Condemning the leaking of Public Protector's provisional reports

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A democratic country requires accountable public administration. Chapter 9 of the Constitution has created a number of institutions that seek to ensure accountable public administration, among which is the Office of the Public Protector. In terms of s 181(2) of the Constitution, the institutions are accountable to parliament and are meant to be independent and impartial when carrying out their duties. Thus, other state organs are instructed to assist these institutions to perform their functions and should not interfere with their functioning.

In this article, I will discuss the role of the Public Protector, more specifically the provisional reports that she prepares. The purpose of this article is to evaluate whether there is any authority that grants the Public Protector any power to issue provisional reports. I will be arguing that the continued issuance of provisional reports prepared by the Public Protector has serious potential to compromise the integrity of that office.

Creation and powers of the Office of the Public Protector

The Office of the Public Protector was established in terms of s 181 of the Constitution and his or her appointment should be carried out in accordance with s 193 of the Constitution. The powers of the Public Protector are outlined in s 182 of the Constitution, and they include the power 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 to report on that conduct, and to take appropriate remedial action. These are extraordinary powers that are vested in an individual, thus there is a need for such powers to be exercised carefully with caution and not be abused.

The work of the Public Protector should be informed by among others, principles of - justice, fairness, competence, trustworthiness, reliability, honesty, efficiency, human dignity, impartiality, transparency, integrity, equality and accountability (s 181 (2) and (3) of the Constitution). The Public Protector should not be seen to be opposing any individual or institution, nor supporting or advancing the interests of any individual or institution. As such, the citizens that the Public Protector serves should at all times have confidence that the Public Protector will always carry out his or her duties without fear or favour nor being unduly influenced by any sector of our society. In terms of s 182(2) of the Constitution, the Public Protector has additional powers that are outlined in the Public Protector Act 23 of 1994 (as amended) (PPA). Section 6(4) of the PPA provides the Public Protector with the power to investigate maladministration, abuse of power, improper or dishonest acts, unlawful enrichment and receipt of improper advantage within government structures (see also G Thornhill, The Role of the Public Protector Case Studies in Public Accountability, 2011 (4) African Journal of Public Affairs 79 at 82). He or she can further report any criminal activity to the prosecuting authority if his or her investigations establish any wrongdoing that attracts criminal liability. The Public Protector can also endeavour to resolve any dispute within government structures through mediation, conciliation and negotiation.

Investigation and preparation of provisional reports

It is worth mentioning that even though s 7(1) of the PPA provides the Public Protector with express powers to conduct preliminary investigations for the purpose of determining the merits of a complaint, however, it does not seem that there is provision in the PPA where the Public Protector is granted the power to provide preliminary findings on his or her preliminary investigations. I hasten to add that even the Constitution is silent on the Public Protector's power to issue preliminary findings. In terms of s 182(1)(a) and (c) of the Constitution, the Public Protector can investigate any conduct in state affairs and report on that conduct. It may be argued that the wording of this provision is wide enough so as to be interpreted to include preliminary investigations, leading to preliminary findings and reports. It seems as though the Public Protector is issuing provisional reports on the strength of s 7(9) of the PPA. It has been stated that: 'The Public Protector issued a Provisional Report in accordance with section 7(9) of the Public Protector Act ... The Provisional Report was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents' (see report no 4 of 2013/14, para 6.7 (www.ppprotector.org/library/investigation_report/2013-14/ UNPAIWP2012SERVICES.PDF, accessed 26-3-2014).

In terms of s 7(9) of the PPA: (a) It appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances. (b) If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.

Section 7(9) of the PPA is the only provision that seems to provide the Public Protector with the power to issue provisional reports. This section does not give the Public Protector the power to provide anyone with a provisional report in order for that person to comment on its contents. This section merely allows for a procedure during the course of the Public Protector’s investigation for the Public Protector to extend his or her hand to the parties subject to the investigation to respond to the allegations that might surface against such parties. Such affected parties are provided with an opportunity during the course of investigations to question some of their accusers or those who implicate them under the watch of the Public Protector, in order for the Public Protector to have more information that will assist in his or her investigations.

I am of the view that there is no need for the Public Protector to issue a provisional report in her investigations. I submit that the Public Protector should only forward whatever allegations are made to the implicated persons and allow them a chance to respond thereto by either giving evidence or questioning witnesses if they so wish.

Leaking provisional reports and their publication by media

It has become customary for the Public Protector to prepare provisional reports and make them available to certain affected individuals or institutions in order to afford them an opportunity to comment or respond to such reports. These provisional reports, depending on their level of public interest, end up being published by major South African media houses.

Although, s 7(2) of the PPA prohibits the publication of documents produced by the office of the Public Protector during the course of the investigation, it nonetheless allows the Public Protector to determine otherwise. The qualification in this section suggests that the Public Protector has the power to allow any person, including a media house to publish a provisional report.

In terms of s 11(1) and (4) of the PPA, any person who contravenes the provisions of s 7(2) shall be guilty of an of-
fence and on conviction be liable to a fine not exceeding R 40 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

A newspaper that publishes a provisional report usually does not indicate from whom it received the report from (see ‘Nkandla report: Zuma in the deep end’ Mail and Guardian 29-11-2013 (http://mg.co.za/article/2013-11-28-nkandla-report-zuma-in-the-deep-end, accessed 26-3-2014)). There will be sectors in society who will argue that the Public Protector is the one who leaked the report to the media (Carlien du Plessis ‘Public Protector did it: ANC on Nkandla leak’ City Press 3-12-2013 (www.citypress.co.za/politics/public-protector-anc-nkandla-leak, accessed 26-3-2014)). On the other hand, there are those who have argued that those parties, to whom the report has been provided, are responsible for leaking the report to the media with a view to discrediting the work done by the Public Protector (‘Security cluster leaked Nkandla report: EFF Soetan 3-12-2013 (www.soetanlive.co.za/news/2013/12/03/security-cluster-leaked-nkandla-report-eff, accessed 26-3-2014)).

In my view, irrespective of who actually leaks the provisional report to the media, there is no justification for newspapers to publish it. In terms of s 7(2) of the PPA, it is a criminal offence to publish the Public Protector’s reports without a determination from the Public Protector. Leaking reports to the media has potential to damage the legitimacy of the Office of the Public Protector, thereby decreasing the public’s confidence in that office. I am of the view that it is the responsibility of the Public Protector to ensure that the reports prepared by his or her office do not end up in the wrong hands. In an effort to eliminate opportunities for report leakages, the Public Protector has recently said that ‘affected and implicated parties will no longer get full provisional reports. Instead, they will be furnished with information or parts of the report that relate to them for purposes of soliciting their comments’ (Public Protector announces a new measure to stem report leaks’ (www.pprotect.org/media_gallery/2013/02/12/2013.asp, accessed 26-3-2014)). It seems that the current Public Protector is of the view that those affected parties to whom she provided the report are responsible for making it available to the newspapers. Advocate Thuli Madonsela has stated that ‘We work with sensitive information for months without any leakages. It cannot be a coincidence that the so-called leaks occur only after reports leave our offices into the hands of parties’ (op cit).

Conclusion

If indeed the leakages of the Public Protector’s provisional reports are not from her office, as suggested by some, I am of the view that the Public Protector has a duty to see to it that the media houses who act contrary to s 7(2) of the PPA are brought to book. Media houses cannot break the law and get away with it. I submit that the PPA should be amended to include substantial fines for media houses and to provide personal liability to those journalists who choose to act contrary to the PPA. It is clear from the PPA that it is a crime to publish the Public Protector’s reports without his or her authorisation. In order to preserve the integrity of the Public Protector’s office, it is imperative that media houses who continue to undermine the law should be prosecuted. It is not enough that the Public Protector simply issues a statement and says that publishing the report was both unethical and unlawful. Those individuals, as well as the institutions they belong to when they act unlawfully, should be dealt with accordingly, because they are compromising the integrity of the Office of the Public Protector.

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