REPORT IN TERMS OF SECTION 8(2) OF THE
PUBLIC PROTECTOR ACT 23 OF 1994

REPORT NO 2
(SPECIAL REPORT)

INVESTIGATION CONCERNING THE
SARAFINA II DONOR

PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
Madam Speaker and Honourable Members of Parliament

I have the honour to submit a special report in terms of Section 8(2) of the Public Protector Act 23 of 1994 regarding my investigation concerning the Sarafina II donor.

Adv S A M Baqwa
Public Protector of the
Republic of South Africa

11 September 1996
# TABLE OF CONTENTS

REPORT ON A COMPLAINT CONCERNING THE SARAFINA II DONOR

**THE OFFICE OF THE PUBLIC PROTECTOR**

1.1 The role of the Public Protector 1
1.2 Jurisdiction 2

**REPORT**

1. INTRODUCTION 2
2. PROCEDURES FOLLOWED 3
3. INTERVIEW WITH THE MINISTER 4

WHAT ARE HUMAN RIGHTS? 8

**THE RECOMMENDATIONS**

| Recommendation 1 | 12 |
| Recommendation 2 | 13 |
REPORT ON A COMPLAINT CONCERNING THE SARAFINA II DONOR

The Office of the Public Protector

1.1 The role of the Public Protector

It is accepted by history, tradition and past and present practice in most modern democracies that redressing citizens' grievances is the role of Parliament. It is one of the functions of an elected Member of Parliament to try to ensure that constituents do not suffer at the hands of executive government. Parliamentary procedures, including questions in the House, and parliamentary debates have been developed for this purpose. Members frequently take up constituents' complaints with the relevant Minister.

Nevertheless, Members today spend much of their time legislating and have neither the time nor the resources to pursue citizen's grievances as vigorously as they might wish. It is in recognition of this situation that the Public Protector with a clear mandate to address citizen's grievances against government agencies, statutory bodies and local authorities has developed as an added dimension of Parliament.

A Public Protector can be described as an 'Officer of Parliament' and is appointed by the President on the recommendation of a joint sitting of both houses of Parliament for a term of seven years. In discharging the role the Public Protector is required to act independently and impartially in a non-adversarial way. The Public Protector is neither an advocate for the complainant nor for the public authority concerned. He ascertains the facts of the case and reaches an impartial and independent conclusion on the merits. It has become necessary to emphasise the latter point because it would appear from what has happened in practice that there is a misconception in
some people’s minds that unless the Public Protector finds ‘in favour’ of the complainant then his decision becomes questionable or he is plainly wrong. This is clearly incorrect because if the Public Protector’s Office were to act in that manner then his independence would be academic or alternatively non-existent. This has particularly become clear from statements of those who are ‘aggrieved’ when they say that because the findings of the Public Protector are not in accordance with their wishes then his credibility becomes questionable in their eyes.

1.2 Jurisdiction

Section 112 of the Interim Constitution provides that the Public Protector shall, in addition to any powers and functions assigned to him or her by any law, be competent to investigate on his or her own initiative or on receipt of a complaint, any mal-administration in connection with the affairs of Government at any level. He also has jurisdiction to investigate any complaint against any person performing a public function or against public entities in any institution in which the State is the majority or controlling shareholder.

Report

1. Introduction

1.1 On Monday, 2 September I received three complaints from Radio 702, the Sunday Times, and the Democratic Party to investigate the failure to disclose the identity of the donor who is to donate about R10,5 million to the Department of Health in connection with the play Sarafina II. This investigation has now been finalised and I have decided to release a report.
2. **Procedures followed**

On 20 May 1996 I reported to Parliament by way of a special Report concerning the play Sarafina II. That Report was tabled in Parliament and it was also widely circulated as a public document. I accordingly do not propose to go into the contents thereof herein. Suffice it to say that the present complaint is a sequel to the events narrated in that Report. In an interview subsequent to that Report, the Minister of Health, Dr N Zuma was interviewed by the media and in one of the interviews she was asked how she was going to address the deficit that had been created in the financial affairs of the Department by the money already spent on the play Sarafina II when it was stopped. She reacted by stating that she had found a donor who would donate about R10.5 million to the Department but at the same time indicated that she would not disclose the identity of the donor. This generated tremendous media speculation, debate and comment. This has led to the present complaint and where we are now.

Upon receiving the complaint it was clear to me, because the matter had been raging in the press for a number of weeks that it was a matter of public interest which I had to attend to quickly and expeditiously. The procedure to be followed in conducting an investigation is determined by me with due regard to the circumstances of each case in terms of Section 7 (1) of the Public Protector Act No 23 of 1994.

In this case I determined that the information required primarily resided with the Minister, the donor and his attorneys. It was accordingly important that I secure an urgent appointment to interview the Minister about the question of the name or identity of the Sarafina II donor. I also considered it important to discuss the matter with the donor and his attorneys.
3. **Interview with the Minister**

Within two days after receiving the complaint, I secured an appointment with the Minister for the purposes of interviewing her. I had the first interview with the Minister on 4 September 1996. Due to lateness of hour our discussions were adjourned to 5 September 1996. I also interviewed the donor concerned and had a discussion with his attorneys, Messrs Arthur E Abrahams and Gross Inc of Cape Town. I was also given relevant documentation by the Minister. The purpose of the interviews was to establish:

(a) the name of the donor

(b) whether there is any legally acceptable justification for the unwillingness to disclose the name of the donor on the part of the Minister in the Department of Health

During the interviews I was able to establish not only the name of the donor, but his background and his personal circumstances. In his communication with the Department, he had been assisted by the attorneys mentioned above. I also questioned the Minister about the Indian Pharmaceutical company, Ranbaxy which had been touted in the newspaper Financial Mail, as the possible anonymous donor. The Minister was categorical in her denial that the company, Ranbaxy was the donor. It was important to address the matter with the Minister because it was common knowledge even at that point that Ranbaxy has been awarded tenders by the Department of Health for the supply of medicines and drugs. I may mention in passing that had it been the case that Ranbaxy was the anonymous donor, I would have had to disclose this name because of the relationship that it already had with the Department. It would have been untenable and improper for the name to be kept secret in the light of the relationship already
referred to. If such a company as Ranbaxy had claimed the right to privacy I would have found that it was a cover up rather than a privacy issue. The donation would have been considered a kick-back rather than a donation.

In evidence given by the Minister, I established that the donor is a white South African businessman who reiterated to me his firm desire to remain anonymous. He had in fact, made anonymity a condition of the donation when he entered into a donation agreement with the Department. He bases his request to remain anonymous on his constitutional right to privacy, the protection of his commercial interests and the protection of his family. He is aware of the controversy that has surrounded Sarafina II and is keen that this should not distract his life and the life of his family. In this regard I wish to quote from a letter addressed to the Minister by his attorneys:

"our client has reviewed the decision regarding the question of anonymity and has come to the conclusion that the anonymity is a non-negotiable condition of the donation even given the emerging conditions. It has always been our client's wish to remain anonymous and the reasons for the anonymity are related to the professional and fiduciary duties of our client and are such that a decision to remain anonymous is absolute. Furthermore, the rapacious nature of the understandably speculative coverage in the media has fortified our client's position in regard to anonymity..........................

As a private citizen of South Africa, the donor has the right to privacy as is provided for in the Constitution. Our client is not a public figure and is entitled to this right and does not have any obligation in this regard.

We believe the broader concept to be considered and resolved is whether a private citizen can make an anonymous donation to the Government on the basis that such donation is legal and desirable. In
any event, the decision regarding the anonymity must remain with the donor. (my underlining) We believe that the offer of the donation was legal. The donor had made the offer for the reasons set out in the draft press statement annexed to our letter of 13 August. I.e. the donor made the offer unsolicited and with the sole motivation that this donation ensured an AIDS awareness campaign for the target audience identified for Sarafina II and to protect South Africa's foreign donor's pool.

The foreign donor's pool is of benefit to all South Africans and it should be the function of all parties to support the Government in protecting this pool by way of resolving issues constructively and in good faith."

According to the donor, the donation is being made for philanthropic reasons and as stated above to give tangible assistance in the fight against AIDS. He has known the Minister of Health for some time and has sympathy with some of the Health problems she has to solve. I was assured by both the Minister and the donor that his business had nothing to do with health, health products or anything that could logically connected with the Department of Health. There was nothing to cause me to believe that the donation was improper in the sense that he had something to gain secretly from the Department.

During the interview, the Minister was asked about the contradiction between her disclosure of the donor being one businessman as opposed to the group of business people which had been earlier referred to in the press. She pointed out that nobody else in the Department knew about the identity of the donor except herself and that she never mentioned a group of business men to anyone.
The issue involved herein primarily presents itself as one of transparency at government level. It is however less than and more pertinent one of human rights. The failure to understand this dimension has led to the debate being skewed in transverse proportions. It is the donor who, as stated above, unsolicited, made the offer. He put a condition to the offer. The offer was accepted by the Minister together with the condition attached to it. The purpose of quoting the attorney’s letter (above) is primarily to highlight how misdirected the debate herein has been. It is clearly stated in the offer that “in any event the decision regarding anonymity must remain with the donor”. What has to be decided therefore is whether this is legally permissible given the fact that this donation is made to a government department. I deal with this matter later in this report.

In my view therefore, the real issue is one of human rights and less of transparency. It has to be stated however that even in matters concerning transparency it has to be measured against competing rights such as the right of access to information and the right to privacy. The former cannot be exercised to the utter disregard of the latter unless there are compelling reasons to do so.

Section 13 of the Constitution of the Republic of South Africa, Act No 200 of 1993, provides as follows:

“13. Privacy. Every person shall have the right to his or her personal privacy which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.”

In evaluating the applicability of Section 13 to the present case, one has to establish whether there is any business relationship or connection between himself and the Department to enable me to override his right to privacy. Alternatively one has to establish whether there is any impropriety or
criminality around the donation itself. After making the relevant enquiries in this regard, I could not but come to the conclusion that I could not trample on his right to privacy without acting unconstitutionally. Section 23 of the Constitution provides as follows:

"23. Access to Information. Every person shall have the right of access to all information held by the State or any Office organs at any level of Government in so far as such information is required for the exercise of protection of any of his or her rights."

The complainants herein seek to base their claim on this Section. In order for me to override the right of the donor, it has to be established beyond doubt that the donor has either committed an illegal act or has an improper relationship with the Department or alternatively that he has voluntarily waved his right to privacy in order for me to find that his name could be freely made available. The complainants have not suggested in their complaints that any of the latter three instances existed in the present case. I would attribute this to the fact that they see the issue as one of a Minister who is refusing to divulge a name rather than a donor who has legally stipulated that he does not want his name to be divulged. Nevertheless, in order not to leave any loopholes, my enquiry encompassed both issues of transparency and human rights. My enquiries with the Ministry, my interview with the donor and his attorneys did not establish that there were circumstances which could lead to my overriding his rights.

What are Human Rights?

A human right has been described as a demand by someone or some groups of people that has been conceded as having validity by a wide spectrum of people. Another question that may be asked in this context is what are human rights for? The point of human rights is to establish or
assert a relationship of the individual as against the State. This is emphasised by Prof Carl Wellman where he says:

“A human right is a cluster of ethical liberties (I may), claims (you must), powers (I can), and immunities (you cannot) that together constitute a system of ethical autonomy possessed by an individual as a human being vis-a-vis the State.” ("A new conception of human rights" in E Kamenka Human Rights.)

The last question one has to ask in this regard is: Are human rights absolute? Various words have been used throughout history to describe human rights. They have been described as inalienable, fundamental, and absolute. Yet it is accepted that sometimes a right we have to assert might not be capable of enforcement. Perhaps a more appropriate way of describing these rights is to use the phrase “prima facie rights”. A prima facie right is perfectly well-grounded, but it may be overridden or defeated by some weightier consideration. We wave our right to liberty in favour of “law and order”. A person can wave his right. One needs to say however, that a right defeated or overridden is not necessarily a right lost. The criminal’s right to liberty is held forfeit; it is not totally defeated. Similarly a right does not cease to exist simply because it cannot be supplied at that moment.

Going back to the facts of the present enquiry, the question that one needs to ask is: What has the donor done to entitle me or anybody for that matter to have his right to privacy held forfeit? Am I justified to violate his right to privacy purely because he has offered to assist the Department of Health by donating a sum of money in furtherance of a good cause? Do I have to violate his right purely because somebody, be it the Democratic Party, the Sunday Times or Radio 702 has asked me to assert their right of access to information? Do I have any legally justifiable reason to violate the donor’s right? Do I have any legal basis upon which I can override the donation agreement that has been entered into by the donor and the Department of
Health by disclosing the name of the donor in the light of the condition of anonymity which was attached to that contractual agreement? Am I entitled purely because of my position as Public Protector to override people's rights regardless of any other considerations such as their privacy, their business interests and their family? In my view all these questions all have to be answered in the negative. Contractual arrangements between the State and private citizens would not be worth the paper they are written on if simply at my bidding the provisions that attach to those contracts can simply be overridden by a third party which is what I am in this context. It is with these considerations that I have decided that the solution to the current problem does not lie in political statements or any further speculation about this matter. In my view, the solution to this matter lies in the recommendations which I make below.

Before making the recommendations and because this matter has been developing incrementally from day to day, I have to allude to the week-end newspaper reports which have indicated that the donor is a front for some businessmen in Natal amongst whom is one Vivian Reddy. It would appear from press reports that Vivian Reddy has already denied any connection with the donor who is the subject of this report. It accordingly became necessary for me to have a further interview with the Minister of Health with a view to establishing her knowledge about the donor being a front for these businessmen. The Minister assured me that there is to the best of her knowledge no connection between the said businessman and the donor.

Having been assured by both the Minister and the donor and having found nothing to indicate any undue benefit to the donor or improper conduct on the part of both parties, and in view of the constitutional and legal provisions quoted above, I have not been able to find any compelling reason to disclose or to recommend disclosure of the name of the donor. I re-iterate that to do so, would in my view be acting unconstitutionally.
One should point out that there are checks and balances in place in terms of the procedures provided for in Chapter X of the Treasury Instructions, whereby such a donation has to be approved by the Treasury and, in the case of donations in excess of R100 000, voted by Parliament. Furthermore, the Auditor-General has to do an audit on the donation. Such safeguards influenced my decision to the extent that an audit would either bear out the assurances received from the Minister and the donor, or indicate that the donor is not bona fide. It was therefore not necessary for me to go on a witch hunt on the basis of unsubstantiated rumours in the press. The difficulty the Auditor-General would have to do a forensic audit on an anonymous donor is addressed in my recommendations below. In any event, a forensic audit can only be done after the money has been paid into the fiscus. In this case, up to the point when this report was made, there had been no payment by the donor. The whole furor has been caused by a promise to pay.

The Recommendations

It is a fact that the question of the identity of Sarafina II donor has been the subject of unbridled, rapacious and venomous speculation in the media and elsewhere. It has been the subject of the most intense media coverage. Whilst most of the questions that have been raised have been proper and legitimate, some of them have been based on the aforesaid speculation and rumour mongering. This speculation and rumour mongering has been about a Minister of State and a Department of State and the procedures that these bodies have followed. At the end of the day, the speculation is not only about the Department of Health but it is also a reflection on how Government conducts its business. South Africans have not only committed themselves both inside and outside Parliament to healing the divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights but also to laying the foundations for a democratic and open society in which Government is based on the will of the people and
every citizen is equally protected by the law. It would appear that South Africa is indeed well on its way towards achieving these objectives. Anything therefore, that appears, however slightly, to affect the progress towards achieving those goals needs to be dealt with and rectified as quickly as possible. The reason for doing so is not to cover up issues or to push them under the table. The reason is that perceptions may be much more damaging than what has actually been done, even where it is legally and properly done. Whether these perceptions are well-grounded or ill-founded is neither here nor there. The fact is, they damage the democratic process presently unfolding in South Africa.

I have looked at the law, including the relevant Treasury regulations and there is nothing illegal that has been done by the Minister of Health. Despite that fact, people inside and outside the Government can justifiably be expected to continue asking why the Minister accepted an anonymous donation despite the Minister’s protestations to the effect that there is nothing sinister in the donation. The concerns of the public have therefore to be addressed, swiftly.

I am accordingly of the view that if South Africans, in the light of the ideals that they have set for themselves, are uncomfortable with what has happened, and I have to take corrective action, not only with regard to the facts of this matter, but also with regard to the legal framework within which the situation has arisen. It is accordingly in this context that I make the following recommendations:

**Recommendation 1**

The present Chapter X of the Treasury Instructions adequately establishes the principles regarding the acceptance of gifts and donations to the State but, in view of the matter currently being considered, it is recommended that the Director-General of State
Expenditure consider augmentation of the Instructions to also specifically deal with the question of anonymous donors. I use the term “anonymous donor” in the context of someone who does not want to reveal his identity at all (by, for example, working through an attorney), as opposed to a donor who is known to the relevant authorities but wishes his name to be kept confidential.

In this regard it is recommended that an additional provision be added to the effect that donations made of which the donor’s identity was for good reasons to be kept confidential should be acceptable as long as the political office bearer and the accounting officer concerned are satisfied that there is no imprropriety or conflict of interest and the identity of the donor is made known to the Office of the Public Protector (in matters where that Office is involved) and the Auditor-General. In addition, the Public Protector and the Auditor-General should, in such a circumstance, provide the Treasury with confirmation that the donor’s identity has been made known to them and that they have no objection thereto.

It follows from the above that where the donor wishes to remain anonymous - as is in the present case - such a donation to the State should not be acceptable.

**Recommendation 2**

Flowing from Recommendation 1 above, it is recommended to the Minister of Health that whilst the terms imposed by the donor in relation to the Sarafina II donation are legal and acceptable in terms of the Treasury Instructions, such terms should be revisited to accord with the procedure set out in recommendation 1 above. Should the donor not find this acceptable, it is recommended that the donation is not
accepted. This would be done in furtherance of openness and transparency which is the hallmark of democratic government.

These recommendations are made after discussions with the Auditor-General together with the Director-General of the Department of State Expenditure and they are in agreement with my views. I have also made the Minister aware of my intent to make them.

Further, shortly before releasing this report it was brought to my attention by the donor's attorneys that the donation has been withdrawn. I am of the view that this creates a climate where the first recommendation above can be implemented immediately to ensure that the events that gave rise to this enquiry will never occur again.