

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION
182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF
SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC
PROTECTOR ACT, 1994**



Report No: 5 of 2008/9

**REPORT ON THE IMPLEMENTATION OF THE RECOMMENDATIONS
MADE IN THE *REPORT OF THE PUBLIC PROTECTOR ON AN
INVESTIGATION INTO ALLEGATIONS OF NON-COMPLIANCE BY THE
PREMIER OF THE FREE STATE PROVINCIAL GOVERNMENT WITH THE
PROVISIONS OF THE FREE STATE YOUTH COMMISSION ACT, 1996***

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Executive summary

The *Report of the Public Protector on an investigation into allegations of non-compliance by the Premier of the Free State Provincial Government with the provisions of the Free State Youth Commission Act, 1996* (the Youth Commission Report) was submitted to the Free State Provincial Legislature on 20 June 2006. From the investigation referred to in the Report it was found, *inter alia*, that the decisions of the Premier to appoint a “caretaker Commissioner” for and the new members of the Free State Youth Commission were invalid and therefore improper.

In this regard, the Public Protector recommended that the Premier should obtain legal advice regarding the appropriate legal remedy to rectify the invalidity of her decision to appoint the new members of the Youth Commission.

The Premier’s legal counsel advised her of their view that the interpretation of the relevant provisions of the Free State Youth Commission Act, 1996, as relied upon in the Youth Commission Report, was incorrect. She was further advised to resolve the difference of opinion in respect of her appointment of the Youth Commissioners by interacting with the Public Protector, the Speaker of the Legislature, the Committee concerned, the Youth Commission and the Executive Council.

In the event of a common understanding on the matter not being reached, the Premier was advised to consider seeking a declaratory order from the High Court.

After having been informed that the Public Protector stands by the findings and recommendations contained in the Youth Commission Report, the Premier decided not to take any further steps. The impact of the decision of the Premier is that neither the said recommendation of the Public Protector, nor the legal advice given to her in relation thereto, has been properly implemented.

The Premier is accountable to the Legislature for the implementation of the recommendations made in the Youth Commission Report and the advice provided to her by her legal advisors, at state expense.

As the Commissioners of the Youth Commission have been in office for more than 2 years, it would probably not be in the interest of the Commission and the public that it serves, to approach a court of law in regard to the difference of opinion between the Premier and the Public Protector at this stage, as it might lead to their appointments being declared invalid on the basis of procedural deficiency. It would also lead to substantial legal costs, which will have to be paid from much needed public funds.

The Public Protector recommended that the Free State Provincial Legislature:

- Consider ratifying the appointment of the Youth Commissioners referred to in the Youth Commission Report for as far as it did not comply with the provisions of the Free State Youth Commission Act, 1996; alternatively
- Ensure that the relevant recommendations made in the Youth Commission Report or the legal advice provided to the Premier in relation thereto, are properly implemented.

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1. INTRODUCTION

This Report is submitted to the Free State Provincial Legislature in terms of the provisions of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act). It relates to the implementation of the recommendations made in the *Report of the Public Protector on an investigation into allegations of non-compliance by the Premier of the Free State Provincial Government with the provisions of the Free State Youth Commission Act, 1996* (the Youth Commission Report).

2. BACKGROUND

2.1 The Youth Commission Report (Report no 66) was submitted to the Free State Provincial Legislature (the Legislature) on 20 June 2006.

2.2 From the investigation referred to in the Report, it was found that¹:

2.2.1 The failure of the Speaker and the Chairperson of the Committee to cooperate with the Premier in mutual trust and good faith in respect of her request for advice in relation to the appointment of new members of the Youth Commission, was inconsistent with the Constitution. The delay caused by lack of cooperation also violated the requirement of diligence in respect of the performance of constitutional obligations;

¹ See Part 13 of the Youth Commission Report

- 2.2.2 The decisions of the Premier to appoint a “caretaker Commissioner” for and the new members of the Youth Commission were invalid and therefore improper; and
- 2.2.3 The failure of the Committee to keep minutes of its deliberations in respect of the advice requested by the Premier relating to the appointment of new members of the Youth Commission was improper and amounted to maladministration.
- 2.3 In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, it was recommended that²:
- 2.3.1 The Premier urgently obtains legal advice regarding the appropriate legal remedy to rectify the invalidity of her decision to appoint the new members of the Youth Commission in the absence of the advice of the Committee;
- 2.3.2 The Committee on Ethics and Members’ Interests of the Free State Provincial Legislature conduct an investigation in terms of the Standing Rules and Orders of the Legislature to determine whether the conduct of the Premier, Speaker and Chairperson of the Committee referred to in the report, constituted a breach of the *Code of Conduct and Ethics for Members of the Free State Provincial Legislature*;
- 2.3.3 The Head of the Free State Provincial Treasury directs, in terms of Regulation 4.1.3 of the Treasury Regulations issued in terms of the Public Finance Management Act, 1999, that an official other than an employee of the Department of the Premier, conduct an investigation into the appropriateness of the expenditure incurred by the said Department in respect of the appointment of the “caretaker Commissioner” for and the new members of the Youth Commission; and

² See Part 14 of the Youth Commission Report

- 2.3.4 The Speaker of the Free State Provincial Legislature take urgent steps to ensure that the proceedings at all meetings of the Committee are properly recorded.

3. PROGRESS MADE WITH THE IMPLEMENTATION OF THE RECOMMENDATIONS

- 3.1 On 2 February 2007, the Secretary to the Legislature advised that the recommendation referred to in paragraph 2.3.4 above, had been implemented. She stated in this regard that:

"It is herewith confirmed that the Speaker issued a directive to the Secretary to the Legislature to ensure that the recommendation is implemented. The Secretary to the Legislature subsequently issued a written advice to the relevant support services divisions (both procedural and institutional support) to ensure that meetings of all Portfolio Committees, including specifically the Committee on Finance, Office of the Premier and the Legislature, are recorded and that such recordings are properly stored and/or archived so that recordings can be transcribed, as and when required."

- 3.2 As indicated below, the remainder of the recommendations made in the Youth Commission Report has not been implemented.

4. THE RESPONSE OF THE PREMIER TO THE YOUTH COMMISSION REPORT

- 4.1 The Premier responded to the Youth Commission Report, on 23 June 2006. She expressed reservations about the manner in which, according to her, the investigation into the matter had been conducted, but indicated that she would obtain legal advice in line with the recommendation referred to in paragraph 2.3.1 above.

- 4.2 On 6 October 2006, the Premier submitted a copy of the legal opinion that she obtained, under a covering letter in which she stated that:

"You will note that the legal advice, which I have received, differs materially from the findings in your report. I shall appreciate it to discuss the way forward with you at your earliest convenience and shall appreciate it if you could arrange for a time and a date for a meeting with my office."

- 4.3 From the legal opinion it appeared that the Premier's counsel decided not to focus on the legal remedies available to the Premier to rectify the invalidity of her decision in relation to the appointment of the Youth Commissioners, as recommended, but regarded it as prudent to conduct a review of the Youth Commission Report to determine whether its findings were valid.
- 4.4 No reference was made in the legal opinion to the reservations relating to the investigation, as expressed by the Premier³.
- 4.5 Counsel disagreed with the findings of unlawful conduct by the Premier referred to in paragraph 63 of the Youth Commission Report (see paragraph 2.2.2 above). Their opinion was essentially based on their interpretation of the relevant provisions of the Free State Youth Commission Act, 1996, which was different to that of the Public Protector.
- 4.6 Based on their opinion, counsel advised the Premier that there is "*no presently clear basis*" upon which the Premier could or should proceed to take legal steps to set aside the appointment by her of the Youth Commissioners. They also stated that:

³ See paragraph 4.1 above

"Given that this opinion has arisen directly out of a recommendation of the Public Protector, and having regard also to the values of co-operative governance, it would appear to us that this opinion should be made available not only to the Public Protector but also to the Speaker, the Committee and the Commission, as well as the Executive Council. This should be done with a view to consultative interaction with those persons and entities on the issues dealt with in this opinion.

In the event of common ground being found in relation to the operation of section 3(1) of the FSYCA, that will doubtless be to the benefit of all interested parties. It may nevertheless be necessary for a declaratory order to be sought from the High Court." Whether or not that were to be considered an indicated step would of course depend upon the outcome of the interaction between the parties. (emphasis added)

5. THE SUBSEQUENT INTERACTION BETWEEN THE PUBLIC PROTECTOR AND THE PREMIER

- 5.1 After having studied the legal opinion submitted by the Premier, she was advised, on 7 December 2006, that:

"In our view, the findings and recommendations contained in our report are justified and in accordance with the facts and the applicable legislation. We therefore stand by what is stated in our report.

You are at liberty to follow the advice of your legal advisors. Under the circumstances, we are of the view that the meeting that you have proposed would serve no useful purpose."

- 5.2 The Premier responded on 18 December 2006, indicating that she did not intend taking any further steps in relation to the matter.

- 5.3 Referring to the legal advice given to the Premier, the Public Protector replied, on 17 January 2007, that:

"Our understanding from this advice given to you was that as there are different views in regard to the validity of the appointments in question, the matter concerned should be further considered or an application should be brought in the High Court for a declaratory order.

We were therefore surprised by the contents of your letter of 18 December 2006, in which you stated that on the basis of the advice of your counsel, you do not intend taking any steps in relation to the matter. As stated above it was our impression that your counsel in fact did not advise you not to take any steps, but indeed suggested which steps should be taken in order to resolve the difference of opinion in regard to the validity of your appointments. Your counsel clearly provided this advice, taking into account that our recommendations were made in terms of the Constitution and that it could not simply be disregarded.

It would therefore be appreciated if you could confirm that you have decided not to take any further steps in regard to the matter to enable us to consider our further report to the Free State Provincial Legislature and to Parliament in connection with the matter."

- 5.4 In her response, dated 12 March 2007, the Premier indicated that she regarded it as unnecessary and a waste of public funds to approach a court of law for a declaratory order, as advised by her legal counsel.
- 5.5 Subsequent attempts to meet with the Premier to discuss the way forward, in the light of her reluctance to follow the advice of her counsel, were unsuccessful.

6. FURTHER ENQUIRIES IN CONNECTION WITH THE IMPLEMENTATION OF THE RECOMMENDATIONS OF THE YOUTH COMMISSION REPORT

The Member of the Executive Council responsible for the Treasury and the Chairperson of the Legislature's Committee on Ethics and Members' Interests were approached in January 2007 in connection with the progress made with the implementation of the recommendations referred to in paragraphs 2.3.2 and 2.3.3 above. No response was received.

7. THE RELEVANT GOVERNING PRINCIPLES OF THE CONSTITUTION AND THE PUBLIC PROTECTOR ACT RELATING TO THE UPHOLDING OF THE DIGNITY AND EFFICIENCY OF THE INSTITUTION OF THE PUBLIC PROTECTOR

- 7.1 Section 181(1) of the Constitution established the Public Protector as one of the institutions strengthening constitutional democracy in the Republic of South Africa.
- 7.2 It also provides that the Public Protector is an independent institution, subject only to the Constitution and the law, and must be impartial and perform its functions without fear, favour or prejudice⁴.
- 7.3 In terms of section 181(3), organs of state must assist and protect the Public Protector to ensure its independence, impartiality, dignity and effectiveness.
- 7.4 The Premier of a Provincial Government is an organ of state by virtue of the definition thereof in terms of section 239 of the Constitution.
- 7.5 The obligations imposed by the Constitution must be fulfilled diligently and without delay and conduct inconsistent with it is invalid⁵.

⁴ Section 181(2) of the Constitution

7.6 Section 9(1)(b) of the Public Protector Act, 1994 provides that:

"No person shall 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."

8. THE ACCOUNTABILITY OF THE PREMIER

8.1 The provisions of the Constitution regulating the executive authority of a province and its accountability were canvassed in detail in paragraph 13 of the Youth Commission Report.

8.2 In terms of these provisions, a Premier must act in accordance with the Constitution and is accountable to the Provincial Legislature for the exercise of his/her powers and the performance of his/her functions.

9. THE PRINCIPLES REGULATING COOPERATIVE GOVERNANCE

9.1 Chapter 3 of the Constitution provides that all spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith.

9.2 In terms of section 41(3) and (4):

"An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."

9.3 The applicability of the said constitutional imperative of corporate governance on the Public Protector was considered in the *Report of the National Assembly's ad hoc Committee on the Review of Chapter 9 and Associated Institutions* (dated 31 July 2007).

9.4 The Committee referred to the judgment of the Constitutional Court in the case of *Electoral Commission v Langeberg Municipality*⁶, in which it was held that while Chapter 9 institutions are organs of state, they do not form part of government. It also stated:

"Therefore, the Committee reiterates that the principles of co-operative government do not apply to the Public Protector and that none of the Chapter 9 institutions are bound by the principles of co-operative government."

10. OBSERVATIONS

10.1 The findings and recommendations of the Youth Commission Report have not been set aside by a court of law and therefore stand.

10.2 The recommendation made in paragraph 68 (see paragraph 2.3.4 above) of the Youth Commission Report has been implemented.

10.3 A Premier is constitutionally obliged to protect the dignity of the institution of the Public Protector and to assist the Public Protector to ensure its effectiveness. He/she should not act in a manner relating to an investigation of the Public Protector, which could be interpreted as contemptuous.

10.4 It is not conducive to the upholding of our constitutional democracy if the findings and recommendations of constitutional institutions are disregarded by other organs of state, merely on the basis of a difference

⁶ 2001(9)BCLR 883 (CC)

of opinion. Differences of opinion need to be resolved in the interest of legal certainty, the protection of the dignity and the enhancement of the efficiency of both the constitutional institution and organ of state involved.

- 10.5 The Public Protector is not obliged to resolve the dispute with the Premier, referred to in this report, in terms of the provisions of the Constitution relating to co-operative government.
- 10.6 The Premier's legal counsel advised her of their view that the interpretation of the relevant provisions of the Free State Youth Commission Act, 1996, as relied upon in the Youth Commission Report, was incorrect. She was further advised to resolve the difference of opinion in respect of her appointment of the Youth Commissioners by interacting with the Public Protector, the Speaker of the Legislature, the Committee concerned, the Youth Commission and the Executive Council.
- 10.7 In the event of a common understanding on the matter not being reached, the Premier was advised to consider seeking a declaratory order from the High Court. It was clearly not the intention of her legal advisors that she should not take any steps regarding the matter.
- 10.8 After having been informed that the Public Protector stands by the findings and recommendations contained in the Youth Commission Report and that a meeting with her would therefore serve no purpose, the Premier decided not to take any further steps.

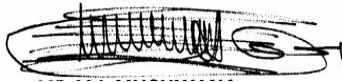
- 10.9 The impact of the decision of the Premier is that neither the recommendation made in paragraph 65 of the Youth Commission Report (see paragraph 2.3.1 above), which stands and was made in terms of the Constitution and the Public Protector Act, nor the legal advice given to her in relation thereto, has been properly implemented.
- 10.10 The Premier is accountable to the Legislature (and not to the Public Protector) for the implementation of the recommendations made in the Youth Commission Report and the advice provided to her by her legal advisors, at state expense.
- 10.11 The recommendations made in paragraphs 66 and 67 of the Youth Commission Report (see paragraphs 2.3.2 and 2.3.3 above) have, as far as could be established, not been implemented.
- 10.12 As the Commissioners of the Youth Commission have been in office for more than 2 years, it would probably not be in the interest of the Commission and the public that it serves, to approach a court of law in regard to the difference of opinion between the Premier and the Public Protector at this stage, as it might lead to their appointments being declared invalid on the basis of procedural deficiency. It would also lead to substantial legal costs, which will have to be paid from much needed public funds.
- 10.13 The contents of this Report were submitted to the Speaker of the Free State Provincial Legislature for his comments in regard to the feasibility of the recommendation made in paragraph 11.1 thereof. In his response, dated 9 April 2008, the Speaker stated:

"We have gone through the report and have accepted it. The draft you have given us was referred to the relevant committee pending the submission of the final report by you."

11. RECOMMENDATION

In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, it is recommended that the Provincial Legislature take urgent steps to:

- 11.1 Consider ratifying the appointment of the Youth Commissioners referred to in the Youth Commission Report for as far as it did not comply with the provisions of the Free State Youth Commission Act, 1996; alternatively
- 11.2 Ensure that the recommendations made in paragraphs 65, 66 and 67 of the Youth Commission Report or the legal advice provided to the Premier in relation thereto, are properly implemented.



ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 13 May 2008