

The Powers of the Office of the Public Protector and the South African Human Rights Commission: A Critical Analysis of *SABC v DA* and *EFF v Speaker of the National Assembly* 2016 3 SA 580 (CC)



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Abstract

This article assesses *South African Broadcasting Corporation v Democratic Alliance* 2016 2 SA 522 (SCA) and *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) and to a lesser extent the state of capture judgments. All of these deal with whether the findings and remedial action of the Public Protector (PP) are binding in certain circumstances. The judgments significantly change the impact and effect of findings made by the Office of the Public Protector (OPP) and have important consequences and lessons for other Chapter 9 institutions. It is apparent from these judgments that there was a concerted attempt to undermine the OPP by systematically disrespecting and not implementing the remedial action. It is argued in the article that egregious violations by public officials contributed to the courts' rulings that the findings of the PP may be binding. The article also explicitly records the unlawful conduct of public officials and the resultant cost and consequence in the hope that conduct of this nature is not repeated. It also specifically notes that the major findings in the Nkandla, SABC and State of Capture reports have withstood judicial scrutiny. Regrettably, this exalted standard has not always been replicated in the reports of the present PP. Finally, the article submits, on the basis of these judgments that the findings of the South African Human Rights Commission should in certain circumstances be binding.

Keywords

Public Protector; findings and remedial action; state capture; Chapter 9 institutions; South African Human Rights Commission

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1 Introduction

In October 2015 the Supreme Court of Appeal (SCA) handed down a judgment in *South African Broadcasting Corporation v Democratic Alliance* ("SABC v DA case")¹ dealing with the nature and scope of the powers of the Public Protector (PP). The case is significant in that it attempts to provide clarity regarding the exercise of such powers, and the judgment was cited with approval by the Constitutional Court when determining the force and effect of the PP's findings in *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*² ("EFF case"). Most recently, the full bench of the Pretoria High Court in *President of the Republic of South Africa v Office of the Public Protector*³ ("State Capture case") applied the EFF case and ruled that the President is bound by the PP's instruction to appoint a commission of inquiry into "state capture".

These judgments redefined the consequences and effect of findings made by the Office of the Public Protector (OPP) and significantly reconfigured the relationship between the OPP and other organs of state. In these cases the judiciary had to determine the effect to be given to the reports and findings of the OPP in a context of cynical and blatant disregard of the rule of law by those exercising public power. It appears that an election was made to shore up the powers of the OPP to deal with patent and blatant unlawful action. Now that the OPP has the capacity to make binding decisions, affected organs of state must either comply or take these decisions on review. Political manoeuvring and nimble prevarications are no longer options. This clarification has important consequences for the OPP. Given the binding nature of some of the findings, the OPP's conclusions on the merits and the remedies it prescribes are more likely to be challenged than was the case in the past. It is thus vital that the OPP, in order to ensure that its legitimacy and credibility as a leading Chapter 9 institution are maintained, must reach procedurally and substantively

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¹ *South African Broadcasting Corporation v Democratic Alliance* 2016 2 SA 522 (SCA).

² 2016 3 SA 580 (CC).

³ 2018 2 SA 100 (GP).

correct decisions, as the previous PP did in the face of unconstitutional and vituperative attacks from parts of the executive, the legislature, and some members of the ANC. The best bulwark against repeated challenges in the courts will be coherent, logical, and defensible reasoning underpinning the conclusions reached by the OPP.

The objective of the OPP, as the SCA had occasion to remind one of the previous PPs, Advocate Lawrence Mushwana, is to function as the last defence against bureaucratic oppression, corruption and malfeasance.⁴ This Court trenchantly criticised his reasoning in *The Public Protector* case and cautioned:⁵

... if that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee.

Both the improper payment and the improper receipt of public money constituted an unlawful act, something that Mushwana failed to recognise.⁶ The SCA reminded the OPP that the office is both independent and impartial, and these words mean what they say, and "fulfilling their demands will call for courage at times".⁷

A number of leading scholars were critical of Mushwana as the PP and were against his subsequent appointment as chairperson of the South African Human Rights Commission ("SAHRC").⁸ During his tenure as PP, he was labelled as the "ANC Protector" as a consequence of the large number of ANC members being cleared of wrongdoing by the OPP.⁹ It is apparent that Advocate Mushwana's successor, Advocate Thuli Madonsela, took the sentiments of the SCA in the *Public Protector* case to heart and it is equally apparent that the state institutions central to the cases discussed in this article palpably failed to do so. Decided cases teach important lessons and a failure to heed these often results in public power being exercised unconstitutionally, and, in some instances, recklessly. Unfortunately for the present incumbent, the court in *ABSA Bank Limited v Public Protector*¹⁰ (*ABSA Bank case*) found that basic errors were made in the report and in

⁴ *The Public Protector v Mail and Guardian Ltd* 2011 4 SA 420 (SCA) para 101 (hereafter the *Public Protector* case).

⁵ *Public Protector* case para 6.

⁶ Govender 2013 *AHRLJ* 99.

⁷ *Public Protector* case para 8.

⁸ Thipanyane 2015/2016 *NY L Sch L Rev* 140.

⁹ Hoexter *Administrative Law* 91.

¹⁰ 2018 2 All SA 1 (GP).

respect of the remedial action required to be taken.¹¹ The court held that the OPP, in requiring the Special Investigating Unit (SIU) to re-open the investigation and recover misappropriated public funds from ABSA, acted inconsistently with the provisions of the *Constitution of the Republic of South Africa, 1996* ("the *Constitution*") and the *Public Protector Act*. Specifically, the court held that the PP exceeded the powers entrusted to her by the *Constitution* and the *Public Protector Act*, and held further that the remedial measures were *ultra vires* the provisions of the *Special Investigation Units and Special Tribunals Act*.¹² Furthermore, the court in *ABSA* held that the remedial measures of the OPP could also be reviewed and set aside on the basis that it had been proven that the OPP was reasonably suspected of bias, as provided for in section 6(2)(a)(iii) of the *Promotion of Administrative Justice Act*.¹³ This finding is particularly worrying as the OPP, as a central tenet, is required to be independent and subject only to the *Constitution* and the law. After the embarrassing exhortation by the courts to the OPP in the *Public Protector* case¹⁴ to be courageous, there was the re-emergence of an effective, independent and respected institution — particularly after the bruising battles with members of the executive as detailed in the cases considered in this note. The finding of a reasonable suspicion of bias in the *ABSA* case, however, is worrying from a broader societal perspective. The efficacy and independence of the OPP cannot be dependent on the identity of the incumbent of the office. The best way to avoid this is for the constitutional and legal imperatives that regulate the functioning of the office to be internalised, and for these to inform all decisions that are taken. The simple question that needs to be answered is whether the decision taken is consistent with the letter and spirit of the *Constitution* and empowering legislation, as interpreted by the courts.

The OPP took the decision in the *ABSA Bank* case on appeal to the Constitutional Court. In *Public Protector v South African Reserve Bank*,¹⁵ the Court had to decide two main issues. First, the court had to decide whether it should interfere with the decision of the Full Bench of the Gauteng North High Court to award punitive costs in favour of the South African Reserve Bank (Reserve Bank) against the PP, Advocate Busisiwe Mkhwebane, in her personal capacity. Second, the court had to decide

¹¹ The Court took the unusual step of ordering the OPP to pay 85 per cent in its official capacity and directed Advocate Busisiwe Mkhwebane to pay 15 per cent of the costs in her personal capacity.

¹² 74 of 1996.

¹³ *ABSA Bank* case para 101; *Promotion of Administrative Justice Act* 3 of 2000.

¹⁴ *Public Protector* case para 8.

¹⁵ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC).

whether the Reserve Bank was entitled to a declaratory order to the effect that the PP abused her office in conducting the investigation that gave rise to her impugned report.

Writing for the majority, Khampepe and Theron JJ (Cameron, Froneman and Mhlantla JJ, Basson, Dlodlo and Petse AJJ concurring) held that granting a personal costs order in a case where it has application will not open the floodgates for further personal costs orders, because the question of whether a personal costs order should be granted must be determined on a case-by-case basis. The only material question was whether the High Court misdirected itself in concluding that the PP did not act in good faith, and "behaved in an unacceptable and secretive manner".¹⁶ The majority emphasised that regard must be had to the higher standard of conduct expected from public officials as well as the number of falsehoods that have been put forward by the PP. This conduct included the numerous "misstatements", like misrepresenting, under oath, her reliance on the evidence of economic experts. As a consequence, they upheld the punitive aspect of the costs order.¹⁷ Certain crucial findings were made by the majority. The PP relied on section 5(3) of the *Public Protector Act*,¹⁸ which indemnified the office of the PP for any report, finding, point of view or recommendation made or expressed in good faith. The majority found that the immunity applied only if the PP acts in good faith. Therefore, if the PP acted in bad faith section 5(3) would be of no assistance to her. The majority found that according to the High Court, the PP acted in bad faith. It further held that there was no reason to interfere with this finding.¹⁹ There is thus an undisturbed finding by the highest court in the land that the PP acted in bad faith.

A further finding made by the High Court was that the PP was reasonably suspected of bias. The PP attacked this finding on the basis that the High Court incorrectly conflated the review grounds of procedural fairness and bias. The majority affirmed that procedural fairness and bias are independent grounds of review under PAJA. It went on to hold that the High Court correctly stated that the conduct of a public official who conducts herself in a procedurally unfair manner may be evidence of a reasonable suspicion of bias. Therefore, the finding of the High Court that the PP was reasonably suspected of bias remained undisturbed.²⁰ The majority rejected

¹⁶ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 160.

¹⁷ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 237.

¹⁸ *Public Protector Act* 23 of 1994.

¹⁹ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) paras 161-162.

²⁰ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) paras 168-170.

the PP's claim that there were innocent errors on her part. The court found that this was not a credible explanation.²¹

The conduct of the PP, as found by the majority, appears to be wholly incompatible with the constitutional imperative in section 181(2) of the *Constitution*. This provision provides that the OPP must be independent, subject only to the *Constitution* and the law, must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice. Acting in bad faith or in a manner that could give rise to a reasonable suspicion of bias is the very antithesis of the constitutional obligations contained in section 181(2).

In a lengthy minority judgment, Mogoeng CJ (Goliath AJ concurring) placed great emphasis on the importance of the state's capacity to investigate and expose unethical conduct. For centuries preceding our constitutional democracy, untouchability was so entrenched that it was unthinkable for anyone to challenge various forms of criminality. Mogoeng CJ pointed out that it was during that era that the Reserve Bank entered into a lifeboat agreement with Bankorp. He also highlighted the need to guard against making personal costs against state functionaries acting in their official capacities fashionable, which he felt was likely to have a negative effect on their willingness to confront perceived or alleged wrongdoing.²² The minority found that the High Court's order for personal costs on an attorney and client scale made against the PP had a potentially weakening effect on that office and all other high state offices.²³ Mogoeng CJ found that the PP had not acted in bad faith and neither had she acted in a grossly negligent fashion.²⁴ However, Mogoeng CJ found that the PP "got the law completely wrong by acting as if it was open to her to direct parliament to amend the Constitution ...".²⁵ Furthermore, Mogoeng CJ found that the PP failed to answer some of the criticism made against her report. According to Mogoeng CJ, she "fumbled around in a way that is somewhat concerning".²⁶ Despite these reservations, Mogoeng CJ set aside the order for personal costs on an attorney and client scale and replaced it with a party and party costs order against the PP, in her official capacity.²⁷

No doubt some of these scathing findings, particularly those in the majority

²¹ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 205.

²² *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) paras 2-6.

²³ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 128.

²⁴ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) paras 102-106.

²⁵ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 64.

²⁶ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 81.

²⁷ *Public Protector v South African Reserve Bank* 2019 6 SA 253 (CC) para 119.

judgment, will feature prominently in any future inquiry or hearing held into the fitness of the PP to hold office.

Very early on in the *First Certification* case²⁸ the Constitutional Court held that as the OPP investigates sensitive and potentially embarrassing affairs of government, safeguarding its independence and impartiality was vital to "ensuring effective, accountable and responsible government".²⁹ The SABC in the cases involving Hlaudi Motsoeneng and the members of the executive and legislature in the cases dealing with the unauthorised and excessive expenditure incurred in upgrading the Nkandla residence of former President Zuma acted in a manner that undermined a vital and indispensable constitutional guarantee. According to section 181(3) of the *Constitution* these organs of state are obliged to assist and protect the OPP to ensure its independence, impartiality, dignity and effectiveness. There was a marked dissonance, however, between what they were obliged to do and professed to be doing on the one hand, and what they were in effect doing on the other hand. The cases considered in this article reveal the extent to which organs of state pursuing unconstitutional objectives were prepared to go, even though their courses of action seriously undermined the OPP. The various courts were faced with the conundrum of allowing this gradual undermining of this institution through various stratagems by non-compliance with the findings made. Alternatively, the courts had to clarify the consequence and effect of the orders to ensure that non-compliance at the discretion of those adversely affected by the decisions was no longer an option. In the light of the importance of the OPP to the constitutional project, the behaviour of the public officials involved, and the egregious impact that it had on the rule of law, it is no surprise that the courts held that the remedial action decided on by the OPP may be binding. This has also had major implications for the OPP and other Chapter 9 institutions such as the SAHRC. The SABC cases are discussed and analysed first.

2 *South African Broadcasting Corporation v Democratic Alliance*³⁰

In order to fully appreciate the reasons for the findings and remedial action required by the PP, it is necessary to deal comprehensively with the facts and conclusions reached by her. In *SABC v DA* the SCA considered the

²⁸ *Certification of the Constitution of the RSA* 1996 4 SA 744 (CC) (hereafter the *Certification case*).

²⁹ *Certification case* para 164.

³⁰ *South African Broadcasting Corporation v Democratic Alliance* 2016 2 SA 522 (SCA) (hereafter *SABC v DA*).

impact and effect of the findings and remedial action made by the OPP. On 17 February 2014 the OPP produced a report entitled "A Report on an Investigation into Allegations of Maladministration, Systemic Corporate Governance Deficiencies, Abuse of Power and the Irregular Appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)". The findings of that report were rejected by the SABC, the Minister of Communications and Mr Motsoeneng, the Acting Chief Operations Officer of the SABC (Acting COO) at the time. They subsequently adopted a strategy of stringing out and frustrating the court process for over two years in a desperate attempt to allow Mr Motsoeneng to keep his job. Given the parlous state of the SABC and its virtual bankruptcy, which had resulted from Mr Motsoeneng's actions, the pertinent question of why such a concerted effort was made to protect Mr Motsoeneng still remains unanswered.

The matter was heard in three courts and it is apparent from the judgments that Mr Motsoeneng's defences were without merit. The first case was heard before Schippers J in the Western Cape High Court and was successfully brought by the Democratic Alliance (DA). This decision was taken on appeal to the SCA by the SABC, the Minister of Communications and Mr Motsoeneng. Again, the DA was successful. Following this defeat, a related matter was heard in the Western Cape High Court before Davis J, who ruled in favour of the DA. Davis J refused leave to appeal his judgment setting aside Mr Motsoeneng's permanent appointment as COO in May 2016. Following this ruling, Mr Motsoeneng unsuccessfully filed a petition to the SCA in July 2016, seeking leave to appeal the judgment.³¹

The litigation arose from the failure of the SABC and the Minister of Communications to implement the recommendations of the PP in respect of Mr Motsoeneng.³² Between November 2011 and February 2012 the OPP received several complaints from former employees of the SABC. These related to the irregular appointment of Mr Motsoeneng as the Acting COO, as well as various complaints of maladministration against him relating to human resources, financial management and governance failure. A further complaint was made in relation to irregular interference in the affairs of the SABC by the then Minister of Communications, Ms Dina Pule. Following an investigation, the PP released her report in February 2014.³³

³¹ *Selfe 2018* <http://www.politicsweb.co.za/politics/motsoenengs-sca-petition-a-waste-of-time-for-which>.

³² *SABC v DA* para 4.

³³ *PP When Governance and Ethics Fail* para 5.

The PP found there were "pathological corporate governance deficiencies at the SABC".³⁴ She found the following to be unlawful: in respect of Mr Motsoeneng, she found that his appointment as Acting COO was irregular; the former chairperson of the SABC, Dr Ben Ngubane, had acted irregularly by ordering that the qualification requirements for appointment to the position of COO be altered to suit Mr Motsoeneng's circumstances, and Mr Motsoeneng's salary progression from R1, 500, 000 to R2, 400, 000 in a single fiscal year was irregular. The PP held that he had abused his power and position to unduly benefit himself; he had fraudulently misrepresented that he had matriculated; he had been appointed to certain posts at the SABC despite not possessing the appropriate qualifications for those posts; and he was responsible, as part of the SABC management, for the irregular appointment of the SABC's Chief Financial Officer. The PP further held that he was involved in the irregular termination of employment of several senior staff members, and he had irregularly increased the salaries of certain staff members, which resulted in a salary bill increase of R29, 000, 000.³⁵

The PP further found that the Department of Communications and Minister Dina Pule, with the assistance of Mr Motsoeneng, had unduly interfered in the affairs of the SABC.³⁶ The PP directed the SABC Board to ensure that monies that were irregularly spent were recovered, that appropriate disciplinary action be taken against Mr Motsoeneng, and that wasteful expenditure incurred as a result of irregular salary increments to Mr Motsoeneng be recovered from him. The Minister and the SABC Board were each required to submit an implementation plan within 30 days, indicating how remedial action would be implemented. All actions in terms of those plans were to be completed within six months.³⁷ It is material that the PP not only directed that remedial action be taken, but also insisted on an implementation plan being devised and implemented within firm time lines. This was obviously prompted by the nature and scale of the maladministration.

Despite the damning findings of widespread unlawful conduct and dishonesty made by the OPP, the SABC Board inexplicably decided that Mr Motsoeneng should be appointed as the permanent COO. This decision was accepted by Ms Faith Muthambi, the new Communications Minister, who announced his appointment. Both the Board and the Minister acted without reference to the OPP's report. As a consequence, the DA applied to

³⁴ *SABC v DA* para 6.

³⁵ *SABC v DA* para 6.

³⁶ *SABC v DA* para 6.

³⁷ *SABC v DA* para 8.

the Western Cape High Court to first suspend Mr Motsoeneng and then to set aside his appointment.³⁸

In opposing the application, the then chairperson of the Board, Ms Tshabalala, and Minister Muthambi, denied that the PP's recommendations had not been carried out. The Minister stated that soon after receiving the PP's report, the Board instructed a firm of attorneys (Mchunu Attorneys) to assist it in "investigating the veracity of the findings of the recommendations by the Public Protector".³⁹ Mchunu Attorneys duly prepared a report, but Ms Tshabalala declined to annex a copy to her affidavit, stating that it was privileged.⁴⁰

When the matter was heard by the SCA, the court questioned whether the Minister had correctly applied her mind in ratifying the decision of the Board to appoint Mr Motsoeneng. She would have needed to consider the Mchunu Report, the recommendation of the Board and the transcript of Mr Motsoeneng's interview, and then weigh those documents against the PP's report that ran to 150 pages. Quite implausibly, she claimed to have read, analysed and reached conclusions in respect of all the documents within a day. In addition, the Minister focussed on only one of several negative findings, this being the allegation of dishonesty relating to Mr Motsoeneng's matric certificate. She ignored the findings of abuse of power, the wastage of public money, the dismissal of senior staff and the shortcomings in corporate governance. She further ignored the failure of the Board to advertise the post, consider other candidates, or hold interviews prior to interviewing Mr Motsoeneng.

The report of the OPP required the Board and the Minister to submit an implementation plan, which they had failed to do. In the circumstances the PP was obliged to raise the issues in court. According to her, Mr Yunus Carim, Ms Muthambi's predecessor, undertook in Parliament to implement the remedial action, but this was not carried out. In addition, the Board sought extensions from the PP but failed to come up with an implementation plan.⁴¹

In the first case heard by the Western Cape High Court before Schippers J, the notice of motion filed by the DA was in two parts.⁴² Part A was an urgent

³⁸ *SABC v DA* para 9.

³⁹ *SABC v DA* para 14.

⁴⁰ *SABC v DA* para 15.

⁴¹ *SABC v DA* para 18.

⁴² *Democratic Alliance v South African Broadcasting Corporation Limited* 2015 1 SA 551 (WCC) (hereafter *DA v SABC* (2015)).

application filed by the DA that sought an order suspending Mr Motsoeneng from his position as the COO of the SABC, pending the finalisation of disciplinary proceedings to be brought against him by the Board and the determination of the relief sought in Part B of the notice of motion. In Part A, the DA also sought an order directing the Board to begin disciplinary proceedings against Mr Motsoeneng within five days of the date of the court's order. It also sought an order directing the Board to appoint someone as acting COO to fill Mr Motsoeneng's position, pending the appointment of a suitably qualified permanent COO.⁴³

Schippers J noted that the PP had commented that the issue of the nature of her powers went beyond the merits of the matter at hand, as it had:⁴⁴

... broader and significant implications for the working of our democracy and the independence and effectiveness of the institution.

He stated that the principal question before the court was: "[a]re the findings of the Public Protector binding and enforceable?"⁴⁵ He held that the powers of the PP are not adjudicative and are far more malleable than the powers of the courts.⁴⁶ This comparison between the powers of the OPP and the powers of the courts was subsequently criticised by the Constitutional Court.⁴⁷

Schippers J went further by stating that the power to make binding decisions is:⁴⁸

... considered antithetical to the institution – the key technique of the ombudsman is one of intellectual authority – making logically consistent and defensible findings – and powers of persuasion.

A contrast was made with the CCMA, which has clearly been given the power to make final, binding and enforceable arbitration awards, as if they were orders of the Labour Court.⁴⁹

The court concluded that the findings of the PP are not binding and enforceable. However, the decision of an organ of state to reject such

⁴³ *DA v SABC* (2015) para 1.

⁴⁴ *DA v SABC* (2015) para 45.

⁴⁵ *SABC v DA* para 19.

⁴⁶ *SABC v DA* para 19.

⁴⁷ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) (hereafter the *EFF* case).

⁴⁸ *DA v SABC* (2015) para 57.

⁴⁹ Section 143(1) of the *Labour Relations Act* 66 of 1995.

findings or remedial action must not be irrational.⁵⁰ A decision by an organ of state whether or not to accept the findings of the PP constitutes the exercise of public power. Rationality is a minimum threshold requirement applicable to the exercise of such power by all organs of state.⁵¹ It is a requirement of the principle of legality that decisions be rationally related to the purpose for which the power was given.⁵²

Schippers J ruled that there were no grounds, rational or otherwise, for the Board to reject the OPP's findings and remedial action.⁵³ He issued an order directing the Board to commence disciplinary charges against Mr Motsoeneng, on account of his alleged dishonesty relating to the misrepresentation of his qualifications, abuse of power, and improper conduct. The court further held that an independent person should preside over the disciplinary proceedings. Pending the completion of the disciplinary proceedings, Mr Motsoeneng was to be suspended on full pay.⁵⁴

The SABC, the Minister of Communications and Mr Motsoeneng took the issue of the latter's suspension on appeal to the SCA. The conclusion reached by the court that the findings by the OPP may be binding, depending on the context and circumstances, marks an important shift regarding the nature of the powers of this office. In their judgment, Navsa and Ponnann JJA emphasised the importance of section 41 of the *Constitution*, which provides that all spheres of government and all organs of state must co-operate with one another and assist and support one another.⁵⁵ The main issue addressed in this case was the nature and extent of the PP's powers. In addressing these the court examined the:⁵⁶

... constitutional and legislative architecture to determine how State institutions and officials are required to deal with remedial action taken by the Public Protector.

The SCA differed from the court *a quo* on the issue of the OPP's powers. The court noted that Chapter 9 institutions were established as independent watchdogs to strengthen South Africa's constitutional democracy.⁵⁷ This

⁵⁰ *SABC v DA* para 20.

⁵¹ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 90 (hereafter the *Pharmaceutical Manufacturers case*).

⁵² *Pharmaceutical Manufacturers case* para 85.

⁵³ *DA v SABC* (2015) para 78.

⁵⁴ *SABC v DA* para 21.

⁵⁵ *SABC v DA* para 2.

⁵⁶ *SABC v DA* para 3.

⁵⁷ *SABC v DA* para 23.

independent status means they are not "functionally interdependent and interrelated in relation to all other spheres of government".⁵⁸ Furthermore, these institutions are not organs of state even though they perform their functions in terms of national legislation, are not subject to executive control, and should be seen to be outside government.⁵⁹

The powers of the OPP in terms of s 182(1)(c) of the *Constitution* far exceed those in comparable jurisdictions.⁶⁰ The court further commented that the *Constitution* sets high standards for government officials and when their conduct is found wanting by the OPP, on the whole they are not likely to "... meekly accept her findings and implement her remedial measures. That is not how guilty bureaucrats in society generally respond".⁶¹

The SCA held that a court is an inaccurate comparator to the OPP. The SCA pointed out that as a consequence of the *Oudekraal* principle a decision set aside by a court "exists in fact and has legal consequences that cannot simply be overlooked".⁶² The court in *SABC v DA* extended the *Oudekraal* principle to apply it to decisions taken by the OPP based on the PP's unique position in South Africa's constitutional order. It therefore concluded that *Oudekraal* applies with "even greater force to the decisions finally arrived at" by the OPP. The rationale for the court's extending the principle beyond the context of administrative law is that the premise underpinning the principle, namely that the "proper functioning of a modern State would be considerably compromised 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", would apply with equal force to the OPP.⁶³ Recently, the incumbent PP, Advocate Mkhwebane, suggested that the OPP should be afforded a similar status as that of a court. For reasons stated later in the article, decisions made by the PP cannot be classified as administrative action as the OPP is not part of the bureaucracy. As the OPP plays an investigative and adjudicative role, it performs functions that are materially and constitutionally different from those performed in a court of law. In terms of the separation of powers doctrine, officers performing investigative functions cannot simultaneously be classified as court

⁵⁸ *SABC v DA* para 24. The Court quoted with approval dicta from the CC in *IEC v Langerberg Municipality* 2001 3 SA 925 (CC) para 27, which emphasised that Chapter 9 institutions are independent and subject only to the Constitution and the law.

⁵⁹ *SABC v DA* para 25.

⁶⁰ *SABC v DA* para 43.

⁶¹ *SABC v DA* para 44.

⁶² *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 26.

⁶³ *SABC v DA* para 45.

officials.⁶⁴ It would appear that some Chapter 9 institutions that are empowered to take decisions straddle the continuum between the bureaucracy and the judiciary. The OPP, like the SAHRC, is a structure of government.⁶⁵ Neither body, however, are members of the bureaucracy, nor can they be described as courts. At the same time, the OPP can make binding, legal, decisions. It is well settled in law that until a decision is set aside in court proceedings for judicial review, it exists in fact and has attendant legal consequences that cannot be ignored. The SCA went further by ruling that the phrase "binding and enforceable" used in the lower court was confusing.⁶⁶

The court stated that the OPP was obviously better suited to determine alleged misconduct within the SABC than the SABC itself. The OPP had conducted a full investigation before publishing its findings, and unless the SABC had taken the matter on review, it was obliged to implement the findings and remedial measures.⁶⁷ The Minister and the Board insisted that they were intent on engaging with the OPP regarding the report. However, the court commented that once the OPP had finally spoken, following a full investigation, having afforded all parties a proper hearing, there should have been compliance. It was clear that the SABC and the Minister had adopted an "intransigent approach".⁶⁸

The SCA further held that the OPP would not be able to achieve the constitutional purpose of its office if other organs of state could ignore its recommendations. The language, history and purpose of section 182(1)(c) clearly provided that the *Constitution* empowered the OPP to provide effective remedies for misconduct.⁶⁹ The court described the OPP as a "venerable" institution.⁷⁰ An institution or person might challenge a finding by the OPP by way of a review application. In the absence of such an application, however, an institution or person could not simply ignore the findings, decisions or remedial action given by the OPP.⁷¹

In addition — as highlighted in *SABC v DA* — a state body could not set up

⁶⁴ *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 833 (CC); Sibanda 2019 <https://www.dailymaverick.co.za/article/2019-08-07-the-public-protectors-call-to-be-accorded-the-status-of-a-judge-is-nonsensical-to-a-certain-degree/>.

⁶⁵ Klaaren 1997 *SAJHR* 7.

⁶⁶ *SABC v DA* para 45.

⁶⁷ *SABC v DA* para 47.

⁶⁸ *SABC v DA* para 48.

⁶⁹ *SABC v DA* para 52.

⁷⁰ *SABC v DA* para 53.

⁷¹ *SABC v DA* para 53.

an investigation process parallel to that of the OPP. The SCA further stated that the view of the court *a quo* that the OPP exercised a mere power of recommendation was incorrect. This conclusion was more consistent with the spirit of the Interim *Constitution* and was "neither fitting nor effective".⁷² The effect of the High Court's judgment was that, if the state body simply ignored the OPP's remedial measures, the onus would be on a private litigant or the OPP to institute court proceedings to demonstrate the veracity of its findings.⁷³

By declining to give effect to the OPP's report the Minister and the SABC Board:⁷⁴

... misconceived the import of the Public Protector's powers and acted irrationally in their response to it.

The case was therefore one of both the Minister and the Board failing to understand the effect of the OPP's findings, as well as failing in their duty to the SABC and the public at large.⁷⁵

As a consequence of this judgment, the OPP's powers to curb maladministration and secure effective remedial action were significantly enhanced.

The SABC, the Minister and Mr Motsoeneng were denied leave to appeal the judgment by both the SCA and the Constitutional Court.⁷⁶ The DA then sought an order in relation to Part B of the original notice of motion from the Western Cape High Court, in terms of which the decisions of the Board and the Minister to recommend Mr Motsoeneng to the position of COO be set aside. It further requested that the Board recommend a new COO.⁷⁷ Ultimately Davis J set aside the decision of the Minister to approve the recommendation of the Board to appoint Mr Motsoeneng to the permanent position of COO of the SABC.⁷⁸

Davis J refused leave to appeal to the SCA, and the latter court dismissed a petition in September 2016. Following this, the DA finally approached the High Court, seeking a number of orders. These included an order declaring

⁷² *SABC v DA* para 53.

⁷³ *SABC v DA* para 53.

⁷⁴ *SABC v DA* para 60.

⁷⁵ *SABC v DA* para 60.

⁷⁶ *SABC v DA* para 29.

⁷⁷ *Democratic Alliance v South African Broadcasting Corporation Limited* 2016 3 SA 468 (WCC) para 18 (hereafter *DA v SABC* (2016)).

⁷⁸ *DA v SABC* (2016) para 55.

that the SABC and its Board had failed to respect and implement the findings and remedial action of the PP, and an order declaring that they had failed to comply with and were in contempt of the Part A order as confirmed by the SCA.⁷⁹ Rogers J looked at the question of whether it was only the PP's remedial action that was binding, or also her findings of fact. He concluded that apart from failing to comply with her remedial action, the SABC had also acted in a manner inconsistent with her factual findings. As a consequence, the DA was entitled to the declarations it sought.⁸⁰

This convoluted and protracted litigation demonstrates how difficult it is to enforce the remedial measures of the OPP if there is a perception that these are purely recommendatory. It is apparent from a conspectus of all the judgments in this saga that there was no rational basis for not abiding by the remedial measures required by the OPP. Now that the powers of the OPP have been clarified in the SCA judgment, the options facing organs of state are now much clearer. They must either review the decision or adhere to the remedial action of the OPP. Placing the onus on the organ of state to either review or abide by the decision of the OPP will certainly obviate the need to engage in protracted and costly litigation by persons who have secured redress from the OPP. However, the impact of the judgment on the ability of the OPP to carry out its mediatory functions remains unclear. The unique role played by the OPP in South Africa's constitutional democracy and the specific need for flexibility was one of the reasons behind the reasoning in Schippers J's judgment.

3 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly*

The SABC report by the OPP was followed by the "Secure in Comfort" report dealing with the Nkandla scandal. The latter ignited a greater measure of public controversy than the highly controversial SABC Report, because it found that the President had unjustifiably benefitted from the security upgrades to his home in Nkandla. This unleashed a firestorm, which culminated in the Constitutional Court's finding that the President, by failing

⁷⁹ *Democratic Alliance v South African Broadcasting Corporation Limited; Democratic Alliance v Motsoeneng* 2017 2 BLLR 153 (WCC) paras 45-46 (hereafter *DA v SABC* (2017)).

⁸⁰ *DA v SABC* (2017) paras 195-196. The mismanagement prevalent under Mr Motsoeneng at the SABC was subsequently laid bare before the nation when the parliamentary *ad hoc* committee heard witnesses and evidence into the fitness of the SABC Board. Its final report is a damning indictment of the Board, the Minister, and also Mr Motsoeneng.

to implement the remedial action of the OPP, had acted in violation of section 83(b) read with sections 182(1)(c) and 181(3)⁸¹ of the *Constitution*.⁸² Section 83(b) obliges the President to uphold, defend and respect the *Constitution*.

The OPP investigated allegations of improper conduct or irregular expenditure concerning the security upgrades at the private residence of the then President, in Nkandla. It concluded that Mr Zuma had failed to act in accordance with his constitutional and ethical obligations, as he had knowingly benefitted from the irregular allocation of state resources. Accordingly, the OPP directed Mr Zuma to pay a portion proportionate to the undue benefit that had accrued to him. In addition, the PP directed Mr Zuma to reprimand various Ministers involved in the security upgrades at Nkandla.⁸³ The OPP's report was submitted to the Presidency and to the National Assembly. For over a year, neither body fulfilled its obligations in terms of the prescribed remedial action, which prompted the court applications by the EFF and DA.⁸⁴

In the *EFF* case Mogoeng CJ noted that taking remedial action under the Final *Constitution* was more far-reaching than merely addressing complaints, as was the case under the Interim *Constitution*.⁸⁵ It involved setting out a proper and comprehensive remedy by the OPP, which was constitutionally empowered to do so. For it to be effective, the remedy often had to be binding.⁸⁶ The Constitutional Court in *EFF* endorsed the sentiments of the SCA in *SABC v DA* in the following terms:⁸⁷

[t]he Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations.

The court held that the language, history and purpose of section 182(1)(c) made it clear that the *Constitution* intended for the OPP to have the power to provide an effective remedy for state misconduct, which included the

⁸¹ Section 181(3) of the *Constitution of the Republic of South Africa* 108 of 1996 (the *Constitution*) obliges "other organs of state ... to assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions".

⁸² *EFF* case para 105.

⁸³ *EFF* case para 2.

⁸⁴ *EFF* case para 3.

⁸⁵ Section 112(1)(b) of the *Constitution of the Republic of South Africa* 200 of 1993.

⁸⁶ *EFF* case para 68.

⁸⁷ *SABC v DA* para 31.

power to determine the remedy and to direct its implementation.⁸⁸

What legal effect the remedial action had in a particular case depended on the nature of the matters in question. In certain circumstances, negotiation, conciliation and mediation would be the most appropriate routes to be taken by the OPP.⁸⁹ Crucially, however, Mogoeng CJ held that it was inconsistent with the context, purpose and language of sections 181 and 182 of the *Constitution*, and concluded that the OPP was empowered only to make recommendations that might be disregarded, provided there was a rational basis for doing so. In doing so, he rejected the test formulated by Schippers J.

A perusal of the powers of the OPP, particularly those contained in section 6 of the Act, clearly indicate that a variety of options are available to the PP depending on the circumstances of the case. The "softer" options of mediation, negotiation and conciliation or providing advice may at times be the most prudent courses of action to follow. If these routes are deemed appropriate by the PP, then those to whom the measures are directed are legally obliged to consider them properly and in determining which course to follow are to have regard to their nature, context and language.⁹⁰ This is important because it signals the importance of mediation, conciliation and providing advice in the resolution of complaints, which are not undermined by the *EEF* case.

However, the subject matter of the investigation and the type of findings that are made to ensure effective remedial action may require that the OPP determine the appropriate remedy and direct its implementation. Once this is done, compliance is no longer optional. According to Mogoeng CJ, the OPP's power to take remedial action is "not inflexible in its application, but situational", and is "wide but certainly not unfettered".⁹¹ Mogoeng CJ listed eight points as being of "cardinal significance" regarding the nature, exercise and legal effect of the remedial power.⁹² First, he stated that the primary source of the power to take appropriate remedial action was the *Constitution*, with the *Public Protector Act* being a secondary source. Second, such power was exercisable only against those that the OPP is constitutionally and statutorily empowered to investigate. Third, it was implicit in the words "take action" that the OPP was empowered to decide

⁸⁸ *SABC v DA* para 52.

⁸⁹ *EFF* case para 69.

⁹⁰ *EFF* case para 69.

⁹¹ *EFF* case para 71.

⁹² *EFF* case para 71.

on and determine the appropriate remedial measure. Fourth, the OPP had the power to determine the appropriate remedy and to prescribe the manner of its implementation. Fifth, the word "appropriate" meant nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case. Sixth, only when it was appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken. Seventh, it was necessary to determine, given the subject matter of the investigation, whether the remedial measure had to be binding to provide appropriate redress, or whether a non-binding measure would suffice. Finally, whether a remedial measure was binding or not was a matter of interpretation aided by its context, nature and language.⁹³

These criteria provided the guidelines to assist in determining whether to follow a route that could result in binding remedial action or alternatively determine a process that could yield pure recommendations. Importantly, these criteria structured the discretion of the OPP, and had to be considered prior to a decision's being made on the appropriate remedial action in a particular case. It might be advisable for the PP, after accepting the complaint, to decide at the outset whether the final remedial measure should be binding or recommendatory. This preliminary decision would determine the procedure to be followed when investigating, assessing and where appropriate suggesting remedial action in a particular case. It was important that decisions that were binding were preceded by a fair process and conducted by an impartial arbiter. It was apparent from the list of criteria that for decisions to be binding, the OPP had to act within its mandate and only against persons and entities over which it had jurisdiction. If the OPP was of the view that a non-binding recommendation would suffice, then that option should be employed. Ultimately, whether a remedial measure was binding or not would be a matter of interpretation determined by its context, nature and language. It would therefore be most prudent that remedial measures directed by the OPP demonstrate that these criteria have been considered and applied. It might be advisable for rules of practice to be developed by the OPP to regulate its internal procedures so as to ensure that processes that lead to recommendations are distinct from processes that lead to binding remedial actions.

The reasoning in the *SABC v DA* and *EFF* cases has had a major impact on South African society, culminating in the Zondo Commission of Inquiry into state capture. Shocking evidence of high-level corruption involving

⁹³ *EFF* case para 71.

parliamentarians, members of the executive and senior public officials has been led at the inquiry chaired by Zondo DCJ. Evidence that members of the Gupta family offered cabinet positions to individuals suggests that the state was compromised at the highest level.

4 *President of the Republic of South Africa v Office of the Public Protector ("state capture case")*

Arguably the most consequential and far-reaching report of the OPP was the "State of Capture" report. Ultimately, the conclusion was that there was *prima facie* evidence of state capture in South Africa. The OPP implicated the President by making serious *prima facie* findings against him and various other entities and private individuals. Robust attempts were made by the Presidency to set aside the report by the OPP.

This case concerned the remedial action contained in the OPP's Report No 6 of 2016/17 entitled "State of Capture" (the Report), which was reviewed by the President before a full bench of the Pretoria High Court. The report contained details of an investigation carried out by the OPP into alleged improper conduct by the President, certain government officials and the Gupta family. In particular, this conduct concerned the appointment of cabinet ministers and directors of state-owned entities, which possibly resulted in the award of government contracts and other benefits to the Gupta family. The remedial action directed the President to appoint a commission of inquiry to investigate the events described in the report.⁹⁴

Quoting *EFF*, Mlambo J emphasised that the OPP's powers to take appropriate remedial action, while wide, were not unfettered. Importantly, such remedial action was always subject to judicial scrutiny.⁹⁵ He referred to *EFF*, where the Constitutional Court had held that the remedial action of the OPP was "context-specific" and was not "inflexible in its application, but situational".⁹⁶ Determining what remedial action was appropriate in a particular case depended on the nature of the issues and the findings made.⁹⁷

Mlambo J further adopted a purposive interpretation of the relevant statutes and concluded that the OPP must have power, in certain circumstances, to

⁹⁴ *President of the Republic of South Africa v Office of the Public Protector* 2018 2 SA 100 (GP) para 2 (hereafter the *President case*).

⁹⁵ *President case* para 84.

⁹⁶ *EFF case* para 71.

⁹⁷ *President case* para 84.

direct the President to appoint a commission of inquiry. In addition, the OPP should be able to direct the manner of the commission's implementation. This would allow the OPP to properly fulfil her constitutional mandate. He added that a contrary interpretation would not only be inconsistent with the *Constitution*, but would "render the Public Protector's power to take remedial action largely meaningless or ineffectual".⁹⁸

The President argued that only the President was empowered in terms of section 84(2)(f) of the *Constitution* to appoint a commission of inquiry. The issue was whether this constitutional power could be limited by the remedial action directed to be taken by the PP. The court emphasised that the exercise of public power, including the exercise of executive power, had to be in accordance with the constraints of the *Constitution* and the principle of legality. The role of the OPP was to protect the public from the wrongful and improper exercise of public power and to provide effective remedial action. This would require the PP in appropriate cases to direct members of the executive on how to exercise their discretionary powers. The court concluded, having regard to the statutory framework, that the PP, in order to carry out her constitutional and statutory duties, had to have the power in appropriate circumstances to direct that the President hold a commission of inquiry and to direct the manner of its implementation.⁹⁹ As a consequence, the Presidency's main ground of review — that it was unlawful for the OPP to instruct the President to appoint a commission of inquiry regardless of the circumstances — was rejected by the court.¹⁰⁰ Taking into consideration the financial and other constraints contained in the Report, the OPP considered it appropriate that the second phase of the investigation be conducted by a commission of inquiry.¹⁰¹ Mlambo J held that the OPP was not prohibited by statute from instructing another organ of state to conduct a further investigation.¹⁰² In fact, the *Public Protector Act* contemplated that the OPP would exercise its powers with the assistance of other state bodies. In particular, the PP could require other parties to "make appropriate recommendations" following the conclusion of an investigation.¹⁰³

Section 182(1)(c) of the *Constitution* required the OPP to "take appropriate remedial action".¹⁰⁴ This meant action that provided a "proper, fitting,

⁹⁸ *President* case para 85.

⁹⁹ *President* case para 82.

¹⁰⁰ *President* case para 86.

¹⁰¹ *President* case para 90.

¹⁰² *President* case para 91.

¹⁰³ *President* case para 94.

¹⁰⁴ *President* case para 114.

suitable and effective remedy for whatever complaint and against whomsoever the Public Protector [was] called upon to investigate".¹⁰⁵ The court ruled that there was compelling *prima facie* evidence that the relationship between the President and the Gupta family amounted to "state capture". This was most clearly seen by the power of the Guptas to influence the appointment of cabinet ministers and directors of state-owned enterprises. They were able to use this power to gain preferential treatment in obtaining state contracts, gaining access to state-provided business finance, and also the award of business licences.¹⁰⁶

In order to decide whether the OPP's remedial action was lawful and rational, the court looked at the role played by a commission of inquiry as well as how it performed that role, and why it was better suited than the OPP to accomplish certain ends.¹⁰⁷ The court ruled that the President's insistence that he should be solely responsible for selecting the judge to head the commission was not in accordance with the legal principle of recusal.¹⁰⁸ The President further argued that it was beyond the powers of the OPP to give directions concerning the manner in which the commission of inquiry would operate.¹⁰⁹ The court held, however, that the OPP had the power to give directions as to the manner of the implementation of the commission of inquiry.¹¹⁰

Among the reasons given by the OPP for instructing the President to establish a commission were that she lacked adequate resources, the investigation was not complete and her term was coming to an end, and she also had concerns about the qualifications and experience of her successor.¹¹¹ The President argued that these reasons were irrational and did not provide a lawful and proper basis for the OPP's remedial action.¹¹² The court, however, determined that the three reasons given by the OPP satisfied the rationality test, in that they were rationally related to the objective sought to be achieved.¹¹³

Thus, in summary, Schippers J in *DA v SABC* concluded that the findings of the OPP were not binding and enforceable – but that the decision to

¹⁰⁵ *President* case para 115.

¹⁰⁶ *President* case para 128.

¹⁰⁷ *President* case para 130.

¹⁰⁸ *President* case para 144.

¹⁰⁹ *President* case para 151.

¹¹⁰ *President* case para 152.

¹¹¹ *President* case para 161.

¹¹² *President* case para 162.

¹¹³ *President* case para 167.

ignore them was not rational. On appeal to the SCA, Navsa and Ponnann JJA criticised the judgment of the court *a quo*. First, they stated that that the OPP cannot achieve the constitutional purpose of its office if other organs of state can ignore its recommendations. The court also held that a court is a misleading comparator when determining the effect of the PP's powers. In *EFF Mogoeng* CJ ruled that the *Constitution* intends for the PP to provide an effective remedy for misconduct on the part of the state, and that this includes the power to determine the remedy. Mogoeng CJ agreed with the SCA's judgment but delimited the PP's powers by emphasising that they are "situational"; in other words, the legal effect of the PP's remedial action depends on the nature of the matter. Most recently Mlambo J developed this idea in *President v Office of the Public Protector* by concluding that the factors relied on by the OPP were rationally related to the objective sought to be achieved. It is obvious that these judgments were in part dictated by the context and by the cynical attempts to ostensibly comply with the findings of the OPP. Public funds and dubious legal stratagems were used in protracted litigation to avoid meaningful compliance with the findings of the OPP. The true purpose of this strategy appeared to be to prevent specific persons who had acted unlawfully from being held accountable and answerable. Importantly, there was a pattern of behaviour of this nature. If this pattern of behaviour had gone unchecked, it would have fundamentally eroded the rule of law and undermined the efficacy of the OPP and other Chapter 9 institutions. It is also apparent that the various courts had the common purpose of ensuring that findings of the OPP could not be disdainfully ignored. The difficulty was to achieve this in a manner that was consistent with the constitutional and statutory obligation of the OPP and in accordance with the doctrine of the separation of powers. Finding that the OPP had the power to make binding decisions was a step too far for Schippers J in *DA v SABC*, but not so for the SCA and the Constitutional Court. Given the fact that these decisions have implications that go beyond the OPP and given the extensive constitutional mandate of the SAHRC, it was considered appropriate to reflect on the impact on it of these judgments.

5 The South African Human Rights Commission

In the last part of the article the question of whether or not the findings in the *EFF* and *SABC v DA* cases can be extended to other Chapter 9 institutions is assessed. Both cases concluded that the decision of the OPP may, in certain situations, have a binding effect. The issue is whether this conclusion can be extended to the South African Human Rights Commission (SAHRC). The six institutions established under Chapter 9 are

discrete and have separate functions. Even so, their grouping under Chapter 9 is not unintended and they all have two common functions: checking government and promoting social justice.¹¹⁴ The SAHRC is included because of the similarities between it and the OPP, from a constitutional perspective. A close reading of the institutions grouped together under Chapter 9 of the *Constitution* and assigned the critical responsibility of supporting constitutional democracy indicates the existence of a constitutional hierarchy of institutions. It appears that the OPP, the first of the institutions mentioned in Chapter 9, is afforded an elevated status. Section 193(5) of the *Constitution* requires that the National Assembly approve a resolution with a supporting vote of at least 60 per cent nominating a person to the post of PP. The PP can constitutionally be removed from office only if a resolution is adopted to that effect by at least two thirds of the members of the National Assembly (NA).¹¹⁵ The same appointment and removal procedures apply to the Auditor-General. The *Constitution* requires that the nomination of other commissioners be approved by a bare majority of the members of the NA, and similarly their removal can be effected by a resolution supported by a majority of the members of the NA.¹¹⁶ Thus the appointment and removal of the PP can be effected by a heightened majority only, which is not so for the other commissioners. The heightened majority for the appointment and removal of the PP suggests a constitutional hierarchy among Chapter 9 institutions.

A material distinction is drawn, however, between the OPP and the SAHRC on the one hand and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CLR Commission) and the Commission for Gender Equality (CGE) on the other. Neither the CLR Commission nor the CGE have the constitutional authority to secure appropriate redress after making findings. The CGE Act empowers it to negotiate and mediate issues and then enables it to refer the matter to the SAHRC, the PP or any other authority.¹¹⁷ It appears that in this important respect the constitutional mandates of the CLR and CGE Commissions are materially different from those of the OPP and the SAHRC.

For the reasons that follow, it is submitted that findings of the SAHRC may, in certain situations, also have a binding effect, and that the conclusion in the *EFF* case can be extended to the SAHRC. If the conclusion in *EFF*

¹¹⁴ Murray 2006 *PELJ* 26.

¹¹⁵ Section 194(4) of the Constitution.

¹¹⁶ Section 193(5)(b)(ii), read with s194(2)(b) of the Constitution.

¹¹⁷ Section 11(1)(e) of the *Commission for Gender Equality Act* 39 of 1996.

rested solely on an analysis and application of section 182 of the *Constitution*, then an argument could have been made that the judgment was restricted in scope to the mandate of the OPP. However, it is clear that the conclusion and findings of the OPP may, in certain circumstances, be binding and rest on several premises, including section 181, section 182, a purposive analysis of the role of the OPP in South Africa's constitutional democracy, and the principles of the rule of law. Resting the conclusion on a much broader foundation than section 182 enables the argument that much of the rationale for the conclusion will apply with equal force to the SAHRC.

Both the OPP and the SAHRC have, within their spheres of competence, the power to investigate an issue and report on their findings, and then in the instance of the OPP, to "take appropriate remedial action", and, in the case of the SAHRC, "to take steps to secure appropriate redress where human rights have been violated".¹¹⁸ It is the manner in which the power of the SAHRC to take remedial steps is couched that may lend credence to the contention that it would have to take a further step such as approaching a court of law to secure appropriate redress for a person whose human rights have been violated. Section 182(1)(c) of the *Constitution* unequivocally empowers the OPP to "take appropriate remedial action". However, it is material that the *Constitution* requires both the redress of the SAHRC and the remedial action of the OPP to be "appropriate". It therefore must follow that if the redress or the remedial action taken by the SAHRC and the OPP is not appropriate, then these institutions would be falling short of their constitutional responsibilities.

"Appropriate" was defined in the *EFF* case as "effective, suitable, proper or fitting to redress the transgression".¹¹⁹ If the decisions of the SAHRC would be deemed to be purely recommendatory in all instances, then it is unlikely to meet the constitutional standard of providing appropriate relief, as it would not be providing effective, suitable, proper or fitting redress. The court in *EFF* reaffirmed the principle that without an effective remedy the values underpinning a right would be undermined. If the SAHRC is unable to secure appropriate redress for violations of human rights, then one of the primary objectives of protecting human rights would be undermined. Thus, the investigation, the reporting and the taking of steps to secure appropriate

¹¹⁸ Section 182 read with s 184 of Constitution.

¹¹⁹ *EFF* case para 71.

redress must be seen as component parts of one endeavour, which is the protection of human rights.

As stated earlier, the court in *EFF* emphasised the significance of section 181 of the *Constitution* to its determination. This section applies to all the Chapter 9 institutions, and was described as a reliable pointer in answering the question of whether the OPP can make binding decisions.¹²⁰ Significantly, the court in *EFF*¹²¹ pointed out that the imperative in section 181 that the institutions be independent, that they be impartial, and that they exercise their powers without fear, favour or prejudice is incongruent with the notion that the implementation of the decision is at the mercy of the person against whom the decision is made. The insistence that the institutions be independent and impartial suggests that they must have the power to make decisions that have consequences and must be abided by. The court posed the rhetorical question – why from a common-sense perspective would institutions be entrenched in the *Constitution*, provided with funding from the taxpayers, employ staff and have offices throughout the country, and then be able to make only inconsequential decisions? Finally, institutions that have the ability to make decisions that have consequences are more likely to support democracy than those that do not. The contents of section 181 point strongly in the direction that, in some instances, the institutions listed can make binding decisions.

The SAHRC is no different from the OPP in that it is also meant to represent and protect the most marginalised in society against those that are better resourced and more powerful. President Zuma's obdurate refusal to implement the findings in the Nkandla and State of Capture reports pitted the OPP against the highest ranking public official in the country. These were most unusual circumstances. However, a finding by the SAHRC that the MEC for Health in KwaZulu-Natal violated the human rights of cancer patients should also be unpalatable, disconcerting and condemnatory of the individual and department concerned.¹²² Requiring them, at their discretion, to implement the remedial measures would not amount to appropriate redress. The more drastic the findings and the more far-reaching the remedial measures, the less likely that the persons affected will implement them. The temptation of the powerful to resist implementing decisions, if they are afforded a discretion, and the consequences of doing so apply with equal veracity to both the OPP and SAHRC.

¹²⁰ *EFF* case para 66.

¹²¹ *EFF* case para 49.

¹²² SAHRC *Final Investigative Report*.

Section 181 of the *Constitution* points quite strongly in the direction that the decisions and the appropriate redress should in certain circumstances be binding. It is an established principle of constitutional interpretation that various constitutional provisions should be interpreted consistently with one another. It would be incongruent for a section to be afforded a particular interpretation and another section of the text to be afforded a contradictory meaning.¹²³ Thus, the mandate of the SAHRC to "take steps to secure appropriate redress where human rights have been violated" must be interpreted to the extent reasonably possible in a manner that is consistent with section 181.¹²⁴ Given the breadth of the SAHRC mandate, it may in some instances be required to come up with redress that requires interactions with institutions and organs of state that were not parties to the complaint. In instances of the systemic violations of human rights, it may have to determine measures that require co-operation from and engagement with other institutions of state, and that may require further mediation and negotiation. The wording of section 184(2)(b) was probably designed to give the SAHRC the flexibility to engage others to ensure adequate implementation, and also to make binding decisions in other circumstances. The difference in wording between section 184(2)(b) and section 182(1)(c), in the light of these considerations, is not sufficient to support the conclusion that the SAHRC does not have the same mandate as the OPP to make binding decisions.

Those contending that the SAHRC cannot in any circumstances make binding decisions will have to deal with the question: "What is the legal status of decisions made by the SAHRC when it orders the respondent to provide appropriate redress?" If the decision is not binding, then how do you prevent respondents from cynically refusing to comply with the directives on the basis that they are purely recommendatory? It was this concern that prompted the High Court in the first *DA v SABC* case to find that the decisions of the OPP were not binding and enforceable, but that any decision not to implement the remedial action must be rational. The court appeared to adopt this approach to prevent cynical non-compliance.

The practical difficulties of this approach were exposed in *EFF*, however, because it seemed that a person or organ of state required to take the remedial action was vested with the discretion to determine if it was rational to ignore the decision. The principled objection was that such an approach would be contrary to the rule of law. The court held that a decision that is

¹²³ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 33.

¹²⁴ Section 184(2)(b) of the Constitution.

grounded in a provision of the *Constitution* or in any law cannot be ignored without a court of law setting aside the decision.¹²⁵ It quoted with approval the comment in *Kirland* that courts of law and not public officials are arbiters of legality.¹²⁶ The rule of law requires that decisions made by those that have legal authority to do so be adhered to or reviewed by a competent court. It would be antithetical to the rule of law for a person affected by the decision to determine whether and what parts of the decision to respect.

In *EFF* the court did not discount the possibility that the decision of the OPP may amount to administrative action and therefore may be reviewed under the PAJA. If the decisions of the OPP were to be classified as administrative action, then it would have a binding effect until being set aside by a court of law. However, in *Minister of Home Affairs v The Public Protector*, the SCA concluded that the remedial action ordered by the OPP was not subject to review in terms of PAJA as it did not amount to administrative action.¹²⁷ The court held that as the OPP exercised both constitutional and public power in terms of legislation, it was an organ of state as contemplated in section 239 (b) of the *Constitution*.¹²⁸ The court defined administrative action as involving the conduct of the bureaucracy in carrying out the daily functions of the state.¹²⁹ It found that as the OPP is designed to strengthen constitutional democracy it does not fit into the category of an institution of public administration. It is also designed to be an independent watchdog that is answerable to Parliament and not to the executive. Furthermore, while it exercises public power it is not a department of state and functions separately from the administration of the state. The core function of the OPP is to investigate, report on and remedy maladministration, and not to administer. Finally, the OPP is given broad discretion to decide as to what complainants to accept, how to conduct the investigation and what remedial action to order.¹³⁰ Thus the conclusion reached by the court that the nature, functions performed and accountability structures of the OPP are materially different from those of an administrative agency. However, the court went on to hold that the principle of legality will apply to the review of decisions

¹²⁵ *EFF* case para 74.

¹²⁶ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 3 SA 481 (CC) para 89.

¹²⁷ *Minister of Home Affairs v Public Protector of the Republic of South Africa* 2018 3 SA 380 (SCA) (hereafter the *Minister of Home Affairs* case).

¹²⁸ Section 239(b) of the Constitution defines an organ of state as any functionary exercising a power or performing a function in terms of the Constitution or a functionary exercising a public power or performing a public function in terms of any legislation, but does not include a court of law.

¹²⁹ *Minister of Home Affairs* case para 38.

¹³⁰ *Minister of Home Affairs* case paras 36-37.

of the OPP. It is submitted that a similar reasoning will apply to the review of remedial action ordered by the SAHRC.

6 Conclusion

The judgments discussed in this article expose the attempts to undermine constitutional guarantees by organs of state and, by necessary implication, acknowledge the determination of the then PP to advance the values of the *Constitution*. There were most decidedly good and bad characters in this drama. The broader objective of the article is not just to describe this behaviour – but also to ensure that the behaviour found egregiously objectionable is not subsequently emulated by others exercising public power.

Most of the lead players in the Motsoeneng and Nkandla sagas no longer hold public office. Ultimately, and after much stress testing, the system worked, mainly due to the existence of an effective OPP, committed opposition parties, a free media, dedicated NGOs, and independent and impartial courts. The Motsoeneng and Nkandla sagas make out the most persuasive case possible for the preservation of the independence and effectiveness of these institutions and civil organisations. It is probable that the ultimate conclusions in these cases, namely that the decisions of the OPP were legally binding, were driven by the lamentable behaviour of the public officials involved. Furthermore, these judgments may have important consequences for other Chapter 9 institutions, and a material issue is whether the ability of the OPP to make binding decisions has implications for other such institutions. It is clear that the OPP, like the SAHRC, is not part of the bureaucracy and both institutions do not perform the role of a court of law. Courts will have the option of either finding that some decisions of the SAHRC can be binding and have legal consequences, or that its decisions are purely recommendatory. The *EFF* case makes it most improbable that the latter option will be adopted.

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List of Abbreviations

AHRLJ	African Human Rights Law Journal
CCMA	Commission for Conciliation, Mediation and Arbitration
CGE	Commission for Gender Equality
CLR	Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
COO	Chief Operating Officer
DA	Democratic Alliance
EFF	Economic Freedom Fighters
NA	National Assembly
NGO	Nongovernmental Organisation
NY L Sch L Rev	New York Law School Law Review
OPP	Office of the Public Protector
PAJA	Promotion of Administrative Justice Act
PELJ	Potchefstroom Electronic Law Journal
PP	Public Protector
SABC	South African Broadcasting Corporation
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SCA	Supreme Court of Appeal
SIU	Special Investigating Unit