IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

(BRAAMFONTEIN)

CASE NO: CCT 171/15

In the matter between:

DEMOCRATIC ALLIANCE	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE MINISTER OF POLICE	Third Respondent
THE PUBLIC PROTECTOR	Fourth Respondent

THE SPEAKER 'S WRITTEN SUBMISSIONS

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A. INTRODUCTION

1. The National Assembly ("**the NA**") is enjoined by section 55(2) of the Constitution to exercise oversight powers over the Executive.

2. This case concerns the reach and purview of the NA's specific constitutional powers of oversight over the Executive. In this regard, the question that arises is whether the Public Protector ("**the PP**") is authorised by the Constitution, national legislation or otherwise to limit these constitutional oversight powers.

3. This case also concerns the reach of the PP's general investigative powers provided for in section 182(1)(c) of the Constitution as regulated by national legislation.[1] In this regard the same question arises, namely, whether the PP is authorised by the Constitution, national legislation or otherwise to "*limit*"[2] the NA's constitutional oversight powers.

4. The Democratic Alliance ("**the DA**") contends that the PP is so authorised in the following terms:

> *"... the NA's jurisdiction was limited by the Public Protector to considering President Zuma's comments and actions on her Report…As this was not done, the NA had nothing before it to*

[1] The Public Protector Act 24 of 1994 and the Executive Members' Ethics Act 82 of 1998.

[2] DA's Replying Affidavit, at paras 45 and 46.

consider, whether by way of exercising its accountability and oversight powers or otherwise."[3]

(Emphasis added)

5. Having made such an extraordinary allegation, the DA proceeds to read certain words into the PP Report in a desperate attempt to support the above conclusion. This the DA does by reading words such as *"personally"* and *"how"* into the text of the PP Report.

6. The PP Report is clear in its terms. It states that the:

"*The President is to … Report to the National Assembly on his comments and actions on this report within 14 days.*"[4]

7. The DA alleges, however, that the PP states in her report that:

"President Zuma was required to report to the NA on <u>how he implemented the remedial action</u>…"

8. In addition, the DA alleges that the President "*never <u>personally</u> commented and took no actions to consider."*

[3] DA's Replying Affidavit, at para 46.

[4] Record, page 82, para (a)4 of the PP Report.

9. It is self-evident that the PP did not require the President to *"personally"* do anything at all nor did she require the President to "*report to the NA on how he implemented the remedial action*." The PP Report simply requires of the President to report to the NA on his comments and actions on the report within 14 days.

10. It is difficult to see how the "*the responses from the President, dated 2 April 2014 and 14 August 2014; and/or a report from the Minister of Police, dated 25 March 2015"* complained of fail to satisfy the requirement of "*his comments and actions"* within the contemplation of the Public Protector's Report.

11. Therefore, the questions that arise, put differently, are:

    11.1. Firstly whether the PP is authorised, by section 182(1)(c) of the Constitution as regulated by national legislation or otherwise, to *"limit*" the oversight powers of the NA or to "*prescribe*"[5] to it on the manner in which it should exercise its oversight powers provided for in section 55(2) of the Constitution; and

    11.2. Secondly, whether the PP did, in fact, limit or prescribe to the NA the manner of the exercise of its constitutional oversight powers.

[5] See footnote 6 below.

12. It is our submission, that the direct answer to both these questions must unequivocally be in the negative because this Court has cautioned against "*prescribing*" to the National Assembly the manner in which it should exercise its constitutional powers.[6] This caveat applies with equal force to the PP and she has, quite correctly and properly, not sought to prescribe to the NA in this regard.

13. This reach of powers juxtaposition has been brought into sharp focus by the impugned actions and resultant resolutions of the NA in relation to the Public Protector's Report of March 2014 ("**the PP Report**").

14. The result is that the DA seeks relief in this Court against the NA in the following terms:

    14.1. granting it direct access to this Court conditionally upon either the Economic Freedom Fighters ("**the EFF**") being granted direct access, or this Court assuming exclusive jurisdiction in the matter brought under case number CCT 143/15 ("**the EFF application**"); and

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[6] See for example**,** *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (Judgment not yet reported) the dicta at paras 155 – 156:

"*…It is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant…*

Despite its protestations to the contrary, what the applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner. By what dint of right can the applicant do so...That attempt impermissibly trenches on Parliament's terrain; that is proscribed by the doctrine of separation of powers."

14.2. declaring the resolutions of the NA of 13 November 2014 ("**the 13 November Resolution**") and of 18 August 2015 ("**the 18 August Resolution**") to be unlawful and constitutionally invalid.

15. The Speaker of the National Assembly ("**the Speaker**") resists this application. In its answering affidavit the Speaker advanced factual and legal grounds[7] in that regard.

16. In response to the factual averments made by the Speaker, the DA stated *inter alia* that "*the DA refuses to be drawn into a … microscopic analysis of … every statement … by a DA member… This matter concerns legal questions… The facts are therefore common cause.*" [8]

17. Consequently, the factual averments made by the Speaker are not in dispute. We proceed, therefore, to make legal submissions below on the basis that the factual averments thus made are common cause. We do so in the following sequence:

17.1. First, the challenge against the resolutions;

17.2. Second, the DA's sections 167(6)(a) and 167(4)(e) application; and

17.3. Third, the conclusion.

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[7] Speaker's Answering Affidavit, para 13.1 – 13.7.

[8] DA's Replying Affidavit.

18. Before we do so, we draw attention to the unsubstantiated and gratuitous allegations made against the NA at paragraph 7 of the DA's replying affidavit where the following is stated:

"*I should say at the outset that the affidavits of the … Speaker… contain rather desperate attempts… to justify the parallel process initiated by President Zuma at exonerating himself … to allow President Zuma to avoid implementing the Public Protector's remedial action and essentially get off scot free."*

19. These gratuitous comments have factual basis and are made purely for political gain. We submit on the authority of ***Turnbull-Jackson***[9] that this conduct calls for the strongest possible censure. There, this Court articulated its displeasure towards similar conduct in the following terms:

"[35] Before I conclude, I am moved to caution against wanton, gratuitous allegations of bias — actual or perceived — against public officials. Allegations of bias, the antithesis of fairness, are serious. If made with a sufficient degree of regularity, they have the potential to be deleterious to the confidence reposed by the public in administrators… accusations of corruption against the innocent may visit them with the most debilitating public opprobrium. Gratuitous claims of bias like the present are deserving of the strongest possible censure."

[9] *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC).

B. THE CHALLENGE AGAINST THE RESOLUTIONS IS MISCONCEIVED

20. The whole basis for the DA's constitutional challenge against the resolutions is summarised by it in the following manner:

> *"To the extent that the NA regarded the responses from the President, dated 2 April 2014 and 14 August 2014; and/or a report from the Minister of Police, dated 25 March 2015, and other reports as "a report" which satisfies the remedial action taken by the Public Protector, and the applicable legislation, the NA acted unconstitutionally and unlawfully. This is the main ground on which the NA's resolutions … are sought to be declared unlawful, unconstitutional and unlawful."*[10]

21. The determination of the issues in this matter hinges, in part, on the answer to the question whether the PP is authorised, by section 182(1)(c) of the Constitution as regulated by national legislation or otherwise, to "*prescribe*"[11] to the NA on the manner in which it should exercise its section 55 oversight powers.

22. We deal with this issue below under the following topics:

    22.1. The true nature of the National Assembly's oversight powers;

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[10] Founding Affidavit, para 11.2.

[11] See footnote 5 above.

22.2. The true nature of the Public Protector's powers and their source; and

22.3. The legislative history and evolution of the Public Protector Act.

The true nature of the National Assembly's accountability and oversight powers

23. The powers vested in the NA by section 55(2) are of a discretionary nature.

24. The principle of legality requires that the exercise of administrative discretionary power must be lawful.[12]

25. The Constitution, the Public Protector Act 23 of 1994 ("**the PP Act**") and the Executive Members' Ethics Act 82 of 1998 ("**the Ethics Act**") do not prescribe to the NA the manner in which those constitutionally ordained powers of accountability and oversight are to be exercised.

26. That matter is left entirely to the discretion of the NA. The NA must, however, to provide mechanisms within which such discretion falls to be exercised. It has provided those mechanisms.

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[12] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 53 footnote 73: *"Administrative lawyers now generally acknowledge the importance of discretion to a functioning legal system. The challenge for administrative law is to ensure that discretion be properly regulated."*

27. There is no frontal challenge against the mechanisms it has provided with the result that their constitutional validity is not in dispute. The issue is thus one of the lawfulness of the invocation of the said mechanisms.

28. Discretionary power is an indispensable necessity in the modern state.[13] In ***Dawood v Minister of Home Affairs***[14] this Court observed:

"Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."

29. Simply put, discretion is a legal power to make a choice between two or more alternative courses of action in accordance with requirements laid down by law.[15]

30. Discretion involves the exercise of discernment and judgment upon which that choice is based, and in the process embraces the interpretation and/or application of rules.

"The scope of discretionary powers may vary. At times, they will be broad; particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are

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[13] Baxter *Administrative Law* (Juta, Cape Town) 82–84.

[14] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 53.

[15] See Wiechers *Administrative Law* (Butterworths) 210; *Giddey v JC Barnard & Partners* 2007 (5) SA 525 (CC) at para 19: "*Where the discretion contemplates that the Court may choose from a range of options, it is a discretion in the strict sense."* (emphasis added).

indisputably clear. The freedom (or 'room') to decide, which must be exercised, does not import arbitrariness; it is not absolute. The discretionary power may be 'wide' or 'narrow'."[16]

31. Wiechers[17] distinguishes between a free and a circumscribed discretion. He states that:

31.1. a free discretion *"is ... a discretion on which the law confers a wide freedom of choice without freeing the exercise of the discretion from adherence to the rules laid down by law;*" and

31.2. a circumscribed administrative discretion *"is more limited or circumscribed in two respects: first of all, the number of options is limited by the statute and, secondly, the circumstances in which the discretion is to be exercised are clearly defined in the statute*".

32. Where the decision-maker, such as the NA *in casu*, is duly authorised, lawfulness requires *inter alia* that it remains within the bounds of the power; not misconstrue it; adheres to the permissible range of considerations and/or options; and to apply its own mind to the matter in accordance with the legislative purpose of the power.

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[16] Baxter at 88.

[17] Wiechers at 221.

33. The pre-democratic grounds for review are usefully summarised by Cloete JA in ***Pepcor Retirement Fund*** ("***Pepcor***"):[18]

> *"Hitherto, where jurisdiction is not in issue and there is no obvious transgression of the boundaries within which the functionary has been empowered to make decisions ... Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of ... an ulterior or improper purpose; or where ... the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter."*
>
> (Emphasis added)

34. The above passage remains relevant. This Court held in *Bato Star*[19] that as the common law informs the provisions of the Promotion of Administrative Justice Act, 2000 ("**PAJA**"), it remains relevant to administrative review but the extent to which it does will have to be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution.

35. It follows, from the above, that in this case, we are concerned with the exercise of a wide discretion, also referred to as "*a discretion in the strict sense"*[20] in respect of which judicial intervention ought to *"be limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of ... an ulterior or improper purpose; or where ... the decision of the functionary*

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[18] *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) at para 32.

[19] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 22.

[20] *Giddey v JC Barnard & Partners* 2007 5 SA 525 (CC) para19.

was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter."[21]

36. We accordingly submit that NA's decision to accept and consider "*the responses from the President, dated 2 April 2014 and 14 August 2014; and/or a report from the Minister of Police, dated 25 March 2015"* and the resolutions flowing from such a consideration were not "*arrived at arbitrarily, capriciously or mala fide or as a result of … an ulterior or improper purpose; or … so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter".*

37. There is thus nothing objectionable in the NA, in the exercise of its discretion, taking all relevant considerations into account including "*responses from the President, dated 2 April 2014 and 14 August 2014; and/or a report from the Minister of Police, dated 25 March 2015".*

38. In addition, the PP directed the President to *"report"* to the NA on his *"comments*" and "*actions"* on the Nkandla Report with 14 days. The 14 day period provided by the PP lapsed on 2 April 2014.[22]

39. The President's response of 2 April 2014, by way of example, is a report on his actions and comments on the PP Report.

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[21] *Pepcor* (supra).

[22] Founding Affidavit, annexure JS(CC) at paras 38.4 and 40; and the Nkandla Report, p68.

39.1. The PP Report dealt with the security upgrades at the President's residence and so did the 2 April 2014 report.

39.2. The PP Report called upon the President to report to the NA on "*actions"* and "*comments"* on her report.

39.3. The 2 April 2014 report sets out the "*actions"* taken, namely:

39.3.1. The establishment of the multi-disciplinary task team;

39.3.2. The proclamation made empowering the Special Investigating Unit ("**SIU**") to investigate the Nkandla upgrades matter;

39.4. The report also contained "*comments"* thereon such as for example:

39.4.1. The multi-disciplinary task team report adopted a certain methodology; and

39.4.2. The President had to apply his mind to interventions then underway.

39.5. In any event, the PP Report as regards the "*action taken*" or *"to be taken*" is based on the wording of section 3(5) of the Ethics Act, which includes reports of the sort presented by the President to the NA.

39.5.1. The NA in the proper discharge of its constitutional obligation is obliged to have regard to all the relevant material presented to it, and that includes all the other reports presented to it by the President.

40. Furthermore, the contention that the President's reports of 2 April 2014 and 14 August 2014 do not constitute reports on the PP's findings and remedial action is simply disingenuous.

40.1. The deponent to the founding affidavit, Mr James Selfe ("**Mr Selfe**") addressed a letter to the Speaker's office at the commencement of the Fifth Parliament requesting the re-establishment of the First Ad Hoc Committee to consider the President's submissions of 2 April 2014. The 2 April 2014 submissions by the President where in fact the President's report to the NA as per the PP's findings.

40.2. It is thus incomprehensible that those submissions that constituted the President's "*report*" have suddenly ceased to be a "*report*" of the sort contemplated in the PP Report.

40.3. Had the "*report"* been a non-report as it is presently contended, Mr Selfe would not have found the need for a committee of the NA to be established for that purpose.

40.4. It is clear that this application was prompted by DA's failure to persuade its NA colleagues to decide in a particular manner.

40.5. That being so, it now seeks to invoke the judicial process in the advancement of what is, in truth, a political issue that falls to be decided through the parliamentary deliberative process.

41. We accordingly submit that the DA's complaint in this regard is unfounded.

The true nature of the Public Protector's powers and their source

42. The DA seeks to give effect to the powers of the PP flowing directly from section 182(1)(c) of the Constitution. It relies in this regard on the fact that the PP states in her report that she invoked section 182(1)(c) powers and hence it discounts any reliance on the PP Act.[23]

43. It locates this portion of its claim directly within section 182(1)(c) of the Constitution despite there being in place the PP Act which covers the field, completely, in that regard.

[23] DA's Heads of Argument, para 34.

44. Section 182(1)(c) of the Constitution provides that the Public Protector has the power, as regulated by national legislation, to investigate any conduct in state affairs, to report on that conduct and to take appropriate remedial action.

45. The above provision makes it plain that:

45.1. Firstly, the powers set out in subsection 1(a) - (e), namely to investigate, report and take appropriate remedial action are "*as regulated by national legislation;*" and

45.2. Secondly, the powers and functions additional to those in subsection 1(a) - (e) are to be *"prescribed by national legislation."*

46. The PP Act is the national legislation that seeks:

46.1. Firstly, to regulate the powers set out in subsection 1(a)-(b) of investigating, reporting and taking appropriate remedial action; and

46.2. Secondly, to prescribe additional powers and functions of the Public Protector.

47. The above is made plain by the preamble of the PP Act which reads, in its material parts, as follows:

*"**Preamble***

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… to report on that conduct and to take appropriate remedial action

… AND WHEREAS the Constitution envisages further legislation to provide for certain ancillary matters pertaining to the office of Public Protector;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows…"

(Emphasis added)

48. It is clear from the above that the mischief of the PP Act is to:

48.1. regulate the powers provided for in section 182(1) (a) - (c); and

48.2. prescribe additional powers and functions of the Public Protector.

49. Section 6(4)(c) (ii) of the PP Act provides, as regards remedial action of the sort we are concerned with in this matter, that:

"(4) The Public Protector shall, be competent-

…

(c) at any time … after an investigation-

… to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority…"

(emphasis added)

50. The above section regulates the section 1 (a) – (c) powers of the PP. It does so by stating that at any time, during or after an investigation, the PP shall be competent to either:

50.1. refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it;

50.2. make an appropriate recommendation regarding the redress of the prejudice resulting therefrom; or

50.3. make any other appropriate recommendation she deems expedient to the affected public body or authority.

51. The *"remedial action"* provided for in section 182(1)(c) is thus regulated by section 6(4)(c) (ii) of the PP Act.

52. The PP Act provides in express language that *"appropriate remedial action"* is not prescriptive but advisory.

53. Accordingly, that "*appropriate remedial action*" is no more than *"an appropriate recommendation regarding the redress of the prejudice resulting therefrom"* or "*any other appropriate recommendation he or she deems expedient to the affected public body or authority…*" in terms of section 6(4)(c)(ii).

54. In sum, the PP in a case such as the present where her investigation affects a public body or authority such as the NA can do one of three things, namely, to refer the matter to the public authority affected thereby, make recommendations on redress of the prejudice flowing therefrom or make any other recommendations.

55. What is clear from the above is that the PP is not authorised by national legislation that regulates her section 182(1)(c) powers to *"prescribe"* to the repository of the power on how it should discharge its constitutional obligations.

55.1. Section 6(4)(c)(i) reinforces the above. It provides that where, during or after an investigation, the Public Protector is of the opinion that the facts disclose the commission of an offence she shall be competent to bring the matter to the notice of the relevant authority charged with prosecutions. The logic behind this section is not hard to find.

55.2. Section 179[24] of the Constitution provides that prosecutorial decisions are an exclusive terrain of the National Prosecuting Authority ("**the NPA**").

55.3. Had the PP been ordained with prescriptive powers of the sort "*two parallel systems of law"*[25] would result. The absurdity of that proposition is self-evident. It is that the PP, who is by all accounts a generalist, would be empowered to prescribe to a constitutionally ordained specialist body such as the NPA, on matters prosecutorial. That proposition postulates the absurd. Deference is all the more indicated in a case such as this. The proposition that the PP has the competence to prescribe to a specialist body, such as the NPA, on when and whom to prosecute must, with respect be rejected. That interpretation is plainly not borne out by the textual analysis of the PP Act, read with the Constitution.

55.4. The DA's proposition that the PP's section 182(1)(c) powers entitle her to prescribe to the NA must apply, by parity of reasoning, to the NPA. With respect, such a proposition needs only be stated to be rejected.

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[24] *"(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-*

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

…."

[25] *My Vote Counts*, para 160.

55.5. Section 8 of the PP Act which deals with the publication of the findings of the PP lends further support to the above interpretation.

55.6. It provides at:

55.6.1. subsection 8(1), that the PP may "*make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her*"; and

55.6.2. subsection 2(b)(iii), that the PP *"shall"*[26] submit a report to the NA on the finding of a particular investigation if it requires the urgent attention of, or an intervention by, the NA.

55.7. The word *"finding"* has been defined to mean *"a conclusion reached by an inquiry."*[27]

55.8. Whatever meaning one chooses to ascribe to the word *"finding"* as it occurs in the PP Act, what remains clear is that where the NA's attention and/or intervention is required, the PP is enjoined, by peremptory language, to submit her report to the NA for intervention and attention pursuant to the provisions of section 8(2)(b)(iii).

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[26] This subsection employs peremptory language, i.e *"shall."*

[27] The Concise Oxford Dictionary, 9th Edition.

55.9. *"Intervention"*[28] denotes active involvement of some form or another. It contemplates positive action required from the NA in order to perfect the *"finding"* of the PP. It can hardly be seriously contended that the attention and intervention referred to in this subsection is a mere rubber-stamping of the PP's report.

55.10. The scenario contemplated in section 8(2)(b)(iii) is akin that often encountered by this Court upon making a finding of legislative unconstitutionality. This Court does not, in such a case, legislate remedial legislation on behalf of Parliament. What it does do, however, is to reach its *"conclusion"* and, thereafter, defer to Parliament to perfect its *"conclusion"*, by for example enacting remedial legislation as it may deem appropriate in the exercise of its legislative powers vesting, as they do, exclusively in Parliament.

56. We submit that the PP's *"findings"* are subject to a similar scheme. She has no constitutional powers of prescription to the NA.

57. Finally in this regard, the submissions that we make above find support in the provisions of the Ethics Act.

57.1. The Ethics Act provides for a code of ethics governing the conduct of, *inter alia*, members of Cabinet;

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[28] The word *"intervene"* is defined to mean *"come between so as to prevent or modify the result or course of events"*; and *"intervention"* means *"an act of intervening"*; The Concise Oxford Dictionary, 9th Edition.

57.2. Section 3(1) provides that the PP must investigate any alleged breach of the code of ethics complaint against a Cabinet Member or a Deputy Minister;

57.3. Upon completion of the investigation, the PP must submit a report in that regard to the President;

57.4. The President must within a reasonable time after receiving the report submit a copy of the report; any comments thereon and report on any action taken or to be taken in that regard to the NA;

57.5. The reason for the submission of the report together with comments thereon and action taken or to be taken is not hard to find. It is so as to enable the NA, as the repository of the oversight and accountability powers, to properly apply its mind on the totality of relevant information submitted and to take a decision in the exercise of its discretion;

57.6. Had the PP's powers been of a prescriptive nature, the requirement to submit comments and further information to the NA would simply not exist. Indeed, submitting the report to the NA would not be necessary as the report would be self-contained and prescriptive so as to require strict compliance therewith, without more;

57.7. *In casu,* the PP directed that the President should submit his comments and action taken to the NA so as to enable the NA to apply its mind thereto;

57.8. The President proceeded to do so;

57.9. Based thereupon the parliamentary process unfolded and it is still ongoing.

58. The DA ‘s objection to the process is, thus, difficult to fathom.

59. The role of the PP is to support the NA in the exercise of its powers. The PP Act regulates her section 182(1)(c) powers. It provides that in instances such as these she should either refer the matter to the NA or make recommendations thereto. There is no mention anywhere of the power to *“prescribe*” to the NA of the sort contended for by the DA. Hers is to support the NA and not to usurp its powers.

60. The above construction is, in our respectful submission, consistent with the doctrine of constitutional subsidiarity.

61. According to Ngcobo J:

“Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation,

it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides."[29]

62. Further, this Court recently articulated the principle thus:

"Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role

…

Over the past 10 years, this Court has often affirmed this. It has done so in a range of cases…"[30]

63. Based on the above, we respectfully submit that the PP's powers provided for in 182(1)(c) are regulated by the PP Act. Accordingly, the powers of the PP are to be sources from the PP Act and not directly from the Constitution.

Legislative history of the Public Protector Act

64. The legislative history of the PP Act supports the proposition set out above.

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[29] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 437.

[30] *My Vote Counts* at paras 53 and 54, footnotes included.

65. Although the PP Act was passed before the coming into effect of the Final Constitution, it has been amended on numerous occasions so as to bring it in line with the provisions of the Final Constitution.

66. The Interim Constitution provided for the powers and functions of the PP under section 112 thereof. That section had six subsections. It resembled, to a large extent, the current section 6 of the PP Act.

67. After the coming into effect of the Final Constitution, the PP Act was amended by:

67.1. Public Protector Amendment Act 113 of 1998 ("**the 1998 Amendment Act**"); and

67.2. Public Protector Amendment Act 22 of 2003 ("**the 2003 Amendment Act**").

68. Only the 1998 Amendment Act is relevant to the submission that we make. It amends the PP Act *inter alia* by:

68.1. Section 2 substituting the Preamble to provide that:

68.1.1. the PP Act is passed pursuant to sections 181-183 of the Final Constitution as opposed to sections 110 - 114 of the Interim Constitution;

68.1.2. the PP Act seeks to give effect the provisions of section 182(1)(c) of the Final Constitution that the Public Protector's power to investigate, report and take appropriate remedial action are regulated by national legislation; and

68.1.3. that the PP Act seeks to give effect to the provisions of section 182 of the Final Constitution that ancillary matters (additional powers) pertaining to the office be provided for in national legislation.

68.2. Section 8 which amended section 6 of the PP Act by inter alia substituting subsections (4), (5), (6), (7), (8) and (9) for subsections (4) and (5).

68.2.1. The result of this amendment is to provide elaborately for the powers of the PP in national legislation as opposed to doing so in the constitutional text.

68.2.2. Essentially, this amendment regulates section 181(2)(c) powers and prescribes additional ones in accordance with section 182 of the Final Constitution. Powers hitherto provided for in the Interim Constitution are now in the PP Act together with additional ones. By way of example:

68.2.2.1. section 112 (1) of the Interim Constitution is now section 6(4) of the PP Act;

68.2.2.2. section 112(2) of the Interim Constitution is now section 6(7);

68.2.2.3. section 112(4) of the Interim Constitution is now section 6(8);

68.2.2.4. additional powers envisaged in section 182 of the Final Constitution are provided for in section 6(5) of the PP Act.

69. The Explanatory Memorandum on the objects of the PP Amendment Bill states as follows:

> " *The Bill aims to bring the provisions of the Public Protector Act, 1994 …in line with the Constitution… the principal Act was originally drafted to give effect to the provisions of sections 110 – 114 of the …Interim Constitution. As a result of the repeal of the Interim Constitution, various amendments to the principal Act are required so as to harmonise it with the provisions of section 181 and 182 of the Constitution and to re-enact certain of the afore-mentioned provisions of the Interim Constitution in the principal Act."*

70. The result is that the Final Constitution provides only for the general powers of the PP which are to be regulated in national legislation. Similarly, the Final

Constitution provides for additional powers of the PP which are to be prescribed by national legislation.

71. The 1998 Amendment Act gives effect to the constitutional injunction of regulating the section 182(1)(c) powers and of prescribing additional powers as envisaged in section 182 (2).

72. We submit that the above reinforces our submission that the powers of the PP are to be sourced not directly from the constitutional text but from the PP Act which is the national legislation seeking to give expression to the rights and obligations set out in section 182 of the Constitution. It covers the entire field in that regard. There is no basis, therefore, for relying directly on the rights and duties provided for in the Constitution.

73. Any construction of the powers of the Public Protector without having regard to the provisions of the PP Act are unhelpful.

74. Accordingly, the powers set out in section 182(1) (c) are to be construed through the prism of the PP Act.

75. That construction leads, inevitably, to the conclusion that where a public authority such as the NA is impacted by the investigation conducted by the PP, she can either refer the matter to such an authority or make recommendations on redress of prejudice or on any other matter indicated by the investigation.

76. Absent a frontal challenge to the constitutionality of the PP Act, this Court must, with respect, source the powers of the PP from the PP Act.

77. The result of that approach is that the PP Act provides that she can do no more than recommend in the circumstances of this case.

78. The NA upon receiving the recommendations, must apply its mind thereto and in its discretion decide on a way forward. That is exactly what occurred *in casu.* The NA acted within the four corners of its constitutional authority.

79. Apart from the gratuitous allegations dealt with above, no primary facts in support of unlawfulness have been put up by the DA. Indeed, the DA contends that the determination of this matter hinges on a point of law namely what is the reach and purview of the PP's powers juxtaposed against those of the NA.

80. We submit on the basis of what has gone before that such powers are not prescriptive.

81. Accordingly, in our respectful submission, the NA in the exercise of its discretion was entitled to act in the manner in which it did.

82. We accordingly submit that the application for a declarator should be dismissed with costs including those consequent upon the employment of two counsel.

C. THE SECTIONS 167(6)(a) AND 167(4)(e) APPLICATION

83. The DA's application for conditional direct access to, and for the exclusive jurisdiction of, this Court must fail because:

83.1. Firstly, it is based on the success of the EFF's application founded on section 167(4)(e) of the Constitution, alternatively, on section 167(6)(a) which simply lacks any real prospects of success for the following reasons:

83.1.1. it is based on the assertion that "*Parliament has failed to fulfil its constitutional obligations under sections 55(2) and 181 of the Constitution;*"

83.1.2. none of these sections - sections 55, 181 and 182 - impose a specific constitutional obligation capable of being enforced against the National Assembly;

83.1.3. relief based on section 167(4)(e) is incompetent because section 42(1) of the Constitution provides that Parliament consists of:

83.1.3.1. The National Assembly; and

83.1.3.2. The National Council of Provinces ("**the NCOP**").

83.1.4. since section 55(2) of the Constitution confers oversight and accountability powers on the National Assembly, and not Parliament, declaratory relief against Parliament is incompetent. Such a relief would equally bind the NCOP in circumstances it has no such constitutional obligation.

83.2. Secondly, and assuming that section 55(2) imposes an obligation on Parliament (which is denied) the DA, in order to succeed, has to show a failure by the National Assembly to provide mechanisms of oversight and accountability. The DA has simply failed to do so. The National Assembly has not only provided mechanisms envisaged in section 55(2), but it has also invoked those mechanisms in the exercise of its oversight and accountability powers in respect of the President.

83.3. Thirdly, the DA's reliance on section 181(3) of the Constitution to invoke the provisions of section 167(4)(e) must fail because section 181(3) does not impose a specific obligation exclusively on the National Assembly to assist and protect the Chapter 9 institutions; that obligation is imposed on all the "*other organs of state"*.

83.4. Fourthly, the DA concedes[31], quite properly and correctly, that its case is not one in respect of which exclusive jurisdiction and direct access provisions apply. This is the reason why it approached the Western Cape Provincial Division of the High Court in the first instance.

83.5. Fifthly and contrary to the DA's contention, the issues that arise in the DA and the EFF application, are far from identical. In the DA application, relief in the form of a PAJA review is being sought whereas in the EFF application a declarator that Parliament failed to fulfil a constitutional obligation is at issue.

83.6. Finally, the DA has simply not made out a case for direct access. No factual basis whatsoever has been laid for the invocation of this procedure. There is no reason for depriving this Court of the benefit of High Court's input in this matter. Futhermore, no reason has been proffered for depriving the respondents their right of appeal in the event that they are ultimately unsuccessful.

84. We accordingly submit that the DA has failed to make out a proper case for the relief sought.

[31] Founding Affidavit, para 18.

D. CONCLUSION

85. We submit, in conclusion, that the DA has failed to make out a proper case for the relief sought in this application.

86. This application must, thus, be dismissed with costs inclusive of those consequent upon the employment of two counsel

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5 December 2015

TABLE OF AUTHORITIES

Legislation

1. Public Protector Act 23 of 1994.

2. Executive Members' Ethics Act 82 of 1998.

3. Promotion of Administrative Justice Act 3 of 2000.

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1. *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 53.

2. *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) at para 32.

3. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 22.

4. *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at para 437.

5. *Giddey v JC Barnard & Partners* 2007 (5) SA 525 (CC) at para 19.

6. *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) at para 35.

7. *My Vote Counts NPC v Speaker of the National Assembly and Others* (CCT121/14) [2015] ZACC 31 (Judgment not yet reported) paras 53 – 54; 155 – 156 and 160.

Textbooks

1. Baxter *Administrative Law* (Juta, Cape Town) 82 – 84.

2. Wiechers *Administrative Law* (Butterworths) 210.