

FETTERING OF PRESIDENTIAL DISCRETION: DID THE PUBLIC PROTECTOR OVERREACH?

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SUMMARY

The President's power to establish a commission of inquiry confers a plethora of discretionary powers for the Head of State. In the exercise of this power, the President acts alone, seemingly without the constitutional obligation to consult any public functionary or institution. This creates challenges for the question of accountability that attends the exercise of the power. Following the release of the State Capture Report, the Public Protector found that the President had *inter alia* outsourced his power to appoint cabinet members to the Gupta family, notwithstanding that he was the only one empowered to exercise the power in terms of the Constitution. Consequently, the Public Protector directed the President to establish a commission of inquiry to probe the allegations further. The President argued that the Public Protector had overreached her powers and trespassed upon his powers as Head of State. In the *State Capture* judgment, the High Court found that the Public Protector's direction to the President to establish a commission of inquiry was lawful and binding. This article investigates whether the Public Protector may compel the President to establish a commission of inquiry, and whether such an order does not violate the doctrine of the separation of powers. It also probes the nature and extent of the Public Protector's investigatory powers, *vis-à-vis* the President's discretion in appointing a commission of inquiry. The article argues that the President's power in the process is too broad and should be curtailed to enhance accountability.

1 INTRODUCTION

Most democracies grapple with the question of where presidential or executive discretionary power ends, and where abuse of power by

government begins.¹ This is because controlling the exercise of public power by those elected to office tends to raise sensitive issues concerning the separation of powers. To this extent, various mechanisms of accountability exist to minimise the abuse of public power by elected representatives. This phenomenon applies *mutatis mutandis* to the exercise of presidential powers in South Africa, which is subject to the general constitutional obligations relating to public power. It is informed *inter alia* by the principle of constitutional supremacy and the rule of law.² In terms of this principle, the Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of the Republic and any law or conduct inconsistent with it is invalid. The obligations imposed by the Constitution must be fulfilled.³ In addition, the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state.⁴

Discretionary use of public power in South Africa is also subject to the principle of legality, an incident of the rule of law.⁵ A decision taken by the President may be reviewed and set aside if it is contrary to the principle of legality. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,⁶ the Constitutional Court pronounced on how the principle of legality may curb the misuse of public power and held that the exercise of public power is only legitimate where it is lawful.⁷ The scope of the principle of legality has also been expanded by the courts to include concerns with lawfulness, rationality, undue delay and vagueness.⁸ The exercise of discretion by the President at times leads to tension with the legislature, the judiciary and the state institutions supporting constitutional democracy,⁹ especially where the need to exercise oversight over the use of the President's appointment powers arises. In Africa, governments have shown an unwillingness to take steps to reduce the President's powers to make appointments in order to improve presidential accountability for the

¹ Andreescu "The Limits of State Power in a Democratic Society" 2016 *Journal of Civil and Legal Sciences* 4. For further reading on this aspect, refer to Lorgovan and Apostol *Discretion and Abuse of Public Power by Public Authorities* (1999).

² S 1(c) of the Constitution of the Republic of South Africa, 1996.

³ S 2 of the Constitution.

⁴ S 8(1) of the Constitution.

⁵ Freedman and Mzolo "The Principle of Legality and Requirements of Lawfulness and Procedural Irrationality: *Law Society of South Africa v President of the RSA* (2019) (3) SA 30 CC" 2021 2 *Obiter* 421 421. For further reading, see Henrico "The Rule of Law in Indian Administrative Law Versus the Principle of Legality in South African Administrative Law: Some Observations" 2021 42 *Obiter* 486 486 and Henrico "Re-visiting the Rule of Law and Principle of Legality: Judicial Nuisance of Licence"? 2014 4 *TSAR* 742 742.

⁶ 1999 (1) SA 374 (CC).

⁷ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council supra* par 56. The principle of legality is recognised in other jurisdictions. See further the *dictum* of the court in *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada Act* [1998] 2 SCR 217 par 72. In this case, the Supreme Court of Canada noted that the principle of the rule of law mandates the compliance of governmental action with the law, including the Constitution. According to the Supreme Court's *dicta*, the executive branch of government may not transgress the provisions of the Constitution, including in the exercise of discretionary powers. See also the court's ruling in *Operation Dismantle Inc v The Queen* [1985] 1 S.C.R. 441 455.

⁸ Freedman and Mzolo 2021 *Obiter* 421.

⁹ See Ch 9 of the Constitution.

use of such powers. This is notwithstanding that in most African countries, the President wields enormous powers of appointment, and often exercises them in an authoritarian and arbitrary manner.¹⁰

In South Africa, it is generally accepted that the courts of law have jurisdiction over the exercise of all public power in South Africa. The President's power to establish a commission of inquiry constitutes an exercise of public power that may be brought for adjudication before the courts. For instance, the Constitutional Court may decide any matter, if it grants leave to appeal, on the grounds that the matter raises an arguable point of law of general public importance that ought to be considered by that court.¹¹ The use of the word "any" illustrates the wide ambit bestowed on the judiciary to probe the alleged abuse of state power by the President and those in public office. While this is a generally accepted principle of law in relation to the courts, the interrogation of the misuse of public power by other institutions such as the Public Protector has in recent years raised controversial issues concerning the separation of powers.¹²

Challenges arise where the President exceeds the limits placed on the powers of the Head of State. A recent example is former President Jacob Zuma conducting a cabinet reshuffle purportedly on the basis of an intelligence report.¹³ Defending the legal basis for his decision, the President contended that there was no constitutional obligation on him to disclose the reasons for effecting a cabinet reshuffle, as he was the sole repository of the power to appoint and dismiss cabinet members.¹⁴ In *Democratic Alliance v President of the Republic of South Africa*,¹⁵ the North Gauteng High Court found that the President was under a constitutional obligation to dispatch records relating to the impugned decision to dismiss then-Minister of Finance Pravin Gordhan and his deputy Mcebisi Jonas to the Registrar of the High Court. This judgment was upheld on appeal by the Constitutional Court in *President of the Republic of South Africa v Democratic Alliance*.¹⁶ To date, the intelligence report (suggested to be the basis for the dismissal decisions) has not been produced before the High Court despite the court

¹⁰ See the *dictum* of the court in *Njenga v The Judicial Service Commission* [2020] EKLK. The applicants in this matter averred that "the President failed to act within a reasonable time, in the performance of a critical constitutional function as required by the Constitution by not duly appointing candidates nominated for appointment by the Judicial Service Commission". See further Masina "Malawi President Working to Trim Executive Powers" (9 August 2020) <https://www.voanews.com/africa/malawi-president-working-trim-executive-powers> (accessed 2020-08-20). Interestingly, this comes after there was an outcry against his (President Chakwera's) decision to appoint some of his family members to cabinet. See in this regard News Agencies "Malawi President Under Fire for Family Appointments to Cabinet" (9 July 2020) <https://www.aljazeera.com/news/2020/07/malawi-president-fire-family-appointments-cabinet200709144741714.html> (accessed 2020-08-20).

¹¹ S 167(3)(b)(ii) of the Constitution.

¹² Discussed fully below.

¹³ Mahlali "Economy Never Fully Recovered after Nene's Axing, State Capture Inquiry Told" (23 November 2018) <https://www.iol.co.za/news/politics/economy-never-fully-recovered-after-nenes-axing-state-capture-inquiry-told-18241186> (accessed 2020-08-25).

¹⁴ *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35 (the *Cabinet Reshuffle* judgment).

¹⁵ [2017] 3 All SA 124 (GP).

¹⁶ [2019] ZACC 35. Also refer to an earlier judgment by the Supreme Court of Appeal in *President of the Republic of South Africa v Democratic Alliance* [2018] ZASCA 79.

ruling that it should be so produced. According to the President, the intelligence report contained *prima facie* evidence of acts by the cabinet ministers that were detrimental to the country's national security. Arguments against the dismissals of the cabinet ministers were made on the basis that the President unlawfully used the intelligence report to abuse his constitutional power to appoint ministers.¹⁷

This article interrogates whether the Public Protector was entitled to compel the President to establish a commission of inquiry to investigate allegations of state capture, given the discretionary nature of such a power. The article also probes the approach followed by the court in relation to the President's powers as Head of State *vis-à-vis* those of the Public Protector. Central to the discussion is the extent of the Public Protector's investigatory powers, and the scope of the institution's remedial action *vis-à-vis* the exercise of the President's discretion. Questions also arise as to whether increased legislative oversight on the President's section 84(2) powers¹⁸ is not desirable, given that the President is collectively and individually accountable to Parliament for the performance and exercise of his constitutional powers and functions.¹⁹

In order to achieve the above objectives, it is necessary to investigate the nature of the President's power to establish a commission of inquiry and the extent to which, despite its discretionary nature, it may be fettered by either the Public Protector or the legislature. The thesis advanced in the article is that the President's power to establish a commission of inquiry is too broad and should be curtailed in order to improve accountability for the exercise of this power, while preserving the essence of the doctrine of the separation of powers. The contention is made that legislative oversight over the President's section 84(2) responsibilities²⁰ remains inadequate.

2 THE PRESIDENT'S SECTION 84(2) POWERS AS HEAD OF STATE

The powers conferred on the President as Head of State, are contained in section 84(2) of the Constitution and are characterised by an element of discretion. He is the Head of State and head of the national executive.²¹ He must uphold, defend and respect the Constitution as the supreme law of the Republic.²² The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.²³

¹⁷ ENCA "SACP Lashes Out at Zuma Over Fake Report" (30 March 2017) <https://www.enca.com/south-africa/sacp-lashes-out-at-zuma-over-gordhan-removal> (accessed 2022-07-06).

¹⁸ Such as the power to establish a commission of inquiry; see s 84(2)(f) of the Constitution.

¹⁹ S 92(2) of the Constitution.

²⁰ The President's section 84(2) responsibilities include *inter alia* the power to appoint ambassadors, confer honours, issue pardons and establish commissions of inquiry.

²¹ S 83(a) of the Constitution.

²² S 83(b) of the Constitution.

²³ S 84(1) of the Constitution.

Post-1994, the Constitutional Court's first opportunity to deal with the President's section 84(2) powers was in *President of the Republic of South Africa v Hugo*.²⁴ Referring to the President's power to grant a pardon, the Constitutional Court remarked *obiter* that

"[t]he powers of the President under section 82(1) which are now contained in section 84(2) of the Constitution, are expressed in wide and unqualified terms."

They can be exercised without the concurrence of Cabinet.²⁵ As long as consultation has taken place, the President's discretion is unfettered in the sense that it is "not expressly limited by the Interim Constitution".²⁶ The respondent argued that the power of pardon bestowed on the President in terms of section 82(1)(k) of the Constitution is subject to the fundamental rights contained in Chapter 3 of the Interim Constitution and the equality provisions contained in section 8.²⁷ The court therefore had to consider whether the President is subject at all to the provisions of the Interim Constitution in the exercise of his section 82(1)(k) powers to pardon or relieve offenders.²⁸

Relying on the supremacy clause of the Interim Constitution,²⁹ the court held that the President's section 82(1) powers are executive powers and do not form part of a different category of powers.³⁰ According to the court,

"[w]hether the President is exercising constitutional powers as head of the executive (the cabinet) or as Head of State, he is acting as an executive organ of government. His powers are neither legislative nor judicial and there is no fourth branch of government."

The court found textual support for its view in the provisions of section 83(1) and (2) of the Interim Constitution, which dealt with the confirmation of executive acts of the President.

The approach followed by the court should be understood in line with the provisions of section 101 of the Constitution, which deals with the legal requirements for executive decisions taken by the President. In terms of this provision, a decision taken by the President must be in writing if it is taken in terms of legislation³¹ or has legal consequences.³² A written decision by the President must be countersigned by another cabinet member if that decision concerns a function assigned to that other cabinet member.³³

While the provisions of section 83 of the Interim Constitution and 101 of the 1996 Constitution are identical, it is submitted that the court's grouping of executive acts of the President together with the powers of the Head of State

²⁴ 1996 (4) SA 1 (CC) (*Hugo* judgment).

²⁵ *Hugo* judgment *supra* par 14.

²⁶ *Ibid.*

²⁷ *Hugo* judgment *supra* par 9.

²⁸ *Ibid.*

²⁹ S 4(1) of the Interim Constitution.

³⁰ *Hugo* judgment *supra* par 11.

³¹ S 101(1)(a) of the Constitution.

³² S 101(1)(b) of the Constitution.

³³ S 101(2) of the Constitution.

cannot stand. The fact that there may be a separate set of powers from the President's executive acts does not imply the existence of a fourth branch of government. This view is supported by the wording of sections 84(1) and 85(2) of the Constitution. The former states that the President

“has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.”

The latter states that the President “exercises executive authority together with other members of the Cabinet”.

Separating the President's powers as Head of State from those exercised in his capacity as head of the national executive is necessary for purposes of holding him accountable for the exercise of such powers. As head of the national executive, the President exercises his authority together with the other members of the Cabinet³⁴ but as Head of State he is

“responsible for–

...

- (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
- (f) appointing commissions of inquiry.”³⁵

It would, for instance, be absurd to hold the President collectively accountable with a cabinet member for the appointment of a cabinet member.³⁶ The President exercises such a power alone, without the constitutional obligation to consult any other state or non-state actor. Should he choose to do so, that is entirely within his discretion. Such a discretion must however be exercised in line with established legal norms and standards. In such a case, the President should be held individually accountable for the cabinet appointment.

The separation of the President's Head of State powers from those exercised in his capacity as head of the national executive is a necessity because of the nature and extent of the discretion bestowed on the President in each category. In *Mansingh v President of the Republic of South Africa*,³⁷ the High Court held that the President's powers as Head of State, which were originally the royal prerogatives of the British Crown, have since been codified in the Constitution. This means that there are no prerogative powers other than those enshrined in section 84(2) of the Constitution. Unlike prerogative powers, which were initially not justiciable, the President's section 84(2) powers are now subject to the prescripts of the Constitution.

³⁴ S 85(1) and (2) of the Constitution.

³⁵ S 84(2) of the Constitution.

³⁶ S 92(2) of the Constitution. The President, together with Cabinet, is individually and collectively accountable to Parliament for the performance and exercise of his powers and functions.

³⁷ 2012 (3) SA 192 (GNP) par 18, with reference to the President's power to confer honours in terms of s 84(2)(k) of the Constitution.

In *Minister for Justice and Constitutional Development v Chonco*,³⁸ the Constitutional Court held in relation to the President's pardon power that, although it is an executive power, it is unrelated to the scope of the powers bestowed on the national executive authority in terms of section 85(2)(e) of the Constitution. The former is exercised by the President alone whereas the latter is exercised through a collaborative venture between the President and his cabinet. According to the court,

"[t]he President's entitlement to consult does not diminish this responsibility nor parcel it out to those with whom he consults."³⁹

In *Law Society of South Africa v President of the Republic of South Africa*,⁴⁰ the Constitutional Court held that presidential power must be exercised in a way that is consistent with the supreme law of the Republic and its scheme: the President is never at large to exercise power that has not been duly assigned to the President.

According to Freedman and De Vos,⁴¹ the President's Head of State powers are usually distinguished from those exercised in his capacity as head of the national executive by focusing on whether the President is required to exercise a political discretion on behalf of the government. If political discretion is involved, that means the President is acting as head of the national executive. They suggest that there is no clear political discretion when the President acts as Head of State. It is submitted that the use of political discretion to categorise the President's powers as head of the national executive is incorrect as the exercise of section 84(2) powers may also involve political discretion. Political discretion in the exercise of the President's powers as head of the national executive authority is limited because he is mandated by the Constitution to consult with the members of his cabinet.

Barrie⁴² notes that the precise meaning of Head of State is not entirely clear. Remarking on the President's appointment powers, he argues that the Constitution should preferably indicate when an appointment is made either as Head of State or as head of the national executive. On the nature and extent of the discretion bestowed on the President, Venter⁴³ argues that in practice the current checks on presidential power are party political in nature. The author argues that the "parameters of government conduct laid down in the Constitution and the availability of judicial review constitute secondary checks on the exercise of presidential power".

³⁸ 2010 (6) BCLR 511 (CC) par 20.

³⁹ *Ibid.*

⁴⁰ 2019 (3) BCLR 329 (CC) par 3.

⁴¹ Freedman and De Vos (eds) *South African Constitutional Law in Context* (2014) 178. For further reading on executive powers see Okpaluba "Judicial Review of Executive Power: Legality, Rationality and Reasonableness" 2015 30 *Southern African Public Law Journal* 379 380 and Venter "Motions of No Confidence: Parliament's Executive Check and Checkmate" 2014 2 *TSAR* 407 407.

⁴² Barrie "Presidential Powers in South Africa: More Questions Than Answers" 2019 40 *Obiter* 130 131.

⁴³ Venter "Judicial Defence of Constitutionalism in the Assessment of South Africa's International Obligations" 2019 22 *Potchefstroom Electronic Law Journal* 1 7.

It is submitted that the focus should rather be on whether the President's discretion is absolute or limited. As Head of State, the President is only subject to the requirement to act in line with the principle of legality and the Constitution.⁴⁴ When acting as head of the national executive, the Constitution places various restrictions on the President. For instance, when appointing the Public Protector and members of the Constitutional Court, the President must do so in line with the recommendations of Parliament and the Judicial Service Commission.⁴⁵ The extent to which the President's discretion may be fettered by another constitutional body is instructive and should inform any discussion relating to whether the Public Protector has the power to instruct the President to establish a commission of inquiry. This aspect is explored in detail below.

3 THE PUBLIC PROTECTOR'S POWER TO TAKE REMEDIAL ACTION: THE *NKANDLA* JUDGMENT

The office of the Public Protector is established in terms of section 181(1)(a) of the Constitution read together with the Public Protector Act⁴⁶ as an independent institution that is "subject only to the Constitution and the law" and it is required to exercise its functions "without fear, favour or prejudice".⁴⁷ The powers of the Public Protector are 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,⁴⁸ to report on that conduct⁴⁹ and to take appropriate remedial action".⁵⁰

In *Economic Freedom Fighters v Speaker of the National Assembly*⁵¹ (the *Nkandla* judgment), the Constitutional Court had to determine whether the remedial actions of the Public Protector are legally binding. The court found that the President is under a constitutional obligation to comply with the Public Protector's remedial actions and that his failure to do so was inconsistent with his constitutional obligation to uphold, respect and protect the Constitution.⁵² According to the court, taking appropriate remedial action "connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate".⁵³

The Public Protector's power to take remedial action is wide but not unfettered. The type of findings made, and the subject matter of the

⁴⁴ See full discussion in this article relating to the *SARFU* judgment under heading 5.1 below.

⁴⁵ In terms of s 193(4) of the Constitution, the President appoints the Public Protector on the recommendation of the National Assembly and appoints various justices of the Constitutional Court in terms of s 174(3) of the Constitution.

⁴⁶ 23 of 1994.

⁴⁷ S 181(2)(a) of the Constitution.

⁴⁸ *Ibid.*

⁴⁹ S 182(1)(b) of the Constitution.

⁵⁰ S 182(1)(c) of the Constitution.

⁵¹ 2016 (3) SA 580 (CC) (*Nkandla* judgment).

⁵² *Nkandla* judgment *supra* par 99.

⁵³ *Nkandla* judgment *supra* par 68 in reference to *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) par 69.

investigation will determine what remedial action to take in a particular case.⁵⁴ The Constitutional Court summed up the Public Protector's power to take remedial action as follows:⁵⁵

- The Constitution is the primary source of the power to take appropriate remedial action. The Public Protector Act is a secondary source.
- Remedial action can only be taken against those that the Public Protector is constitutionally and statutorily empowered to investigate.
- The words "take action" imply that the Public Protector may decide on and determine the appropriate remedial measure. The taking of the remedial action does not have to be left to other institutions and by its nature it is not a power of no consequence.
- The Public Protector can determine the appropriate remedy and the manner of its implementation.
- Remedial action is appropriate if it is effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption in a particular case.
- Legally binding remedial action can be taken only when it is appropriate and practicable to effectively remedy or undo the complaint.
- A non-binding recommendation or measure may be appropriate depending on the subject matter of the investigation and the findings made.
- Whether a particular remedial action taken, or measure employed by the Public Protector in terms of her constitutionally allocated powers is binding or not or what its legal effect is, is a matter of interpretation aided by context, nature and language.⁵⁶

In the *Nkandla* judgment, the Constitutional Court ruled that the Public Protector's remedial actions are legally binding, and that the President was under a constitutional obligation to comply with the Public Protector's remedial actions. Similarly, the National Assembly was found to have failed in its constitutional obligation to hold the President accountable for failing to comply with the remedial actions of the Public Protector.⁵⁷

Under heading 4 below, the judgment in *President of the Republic of South Africa v The Office of the Public Protector (State Capture judgment)*⁵⁸ is discussed in relation to the extent of the binding nature of the Public Protector's remedial actions. In this case, the North Gauteng High Court had to determine whether the Public Protector may lawfully instruct the President to establish a commission of inquiry.

⁵⁴ *Nkandla* judgment *supra* par 71.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ The National Assembly is mandated by the Constitution to hold the President accountable for the performance and exercise of his functions in terms of s 92(2) read together with s 55(2)(b) of the Constitution.

⁵⁸ 2018 (2) SA 100 (GP) (*State Capture* judgment).

4 THE STATE CAPTURE JUDGMENT

In March 2016, the Public Protector received complaints alleging irregular conduct in the appointment of cabinet ministers and the awarding of state contracts.⁵⁹ This culminated in an investigation into and the eventual release of a report (the State of Capture report) on the veracity of the alleged improprieties. Among the findings made were that the President used his influence to enable members of the Gupta family to get preferential treatment in the awarding of state contracts. Following the release of the State of Capture Report, the Public Protector took remedial action instructing the President to establish a commission of inquiry to further probe the findings identified in the report – this notwithstanding that it is only the President who is empowered in terms of section 84(2)(f) of the Constitution to establish a commission of inquiry. President Jacob Zuma took the report on judicial review, challenging the legality of the remedial action. He asked the court to set aside the remedial action of the Public Protector, which directed:⁶⁰

- the President to appoint, within thirty days, a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name to the President;
- the commission of inquiry to be given powers of evidence collection no less than that of the Public Protector; and
- the commission of inquiry to complete its task and to present the report and findings and recommendations to the President within one hundred and eighty days after which the President was to submit a copy with an indication of his intentions regarding the implementation of the recommendations to Parliament within fourteen days of releasing the report.

In the notice of motion, the President contended that the matter should be remitted to the Public Protector for further investigation. In support of this contention, he argued that the Public Protector did not have the power to delegate or outsource its functions to a commission of inquiry.⁶¹ Among the issues identified by the Public Protector for further investigation were the following:⁶²

- whether any state functionary in any organ of state or other person had acted unlawfully, improperly or corruptly in connection with the appointment or removal of ministers and directors or boards of directors of state-owned enterprises;
- whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the awarding of state contracts or tenders to Gupta-linked companies or persons;

⁵⁹ Public Protector South Africa “*State of Capture*”: A Report of the Public Protector Report No: 6 of 2016/17 (14 October 2016) <https://www.sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016> (accessed 2021-01-19) 4.

⁶⁰ *State Capture* judgment *supra* par 3.

⁶¹ *State Capture* judgment *supra* par 5.

⁶² *State Capture* judgment *supra* par 16.

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- whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the extension of state-provided business financing facilities to Gupta-linked companies or persons;
 - whether any state functionary in any organ of state or other person acted unlawfully, improperly or corruptly in connection with the exchange of gifts in relation to Gupta-linked companies or persons; and
 - whether any person or entity was prejudiced due to the conduct of the SOE.

The Public Protector made the following observations:⁶³

“The investigation has proven that the extent of the issues it needs to traverse and resources necessary to execute it is incapable of being executed fully by the Public Protector. This was foreshadowed at the commencement of the investigation when the Public Protector wrote to government requesting for resources for a special investigation similar to a commission of inquiry overseen by the Public Protector. This investigation has been hamstrung by the late release which caused the investigation to commence later than planned.”

The Public Protector noted that the President has the power under section 84(2)(f) of the Constitution to appoint commissions of enquiry and that it was on this basis that the President was instructed to appoint a commission of inquiry within thirty days. However, the selection of a judge for purposes of heading the commission was to be carried out by the Chief Justice and not the President.

The President’s grounds of review were *inter alia* that:⁶⁴

- The Constitution vests the power to appoint a commission of inquiry in the President. Only he can exercise that power and it is unconstitutional for the Public Protector to instruct him to do so. The President asserts that if he complied with the remedial action, his decision would be reviewable because it would have been taken under the dictates of another and would be an abdication of his power under section 84 of the Constitution.
- The direction that the Chief Justice appoint the judge to head the commission of inquiry is unlawful as the Constitution does not assign this power to the Chief Justice. The direction is also irrational as there is no reason to suggest that a judge selected by the President would not be independent and impartial.
- It is beyond the powers of the Public Protector to give directions as to the manner in which the commission of inquiry is to be implemented. It is the President’s prerogative to select the officer to preside over the commission and it is also the President alone who can decide upon the issues that the commission is to investigate, its powers and when the commission is to complete its investigation.
- The remedial action constitutes an unlawful delegation of the Public Protector’s investigatory powers to a commission of inquiry.

⁶³ *State Capture* judgment *supra* par 46.

⁶⁴ *State Capture* judgment *supra* par 59.

- It is impermissible for the Public Protector to order the President to exercise an executive power as this offends against the separation of powers doctrine.

The primary question for consideration before the court was whether the President's power to establish a commission of inquiry could permissibly be limited by the Public Protector's remedial action.⁶⁵ The North Gauteng High Court held that the power to establish a commission of inquiry vests in the President and that only he can exercise that power. This did not mean that there are no constraints to the exercise of the power.⁶⁶

The High Court found that the President does not enjoy unlimited powers, a fact evident from the wording of section 84. According to the court, section 84(1) is cast in obligatory language. The provision states that the President has the powers "entrusted by the Constitution". In section 84(2)(f), it is further provided that the President "is responsible for appointing commissions of inquiry". The court held that the use of the words "entrust" and "responsible" implies that the President's power to establish a commission of inquiry is coupled with a duty.⁶⁷ Even though the Constitution vests in the President the power to appoint a commission of inquiry, this power is not an untrammelled one. The High Court found:

"The President's power to appoint a commission of inquiry will necessarily be curtailed where his ability to conduct himself without restraint brings him into conflict with his obligations under the Constitution".⁶⁸

The principle that the power to establish a commission of inquiry is subject to the Constitution and the law is well established in South African law. The question should be posed whether the President's direct implication in the State of Capture report means that his ability to conduct himself without restraint brings him into conflict with his obligations under the Constitution. It is submitted that the court did not give definitive guidance on this point. Regarding the President's challenge to the powers of the Public Protector, the court referred to the ruling in the *Nkandla* judgment where the court described the mandate of the Public Protector as entailing the protection of the public from any conduct in state affairs that could result *inter alia* in impropriety or prejudice. The Constitutional Court held that pursuant to that mandate, the Public Protector should thereafter take appropriate remedial action.⁶⁹ Regarding the contention by the President that the Public Protector unlawfully delegated her investigatory powers to a commission of inquiry, the court held that the argument misconceived the manner in which the Public Protector had exercised her powers.⁷⁰ Finding that there was no delegation, the High Court found that the Public Protector did what is bestowed on her by section 182(1) of the Constitution.

Regarding the direction by the Public Protector that the Chief Justice should nominate the judge to preside over the commission of inquiry, the

⁶⁵ *State Capture* judgment *supra* par 60.

⁶⁶ *State Capture* judgment *supra* par 65.

⁶⁷ *State Capture* judgment *supra* par 68.

⁶⁸ *State Capture* judgment *supra* par 71.

⁶⁹ *State Capture* judgment *supra* par 74. See further the *Nkandla* judgment *supra* par 51.

⁷⁰ *State Capture* judgment *supra* par 87.

court applied the principles of recusal. On this point, the High Court held that the President's insistence that he alone select a judge to head the commission is at odds with the legal principle of recusal. According to the court,

"judges recuse themselves from matters in which they are personally conflicted in order to exclude the possibility or the perception of bias affecting the outcome and in order to protect the integrity of the legal process in the eyes of the public."⁷¹

The principle of recusal is not only concerned with actual bias, but a reasonable apprehension of bias.⁷² The court found that the recusal principle was equally applicable to the President because he has an official duty to select a judge to head the commission. However, by virtue of his direct or indirect implication in the matters to be investigated, he was *de jure* prevented from selecting a judge to head the commission.⁷³

The application of the principle of recusal by the High Court is legally sound. However, it is submitted that the analogy drawn by the court between judicial bias and the perceived conflict of interest held by the President is not a useful comparison. This is because there is a legal mechanism to ensure that a matter in which a presiding judge has a conflict of interest continues without interruption. Should the judge recuse him or herself, another presiding officer can take over the matter and try it *de novo*.⁷⁴ However, the Constitution does not provide guidance on what should happen in the case of a discretionary power bestowed on the President alone, in cases where he is directly involved in the subject matter, and there is a need to exercise oversight flowing from a discretionary power bestowed upon him alone.

According to the ruling of the North Gauteng High Court in the *State Capture* judgment, the Public Protector may compel the President to establish a commission of inquiry. In addition, the Chief Justice and not the President may nominate the judge who will preside over the commission in instances where the President is perceived to hold a conflict of interest in the matter. The correctness of this judgment is suspect owing to the fact that the President is the only one entrusted with the power to establish a commission of inquiry by the Constitution. The judgment therefore raises sensitive issues concerning the separation of powers in relation to whether the Public Protector's remedial action impermissibly encroaches on the President's powers as Head of State.

The debate on whether the Public Protector overstepped her constitutional mandate to take appropriate remedial action is explored under the next heading. The discussion is two-fold. First, the President's power to establish a commission of inquiry is discussed and secondly, the question on whether the Public Protector exceeded the scope of her powers is probed. An analysis of the Public Protector's remedial action *vis-à-vis* the President's power to establish a commission of inquiry is also undertaken.

⁷¹ *State Capture judgment supra* par 144.

⁷² *State Capture judgment supra* par 145.

⁷³ *State Capture judgment supra* par 146 to 147.

⁷⁴ Okpaluba and Maloka "The Fundamental Principles of Recusal of a Judge at Common Law: Recent Developments" 2022 43 *Obiter* 88 89.

5 PUBLIC PROTECTOR OVERREACH

5.1 The President's power to establish a commission of inquiry

Section 84(2)(f) of the Constitution, read together with the Commissions Act,⁷⁵ bestows on the President the power to establish a commission of inquiry. As alluded to above, the President has the power to make any appointment that the Constitution or legislation requires him to make, other than as head of the national executive.⁷⁶ The use of the word “any” should be understood to refer to the appointment of any public official, including the appointment of the judge who will head up a commission of inquiry. Post-1994, the President’s power to establish a commission of inquiry first arose for consideration in *President of the Republic of South Africa v South African Rugby Football Union (SARFU judgment)*.⁷⁷ At issue was the constitutional validity of two presidential notices that appeared in the *Government Gazette* on 26 September 1997.⁷⁸ The first notice announced the appointment of a commission of inquiry into the administration of rugby in the country. The other notice declared the provisions of the Commissions Act applicable to the commission and promulgated regulations for its operation.⁷⁹ One of SARFU’s central arguments was that the President had abdicated his responsibility to appoint a commission of inquiry to his cabinet minister. On what would constitute an abdication of power, the Constitutional Court, referring to Baxter,⁸⁰ held that abdication occurs when:

- an office-bearer unlawfully delegates a power conferred upon him or her;
- when he or she acts under dictation; and
- when he or she passes the buck.⁸¹

A commission of inquiry is an adjunct to the policy formulation responsibility of the President.⁸² It is a mechanism that he can use to obtain information and advice.⁸³ The power to appoint a commission of inquiry is a tool to assist the executive branch of government in the performance of its governance duties.⁸⁴ When establishing a commission of inquiry, the President must do so personally, and any such exercise must be recorded in writing and signed.⁸⁵ The establishment of a commission of inquiry must not infringe any right in the Bill of Rights; the power to appoint such a commission is constrained by the principle of legality, and should be exercised by the

⁷⁵ 8 of 1947 (Commissions Act).

⁷⁶ S 84(2)(e) of the Constitution.

⁷⁷ 2000 (1) SA 1 (CC) (SARFU judgment).

⁷⁸ SARFU judgment *supra* par 2.

⁷⁹ *Ibid.*

⁸⁰ Baxter *Administrative Law* (1984) 434. See further *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C) 117 F–G.

⁸¹ SARFU judgment *supra* par 39.

⁸² SARFU judgment *supra* par 147.

⁸³ *Ibid.*

⁸⁴ SARFU judgment *supra* par 220.

⁸⁵ SARFU judgment *supra* par 148. See further s 101(1) of the Constitution.

President in good faith. The President must not misconstrue the nature of the power to establish a commission of inquiry as bestowed on him by the Constitution.⁸⁶ From the foregoing, it is apparent that the power to establish a commission of inquiry is vested in the President alone. The principles enunciated above should be understood with the assumption that the President is not directly implicated in the matters to be investigated. They do not provide definitive guidance in cases where a repository of the power to establish a commission of inquiry is also implicated in the subject matter to be investigated.

Hoffman⁸⁷ argues in relation to the State of Capture Report that the Public Protector may have overlooked the provisions of section 90 of the Constitution, which empowers the Deputy President to act in cases where the President is unable to exercise his powers. In terms of the provision, when the President is absent from the Republic, otherwise unable to perform the office of President or during a vacancy in the presidency, the Vice-President may step in and take over the role of Head of State. In light of the rule against the delegation of discretionary powers, as espoused by the court in the *SARFU* judgment, there is no indication in the Constitution as to who has the power to make a determination that the President is unable to perform his duties as Head of State, for instance.

The law regarding the extent to which the power to establish a commission of inquiry may be fettered by an oversight body such as the Public Protector should be reformed. While the Constitutional Court made it clear in the *SARFU* judgment that the President must *inter alia* act in good faith in establishing a commission of inquiry, the Constitution does not expressly specify which institution has the responsibility to hold him accountable in the event that he does not comply with this requirement. Similarly, the Constitutional Court in the *Nkandla* judgment held that the Constitution does not expressly state the mechanisms the National Assembly may use to exercise oversight over the President.⁸⁸ This poses a challenge because in instances where there is a direction to establish a commission of inquiry and the President is directly implicated, the Constitution does not provide guidance on who may step in to exercise the power, and how to go about selecting the functionary for the process.⁸⁹

From the foregoing, the question should be posed as to whether the High Court in the *State Capture* judgment incorrectly applied the legal principles relating to the establishment of a commission of inquiry in terms of the Constitution and as applied by the Constitutional Court in the *SARFU* judgment.

Under the next heading, the question that is probed is whether the Public Protector overreached her constitutional power to take appropriate remedial action by instructing the President to establish a commission of inquiry.

⁸⁶ *SARFU* judgment *supra* par 148.

⁸⁷ Hoffman "Op-Ed: A Commission of Inquiry into State Capture: To Be or Not to Be?" (2017-05-02) *Daily Maverick*.

⁸⁸ *Nkandla* judgment *supra* par 43.

⁸⁹ *Ibid.*

5 2 Did the Public Protector overreach her constitutional mandate?

Ex facie, in the *State Capture* case the Public Protector encroached on the President's power to establish a commission of inquiry. The finding of the North Gauteng High Court in recognising the legality of the Public Protector's remedial action is at odds with the Constitution and the doctrine of the separation of powers. However, sight should not be lost of the fact that the President was directly implicated in allegations of wrongdoing. Therefore, if he established the commission of inquiry and consequently nominated a judge to head the process, this would have been controversial.

To answer the question whether the Public Protector trespassed on the President's power to establish a commission of inquiry, the views expressed by Slade⁹⁰ on the subject are instructive. In reaction to the judgment, the author notes that the High Court did not consider whether, within the separation of powers doctrine, "any other branch can force the President to exercise this discretionary constitutional power for purposes of checks and balances". He argues that the discussion by the High Court of the Public Protector's power to take appropriate remedial action appears unconvincing from a separation-of-powers perspective.⁹¹ Referring to the pre-eminent domain principle, Slade argues that where an unwarranted intrusion by one branch of government into the exclusive domain of another is alleged, "it must first be determined whether the particular power or function falls within the pre-eminent domain of one of the branches".⁹² The theory of pre-eminent domain "emphasises the separation of functions and limits the attribution of certain powers to the wrong institution".⁹³ He contends:

"The High Court did not consider the separation of powers and the principle of pre-eminent domain in upholding the Public Protector's remedial action against the President. The Court did not consider whether the appointment of a commission of inquiry falls within the exclusive competency (or pre-eminent domain) of the President as Head of State, and consequently under which circumstances, *if at all*, it may be justifiable to encroach upon that power for purposes of checks and balances. The decision therefore lacks an explanation of how, within the specific context, the separation of powers impacts the specific dispute before the Court or, conversely, how the outcome impacts the evolving understanding of the separation of powers doctrine."

The submission that the Public Protector *ex facie* encroached on the President's power to establish a commission of inquiry accords with the views echoed by Slade. However, the question whether the Public Protector encroached on the President's powers as Head of State cannot be resolved purely on the basis of the doctrine of the separation of powers. The fact that the President was also directly implicated in the matters to be investigated is also central to the discussion. While the above contention by Slade is

⁹⁰ Slade "The Implications of the Public Protector's Remedial Action Directing the Exercise of Discretionary Constitutional Powers: Separation of Powers Implications" 2020 24 *Law Democracy and Development* 364 375.

⁹¹ Slade 2020 *Law Democracy and Development* 376.

⁹² *Ibid.*

⁹³ *Ibid.*

correct, it does not paint a full picture of the facts if one considers the President's direct implication in the matters to be investigated.

The fact that the High Court applied the principles of recusal in upholding the Public Protector's remedial action is a critical component of the debate and should not be overlooked. To this extent, the enquiry into whether the Public Protector trespassed on the President's power to establish a commission should primarily consider the following six aspects:

- the nature of the President's power to establish a commission of inquiry;
- the Public Protector's power to take binding remedial action;
- the extent to which the remedial action may interfere with the institutional autonomy of other state institutions;
- whether such a remedial action can permissibly interfere with the discretionary powers bestowed on a public official by the Constitution;
- whether such interference would be constitutionally justified; and
- whether the President's direct involvement in the issues to be investigated calls for his recusal from the process.

Tsele⁹⁴ writes that the decision of the High Court in the *State Capture* judgment is significant because it led to the establishment of the Zondo Commission.⁹⁵ It should be noted however that the High Court in the *State Capture* judgment merely affirmed the legality of the remedial action (to establish a commission of inquiry) in the State of Capture Report. It is submitted that the Zondo Commission was established as a result of the remedial action and not the judgment *per se*. Tsele argues that, on a proper interpretation of section 84(2)(f) of the Constitution, only the President has the power to establish a commission of inquiry and that neither the Public Protector nor any court of law has the right to usurp that power or prescribe to the President how it should be exercised.⁹⁶ He further submits that the only caveat to the above rule is that the President's decision on how to establish the commission of inquiry is liable to be set aside on judicial review if it is irrational or taken in bad faith.⁹⁷

In particular, Tsele submits that the High Court failed to distinguish between the review of a decision that has already been taken, and "directing the President to exercise a power solely reserved to him by the Constitution, even before the President has exercised the discretionary power himself".⁹⁸ This assertion is legally incorrect. This is because the question before the court had to do with the legality of the Public Protector's remedial action. It did not relate to the question whether the President's refusal to comply with the remedial action on account of its nature as a discretionary power was lawful. The High Court merely affirmed the *dictum* of the Constitutional Court's finding in the *Nkandla* judgment regarding the legally binding nature

⁹⁴ Tsele "Observations on the State Capture Judgment" 2021 138 *South African Law Journal* 477 478.

⁹⁵ The Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State chaired by Justice RMM Zondo (Zondo Commission).

⁹⁶ Tsele 2021 *SALJ* 478.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

of the Public Protector's remedial actions. The very question of whether the person against whom the remedial action is directed complies with it is instructive.

In summary, the decision that had already been made was the Public Protector's instruction to the President to establish a commission of inquiry. In order to determine its legality, the court had to determine whether the Public Protector may direct the President to exercise a discretionary power. It is the nature and extent of the remedial action that was central to the dispute before the court, and not the manner in which it had "already" been exercised. In fact, whether or not the President decided to comply with the remedial action, his decision would have been liable for judicial review. In the event that the President did not dispute the validity of the remedial action, the manner in which he established the commission of inquiry would also have been justiciable before the court.

Regrettably, authors on the subject do not adequately engage with the principle of recusal, which is briefly discussed below.

6 PUBLIC PROTECTOR OVERREACH AND RECUSAL: A CURSORY APPROACH TO THE PRESIDENT'S DIRECT IMPLICATION

The President's involvement in the facts to be investigated by virtue of his implication in the State of Capture Report is of interest. It is therefore imperative to have regard to the question of bias, which is the measure applied to determine whether a public functionary should recuse him- or herself. It is submitted that the test for recusal is relevant to the question on whether the President should have been entitled to establish a commission of inquiry or not. The correct approach to determining bias is well established in relation to judicial officers, but applies *mutatis mutandis* to other forms of public power and is set out below:⁹⁹

- There must be a reasonable apprehension.
- The reasonable apprehension ought to be held by an objective and well-informed person.
- The apprehension must be that the decision maker will not be impartial in the matter.
- The apprehension must be in light of the oath of office taken by the judges.

In South Africa, the test for bias is therefore whether there is a reasonable apprehension of the presence of bias.¹⁰⁰ Proof of bias can be established if the decision maker has *inter alia* a pecuniary interest in the subject matter before him.¹⁰¹ The fact that the President was directly implicated in the facts

⁹⁹ Siyo and Mubangizi "The Independence of South African Judges: A Constitutional and Legislative Perspective" 2015 18 *Potchefstroom Electronic Law Journal* 817 820. See further SARFU judgment *supra* par 48.

¹⁰⁰ *Bernert v ABSA Bank* 2011 (4) BCLR 329 (CC) par 29. See further Okpaluba and Juma "The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa" 2011 14 *Potchefstroom Electronic Law Journal* 14 14.

¹⁰¹ Okpaluba and Juma 2011 *PELJ* 16. See also *Webb v The Queen* 1994 181 CLR 41 74.

to be investigated, while not an absolute bar for him to set up the commission of inquiry, should definitely be factored into the debate. It is therefore insufficient for the debate to focus only on the doctrine of the separation of powers and the inappropriateness of the Public Protector's instruction to the President to exercise a discretionary power.

The current constitutional framework does not enable Parliament to participate in the appointment of a commission of inquiry. It is submitted that parliamentary involvement is desirable as the President accounts individually and collectively to Parliament. In particular, the National Assembly is responsible for electing the President.¹⁰² The Constitution should be amended to specify instances that preclude the President from exercising a power conferred upon him by the Constitution if he is directly involved in the subject matter.

7 CONCLUSION

Given the discretionary nature of the power, the Public Protector is not empowered to instruct the President to establish a commission of inquiry in terms of the current constitutional framework. It is submitted that this is due to inadequate mechanisms for the National Assembly to oversee the exercise of the power, despite the fact that the President accounts to Parliament for the exercise of his powers and the performance of his functions. In terms of the Constitution, the President is individually and collectively accountable to Parliament for the exercise of the powers and functions entrusted to him by the Constitution.¹⁰³ The National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it.¹⁰⁴ It must also provide for mechanisms to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and of any organ of state.¹⁰⁵ The National Assembly may summon any person to appear before it and give evidence on oath or affirmation, and produce documents.¹⁰⁶ It may require any person or institution to report to it.¹⁰⁷ Any person or institution may be compelled by the National Assembly to comply with a summons or the requirement to give evidence on oath or affirmation or report to it.¹⁰⁸ Any interested persons may also submit petitions, representations or submissions to the National Assembly.¹⁰⁹ The National Assembly should be empowered to improve its ability to hold the President accountable for the exercise of his powers as Head of State.

The Constitution only gives the National Assembly the discretionary power to put in place measures to exercise oversight over the executive branch of government. It does not state what those mechanisms are. The National

¹⁰² S 86(1) of the Constitution.

¹⁰³ S 92(2) of the Constitution.

¹⁰⁴ S 55(2)(a) of the Constitution.

¹⁰⁵ S 55(2)(b) of the Constitution.

¹⁰⁶ S 56(a) of the Constitution.

¹⁰⁷ S 56(b) of the Constitution.

¹⁰⁸ S 56(c) of the Constitution.

¹⁰⁹ S 56(d) of the Constitution.

Assembly may determine and control its internal arrangements, proceedings and procedures.¹¹⁰ It may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.¹¹¹ The rules and orders of the National Assembly must provide for the establishment, composition, powers, functions, procedures and duration of its committees.¹¹² It is submitted that the National Assembly is in contravention of this constitutional injunction because it has not established a standing committee on the President's powers as Head of State and head of the national executive. There are increasing calls for the establishment of a standing committee on the President's powers, in order to enhance parliamentary oversight over the executive branch of government.¹¹³

The Constitutional Court has already pronounced that this is at odds with the National Assembly's duty to hold the President accountable for the exercise of his powers and the performance of his functions. In *Economic Freedom Fighters v Speaker of the National Assembly (EFF 2)*,¹¹⁴ the Constitutional Court had to decide whether the National Assembly has fulfilled its constitutional obligations to hold the President accountable. Referring to section 57(1) of the Constitution, a dissenting judgment of the Constitutional Court found that it is the National Assembly and not the court that has the power to determine and control its own proceedings and procedures. According to the *dictum* of the minority court, it would be a violation of the doctrine of the separation of powers should it dictate to the National Assembly which option or model to adopt in holding the President accountable.¹¹⁵ In the majority judgment, the Constitutional Court found that the National Assembly has failed in its constitutional obligation to hold the President accountable by failing to put in place rules to conduct impeachment proceedings.

There is a lacuna between the Public Protector's power to take remedial action and the National Assembly's obligation to hold the President accountable for the exercise of his powers in terms of section 84(2) of the Constitution. This lacuna stems from instances in which the President may be directed by the Public Protector to exercise a discretionary power vested in him by the Constitution in pursuance of the latter's remedial action. In view of the *SARFU* judgment, only the President may exercise a power conferred on him as Head of State. As an oversight body tasked with holding the President accountable, Parliament's role in such instances is not clear. This is also notwithstanding that, as a Chapter 9 institution, the Public Protector also accounts to the National Assembly.¹¹⁶ This lacuna can be remedied by a constitutional amendment enabling the participation of Parliament in the President's power to establish a commission of inquiry. This is because both

¹¹⁰ S 57(1)(a) of the Constitution.

¹¹¹ S 57(1)(b) of the Constitution.

¹¹² S 57(2)(a) of the Constitution.

¹¹³ South African Government "Parliament Agrees on Establishment of Committees" (5 June 2019) <https://www.gov.za/speeches/national-assembly-rules-committee-agrees-establishment-committees-5-jun-2019> (accessed 2022-07-07).

¹¹⁴ [2017] ZACC 47 (*EFF 2*).

¹¹⁵ *EFF 2 supra* par 76.

¹¹⁶ S 181(5) of the Constitution.

the Public Protector and the President are accountable to the National assembly for the performance and exercise of their constitutionally allocated powers and functions.¹¹⁷

It is not disputed that the Public Protector's remedial actions are legally binding. However, the manner in which they are directed to implicated parties should be done in such a way that it is not perceived as an invitation to exercise public power under unlawful dictation. The law should be reformed to give guidance in instances where the implementation of the Public Protector's remedial actions is dependent on the exercise of an original power conferred on the President as Head of State. There should be a three-pronged approach to the President's power to establish a commission of inquiry. All three branches of government should participate in the process in that:

- subject to a lack of clear conflict of interest, the original power of establishing the commission should still be vested in the President;
- the terms of reference of the commission should be debated in the National Assembly; and
- the nomination of who is to head the commission should be deliberated upon among members of the judicial branch of government. After such deliberation, they should present one name of a judge to the President who, acting together with the National Assembly and the judiciary, and following deliberations from the three branches of government, will then formalise the appointment of the nominee for purposes of heading the commission.

Any dispute regarding the question of whether the President is rightfully placed to establish the commission of inquiry should be debated in the National Assembly in pursuit of its constitutional obligations to hold members of the executive accountable for the exercise of their constitutional powers and functions. Should the National Assembly fail to comply with its constitutional obligations in this regard, the judiciary should then have power to make the final determination on whether both the President and the National Assembly have complied with their respective constitutional obligations. If an averment is made that the President is not rightfully placed to establish the commission because of his direct implication in the facts to be investigated, the National Assembly should debate the matter and adopt a resolution calling for the Deputy President to establish the commission instead, provided that the allegations against the President establishing the inquiry are legally sound.¹¹⁸ As far as the constitutional amendment

¹¹⁷ The Public Protector accounts to the National Assembly in terms of s 181(5) of the Constitution. Even though the institution has the power to take direct remedial action against the President, if the Constitution is amended to empower the National Assembly to participate in the establishment of a commission of inquiry, then the Public Protector can submit such recommendations directly to Parliament, to kick-start the process of appointing the inquiry.

¹¹⁸ In pursuit of his powers as Acting President in terms of section 90 of the Constitution. The provision governs the position of the Acting President in circumstances where the President is absent from the Republic, otherwise unable to fulfil the duties of President or during a vacancy in the office of the President. As Acting President, the Deputy-President has the responsibilities, powers and functions of the President. See in this regard Hoffman "Op-Ed:

proposed above is concerned, the President should exercise the power to appoint a commission of inquiry in consultation with Parliament and the judiciary. The amended section 84 of the Constitution could read thus:

“84 *Powers and functions of the President:*

- (1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
- (2) The President is responsible for–
 - ...
 - (f) appointing commissions of inquiry, after consulting with the National Assembly and the judiciary, and subject to a two-thirds majority vote in the National Assembly;
 - ...
- (3) The appointment of the commission of inquiry shall be complete, subject to the conditions outlined below:
 - (a) The terms of reference of the commission are subject to debate and a two-thirds majority vote in the National Assembly;
 - (b) Nomination of the Commission Chair must be debated among members of the judiciary at a panel which shall sit after consultation and consensus has been reached between the President as head of the national executive, the judiciary and the legislature regarding date, place and time. Thereafter, the panel sitting shall forward one name to the President for consideration;
 - (c) The President shall thereafter formalise the appointment of the candidate to head the commission of inquiry;
 - (d) If the President has reservations about the candidate submitted by the panel in subsection (4), he must inform the National Assembly and the panel sitting of the same in writing of the reasons for his rejection of the candidate selected;
 - (e) Should there be any dispute regarding whether it is desirable for the President to establish the commission on account of his perceived bias, such must be debated in the National Assembly;
 - (f) If any bias is established following the debate in subsection (6), Parliament should nominate the Deputy President to establish the commission of inquiry;
 - (g) Subsection (7) should be read together with section 90(1) of the Constitution.”

South Africa is a country founded *inter alia* on the rule of law and the principle of constitutional supremacy. Any exercise of public power, including the power to appoint commissions of inquiry, should be subject to the Constitution. The President’s power to establish a commission of inquiry can no longer be an absolute discretionary power that is immune from legislative oversight. The inadequacy of the current provisions is borne out by the fact that the Zondo Commission of Inquiry was only appointed in January 2018, almost 14 months after the Public Protector’s State of Capture Report was released, and only after the North Gauteng High Court declared the Public Protector’s remedial action to be binding and that President Zuma had, within 30 days, to appoint a commission of inquiry, headed by a judge selected solely by the Chief Justice.

In addition to the amendments proposed to section 84, it is submitted that the provisions of section 55(2) should be amended to indicate that legislative oversight also extends to the President's powers as Head of State.