IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.: 143 / 15

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE PUBLIC PROTECTOR	Third Respondent

THIRD RESPONDENT'S WRITTEN SUBMISSIONS

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INTRODUCTION AND OVERVIEW

1 The Third Respondent ("**the Public Protector**") is a Chapter 9 institution, established pursuant to the Constitution. This Court has held that the purpose of the Public Protector's office "**is to ensure that there is an effective public service which maintains a high standard of professional ethics**",[1] and that the Public Protector is granted the power to "**investigate**" the grievances of members of the public into "**any conduct of state affairs**", and to "**report**" on such conduct and "**take appropriate remedial action**",[2] in order to "**strengthen constitutional democracy in the Republic**".[3]

2 The present application turns upon the legal status that this Court ascribes to a report of the Public Protector entitled "**Secure in Comfort**" ("**the Report**"), which the Public Protector published on 19 March 2014, and the findings made and remedial action taken therein. The Report concerned "**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 it resulted in findings being made and in remedial action under section 182(1)(c) of the Constitution being taken against

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1 **Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC) at paragraph 161

2 Section 182 of the Constitution

3 Section 181(1) of the Constitution

the Second Respondent ("**the President**"). To date, however, the President has yet to comply. The first critical question thus arising in this application is whether the President is required, in law, to do so.

3 In its application, the EFF seeks an order from this Court declaring that –

3.1 the President is indeed bound to comply with, and give effect to, remedial action that is contained in the Report;

3.2 the President has failed to implement the findings and remedial action in the Report and, in doing so, has failed to fulfil his constitutional obligations in his capacity as Head of the National Executive; and

3.3 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.

4 The EFF seeks no relief against the Public Protector. However, its application is fundamentally premised on the enforceability of the remedial action that is set out in the Public Protector's Report.[4]

5 The Public Protector submits that the remedial action in the Report, and indeed any remedial action taken pursuant to section 182(1)(c) of the Constitution, gives rise to binding and enforceable legal consequences. She moreover submits

[4] Paragraph 2 of the EFF's written submissions

that such remedial action must be complied with unless and until it is set aside by a court. However, beyond this, she takes no position on the merits of the application.

6 The central thrust of the Public Protector's submissions in this application 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. We shall expand upon this submission in the paragraphs that follow. In doing so, we shall structure the remainder of our written argument as follows:

6.1 First, we shall set out the Public Protector's findings and the remedial action relevant to the present application;

6.2 Second, we shall demonstrate that the provisions of the final Constitution and the Public Protector Act 23 of 1994 ("**the Public Protector Act**") both permit the Public Protector to take the remedial action of the nature set out in the Report;

6.3 Third, we shall set out the legislative history of the institution of the Public Protector, which, we submit, serves to reinforce the Public Protector's power to take remedial action under the final Constitution;

6.4 Fourth, we shall contend that the remedial action taken in the Report gives rise to binding legal obligations, and that these obligations stand and must be implemented unless or until they are set aside by a court of law; and

6.5 Finally, we shall examine the decision of the Western Cape High Court in **Democratic Alliance v South African Broadcasting Corporation Limited and Others**,[5] which considered the same issue ("**the High Court Judgment**"). The Supreme Court of Appeal ("**SCA**") has since overturned the approach followed in the High Court judgment, in its decision in **SABC v DA** ("**the SCA Judgment**").[6] We shall submit that the SCA's approach is correct in law.

7 We shall deal with each of these issues in turn.

THE PUBLIC PROTECTOR'S REPORT

8 The Public Protector's investigation was conducted in terms of –

8.1 the provisions of section 182 of the Constitution;

8.2 sections 6 and 7 of the Public Protector Act; and

8.3 partly, in terms of sections 3 and 4 of the Executive Members' Ethics Act 82 of 1998 ("**the Ethics Act**").[7]

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5 2015 (1) SA 551 (WCC)

6 [2015] ZASCA 156 (as yet unreported)

7 Paragraph 1.2 of the Report, page 78

9 The issues considered in the Report that are relevant to the present application, and the Public Protector's findings in each instance, were as follows:

9.1 First, 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 went beyond what was required for the President's security. The Public Protector concluded that some of these improvements did indeed exceed what was needed.[8]

9.2 Second, whether the expenditure incurred by the State in regard to the improvements was excessive, or amounted to opulence on a grand scale. The Public Protector concluded that this complaint was also established.[9]

9.3 Third, whether the President's family and/or relatives improperly benefited from the measures taken at the President's private residence. The Public Protector 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.[10]

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8 Paragraph 10.1 of the Public Protector's founding affidavit in her application for intervention. Also see paragraphs 10.3.1 to 10.3.3 of the Report, page 263 (internal pages 429 to 430)

9 Ibid at paragraph 10.2. Also see paragraphs 10.4.1 to 10.4.2 of the Report, pages 263 to 264 (internal pages 430 to 431)

10 Ibid at paragraph 10.3. Also see paragraphs 10.5.1 to 10.5.5 of the Report, page 264 (internal pages 431 to 432)

9.4 Fourth, whether the President should be liable for some of the costs incurred. In this regard, the Public Protector found in the affirmative.[11]

9.5 Fifth, whether the President's conduct was in violation of the Ethics Code in respect of the project. Towards the end of her 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.[12] The Public Protector considered this contention and found it to have no merit.[13] She moreover found 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**".[14] The Public Protector 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

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11 Ibid at paragraph 10.4. Also see paragraphs 10.9.1.1 to 10.9.1.5 of the Report, pages 266 to 267 (internal pages 436 to 437)

12 See paragraphs 3.2.4 to 3.2.13 of the Report, pages 93 to 94 (internal pages 89 to 91)

13 Paragraph 10.5 of the Public Protector's founding affidavit in her application for intervention

14 Para 3.2.12 of the Report, pages 93 to 94 (internal pages 90 to 91)

office as a member of Cabinet, as contemplated by section 96 of the Constitution.[15]

10 In the Report, the Public Protector then proceeded to take the following remedial action in terms of section 182(1)(c) of the Constitution was as follows:[16]

10.1 The President is to 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;

10.2 The President is to pay a reasonable percentage of the costs of the measures as determined with the assistance of National Treasury;

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

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

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15 Paragraph 10.5 of the Public Protector's founding affidavit in her application for intervention. Also see paragraphs 10.10.1.1 to 10.10.1.7 of the Report, pages 267 to 268 (internal pages 438 to 439)

16 Paragraphs 11.1 to 11.4 of the Public Protector's founding affidavit in her application for intervention

11 Our submission is that the remedial action that the Public Protector took in the Report gives rise to binding legal consequences. We say this for the reasons set out below.

THE CHAPTER 9 INSTITUTION'S PARTICULAR IMPORTANCE IN OUR DEMOCRACY AND THE PROPER INTERPRETATION OF THE PUBLIC PROTECTOR'S POWERS

12 Section 181(1) of the final Constitution establishes six institutions which have the express purpose of "**strengthen[ing] constitutional democracy in the Republic**". They are:

12.1 The Public Protector;

12.2 The South African Human Rights Commission;

12.3 The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;

12.4 The Commission for Gender Equality;

12.5 The Auditor-General; and

12.6 The Electoral Commission.

13 Section 181 of the Constitution then goes on to provide that the office of the Public Protector (and the other Chapter 9 Institutions) –

13.1 shall be "**independent**";[17]

13.2 is "**subject only to the Constitution and the law**";[18] and

13.3 must be assisted and protected by other organs of state "**to ensure [its] independence, impartiality, dignity and effectiveness**".[19]

14 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**".[20]

15 The Public Protector (as with other Chapter 9 Institutions) provides a "**protective framework for civil societ**y" to ensure accountability, responsiveness and openness.[21]

16 In **Public Protector v Mail & Guardian Ltd and Others**,[22] the SCA was required to consider the powers of the Public Protector. With respect to the importance of the institution, it held:

"The office of the Public Protector is an important institution. It

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17 Section 181(2) of the Constitution

18 Section 181(2) of the Constitution

19 Section 181(3) of the Constitution

20 **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 2000 (1) SA 1 (CC) at paragraphs 133 to 134

21 **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 paragraph 25

22 2011 (4) SA 420 (SCA)

provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee".[23]

17 The Public Protector's powers and functions are set out in section 182(1) of the Constitution. They are:

> **"(1) The Public Protector has the power, as regulated by national legislation –**
>
> **(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;**
>
> **(b) to report on that conduct; and**
>
> **(c) <u>to take appropriate remedial action</u>."**

18 Importantly, section 182(1)(c) of the Constitution envisages that the Public Protector will not only investigate and report, but that he/she shall <u>additionally</u> be empowered to "**take appropriate remedial action**".

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[23] Ibid at paragraph 6

19 Section 182(2) of the Constitution provides that the Public Protector has the "**additional powers and functions prescribed by national legislation**".[24] There are various pieces of legislation that provide additional powers to the Public Protector.[25] However, for present purposes, it suffices to say that none of the powers granted to the Public Protector under these ancillary enactments detract from the Public Protector's original constitutional powers. Indeed, they could not, given the supremacy of the Constitution over all other law of the Republic.[26] This is so for an additional reason where the Public Protector Act is concerned: the Public Protector Act predates the enactment of the final Constitution. It could thus never modify the meaning of the Public Protector's power to "**take appropriate remedial action**" under section 182(1)(c) of the final Constitution, much less limit its import.

20 The original constitutional powers of the Public Protector to investigate, report and take remedial action are required to be respected by organs of State, spheres of Government and the Executive. In its **Certification** decision,[27] this Court

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24 Our emphasis

25 See, for example, the Protected Disclosures Act 26 of 2000 at section 8(1)(a); the Promotion of Access to Information Act 2 of 2000 at sections 83(h) and 84(b)(x); the Commission for Gender Equality Act 39 of 1996 at section 11(1)(e); the Ethics Act at sections 3 and 4; The Electoral Commission Act 51 of 1996 at section 6(3)(d); the Special Investigating Units and Special Tribunals Act 74 of 1996 at section 5(6)(b); the National Archives and Records Service of South Africa Act 43 of 1996 at section 6(4)(e); the National Nuclear Regulator Act 47 of 1999 at section 51(5)(a)(ii); the National Environmental Management Act 107 of 1998 at section 31(5); and the Housing Consumers Protection Measures Act 95 of 1998 at section 22

26 Section 2 of the Constitution

27 **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996** above note 1 at paragraph 161

referred to the notion of remedial action to be taken by the Public Protector as an important component of the institution. This Court held that the functions of the office of the Public Protector would "**inherently entail … investigation of sensitive and potentially embarrassing affairs of government**" and, for this reason, it held that the independence and impartiality of the Public Protector would be "**vital to ensuring effective, accountable and responsible government**".[28]

21 The Public Protector is the only Chapter 9 Institution empowered by the Constitution "**to take appropriate remedial action**". The SCA has referred to the breadth of the powers granted to the Public Protector in the following terms:

> "**The Act makes it clear that, while the functions of the Public Protector include those that are ordinarily associated with an ombudsman, they also go much beyond that. The Public Protector is not a passive adjudicator between citizens and the State, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring proaction in appropriate circumstances.**
>
> **….**
>
> **The Act confers upon the Public Protector sweeping powers to discover information from any person at all. He or she may call for explanations, on oath or otherwise, from any person; he or she may**

[28] Ibid

require any person to appear for examination; he or she may call for the production of documents by any person; and premises may be searched and material seized upon a warrant issued by a judicial officer. Those powers emphasise once again that the Public Protector has a proactive function. He or she is expected not to sit back and wait for proof where there are allegations of malfeasance, but is enjoined to actively discover the truth."[29]

(Our emphasis)

22 We emphasise that, in the present case, no contention has been made that the Public Protector has exercised her powers in a manner that is in any way unlawful or inappropriate.

THE LEGISLATIVE HISTORY OF THE POWERS OF THE PUBLIC PROTECTOR

23 The concept of a 'public protector' or 'ombudsman' is not unique to South Africa. It has its historical roots in the institution of the Swedish Parliamentary Ombud,[30] which was established in response to the Swedish King's authoritarian rule. In modern societies, the name 'ombudsman' is now used in respect of a family of institutions across different jurisdictions.[31] These institutions all share

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29 **Public Protector v Mail & Guardian Ltd and Others** 2011 (4) SA 420 (SCA) paragraphs 9 to 11

30 **Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996** above note 1 at para 161

31 Paragraph 29 of the Public Protector's founding affidavit in her application for intervention

a common denominator of administrative oversight or scrutiny. However, the contours of their respective powers vary, from country to country.

24 In South Africa, the genesis of the office that is now called the Public Protector lies in the office of the Advocate General. The latter office was created in 1979.[32] The Advocate-General's office was originally located within the Department of Justice.[33] Since its inception, the Advocate-General's office was empowered to investigate and report on complaints made in respect of financial maladministration within state organs.

25 The name of the office of the Advocate-General was changed to that of an "**Ombudsman**", and the legislation to that of the "**Ombudsman Act**" when Parliament promulgated the Advocate-General Amendment Act 104 of 1991.[34] This latter amendment granted the South African "**Ombudsman**" powers of search and seizure, and it broadened the remit of the ombudsman's oversight role from financial maladministration to the investigation of any maladministration for which there were reasonable grounds to believe that "**the State or the public in general [were] being prejudiced by maladministration in connection with the affairs of the State**".

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32 The office of the Advocate General was created pursuant to the Advocate-General Act 118 of 1979

33 Paragraph 34 of the Public Protector's founding affidavit in her application for intervention

34 See section 12 of the Advocate-General Amendment Act 104 of 1991

26 Worth noting is that, prior to the enactments of the interim and final Constitutions, the office of the then-Ombudsman was a statutory body based in the Department of Justice. 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.

27 South Africa's system of government changed to that of a constitutional democracy when the Interim Constitution took effect.[35] The Interim Constitution became the supreme law binding on all organs of State at all levels of Government,[36] and the newly-titled office of Public Protector, independent of government,[37] was established by means of Section 110 of the interim Constitution.[38] The powers of the Public Protector under section 112 of the interim Constitution were essentially to investigate, resolve or refer complaints of Government malfeasance.[39]

28 The powers of the Public Protector would again be expanded in the final Constitution. However, at the effective date of the change from parliamentary sovereignty to constitutional democracy, the powers of the Public Protector were regulated by the provisions of the interim Constitution, read with the Advocate-

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35 Constitution of the Republic of South Africa Act 200 of 1993

36 Constitutional Principle IV, Schedule 4, Interim Constitution

37 Paragraph 35 of the Public Protector's founding affidavit in her application for intervention.

38 The Interim Constitution took effect on 27 April 1994

39 Section 112 of the Interim Constitution. See paragraph 36 of the Public Protector's founding affidavit in her application for intervention.

General Act 118 of 1979, as amended by the Advocate-General Amendment Act 55 of 1983 and the Advocate-General Amendment Act 104 of 1991.[40] This remained the position until the enactment of the Public Protector Act.

29 The Public Protector Act came into effect on 25 November 1994. Under this latter statute, the high water-mark of the Public Protector's powers under the latter statute was that the Public Protector was empowered to "**endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission**" *inter alia* by alternative dispute resolution, or otherwise by "**any other means that may be expedient in the circumstances**".[41] When the final Constitution was passed, the powers of the Public Protector were extended further: she was given the power not only to investigate and report on malfeasance, but also to "**take remedial action**".

30 Since the enactment of the final Constitution, the Public Protector's powers can no longer be equated with those of an 'ordinary' ombudsman. Indeed, the Supreme Court of Appeal has held that they "**go much beyond that**".[42]

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40 At paragraph 31 of the SCA Judgment, the SCA refers to the "**Ombudsman Act 118 of 1979**", which is the same enactment to which we refer in these written submissions as the "**Advocate-General Act 118 of 1979**", the name of which was retrospectively amended by the Advocate-General Amendment Act 104 of 1991. The SCA Judgment also refers to "two predecessors of the Public Protector", which are the Advocate-General and the Ombudsman. The SCA's reference is, respectfully, not incorrect, however, for clarity, we point out that the distinction between the Public Protector's "**two predecessors**" in South Africa refers solely to nomenclative distinction

41 Section 6(4)(b) of the Public Protector Act

42 **Public Protector v Mail and Guardian Ltd and Others** 2011 (4) SA 420 (SCA) at paragraph 9

31 In relation to the office of the Public Protector, this Court has itself 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**".[43]

THE BINDING EFFECT OF REMEDIAL ACTION TAKEN BY THE PUBLIC PROTECTOR

32 On a proper construction of the Constitution and the Public Protector Act, it is submitted that it is clear that the findings of and remedial action taken by the Public Protector give rise to binding legal consequences.

33 In **Cool Ideas 1186 CC**,[44] this Court elaborated upon this principle of statutory interpretation as follows:

> "**A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:**
>
> **(a) that statutory provisions should always be interpreted purposively;**

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43 **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996** above note 1 at paragraph 161 (our emphasis)

44 **Cool Ideas 1186 CC v Hubbard and Another** 2014 (4) SA 474 (CC)

(b) the relevant statutory provision must be <u>properly contextualised</u>; and

(c) all statutes must be <u>construed consistently with the Constitution</u>, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso is closely related to the purposive approach referred to in (a)".[45]

(Our emphasis)

34 We submit that an interpretation of the Public Protector's powers as imposing a binding remedy would be –

34.1 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. This Court has emphasised that an "**appropriate remedy**" must "**mean an effective remedy**".[46]

34.2 consistent with the constitutional principle of accountability;[47]

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45 Ibid at paragraph 28; also see **Stratford and Others v Investec Bank Limited and Others** 2015 (3) SA 1 (CC) at paragraph 20. The present case entails the interpretation of both legislation and the Constitution itself. Additional principles apply to the latter. See **S v Makwanyane and Another** 1995 (3) SA 391 (CC) at paragraph 15; and **Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)** 2007 (1) BCLR 47 (CC) at paragraph 37

46 **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC) at paragraph 97

47 **Minister of Safety and Security v Von Duivenboden** 2002 (6) SA 431 (SCA) at para 20; **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC) at paragraphs 77 to 78 ("**Metrorail**")

34.3 consistent with the constitutional principle of "effectiveness" under section 181(3) of the Constitution, and the need to be responsive to people's needs;[48]

34.4 in accordance with the purpose served by the Public Protector as being a pro-active investigator (and not a "**passive adjudicator**") who provides a "**protective framework for civil society**".[49]

35 We submit that a purposive approach would establish that the institution of the Public Protector is a constitutional safeguard of clean government. If the findings and remedial action contained in a report of the Public Protector could be ignored or second-guessed by government or organs of State, this would undermine this safeguard and the rule of law.

36 The fact that the remedial action of the Public Protector has binding legal effect is further supported by a proper construction of section 182 of the Constitution read with section 6 of the Public Protector Act. The Public Protector clearly enjoys both the power to take remedial action and the power to recommend.[50]

37 A construction of the Constitution and the applicable legislation which finds otherwise, would, it is respectfully submitted, render the institution of the Public

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48 **Metrorail** ibid at paragraph 78; sections 41(11)(c) and 195(11)(b) of the Constitution read with section 181(3) thereof

49 **Public Protector v Mail and Guardian** above note 42 at paragraph 9, **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996** above note 30 at paragraph 25

50 A recommendation in terms of the Public Protector Act merely constitutes a species of remedial action as envisaged in section 182(1)(c) of the Constitution

Protector ineffective as a constitutional bulwark against government malfeasance. The Public Protector Act must be read consistently with the final Constitution.[51]

THE MANNER IN WHICH FINDINGS OF THE PUBLIC PROTECTOR MAY VALIDLY BE SET ASIDE

38 In a recent judgment of this Court,[52] Cameron J, on behalf of the majority, held that it was not open to government to "**take shortcuts**" in relation to invalid administrative action. Instead, government is required to challenge what it considers to be an invalid administrative act and seek to have it set aside.

39 The underlying rationale for the principle that even invalid administrative acts have legal effect, unless and until set aside by a court of law, is the following:

39.1 Absent such a principle, it would be "**a licence to self help. It invites officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. That would spawn confusion and conflict, to the detriment of the administration and the public**".[53]

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51 **Van Rooyen and Others v The State and Others (Federal Council of the Bar of South Africa Intervening)** 2002 (5) SA 246 (CC) at paragraph 180

52 **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd** 2014 (3) SA 481 (CC)

53 Ibid at paragraph 89

39.2 It would compromise the proper functioning of a modern State "**if an administrative act could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question**".[54]

39.3 It would "**invite a vortex of uncertainty, unpredictability and irrationality**" and would undermine the rule of law itself.[55]

40 Whether or not the Public Protector's report constitutes administrative action – which we submit it does – does not detract from the above principles.

41 The SCA has recently had occasion to consider the application of these principles in relation to the office of the Public Protector, specifically ("**the SABC matter**").[56] That court confirmed that the correct approach to the Public Protector's Report is that it is binding on the parties affected by it irrespective of whether or not the Report constitutes "**administrative action**" under PAJA. In reaching this conclusion, the SCA overturned the reasoning of the Western Cape High Court in **Democratic Alliance v South African Broadcasting Corporation Limited and Others**.[57] For the reasons set out below, we respectfully submit that it is the SCA's approach that should be preferred.

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54 Ibid at paragraph 101, citing **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (SCA) at paragraph 26

55 Ibid at paragraph 103

56 Above note 6

57 Above note 5

THE SABC MATTER

(a) The High Court judgment

42 The facts in the SABC matter may be summarised as follows:[58]

42.1 The Public Protector received complaints from three former employees of the South African Broadcasting Corporation ("**the SABC**") between November 2011 and February 2012;

42.2 The complaints received by the Public Protector related to the irregular appointment of the Acting Chief Operations Officer of the SABC ("**Acting COO**"), Mr Hlaudi Motsoeneng, as well as systemic maladministration relating *inter alia* to human resources, financial mismanagement, governance failure and the irregular interference by the then Minister of Communications, Ms Dina Pule, in the affairs of the SABC;

42.3 The Public Protector investigated the complaints, and released a report finding, *inter alia*, that the appointment of the Acting COO was indeed irregular, and that there had indeed been unlawful interference by the then Minister of Communications in the affairs of the SABC; and

42.4 The Public Protector directed *inter alia* that, in terms of section 182 of the Constitution, the Board of the SABC should take appropriate disciplinary

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58 SCA Judgment at paragraphs 5 to 9

action against the Acting COO, *inter alia* on account of the fact that he had dishonestly misrepresented his qualifications.

43 Instead of implementing the remedial action ordered by the Public Protector, the Board of the SABC appointed a firm of attorneys to *inter alia* to 'investigate' the "**veracity of the findings and recommendations by the Public Protector**" and, ostensibly on the strength of the outcome the latter investigation, resolved that the Acting COO would be appointed as the permanent Chief Operations Officer of the SABC.[59] This then prompted the Democratic Alliance ("**the DA**") to apply to the Western Cape Division of the High Court to suspend and set aside the Acting COO's appointment.[60]

44 While the High Court found in the DA's favour, it did so expressly on the basis that the Public Protector's findings were not binding and enforceable. In his judgment, Schippers J interpreted the Public Protector's powers in the following way:

44.1 The powers of the Public Protector are not adjudicative. Unlike courts, the Public Protector does not hear and determine cases, nor are her findings binding on persons or organs of state.[61]

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59 SCA Judgment at paragraph 9

60 Ibid at paragraphs 9 to 13

61 High Court judgment at paragraphs 50 to 51

44.2 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 actions are mere recommendations which an organ of state may accept or reject.[62]

44.3 There will be instances in which an organ of state may ignore the findings of the Public Protector, but this will only be permitted if the relevant organ of state has "**cogent reasons for doing so, that is for reasons other than merely a preference for its own view**".[63]

45 The formulation by the High Court of the effect of the Public Protector's findings and remedial action in her report has the effect of relegating such findings and remedial action to a less binding form of action, with lesser legal effect, than even 'ordinary' administrative action:

45.1 There is no positive obligation on the subject of the findings, in the event of it deciding not to comply therewith, to first review the report and have it set aside by a court;

45.2 The test as to whether or not to comply with the findings and remedial action (i.e. the low-threshold rationality test) is less than that of ordinary administrative action; and

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62 Ibid at paragraph 59

63 Ibid at paragraph 60

45.3 The Public Protector (or the complainant) would then carry an additional onus, in seeking compliance with her report, of having to review non-compliance with her report.

46 In reaching the conclusion that the Public Protector's findings were not binding and enforceable, Schippers J relied in particular upon two propositions:

46.1 First, the learned judge appears to have found support for this position by comparing the powers of the Public Protector with that of a court (to which we shall refer as "**the first proposition**"); and

46.2 Second, the learned judge relied on the English Court of Appeal decision in **R (on the application of Bradley and Others) v Secretary of State for Work and Pensions**[64] ("***Bradley***") ("**the second proposition**"), which was a decision that was based upon an entirely different statutory and constitutional setting.

47 In upholding the appeal, the SCA dismissed both of these propositions as incorrect.

(b) The judgment of the SCA

48 The SCA delivered a unanimous judgment on 8 October 2015. In the opening paragraphs of the judgment, Navsa and Ponnan JJA explain the function of the institution of the Public Protector as follows:

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64 [2008] 3 All ER 1116 (CA)

> "**In modern democratic constitutional States, in order to ensure governmental accountability, it has become necessary for the guards to require a guard. <u>And in terms of our constitutional scheme, it is the Public Protector who guards the guards</u>. That fundamental tenet lies at the heart of this appeal, in which we consider the Public Protector's powers and examine the constitutional and legislative architecture to determine how State institutions and officials are required to deal with remedial action taken by the Public Protector**".[65]
>
> (Our emphasis)

49 The SCA then proceeded to analyse the first proposition that informed the High Court judgment. The first proposition was swiftly dismissed on the basis that –

> "**<u>a court is an inaccurate comparator and the phrase 'binding and enforceable' is terminologically inapt and in this context conduces to confusion</u>**".[66]
>
> (Our emphasis)

50 In considering the High Court's reliance on ***Bradley***, the SCA first had regard to the historical context of the creation of the office of the Public Protector in

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65 SCA Judgment at paragraph 3

66 Ibid at paragraph 45

South Africa and other jurisdictions.[67] Holding that it was "**necessary to contextualise the position and purpose within our [own] Constitutional framework**",[68] the Court then analysed the language of the provisions of the interim Constitution as against those of the final Constitution and the present legislation. The Court concluded that Schippers J's reliance on ***Bradley*** for the correctness of the second proposition was inapposite:

> "***Bradley*** **does not in any way assist in the interpretation of our Public Protector's constitutional power 'to take appropriate remedial action'. It concerned a different institution with different powers, namely, the powers of the Parliamentary Commissioner Act, 1967, who undertakes investigations at the request of Members of Parliament. She does not have any remedial powers. … The function of the Parliamentary Commissioner appears, in other words, to be confined to a reporting function, which is merely one of the functions of our Public Protector … . The Parliamentary Commissioner does not have any equivalent of our Public Protector's power to 'take appropriate remedial action'. *Bradley* is consequently not of any assistance in the interpretation and understanding of our Public**

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67 SCA Judgment paragraph 26

68 Ibid at paragraph 23

Protector's remedial powers. <u>Schippers J's reliance on *Bradley* was therefore misplaced</u>".[69]

(Our emphasis)

51 In the SCA, it was submitted on the Public Protector's behalf that, if the High Court judgment were allowed to stand, it would permit for the following undesirable practical implications:

51.1 Regarding the rationality test, an organ of state would only be required to meet the low threshold of showing a rational basis for <u>refusing</u> to follow the findings of the Public Protector's report. This would effectively reverse the positions of the reviewer and, so to speak, the reviewee: it would place the respondent organ of state whose conduct had been administratively scrutinised and reviewed by the Public Protector, and found wanting, in a position of itself reviewing the decision of the Public Protector; and

51.2 It also appeared to place an onus on the Public Protector to prove that the decision by the organ of state was irrational, in that, if there was 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 remedial action would stand.

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69 Ibid at paragraph 46

52 In its judgment, the SCA unequivocally agreed with these submissions:

> "**The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of s 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy and direct its implementation**".[70]
>
> (Our emphasis)

(c) The importance of a judgment on the issue of the powers of the Public Protector from this Court

53 The EFF's application is not an appeal against the judgment of the SCA in the SABC matter. However, the question of whether the Public Protector has the power to make findings and take remedial action which are binding and enforceable plainly arises on the present facts. The Public Protector's interest in a pronouncement by this Court upon the binding nature and legal effect of the powers of the institution self-evidently extends to the interpretation of her powers in all matters, and not only in regard to the matter at hand.

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70 Ibid at paragraph 52

54 In the appeal before the SCA, it was pointed out on the Public Protector's behalf that the approach of the High Court in the SABC matter had severely compromised the functioning of the office in the following ways:

54.1 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;[71]

54.2 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;[72] and

54.3 The capacity to reject the findings of the Public Protector by advancing a rational basis for doing 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.[73]

55 Although the SCA has since rejected the reasoning of the High Court in the SABC matter, the same issue of the nature and extent of the Public Protector's powers arises on the present facts. We submit that a judgment of the highest

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71 Paragraph 17.1 of the Public Protector's founding affidavit in her application for intervention

72 Ibid at paragraph 17.2

73 Paragraph 17.3 of the Public Protector's founding affidavit in her application for intervention.

Court on this issue would of great importance to the proper functioning of the office of the Public Protector.

CONCLUSION

56 For the reasons set out above, we submit that the remedial action contained in the Report of the Public Protector is indeed binding and enforceable, and it cannot be ignored unless and until set aside by a court of law.

57 Given the position taken by the Public Protector in respect of the relief sought in the present application, we make no submissions as to the the relief sought by the EFF.

GILBERT MARCUS SC

MKHULULI STUBBS

Counsel for the Third Respondent
Chambers, Sandton
4 November 2015

LIST OF AUTHORITIES

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2. **Democratic Alliance v South African Broadcasting Corporation Limited and Others** 2015 (1) SA 551 (WCC)
3. **Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996** 1996 (4) SA 744 (CC)
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6. **Matatiele Municipality and Others v President of the Republic of South Africa and Others (2)** 2007 (1) BCLR 47 (CC)
7. **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd** 2014 (3) SA 481 (CC)
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11. **Public Protector v Mail and Guardian Ltd and Others** 2011 (4) SA 420 (SCA)
12. **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC)
13. **Stratford and Others v Investec Bank Limited and Others** 2015 (3) SA 1 (CC)
14. **SABC v DA** [2015] ZASCA 156
15. **S v Makwanyane and Another** 1995 (3) SA 391 (CC)
16. **Van Rooyen and Others v The State and Others (Federal Council of the Bar of South Africa Intervening)** 2002 (5) SA 246 (CC)