

The brewing tug-of-war between South Africa's Chapter 9 Institutions:  
The Public Protector *vs* the Independent Electoral  
Commission

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**Abstract:** The release of the Public Protector's final report on the allegations of maladministration against the chairperson of the Independent Electoral Commission has put under the microscope the development of the principles of the rule of law within the context of the powers and functions of these institutions in furthering the objectives of the new constitutional dispensation. It generated debates on whether these institutions are fulfilling their duty of promoting constitutional democracy or are at each other's throats. These debates rests on the interrelationship that exist between the principle of accountability and the legitimate role that is played by the institutions themselves in ensuring the proper and effective strengthening of South Africa's democracy. The debates also focus on the government's commitment to the advancement of the rule of law in the regulation of state authority.

Against this background, this paper examines the application of the principle of the rule of law within the framework of Chapter 9 institutions with particular reference to the Public Protector and the Independent Electoral Commission. Such undertaking is motivated by the recent release of the report as indicated above which reinforced the objective of having established the 'anti-corruption and ethical institutions in bringing about good governance' who subsequently became embroiled in a "cat-fight" over the legitimacy of their powers. The intention is not to analyse the constitutional status or history of these institutions but rather on the factors that have the potential to compromise their integrity and legitimacy in upholding the principles of the rule of law as foundational values of the new dispensation.

## 1. Introduction

The Constitution of the Republic of South Africa 1996<sup>1</sup> has since the attainment of democracy provided an important feature of the new dispensation by establishing Chapter 9 institutions<sup>2</sup> in order to ensure the advancement of South Africa's democratic character in the regulation of state authority. These institutions are empowered to be independent and expected to be impartial in the exercise of their functions in order to provide an effective oversight role of both public and private spheres in the regulation of their authorities. The Constitution has further provided an opportunity for ordinary citizens to get redress against maladministration in the exercise of government authority especially in a country like ours that emerges from a system that was characterised by oppression of its general populace and lacked accountability in the enforcement of both the state and government conduct<sup>3</sup>.

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<sup>1</sup> Hereinafter referred to as the "Constitution".

<sup>2</sup> This does not necessarily mean that they are 9 (nine) but six and are included in Chapter 9 of the Constitution and hereinafter referred to as "institutions strengthening constitutional democracy in the Republic".

<sup>3</sup> See the Parliament of the Republic of South Africa (2007): Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions. A report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa at 3. See also *Azanian Peoples Organization v President of the Republic of South Africa* 1996 (8) BCLR 1015 (CC). Mahomed DP pointed out that: "For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination ... The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation," at para 1.

The Constitutional Court further laid the foundation on the importance of these institutions in the *Certification*<sup>4</sup> judgment as it held that ‘they have to ensure that government exercises its duties effectively and members of the public who are aggrieved by the government conduct should be able to lodge their complaints with them’.<sup>5</sup> Sithebe also gives effect to the legitimacy of these institutions by pointing out that they ‘form the cornerstone to the sustenance of democracy and are important for the full realisation of other democratic principles such as accountability, respect for the rule of law and human rights’.<sup>6</sup> In a nutshell, these institutions were established and designed to:

- restore the credibility of the state and its institutions in the eyes of the majority of its citizens;
- ensure that democracy and the values associated with human rights and democracy flourished in the new dispensation;
- ensure the successful re-establishment of, and continued respect for, the rule of law; and
- ensure that the state became more open and responsive to the needs of its citizens and more respectful of their rights.<sup>7</sup>

These factors are essential as they provide guidance and shape the framework on how these institutions should execute their role in ‘assisting the various organs of state in adhering to their fundamental roles’.<sup>8</sup> They are of fundamental importance in determining the advancement of the principle of rule of law which prohibits the arbitrary exercise of public power.<sup>9</sup> They are also of direct relevance in respect of the way in which the Chapter 9 institutions themselves enforce the rule of law in the carrying out of their mandates in their own context.

Against this background, this paper examines the application of the principle of the rule of law within the framework of Chapter 9 institutions with particular reference to the Public Protector<sup>10</sup> and the Independent Electoral Commission.<sup>11</sup> Such undertaking is motivated by the recent release of the Public Protector’s report<sup>12</sup> on the allegations of maladministration against the chairperson of the Independent Electoral Commission whilst she was still the Chief Electoral Officer of the latter. It is further reinforced by the objective of having established the envisaged ‘anti-corruption and ethical institutions in bringing about good governance’<sup>13</sup> who subsequently became embroiled in a “cat-fight” struggle over the legitimacy of their powers. The intention is not to analyse the constitutional status or history of these institutions<sup>14</sup> but to focus on the factors that have the potential to compromise their integrity and legitimacy in upholding the principles of the rule of law as foundational values of the new dispensation.<sup>15</sup> It is argued that the institutions should not adopt an “arm’s length” approach to the evolution of the

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<sup>4</sup>*Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC).

<sup>5</sup> *Ibid.*, at para 161.

<sup>6</sup> See Sithebe K ‘Chapter 9 institutions: for the sake of accountability and constitutional democracy’ 24 March 2014 accessed at [www.africlaw.com](http://www.africlaw.com) on 05 May 2014.

<sup>7</sup> See the Report (note 3 above) at 3.

<sup>8</sup> See the De Vos P and Freedom W (eds) *South African Constitutional Law in Context* (2014) Oxford Publishers, ISBN 978 019 5991376 at 258.

<sup>9</sup> See Kruger R ‘The South African Constitutional Court and the rule of law: the *Masethla* judgment, a cause for concern’ (2010) Volume 13 No 3 *Potchefstroom Electronic Law Journal* at 468-508.

<sup>10</sup> Established in terms of section 181(1)(a) of the Constitution, and hereinafter referred to as the “PP” and became operational effectively as from 01 October 1995. See also the historic development of the office of the Ombudsman (Public Protector) in Ntlama N ‘An overview of the ‘independence’ of the Ombudsman in South Africa and Namibia’ forthcoming in (2014) Volume 3, *Stellenbosch Law Review Journal*.

<sup>11</sup> Established in terms of section 181(1)(f) of the Constitution, hereinafter referred to as the “IEC”. The Commission came into being on 01 July 1997 when the first Commissioners were appointed and the Chief Electoral Officer in November 1997.

<sup>12</sup> See the report entitled: “Inappropriate Moves”: an investigation into allegations of maladministration and corruption in the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission: No 13 of 2013/2014 ISBN 978-1-920692-0205.

<sup>13</sup> Extracted from Mukoro A ‘The Ombudsman phenomenon in African states public services’ Department of Local Government Studies, Obafemi Awolowo University, Nigeria at 4.

<sup>14</sup> See the general history in Ntlama N ‘An overview of the principle of ‘independence’ of the Ombudsman in South Africa and Namibia’ forthcoming (2014) Volume 3 *Stellenbosch Law Review Journal*, which has a direct relevance and application in respect of the two institutions under discussion herein.

<sup>15</sup> See section 1(c) of the 1996 Constitution which provides that the Republic of South Africa is founded on values of supremacy of the Constitution and the rule of law.

principles of the new democratic dispensation in legitimising their own constitutional and legal processes if they have to ensure the promotion of their integrity.

## 2. Brief Overview of the Rule of Law

The rule of law is one of the basic principles which constitute the new constitutional order as it influences the manner in which the organs of state<sup>16</sup> are to execute their duties within the framework of the new dispensation<sup>17</sup>. It is not just an ordinary principle but a foundational value of the new dispensation which require the application of public power within the framework of the law<sup>18</sup>. It emerged to limit the powers of the rulers by subordinating their activities to the framework of the law in ensuring the transformation of the state to a constitutional state<sup>19</sup>. It is deeply rooted in eliminating South Africa's historic past where the state became the law unto itself and disregarded the proper and effective application of the law.<sup>20</sup> Without a focus on this history, the rule of law is designed as the 'bedrock on which democracy and democratic practices are anchored' in ensuring the maintenance of respect of the values and principles of the new dispensation<sup>21</sup>. This was emphasised by Langa J in *S v Makwanyane*<sup>22</sup> as he held that 'when the Constitution was enacted it signalled a dramatic change in the system of governance from one based on rule by parliament to a constitutional state ... where rule by force would be replaced by democratic principles and a governmental system based on the precepts of equality and freedom'.<sup>23</sup>

The idea of the concept of the rule of law is therefore, traced back to Dicey<sup>24</sup> who contended that it entails the functioning of the state within the framework of the law. This principle was articulated by the Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*.<sup>25</sup> The Court held that the principle is the 'conception of the new constitutional order that constrains the exercise of public power'.<sup>26</sup> Subsequently, Chaskalson P in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa*<sup>27</sup> shared the same sentiments as he also held that:

"It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."<sup>28</sup>

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<sup>16</sup> See the definition of the organ of state in section 239 as:

- (a) any department of state or administration in the national, provincial or local sphere of government or
- (b) any other functionary or institution
  - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer.

<sup>17</sup> See Currie I and De Waal J *The Bill of Rights Handbook* 5<sup>th</sup> ed (2005) Juta Publishers at 7.

<sup>18</sup> See Kruger (note 9 above) at 476. See also Chief Justice Mogoeng Mogoeng entitled: 'The rule of law in South Africa: measuring judicial performance and meeting standards' 25 June 2013 accessed at [www.constitutionallyspeaking.co.za](http://www.constitutionallyspeaking.co.za) on 25 May 2014.

<sup>19</sup> Diescho J 'The paradigm of an independent judiciary: its history, implications and limitations in Africa' at 22 in Horn N & Bosl A *The independence of the judiciary in Namibia* (2009) Macmillan Publishers, ISBN 978-99916-0-807-5, Windhoek.

<sup>20</sup> *Masethla v President of the Republic of South Africa* 2008 (1) BCLR 1 (CC) at para 33. See also Abioye F 'The rule of law in English speaking African countries: the case of Nigeria and South Africa' Unpublished LLD thesis (2011) University of Pretoria.

<sup>21</sup> See Shivute P 'The rule of law in Sub-Saharan Africa: an overview' at 215 in Horn N & Bosl A (eds) *Human rights and the rule of law in Namibia* (2009) Macmillan Education Publishers, Namibia, ISBN: 978-99916-0-807-5.

<sup>22</sup> 1995 (6) BCLR 665 (CC).

<sup>23</sup> *Makwanyane* at para 220.

<sup>24</sup> Dicey AV *Introduction to the study of law of the Constitution* 10<sup>th</sup> ed (1959) quoted in Currie and De Waal (note 17) above at 10.

<sup>25</sup> 1998 (12) BCLR 1458 (CC).

<sup>26</sup> *Ibid* at para 58.

<sup>27</sup> 2000 (3) BCLR 241 (CC).

<sup>28</sup> *Ibid* at para 85.

It is drawn from above as Rautenbach & Malherbe point out that the principle of the rule of law encapsulates the following features:

- accountability of government officials under the law.
- legitimacy of the government conduct.
- certainty of laws which are clearly defined and publicised.
- application of the law in a fair, reasonable and accessible way.<sup>29</sup>

Broadly, these features entail the significance of the rule of law within the domain of the public law function in the regulation of state and government authority. They are directly linked to the principle of accountability which is essential for the proper functioning of both the state and its Chapter 9 institutions. Accountability is one of the foundational values for good governance in the prevention of abuse of state power which may undermine the promotion of the basic principles of the new constitutional dispensation. It subjects those holding public office to scrutiny in respect of the manner in which they exercise and perform their functions. The principle of accountability is interdependent to the concept of “*Batho Pele*” which means “People First”. The concept encapsulates the following principles: consultation, setting service standards, increasing access, ensuring courtesy, providing information, openness and transformation, redress and value for money. These principles seek to ensure:

- The promotion and maintenance of high standards of professionalism in [good governance and leadership].
- The provision of service impartially, fairly, equitable and without bias.
- The utilisation of resources efficiently and effectively.
- The encouragement of citizens to policy making, and
- The accountable, transparent and development-oriented public administration.<sup>30</sup>

These factors give effect to the foundational provision of the Constitution as it entrenches the responsibility of the state in ensuring its accountability and transparency in the regulation of its authority.<sup>31</sup> They further reinforce the application of section 41 and section 195 of the Constitution which spells out in no uncertain terms that accountability is essential for the upholding of the goals of South Africa’s democracy. Without focusing on the principles laid down in these sections, the significance of accountability in the regulation of state authority was endorsed by O’Regan J in *Rail Commuters Action Group v Transnet Ltd/ t/a Metrorail*<sup>32</sup> as she held that:

- Accountability of those exercising public power is one of the founding values of our Constitution [and] ... is thus expressly mentioned in a range of provisions ... is asserted within the scheme of the Bill of Rights [and] one which is relevant to a consideration of the “spirit, purport and objects of the Bill of Rights”.<sup>33</sup>
- The value of accountability is asserted not only for the state, but also for all organs of state and public enterprises [and a] principle that government, and organs of state, are accountable for their conduct is an important principle that bears on the construction of constitutional and statutory obligations.<sup>34</sup>

The importance of accountability and its interrelationship with the *Batho Pele* (“People First”) principles is a vanguard in the promotion of the advancement of the rule of law on monitoring

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<sup>29</sup> See Rautenbach & Malherbe *Constitutional law* (2012) 6<sup>th</sup> ed LexisNexis Publishers, Cape Town, ISBN 978409058390 at 9.

<sup>30</sup> Accessed at the Republic of South Africa Department of Independent Police Investigative Directorate website: [www.ipd.gov.za](http://www.ipd.gov.za) on 29 July 2014.

<sup>31</sup> See section 1(d) of the Constitution.

<sup>32</sup> 2005 (4) BCLR 301 (CC).

<sup>33</sup> See paras 74-75.

<sup>34</sup> See para 76.

government action and determining ways in which the rationality of its action can be examined.<sup>35</sup> At the heart of such monitoring function, these principles have put into test the measures and mechanisms put in place by the Chapter 9 institutions in order to give expression to the rule of law. Without a focus on this role as well, it is clear that since the twenty year's into the democracy, the focus has been on how government regulates its affairs but not on how the institutions themselves are actually giving effect to the upholding of the rule of law and accountability against maladministration within their own domain. It is actually unprecedented for a constitutional institution to investigate another and causes an uncertainty on the management of the relations in developing the principles on "watching the watchdog".<sup>36</sup> It also raises the question on the political commitment of the state to ensure the promotion and protection of the integrity of the constitutional institutions who are embroiled in a public spat over the findings of misconduct against each other.

### **3. Watching the Watchdog: the tug of war between the Public Protector and the Independent Electoral Commission**

'[the dawn of democracy] includes a promise of representative and accountable government functioning within the framework of pockets of [law] that are provided by various independent institutions, which include the office of the Public Protector ... [where] the [fulfilment] of their demands will call for courage at times, but it will always call for vigilance and conviction of purpose'.<sup>37</sup>

As indicated above, the Constitution establishes the following Chapter 9 institutions in order to strengthen constitutional democracy. These institutions include:

- (a) The Public Protector which is established in terms of section 181(a) and empowered to investigate any suspicion of improper conduct and report such conduct in order to take remedial action.<sup>38</sup>
- (b) The Human Rights Commission which is established in terms of section 181(b) to promote respect and the culture of human rights as envisaged in section 184 of the Constitution.<sup>39</sup>
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities which is established in terms of section 181(c) to promote respect of the rights of cultural, religious and linguistic communities on the basis of equality and non-discrimination as entrenched in section 185 of the Constitution.<sup>40</sup>
- (d) The Commission for Gender Equality which is established in terms of section 181(d) to ensure the promotion of gender equality as contemplated in section 187 of the Constitution.<sup>41</sup>
- (e) The Auditor-General which is established in terms of section 181(e) to audit and report on the proper implementation of the government budget as envisaged in section 188 of the Constitution.<sup>42</sup>

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<sup>35</sup> See for example *Glenister v President of the South Africa* 2011 (7) BCLR 651 (CC) where the Court dealt with the challenge on the disbandment of the Scorpions (Directorate of Special Operations).

<sup>36</sup> Extracted from Vawda Y and Mtshali M 'Who is watching the watchers?: a critical assessment of the Independent Police Investigative Directorate's prospects of investigating misconduct in the South African Police Service' (2013) Volume 17 *Law, Development & Democracy* 132-156.

<sup>37</sup> See Nugent J in *Mail & Guardian v The Public Protector* 2011 (4) 420 SCA at para 8.

<sup>38</sup> See section 182 of the Constitution which is substantiated by the provisions of the Public Protector Act 23 of 1994 as amended by Act 22 of 2003.

<sup>39</sup> The powers of the Commission are substantiated in the Human Rights Commission Act 54 of 1994 as amended by Act 47 of 1997.

<sup>40</sup> This is reinforced by the adoption of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002.

<sup>41</sup> This is also regulated in the Commission on Gender Equality Act 39 of 1996.

<sup>42</sup> This is further endorsed in the Public Audit Act 25 of 2004.

- (f) The Electoral Commission which is established in terms of section 181(f) and empowered to manage elections in terms of section 90 as entrenched in section 90 of the Constitution.<sup>43</sup>

The role of these institutions is to ‘monitor government conduct and contribute to the transformation of South Africa into a society in which social justice prevails’.<sup>44</sup> Of great significance is their autonomous status from both the executive and the legislature in the execution of their duties<sup>45</sup> even though they are accountable to Parliament.<sup>46</sup> They are also meant to be independent which require other state organs not to interfere with their functioning and should be assisted in performing their functions.<sup>47</sup>

Of great concern is the tension that has emanated from two of these institutions: the Public Protector and the Electoral Commission. These institutions have for the first time, in the history of South Africa’s democracy, brought the tug of war between them. The war emanates from the investigation by the Public Protector on allegations of irregularities in the procurement of the IEC’s head offices which were lodged by President of the United Democratic Movement and Member of Parliament: General Bantu Holomisa.<sup>48</sup> The Public Protector had to investigate the ‘allegations of suspected irregularities in the procurement of the Riverside Office Park to accommodate the head offices of the Electoral Commission (the Commission), the validity of the lease agreements entered into by the Commission in respect thereof and various payments to Abland’. Also, to investigate further the conflict of interest between Adv. Tlakula and Member of Parliament: Honourable Thaba Mufamadi.<sup>49</sup>

Without providing an extensive background on the allegations, after a thorough investigation into the matter, the Public Protector found that “the process of acquiring the head offices was grossly irregular and Advocate Tlakula, by her own admission, violated her own procurement policies.<sup>50</sup> It was further found that she had an "undisclosed and unmanaged conflict of interest" in the lease, through her business relationship with Honourable Thaba Mufamadi, chairman of a company with a 20% stake in the company which was awarded the tender.<sup>51</sup>

The findings were consolidated and substantiated by the Department of National Treasury which appointed an independent company: Price Waterhouse Coopers to conduct a forensic investigation on the matter.<sup>52</sup> Treasury also found that Adv. Tlakula did not follow the due process in the tendering and awarding of the contract to the bidder. The misconduct of Adv. Tlakula was further affirmed by the Electoral Court in the *United Democratic Movement v Tlakula* judgment<sup>53</sup> as the Court called for her removal from office as it also established that:

- Adv Tlakula wilfully flaunted legal prescripts on a wholly insufficient basis ... and failed to explain how a period of two years which were to elapse before any further elections were to be held, could possibly have rendered the circumstances or her decision of such an urgent nature to depart from the prescripts.<sup>54</sup>
- She chose not to abide by the law ... Her actions in this regard are unlawful and as such, in our view, constitute misconduct ... Save for the urgency issue, which is untenable, the respondent provides no justification for her deliberate decision to break the law ... and concluded by [saying] that her failure to follow due process was due to an honest mistake.<sup>55</sup>

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<sup>43</sup> The powers are further endorsed in the Electoral Commission Act 51 of 1996 as amended by Act 14 of 2004.

<sup>44</sup> See Murray C ‘The Human Rights Commission et al: what is the role of South Africa’s Chapter 9 institutions?’ (2006) Volume 9 No 2 *Potchefstroom Electronic Law Journal* at 125 quoted in De Vos P and Freedom W (eds) *South African Constitutional Law in Context* (2014) Oxford University Press, ISBN: 9780195991376.

<sup>45</sup> See section 181(2) of the Constitution.

<sup>46</sup> See section 181(5) of the Constitution.

<sup>47</sup> See Marumoagae C ‘Condemning the leaking of Public Protector’s provisional reports’ (2014) *De Rebus Journal*, at 32.

<sup>48</sup> See the Report at para 2.1 at 23.

<sup>49</sup> *Ibid*, at 4.

<sup>50</sup> See the Report at paras 10.2.1 and 10.2.2.

<sup>51</sup> *Ibid*.

<sup>52</sup> See the report entitled: National Treasury Forensic Investigation: Electoral Commission Riverside Office Park, 14 December 2013.

<sup>53</sup> (EC 05/15) [2014] ZAEC 5 (18 June 2014).

<sup>54</sup> *Ibid* at para 95.

<sup>55</sup> *Ibid*, at paras 99 and 102.

Against this background, of great concern is the response of Adv. Tlakula to these findings. First, the manner in which she conducted herself during the investigation further leaves much to be desired. The chairperson participated in the investigation including 'simple administrative tasks such as asking for extensions of time for comment on the process through her lawyers'.<sup>56</sup> It must be noted that the Public Protector, just like the IEC is not a court of law but an institution which is designed to enhance the proper and effective adherence to the evolution of the principles of the rule of law. Its role is deeply rooted in the Constitution and the subsequent Protector's Act.<sup>57</sup> The latter traces its powers to the law and procedure that she followed in conducting the investigation. The importance of the Act was endorsed by Nugent J in the *Mail & Guardian* judgment as he held that:

- the Act repeats in greater detail the constitutional jurisdiction of the Public Protector over public bodies and functionaries and it also extends that jurisdiction to include other persons and entities in certain circumstances. In broad terms, the Public Protector may investigate, amongst other things, any alleged improper or dishonest conduct with respect to public money, any alleged offence created by specified sections of the Prevention and Combating of Corrupt Activities Act 12 of 2004 with respect to public money, and any alleged improper or unlawful receipt of improper advantage by a person as a result of conduct by various public entities or functionaries.<sup>58</sup>

In a sense, the Act gives a practical expression to the rule law and accountability as it enables the Public Protector to enforce the limitation on the abuse of administrative powers including the failure to uphold the rules by Chapter 9 institutions.<sup>59</sup> As the report affirms, Adv. Tlakula misconstrued the mandate and powers of the Public Protector<sup>60</sup> as she failed to acknowledge the oath of office in upholding the foundational values of transparency, accountability and other related factors in consolidating South Africa's constitutional democracy.<sup>61</sup>

Second, Adv. Tlakula could not accept as correct the findings of the Public Protector, creating an impression that the PP was lying. She raised procedural issues as she held that the Public Protector failed to present her with the investigation strategy. It is quite strange that the findings of the Public Protector which were confirmed by other independent bodies could not be accepted as correct because it diminishes the important role and integrity of the institution as a 'defence against bureaucratic oppression and against corruption and malfeasance in public office that is capable of insidiously destroying the nation'.<sup>62</sup> If there was something untoward in respect of the manner in which the Public Protector conducted the investigation, she could have allowed for an opportunity for the report to be debated in Parliament before giving an opinion. It is the latter that has jurisdiction to deal with the dispute over both procedural and substantive issues in relation to the investigation. The matter could then, after being debated in Parliament and a solution is not reached, after Adv. Tlakula made an application for such conduct be reviewed by a court of law. The *Mail & Guardian* judgment has already laid a precedent in this regard as the court found that the if Public Protector failed to investigate properly the 'substance of the allegations that were lodged with the institution on the payment of money to suppliers, whether payment fell within the authority of the person who authorised it, adherence to principles of good corporate governance [are essential]'.<sup>63</sup>

Third, without engaging with the procedural issues, Adv. Tlakula could not as well respond to the findings of the Public Protector as she was waiting to hear the feedback on the concerns she raised with the National Minister of Finance. The non-responsiveness of the chairperson to the findings created a negative perception and an impression of the Public Protector who was on a witch hunt to taint the image of the IEC. It further undermines the credibility of the Public Protector's findings which are essential to

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<sup>56</sup> See the Report at 6.

<sup>57</sup> See the Public Protector Act (note 38 above).

<sup>58</sup> At para 10.

<sup>59</sup> See Shivute P 'The rule of law in sub-Saharan Africa: an overview' at 213 in Horn N & Bosl A (eds) (note 19 above).

<sup>60</sup> See the Report at 200.

<sup>61</sup> Mogoeng M 'Judiciary to do things 'differently and better' *Mail & Guardian Newspaper*, 12 August 2012.

<sup>62</sup> *M&G* at para 6.

<sup>63</sup> *M&G* at para 99.



the adherence to its recommendations.<sup>64</sup> Basically, it compromised her fiduciary duties which are a requirement of good governance.<sup>65</sup>

Fourth, the IEC itself, even though at first, showed commitment to the office of the Public Protector, turned around and shifted the responsibility solely to Adv. Tlakula. In this instance, it also filed an affidavit in the *UDM* judgment and committed itself that it will comply with the decision of the Electoral Court and did not take part in the proceedings.<sup>66</sup> The matter was further concretised when the ‘remaining commissioners gave assurance that they and the Commission would not be hampered in the performance of their functions, should the respondent not be present or available during the [07<sup>th</sup> May 2014] elections [which were forthcoming at the time]. This issue was, accordingly, not a bar to the continuation of these proceedings’.<sup>67</sup>

Fifth, notwithstanding its distancing itself from the matter, the current CEO approved the provision of legal fees to Adv. Tlakula in fighting the Public Protector’s report. Although it further alleges that the CEO approved the funding without the IEC, the latter, as an institution bears an ultimate responsibility as an institution that is required to be led by credible people of high moral standing and authority in leadership and governance.

Sixth, the acceptance of the Public Protector’s certain recommendations by the *Ad hoc* Committee of the National Assembly but unable to accede to them as it argued that it will be unconstitutional to do so raises uncertainty on the credibility of the parliamentary processes which are directly linked to political appointments.<sup>68</sup> It further undermines the jurisprudence that emanates from the Constitutional Court as the latter pointed out in *Glenister* that for example, there are jurisdictions like ours where the executive has a final responsibility on the functioning of the state institutions and is a special feature of our constitutional democracy for the Cabinet to take final responsibility on how the institutions uphold the rule of law.<sup>69</sup>

Seventh, the whole process is compromised by the non-committal of the President as both the head of the national executive and legislature<sup>70</sup> in ensuring the decisive adherence to the findings of the Public Protector. This creates a division in the ‘promotion of unity of the nation as led by its institutions in advancing the interests of the Republic’.<sup>71</sup> South Africa, notwithstanding its twenty years into the democracy, its consolidation of effective and proper measures is still in its infancy because the tug of war between these institutions raises questions which are among others related to the role of the President as both the head of state and the head of the national executive in ensuring the protection of the integrity of both institutions to ensure not only the country’s developmental aspirations but:

- Robust and constitutional order in which the rule of law is extended beyond the confines of government action to its functionaries.
- Responsive and accountable functionaries.
- Implementation of choices that are made in respect of rights and freedoms of the citizens.
- Responsive leadership to improve investor confidence and reduce corruption.<sup>72</sup>

This role is further clouded by findings against the President himself of having benefited unduly from the upgrade of his Nkandla private residence at a cost of more than R200m.<sup>73</sup> Without a focus on the latter, these findings are essential for the determination of the striving of South Africa’s democracy towards maturity as they reinforce the commitment to the investigation of alleged impropriety in public administration and governance. They affirm that irrespective of socio-political status, any allegations of misconduct will be investigated but such objective, is undermined by the manner in which the Adv Tlakula and the President handled the matter. In this regard, the lack of decisiveness by the President in

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<sup>64</sup> See Musuva C ‘Promoting the effectiveness of democracy protection institutions in Southern Africa: South Africa’s Public Protector and Human Rights Commission’ (2009) EISA Research Report No 41, ISBN: 978-1-920446-15-4 at 18.

<sup>65</sup> See Thornhill C ‘The role of the Public Protector: case study in public accountability’ (2011) Volume 4 No 2 *African Journal of Public Affairs* at 83.

<sup>66</sup> *UDM* at para 4.

<sup>67</sup> *UDM* at para 17.

<sup>68</sup> 07 November 2013.

<sup>69</sup> *Glenister* at para 122.

<sup>70</sup> See section 83(a) of the Constitution.

<sup>71</sup> Section 83(c) of the Constitution.

<sup>72</sup> Rotberg RI ‘Governance and leadership in Africa: measures, methods and results’ (2009) Volume 62 No 2 *Journal of International Affairs*, 113-126.

<sup>73</sup> See further engagement in Ntlama (note 14 above).



this matter has provided an opportunity for religious leaders who grouped themselves and came into the fold and slandered the Public Protector of poisoning the atmosphere in South Africa.<sup>74</sup> Such conduct is nothing more than a lack of respect which has decreased public confidence and damaged the reputation of the Public Protector<sup>75</sup> which has been created by the President. The matter is further compromised by the absence of leave which was granted to Adv. Tlakula by the President after the findings of the Electoral Court that also recommended for the National Assembly to 'adopt the facts, views and conclusions of the court which found that she committed the misconduct that warranted her removal from office'.<sup>76</sup>

Notwithstanding these factors, the Public Protector was vindicated by the Electoral Court in the *UDM* judgment as it held that:

- the person who occupies the office of commissioner must be free from conduct which can taint that high office, irrespective of when the misconduct occurred.<sup>77</sup>
- Adv. Tlakula stood in a fiduciary duty towards the Commission and owed it a duty to disclose a potential conflict of interest.
- The skewed procurement process suffered from multiple infringements, which, in turn, favoured her business associate to the detriment of other bidders and at a cost substantially to the detriment of the Commission by causing it to incur unjustified expenditure.
- The conduct of [Adv. Tlakula] was inconsistent with her office and obligations as CEO and accounting officer; she had breached the norms that govern her office.
- It was also unlawful in circumstances where she was imbued with the particular responsibility to ensure proper legal process.
- Her wrongdoing shows that she misconducted herself seriously in dealing with the business of the Commission.<sup>78</sup>

The above factors advance the human factor in the regulation of constitutional duties. They compromise the credibility of the two institutions, particularly the IEC, who is assigned to execute the responsibility of the office in a manner that promotes the integrity of the institution.<sup>79</sup> The lack of decisiveness by the National Assembly in the Public Protector, Treasury and the Electoral Court findings leaves so much to be desired and questions the credibility of the Assembly and its accountability to the general populace of the Republic of South Africa. It actually strengthens the tug of war between the institutions that are designed to enhance the proper evolution of the values of the principles of the new democratic dispensation.

### 3. Conclusion

The bone of contention in this article is not to examine the powers and independence of these institutions but rather to identify factors that compromise their integrity in response to the Public Protector's findings. The Public Protector has since her appointment, uncovered most of the hidden corrupt activities by high profile people. It has been identified that there are various factors as indicated above which have the potential to compromise the integrity of these institutions. If the findings and recommendations of the Public Protector are not properly handled and the National Assembly does not tread carefully in responding to the reports of these institutions, it will slowly destroy the gains that South Africa has achieved.

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<sup>74</sup> See report by Ispas M 'Bishops accuses Public Protector of poisoning the atmosphere in South Africa' *City Press Newspaper*, dated 13 March 2014.

<sup>75</sup> See Marumoagae (note 47 above).

<sup>76</sup> *UDM* at para 161.

<sup>77</sup> *UDM* at para 44.

<sup>78</sup> *UDM* at para 151.

<sup>79</sup> Diescho, (note 19 above).