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South Africa's Legal and Constitutional 'Rain' Showering over the Office of the Public Protector

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Abstract: The establishment of the office of the Public Protector alongside other Chapter 9 institutions in the Constitution 1996 in supporting South Africa's constitutional democracy signaled the needed dramatic change in the promotion of good governance. The Public Protector is a unique institution that was designed as the cornerstone, pillar and foundation that has to ensure adherence to the effective implementation of the principles of the new constitutional dispensation. Its core and broad framework is to promote and rebuild an effective system of regulating public authority in ensuring adherence to the culture of justification on the exercise of such power. However, the office of the current Public Protector: Advocate Busisiwe Mkhwebane has since her appointment seem to be stifled by litigation that is initiated or brought against her office. The conspicuous feature is her description by the courts as incompetent, egregious, carries her duties in a biased way, unfit and a dishonest person that misconstrues the points of law that are foundational to the investigative role of her office. Debates have ensued and calls were made for her removal from office to an extent, an enquiry headed by former Justice Bess Nkabinde was established to investigate her competence and fitness to hold office. The enquiry recommended that she be removed subject to the parliamentary process. The process has already begun and the President has since suspended her from office. With this background, South Africa's 28 years of democracy come in the wake of the damning court judgments against the current Public Protector: Advocate Busisiwe Mkhwebane. This paper provides an overview of the non-exhaustive list of selected cases of the various divisions of the High Courts including the Constitutional Court that described the Public Protector as unfit and incompetent in holding office. The paper argues that the said description by the courts negates the integrity and status of the office of the Public Protector. The argument and related cases are limited to the term of office of the current incumbent: Advocate Mkhwebane. It is also not the intention of this paper to make a personal description of the current incumbent and analysis of the cases vis-à-vis the process of the removal of the head of the Chapter 9 institutions but uses the language of the courts on their description of her holding office.

Keywords: Public Protector, Rule of Law, Accountability, Jurisprudence, Rain, Transparency

1. Introduction

The year 2022 marks the celebration of 26 years of the Constitution, 1996 (the *Constitution*) [1] with the theme of 'One Constitution One Nation' and the establishment of the Public Protector alongside other Chapter 9 institutions in the said Constitution serve as an integral part of South Africa's transition into the new democracy from a tainted and bleak apartheid past [2]. This past polluted every aspect of the principles of the rule of law and good governance [3]. Considering the protracted history of maladministration in public governance, [4] the Public Protector was established against it as a unique constitutional structure that is designed to enhance constitutional democracy [5]. The Public Protector, by its very nature, is a separate and independent institution from the branches or spheres of government and has to act impartially without fear or favour in the fulfilment of its mandate in ensuring the promotion of good governance. The Public Protector, traceable to the historic term of Ombudsman, [6] and Advocate General in South African context, [7] is the cornerstone, pillar and foundation that strives towards adherence to the effective implementation of the principles of the new constitutional dispensation. Its core and broad framework is to promote the principles of accountability in ensuring the culture of justification on the exercise of public power. This role is of significance in the re-building of the

proper system of governance that is designed to ensure the exercise of authority that meet the needs and demands of regulating effective public power [8].

Thereof, the Constitution 1996, which is characterised as the 'holy grain' [9] of South African law, requires the Public Protector not merely to exercise the monitoring of good governance but to fulfil a constitutional responsibility. That responsibility seeks to promote the principles of accountability that is linked to the principles of transparency in respect of the way in which the governments exercise and undertake its core governmental authority. The interdependence of the two principles: accountability and transparency entails fairness in the application, and enforcement of legal rules without fear or favour in ensuring good governance. Srivastava [10] contends that they are characterised by (i) enhancing effective and efficient administration; (ii) improving the quality of life of citizens; (iii) establishing legitimacy and credibility of institutions; (iv) making administration responsive, (v) citizen-friendly and citizen-caring; (vi) ensuring accountability; (vii) secures freedom of information and expression; (viii) reduces cost of governance; (ix) making every department result-oriented; (x) improves quality of public services; (xi) improving productivity of employees; (xii) eradicating corruption to re-establish credibility of government; and (xiii) removing arbitrariness in exercise of authority; and (xiv) use of IT base services to de-mystify procedures and improve the citizen government interface [11]. These factors entail a wider role and function of the Public Protector in ensuring the state's compliance with an effective system of regulating public authority. This involves the exercise of such responsibility with 'due diligence and without delay the performance of constitutional obligations which are premised on good governance and social trust based on reasonable and responsive decision - making' [12]. Such performance reinforces the significance of the supremacy of the principle of the rule of law, which is grounded as a foundational value [13] and on the supremacy of the Constitution [14] that should be observed by both the state and citizenry, [15].

However, with the distinct status and specific role attached to the institution, South Africa has after more than two decades into the democracy come in the wake of damning court judgments against the office of the Public Protector. What is striking is that the office lost most of the court cases that were initiated or brought against it. Advocate Mkwebane is described in various court judgments to be referred here, as an incompetent, egregious, and unfit and a dishonest person that carries her duties in a biased way and misplaces the points of law including the facts that are foundational to her own investigations in such a high profile and prestigious office. Calls have been made for her removal from office to an extent, an enquiry headed by former Justice Bess Nkabinde was established to investigate her competence and fitness to hold office [16]. The enquiry recommended that she be removed but through the parliamentary process which has commenced its task although she attempted to halt it many times and failed [18]. Thus, the *Speaker of the National Assembly v Public Protector* [17] overruled *Public Protector v Speaker of the National Assembly* [19] that appeared to have revived the attempt, as rule129AD (3) of the National Assembly was declared invalid for, amongst others, the inclusion of the retired member of the judiciary: Justice Bess Nkabinde as Chairperson of the Panel that investigated her fitness. [18] The *Speaker2022* validated the appointment and the President Ramaphosa has since suspended her pending the outcome of the impeachment process by the Committee of the National Assembly. [19].

With this background, this paper provides an overview of the non-exhaustive list of selected cases of the various divisions of the Courts including the Constitutional Court that described and found the Public Protector unfit, incompetent, misconstrue and bias in the application of the law in the investigating role of the institution. The paper argues that the said description by the courts negates the integrity and status of the office of the Public Protector. The argument and related cases are limited to the term of office of the current incumbent: Advocate Mkhwebane. It is also not the intention of this paper to make a personal description of the current incumbent and analysis of the cases vis-à-vis the process of the removal of the head of the Chapter 9 institutions but uses the language of the courts on their description of her holding office.

2. Setting the Scene for an Accountable System of Constitutional Democracy in South Africa

The establishment of the Public Protector in section 181 with its direct linkage to the functions as envisaged in section 182 of the Constitution serves as a focal point for the promotion of the principles of the new dispensation. The Public Protector is the mouthpiece and serves as a vanguard of the new democratic dispensation in the promotion of good governance. The requirements for the appointment of the heads of other Chapter 9 institutions are entrenched in section 193 of the Constitution, which, at the instance of the Public Protector is supported by the Public Protector Act 23 of 1994 as Amended by Act 22 of 2003. The latter Act lists the needed qualities, attributes and skills of the prospective Public Protector, and provides that:

1A(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who:

(a) is a Judge of a High Court; or
(b) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or
(c) is qualified to be admitted as an advocate or an attorney and has, for accumulative period of at least 10 years after having so qualified, lectured in law at a university; or
(d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or

public finance; or

(e) has, for a cumulative period of at least 10 years, been a member of Parliament; or

(f) has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years.

It is evident from the requirements that the Public Protector must be a person who is beyond reproach and grounded in the qualities of the professional qualification in ensuring the independence of the institution. The qualities entail the prestige of the person to hold such an office, which has long been established to ensure an effective system of monitoring public power. Mbiada traces the historic and international development of the office of the Public Protector, which at the time was referred as ombudsman in Sweden, 1809, as it spread out through many countries until New Zealand in 1962. [20] In the South African context, the office is traceable to the Advocate General in 1979 with the latter's 'mandate limited and restricted to investigating the improper use of public money'. [21] Despite the terminology, the primary focus of the ombudsman as articulated by Mbiada entails the (i) monitoring and regulation of the administrative activities of the executive branch of government; (ii) serving as a complaint-handling mechanism tasked with improving the accountability of government; (iii) serving as a vertical and horizontal accountability mechanism by receiving complaints from the people against the government, (iv) thereby serving as a check on government activities; (v) being an instrument of democratic accountability between individuals and the administration of the state. [22] Today, as Mbiada contends is that ombudsman has evolved so that 'it now incorporate a number of activities such as the human rights ombudsman assumes the protection of human rights; the classical ombudsman deals with maladministration in the public sector; and other ombudsmen deal with a range of services'. [23] The evolution envisage the critical role of the Public Protector in ensuring an 'effective monitoring of the conduct of state officials and agencies with the main aim of promoting a meaningful and ethical public service'. [24].

The constitutional and legal identity of the Public Protector was concretised in *President of the Republic of South Africa v Office of the Public Protector* [25] with reference to the powers accorded to the institution as envisaged in section 7 of the Public Protector Act and held:

> … the investigative powers of the Public Protector are of the widest character [and] requires the provision of an effective remedy for state misconduct [to ensure] the protection of the public from any conduct of impropriety [including] directing or instructing the President to exercise powers entrusted to him under the Constitution. … [Further] the powers of the Public Protector are [grounded] in section 182 (1) of the Constitution … [and] it is clear from the wording of the section that the Public Protector is afforded three separate powers: (1) to investigate conduct that is alleged or suspected to be improper; (2) to report on that conduct, and (3) to take appropriate remedial action. [Hence, on the establishment of prima facie] evidence that points to serious misconduct is an adequate and proper basis [to be acted upon]. [26].

The institution has thereof been characterized as a 'bulldog' or 'watchdog' [29] which is indicative of the status and uniqueness it holds in the promotion of the principles of the new dispensation. Moegoeng CJ in *Economic Freedom Fighters v Speaker of the National Assembly* [27] gave content to its importance and held:

> … the institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation... The Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate …[and] is one of those deserving of this constitutionally-imposed assistance and protection. It is with this understanding that even the fact that the Public Protector was created, not by national legislation but by the supreme law, to strengthen our constitutional democracy, that its role and powers must be understood. [28].

Moegoeng CJ in *EFF2016* went on to hold that the Public Protector:

> … is a new institution – different from its predecessors like the "Advocate General", or the "Ombudsman" and only when we became a constitutional democracy did it become the "Public Protector". … [and] is thus *one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance.* … The Public Protector is *one of the true crusaders and champions of anti-corruption and clean governance*, [29] (author's emphasis).

The constitutional role and special attributes accorded to the Public Protector contextualizes Pienaar's argument that 'it is a known fact that 'litigation tends to be formal, expensive and dilatory … [and therefore] a state is not genuinely 'constitutional' merely by virtue of the fact that it possesses a constitution. It achieves that quality or status only when the constitution is translated into reality]'. [30] Pienaar's argument gives credence to the wide powers and responsibilities of the Public Protector because it is of public interest that citizens equally abide by the laws of the Republic, uphold the principles of the new dispensation, and allow the course of the law to take its course. As much as the Public Protector cannot investigate court decisions, the conduct of ordinary citizens may be investigated especially with the release of the list of people by the Minister of Police: Bheki Cele alleged to have instigated the destruction of the country in the July 2021 unrest in Gauteng and KwaZulu-Natal. [31] This means that the role of the Public Protector is two-pronged as it is double-edged because it entails a vertical and horizontal application. This means that the 'democratic and constitutional state has to be protected against lawlessness and disrespect for authority and against fellow citizens who threaten to undermine the freedoms which currently characterize South Africa's fledging constitutional democracy'. [32] The co-responsibility by either the state or

citizenry seek to ensure that the constitutional and legal framework put in place for an effective system in the functioning of the Public Protector serves as a symbol of hope for consolidating the hard fought democracy. The importance of the functioning of the Public Protector, which is foundational to the integrity of the office was given effect in *DA v Public Protector* [33] as the court held the Public Protector 'must not only discover the truth but must also inspire confidence that the truth has been discovered. … [and] the function is as much about public confidence that the truth has been discovered as it is about discovering the truth'. [33].

However, as a constitutional structure, the obligations of the office requires any of the incumbent not only the current incumbent to be immune from suspicion and not cloud the well-crafted constitutional identity and responsibility of the office in the fulfilment of a legitimate purpose of contributing towards the advancement of the principles of the new democracy.

3. Office of the Public Protector: Fit for Purpose

In *Economic Freedom Fighters v Gordham*, [34] the uniqueness of the office of the Public Protector was articulated as follows:

> …, the Public Protector is a constitutional servant, like the courts, and her Office should be afforded respect. It is an office of fundamental constitutional significance and her powers are not only desirable but also necessary for the purpose, inter alia, of holding public office bearers accountable. … While she may be criticised, … to mount a bad faith attack on her Office would surely work to undermine the constitutional project of the Republic. [34].

With this status, South Africa might be more than two decades since attaining democracy in 1994, the holding of an enquiry to determine the competence and fitness of a Chapter 9 head, which in this instance is the Public Protector, is unprecedented. [35] The enquiry came against the criticisms from the courts that found the Public Protector as an incompetent, bias and a person that misconstrues the law. The process was mooted by the tabling of the motion of no confidence following various scathing court judgments that found her misinterpreting the application of the law in her investigating role. [36].

At the risk of repetition, there appears to be increased litigation for or against the institution of the Public Protector subsequent to the *EEF2016* judgment following the assumption of office of the current incumbent of the office on 19 October 2016. The judgment found the remedial actions of the institution were of a binding nature not just mere recommendations, [29] which then led to some of the reports produced by the office being taken for review by the courts. It is these reports that exposed the weaknesses in the manner in which the Public Protector exercised her investigating role. Hence, Govender and Swanepoel cautioned that with the 'great potential to challenge the Public Protector's findings and remedial actions it would be essential that it ensures its legitimacy and credibility as a leading Chapter 9 are maintained, must reach procedurally and substantively correct decisions … [and] the best bulwark against repeated challenges in the courts will be coherent, logical and defendable reasoning underpinning the conclusions reached by the [office]'. [37].

The *Public Protector v South African Reserve Bank* [38] which was a direct appeal to the Constitutional Court of the decision of the Gauteng High Court in the *South African Reserve Bank v Public Protector* [38] and awarded personal costs orders against the Public Protector raised questions about the integrity of the office. [38] In this case, the Court went through a painstaking exercise in resolving the impasse that engulfed the two constitutional bodies. [38] In traversing the insidious position, the Court made some damning and alarming observations for the office of the Public Protector that it 'got the law completely wrong by ordering parliament to amend the Constitution'. Another startling observation, which confused the Court was the 'Public Protector's failure and fumbling to give convincing answers that could put into rest criticisms on the questions raised with reference to (i) the interactions with the Presidency and State Security Agency; (ii) the treatment of the transcript or minutes and (iii) not affording the Banks the opportunity to be heard for the second time after the provisional report was released to interested parties? [38] The court went on to establish that the exercise of her powers might not have been in bad faith, reckless or unlawful but her demeanor as a credible witness and the contradictions she presented on the facts and evidence left her professional competence questionable. [38].

Although the Court found that the personal costs order on an attorney and client scale against the Public Protector by the High Court was unjust and upheld the appeal,[38] the constitutional status of the office received a 'hard legal, academic, public and political knock-down' as the questions and debates about the fitness to hold office started to emerge. [39] These debates dug deeper whether she was personally and professionally fit for purpose of her appointment. Roussouw commended the High Court from saving the country from a 'constitutional embarrassment where the Public Protector tip-toed into the arena that was not within her mandate which could have left the situation untenable by even extending her powers to even usurp the role of the Constitutional Court'. [40] Roussouw further describes the Public Protector as a 'national embarrassment that should do the honourable thing and resign from office because she failed to understand the scope of the limitations of her own office, which extended to a complete lack of understanding of the functions and policy limitations of a central bank'. [41] The embarrassment was also identified by De Vos [42] who views the application by the Public Protector to rescind the *Public Protector v President of the Republic of South Africa* [43] judgment as 'opportunistic because of the reliance on false claims and contradiction on the admission she previously made under oath'. [43] He points out that the application is problematic as it is made fatal by 'making the claim, which is

demonstrably false as the 2000 version of the Code has not been repealed, replaced or amended; heavy reliance on a footnote in the Nkandla judgment of the Ministerial Handbook is a legal absurdity; and the ignorance of the Public Protector of her earlier concession on 16 November 2019 of the binding and correctness of the 2000 version of the Handbook'. [43].

The said description and rebuke of the Public Protector is quite heavy but it is worth to highlight that the office is not individualistic or about the personality of the incumbent that holds it but of importance is the manner in which the said holder carries him/herself in the advancement of the integrity of the said institution. Legodi J in the *General Council of Bar v Jiba* [44] with reference to the qualities needed of a lawyer which are of direct link to the requirements to any incumbent of the office of the Public Protector acknowledged the role of formal education but held that there are natural born-talents which are nurtured by it that are but not limited to 'impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain, practitioners to conduct themselves in a dignified manner and also maintenance of the dignity of the court; the possession of knowledge and technical skills, a capacity for hard work, respect for legal order and a sense of equality or fairness'. [44] These qualities befits any of the incumbent of the office of the Public Protector.

However, the above natural-born qualities, which were supposedly to be grounded by formal qualifications, appears not to have survive practice. Questions emerged whether academic qualifications in practice, robbed the ordinary citizenry of an effective system of monitoring public governance. The non-survival of the qualities were evinced in *Gordham v Public Protector* [45] where the Public Protector was again given a scathing censure on the misinterpretation of jurisdiction as envisaged in section 6 (9) of the Public Protector Act with reference to special circumstances in the investigation of complaints that are older than two years. [45] The Court established that the Public Protector dealt with the question of jurisdiction with reference to special circumstances in the exercises of her discretion haphazardly which showed the failure to understand it or she simply ignored it from the outset … [or] she does not know when to exercise her discretion in terms of section 6 (9). [45].

The Constitutional Court in *Public Protector v President of the Republic of South Africa* [46] delivered another scornful critique against the Public Protector's disregard of facts and law on the findings and remedial actions that she recommended to be taken against President Cyril Ramaphosa. The Court went on to question her appreciation of the law on the investigation of complaints and of further significance, the integrity of her professional qualification as an incumbent to the office. [46] The majority found her wanting by 'going overboard in making the supervisory order against the Police, the National Prosecuting Authority and Parliament … [and her] conclu[sion] that the President deliberately misled Parliament, and to use "willful" and "inadvertent" interchangeably when the two are mutually exclusive [was wrong]. [47].

In addition, President Ramaphosa is the head of the State and the National Executive. [48] The President was described in *EFF v Speake*r as a 'constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project'. [27] The President is by all definitions and purposes a constitutional being, face of the Republic, and has to protect the integrity of his office not just with constitutional and legal responsibilities but high demands of ethical and moral behavior. [41] Thereof, the CR17 donations were made in his capacity as a member of a political party and not of government or parliament. His ascension to Presidency was through a parliamentary voting process in the National Assembly as envisaged in section 86 of the Constitution and not through the political party status, although it might have indirectly facilitated it. It was through the parliamentary process in a representative form involving all other political parties that are represented in parliament and not of his own political party. The office of the Presidency, which falls within the status of the executive branch of government was held in contempt for the breach of ethics, which was of no direct linkage to the CR17 donations.

Thus, the misdirection in the lodging of the complaint, investigation and court processes could have been directed on President Ramaphosa's personal capacity and his presidency status of his organisation. The misconstruction of the law in the investigations as various courts found, leave a bitter taste on the development of the promotion of the principles of accountability. The archaic investigation against an arm of the state (executive), which was of no direct relevance to the enquiry shows the Public Protector's misdirection and misconception of the law with reference to the parties that are subject of her investigative role. The 'uncontroverted disregard of the status of the office of the President did not meet the basic benchmarks of the investigations that have to be carried with an open mind'. [49] A distinction has to be drawn between the role of the President representing his political organisation and that of his role as President of the country. This distinction was evidenced by President Ramaphosa's appearance before the State Capture Commission, which was presided by the Deputy Chief Justice Zondo as President of his organisation: the African National Congress on 28-29 April 2021 and as President of the country on 11-12 August 2021. [51] It is my considered view that the distinction is not meant to conflate the process but to deal with each particular role independently of each other in the determination of the role of each of the offices in the promotion of the principles of accountability and transparency in respect of each obligation the person has to execute. The separation of the state from political organisations and the statuses the person holds in each is of importance in building the cadre of government officials distinctively from their political parties in ensuring the promotion of ethical and moral principles in the regulation of state authority. (52].

The finding by the Court is of great concern for the office of the Public Protector which requires high standards in the exercise of the duties of such an office. The Public Protector's constitutional status is couched in the language of the basic

values and principles that govern public administration as entrenched in section 195 of the Constitution. [55] The findings against President Ramaphosa and the remedial action to be taken came in the footsteps of the *EFF2016* judgment that affirmed Public Protector's decisions and recommendations are not merely to be acknowledged but to be acted upon unless reviewed and set aside by a court of law. [27] The 'redefinition and reconfiguration of relationship of the Public Protector and other organs of state is of great significance for the consequence of the impact that the findings made might have on the exercise of state authority'. [27] Such importance was nearly misplaced and rescued by the court in *Public Protector v Commissioner for the South African Revenue Service* [50]. In this case the court found that the Public Protector had gone on a 'protracted power expedition exercise instead of requesting the taxpayer's written consent, in terms of section 69 (6) (b) of the Tax Administration Act'. [50].

In addition, the Public Protector's exercise of public authority exists outside the domain of the doctrine of separation of powers, which entails the division of authority between the three branches of the state: legislature, executive and judiciary. This principle was well captured and articulated in the *Institute for Accountability in Southern Africa v Public Protector.* [40] In this case a declaratory order was sought on the fitness and competence in holding office as required by section 193 (1) (b) of the Constitution read with section 1A(3) of the Public Protector Act. [41] The heavy reliance of this application was placed on the judgments already delivered by the courts, which established the incompetence, misconstruction of the law and bias in its application by the current incumbent in office. [42] The application required the court to thread on a tightrope to ensure it does not interfere in the functioning of the legislative branch of the state through the National Assembly, which had already started the process for the removal of the Public Protector. The Court found the argument of the Institute for a 'mere declaration' of incompetence to hold office unjustified as it would entail the pulling of the National Assembly by the hand in ensuring compliance with its order. [43] The court reasoned that:

> … But this court is not to interfere in the process of the National Assembly, unless clearly mandated to do so by the Constitution. *It is not for the court to prescribe to the National Assembly what it ought to conclude in light of the various findings of fact made by our courts regarding Ms Mkwebane in her role as PP, or to anticipate the outcome of its processes*. *That function falls outside the (constitutional) scope of authority of the courts and would, in my view, constitute an unjustified intrusion into the processes of the National Assembly*. … *The grant of the relief sought by the Institute in these proceedings would; in my view, directly and possibly impermissibly, infringe upon the constitutionally mandated terrain of the National Assembly (and the President)*. In the circumstances, I propose to exercise my discretion against the grant of the declaratory relief, [44] (author's emphasis).

The doctrine as affirmed by the Court is of direct relevance to also the limits of the Public Protector, traceable to Advocate General [54] as the institution also exists within the definition of an organ of state as envisaged in section 239 of the Constitution. The falling of the Public Protector within the domain of section 239 involves the co-operation with the other branches in the quest to fulfill the constitutional mandate of strengthening constitutional democracy. The doctrine serves as a safety valve not only for the Public Protector but also for branches as well not to overreach on each other's constitutional responsibilities. The doctrine is therefore an underlying principle, which seeks to manage relations between the branches and other state organs.

Copping J might have dismissed the application for a declaratory order, which could have intruded into the domain of the National Assembly; the unsuccessful challenge has reinforced the negativity on the integrity of the office of the Public Protector. The charges of perjury, which were laid against her by Head of Accountability: Paul Hoffman, following *ABSA Bank v Public Protector,* [53] which established that her 'Absa-Bank Report' [53] was founded on 'falsehoods' entrenched the cause for concern for the said office. [53] Similarly, the *Public Protector v Speaker of the National Assembly* which was subsequently heard by the Constitutional Court in *Speaker2022* has not saved the institution from negativity. The High Court declared invalid the rules of the National Assembly, which sets the framework for the composition of the panel that was presided by the retired Judge to investigate her fitness into office. The judgment came in too late as the damage on the status and uniqueness of the office has already been done not only in the public eye, but also within the legal, academic and other professional environments. The Constitutional Court endorsed the appointment of the judge in the panel as it constituted guarding against the perception of bias as the Speaker consulted with the Chief Justice before the appointment. [17] The issue of legal representation was also addressed by the Court as it held that it 'maintained a reasonable and fair procedure that required full legal representation that would not detract from holding her accountable'. [17].

The process for her removal pursuant to *Speaker2022* and which has started on 04 May 2022 for completion by 22 September 2022 comes at the time voluminous jurisprudence is already in the public domain negating the integrity and caused reputational damage not only to the incumbent but the office itself. South Africa today is faced with a challenge of what seems to be a compromised head of a Chapter 9 institution that negated the status of the office. As matters stands, it also appears that there is regress on the effective system of ensuring public/private accountability in the advancement of the principles of good governance. The selective investigation and bias in the application and interpretation of the law as found by the courts do not equate with the general principles of enhancing the democratic principles of democracy in the regulation of state authority. The main purpose of strengthening constitutional democracy is clouded by the alleged incompetence that leave uncertainty on its significance.

4. Conclusion

After two decades of democracy with a celebratory theme of One Constitution One Nation of the 25 years of the Constitution 1996, the constitutional status of the institution of Public Protector is clouded by the lack of legitimacy and credibility in the monitoring and promotion of an effective system of monitoring public governance. The celebration which could have been done with much vigor and zeal and reflect on the progress made since attaining democracy on how South Africa has done raises questions than answers. The establishment of the lack of competence and fit for purpose as evinced by the language of the courts on the description of the current incumbent negates the status of the office of the Public Protector. The language used by the courts is grounded on the prescripts of the Constitution which showered like a legal rain over the credibility of the institution. The legal and constitutional rain has not been smoothened by any of the cases that are highlighted here that found the Public Protector unfit to exercise authority bestowed on the institution. The arbitrary exercise of public power in this office casts doubts on the independence and impartiality of the Public Protector in the execution of her duties. It appears that the fostering of a constitutional vision for the re-building of a credible system of governance remains to be seen.

Appendix

The idiom 'rain' is used to show that the language used by the courts in the description of the manner in which the office of the Public Protector is carrying and fulfilling its mandate is indicative of the way in which the office has been inconsistent in the exercise of authority that is bestowed on it.

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