislation, and cannot be compared with that which prevails, for example, in the United Kingdom.

## The implication would also be to totally negate section 182(1)(c) of the Constitution conferring on the Public Protector “*power to take appropriate remedial action*”, as the UK court decision on which the High Court based its decision in the SABC matter was directed at the powers of the UK Parliamentary Ombudsman, whose powers are only to investigate and report to Parliament, which is a position that is similar to the Public Protector only under the era prior to the enactment of the Final Constitution;

## Regarding the rationality test, 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, which effectively places the public functionary or respondent organ of state whose decision has been administratively scrutinised and reviewed by the Public Protector and found wanting, in a position of reviewing the decision of the Public Protector, which, in my respectful view, is at odds with sections 181(2), 182(1)(c) and other relevant provisions of the Constitution; and

## It also appears to place an onus on the Public Protector to prove that the decision by the organ of state was irrational. 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

# This, it is respectfully submitted, is a test formulated by the Court without basis in either the Constitution or the Public Protector Act. As I have said, it is instead a test formulated on the basis of the reasoning in the English Court of Appeal decision in *R (on the application of Bradley and Others) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116 (CA) (“***Bradley***”), a decision based upon an entirely different statutory and constitutional setting.

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

## There is no positive obligation on the subject of the findings, in the event of it deciding not to comply therewith, to review the report before a Court;

## 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

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

# In order to seek compliance with my report, it is the Public Protector or the complainant that will then have an obligation to litigate. The Public Protector is therefore saddled with an onus to litigate in order to strengthen the effectiveness of her office. This approach, I submit, is contrary to both the intention of the relevant empowering provisions of the Constitution (and other applicable legislation) and the reasoning of this Court in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).

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

# The Public Protector’s interest in a pronouncement by the Constitutional Court upon the binding nature and legal effect of the powers of the institution self-evidently extends to the interpretation of my powers in all matters, and not only in regard to the matter at hand. In my respectful submission, these reasons all point to a direct and substantial interest in the EFF’s application that is sufficient for this Court to permit my intervention as a party, alternatively, as an *amicus curiae*.

# **THE SUBMISSIONS TO BE ADVANCED BY THE PUBLIC PROTECTOR IF ADMITTED**

# If admitted as a party or a friend of the Court, in support of my argument for the binding nature of the remedial action contained in the Report in terms of section 182(1)(c) of the Constitution, my submissions will address three issues in turn:

## First, I shall address the proper contextualisation of the Public Protector’s powers in section 181 of the Constitution as one of several administrative oversight bodies whose powers are unique or *sui generis* and that the concept of an Ombudsman is not a helpful starting point in view of the diversity of Ombudsman powers globally

## Secondly, I shall address the legislative history of the Public Protector Act, which, together with the Constitution, is an important source of the powers granted to my office;

## Thirdly I shall demonstrate that, properly interpreted, the final Constitution and the Public Protector Act both grant me the power to take the remedial action contained in the Report;

## Fourthly, I shall explain the reasons for my submission that the remedial action contained in the Report gives rise to binding legal obligations, and that these obligations stand unless or until they are set aside by a court of law; and

## Fifthly, I shall explain that the threshold set by the High Court in the SABC matter is too low, even by the standards applicable to regular Ombudsman who do not have the remedial powers granted to me under the Constitution.

# I expand upon these submissions below.

# The legislative history of the Public Protector Act

# It appears to me that the High Court in the SABC matter seemed to accept, and I respectfully submit, incorrectly, that the name ‘ombudsman’ is determinative of the powers the Public Protector’s office. The truth is that the concept is given to a family of institutions across different jurisdictions, whose common denominator is administrative oversight or scrutiny. These institutions have a different status to the institution of the Public Protector under the Final Constitution. Each institution has powers that differ from country to country.

# In placing emphasis on the concept of a generic ‘ombudsman’, the High Court adopted an approach that I respectfully submit is unhelpful. In the SABC matter, the High Court appeared to take it for granted that the UK Parliamentary Commissioner sets the standard for the powers of Ombudsmen, whereas, even the Ombudsman’s office in Sweden, which was the first country to introduce an oversight body of this nature, has far more powers than those of the office in the UK. Furthermore, consistent with the unique nature of the office from jurisdiction to jurisdiction, the powers of the office in Sweden differ from those of others in Pakistan, and Israel, to name but two examples.

# A related key factor overlooked by the High Court is the fact that a ‘classical’ Ombudsman such as the UK Parliamentary Ombudsman only investigates maladministration, and it has a remit that excludes acts of political office bearers in the Executive and the Legislature. In the case of the office of the Public Protector in South Africa, neither the Executive nor even Parliament itself are exempt from administrative scrutiny or oversight by the Public Protector and its fellow Chapter 9 institutions.

# In my submission, even a cursory glance at the genesis and history of the Public Protector shows clearly that the office has an Ombudsman-like dimension, but is not an Ombudsman as envisaged in *Bradley*, the decision on which the High Court’s judgment turned.

# The genesis of the office now called the Public Protector lies in the Advocate General, a graft-busting body established in 1979 (pursuant to the Advocate-General Act 118 of 1979). At its inception, the Advocate-General’s office did not have the powers of administrative oversight. Ombudsman-related functions were then added when the Advocate-General Amendment Act 55 of 1983 came into effect. The effect of the latter enactment was that it brought maladministration and related administrative justice grievances into the office’s remit. It also changed the name of the Act and the institution to the Ombudsman Act and Ombudsman, respectively. Under the Ombudsman Act, the office was given additional powers to endeavour to resolve disputes or grievances brought to it through conciliation, mediation or negotiation, or indeed any other means that the office deemed appropriate.

# Worth noting is that, until then, the office of the then-Ombudsman was a statutory body based in the Department of Justice, and it was accountable to the President and Parliament. This is important because, in a system of parliamentary sovereignty, the office’s powers then were similar to those under section 10 of the UK Parliamentary Commissioner Act of 1967, which are confined to investigating and reporting.

# South Africa’s system of government changed to that of a constitutional democracy when the Constitution of the Republic of South Africa Act 200 of 1993 (“**Interim Constitution**”) took effect. At that time, the name of the office was changed from Ombudsman to “Public Protector”, without material changes to its powers and functions. However, what is noteworthy is that the effect of the Interim Constitution was to transform the Public Protector’s office from a statutory body to an independent body under the Constitution.

# However, regarding the issue at hand, being the power to take remedial action, the Interim Constitution was not clear. Section 112(1) of the Interim Constitution provided that the Public Protector, “*in addition to any powers and functions assigned to him or her by any law, [shall] be competent*” to investigate**, resolve** or refer complaints of government malfeasance.

# When the Public Protector Act was passed in 1994, it regulated and expanded the powers of the Public Protector to include coercive powers such as the power to subpoena persons and information and protection from contemptuous conduct. Notably, the Act’s regulatory provisions deal with investigation (section 6 and 7) and reporting (section 8). There is no section that specifically regulates the power to take remedial action.

# A significant language change was adopted in the Final Constitution which , for the first time, introduced language not to be found in the UK OImbudsman provisions or any of the old Ombudsman bodies, that is, the power vested in the Public Protector by section 182(2) of the Constitution, to “take appropriate remedial action”.

# I respectfully submit that the power “*to take appropriate remedial action*”, is unique to our context. It is not comparable to the legislation interpreted in the *Bradley* case. .

#  I explain in more detail immediately below.

# The powers of the Public Protector as a Chapter 9 Institution under the Constitution

# Chapter 9 institutions are established under the Constitution in order to support and strengthen South Africa’s democracy. Section 181(2) of the Constitution provides that all Chapter 9 institutions shall be “*subject only to the Constitution and the law*”.Thus, in contrast to a system of parliamentary sovereignty, the establishment of Chapter 9 institutions express a key principle of constitutionalism: the limitation of public power.

# Under the Constitution, my powers, including the power to take appropriate remedial action as envisaged in section 182(1)(c) of the Constitution is to be contextualised in section 181 of the Constitution which innovatively introduces a group of administrative oversight bodies to supplement accountability in the exercise of public power in various areas of public governance. Unlike the UK Parliamentary Ombudsman, these independent bodies report to Parliament in a manner that is similar to members of the Executive and are not part of or capable of being second-guessed by Parliament, whose acts are also subject to their scrutiny in appropriate circumstances.

# My powers are, accordingly, better benchmarked against section 181(2) of the Constitution and not to be equated with those of an ombudsman under a Westminster system of government. The SCA has held that they “*go much beyond that*” (*Public Protector v Mail and Guardian Ltd and Others* 2011 (4) SA 420 (SCA) at para 9). Indeed, this Court has held that the final 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*” (*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).

# The Constitution provides that the office of the Public Protector, as a Chapter 9 institution, is one of the State institutions that is established expressly to “*strengthen constitutional democracy in the Republic*”. Pursuant to the terms of section 181 of the Constitution, the Public Protector (and the other Chapter 9 institutions) –

## is independent and “*subject only to the Constitution and the law*”*;* and

## must be assisted and protected by other organs of state “*to ensure [its] independence, impartiality, dignity and effectiveness*”.

# This Court has held that 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*” (*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 to 134), and that my office (as well as those of other Chapter 9 institutions) provides a “*protective framework for civil society*” that ensures accountability, responsiveness and openness (*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 SCA has described my office in particular as a “*last defence against bureaucratic oppression*” (*Public Protector v Mail & Guardian Ltd and Others* (*supra*) at para 6).

# My powers and functions under the final Constitution are set out at section 182(1) thereof. Section 182(1) of the Constitution provides as follows:

# *“(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 to result in any impropriety or prejudice;*

# *(b) to report on that conduct; and*

# *(c) to take appropriate remedial action.*”

# Thus, contrary to the position under the Interim Constitution, the final Constitution expressly empowers my office to do more than simply investigate and report. In fact, the Public Protector is the only Chapter 9 institution of all such institutions that the Constitution itself imbues with the specific remedial power “*to take appropriate remedial action*”.

# I also point out that one of the reasons for the refusal by this Court to initially certify the new text of the Constitution was that it considered the power to remove the Public Protector by a simple majority as insufficient to ensure the independence and impartiality of the incumbent, which was “*vital to ensuring effective, accountable and responsible government*”. The provision was re-drafted to require a two-thirds majority of the National Assembly to secure removal (*Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) at para 163).

# Section 182(2) of the Constitution permits Parliament to promulgate legislation granting me additional powers over and above those I have set out above. Indeed, the Ethics Act and the Public Protector Act are two such examples. In the present case, however, I exercised my powers in terms of section 182(1)(c) of the Constitution.

# In my submission, section 182(1)(c) of the Constitution clearly requires that the exercise of my powers should be respected by organs of state, spheres of government and by the Executive, unless and until set aside by a court of law.

# The binding effect of the remedial action in the Report

# On a proper construction of section 182(1)(c) read with section 181(2) and other relevant provisions of the Constitution, I will submit that it is clear that any remedial action that I may take, pursuant to my powers as the Public Protector, will be binding and enforceable unless and until set aside by a court of law.

# I say this not least because a proper construction of the Constitution read with the Public Protector Act requires a purposive approach to statutory interpretation. A purposive approach would establish that the institution of the Public Protector is a constitutional safeguard of ‘clean’ government. In my submission, an approach that accepts that organs of state may permissibly second-guess, ignore or ostensibly dilute my findings and any remedial action that I may order under section 182(1)(c) of the Constitution, without a review by a court, would only serve to undermine the safeguard of the Public Protector’s office and, moreover, to undermine the rule of law.

# The fact that the remedial action of the Public Protector has binding legal effect is supported by a proper construction of section 182 of the Constitution read with section 181(2) of the Constitution and section 6 of the Public Protector Act. I submit that the Constitution and the Public Protector Act grant me separate and distinct remedial powers, which are not to be conflated. The office of the Public Protector is imbued with the power both to make recommendations and to take remedial action. It follows that, in my capacity as the Public Protector, I am empowered to fashion remedies that include the exercise of either or both of these powers.

# I stress, however, that in the present case, I took remedial action explicitly in terms of section 182(1)(c) of the Constitution. To interpret the relevant powers as did the High Court in the SABC matter would render the institution of the Public Protector ineffective as a constitutional bulwark against government malfeasance. In my submission, there are at least five reasons why the interpretation advanced concerning the power to take appropriate remedial action is to be preferred –

## First, the interpretation that remedial action prescribed by the Public Protector is binding would be 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;

## Second, the interpretation would be consistent with the constitutional principle of accountability;

## Third, it would be consistent with the text of section 181(2) of the Constitution, which guarantees that the Public Protector shall be “*subject only to the Constitution and the law*”;

## Fourth, it would be consistent with the constitutional requirement of effectiveness stipulated in section 181(3) of the Constitution; and

## Fifth, the interpretation would serve to reinforce the Public Protector’s judicially recognised role as being a proactive investigator who provides a “*protective framework for civil society*” and as an institution which “*strengthens constitutional democracy in the Republic*” as stipulated in section 181(1) of the Constitution.

# There is an important legal consequence that arises from the interpretation that I have advanced above, which is as follows. An interpretation that remedial action taken by the Public Protector results in a binding decision means that it must be followed unless it is reviewed and set aside by a court. It is not competent for any party to then adopt a course of action that ignores or dilutes my prior decision. This, I am advised, is the effect *inter alia* of this Court’s decision in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty)* (*supra*).

# **THE PUBLIC PROTECTOR’S SUBMISSIONS WILL ASSIST THE COURT**

# In my submission, the Public Protector has a direct and substantial interest in the EFF’s application, and I respectfully submit that it would be in the interests of justice that I be granted leave to intervene as a respondent to the application. However, if the Public Protector is not admitted as a party, then, in my respectful submission, the argument outlined above will still be useful to the Court in its determination of the EFF’s application in any event. Thus, in the alternative to being granted leave to intervene as a respondent, I respectfully submit that this Court should permit the Public Protector to intervene as *amicus curiae*.

# Although the EFF’s application appears to presume that the remedial action prescribed in the Report is indeed binding, I respectfully submit that the Public Protector’s submissions in regard to the reasons for this may differ.

# Given the fact that I myself am the organ of state that elected to prescribe the remedial action that is set out in the Report, I respectfully submit that I am the party who is best-placed to speak to the Report’s content.

# **THE ATTITUDE OF THE OTHER PARTIES TO THE ADMISSION OF THE PUBLIC PROTECTOR AS *AMICUS CURIAE***

# On 10 September 2015, my legal representatives wrote to the attorneys for the parties to the EFF’s application and requested their consent to the intervention of the Public Protector as *amicus curiae*. I have attached the letter hereto marked “**TNM1**”.

## The EFF’s attorneys have not replied to the abovementioned correspondence;

## On 17 September 2015, the attorneys for the first respondent replied to the abovementioned correspondence (attached hereto marked “**TNM2**”), indicating that their client did not oppose the Public Protector’s intervention in the matter.

# I respectfully submit that the first respondent consents to my intervention reinforces the reasons for intervention that I have set out further above.

# I further submit that my participation in these proceedings, whether as a party or an *amicus* and the submission of this affidavit, cannot occasion any prejudice to any of the parties.

# **CONCLUSION**

# Having regard to all of the above, I respectfully request that this Court grant the relief sought in the attached notice of motion, including such further directions as this Court considers necessary or appropriate concerning my participation in these proceedings.

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **THULISILE NOMKHOSI MADONSELA**

I hereby certify that the deponent declares that he knows and understands the contents of this affidavit and that it is to the best of the deponent’s knowledge both true and correct. This affidavit was signed and sworn to before me at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ on this the \_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_ 2015, and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended have been complied with.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**COMMISSIONER OF OATHS**

 EX OFFICIO:

 FULL NAMES:

 PHYSICAL ADDRESS:

 DESIGNATION: