

The Remedial Action of the "State of Capture" Report in Perspective

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Date published

10 July 2017

Editor Prof Christa Rautenbach

How to cite this article

Wolf L "The Remedial Action of the
"State of Capture" Report in
Perspective" *PER / PELJ* 2017(20)
- DOI

<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1687>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1687>

Abstract

In the State of Capture report the public protector instructed the president to appoint a commission of inquiry to investigate the capture of state institutions by the Gupta family. The president and his family are personally implicated and due to a conflict of interests, the public protector limited both his choice of a commissioner to conduct the inquiry and the power to specify certain terms of reference. In the *Economic Freedom Fighters*, the Constitutional Court ruled that the public protector's remedial action is legally binding and must be executed by the state organs concerned. President Zuma challenges the remedial action on the basis that it is the sole prerogative of the head of state under section 84(2)(f) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) to appoint commissions of inquiry and that it is an unfettered discretionary power, which may not be limited. It is not only doubtful whether the responsibility to appoint commissions of inquiry is invariably a discretionary power; it is also doubtful whether the president has an unfettered discretion. In the case of a conflict of interest the president would in any event be barred from taking a decision in terms of the *nemo iudex maxim* if the decision could be tainted by bias. The difficulty is that section 90 of the *Constitution* does not regulate the *ad hoc* exercise of section 84(2) powers by another state organ when the president should recuse himself from taking a decision. The limitations imposed by the public protector in regard to the commission of inquiry appear to be the best solution under the circumstances.

Keywords

Public protector; commission of inquiry; remedial action; public protector; *nemo iudex maxim*; State of Capture.

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1 Introductory comments

President Zuma has challenged the validity of the remedial action that the former Public Protector, Advocate Madonsela, prescribed in her *State of Capture* report. The key issue is how to reconcile the powers of the public protector to take remedial action under section 182(1)(c) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) with the powers of the respective state organs that should execute the remedial action, *in casu*, the appointment of a commission of inquiry into the alleged capture of state institutions by the Gupta family. A second aspect is how best to avoid biased decisions by the president, since he is personally implicated. In terms of the *nemo iudex* maxim, a state official must recuse himself from taking decisions when a conflict of interest arises. The difficulty is that section 90 of the *Constitution* provides for other state organs to take over functions of the president as head of state only in an acting capacity and for a specified period, not on an *ad hoc* basis.

2 The *State of Capture* report in a nutshell

Allegations of corruption, irregularity and personal enrichment are widespread and run deep: that is the over-riding message contained in the 350-plus pages of the *State of Capture* report. The report documents the involvement of the Gupta family in the appointment and dismissal of ministers and directors of state-owned enterprises (SOEs) resulting in the improper and corrupt award of state contracts and benefits to the Gupta family's business empire. Members of cabinet, a former cabinet minister and other persons testified that the Gupta family offered bribes and/or posts in exchange for certain benefits. The president and/or his family members were either present or facilitated the meetings. The evidence presented by the public protector is too extensive to set out all the details here.¹

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¹ Public Protector 2016 http://www.pprotect.org/library/investigation_report/2016-17/State_Capture_14October2016.pdf (*State of Capture Report*) 14-23, 45-283. The report referred to several instances where the Guptas tried to influence cabinet appointments or dismissals, *inter alia* that of former finance minister Nene, former deputy finance minister Jonas, and former public enterprises minister Hogan. Ms Mentor testified that the Guptas offered her Hogan's position in exchange for favours. The report chronicles how Molefe, a Gupta protégée, was first appointed as a CEO of Transnet and then moved to Eskom as CEO to do their bidding. He and the mineral resources minister, Zwane, exerted pressure to force Glencore Plc to sell its Optimum

It appears that the *State of Capture* report was initially intended to be released as a preliminary report or as a report on the first phase of the investigation.² Two factors played a role in Madonsela's taking the decision to declare the report final and to sign it off on 14 October 2016.³ First, she had a specific time frame in which to report: the Executive Members' Ethics Act 82 of 1998 obliges her to investigate any alleged breach of the Executive Ethics Code and thereafter, within 30 days, to submit a report to either the President or the Premier, depending on the nature of the complaint.⁴ Secondly, Advocate Mkhwebane, the incoming public protector, had made public announcements about why she thought that the state capture probe could not be a priority once she was in office.⁵

It appears that the legal advisors of the public protector thought that if she only presented findings, it would be difficult to take the report on review.⁶ What was being produced was *prima facie* evidence of wrongdoing, and to review on that basis would be difficult. Due to time constraints, a lack of funds, and the legal manoeuvres of some of the implicated parties, including President Zuma, section 7(9) of the *Public Protector Act* 23 of 1994 could not be complied with.⁷ This section allows those against whom adverse findings will be made the opportunity to respond to all the allegations. It also allows an implicated person or his or her legal representative, through the public protector, to question other witnesses, as determined by the public

Coal operation to a company controlled by the Gupta family and the president's son Duduzane Zuma. The former deputy minister of finance, Jonas, testified that the Guptas offered him the post of finance minister and a bribe of R600 million provided that he would be co-operative and help them to attain their goal of increasing the amount of money they made from the state from R6 billion to R8 billion. He was expected to remove the director-general of the National Treasury and other key members of Executive Management.

² Marumoagae 2014 *De Rebus* 32 points out that there is no provision in the *Public Protector Act* 23 of 1994 that regulates the publication of preliminary findings.

³ Gallens 2016 <http://www.news24.com/SouthAfrica/News/madonsela-weighs-her-options-over-state-capture-report-interdict-20161013>.

⁴ Section 3(2) of the *Executive Members' Ethics Act* 82 of 1998.

⁵ Tmg Digital 2016 <http://www.heraldive.co.za/news/2016/10/06/new-public-protector-reveal-thulis-state-capture-probe-cant-priority>. After she took office the investigation grinded to a halt, and even after the #GuptaLeaks event revealed the massive scale of wrongdoing, she did not pursue the matter with much enthusiasm.

⁶ Vollgraaff et al 2016 <http://www.fin24.com/Economy/madonselas-regret-i-shouldve-been-harder-on-zuma-20161102-2>.

⁷ Rabkin 2016 <https://www.businesslive.co.za/bd/national/2016-10-26-state-capture-report-done-fairly>. President Zuma claimed that he had not been given enough time to respond to the allegations and maintained he had been told he was implicated only on October 2, 2016. It has been meticulously documented that Zuma was in fact offered an opportunity to make representations several times from March 2016. He failed to respond to 42 questions posed by Madonsela that also involved his son Duduzane and used delaying tactics not to give evidence.

protector.⁸ If adverse findings therefore had been made against anyone without complying with section 7(9), a court may have been persuaded to review and set aside the report on the basis that the public protector had not complied with her legal duties in compiling the report. The fact that the report does not make findings against any implicated person may therefore make it more difficult to persuade a court that the report should be reviewed and set aside.⁹ Madonsela admitted that the task to investigate the allegations of state capture was so huge that she could only scratch the surface.

On the eve of Madonsela's releasing the report, President Zuma applied for an urgent interdict to prevent the publication of the report. He wanted the investigation to be completed by Madonsela's successor, apparently in the hope that she would be less rigorous or might not pursue the probe any further.¹⁰ However, during the hearing he withdrew the application. On November 2, 2016 the Pretoria High Court ordered the release of the report.¹¹

A second report, published by academics in May 2017, documents how a Zuma-centred power-elite has managed to capture key state institutions to repurpose them in subverting the constitutional and legal framework. The report refers to it as a "silent coup" that created a mafia-like shadow state.¹² Corruption normally refers to a condition where public officials pursue private ends using public means. While corruption in the executive and public administration is wide-spread, state capture is a far greater systemic threat.

Hard on the heels of this report, an anonymous whistle-blower leaked between 100,000 and 200,000 emails from the Gupta network. The #GuptaLeaks indicate that the public protector's report revealed only the tip of the state capture iceberg. The emails show that the Gupta influence on

⁸ The *State of Capture Report* 13 lists the names of the persons to whom notices in terms of s 7(9) of the *Public Protector Act* were issued, *inter alia* Zuma, the Gupta brothers, and ministers Brown, van Rooyen and Zwane. All these notices were dispatched in October 2016.

⁹ De Vos 2016 <https://www.dailymaverick.co.za/opinionista/2016-11-03-can-zuma-use-the-law-to-avoid-the-consequences-of-madonselas-report/#.WVHwPOlpzyQ>.

¹⁰ Lowman 2016 <http://www.biznews.com/leadership/2016/10/13/zumas-last-ditch-effort-to-silence-madonsela-on-state-capture>.

¹¹ Evans 2016 <http://www.news24.com/SouthAfrica/News/zuma-withdrawal-catches-public-protectors-office-by-surprise-20161102>; Nicolaidis and Bateman 2016 <http://ewn.co.za/2016/11/02/public-protector-ordered-to-release-state-capture-report-by-5pm-today>.

¹² Swilling *et al* 2017 <http://markswilling.co.za/wp-content/uploads/2017/05/25052017-Betrayal-of-the-Promise.pdf>.

cabinet and other appointments is far more extensive and has been operative since May 2009, ie from the beginning of the first Zuma presidency. The Guptas boasted that they had made Zuma's son Duduzane a billionaire. They had also bought Zuma a R331 million mansion and helped his son to buy an R18 million luxury apartment in Dubai. The kickbacks they have received from state contracts run into billions of rands.¹³

3 The remedial action

The remedial action essentially entails that the public protector instructed the president to appoint, within 30 days, a commission of inquiry into "state capture". The public protector noted that the president has the power to appoint a commission of inquiry under section 84(2) of the *Constitution*. However, in the matter of the *Economic Freedom Fighters v Speaker of Parliament*, which concerned irregularities in the upgrades of the private residence of the president at Nkandla, he said that: "I could not have carried out the evaluation myself lest I be accused of being judge and jury in my own case".

Since the president is implicated in the state capture inquiry, Madonsela instructed that the chief justice should provide one name of a judge to the president to head the commission. The commission should be adequately funded by the treasury and be given powers of evidence collection that are no less than that of the public protector. The commission should complete its inquiry within 180 days and present the president with findings and recommendations. The president should submit a copy to parliament within 14 days of its release and inform parliament about his intentions regarding the implementation of the recommendations. The second aspect of the remedial action entails that parliament should review, within 180 days, the *Executive Members' Ethics Act* 82 of 1998 to provide better guidance regarding integrity, including the avoidance and management of conflict of interest. Finally, it was recommended that the National Prosecuting Authority (NPA) should investigate and prosecute possible breaches of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004 and the *Public Finances Act* 44 of 1998.¹⁴

¹³ Most information is available on the amaBhungane databank under "#GuptaLeaks: all the latest on the Gupta-Zuma scandal" (amaBhungane Reporter 2016 <http://amabhungane.co.za/article/2016-09-23-two-to-tango-the-story-of-zuma-and-the-guptas>).

¹⁴ *State of Capture Report* 24-26, 353-354.

In her report Madonsela stated that she had decided to direct that a judicial commission be set up to probe Zuma's relationship with the Guptas because the scope of the investigation was too extensive and had been hamstrung by an insufficiency of funds. At the outset of the investigation she had requested resources for a special investigation similar to a commission of inquiry overseen by the public protector. The justice department had made the funds available only in September and the allocated R1.5 million was completely insufficient.¹⁵ The funds seem meagre indeed, compared to the R40 million, subsequently increased to R137 million, which the department of justice made available to the Seriti commission to conduct an inquiry of a similar scale.¹⁶

The president was faced with the option of either complying with the remedial action within 30 days or challenging it. He opted for taking the remedial action on judicial review and launched an action in the Pretoria High Court to set the remedial action aside. He reportedly argues that the remedial action is unconstitutional and that the matter should be sent back to the new public protector for further investigation.¹⁷

The question is whether the president launched the action in the right jurisdiction. In a press statement issued by the presidency on 26 May 2017, he stated that the review challenge is aimed at clarifying and strengthening constitutional jurisprudence "on the roles of the Executive, the Judiciary and Chapter 9 institutions".¹⁸ The challenge therefore clearly entails a dispute about the demarcation of the powers of state organs, more specifically the head of state and the public protector, which falls in the exclusive jurisdiction of the Constitutional Court.¹⁹

4 The nature and scope of remedial action under section 182(1)(c)

¹⁵ *State of Capture Report* 353.

¹⁶ Department of Justice and Constitutional Development 2013 http://www.justice.gov.za/m_statements/2013/20130822-comms-funding.html; Heard 2016 <http://city-press.news24.com/News/the-r137m-price-tag-for-whitewash-arms-deal-report-20160524>.

¹⁷ Quintal 2016 <https://www.businesslive.co.za/bd/national/2016-11-25-zuma-to-take-madonselas-state-capture-report-to-court>.

¹⁸ Presidency 2017 <http://www.psppd.org.za/press-statements/president-zuma-not-opposed-establishing-commission-inquiry-%E2%80%9Cstate-capture%E2%80%9D>.

¹⁹ Section 167(4)(a) of the *Constitution*. The offices of the head of state and the public protector both fall within the scope of the definition of "state organs" in terms of s 239 para (b)(i) of the *Constitution*.

The Chapter 9 institutions were created to strengthen democracy and accountability. They are independent but accountable to the National Assembly.²⁰ On the one hand, the institutions therefore have to act as watchdogs, holding state organs (including legislative and executive bodies) accountable, and on the other, they are accountable to the Assembly.²¹ To ensure their independence, the institutions must be sufficiently funded.

Corder *et al* noted that some Chapter 9 institutions must be seen as complementary to Parliament's own oversight functions. They aid and support Parliament by providing it with information. With the complex nature of modern government, members of parliament often do not have the time and resources to investigate in depth, or because of party discipline do not have the political independence that is required to arrive at an impartial decision on a complaint. Hence, state institutions supporting constitutional democracy have been created to assist Parliament in its traditional functions.²² This is certainly true for the office of the public protector.

The public protector has been vested with constitutional powers to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.²³ The public protector may not investigate court decisions.²⁴ Implicit in that is that criminal investigations and prosecutions by the National Prosecuting Authority are *sub judice* and may also not be investigated. They fall in the exclusive competence of the prosecuting authority as part of the administration of justice.²⁵ There had been difficulties in the past where a public protector exceeded the scope of his powers in this regard.²⁶

²⁰ Section 181(2) and (5) of the *Constitution*.

²¹ De Vos "Role of Chapter 9 Institutions" 163.

²² Corder, Jagwanth and Soltau 1999 <http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf> para 7.1.2.

²³ Section 182(1)(a) of the *Constitution*.

²⁴ Section 182(3) of the *Constitution*.

²⁵ Section 179(2) and (4) of the *Constitution*.

²⁶ Public Protector 2005 http://www.gov.za/sites/www.gov.za/files/public_protector_0405.pdf (*Mushwana Report*) 31-34. Deputy President Zuma laid a complaint with the public protector in connection with a criminal investigation conducted against him relating to allegations of corruption in the arms deal in May 2004. The erstwhile public protector, Mushwana, found that the NPA had violated Zuma's rights to human dignity. The NPA objected in no unclear terms to the report, since the investigation of a *sub judice* matter did not fall within the scope of powers of the public prosecutor. See Monare 2006 <http://www.iol.co.za/news/south-africa/npa-questions-mushwanas-ambit-on-zuma-report-291587>.

There are no explicit limits to the kind of remedial action that could be ordered except that it must be "appropriate". As set out above, the remedial action of the public protector in the *State of Capture* report involved instructions to three different state organs: the president was tasked with appointing a judicial commission of inquiry, the Assembly with reviewing the *Executive Members' Ethics Act* to provide better guidance regarding integrity, including the avoidance and management of conflicts of interest, and the prosecuting authority with investigating and prosecuting possible breaches of criminal law. This does not imply that the public prosecutor is usurping their powers, because they must still take the remedial action by themselves.

In *Economic Freedom Fighters (EFF) v Speaker of the National Assembly*, the Constitutional Court ruled that section 182(1)(c) spells out that the public protector's power "to take appropriate remedial action" is legally binding and not merely a recommendation that can be ignored, nilly willy.²⁷ In the *Secure in Comfort* report the public protector instructed President Zuma to pay back a reasonable portion of the non-security upgrades to his private residence in rural KwaZulu-Natal, which instruction with the approval of the National Assembly, he did not comply with.²⁸ The Constitutional Court did not mince its words about that:²⁹

Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles. This is done not only to observe the constitutional values and principles necessary to ensure that the 'efficient, economic and effective use of resources [is] promoted', that accountability finds expression, but also that *high standards of professional ethics are promoted and maintained*. To achieve this requires a difference-making and responsive remedial action. Besides, one cannot really talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.

The court held that the National Assembly had a constitutional duty to scrutinize the president's conduct reported to it by the public protector, and was duty-bound to hold the president accountable in terms of section 55 by facilitating and ensuring compliance with the decision of the public protector.³⁰ Although the National Assembly was permitted to scrutinize the report of the public protector to determine the correctness of the report with

²⁷ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC) (hereafter *EFF v Speaker*) paras 50-52, 65, 72-79.

²⁸ *Secure in Comfort* Report paras 10.10.1.5-6.

²⁹ *EFF v Speaker* para 65 (emphasis supplied).

³⁰ *EFF v Speaker* para 97.

a view to having the report reviewed by a court,³¹ it was not permitted to substitute the report with its own findings.³²

The Court made clear that remedial action ordered by the public protector has to be executed by the relevant state organs in terms of the constitutional powers allocated to them. This implies that the public protector's powers under section 182 of the *Constitution* must be interpreted in a way that would harmonise her powers with the powers of other state organs. In *Matatiele* the Constitutional Court emphasised that the provisions of the *Constitution* must be construed purposively and should not be interpreted in isolation.³³

One can therefore make a strong case that just as the Assembly was obliged to hold the president accountable in terms of the powers under section 55 of the *Constitution*, the prosecuting authority should be notified when in the opinion of the public protector the facts of an investigation disclose the commission of an offence. In fact, the *Public Protector Act* obliges the public protector to do so.³⁴ Despite criminal charges having been laid, not much has come of these "state capture" investigations. This is partly due to the *de facto* executive control of the prosecuting authority, and partly to the unclarified constitutional status of the prosecuting authority in relation to its functional and structural independence from the executive.³⁵

³¹ *EFF v Speaker* paras 85–87.

³² In *EFF v Speaker* paras 98–99 the court held: "[T]here was everything wrong with the National Assembly stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and 'remedial action'. This, the rule of law is dead against. *It is another way of taking the law into one's hands and thus constitutes self-help ...* By passing that resolution the National Assembly *effectively flouted its obligations*. Neither the President nor the National Assembly was entitled to respond to the binding remedial action taken by the Public Protector as if it is of no force or effect or has been set aside through a proper judicial process. The ineluctable conclusion is therefore that the National Assembly's resolution based on the minister's findings *exonerating the President from liability is inconsistent with the Constitution and unlawful*." (Emphasis supplied.)

³³ In *Matatiele Municipality v President of the RSA* 2007 6 SA 477 (CC) para 36, Ngcobo J quoted a judgment of the German Federal Constitutional Court (BVerfGE 1, 14) and held that: "Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it "has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate". Individual provisions of the Constitution cannot therefore be considered and construed in isolation. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole".

³⁴ Section 6(4)(c)(i) of the *Public Protector Act* 23 of 1994.

³⁵ The difficulties currently being experienced in containing corruption in the public administration can be attributed to the dissolution of the prosecuting authority's own independent forensic unit (the "Scorpions") and to the fact that the executive subjects

Similarly, one can argue that when the public protector notices that a particular investigation is too extensive and would need substantial funding, she could require that the head of state should appoint a commission with sufficient funding to conduct an in-depth inquiry. In terms of the powers conferred upon the public protector under section 6(4)(c)(ii) of the *Public Protector Act*, Madonsela had the competence, at any time prior to, during or after the investigation, if she deemed it advisable to do so, to refer the matter to an appropriate public body to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or to make any other appropriate recommendation he or she deemed expedient. A judicial commission of inquiry into executive malfeasance would be an appropriate public body *in casu*. It therefore seems that Madonsela acted within the limits of her constitutional and statutory powers. It is not for the president to determine what remedial action is or is not appropriate.

There have been difficulties in the past in ensuring the independence of Chapter 9 institutions insofar as they should be sufficiently funded.³⁶ One difficulty is that their budgets are not allocated by Parliament or directly by the treasury but by government departments.³⁷ The justice department handles the budget of the public protector, and as we have seen in the case of the "state capture" investigation, the extra funding that was requested was allocated only after a long delay and was completely insufficient. This certainly hampered the capacity of the public protector to conduct the investigation as extensively as she would have liked to within the available timeframe.

Dube rightly argues that given the time frames and sheer volume of the investigations to be conducted, there has been insufficient time to make

prosecutors to undue control. The executive cannot give orders to prosecutors – neither in a Westminster system, nor in a constitutional state. In the Westminster system, prosecutors are functionally independent from the executive and cabinet ministers must abide by the doctrine of independent aloofness. In a constitutional state, prosecutors are both functionally and structurally independent from the executive. See Wolf 2015 *Administratio Publica* 32-35. The nature of their powers is not executive and they are not constitutionally mandated to take administrative action. That falls in the exclusive domain of the executive (s 85(2)(a) of the *Constitution*). Prosecutors enforce criminal law, and that falls in the domain of the administration of justice. See Wolf 2011 *TSAR* 703-729. Thus, they are grouped together with the judiciary as a second organ in the third branch of state power (the judicature), which is responsible for the administration of justice under Chapter 8 of the *Constitution*. See Wolf 2015 *Administratio Publica* 36-49. The status of the prosecuting authority and nature of its powers are in urgent need of clarification by the Constitutional Court.

³⁶ *Independent Electoral Commission v Langeberg Municipality* 2001 9 BCLR 883 (CC).

³⁷ De Vos "Role of Chapter 9 Institutions" 166-168.

binding remedial findings which would have withstood the scrutiny of the courts. The *State of Capture* report therefore does not make specific findings but rather recommends the appointment of a commission of inquiry that is properly funded. The commission of inquiry would then be a judicial fact-finding mission of a very high level of competency, based on the *State of Capture* report's *prima facie* assessments. Given further the circumstances in which the *State of Capture* report was compiled, there is a need for the commission of inquiry to bring to finality the investigations conducted by the erstwhile public protector. It is well known that her term of office ended on 14 October 2016 and that she was bound by the time-frame of the *Executive Members' Ethics Act*.³⁸ In the light of the Constitutional Court's views on the public protector's powers, the President would probably have to show why, given the *State of Capture* report, it is not rational to appoint a commission of inquiry.

There are certainly implicit constitutional limits to the kind of remedial action that can be ordered. The remedial action directed at the National Assembly in the *State of Capture* report, compared to the remedial action ordered by Madonsela's successor in the *Bankorp* matter, illustrates the point. Madonsela noted shortcomings in the *Executive Members' Ethics Act*, which made it difficult for the public protector to exercise her powers, and requested a review of the Act to provide better guidance regarding integrity, including the avoidance and management of conflict of interests. This falls within the constitutional scope of the powers of Chapter 9 institutions, insofar as section 181(3) of the *Constitution* obliges other state organs to assist them "through legislative and other measures" to ensure the impartiality and effectiveness of the exercise of their functions. Madonsela was careful not to instruct Parliament to amend the Act.

Mkhwebane, however, told the Chairperson of the Portfolio Committee on Justice and Correctional Services of the National Assembly that he or she "*must* initiate a process that *will* result in the amendment of section 224 of the *Constitution*".³⁹ In other words, she invoked remedial powers of the public protector to enforce a constitutional amendment of the powers of the Reserve Bank.⁴⁰ The primary task of the latter is to manage currency

³⁸ Dube 2016 <http://www.politicsweb.co.za/news-and-analysis/did-the-state-of-capture-report-usurp-the-president>.

³⁹ Para 7.2.1. of the *Bankorp Report* (Public Protector 2017 http://www.pprotect.org/library/investigation_report/2016-17/Report%20of%202017&2018%20Public%20Protector%20South%20Africa.pdf).

⁴⁰ Sections 224(1) and 225 of the *Constitution*.

stability in the interest of balanced and sustainable economic growth and to function as a lender of last resort, which task she ordered to be amended so that the Reserve Bank would be a state bank that nationalises the currency to create money. The audacity of the remedial action leaves one speechless. It reflects a gross misconception of the powers of the public protector. A constitutional amendment is a very serious matter and must be well considered. The *Constitution* has therefore conferred the sole prerogative to amend the *Constitution* upon the National Assembly, and the latter must adhere to the extraordinary procedures prescribed by section 74. It does not fall within the scope of the Chapter 9 institutions to order a constitutional amendment: they are "subject to the Constitution and the law".⁴¹ Mkhwebane therefore has to operate within the framework of the *Constitution* as it is.⁴² There are other disturbing aspects of the remedial action she ordered, which reveals a serious lack of understanding of the law.⁴³ It certainly makes her fitness for the office questionable.

5 The responsibility for appointing commissions

Two issues are relevant in the context of the president's challenge of the remedial action: the first is whether the responsibility of the head of state to appoint commissions of inquiry is invariably a discretionary power, and

⁴¹ Section 181(2) of the *Constitution*.

⁴² De Vos 2016 <https://www.dailymaverick.co.za/opinionista/2016-11-03-can-zuma-use-the-law-to-avoid-the-consequences-of-madonselas-report/#.WVHwPOlpzyQ>.

⁴³ She ordered the Special Investigation Unit (SIU) to approach President Zuma to reopen the recovery of interest, following the financial assistance of the Reserve Bank to the banking group Bankorp over the period 1985 to 1995 as recommended by the CIEX report (1997). In 2000 a panel of experts lead by Judge Dennis Davis found that the Reserve Bank acted *ultra vires*, but that it was not feasible to pursue the matter due to difficulties pertaining to the quantification of the alleged enrichment of the legal successors of the Bankorp group and the identity of the beneficiaries. The Mbeki government followed the panel's advice. The complaint about the government's failure to implement the recommendations of the CIEX report was lodged only in 2010. In terms of s 6(9) of the *Public Protector Act*, the public protector was barred from investigating the complaint, since it was not reported within two years. Any claims to recover the debt have also prescribed, which makes the remedial action even more irrational.

second, whether the power is an unfettered discretion. Other aspects of the challenge will also be discussed briefly.

5.1 The challenge of the president

Reportedly, the president is challenging the remedial action on the basis that it violates the rule of law, is inconsistent with the *Constitution* and "breaches the separation of powers principle". He argues:⁴⁴

What is at stake is the interpretation of the Constitution on a matter as fundamental as the powers of the Head of State and Government and the relationship of the executive branch with other branches.

The president appears to be under the impression that the section 84(2) responsibilities are executive powers. These powers, however, are *sui generis* and should be distinguished from powers of the executive branch under section 85.⁴⁵ The separation of powers refers specifically to the three branches of state power (*trias politica*), viz the legislature, the executive and the administration of justice.⁴⁶ Therefore a dispute about the demarcation of the powers of the head of state and the public protector has nothing to do with the separation of powers.

The president further argues that the power to appoint commissions of inquiry is an unfettered discretionary power of the head of state and that the public protector may not issue instructions to appoint such an inquiry.

5.2 The nature and scope of the power to appoint commissions of inquiry

Before the nature and scope of the power to appoint commissions of inquiry are considered, a brief discussion of the origins of the power is appropriate in order to highlight the ambivalent nature of the power as it evolved.

5.2.1 The origins of the prerogatives and their transition

The prerogative powers, including the power to appoint commissions of inquiry, were received as constitutional common law on the basis of British law in the Union of South Africa in 1910. In later South African constitutions, only the prerogatives that were explicitly listed formed part of the powers of

⁴⁴ Presidency 2017 <http://www.psppd.org.za/press-statements/president-zuma-not-opposed-establishing-commission-inquiry-%E2%80%9Cstate-capture%E2%80%9D>.

⁴⁵ *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2001 1 SA 1 (CC) para 144 (hereafter *President v SARFU*).

⁴⁶ De Vos and Freedman *South African Constitutional Law* 102; Rautenbach and Malherbe *Constitutional Law* 84.

the head of state.⁴⁷ The convention that the prerogatives should be exercised on the advice of another state organ was retained. The rationale behind the convention was to serve as a curb on the exercise of these powers.⁴⁸

In the United Kingdom the royal prerogatives are residual powers of the former feudal or absolutist monarchs that cut across the whole spectrum of state power.⁴⁹ The appointment of royal commissions of inquiry falls under the political prerogatives, more specifically the executive prerogatives, and is exercised on the advice of the prime minister or the cabinet.⁵⁰ Royal commissions of inquiry serve the purpose of advising the government on public policy issues with a view to drafting or amending legislation. When the commission has delivered its report, it is for the minister or the government to decide how far its recommendations are acceptable, and if so, in what form they should be carried out, for example by the preparing of a bill to amend the law. For all practical purposes, the executive appoints commissions of inquiry in the UK, because the prerogative power must be exercised on the advice of the prime minister. Royal commissions of inquiry must be distinguished from inquiries appointed by ministers under the *Tribunals of Inquiry (Evidence) Act* of 1921.⁵¹ Unlike these inquiries, royal commissions of inquiry do not have the power to compel the attendance of witnesses.⁵²

Initially, the prerogative to appoint commissions of inquiry in South Africa was also restricted to public policy matters, but the *Commissions Act* 8 of 1947, which is still in force, extended the scope of such inquiries to "matters of public concern" and conferred the powers to subpoena witnesses and

⁴⁷ Section 7(3) of the *Republic of South Africa Constitution Act* 32 of 1961 (hereafter the *1961 Constitution*).

⁴⁸ Carpenter *Constitutional Law* 174-175; Wiechers *Staatsreg* 59-67.

⁴⁹ A distinction is drawn between prerogatives that are personal, ecclesiastical, political (ie executive and legislative), "acts of state" (foreign affairs) or relating to the dispensing of justice. Depending on the case, a prerogative has to be exercised on the advice of the prime minister, the Lord Chancellor or the secretary of home affairs. See Bradley and Ewing *Constitutional and Administrative Law* 246-258, 306; *Finer Governments* 124; House of Commons Public Administration Select Committee 2004 <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpublicadm/422/422.pdf> (House of Commons *Taming the Prerogative*) 5-8; House of Commons Public Administration Select Committee 2005 <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpublicadm/51/51i.pdf> (House of Commons *Government by Inquiry*).

⁵⁰ Bradley and Ewing *Constitutional and Administrative Law* 246-258, 306.

⁵¹ The *Tribunals of Inquiry (Evidence) Act* of 1921 was repealed and replaced with the *Inquiries Act* in 2005.

⁵² Bradley and Ewing *Constitutional and Administrative Law* 306; Gosnell 1934 *Polit Sci Q* 84-118.

take evidence under oath like those of the erstwhile Supreme Court on commissioners. Inquiries into matters of public policy were usually chaired by experts in a specific field. Matters of "public concern", by contrast, were extended to include executive malfeasance and an abuse of power. Because of the subpoena powers and the extended scope of potential investigations, a practice soon developed that judges were appointed to chair such inquiries.

The difficulty is that unlike the British Act, which has cast the latter type of inquiry in the form of a self-control mechanism for the executive, the South African Act conferred this power also upon the head of state.⁵³ In terms of common law, however, prerogatives are usually curbed by legislation, not extended. The 1961 *Constitution* also explicitly stipulated that the state president possessed *the same powers and functions* as the Queen had possessed by virtue of her prerogative immediately prior to the commencement of the *Constitution*.⁵⁴ In the UK, the appointment of inquiries into matters of public interest (or concern) was not part of the prerogative power. Strangely, it appears that the *Commissions Act* in fact intended to expand the original prerogative power since it refers explicitly to commissions appointed under the prerogative power before the Act commenced.⁵⁵ It was not necessarily "unconstitutional" that parliament conferred the power on the state president to appoint such inquiries into executive malfeasance, because the head of state was also a part of parliament under the Westminster constitutions. Such inquiries could be legitimised with the oversight functions of parliament.⁵⁶

The fusion of the offices of head and state and head of government in 1984 implied that the state president, who could appoint commissions of inquiry

⁵³ The British parliament largely gave up its powers to conduct inquiries when the 1921 Act was adopted. In 2005 the House of Commons conducted an extensive inquiry about commissions of inquiry and found that ministerial commissions of inquiry have often been used for "kicking an issue into the long grass, blaming predecessors in government, making a gesture or simply buckling to public pressure to do something". Executive control of such inquiries had led in effect to the diminishing of the role of parliament to hold the executive accountable since the 1970s. See House of Commons *Government by Inquiry* 9, 12, 60–69.

⁵⁴ Section 7(4) of the 1961 *Constitution*. Section 7(3) listed all former prerogative powers that were conferred upon the head of state.

⁵⁵ Section 1 of the *Commissions Act* 8 of 1947 (hereafter the *Commissions Act*) determines: "Whenever the Governor-General has, before or after the commencement of this Act, appointed a commission ... for the purpose of investigating a matter of public concern, he may by proclamation in the Gazette declare the provisions of this Act to be applicable..." (emphasis added).

⁵⁶ On the nature of the office of the state president under the 1961 *Constitution*, see Wiechers *Staatsreg* 227–228.

as head of state, was required do so on his own advice (as the head of government). The curb on the power thus fell away, yet nobody raised any concerns about that. A fair number of constitutional law experts queried the retention of the prerogatives in a republican state when the 1983 *Constitution* was adopted,⁵⁷ but it was scarcely discussed when the 1993 and 1996 *Constitutions* were drafted.⁵⁸ Royal prerogatives, however, are an inherent part of a constitutional monarchy and constitute residual powers of a monarch not yet wrested from the Crown.

The drafters of the 1993 and 1996 *Constitutions* therefore ought to have considered whether some of these residual powers of a constitutional monarch, which had been retained in the 1961 and 1983 *Constitutions*, should not be allocated to other state organs that are responsible to perform such functions in terms of a modern separation of powers. There are several powers listed in section 84(2) of the 1996 *Constitution* that can and should be exercised by the head of state in a republican constitutional state. However, both the pardoning power (the former judicial royal prerogative to veto court sentences) and the power to appoint commissions of inquiry are problematic for various reasons.⁵⁹ The power to appoint commissions of inquiry into policy matters for the purposes of drafting concept legislation actually falls in the domain of the executive and the legislature, not the head of state.⁶⁰ The head of state is no longer a part of parliament, as he was under the Westminster constitutions, to justify such a power.⁶¹

Thus far the Constitutional Court has not declared judicial commissions of inquiry into matters of public concern to be incompatible with judicial functions. In *South African Association of Personal Injury Lawyers v Heath*,⁶² the Constitutional Court indicated that "in appropriate

⁵⁷ Basson and Viljoen *Constitutional Law* 58 ff; Booysen and Van Wyk '83 *Grondwet* 60 ff; Carpenter *Constitutional Law* 174; Carpenter 1989 *CILSA* 190; Van der Vyver *Grondwet* 16 ff.

⁵⁸ *Constitution of the Republic of South Africa* 200 of 1993.

⁵⁹ The royal prerogative of pardoning or relieving is a veto of judicial sentences and no longer compatible with a modern separation of powers. The overturning or amendment of the judgments of highly trained judges by a lay person cannot be legitimised in a constitutional state. It is not compatible with s 165(5) of the *Constitution* or the equal treatment clause in the bill of rights either. For a critical appraisal see Wolf 2011 *PELJ* 59, 119-125.

⁶⁰ Subsections 85(2)(b) and (d) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) confers the power to develop policy and prepare and initiate legislation upon the executive. Section 44 confers similar powers upon the legislature.

⁶¹ Section 87 of the *Constitution*.

⁶² *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) (hereafter *SA Association v Heath*).

circumstances" the president may appoint a judicial officer to preside over a commission without infringing upon the separation of powers, but that will "depend on the subject matter of the inquiry":⁶³

The performance of such functions ordinarily calls for the qualities and skills required for the performance of judicial functions – independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information.

The court warned, however, that the appointment of a judicial officer would be inappropriate where the judicial officer would be required to perform functions that were far removed from the judicial function.⁶⁴ Judicial commissions of inquiry have a long tradition and generally enjoy a high standing because of their reputation for impartiality and non-partisanship.

5.2.2 *The SARFU judgment on the nature of section 84(2) powers*

In *SARFU* the Constitutional Court explained that the power to appoint commissions of inquiry under section 84(2)(f) of the *Constitution* historically derived from the royal prerogatives that were exercised by the head of state under previous constitutions. The court held that both the 1993 and 1996 *Constitutions* make no mention of "prerogative powers", and accordingly the powers conferred upon the president by section 84(2) are limited to those listed.⁶⁵ On this basis the court concluded that these powers are now "original" powers of the head of state derived from the *Constitution* and not from prerogatives.⁶⁶ Whether one can maintain that the power to appoint commissions of inquiry is an "original" power of the head of state simply because it has not been called a prerogative power by section 84(2) is debateable. Sections 7(3) and (4) of the 1961 *Constitution* already transformed the prerogative powers into powers of the republican head of state.⁶⁷ In terms of all the *Constitutions* since 1961 this power had the same content and was always exercised by the same office bearer. That hardly makes the power original.

The court further held that the section 84(2) powers are "concerned with matters entrusted to the head of state" and noted that:⁶⁸

⁶³ *SA Association v Heath* para 34.

⁶⁴ *SA Association v Heath* para 35.

⁶⁵ *President v SARFU* para 144.

⁶⁶ *President v SARFU* para 145.

⁶⁷ See n 60.

⁶⁸ *President v SARFU* para 145.

The exercise of *some* of these responsibilities *is strictly controlled by express provisions of the Constitution*. For example, the responsibility conferred by subsections 84(2)(a)-(c) concerning the assenting to and signature of Bills is regulated by section 79... These are very specifically controlled constitutional responsibilities directly related to the legislative process... Section 84(2)(d) and (e) which refer to the President's power to summon extraordinary sittings of parliament and his responsibility for making appointments required by the Constitution are similarly narrow constitutional responsibilities. (Emphasis added.)

The Court then came to the astounding conclusion that:⁶⁹

The *remaining section 84(2) powers are discretionary powers* conferred upon the President which are *not constrained in any express manner* by the provisions of the Constitution. Their scope is narrow: the conferral of honours; the appointment of ambassadors; the reception and recognition of foreign diplomatic representatives; the calling of referenda; the appointment of commissions of inquiry and the pardoning of offenders. *They are closely related to policy; none of them is concerned with the implementation of legislation*. Several of them are decisions which result *in little or no further action by the government*: the conferral of honours, the appointment of ambassadors or the reception of foreign diplomats, for example. (Emphasis added.)

The court further elaborated that:⁷⁰

In the case of the appointment of commissions of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations. ... *A commission of inquiry is an adjunct to the policy formation responsibility of the President*. (Emphasis added.)

The Court concluded that even if there are no explicit constraints to the section 84(2) responsibilities, they are nevertheless implicitly subject to the following constraints: the president (i) must exercise the powers personally, (ii) may not infringe any provisions of the bill of rights, (iii) must abide by the principle of legality; and (iv) must act in good faith and not misconstrue his powers. The latter statement implies that he may not exercise any of the responsibilities in a manner which is arbitrary, capricious, in bad faith, or in furtherance of an ulterior or improper purpose; he may also not misconceive the nature of the powers.⁷¹ To summarise, the section 84(2) responsibilities of the head of state should be exercised in compliance with the *Constitution* and the law, and in a responsible and ethical manner.⁷²

⁶⁹ *President v SARFU* para 146.

⁷⁰ *President v SARFU* paras 146-147.

⁷¹ *President v SARFU* paras 148 and 225.

⁷² Section 83(b) in conjunction with the oath of office of the president (Schedule 2, part 1) requires that he should uphold and maintain the *Constitution* and all the laws and should discharge his duties true to the dictates of his conscience.

Two aspects of the cited passages are of interest insofar as they potentially affect the validity of the remedial action ordered by the public protector: first, the shaky foundation upon which the Court classified certain responsibilities, including the power to appoint commissions of inquiry, as discretionary in contrast to simply being a responsibility; and secondly, the ambivalence of the court's interpretation of the nature of the power to appoint commissions of inquiry and receive input by others.

As seen above, the court classified the responsibilities under sections 84(2)(f)–(k) as discretionary powers. Yet it is hard to justify that they are invariably or *per se* discretionary. The president cannot, for example, refuse to call a national referendum in terms of an Act of parliament because the Act impels him to do so.⁷³ Likewise the president is bound to exercise his responsibilities in regard to receiving and recognising foreign diplomatic representatives and to appoint ambassadors, diplomatic and consular representatives to represent the country.⁷⁴ It is not a discretionary power. Like in the case of appointments that he makes under subsection (e), he has the discretion about whom to appoint as diplomats, but must discharge the responsibility. The only two responsibilities that can be termed discretionary are those under subsections (j) and (k), ie pardoning and the conferral of honours.

The fact that the exercise of the section 84(2) responsibilities is co-influenced by other provisions does not say anything about the nature of the powers insofar as they are obligatory or discretionary. Sections 79 and 81, for example, make clear that the powers under subsections 84(2)(a)–(c) are obligatory. The president may not delay the promulgation of legislation by not signing and publishing legislation promptly after the legislature adopted a bill. By contrast, the summoning of the legislative bodies for special sittings is further elaborated upon by section 51(2), but this would appear to be a discretionary power. Likewise, some of the powers that are not further elaborated upon by other constitutional provisions can also be obligatory, eg the calling of a referendum in terms of an Act of parliament. It is also not convincing that appointments made under subsection (e) (eg appointments to the Chapter 9 institutions in terms of section 193(4) of the *Constitution*) are obligatory whereas appointments under subsection (i) are discretionary. To summarise: it would be more correct to say that the exercise of some of the section 84(2) responsibilities is co-influenced by other provisions of the

⁷³ Section 84(2)(g) of the *Constitution*.

⁷⁴ Section 84(2)(h) and (i) of the *Constitution*.

Constitution, but whether a power is obligatory or discretionary depends on the circumstances.

It will be argued that the nature of the power to appoint commissions of inquiry is not necessarily a discretionary power and that the Constitutional Court might even have realised that in a later case. In the *SARFU* matter, the power was indeed exercised solely on a discretionary basis. The racial domination of rugby by one group was of concern to the president and thus he exercised the discretion to appoint a commission of inquiry into the administration of rugby in the country.⁷⁵

However, the matter of *Crawford-Browne* showed that there is potentially room for forcing the president to appoint a commission of inquiry. Two presidents were petitioned to appoint a commission of inquiry into alleged irregularities pertaining to the arms deal. It was argued that it is the head of state's responsibility to do so and the refusal to appoint a commission was challenged as irrational because he must discharge the responsibility in a manner which accords with the tenets of legality and rationality.⁷⁶ From the directives requiring that written argument should be presented to the Constitutional Court addressing the issue of whether section 84(2)(f) of the *Constitution* obliges the president to exercise his power to appoint a commission of inquiry "whenever there are indications of corruption and misfeasance in relation to public procurement", and if not, in what circumstances indications of corruption, malfeasance and misfeasance would oblige the president to appoint a commission of inquiry bear testimony to the fact that the Constitutional Court saw a need to address the issue of whether or under what circumstances commissions of inquiry into executive malfeasance and an abuse of power would be appropriate.⁷⁷

One can make a strong case that the president does not have a discretion whether or not to appoint a commission of inquiry if he is required to do so

⁷⁵ *President v SARFU* para 2.

⁷⁶ *Crawford-Browne v President of the Republic of South Africa (WC)* (unreported) case number 1135/09. Zuma's counsel filed a number of exceptions, *inter alia* that only the Constitutional Court has the jurisdiction to decide the matter. Crawford-Browne then filed an application to the Constitutional Court to grant the same relief he claimed in the action by way of a declaratory *mandamus* aimed at securing the appointment of an independent judicial inquiry into the arms deal: *Crawford-Browne v The President of the Republic of South Africa (CC)* (unreported) case number CCT 103/10 (settled out of court). Before the case could be heard in September 2011, President Zuma reached a last minute out-of-court settlement with Crawford-Browne. See Hoffman *Confronting the Corrupt* 53-62.

⁷⁷ *Crawford-Browne v The President of South Africa (CC)* (unreported) case number CCT 103/10; directions of the Chief Justice issued on 7 February 2011 (settled out of court).

by the public protector in terms of the powers under section 182(1)(c). This is no different from the situation where the president is required to assent to and promulgate legislation adopted by parliament or to call a referendum if an Act of Parliament requires him to do so. These state organs act in terms of constitutional powers conferred upon them, which makes it obligatory that he takes specific action when required to do so because it is his responsibility to perform these tasks.

I now move to the second aspect, *viz* the ambivalence of the court's explanation of the nature of the section 84(2) responsibilities, because it does not clearly delineate these responsibilities from executive powers. On the one hand, the court reasoned that none of the section 84(2) responsibilities "is concerned with the implementation of legislation". The implementation of legislation is a function allocated to the executive by section 85(2)(a) of the *Constitution*.⁷⁸ One can therefore only agree with the court that the exercise of these responsibilities cannot involve administrative action.⁷⁹ In fact, none of the section 84(2) responsibilities can be classified as administrative action.⁸⁰ Yet the court also regards it as part of the powers of the head of state to formulate policy on the basis of recommendations made by a commission of inquiry. That, however, is a power of the executive branch in terms of section 85(2)(b) of the *Constitution*.

The ambivalence is further underscored by the fact that the court noted that several of the decisions taken in terms of subsections 84(2)(f)–(k) "result in little or no further action by the government", which implies that the cabinet can actually be involved in taking these decisions to a certain extent. What

⁷⁸ *President v SARFU* para 145.

⁷⁹ *President v SARFU* paras 34, 127–128. Strangely, the Court did not find it necessary to decide whether the decision to make the *Commissions Act* applicable to an inquiry should be classified as administrative action. The views expressed by the court (eg in paras 141 and 148) are rather confusing. The confusion stems partly from the fact that the court associates administrative action with the exercise of a "public duty" of the "public administration". In fact, all state institutions, including the judiciary, prosecutors and the legislature, exercise public powers. The definitive characteristic of administrative action is that it specifically concerns the exercise of *executive power*. In contrast to other executive powers (eg internal executive action, disciplinary measures, the issuing of regulations, etc) administrative action is taken in relation to a natural or legal person in a *vertical* power relation. *In casu*, the appointment of a commission of inquiry by the president is a *horizontal* power relation: two state organs are involved – the president and the commission of inquiry.

⁸⁰ An administrative act is a measure taken by an executive state organ or authority which has regulating character in the individual instance, and the communication of the measure creates a direct, external effect that establishes its legal enforceability in terms of administrative law. It concerns measures such as the issuing of licences, permits, notices, etc in a vertical power relation in the sphere of executive state administration.

should one then make of the Court's statement that section 84(2)(f) confers the power to appoint commissions of inquiry "upon the president alone"?⁸¹

The court reasoned that it would amount to an "abdication of power" if the President should delegate the power to appoint a commission of inquiry to another state organ or person.⁸² It therefore appears that what the court meant was that the president cannot delegate his functions of office to another state official. The court was careful not to preclude that the president may consult with cabinet ministers or take advice from other advisors in the exercise of the head of state responsibilities, provided it is the president who finally exercises the power.⁸³ The court found that it need not precisely determine what would constitute such an abdication of the power, but in reliance on Baxter's *Administrative Law*,⁸⁴ indicated that it could be any of the following: an unlawful delegation of the power; when acting on the instructions of another person; or "passing the buck".⁸⁵

One should be careful, however, to apply rules of administrative law directly to other constitutional powers. The head of state obviously cannot delegate his powers to another state organ, whereas this is possible in executive state administration. Section 90 of the *Constitution* provides for substitutes in an acting capacity when the president is absent from the country or otherwise unable to fulfil the duties of President, but not for a delegation of power.⁸⁶ The prompting to exercise some of these responsibilities by another state organ also cannot be equated with an unlawful "instruction". It is not clear what the court envisaged under "passing the buck" in relation to the exercise of these powers. Usually it means to blame someone or make others responsible for a problem that you should deal with.

5.3 The "unfettered discretion" and a conflict of interests

The difficulty is that the head of state (President Zuma) is required to appoint a commission of inquiry into alleged improper or corrupt behaviour of the head of government (also President Zuma) on the basis of *prima facie* evidence presented to the public protector. He allegedly abdicated executive powers to the Gupta family with regard to cabinet and other

⁸¹ *President v SARFU* para 38.

⁸² *President v SARFU* para 38.

⁸³ *President v SARFU* paras 40-44.

⁸⁴ Baxter *Administrative Law* 434-444.

⁸⁵ *President v SARFU* paras 39-40.

⁸⁶ Section 90(1)(a)-(d) of the *Constitution* prescribes the order of the office-bearers that should take over such functions: first the deputy president, then a minister designated by the president, thereafter a minister designated by the other cabinet ministers, and finally the speaker of the National Assembly.

appointments and allegedly acted in a manner which is inconsistent with sections 91 and 96 of the *Constitution* as well as the *Executive Members' Ethics Act* in exchange for financial benefits for his family.

In the *State of Capture* report, the public protector noted that President Zuma conceded that he could not be "judge and jury" in his own case in regard to the Nkandla upgrades.⁸⁷ However, in contrast to the view that he finally came to endorse in the Nkandla matter, the president has taken the stance in the "state capture" matter that he has an unfettered discretion to appoint commissions of inquiry when it suits him and that it falls in his exclusive discretion to determine the terms of reference.⁸⁸

The first misconception is that he has an unfettered discretion to appoint commissions of inquiry. In *SARFU* the Constitutional Court explicitly ruled that the power is implicitly constrained by the rule of law: decisions may not be taken in furtherance of an ulterior or improper purpose.⁸⁹ Secondly, given the fact that the remedial action involves an inquiry into alleged improper behaviour of the president, the conflict of interest would certainly require a reasonable limitation of his powers to preclude a potential undue manipulation of the inquiry. Madonsela tried to avoid these difficulties by limiting the president's power to appoint the commission of inquiry insofar as he should not be allowed to select a judge of his choice or to frame specific terms of reference for the investigation on the basis of the *nemo iudex* maxim.

5.3.1 *The nemo iudex maxim*

The maxim *nemo iudex in sua causa* is a common law principle associated with procedural fairness and is often described as the rule against bias. In *De Lange v Smuts Mokgoro* J observed that:⁹⁰

[At] heart, fair procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured [principle] that no-one shall be the judge in his or her own matter ... [aims] toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law.

The *nemo iudex* maxim applies not only to the administration of justice involving decisions taken by prosecutors and judges, but extends to a variety of less obvious forms of impartiality to secure good administration.

⁸⁷ *State of Capture Report* 24-25, 353.

⁸⁸ Presidency 2017 <http://www.psppd.org.za/press-statements/president-zuma-not-opposed-establishing-commission-inquiry-%E2%80%9Cstate-capture%E2%80%9D>.

⁸⁹ See n 71.

⁹⁰ *De Lange v Smuts* 1998 3 SA 785 (CC) para 131 (minority judgment).

Decisions are more likely to be sound when the decision-maker is unbiased and the public will have more faith in a process when justice is not only done but is seen to be done. Decision-makers must therefore be prevented from making decisions that are based on illegitimate (often personal) motives and considerations. The sources of bias could include that the body or person taking the decision has a financial interest or a personal interest in the matter. It could also involve bias on the subject matter or "official" or institutional bias. The maxim finds application essentially in judicial and quasi-judicial contexts, epitomised respectively by the judicial trial and proceedings of disciplinary and other tribunals.⁹¹ It will certainly also apply to the appointment of a judicial commission of inquiry.⁹²

5.3.2. *Credibility of the inquiry*

Dube supports the contention that there are reasonable limitations to the presidential power to appoint a commission of inquiry when it is in the public interest. By necessary implication it is important that the commission should have absolute credibility and therefore not even a whiff of partiality. Thus, the public interest should outweigh the presidential discretion to determine who should conduct the inquiry.⁹³

De Vos noted that the remedial action required by the public protector fetters the discretion of the president to appoint commissions of inquiry. Yet in these extraordinary circumstances in which the president is being implicated in breaches of the *Executive Members' Ethics Act* and in possible corruption, there are excellent reasons why the president should not have the discretion to appoint a judge of his choice to head a commission of inquiry to investigate matters delineated by the president. The president is conflicted as he is implicated in wrongdoing which would have to be investigated by the commission of inquiry. It is inevitable that if his discretion is not fettered he would appoint a judge he perceives to be sympathetic to him. This conflict of interest would almost certainly invalidate the entire commission.⁹⁴

⁹¹ Hoexter *Administrative Law* 405-412.

⁹² Hoexter *Administrative Law* 405 notes that in other settings allegations of what might sound like bias are more likely to be couched in the language of "abuse of discretion": an administrator will be accused of pursuing ulterior purposes or taking irrelevant considerations into account rather than of being biased.

⁹³ Dube 2016 <http://www.politicsweb.co.za/news-and-analysis/did-the-state-of-capture-report-usurp-the-president>.

⁹⁴ De Vos 2016 <https://www.dailymaverick.co.za/opinionista/2016-11-03-can-zuma-use-the-law-to-avoid-the-consequences-of-madonselas-report/#.WVHwPOlpzyQ>.

There is indeed a high risk that the credibility and impartiality of the inquiry would be compromised if the president could select a judge of his choice to conduct the inquiry. The Seriti commission of inquiry is a case in point. It raised serious concerns insofar as President Zuma was compromised by the topic of the inquiry but had the scope to select the commissioners and could influence the inquiry in other ways. Zuma took the decision to appoint the commission of inquiry into the arms deal only after his lawyers had a quiet word with him to say that they had a rather difficult case to answer in the Constitutional Court and stood every chance of losing it. Rather than having the courts dictate how the investigation should happen, the president moved first and kept its scope and depth within his control by announcing it himself.

It is difficult to deny that Zuma hand-picked the judges to conduct the inquiry, at least two of whom he perceived to be potentially sympathetic to him. He appointed Supreme Court of Appeal Judge Willie Seriti as chair of the commission. Deputy Judge President of the High Court of Pretoria, Willem van der Merwe and Judge Francis Legodi of the same court were to co-chair the inquiry. Justice van der Merwe presided over Zuma's rape trial in 2006, where Zuma was acquitted, and immediately recused himself due to the obvious implications for his impartiality. Justice Seriti was apparently the judge who authorised the tapping of the telephone conversations which produced the so-called "spy tapes" that were leaked to Zuma and which he used to pressurise the prosecuting authority to drop 783 charges of corruption and fraud against him in 2009. Zuma was *inter alia* accused of having solicited a bribe in the range of R500,000 a year from a French arms company in exchange for favours in the arms procurement proceedings. Unlike van der Merwe, Seriti did not recuse himself.⁹⁵

According to reports, Seriti ruled the commission with an iron fist, and facts were manipulated or withheld from commissioners. Justice Legodi withdrew and several investigators resigned in protest about the manner in which the inquiry was conducted.⁹⁶ The commission was criticised for the incorrect

⁹⁵ Rabkin *Business Day* 5; Underhill 2012 <https://mg.co.za/article/2012-10-19-00-arms-deal-twist-raises-alarm>.

⁹⁶ In August 2014 advocates Skinner SC and Sibiya resigned as investigators because Justice Seriti denied them the right to re-examine witnesses, even though it was a crucial part of their job. Vital documentary evidence was withheld from them. The two advocates joined a growing list of senior legal figures who quit the commission in the 18 months before and who expressed disquiet in public or to their colleagues about the clandestine way in which the commission was being conducted. They include senior investigator and attorney Moabi, principal legal researcher attorney Painting, and evidence leader Aboobaker. The resignations snowballed after Moabi claimed in his resignation letter that the commission had a "second agenda". Those who left

handling of witnesses and the exclusion of important documentation. A lawyer who was engaged as a consultant for the French arms dealer Thales offered evidence that Thales donated €1 million to the ANC as a kickback after it was awarded a R2,6 billion contract in 1997. He was also willing to testify that Zuma received hundreds of thousands of rands from the arms company during the time when he was deputy president, that the company invited Zuma to the Rugby World Cup semi-final in Paris and paid for his stays in luxury hotels in Paris and Brussels, bought him expensive designer clothes and gave him €25.000 spending money during the trip. Zuma allegedly tried to silence the lawyer by asking him not to testify before the commission. The lawyer nevertheless approached the commission twice and offered to testify, but never received a response.⁹⁷

Upon making the report public Zuma expressed his "sincere gratitude and appreciation" to Seriti for his findings that "not a single iota of evidence was placed before it" showing that bribes had been paid to consultants, public officials or members of cabinet.⁹⁸ The findings of the commission, which were widely perceived to be partial and a whitewash designed to acquit the government of any wrongdoing, have been challenged by Corruption Watch and the Right2Know Campaign.⁹⁹ Zuma's interference with a key witness shows that the arms deal inquiry was tainted from the very beginning. One may rightly wonder whether there was not also undue influence on the chairperson of the commission, as in the Hlophe affair.¹⁰⁰ The way in which the inquiry was conducted definitely stands in stark contrast to the way in which other judicial inquiries have been conducted.

Another inquiry illustrates the dilemma where a president in an executive capacity is personally involved in events that form the topic of an inquiry and

claimed this was to protect members of the ANC, including President Zuma, from being implicated. See Underhill 2013 <https://mg.co.za/article/2013-08-02-arms-deal-commission-lawyer-resigned-over-second-agenda>; Underhill 2014 <https://mg.co.za/article/2014-08-11-resignations-take-arms-deal-probe-from-mess-to-farce>.

⁹⁷ Grootes 2017 <http://ewn.co.za/2017/05/02/arms-deal-critics-welcome-ajay-sooklal-affidavit-into-zuma-s-concealed-role>.

⁹⁸ Seriti 2015 <http://www.gov.za/documents/arms-procurement-commission-report-21-apr-2016-0000> (*Seriti Report*); Thamm 2016 <https://www.dailymaverick.co.za/article/2016-04-21-seriti-commission-findings-on-arms-deal-it-aint-over-till-concourt-sings/#.WVUAyOlpyzQ>.

⁹⁹ Jamal 2016 <https://www.timeslive.co.za/news/south-africa/2016-04-22-seriti-commission-of-inquiry-whitewash---findings-are-a-joke-critics/>; Hoffman *Confronting the Corrupt* 63-94; Grootes 2017 <http://ewn.co.za/2017/05/02/arms-deal-critics-welcome-ajay-sooklal-affidavit-into-zuma-s-concealed-role>.

¹⁰⁰ In May 2008, judges of the Constitutional Court accused the Western Cape Judge President John Hlope of improper behaviour because he tried to influence a number of them in favour of Zuma in the Thint/Thales matter.

uses the power of the head of state to manipulate the proceedings in his favour. In September 2007 Advocate Pikoli, national director of the National Prosecuting Authority (NPA), crossed swords with former President Mbeki over the prosecution of the erstwhile Police Commissioner Selebi on charges of corruption. On the pretext that it was a matter of "national security" and that the president (in an executive capacity) has the final say in the matter, he suspended Pikoli from office.¹⁰¹ The president appointed the Ginwala commission of inquiry into Pikoli's fitness to hold office. The inquiry was conducted in terms of section 12(6) of the *National Prosecuting Authority Act* 32 of 1998 and not the *Commissions Act*, but the president's power to appoint such a commission arguably derives from section 84(2)(f) of the *Constitution*.

The impartiality of Dr Ginwala, a former speaker and a close confidante of the president, was questioned at her appointment. She was spotted on a flight in the company of the justice minister a few days before Pikoli was suspended, but the justice minister refused to answer questions in this regard in parliament.¹⁰² It was suspected that the president had appointed a person to conduct the inquiry who was favourably disposed towards him. As could be expected, Ginwala did not make any adverse findings about the legality of the president's suspension of Pikoli to save his friend from being prosecuted.¹⁰³ Even though the president and the justice minister were precluded from interfering with criminal prosecutions,¹⁰⁴ they were not even called to appear before the commission to give evidence about the role they had played in Pikoli's illegal suspension from office. The terms of reference also precluded such an investigation. This shows how the president, acting as head of state, can manipulate an inquiry to sweep under the carpet its own abuse of power in an executive capacity.

The constitutionality of section 12(6) of the *National Prosecuting Authority Act* is highly questionable.¹⁰⁵ In the Pikoli matter there was actually a dispute

¹⁰¹ Letter of former President Mbeki to Adv Vusi Pikoli dated 23 September 2007 suspending him from office. See Trengove, Bruinders and Makola 2008 <http://www.politicsweb.co.za/replies/the-real-reason-for-pikolis-suspension>. On undue executive interference in criminal prosecutions, see n 35.

¹⁰² The fact that the justice minister and Ginwala had travelled together was meaningful insofar as the minister might have influenced her. If they had had meetings before the commission was appointed, the independence of the inquiry was still-born. See Spies 2007 http://www.armsdeal-vpo.co.za/special_items/statements/not_recall.html.

¹⁰³ Ginwala 2008 http://www.justice.gov.za/commissions/2008_ginwala.pdf (Ginwala Report).

¹⁰⁴ Section 31(1)(b) of the *Prosecuting Authority Act*.

¹⁰⁵ If there is a dispute between state organs about the status or the nature and scope of its powers, this falls in the exclusive jurisdiction of the Constitutional Court (s 167(4))

about the demarcation of the powers of two state organs, and that falls in the exclusive jurisdiction of the Constitutional Court in terms of section 167(4) of the *Constitution*. A commission of inquiry into the national director's fitness to hold office cannot be used to settle such a dispute.

Grant observed that Zuma dodged the arms deal debacle and is seemingly using the same tactic now to control the framework of the "state capture" inquiry.¹⁰⁶ Should he appoint a commission of inquiry into state capture there would be a considerable risk that he would find himself, as well as members of his immediate family, exposed to potential civil and criminal liability for their alleged participation in the capture of the state. In the light thereof, there is a very high risk that the "state capture" inquiry could be manipulated in the same way as the arms deal inquiry was.

5.3.3 *Limitation of the power to appointment a commission of inquiry*

In terms of the *nemo iudex* rule the president should be barred from taking any decisions in this regard due to his personal involvement and the financial interests of his family and friends that are at stake. There are two possible ways in which this difficulty could be resolved, but only one is constitutionally viable. The first is the option chosen by the public protector, viz that the chief justice should present the president with the name of a particular judge to conduct the inquiry and that some terms of reference are predetermined to avoid a manipulation of the inquiry. The second option is that one of the state officials listed to perform the responsibilities of the head of state in an acting capacity should appoint the commission of inquiry.

5.3.3.1 How should the commissioner be selected?

The first option does not entail a delegation of power to the chief justice because he is not formally required to take the decision to appoint the commission of inquiry. It is a measure which is intended to avoid a biased decision. Due to the high regard for the impartiality of the judiciary, it is

of the *Constitution*). It is not for the president as the head of state to decide whether or not the director of public prosecutions is fit to hold office. This can be decided only in terms of legal norms, as illustrated by Simelane's case in *Democratic Alliance v President of South Africa* 2013 1 SA 248 (CC). The mechanism of a commission of inquiry has been abused to get rid of directors of the prosecuting authority when they do not dance to the tune of the executive – see Wolf 2015 *Administratio Publica* 44-47. Even though the Ginwala inquiry found that Pikoli was fit to hold office, both Mbeki and Motlante refused to reinstate him in office.

¹⁰⁶ Views expressed in an interview with Umraw 2017 http://www.huffingtonpost.co.za/2017/05/29/heres-how-zuma-will-ensure-a-judicial-inquiry-into-state-captur_a_22115149/.

understandable that the public protector determined that the commission should be headed by a judge selected on the advice of the chief justice. The chief justice seems to be the obvious choice, since he is a non-partisan outsider, knows his colleagues, and could determine their availability. Viewed from this perspective, the chief justice can be regarded as an appropriate person to select a judge to ensure the non-partisanship and credibility of the inquiry. In terms of the remedial action, the chief justice would not be involved in anything except to advise the president about a suitable judge to conduct the inquiry. Chief Justice Moegoeng Moegoeng has indicated that he will not become active in the matter unless he is approached by the president.¹⁰⁷

A careful reading of the *SARFU* judgment has showed that the Constitutional Court has not precluded such advice, as long as the president formally exercises the section 84(2) responsibilities. Such advice therefore cannot be construed as an unconstitutional delegation of power. This aspect of the remedial action therefore seems to be in order. Interestingly, a House of Commons report on commissions of inquiry in the UK addressed the dilemma of such a conflict of interest and recommended that the chief justice should be equally involved in all decisions about the use of judges in inquiries.¹⁰⁸

The second option is that the president should recuse himself from any involvement in appointing such a commission of inquiry and leave it to the deputy president to comply with the remedial action. A number of lobby groups have approached the Constitutional Court to ask deputy president

¹⁰⁷ Madia 2016 <http://www.news24.com/SouthAfrica/News/chief-justice-will-wait-to-hear-from-zuma-on-state-capture-inquiry-20161117>.

¹⁰⁸ House of Commons *Government by Inquiry* 3, 19-26. The inquiry considered the political and constitutional implications of the frequent use of judges to head inquiries, especially the impact on judges' independence and reputation for political neutrality. About 30% of executive departmental inquiries or statutory inquiries appointed by a minister (ie excluding the royal commissions) were chaired by a judge in the 20th century. Many of these inquiries took on a quasi-judicial nature, and although the skills and impartiality of judges could benefit such inquiries, this practice also has a negative effect in that the judiciary is consequently short of personnel for long periods. The reputation of judges could also be tarnished by their engagement in politically sensitive inquiries: If their reports fail to conclude that ministers or senior officials abused their powers, the reports may be characterised as a "whitewash" by political opponents; if their findings blame ministers they may be criticised for interfering in politics. There is a real danger that a judge who chaired a politically controversial inquiry will be perceived differently by sections of the public when he returns to his judicial role. The report recommended that the chief justice "should be equally involved with Ministers in all decisions about the use of judges in inquiries".

Ramaphosa to set up the commission of inquiry in an acting capacity in terms of section 90(1)(a) of the *Constitution*.¹⁰⁹

The difficulty with this option is that another state official can take over the functions of the president in an acting capacity only within the limited scope specified by section 90(1) of the *Constitution*, ie when the president is absent from the country or "otherwise unable to fulfil the duties of President" (eg when he is seriously ill for a long period or falls into a coma), or during a vacancy. The provision requires that the substitute should perform the functions of the president for *a specific period*, namely for the duration of the absence of the president from the country, for the duration of his incapacity, or for the duration of a vacancy. Subsections (a) to (d) determine a ranking order of officials that may perform the functions of the head of state in an acting capacity: first the deputy president, then a minister designated by the president, thereafter a minister designated by the other members of the cabinet, and finally the speaker of parliament. Sections 90(2) and (4) also make clear that the person takes over *all the functions* in an acting capacity "during the period". Before the acting president can take over the responsibilities, powers and functions of the president, he must swear or affirm faithfulness to the Republic and obedience to the *Constitution*.¹¹⁰ *In casu*, none of the section 90(1) instances are applicable. Section 90 does not contemplate the taking over of a specific task of the president in an acting capacity on an *ad hoc* basis.

The *Constitution* does not offer any guidelines as to what should happen when the president is faced by a conflict of interests and must recuse himself from taking specific decisions. If a cabinet minister would recuse him- or herself from taking specific decisions due to a conflict of interest, a deputy minister or other official with the requisite power could step in and take the decision. The deputy president, however, is a member of the cabinet but not the deputy head of state.¹¹¹ It would amount to an unconstitutional delegation of a power if the deputy president should exercise powers on behalf of the head of state on an *ad hoc* basis.

¹⁰⁹ Thamm 2017 <https://www.dailymaverick.co.za/article/2017-06-11-state-capture-lobby-groups-approach-concourt-to-ask-ramaphosa-to-set-up-commission-of-inquiry/#.WVUaUelpzyQ>. Ramaphosa called for a judicial commission of inquiry twice before President Zuma issued the press statement in May 2017, but did not give any indication of how this should be instituted. See Goba 2017 <https://www.timeslive.co.za/politics/2017-05-30-state-capture-is-busy-eating-the-anc-away-ramaphosa>; ANA Reporter 2017 <http://www.iol.co.za/news/politics/ramaphosa-renews-call-for-state-capture-inquiry-9257815>.

¹¹⁰ Section 90(3) of the *Constitution*.

¹¹¹ Section 91(1) and (2) and s 92(1) of the *Constitution*.

In a serious matter such as "state capture", parliament could of course pass a motion of no confidence or remove the president from office. This would create a vacancy that would enable the deputy president to take the relevant action in an acting capacity. This has not happened, though. In fact, the Cabinet and the ANC in parliament went to great lengths to protect Zuma from the report's implications.¹¹²

If the deputy president were to appoint a commission of inquiry, this would also not solve the problem of institutional bias or bias regarding the subject matter of the inquiry.¹¹³ After President Zuma issued the press statement on 26 May 2017 that he was not opposed to appointing a "state capture" inquiry, the ANC's National Executive Committee (NEC) endorsed his proposal to appoint a judicial commission of inquiry on his own terms.¹¹⁴ The dilemma is therefore that all four ANC substitutes for the president in an acting capacity are bound by this decision and would be tainted by bias in his favour.

Apart from that, all cabinet members are appointees of President Zuma. Should the Constitutional Court therefore rule that Deputy President Ramaphosa should execute the remedial action on his behalf as he is not implicated in the matter, there is nothing that would prevent Zuma from dismissing Ramaphosa from office in order to retain his grip on the terms of reference. He could then handpick one of his "trusted ministers" to appoint an inquiry according to his liking.

5.3.3.2 The terms of reference of the commission of inquiry

A commission of inquiry is usually appointed by way of proclamation in the Government Gazette and contains particulars about the terms of reference. The terms of reference constitute a mandate for the commissioner which he uses to determine the scope of the commission's investigation. It must be reasonably comprehensive so that the commission or interested parties can determine the nature and ambit of the commission's mandate with reasonable certainty. The terms of reference are issued independently of

¹¹² Subsequent to the release of the *State of Capture Report*, a motion of no confidence in the president was rejected by the ANC majority in parliament – Nicholson 2016 <https://www.dailymaverick.co.za/article/2016-11-10-no-confidence-anc-wins-the-vote-but-zuma-suffers-in-battle/#.WVUhVulpzyQ>.

¹¹³ Institutional bias refers to officers taking a decision for an inquiry in which they officially have a stake. See Hoexter *Administrative Law* 411-412.

¹¹⁴ Bendile 2017 <https://mg.co.za/article/2017-05-29-anc-calls-for-judicial-commission-of-inquiry-into-state-capture>.

the *Commissions Act*.¹¹⁵ The *Commissions Act* is not automatically applicable to all commissions of inquiry. The power to make the *Commissions Act* applicable to a commission is conferred by legislation.¹¹⁶ The legislation gives important and potentially invasive powers to a commission in order to ensure that it is able to perform its task effectively.

The *State of Capture* report determines that the judge chairing the commission should investigate all the issues pertaining to "state capture", using the record of the public protector's investigation and the report as a starting point. It further appears that the public protector intended that the commission of inquiry should also be given powers of evidence in terms of the *Commissions Act*. She required that the powers of evidence should be "no less than that of the public protector".¹¹⁷ Section 3 of the *Commissions Act* determines that for the purpose of ascertaining any matter relating to the subject of investigations, a commissioner shall have the powers of a High Court to summon witnesses, to lead evidence under oath and to require the production of documents to the inquiry. These powers are similar to the powers conferred upon the public protector in terms of section 7 of the *Public Protector Act*. There would be little sense in conducting the inquiry without such powers of evidence. Apart from that, the judge should be able to appoint his/her own staff and must complete the inquiry and present the report with findings and recommendations to the president within 180 days. Once the report is presented to the president, he should submit a copy to parliament within 14 days of its release and inform parliament about his intentions regarding the implementation of the recommendations.¹¹⁸ The framework of the inquiry is therefore part of the remedial action.

Zuma's stance is that the remedial action infringes upon the scope and ambit of his powers as head of state. He objects to the public protector's instructing him what type of commission to appoint, what the subject matter of the inquiry should be, what the timeline for establishing the commission (ie within 30 days after the publication of the report) should be, what its terms of reference and the duration to conduct the inquiry should be, and what the time span within which Zuma should submit the report to

¹¹⁵ Freedman "Commissions" 157. The provisions of the *Commissions Act* do not refer to the terms of reference of a commission.

¹¹⁶ Section 1 of the *Commissions Act*. See *President v SARFU* paras 126, 130-131, 154, 163.

¹¹⁷ *State of Capture Report* 354.

¹¹⁸ *State of Capture Report* 354.

parliament and inform parliament about his intentions regarding the implementation of the recommendations should be.¹¹⁹

In contrast to his reaction to the remedial action ordered by the public protector, President Zuma strangely did not object to a member of the executive branch (the justice minister) framing and issuing the terms for the Seriti commission. This most probably amounted to an unconstitutional delegation of power. Radebe framed the terms in a quest "to rid our nation" of what has become "an albatross that must now cease to blemish the reputation of our government".¹²⁰ He dramatically added:

As we cross the Arms Deal Rubicon, we wish to assure all South Africans that this Commission will work independently of everyone, including the Executive. Its credibility remains paramount as it is about to undertake an all-important national duty. The impact of its work will be significant even beyond the borders of our shores. ... Every time an end appeared in sight, new allegations would emerge. It is our conviction that the Inquiry will enable us collectively as a nation to reach closure on this otherwise contentious matter.

The reason why Madonsela formulated the instructions in the *State of Capture* report in a particularly detailed way might also have to do with past experiences. It was not the first time that Madonsela had had to investigate the gross abuse of power by the president, and she had ample experience of his tendency to use loopholes to buy time, postpone, delay, defer, defuse and deny issues.¹²¹

This tendency is also apparent in the arms deal inquiry. Two years expired between Zuma's reaching an out-of-court settlement with Crawford-Browne and appointing the commission. Initially the inquiry had to be completed within two years from the date when the terms of reference were issued (27 October 2011), with an additional period of six months to complete the final report. This gave Zuma ample time to canvass for his re-election without any blemishes at the 2012 ANC national conference. The inquiry was further dragged out, with the report finally being submitted to the president on 30 December 2015. Zuma released it in April 2016, ie six-and-a-half years after he agreed to appoint the commission.¹²² If it should take as long to complete the inquiry into "state capture", Zuma will no longer be in office and would

¹¹⁹ Presidency 2017 <http://www.psppd.org.za/press-statements/president-zuma-not-opposed-establishing-commission-inquiry-%E2%80%9Cstate-capture%E2%80%9D>.

¹²⁰ Department of Justice and Constitutional Development 2011 http://www.justice.gov.za/m_statements/2011/20111027_armscomms.html.

¹²¹ See n 7.

¹²² Thamm 2016 <https://www.dailymaverick.co.za/article/2016-04-21-seriti-commission-findings-on-arms-deal-it-aint-over-till-concourt-sings/#.WVUAyOlpyzQ>.

probably be enjoying the fruits of state capture in the luxury mansion the Guptas bought for him in Dubai.

It was also to be anticipated that Zuma would try to fiddle with the topic and scope of the inquiry. And so it happened. After the ANC's NEC committee endorsed his proposals, the body insisted that the inquiry should be expanded to uncover the general influence of business on the state since 1994.¹²³ This is clearly an attempt to overburden the commission and to undercut the purpose of the remedial action. If the president should be allowed to tamper with the remedial action in that he could change the topic of the inquiry, this would give rise to bias in the subject matter.¹²⁴

6 Conclusions

In terms of the remedial action in the *State of Capture* report, the president is required to appoint a commission of inquiry into the capture of state institutions by the Gupta family, who used their connections to him to manipulate cabinet and other appointments and to enrich themselves through tainted state procurement. President Zuma has launched an action to set aside the remedial action and to refer the investigation back to Madonsela's successor. He argues that it is the sole prerogative of the head of state under section 84(2)(f) of the *Constitution* to appoint commissions of inquiry. However, in the matter of the *Economic Freedom Fighters* the Constitutional Court ruled that the public protector's power to take appropriate remedial action under section 182(1)(c) of the *Constitution* is legally binding and must be executed by the state organs concerned.

Since the president and his family are implicated in allegations of corruption and undue enrichment, the public protector has limited his choice of a commissioner to conduct the inquiry and his power to determine the terms of reference to some extent, to avoid a biased outcome. She also set a time frame for the inquiry to be conducted to bring it to finality in good time for the recommendations to be implemented timeously.

It has been shown that like other section 84(2) powers the responsibility of the head of state to appoint commissions of inquiry is not invariably a discretionary power and could also be triggered by another state organ. It is

¹²³ Umraw 2017 http://www.huffingtonpost.co.za/2017/05/29/heres-how-zuma-will-ensure-a-judicial-inquiry-into-state-captur_a_22115149/.

¹²⁴ For a discussion of this aspect of the *nemo iudex maxim*, see Hoexter *Administrative Law* 409-411.

also not an unfettered discretion: the Constitutional Court clearly spelt out implicit limits to the power in *SARFU*.

In terms of the *nemo iudex* maxim the president would be barred from taking any decisions relating to a commission of inquiry into his own wrongdoing and ought to recuse himself. The difficulty is that he cannot delegate this power to another person on an *ad hoc* basis. Section 90 provides that another state official can take over all the functions of the head of state only for the duration of the president's absence from the country or for the duration of his incapacity to fulfil the duties of office. It would therefore amount to an unconstitutional delegation of power if the deputy president should appoint a commission of inquiry on his behalf.

In *SARFU* the Constitutional Court indicated that advice to the president by another state organ is allowed as long as he formally takes the decision to appoint the commission of inquiry. The instruction of the public protector that the chief justice should advise the president on which judge to appoint as the commissioner probably cannot be faulted.

In terms of the *nemo iudex* maxim a reasonable limitation of the terms of reference would also be necessary to avoid a manipulation of the inquiry. This aspect of the remedial action therefore also appears to be in order.

The powers of the public protector to investigate executive malfeasance and malpractices do not exclude a more extensive investigation by a judicial commission of inquiry. *In casu* two factors played a role in the former public protector's deciding to refer the investigation to a commission of inquiry: the first is that insufficient funds had been made available to her office by the executive to conduct the inquiry, and the second is that during the investigation it became clear that the sheer scope of the investigation would actually require a commission of inquiry that could conduct a full-scale inquiry. It is not for the president to decide what form the remedial action would be more appropriate under the circumstances.

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List of Abbreviations

ANC	African National Congress
CILSA	Comparative and International Law Journal of Southern Africa
EEF	Economic Freedom Fighters
NEC	National Executive Committee
NPA	National Prosecuting Authority
PELJ	Potchefstroom Electronic Law Journal
Polit Sci Q	Political Science Quarterly
SARFU	South African Rugby Football Union
SOEs	State-owned enterprises
SIU	Special Investigation Unit
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UK	United Kingdom