Mr Xolani Malamela  
Provincial Secretary  
NEHAWU Eastern Cape Province  
10 St James Road  
Southernwood  
EAST LONDON

Dear Mr Malamela

REPORT NO. 34 of 2009/10: AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE MEC AND THE HEAD OF THE DEPARTMENT FOR SAFETY AND LIAISON IN THE EASTERN CAPE PROVINCE

Attached hereto is my report on an investigation into allegations of improper conduct relating to the alteration of the organogram, nepotism and irregular appointment of certain staff members by the MEC and the Head of Department for safety and liaison in the Eastern Cape Province, for your information.

Best wishes

[Signature]

ADV T N MADONSELA  
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA  
01/02/2010
Honourable N Kivié
Premier of the Eastern Cape Province
2nd Floor Office of the Premier Building
BHISHO

Dear Honourable Kivié

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REPORT NO. 34 OF 2009/10

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE MEC AND THE HEAD OF THE DEPARTMENT FOR SAFETY AND LIAISON IN THE EASTERN CAPE PROVINCE
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EXECUTIVE SUMMARY

(i) On 31 July 2008, the Public Protector received a letter from Dr E.G Bain, then Acting Chairperson of the Public Service Commission (the PSC) wherein it was alleged that the Head of Department (the HOD) and the then Member of the Executive Council (the MEC) for Safety and Liaison in the Eastern Cape Province (the Department) had altered the organogram of the Department to create a position that did not exist for Mr. Neil Naidoo and improperly appointed staff members through nepotism.

(ii) The allegations were initially made on the National Anti-Corruption Hotline (the NACH) of the PSC before being referred to the Public Protector for investigation.

(iii) From the investigation, the following key findings were made:

(a) The allegation that the HOD and the MEC altered the organogram of the Department to create a position for Mr. Neil Naidoo was not substantiated;

(b) No act of impropriety or improper conduct that could be attributed to an act or omission on the part of the HOD and the MEC, relating to the appointment of Mr. Neil Naidoo for the positions of Deputy Director and Director could be found;

(c) The failure by the MEC to record on the recruitment documents, the reasons for not approving the recommendations of the selection committee, or considering the highly recommended candidates for appointment, was not in line with the requirements of regulation VII D.7 of the Regulations and was therefore improper; and

(d) The MEC’s failure to record on the recruitment documents, the verification in writing that he was satisfied that Messrs Naidoo and Nqini qualified in all respects for their respective posts and that their claims in their application
for the posts have been verified, was not in line with the requirements of regulation VII D.8 and was therefore improper.

(v) The remedial action to be taken by the Premier of the Eastern Cape Province is to take urgent steps to ensure that:

a) Executing authorities are aware of, and fully comply with the relevant provisions of the Public Service Act and Regulations when exercising their powers in the appointment of staff.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE MEC AND THE HEAD OF THE DEPARTMENT FOR SAFETY AND LIAISON IN THE EASTERN CAPE PROVINCE

1. INTRODUCTION

1.1 This report is submitted, in terms 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) to the Provincial Secretary of Nehawu: Eastern Cape Province (the Complainant) and the Premier of the Eastern Cape Province.

1.2 It concerns an investigation into allegations of improper conduct and maladministration relating to alteration of the organogram, nepotism and irregular appointment of certain staff members by the then Member of Executive Council (the MEC) and the Head of Department (the HOD) for Safety and Liaison in the Eastern Cape Province.

2. BACKGROUND

2.1 On 31 July 2008, the Public Protector received a letter from Dr E.G Bain, then Acting Chairperson of the Public Service Commission, in which inter alia, it was stated:

"Cabinet approved the establishment of a National Anti-Corruption Hotline (NACH) in August 2003. On September 2004, the NACH became operational.

The Public Service Commission received one (1) case reported on the NACH (case reference no. 9920080618024) concerning the MEC for Safety, Security, Liaison and Transport and the HOD for Community Safety and Liaison relating to alleged nepotism. The case is referred to your Office to investigate the allegations further". A Call Case Report outlining the allegations was attached.
3. THE COMPLAINT

The complaint recorded in the Call Case Report, inter alia, contained the following allegations:

"Mr. Bashir Hoosain, employed as HOD and the Mr. Thobile Mhlahlo employed as the MEC at Department of Safety and Liaison, situated in Old commission, Independence Avenue, Bisho, Eastern Cape, is reported for nepotism and irregular appointment.

The caller alleges that the original organogram was changed by Messer’s Hoosain and Mhlahlo to create a position for Mr. Neil Naidoo who at the time was employed as a Deputy Director. The caller mentions that Mr. Hoosain created a position for Mr. Naidoo on a twelve month contract. According to the caller, Mr. Naidoo did not want to report to Ms Nqakula (first name unknown) who was the Director at the time.

The caller mentions that the Assistant Director’s position was awarded to a candidate with no experience and/or qualifications. The caller alleges that the only reason Mr. Nqini (first name unknown) obtained the position was because Mr. Hoosain instructed the interviewing panel to award the highest score to him.

The caller requests that the allegations be investigated”. (sic)

4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

4.1 The institution of the Public Protector was established by Chapter 9 of the Constitution to strengthen our constitutional democracy. In terms of section 182 of the Constitution, the Public Protector is empowered 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 impropriety or prejudice, to report on the conduct investigated and to take appropriate remedial action.

4.2 Section 6(4) of the Public Protector Act, provides that the Public Protector is competent to investigate, on own initiative or on receipt of a complaint, *inter alia*, any alleged:

4.2.1 Maladministration in connection with the affairs of government at any level;

4.2.2 Abuse or unjustifiable exercise of power or unfair, capricious or other improper conduct; or

4.2.3 Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.

4.3 Having regard to the powers of the Public Protector in terms of the Constitution and the Public Protector Act, the allegations of improper conduct and maladministration leveled against the then MEC and the Head of Department for Safety and Liaison in the Eastern Cape Province, fall within the powers and jurisdiction of the Public Protector to investigate.

5. **THE INVESTIGATION**

The investigation was conducted in terms of the provisions of sections 6 and 7 of the Public Protector Act and comprised:

5.1 Assessment of the complaint and information received;

5.2 Correspondence with:

5.2.1 The MEC;
5.2.2 The HOD;

5.2.3 Ms Nomfundo Mahonga of the Department;

5.2.4 Mr. Andile Somie: Nehawu: Eastern Cape Province;

5.3 Consideration of the:

5.3.1 Recruitment documents relating to Messrs. Naidoo and Nqini;

5.3.2 Organogram of the Department;

5.4 Consideration and application of the relevant provisions of:

5.4.1 The Constitution;

5.4.2 The Public Service Act, 1994; and

5.4.3 Public Service Regulations, 2001

6. THE LEGISLATIVE FRAMEWORK APPLICABLE TO APPOINTMENTS AND FILLING OF POSTS IN THE PUBLIC SERVICE

6.1 The Constitution

6.1.2 In terms of section 195(1), public administration (every sphere of government, organ of state and public enterprises\(^1\)) must be governed by the democratic values and principles enshrined in the Constitution. These principles provide, \textit{inter alia}, that:

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\(^1\) See section 195 (2)
6.1.2.1 A high standard of professional ethics must be promoted and maintained;

6.1.2.2 The public administration must be accountable; and

6.1.2.3 Good human resource management and career-development practices, to maximise human potential, must be cultivated.

6.2 The Public Service Act, 1994

6.2.1 Section 11(2) provides, inter alia, that in the making of any appointment or the filling of any post in the public service, all persons who qualify for the appointment, transfer or promotion concerned shall be considered and the evaluation of the persons shall be based on training, skills, competence and knowledge.

6.2.2 However, section 11(3) provides that notwithstanding the provisions of subsection (2), the relevant executing authority may approve the appointment, transfer or promotion of persons to promote the basic values and principles referred to in section 195(1) of the Constitution.

6.3 Public Service Regulations, 2001 (the Regulations)

6.3.1 Regulation VII D of Chapter 1 of the Regulations provides, inter alia, as follows:

6.3.1.1 An executing authority shall appoint a selection committee to make recommendations on appointments to posts;

6.3.1.2 In terms of regulation VII D.5, the selection committee shall make a recommendation on the suitability of a candidate after considering only-

(a) information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;
(b) the training, skills, competence and knowledge necessary to meet the inherent requirements of the post; and

(c) the needs of the department for developing human resources;

6.3.1.3 A selection committee shall record the reasons for its decision with reference to the criteria in regulation VII D.5;

6.3.1.4 In terms of regulation VII D.7, the executing authority shall record the reasons for her or his decision in writing, when he or she does not approve a recommendation of the selection committee; and

6.3.1.5 Regulation VII D.8 provides that before making a decision on an appointment or filling of a post, an executing authority shall-

(a) satisfy herself or himself that the candidate qualifies in all respects for the post and that her or his application for the post have been verified; and

(b) record in writing that verification.

7. THE EVIDENCE

7.1 The information received from the HOD

7.1.1 Mr. Naidoo did not resign from his Deputy Director position but instead applied internally for a higher position of Director.

7.1.2 The Department was using the organogram, which was approved in 2003, and the allegation that the organogram was altered is not correct.

7.1.3 The process of requesting the executing authority to approve the post of Director: Crime Prevention additional to the establishment in terms of regulation III G of
Chapter 1 of the Public Service Regulations, was followed with regard to the appointment of Mr. Naidoo to the position of Director.

7.1.4 Mr. Nqini was appointed after following the normal recruitment processes. He met all the requirements, including qualification, and was found suitable for the position.

7.1.5 The final decision to appoint Mr. Nqini was made by the MEC.

7.2 The response of the MEC

7.2.1 On 14 July 2009, a letter in terms of the provisions of section 7(9) of the Public Protector Act was sent to the MEC, advising him that from our observations and the information received during the investigation it appeared that:

7.2.1.1 He had approved the appointment of Mr. Nqini to a position of Deputy Director, deviating from the recommendations of the selection panel, and that the approval of the appointment was improper; and

7.2.1.2 He failed to record the reasons/verification in writing, as required by the Regulations and the Public Service Act, for deviating from the recommendations of the selection panel which highly recommended Mrs C N Makwabe, Mr. K D Du Plooy and Mr. V G Soka, when he appointed Mr. Nqini and that his conduct in that regard was in prima facie in contravention of the Regulations and improper.

7.2.1.3 Having considered the matter, the MEC was informed that the Public Protector might make an adverse finding against him in connection with the above observations.

7.2.2 Consequent to the said notice, the MEC responded, inter alia, as follows:
7.2.2.1 The normal recruitment process was followed and Mr. Nqini met the requirements including proper qualification. He was suitable for the position.

7.2.2.2 As the Executing Authority, he was satisfied that Mr. Nqini was the right candidate to be appointed for the post and that special security measures that are suitable for the Department of Safety and Liaison were the main consideration in the appointment of Mr. Nqini.

7.2.2.3 He has appointed more than 50 Managers in the Department, he served over a period of time and has considered some of the recommendations of the panels and some not. He had head-hunted Managers when he was not satisfied with the strengths and weaknesses presented to him.

7.2.3 On 20 October 2009, follow up questions were forwarded to the MEC, requesting him to provide documents where full reasons for the deviation from the recommendations of the panel were recorded and to advise the Public Protector of the legal basis and reasons for not appointing the highly recommended candidates.

7.2.3.1 He was further requested to provide a comprehensive explanation of the special security measures that are suitable for the Department of Safety and Liaison that was apparently considered in the appointment of Mr. Nqini.

7.2.4 By the time of issuing of this report, no further response relating to the matter was received from the MEC.

7.3 The recruitment documents relating to Messrs Naidoo and Nqini

7.3.1 The recruitment documents relating to the appointment of Messrs Naidoo and Nqini do not contain written verification by the MEC, as required in terms of regulation VII D.8 of the Regulations, that he was satisfied that the candidates
qualified in all respects for their respective posts and that their claims in their applications for the relevant posts have been verified.

7.3.2. No reasons by the MEC for not approving the recommendations of a selection committee appear in the recruitment documents relating to the appointment of Mr. Nqini, as required by regulation VII D.7 of the Regulations.

7.3.3 There is no evidence in the recruitment documents of Mr. Nqini that suggests or creates the impression that the HOD instructed the selection committee to award the highest score to Mr. Nqini.

8. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

8.1 The Department followed proper recruitment processes in the recruitment of candidates for the positions filled by Messrs Naidoo and Nqini.

8.2 There is no factual basis for the allegation that the organogram of the Department was altered to create a position for Mr. Neil Naidoo.

8.3 The allegation that Mr. Nqini was appointed without proper qualifications and experience could not be corroborated by evidence received and was therefore without factual basis.

8.4 The recruitment documents relating to the appointment of Messrs Naidoo and Nqini did not contain the verification by the MEC, as required in terms of regulation VII D.8 of the Regulations, that he was satisfied that the candidates qualify in all respects for the post and that their claims in their applications for the post have been verified.
10. REMEDIAL ACTION TO BE TAKEN

In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, the remedial action to be taken by the Premier of the Eastern Cape Province (the Premier) is to take urgent steps to ensure that:

10.1 Executing authorities are aware of, and fully comply with the relevant provisions of the Public Service Act and Regulations when exercising their powers in the appointment of staff.

11. CONCLUSION

The Premier must inform the Public Protector of the progress in the implementation of the remedial action mentioned in paragraph 10 above, within a period of six months of the date of the report.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
Date: 01/02/2010

Assisted by: Mr. P Tjale (Senior Investigator)