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CASE NOTE

The South African Constitutional Court: Upholding the Rule of Law and the Separation of Powers

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Abstract

The supremacy of the constitution and the rule of law are key features of the post-apartheid legal order in South Africa. For either to have any real value, however, it is necessary that they are interpreted and applied by an independent judiciary that is free from executive influence. This important task has fallen mainly on the Constitutional Court. It has recently been called upon to rule on the lawfulness of the conduct of both the president and the National Assembly and held that both had acted unlawfully and inconsistently with the constitution. In the author's view, this ruling signifies that the maturing court is fully aware of its own constitutional obligations and that, unlike its apartheid era predecessors that were hamstrung by the supremacy of Parliament, it possesses a mandate to check the abuse of power by other branches of government.

Keywords

Public protector, remedial action, Constitutional Court, rule of law, separation of powers, South Africa

INTRODUCTION

South Africa's democratic Constitution[1] celebrated its 20th anniversary early in 2017 (the Constitution).[2] It provides for many things in its 14 chapters, 243 sections and seven schedules, including a Constitutional Court that is

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1 Under the three previous constitutions (the South Africa Act 1909, the Republic of South Africa Constitution Act, No 32 of 1961 and the Republic of South Africa Constitution Act, No 110 of 1983), the majority of South Africans were denied the vote. Furthermore, none of those constitutions contained a bill of rights; see J Mubangizi "Some reflections on two decades of human rights protection in South Africa: Lessons and challenges" (2014) 22 *African Journal of International and Comparative Law* 512 at 512.

2 The Constitution came into force on 4 February 1997. See its preamble and the remarks of one of the former judges of the Constitutional Court: K O'Regan "Cultivating a constitution: Challenges facing the Constitutional Court of South Africa" [2000] *Dublin University Law Journal* 1.

declared to be "the highest court of the Republic" (the Court).[3] The Court's remit is to decide on constitutional matters, and any other matter that raises an arguable point of law of general public importance.[4] As such, therefore, its remit is narrower than that of other courts of last instance, such as the Supreme Courts in Canada and the UK that both have jurisdiction to hear appeals in respect of all areas of the law.[5] The Court has the final say on whether a matter is within its jurisdiction.[6] Since its creation, it has been called upon to determine a range of important issues, including the constitutionality of legislation[7] made by the South African Parliament (the National Assembly and the National Council of the Provinces)[8] and its predecessors. Thus, for example, in what has been described as the Court's "first politically important and publicly controversial holding",[9] it declared that provisions in the Criminal Procedure Act 71 of 1977 sanctioning capital punishment were inconsistent with South Africa's interim Constitution.[10] In another ruling in the same year, the Court held that certain amendments to the Local Government Transition Act 209 of 1993 were unconstitutional.[11] This decision has been described as being "particularly significant" given that its effect was "to cause a postponement of the local government elections in [the Western Cape] province and in KwaZulu Natal".[12]

Recently, and amid much publicity, it was necessary for the Court to decide, in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (*Economic Freedom Fighters*),[13] whether President Jacob Zuma and the National Assembly had acted lawfully in respect of a report published by the Public Protector. The Court's unanimous ruling, that both had acted contrary to their constitutional obligations, is legally significant, even if its effect in political terms may be less immediate and more difficult to predict.

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3 The Constitution, sec 167(3)(a).
4 Id, sec 167(3)(b)(i) and (ii).
5 One of the Court's former judges has contended, however, that it is an "advantage" for the Court to be able to confine itself to constitutional issues. See A Chaskalson "Judging human rights in South Africa" (1998) *European Human Rights Law Review* 181 at 184.
6 The Constitution, sec 167(3)(c).
7 It has been noted that the Court has exercised this "strong form of judicial review" frequently, "on average five times a year since 1994"; see K O'Regan "Text matters: Some reflections on the forging of a new constitutional jurisprudence in South Africa" (2012) 75 *Modern Law Review* 1 at 1.
8 The Constitution, sec 42(1)(a) and (b).
9 See Mubangizi "Some reflections", above at note 1 at 516.
10 See *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).
11 See *Executive Council, Western Cape and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; (1995) 4 SA 877 (CC); 1995 (10) BCLR 1289 (CC).
12 See H Corder "South Africa's transitional Constitution: Its design and implementation" (1996) *Public Law* 291 at 306.
13 [2016] ZACC 11.

THE REPORT

The Office of the Public Protector is one of a number of "chapter nine institutions" provided for under the Constitution[14] that are designed to support constitutional democracy in South Africa.[15] Constitutional complaints are addressed in the first instance to these institutions rather than directly to the Court.[16] Under section 182 of the Constitution, the Public Protector has the power to investigate any government conduct that is alleged or suspected to be improper, to report on that conduct and to take appropriate remedial action.[17]

Additionally, the Public Protector has the power and functions prescribed by national legislation,[18] in particular the Public Protector Act 23 of 1994,[19] as amended.[20] In the exercise of her powers and functions, the Public Protector looked into allegations of improper conduct or irregular expenditure relating to security upgrades at the president's private residence (Nkandla homestead in KwaZulu-Natal province). She later concluded in a voluminous report[21] that a number of improvements to the residence (such as a visitors' centre, an amphitheatre and a swimming pool), which had been made at considerable public expense,[22] were not security features. Accordingly, since they would otherwise constitute undue benefit or unlawful enrichment to the president and his family, they were to be paid for by him. She therefore directed in her report that a range of remedial measures be taken, including that the president pay a reasonable percentage of the reasonable costs expended on the non-security features, and that he reprimand the

14 Others include the Commissions for Human Rights, Gender Equality and Electoral Matters. The Constitution provides for these in secs 184, 187 and 190–91 respectively.

15 As declared by the title of chap 9 of the Constitution. It has been observed that the provisions relating to the "chapter nine institutions" were "spelt out in some detail in the Constitution"; see Corder "South Africa's transitional Constitution", above at note 12 at 302. Although these remarks were made in relation to South Africa's interim or, as he prefers, "transitional" Constitution (the Constitution of the Republic of South Africa Act, 200 of 1993), they apply equally to the 1996 Constitution. South Africa's interim Constitution has been described as being "the bridge between apartheid and democracy"; see Chaskalson "Judging human rights", above at note 5 at 181.

16 See Chaskalson, id at 183–84.

17 The Supreme Court has described these three powers as being "complementary"; see *South African Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others* [2015] ZASCA 156, para 42.

18 See the Constitution, sec 182(2).

19 In *South African Broadcasting Corporation SOC Ltd*, above at note 17, the Supreme Court rejected the suggestion that the primary source of the Public Protector's powers was the act rather than the Constitution, since to hold otherwise "would have the effect of the tail wagging the dog" (para 43).

20 See the Public Protector Amendment Act, 113 of 1998.

21 Report no 25 of 2013/14 (19 March 2014).

22 By the time the Public Protector had concluded her investigation, R 215 million (approximately GBP 9.89 million) had been spent on the project and the total cost was forecast to be R 246 million (GBP 11.31 million); see id at 4.

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ministers involved in the project.[23] A copy of the report was also submitted to the National Assembly in the light of its constitutional obligations[24] to hold the president to account. Crucially however, neither the president nor the National Assembly did what they were required to do in terms of the remedial action. Instead, the National Assembly ultimately passed a resolution exonerating the president from the liability determined by the Public Protector. Accordingly, the actions or inactions of these key constitutional actors were challenged by two of the minority political parties in the National Assembly.[25]

It is evident from this necessarily brief statement of the background to the case that the Court was confronted by a range of important constitutional issues. These included: whether it had exclusive jurisdiction to hear the application by the Economic Freedom Fighters; the legal effect of the remedial action required by the Public Protector; and the nature of the National Assembly's obligation to hold the president to account. In reaching decisions on these matters, it was necessary for the Court to interpret constitutional provisions that either expressly or by implication recognize and apply the doctrines of the rule of law and the separation of powers.[26]

JURISDICTION

This article only touches on the jurisdictional issue.[27] The Court is the "apex court" in South Africa and regards itself as "the ultimate guardian of the Constitution and its values".[28] Nevertheless, it recognizes that its exclusive

23 For further detail, see id, para 11.1.1–11.1.4, set out in the judgment in *Economic Freedom Fighters*, para 10.

24 Under the Constitution, secs 42(3) and 55(2).

25 At the time of writing, the 400 member National Assembly is dominated by the party of government, the African National Congress, which has 249 seats. The Democratic Alliance and the Economic Freedom Fighters are the next largest parties with 89 and 25 seats respectively. The remaining 37 seats are divided between ten political parties, including the Inkatha Party with ten seats and the African People's Convention with a single seat.

26 While the "rule of law" is expressly referred to in sec 1 of the Constitution as one of South Africa's founding values, "separation of powers" is not mentioned. It has been contended, however, that the doctrine is implicit in the Constitution; see, for example, the remarks of Langa CJ in *Glenister v President of the Republic of South Africa and Others* [2008] ZACC 19, para 28. In the earlier case of *In re: Certification of the Constitution of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), the Court noted that there is "no universal model of separation of powers" and that "there is no separation that is absolute"; rather, "the scheme is always one of partial separation" (paras 108–09).

27 It is recognized, however, that "uncertainty over jurisdictional issues" was a matter that "plagued the Constitutional Court in its early years and helped to undermine its image"; see L Berat "Constitutional Court profile: The Constitutional Court of South Africa and jurisdictional questions: In the interest of justice?" (2005) *International Journal of Constitutional Law* 39 at 74.

28 See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9, para 72.

jurisdiction in relation to matters such as whether Parliament or the president has failed to fulfil a constitutional obligation ought to be narrowly interpreted so as not to deprive other courts (such as the Supreme Court of Appeal) of their constitutional jurisdiction and the opportunity to "contribute to the further development and enrichment"[29] of South Africa's constitutional jurisprudence. However, since it was alleged that the president had personally failed to comply with the remedial action and uphold the Constitution, and that under the supreme law the office holder is "national pathfinder, the quintessential commander in chief of state affairs and the personification of this nation's constitutional project",[30] the Court had little difficulty in deciding that it did have exclusive jurisdiction to hear the case in accordance with section 167(4)(e) of the Constitution. For some this may come as no great surprise, especially those who have contended that the Court has on occasion been guilty of extending its jurisdiction beyond that laid down in the Constitution.[31] Nevertheless, even if the Court has in the past been guilty of creeping expansionism, on this occasion there can be little doubt that it was concerned with a matter that was self-evidently constitutional in nature. This observation is not undermined by the opinion expressed by Van der Westhuizen J in *Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* that "philosophically and conceptually it is difficult to conceive of any legal issue that is not a constitutional matter within a system of constitutional supremacy".[32] Rather, it is the case that a legal challenge that the conduct of the head of both the executive and the legislature is contrary to obligations laid down in the Constitution amounts to a constitutional matter par excellence.

REMEDIAL ACTION

As noted above, the Office of Public Protector is a creature of the Constitution rather than of ordinary law. In the judgment of the Court, the "carefully selected nomenclature alone, speaks volumes for the role meant to be fulfilled".[33] That role had previously been described by the Supreme Court as

29 *Economic Freedom Fighters*, para 32.

30 Id, para 20. For a judicial explanation of the nature of South Africa's "constitutional project", see the remarks of Mahomed J in *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC), para 262.

31 See, for example, CH Lewis "Reaching the pinnacle: Principles, policies and people for a single apex court in South Africa" (2005) 21 *South African Journal on Human Rights* 509; and J Lewis "The Constitutional Court of South Africa" (2009) 125 *Law Quarterly Review* 440.

32 [2006] ZACC 24, 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC), para 36. Cited in J Lewis, id at 456.

33 *Economic Freedom Fighters*, para 51. Given the role and functions of the Public Protector, in other legal jurisdictions the preferred nomenclature for the office tends to be "ombudsman" or "ombud", as noted in *South African Broadcasting Corporation SOC Ltd*, above at note 17, para 2. See also Chaskalson "Judging human rights", above at note 5

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involving guarding the guardians.[34] In the light of being "one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs",[35] the Court recognized that the Public Protector's power to take appropriate remedial action was wide and encompassed some remedial measures, such as mediation, conciliation or negotiation, that may have limited legal effect in that those to whom they were directed would merely need to give them proper consideration. In other cases however, depending upon the nature of the issues under investigation and the findings made, the remedial action may have a binding effect.[36] Through the use of an arboreal metaphor, the Court sought to emphasize that the Public Protector's power to take remedial action derived from the "supreme law", the Constitution, not an ordinary act of Parliament. Thus Mogoeng CJ opined that, "just as roots do not owe their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forbears into operational obscurity".[37]

Given that the South African constitutional order "hinges" on the rule of law, the Court was anxious to stress that those to whom remedial action applies are not at liberty simply to ignore it, since to do so would amount to taking the law into their own hands. Rather, if they object to it, they are entitled to bring a legal challenge before the courts, since "remedial action is always open to judicial scrutiny".[38] In the judgment of the Court:

> "The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else

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at 183. Before the 1996 Constitution, South Africa had an ombudsman in name as well as function; see the now repealed Ombudsman Act 118 of 1979.

34 See, for example, *South African Broadcasting Corporation SOC Ltd*, above at note 17, para 3.

35 *Economic Freedom Fighters*, para 52. The Public Protector was also described as being the "embodiment of a biblical David" taking on the Goliath of impropriety and corruption perpetrated by state officials, and as one of the "true crusaders and champions of anti-corruption and clean governance": ibid.

36 For, as Mogoeng CJ pointed out, "if compliance with remedial action were optional, then very few culprits, if any at all, would allow it to have any effect"; see *Economic Freedom Fighters*, para 56. In a similar vein, the Supreme Court had previously remarked that it was "naïve to assume that organs of State and public officials, found by the Public Protector to have been guilty of corruption and misfeasance in public office, will meekly accept her findings and implement her remedial measures"; see *South African Broadcasting Corporation SOC Ltd*, above at note 17, para 44.

37 *Economic Freedom Fighters*, para 64.

38 Id, para 71.

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> approach courts of law to set them aside, so we may validly escape their binding force".[39]

Since the remedial action against the president was binding and because it required him to take "concrete and specific steps",[40] such as the payment of money, the Court considered that he was entitled to challenge the Public Protector's report through the judicial process. Like any other citizen of the republic, he was not compelled simply to follow the dictates of the Public Protector's report where he had reservations about its findings or the remedial action that it prescribed. Absent a court challenge, however, the only course of action available to him had been to comply. Being absolved from liability by resolution of the National Assembly had therefore been an unconstitutional approach to take. The non-compliance with the remedial action had persisted until the present applications were launched, at which stage the president circulated draft orders to both the Court and the parties indicating his intention to comply.[41] By this time, however, the Court considered that his "substantial disregard for the remedial action" signified a failure on his part "to uphold, defend and respect the Constitution as the supreme law of the land",[42] as required by section 83(b) of the Constitution. Moreover, as an organ of the state, he had failed to fulfil his constitutional obligation to ensure "the independence, impartiality, dignity and effectiveness" of the Public Protector.[43] While the Court accepted that the president may have acted in good faith in the sense that he had followed incorrect legal advice, it felt that this did "not detract from the illegality of his conduct".[44] As Mogoeng CJ explained, the president "was the subject of the investigation and is the primary beneficiary of the non-security upgrades and thus the only one required to meet the demands of the constitutionally-sourced remedial action".[45]

The Court's conclusion that the president had acted unlawfully was, of course, confined to the issue of his failure either to take the remedial action prescribed by the Public Protector, or to challenge it before the courts. The

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39 Id, para 75.
40 Id, para 77.
41 Id, para 14.
42 Id, para 83.
43 See the Constitution, sec 181(3).
44 *Economic Freedom Fighters*, para 83. In a leading English case, *M v Home Office* [1994] 1 AC 377, a unanimous House of Lords reached a similar conclusion when it held that, although the home secretary had acted on incorrect legal advice when failing to comply with a court order, this did not absolve him from being found in contempt of court while acting in his official capacity. As Lord Templeman observed (at 395), "the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War".
45 *Economic Freedom Fighters*, para 35.

present proceedings[46] were not concerned, therefore, with the veracity of her report's findings or the reasonableness of the remedial action she had prescribed. In terms of the separation of powers, the ruling against President Zuma illustrates very well the independent and impartial judicial branch of government holding the head of the executive and of the state to account. As Langa CJ put it in the earlier case of *Glenister v President of the Republic of South Africa and Others*, "it is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds".[47] In *Economic Freedom Fighters* itself, Mogoeng CJ observed rather more dramatically that, "constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck".[48] In this particular instance, the Court wielded that sword against both the president and the third branch of government, the legislature.

Parliament was described by the Court as being the "embodiment of the centuries-old dreams and legitimate aspirations of all our people", and the "voice of all South Africans, especially the poor, the voiceless and the least-remembered".[49] The chief justice continued:

> "It is the watchdog of state resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office."[50]

46 In the past, the Court has been criticized for the often lengthy delays between hearing a case and handing down its judgment, even in relation to urgent matters; see Lewis "The Constitutional Court", above at note 31 at 465–66. On this occasion, however, the gap between the hearing and judgment dates (9 February 2016 – 31 March 2016) was relatively modest and certainly a long way below the annual averages identified by Lewis in the period 2005–08 (177, 142, 167 and 159 days respectively).

47 See [2008] ZACC 19, para 33.

48 *Economic Freedom Fighters*, para 1.

49 Id, para 22. It has been argued that the Court's jurisprudence sometimes betrays an "atavistic sentimentality", in that judgments contain phrases designed to accord prominence to the values of dignity, equality and freedom as set out in the preamble and sec 1 of the Constitution; see Lewis "The Constitutional Court", above at note 31 at 442. While the evidence that Lewis adduces would seem to support the claim, on this occasion however it might be argued that at worst the phrases used merely signify a propensity to rhetorical flourishes rather than something more misguided.

50 *Economic Freedom Fighters*, para 22.

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A number of these propositions reflect the obligations imposed upon the National Assembly by the Constitution itself.[51] The fact that Mogoeng CJ identified them before noting that "parliament also passes legislation with due regard to the needs and concerns of the broader South African public"[52] might suggest that the Court regards Parliament's scrutiny role as more important than its law-making role. Moreover, it is not only the order in which the remarks were made but also their tone that might be interpreted as signifying the secondary importance of the legislative function. Alternatively, and more compellingly, however, it may be argued that this is to read too much into what was said. The priority accorded to Parliament's scrutiny role may simply be due to the fact that, in the circumstances of *Economic Freedom Fighters*, this role was central to the proceedings whereas its legislative role was not. The reference to the latter role may simply be regarded, therefore, as a further example of the Court making a "supererogatory" statement.[53]

The Court accepted that the National Assembly had been entitled to satisfy itself as to the correctness of the Public Protector's findings and the appropriateness of the remedial action, before seeking to hold the president to account in accordance with its own obligations under sections 42(3) and 55(2) of the Constitution,[54] and that "the mechanics how to go about fulfilling those constitutional obligations is a discretionary matter best left to the National Assembly".[55] Nevertheless it made clear that the judiciary does have a role to play in the present context. This consists of determining "whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations".[56] Thus, while the Court was mindful of the need for it to be "on high alert against impermissible encroachment on the powers of the other arms of government",[57] adherence to the separation of powers doctrine imposed reciprocal obligations on each branch of government.[58] In the present case therefore, the National Assembly's attempt to set aside the Public Protector's findings and remedial action[59] amounted to

51 See, in particular, sec 55(2)(a) and (2)(b)(i).

52 *Economic Freedom Fighters*, para 22.

53 It has been suggested that the Court has a "habit" of making such statements; see Lewis "The Constitutional Court", above at note 31 at 442.

54 In the judgment of the Court, receipt of the Public Protector's report by the National Assembly "effectively operationalised the House's obligations in terms of sections 42(3) and 55(2) of the Constitution"; see *Economic Freedom Fighters*, para 44.

55 Id, para 93.

56 Id, para 83.

57 Id, para 93.

58 This relationship is sometimes expressed in terms of "comity". Thus, in *Economic Freedom Fighters* itself, Mogoeng CJ spoke (id, para 19) of it being "necessary to preserve the comity between the judicial branch and the executive and legislative branches of government".

59 This followed the National Assembly's establishment of two ad hoc committees of its members, both of which produced reports exonerating the president from liability for the improvements to his private residence.

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the usurpation of the "authority vested only in the Judiciary",[60] and a failure to scrutinize the president's conduct contrary to section 42(3) of the Constitution. Its resolution was accordingly "inconsistent with the Constitution and unlawful".[61]

DISCUSSION

The ruling in *Economic Freedom Fighters* has been the catalyst for presidential contrition and an impeachment motion in the National Assembly. Thus, in a live television address broadcast on Friday 1 April 2016,[62] President Zuma issued a carefully worded apology in respect of a matter which had "caused a lot of frustration and confusion". Although there had been some speculation that he might resign, he instead declared his respect for the Court's judgment and his intention to abide by it. In mitigation, he claimed to have acted in "good faith" and to have "never knowingly and deliberately set out to violate the Constitution". Moreover, he declared that "any action that has been found not to be in keeping with the Constitution happened because of a different approach and different legal advice".[63]

The following Tuesday (April 5), the National Assembly debated a motion moved by the Democratic Alliance Party that sought to remove President Zuma from office. Under section 89 of the Constitution, a South African president may only be removed on the basis of one of three grounds: a serious violation of the Constitution or of the law; serious misconduct; or an inability to perform the functions of office. For removal to take place however, it is necessary that the resolution is passed by at least two thirds (ie 267) of National Assembly members.[64] Given the political strength of the African National Congress (ANC) in the chamber,[65] it came as no surprise that the number of votes in favour of the motion (143) fell a long way short of the required majority. Thus it would appear that a president who "has been described as the quintessential escape artist"[66] has survived a further attempt to challenge his conduct and integrity.[67] For how long he will remain in office remains

60 *Economic Freedom Fighters*, para 94.

61 Id, para 99.

62 The day after the Court handed down its judgment.

63 The quotes in this summary of President Zuma's broadcast are taken from an online report on the BBC News website; see "South Africa's Jacob Zuma 'sorry' over Nkandla scandal", available at: <http://www.bbc.co.uk/news/world-africa-35943941> (last accessed 6 April 2017).

64 The same high threshold also applies in respect of a National Assembly resolution to remove the Public Protector from office; see the Constitution, sec 194(2)(a).

65 As explained in note 25 above.

66 See "South Africa's Jacob Zuma 'sorry'", above at note 63.

67 Since *Economic Freedom Fighters* was decided, the High Court in Pretoria has held that the decision by the national director of public prosecutions not to prosecute Jacob Zuma in respect of corruption charges in 2009 (shortly before he became president) was irrational; see *Democratic Alliance v Acting National Director of Public Prosecutions and*

to be seen. Under the Constitution, a president is able to serve a maximum of two terms. If, however, the president is elected during the course of a Parliament because a vacancy has arisen, the period between his appointment and the next presidential election does not count as a term.[68] In the case of President Zuma therefore, since he assumed office on 9 May 2009, it follows that he may remain president until 2019.[69] Whether or not he does will largely depend upon the success of his party in a future general election, the political support he enjoys within the ANC and how the National Assembly votes when it next elects a president.[70]

Of course, it should not be forgotten that, in addition to finding in *Economic Freedom Fighters* that the president had acted in contravention of the Constitution, the Court reached a similar conclusion in relation to the National Assembly. Its response to the ruling is also of interest in that, although there were signs of contrition, there were also elements of self-justification not dissimilar to those advanced by President Zuma. Thus, in a statement, the speaker of the National Assembly expressed gratitude to the Court for having provided "guidance" and "legal certainty" regarding the status of the reports produced by chapter nine institutions and the recommendations made in them.[71] The clear tenor of the remarks was that the National Assembly acted as it did due to the uncertain legal position at the relevant time. Presumably the "different legal advice" referred to by President Zuma in his television broadcast relates to essentially the same point: that both institutions acted as they did due to an innocent misunderstanding regarding the binding nature of the remedial action specified in the Public Protector's report. While they had been advised that they were under no legal duty to act upon it, the Court's ruling had now clarified that they had been under such an obligation. Expressed thus, the failings of both the president and the National Assembly seem less egregious. However, before they are absolved from responsibility, it is necessary to consider whether the legal position was really quite as uncertain as they claimed. In other words, was the legal advice upon which they acted reasonable in the circumstances, or might reference to it simply be a means of deflecting criticism from their own conduct?

The leading case on the legal status of remedial action prescribed in a report by the Public Protector is the Supreme Court decision in *South African*

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Others, case no 19577/2009, 29 April 2016. The charges, which relate to government arms deals, may well be reinstated if there is no appeal against the High Court's ruling.

68 See the Constitution, sec 88(2).

69 The National Assembly is elected for a term of five years; see id, sec 49(1).

70 Id, sec 86(1) provides for the National Assembly to elect a president from among its members.

71 "Nkandla final report in Parliament at 2pm" (13 November 2014) *eNews Channel Africa*, available at: <http://www.enca.com/south-africa/catch-it-live-nkandla-final-report-parliament> (last accessed 10 May 2017).

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Broadcasting Corporation SOC Ltd and Others v Democratic Alliance and Others.[72] For present purposes the facts of the case are not especially important. What does matter, however, is that both the state broadcaster and successive holders of the post of minister of communications in the South African government behaved as if they were entitled to disregard the Public Protector's remedial measures, and instead institute a parallel procedure of their own that effectively amounted to self-determination of the allegations made against the broadcaster. The ministers were complicit in that they endorsed decisions reached by the broadcaster's governing body that ran contrary to the remedial measures. In the judgment of the Supreme Court, the Public Protector's findings could not "simply be displaced by the SABC's own internal investigation".[73] Rather, if the state broadcaster was aggrieved by her findings, "its remedy was to challenge that by way of a review".[74] It followed, therefore, that, absent a legal challenge, they had been obliged to comply with the remedial measures. In an important passage, the Supreme Court observed:

> "The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of s.182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation".[75]

These remarks confirm that the authority of the Public Protector to impose remedial action is derived from the express wording of the Constitution itself. They also make clear that, if the Public Protector did not have the power to impose legally binding remedial measures, the watchdog role that she performs would be rendered nugatory. Although the text of the Constitution does not expressly address the point, it is a perfectly reasonable inference to draw. Thus, although the first instance judge thought otherwise when the case was heard in the Western Cape Division of the High Court,[76] it is overstating the case to suggest that the decision of Schippers J created the legal uncertainty to which President Zuma and the National Assembly both referred. A more compelling counter argument is that Schippers J's interpretation of section 182(1)(c) suited the purposes of both parties, even though it was clearly at

72 [2015] ZASCA 156.
73 Id, para 47.
74 Ibid.
75 Id, para 52.
76 See *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* (2015) (1) SA 551 (WCC).

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odds with a purposive and contextual construction of the provision.[77] Any uncertainty that Schippers J's judgment may have created was dispelled by the Supreme Court's decision on appeal. Since that decision was handed down on 8 October 2015, it is fair to suggest that, by the time of the Court hearing in *Economic Freedom Fighters*, the respondents were well aware of the fact that they had not been legally entitled to disregard the Public Protector's remedial action.

The decision in *Economic Freedom Fighters* thus confirms that, where the Public Protector's remedial measures are binding, state organs have two potential courses of action available to them. Either they can comply with the measures, thus signifying their acceptance of the Public Protector's findings and the reasonableness of what they are required to do, or they can bring a legal challenge before the courts. What they are not permitted to do is disregard the remedial measures and instead institute their own procedures for dealing with the allegations against them. Had the Court accepted that this lay within the scope of the available options, it would have completely undermined the authority of the Public Protector and would have established a precedent that would soon be followed. In short, the floodgates would have been well and truly opened. More fundamentally, such a ruling would have signified that, in the eyes of the judiciary, the president and the legislature were entitled to behave as if they were above the law. As Lord Denning once observed however, "be you never so high, the law is above you".[78] Although the Court did not refer to these words in *Economic Freedom Fighters*, its judgment conveys essentially the same message to the president and the National Assembly. It also illustrates the constitutional legitimacy of the Court, and the valuable role it is able to play in a youthful democracy where one political party has rapidly attained a position of near complete dominance.

The former Lord Chancellor, Lord Hailsham, once famously described the UK system of government as being an "elective dictatorship".[79] By this he

77 As Mogoeng CJ pointed out in *Economic Freedom Fighters* (para 66), "the language, context and purpose of sections 181 and 182 of the Constitution give reliable pointers to the legal status or effect of the Public Protector's power to take remedial action". It has been noted that, whereas the mode of constitutional interpretation in South Africa was literal and textual before 1993, since then it has been contextual and purposive; see R Matemba "Judicial activism: Usurpation of Parliament's and executive's legislative functions, or a quest for justice and social transformation" (2011) 13 *European Journal of Law Reform* 277 at 289.

78 *Gouriet v Union of Post Office Workers* [1977] 1 All ER 696 at 718. Lord Denning was in fact quoting the words of Thomas Fuller uttered more than 300 years earlier. The then Master of the Rolls had cause to rely upon them in a case concerning a trade union boycott of postal communications between the UK and South Africa that raised the issue of whether the Attorney General had been entitled to refuse to consent to a relator action.

79 See Lord Hailsham *The Dilemma of Democracy: Diagnosis and Prescription* (1978, Collins) at 126.

meant that electoral success virtually guaranteed the party of government the ability to control the legislature and hence secure the enactment of its favoured policies. Modern-day South Africa may be similarly described.[80] Accordingly, at a time when the legislative branch of government has shown itself unwilling to comply with its constitutional obligation to hold the executive branch to account, it is incumbent on judges to have the courage, conviction and independence to reach decisions like that in *Economic Freedom Fighters*. The political ramifications of the Court's decision may not be on a par with those that followed *Zuma v National Director of Public Prosecutions*,[81] where the judgment of Nicholson J "was at least the proximate cause of [President Thabo] Mbeki's recall and resignation".[82] Nevertheless, the legal ramifications are significant, as this discussion has sought to illustrate. In complying with its duty pursuant to section 172(1) of the Constitution, the Court has issued an important reprimand to both the president and the National Assembly by reminding them that they are also bound to act in accordance with the Constitution and the rule of law. Additionally, it has underlined the legal position regarding the status of binding remedial action prescribed by the Public Protector, thereby confirming that this chapter nine watchdog has teeth.[83] Under the apartheid regime, where the supremacy of Parliament held sway,[84] court decisions provided little protection against laws,[85] regulations and executive conduct that were the antithesis of a rights-focused[86]

80 Writing in 2005, Berat contended that the ANC "rules a de facto one-party state with some democratic features"; see Berat "Constitutional court profile", above at note 27 at 75. The decade that has followed does not provide any meaningful evidence to contradict this view.

81 [2008] ZAKZHC 71; [2009] 1 All SA 54 (N).

82 See J Klaaren and T Roux "The Nicholson judgment: An exercise on law and politics" [2010] *Journal of African Law* 143 at 144.

83 It has previously been noted that there is a perception in South Africa that the chapter nine institutions are "toothless watchdogs"; see Mubangizi "Some reflections", above at note 1 at 522.

84 In *Sachs v Minister of Justice* [1934] AD 11, Stratford CJ explained (at 37) that the relationship between the legislature and the courts was such that "Parliament may make any encroachment it chooses upon the life, liberty or property of any individuals subject to its sway … and it is the function of the courts of law to enforce its will". The quote is referred to by K O'Regan in "Breaking ground: Some thoughts on the seismic shift in our administrative law" (2004) 121 *South African Law Journal* 424 at 424 and by A Chaskalson in his address to the Cape Law Society "The rule of law: The importance of independent courts and legal professions" (9 November 2012), available at: <http://www.constitutionalcourt.org.za/site/judges/justicearthurchaskalson/20121113093201600.pdf> (last accessed 6 April 2017).

85 The "main pillars of apartheid" were the Natives Land Act No 27 of 1913, the Group Areas Act No 36 of 1966, the Population Registration Act No 30 of 1950 and the Bantu Education Act No 47 of 1953; see Berat "Constitutional Court profile", above at note 27 at 41.

86 For some, repressive and discriminatory laws may still be said to be compliant with the rule of law provided that they have been enacted following the correct procedures and that those who apply them act within the scope of their powers. See, for example, J Raz

formulation of the rule of law.[87] Under the new South African legal order, however, where supremacy has been transferred from the legislature to the Constitution and where the courts have been accorded a central role in checking the abuse of power, the decision in *Economic Freedom Fighters* marks an important milestone in the journey towards a society that embraces the values of democracy, human dignity, equality and freedom.

contd
"The rule of law and its virtue" in J Raz *The Authority of Law: Essays on Law and Morality* (1979, Oxford University Press) 210 at 211 and 221. For others, however, adherence to the rule of law embraces the substantive as well as the formal, in particular the protection of human rights; see, for example, T Bingham *The Rule of Law* (2010, Allen Lane) at 66–67 and J Steyn "Democracy, the rule of law and the role of judges" [2006] *European Human Rights Law Review* 243 at 245.

87 See S Kentridge "Parliamentary supremacy and the judiciary under a Bill of Rights: Some lessons from the Commonwealth" (1997) *Public Law* 96 at 105.