

## **Discipline and Democracy.<sup>1</sup>**

The Constitution of the Republic of SA 1996 is sometimes mentioned in the same breath as some of the most iconic and enduring constitutions of the world. This has allowed us, the people, and the politicians, to bask in its reflected glory. National Constitutions seek to ensure those that exercise public power now and in the future do so in the public interest. As a people we have learnt that we need to take rights seriously if the constitutional democracy is to survive and grow and our own interests protected. The recognition of gay marriages was not a popular cause with the majority of South Africans. From a legal perspective it was relatively easy for the Constitutional Court to reach the decision that the non-recognition of gay marriages was inconsistent with the rights to equality and dignity. No doubt, those belonging to some religions found this decision jarring to their beliefs and sentiments. However the logic of the Constitutional Court's decision is that the court is interpreting the Constitution, a secular text, and needs to be guided by its values including the imperative of affording religious communities maximum scope and freedom within their sectarian sphere to profess and engage unhindered in their religious practices. Ultimately the constitutional message is that as a society we can recognise gay marriages and simultaneously continue professing and practising our religious beliefs. The Civil Unions Act gave rights to gay men women to marry and the society continued as usual. It seems as if the broader society, by and large, is acquiring the discipline to take rights seriously.

A few weeks ago, a resurgent and confident Office of the Public Protector, found that the SAPS under General Cele and the Department of Public Works had acted unlawfully in entering into a long term R500 million lease agreement with Roux Shabangu. The Public Protector, Ms Thuli Madonsela found that the process that preceded the signing of the agreement to be fatally flawed and that both SAPS and the Department of Public Works had failed to comply with the Constitution, the Public Finance Management Act, the Treasury regulations and the supply chain management rules and policies. She concluded that the parties had engaged in mal-administration and had dealt with public funds in a reckless manner. This is a stinging indictment of SAPS and of the Department

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of Public Works by an office that was set up to support the constitutional democracy. Various findings and recommendations have been made including the setting aside of the lease agreement. The report has practical and symbolic significance. At a practical level, public officials should not unlawfully and unjustifiably enrich others at taxpayers' expense and at the expense of the most marginalised in the society.

At a symbolic level, the manner in which government deals with these findings would be an indication of whether there is the discipline to govern within the confines of the Constitution and the rule of law. The Office of the Public Protector cannot make binding findings and order that the lease agreement be set aside as these would conflict with doctrine of separation of powers. Other organs of state now have to take up the cudgels. However the findings of the Public Protector are not without legal effect. The independence of the Public Protector is expressly protected in the Constitution. There is a direct constitutional duty on all organs of state to assist and protect the Office of the Public Protector and to ensure its independence, impartiality, effectiveness and dignity. The same duty exists in respect of other Chapter 9 institutions such as the South African Human Rights Commission and the Independent Electoral Commission. This constitutional responsibility would be violated if these findings are not carried forward by the relevant organs of state in a determined, purposeful and assiduous manner.

According to the Public Protector, the failure to comply with the Constitution and the various applicable laws is particularly egregious in this instance. This is not just an issue between Ms Madonsela and General Cele, but about whether those who exercise public power have the discipline to honour their oath of office to obey, respect and uphold the Constitution. It is precisely because of these wider implications that society as a whole should participate in this debate. Government's response to the report must be subject to intense scrutiny as we all have a direct and vested interest in the outcome. A docile, compliant and servile public protector will be of absolutely no use to us. By way of contrast an independent, competent and effective Public Protector, the sort envisaged by our Constitution, would be able to contribute profoundly to the development of our constitutional democracy, to safeguarding our rights and to the realisation of the objectives of the Constitution.

State Law advisors should not lightly agree to requests that the decision of the Public Protector be taken on review. If the decision is made to take the findings on review we should comprehensively be informed of why the government has decided that the report be reviewed and set aside. Cynical and grudging compliance with the findings will have long term corrosive effects on our systems and structures. The temptation to bury this issue within the judicial processes and thus remove it from the public discourse must be resisted.

Given the comprehensive nature of the investigation conducted by the Public Protector, the constitutional imperatives and the need to ensure public confidence in bodies like the Public Protector, a responsive and accountable government would seek immediately to enforce and give effect to the findings. Procrastination and inaction on the part of the government would send a lamentable message. It could render the commitment to fiscal discipline and to the proper use of state resources to improve the quality of life, an empty and meaningless promise. It will demonstrate disdain for core constitutional values and fundamentally undermine the office of the Public Protector. Government has the potential and capacity to be a great teacher and in this instance it must now lead. Failure to implement the Public Protector's findings will not only demonstrate a lack of discipline and leadership but a regrettable inability to follow the example of the people.

Committed and robust implementation of the findings of the report will have the opposite effect. It would signal that everyone, including the National Commissioner of Police, is obliged to respect the law and equally importantly it will affirm that our systems and institutions are independent and competent enough to take appropriate action when they do not. It will give us just cause to take pride not just in the text of the Constitution but in the institutions that it creates.

If ever there was a good time for this report to be released, it is now. In an election campaign we, and not the politicians, determine the questions that we want answered as we possessed the sovereignty that comes with having a deliberative and free vote. We thus have the discretion to cast a determinative opinion on government's response to the report and on its other activities in providing essential services when we cast our votes in May of this year. Having

local government elections approximately two years after the national and provincial elections means that government needs to account at least twice to us as an electorate in a five year cycle. A single election would mean that our judgment on issues such as this would be delayed for another three years. Much of the sting would be removed by the wait. I am not convinced that the administrative convenience of having a single election for the local, provincial and national spheres justifies the loss of having government being responsive and accountable to the electorate on two occasions in a five year cycle. We need more accountability and responsiveness and not less.