IMPROPER INFLUENCE
UNPROVEN

Report no. 13 of 2011/12:
An Investigation into an alleged
breach of Section 2(2)(a)(i) and (2)(2)(b)(ii)
and (v) of the Executive Members' Ethics Act and
the Executive Ethics Code by the Premier of Gauteng,
Ms NP Mokonyane

PUBLIC PROTECTOR
SOUTH AFRICA

"IMPROPER INFLUENCE UNPROVEN"

REPORT NO. 13 OF 2011/12

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Executive Summary

(i) This is a report by the Public Protector on an investigation into the alleged breach of section 2 of the Executive Members’ Ethics Act, 1998, and by implication, the corresponding provisions of the Executive Ethics Code by the Premier of the Gauteng Provincial Government, Ms N P Mokonyane.

(ii) The Public Protector received a complaint from Mr J Bloom, Member of the Provincial Legislature for the Democratic Alliance, Gauteng, on 23 April 2010.

(iii) Mr Bloom (the Complainant) alleged that the denial by Premier Mokonyane of her office’s involvement in the awarding without tender, of a R30 million project to beautify the R24 Albertina Sisulu Highway between the OR Tambo International Airport and Johannesburg possibly constituted unethical behaviour. In particular, that this appeared to be a breach of sections 2(2)(a)(i) and (ii) and 2(2)(b)(ii) and (v) of the Executive Members’ Ethics Act, 1998, [and by implication, the corresponding provisions of the Executive Ethics Code].

(iv) In addition, that there appeared to be maladministration as the reason cited for awarding the contract without tender was that of urgency because of the need to complete it before the 2010 FIFA World Cup, when documents showed that consideration of the project was at an advanced stage in June 2009.

(v) The Public Protector’s findings are that:

(a) The Premier’s Office received the proposal by Utho Ngathi addressed to the Premier and referred it to the Department of Roads and Transport;
(b) The letter of appointment to Utho Ngathi made reference to Utho Ngathi's "proposal to the Office of the Premier, Executive Council Sub-Committee and Department of Roads and Transport with the detailed presentation of the Beatification of R24 Albertina Sisulu Highway"

(c) No tangible evidence was found that indicates that the role of the Premier and her office went beyond the receipt and referral of the proposal to the Department of Roads and Transport, and therefore influenced the adjudication or award of the contract or tender;

(d) The Premier's statement that there was no presentation to her office is upheld in the absence of tangible evidence to the contrary; and

(e) The Premier did not act in breach of the provisions of sections 2(1(a) to (d), and 2(3(a), (c) and (d) of the Code, and is consequently not guilty of any unethical behaviour.
1. INTRODUCTION

1.1 This report is submitted to the President of the Republic of South Africa in terms of the provisions of section 3(2) of the Executive Members' Ethics Act, 1998 (the Act). A copy is provided to the Complainant.

1.2 Section 3(2) of the Act provides as follows:

"The Public Protector must submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint-

(a) to the President, if the complaint is against a Cabinet member, Premier or Deputy Minister, and

(b) ...

1.3 The report relates to an alleged breach of sections 2 of the Executive Members' Ethics Act, 1998 (the Act) and the Executive Ethics Code (the Code) respectively by the Premier of Gauteng, Ms N P Mokonyane.

2. THE COMPLAINT

2.1 The Public Protector received a complaint on 23 April 2010 from Mr J Bloom, who is a Member of the Provincial Legislature for the Democratic Alliance, Gauteng. The complaint is in terms of section 4(1)(b) of the Act, and was sent by email.

2.2 Mr Bloom (the Complainant) specifically stated the following:

"I wish to refer the issue of possible unethical behaviour by Premier Nomvula Mokonyane in denying any involvement of her office in the award without tender of a
R30 million project to beautify the Albertina Sisulu freeway between the OR Tambo Airport and Johannesburg.

There appears to be a breach of the Code of Conduct as referred to in the Executive Members’ Ethics Act 82, 1992 [sic], specifically 2(a)(i) at all times to act in good faith and in the best interest of good governance; and (ii) to meet all the obligations imposed on them by law; and also 2 (b)(ii) [not] acting in a way that is inconsistent with their office and 2(b)(v) [not] acting in a way that may compromise the credibility or integrity of their office or of the government.

There also appears to be maladministration as the reason cited for awarding the contract without tender is that of urgency because of the need to complete it before the World Cup, when documents show that consideration of the project was at an advanced stage in June last year.

I attach an official reply by Mokonyane to questions in the Gauteng Provincial Legislature in this matter that appears to contradict documents in my possession that I also attach.

According to the reply:

1 The company communicated with the Office of the Premier on the 15th of September 2009.
2 The communication was in the form of a proposal.
3 The Department of Roads and Transport did not communicate with the Office of the Premier in connection with this project by this company.
4 The proposal was not presented to the Office of the Premier.

This is not in accord with the enclosed document that is dated 22 June 2009 from Ms B Monama, the Head of Department of Roads and Transport that is headed SUBJECT:
DEVIATION FROM NORMAL TENDER PROCESS IN THE APPOINTMENT OF UTHO
NGATHI DEVELOPMENT CORPORATION, FOR PROVISION OF SERVICES ON THE
ALBERTINA SISULU (R24) BEAUTIFICATION PROJECT.

On page 3 of this letter it says:

"The consulting company, namely Utho Ngathi Development Corporation, following a
presentation of their R24 Beautification project proposal to the Premier's Office and the
EXCO subcommittee, were deemed competent to complete this task based on the
following credentials."

Another document that I attach is a letter by Mrs Monama dated 15 January 2010
addressed to Utho Ngathi Development Corporation that starts with the following:

"Further to your proposal to the Office of the Premier, Executive Council Subcommittee and
Department of Roads and Transport with the detailed presentation of the Beautification
Project of R24 Albertina Sisulu Highway."

I also append below a press statement by Premier Mokonyane that denies any involvement
with the award of this project, which also appears to be at variance with the above letters."

2.3 The press statement (the Statement) states amongst others:

"The Gauteng Provincial Government has noted media reports alleging that Premier
Nomvula Mokonyane has awarded a R30 million tender to beautify the Albertina Sisulu
highway “without a proper tender process”.

Premier Nomvula Mokonyane and the Office of the Premier have not played any role
whatsoever in the awarding of the tender or in the appointment of Utho Ngathi to
implement the Albertina Sisulu beautification project."
The R24 Albertina Sisulu Highway beautification project is led and implemented by the Gauteng Department of Roads and Transport, and as the implementing entity, the department is responsible for all procurement concerning this project...

2.4 The Reply to a Question for Written Reply reads:

"With regard to the contract awarded to Utho Ngathi Development Corporation to beautify the Albertina Sisulu highway, will the Premier indicate:

(i) When did this company first communicate with the Premier's Office;
(ii) What was the content of this communication;
(iii) When did the Department of Roads and Transport first communicate with the Premier's Office in connection with this project by this company;
(iv) When was this proposal presented to the Premier's Office;
(v) When was this proposal present [sic] to the Executive Council or any of its sub-committees;
(vi) When was this proposal first discussed in the Executive Council;
(vii) When was a decision taken on this project by the Executive Council;
(viii) When was conditional approval for this project first taken;
(ix) What body took the decision that the Department of Agriculture and Rural Development surrender R30m for this project; and
(x) What role did the Premier's Office play in co-ordinating [sic] action in this project between the Departments of Roads and Transports; [sic] Agriculture and Rural Development; Sports, Arts, Culture and Recreation and any other Department."
2.4.1 The response from the Premier’s Office was as follows:

"Response

(i) The company communicated with the Office of the Premier on the 15th September 2009.
(ii) The communication was in the form of a proposal.
(iii) The Department of Roads and Transport did not communicate with the Office of the
     Premier in connection with this project by this company.
(iv) The proposal was not presented to the Office of the Premier.
(v) N/A.
(vi) N/A.
(vii) N/A.
(viii) N/A.
(ix) The Provincial Budget Committee took the decision.
(x) None."

3 THE JURISDICTION OF THE PUBLIC PROTECTOR

3.1 Section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution)
provides that 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 alleged or suspected to
be improper or to result in any impropriety or prejudice. It further mandates the Public
Protector to report on the conduct investigated, and to take appropriate remedial action.

3.2 Section 182(2) of the Constitution provides that the Public Protector has the additional
powers and functions prescribed by national legislation.

3.3 Such additional functions are prescribed by the Executive Members’ Ethics Act, 1998.
Sections 3(1) and 4(1) (a) of the Act provide, among others, that the Public Protector must
investigate any alleged breach of the Code (published by the President in terms of section
2(1) of the Act) on receipt of a complaint by a member of the legislature of a province if the complaint is against a Member of the Executive Council (MEC). The Act defines MEC to include Premiers.

3.4 Section 3 (4) of the Executive Members' Ethics Act, 1998 further provides that:

"When conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act, 1994 (Act 23 of 1994)."

3.5 The Public Protector therefore has the necessary powers to investigate the matter/s raised in the present complaint. The complaint relating to maladministration is however not dealt with in this report. It will be reported on separately in terms of the Public Protector Act, 1994.

4 THE INVESTIGATION

The investigation was conducted in terms of section 3(2) of the Executive Members' Ethics Act, 1998 read with section 182(1) and (2) of the Constitution and sections 7 and 8 of the Public Protector Act 23 of 1994.

4.1 Regulatory Framework

4.1.1 The Executive Members' Ethics Act, 1998 and the Executive Ethics Code

This Act provides for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers, and members of provincial Executive Councils.
4.1.1.1 Section 2 of the Act states:

"2 The code of ethics must-

(2) include provisions requiring Cabinet members, Deputy Ministers and MECs-

(i) at all times to act in good faith and in the best interest of good governance; and

(ii) to meet all the obligations imposed on them by law; and

(b) include provisions prohibiting Cabinet members, Deputy Ministers and MECs from-

(ii) acting in a way that is inconsistent with their office;

(v) acting in a way that may compromise the credibility or integrity of their office or of the government".

4.1.1.2 Section 2 of the Code provides:

"2.1 Members of the Executive must to the satisfaction of the President or the Premier, as the case may be-

(a) perform their duties and exercise their powers diligently and honestly;

(b) fulfil all the obligations imposed upon them by the Constitution and law; and

(c) act in good faith and in the best interest of good governance; and

(d) act in all respects in a manner that is consistent with the integrity of their office or the government.

2.2 In deciding whether members of the Executive complied with the provisions of clause 2.1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government."
2.3 Members of the Executive may not-

(a) wilfully mislead the legislature to which they are accountable;

(c) act in a way that is inconsistent with their position;

(d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person,"

4.2 Key sources of information

The following are sources of information that were used in the investigation:

(a) Email from the Complainant dated 23 April 2010 addressed to the Public Protector;

(b) Unsigned document headed "Subject: Deviation from normal tender process in the appointment of Utho Ngathi Development Corporation, for provision of services on the Albertina Sisulu (R24) Beautification Project" dated 22 June 2009;

(c) Signed document (the Signed Deviation Memorandum) headed "Subject: Deviation from normal tender process in the appointment of Utho Ngathi Development Corporation, for provision of services on the Albertina Sisulu (R24) Beautification Project" dated February 2010 and signed by Ms M B Monama, Head of Department and MEC B Nkosi, Member of the Executive Council;

(d) Undated and unsigned memorandum (Unsigned Internal Memorandum), which bears the name Ms M B Monama, Acting HOD: Department of Roads and Transport as the signer. No name is indicated for enquiries. The memorandum is addressed to Mr Khuselo Mngaza, DDG Transport, Ms J van Antwerpen, CFO: Department of Roads and Transport, and Mr Stephen Mosiniki, Chief Director: Transport
Infrastructure. The memorandum is headed “Procurement of Services for the beautification of the Albertina Sisulu (R24) Highway”.

(e) Signed memorandum addressed to the “Head of Department” and headed, “Subject: Deviation from normal tender process in the appointment of Utho Ngathi Development Corporation, for provision of services on the Albertina Sisulu (R24) Beautification Project”. The memorandum was signed by Ms M B Monama, Head of Department (HOD), Department of Roads and Transport on 28 January 2010. Although the heading is different, the content is similar to that of the memorandum mentioned in (d) above.

(f) Press statement issued by the Office of the Premier, Gauteng on 17 March 2010;

(g) Reply to a Question for Written Reply from the Office of the Premier with reference: Question 5.PR005;

(h) Service Level Agreement between the Department and Utho Ngathi Development Corporation (Utho Ngathi);

(i) Letter dated 13 January 2010 (Letter of Appointment) addressed to Utho Ngathi and signed by the HOD of Roads and Transport Ms B Monama informing them that they had been selected as the preferred service providers. The letter was signed on 15 January 2010;

(j) Letter from the Public Protector dated 29 April 2010, addressed to the Premier;

(k) Response from the Premier dated 5 May 2010;

(l) Response from the Premier dated 2 May 2010 (should be 2 June 2010);
(m) Response from the Premier dated 25 June 2010

(n) Gauteng Programme of Action (POA) for September 2009;

(o) Gauteng Programme of Action for November 2009;

(p) Letter from the Premier seconding Ms Monama to the Department of Roads and Transport with effect "from 23 July 2009 until further notice";

(q) Proposal from Utho Ngathi addressed to the Premier, Gauteng Provincial Government dated 15 September 2009;

(r) Interview under oath with Ms Monama, the Head of Department of Roads and Transport on 21 May 2010;

(s) Interview with Mr Molefe Mollo, a Director in the Department;

(t) Interview with the Complainant; and

(u) Interview with Ms Margaret-Ann Diedricks, the Acting Director-General in the Premier’s Office.

4.3 Summary of the investigation process and evidence

4.3.1 The Public Protector wrote a letter to Premier Mokonyane on 29 April 2009 requesting her to respond to the allegations raised by the Complainant.

4.3.2 The Premier responded by letter dated 5 May 2010. In her response, the Premier stated amongst others:
"I have considered the allegations made by the Honourable J Bloom MPL...as quoted in your letter.

The said allegations were raised in a Question For Written Reply dated 13th April 2010 ("the question") in the Provincial Legislature by Mr Bloom.

The Office of the Premier fully responded to the question by way of a letter dated 15th April 2010.

The basis for the allegations contained both in the question and the letter of complaint, relates to the beautification of the Albertina Sisulu Freeway Project ("the project"). The basis of Mr Bloom’s complaint is effectively that my office and I were involved in the award of the project to Utho Ngathi. Mr Bloom misconstrues the fact that reference to the Office of the Premier refers to the Premier when in fact same should be understood to refer to the structures, systems and functionaries of the office.

The plans to upgrade and beautify the Albertina Sisulu Freeway were first mooted in the state of the province address during February 2007 by the then Premier of Gauteng, Mr MS Shilowa. Since then, there have been discussions about the plans which subsequently formed part of the Gauteng Highway Improvement Scheme under the auspices of the Department of Transport. The plans have therefore been a matter of public knowledge since 2007.

During September 2009, an unsolicited proposal of an entity known as Utho Ngathi was received by the Office of the Premier and immediately referred to the Department of Roads and Transport ("the Department") for their attention and consideration. The Office of the Premier is accustomed to receive such similar proposals and on receipt thereof, refers same to the relevant provincial departments for their consideration.
The Department of Transport proceeded with the implementation of the Albertina Sisulu Beautification Project which included the identification of necessary services for the completion of the project. This necessitated the evaluation and adjudication of a tender for the project. During this process they also considered the unsolicited proposal from Utho Ngathi. It is now common knowledge that the Department of Transport awarded the tender to Utho Ngathi based on the fact that the proposal met the requirements. The department has indicted that the award of the tender to Utho Ngathi was against the backdrop of stringent timeframes. It is in the light of this and the fact that Uthi [sic] Ngathi could not meet these timelines that the contract was subsequently cancelled. Neither I nor The Office of the Premier was a party to any procurement process or decision to award the project to Utho Ngathi or to cancel it. This demonstrates that the project was not conceptualised in the interest of Utho Ngathi in that the Department continues with the implementation thereof despite the cancellation.

The response to the question from the office of the Premier and the statement issued by my office on 17th March are consistent and do not conflict with any correspondence or statements of the Department as alleged in the letter of complaint. The letter signed by the HOD of the Department is [sic] requesting deviation from the normal tender process, to my knowledge, is dated 02nd February 2010 and not 22 June 2009 as alleged on page 2 of your letter. Therefore, reference in paragraph 3 of the letter of complaint to the fact that the project was at an advanced stage in June 2009 may be incorrect...”

4.3.3 Interviews were then conducted with Ms B Monama, the then Head of Department, Roads and Transport, Mr Molefe Mollo, a Director in the Supply Chain section of the Department, and the Complainant on 21 May 2009.

4.3.4 Ms Monama indicated that the unsigned document headed “Subject: Deviation from normal tender process in the appointment of Utho Ngathi Development Corporation, for provision of services on the Albertina Sisulu (R24) Beautification Project” dated 22 June 2009, and bearing her name for signature could not be
authentic. According to her, she was only seconded to the Department with effect from 23 July 2009, and produced a letter to this effect signed by the Premier. Prior to this, she had not acted in any capacity in the Department.

4.3.4.1 She also indicated that she had received the proposal from an official from the Premier's office while she was there to attend an unrelated meeting. She could not recall who the official was. There was also no accompanying letter from the Premier's Office. The proposal is dated 15 September 2009 and addressed to “The Premier, Gauteng Provincial Government” and is indicated as being for “Attention: Honorable Ms Nomvula Mokonyane”. The proposal starts:

“We hereby wish to make a formal submission to your office, our document regarding the proposed transformation of the Albertina Sisulu Highway from its ordinary self into a Spectacular Scenic Botanical Drive”.

4.3.4.2 She further indicated that:

(a) The reference in the Letter of Appointment to a presentation to the Premier's Office could be a genuine mistake, as she never personally attended one. She also indicated that she could not personally vouch for the fact whether or not such presentation took place in the Premier's office and that the latter is best placed to answer this question;

(b) The Project was discussed at the September Extended [Provincial] Lekgotla (2009). She provided a copy of the September Programme of Action (POA), which is headed "Proposed Streamlined Exco Report". It has columns for Number, Action/Priority/ Key Project, Lead Department, Supporting Department, Due Date, Source and Comment/Status. Item number 128 in the POA is indicated as Albertina Sisulu Corridor (COJ, EMM, GPG). The Lead Department is reflected as DRT (Department of Roads and Transport) and
the supporting departments as Municipalities. The due date is given as October 2009, and the Source as Sept. Ext. Lekgotla;

(c) The Project was adopted at the November meeting of the Provincial Executive Committee. She provided a copy of the 11 November POA. It is headed “Revised 2009/10 Programme of Action”. Except for an extra column headed “Indicator (What will be achieved by Due Date”, it has the same columns as the September one. Item 92.2 is listed as Albertina Sisulu Corridor (COJ, EMM, GPG). The DRT is listed as the lead department. Municipalities are listed as supporting departments. In the new Indicator column, it is reflected, "Development/Implementation plan for the R21 and R24 Corridor". The due date is indicated as November 2009, and the source as Sept. Ext. Lekgotla; and

(d) The project was therefore approved late, and left the Department with very little time to implement it. The Department therefore considered the proposal by Utho Ngathi. She provided a copy of the Signed Deviation Memorandum which indicated among others:

"BACKGROUND
During late November 2009, the Executive Council (EXCO) of the Gauteng Provincial Government (GPG) took a decision to have the R24 leg of the Albertina Sisulu highway upgraded and uplifted in preparation for the 2010 FIFA World Cup. The EXCO also decided that the project shall be implemented by the Department of Roads and Transport. The project was subsequently named Sisulu Beautification Project.

The Department of Roads and Transport will also involve the work [sic] with several other stakeholders identified as relevant to this project:"
• SANRAL - as the technical experts regarding that implementation
• GDARD - to ensure the relevant environmental issues are appropriately taken into consideration
• Ekurhuleni Metropolitan Municipality – the relevant municipality in which this project will be implemented.

A task team was to be established amongst these stakeholders to [sic] that will manage and report to the Department of Roads and Transport.

MOTIVATION FOR THE DECISION TO DEViate

In regard with this project the timeframe before the commencement of the 2010 FIFA World Cup is short. The following was taken into consideration:

• The tender should be advertised in the tender bulletin as well as public media for a period of 30 days
• Treasury discourages the advertising of bids during December recess
• Based on the fact that the December recess only finalises during mid-January, the tender would only be advertised from February until March, which would then result in a decision only be [sic] taken mid April 2010
• The time to implement the project successfully would be insufficient as it with [sic] leave the Department of Roads and Transport with one month
• If the tender processes were to be followed, the project will not be implemented in time to meet the intended purpose.

Therefore, there was a need to deviate from normal tender processes. The Department of Roads and Transport was at the time, engaged in an
extreme process to review all contracts entered into by the Department and was not in a position to consider any of the service providers on its database.

On the other hand, Utho Ngathi Development Corporation has submitted an unsolicited bid to the Office of the Premier that seemed to respond to the requirement of the project.

This resulted in a conditional approval of the concept and appointment, subject to observance of due process and relevant procurement legislation..."

4.3.5 A telephonic interview was conducted with Mr Mollo. His name was indicated as the person from whom enquiries could be made in the unsigned document dated 22 June 2009. He denied any knowledge of the document.

4.3.6 In an interview with the Complainant on the same day, the discrepancies relating to the key document dated 22 June 2009 were raised. In particular, the date on the face of the document and the secondment of Ms Monama to the Department, as well as the denial by Mr Mollo of any knowledge of the document. He indicated that the information was obtained from a source that he could not divulge. He could therefore not avail his source for an interview, even on condition of anonymity. He, however, indicated that he had raised this discrepancy with the source, who promised to revert to him by Tuesday, 25 May 2010.

4.3.6.1 In an email dated 31 May 2010 the Complainant indicated:

"My source tells me that she can only get further information tomorrow, and that it is a matter of sequencing the proper series of events. I would therefore be grateful if you would hold on until this happens".
4.3.6.2 Later, in another email dated 4 June 2010, he stated:

“My source is unfortunately unable to contact her source so it does not appear that you will have new information in this matter other than what you get from your interviews and request for documents.”

4.3.7 The Public Protector wrote to the Premier on 28 May 2010 seeking clarity on certain issues that arose from the Premier’s letter and interviews with officials, as well as with the Complainant.

4.3.7.1 The Public Protector's letter read as follows:

"I refer to your letter dated 5 May 2010 and mine dated 7 May 2010. As indicated in my aforementioned letter, the investigator in this matter has conducted interviews with the HOD: Roads and Transport, Gauteng and officials in that department.

My office has not been able to obtain any correspondence or the name of the official from your office who referred the proposal from Utho Ngathi Development Corporation to the Department of Roads and Transport. In this regard, kindly provide me with the following:

- Letter from your office referring the proposal to the Department of Roads and Transport; and
- In the absence of any such letter the name of the official and the date on which this referral was done, and whether receipt was signed for.

In your letter, you also state: “Mr Bloom misconstrues the fact that reference to the Office of the Premier refers to the Premier when in fact same should be understood to
refer to the structures, systems and functionaries of the office. Kindly clarify the following in this regard:

- Whether over and above the receipt of the proposal from Utho Ngathi Development Corporation, a presentation was made by the latter to any of the structures and functionaries in your office regarding the proposal;
- Whether, given the fact that the project cuts across different Departments (the Department of Agriculture for example provided the financial resources for the project), your office played any coordinating role in relation to this project at any stage. If so, kindly indicate in detail the role that was played by your office in this regard;
- The structure in the Gauteng Provincial Government which ordinarily is responsible for coordination of such cross-cutting projects, which involve the cross-transfer of funds between Departments; and
- Copies of referral letters of at least two similar proposals to relevant departments (in your response you indicate that your "office is accustomed to receiv[ing] ...similar proposals and on receipt thereof, refers same to the relevant provincial departments for their consideration".

4.3.7.2 The Premier responded by letter dated 2 May [June] 2010. In her response she stated:

"Save what I have stated in the letter dated 5 May 2010, I bear no personal knowledge of the administrative processes followed in respect of the award of the beautification of the Albertina Sisulu Freeway Project...to Utho Ngathi as alleged in your letter.

The detail requested in respect of the processes followed in the referral of the proposal and matters incidental thereto are administrative matters which do not fall within my personal knowledge. In so far as any allegations are made that I acted unethically towards the Gauteng Provincial Legislature..., such allegations are
4.3.8 An interview was conducted with the Acting Director-General in the Premier’s Office, Ms Margaret-Ann Diedricks on 14 June 2010. She indicated the following:
(a) She assumed her acting responsibilities from 1 September 2009;
(b) In her time as Acting Director-General, she is not aware of any correspondence referring proposals to departments from the Premier’s office;
(c) During this period, she is not aware of any presentation that was made to the Premier’s Office by Utho Ngathi relating to the project in question; and
(d) That any questions relating to the period before 1 September 2009 would be more appropriately addressed to the former Director-General.

4.3.9 The Public Protector wrote another letter to the Premier on 15 June 2010 seeking clarity on outstanding issues.

4.3.9.1 The Public Protector’s letter read:

"I refer to my letter dated 9 June 2010. In the letter, I indicated that my investigator would conduct an interview with the Acting Director-General in your office, Ms Margaret-Ann Diedricks. Although the interview was to some extent helpful, she could not speak to all the issues raised. This therefore still leaves certain pertinent issues and questions unanswered.

I had addressed all my letters to you based on the fact that the functionaries and systems in your office are there to support you. It would therefore not be unreasonable to expect that your functionaries can advise you in relation to any matter pertaining to your office."
Ombudsman the world over try as far as possible to cultivate an environment of co-operation with organs of state based on the mutual interest in seeing good governance flourish.

Having said that however, I wish to bring to your attention certain legal provisions that are available to the Public Protector where co-operation might be lacking. Section 181(3) the Constitution provides that organs of state must assist the Public Protector amongst other Chapter 9 institutions to ensure its effectiveness. In addition, section 7(4)(a) of the Public Protector Act, 1994 states:

“For purposes of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person”

My view is that the issues I have raised for your response, are matters that can easily be dealt with without resorting to such measures. I therefore raise the following issues for your response:

(a) How was the proposal by Utho Ngathi delivered to the Premiers’ office?
(b) By whom was it delivered?
(c) To whom was it delivered?
(d) How was the proposal delivered to the Department of Roads and Transport?
(e) By whom was it delivered?
(f) To whom was it delivered?
(g) Did the Premier’s Office keep a copy of the proposal, and if so what happened to it?
(h) What systems are in place to ensure that the flow of documents in the Premier’s Office is tracked?
(i) In the interview with the Acting Director-General, she indicated that since her assumption of the acting post on September 2009, she was not personally aware of any presentation by Utho Ngathi to the Premier’s Office but could not say for sure whether this was not done during the tenure of the previous Director-General. She referred my investigator to the former Director-General to verify this. I am of the view that the former Director-General did not perform his official duties in his personal capacity but on behalf of your office. If such presentation took place, then this is information which resides with your office and can easily be verified. Kindly therefore indicate whether any such presentation took place before or after 1 September 2009 within your office.

(j) Kindly also make available any document of whatever nature that is under the control or in the possession of your office that pertains to the beautification of the Albertina Sisulu Highway.

4.3.9.2 The Premier responded by letter dated 25 June 2010 as follows:

(a) The proposal by Utho Ngathi was delivered at the offices of the Premier at the Legislature;

(b) It was delivered by Vuyo Dawethi;

(c) The proposal was received by Thele Moema, the Premier’s Special Advisor;

(d) It was handed over to the HOD of Roads and Transport after one of the subcommittee meetings at the Office of the Premier;

(e) This was done by a member of the subcommittee secretariat at the request of Thele Moema;

(f) The Premier is not aware of any formal presentation to her office save for the delivery and referral that was made at the Legislature office; and

(g) The only documents available are earlier presentations to the Executive Council of the Gauteng Provincial Government made by the Provincial Department of Transport prior to the award of the project to Utho Ngathi."
4.4 Evaluation of the Evidence

4.4.1 The Premier’s response to the Question for Written Reply states that Utho Ngathi communicated with the office of the Premier on 15 September 2009, and further that the communication was in the form of a proposal. From this, it is clear that the Premier’s office took delivery of the proposal.

4.4.2 In the press statement of 17 March 2010, the Premier and her office stated that they both had not played any role whatsoever in the awarding of the tender or in the appointment of Utho Ngathi to implement the Albertina Sisulu beautification project. In her letter of 5 May 2010, the Premier indicates that the proposal was referred to the Department of Roads and Transport. The evidence obtained by the Public Protector therefore indicates that the Office of the Premier’s role consisted of the receipt and referral of the proposal to the Department.

4.4.3 In her interview, Ms Monama indicated that the reference to a presentation to the Premier’s office in the letter appointing Utho Ngathi as the successful service provider could be a genuine mistake. This response merely serves to raise further questions relating to how, even if this could be taken to be true, such a mistake could have arisen. The Public Protector could unfortunately not uncover any evidence of such presentation, or any witnesses to such presentation.

5. CONCLUSION

5.1 The information available indicates that the proposal by Utho Ngathi was addressed to the Premier. It was delivered at the offices of the Premier at the Legislature. It was delivered by Vuyo Dawethi, the Director of Utho Ngathi. It was received by Mr Thele Moema, the Premier’s Special Advisor. It was then handed to the HOD for Roads and Transport, Ms B Monama after one of the subcommittee meetings at the Office of the Premier, by a member of the
subcommittee secretariat at the request of Mr Moema. No evidence to contradict was found by
the Public Protector.

5.2 The Premiers' response in the Gauteng Provincial Legislature was that Utho Ngathi
communicated with her office on 15 September 2009 by way of a proposal. The denial by the
Premier of "any involvement of her office in the award of the tender" and the statement that
"the proposal was not presented to the Office of the Premier" can be interpreted in two ways.

5.2.1 The first interpretation refers to the mere delivery and receipt of the proposal, (which in turn led
to the referral of the proposal to the Department).

5.2.2 The second interpretation refers to the formal presentation to her office for purposes of the
adjudication and ultimately award of the tender. The Public Protector has not found any
evidence that indicates that the Premier or her office influenced the final award of the tender.

5.3 The document dated 22 June 2009 cannot be relied upon as a basis for drawing conclusions in
support of the contention that the Premier misled the Legislature. The Public Protector was not
able to verify its origin and authenticity. It is unclear for example, why the document provides
for a signature by a person who was not yet in the Department when it was purportedly
drafted. It would have been helpful to interview the Complainant's source in this regard.

5.4 Having said that however, the Public Protector notes the similarities in content between the
undated and unsigned memorandum and the one that was later signed by Ms Monama on 28
January 2010.

5.5 Unlike the unsigned document dated 22 June 2009, the Signed Deviation Memorandum
provided by Ms Monama does not contain any reference to the appointment of Utho Ngathi as
the preferred service provider being made following a presentation to any structure. As already
stated, although the appointment letter to Utho Ngathi dated 13 January 2010 makes reference
to Utho Ngathi's "proposal to the Office of the Premier, Executive Council Sub-Committee and
Department of Roads and Transport with the detailed presentation of the Beautification Project
of R24 Albertina Sisulu Highway" no evidence of, and witnesses to, any such presentation to the Premier’s Office could be found. No witnesses could also be found who have knowledge of any such presentation. The Premier did however indicate that there is documentation relating to “presentations to the Executive Council of the Gauteng Provincial Government by the Provincial Department of Transport prior to the award of the project to Utho Ngathi”.

5.6 Records made available to the Public Protector indicate that the project was approved at the earliest in September 2009, and at the latest in November of the same year.

5.7 The role of Premier’s Office in the tender was the receipt and referral of the proposal to the Department of Roads and Transport. It is not clear, however, why the Office of the Premier should place itself in the role of a conduit between prospective service providers and Departments, especially where proposals are delivered in person. Given the sensitivities around tenders and contracts, it is prudent to indicate to prospective service contractors, that they should deal with the relevant departments directly. It would also have been expected of the Office of the Premier to refer the proposal by Utho Ngathi formally with an accompanying letter to the Department of Roads and Transport. The Premier’s response in this regard was:

"A system to track all documentation is in place, except that in the afore-mentioned case the documentation was not formally received at the Premier’s main office and thus did not follow that usual route since it was initially delivered at the Legislature”.

It is not clear however, what the difference this should make is. Correspondence and other documents directed to the Premier should still be handled in a formal way regardless of where they are received. Failure to do so in cases such as the present one, merely adds to the speculation and perceptions of impropriety.
6. FINDINGS

The Public Protector’s findings are that:

(a) The Premier’s Office received the proposal by Utho Ngathi addressed to the Premier and referred it to the Department of Roads and Transport;

(b) The letter of appointment to Utho Ngathi made reference to Utho Ngathi’s “proposal to the Office of the Premier, Executive Council Sub-Committee and Department of Roads and Transport with the detailed presentation of the Beatification of R24 Albertina Sisulu Highway”

(c) No tangible evidence was found that indicates that the role of the Premier and her office went beyond the receipt and referral of the proposal to the Department of Roads and Transport, and therefore influenced the adjudication or award of the contract or tender;

(d) The Premier’s statement that there was no presentation to her office is upheld in the absence of tangible evidence to the contrary; and

(e) The Premier did not act in breach of the provisions of sections 2(1(a) to (d), and 2(3)(a), (c) and (d) of the Code, and is consequently not guilty of any unethical behaviour.

7. REMEDIAL ACTION

Given that no adverse findings have been made against the Premier, no remedial action needs to be taken in respect of the complaint relating to the Executive Members’ Ethics Act, 1998.
8. MONITORING
The absence of adverse findings by the Public Protector also obviates any need to monitor this report.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 27 SEPTEMBER 2011

Assisted by: Mr Lufuno Reginald Ndou
Executive Manager: Service Delivery