Allegations of failure by the Witness Protection Unit to properly inform Complainant of rights to protection
Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(2A) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report relates to an investigation into allegations of maladministration by the Office for Witness Protection of the National Prosecuting Authority, when the Office for Witness Protection failed to adequately inform the Complainant, Ms NNC Zondi of her rights to protection in terms of section 10(1)(g) of the Witness Protection Act 112 of 1998 (the Witness Protection Act).

(iii) The complaint was lodged by Ms TM Xaluva on behalf of Ms NNC Zondi (Complainant) on 15 November 2018.

(iv) Based on an analysis of the complaint, the following issues were considered and investigated:

(a) Whether the conduct of members of the Office for Witness Protection, by failing to initially inform the Complainant of and to explore the availability of alternative means of protection in terms of section 10(1)(g) of the Witness Protection Act, other than entry to the Witness Protection Programme, amounted to maladministration.

(b) Whether the Complainant was prejudiced as result of or in the course of her interaction with members of the Office for Witness Protection.

(v) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Department of Home Affairs, the South African Police Services (SAPS), the National Prosecuting Authority and the Office for Witness Protection, an analysis of the documents and information.
obtained during the investigation and application of the relevant legislation, policy and jurisprudence.

(vi) Having considered the evidence obtained during the investigation against the relevant regulatory framework, I make the following findings:

(a) Regarding whether the conduct of members of the Office for Witness Protection, by failing to initially inform the Complainant of and to explore the availability of alternative means of protection in terms of section 10(1) (g) of the Witness Protection Act, other than entry to the Witness Protection Programme, amounted to maladministration.

(aa) The allegation that members of the Office for Witness Protection failed to initially inform the Complainant of and to consider other means of witness protection as envisaged in section 10(1)(g) of the Witness Protection Act, is substantiated.

(bb) The State and the Institutions responsible for the criminal Justice System have through various instruments, charters and standards recognised the rights of witnesses and victims of crime to receive information and to be informed of all relevant services available to victims and witnesses by service providers. It also includes the right to be protected from intimidation, harassment, fear, tampering, bribery, corruption and abuse to ensure a victim’s safety as a witness and the availability of his/ her testimony.

(cc) The risks to and threats to the safety of the Complainant were reported to members of the Office for Witness Protection. The Complainant had a right to expect action from the State to protect her against such threats and risks through the services and means at its disposal in a structured and constructive manner. Providing the Complainant with an option to stay where she was, when she clearly did not feel safe, did not constitute alternative means of protection as envisaged in the Act, and did not meet the standards of the service that the State and the Office for Witness
Protection committed to and are expected of a public functionary in terms of section 195 of the Constitution.

(dd) The Act, recognises in section 10(1)(g) that there might be circumstances in which witnesses or related persons might not be able to adjust to the witness protection programme as invoked through the provisions of the Act, having regard to personal characteristics, circumstances and family or other relationships. In such circumstances the Act implores the Director to consider and explore the availability of other means of protection, without invoking the provisions of the Act (entry into the Witness Protection Programme). To suggest that the Director is only under a duty to consider and explore alternative means of protection if and when a witness or victim of a crime has agreed to be subjected to the formal witness programme application process, and to abandon such a witness or victim if he/ she indicates that they will not be able to adjust to the programme, is in disregard of the very rights that the Government and the Institutions concerned profess to recognise and commit to in the current victims and witness support framework and instruments.

(ee) In the circumstances it is clear that the State, and its functionaries, in particular the members of the Office for Witness Protection, did not live up to the standards of information and protection to which they have committed themselves in support of witnesses and victims of crime, nor have they lived up to the values and principles of fair and responsive public administration as envisaged in section 195 of the Constitution.

(ff) The conduct of the members of the Office for Witness Protection in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

(b) Regarding whether the Complainant was prejudiced as result of or in the course of her interaction with members of the Office for Witness Protection.
(aa) The allegation that the Complainant experienced the interaction with the members of the Office for Witness Protection as traumatic and prejudicial, is substantiated;

bb) From the evidence at my disposal Complainant was already suffering severe hardship as a result of being both a victim and a witness in a serious criminal matter that involved abuse and violation of the dignity of a number of young girls, including herself. She had to discontinue with the tertiary education she intended to pursue and due to the personal nature of the crime that was committed against her, she was very reliant on her family for emotional and psychological support, to manage and deal with the trauma she was enduring. To remove her family would be to remove the emotional and psychological stability that she experienced, and relied on from her family.

cc) To be made aware of the fact that her life was at risk, and then to be left without effective support from the very Institutions that were expected to be accommodative of and sensitive to her needs and circumstances, added to the trauma that she was already experiencing.

(dd) The conduct of the members of the Office for Witness Protection resulted in prejudice as envisaged in Section 182(1) of the Constitution and improper prejudice as envisaged in Section 6 (4) (v) of the Public Protector Act.

(vii) The appropriate remedial action I am taking in terms of Section 182(1)(c) of the Constitution with the view of placing the Complainant as close as possible to where she would have been had the improper conduct and maladministration not occurred, is the following: -:

(a) The Acting Director of the Office for Witness Protection to
(aa) Issue a written apology within thirty (30) working days from the date of the report to the Complainant apologising for, the failure by the Office for Witness Protection to offer her alternative protection in terms of section 10(1)(g) of the Witness Protection Act, which resulted in her suffering prejudice and not having access to protection when her life was in danger;

(bb) In line with the rights and standards recognised in witness and victim support framework as discussed in this report, and in consultation with the National director of Public Prosecutions must establish guidelines through a policy document or operational procedures to facilitate the screening and assessment of each matter where it is reported in terms of section 7(1) of the Act that a witness has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons whether known to him or her or not, by reason of his or her being a witness, with the view to:-

i) promote, give effect to and within their scope of responsibility, enforce the rights of victims and witness to support and protection as contemplated in, *inter alia*, the *Service Charter for Victims* and *Minimum Standards on Services*;

ii) within its scope of responsibility, render relevant services to protection services to witnesses in an integrated and coordinated manner;

iii) provide clear, timely and consistent information about relevant support and protection services and assistance available to witnesses; and

iv) Be sensitive to, to curb or mitigate victimhood and the challenges surrounding gender based violence, femicide and abuse of women and children in South Africa.

bb) The required policy or guidelines must furthermore give effect to the application of section 10(1) (g) of the Witness Protection Act. This would then oblige the Office for Witness Protection to transparently inform witnesses of this.
cc) In the interim, pending the finalisation and implementation of the aforementioned policy or guideline, the Acting director of the Office for Witness Protection must take steps to ensure that in the initial preliminary interview witnesses are transparently informed of their rights and all possible alternatives in terms of Section 10(1) (g) of the Witness Protection Act being available, and also of any other means of protecting the witness without invoking the provisions of the Act. Directly linked to this should also be the inherent consideration of section 10(1) (e) of the Witness Protection Act “where the probability that the witness to adjust to protection having regard to the personal characteristics, circumstances, family or other relationships of the witness are considered.”

dd) If additional funding is required by the Office for Witness Protection or the National Prosecution Authority to properly fund its obligations in terms of section 10(g) of the Act, it should consider bids to National Treasury to ensure that this is prioritised in its budget.

ee) I further deem it necessary and in the Public interest that this report on the findings of this particular investigation be submitted to and tabled in the National Assembly in terms of section 8(2)(b) of the Public Protector Act.

ff) A copy of the Report is be submitted to the Minister of Social Development for noting in so far as it might relate to the statutory interventions and intersectoral programmes or victim support service programmes that the Department and relevant Institutions have embarked on with the publication of the draft Victim Support Services Bill 2019, to promote integrated service delivery for a victim and witness empowerment programme.
(viii) **Monitoring**

(b) In monitoring the implementation of the remedial action as stipulated in paragraph (a) (aa) to (ff) of this report, the Acting Director of the Office for Witness Protection is further required to submit to the Public Protector an implementation plan indicating how the aforementioned remedial action will be implemented within 30 working days from the date of issuing the report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY THE OFFICE FOR WITNESS PROTECTION OF THE NATIONAL PROSECUTING AUTHORITY, WHEN THE OFFICE FOR WITNESS PROTECTION FAILED TO ADEQUATELY INFORM THE COMPLAINANT, MS NNC ZONDI OF HER RIGHTS TO PROTECTION IN TERMS OF SECTION 10 (1)(g) OF THE WITNESS PROTECTION ACT 112 OF 1998.

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).

1.2 This report is submitted to Ms NNC Zondi (Complainant) and to;

1.3 The National Director of Public Prosecutions, Advocate S Batohi and to;

1.4 The Acting Director Office for Witness Protection, Advocate K Van Rensburg (the Acting Director) and to;

1.5 The Minister of Justice, the Honourable Mr R Lamola, MP.

1.6 The Minister of Social Development, the Honourable Lindiwe Zulu, MP; and

1.7 The Speaker of the National Assembly, the Honourable Thandi Modise, MP

1.8 This report relates to my investigation into allegations of maladministration by the Office for Witness Protection of the National Prosecuting Authority, when the Office for Witness Protection failed to adequately inform the Complainant of her rights to protection in terms of section 10 (1)(g) of the Witness Protection Act 112 of 1998 (the Act).
2. **THE COMPLAINT**

2.1 The complaint was lodged by Ms TM Xaluva on behalf of Ms NNC Zondi (Complainant) on 15 November 2018.

2.2 The Complainant alleged that on 23 October 2018, she was alerted about a potential threat to her life by Brigadier Govender of the Directorate for Priority Crime Investigation (DPCI) by reason of his or her being a witness or a potential witness in a criminal matter relating to the prosecution of Pastor Omotoso on 48 charges of human trafficking, rape and abuse of young women. Upon receipt of this information, she decided to seek witness protection and reported her concerns, beliefs and fears to the Office for Witness Protection.

2.3 On 2 November 2018, the Complainant met with Ms Rochelle Brennan, Head of Witness Protection Unit: Gauteng, who explained to her how the Witness Protection Programme works, indicating to her amongst others that she will need to be relocated and change her name so that her identity can be protected. From this the Complainant understood that her educational aspirations will be compromised by the move, and most importantly she will lose the support of her friends and family.

2.4 Notwithstanding the risk to her safety, the Complainant sent an e-mail to Ms Brennan on 12 November 2018 declining to be placed into the Witness Protection Programme based on a number of reasons. In essence she was of the view that the system was extremely rigid, too disruptive and too unsympathetic to victims of crime.

2.5 Based on the above and the report to my Office that there were reasons to believe that the safety of the Complainant may be at risk, I conducted a meeting with the Minister of Justice, the Honourable Mr. M. Masutha on 12 December 2018.
2.6 The Honourable Minister commented during the meeting and inter alia indicated that it was not appropriate for him to participate in the said meeting, due to the nature of the meeting, and the separation of powers that exists for a reason. He commented that there is nothing wrong with state institutions conferring, however he was of the opinion that it was not proper to confer in front of the Complainant. Furthermore the Minister advised that the Complainant is a private person who is still under oath and testifying in criminal proceedings, wherein the legal implications are that anyone can be subpoenaed to testify. The Minister indicated that he cannot, at that stage, account for the Judiciary for how they have chosen to respond in this matter. The issues of independence needs to be clearly understood. He indicated that formal complaints are to be escalated to the National Director of Public Prosecutions and if it cannot be addressed at that level it can thereafter be escalated to him. The Minister concluded that the Office for Witness Protection should take the matter further.

2.7 The following resolutions were taken at the meeting as to the way forward being that:

(a) The Acting Head of the Office for Witness Protection, Mr Ronnie Borcherds would engage the Complainant and urgently arrange for other means of protection for her under Section 10(1)(g) of the Act; and

(b) Mr Borcherds would engage the office of the Director of Public Prosecutions (DPP) and consult with other 28 witnesses in the same criminal matter, to assist them with applications for protection in terms of the Act, including providing them with the option of other means of protection as envisaged in section 10(1) (g) of the Act.

2.8 After engagement with the Complainant and the other 28 witnesses we were informed by the Mr Boucherds on 14 December 2018 that the
Complainant and the other 28 witnesses rejected to be admitted onto the Witness Protection Program.

2.9 The Complainant in her e-mail dated 16 December 2019 confirmed that she rejected the Witness Protection Program and however qualified that she did so because the Witness Protection Program is designed for criminal informants who are bargaining against jail time, and does not work for witnesses who are blameless and deserve to continue living their lives after reporting a crime.

2.10 On 31 July 2019 I received a report from the National Commissioner of the South African Police Services (SAPS) General KJ Sithole, informing me that Crime Intelligence made several enquiries regarding the alleged threat and has to date not been able to confirm the existence of a threat against the life of Cheryl Zondi or any of the other witnesses in the case. Since October 2018 when the initial threatening messages were sent to the witnesses, no further threats against any witnesses have been reported to date. In the circumstances Crime Intelligence is of the view that the current threat level does not qualify all the witnesses to receive fulltime protection by the SAPS, however the SAPS could provide security escorts for the witnesses when they are testifying in court.

2.11 During the initial consultation with the Complainant, concerns were raised regarding Mr Omotoso being in possession of multiple passports, with the fear that he could flee and pose a possible threat to the Complainant. This was raised with the Acting Director of Home Affairs, Mr Thulani Mavuso, who responded to me informing that there are ongoing criminal proceedings relating to this matter. Furthermore he indicated that Mr Omotoso is in custody because the Department has done a thorough investigation, and in the circumstances opposed bail, opposed all Mr Omotoso’s attempts to legalise his status in the country and also rejected his appeal to have him removed from the prohibited list of persons. The Department of Home Affairs cannot provide copies of Mr Omotoso’s visas as they are the subject of court proceedings and to do so may prejudice the state’s case.
2.12 I regarded it in the public interest to pursue the original complaint lodged with my office that in her initial consultation with the Office for Witness Protection on 2 November 2018, the Complainant was allegedly not properly informed of the availability of alternative means of protection, nor was there any transparency in explaining alternative means of protection without entering the Witness Protection Programme as contemplated in section 10(1) (g) of the Act.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

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

“The Public Protector has 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”.

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate Alternative Dispute Resolution (ADR) mechanism.
3.5 In the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016, the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

3.5.1 The remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences” (para 73);

3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.5.5 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to
their nature, context and language, to determine what course to follow (para 69);

3.5.6 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);

3.5.7 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);

3.5.8 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(c));

3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.10 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 all SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the Court held as follows, when confirming the powers of the Public protector:
3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (para 79);

3.6.2 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted on them under the constitution where that is required to remedy the harm in question (para 82);

3.6.3 The Public Protector, in appropriate circumstances, has the power to direct the President to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (para 85 and 152);

3.6.4 There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);

3.6.5 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 and 101):

(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.

3.6.6 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

3.6.7 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para105).
3.6.8 The fact that there are no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute *prima facie* findings that point to serious misconduct (para 107 and 108);

3.6.9 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112);

3.7 The Office for Witness Protection and the National Prosecuting Authority (NPA) mentioned in this report are organs of state and its conduct amounts to conduct in state affairs, as a result the complaint falls within the ambit of the Public Protector’s mandate. Accordingly, I have the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.8 My power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties in this investigation.

4. **THE INVESTIGATION**

4.1 **Methodology**

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 The complaint was classified as a Service Delivery complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act.

4.1.3 The Public Protector Act confers on the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration
4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

(i) What happened?
(ii) What should have happened?
(iii) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
(iv) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry primarily focussed on whether there was **maladministration by officials of the Office for Witness Protection of the National Prosecuting Authority, when the Office for Witness Protection failed to adequately inform the Complainant of the availability of other means of protection in terms of section 10(1) (g) of the Witness Protection Act.**

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Office for Witness Protection.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the Complainant has suffered prejudice, the idea is to place her as close as possible to where she would have been had the Office for Witness Protection concerned complied with the regulatory framework setting the applicable standards for good administration.
4.3 On analysis of the complaint, information and documents received during preliminary enquiries, the following issues were considered and investigated:

4.3.1 Whether the conduct of members of the Office for Witness Protection, by failing to initially inform the Complainant of and to explore the availability of alternative means of protection in terms of section 10(1) (g) of the Witness Protection Act, other than entry to the Witness Protection Programme, amounted to maladministration.

4.3.2 Whether the Complainant was prejudiced as result of or in the course of her interaction with members of the Office for Witness Protection.

4.4 The Key Sources of information

4.4.1 Documents and information received.

4.4.2 Response from the NPA, on witness protection update, dated 14 December 2018;

4.4.3 Response from the Department of Home Affairs, dated 19 June 2019;

4.4.4 Threat assessment response, National Commissioner South African Police Services (SAPS), dated 30 July 2019;

4.4.5 Response from Complainant, dated 16 December 2019; and

4.4.6 Response to section 7(9) notice from the Office for Witness Protection.

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS
5.1 Regarding whether the conduct of members of the Office for Witness Protection, by failing to initially inform the Complainant of and to explore the availability of alternative means of protection in terms of section 10(1) (g) of the Witness Protection Act, other than entry to the Witness Protection Programme, amounted to maladministration.

Common cause

5.1.1 It is common cause that the Complainant was a witness in the much publicised criminal case of Pastor Omotoso who is facing 48 charges, including sexual assault, the contravention of the Immigration Act, rape and human trafficking involving a large number of young girls.

5.1.2 It is also common cause that the Complainant was notified by the Directorate for Priority Crime Investigation, that her life was in danger and that she reported her belief that her safety was threatened, to the Office for Witness Protection.

Issues in dispute

5.1.3 It is in dispute whether members of the Office for Witness Protection failed during the initial consultation with the Complainant, to inform her of and to explore the availability of alternative means of protection in terms of section 10(1) (g) of the Witness Protection Act.

Response by the Office for Witness Protection

5.1.4 The Acting Director denied that the members of the Office for Witness Protection did not inform or advise the Complainant on the availability of other means of protection than entering the witness protection programme.

5.1.5 In his response to the notice of my intended findings in terms of 7(9) of the Public Protector Act, he relied on an e-mail that was apparently sent by the Complainant to the Ms Brennan, of the Gauteng Office for Witness Protection, which stated as follows:
“I would also like to acknowledge that the advice given to me by you was to continue staying with Mam’ Thoko Xaluva, Chairperson of the CRL Rights Commission…”

5.1.6 The Acting Director submitted that the communication contradicts the allegations by the Complainant and serves as an acknowledgement by the Complainant, that she, of her own accord, “received advice exactly in line with what was tended by Section 10(1) (g).” The Acting Director further submitted that this was confirmed in the recording of the interview, which was attended by Mrs Xaluva, who confirmed that the Complainant could stay with her.

5.1.7 Furthermore the Acting director submitted that that since the Complainant in her own version, rejected the Witness Protection Programme, there was no application by her to enter into Witness Protection. In the circumstances, the section 10(1) (g) report that the Director of Witness Protection would have considered in assessing an application for protection did not arise, because the Complainant never made an application for witness protection.

5.1.8 The Acting Director further submitted that in my notice in terms of section 7(9) of the Public Protector Act, I incorrectly characterised witness protection as a "right" that was due to the complainant. He states that witness protection is more correctly “discretion that falls upon the Director of WP who must exercise the discretion in line with the prescripts of a government administrator.”

5.1.9 In support of his statement the Acting Director refers to section 10(1) of the Act, which provides as follows:

“The Director must in respect of an application for protection have due regard to the report and recommendations of the witness protection officer concerned, or if such an application has not been referred to a witness protection officer in terms of section 7 (4), any written recommendations by the interested functionary concerned as to whether the person concerned should be placed under protection or not..."
5.1.10 The Acting Director further submits that that section 10(1) (g) of the Act provides for one of the factors that the Director must take into consideration when applying his/her discretion whether to induct or reject an applicant for witness protection, which discretion was not required in the circumstances as there was no application for witness protection from the Complainant.

Application of the relevant legal framework

5.1.11 Section 7(1) of the Act provides that any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness, may report such belief to, amongst others, a member of the Office for witness Protection. In terms of section 7(3) of the Act, any person to whom a report is made as contemplated in subsection (1), must assist the applicant (witness) in the making of an application for protection.

5.1.12 Section 10(1) of the Act provides that the Director must in respect of an application for protection have due regard to the report and recommendations of the witness protection officer concerned, or if such an application has not been referred to a witness protection officer in terms of section 7(4), any written recommendations by the interested functionary concerned as to whether the person concerned should be placed under protection or not and must also take into account-

\[ \text{a) the nature and extent of the risk to the safety of the witness or any related person:} \]

\[ \text{b) any danger that the interests of the community might be affected if the witness or any related person is not placed under protection;} \]

\[ \text{c) the nature of the proceedings in which the witness has given evidence or is or may be required to give evidence, as the case may be:} \]
d) the importance, relevance and nature of the evidence given or to be given by the witness in the proceedings concerned;

e) the probability that the witness or any related person will be able to adjust to protection, having regard to the personal characteristics, circumstances and family or other-relationships of the witness or related person;

f) the cost likely to be involved in the protection of the witness or any related person;

g) the availability of any other means of protecting the witness or any related person without invoking the provisions of this Act; and

h) any other factor that the Director deems relevant.

5.1.13 The Service Charter for Victims of Crime (Service Charter) and the Minimum Standards on Services for Victims of Crime in South Africa (Minimum Standards) present a rights framework for services provided under the Victim Empowerment Programme and sets out responsibilities that each government department such as South African Police Services, National Prosecuting Authority, Departments of Health, Justice and Constitutional Development, Social Development and Correctional Services, should provide when victims present themselves at these public institutions.

5.1.14 The Service Charter and Minimum Standards embody the Government’s commitments for promoting justice for victims of crime in South Africa as contained in, inter alia


b) The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 (GA/RES/40/34);

c) the Prevention and Eradication of Violence Against Women and Children Addendum to the 1997 SADC Declaration on Gender and Development
d) The National Crime Prevention Strategy, 1996;

e) The National Victim Empowerment Programme, 1998; and


5.1.15.1 The Service Charter and Minimum Standards state that it is part of the responsibility of the state to promote the equal enjoyment of all the rights and freedoms that are guaranteed in the Constitution by all and that an equitable criminal justice system can only be achieved if the rights of both victims and accused persons are recognised, protected and balanced. (Own emphasis).

5.1.15.2 In terms of the Service Charter and Minimum Standards these rights include the right to receive information and to be informed of all relevant services available to victims and witnesses by service providers. It also includes the right to be protected from intimidation, harassment, fear, tampering, bribery, corruption and abuse to ensure a victim’s safety as a witness and the availability of his/ her testimony.

5.1.15.3 A victim and a witness further has the right to request assistance and, where relevant, have access to available social, health and counselling services, as well as legal assistance. In terms of the Service charter all service providers will, within the scope of their functions, take all reasonable steps to accommodate … (a victim and a witness) and ensure that he/ she is treated in a sensitive manner.

5.1.16 The Constitution\(^1\) is regarded as a cornerstone of democracy in South Africa and it enshrines the rights of all people. Section 195 of the Constitution further states that the democratic values and principles governing public administration must include the following principles:

a) A high standard of professional ethics;

b) efficient, economic and effective use of resources;

c) a development-oriented public administration;

d) provision of services in an impartial, fair and equitable way, without bias;

e) responding to people’s needs and encouraging the public to participate in policy making;

f) accountable public administration;

g) fostering transparency;

5.1.17 The intention of the provisions of section 195 of the Constitution is to ensure that administration in every sphere of government, organs of state and public enterprises subscribe to the highest standard of professional ethics, when administering affairs in their relevant sectors.

6.1.6 Similarly in Pharmaceutical Manufacturers of SA²: In re Ex parte President of the RSA 2000 2 SA 674 (CC) 708 the court held that all public powers must comply with the Constitution, which is the supreme law and which includes the doctrine of legality. It was also confirmed that it does not matter that a government entity may be purporting to act under the cover of law, statutory or otherwise, but that the real issue is whether the government properly acted within the law. After all, the court emphasised that the principle of legality requires all organs of state to always act in terms of the law.

5.1.18 I have noted that the Minister of Social Development recently published the draft Victim Support Services Bill, 2019, which aims to provide a statutory framework for the promotion and upholding of the rights of and to provide protection, response, care and support to victims of violent crime. The Bill also codifies the responsibilities of the various Ministers and Institutions involved in the Criminal Justice System in respect to support services for victims and witnesses during criminal proceedings and in relation to such proceedings, including plans and programmes for the development, management, implementation, monitoring, evaluation, review, and the impact of the victim’s charter.

² Pharmaceutical Manufacturers of SA²: In re Ex parte President of the RSA 2000 2 SA 674 (CC) 708
5.1.19 It is further noted that the draft Bill currently provides that every relevant department, associated profession, and service provider must implement a code of conduct that directs the employees to treat victims in accordance with the rights of victims -
(a) to be treated with dignity and privacy,
(b) to receive information;
(c) to offer information;
d) to receive protection;
(e) to receive assistance;

Conclusion
5.1.20 In the circumstances I am not convinced by the Acting Director's submission in the first instance that the Complainant, as the victim of a crime and witness for the State in a criminal matter, would not have a right to protection, or at least information about the services or options available to her to address the fears and threats that she endured at the time as a result of her assistance to and involvement in the criminal Justice System. Such an approach is contradicted by undertakings and commitments of the Government and the functionaries and institutions involved in the Criminal Justice System.

5.1.21 Similarly, to suggest that the duty to advise the Complainant on alternative means of protection as envisaged in section 10(g) of the Act, would only have arisen if the Complainant formally lodged an application for protection, and/or accepted entering into the witness protection programme also flouts the values and principles in terms of which the Institutions involved in the Criminal Justice system committed themselves to be accommodative of and sensitive to the needs of witnesses and victims of crime.

5.1.22 The Act clearly recognises in section 10 that there might be circumstances in which witnesses or related persons might not be able to adjust to the witness protection programme as invoked through the provisions of the Act,
having regard to personal characteristics, circumstances and family or other relationships. In such circumstances the Act implores the Director to consider and explore the availability of other means of protection, without invoking the provisions of the Act. This is a standard practice in many jurisdictions across the world. The UNODC Good Practices for the Protection of Witnesses manual³ states that the primary objective of any witness protection programme is to safeguard witnesses in cases of serious threat which cannot be addressed by other protection measures in cases of special importance where the evidence to be provided by the witnesses (including victims) cannot be obtained by other means.

5.1.23 The further suggestion that the Director is only under a duty to consider and explore alternative means of protection if and when a witness or victim of a crime has agreed to be subjected to the formal witness programme application process, and to abandon such a witness or victim if he/ she indicates that they will not be able to adjust to the programme, is in disregard of the very rights that the Government and the institutions concerned profess to recognise and commit to in the above-mentioned victims and witness support framework and instruments.

5.1.24 Again, many jurisdictions propose a greater emphasis on the consideration of possible alternative arrangements, other than entry to the Witness Protection Program as part of the pre-entry assessment. In some of the jurisdictions, it is a requirement not only that such alternatives be stated, but that express reasons be set out and recorded if rejecting them⁴.

5.1.25 The fact of the matter was that the risks to and threats to the safety of the Complainant were reported to the Office for Witness Protection. Protection is provided because witness’s lives can be in real danger. The Complainant

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had a right to expect action from the State to protect her against such threats and risks through the services and means at its disposal in a structured and constructive manner. Providing the complainant with an option to stay where she was, when she clearly did not feel safe, did not constitute alternative means of protection as contemplated in section 10(1)(g) of the Act, or met the standards of the service that the State and the Office for witness protection committed to and expected of a public functionary in terms of section 195 of the Constitution.

5.1.26 The evidence before me indicates that a procedure is to be followed prior to invoking the provisions of the Witness Protection Act. In terms thereof, the Office for Witness Protection should have informed the Complainant of any other available means of protection in terms of section 10(1) (g) of the Witness Protection Act, enabling her to make an informed decision, rather than simply suggesting that she enter the Witness Protection Program with the present rigorous protection practices applicable for witnesses. To this end, the Office for Witness Protection is required to adequately and concisely inform the Complainant of all her rights and options to protection in terms of the Witness Protection Act, thereby affording her a fair opportunity to make an informed decision regarding her protection. The evidence at my disposal indicates that since the Complainant was not initially properly advised of her alternative rights to witness protection without invoking the Witness Protection Act, she suffered severe prejudice, and secondary victimisation, at the hands of a system that prima facie appears to not consider the personal circumstances of victims of crime.

5.1.27 The reliance of the Office for Witness Protection that section 10(1) (g) does not create a right, but rather a discretion is wholly rejected as this would appear to nullify the intention of the Witness Protection Program, which intention is to ensure the safety, security and well-being of witnesses. It is my submission that not dispensing full advice of all the options open to the witness just at the preliminary interview; from the most convenient options considering her unique circumstances to the most cumbersome options would not serve to meet the spirit of the Witness Protection Act, which is to
ensure the safety and security of persons. Failure by the state to protect witnesses runs counter to the efforts to wage war against crime, and thereby if the state fails to protect witnesses the fight against crime will not succeed.

5.1.28 As much as the Office for Witness Protection proposes that section 10(1)(g) of the Witness Protection Act to be discretionary, there are no guiding regulations that pre-determine how and when this discretion should be applied. From practical interpretation of the Witness Protection Act, it is deemed to be most applicable at the preliminary interview stage, where all other applicable factors should be considered including section 10(1)(g) of the Witness Protection Act, which was not done in this case. All factors ought to be considered and the Complainant ought to have had more transparent engagements regarding alternative protection considering that the reason she approached the Office for Witness Protection was that she feared for her life and furthermore that she had a dire need for protection.

5.2 Whether the Complainants interaction with the current Witness Protection Program, had the effect of prejudicing the Complainant.

Common cause

5.2.1 It is common cause that the Witness Protection Act provides for other means of protecting witnesses, without invoking the provision of the Act itself.

5.2.2 It was not disputed that the Office for Witness Protection only intervened approximately a week after the Complainant was notified that there was a threat to her life.

5.2.3 It was also not in dispute that the Office for Witness Protection was made aware of the Complainant’s personal circumstances, in this instance, her
strong support structure from family and friends, and furthermore her educational aspirations.

**Issues in dispute**

5.2.4 The issue in dispute is whether the actions of the Office for Witness Protection, and the current Witness Protection Act had the effect of prejudicing the Complainant.

5.2.5 It is in dispute whether the Office for Witness Protection only explained the provisions relating to the Complainant receiving protection by invoking the Act, as it was understood by the Complainant that she will have to change her name, her identity and lose contact with her family and furthermore not be able to attend the tertiary institution where she intended to pursue her studies.

**Application of the relevant legal framework**

5.2.6 In addition to the rights, values and principles underscored by the Government, and institutions’ commitments in the above-mentioned Service Charter and Minimum Standards, the White Paper on Transforming Public Service Delivery issued by the Government in 1997 identified eight Batho Pele Principles for transforming public service delivery. The principles relevant to the present complaint are:

*Courtesy: Citizens should be treated with courtesy and consideration.*

*Redress: If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response.*

*Value for money: Public services should be provided economically and efficiently in order to give citizens the best possible value for money.*
5.2.7 “Appropriate remedial action” is defined by the provisions of section 6(4)(c) of the Public Protector Act which provides that I shall be competent, at a time prior to, during or after an investigation, if I deem it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or to make any other appropriate recommendation I deems expedient to the affected body or authority.

5.2.8 From the evidence discussed above the Office for Witness Protection failed to properly inform the Complaint of her rights to alternative forms of protection. The Office for Witness Protection did not apply the Batho Pele Principles when dealing with the personal circumstances of the Complainant. The Department also failed to speedily provide the Complainant with the appropriate redress.

5.2.9 From the evidence above the Complainant was already suffering severe hardship as a result of her assistance to and involvement in the prosecution of Pastor Omotoso. To be made aware of the fact that her life was at risk, and then to be left without any support from the very institutions that she was making sacrifices for, added to her trauma of having to discontinue with the tertiary education she intended to pursue. Furthermore due to the personal nature of the crime that was committed against her, she was very reliant on her family for emotional and psychological support, to manage and deal with the trauma she was enduring. To remove her family would be to remove the emotional and psychological stability that she experienced, and relied on from her family.

Conclusion

5.2.10 The Office for Witness Protection was required to comply with the Witness Protection Act, the officials acted negligently in not properly informing the Complainant of her alternative rights to protection, and required her to put
her educational aspirations on hold and forfeit her family support, which had the resultant effect of causing her to suffer severe prejudice.

5.2.11 What cannot be overlooked is that the Complainant intended to pursue her educational aspirations, which would have to be placed on hold according to the advice that she received from the Office for Witness Protection, and furthermore that she was going to have to forfeit the much needed emotional and psychological support that she heavily relied on from her family, thereby causing her to suffer severe prejudice.

6. FINDINGS

Having regard to the evidence received, and for the reasons advanced herein above, I make the following findings:

6.1 Regarding whether the conduct of members of the Office for Witness Protection, by failing to initially inform the Complainant of and to explore the availability of alternative means of protection in terms of section 10(1) (g) of the Witness Protection Act, other than entry to the Witness Protection Programme, amounted to maladministration.

6.1.1 The allegation that members of the Office for Witness Protection failed to initially inform the Complainant of and to consider other means of witness protection as envisaged in section 10(1) (g) of the Witness Protection Act, is substantiated.

6.1.2 The State and the Institutions responsible for the criminal Justice System have through various instruments, charters and standards recognised the rights of witnesses and victims of crime to receive information and to be informed of all relevant services available to victims and witnesses by service providers. It also includes the right to be protected from intimidation, harassment, fear, tampering, bribery, corruption and abuse to
ensure a victim’s safety as a witness and the availability of his/ her testimony.

6.1.3. The risks to and threats to the safety of the Complainant were reported to members of the Office for Witness Protection. The Complainant had a right to expect action from the State to protect her against such threats and risks through the services and means at its disposal in a structured and constructive manner. Providing the Complainant with an option to stay where she was, when she clearly did not feel safe, did not constitute alternative means of protection as envisaged in the Act, and did not meet the standards of the service that the State and the Office for Witness Protection committed to and are expected of a public functionary in terms of section 195 of the Constitution.

6.1.4. The Act, recognises in section 10 that there might be circumstances in which witnesses or related persons might not be able to adjust to the witness protection programme as invoked through the provisions of the Act, having regard to personal characteristics, circumstances and family or other relationships. In such circumstances the Act implores the Director to consider and explore the availability of other means of protection, without invoking the provisions of the Act (entry into the Witness Protection Programme). To suggest that the Director is only under a duty to consider and explore alternative means of protection if and when a witness or victim of a crime has agreed to be subjected to the formal witness programme application process, and to abandon such a witness or victim if he/ she indicates that they will not be able to adjust to the programme, is in disregard of the very rights that the Government and the Institutions concerned profess to recognise and commit to in the current victims and witness support framework and instruments.

6.1.5. In the circumstances it is clear that the State, and its functionaries, in particular the members of the Office for Witness Protection, did not live up to the standards of information and protection to which they have committed themselves in support of witnesses and victims of crime, nor have they lived
up to the values and principles of fair and responsive public administration as envisaged in section 195 of the Constitution.

6.1.6. The conduct of the members of the Office for Witness Protection in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.2 Regarding whether the Complainant was prejudiced as result of or in the course of her interaction with members of the Office for Witness Protection.

6.2.1 The allegation that the Complainant experienced the interaction with the members of the Office for Witness Protection as traumatic and prejudicial, is substantiated;

6.2.2 From the evidence at my disposal Complainant was already suffering severe hardship as a result of being both a victim and a witness in a serious criminal matter that involved abuse and violation of the dignity of a number of young girls, including herself. She had to discontinue with the tertiary education she intended to pursue and due to the personal nature of the crime that was committed against her, she was very reliant on her family for emotional and psychological support, to manage and deal with the trauma she was enduring. To remove her family would be to remove the emotional and psychological stability that she experienced, and relied on from her family.

6.2.3 To be made aware of the fact that her life was at risk, and then to be left without effective support from the very Institutions that were expected to be accommodative of and sensitive to her needs and circumstances, added to the trauma that she was already experiencing.
6.2.4 The conduct of the members of the Office for Witness Protection resulted in prejudice as envisaged in Section 182(1) of the Constitution and improper prejudice as envisaged in Section 6 (4) (v) of the Public Protector Act.

7. **REMEDIAL ACTION**

7.1 During my interaction with this particular case I made the following observations and direct the following remedial action to be taken, which in my opinion will enhance the manner in which the Office for Witness Protection functions and operates when dealing with victims of crime and witnesses who require protection.

7.2 **The Acting Director of the Office for Witness Protection to:**

7.2.1 Issue a written apology within thirty (30) working days from the date of the report to the Complainant apologising for, the failure by the Office for Witness Protection to offer her alternative protection in terms of section 10(1)(g) of the Witness Protection Act, which resulted in her suffering prejudice and not having access to protection when her life was in danger;

7.2.2 In line with the rights and standards recognised in witness and victim support framework as discussed in this report, and in consultation with the National director of Public Prosecutions must establish guidelines through a policy document or operational procedures to facilitate the screening and assessment of each matter where it is reported in terms of section 7(1) of the Act that a witness has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons whether known to him or her or not, by reason of his or her being a witness, with the view to

   a) promote, give effect to and within their scope of responsibility, enforce the rights of victims and witness to support and protection as contemplated in, *inter alia*, the *Service Charter for Victims* and *Minimum Standards on Services in South Africa* ;
b) within its scope of responsibility, render relevant services to protection services to witnesses in an integrated and coordinated manner;

c) provide clear, timely and consistent information about relevant support and protection services and assistance available to witnesses, including other means of protection than entry into the Witness Protection Programme; and

d) be sensitive to, to curb or mitigate victimhood and the challenges surrounding gender based violence, femicide and abuse of women and children in South Africa.

7.2.3 The required policy or guidelines must furthermore give effect to the application of section 10(1) (g) of the Witness Protection Act. This would then oblige the Office for Witness Protection to transparently inform witnesses of this.

7.2.4 In the interim, pending the finalisation and implementation of the aforementioned policy or guideline, the Acting director of the Office for Witness Protection must take steps to ensure that in the initial preliminary interview witnesses are transparently informed of their rights and all possible alternatives in terms of Section 10(1) (g) of the Witness Protection Act being available, and also of any other means of protecting the witness without invoking the provisions of the Act. Directly linked to this should also be the inherent consideration of section 10(1) (e) of the Witness Protection Act “where the probability that the witness to adjust to protection, having regard to the personal characteristics, circumstances, family or other relationships of the witness are considered.”

7.2.5 If additional funding is required by the Office for Witness Protection or the National Prosecution Authority to properly fund its obligations in terms of section 10(1) (g) of the Act, it should consider bids to National Treasury to ensure that this is prioritised in its budget.
7.3 I further deem it necessary and in the Public interest that this report on the findings of this particular investigation be submitted to and tabled in the National Assembly in terms of section 8(2)(b) of the Public Protector Act.

7.4 A copy of the Report is be submitted to the Minister of Social Development for noting in so far as it might relate the statutory interventions and intersectoral programmes or victim support service programmes that the Department and relevant Institutions have embarked on with the publication of the draft Victim Support Services Bill 2019, to promote integrated service delivery for a victim and witness empowerment programme.

8. MONITORING

8.1 In monitoring the implementation of the remedial action as stipulated in paragraph 7.2.1 to 7.2.5 of this report, the Acting Director of the Office for Witness Protection is further required to submit to the Public Protector an implementation plan indicating how the aforementioned remedial action will be implemented within 30 working days from the date of issuing the report.

8.2 In line with the Constitutional Court Judgement in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding, unless set aside by a Court order.

ADVOCATE BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 4/12/2020

Assisted by Ms V Pillay: Senior Investigator