



PUBLIC PROTECTOR
SOUTH AFRICA

Accountability • Integrity • Responsiveness

**Statement by Public Protector Adv. Thuli Madonsela
during a media briefing on Monday, March 30, 2015 at
the Public Protector House in Pretoria.**

Programme Director;

Deputy Public Protector, Adv. Kevin Malunga;

Chief Executive Officer, Dr. Maria du Toit;

Public Protector Team;

Members of the media;

Ladies and gentlemen;

Good afternoon and welcome to our last media briefing for the year ending tomorrow. Thank you, once again, for your continued interest in the work of the Public Protector.

This is the first public appearance of Dr Du Toit as our new Chief Executive Officer. I would like to welcome her to the Public Protector Team and thank her for joining this team.

A lot rests on her shoulders. Among other things, Dr Du Toit –together with Mr Kennedy Kaposi, our new Chief Financial Officer - must guide this institution to constantly enhance its own governance and management so as to lead by example.

As I was preparing for this session, I came across profound words uttered by our late former President, Nelson Mandela, at a International Ombudsman Institute gathering in 2000. He said (I quote):

“In South Africa, like in many parts of the developing world, the substantive difference people seek to feel from the advent of democracy and political freedom, is the alleviation of poverty and material deprivation. We do the long-term future of democracy a profound disfavor and we are unfaithful to the dreams we pursued in our liberation and democratic struggles if we do not make the realization of a better life for all the central objective of our new democracies.” (Close quote)

These words bear resonance to the spirit of my findings and remedial action as articulated in some of the four

investigation reports that I am releasing this afternoon, which are titled *A Fair Chance to Serve*, *Cost of Travel*, and *Ambulance Ethics*.

I have temporarily withheld the report relating to an alleged breach of the Executive Ethics Code by the Minister of Trade and Industry, the Hon. Rob Davies, for later release. It will form part of a batch of reports that will focus on the separation of party and state. I have also withheld *Permitted Benefits*, with a view to releasing it on Wednesday, April 01, 2015.

The four that we are releasing today bring to just under 20 (or 18 to be specific) the total number of investigation reports that we have issued this year.

As you will see in our Annual Report, the bulk of cases we handle during any given financial year do not culminate in formal investigation reports.

Most complaints are resolved through quick Appropriate Dispute Resolution (ADR) methods such as negotiation, mediation and conciliation.

This sees the parties that are involved in disputes brought together in a bid to have the matters resolved amicably.

During such sessions, a settlement agreement is developed and the parties sign on the dotted line, paving the way for the implementation of remedial action.

Only when ADR efforts fail do we proceed to investigate and report.

This kind of approach is applicable to all but conduct failure matters such as alleged corruption, abuse of state resources and violations of the Executive Ethics Code.

Before I proceed to the reports being released today, I would like to cite a few of the ADR cases that have seen people's dignity being restored.

In one case, a North West pensioner was last month awarded a R200 000 compensation over life-threatening damages to his house, allegedly, as a result of a government infrastructure development project.

Now the man's household is getting ready to move into a new home, on an alternative site, where they hope to live happily ever after.

He approached us, complaining that a North West provincial government project to construct a road in his home village left him and his family fearing for their lives in a house that was teetering on the brink of collapse. The road passes a few feet from his front door.

The walls of his house began to crack badly, allegedly, as a result of the use of heavy road construction machinery. He complained that the equipment was shaking the

structure to its very foundations, placing the lives of his family in danger.

He also complained that, in addition to a disintegrating house, the road's storm water drainage system was constructed in such a way that it faced his yard, flooding the enclosure each time it rained.

This left him stranded in the house, with no way of connecting with the outside world in person. The wet clay grounds in the surroundings also left his cattle trapped in the mud.

When we last spoke to him about a week ago, the happy and relieved 61-year-old had just paid for building material to construct a new and safe house for his family.

We also dealt with a case involving a Free State taxi owner, also 61 years of age, who was thrown a lifeline after a gloomy six-year period during which the depressed man contemplated taking his own life.

He hit the lowest point of his life following a road accident in 2008, during which his taxi and only source of income was crashed onto by a vehicle belonging to Statistics South Africa.

The taxi, which, at the time, gave the man a daily income of R700, was damaged beyond economic repair, leaving him in a quagmire of untold financial difficulty.

Not only was he no longer able to provide for his wife and three school-going children, creditors, including the financiers of his vehicle loan, were breathing down his collars and unwilling to listen to his explanations.

We learned of his plight six years later, in 2014. Now, the man is rebuilding his life after receiving a reimbursement to the tune of more than R246 000. The money covers the market value of his taxi as at the time of the accident (R169 557.15), the settlement of the debt owed to his financiers (R56 884.68) and a consolatory payment or “sorry money” (R20 000) for the undesirable experience.

Also as part of the settlement agreement entered into by the two parties, government will help rehabilitate his tarnished credit record, which is in that state due to no fault of his own.

What makes this one story special is the fact that it was a self-referral matter. The Statistician-General, Mr Pali Lehohla, referred the matter involving his own department to us for a resolution. He also advised the complainant to lodge a complaint with us. This is indeed exemplary. When we join hands against maladministration, we all

emerge victorious. We would like to see more of these examples.

I must add that these are among the cases on which the Deputy Public Protector and his Early Resolution team are instrumental.

I now move to the investigation reports we are releasing today.

The first report I will deal with is titled *The Cost of Travel*. It communicates my findings and appropriate action to remedy any wrong I may have found as envisaged in section 182(1 (c) of the Constitution, following an investigation into a complaint lodged by Hon Winston Rabotapi MP (the Complainant) of the Democratic Alliance (DA).

The complaint had to do with an alleged violation of the Executive Ethics Code and the Constitution, involving excessive use of ministerial travel privileges by the Minister and Deputy Minister responsible for the Department of Sport and Recreation, the Hon Fikile April Mbalula MP and the Hon. Gerhardus Oosthuizen MP.

Hon Rabotapi alleged that Minister Mbalula and Deputy Minister Oosthuizen improperly caused the Department of Sport and Recreation to incur expenditure in the sum of approximately R2.6 million in respect of 345 domestic and international flights since 2010.

Hon Rabotapi further stated that in a parliamentary reply to a question that he asked, Minister Mbalula indicated that Deputy Minister Gerhardus Oosthuizen had spent an amount of approximately R1.1 million in respect of 105 flights effective from 1 April 2010 inclusive of 29 domestic flights at the cost to the Department of R806 293.00.

He further alleged that Minister Mbalula caused his Department to incur an amount of R747 410.00 in respect of 16 international flights and for the amount for 224 domestic flights that Minister Mbalula had undertaken.

President Zuma was informed of the delay in the finalisation of the investigation and an I made an undertaking that I would issue the report as soon as it was finalised (you will recall that in terms of the law, all investigations conducted under the Executive Members Ethics Act must be concluded in 30 days. However, owing to a stretched team that is buckling under the weight of an extraordinarily heavy workload, we have always struggled to meet the 30 day deadline).

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

- (a) Regarding whether Minister Mbalula and Deputy Minister Oosthuizen improperly caused the

Department of Sport and Recreation to incur an amount of approximately R2.6 million in respect of 345 domestic and international flights since 2010.

- (i) The allegation that Minister Mbalula and Deputy Minister Oosthuizen improperly caused the Department of Sport and Recreation to incur an amount of approximately R2.6 million in respect of 345 domestic and international flights could not be substantiated.
 - (ii) While Minister Mbalula and Deputy Minister Oosthuizen spent an amount close to the alleged R2.6 Million, I found no evidence indicating that any of the flights were undertaken improperly and outside the mandate of the Department of Sport and Recreation.
- (b) On whether Minister Mbalula and Deputy Minister Oosthuizen improperly incurred excessive transport costs for international and domestic flights
- (i) The allegation that Minister Mbalula and Deputy Minister Oosthuizen improperly caused the Department to incur excessive transport cost for

international and domestic flights was not substantiated by the evidence

- (ii) I could not find any evidence showing that Minister Mbalula and Deputy Minister Oosthuizen undertook flights not in line with the functions of their Department or essential with regard to the 2010 Soccer World Cup, International Cricket Council (ICC) in India and Ireland; the International Rugby Board (IRB) in New Zealand; Netball Championships in Singapore and Gymnastrada in Australia.
- (iii) Minister Mbalula undertook 12 international trips at a cost of R767000.20; averaging R 63,168.00 per trip and his 63 general domestic trips cost R361,622.00 with R197, 800.00 of this amount being trips to Parliament.
- (iv) Deputy Minister Oosthuizen undertook 16 international trips at the cost of R897 927.00, averaging R 56,120.00 per trip and he undertook 77 domestic trips at the cost of R514, 680.00 with R369, 676.00 of this amount being for trips to Parliament.

- (v) I could not find any evidence showing improperly excessive costs incurred by the Department in respect of trips undertaken by Minister Mbalula and Deputy Minister Oosthuizen in violation of Annexure A, Paragraph 1.2 of the Ministerial Handbook and the Guidelines for Official Travel Abroad of the Ministerial Handbook and, consequently, provisions of Paragraph 2.3 of the Executive Ethics Code.

- (c) Regarding whether the conduct of Minister Mbalula and Deputy Minister Oosthuizen constitutes a violation of section 96 (2) of the Constitution and the Executive Ethics Code
 - (i) The allegation that the conduct of Minister Mbalula and Deputy Minister Oosthuizen constitutes a violation of section 96(2) of the Constitution and the Executive Ethics Code could not be substantiated.

 - (ii) Nothing suggests that the flights undertaken by Minister Mbalula and Deputy Minister Oosthuizen were not compliant with provisions of Paragraph 2.3 of the Executive Members Ethics Code and guidelines for official travel abroad in the Ministerial Handbook and therefore do not constitute a violation of section 96 (2) of the Constitution and the Executive Ethics Code.

The appropriate remedial action to be taken in terms of section 182(1)(c) and section 6(4)(c)(ii) of the Public Protector Act is that:

- (i) Due to the absence of any adverse findings against Minister Mbalula and Deputy Minister Oosthuizen and the fact that I did not find any other anomalies requiring correction, I have not taken any remedial action.
- (ii) Regarding the need to take austerity measures and to ensure that limited public funds are principally used for the benefit of the populace, I hope that Minister Mbalula and Deputy Minister Oosthuizen in exercising their discretionary powers, to decide which trips to undertake and how much resources to invest in each trip, they take into account the austerity measures by the Minister of Finance.
- (iii) I am pleased to record that none of the parties involved challenged my jurisdiction or powers and that they have all accepted my findings without any reservations. I thank all parties involved for their cooperation.

The second report that I am releasing today is entitled *Ambulance Ethics*. It communicates my findings and the appropriate remedial action to correct the situation, as envisaged in section 182(1)(c) of the Constitution, following an investigation into a complaint lodged by Mr Sizwe Mchunu, a Member of the KwaZulu-Natal (KZN) Provincial Legislature representing the DA (the Complainant), on 14 December 2012.

The Hon. Mchunu alleged a breach of the Executive Ethics Code by Dr Sibongiseni Dhlomo, KZN Member of Executive Council for Health, involving improper use of an emergency medical helicopter to attend to a private political event that was not a medical emergency thus extraneous to the purposes of the medical helicopter. The complaint included an allegation that the unavailability of the said medical helicopter for a child injured in an accident that occurred while it was flying MEC Dhlomo may have caused the death of that child.

In the main, the complaint was that MEC Dhlomo utilized an emergency medical helicopter of the Department of Health to attend a funeral and that MEC Dhlomo's usage of the emergency medical helicopter on the day in question resulted in the Department being unable to utilise it to attend to an accident resulting in the death of a minor.

The Complainant alleged that on 3 November 2012, MEC Dhlomo used the South African Air Mercy Red Cross Trust (the Red Cross Trust) an only available emergency medical helicopter based in the Ethekekwini Metro, to fly to Hlabisa community on 3 November 2012, purposes not related to its intended use.

Given that the purpose of the medical helicopter is to attend to medical emergencies in a responsive way, the 750km round trip to Hlabisa was in conflict with this public healthcare service being responsive to the needs of the public, and thereby in conflict with good governance and, more specifically, in violation of his duties under the Executive Ethics Code. MEC Dhlomo commandeered the medical helicopter for reasons that appear not to be justifiable.

The use of the medical helicopter resulted in the failure by emergency medical services to save the life of a minor child who died in a car accident on the same day and during the same period that the helicopter was being used by the MEC.

MEC Dhlomo did not lodge a flight plan with relevant authorities. He used the emergency medical helicopter to attend to his “private interests” which may have included campaigning for his political party ahead of the Hlabisa

Municipal by-elections which were to be held on 5 December 2012, and/or attending a funeral of Hlabisa Hospital Head, Dawn Zungu's relative.

While MEC Dhlomo did not dispute that he indeed used the emergency medical helicopter to attend a funeral, he submitted that he was not exclusively attending the funeral. He maintained that his main reason was to address the community of Hlabisa on issues that had been raised by the community.

In investigating the matter, I had to consider the probity of the usage of the emergency medical helicopter by the MEC.

On analysis of the complaint and information sourced, the following issues were identified and investigated:

1. Did MEC Dhlomo improperly use an emergency medical helicopter of the Department of Health to attend a funeral in violation of the Executive Ethics Code?
2. Did the utilisation of the emergency medical helicopter by MEC Dhlomo result in the failure of the emergency services to provide emergency medical care to a child resulting in his death?

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

1. Regarding whether MEC Dhlomo improperly used an emergency medical helicopter of the Department of Health to attend a funeral in violation of the Executive Ethics Code, I find that:

(a) MEC Dhlomo did use the emergency medical helicopter to fly to Hlabisa on 03 November 2012 but he was not exclusively attending a funeral. His main mission was to address the community of Hlabisa at the funeral about an incident that took place in Hlabisa hospital which due to the vastness of distance and bad roads, would have been impossible to achieve in one day.

(b) The use of the emergency medical helicopter for activities that do not constitute a medical emergency is improper for various reasons including feeding perceptions of using public emergency services for personal comfort at the expense of the public.

(c) However, I have accepted that MEC Dhlomo *bona fide* believed it was not wrong to use the emergency medical helicopter as this was part of a long standing agreement between the Department and the Red Cross Trust. The contract was also captured in an internal Standard Operating Procedure regarding circumstances under which the emergency medical helicopter could be used.

(d) Although making financial sense with regard to optimal use of available ambulance hours, the contract was ill-conceived because, among other things, while executing an administrative mission the ambulance would not be readily available for medical emergencies.

(e) The MEC Dhlomo's conduct was not in violation of the Executive Ethics Code.

2. Regarding whether the utilisation of the emergency medical helicopter by MEC Dhlomo resulted in the failure of the emergency services to provide emergency medical care to a child resulting in his death, I find that:

- (a) The Department did respond expeditiously to the accident using ground vehicles.
- (b) There is no evidence that indicates that the emergency medical helicopter that was used by the MEC on the day in question was required for that emergency or any other.
- (c) However, the policy is inappropriate as there is a real risk of a person dying because of the emergency medical ambulance being unavailable while being used for administrative purposes. The arrangement also feeds negative perceptions regarding competing needs of patients and departmental management.
- (d) The MEC has accepted that the policy presents uncomfortable practical and ethical risks and to have it reviewed as soon as possible.

3. Given the distance between Durban and Hlabisa. Had MEC Dhlomo travelled by road, he would not have been on time to reach Hlabisa in time to address

the community. A Google Map search indicates that the distance between Hlabisa and Durban is 268km, which is approximately some 3 hours 36 minutes' drive.

4. According to the MEC, his itinerary was such that his last meeting was at 11h30; he would have reached Hlabisa at around 15h00. A study of the AMS Captains Log show that the helicopter trip from Durban to Hlabisa took 47 minutes and the MEC used his vehicle to return to Durban.
5. Though not investigated, it has been brought to my attention that other provinces have similar arrangements with their helicopter ambulances.

Appropriate remedial action I take in terms of section 182(1)(c) of the Constitution is to call on:

- (a) The Head of Department, Dr Zungu to take immediate action to review the contract between the Department and the Red Cross Trust to make provision for a separate helicopter to cater for non-medical emergencies.
- (b) The Minister of Health and MECs, acting under the auspices of MinMECs, to consider reviewing

arrangements pertaining to helicopter ambulance services to establish if other provinces have similar arrangements and to correct the situation if that is the case.

The last report for the day is titled *A Fair Chance to Serve*. It communicates my findings and the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, pursuant to an investigation into the alleged improper failure by the South African Police Service (SAPS) to re-enlist its former member, Mr M C Maloba (the Complainant) to its service after he responded to an advertisement that sought to recruit former members of the SAPS back into the service and its failure to give him valid reasons in that regard.

The Complainant, a 47 years old unemployed married father with three (3) dependants, a 23 year old girl, a 19 year old boy and 16 year old girl, who is a former member of the SAPS in Polokwane, allegedly responded to an advertisement that was issued by the SAPS in January 2010 inviting former members to submit their applications if they were still interested in returning to its service. He allegedly went through an assessment process in February 2010 after which he was shortlisted and passed the assessment. However, the SAPS failed to re-enlist him to its service.

In the main the complaint was that: 1) The SAPS unduly failed to give him reasons regarding why he was not re-

enlisted into its service after he made several attempts to solicit its reasons; 2) When the SAPS finally gave him the reason, it was factually incorrect and therefore could not be used to justify his exclusion. The reason allegedly given to him was that he had a civil case pending against him and that in terms of the SAPS policy if a former member has a pending civil case, he may not be re-enlisted.

The SAPS did not dispute that the Complainant applied for a permanent police officer position and was assessed as fit to serve. It further did not dispute that it delayed informing the Complainant of the reasons and when it did, it informed him that the reason it could not re-enlist him was because it had an outstanding civil case against him two (2) years and six (6) months after he applied to be re-enlisted. The SAPS alleged that the Minister of Safety and Security had a civil claim of an outstanding debt of R22 500 against him.

On analysis of the complaint, the following issues were identified and investigated:

(a) Did the SAPS unduly fail to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act?

(b) Were the reasons subsequently provided by the SAPS in not re-enlisting the Complainant fair, just and reasonable in the circumstances of this case? and

(d) Was the Complainant prejudiced by the conduct of the SAPS?

The investigation process commenced with an attempt to mediate between the parties hoping they would reach a mutual agreement. After the parties could not agree, a formal investigation was conducted through meetings and interviews with the Complainant and the SAPS officials as well as through inspection of all relevant documents and correspondence received from the SAPS.

The standard used to assess the propriety of the conduct of the SAPS involved laws regulating administrative action, policies and prescripts regulating recruitment at the SAPS and principles of natural justice developed over time. Section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA) were relied on to assess whether the conduct of the SAPS was in compliance with the Complainant's right to just administrative action. The SAPS Regulations for appointment were applied to establish whether the reasons provided by the SAPS for not re-enlisting the Complainant to its service were justifiable.

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(a) Whether the SAPS unduly failed to inform the Complainant about the outcome of his application and assessments; if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:

(aa) The SAPS unduly failed to inform the Complainant about its decision on the outcome of his application to be re-enlisted and also failed to give him a reasonable opportunity to make representation regarding its decision not to re-enlist him;

(bb) Such failure violated section 3(2)(b)(ii), (iii), (iv) and (v) of the Promotion of Administrative Justice Act No. 3 of 2000 and section 33(1) and (2) of the Constitution; and

(cc) The SAPS' conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994.

(b) Whether the reason(s) subsequently provided by the SAPS in not re-enlisting the Complainant were fair, just and reasonable in the circumstances of this case:

(aa) The Complainant was advised that the reason he could not be re-enlisted was that the Minister of Safety and Security (now Minister of Police) had a pending civil case against him relating to a departmental debt of R22 500.00. He was later required to undergo a new assessment;

(bb) After perusing Regulation 11 of the SAPS relating to Application for Appointment and the SAPS Circular dated 7 January 2010 relating to Re-enlistment in the SAPS, I could not find any provision that excludes a person with a civil case pending against him or her from being appointed;

(cc) In the circumstances, the reason given to the Complainant by the SAPS for its failure to re-enlist him to its service is found to be unfair, unjust and unreasonable;

(dd) It is disconcerting that the Complainant and my office were provided with contradictory reasons by the SAPS as to why he could not be re-enlisted to its service. Despite being informed that the reason he could not be re-enlisted was that the Minister of Safety and Security (now Minister of Police) had a pending civil case against him relating to a departmental debt of R22 500.00, in another instance he was informed that there was a moratorium on the placements or re-enlistments of former members.

(ee) My office on the other hand was informed by a letter dated 12 September 2012 from the Provincial Commissioner of the SAPS in Limpopo that his office had confirmed with the National Head Office that the Complainant could be accommodated but still had to comply with all the previous requirements for re-enlistment as indicated in the advertisement of 17 January 2010.

(ff) Requiring the Complainant to redo the assessments for the second time after more than two years was both unfair and unreasonable in the circumstances; and

(gg) The Complainant's right to just administrative action enshrined in section 33 of the Constitution was violated.

(c) Whether the Complainant was prejudiced by the conduct of the SAPS:

(aa) The Complainant was prejudiced by the conduct of the SAPS as envisaged in section 182(1)(a) of the Constitution because a timely response by the SAPS would have afforded him an opportunity to take action to clear his name against the allegations of having a civil case which would have resulted in the SAPS re-enlisting him into its Service;

(bb) Had he been re-enlisted in 2010 it would have placed him in a better financial position but failure to re-enlist him has meant that he lost on potential income which would have come in handy since to date he is not employed and is married with three dependent children; and

(cc) In my view, had the Complainant been enlisted as a police officer when he was assessed as fit to serve, he would have been placed optimally in a position to pay the Minister of Police the alleged accumulated debt of R22 500.00;

(dd) In that regard, I find the exclusion irrational and unfair because of the unfair and irrational exclusion, the Complainant was not only placed in a position of being unable to pay the alleged debt, he has been unduly plunged into poverty;

(ee) I also find it disconcerting that the alleged debt was never substantiated by any legal process of recovery against the Complainant. Instead the Complainant was required to undergo a new assessment before being re-enlisted; and

(ff) The Complainant had a legitimate expectation that once he had passed the interview and all other assessments, he would be re-enlisted to the SAPS.

The appropriate remedial action I am taking in pursuit of section 182(1)(c) with the view of placing the Complainant as close as possible to where he would have been had the maladministration not occurred, is the following:

(a) The National Commissioner of the SAPS should immediately re-enlist the Complainant into the SAPS and provide him with a training programme to assist him to achieve the required physical fitness levels;

(b) The Provincial Commissioner of the SAPS should write a letter of apology to the Complainant for the prejudice caused to him and his family within 30 days from date of issuing of this report; and

(c) The National Commissioner should compensate the Complainant within 60 days from the date of issuing of this report a reasonable portion to be determined by an independent assessor, of what he would have earned had he been re-enlisted in 2010 when he was assessed as fit to serve.

As I have said on previous reports, I have played my part. It is now up to the competent authorities mentioned in these reports to play their part.

Thank you.

Adv. Thuli Madonsela
Public Protector of South Africa