REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

Report No: 7 of 2008/9

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF THE MISAPPROPRIATION OF PUBLIC FUNDS BY THE DEPARTMENT OF HEALTH

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Executive summary

The Office of the Public Protector investigated a complaint lodged by a Member of Parliament in connection with advertisements placed by the Department of Health in several newspapers, in September 2007, in connection with the judgment of the High Court in an application brought by the Minister of Health against the *Sunday Times.* The application related to the application of certain provisions of the National Health Act, 2003 in respect of the medical records of the Minister, which were in the unauthorised possession of the *Sunday Times.*

It was alleged that the placing of the said advertisements could be considered to be unauthorised or fruitless and wasteful expenditure in terms of the provisions of the Public Finance Management Act, 1999 (PFMA).

From the investigation it was found that the administration of the National Health Act, 2003 forms part of the core business of the Department of Health and that it therefore has the responsibility to inform the public of any incident that might have a significant impact on their rights and the other matters regulated by the Act. The Director General of the Department was of the view that part of the interpretation afforded to the relevant sections of the Act by the Court, could be questioned and that the public should be informed accordingly. The purpose that the Department sought to achieve with the placing of the advertisements was within the authority of the Director General to approve and his decision in this regard was rationally related to the core business of the Department.

The complaint of the misappropriation of public funds by the Department was therefore held to be without substance.

During the investigation it was noted with concern that the contents of one the articles placed as advertisements were severely critical of the judgment of the High Court. Having regard to the findings of the Constitutional Court in regard to the crime of contempt of court in the current constitutional dispensation, it was concluded that:

- Organs of state, such as functionaries that exercise public power, have a constitutional obligation to protect the courts to ensure its effectiveness and to uphold its dignity.

- Any conduct by an official of the State that is offensive and likely to damage the administration of justice is therefore unlawful.

- Such conduct could be found to constitute the common law crime of contempt of court, which is punishable by law.

- The publication of statements accusing a Judge of having delivered a judgment that poses a threat to the rule of law and referring to his reasoning as being incoherent and contradictory, might be regarded as having the potential of impacting negatively on the reputation of the Court and the Judge concerned. It might also impact on the confidence that the public should have in the compliance of our courts with its constitutional imperatives relating to the administration of justice. It is however a matter that should be attended to by the authority charged with prosecutions.

The Public Protector therefore notified the Acting National Director of Public Prosecutions that the facts of the matter referred to in this report may disclose the commission of the offence of contempt of court.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF THE MISAPPROPRIATION OF PUBLIC FUNDS BY THE DEPARTMENT OF HEALTH

PART A: INTRODUCTION

1. SUBMISSION OF THE REPORT

This report is submitted to the Minister of Health, the Director General of the Department of Health and the Acting National Director of Public Prosecutions, in terms of the provisions 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). It relates to an investigation into an allegation of the misappropriation of public funds by the Department of Health.

2. BACKGROUND

2.1 During 2005, the Minister of Health, Dr M E Tshabalala-Msimang, was hospitalised at the Cape Town Medi Clinic, on two occasions.

2.2 On 12 August 2007, the *Sunday Times* published an article, alleging that the Minister made excessive use of painkillers and sleeping tablets and that she consumed alcohol during her hospitalisation.

2.3 The Minister discovered that her hospital records relating to her two said admissions had been removed from the archives of Cape Town Medi Clinic in an unauthorised manner.

2.4 She was joined by Medi Clinic in a High Court application brought against the editor and the owner of the *Sunday Times* and the journalists involved, asking the Court to order the return of the Minister's hospital records and interdicting

and restraining the respondents from further commenting on and publishing any comments on the unlawfully obtained records[1].

2.5 It was contended on behalf of the Applicants in the court application that the possession by the *Sunday Times* of the private and confidential medical records of the Minister contravened the provisions of the National Health Act, 2003 (the Act) and was therefore unlawful.

2.6 The relevant provisions of section 17 of the Act provides that:

"***Protection of health records-***

(1) The person in charge of a health establishment in possession of a user's health records must set up control measures to prevent unauthorised access to those records and to the storage facility in which, or system by which, records are kept.

(2) Any person who-

(a).....
(b).....
(c).....
(d).....
(e).....
(f) without authority, copies any part of a record;
(g) without authority, connects the personal identification elements of a user's records with any element of that record that concerns the user's conditions, treatment or history;

[1] *Mantombazana Edmie Tshabalala-Msimang and Another v Mondli Makhanyane and Others,* case no 18656/07, Witwatersrand Local Division

(h) gains unauthorised access to a record or record keeping system, including intercepting information being transmitted from one person or one part of a record keeping system to another;

(i).....

(j).....

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment."

2.7 In his judgment, delivered on 30 August 2007, Judge Jajbhay held that the *Sunday Times* acted in contravention of the said provisions of the Act, by being in unauthorised possession of the hospital records of the Minister[2].

2.8 As far as the request that the respondents be interdicted and restrained from further commenting on the contents of the unlawfully obtained records, the Court found that:

"*In a case where the information sought for publication is obtained by unlawful means, there may well be overriding considerations of public interest which would permit of its publication.* [3]:

and

"*This is a case where the need for the truth is in fact overwhelming. Indeed in this matter the personality involved as well as her status establishes her newsworthiness. Here we are dealing with a person who enjoys a very high position in the eyes of the public and it is the very same public that craves*

[2] Par [26] on page 19
[3] Par [34] on page 26

attention in respect of the information in the hands of the Sunday Times. The overwhelming public interest points in the direction of informing the public about the contents incorporated in the medical records in relation to the first applicant (the Minister), *albeit that the medical records may have been unlawfully obtained. In these circumstances I am unable to accede to the requests of the applicants with regard to paragraphs 3 and 7 of their notice of motion which in effect would impose a form of censorship in relation to any future publication around the medical records*[4]*."*

2.9 The Court ordered, *inter alia*, the return of the Minister's medical records to the hospital involved and that the respondents have to delete all copies of these records that may be stored on their personal computers or laptops. The personal notes made by the respondents in respect of the records were not affected by the order.

3. THE ARTICLES PUBLISHED BY THE DEPARTMENT OF HEALTH

3.1 On 21 September 2007, several newspapers published an advertisement placed by the Department of Health (the Department) in connection with the judgement of the High Court, referred to in paragraph 2 above.

3.2 The advertisement consisted of 2 articles, under the headings: "*Reflections on the Judgment"* and "*In Defence of the National Health Act"*, respectively. The first was written by Mr S Ramasala, the Head of Legal Services, and the second by Mr T Maseleku, the Director General of the Department.

3.3 Details of what was contained in the said articles are referred to in paragraphs 9 and 10 below.

[4] Par [50] on page 32

4. THE COMPLAINT

4.1 Mr M Waters MP of the Democratic Alliance lodged a complaint with the Office of the Public Protector in connection with the advertisements referred to in paragraph 3 above, on 25 September 2007.

4.2 In his letter of complaint, Mr Waters stated that:

"*The Sunday Times report that was the matter in contention during the court case concerned the Minister's personal conduct while on sick leave, and while she was not acting in any way in her official capacity. The Department itself admits in the text of the advert that the Minister was 'litigating in her private capacity' when she took this matter to court.*

The question of the newspaper's right of access to these records therefore does not appear to relate to the core business of the Department of Health and does not either directly or indirectly relate to the purposes for which public money was allocated to the Department. It could also not be said to relate to the administration or marketing of the business of the Department.

It would seem, then, that this expenditure could be considered to be unauthorised, fruitless and wasteful in terms of the requirements of the Public Finance Management Act, 1999 (PFMA) for expenditure of public money.

I would like to request that you conduct an investigation to determine whether this expenditure does indeed constitute proper use of public funds."

5. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

5.1 The Public Protector has the power, in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution), 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, to report on such conduct and to take the appropriate remedial action.

5.2 Section 182(2) of the Constitution provides that the Public Protector has the additional powers and functions prescribed by national legislation.

5.3 In terms of section 6(4) of the Public Protector Act, 1994, the Public Protector is competent, on receipt of a complaint or on own initiative, to investigate a complaint of any alleged maladministration in connection with the affairs of government at any level and any alleged improper conduct by a person performing a public function.

5.4 The allegation of the misappropriation of public funds by the Department of Health falls within the jurisdiction and under the powers of the Public Protector to investigate.

6. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act, 1994. It comprised:

6.1 Consideration of the complaint lodged by Mr Waters;

6.2 Consideration of the relevant articles published in the newspaper advertisements placed by the Department on 21 September 2007;

6.3 Correspondence with the Director General of the Department, Mr T D Mseleku;

6.4 Consideration and application of the relevant provisions of the Constitution; the Public Finance Management Act, 1999 (PFMA); the Appropriation Act, 2007, the National Health Act, 2003 and the Public Protector Act;

6.5 Consideration of the judgment in the case of *Mantombazana Edmie Tshabalala-Msimang and Another v Mondli Makhanyane and Others*[5]; and

6.6 Consideration and application of the relevant findings in the judgment of the Constitutional Court in the cases of *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*[6] and *S v Mamabolo*[7].

PART B: THE ALLEGATION OF THE MISAPPROPRIATION OF PUBLIC FUNDS

7. THE PUBLIC FINANCE MANAGEMENT ACT, 1999

7.1 General provisions

7.1.1 The object of this Act is to regulate financial management in the national and provincial governments, to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively and to

[5] Supra
[6] 2000(2) SA 674 (CC)
[7] 2001(3)SA 409 (CC)

provide for the responsibilities of persons entrusted with financial management. A reference to a "department" in the Act means a national or provincial department[8].

7.1.2 In terms of section 13, all money received by the national government must (except in the case of certain exceptions that are not relevant to the matter in question) be paid into the National Revenue Fund.

7.1.3 Section 15 provides that only the National Treasury may withdraw money from the National Revenue Fund and may do so to provide funds that have been authorized in terms of an appropriation by an Act of Parliament.

7.1.4 The following definitions contained in section 1 are of relevance to the matter under consideration:

7.1.4.1 *fruitless and wasteful expenditure* means expenditure which was made in vain and would have been avoided had reasonable care been taken;

7.1.4.2 *irregular expenditure* means expenditure, other than unauthorized expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including the Act;

7.1.4.3 *unauthorized expenditure* includes expenditure that is not in accordance with the purpose of a vote;

7.1.4.4 *vote* means one of the main segments into which an appropriation Act is divided and which specifies the total amount, which is usually appropriated per department.

[8] See section 1

7.2. The accounting officer and his/her responsibilities

7.2.1 Section 36(2) provides that the head of a department is the accounting officer.

7.2.2 The accounting officer of a department, *inter alia:*

7.2.2.1 Is responsible for the effective, efficient, economical and transparent use of the resources of the department[9];

7.2.2.2 Must prevent unauthorized, irregular and fruitless and wasteful expenditure[10];

7.2.2.3 May not commit a department to any liability for which money has not been appropriated[11]; and

7.2.2.4 Is responsible for ensuring that expenditure of the department is in accordance with the vote of the department and that effective and appropriate steps are taken to prevent unauthorized expenditure[12].

8. THE APPROPRIATION ACT, 2007

8.1 This Act provides for the appropriation of money from the National Revenue Fund for the requirements of the State in the 2007/8 financial year.

8.2 Section 2 provides for appropriations to votes and main divisions within a vote and for specific listed purposes, as set out in the Schedule.

[9] Section 38(1)(b)
[10] Section 38(1)(c)(ii)
[11] Section 38(2)
[12] Section 39(1)

8.3 The Department of Health falls under Vote 15. The aim of the Department is stated as: "*To promote the health of all people in South Africa through a caring and effective national health system based on the primary health care approach.*"

8.4 The provision of legislative and communication services are amongst the purposes of the Department that are specifically listed.

9. THE CONTENTS OF THE ARTICLE WRITTEN BY THE DIRECTOR GENERAL

9.1 Mr Mseleku's article was entitled: "*In Defence of the National Health Act".*

9.2 The article started off by making general remarks about the features of the National Health Act and specifically the provisions of section 17 thereof[13]. It referred to the fact that the Minister's medical records were unlawfully removed from the hospital where she was treated and that the matter had been reported to the South African Police Service.

9.3 He continued by accusing the *Sunday Times* of undermining the confidentiality of medical records provided for by the Act, based on the argument that the information relating to the Minister was of public interest.

9.4 Referring to the finding of the High Court that the *Sunday Times* acted in contravention of the provisions of the Act by being in possession of the medical records of the Minister, Mr Mseleku stated:

[13] See paragraph 2.6 above

"As the Health Department, we celebrate the vindication of rights of patients to confidentiality by the High Court and we salute all those who contributed in ensuring that the National Health Act does indeed encompass the caring values of our democratic dispensation as contained in our Constitution."

10. THE ARTICLE WRITTEN BY THE HEAD: LEGAL SERVICES OF THE DEPARTMENT

10.1 The heading of this article was: *"Reflections on the Judgment".*

10.2 It consisted mainly of extremely critical remarks on the judgment concerned. In the opening paragraph, it was stated that:

"The judgment of Jajbhay J, in the much publicised matter of the Minister of Health, Dr Manto Tshabalala-Msimang and the Sunday Times constitutes a serious threat to one of the founding values of our Constitution-the rule of law. At the outset let us state that, although the judgment of Jajbhay was in favour of Dr Manto Tshabalala-Msimang acting in her private capacity, it is a huge disappointment in terms of its internal contradictions and lack of coherence." (emphasis added)

10.3 Mr Ramasala continued by critically summarising part of the judgment and referring to it as weak and incoherent. He concludes:

"There was a failure to fully comprehend and to properly apply the provisions of the National Health Act. The judge also seems to have ignored the fact that the Minister was litigating in her private capacity as an erstwhile patient seeking the protection of her confidential health records and not in her capacity as Minister

of State vindicating her reputation as such or defending her right to remain in office.

More disturbingly, despite the provisions of sections 14, 15, 16 and 17 of the Act, whose constitutionality was never challenged, in the second part of his order Jajbhay J, effectively granted the Sunday Times and its employees the right to disclose the contents of the health records in the form of commentary. This he did by explicitly stating that they are not restrained or interdicted from publishing comments on the health records. As stated above, he furthermore suggested that unlawfully obtained confidential records of a patient may be lawfully published 'in the public interest' in contravention of the Act. This is the conclusion that constitutes a serious threat to the rule of law-one of the values of our Constitution."

11. THE EXPLANATION BY THE DIRECTOR GENERAL

11.1 The reasons why the articles were written and published as an advertisement

11.1.1 In his response to the complaint, the Director General explained that it was decided to write the articles in response to what was regarded as a one-sided report by the *Sunday Times* on the contents of the judgment. According to him, the said newspaper only gave prominence to the suggestion in the judgment that the provisions of the Act relating to the protection of medical records could be ignored, when doing so is in the public interest. He also stated that:

"The newspapers approached to publish the articles as opinion pieces were unable to do so. When a court suggests that it is permissible to contravene the Act in the public interest and such suggestion is reported on prominently, we

have an obligation as the Department that administers the Act, to communicate with the public that was targeted by such reporting, that such suggestion cannot be correct. Placing the adverts was one means we deemed effective in reaching out to the public that was targeted."

11.1.2 He also advised that the Department could not appeal against the judgment as it was not a party to the proceedings that gave rise to it.

11.2 How much did it cost?

The advertisement was placed in 5 prominent newspapers at a cost of R 381 666-87.

11.3 Did the contents of the advertisements relate to the core business of the Department?

11.3.1 According to the Director General, the contents of the advertisements related to the core business and marketing of the Department as it dealt with a judgment in relation to the Act.

11.3.2 He stated in this regard that:

"*The Act was developed by the Department of Health over several initial years of democracy and provides a legal framework for the national health system in South Africa. The matter between Dr M E Tshabalala-Msimang and the Sunday Times was the first court case relating to a significant section of the Act dealing with the rights of patients and health care users. The Act is administered by the Department. Therefore, the Department has a direct interest in the interpretation of the Act by the courts which has a bearing on the implementation of the Act."*

11.3.3 The Director General concluded that the expenditure on the advertisements could therefore not be regarded as unauthorised or fruitless and wasteful.

12. CONCLUSION

12.1 The administration of the National Heath Act, 2003 forms part of the core business of the Department, for which public funds were appropriated by Parliament in terms of the Appropriation Act 2007 and the Public Finance Management Act, 1999.

12.2 In hindsight, the Department should have considered an application to the High Court to join the Applicants in the matter concerned or to intervene, as it clearly had a direct and substantial interest in respect of the interpretation afforded to the relevant sections of the Act, especially as it was the first time that it was challenged in court. By doing so, it would have enabled the Department to raise its concerns in connection with the judgment of the Court on appeal.

12.3 It is the responsibility of the Department to inform the public of any incident that might have a significant impact on their rights and the other matters that are being regulated by the Act.

12.4 The contents of the articles that were placed as advertisements in newspapers focused on a judgment of the High Court in relation to the interpretation of certain provisions of the Act.

12.5 The Director General and the Head: Legal Services were clearly of the view that part of the interpretation afforded to the relevant sections of the Act by the Court, could be questioned and that the public should be informed accordingly.

12.6 The fact that the Minister of Health was a party to the said court application was immaterial as the advertisements did not focus on what was decided about her, as an individual, but on what was decided in regard to the protection of the confidentiality of the records of patients and the impact of the public interest thereon.

12.7 The decision of the Director General, as the accounting officer of the Department, to approve the expenditure associated with the advertisement was taken in terms of the discretion afforded to him by the PFMA.

12.8 In considering whether this exercising of public power was appropriate and reasonable under the circumstances, regard has to be taken of what was found in this respect by the Constitutional Court in the case of *Pharmaceutical Manufacturers Association of SA an Another: In re Ex Parte President of the Republic of South Africa and Others*[14]*:*

> *"In S V Makwanyane Ackerman J characterized the new constitutional order in the following terms: 'We have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where state action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts or our new constitutional order.*
>
> ...

[14] 2000(2)SA 674 (CC) from 708

It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which power was given, otherwise they are in fact arbitrarily and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.

....

Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of the Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. <u>As long as the purpose sought to be achieved by the exercise of the public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."</u> (emphasis added)

12.9 From the information obtained during the investigation and consideration of the relevant provisions of the PFMA, it appears that the purpose that the Department sought to achieve with the placing of the advertisements was within the authority of the Director General to approve and that his decision in this regard was rationally related to the core business of the Department.

12.10 It therefore cannot be found that the expenditure associated with the placing of the advertisements was "*unauthorised*" as defined by the PFMA.

12.11 As the information contained in the articles relate to the core business of the Department and as it aimed at informing the public on matters relating thereto, the associated expenditure was not made in vain. It can therefore also not be regarded as having been *"fruitless and wasteful".*[15]

PART C: CONTEMPT OF COURT

13. THE CONCERN

13.1 The contents of the articles placed as advertisements were critical of the judgment of the High Court, and in the case of the article of the Head: Legal Services, quite severely so[16].

13.2 Although Mr Waters did not raise this issue in his complaint, it was decided to consider whether the remarks made in the articles might have amounted to contempt of court, and if so, what steps should be taken.

[15] See paragraph 7.1.4.1 above
[16] See paragraph 10 above

14. THE RESPONSE OF THE DIRECTOR-GENERAL

14.1 During the investigation the concern that the criticism expressed against the said judgment might be regarded as contemptuous was raised with the Director General.

14.2 He responded as follows:

"We do not view the criticism against the judgment as contemptuous. The judge himself said when he delivered judgment that everyone is free to comment or criticize the judgment. Further, the courts have the power to deal with any contemptuous conduct towards them and we have not heard from the court that the criticism expressed is contemptuous."

15. THE RELEVANT PROVISIONS OF THE CONSTITUTION

15.1 The judicial authority of the Republic is vested in the courts.

15.2 The courts are, in terms of section 165(2), independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

15.3 Section 165(4) is of particular significance to the matter under discussion in this Part of the report. It provides that:

"*Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."*

15.4 In terms of section 239, *"organ of state"* includes any functionary exercising a public power or performing a public function in terms of any legislation.

16. CONTEMPT *EX FACIE CURIAE* VERSUS THE RIGHT TO FREEDOM OF EXPRESSION: THE JUDGMENT OF THE CONSTITUTIONAL COURT IN *S v MAMABOLO*

16.1 The nature and purpose of the offence of scandalising the court

16.1.1 The question as to how far one can go in criticising a Judge in our new constitutional order was considered by the Constitutional Court in the case of S v Mamabolo[17].

16.1.2 In his judgement, supported by all the other Judges, albeit qualified by Sachs J, Kriegler J, as he then was, considered the elements of the crime of scandalising the court. He concluded that it is a form of contempt of court which, in turn, is a broad variety of offences that have little in common with one another save that they all relate, in one way or another, to the administration of justice.[18] He continued in this regard as follows:[19]

"*The fundamental question that has to be addressed at the outset here, is why there is such an offence as scandalising the court at all in this day and age of constitutional democracy. Why should Judges be sacrosanct? Is this not a relic of a bygone era when judges were a power unto themselves? Are Judges not hanging on to this legal weapon because it gives them a status and untouchability that is not given to anyone else? Is it not rather a constitutional imperative that public office-bearers, such as Judges, who wield great power, as*

[17] 2001(3)SA 409 (CC)
[18] Par [13]
[19] At Par [15]

Judges undoubtedly do, should be accountable to the public who appoint and pay them? Indeed, if one takes into account that the Judiciary, unlike the other two pillars of the State, are not elected and are not subject to dismissal if the voters are unhappy with them, should not Judges pre-eminently be subjected to continuous and searching public scrutiny and criticism?

The answer is both simple and subtle. It is, simply, because the constitutional position of the Judiciary is different, really fundamentally different. In our constitutional order, the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights-even against the State. No one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law against governmental erosion."

16.1.3 The Court also held that the ostensible tension between the right of freedom of expression and the protection of the reputation of the judicial process ought not to be exaggerated[20]. Judgments by the courts are often of public concern and openness seeks to ensure that the citizenry know what is happening and can debate the matter further. Self-evidently, such informed and vocal public scrutiny

[20] From Par [29]

promotes impartiality, accessibility and effectiveness and constitutes a democratic check on the Judiciary.

16.1.4 *"But the freedom to debate the conduct of public affairs by the Judiciary does not mean that attacks, however scurrilous, can with impunity be made on the Judiciary as an institution or on individual judicial officers. A clear line cannot be drawn between acceptable criticism of the Judiciary as an institution and of its individual members, on the one side, and, on the other side, statements that are downright harmful to the public interest by undermining the legitimacy of the judicial process as such. But the ultimate objective remains: courts must be able to attend to the proper administration of justice and - in South Africa possibly more importantly-they must be seen and accepted by the public to be doing so. Without the confidence of the people, courts cannot perform their adjudicative role, nor fulfil their therapeutic and prophylactic purpose[21]".* (emphasis added)

16.2 The constitutional challenge

16.2.1 It was also argued by counsel for the appellant that in the light of the constitutional rights and freedoms now contained in the Bill of Rights, there is no room for the continued recognition of the crime of scandalising the court[22].

16.2.2 The Court however found that the right to dignity is at least as worthy of protection as the right to freedom of expression. In this regard Judge Kriegler also stated[23]:

"*Having regard to the founding constitutional values of human dignity, freedom and equality, and more pertinently the emphasis on accountability,*

[21] At par [32]
[22] At par [34]
[23] At par [44]

responsiveness and openness in government, the scope for a conviction on this particular charge must be narrow indeed if the right to freedom of expression is afforded its appropriate protection. The threshold for a conviction on a charge of scandalising the court is now even higher than before the superimposition of constitutional values on common-law principles; and prosecutions are likely to be instituted only in clear cases of impeachment of judicial integrity. It is a public enquiry, not a private delict; and its sole aim is to preserve the capacity of the Judiciary to fulfil its role under the Constitution. Scandalising the court is not concerned with the self esteem, or even the reputation, of Judges as individuals, although that does not mean that conduct or language targeting specific individual judicial officers is immune. Ultimately, the test is whether the offending conduct, viewed contextually, really was likely to damage the administration of justice." (emphasis added)

16.2 The procedure to be followed in lodging a complaint

The court held that justice would best be served if a complaint or charge of contempt *ex facie curiae* (outside the court) is referred to the prosecuting authorities to deal with as it deems best[24] rather than for a court to deal with it by means of a summary hearing.

17. THE PROVISIONS OF SECTION 6(4)(c)(i) OF THE PUBLIC PROTECTOR ACT

This section provides that:

"*The Public Protector shall be competent at a time prior to, during or after an investigation if he or she is of the opinion that facts disclose the commission of*

[24] At par [59]

an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions".

18. CONCLUSION

18.1 Organs of state, such as functionaries that exercise public power, have a constitutional obligation to protect the courts to ensure its effectiveness and to uphold its dignity.

18.2 Any conduct by an official of the State that is offensive and likely to damage the administration of justice is therefore unlawful.

18.3 Such conduct could be found to constitute the common law crime of contempt of court, which is punishable by law.

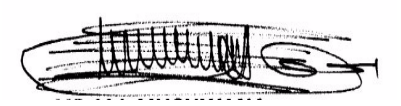
18.4 The publication of statements accusing a Judge of having delivered a judgment that poses a threat to the rule of law and referring to his reasoning as being incoherent and contradictory, might be regarded as having the potential of impacting negatively on the reputation of the Court and the Judge concerned. It might also impact on the confidence that the public should have in the compliance of our courts with its constitutional imperatives relating to the administration of justice. It is however a matter that should be attended to by the authority charged with prosecutions.

19. KEY FINDING

From the investigation it was found that the complaint of the misappropriation of public funds by the Department of Health, is without substance.

20. NOTIFICATION OF THE NATIONAL PROSECUTING AUTHORITY

In terms of the provisions of section 6(4)(c)(i) of the Public Protector Act, the Acting National Director of Public Prosecutions is notified that the facts of the matter referred to in this report may disclose the commission of the offence of contempt of court.



ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
Date: 16 May 2008

Assisted by: Adv C H Fourie
Head: Special Investigations
Office of the Public Protector