Statement by Public Protector Adv. Thuli Madonsela during a media briefing on the way forward regarding the Nkandla provisional report at the Court Classique Hotel in Pretoria on Wednesday, November 20, 2013.

Deputy Chairperson of the National Press Club, Ms Tanya de Vente-Bijker;

The Executive Committee and members of the National Press Club;

Deputy Public Protector, Adv. Kevin Malunga and the Rest of the Public Protector Team;

Members of the media;

The People of South Africa

Greetings from the Public Protector South Africa Team!

I am deeply grateful for the privilege of addressing you this morning. I'm particularly grateful to the National Press Club (NPC) for hosting us at short notice.

My team and I cherish this opportunity not only because it honours the principle of open and transparent democracy enshrined in our world acclaimed Constitution. The platform you have extended to us over the years to address the nation helps us comply with the constitutional injunction in section 182(4) of the Constitution requiring that my office be accessible to all persons and communities.

As promised, on Friday, 15 November 2013, I received a 28 page submission from the Minister of Police on behalf of security cluster Ministers, pointing out provisions of my provisional report that in their opinion, constitute or have the potential to constitute security breaches.

The purpose of my address today is to map up the way forward regarding how I intend to deal with the submission and ultimate release of my report on the investigation into the security upgrades at the President's private residence in Nkandla, KwaZulu-Natal.

Call me naive as one (presumably sophisticated) Member of Parliament has already done, but I never anticipated what happened on Thursday 08 November 2013. The events that unfolded after November 1, 2013 following my sharing of the provisional report with security cluster

Ministers regarding the security upgrades at the President's private residence in Nkandla, are unprecedented.

As you may already know, around 09h00 on Friday, November 08, 2013, my office received notice of court action taken against me by four Ministers, three of which are part of the security cluster of the Cabinet. The notice required a response in an hour and advised that the matter was to be heard in court five hours later, at 14h00.

The court papers were preceded by a letter that arrived at about 14h00 the day before, on Thursday, November 7, 2013, reiterating a request made on Monday, November 04, 2013 that I extend the timeline for the Ministers in question to submit their security related opinions on the provisional report to Friday, November 15, 2013. The letter stated that if I did not respond by 15h00 that day, which was about an hour later, the Ministers would assume I was declining.

Oblivious to the unfolding drama, I was at a little church near Mmabatho addressing a community, where I called for a patriotic engagement with government, using avenues such as my office and legislative petitions committees to register and address service failure grievances. I advised that burning and breaking things is unpatriotic. To organs of state, I called for a listening ear and respectful engagement with communities. The community of Dihatshwane, where I was heard service delivery concerns relating to land, lack of a school, electricity, water and usable roads, among other things. Many of these grievances date back to the dawn of democracy. The community seemed to receive my message of patriotic engagement positively.

As customary, my office had prepared a draft response to discuss and dispatch first thing in the morning. But as I was going up the stairs to my office, I was told that we had just been served with court papers. On quick assessment of the court papers, it became clear that the demand from the Ministers concerned now transcended an extra five working days and incorporated a negotiated process complete with the courts as a deadlock-breaking mechanism. We agreed that such couldn't be right as section 182 of the Constitution and sections 6&7 of the Public Protector Act give me unfettered power and responsibility to investigate, make findings, report and remedy administrative wrongs in all state affairs. The Executive Members' Ethics Act also gives me unfettered power to investigate and report to the President as I deem fit.

It is worth noting that the Ministers in question did not and have since then never cited any constitutional or statutory provision that gives them the rights they claimed in court papers.

We had to urgently find a lawyer and prepare a response in an hour as we do not have a specific law firm we are attached to, because we do most of our legal work or brief the state attorney. In hindsight, things could have been handled differently. It did not sit well with me to read in newspapers that my office was "fighting" with the Security Cluster, with allegations and counter-allegations swinging in both directions in court papers.

I am sure many will concur that such conduct is not healthy and certainly does not bode well for the principles that underpin the concept of cooperative governance.

As an Ombudsman office, cooperation is the hallmark of our work. Although we are universally regarded as watchdogs, we whisper more than we bark and certainly only bite when it is absolutely necessary. The hallmark of an Ombudsman is moral suasion. Our style and our teeth are *sui generis*; don't try to compare them with those of courts. You may be aware that we model our work against the institution of the *Makhadzi,* a special aunt in the Venda culture whose role is to advise the king on the right way to treat people and handle public power.

Incidentally that is the advice I gave to investigators from all over Africa this past Saturday in Zambia.

Our approach in dealing with the Nkandla matter since January 2012 has been characterised by a lot of whispering as a means to unblocking pathways. We refer to this as soft power. Even when the state attorney served papers on April 24, 2013, announcing that the investigation was to be held in abeyance while the SIU and Auditor General were being approached to commence new investigations as this was what the Ministers wanted in pursuit of the recommendations of a Department of Public Works appointed internal Task Team, we resorted to whispering to the Ministers and broke through the barrier.

If whispering is our hallmark, why did we not whisper on the fateful day of November 8, 2013? I've already answered that question in my answering affidavit filed on November 15, 2013. The Ministers concerned were asserting a right to vet my report and outlining a process forward that would enable them to exercise that right and in the event of a deadlock, for a court to step in and tell me what to throw out and what to retain. In my considered view, this is at odds with the Constitution, the Public Protector Act and the Executive Members' Ethics Act.

I'm saddened by the fact that the matter ended up in court and inevitably took an adversarial turn. My colleague in Sudan, Judge Abuzaid constantly reminds us as African Ombudsman and Mediators Association colleagues that an adversarial approach is inimical to our offices' role. We seek to heal misunderstandings between organs of state and the people. That is better done through dialogue, which is facilitated by the inquisitorial nature of our proceedings. One of his favourite quotes is to the effect that "*You cannot take each other to court and come back as friends*".

Coming back to the Nkandla matter, we now have the task of rebuilding trust. I believe our common commitment to the constitutional values that include transparency, public accountability and the rule of law will help us put the unfortunate court drama behind us. I believe both government and my office are committed to building public trust, particularly in the current climate of a huge public trust deficit.

For us, we are particularly anxious to consolidate the inroads that my team and I have made over the years to improve cooperation and compliance with our investigations and decisions, respectively.

However, in as much as we go out of our way to do our work in a friendly manner –as seen in our preferred use of soft power even though we are legally empowered to issue subpoenas; search and seize; issue contempt of the Public Protector orders- organs of state have a constitutional responsibility to help my office live up to its constitutional mandate without any hindrances.

In fact in terms of section 181(3) it is a constitutional duty of all organs of state, through legislative and other measures, to "assist and protect" my office to ensure its independence, impartiality, dignity and effectiveness.

Section 181 further states that the Public Protector's powers must be exercised independently, and without fear, favour or prejudice. In addition, section 181(4) states explicitly that "*no person or organ of State may interfere with the functioning of [the Public Protector].*"

The Public Protector Act, also, states unambiguously that it is the Public Protector's sole

discretion to determine how to conduct her proceedings and to make findings.

May I also place on record that when I pointed out that there was a challenge regarding the competent authority to receive a report about the President following an investigation conducted under the Executive Members' Ethics Act, my point was informed by the following reality:

The Executive Members' Ethics Act 82 of 1998 does not provide that the Public Protector can submit his/ her report directly to Parliament. In terms of section 3(2) of the Act -

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

(a) to the President, if the complaint is against a Cabinet member, Premier or Deputy Minister;and
(b) (b) to the Premier of the province concerned, if the complaint is against an MEC."

As can be seen, the EMEA does not give me discretional power regarding where to send the report. That is why in 2010 I requested an amendment and both Cabinet and Parliament agreed and have since been giving me progress reports. I fail to see how sharing this truth is compromising the investigation or the report.

I have equally noted those who have launched veiled attacks on my office, accusing us of launching parallel investigations on matters that were already being investigated by other institutions, effectively saying we are squandering public funds.

Incidentally, it is the opposite that is true. When the securities cluster Ministers, insisted on starting new investigations by the Auditor General (AG) and the Special Investigating Unit (SIU), I advised that this may be a waste of money given that our investigation was at the time 90% complete. My office gave a similar response to the state attorney when he wrote to me on April 24, 2013, outlining a way forward that entailed holding our investigation in abeyance while investigations by the Auditor General and the SIU, both still to be commissioned, commence and conclude.

I want to place on record that as customary and in line with our bilateral agreements, the AG and the SIU were approached early in our investigation to ascertain their involvement if any. It is a fact that both the AG and the SIU had not commenced any investigations when we started this investigation and neither had that of the Minister of DPW's Task Team. When approached, the AG indicated that a request was made but declined and the SIU advised that the President had not yet given it a proclamation to investigate the matter. Where then is the duplication? In fact if there was to be duplication, it would have been created by either the AG or the SIU commencing an investigation parallel to ours.

As a rule, we never investigate when another institution is investigating. If the other institution has limited power, we rather agree that it concludes its process, provide me with a report and then I take the process forward. This was the approach I took for example with the complaint against former Minister Dina Pule on the ICT Indaba.

When my office was approached last year to investigate alleged misuse of police intelligence funds (the so-called slush funds) for a security wall around the Minister of Police's home in KwaMbonambi, KwaZulu-Natal, we immediately indicated that we would not duplicate the work as the Auditor-General was already looking into that matter. I made arrangements to be briefed

by the AG's team and was satisfied with the process.

Again when I was asked to investigate allegations of General Mdluli of Crime Intelligence's abuse of power and state resources, involving the same fund, I deferred to the Inspector General of Intelligence and the AG. My role so far has been to receive briefings on the matter.

Even when no other competent body is investigating, I still refer matters to them where appropriate. For example, when I was approached by an MEC in one of the provinces to investigate the involvement of a National Deputy Minister and senior police officers in subverting the law to enable drug lords to operate unhindered, I immediately called General Anwa Dramat and requested that he accepts a referral. The matter is now being investigated by the Hawks.

I did the same thing earlier this year when I was asked to investigate the landing of a private jet at the Waterkloof Air Force base. I declined to investigate on the basis that, among other things, an investigation had already been carried out. Instead I chose to look into allegations by an official from the air force who alleged she had been denied due process by and implicated unfairly without being interviewed by the Task Team appointed by the Minister of Justice and Constitutional Development to investigate the matter.

In so far as the Nkandla investigation is concerned, I have stated that I received the first complaint about the matter in December 2011. Two more complaints were received last year following a second exposé by a newspaper. The first expose by the Mail and Guardian was in 2009 and no investigation request was received by my office and no investigation was carried out by other organs of state.

Nobody had launched an investigation into the matter; be it the Auditor-General, the Special Investigating Unit or Ministerial Task Team, when my office wrote to the Presidency in January 2012 advising of the request to investigate. All parties involved know this too well and I have no idea why they are trying to mislead the people of South Africa.

Furthermore, when I met the Director-General in the Presidency, a day after advising the Presidency on the request to investigate, he advised of no other investigations and simply pointed out the organs of state to whom I had to direct my questions. I proceeded to do so starting with the Minister of Defence, who pointed me to the Minister of Police. DPW also tendered no resistance at the beginning and supplied documents and information, including classified documents, without any conditions.

On the security question, it is important to appreciate that it is everyone's job to obey the law, which includes national security laws. As Public Protector, I also see it as our responsibility not to compromise the President's security and that of the state. The report in question was accordingly prepared with extreme care to avoid any security breaches.

It must be noted that I have never understood my role as being that of a security expert or an expert on hospital surgeries, construction of RDP houses, or any technical field. I understand my role and that of judges as requiring my ability to sift through evidence and determine (in my case on a balance of probabilities), what happened, what, in accordance with the law or rules, should have happened and make a determination regarding the propriety of what happened. If I make a finding that what happened should not have happened my job is to determine whose fault was that, or who "dropped the ball" and then specify what should be their accountability.

In their court papers, the Ministers that took me to court seem to have a different view yet

paradoxically, they do not think a judge should be an expert to make the same determination they argued I was neither authorised nor had the skills to make.

While my job as an Ombudsman involves a combination of investigating and adjudicating, like a judge in the civil law system, it is prudent to seek expert opinions, where appropriate. It was in this regard that I welcomed the request for the involvement of the security cluster.

This takes me back to the roadmap for finalising the report. Firstly please take note that I have decided to depoliticise the process.

As argued in court papers, I never wished to enter into a politicised environment. My deal was initially with officials. It was, as indicated in our court papers, General Ramlakan from the Department of Defence who requested that he and his colleagues have sight of the report's use of classified documents to ensure there were no security breaches. The arrangement changed when, at the close of my last meeting with the security cluster Ministers, the Minister of Defence asked if the deal was still on, and when I answered affirmatively and proceeded to map out how General Ramlakan and his colleagues would interface with my team once the report was ready, she requested that the report be rather given to the Ministers. I now regret acceding to that request.

In their court papers the Ministers pointed out that it is not them that are security experts but the staff they employ, advising that teams of officials have been busy with the provisional report with a view to identifying, what in their view, constitute security breaches. I concur. That is the reason my deal was for the involvement of the officials and not Ministers in the first place.

The depoliticised way forward seeks to take the process back to technical rather than political engagement. The envisaged process will involve the following steps:

1. My team and I will review the 28 page government submission with a view to assessing the reasonability of the security concerns and where considered reasonable, alter the report as I deem fit;
2. I will invite the Ministers in the security cluster to nominate security experts from within the government to meet me at my office and discuss with them the contended issues. I will thereafter apply my mind and make a decision.
3. I will discuss whatever issues remain unresolved, which I hope won't exist, with selected independent security experts.
4. The provisional report will be shared with respondents, complainants and implicated parties for comments within ten (10) working days. Those outside the security cluster, except the President, will not get a copy of the report but will be invited to come and view relevant parts thereof at our offices.
5. The final report is prepared and handed over to the Presidency, complainants, respondents and competent authorities I would have asked to take action if any needs to be taken.

I hope this will remove any anxieties regarding the report and take care of all the genuine security concerns. I thank all the people of South Africa that continue to support while holding my office accountable for its exercise of state power. My team and I count on that support as we continue to play our part in fulfilling the constitutional promise of a state that is accountable, operates with integrity at all times and is responsive to all the people. That is a state where state power is always exercised in accordance with the law and all state action is informed by public interest.

Thank you.

Adv. Thuli Madonsela

Public Protector of South Africa