IN LIGHT OF 'NKANDLA', WHAT IS THE ROLE OF THE PUBLIC PROTECTOR IN UPHOLDING THE RULE OF LAW IN SOUTH AFRICA?

*by Aadelah Shaik Yakoob**

1 Introduction

In March of 2014, the Public Protector of South Africa, Thuli Madonsela released a report entitled *Secure in Comfort* (the report).[1] The report was compiled in response to several complaints received by the Public Protector regarding security upgrades that were made to the private residence of President Jacob Zuma in Nkandla, during the period 2009 to 2013, at the expense of the State (the Nkandla project).[2] Prior to the investigation by the Public Protector and the release of the report, the story had received widespread attention in the media, causing concern among South Africans that the project was a product of maladministration, corruption and the misuse of public funds.[3]

The report later confirmed these and other allegations surrounding the project.[4] The findings by the Public Protector revealed, among other things, that while the authority to facilitate security upgrades at the home of the President does exist, this authority was exercised improperly and beyond its scope by officials in the Nkandla project.[5] She found further, that the Nkandla project was unjustifiably funded by public funds, which were meant to be spent on other significant public projects and that the conduct of all organs of state involved in managing the Nkandla project was unlawful and amounted to improper conduct and maladministration.[6] Most importantly, she revealed that President Zuma and members of his family unduly benefited from the excessive and opulent upgrades

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1 'Secure in comfort', Report of the Public Protector, 2014.

2 Secure in comfort (n 1 above) 5.

3 See M Letsoalo & C Molele '*Bunker, bunker time: Zuma's lavish Nkandla upgrade*' http://mg.co.za/article/2011-11-11-bunker-time-for-zuma (accessed on 5 August 2015), alleging the occurrence of maladministration surrounding the project. On 30 September 2012 the City Press Newspaper published an article on the Nkandla scandal, alleging that in excess of R203 million had been spent on the project (website unavailable).

4 Secure in comfort (n 1 above) 6.

5 Secure in comfort (n 1 above) 53.

6 Secure in comfort (n 1 above) 55 and 62, 'funds were reallocated from the Inner City Regeneration and the Dolomite Risk Management Programmes of the Department of Public Works'.

to his private residence at the expense of the state.[7] Accordingly, the Public Protector ordered remedial action by a recommendation that the President take steps to assess the costs of the upgrades that did not relate to security measures, and then pay back a reasonable portion of these costs.[8]

Fourteen days after the release of the report, the Presidency responded to the report and the recommendations made by alleging that the Public Protector's findings and recommendations were unfounded based on the fact that her actions and the report constituted a 'violation of the separation of powers.'[9] This allegation had no basis in law, as the Public Protector does not belong to any of the organs of state which are subject to the doctrine of separation of powers.[10] The doctrine of separation of powers divides the state into the judicial, legislative and executive spheres of government,[11] whereas the Public Protector is a Chapter 9 institution which enjoys independence from any of the above spheres of government.[12] The Presidency further alleged that recommendations made by the Public Protector are not binding on any persons and thus chose to ignore any recommendations made in the report. The President had thereafter been evasive on the matter both in Parliament and in the media, despite the efforts of members of Parliament to hold the President accountable on the basis of the report.[13] This matter has caused strife among South Africans, created international embarrassment for the country and disrupted many a parliamentary session, including the State of the Nation Address in February 2015.[14]

In a follow up to the report the Minister of Police, Mr Nathi Nhleko, issued a secondary 'Nkandla Report' in March of 2015 at the request

7 Secure in comfort (n 1 above) 57.
8 Secure in comfort (n 1 above) 68.
9 K Magubane 'Ministers want High Court Judicial Review of Nkandla' http://www.bdlive.co.za/national/2014/05/15/ministers-want-high-court-judicial-review-of-nkandla-report (accessed 5 August 2015).
10 Sec 8(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and Schedule 4 of the Interim Constitution of the Republic of South Africa, 1993 provide for the separation of powers between the judicial, legislative and executive organs of state.
11 Sec 8(1) of the Constitution (n 10 above).
12 Sec 181(2) of the Constitution — 'these institutions are independent, and subject only to the Constitution and the law … and perform their functions without fear, favour or prejudice.'
13 E News Channel Africa 'EFF — Pay back the money' https://www.enca.com/eff-we-want-money (accessed 6 August 2015); E Fereira *et al* 'Nkandla report passes after riotous debate' http://www.news24.com/SouthAfrica/Politics/Nkandla-report-passes-after-riotous-debate-20141113 (accessed 6 August 2015); E Mabuza 'EFF: Zuma and Parliament violated Constitution on Nkandla' http://www.sundayworld.co.za/news/2015/08/14/eff-zuma-and-parliament-violated-constitution-on-nkandla (accessed 16 August 2015); M Merten 'Nkandla: now DA takes Zuma to court' http://www.iol.co.za/news/politics/nkandla-now-da-takes-zuma-to-court-1.1902074#.VeSZ0CWqqko (accessed 20 August 2015).
14 R Calland 'An eyewitness account of SONA 2015' http://mg.co.za/article/2015-02-13-an-eyewitness-account-of-sona-2015 (accessed 16 August 2015).

of the President.[15] In this report, the Minister absolved the President of any responsibility regarding the maladministration surrounding the Nkandla project and exonerated the President of any duty to pay back any funds in respect of the project.[16] This parallel investigation by the Minister seemed to have no purpose other than to undermine and override the initial report by the Public Protector.

The 'Nkandla scandal', as many call it, sparked my attention as both a student of administrative and constitutional law and as a concerned and interested citizen. The abovementioned events, as well as the fact that corruption within the executive sphere of government has become a recurrent problem in South Africa,[17] prompted my interest in investigating what the role of the Public Protector is in South Africa. The significance of such a role may play a crucial role in upholding the rule of law and curbing the incidence of corruption in South Africa.

The focus of this article will, therefore, be to ascertain what role, if any, the Public Protector plays in achieving and upholding the rule of law as envisaged in section 1(c) of the Constitution. In doing so, I will assess the powers of the Public Protector as envisaged by the Constitution and supporting legislation and analyse the effect of recommendations made by the Public Protector. I will then offer a discussion on certain shortfalls within the legislation that have become a hindrance to the Public Protector achieving her mandate in practice. I will, further, highlight the importance of the powers of the Public Protector as an avenue to achieving the rule of law, and, offer an analysis of the judgments in *South African Broadcasting Commission v Democratic Alliance*[18] and *Economic Freedom Fighters v Speaker of the National Assembly*.[19] I will, finally, conclude by

15 Report by the Minister of Police to Parliament on security upgrades at the Nkandla private residence of the President, March 2015 http://www.gov.za/sites/www.gov.za/files/speech_docs/REPORT%20BY%20THE%20MINISTER%20OF%20POLICE%20TO%20PARLIAMENT%20ON%20SECURITY%20UPGRADES%20AT%20THE%20NKANDLA%20PRIVATE%20RESIDENCE%20OF%20THE%20PRESIDENT.pdf. (accessed 16 August 2016) para 1.1 (The Minster's Report).

16 *The Minister's Report* (n 15 above) para 9.

17 In addition to the Nkandla scandal, recent corruption scandals include, among others, the involvement of former Police Chief Mr Bheki Cele in unlawful and improper property deals see (J Maromo 'Cele an active participant in leasing scandal' http://mg.co.za/article/2012-04-02-cele-an-active-participant-in-leasing-scandal (accessed 20 August 2015)); former national Police Commissioner, Mr Jackie Selebi, being convicted on corruption charges in 2010 (S Evans 'Selebi guilty of corruption' http://www.timeslive.co.za/local/2010/07/02/selebi-guilty-of-corruption1)), and various government officials being found to have forged their qualifications (see South African Broadcasting Commission 'High profile cases of fake qualifications in 2014' http://www.sabc.co.za/news/f1/f02fb30046ae5c38984df838250c0ce1/High-profile-cases-of-fake-qualifications-in-2014-20141224) (accessed 20 August 2015).

18 2015 ZASCA 156 (SCA) (unreported case found at http://www.saflii.org/za/cases/ZASCA/2015/156.html).

19 2016 (3) SA 580 (CC).

discussing possible solutions to the challenges faced by the Public Protector in practice and offer a summary of my views.

2 The Constitutional and statutory powers of the Public Protector

2.1 The Constitution and supporting legislation

The institution of the Public Protector finds its roots in section 181 and 182 of the Constitution. It is the first of several 'Chapter 9' institutions tasked with supporting constitutional democracy.[20] Section 181 of the Constitution provides some general governing principles which apply to all Chapter 9 institutions. These principles create the first point of departure in establishing the role and powers of the Public Protector.

Section 181 instructs firstly that all Chapter 9 institutions are independent from any other organ of state; they are subject only to the law and the Constitution and must exercise their mandate impartially and without fear, favour or prejudice.[21] Section 181(3), in particular, dictates further that other organs of state, through legislation or other measures, must assist and protect all Chapter 9 institutions, ensuring the impartiality, independence, dignity and effectiveness of these institutions.[22] Section 181(4) prescribes further, that, no person or organ of state shall interfere with the functioning of a Chapter 9 institution,[23] and, that these institutions should report to the National Assembly regarding their activities at least once a year.[24]

Section 182 of the Constitution then deals specifically with the functions of the Public Protector. It empowers the Public Protector to investigate any conduct of the State or the public administration in any sphere of government that is suspected to be improper, prejudicial or that may result in any impropriety.[25] The Public Protector is then empowered to report on that conduct and take appropriate remedial action.[26] The fact that section 182(1)(c) of the Constitution expressly empowers the Public Protector to 'take appropriate remedial action' clearly indicates that recommendations made by the Public Protector are binding and enforceable in nature.

20 Chap 9 of the Constitution creates several 'State Institutions Supporting Constitutional Democracy', these include: the Public Protector, the Human Rights Commission and the Electoral Commission.
21 Sec 181(2) of the Constitution.
22 Sec 181(3) of the Constitution.
23 Sec 181(4) of the Constitution.
24 Sec 181(5) of the Constitution.
25 Sec 182(1)(a) of the Constitution.
26 Sec 182(1)(b) and (c) of the Constitution.

As will be discussed later, this has in fact been confirmed by the Constitutional Court.

The Public Protector Act[27] sets out the additional powers and functions of the Public Protector as contemplated by section 182(2) of the Constitution. The Act sets out various procedural and administrative guidelines regarding, inter alia, the appointment,[28] remuneration[29] and investigative procedures[30] concerning the institution of the Public Protector in sections 1A, 2 and 7, respectively. The additional powers of the Public Protector are set out in section 6, in terms of which the Public Protector may at his/her own discretion, or, in response to a complaint received, investigate, among other things, any maladministration within government at any level.[31] He/she also has the power to investigate the abuse or unjustifiable exercise of power by a person performing a public function,[32] and, any unlawful enrichment or the receipt of an improper advantage by a person as a result of an act/omission in the public administration or at any level at government.[33] Importantly, section 6(4)(c)(ii) empowers the Public Protector to make an appropriate recommendation to redress the prejudice resulting from the matter being investigated by him/her or make any other recommendation he/she deems fit to the affected public body or authority.[34] Section 6(4)(b) and 6(4)(d) also grant the Public Protector the power to resolve a dispute or rectify any omission by means of, mediation/conciliation, advising a complainant regarding appropriate remedies or any other means he/she deems necessary in the circumstances.[35]

2.2 Interpreting the powers of the Public Protector and shortfalls within the legislation

Upon analysis of the Public Protector Act, it becomes clear that the legislature failed to properly define important concepts relating to the powers of the Public Protector. The definitions and interpretations of the terms 'recommendation' and 'appropriate remedy' do not feature in section 1 of the Act. The Act also does not give any indication as to the effect of recommendations made by the Public Protector and whether these recommendations are binding on public bodies and authorities. Furthermore, while the Constitution

27 Public Protector Act 22 of 2003.
28 Sec 1A of the Public Protector Act.
29 Sec 2 of the Public Protector Act.
30 Sec 7 of the Public Protector Act.
31 Sec 6(4)(a)(i) of the Public Protector Act.
32 Sec 6(4)(a)(ii) of the Public Protector Act.
33 Sec 6(4)(a)(iv) of the Public Protector Act.
34 Sec 6(4)(c)(ii) of the Public Protector Act.
35 Secs 6(4)(b) and 6(4)(d) of the Public Protector Act.

explicitly empowers the Public Protector to 'take appropriate remedial action,'[36], the Public Protector Act mentions only that the Public Protector may 'advise a complainant regarding appropriate remedies'[37] but does not contain any provision dealing specifically with the concept of remedial action and what it may or may not entail. This discrepancy has led to confusion and uncertainty regarding the scope and effect of recommendations made by the Public Protector, as seen in the Nkandla scandal.

Rautenbach and Malherbe[38] offer a discussion on the requirements for the exercise of Presidential and other executive powers in certain instances where the President or another member of the executive is required to act 'on the recommendation of'[39] another functionary or institution. They argue that this term cannot be interpreted within legislation in the same manner as the words 'after consultation with.'[40] The latter does not have a binding effect, while the former does.[41] If this method of interpretation is followed, the President or other members of the executive are, in theory, bound to act according to such recommendations received.[42] However, we have seen that members of the executive instead choose to interpret the term 'recommendation' far too narrowly in practice.

What we observe in practice is that certain provisions of the Public Protector Act are vague, and, the Act lacks important terminology found in section 182 of the Constitution. This has resulted in the Act being ambiguous, open ended and susceptible to manipulative interpretations by those wishing to escape or evade responsibility in cases of maladministration and impropriety that have been investigated and reported upon by the Public Protector. This often results in these cases going without proper redress, and the rule of law being trampled upon without any consequence.

3 The role of the Public Protector in upholding the rule of law

Having discussed the powers conferred upon the Public Protector by the law and the ambiguity and shortfalls of certain aspects of the legislation governing her powers, I will now analyse the role of the Public Protector in upholding the rule of law and highlight how the above legislative shortfalls hinder or threaten the theoretical power

36 Sec 181(1)(c) of the Constitution.
37 Secs 6(4)(b)(ii) and 6(4)(d)(ii) of the Public Protector Act.
38 Rautenbach & Malherbe *Constitutional Law* (2012).
39 Rautenbach & Malherbe (n 38 above) 144-145.
40 As above.
41 As above.
42 As above.

that the Public Protector possesses to be a direct enforcer of the rule of law in South Africa.

The principle of 'the rule of law' is rooted in section 1 of the Constitution which sets out the values upon which the sovereignty and democracy of South Africa are founded. One of these values is the 'supremacy of the Constitution' and the 'rule of law' as found in section 1(c). In an ordinary context, the rule of law translates to the principle that no person/entity or their actions are ever above or immune to the law. For the purposes of jurisprudence and governance however, the meaning and interpretation of the rule of law is far more detailed and far reaching. The rule of law is a widely accepted legal ideal which finds its roots in English law.[43] An English constitutional lawyer, AV Dicey, was influential in defining the rule of law as we understand it today.[44] He summarises the rule into three core principles: the fact that every person is subject to and equal before the law; that every person is subject to appearing before the ordinary courts of a land and that there are to be no special courts for certain people and, finally, that the rule of law stems from and is a symbol of the legal victories of ordinary people and is not an aspect of the law that is imposed by any authority above the people.[45]

Hoexter notes that in a pre-constitutional South Africa, the rule of law was seen by many liberals as a possible way to compensate for the unrepresentative government and lack of a Bill of Rights at the time.[46] While it may seem that in a post constitutional era, where just administrative action and the control of public power are specifically provided for,[47] the generality of the rule of law is obsolete, the opposite is in fact true.[48] While the Promotion of Administrative Justice Act has codified aspects of administrative law in South Africa,[49] certain conduct by public bodies may not meet the definition of 'administrative action,'[50] while other conduct is specifically excluded from the definition.[51] Standards against which the exercise

43 G Quinot *et al Administrative Justice in South African Introduction* (2015) 5.
44 As above.
45 As above.
46 C Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165-185.
47 In terms of sec 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000.
48 Hoexter (n 46 above).
49 As above.
50 Sec 1 (a)-(b) of Promotion of Administrative Justice Act defines 'administrative action' as any decision/failure to take a decision by an organ of state when exercising a power in terms of the Constitution or provincial constitution; or exercising a public power or performing a public function in terms of any legislation; or where a natural/juristic person other than an organ of state exercises a public power or performs a public function in terms of an empowering provision.
51 Sec 1(b)(aa)-(ii) of Promotion of Administrative Justice Act. Some examples of these exclusions are, inter alia, the executive powers and functions of the National Executive and the legislative functions of Parliament.

of public power in the form non-administrative action could be reviewed were therefore needed, in order to ensure the lawfulness and rationality of those actions. The rule of law (and the principle of legality which flows from it)[52] was a perfect avenue through which such standards could be achieved.[53] The rule of law and the principle of legality thus provide a minimum threshold or safety net that governs the exercise of all public power.[54]

Chapter 9 institutions, including that of the Public Protector, are perhaps in theory institutions which are tasked with ensuring that the standards imposed by the rule of law are upheld in practice. As previously discussed, section 181 of the Constitution creates the various Chapter 9 institutions and designates that these institutions 'strengthen constitutional democracy.'[55] Since one of the values upon which that democracy stands is in fact the rule of law,[56] it follows that strengthening our democracy would entail also strengthening and upholding the rule of law.

The drafters of our Constitution created Chapter 9 institutions with a deliberate intent to raise the standards of integrity and accountability that our government should be held to.[57] They created these institutions as safeguards that go above and beyond the standards already imposed by our Constitution that ensure good governance and accountability.[58] The purpose of these institutions, including that of the Public Protector, is to strengthen democracy by limiting the exercise of public power where necessary and creating additional pathways for ordinary citizens to hold the government, which they have entrusted with power, accountable for the use of that power.[59] The purpose of these institutions therefore ties directly into the purpose of the concept of the rule of law being an ideal meant to hold all persons equally accountable before the law, even those in power.

52 Legality as an aspect of the rule of law has evolved to include standards that require an exercise of public power to be in good faith (*President of the Republic of South Africa v SARFU* 2000 (1) SA 1 (CC)), be rational and not arbitrary (*Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)), be carried out in a procedurally fair manner (*Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)), be subject to the requirement that reasons be given for the exercise of such power (*Wessels v Minister of Justice and Constitutional Development* 2010 (1) SA 128 (GNP)) and that all relevant factors are considered in the decision making process while such a power is being exercised (*Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC)).

53 Hoexter (n 46 above).

54 As above. Further see: A Price 'The content and justification of rationality review' (2010) 2 *South African Public Law* 346-348.

55 Sec 181 of the Constitution.

56 Sec 1(c) of the Constitution.

57 T Madonsela 'The role of the Public Protector in protecting human rights and deepening democracy' (2012) *Stellenbosch Law Review* 6.

58 As above.

59 As above.

Chapter 9 institutions are furthermore an embodiment of an active democracy and act as an intermediary between the ordinary citizen and those who hold office in government. They serve as one of the most direct and effective ways, outside court action, that any citizen can participate in governance and have their concerns heard and acknowledged.[60] Unlike court action, however, access to these institutions is of absolutely no cost to a citizen. In my view, these institutions represent another 'branch of government' on their own, a branch tasked with representing and protecting the interests of the ordinary citizen against the abuse of public power. In this way, Chapter 9 institutions, including the institution of the Public Protector, are symbols of the people and the purpose and mandate of these institutions often stems directly from the people themselves in the form of complaints or requests made to these institutions. This is in line with the third principle identified by Dicey, that, the rule of law stems from and is imposed by the people themselves,[61] and as such these institutions serve as an embodiment of the rule of law in practice.

Considering the provisions of the Constitution and the Public Protector Act, the Public Protector is competent to investigate the following: maladministration at any level of government; the abuse or unjustified exercise of power; an improper or dishonest act or omission; an improper or unlawful enrichment of a person within the public administration or any other act or omission by a person within government or a person performing a public function that results in the unlawful or improper prejudice of another person.[62] Each and every one of the above scenarios amounts to the violation of the rule of law and the principle of legality, as discussed above, in some or other manner. I would go as far as to say that section 6(4)(c) of the Public Protector Act can be summed up, in layman's terms, in a single phrase, 'the Public Protector is competent to investigate any violation of the rule of law within any sphere of government.' Theoretically, these provisions create an implicit duty on the Public Protector to directly uphold the rule of law through her mandate, by investigating, reporting on and redressing violations of the rule of law.

If a rigid and somewhat positivist approach is followed in interpreting the Constitution as well as the Public Protector Act, it would seem that the Public Protector has a sufficient degree of power to directly enforce the rule of law through her investigations and subsequent recommendations. In an ideal case, the Public Protector would directly uphold the rule of law as follows: the Public Protector

60 C Murray 'The Human Rights Commission et al: What is the role of South Africa's Chapter 9 Institutions?' (2006) *Potchefstroom Electronic Law Journal* 7; see also S Woolman & M Bishop *Constitutional Law of South Africa* (2014) 24A.2.

61 Quinot (n 43 above) 5.

62 Sec 6(4)(a)(i)-(v) of the Public Protector Act.

would elect to investigate, of her own accord or as a response to a complaint from the public, a violation of the rule of law that occurs in one of the ways mentioned in section 6(4)(a) of the Public Protector Act. She would then carry out such an investigation on the alleged violation in terms of section 7 of the above mentioned Act. The Public Protector would then report on her findings, after the investigation, that a violation of the rule of law has (or has not) occurred in one of the ways listed in section 6(4)(a). She would then make recommendations to or instruct the relevant official or public body that specific remedial action be taken to redress the violation and any prejudice that resulted from it. Finally, the relevant official or public body would respect the findings of the Public Protector, implement her recommendations and accordingly redress the violation of the rule of law that occurred.

If the above model, as intended by legislation, was followed, the Public Protector would in fact play an integral role as a direct enforcer of the rule of law in South Africa. The unfortunate truth is that in practice the above procedure, as envisaged by the Constitution and supporting legislation, is not followed by government officials. The Public Protector must often rely on the assistance of the courts to properly exercise her mandate and uphold the rule of law, rendering the theoretical independence of the institution superfluous in practice.[63]

4 An analysis of *South African Broadcasting Commission Limited v Democratic Alliance*[64] *and Economic Freedom Fighters v Speaker of the National Assembly*[65]

In *Democratic Alliance v South African Broadcasting Corporation Limited and Others*,[66] the effect of recommendations made by the Public Protector and the correct interpretation of her powers was raised, giving the High Court an opportunity to clarify and shed light on the confusion. The case dealt with an application brought by the Democratic Alliance (DA) seeking to have Chief Operations Officer (COO) of the SABC, Hlaudi Motsoeneng, suspended from his position as COO pending disciplinary action against him.[67] Motsoeneng faced this pending disciplinary action as a result of findings and recommendations made by the Public Protector that he was guilty of

63 Woolman & Bishop (n 60 above) 24A.2.
64 *SABC v DA* (n 18 above).
65 *EFF v Speaker of the National Assembly (*n 19 above*)*.
66 *Democratic Alliance v South African Broadcasting Corporation Limited* 2015 (1) SA 551 (WCC).
67 *DA v SABC* (n 66 above) para 1.

maladministration and fraudulently misrepresented his qualifications to the SABC.[68] The DA based their claims upon these findings by the Public Protector, which arose out of an investigation conducted by her into various allegations of maladministration at the SABC that were referred to her by senior officials at the SABC themselves.[69] Following the report and findings however, the board of directors at the SABC refused to institute disciplinary proceedings against Motsoeneng and instead permanently appointed him as COO, effectively blatantly ignoring the Public Protector's report and her recommendations.[70]

The blatant disregard for the Public Protector's report and her findings in this matter prompted her to join the matter with the intention of asking the High Court to determine if her report was valid and legally binding.[71] This led to the Court assessing the scope and powers of the Public Protector. The opinion of the Court in this regard was slightly contradictory and did not clarify the matter sufficiently. Early in the judgment the Court makes a note that remedial action required by the Public Protector in terms of section 182(1) of the Constitution is not a mere recommendation, and is therefore binding until set aside by a Court.[72] In a later portion of the judgment that dealt specifically with the powers of the Public Protector however, the Court held that neither the Public Protector Act nor the Constitution contain any provision that the findings or remedial action required by the Public Protector are binding and enforceable and that the legislator would have explicitly stated this if it was so intended.[73] However, the Court reiterated that these are still not 'mere recommendations', that an organ of state has the choice to accept or reject.[74] The Court reasoned this firstly on the basis that an organ of state may not merely ignore recommendations made by the Public Protector as this would directly conflict with the duty imposed upon such an organ by section 181(3) of the Constitution which provides that other organs of state, through legislation and other means, must assist and protect Chapter 9 institutions, to ensure their independence, impartiality, dignity and effectiveness.[75] A blatant disregard for the institution of the Public Protector and her findings is an obvious contradiction of this duty.

The Court further based its view on the principle of legality,[76] finding that the decision to institute or reject recommendations made by the Public Protector is undoubtedly an exercise of public power,

68 *DA v SABC* (n 66 above) para 10(1)-(2).
69 *DA v SABC* (n 66 above) para 5.
70 *DA v SABC* (n 66 above) para 13.
71 *DA v SABC* (n 66 above) para 3.
72 *DA v SABC* (n 66 above) para 21.
73 *DA v SABC* (n 66 above) para 58.
74 *DA v SABC* (n 66 above) para 59.
75 *DA v SABC* (n 66 above) para 60.
76 n 52 above.

which is subject to a minimum threshold of rationality which entails that a decision be rationally related to the purpose for which the power to make that decision was given in the first place. If not, such a decision is regarded as arbitrary.[77] The Court further set out a guideline of procedural steps to be followed by an organ of state when deciding to either accept or reject recommendations made by the Public Protector, in order to render such a decision rational.[78]

The above judgment was however appealed by Motsoeneng and the SABC and, subsequently, the Supreme Court of Appeal was given the opportunity to clarify the effect of recommendations made by the Public Protector.[79] As regards the powers of the Public Protector, the Court disagreed with the findings of the High Court and held that the Public Protector cannot realise the constitutional purpose of the institution if other organs of state second-guess her findings and ignore her recommendations.[80] Accordingly the Court held that Section 182(1)(c) of the Constitution should therefore be taken to mean that the Public Protector may take remedial action herself and that she may determine a remedy and direct its implementation.[81] The Court held further, that, any person wishing to challenge the findings and recommendations of the Public Protector may do so by way of a judicial review, and absent of such a review such a person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector.[82] The Court also noted that in this case, the SABC called upon an independent law firm (Mchunu attorneys) to investigate the findings of the Public Protector (without her knowledge).[83] The firm then absolved Motsoneng of any wrongdoing.[84] The Court recognised this as a threat to the independence of the Public Protector and held that an individual or body affected by any finding, report or recommendation made by the Public Protector is not entitled to embark on a parallel investigation to that of the Public Protector, and adopt a position that trumps the findings, or remedial action taken by the Public Protector.[85] As such, investigations and commissions of inquiry like these are essentially unlawful and unnecessary. In light of this, it is clear that similarly, in

77 *DA v SABC* (n 66 above) paras 71 & 74.
78 *DA v SABC* (n 66 above) para 72(a)-(d).
79 Legalbrief 'Public Protector Powers in Limbo' http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjcv-mj9-jPAhUMJcAKHaQtDWEQFgglMAA&url=http%3A%2F%2Flegalbrief.co.za%2Fdiary%2Flegalbrief-today%2Fstory%2Fpublic-protector-trussed-in-legal-chains%2Fpdf%2F&usg=AFQjCNGO6afWR-gThi-OkasYHWMVsFUDzQ&sig2=MLjN_A3RC0R9ErGFQoAJAg&bvm=bv.136499718,d.d24 (accessed 20 October 2016).
80 *SABC v DA* (n 18 above) para 52.
81 As above.
82 *SABC v DA* (n 18 above) para 53.
83 *SABC v DA* (n 18 above) para 16.
84 As above.
85 *SABC v DA (*n 82 above).

the Nkandla scandal, the parallel investigation conducted by Minister Nhleko[86] was unnecessary and invalid.

In *Economic Freedom Fighters v Speaker of the National Assembly*[87] the Constitutional Court finally had the opportunity to clarify the position regarding the binding effect of the powers of the Public Protector. In doing so, the court commented on the reasons the institution of the Public Protector exists and highlighted the fact that the time and state resources spent by the institution during its investigations would make no sense if the subsequent decisions of the Public Protector were inconsequential.[88]

In assessing and interpreting the powers of the Public Protector, the Constitutional Court found it inconceivable that the Public Protector Act was intended by the legislature to 'water down' the powers conferred on the Public Protector under the Constitution.[89] The court pointed out that the Public Protector Act would be invalid if it were inconsistent with the Constitution and therefore,[90] the primary source of the Public Protector's power to take remedial action stems from the supreme Constitution, whereas the Public Protector Act serves only as a secondary source.[91] The Court ultimately held that remedial action taken by the Public Protector is binding in nature, but is not unfettered, as a decision taken by the Public Protector is always open to judicial scrutiny.[92]

The above landmark judgments have significantly clarified the powers of the Public Protector and simultaneously vindicated the institution as a direct means of enforcing the rule of law in South Africa. It is, however, unclear whether these judgments will be enough to ensure the functionality and independence of the Public Protector in practice going forward. It can be argued that certain loopholes and discrepancies within the Public Protector Act[93] may leave the door open to persons who wish to interpret the Act in a way that favours or mitigates their own reprehensible actions. In particular, the lack of procedural guidelines regarding remedial action and how one may challenge remedial action may result in decisions of the Public Protector repeatedly being subjected to judicial scrutiny merely as a means to delay the implementation thereof. This will result in the Public Protector having to continually rely on the courts to carry out her mandate and effectively uphold the rule of law, meaning that a significant amount of time and state

86 The Minster's Report (n 15 above).
87 *EFF v Speaker of the National Assembly* (n 19 above).
88 *EFF v Speaker of the National Assembly* (n 19 above) para 49.
89 *EFF v Speaker of the National Assembly* (n 19 above) para 57.
90 *EFF v Speaker of the National Assembly* (n 19 above) para 58.
91 *EFF v Speaker of the National Assembly* (n 19 above) para 71(a).
92 *EFF v Speaker of the National Assembly* 9n 19 above) para 71.
93 See para 2.2 above.

resources will be expended on court action, each time the Public Protector wishes to implement remedial action to redress a violation of the rule of law. This would further render the Public Protector's theoretical power as a direct enforcer of the rule of law superfluous in practice.

It is worth mentioning that the Public Protector Act was enacted and promulgated in 1994, before the enactment of the final Constitution in 1996. This is perhaps the reason for the discrepancies between the Act and the Constitution. In order to properly secure the functionality of the Public Protector in future, the Public Protector Act needs to be amended so that it is line with the Constitution. It further needs to give effect to the judgments in *South African Broadcasting Commission v Democratic Alliance* and *Economic Freedom Fighters v Speaker of The National Assembly*.[94] In particular, the Act needs to clarify the definition of 'remedial action' and what steps this term may, or may not, entitle the Public Protector to take in order to redress a violation of the rule of law. Lastly, the Act should be amended to include strict procedural guidelines for bodies or persons who wish to challenge a report or remedial action taken by the Public Protector, with the aim of preventing persons from merely arbitrarily disregarding her reports or delaying the implementation of remedial action prescribed by the Public Protector. Such procedural measures may include, inter alia, an internal appeal/review to the Public Protector herself and adequate time constraints regarding, among other things, the implementation of or appeal against remedial action.

5 Conclusion

The Public Protector is one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs.[95] The Nkandla scandal, the report by the Public Protector on the issue and the events that followed have brought to light the important role that the Public Protector plays in constraining public power, ensuring the rule of law and upholding the values of our democracy. It has further brought to the attention of many South Africans the sad reality that government does not respect the institution of the Public Protector or its findings and that the independence, dignity and legitimacy of the institution are under serious threat in light of government's attempts to undermine it. This, in turn, has posed a serious threat to the rule of law in South Africa.

94 *EFF v Speaker of the National Assembly* (n 19 above).
95 *EFF v Speaker of the National Assembly* (n 19 above) para 52.

Government's response in the Nkandla scandal as well as in *Democratic Alliance v South African Broadcasting Commission* have brought to light certain shortcomings in the legislature's definitions of the powers that the Public Protector possesses,[96] which may currently contribute to the hindrances that prevent the institution from functioning to its full potential in curbing corruption within government and enforcing the rule of law. It is necessary that the legislature amend the Public Protector Act to clearly define the powers of the institution and the procedural consequences of remedial action taken by the Public Protector. However, until such a time that the Act is amended, there is hope that the judgments in *Economic Freedom Fighters v Speaker of the National Assembly* and *South African Broadcasting Commission v Democratic Alliance* which clarified the binding effect of remedial action taken by the Public Protector, will assist in vindicating the institution, making it clear to all organs of state that the Public Protector and her recommendations may not simply be ignored.

Despite the many challenges that the institution of the Public Protector currently faces it has still in certain instances been successful in indirectly securing the rule of law through the assistance of the courts. It has also been able to serve many additional important roles in practice. It has, for example, achieved a great deal through its reporting function and important value during judicial proceedings. Most importantly, the institution has fulfilled its role in acting as a watchdog for the people of South Africa. The Nkandla report sparked the interest of millions of citizens, lending itself to many debates on the issue in Parliament, on social media and at the dinner table of the ordinary South African. In doing this, I would say, that the institution of the Public Protector has actually achieved the ultimate and most important purpose that any Chapter 9 institution seeks to fulfil, strengthening our democracy. Politically aware and active citizens are the lifeblood of any democracy and the Nkandla report seems to have injected new life into the veins of South Africa's democracy, forcing the ordinary citizen to actively question and hold accountable those whom we have entrusted with public power.

96 *DA v SABC* (n 66 above).