

THE SELECTION PROCESS IN CHOOSING THE PUBLIC PROTECTOR: AN ASSESSMENT

By Professor George Devenish*

An *ad hoc* committee was established by Parliament to oversee the appointment of the successor to the Public Protector, Advocate Thuli Madonsela. It was chaired by the African National Congress (ANC) MP, Dr Makhosi Khoza. In her opening speech she promised “the best person for the job”. Serving in the committee, were Julius Malema on behalf of the Economic Freedom Fighters (EFF), together with the following: Glynnis Breytenbach, Phumzile van Damme, James Selfe and Werner Horne, on behalf of the Democratic Alliance (DA). Other members included on behalf of the ANC, besides the chairperson, Makhosi Khoza, Bongani Bongo, Amos Masondo, Nicolaas Koorhof, Grace Tseke, Madipoane Mothapo, and Patrick Maesela.

Representing the smaller parties: Professor Themba Msimang for the IFP, Steve Swart for the African Christian Democratic Party (ACDP) and Sibusiso Mncwabe on behalf of the National Freedom Party (NFP).

Khoza, who proved to be a fair and competent chairperson, acknowledged that a number of factors have “conspired to make the process more fraught than ever - not least the incumbent Public Protector Thuli Madonsela’s track record of ruffling feathers in the corridors of power”. She had also acquired a reputation for being fearless, profoundly committed and competent, and in so doing she attracted the attention and respect of the public and the media.

Khoza also commented perceptively that the selection of a new Public Protector “offered an opportunity to engage on issues of morality versus legality”.

The Chief Justice, Mogoeng Mogoeng, in the famous Nkandla judgment, stated that the Public Protector office was established to “strengthen constitutional democracy in the Republic” and to achieve this crucial objective, the incumbent was required to be “independent and subject only to the Constitution and the law”. He commented further that the Public Protector, like other chapter 9 institutions, was required to exercise the powers and functions vested in it without “fear, favour or prejudice”.

72 applications and nominations in all were received by the closing date of Friday, 10 July 2016. After sifting through the list, the *ad hoc* parliamentary committee released a shortlist of 14 names: Judge Sharise Weiner, Professor Bongani Majola, Adv MT Goodman, Prof Narnia Bohler-Muller, Adv Muvhango Lukhaimane, Adv Busiswe Mkhwebane, Adv Chris Madibeng Mokoditwa, Adv Nonkosi Princess Cetywayo, Adv Mhlaliseni Mthembu, Jill Oliphant, Kaajal Ramjathan-Keogh, Adv Kevin Malunga, Judge Siraj Desai and Willie Hofmeyr, Deputy National Director of Public Prosecutions.

It was decided at the meeting on 13 July 2016 that all the shortlisted candidates would be interviewed on Thursday, 11 August - on the same day - in order to avoid them watching the interviews live on TV.

Although, it is clear from the above that the public and opposition parties were to a greater or lesser extent involved in the process, the final decision rested with ANC, as the majority party, since a 60% majority is required in the National Assembly (NA) for actual appointment. The realpolitik of the situation was that since the ANC held more than 60% of the seats in Parliament it was able to get its way. Nevertheless, it is submitted, it was to some extent constrained by public opinion, should it have wished to appoint a person the public perceived as totally unsuitable.

Although the wisdom of a marathon process of interviewing all the shortlisted applicants for the position of Public Protector, sitting for more than 20 hours under the chairmanship of Khoza on 11 August 2016, was open to question, the manifestly transparent process must be welcomed. The process was, however, fraught with drama since for the first time it was aired live on national television. The penetrating interviews involved, *inter alia*, allegations of receiving money from foreign organisations to litigate, as well as revealing the conduct of a number of candidates that had skeletons in their closets. These ranged from allegations of cell phone theft, gambling in a Casino, lack of security clearance, rape accusations and bias in the prosecution of persons of high office.

What was manifestly clear was that the panelists had done their homework thoroughly, delving into the respective candidates' past lives and work experience. It was clear from some of the questions put to the candidates that some members of the committee had their own agendas, which reflected biases in the manner of their questioning. They thereby appeared to endeavour to use tactics in order to reveal negative information on those they deemed undesirable or politically compromised.

Of the 14 candidates interviewed, a further shortlist of five was agreed on. These persons were: Judge Siraj Desai, Professor Bongani Majola, Advocate Busisiwe Mkhwebane, Judge Sharise Weiner and Adv Muvhango Lukhaimane. The *ad hoc* committee - after careful and thorough deliberation - decided to recommend Advocate Busisiwe Mkhwebane to the NA as the new Public Protector.

The NA must endorse her name and it will then be submitted to President Zuma for appointment. Her professional background involves, *inter alia*, apart from working in the State Security Agency, the Department of Home Affairs and working as a senior investigator in the office of the Public Protector, serving as a diplomat in China for four years. The *ad hoc* committee agreed that she was a suitable person for the position of Public Protector, despite some misgivings that she was too close to President Zuma, expressed by Glynnis Breytenbach of the DA, and Julius Malema of the EFF, respectively.

Sandiso Bazana, a lecturer in organisational psychology at Rhodes University, writing for *The Witness*, critiques the interview process on two grounds. Firstly, the selection of the members of the *ad hoc* committee, which consisted entirely of politicians. Although this does have some merit, at least in theory, in practice the exercise of appointment is essentially political, and it is expecting far too much to expect politicians to surrender or even attenuate their power, by involving persons with expertise outside of Parliament, in civil society. The second critique is that an interview is inadequate if the aim is to identify characteristics such as integrity, honesty and reliability. However, on this point, it must be borne in mind that the appointment of the Public Protector cannot be equated with appointments of high-powered persons in the private sector. Other dynamics prevail in the sphere of government and politics.

Despite certain questionable tactics as described above, the multi-party nature of hearings facilitated a measure of balance. In general, Khoza, as chairperson was impartial and competent. The exercise as a whole must therefore be regarded as having sufficient merit. The process was most certainly not entirely exemplary. According to Prof Penny Andrews, Dean of the Law School of the University of Cape Town, Madonsela has raised the profile of the Public Protector to become “one of the country’s trusted governance institutions”. In so doing she has set a “very high bar in the exercise of her duties. She has left a morally coherent and impeccable professional template for her successors to adopt”. This is the formidable challenge that Busisiwe Mkhwebane faces. Her office should be given every support and encouragement. In the words of a famous and ancient Latin maxim, *carpe diem!*

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