IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT143/15 and CCT171/15

In the matters between:

THE ECONOMIC FREEDOM FIGHTERS Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY REPUBLIC OF SOUTH AFRICA First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA Second Respondent
THE PUBLIC PROTECTOR Third Respondent
CORRUPTION WATCH (RF) NPC *Amicus Curiae*

and

DEMOCRATIC ALLIANCE Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA Second Respondent
MINISTER OF POLICE Third Respondent
PUBLIC PROTECTOR Fourth Respondent
CORRUPTION WATCH (RF) NPC *Amicus Curiae*

FILING SHEET

Presented for service and filing:

1. Corruption Watch's list of authorities;

2. Corruption Watch's practice note; and

3. Corruption Watch's written submissions.

DATED and **SIGNED** at **ILLOVO** on this 4th day of **DECEMBER 2015**

WEBBER WENTZEL
Applicant's attorneys
10 Fricker Road
Illovo Boulevard
JOHANNESBURG
Ref: V Movshovich
Tel: (011) 530 5000
Fax: (011) 530 5111
Ref: V Movshovich / P Dela / D Cron
3004494

TO: **THE REGISTRAR**
Constitutional Court, Constitution Hill
Braamfontein
JOHANNESBURG

AND TO: **GODLA AND PARTNERS**
Attorneys for the Economic Freedom Fighters
28 Wale Street
2nd Floor, Waalburg Building
CAPE TOWN
Tel: 021 423 1101
Fax: 021 423 1102
c/o DUDU MTHIMUNYE HLUYO ATTORNEYS
Corner House, Ground Floor
77 Commissioner Street
JOHANNESBURG
Tel: 011 036 5944
Fax: 086 503 3295
E-mail: dudu@mthimunyehluyo.co.za

13H10
04/12/15
LAURENCE

AND TO: MINDE SCHAPIRO & SMITH INC
Attorneys for the Democratic Alliance
Tyger Valley Office Park
Building Number 2
Cnr Willie van Schoor and Old Oak Roads
CAPE TOWN
Tel: 021 918 9012
Fax: 021 918 9090
Email: elzanne@mindes.co.za
c/o CHRISTODOULOU & MAVRIKIS
Unit 1 Virgin Atlantic Building
50 Sixth Road, Hyde Park
JOHANNESBURG
Tel: 011 325 4201
Fax: 086 713 3180

AND TO : STATE ATTORNEY
Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: Imanuel@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: lchowe@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: zkarjiker@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO: TO: ADAMS & ADAMS

Attorneys for the Public Protector
Lynwood Bridge Office Park
4 Daventry Road
Lynwood Manor
PRETORIA
Tel: 012 432 6000
Fax: 012 432 6599
Email: andrew.molver@adamsadams.com
Ref: Andrew Molver\LT2681
c/o ADAMS & ADAMS
2nd Floor
34 Fredman Drive (cnr 5th Street)
SANDTON
Tel: 011 895 1000
Fax: 011 784 2888
Ref: Manisha Maganbhai-Mooloo

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT143/15 and CCT171/15

In the matters between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY REPUBLIC OF SOUTH AFRICA	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE PUBLIC PROTECTOR	Third Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*
and	
DEMOCRATIC ALLIANCE	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF POLICE	Third Respondent
PUBLIC PROTECTOR	Fourth Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

FILING SHEET

Presented for service and filing:

1. Corruption Watch's list of authorities;

2. Corruption Watch's practice note; and

3. Corruption Watch's written submissions.

DATED and **SIGNED** at **ILLOVO** on this 4th day of **DECEMBER 2015**

WEBBER WENTZEL
Applicant's attorneys
10 Fricker Road
Illovo Boulevard
JOHANNESBURG
Ref: V Movshovich
Tel: (011) 530 5000
Fax: (011) 530 5111
Ref: V Movshovich / P Dela / D Cron
3004494

TO: **THE REGISTRAR**
Constitutional Court, Constitution Hill
Braamfontein
JOHANNESBURG

AND TO: **GODLA AND PARTNERS**
Attorneys for the Economic Freedom Fighters
28 Wale Street
2nd Floor, Waalburg Building
CAPE TOWN
Tel: 021 423 1101
Fax: 021 423 1102
c/o DUDU MTHIMUNYE HLUYO ATTORNEYS
Corner House, Ground Floor
77 Commissioner Street
JOHANNESBURG
Tel: 011 036 5944
Fax: 086 503 3295
E-mail: dudu@mthimunyehluyo.co.za

AND TO: MINDE SCHAPIRO & SMITH INC

Attorneys for the Democratic Alliance
Tyger Valley Office Park
Building Number 2
Cnr Willie van Schoor and Old Oak Roads
CAPE TOWN
Tel: 021 918 9012
Fax: 021 918 9090
Email: elzanne@mindes.co.za
c/o **CHRISTODOULOU & MAVRIKIS**
Unit 1 Virgin Atlantic Building
50 Sixth Road, Hyde Park
JOHANNESBURG
Tel: 011 325 4201
Fax: 086 713 3180

CHRISTODOULOU & MAVRIKIS INC ATTORNEYS
RECEIVED WITHOUT PREJUDICE
DATE: 04/12/15 TIME: 12:46

AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: Imanuel@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: lchowe@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: zkarjiker@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO: TO: ADAMS & ADAMS

Attorneys for the Public Protector
Lynwood Bridge Office Park
4 Daventry Road
Lynwood Manor
PRETORIA
Tel: 012 432 6000
Fax: 012 432 6599
Email: andrew.molver@adamsadams.com
Ref: Andrew Molver\LT2681
***c/o* ADAMS & ADAMS**
2nd Floor
34 Fredman Drive (cnr 5th Street)
SANDTON
Tel: 011 895 1000
Fax: 011 784 2888
Ref: Manisha Maganbhai-Mooloo

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT143/15 and CCT171/15

In the matters between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY REPUBLIC OF SOUTH AFRICA	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE PUBLIC PROTECTOR	Third Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*
and	
DEMOCRATIC ALLIANCE	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF POLICE	Third Respondent
PUBLIC PROTECTOR	Fourth Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

FILING SHEET

Presented for service and filing:

1. Corruption Watch's list of authorities;

2. Corruption Watch's practice note; and

3. Corruption Watch's written submissions.

DATED and **SIGNED** at **ILLOVO** on this 4th day of **DECEMBER 2015**

WEBBER WENTZEL
Applicant's attorneys
10 Fricker Road
Illovo Boulevard
JOHANNESBURG
Ref: V Movshovich
Tel: (011) 530 5000
Fax: (011) 530 5111
Ref: V Movshovich / P Dela / D Cron
3004494

TO: **THE REGISTRAR**
Constitutional Court, Constitution Hill
Braamfontein
JOHANNESBURG

AND TO: **GODLA AND PARTNERS**
Attorneys for the Economic Freedom Fighters
28 Wale Street
2nd Floor, Waalburg Building
CAPE TOWN
Tel: 021 423 1101
Fax: 021 423 1102
c/o DUDU MTHIMUNYE HLUYO ATTORNEYS
Corner House, Ground Floor
77 Commissioner Street
JOHANNESBURG
Tel: 011 036 5944
Fax: 086 503 3295
E-mail: dudu@mthimunyehluyo.co.za

AND TO: MINDE SCHAPIRO & SMITH INC

Attorneys for the Democratic Alliance
Tyger Valley Office Park
Building Number 2
Cnr Willie van Schoor and Old Oak Roads
CAPE TOWN
Tel: 021 918 9012
Fax: 021 918 9090
Email: elzanne@mindes.co.za
c/o **CHRISTODOULOU & MAVRIKIS**
Unit 1 Virgin Atlantic Building
50 Sixth Road, Hyde Park
JOHANNESBURG
Tel: 011 325 4201
Fax: 086 713 3180

AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: Imanuel@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO : STATE ATTORNEY

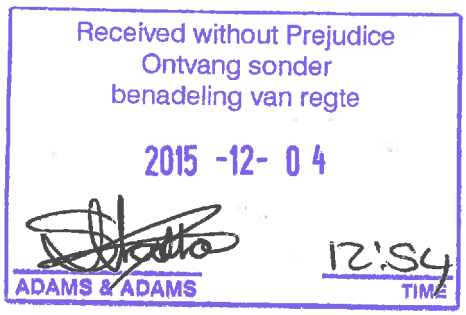
Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: lchowe@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: zkarjiker@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za

AND TO: TO: ADAMS & ADAMS

Attorneys for the Public Protector
Lynwood Bridge Office Park
4 Daventry Road
Lynwood Manor
PRETORIA
Tel: 012 432 6000
Fax: 012 432 6599
Email: andrew.molver@adamsadams.com
Ref: Andrew Molver\LT2681
c/o ADAMS & ADAMS
2nd Floor
34 Fredman Drive (cnr 5th Street)
SANDTON
Tel: 011 895 1000
Fax: 011 784 2888
Ref: Manisha Maganbhai-Mooloo



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT143/15 and CCT171/15

In the matters between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant
and	
THE SPEAKER OF THE NATIONAL ASSEMBLY REPUBLIC OF SOUTH AFRICA	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE PUBLIC PROTECTOR	Third Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*
and	
DEMOCRATIC ALLIANCE	Applicant
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF POLICE	Third Respondent
PUBLIC PROTECTOR	Fourth Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

FILING SHEET

Presented for service and filing:

1. Corruption Watch's list of authorities;

2. Corruption Watch's practice note; and

3. Corruption Watch's written submissions.

DATED and **SIGNED** at **ILLOVO** on this 4th day of **DECEMBER 2016**.

WEBBER WENTZEL
Applicant's attorneys
10 Fricker Road
Illovo Boulevard
JOHANNESBURG
Ref: V Movshovich
Tel: (011) 530 5000
Fax: (011) 530 5111
Ref: V Movshovich / P Dela / D Cron
3004494

TO: **THE REGISTRAR**
Constitutional Court, Constitution Hill
Braamfontein
JOHANNESBURG

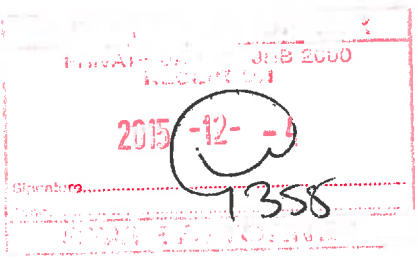
AND TO: **GODLA AND PARTNERS**
Attorneys for the Economic Freedom Fighters
28 Wale Street
2nd Floor, Waalburg Building
CAPE TOWN
Tel: 021 423 1101
Fax: 021 423 1102
c/o DUDU MTHIMUNYE HLUYO ATTORNEYS
Corner House, Ground Floor
77 Commissioner Street
JOHANNESBURG
Tel: 011 036 5944
Fax: 086 503 3295
E-mail: dudu@mthimunyehluyo.co.za

AND TO: MINDE SCHAPIRO & SMITH INC

Attorneys for the Democratic Alliance
Tyger Valley Office Park
Building Number 2
Cnr Willie van Schoor and Old Oak Roads
CAPE TOWN
Tel: 021 918 9012
Fax: 021 918 9090
Email: elzanne@mindes.co.za
c/o **CHRISTODOULOU & MAVRIKIS**
Unit 1 Virgin Atlantic Building
50 Sixth Road, Hyde Park
JOHANNESBURG
Tel: 011 325 4201
Fax: 086 713 3180

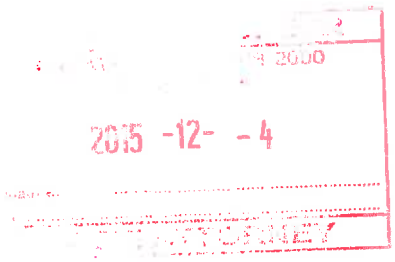
AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: Imanuel@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za



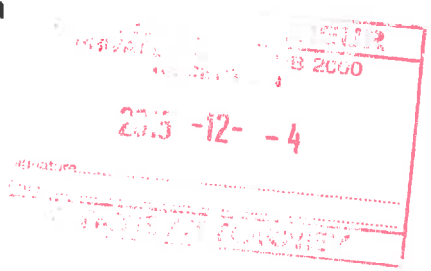
AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: lchowe@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za



AND TO : STATE ATTORNEY

Attorneys for President Zuma, the Speaker of the National Assembly and the Minister of Police
4th Floor, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9200/03
Fax: 021 421 9364
E-mail: zkarjiker@justice.gov.za
c/o STATE ATTORNEY
12th Floor, North State Building
95 Albertina Sisulu Street
JOHANNESBURG
Tel: 011 330 7660
Fax: 086 612 4106
Ref: V J Dhulam
E-mail: VDhulam@justice.gov.za



AND TO: TO: ADAMS & ADAMS

Attorneys for the Public Protector
Lynwood Bridge Office Park
4 Daventry Road
Lynwood Manor
PRETORIA
Tel: 012 432 6000
Fax: 012 432 6599
Email: andrew.molver@adamsadams.com
Ref: Andrew Molver\LT2681
c/o ADAMS & ADAMS
2nd Floor
34 Fredman Drive (cnr 5th Street)
SANDTON
Tel: 011 895 1000
Fax: 011 784 2888
Ref: Manisha Maganbhai-Mooloo

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT143/15 and CCT171/15

In the matters between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY REPUBLIC OF SOUTH AFRICA	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE PUBLIC PROTECTOR	Third Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

and

DEMOCRATIC ALLIANCE	Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF POLICE	Third Respondent
PUBLIC PROTECTOR	Fourth Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

CORRUPTION WATCH'S WRITTEN SUBMISSIONS

A INTRODUCTION

1. These submissions address two related issues that are at the core of this case: (i) the status and scope of the Public Protector's remedial powers; and (ii) how organs of state and public officials are required to respond to remedial action directed by the Public Protector.

2. The Supreme Court of Appeal held in the *SABC* case[1] that remedial action of the Public Protector in terms of s 182(1)(c) of the Constitution has legal effect, and, unless set aside on judicial review, organs of state and public officials may not ignore it.[2]

3. The SCA further held that the Public Protector is unable to realise the constitutional purpose of her office if organs of state or public officials second-guess her findings, or ignore her remedial directions by establishing parallel processes that do not serve to implement her directions.[3]

4. We submit that these findings of principle are correct, and that this Court should confirm and apply them in the present matter. This means that this Court should, in addition to declaring that the findings of the Public Protector have legal effect until set aside on judicial review, (i) order the President to give effect to the findings of the Public Protector and (ii) declare that the parallel process of other organs of state (notably the Minister of Police and the National Assembly) are of no legal effect.

---

[1] *SABC v DA* [2015] ZASCA 156 (8 October 2015).

[2] Ibid at paras 47 and 52.

[3] Ibid.

B THE STATUS OF THE PUBLIC PROTECTOR'S REMEDIAL POWERS

(i) The source of the power and its scope

5. Section 182 of the Constitution confers the following powers on the Public Protector:

> *"(1) The Public Protector has the power, as regulated by national legislation –*
>
> *(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
>
> *(b) to report on that conduct; and*
>
> *(c) to take appropriate remedial action.*
>
> *(2) The Public Protector has the additional powers and functions prescribed by national legislation."*

6. Corruption Watch submits that, on a proper interpretation of s 182(1)(c), the Public Protector has the power to make remedial orders binding on organs of state and state officials whenever it is appropriate to do so.

7. We emphasize that this power is subject to the following

limitations:

7.1 The Public Protector may only make remedial orders, that is, orders designed to remedy state misconduct.

7.2 She may only make remedial orders binding on organs of state and public officials.

7.3 She may only make a remedial order when it is "*appropriate*" to do so, that is, when the order is a fitting remedy for the state misconduct at which it is aimed.

7.4 The Public Protector also has the power to make non-binding recommendations. Whether a particular directive is a binding order or a non-binding recommendation, depends on its proper interpretation.

7.5 Parliament may regulate the exercise of the Public Protector's remedial power by national legislation. It has, however, not yet done so.

8. The proper interpretation of the Public Protector's remedial power depends, as always, on its language, context, history and purpose.

(ii) The language and context of the power

9. The Constitution itself directly confers powers on the Public Protector in s 182(1). It does not merely require national legislation to do so. It says, on the contrary, that the Public Protector's constitutional powers may be "*regulated by national*

legislation".

10. It goes on to say in s 182(2) that the Public Protector "*has the additional powers and functions prescribed by national legislation"*. Parliament may thus regulate the exercise of the Public Protector's constitutional powers and supplement them by national legislation. But the primary source of her powers is the Constitution itself.

11. Section 182(1) confers three powers on the Public Protector: to investigate, to report and to remedy. There is no suggestion in the language of the section that any of them enjoys primacy over the others. All three are of equal status.

12. The mischief at which all three powers are directed is state misconduct, that is, "*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"*. The Pubic Protector may investigate state misconduct, report on her findings and take remedial action pursuant to her report.

13. Section 182(1)(c) entitles the Public Protector "*to take appropriate remedial action"*. It is in the first place a power to take action. The Public Protector has the power to take remedial action herself, that is, to provide the remedy. It goes much further than a mere power to recommend to others that they take remedial action. The Public Protector may determine the remedy and order its implementation.

14. The Public Protector may take "*appropriate"* remedial action. It

has the following implications:

14.1 An "*appropriate"* remedy is one that is suitable, proper or fitting.[4]

14.2 A remedy for the state misconduct must normally be effective to be appropriate. This Court has often held that,

> *"An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced."*[5]

14.3 The Public Protector's power to take appropriate remedial action accordingly entitles her to determine a remedy and order its implementation. Once the Public Protector establishes state misconduct, she has the power to provide a remedy for it. The Supreme Court of Appeal in the *SABC* case expressly upheld this.[6]

14.4 Without the power to make binding orders on the state institutions involved, she cannot do so. She can investigate and report, but she cannot remedy or combat the wrongdoing. Mere recommendation is accordingly not

---

[4] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 97; *Pharmaceutical Society of SA v Tshabalala-Msimang* 2005 (3) SA 238 (SCA) para 76; *Rustenburg Platinum Mines v CCMA* 2007 (1) SA 576 (SCA) para 45(ii)

[5] *Fose v Minister of Safety and Security* 1997 (3) SA para 69; *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) para 74; *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA 94 (CC) para 14; *Mvumvu v Minister for Transport* 2011 (2) SA 473 (CC) para 48

[6] *SABC* (supra) at para 52.

appropriate. On the contrary, it renders the Public Protector ineffective to fight "*against bureaucratic oppression, and against corruption and malfeasance in public office"*.[7]

15. The suggestion that her remedial action takes the form of recommendations that do not have legal effect is neither fitting nor effective.[8] This is because:

15.1 It is naïve to assume that organs of state and public officials, found by the Public Protector to have been guilty of corruption and malfeasance in public office, will meekly accept her findings and implement her remedial recommendations. That is simply not how guilty bureaucrats in our society respond.[9]

15.2 To hold that the Public Protector's remedial action takes the form of recommendations would mean that the burden falls on private litigants or the Public Protector to challenge a failure by an organ of state or state official to remedy malfeasance or abuses of power.

15.3 The burden to enforce compliance with the Public Protector's remedial directions cannot be left to private litigants, who in many cases may have insufficient resources to litigate effectively against the state.

---

[7] *Public Protector v Mail & Guardian* 2011 (4) SA 420 (SCA) para 6; see too Record: Vol 10, p 1100, paras 27-40, Corruption Watch's intervention affidavit.

[8] Speaker's heads, paras 68-80.

[9] These submissions were expressly adopted by the Supreme Court of Appeal in the *SABC* case. See in this regard paragraph 44 of the judgment.

15.4 In order for the office of the Public Protector to be effective it must have the power to take remedial action that is, in the first instance, binding on the organ of state or state official concerned.

16. The Public Protector's remedial power may be contrasted with that of the Human Rights Commission (HRC). Whereas the Public Protector may "*take appropriate remedial action*", s 184(2)(b) merely allows the HRC "*to take steps to secure appropriate redress where human rights have been violated*". The Public Protector has the power to take remedial action. The HRC, on the other hand, may merely "*take steps to secure*" appropriate redress.

17. The Public Protector is given the power to take remedial action pursuant to her investigation of and report on state misconduct.[10] It is backed-up by the duty imposed on all other organs of state by s 181(3) of the Constitution to "*assist and protect*" the Public Protector[11] to ensure her "*independence, impartiality, dignity and effectiveness*". This duty reinforces the understanding of the Public Protector's remedial power to allow her to make orders binding on all organs of state.

18. It does not confer judicial powers on the Public Protector. She merely operates as the "*complaints office*" of the state. Citizens may complain to her of state misconduct. She investigates the

[10] that is, "*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*"

[11] and the other Chapter 9 institutions.

complaint and reports on it. If she finds malfeasance, she has the power to take appropriate remedial action, that is, to put it right on behalf of the state. She determines the remedy and orders its implementation. She does so as the state institution mandated by the Constitution to investigate, report on and cure malfeasance in the state. The Public Protector thus cannot exculpate state officials or organs of state, instead, she acts positively to protect the public.

19. The Public Protector's remedial power may seem wide and open-ended but s 182(1) renders it subject to regulation by national legislation. Our courts have held that, where a public authority is given the power to "regulate" an activity, it may organise that activity in any way it sees fit, short of prohibiting the activity altogether.[12] This means that, short of prohibiting the Public Protector's power to make binding orders pursuant to a finding of maladministration, parliament may regulate any aspect of the exercise of her remedial powers.

(iii) The history of the power

20. The history of the Public Protector's remedial power under s 182(1)(c) of the Constitution reinforces our interpretation.

21. The predecessors of the Public Protector are the Advocate General and the Ombudsman. The office of the Ombudsman, like the Advocate General that came before it, had the power under the Ombudsman Act 118 of 1979 to investigate reports of

[12] Lawrence Baxter *Administrative Law* p.406; *R v Williams* 1914 AD 460; *Gründlingh v Phumelela Gaming and Leisure* 2005 (6) SA 502 (SCA) para 1.

maladministration, but not to take remedial action directly. In other words, the legislature expressly limited the Ombudsman's remedial powers. He had to refer his findings to other institutions for remedial action.[13]

22. The office of the Public Protector was established by s 112(1)(b) of the Interim Constitution. That section, echoing the Ombudsman Act and the Attorney General Act before it, merely stated that it was competent for the Public Protector, pursuant to an investigation:

> "to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by –
> *(i) mediation, conciliation or negotiation;*
> *(ii) advising, where necessary, any complainant regarding appropriate remedies; or*
> *(iii) any other means that may be expedient in the circumstances."*

23. Sections 6(4)(b), (c) and (d) of the Public Protector Act, which was enacted pursuant to the Interim Constitution, mirror the

[13] Section 5(4) provided that the Ombudsman could, whether or not he or she held an inquiry, and at any time before, during or after such inquiry: (a) if he is of the opinion that the facts disclose the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions; (b) if he deems it advisable, refer any matter which has a bearing on mismanagement to the institution, body, association or organization affected by it or make an appropriate recommendation regarding the redress of the prejudice referred to in section 4 (1) (d) or make any other recommendation which he deems expedient to the institution, body, association or organisation concerned.

language of s 112(1)(b) of the Interim Constitution.[14]

24. The Final Constitution, however, conferred different and harder remedial powers on the Public Protector. Instead of empowering the Public Protector to *"endeavour"* to resolve a dispute, or *"rectify any act or omission"* by *"advising"* a complainant of an appropriate remedy as under the Interim Constitution, the Final Constitution empowers the Public Protector to *"take appropriate remedial action"*.

25. This is a deliberate and significant shift in language. It changes the Public Protector's role from an advisory one into an active and direct one. Unlike her predecessors, the Public Protector does not merely report and recommend that other institutions take action following an investigation. The Public Protector has an express additional power - she takes remedial action.

26. After the adoption of the Final Constitution, parliament amended the Public Protector Act to bring it into line with the Final Constitution.[15] However, the provisions relating to the Public Protector's remedial powers remained unchanged. In other words, s 6(4) of the Public Protector Act reflects the language of s 112(1)(b) of the Interim Constitution rather than s 182(1)(c) of the Final Constitution.[16]

27. The critical change that s 182(1)(c) heralded is a useful aid to its

[14] The Interim Constitution was enacted on 27 April 1994. The Public Protector Act was enacted on 25 November 1994.

[15] See, in this regard, the Public Protector Amendment Act, 113 of 1998. The Public Protector Act was also later amended by the Public Protector Amendment Act 22 of 2003.

[16] The Public Protector Amendment Acts did not amend s 6(4) at all.

proper interpretation.

(iv) The purpose of the power

28. The Public Protector's constitutional mandate is aimed at state misconduct.[17] It is fitting that this should be so because the Constitution sets high standards for the exercise of public power by state institutions and officials:

28.1 The founding values of the Constitution include accountability, responsiveness and openness in government in s 1(d).

28.2 Section 7(2) obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

28.3 Section 33(1) requires administrative action to be lawful, reasonable and procedurally fair.

28.4 Section 41 requires all organs of state to respect and co-operate with one another and *inter alia* to "*provide effective, transparent, accountable and coherent government for the Republic as a whole"*.

28.5 Section 195 requires all organs of state and public officials to adhere to high standards of ethical and professional conduct.

28.6 Section 217 provides that all procurement in the public

[17] "*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"*

sector must be done in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

29. This is the context in which s 182 mandates the Public Protector to investigate, report on and remedy state misconduct. As the Supreme Court of Appeal observed in Mail & Guardian,

> *"The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee."*[18]

30. This objective of policing state conduct to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat corruption as this Court noted in Glenister[19]:

> *"Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance*

[18] *Public Protector v Mail & Guardian* 2011 (4) SA 420 (SCA) para 6

[19] *Glenister v President of the RSA* 2011 (3) SA 347 (CC)

development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of state contract for goods and services."[20]

"Section 7(2) (of the Constitution) casts an especial duty upon the State. It requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. It is uncontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The State's obligation to 'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms."[21]

31. The purpose of the Public Protector's powers is thus to provide "*what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office"*[22]. The Public Protector is empowered to protect the public against malfeasance in public office by investigating complaints of state misconduct, reporting on it and providing

[20] Glenister para 176

[21] Glenister para 177

[22] Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) para 6

remedies for it.

32. To achieve this purpose, the Public Protector must have the power to determine the remedy and order its implementation. She cannot realise the constitutional purpose of her office if other organs of state may second-guess her findings and ignore her recommendations.

33. This point is clearly illustrated in the SABC case, where the SABC purported to circumvent the findings of the Public Protector by establishing a "parallel process". The SCA commented as follows:[23]

> *"It was not for it [the SABC] to set up a parallel process and then to adopt the stance that it preferred the outcome of that process and was thus free to ignore that of the Public Protector. Nor was it for the Minister to prefer the Mchunu report to that of the Public Protector. It bears noting that the Public Protector is plainly better suited to determine issues of maladministration within the SABC than the SABC itself. That, after all, is why the office of the Public Protector exists. The Public Protector is independent and impartial. Mchunu Attorneys, who had already represented the SABC during the course of the Public Protector's investigation, was not. The Public Protector conducted a detailed investigation in which she interviewed all the relevant role players, considered all relevant documents, and gave all affected parties an opportunity to comment*

[23] *SABC* (supra) at para 47 (our emphasis).

> *on her provisional report. Only after following that process, did she make her findings and take remedial action. That cannot simply be displaced by the SABC's own internal investigation. Thus, absent a review, once the Public Protector had finally spoken, the SABC was obliged to implement her findings and remedial measures."*

34. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action itself. She may determine the remedy and order its implementation. All organs of state and public officials are bound by her remedial directions.

C THE PRESIDENT'S FAILURE TO COMPLY

35. In this matter the Public Protector took remedial action in terms of s 182(1)(c) of the Constitution. Her remedial action took the form of directions that oblige President Zuma to:[24]

    35.1 take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the Department of Public Works that do not relate to security, and which include the visitors' centre, the amphitheatre, the cattle kraal and chicken run, and the swimming pool at Nkandla;

    35.2 pay a reasonable percentage of the cost of the measures as determined with the assistance of National Treasury;

[24] Record, Vol 2, p 269.

35.3 reprimand the Ministers involved for the *"appalling manner in which the Nkandla Project was handled and state funds were abused"*; and

35.4 report to the National Assembly on his comments and actions on these directions within a period of 14 days.

36. It is clear from the facts of the case that the President has not complied with the remedial directives of the Public Protector, but has instead purported to initiate parallel investigations.

36.1 On 14 August 2014, the President directed the Minister of Police to investigate and report on the very issue that the Public Protector had already investigated and determined, namely, *"whether the President is liable for any contribution in respect of the security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports".*[25]

36.2 On 25 March 2015, the Minister of Police furnished a report which purported to investigate and determine the very issues the Public Protector had already investigated and determined, namely, whether or not the visitors' centre, the amphitheatre, the cattle kraal and chicken run, and the swimming pool were "security features".[26]

[25] Record: Vol 5 p 589, Report by the Minister of Police to Parliament dated 25 March 2015. The reference to "respective reports" is a reference to the reports of Joint Standing Committee on Intelligence, the Public Protector's report, and the SIU report referred to in President Zuma's report to the Speaker of the National Assembly at Record: Vol 5 p 53.

[26] The Minister of Police records these "Findings and Recommendations" under Item 8 of his report; Record: Vol 4, p 502.

37. In addition, the National Assembly purported to establish its own process in response to a letter from the President to the Speaker dated 2 April 2014 which ultimately culminated in two resolutions of the NA, of 13 November 2014 and 18 August 2015 respectively.[27]

38. The Public Protector determined the remedy and ordered its implementation. Her remedial directions bind all organs of state and public officials. This means that:

    38.1 The President must implement the order; and

    38.2 The parallel processes of the Minister of Police and Parliament have no legal effect.

39. This is relief is requested in prayer 3 of the EFF's notice of motion and in prayers 1.1, 1.2, 2.1, 2.2, 3.1 and 3.2 of the DA's notice of motion.[28]

D A WORRYING TREND

40. The common factor in the *SABC* case and the current matter is an organ of state that, instead of implementing the Public Protector's remedial directions, purports to establish parallel process to substitute the report of the Public Protector.

41. In addition, Corruption Watch (and the Public Protector) notes an increasing trend of state officials who simply ignore the findings of the Public Protector altogether.

---

[27] Record: Vol 4, pp 583-588; Vol 6, pp 813-817.

[28] EFF's notice of motion, Record: Vol 1, pp 3-5; DA's notice of motion, Record: Vol 1, pp 1a – 4a.

42. Whether the public actor purports to second-guess the Public Protector's findings with a parallel process or simply ignores her findings, the outcome is the same. The office of the Public Protector is rendered useless [29] and officials implicated in abuses of public power continue to act with impunity.[30]

43. From Corruption Watch's perspective, unless and until state actors are compelled to comply with the findings of the Public Protector (absent judicial review), the battle against corruption will be undermined.

44. The non-compliance of the President in this case strikes a particularly severe blow to the fight against corruption and the abuse of public power as it emanates from the highest office in the country.[31] It is an invitation to organs of state and lower level public officials to disregard the directions of the ultimate guardian of the public weal. It discourages the members of the public from complaining to the Public Protector (and organisations such as Corruption Watch) when organs of state and public officials abuse public power.[32]

E CONCLUSION

45. We submit that in determining this matter this Court should affirm the core principles that have been the focus of these

[29] Record: Vol 7, p 855, para 25, Public Protector's affidavit

[30] Record: Vol 10, 1100, paras 27-30, Corruption Watch's intervention affidavit.

[31] Corruption Watch has noted an increasing trend (particularly following the Nkandla scandal) of public officials refusing to engage with complaints about malfeasance and abuses of public power in the context of complaints about procurement corruption. Record: Vol 10, p 1100, Corruption Watch's intervention affidavit, paras 27-28.

[32] Record: Vol 10, p 1101, para 29, Corruption Watch's intervention affidavit.

submissions, namely, that the language, history and purpose of s 182(1)(c) make it clear that the Constitution intends the Public Protector to have the power to provide an effective remedy for state misconduct. It includes the power to determine the remedy and order its implementation. Absent a judicial review, once the Public Protector has issued remedial directions, the organ of state of public official is obliged to implement them.

46. This means that the Court should order that the President comply with the findings of the Public Protector and that the reports and processes of any other organ of state are of no legal effect.

ISMAIL JAMIE SC
CAROL STEINBERG
LUKE KELLY
Counsel for Corruption Watch

Chambers
Cape Town and Sandton
4 December 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT143/15 and CCT171/15

In the matters between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY REPUBLIC OF SOUTH AFRICA	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE PUBLIC PROTECTOR	Third Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

and

DEMOCRATIC ALLIANCE	Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF POLICE	Third Respondent
PUBLIC PROTECTOR	Fourth Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

PRACTICE NOTE FOR CORRUPTION WATCH

---

1. Legal representatives

Attorneys: Webber Wentzel Attorneys
Mr V Movshovich
011 530 5000
vlad.movshovich@webberwentzel.com

Counsel: Ismail Jamie SC (021-4234395)
Carol Steinberg (011-2175062)
Luke Kelly (021-4220143)

2. Nature of the proceedings

These proceedings concern applications brought by the Economic Freedom Fighters ('EFF') and the Democratic Alliance ('DA') for relief pertaining to the Public Protector's Nkandla report dated 19 March 2014.

3. Issues to be determined

3.1. Corruption Watch has been granted leave to intervene as *amicus curiae* and to present written and oral argument.

3.2. Insofar as Corruption Watch is concerned, the principal issues for determination in this matter are: (a) the scope and status of the Public Protector's remedial powers; and (b) how organs of state and public officials are required to respond to remedial action directed by the Public Protector.

4. Relevant portions of the record

The entire record is relevant to these proceedings.

5. Estimated duration of argument

It is estimated that one day is required for the hearing of both matters. Corruption Watch will abide this Court's directions in this regard, and as to the time allocated to it for oral argument.

6. Summary of Corruption Watch's submissions

6.1. Corruption Watch will submit that this Court should affirm the finding of the Supreme Court of Appeal held in *SABC* case,[1] that remedial action of the Public Protector in terms of s 182(1)(c) of the Constitution has legal effect, and, unless set aside on judicial review, organs of state and public officials may not ignore it.[2]

6.2. It will submit further that this Court should also affirm the Supreme Court of Appeal's finding that the Public Protector is unable to realise the constitutional purpose of her office if organs of state or public officials second-guess her findings, or ignore her remedial directions by establishing parallel processes that do not serve to implement her directions.[3]

6.3. In the circumstances of these applications, and applying these findings, Corruption Watch will argue that this Court should (i) order the President to give effect to the findings of the Public Protector and (ii) declare that the parallel process of other

[1] *SABC v DA* [2015] ZASCA 156 (8 October 2015).

[2] Ibid at paras 47 and 52.

[3] Ibid.

organs of state (notably the Minister of Police and the National Assembly) are of no legal effect.

7. List of authorities

A list of authorities, alphabetically arranged, is filed herewith.

ISMAIL JAMIE SC
CAROL STEINBERG
LUKE KELLY
Counsel for Corruption Watch

Chambers
Cape Town and Sandton
4 December 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT143/15 and CCT171/15

In the matters between:

THE ECONOMIC FREEDOM FIGHTERS	Applicant

and

THE SPEAKER OF THE NATIONAL ASSEMBLY REPUBLIC OF SOUTH AFRICA	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
THE PUBLIC PROTECTOR	Third Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

and

DEMOCRATIC ALLIANCE	Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
PRESIDENT JACOB GEDLEYIHLEKISA ZUMA	Second Respondent
MINISTER OF POLICE	Third Respondent
PUBLIC PROTECTOR	Fourth Respondent
CORRUPTION WATCH (RF) NPC	*Amicus Curiae*

CORRUPTION WATCH'S LIST OF AUTHORITIES

BOOKS

Lawrence Baxter *Administrative Law* (Juta, 1984) at p.406

CASES

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Glenister v President of the RSA 2011 (3) SA 347 (CC)

Gründlingh v Phumelela Gaming and Leisure 2005 (6) SA 502 (SCA)

Minister of Home Affairs v NICRO 2005 (3) SA 280 (CC)

Mvumvu v Minister for Transport 2011 (2) SA 473 (CC)

Nyathi v MEC for Department of Health, Gauteng 2008 (5) SA 94 (CC)

Pharmaceutical Society of SA v Tshabalala-Msimang 2005 (3) SA 238 (SCA)

Public Protector v Mail & Guardian 2011 (4) SA 420 (SCA)

R v Williams 1914 AD 460

Rustenburg Platinum Mines v CCMA 2007 (1) SA 576 (SCA)

SABC v DA [2015] ZASCA 156 (8 October 2015).

ISMAIL JAMIE SC

CAROL STEINBERG

LUKE KELLY

Counsel for Corruption Watch

Chambers

Cape Town and Sandton

4 December 2015