



**Address by Public Protector, Adv Thuli Madonsela during a media briefing marking the release of an investigation report, *Yes, We Made Mistakes*, held at the CSIR in Pretoria on Friday, June 01, 2012**

**Chairperson of the National Press Club;  
Members of the leadership of the NPC present;  
Deputy Public Protector, Adv Mamiki Shai;  
Members of the Public Protector Team, in particular Adv Fourie and Adv Janse van Rensburg;  
Members of the media;  
Ladies and gentlemen;**

I am deeply indebted to the National Press Club and the media in general for its interest in the matters I wish to bring to the attention of the people of South Africa and for your ongoing interest in my office's work.

Public dialogue on my office's work is an important factor in our quest to be accessible to all persons and communities as directed by section 182(4) of the Constitution.

Public dialogue is also an important factor in the implementation of findings and the moral suasion that underpins the non judicial enforcement character of my office. Public dialogue also depends on people talking and exacting accountability.

The media, as I have previously indicated, has been a key facilitator of moral suasion, which is a critical catalyst to the implementation of findings of institutions such as that of the Public Protector. This is how we contribute to the strengthening of constitutional democracy.

As most of you may be aware, the act of releasing a Public Protector investigation report is in line with Section 182(5) of the Constitution. This section states that any report of the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential. No such circumstances exists, hence our being here today.

The focus of this media briefing session on the report titled "***Yes, We Made Mistakes***". This report follows my investigation of complaints received from Mr S Stellenboom; Mr T Ehrenreich of COSATU in the Western Cape; Mr S Mjongile of the ANC in the same province; and Ndifuna Ukwazi, a civil society organisation.

All these complainants based their complaints on an article published by the *Sunday Times* on 14 August 2011. The gist of the complaints was that:

- a. The Western Cape Premier, Ms Helen Zille (the Premier) awarded a “*communications tender*” (in December 2010) worth R1 billion to an advertising agency, TBWA / Hunt Lascaris (TBWA) without following proper procurement procedures and prescripts. The agency would apparently take over all the communication needs of the ten provincial government departments in the Western Cape.
  - b. The tender was not publicly advertised as is required by Treasury Regulations.
  - c. A review of the Provincial Treasury found that the process to appoint TBWA “*revealed a lack of control measures and good governance principles*”. It also raised questions about the appointment of *Yardstick*, a marketing and communications consultant, to run the entire selection process.
  - d. The tender committees that considered the bids included Special Advisers to the Premier and the Head of Strategic Communications of the Department. The involvement of the Premier’s Special Advisers in operational processes is against the Public Service Act prohibiting interference in the administration and management of departments. The compliance with Treasury Regulation 16 (and other applicable regulations) and the *Guide for Accounting Officers* issued by the National Treasury was also questioned.
  - e. The tender was initially described as a R1.5 million contract for the Premier’s office when the agency was appointed. However, in June 2011, the Director-General of the Department of the Premier (DG) informed all provincial departments to participate in the contract to develop a common brand. This meant that the agency’s mandate would be expanded, effectively increasing the amount agreed upon from R1.5 million to anything up to R500 million a year. To do this, a new tender process should have been initiated.
  - f. Members of the Bid Adjudication Committee of the Department of the Premier (BAC) were replaced shortly before the bids in respect of the procurement of the communication services referred to above, were considered.
  - g. The tender process was repeated three times resulting in fruitless and wasteful expenditure.
  - h. Cautionary advice from the Provincial Treasury and Supply Chain Management Unit of the Department of the Premier (the Department) in respect of the procurement was repeatedly ignored.
  - i. The scoring system was suspiciously riddled with anomalies and most of the panel members ignored scoring instructions which resulted in unclear determination of acceptability.
  - j. A number of after-the-fact measures were taken in an attempt to conceal some of the deficiencies in the procurement process.
- i. The allegations were analysed resulting in four main issues that formed the basis of the investigation. These issues were:
- a. Whether the Department employed proper demand management in respect of the procurement process;
  - b. Whether failure by the Department to employ proper demand management resulted in fruitless and wasteful expenditure;
  - c. Whether the Department kept proper records of the proceedings of the Bid Evaluation Committee that was involved in the procurement process; and
  - d. Whether the appointment of the two Special Advisers to the Bid Evaluation Committee (BEC) was unlawful or improper.
  - e. The investigation involved the perusal of the relevant documentation relating to the procurement of the contract; analyses of relevant legislation, policies and

National Treasury prescripts; perusal of relevant newspaper reports; interviews with the complainants and senior officials of the Department of the Premier; consultation with National Treasury and other relevant parties. The Public Protector also obtained a legal opinion from independent senior counsel, Adv B R Tokota SC.

- f. A Provisional Report on the investigation was issued on 16 April 2012 and the Department of the Premier, the Provincial Treasury and the complainants were afforded an opportunity to respond thereto. Comprehensive responses, including two legal opinions from Senior Counsel were submitted. The Public Protector also met with the Premier and the complainants in connection with the responses to the Provisional Report on 17 May 2012.
- g. The Provisional Report was leaked to the media during the weekend of 12-13 May 2012.
- h. In a letter addressed to the Public Protector on 16 May 2012, the Premier, raised a number of concerns regarding the submission of the Provisional Report to certain parties, including the complainants and the subsequent leaking thereof to the media. She asserted that as a result of the leaking of the Provisional Report, the investigation has been compromised and the Provincial Government had been prejudiced.
- i. The leaking of the Provisional Report was unfortunate and an unethical act by all the parties involved. However, the Public Protector did not allow this to compromise the investigation. Responding to enquiries by the media, the Public Protector clearly stated that she does not comment on the contents of Provisional Reports, which are regarded as confidential documents. She explained that the status and purpose of Provisional Reports are to furnish all parties with the provisional views of the Public Protector in order to provide them with an opportunity to make final submissions on the facts, law or otherwise, to be considered by her for the purposes of the final report.
- j. As far as the availing of Provisional Reports to the respective parties involved, including the complainants, is concerned, it should be noted that section 7(1)(b)(i) of the Public Protector Act provides that the format and procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case. The Public Protector Act only prescribes that a notice of intention to make an adverse finding against a person implicated by the matter investigated must be provided to him/her in order to respond in connection therewith.. (Section 7(9)) Following the *Mail and Guardian* case the Public Protector decided to issue provisional reports in order to clear any factual, legal or other complications before articulating her findings in a final report. In fact, the issuing of provisional reports is not uncommon in Ombudsman institutions globally and is regarded by the UN Ombudsman Guidelines as good practice. The Public Protector applies this procedure to all reports and provisional findings have no status.
- k. The Department submitted a comprehensive response, which included legal opinions obtained from two independent senior counsel, to the contents of the Provisional Report. The Head Official of the Western Cape Provincial Treasury and the Secretary General of the ANC: Western Cape also submitted detailed comments. These responses, including the legal opinions, were extremely helpful and thoroughly considered in the drafting of this report. The views expressed at the two meetings, one with the Premier, the other with the complainants, were also considered.

- l. There was generally little disagreement on issues of fact. The engagements centered mainly around the interpretation of law and the weight to be assigned to some of the agreed facts.
- m. The key contentious issue raised in the responses to the Provisional Report was the lawfulness or otherwise of the appointment of the Special Advisers of the Premier as members of the BEC. In the end, the Public Protector had to make a determination on this matter. She took into account the following:
  - a. Arguments raised by the Secretary-General of the ANC: Western Cape who maintained the view that the appointment of the Special Advisers was unlawful as they were appointed only to advise and assist the Executive Authority. It was further stated that the Provincial Government should have known better as in 2001 a similar tender involving the same company and one of the Special Advisers was questioned and found to be unlawful by the Public Protector
  - b. Opinions from the Office of the Accountant-General and the National Treasury which advised that only officials and persons specifically contracted for that purpose, should be appointed to a BEC. They further stated that Special Advisers were not allowed to be part of a BEC.
  - c. A legal opinion obtained by the Public Protector from Adv B R Tokota, that advised that the appointment of Special Advisers of the Premier to the BEC is unlawful as it does not comply with instructions and guidelines issued by the National Treasury.
  - d. Comments by the Department and the Provincial Treasury in terms of which the appointment of Special Advisers as members of the BEC is not unlawful.
  - e. Two legal opinions from Adv O Rodgers SC and Adv G Budlender SC respectively, submitted by the Department in terms of which the appointment of the Special Advisers as members of the BEC was not unlawful. Adv Budlender expressed the view that it might have been improper.
  - f. The key issue for the Public Protector's determination was the legal status of a Circular and a Guide issued by the National Treasury that dealt with Supply Chain Management issues, such as the composition of the BEC. She had to consider whether the violation of the Circular and the Guide constituted unlawfulness. Beyond lawfulness, the Public Protector also had to determine the propriety of such action from the point of view of good administration, which is the opposite of maladministration. An issue that weighed heavily in this regard, was the reasonableness of a perception that, where the Special Adviser is, the will of the Premier is. The Public Protector's finding in this regard is contained in the specific findings below.
  - g. The Public Protector also took into account the report of the Provincial Treasury on the procurement process and its transversal nature, which made a number of negative findings against the Department. However, although it was concluded that TBWA would in any event have been awarded the contract, the Supply Chain Management process revealed a lack of control measures and good governance principles.

My general findings are the following:

- h. The Department identified the need for a single brand identity and communication strategy for the Western Cape Provincial Government prior to 2010. The objective of this initiative was to procure a transversal term contract that would have been applicable to all provincial departments. A single brand for the Provincial Government was, however, only endorsed by the Provincial Cabinet on 13 April 2011; some months after the tender had been awarded.
- i. The procurement process embarked on by the Department was not facilitated by the Provincial Treasury, as required by Treasury Regulation 16.A6.5. The Provincial Treasury only became aware of the procurement of the services of TBWA after concerns were raised by the Heads of Departments regarding their Departments' participation in the transversal agreement, and the associated costs.
- j. The bid for the development of a brand and brand delivery strategy for the Provincial Government was advertised by the Department on three occasions. The first two advertisements had to be cancelled due to a failure on the part of the Department to implement a proper demand management process.
- k. The allegation that the tender for the procurement referred to in this report was not properly advertised is inconsistent with the evidence and information obtained during the investigation. The tender for the Department of the Premier was found to have been duly advertised. The *Sunday Times* also retracted this allegation on 21 August 2011.
- l. The Department employed the services of Yardstick to facilitate the procurement process on the advice of the ACA. No evidence of any impropriety in respect of the appointment of Yardstick could be found during the investigation. The Provincial Treasury found the appointment of Yardstick as a facilitator of the procurement process to have been prudent under the circumstances where two previous attempts to procure the intended service failed.
- m. The Provincial Review Report identified that there were some anomalies in the score sheets. The Provincial Treasury indicated that it was not clear whether there were discussions by the BEC to establish the reasons why that was the case. These anomalies had no impact on the ultimate finding of the Report in respect of the regularity of the process. The grand totals of two BEC members during shortlisting revealed stricter scoring, which explained low scores of certain BEC members. The comments of the Provincial Treasury and the evidence and information obtained during the investigation do not support the allegation that the scoring was "*riddled with anomalies*".
- n. The investigation revealed that the Department failed to keep proper records of the proceedings of the BEC.
- o. The composition of the BAC changed before the bid was adjudicated. The explanation that it related to improving the operational efficiency of the Committee and that it was applicable to all subsequent bids, was acceptable.
- p. The allegation that the communications tender awarded to TBWA was worth R1 billion is not supported by the evidence and information obtained during the investigation. The contract provides for a total fixed remuneration in the amount of R1 520 000 for the once-off deliverables. The total cost of communication services for the Provincial Government

- as a whole (including the costs associated with the execution of the contract) was limited, according to a decision taken by the Executive Authority of the Department, to R70 million per annum.
- q. Certain after-the-fact steps were taken in an attempt to deal with some of the deficiencies of the procurement process, in that the Provincial Treasury had to intervene to address the non-compliance by the Department with Treasury Regulation 16A6.5 in respect of transversal term agreements.
  - r. On the advice of the Provincial Treasury the botched attempt by the Department to conclude a transversal term agreement was managed by applying the provisions of Treasury Regulation 16A.6.6 to the agreement with TBWA. The impact thereof was that the accounting officers of other provincial departments could opt to participate in the contract between the Department and TBWA. At the time of the conclusion of the investigation, four other provincial departments were already participating in the agreement. Their participation resulted in extending the value of the agreement between the Department and TBWA.
  - s. The allegation that cautionary advice from the Provincial Treasury and the SCM Division of the Department was ignored is not supported by the evidence. The Department explained that it engaged Yardstick prior to receiving a formal quotation in order to measure the nature of the service provided by Yardstick as well as an indication regarding pricing. The intervention of the Provincial Treasury was only requested after the tender had already been awarded to TBWA. However, it was noted in the Provincial Treasury Review Report that issues of distrust and "*dissention in the ranks*" amongst the officials involved delayed the conclusion of the procurement process. This might have created a perception of indifference to issues that were raised.
  - t. No evidence or information was presented or found during the investigation indicating that the Premier participated in the procurement process. Her involvement did not impact on the tender, was after the fact and was limited to the Provincial Cabinet meeting held on 13 April 2011, i.e. after the Top Management Meeting where Provincial Treasury was requested to craft a way forward around the transversal implications of the bid award, which were problematic. The Provincial Cabinet resolved to endorse a single brand for the Provincial Government and noted a report by the DG in connection with the procurement of the services of TBWA and that certain measures had to be taken for the contract to operate transversally. She was also involved in the decision to limit the total expenditure of the Provincial Government in respect of communication services to R 70 million per annum. The decision to involve the Premier's special advisors in the BEC was made by the then Acting Deputy Director-General, Mr A Groenewald.
  - u. The SCM Division of the Department lacked capacity to manage the prescribed procurement processes that apply to organs of state effectively and efficiently.
  - v. Certain deficiencies and shortcomings in the procurement process were identified by the Provincial Treasury in its report on a review of the procurement process. However, on its own, it did not render the process or the agreement that was eventually signed unlawful or invalid.

- w. The involvement of the Head of Strategic Communications of the Department in the BEC was allowed as he is an official of the Department.
- x. Regarding the alleged previous improper involvement of Mr R Coetzee in the capacity as a Special Adviser to Premier in the awarding of a contract to TBWA in 2001, it was established that he was not a member of the Evaluation Committee. He was requested to assist the Committee at a presentation of bidders together with six other persons in August 2001. By that time he had already resigned from the position of Special Adviser with effect from 1 July 2001. From the verifiable records of the Department and the Provincial Treasury it could not be determined whether or not Mr Coetzee was involved in any impropriety at the time. The Public Protector never issued a report on this matter.

My specific findings are as follows:

**Finding 1: The failure by the Department to employ proper demand management as required by Treasury Regulation 16A3 in respect of the procurement process constituted maladministration**

- n. The Department failed to apply proper demand management in respect of the procurement of the services referred to in this report due to:
  - o. A lack of proper planning;
  - p. Failure to precisely determine the specific needs and requirements of the Department in terms of what the supplying industry could offer and reasonably comply with; and
  - q. Failure to consider and apply the relevant provisions of the Treasury Regulations, which resulted in an untenable understanding that the procurement process would result in a transversal term agreement.
- r. The failure to apply proper demand management in respect of the bid in question contravened the provisions of regulation 16A.3 of the National Treasury Regulations and amounted to maladministration.

**Finding 2: The failure by the Department to employ proper demand management resulted in fruitless and wasteful expenditure**

- s. It resulted in the expending of public funds in respect of the advertising of the tender on two occasions and the utilisation of human and other resources, that would have been avoided had reasonable care been taken, and therefore constituted fruitless and wasteful expenditure in terms of section 1 of the PFMA, in the amount of R8 696.
- t. By appointing Yardstick to facilitate the procurement process, the Department prevented further fruitless expenditure
- u. According to the report of the Provincial Treasury and the response of the Department to the Provisional Report, measures have already been taken to improve the demand management system of the Department.

**Finding 3: The failure by the Department to keep records of the proceedings of the BEC constituted maladministration**

- v. The failure by the Department to ensure that proper minutes of the meetings of the BEC were taken and filed in its records is in contravention of regulation 16A.3 of the National Treasury Regulations and amounted to maladministration.

**Finding 4: The appointment by the Acting Deputy Director-General, Mr A Groenewald, of two Special Advisers of the Premier to the BEC was improper**

- w. The legal opinions obtained during the investigation and presented by the Department in its response to the Provisional Report, indicate that although there may be some merit in arguing that the appointment of the Special Advisers of the Premier as members of the BEC was unlawful, such an argument would have to be based on implied illegality in the absence of any explicit prohibition in law, in this regard. The implied illegality would have to include reliance on instructions and guidelines issued by the National Treasury that cannot be regarded with certainty as "*regulations and instructions*" as contemplated by the provisions of sections 1 and 76 of the PFMA. In the light of the uncertainty in respect of the legal status of circulars, practice notes and instruction notes issued by the National Treasury, it cannot be contended with certitude that non-compliance with it constitutes unlawful conduct.
- x. However, as the Head Official of the Provincial Treasury and hinted in the legal opinion of Adv Budlender SC, the appointment of Special Advisers as members of the BEC is considered to be improper. Appointing persons who have been employed specifically to advise the Executive Authority of the Department to be part of a procurement process, which resorts in the domain of the administration, raises the risk profile of the process and can create suspicions and perceptions of political interference or influence, which will be detrimental to its integrity.
- y. While the appointment of the two special advisers may not have violated the principle of legality it was ill-advised. It resulted in suspicions and perceptions of political involvement and influence in respect of the procurement process that should have been avoided. The appointment was not in line with the spirit and purpose of the National Treasury's Guide for Accounting Officers which seeks to give meaning to the Treasury Regulations, the Public Finance Management Act, 1999 (PFMA) and section 217 of the Constitution.
- z. The conduct of the DG, Adv B Gerber, as the accounting officer, ultimately accountable for procurement in terms of section 44 of the PFMA and that of Mr A Groenewald, to whom the authority to appoint the members of the BEC was delegated, was therefore improper and amounted to maladministration. However, his conduct could not be found to have constituted wilful intent or gross negligence.

Remedial action to be taken as envisaged by section 182 of the Constitution, is the following:

- aa. The Minister of Finance to amend the Treasury Regulations to regulate the composition of Bid Specification, Bid Evaluation and Bid Adjudication Committees to avoid any uncertainty in regard to the lawfulness and propriety of the appointment of its members.
- bb. The Director-General of the National Treasury to take urgent steps to ensure that the legal status of circulars, practice notes and other instructions are clearly

determined and defined in terms of the provisions of section 76 of the PFMA, when it is issued.

- cc. The Director-General of the Department to take urgent steps to:
- dd. Improve the Supply Chain Management System of the Department to ensure that Special Advisers are excluded from being appointed as members of Bid Specification, Bid Evaluation and Bid Adjudication Committees;
- ee. Improve the skills and the capacity of the SCM Division of the Department;
- ff. Improve the record keeping of the SCM Division of the Department;
- gg. Ensure that the officials of the SCM Division and the members of bid committees are trained on the prescripts of the National and Provincial Treasuries in respect of demand and acquisition management; and
- hh. Take corrective measures to prevent a recurrence of the failure in demand management process referred to in this report.

The Directors-General of the National Treasury and the Department are to:

- ii. Submit to the Public Protector an implementation plan in respect of the remedial action taken in paragraph 17 above within 30 days of the date of the issuing of this report; and
- jj. Submit a report to the Public Protector on the implementation of the remedial action referred to in paragraph 17 above within 90 days of the date of the issuing of this report.

In conclusion, I would like to, once again, go back to this profound quote of former President Nelson Mandela:

*“Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to the scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order.*

*An essential part of that constitutional architecture is those state institutions supporting democracy. Among those are the Public Protector, the Human Rights Commission, the Auditor General, the Independent Electoral Commission, the Commission of Gender Equality, the Constitutional Court and others.”*

*He added:*

*“It was, to me, never reason for irritation but rather a source of comfort when these bodies were asked to adjudicate on actions of my Government and the Office and judged against. One of the first judgments of our Constitutional Court, for example, found that I, as President, administratively acted in a manner they would not condone. From that judgment my government and I drew reassurance that the ordinary citizens of our country would be protected against abuse, no matter from which quarters it would emanate. Similarly, the Public Protector (Ombudsman) had on more than one occasion been required to adjudicate in such matters.”*

I will now take questions, if there are any.

Thank you.

**Adv. T. N. Madonsela**

**Public Protector of the Republic of South Africa**