# THE POWERS OF THE SOUTH AFRICAN PUBLIC PROTECTOR: A NOTE ON *ECONOMIC FREEDOM FIGHTERS V SPEAKER OF THE NATIONAL ASSEMBLY*

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## INTRODUCTION

Whether the Public Protector's powers to take appropriate remedial action in terms of the Constitution of the Republic of South Africa, 1996 (herein as the Constitution), are binding or not became a source of political and academic debates in South Africa in recent years. This mainly stems from the Public Protector's reports on the mismanagement of funds during the security upgrades of President Zuma's private home in Nkandla,[1] and on the South African Broadcasting Corporation (SABC), where the President's alleged close ally was found not to be fit to hold office.[2] On the President's private home security upgrades, the Public Protector found a number of items that were not related to a security upgrade of the President's private home including the visitor's centre, cattle kraal, chicken run, amphitheatre, marquee area and the swimming pool. Further, the President's family was found to have improperly benefitted from these non-security upgrades.[3] Most importantly, the Public Protector found the President to have 'failed to discharge his responsibilities [as the ultimate guardian of public power and state resources]'.[4] According to the Public Protector, this failure to take reasonable steps amounted to a violation of the Executive Ethics Code and was inconsistent with his office as contemplated in section 96 of the Constitution.[5] The Public Protector took remedial action requiring the President to 'pay a reasonable percentage of the cost of the measures' that do not relate to security.[6] The former Public Protector, Thuli Madonsela, received severe criticism for

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[1]See, Public Protector, Secure in Comfort (Report No 25 of 2013/2014).
[2] See, Public Protector, When Governance and Ethics Fail (Report No 23 OF 2013/2014).
[3] Public Protector, Secure in Comfort (n 1) 55, 57-58.
[4] Ibid 65.
[5] Ibid.
[6] Ibid 68.

the *Secure in Comfort* report from the supporters of the President.[7] Since the Public Protector's *Secure in Comfort* report, two subsequent reports were also compiled and these absolved the President of any wrongdoing in the Nkandla project.[8] This led to a constitutional challenge before the Constitutional Court (herein as the Court).[9] The matter involving the SABC also ended up in the Western Cape High Court[10] and the Supreme Court of Appeal (herein after as SCA)[11] where the two courts issued conflicting rulings about the scope of the powers of the Public Protector.

Subsequently, the scope of the powers of the Public Protector was one of the central questions for determination by the Court in the landmark case of *Economic Freedom Fighters.*[12] This note critically examines that case, where the Court found that the remedial actions of the Public Protector have a binding effect. The note argues that the Court errored by ignoring the text and history of the Constitution in its interpretations of the powers of the Public Protector. We also argue that the Court got it wrong when it dismissed an argument that the powers of the Public Protector should be sourced from the Public Protector Act and not directly from the Constitution. In order to appreciate the significance of our criticism, it is important for us to briefly discuss the high court and SCA judgments.

## A BRIEF DISCUSSION OF THE HIGH COURT AND SCA JUDGMENTS ON THE POWER TO TAKE REMEDIAL ACTION

The High Court Decision: *Democratic Alliance v South African Broadcasting Corporation*[13]

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[7] Verashni Pillay, 'Nkandla Report: It's the ANC v Thuli Madonsela' Mail & Guardian (Johannesburg, 18 March 2014) <http://mg.co.za/article/2014-03-18-anc-verses-thuli-madonsela-the-pressure-mounts accessed 1 April 2014; and News24, 'ANCYL: Madonsela must resign' News24 (Johannesburg, 20 March 2014) <www.news24.com/SouthAfrica/Politics/ANCYL-Madonsela-must-resign-20140320> accessed 1 April 2014.

[8] See, Joint Standing Committee on Intelligence, *Prestige Project A: Security Measures President's Private Residence: Nkandla* **(**08 November 2013); and Parliament of the Republic of South Africa, *Report of the Ad Hoc Committee to consider the Report by the President regarding the security upgrades at the Nkandla private residence of the President* First Session, Fifth Parliament [No 91—2014] 2947, 2949.

[9] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

[10] *Democratic Alliance v South African Broadcasting Corporation* 2015 (1) SA 551 (WCC).

[11] *South African Broadcasting Corporation v Democratic Alliance* 2016 s SA 522 (SCA).

[12] *Economic Freedom Fighters* (n 9).

[13] *Democratic Alliance v South African Broadcasting Corporation* (n 10).

In this case, the high court ruled that the Public Protector does not have the power to make decisions that bind organs of state investigated by her office. The case arose from the Public Protector's report titled 'When Governance and Ethics Fail.'[14] The report concerned an investigation into various corporate governance failures and irregular conduct on the part of the SABC. It made several remedial actions, which were ignored by the SABC and the responsible cabinet Minister on the basis that they were not binding, and the matter ended up in court.

The Public Protector joined the proceedings and submitted that a proper construction of section 182(1)(c) of the Constitution[15] and section 6 of the Public Protector Act, is that the findings and remedial action of the Public Protector are binding and enforceable, unless properly and successfully challenged in judicial review proceedings.[16] The court rejected this submission and held that:

> 'unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of state. If it was intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so. Instead, the power to take remedial action is inextricably linked to the Public Protector's investigatory powers. Having regard to the plain wording and context of s 182(1), the power to take appropriate remedial action, means no more than that the Public Protector may take steps to redress improper or prejudicial conduct. But that is not to say that the findings of the Public Protector are binding and enforceable.'[17]

Furthermore, the court held that 'the power and function of the Public Protector are not adjudicative because the Public Protector does not hear and determine causes.'[18] The court reasoned that 'the Public Protector's investigative role means that a complaint is not required to put together a case against a public body or official.'[19] Instead, the Public Protector 'simply

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[14] Public Protector, When Governance and Ethics Fail (n 2).

[15] Section 182 of the Constitution reads as follows:

> Functions of Public Protector
> 182. (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) to take appropriate remedial action.

[16] *Democratic Alliance v South African Broadcasting Corporation* (n 10) [49].

[17] Ibid.

[18] Ibid [50].

[19] Ibid [53].

investigates the complaint to determine whether it is valid and requires redress.'[20] According to the court, 'this process has many procedural and cost advantages for the complainant, and gives effect to the constitutional requirement that proportionate and accessible redress mechanisms are made available to citizens - hence the power to take appropriate remedial action.'[21]

The court also noted that 'the Court has said the Public Protector is modelled on the institution of the ombudsman.'[22] It emphasized that this is significant for the reason that:

> 'In contrast to their investigatory powers, ombudsmen ordinarily do not possess any powers of legal enforcement. Indeed, the power to make binding decisions is considered antithetical to the institution - the key technique of the ombudsman is one of intellectual authority and powers of persuasion. It seems to me that in principle, the position of the Public Protector is no different.'[23]

Furthermore, the court found that the Public Protector Act 'contains no provision that the findings and remedial action required by the Public Protector are binding and enforceable, as in the case of a court order.' The court noted that 'in cases where the law giver intends that the findings of a tribunal should be enforceable, it says so.'

Lastly, the court held that the fact that the remedial action taken by the Public Protector are not binding does not mean that these remedial actions are mere recommendations, which organs of state may accept or reject. Instead, the court, citing heavily from a United Kingdom Supreme Court of Appeal judgment in *Bradley,*[24] ruled that before rejecting the remedial action of the Public Protector, the relevant organ of state must have cogent reason for doing so. In other words, the reasons for rejecting the remedial action must not be merely a preference by such organ of state for its own view to prevail.

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[20] Ibid [53].
[21] Ibid [53]. See also, Richard Kirkman 'Explaining the Lack of Enforcement Power Possessed By the Ombudsman' (2008) 30 *J Soc Welf and Fam L* 253 (arguing that if ombudsman findings were binding it would lead to high litigation costs and impact access to justice because government will hire lawyers to defend their causes).
[22] *Democratic Alliance v South African Broadcasting Corporation* (n 10) [55].
[23] Ibid [57].
[24] *Bradley v Secretary of State for Work and Pensions* [2009] Q.B. 114 (holding that a public functionary acting rationally, was entitled to reject a finding of maladministration by the UK Ombudsman and prefer his own view. However, it was necessary that the functionary's own view was itself not irrational; that it was not enough for the functionary simply to assert that he had a choice.' Instead, a public functionary must have a rational reason for rejecting a finding which the UK Ombudsman had made after an investigation under the governing legislation.) See, also *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495 (Admin), (2009) 159 NLJ 1514 (endorsing the holding in *Bradley*).

The SCA Decision: *South African Broadcasting Corporation v Democratic Alliance*

The high court decision in *Democratic Alliance v South African Broadcasting Corporation* was taken on appeal to the SCA. At the heart of the appeal was the question of scope of the Public Protector's power to take appropriate remedial action. The SCA held that the power to take appropriate remedial action must mean that "the Public Protector may determine the remedy and its implementation."[25] The court further held that:

> "Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector."[26]

In arriving at this conclusion, the SCA observed that the predecessors of the Public Protector being the Advocate-General and Ombudsman had the power under the repealed Ombudsman Act 118 of 1979 to investigate reports of maladministration, but could not take remedial action directly.[27] Instead, both the Ombudsman and Advocate-General had to refer their findings to other institutions for remedial action.[28] We should note at the outset that referring a matter to another institution for action was not unique to the Advocate-General or Ombudsman to warrant the SCA's conclusion in the case. Under current legislation, the Public Protector is equally empowered and required to refer certain matters to other institutions such as the prosecuting authority for action.[29] So, the SCA's observation was not a persuasive justification that the Public Protector was intended to have enforcement powers.

Furthermore, the SCA observed that when the Public Protector was first established under section 110 of the Interim Constitution, the powers granted to it echoed those obtained in the Ombudsman Act and the Advocate General Act 92 of 1992. These powers, contained in section 112 of the Interim Constitution, provided that:

> b. to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by-
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> i. mediation, conciliation or negotiation;
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> ii. advising, where necessary, any complainant regarding appropriate remedies; or

[25] *South African Broadcasting Corporation v Democratic Alliance* (n 11) [52].
[26] Ibid [53].
[27] Ibid [31].
[28] Ibid [31].
[29] See, Public Protector Act, s 6(4)(c)(i) and (ii).

iii. any other means that may be expedient in the circumstances;

orc. at any time prior to, during or after an investigation

i. if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or

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

Given the above provision, the SCA noted that when the Constitution was enacted a significant shift in the language of the powers of the Public Protector was adopted.[30] It noted that 'instead of empowering the Public Protector to endeavour to resolve a dispute or rectify any act of omission by simply advising a complainant of an appropriate remedy as under the Interim Constitution, the Constitution empowers the Public Protector to take appropriate remedial action.'[31] The SCA emphasized that it was significant that the 'Constitution itself directly confers powers on the Public Protector to (a) investigate (b) report (c) take appropriate remedial action.'[32] Regarding the high court's reliance on *Bradley,* the SCA dismissed the relevance of *Bradley* in South Africa. It reasoned that *Bradley* does not assist in the interpretation of the Public Protector's power to take appropriate remedial action because it concerned a different institution – the UK Ombudsman – with different statutory powers than the Public Protector.[33]

Lastly, a significant pronouncement made by the SCA was a response to the Minister's submission. During the course of litigation, the Minister accepted that the Public Protector's powers exceeded those of similar institutions in comparable jurisdictions.[34] However, the Minister 'suggested that the powers of the Public Protector ought to be sourced from the Public Protector Act, being the legislation envisaged by section 182(1) (c) of the Constitution rather than from the Constitution itself.'[35] The SCA rejected this suggestion reasoning that 'the Constitution is the primary source and it stipulates and refers to additional powers to be prescribed by national legislation;' that the 'proposition by the

[30] *South African Broadcasting Corporation v Democratic Alliance* (n 11) [42].
[31] Ibid [42].
[32] Ibid.
[33] Ibid [46].
[34] It is unclear what these comparable jurisdictions are. However, we understand this to include the United Kingdom, which is why *Bradley* is relevant.
[35] *South African Broadcasting Corporation v Democratic Alliance* (n 11) [43].

Minister is contrary to the constitutional and legislative scheme and would have the effect of the tail wagging the dog.'[36]

**THE COURT JUDGMENT: *Economic Freedom Fighters***

Following the SCA decision, the Court was presented with a case which required it to, among other things, determine the powers of the Public Protector or affirm the SCA decision on the question. *Economic Freedom Fighters* arose out of the Public Protector's investigation of allegations of improper conduct or irregular expenditure relating to the security upgrades at President Zuma's residence in Nkandla.[37] The Public Protector concluded that several improvements made at the President's private residence were non-security. Since the state was under an obligation to provide security for the President at his private residence, any installation that had nothing to do with the President's security amounted to undue benefit or unlawful enrichment to him and his family and must therefore be paid for by him. In arriving at this conclusion, the Public Protector found that the President failed to behave in line with certain constitutional obligations, particularly section 96(1), (2)(b) and (c) of the Constitution,[38] by consciously receiving unwarranted benefit from the inappropriate utilization of state resources.[39] The Public Protector also concluded that the President violated the provisions of the Executive Member's Ethics Act of 1998 and the Executive Ethics Code, which are the legal instruments contemplated in section 96(1) of the Constitution. Pursuant to her constitutional powers to take appropriate remedial action, the Public Protector dictated that the President pays back a portion of the money that represented the costs of the non-security features, which the President and his family undeservedly gained from.[40]

The Public Protector also dictated that the President should reprimand the Cabinet Ministers involved in the project for their misdemeanours. At the time the Public Protector

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[36]Ibid.

[37] *Economic Freedom Fighters* (n 9) [2].

[38] The relevant wording of section 96 provides: "Conduct of Cabinet members and Deputy Ministers

(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

[39] *Economic Freedom Fighters* (n 9) [2], [7-10].

[40] *Economic Freedom Fighters* (n 9) [2].

issued these remedial actions, the office of the Public Protector also submitted a report containing these remedial actions to the President and the National Assembly. For a period over a year after this submission, the President and the National Assembly did not do what they were required to do in terms of these remedial measures. The Court noted that on its part, the National Assembly set up two Ad Hoc Committees comprising its members, to examine the Public Protector's report as well as other reports including the one compiled, also at its instance, by the Minister of Police. Following the submission and considerations of these reports, the National Assembly resolved to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the Public Protector.[41] Thereafter, two political parties representing minority members in Parliament, the Economic Freedom Fighters and the Democratic Alliance, lodged a direct application to the Court against the President and the National Assembly.

In a unanimous decision authored by Mogoeng CJ, the Court began by deferring to the SCA's two previous decisions in *South African Broadcasting Corporation v Democratic Alliance* and *Mail & Guardian,*[42] which outlined the history of the Public Protector and the evolution of its powers.[43] Mogoeng CJ explained that the Public Protector was created to strengthen constitutional democracy and hence the requirement to be independent and impartial and subject only to the Constitution and the law; and as such it would probably not make sense if the Public Protector's decisions or remedial actions were inconsequential.[44] Mogoeng CJ also noted that given 'the costly nature of litigation as a constitutional option for average citizens, the founding fathers and mothers of our Constitution conceived of a way to give the poor and marginalised a voice to combat corruption.'[45]

Like the SCA, Mogoeng CJ found that the remedial actions of the Public Protector had a binding effect on all state organs investigated by it. His explanation was that 'if compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have, it is incomprehensible just how the Public Protector could ever be effective to contribute to the strengthening of our constitutional democracy'.[46] The Chief Justice rejected the argument by the National Assembly that the powers of the Public Protector must be sourced in light of the Public Protector Act and endorsed

[41] *Economic Freedom Fighters* (n 9) [12].
[42] *Public Protector v Mail & Guardian* 2011 (4) SA 420 (SCA).
[43] *Economic Freedom Fighters* (n 9) [48].
[44] Ibid [49].
[45] Ibid [49-52]
[46] Ibid [56].

the SCA's reasoning by further explaining that 'since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector.'[47] By using the word "as regulated" in section 182(1), Mogoeng reasoned, the drafters of the Constitution sought to 'simplify and provide details with respect to how the power in its different facets is to be exercised.'[48] However, he cautioned that nothing about 'additional in this context could ever be understood to suggest the removal or limitation of the constitutional power; that the Public Protector Act did not purport to nor could it validly denude the Public Protector of her constitutional powers.'[49]

To further substantiate the point that remedial action by the Public Protector has binding effect, Mogoeng CJ reasoned 'that one cannot talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.' In his view, the words 'take appropriate remedial action do point to a realistic expectation that binding and enforceable remedial steps might frequently be the route open to the Public Protector to take because these words are essential for the fulfilment of the Public Protector's mandate'.[50]

Unlike under the Interim Constitution where the Public Protector was expected to endeavour to address complaints, the Chief Justice noted that 'taking appropriate remedial action is much more significant than mere endeavour to address a complaint, and that sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint.'[51]

## CRITICAL COMMENTS ON *ECONOMIC FREEDOM FIGHTERS*

In the discussion that follows we criticize the judgment by Mogoeng in *Economic Freedom Fighters* as well the SCA ruling to the extent that the latter's ruling was endorsed. Firstly, we are concerned with the textual interpretation on the proper meaning of the power to take appropriate remedial action by the SCA which was subsequently endorsed by the Court.[52] As noted above, the SCA emphasized the shift in language from the Interim Constitution to the

[47] Ibid [58].
[48] Ibid [60].
[49] Ibid [61].
[50] Ibid [65] and [67].
[51] Ibid [68].
[52] Ibid [64-70].

current Constitution, which introduced the language of the power to take appropriate remedial action into the text. Given that the power to 'take remedial action' is not defined in the Constitution or the Public Protector Act and was the centre of the dispute, this shift in language gave rise to an issue of constitutional interpretation of section 182(1)(c). In other words, it required the SCA to determine the intention of the framers to incorporate the power to 'take appropriate remedial action' into the text.

As a matter of constitutional interpretation the courts and commentators agree that 'the beginning point for determining the meaning of a constitutional provision is the text itself'[53] The Court emphasized this point in *S v Zuma* when it said:

> 'While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. [It] cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.'[54]

In their commentary on *S v Zuma*, Currie and de Waal accept that *S v Zuma* stands for the proposition that 'interpretation of the Constitution must be grounded in the text and that the text sets the limits of a feasible interpretation.' [55] In our view, as a matter of textual interpretation, the express power to take appropriate remedial action in section 182(1) cannot be deemed as granting powers to the Public Protector to take legally binding remedial action. We submit that had the framers sought to grant such powers to the Public Protector, they would have made an express provision in the Constitution by including the term 'binding' or some other wording to that effect. To further demonstrate our point about the framers being precise in their choice of language, one need only turn to section 165(5) of the Constitution which states: 'an order or decision issued by a court binds all persons to whom and organs of state to which it applies.' Because of its implications, the framers surely would not have left this question unclear or implied in relation to decisions or powers of the Public Protector. They would have been express as they were in relation to the judiciary.

Moreover, section 165(2) which provides "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice" is written in almost identical terms to section 181(2) of the Constitution, which governs the Public Protector, yet the Constitution in terms of section 182(1)(c) deliberately left

[53] *S v Zuma* 1995 (2) SA 642; Iain Currie and Johan De Waal, The Bill of Rights Handbook (Juta 2005) 147.
[54] Ibid [17-18].
[55] Currie and de Waal (n 52) 148.

out the term 'binding' in reference to remedial action by the Public Protector. We submit that the text left out the term 'binding' because the framers chose not to give power to make binding recommendations to the Public Protector.

Secondly, when the meaning of a constitutional provision is in dispute, such as in this case, courts have looked to the constitutional history of the impugned provision. For example, in resolving the dispute concerning the constitutionality of the death penalty provision in South Africa, the Court in *Makwanyane*[56] looked to the history of the impugned constitutional provision. The Court gave us guidance about the use of other documents in the interpretation of the Constitution by stating the following:

> 'Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process [MPNP]. The final draft adopted by the forum of the MPNP was, with few changes, adopted by Parliament. The MPNP was advised by technical committees, and the reports of these committees on the drafts are the equivalent of the *travaux préparatoires*, relied upon by the international tribunals. It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution.'[57]

The principle that emerged since *Makwanyane* as articulated by Justice Nkabinde in *Mansingh*[58] is that courts will consider reports from technical committees established by and to advise the Constitutional Assembly where such reports are clear, not in dispute and relevant to understand a particular provision. In fact, the SCA has previously relied on a report by the committee set up by the Constitutional Assembly in *General Council of the Bar*,[59] in order to determine whether section 84(2)(k) of the Constitution authorizes the President to confer the status of senior counsel on practicing advocates. The SCA pronounced that:

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[56] *S v Makwanyane* 1995 (3) SA 391.
[57] Ibid [17-18].
**[58]** *Mansingh v General Council of the Bar*, 2014 (2) SA 26 (CC) [25-28] where Justice Nkabinde J says ('when there is documentary evidence regarding that purpose, we may have regard to such evidence'.)
[59] *General Council of the Bar v Mansingh* 2013 (3) SA 294 (SCA)

> 'The general intent of the drafters of the Constitution therefore seems to be plain. Insofar as executive powers derived from the royal prerogative were not incompatible with the new constitutional order, they should be codified and maintained. Conversely stated, the intention was not to abolish prerogative powers or to diminish the function of the head of state previously derived from the royal prerogative, but to codify these powers insofar as they are not inimical to the constitutional state and to render the exercise of these powers subject to the Constitution. In this light the historical perspective therefore seems to support the appellants' argument that the power to 'confer honours' contemplated in section 84(2)(k) of the Constitution must be afforded its traditional content, which included the power to appoint silks.'[60]

In light of the above, it is surprising and problematic that the SCA made pronouncements about the powers of the Public Protector without support from the text and its history when the provisions governing the powers of the Public Protector were in dispute. More disturbing is the fact that the SCA relied on evidence or documents that cannot be characterised as part of the preparatory works (*travaux préparatoires*) from the MPNP.

It is well established that the Public Protector was the subject of immense public debate before and during the MPNP. A technical committee was set up by the Constitutional Assembly to advise and consider the proposed constitutional provisions for the Public Protector. The report of the Constitutional Assembly committee is clear and relevant to why section 181(1)(c) was enacted. It states that the framers decided to include broad principles in the Constitution and leave the specifics to be dealt in the legislation.[61] The problem with the SCA's judgment is that it reached a conclusion about the powers of the Public Protector without any reference to the history of the relevant constitutional provisions as contained in the Constitutional Assembly's committee report. It is our view that to 'take appropriate remedial action' is a term of art within the constitutional and legislative scheme of the Public Protector, which, in order to ascertain its meaning and resolve the dispute, required the SCA to consider the history of the impugned provisions.

Further, we submit that the pronouncement by the SCA that 'the language, history and purpose of the section 182(1)(c) make clear that the Constitution intends for the Public Protector to have the power to determine the remedy and direct its implementation' is neither supported by the history and purpose of the provision nor the clear intentions of the Constitutional Assembly. We find it problematic that instead of relying on the Constitutional Assembly's committee report that considered the provision at issue, the SCA relied on

[60] Ibid [26].
[61] Constitutional Assembly Theme Committee 6.3, Report on the Public Protector (26 May 1995).

'Ready to Govern,' a document adopted by the African National Congress, which falls outside the kind of evidence *Makwanyane* said ought to inform interpretation of the Constitution. The SCA's failure to consider the Constitutional Assembly's committee report is manifestly demonstrated when it dismissed the Minister's suggestion that the power of the Public Protector should be sourced from the Public Protector Act and not the Constitution directly. Had the SCA considered the Constitutional Assembly committee report, it would have found that the Minister's suggestion was consistent with the intentions of the framers, who deliberately decided to only include broad principles and features of the Public Protector in the constitutional text while providing specific powers in the governing legislation.

In other words, the Constitutional Assembly's committee report is unambiguous that the framers sought to define and source the specific powers of the Public Protector in the legislation rather than directly in the Constitution. To illustrate the manifestation of the framer's intentions, section 112 of the Interim Constitution was inserted into section 6 the Public Protector Act almost verbatim. This gesture was precisely to implement the framer's intention that the specific powers of the Public Protector must be sourced from the Public Protector Act as opposed to the Constitution directly. In our view, the SCA dismissed the Minister's suggestion because it did not have regard to the relevant history of the constitutional provision at issue. To put the point another way, the Minister's submission is constitutionally correct when read within the context of the constitutional history of section 182(1)(c). Additionally, the Constitutional Assembly's report is clear that the framers considered the advice given to it by the technical committee and decided against granting the power to the Public Protector to enforce her own recommendations.[62] More simply, the views of the technical committee ceased to constitute advice when the Constitutional Assembly endorsed them thereby transforming them into views of the framers. Thus, we submit that the SCA's reasoning and conclusion should be scorned because it is contrary to the clear intentions of the Constitutional Assembly.

Despite the jurisprudence discussed above, Mogoeng CJ made a number of pronouncements suggesting the intentions of the framers. Yet, Mogoeng made no specific reference to the history of the impugned provision which is obtained in the Constitutional Assembly committee report. To illustrate, the Chief Justice explained that the 'office of the Public Protector is a new institution – different from its predecessor like the Advocate General

[62] Constitutional Assembly (n 61) [7.0.7].

or the Ombudsman.'[63] The difference in the institutions depends on the language of authority adopted in their enabling legal instruments be it the Constitution or an Act of Parliament. In relation to the Constitution, the Constitutional Assembly committee report would assist in determining the meaning of the words adopted. Our view is that Mogoeng CJ failed to sufficiently explain this difference between the Public Protector and previous institutions in terms of the constitutional history.[64] One cannot explain the evolution from the Advocate General and/or Ombudsman to the Public Protector without engaging with the reports from Constitutional Assembly where these issues were debated and decided upon.

Additionally, in explaining why the Public Protector's remedial action is binding Mogoeng CJ speaks on behalf of the 'founding fathers and mothers as having conceived of a means to give the poor a voice to crush corruption in the public sector'.[65] Yet, his explication is not supported by the Constitutional Assembly reports or deliberations. Why would the Court insist on speculating on what the framers intended when it could read a report by the Constitutional Assembly as it did in *Makwanyane* and *Mansingh*? Above all, reports from the Constitutional Assembly expressly rejected many of the propositions that Mogoeng CJ seems to attribute to the founding fathers and mothers. Chief among these propositions is the consensus reached by the committee of experts, which advised the Constitutional Assembly, that 'the Public Protector should be constitutionalized, and that the constitutional clause on Public Protector should set out fundamental principles and detail must be left to legislation.'[66] This advice, which was endorsed by the Constitutional Assembly, is authority for the proposition that the framers intended that powers of the Public Protector be sourced from legislation and not the Constitution directly. The Constitutional Assembly's committee report went further to say that:

> 'There seems to be general agreement among all submissions that the Public Protector should have the type of powers contained in section 112 of the [Interim Constitution]. In other words, all agree that the office should be able to
> 5.3.1.1investigate maladministration, corruption and impropriety in government and public administration;
> 5.3.1.2 refer any matter to the appropriate authority, person or institution.
> 5.3.1.3 *make recommendations* to the appropriate authority, person or institution.'

[63] *Economic Freedom Fighters* (n 9) [51].
[64] Ibid [51].
[65] Ibid [52].
[66]Constitutional Assembly (n 61) [6].

Unlike the issue of the death penalty, which the framers left to the Court to decide,[67] the framers did not leave it to the Constitutional Court to decide the extent of the powers of the Public Protector. Instead, the framers took a considered view and left no uncertainty – subject to constitutional history – regarding the powers of the Public Protector to make recommendations as remedy to a complaint. This aspect should have been ventilated upon by the Court. While Mogoeng CJ accepts that greater clarity concerning the powers of the Public Protector is obtained in the Public Protector Act, he omits to acknowledge that this was by design of the framers as explained in the Constitutional Assembly report.[68] Indeed, Mogoeng recognizes that there are different types of remedial actions one of which is mediation. By doing so, he confirms that remedial action was undeniably a term of art or general principle as explained in the committee reports. Given the Court's omission to consult the Constitutional Assembly report, which we believe could have led the Court to a different outcome, we are left with a view that the Court preferred the meaning of the powers of the Public Protector that was in line with public opinion at the time of the case, something that the Court itself has previously cautioned against.[69]

Thirdly, we argue that the Mogoeng Court overlooked to acknowledge that the only means by which a court can examine whether or not the Public Protector failed to exercise her powers, as regulated, is through an examination of the Public Protector Act that governs the Public Protector's powers. This exercise cannot be reasonably achieved through an examination of the constitutional provisions alone because the Constitution is silent on these details on account of the framers' political choice to give Parliament the power to provide these details in the legislation. If the framers intended the powers of the Public Protector to be sourced directly from the Constitution, they would have signalled this intention by providing some details about her powers in the text. They clearly would not have left the Constitution silent on the matter. Their silence speaks volumes. What meaning should the Court have drawn from this silence?

In *Du Plessis*[70] Justice Mahomed read the silence in the Interim Constitution, about the application of the bill of right to private actor, as an indication that the framers did not intend

[67] See, *Makwanyane* (n 56) [5], [25] and [324].
[68] *Economic Freedom Fighters* (n 9) [62].
[69] See *Makwanyane* (n 56) [88] where the Court remarked "public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication."
[70] *Du Plessis v De Klerk* 1997 (1) BCLR 1 (CC).

the bill of rights to apply to private action. Following the judgment in *Du Plessis*, the framers clarified the legal position and specifically mentioned that the bill of rights applied to private actors in the Constitution, which succeeded the Interim Constitution.

Moreover, the courts have looked to the Public Protector Act, and not the Constitution directly, to determine whether the Public Protector has acted within the bounds of the law or to give content to her powers.[71] In one of the first major cases to examine the powers of the Public Protector *Mail & Guardian*, the SCA ruled that the Public Protector failed to properly execute his powers. The SCA came to this conclusion after examining the Public Protector Act. To put it differently, the SCA sourced the powers of the Public Protector from the Public Protector Act and not the Constitution directly before reaching a conclusion. Hence, it is submitted that the powers of the Public Protector must be sourced from the Public Protector Act while guided by the principles in the Constitution. The Court got it wrong in finding otherwise.

## VI CONCLUSION

It is our view that the legal consequences of the decisions of the Public Protector were never intended to bind organs of state in the strict legal sense. This is why the framers considered and rejected the suggestion to empower the Public Protector 'to require written reasons as to why a particular department, person or institution declines to follow his or her recommendations.'[72] Had this suggestion been approved by the Constitutional Assembly, it would have had the effect of rendering the Public Protector's recommendations or decisions legally binding. We find that the high court's decision in *Democratic Alliance v South African Broadcasting Corporation* is preferred because of its consistency with the clear political choices made by the Constitutional Assembly concerning the powers of the Public Protector by requiring that organs of state must have cogent reasons before rejecting the findings or remedial action of the Public Protector.[73] The judgments by the Court and the

[71] See for example, *National Empowerment Fund v Public Protector and Others* [2017] ZAGPPHC 610 set aside the Public Protector's report for misconstruing her powers in the Public Protector Act; *Commissioner of the South African Revenue Service v Public Protector and Others* [2020] ZAGPPHC 33 held that the Commissioner of the South African Revenue Service had good cause in terms of the Public Protector Act read with the Tax Administration Act not to withhold taxpayer information; *Absa Bank Limited and Others v Public Protector and Others* [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP).

[72] Constitutional Assembly (n 61) [7.0.7].

[73] See, *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) [27] holding that "first and foremost it must be emphasised that the Court has no power, no mandate and no right to express any view on the political choices made by the CA

SCA on the powers of the Public Protector cannot, in our view, be defended based on the Constitution's text, structure and history. The SCA and Court should have done a better job in justifying the decisions they took in this matter in reference to authority, ideas, values, the text and relevant history of the text as instructed by *Makwanyane* and other case law.

The negative consequences of the judgment in *Economic Freedom Fighters,* which fundamentally transformed the Public Protector into a court, have begun to emerge in South Africa.[74] A series of litigations has ensued after the judgment in *Economic Freedom Fighters,* which have led to high litigation costs, budget shortfalls for the institution of the Public Protector and negative impact on access to justice for millions of poor South Africans, who cannot afford lawyers to vindicate their rights.[75] Other implications of the judgment in *Economic Freedom Fighters* and the related increase in judicial review cases are: the person of the Public Protector has been penalized with personal costs orders;[76] and some of her remedial actions have effectively not being implemented because of either successful judicial review outcomes or lengthy court processes.[77] The potential negative effects of making

in drafting the New Text… the wisdom or otherwise of any provision of the New Text is not this Court's business."

[74] In a series of litigation that has ensued after the judgment in *Economic Freedom Fighters* the person of the Public Protector has either been slapped with personal costs orders, her remedial actions not effectively being implemented or her office has faced budgetary challenges due to a floodgate of cases being brought but also being reviewed. See, *President of the Republic of South Africa v Public Protector of the Republic of South Africa and Others* [2019] ZAGPPHC 368 where the public protector ordered the President to discipline a cabinet minister. Despite being binding, the order was never implemented; *President of the Republic of South Africa and Another v Public Protector and Others* [2020] ZAGPPHC 9 where Public Protector ordered the President to release information relating to his party political funding. The order was never implemented.

[75] Public Protector, Strategic Plan 2018/2023 and Annual Performance Plan 2018/19, (2018) 57 – "noting the increased litigation (completed cases taken on judicial review due to binding nature of Public Protector remedial action) and that justice delayed is justice denied."; and Makhosandile Zulu, 'R29m shortfall for office of the public protector in the new financial year' The Citizen (Johannesburg, 17 April 2018)<https://citizen.co.za/news/south-africa/1897073/r29m-shortfall-for-office-of-the-public-protector-in-the-new-financial-year/> accessed 8 April 2020 "noting that the litigation costs have risen significantly in the past few months due to the Economic Freedom Fighters judgment that most of the office's cases were being taken on judicial review."

[76] *Absa Bank Limited and Others v Public Protector and Others* [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP) where a personal costs order against the Public Protector was issued.

[77] See, *President of the Republic of South Africa v Public Protector of the Republic of South Africa and Others* [2019] ZAGPPHC 368 where the public protector ordered the President to discipline a cabinet minister. Despite being binding, the order was never implemented; *President of the Republic of South Africa and Another v Public Protector and Others* [2020]

recommendations of a similar body like the Public Protector has been studied in the United Kingdom.

In his article *Explaining The Lack Of Enforcement Power Possessed By The Ombudsman,* Richard Kirkham notes that "most ombudsmen are of the view that part of the strength of the institution is that it allows for a form of dispute resolution that to a large extent bypasses the legal process and all the disadvantages that come with legal formality."[78] Consequently, "the vast majority of disputes are resolved on a relatively informal basis and in the spirit of communication and cooperation."[79] Kirkham observes that "the ombudsman technique [of engagement] can even help facilitate long-term administrative reform by engaging public authorities in the process of identifying flaws in their administrative processes…because the ombudsman is not seen as a court."[80] Kirkham notes that "[t]he fear of the ombudsman community…is that their relationshipp with public authorities would change detrimentally were they to be granted legal powers of enforcement and this would reduce their ability to provide effective and efficient redress for complainants."[81] Specifically, Kirkham notes that there is a potential "danger that public authorities would start treating ombudsmen in the same manner as the legal process,"[82] where "public authorities would be more likely to employ lawyers in their dealings with the ombudsmen, would be less cooperative in the provision of information, and much less likely to admit areas of fault and explore with the ombudsman alternative solutions."[83] These fears and observations are relevant in South Africa, and the jury is still out on the extent to which these consequences have and will continue to affect South Africans.

ZAGPPHC 9 where Public Protector ordered the President to release information relating to his party political funding. The order was never implemented.

[78] Kirkham (n 21) 259.

[79] Kirkham (n 21) 259.

[80] Ibid.

[81] Ibid 259-260.

[82] Ibid

[83] Ibid.