
REPORT NO. 48 OF 2009/10

REPORT ON AN INVESTIGATION INTO AN ALLEGATION THAT THE NATIONAL PROSECUTING AUTHORITY FAILED TO DISCHARGE ITS MANDATE AS RECOMMENDED BY THE TRUTH AND RECONCILIATION COMMISSION
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Executive Summary

(i) The Public Protector investigated a complaint relating to the failure of the National Prosecuting Authority’s (NPA) Special Task Team on Missing Persons to facilitate the issuing of a death certificate, payment of a special pension, reparation, provision of video footage and pathological reports to the Bonga family (the Complainants). The Complainants reported that the South African National Defence Force (SANDF) refused to honour Mr Richman Muziwendonda Bonga (the deceased) with a full military funeral.

(ii) In a report submitted to the President of the Republic of South Africa in 2007, the Truth and Reconciliation Commission (TRC) recommended, inter alia:

(aa) That a Special Task Team on Missing Persons (the Special Task Team) be established within the Office of the National Director of Public Prosecutions and be given a specific mandate and timeframe.

(bb) That the mandate should include conducting further investigations into individual cases, confirming the disappearance and, where appropriate, making a finding confirming victim status and disappearance and issuing a report, to enable the families of the disappeared to access reparation.

(iii) The Public Protector investigated the complaints and made the following findings:

(a) The NPA’s failure to discharge its undertaking to the family constituted improper conduct to the extend that:
(aa) The deceased was re-buried in 2006 but is still recorded on the National Population Register as being alive;

(bb) the deceased’s family did not receive any reparation because they did not appear before the TRC in respect of the deceased’s death/disappearance;

(cc) the deceased’s family did not receive the video footage of the exhumation and the pathological reports confirming the identity of the exhumed; and that

(b) The deceased was not honoured with a full military funeral because he was not a member of the SANDF at the time of his death.

(iv) Remedial action to be taken by the National Prosecution Authority is that:

(aa) The Special Task Team ensures that the deceased’s death is duly registered with the Department of Home Affairs;

(bb) The pathological/anthropologist report be issued to the family within 90 days of receipt of the report; and

(cc) The video footage/photographs are procured for the family at the expense of the Special Task Team within 90 days of receipt of the report.
REPORT ON AN INVESTIGATION INTO AN ALLEGATION THAT THE NATIONAL PROSECUTING AUTHORITY FAILED TO DISCHARGE ITS MANDATE AS RECOMMENDED BY THE TRUTH AND RECONCILIATION COMMISSION

1. INTRODUCTION

1.1 This is a report 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). It is submitted to:

1.1.1 The Complainants;

1.1.2 The Minister of Justice and Constitutional Development; and

1.1.3 The National Director of Public Prosecutions (NDPP).

1.2 It relates to an investigation into the alleged failure by the National Prosecuting Authority (NPA) to assist or provide documents, reports and video materials to the Bonga Family (the Complainants) subsequent to the exhumation and re-burial of Mr. Richman Muziwendonda Bonga (the deceased) who disappeared in 1983.

1.3 The deceased, who was a member of the military wing of the African National Congress, Umkhonto we Sizwe, was assassinated and buried in an unmarked grave in Piet Retief which falls within Mkhondo Local Municipality, Mpumalanga.

2. THE COMPLAINT

2.1 The investigation came about as a result of a complaint lodged with the Public Protector on 31 March 2009 by a member of the Bonga Family.
The Complainant alleged that his family, herein referred to as the family, was approached by the NPA's Special Task Team on Missing Persons (Special Task Team) on 23 April 2006 informing them that the Special Task Team had established the whereabouts of the deceased and his remains were to be exhumed in order to establish the cause of death and possible prosecution of the perpetrators.

2.2 The first complaint relates to the Special Task Team's failure to discharge an undertaking to furnish or assist the family with the following, which may constitute improper conduct on the part of the Special Task Team:

2.2.1 Issuing of death certificate;

2.2.2 Pathological reports conducted on the exhumed body;

2.2.3 A claim for special pension and reparation by the family; and

2.2.4 Video material of the exhumation and funeral.

2.3 The second complaint relates to alleged prejudicial conduct by the South African National Defence Force (SANDF) to accord the deceased with a full military funeral.

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

3.1 Section 182 (1) of the Constitution provides that:

"The Public Protector has the power, as regulated by national legislation-

(a) 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;

(b) to report on that conduct; and

(c) to take appropriate remedial action.”

3.2 In terms of section 6(4)(a) of the Public Protector Act the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government, abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function.

3.3 In terms of section 6(4)(c) of the Act, the Public Protector may at any time prior to, during or after an investigation, *inter alia*, make any appropriate recommendation that he/she deems expedient to the public body or authority affected by it.

4. THE INVESTIGATION

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

4.1.1 Assessment of the complaints;

4.1.2 Correspondence with the Head of the NPA Special Task Team and the Department of Justice and Constitutional Development;

4.1.3 Meeting with the official responsible for the TRC Unit located within the Department of Justice and Constitutional Development; and
4.1.4 Consideration of the relevant legislation.

4.2 ISSUING OF A DEATH CERTIFICATE

4.2.1 Enquiries were made with the Special Task Team and they stated that the death certificate was obtained and personally handed to members of the family by the then Minister of Justice and Constitutional Development, Ms Bridgette Mabandla, in June 2005 at a special ceremony at Freedom Park.

4.2.2 The report further indicated that the Special Task Team had learned that the family had misplaced the death certificate and that a duplicate could be obtained from the Department of Home Affairs. However, on taking up the matter with the Department of Home Affairs it was established that the deceased is registered in the National Population Register as being alive.

4.2.3 The NPA corresponded with the Public Protector on 05 June 2009 reporting that they, in liaison with the Truth and Reconciliation Commission Unit in the Department of Justice and Constitutional Development, will secure another certificate from the Department of Home Affairs as it appears that the family had lost the initial certificate issued by the Minister in 2005.

4.3 PATHOLOGICAL REPORT AND VIDEO MATERIAL FOR THE EXHUMATION AND REBURIAL

4.3.1 In its response, the Special Task Team reported that a report is on the verge of being completed by forensic anthropologists from Argentina and that it would be ready within a few weeks from the date of the preliminary report (sic).
4.3.2 According to the report from the NPA the video footage of the exhumation was contracted to a private photographer whose particulars were provided to the family for possible purchase of the work should they deem it necessary to procure same. The photographer was apparently contracted by the Mayor of Mkhondo Local Municipality to take pictures and the video footage of the exhumation.

4.3.3 The Special Task Team further made an undertaking to the Public Protector to provide the family with photographs of the exhumation.

4.4 ASSISTANCE WITH SPECIAL PENSION AND REPARATION

4.4.1 The NPA responded by indicating that documentary support was furnished to the Complainants in order to enable them to access a special pension. The application for a special pension was filed in 2006 by Mr. Mzwandile Mtyobile, in his capacity as a son and beneficiary of the deceased.

4.4.2 Noting the undue delay of the special pension claim, the Public Protector took the matter up with the Directorate: Special Pensions at the Government Employee Pension Fund (GEPF) on 19 June 2009. There was no apparent reason for the delay and the GEPF advised that the claim was ready for payment subject to the issuing of a tax directive by the South African Revenue Service. The claim was finalised and an amount of R69 816, 49 was paid over to the deceased’s beneficiary, Mr Mzwandile Mtyobile, on 25 June 2009.

4.4.3 The Special Task Team is adamant that the Complainant is ineligible to receive reparation on the basis that they did not appear or make presentations to the Truth and Reconciliation Commission (TRC) in respect of the deceased’s death/disappearance. This matter was referred to the TRC Unit at the Department of Justice and Constitutional Development for clarity. The TRC Unit maintains that eligibility for
reparation is dependent upon statements made during the TRC sessions. The family had neither made a statement nor registered a case with the TRC.

4.5 APPLICATION FOR A MILITARY FUNERAL

4.5.1 The last aspect of the complaint relates to the refusal by the SANDF to honour the deceased with a full military funeral.

4.5.2 The Public Protector contacted the SANDF, which then advised that being a member of the Non Statutory Force (NSF) did not necessarily imply that one qualified to be a member of the SANDF. The deceased, who was a member of the military wing of the African National Congress, Umkhonto we Sizwe, was disqualified from being honoured with a military funeral on the basis that he did not demobilise with the SANDF and was therefore not a member of the SANDF at the time of his death.

5. LEGISLATIVE FRAMEWORK

5.1 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

The preamble to the Constitution provides for the healing of the divisions of the past and establishes a society based on democratic values, social justice and fundamental human rights.

5.2. THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT, 1995

The Promotion of National Unity and Reconciliation Act, 1995 provides for the conducting of investigations and the holding of hearings by the TRC into the gross violation of human rights committed from 1 March 1960 to 10 May 1994.
5.3 TRUTH AND RECONCILIATION REPORT

5.3.1 The TRC report provides for the establishment of a Special Task Team on Missing Persons within the Office of the NDPP and that it is given a specific mandate and time frame. The mandate includes conducting further investigations into individual cases, confirming the disappearance and, where appropriate, making a finding conferring victim status on the disappeared\(^1\).

5.3.2 The TRC report also provides that once the Special Task Team has completed its work and compiled its report, it has to make findings so that the families of the victims can access reparations\(^2\).

5.3.3 The TRC report further states that where the Special Task Team on Missing Persons is satisfied that a person has disappeared or has died, and a finding to that effect has been made, it has to facilitate the presumption of death process. Death certificates will have to be issued and the families referred to the President’s Fund for reparations\(^3\).

6. FINDINGS

6.1 The response from the NPA dated 26 May 2009 indicating that the death certificate had been issued and handed to the Family in 2005 is contrary to records at the Department of Home Affairs which indicates the deceased as being alive as recently as 02 June 2009.

6.2 As at 02 June 2009 the Family has not yet received the re-issued death certificate as per undertaking of the Special Task Team.

\(^1\) Page 533 paragraph 100 of Volume 6 Section 4 Chapter 1
\(^2\) Page 536 paragraph 107 of Volume 6 Section 4 Chapter 1
\(^3\) Page 535 paragraph 109 of Volume 6 Section 4 Chapter 1
6.3 Even though the Special Task Team is required by law to compile a report on completion of its work, and the family is entitled to the pathological reports, they have not yet received the reports, despite an undertaking by the Special Task Team.

6.4 The Special Task Team did not, as recommended by the TRC where it is satisfied that a person has disappeared or has died, facilitate the presumption of death process, and refer the family to the President’s fund for reparation.

6.5 Furthermore, the Special Task Team has not made available to the family copies of the exhumation photographs despite an undertaking to the Public Protector to do so.

6.6 The deceased, Mr Richman Muziwendonda Bonga, was not eligible to be honoured with a full military funeral on the basis that he was not a member of the SANDF at the time of his death.

7. **REMEDIAL ACTION TO BE TAKEN**

In terms 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 National Prosecuting Authority is to ensure that:

7.1 The deceased’s death is duly registered with the Department of Home Affairs;

7.2 The anthropologist report is issued to the Family within 6 months of the receipt of the report; and

7.3 The video footage/photographs are procured for the family at the expense of the Special Task Team within 6 months of the receipt of the report.
8. CONCLUSION

8.1 The NDPP must report to the Public Protector on progress in the implementation of the said remedial action, within 180 days of receipt of the report.

ADV T N MADONSELA
PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 31/03/2010

Assisted by: Adv EM Masilela (Senior Investigator)