

The Role of the Public Protector

Case Studies in Public Accountability

C Thornhill

School of Public Management and Administration
University of Pretoria

“To protect the Treasury from being defrauded, let all public monies be issued in front of the whole city, and let copies of the accounts be deposited in different wards....”

– Aristotle, *The Politics*

ABSTRACT

Democracy demands regular free and fair elections, transparency and public accountability. Public administration is subject to the democratic ideals of society and in the case of South Africa it has been the premise on which the public service has been founded since the inception of the Constitution of the Republic of South Africa, 1996. Section 195 of the Constitution contains the principles on which public administration must be based. These principles include inter alia that public administration must be accountable. To obtain, maintain and promote public accountability the Constitution provides in chapter 9 for State Institutions Supporting Constitutional Democracy. The abovementioned provisions clearly identify the South African government’s commitment to accountable public administration. In this article two cases are used to highlight the effects of the role of the Public Protector as one of the Chapter 9 institutions and its contribution to obtaining transparency and accountable public administration.

INTRODUCTION

Public administration in contemporary society is becoming more and more complex as a result of the extensive involvement of the state in promoting the general welfare. Public officials are also granted more flexibility in their decision making authority in accordance with the approaches promoted by the proponents of the New Public Management (NPM) movement. However, the public administration remains subject to the political structures and they in turn remain accountable to society (or more specifically the electorate). Therefore, the requirement for public accountability cannot be ignored in favour of the need for a more streamlined NPM required authority to act speedily.

Democratic government requires accountable public administration. The *Constitution of the Republic of South Africa, 1996* is a prime example of a state's commitment to democratic ideals and to transparent and accountable public administration. In this article attention is devoted to the role of one of the constitutional institutions created to support democratic government. The Public Protector has been established in terms of section 182(1) of the Constitution, 1996 and related legislation. In giving effect to this responsibility, the Public Protector has recently issued two reports on maladministration in the South African public sector. The contents of the reports are briefly described and evaluated to establish whether the Public Protector (PP) does indeed contribute to the lofty ideals of transparent and accountable public administration.

PUBLIC ACCOUNTABILITY

In his seminal work on public accountability Normanton defined public accountability "as consisting in a statutory obligation to provide, for independent and impartial observers holding the right of reporting their findings at the highest levels in the state, any available information about financial administration which they may request." (Normanton 1966:2). However, public accountability is no longer only viewed from a financial perspective, public accountability is deemed to be an inherent requirement in any political, administrative and managerial action in the public sector. Even in the private sector accountability is becoming an imperative for quality of goods, services and for managing human resources.

It should be borne in mind that democratic government implies elected representatives of society. Thus the final political structure responsible for satisfying societal needs is elected. Democracy also implies that members are elected on the *popularity* of a candidate or of a political party. There are no criteria set for the election of a member apart from being able to represent a particular section of society or a particular group (e.g. the labour movement such as the Congress of South African Labour Unions). No requirement is set regarding the level of education or special skills or profession. Thus when ministers are appointed by the President (section 91(2) Constitution, 1996), they are normally drawn from the pool of members of Parliament. Currently there are two exceptions as provided for in section 91(3)(c) of the Constitution (Minister P Gordhan and Minister E Patel). The reason for providing this detail is to indicate that members of Cabinet mostly occupy their posts due to democratic norms, not professionalism. Therefore, they are accountable to society as they represent them. They are not only accountable to the electorate or the party that appointed them under the proportional electoral system. This also illustrates the need for openness (Bayat & Meyer 1994:40). Ministers act on behalf of society and are obliged to honour the values inherent in a democracy. In the case of South Africa the Constitution *inter alia* states that it "is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". Thus, all laws, codes and prescribed procedures, issued within this stated value framework, has to be honoured by political office bearers, appointed officials and members of society. The implications of this requirement will become clear in the cases investigated by the PP and quoted in this discussion.

Accountability can be divided into various categories for the purposes of discussion and to clarify particular characteristics. Sikhakane and Reddy (AJPA 2011:86) divide this function into hierarchical and professional accountability. In the cases referred to in the article the



function is discussed within the hierarchical division. In this sense the ministers involved as well as the accounting officers and other officials involved have to honour the constitutional obligation that they are in service of society and that they derive their authority from society. Thus they act in a hierarchy i.e. the officials involved are accountable to the political office bearers; they are accountable to the President and the President and ministers are accountable to Parliament consisting of democratically elected representatives of society as the supreme authority in the state.

Section 195 (1)(f) of the *Constitution of the Republic of South Africa, 1996*, requires of public administration to be accountable. This demands that public administrative activities must be performed in such a way that reasons could be provided for any action or inaction. The King III report on Corporate Governance, published in 2009 simply implies “comply or explain” (King III 2009:5). This requirement is not only applicable to the private sector companies, but to organs of state (defined in section 239 of the Constitution, 1996) as well. The Report states unequivocally that “King III applies to all entities regardless of the manner and form of incorporation or establishment whether public private or the non-profit sector. “It could thus be argued that administrative and executive decisions and actions or inactions are open to public scrutiny.

To this argument concerning reasons for actions and/or explanations why deviations occurred should also be added the requirements of the *Promotion of Access to Information Act, 2* of 2000 and the *Promotion of Administrative Justice Act, 3* of 2000.

- The *Promotion of Access to Information Act, 2000* was passed “to give effect to the constitutional right of access to any information held by the state or any information that is held by another person and that is required for the exercise or protection of any rights...” Although certain exceptions apply, the Act is a mechanism to bring information in the public domain and to promote transparent administrative and executive decisions and actions.
- The *Promotion of Administrative Justice Act, 2000* was passed by Parliament “to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative actions contemplated in section 36 of the *Constitution of the Republic of South Africa, 1996*...”

It is obvious that the South African government has, through the Constitution, 1996 and the two pieces of legislation quoted above, established a framework to promote transparency and public accountability. This was strengthened by the adoption of the *King Code of Governance* and the utilisation of the state institutions created in terms of chapter 9 of the Constitution, 1996. The two primary institutions in this regard are the Auditor-General and the Public Protector which will be discussed in the following paragraphs

AUDITOR-GENERAL

The Auditor-General’s office was the last stage in the long parliamentary history to transfer authority from a king to society. The Auditor-General (originally called Comptroller and Auditor-General) was appointed to provide a vehicle allowing Parliament to have direct access to the financial matters of government departments. In the South African system the Auditor-General AG) is appointed in terms of section 188 of the Constitution, 1996 for a

fixed, non-renewable term of between five and ten years (section 189). The duties of the AG has been extended over the years and now covers the auditing of all three spheres of government and other institutions as required by national or provincial legislation.

The Auditor-General is appointed after a process initiated by the Speaker in the National Assembly, recommending a person for appointment to the President (section 6(1) *Public Audit Act*, 25 of 2004). The AG is independent and is subject only to the Constitution and the law, including the *Public Audit Act*, 2004. The AG must annually submit a report to the National Assembly on his/her activities as mentioned above. The AG has unrestricted powers, at all reasonable times, to any document and may inspect and question any person or direct a person to disclose any information relevant for the audit. Although not directly relevant to the two cases to be discussed, the AG is authorised by the *Public Audit Act*, 2004 to investigate any case of suspected misappropriation of public money, the misuse of public money or wasteful expenditure. As such the AG is one of the most significant contributors to the role of Parliament to ensure that public monies are spent to best advantage of society.

PUBLIC PROTECTOR

Chapter 9 of the Constitution of the Republic of South Africa, 1996 provides for *State Institutions Supporting Constitutional Democracy*. Section 181(1) prescribes the functions of the Public Protector. These functions include *inter alia*

- 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 impropriety or prejudice;
- to report on that conduct; and
- to take appropriate remedial action.

Section 182(5) of the Constitution also contains an important condition; tantamount to democratic government i.e. that the report must be open to the public unless exceptional circumstances require the report to be kept secret. The powers and functions of the Public Protector are expounded in section 6(4) of the *Public Protector Act*, 23 of 1994 by determining that the Public Protector (PP) is competent to investigate on his/her own initiative or on receipt of a complaint any alleged maladministration in connection with the affairs of government at any level. This competence includes any abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct as well as any improper or dishonest act or omission which may relate to an infringement of the *Prevention and Combating of Corrupt Activities Act*, 12 of 2004. Since her appointment as Public Protector, Ms Madonsela has investigated various cases of alleged misconduct, abuse of power, illegal actions, wasteful expenditure and unauthorised expenditure. Two cases are briefly discussed to illustrate the role of one of the institutions created in terms of the Constitution to support democracy.

Against the rules

The Report: *Against the rules*, published on 22 February 2011 should be considered within the legal framework summarised in the abovementioned paragraphs. It is noteworthy that the



Public Protector is constitutionally entrenched in the same manner as the Auditor-General. This creates the impression that the Public Protector should be accorded the same status as the Auditor-General regarding his/her findings if it meets the same degree of probity and objectivity characterising the latter's report to Parliament.

The Public Protector's report under discussion was prompted by complaints lodged by the Director of the Institute for Accountability in Southern Africa and a Member of Parliament and based on an allegation in a Sunday newspaper. The complaints concerned the alleged lease of offices in Pretoria for the South African Police. Thus the Public Protector's investigations into the matter complied with her constitutional mandate and expounded by section 6(4) of the *Public Protector Act, 1994*. The issue investigated primarily concerned the non-compliance with section 217 of the Constitution regarding the procurement of goods and/or services by an organ of state (in terms of section 239, e.g. a department). This implies that any such contract must be fair, equitable, transparent, competitive and cost-effective.

The Public Protector informed the Department of Public Works (DPW) and the National Commissioner of Police concerning the allegations and requested the departments concerned on 3 August 2010 to suspend the implementation of the lease agreements. The National Commissioner of Police questioned the legality of the investigation process by the Public Protector. However, the investigation was conducted in accordance with the mandate of the Public Protector as contained in the Constitution and the Public Protector Act.

The issue under investigation concerned the leasing of office space in the SANLAM Middestad building in Pretoria. It is significant to note that the Divisional Commissioner estimated the needs on 16 April 2010 as 13 808,52 m², this was later amended to 21 020,50 m² on 10 May 2010 and ultimately to 25 301,54m² on 19 July 2010 and was later increased (a fourth time). The latter being the total size of the building. This also seemed to be too coincidental to the PP. Another factor of concern was that the SAPS argued that the office space was urgently required for the FIFA World Cup which was scheduled for June/July 2010. To this the PP responded by stating that the date for the World Cup had been known six years in advance and that the need could thus not have occurred suddenly. In spite of legal opinion obtained, the Director General (DG) of the DPW proceeded with the lease. However the PP argued that the whole building was not needed urgently, only a crime prevention unit in the city centre could possibly be classified as urgently required. The DPW signed the lease agreement. The PP proposed that the lease be suspended. This proposal was accepted by the Director-General of the DPW. On 22 November the DPW advised Nedbank that it was continuing with the lease in spite of the fact that the findings of the PP were accepted. The DG of the Department was suspended by the Minister on 7 December 2010, but the Acting DG of the Department confirmed that the Department was continuing with the lease.

The National Treasury was requested to consider the controversial issue. The Minister of Finance's response indicated that the prescribed Treasury Regulations had not been followed and could not condone the irregular expenditure that resulted from the lease agreement. The DPW responded by arguing that there was an urgent need; that office space in the city centre was unavailable and that the processes followed were consistent with the Department's *procurement regime*. No response was provided as to the reasons why no attention was paid to the legal advice that the process was in breach of the fiduciary duties and requirements of good governance. The National Commissioner of Police argued that he was materially prejudiced in preparing his response and that he was not required to have an

expert knowledge of the legal and regulatory environment applicable in other departments (thus implying *inter alia* those in the DPW or Treasury).

After considering the arguments the PP concluded that

- the evidence submitted by the National Commissioner of Police was generally consistent with the relevant documentation received, but inconsistent with that of other officials in the SAPS and that the National Commissioner conceded that the procurement process was compromised as a result of the negotiations that took place with the lessor;
- the DPW indicated that they took note of the PP's draft report and that they acted on the advice of officials in the Department, but did not react to contents of the PP's report;
- the information obtained from the lessor (R Shabangu) was inconsistent with the information obtained from the DPW and could not be sustained from the information obtained from officials regarding events pertaining to the procurement of the lease;
- as far as the procurement process is concerned, the SAPS did not follow due process and that it overlapped with the legislative mandate and objectives of the DPW;
- the DPW's processes leading to the procurement of the lease agreement was highly truncated and outside the normal operating procedures of the Department concerning the Supply Chain Management requirements;
- there was no urgent need for the SAPS to acquire the total area identified; and
- the lease was not budgeted for and no provision was made by the SAPS for the necessary funds to be made available.

In the final analysis the PP *inter alia* concluded that

- the management of assets by the SAPS did not comply with the *Government Immovable Asset Management Act, 2007*;
- the involvement of the SAPS proceeded beyond the demand management phase of the Supply Chain Management process;
- the SAPS adjusted the need to fit the specifications of a single supplier;
- the procurement of the lease was not in accordance with a system that ensured cost effectiveness;
- the so-called urgency as argued by the SAPS applied to only a small part of the need (a crime prevention section for the FIFA World Cup);
- the DPW did not provide acceptable reasons for deviating from the requirements as required by the prescripts nor complied with the urgency requirement or the principles of fairness, equitability and transparency; and
- the conduct of the accounting officers of the SAPS and the DPW was improper and unlawful.

Response to the allegations by the PP were received from firstly the Minister of Finance questioned the lease agreement and stated *inter alia* that the National Treasury cannot condone any irregular expenditure resulting from the contract and proposed that the "*letter and the spirit of the PFMAS will be enforced*" (PP 2010:65). The arguments by the Minister of Public Works and the National Commissioner of Police regarding the urgency of access to accommodation due to the FIFA World Cup were not acceptable to the PP. Strong arguments were offered to refute the urgency for accommodation (PP report 2010:72-73). The PP also questioned various explanations forwarded by the National Commissioner of Police and the DPW (*Ibid.* 71-78). In the final analysis



the PP maintained that the allegations proven and that the SAPS and the DPW contravened the prescribed procedures and regulations pertaining to sound financial management.

In the extreme

The Report, entitled: *Report of the Public Protector on an Investigation into the allegations of a Breach of the Executive Ethics Code by the Minister of Cooperative Governance and Traditional Affairs, Mr Sicelo Shicheka, MP* was published in 2011. The report investigated five main allegations against the Minister. These included (Public Protector 2011:5-6):

- alleged violation of the Code of Ethics (the Executive Ethics Code published in terms of the *Executive Members' Ethics Act, 1998*;
- alleged spending of public monies under false pretences, misrepresentation of facts; or unauthorised;
- allegedly tried to get his department to pay for accommodation in an hotel while on sick leave;
- allegedly being assisted through municipal resources to construct a house in the Eastern Cape; and
- allegedly claiming travelling expenditure to destinations outside of the country while on sick leave.

The contents of the Report are not discussed in detail as it is freely available in terms of Act governing the Public Protector's functions. However, some examples of the alleged misconduct by the Minister are quoted to illustrate the nature of the investigation

It was alleged that the minister misrepresented the reasons for travelling to Switzerland, pretending that he was on an official visit on World Cup duties (Public Protector 2011:5) while actually visiting someone incarcerated in Anstalten Hindelbank prison resulting in an expenditure to the state of ±R546 864 instead of the reported ± R367 000. As far as wasteful accommodation is concerned the allegations amounted to ± R394 302. These amounts exclude the request to his Department to pay an accommodation bill at the Lesotho Sun hotel while on sick leave. This request was not honoured by the Department.

The PP's scope of investigation was limited to the period September 2008 to September 2011 (PP 2011:17) and entailed

- Interviews with 10 officials and former officials of the Department of Cooperative Governance and Traditional affairs and of the Ministry; the Director-General; the Chief Financial Officer; other officials; Co-Chair person of the South African Football Association; Counsellor for the Department of International Relations and Cooperation formerly based in Switzerland; the Ambassador to Switzerland by telephone and a member of his staff as well as Mr Mntambo (one of the persons who benefited from the Minister's claim for hotel expenses).
- Documents concerning travelling and accommodation arrangements were investigated.
- Correspondence *inter alia* between the minister and the President; the Minister and his advisory team; with the ambassador in Switzerland; the Ombudsman for the State of Zurich; with the Director-General; the South African Football Association; and the travel agency.
- Legislation and prescripts such as the Constitution, the Public Protector Act, the Executive Members' Act, the Executive Ethics Code and the Ministerial Handbook.

- After completion of the extensive investigation the PP made the following findings:
- The visit to Switzerland constituted a violation of the Executive Ethics Code, the Public Protector Act and the Constitution.
- The accommodation claimed at a particular hotel in Cape Town for himself while a house had been available constituted a violation of the Executive Ethics Code and the Constitution.
- The Minister's invitation to a guest to travel to Cape Town at state expense constituted as violation of the Executive Ethics code and the Constitution
- The Minister's conduct in trying to claim for accommodation at the Lesotho Sun hotel constituted a violation of the /executive /ethics /code and the Constitution.
- The Minister's conduct in respect of private accommodation while on sick leave constituted a violation of the Executive Ethics Code and the Constitution.

In response to the PP's report the minister was afforded the opportunity to respond. This was done through his advisors. The response regarding the visit to Switzerland was contested as it was argued that he did attend to FIFA World Cup soccer matters as well. However, the evidence of the ambassador and the FIFA World Cup Organising Committee seem to refute this evidence (PP report 29.011:73-75). The accommodation in the One and Only Hotel was justified by arguing that he only stayed in the hotel; occasionally and was entitled to do so in terms of the Ministerial Handbook. Mr Mntambo's presence was also justified as he was considered to be his *father* and that the term family was not clearly defined. This response is also rejected by the PP (PP report 2011:80). Similarly the Minister disputed that he stayed in the Lesotho Sun Hotel, but the hotel confirmed this and supported by a voucher from the Department (*Ibid.*81). The other visits viewed as irregular by the PP were refuted by the Minister through his advisors, arguing that the Minister "*remains the property of the state and all benefits are available to the office irrespective of his condition*" but was refuted by evidence from the relevant Ministerial Handbook.

In accordance with the PP's mandate particular remedial actions are proposed by the PP. These include that the President take serious action against the Minister; that terminology be redefined to obviate misunderstanding; the Department to take steps to recover particular expenses claimed, but to which he was not entitled; the Department to take steps to improve the controls and record keeping of the minister's private office; and the Director-General to take urgent steps to conclude the investigation into the alleged abuse of the minister's travelling privileges.

The views expressed by the PP clearly illustrates the fact that accountability, i.e. to give reasons for actions or omissions of following due process happen *after* the fact. It is imperative to establish procedures and mechanisms to rather prevent irregular or unauthorised expenditure. One of the recent developments receiving attention is monitoring and evaluation. Babette Rabie gives a comprehensive overview (Rabie 2010:141-160) of the systems in place in various countries. An extensive *Policy framework for the government-wide monitoring and evaluation system* (GWM&ES) had been adopted in 2007. This system is implemented together with Treasury's *Programme Performance Information Framework* to prepare the audit of non-financial information as well as Stats South Africa's *Statistical Quality Assessment Framework* to ensure the quality of generated performance information. This policy framework thus establishes a framework for monitoring. If this had been in place in both the cases discussed irregular or unauthorised expenditure could probably have been

prevented or limited. It illustrates the need for evaluation and monitoring as a prerequisite for effective control and a mechanism to assist in alleviating the burden of the accounting offices in rendering account after a wrongful action.

EFFECTS OF FINDINGS

The reports by the PP are valuable sources of reference in public administration as outlined in chapter 10 of the Constitution, 1996. It furthermore establishes the important role of accounting officers in the public service and the implications of their duties and responsibilities in financial management. Although New Public Management demands a more business like approach in the public sector, the PP's reports prove that public accountability is not only a cornerstone of democracy, but also reiterates that due process must be followed to ensure accountable public administration. The requirement that departments must comply with the contents of the Constitution, 1996, the *Public Finance Management Act*, 1999 and the processes prescribed for Supply Chain Management are also proven in the findings. The need to honour ethical guidelines developed to promote transparent and accountable government are highlighted. The role of the state institutions supporting also democracy has been proven beyond doubt.

The Director-General had been dismissed in the early stages of the investigation which proves that accountability vests in the head of department. As accounting officer the DG is the final stage in financial accountability in a department. This dismissal thus bears proof of the value of having clear legal prescriptions to guarantee effective financial administration. However, it should be mentioned that the former Minister Geoff Doidge who was the Minister of Public Works when the allegations into the leasing were made was dismissed on 31 October 2010 and replaced by Ms Mahlangu Nkabinde. The latter announced that the lease agreement would be honoured. It is already history that the matter was not resolved with the appointment of Mahlangu Nkabinde. The matter dragged on for nearly a year before the final actions were announced.

The President announced on 24 October 2011 that the Minister of Cooperative Governance and Traditional Affairs, Mister Sicelo Shiceka and the Minister of Public Works, Ms Gwen Mahlangu Nkabinde will leave Cabinet (<http://www.polity.org.za/print-version/zuma-axes-mashlangu-nkabinde-shiceka-2011> (Accessed 2011/10/25)). The National Commissioner of Police, Mr Bheki Cele has been suspended with immediate effect. With this announcement, the President has acknowledged the status of the PP as one of the prominent institutions supporting democracy. It also proves South Africa's commitment to open and transparent democratic government and administration.

The PP's reports bear evidence of her commitment to act decisively in cases of alleged maladministration or management. The investigations concerning the two cases quoted indicate a commitment to search and find the relevant data, verify it and recommend solutions to the causes of the allegations, if found to be relevant.

CONCLUSION

Chapter 9 institutions have been established to support democratic government. Two of these institutions were mentioned above. However, particular attention was devoted to only the

Public Protector to establish whether such institutions are empowered through the Constitution and their establishing legislation to promote transparency and accountability. The processes followed by the PP in both cases proved that scientifically acceptable procedures were adhered to. Evidence was gathered; facts were corroborated; opportunities were offered to the parties involved; and their response evaluated. The investigations complied with the mandate of the PP and resulted in a genuine effort to promote efficiency and transparent and accountable government and administration as prerequisites for democracy.

The role of the PP has been vindicated in the assurance that public administration is accountable. It has furthermore established the President's authority in terms of section 91(2) of the Constitution regarding the appointment and dismissal of ministers. The requirements concerning the conduct required of minister as contained in section 96 of the Constitution have also been made abundantly clear through the ruling of the President regarding the two errant ministers.

REFERENCES

- Bayat, M.S. and Meyer, I.H. 1994. *Public Administration: concepts, theory and practice*. Halfway House: Southern Book Publishers (Pty) Ltd.
- Institute of Directors, Southern Africa. 2009. *King code of governance for South Africa (King III)*. Pretoria: Institute of Directors in Southern Africa.
- Normanton, E.L. 1966. *The accountability and audit of governments: a comparative study*, New York: Frederick A Praeger
- Rabie, B. 2010. An exploration of South Africa's framework for public sector monitoring and evaluation: lessons from international best practice. *Administratio Publica*, 18(1) April:139–160.
- Sikhakane, B.H. and Reddy, P.S.2011. Public accountability at the local government sphere in South Africa. *African Journal of Public Affairs*, 4(1) June:65–102.
- South Africa. *Constitution of the Republic of South Africa*, 1996.
- South Africa. *Public Protector Act*, 23 of 1994.
- South Africa. *Promotion of Access to Information Act*, 2 of 2000.
- South Africa. *Promotion of Access to Information Act*, 3 of 2000.
- South Africa. *Prevention and Combating of Corrupt Activities Act*, 12 of 2004.
- South Africa. *Public Audit Act*, 25 of 2004.
- South Africa. 2010. *Against the rules; report no 33 of 2010/2011 of the Public Protector in terms of section 182(1) of the Constitution of the Republic of South Africa*, 1996. Pretoria: The Public Protector.
- South Africa. 2011. *In the extreme, report no 11 of 2011/2012 of the Public Protector on an investigation into allegations of breach of the Executive Ethics Code by the minister of Cooperative Governance and Traditional Affairs, Mr Sicelo Shiceka, MP*. Pretoria: The Public Protector.

AUTHOR'S CONTACT DETAILS

Prof. C Thornhill
E-mail: chris.thornhill@up.ac.za

