LAW MATTERS

By **Franny Rabkin**

THE PUBLIC PROTECTOR AND THE PROBLEM OF BINDING REMEDIAL ACTION

There was an argument made at a stage that one of the weaknesses of the Constitution was that it gives too much power to the president. That it was drafted with Nelson Mandela in mind, and it should perhaps have been drafted with Jacob Zuma in mind.

With all the recent drama around the reports of the Public Protector, I have discerned a similar argument floating around: that, in our zeal to put a sword into the hands of Thuli Madonsela, we have created a legal monster — a Busisiwe Mkhwebane with a sword.

The *SABC* judgment of the Supreme Court of Appeal and the *Nkandla* judgment of the Constitutional Court found that remedial action directed by the public protector was binding until it was set aside by a court on review. The judgments were game-changers for the office of the public protector. Reports that could be, and often were, simply ignored must now be implemented or subjected to judicial scrutiny.

At the beginning of June, of the 100 or so reports that Mkhwebane has signed off, 27 have been taken on review. This week - it is mid June as I write - another review application was made. If Mkhwebane sticks to her guns on the president and Bosasa, we can expect yet another.

The implications are massive - both for the office of the public protector, which is already over-burdened and under-resourced, and for the subjects of her adverse findings. The public protector must divert precious resources to defending her findings and the subjects of her reports must go to court, even where her findings are clearly wrong - an example being where she directed that the Constitution be amended in flagrant breach of the separation of powers.

Also, a process that was intended to be a fast and cheap recourse for ordinary members of the public has now had an extra layer added to it. Before, people who didn't want to do what the public protector directed used to simply ignore her. Making her remedial action binding didn't mean these people were all suddenly complying. Now they are going to court. The result is a delay and an expensive one.

One of the key motivating factors for binding remedial action was to make her office more effective. Twenty-seven out of 100 is not too bad, but if the proportion were to rise, it may

have the opposite effect - to undermine the effectiveness of her office.

Under the bright light of judicial scrutiny, the results have not been pretty. Mkhwebane has not lost every case. But where she has lost, the scathing criticism of the courts have knocked public confidence in her and - despite no direct evidence - speculation is rife that she is "captured" and part of Zuma's "fight back" campaign. Those who don't go so far as to say captured say that she is supremely incompetent, which is also not great for public confidence.

Now people are saying the *SABC* judgment and *Nkandla* judgments were wrong; they were an aberration, the result of extraordinary times, times when we had a president treating us like fools with his firepool, and a Parliament that did nothing to hold him to account. How, they ask, can the public protector be more powerful in some ways than the high court (since the public protector may not be appealed, but only reviewed, this means it is harder to counter the findings of the public protector than the high court).

When I travelled down to Bloemfontein for the SABC matter, I was in two minds on this question. Maybe it was because I was never a member of the Order of the Worship of Thuli. Maybe it was because, like the high court, I was comparing public protector findings to court adjudication and tying myself up in all sorts of knots.

But I was persuaded during the hearing that, in principle, and notwithstanding who is the public protector or what kind of a delinquent executive is at the helm, remedial action directed by the public protector is indeed binding under our Constitution. Today I went back to the *SABC* judgment and I remain persuaded. It is really a very good judgment.

Some have suggested that the problem lies elsewhere, with the appointment process - that it is too political or it is not rigorous enough. I do think we in the media should do better with scrutinising candidates (this time around we were all rushing around looking into Judge Siraj Desai, who was supposed to be the front-runner, I don't remember Mkhwebane getting much attention from our side). But I'm not yet persuaded that the process is too political. The public protector accounts to Parliament and I think it is right that Parliament appoints. At the end of the day, South Africa is a democracy and we cannot insulate our institutions from the democratic process because our politicians can mess up.

Perhaps what needs to happen is for the courts to develop a jurisprudence around the review of public protector remedial action - with a standard of review that finds a balance, which optimises the effectiveness of her office but limits the potential for abuse.

These are not easy questions (for me anyway). But when we seek answers, I think it is important to step back from the political battles and personalities of the day. I believe the law should not be drafted (or developed by the courts) with any individual in mind - it should be appropriate whoever is incumbent and it should be decided on a principled basis. We also need to debate these questions in a way that builds the institution of the public protector in the long term.

Finally, we need to remember that it is not the public protector (or the courts for that matter) that is primarily meant - under our Constitution - to hold the executive to account. It is Parliament. Building the law in a way that shifts that obligation to fall primarily on courts or the public protector will come back to bite us one day.

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