
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO. 16 of 2009/10

REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR APPOINTMENT OF A HEADMAN IN TSENGIWE BY THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS IN THE EASTERN CAPE PROVINCE
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Executive Summary

(i) The Office of the Public Protector investigated a complaint lodged by a Committee of 13 (the Complainants) allegedly representing the majority of the Tsengiwe Administrative Area in connection with the alleged incorrect appointment and recognition of Mr B B N Msengana by the Member of the Executive Council for Local Government, Housing and Traditional Affairs to be a headman to rule the Tsengiwe Administrative Area in Mdumazi in the Eastern Cape Province.

(ii) The Complainants alleged that the appointment process was not transparent as the community was never involved. After the eHlathini Traditional Council (Council) ignored their pleas for rectification thereof, the Complainants raised the matter with the Department of Local Government and Traditional Affairs in the Eastern Cape Province (Department), but it only responded after it had already appointed Mr Msengana as headman.

(iii) The investigation revealed the following:

(a) Mr Msengana is not from a royal family. There is no royal family in Tsengiwe Administrative Area and therefore his appointment was not in terms of the applicable legislation;

(b) There are no systems in place in the Eastern Cape Province to assist the Premier in ascertaining whether or not a person identified in terms of the relevant legislation is from the authentic royal family;
(c) There is a shortcoming in the Provincial legislation with regards to the filling of vacancies for headman/woman in instances where there is no royal family in the traditional community;

(d) The applicable legislation is not clearly understood by traditional leaders, council, and communities; and

(iv) The Public Protector recommended the following:

(a) That the matter be referred to the House of Traditional Leaders for recommendation as provided for in terms of section 18(4)(a) of the Eastern Cape Province Traditional Leadership and Governance Act, 2005 and section 11(3)(a) of the Traditional Leadership and Governance Framework Act, 2003;

(b) The Provincial legislation should be amended to address the limitations identified in section 16 regarding the appointment of a headman/headwoman for traditional communities without royal families;

(c) The Department must establish and maintain a register for all royal families who are ruling in their traditional communities in the Eastern Cape Province;

(d) The Department should train all stakeholders responsible for the implementation of the legislation; and

(e) The Department should, in order to avoid conflict in the area, facilitate the establishment of an interim structure to take charge of
the administration of the Tsengiwe Administrative Area whilst these recommendations are being implemented.
REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR APPOINTMENT OF A HEADMAN IN TSENGIWE BY THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS IN THE EASTERN CAPE PROVINCE

1. INTRODUCTION

1.1 This report is submitted to the Member of the Executive Council responsible for Local Government and Traditional Affairs (MEC) and the Superintendent-General of the Department of Local Government and Traditional Affairs (the Department) 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 Act).

1.2 It relates to an investigation into allegations of the irregular appointment of Headman Ndiphiwe Msengana by the MEC on the recommendation of the Ehlathini Traditional Council (Council) without the involvement of the Tsengiwe community.

2. THE COMPLAINT

2.1 On 7 August 2008 the Office of the Public Protector (OPP) received a complaint lodged by Mr Mawaka C Ncoko on behalf of the Committee of 13 (the Complainants) which represents the majority of the community of Tsengiwe who's view it was that the Department did not involve them in the appointment of Mr Ndiphiwe Msengana as their headman.

2.2 The Complainants have, in an attempt to resolve the dispute, approached the Department.
2.3 The Department delegated Mr Mateta, Senior Manager in the Traditional Affairs directorate to investigate and report on the matter, but without success as the report was never provided to the Complainants.

2.4 The appointment of Mr Msengana was processed by the eHlathini Tribal Council without the involvement of the community as it has been the case in the appointment of headmen in the past.

2.5 The appointment of Mr Msengana’s predecessors was preceded by a democratic process in that the entire community was involved and was unanimous in electing them to assume the headmanship of their area.

2.6 The Complainants allege that the community is divided into two antagonistic groups and that the situation is so tense that it may result in violence should this matter remain unresolved.

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

3.1 In terms of section 182 of the Constitution, the Public Protector has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is suspected to be improper or to result in any impropriety or prejudice.

3.2 The additional powers of the Public Protector to investigate are derived from sections 6(4), 6(5) and section 7(1)(a) of the Public Protector Act, 1994.

3.3 The Public Protector has the jurisdiction to investigate this matter as it relates to allegations of irregular appointment thus resulting in improper
prejudice, suffered by the Complainants when their democratic right to choose their traditional leader was interfered with.

4. **THE INVESTIGATION**

The investigation was conducted in terms of section 6 and 7 of the Public Protector Act, 1994, and it comprised the perusal and consideration of the following:


4.1.1 Section 1(1) of the Traditional Leadership and Governance Framework Act, 2003 defines headman or headwoman as a traditional leader who (a) is under the authority or exercises authority within the area of jurisdiction of a senior traditional leader in accordance with customary law; and (b) is recognised as such in terms of this Act.

4.1.2 The same section defines a royal family as a core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close to the ruling family.

4.1.3 Both the national legislation and the provincial legislation define the traditional leader as any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, save for the usage of the word iNkosana instead of headman in the former legislation.
4.1.4 Section 11(1) confers the power to identify a person who qualifies in terms of customary law to assume the position of headman or headwoman whenever that position becomes vacant. This must be with due regard to the applicable customary law.

4.2 Traditional Leadership and Governance Act, 2005 (Eastern Cape) (Act No 4 of 2005)

4.2.1 Section 18(1) of the Provincial legislation mirrors section 11(1) save for the fact that it stipulates that the identification must be made within 60 days instead of a reasonable time as provided for in the latter section.

4.2.2 Both acts are unanimous regarding dispute resolution where the Premier has received evidence or allegations that the identification of a person referred to in section 11(1) and 18(1) of the respective acts, was not done in accordance with the provisions of these acts, customary law or custom. The Premier may refer the matter to the Provincial House of Traditional Leaders for its recommendations or may refuse to issue a certificate of recognition. The matter should then be referred to the royal family for consideration and resolution where the certificate of recognition has been refused.

4.2.3 Section 11(1)(b)(i) of the Traditional Leadership and Governance Framework Act, provides that the Provincial legislation may also provide for the election of a headman or headwoman in terms of customary law.

4.3 Meeting with the Complainants

4.3.1 The meeting was held on 28 August 2008, at Calusa offices in Cala. It emerged from the presentation made by the chairperson, supported by all the members present that their area is not under the authority of a chief
and that there is no royal family in their community and therefore the claim by the Council that the Msengana family is a royal family was rejected.

4.3.2 The Tsengiwe Administrative Area is situated in the Xalanga District. The district consists of 4 traditional communities, namely eHlathini, Mqolombeni, KwaGcina and eMaqwatini and only the last two are under the authority of chiefs, namely Chiefs Gecelo and Stokwe respectively.

4.3.3 It emerged that all headmen preceding Mr Msengana, including his late uncle from whom he succeeded, were elected by the community and were not from the Msengana family. Further, two of the last four headmen were from the Jamjam, Tsengiwe families.

4.3.4 The Council was accused of processing the appointment of Mr Msengana without the knowledge of the community. Even though it was aware of the community’s dissatisfaction, the Council apparently went ahead with the appointment.

4.3.5 The complainants felt strongly that the applicable legislation was misinterpreted purposely by the Council in order to benefit Mr Msengana.

4.4 Meeting with the Traditional Council

4.4.1 The meeting with the Council was held on 25 September 2008 at the Arthur Tsengiwe College of Education and all members of the Council attended.

4.4.2 The Council confirmed that it was responsible for the processing of the appointment Mr Msengana and to that effect, it forwarded the royal resolution form to the Department on 2 April 2007.
4.4.3 Mr Msengana gave a clear account of how his family came to the area and also how at times they assumed headmanship. However he unequivocally stated that the Msengana family is not of royal blood and is therefore not a royal family as defined in section 1 of the Traditional Leadership and Governance Framework Act, 2003 read with section 1 of the Provincial Traditional Leadership and Governance Act, 2005.

4.4.4 Mr Msengana, supported by other members of the Council, complained about statements by the Complainants that headmen to the enactment of the provincial legislation regarding traditional leadership, were elected by the community.

4.4.5 The Council intimated that the villagers would have preferred the voting system for the appointment of a headman to be sustained as it was more democratic. The Council was of the belief that the new legislation conferred the status of royalty to those families whose members were ruling headmen at the time the Act came into operation, hence they found nothing wrong when the Msenganas identified their own as a successor to the deceased headman.

4.4.6 During the meeting Mrs Mkefa, the Council's secretary, indicated that training on new legislation is necessary as it is the general understanding amongst all council members that the provincial legislation has granted royal family/blood status to those elected headmen who were not of royal blood, but ruling at the time of its promulgation.

4.5 A report from the Superintendent-General of the Department

4.5.1 The report was compiled by Mr Mateta, Senior Manager, to update the Superintendent-General on the appointment and recognition of Mr Msengana as iNkosana for Tsengiwe Administrative Area, as well as
on the allegations from the community duly represented by the Complainants about the alleged irregular appointment.

4.5.2 In the report it is held that the dissatisfaction on the part of the community is based on their disregard for the provisions of the provincial legislation and by “doggedly clinging” to the repealed Transkei Authorities Act, 1965.

4.5.3 Further, the report recommended that a legal opinion be sought since the Complainants apparently challenged the provisions of the Traditional Leadership and Governance Act, 2005 and the Traditional Leadership and Governance Framework Act, 2003.

5. EVALUATION OF FACTS AND EVIDENCE

5.1 Based on both oral and documentary evidence received from the Complainants, it is apparent that the dissatisfaction is triggered by the misinterpretation of section 1 of both the Traditional Leadership and Governance Act, 2005 and the Traditional Leadership and Governance Framework Act, 2003, regarding the definition of a royal family.

5.2 Section 18(1)(a)(i) and (ii) is silent with regards to a process that must be followed regarding the appointment of a headman in an instance where there is no royal family in a traditional community from which an iNkosana or headman should be identified as this section provides.

5.3 The drafters of the provincial legislation did not consider the provisions of section 11(2)(b)(i) of the principal legislation which provides that the provincial legislation may also provide for customs. Had the provisions of this section been incorporated into section 18 of the Traditional Leadership and Governance Act, 2005, the dispute regarding cases where there is no royal family in a traditional community could have been addressed.
5.4 Given what is outlined in paragraph 5.3 above, the finding in the Senior Manager’s report that the Complainants are “clinging doggedly” to a repealed Transkei Authorities Act, could be justified.

5.5 The submission by the Complainants that in the Tsengiwe Administrative Area, the community is not under the authority of a chief, that there is no royal family in Tsengiwe and that Mr Msengana is not of royal blood, was corroborated by the Council and by Mr Msengana himself.

5.6 The dispute resolution process provided for in both sections 11 and 18 of both the legislation referred to in 4.2.2 above, was not applied by the MEC.

6. **KEY FINDINGS**

6.1 Mr Msengana is not from a royal family. There is no royal family in Tsengiwe Administrative Area and therefore his appointment was not in terms of the applicable legislation;

6.2 There are no systems in place in the Eastern Cape Province to assist the Premier in ascertaining whether or not the person identified in terms of the provisions of the acts/legislation is from an authentic royal family;

6.3 There is a shortcoming in the provincial legislation with regards to the filling of vacancies for headman/headwoman in instances where there is no royal family in the traditional community;
6.4 The applicable legislation is not clearly understood by traditional leaders, Council, and communities; and

6.5 The dissatisfaction on the part of the community is justified.

7. RECOMMENDATIONS

In terms of section 182(1)(c) of the Constitution and section 6(4)(c)(iii) of the Public Protector Act, 1994, it is recommended that:-

7.1 The matter be referred to the House of Traditional Leaders for recommendations as provided for in terms of section 18(4)(a) of the Traditional Leadership and Governance Act, 2005 and section 11(3)(a) of the Traditional Leadership and Governance Framework Act, 2003;

7.2 The provincial legislation should be amended to address the limitations identified in section 18 regarding the appointment of a headman/headwoman for traditional communities without royal families;

7.3 The Department must establish and maintain a register for all royal families who are ruling in their traditional communities in the Eastern Cape Province;

7.4 The Department should train all stakeholders that are responsible for the implementation of this legislation; and

7.5 The Department should, in order to avoid conflict in the area, facilitate the establishment of an interim structure to take charge of the administration of the Tsengiwe Administrative Area whilst these recommendations are being implemented.
8. CONCLUSION

The Office of the Public Protector will monitor the implementation of the recommendations referred to in paragraph 7 at intervals of 3 months from the date of this report.

ADV L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 20/08/09

Assisted by: R Z Molose, Investigator Eastern Cape Provincial Office