

OFFICE OF THE PRESIDENT

No. 2012

25 November 1994

NO. 23 OF 1994: PUBLIC PROTECTOR ACT, 1994.

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:

ACT

To provide for matters incidental to the office of the Public Protector as contemplated in the Constitution of the Republic of South Africa, 1993; and to provide for matters connected therewith.

(English text signed by the President.)

(Assented to 16 November 1994.)

PREAMBLE

WHEREAS sections 110 to 114 of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provide for the establishment of the office of Public Protector in order to investigate matters and to protect the public against matters such as maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function and an act or omission by a person performing a public function resulting in improper prejudice to another person;

AND WHEREAS the Constitution envisages further legislation to provide for certain ancillary matters pertaining to the office of Public Protector, including the remuneration and conditions of employment, immunities and privileges, powers and functions and staff of the Public Protector;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context otherwise indicates-

- (i) "committee" means a committee established under section 2(1); (iii)
- (ii) "Deputy Public Protector" means any person appointed in terms of section 3(2); (i)
- (iii) "investigation" means an investigation referred to in section 7; (vi)
- (iv) "joint committee" means a committee referred to in section 110(2)(a) of the Constitution; (ii)
- (v) "member of the office of the Public Protector" includes the Public Protector, a Deputy Public Protector, a member of the staff of the Public Protector and any person contemplated in sections 3(12) and 7(3)(b); (iv)
- (vi) "new Constitution" means the new Constitution contemplated in Chapter 5 of the Constitution; (v)
- (vii) "Provincial Public Protector" means any person appointed as such in terms of a law contemplated in section 114(1) of the Constitution; (viii)

(viii) "Public Protector" means any person appointed as such in terms of section 110(2) of the Constitution; (vii)

(ix) "Public Service Commission" means the Commission established by section 209(1) of the Constitution. (ix)

Appointment of committee, remuneration, vacancies in office and other terms and conditions of employment of Public Protector

2. (1) Parliament shall, in accordance with the rules and orders of Parliament, appoint a committee for the purpose of considering matters referred to it in terms of this Act.
- (2) The remuneration and other terms and conditions of employment of the Public Protector shall, subject to section 110(6) of the Constitution, from time to time be determined by Parliament upon the advice of the committee: Provided that such remuneration shall not be less than that of a judge of the Supreme Court of South Africa.
- (3) Parliament or, if Parliament is not in session, the joint committee may allow a Public Protector to vacate his or her office-
 - (a) on account of continued ill-health; or
 - (b) at his or her request: Provided that such request shall be addressed to Parliament or the joint committee, as the case may be, at least three calendar months prior to the date on which he or she wishes to vacate such office, unless Parliament or the joint committee, as the case may be, allows a shorter period in a specific case.
 - (4) If the joint committee allows a Public Protector to vacate his or her office in terms of subsection (3), the chairperson of the joint committee shall communicate the vacation of office by message to Parliament.
 - (5) The Public Protector may, at any time, approach the committee with regard to any matter in respect of which Parliament has functions pertaining to the office of the Public Protector.

Deputy Public Protector and staff of Public Protector

3. (1) The Public Protector shall, subject to his or her directions and control, in the performance of his or her functions under this Act and the Constitution, be assisted by-

- (a) one or more Deputy Public Protectors;
 - (b) a suitably qualified and experienced person as Chief Administrative Officer, appointed by the Public Protector or seconded in terms of subsection (12), for the purpose of assisting the Public Protector in the performance of all financial, administrative and clerical functions pertaining to the office of the Public Protector; and
 - (c) such staff, seconded in terms of subsection (12) or appointed by the Public Protector, as may be necessary to enable the Public Protector to perform his or her functions.
- (2) (a) The President shall, subject to the provisions of paragraph (b), appoint one or more persons, qualified to be appointed as a Public Protector in terms of the Constitution, as Deputy Public Protectors.
 - (b) An appointment in terms of paragraph (a) shall only be made from persons-

- (i) nominated by the joint committee after consultation with the Public Protector; and
 - (ii) approved by the National Assembly and the Senate by a resolution adopted by at least 75 per cent of the members present and voting at a joint meeting.
 - (c) If any nomination is not approved as contemplated in paragraph (b) (ii), the joint committee shall nominate another person in accordance with paragraph (b) (i).
 - (d) If the Public Protector has not yet been appointed or if the office of Public Protector is vacant or if, on account of his or her incapacity, the Public Protector cannot be consulted at the time when it is necessary to nominate a person in terms of paragraph (b) (i), the joint committee may nominate persons without undertaking the consultation contemplated in the said paragraph (b) (i).
 - (e) Unless the new Constitution provides otherwise, a Deputy Public Protector shall hold office for a period of seven years.
 - (f) The provisions of section 2(3) and (4) shall apply mutatis mutandis in respect of a Deputy Public Protector.
- (3) A Deputy Public Protector shall have such powers as the Public Protector may delegate to him or her.
- (4) Whenever the Public Protector is, for any reason, unable to perform the functions of his or her office, or while the appointment of a person to the office of Public Protector is pending, the most senior Deputy Public Protector available shall perform such functions.
- (5) If a vacancy occurs in the office of Deputy Public Protector the President may, subject to the provisions of this section, appoint another person to that office.
- (6) The President may, on the grounds of misbehaviour, incapacity or incompetence, determined by the joint committee after consultation with the Public Protector, and upon receipt of an address from both the National Assembly and the Senate requesting the removal of a Deputy Public Protector, remove such Deputy Public Protector from office.
- (7) The President may, in consultation with the Public Protector, suspend a Deputy Public Protector pending a decision in terms of subsection (6).
- (8) The remuneration and other terms and conditions of employment of a Deputy Public Protector shall from time to time be determined by Parliament upon the advice of the committee.
- (9) The persons appointed by the Public Protector in terms of subsection (1) (b) or (c) shall receive such remuneration, allowances and other employment benefits and shall be appointed on such terms and conditions and for such periods, as the Public Protector may determine.
- (10) In exercising his or her powers in terms of subsections (1) and (9), the Public Protector shall consult with the Minister of Finance and the Public Service Commission.
- (11) (a) A document setting out the remuneration, allowances and other conditions of employment determined by the Public Protector in terms of subsection (9), shall be Tabled in Parliament within 14 days after such determination.

- (b) If Parliament disapproves of any determination such determination shall cease to be of force to the extent to which it is so disapproved.
- (c) If a determination ceases to be of force as contemplated in paragraph (b)-
 - (i) anything done in terms of such determination up to the date on which such determination ceases to be of force shall be deemed to have been done validly; and
 - (ii) any right, privilege, obligation or liability acquired, accrued or incurred up to the said date under and by virtue of such determination, shall lapse upon the said date.

(12) The Public Protector may, in the performance of the functions contemplated in subsection (1)(b), at his or her request after consultation with the Public Service Commission, be assisted by officers in the Public Service seconded to the service of the Public Protector in terms of any law regulating such secondment.

(13) A member of the office of the Public Protector shall-

- (a) serve impartially and independently and perform his or her functions in good faith and without fear, favour, bias or prejudice;
- (b) serve in a full-time capacity to the exclusion of any other duty or obligation arising out of any other employment or occupation or the holding of any other office: Provided that the committee may exempt a Deputy Public Protector and a person contemplated in section 7(3)(b) shall be exempted from the provisions of this paragraph.

(14) No person, other than a person contemplated in section 7(3), shall conduct an investigation contemplated in section 7 or render assistance with regard thereto in respect of a matter in which he or she has any pecuniary interest or any other interest which might preclude him or her from performing his or her functions in a fair, unbiased and proper manner.

(15) If any person fails to disclose an interest contemplated in subsection (14) and conducts or renders assistance with regard to an investigation contemplated in section 7, while having an interest in the matter being investigated, the Public Protector may take such steps as he or she deems necessary to ensure a fair, unbiased and proper investigation.

Finances and accountability

4. (1) The Chief Administrative Officer referred to in section 3(1)(b)-

(a) shall, subject to the Exchequer Act, 1975 (Act No. 66 of 1975)-

(i) be charged with the responsibility of accounting for money received or paid out for or on account of the office of the Public Protector;

(ii) cause the necessary accounting and other related records to be kept; and

(b) may exercise such powers and shall perform such duties as the Public Protector may from time to time confer upon or assign to him or her, and shall in respect thereof be accountable to the Public Protector.

(2) The records referred to in subsection (1)(a)(ii) shall be audited by the Auditor-General.

Liability of Public Protector

5. (1) The office of the Public Protector shall be a juristic person.
- (2) The State Liability Act, 1957 (Act No. 20 of 1957), shall apply mutatis mutandis in respect of the office of the Public Protector, and in such application a reference in that Act to "the Minister of the department concerned" shall be construed as a reference to the Public Protector in his or her official capacity.
- (3) Neither a member of the office of the Public Protector nor the office of the Public Protector shall be liable in respect of anything reflected in any report, finding, point of view or recommendation made or expressed in good faith and submitted to Parliament or made known in terms of this Act or the Constitution.

Reporting matters to and additional powers of Public Protector

6. (1) Any matter in respect of which the Public Protector has jurisdiction may be reported to the Public Protector by any person-
 - (a) by means of a written or oral declaration under oath or after having made an affirmation, specifying-
 - (i) the nature of the matter in question;
 - (ii) the grounds on which he or she feels that an investigation is necessary;
 - (iii) all other relevant information known to him or her; or
 - (b) by such other means as the Public Protector may allow with a view to making his or her office accessible to all persons.
- (2) A member of the office of the Public Protector shall render the necessary assistance, free of charge, to enable any person to comply with subsection (1).
- (3) The Public Protector may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is-
 - (a) an officer or employee in the service of the State or is a person to whom the provisions of the Public Service Act, 1994 (Proclamation No. 103 of 1994), are applicable and has, in connection with such matter, not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Public Service Act, 1994; or
 - (b) prejudiced by an act or omission referred to in subsection (4)(d) or section 112(1)(a)(v) of the Constitution and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.
- (4) In addition to the powers and functions assigned to the Public Protector by section 112 of the Constitution, he or she shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged-
 - (a) maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992);
 - (b) abuse or unjustifiable exercise of power or unfair, capricious,

discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);

- (c) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or
- (d) act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.

(5) The Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged attempt to do anything which he or she may investigate under section 112 of the Constitution or subsection (4).

Investigation by Public Protector

7. (1) The procedure to be followed in conducting an investigation shall be determined by the Public Protector with due regard to the circumstances of each case, and the Public Protector may direct that any category of persons or all persons whose presence is not desirable, shall not be present at the proceedings during the investigation or any part thereof.
- (2) Notwithstanding anything to the contrary contained in any law no person shall disclose to any other person the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, a Deputy Public Protector or a person contemplated in subsection (3)(b) during an investigation, unless the Public Protector determines otherwise.
- (3) (a) The Public Protector may, at any time prior to or during an investigation, request any person-
- (i) at any level of government, subject to any law governing the terms and conditions of employment of such person;
 - (ii) performing a public function, subject to any law governing the terms and conditions of the appointment of such person; or
 - (iii) otherwise subject to the jurisdiction of the Public Protector, to assist him or her, under his or her supervision and control, in the performance of his or her functions with regard to a particular investigation or investigations in general.
- (b) The Public Protector may designate any person to conduct an investigation or any part thereof on his or her behalf and to report to him or her and for that purpose such a person shall have such powers as the Public Protector may assign to him or her, and the provisions of section 9 and the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975), in respect of Commissions of Inquiry, shall apply mutatis mutandis in respect of that person.
- (4) (a) For the purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person.

- (b) The Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated.
- (5) A direction referred to in subsection (4) (a) shall be by way of a subpoena containing particulars of the matter in connection with which the person subpoenaed is required to appear before the Public Protector and shall be signed by the Public Protector and served on the person subpoenaed either by a registered letter sent through the post or by delivery by a person authorised thereto by the Public Protector.
- (6) The Public Protector may require any person appearing as a witness before him or her under subsection (4) to give evidence on oath or after having made an affirmation.
- (7) The Public Protector may administer an oath to or accept an affirmation from any such person.
- (8) Any person appearing before the Public Protector by virtue of the provisions of subsection (4) may be assisted at such examination by an advocate or an attorney and shall be entitled to peruse such of the documents or records referred to in subsection (2) as are reasonably necessary to refresh his or her memory.
- (9) If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated, the Public Protector shall afford such person an opportunity to be heard in connection therewith by way of the giving of evidence, and such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.
- (10) The provisions of this section shall be applicable to any person referred to in subsection (9).

Publication of findings

8. (1) The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.
- (2) The Public Protector shall submit to Parliament half-yearly reports on the findings in respect of investigations of a serious nature, which were conducted during the half-year concerned: Provided that the Public Protector shall, at any time, submit a report to Parliament on the findings of a particular investigation if -
- (a) he or she deems it necessary;
 - (b) he or she deems it in the public interest;
 - (c) it requires the urgent attention of, or an intervention by Parliament;
 - (d) he or she is requested to do so by the Speaker of the National Assembly; or
 - (e) he or she is requested to do so by the President of the Senate.
- (3) The findings of an investigation by the Public Protector shall, when he or she deems it fit but as soon as possible, be made available to the

complainant and to any person implicated thereby.

Contempt of Public Protector

9. (1) No person shall-
 - (a) insult the Public Protector or a Deputy Public Protector;
 - (b) in connection with an investigation do anything which, if the said investigation had been proceedings in a court of law, would have constituted contempt of court.
- (2) Nothing contained in this Act shall prohibit the discussion in Parliament of a matter being investigated or which has been investigated in terms of this Act by the Public Protector.

Compensation for expenses

10. The Public Protector may, with the specific or general approval of the Minister of Finance or any person authorised by the said Minister to so approve, order that the expenses or a portion of the expenses incurred by any person in the course of or in connection with an investigation by the Public Protector, be paid from State funds to that person.

Offences and penalties

11. (1) Any person who contravenes the provisions of sections 3(14), 7(2) and 9 of this Act, or section 111(3) of the Constitution, shall be guilty of an offence.
- (2) Any person who fails to disclose an interest contemplated in section 3(14), shall be guilty of an offence.
- (3) Any person who, without just cause, refuses or fails to comply with a direction under section 112(3)(a) of the Constitution or section 7(4)(a) of this Act or refuses to answer any question put to him or her under those paragraphs or gives to such question an answer which to his or her knowledge is false, or refuses to take the oath or to make an affirmation at the request of the Public Protector in terms of section 7(6), shall be guilty of an offence.
- (4) Any person convicted of an offence in terms of this Act shall be liable to a fine not exceeding R40 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

Guidelines for provincial public protectors

12. (1) The Public Protector shall as soon as possible after a provincial public protector has been appointed under a law contemplated in section 114(1) of the Constitution, and after consultation with the provincial public protectors, publish in the Gazette a notice setting out general guidelines in accordance with which a provincial public protector shall exercise and perform his or her powers and functions as contemplated in section 114(4) of the Constitution: Provided that this subsection shall not be construed as prohibiting a provincial public protector from departing from such guidelines in a particular case in consultation with the Public Protector.
- (2) Unless provided otherwise in a law of a provincial legislature contemplated in section 114(1) of the Constitution, the provisions of sections 5 up to and including section 11 shall mutatis mutandis apply to a provincial public protector in respect of an investigation

into a matter by him or her: Provided that a reference to "Public Protector" shall be construed as a reference to a provincial public protector, a reference to "Parliament" shall be construed as a reference to a provincial legislature and a reference to "Minister of Finance" shall be construed as a reference to the member of the Executive Council responsible for finance.

Application of Act

13. The provisions of this Act shall not affect any investigation under, or the performance or exercise of any duty or power imposed or conferred by or under, any law.

Repeal of laws

14. The Ombudsman Act, 1979 (Act No. 118 of 1979), the Advocate-General Amendment Act, 1983 (Act No. 55 of 1983), and the Advocate-General Amendment Act, 1991 (Act No. 104 of 1991), are hereby repealed.

Short title

15. This Act shall be called the Public Protector Act, 1994.