

PUBLIC PROTECTOR  
SOUTH AFRICA

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Please quote this reference in your reply: Report No. 17 of 2011/12

Mr. D Maynier, MP  
DA Shadow Minister of Defence and Military Veterans  
PO Box 15  
CAPE TOWN  
8000

Dear Honourable Maynier

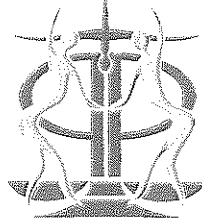
**REPORT NO. 17 OF 2011/12: REPORT ON AN INVESTIGATION IN CONNECTION WITH THE ALLEGED IRREGULAR APPOINTMENT OF THE SPECIAL ADVISOR, DR P NGOBENI**

Attached hereto is my report on an investigation into the above matter, for your information.

Best wishes

ADV J N MADONSELA  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

Date: 30/03/2012



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SOUTH AFRICA

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Please quote this reference in your reply: Report No.17 of 2011/12

The Honourable Minister LN Sisulu, MP  
Minister of Defence and Military Veterans  
Private Bag X427  
PRETORIA  
0001

Dear Minister Sisulu

**REPORT NO. 17 OF 2011/12: REPORT ON AN INVESTIGATION INTO ALLEGED  
IRREGULAR APPOINTMENT OF THE SPECIAL ADVISOR, MR P NGOBENI**

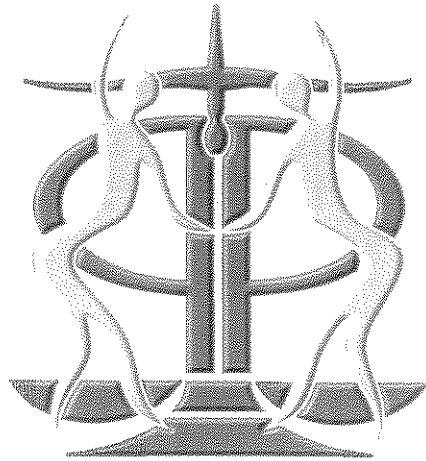
Kindly be advised that I have concluded my investigation into the above matter and I  
attach my report on the investigation for your information.

Best wishes

ADV T N MADONSELA  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

Date: 20/03/2012

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



PUBLIC PROTECTOR  
SOUTH AFRICA

REPORT No. 17 of 2011/2012

*"Fugitive or Not"*

REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR  
APPOINTMENT OF THE SPECIAL ADVISOR TO THE MINISTER OF DEFENCE  
AND MILITARY VETERANS



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## Executive Summary

- (i) The Public Protector conducted an investigation regarding the alleged irregular appointment of the Special Advisor to the Minister of Defence and Military Veterans (the Minister).
- (ii) Mr David Maynier, a Member of Parliament approached the Public Protector with a complaint pertaining to the appointment of the Special Advisor, Mr Paul Ngobeni in the Ministry for Military Defence and Military Veterans (the Ministry),
- (iii) The complaint is based on media reports claiming that Mr Ngobeni is permanently prohibited from practising law in the State of Connecticut in the United States of America, where he is allegedly facing ethical misconduct and criminal charges, including forgery and larceny, and is regarded as a fugitive from justice;
- (iv) Mr Maynier (the Complainant), alleged that he could not understand how a person who is permanently prohibited from practising law, facing a series of criminal charges and is a fugitive from justice, could be appointed in the sensitive position of Special Advisor to the Minister and requested the Public Protector to investigate the following:
  - (a) Whether there was failure to comply with any legislation, regulations or procedures in the appointment of Mr Paul Ngobeni as Special Advisor in the Ministry; and
  - (b) Whether the Minister erred in any way in her appointment of Mr Ngobeni.
- (v) The Public Protector's findings are that:

- 
- (a) Mr Ngobeni has failed to appear in Court in the State of Connecticut and he is a fugitive from justice in the United States of America.
- (b) While the allegation that Mr Ngobeni is disbarred from practicing law in the the State of Connecticut in the United States of America is substantiated, he did resign following a process that sought to disbar him.
- (c) Mr Ngobeni was vetted in accordance with the applicable provisions of the law. However, the vetting process was not sufficiently thorough as it did not go beyond his word and deal with his fugitive status.
- (d) The Complainant's allegations that Mr Ngobeni's appointment as the Special Advisor to the Minister was irregular and that he was not vetted are unsubstantiated. The Minister accordingly did not fail to comply with the relevant legislation, regulations and procedures for processing the Special Advisor's appointment.
- (e) The Minister did not contravene any legislative prescript in Mr Ngobeni's appointment and she is accordingly not responsible for any maladministration.
- (vi) The appropriate remedial action to be taken is that the Department of Defence and Military Veterans must take necessary steps to tighten its vetting processes in order to ensure that the gaps, such as those found in Mr Ngobeni's vetting process, are not experienced in respect of other appointees

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**REPORT ON AN INVESTIGATION INTO THE ALLEGED IRREGULAR  
APPOINTMENT OF THE SPECIAL ADVISOR TO THE MINISTER OF DEFENCE  
AND MILITARY VETERANS**

**1. INTRODUCTION**

- 1.1 *"Advising the Minister"* (Report no ... of 2011/12) is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act)"
- 1.2 This report is submitted to the Honourable Ms Lindiwe Sisulu, Minister of Defence and Military Veterans (the Minister).
- 1.3 A copy is provided to the Complainant, Mr David Maynier, in terms of section 8(3) of the Public Protector Act.
- 1.4 The report relates to an investigation undertaken by the Public Protector regarding the alleged irregular appointment of the Special Advisor to the Minister of Defence and Military Veterans.

**2. THE COMPLAINT**

- 2.1 Mr David Maynier, a Member of Parliament (the Complainant) approached the Public Protector on 15 December 2009 with a complaint pertaining to the appointment of the Special Advisor, Mr Paul Ngobeni, to the Minister.
- 2.3 The Complainant alleged that he could not understand how a person who is permanently prohibited from practising law, facing a series of criminal



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charges and is a fugitive from justice in the State of Connecticut, in the United States of America, could be appointed in the sensitive position of Special Advisor to the Minister.

- 2.4 The Complainant requested the Public Protector to establish the following:
- (i) Whether there was failure to comply with any legislation, regulations or procedures in the appointment of Mr Paul Ngobeni as Special Advisor in the Ministry of Defence and Military Veterans; and
  - (ii) Whether the Minister erred in any way in appointing Mr Ngobeni.

### **3. BACKGROUND TO THE COMPLAINT**

- 3.1 Mr Ngobeni is a South African citizen who practised law in the State of Connecticut, before returning to South Africa. Soon after his return he was appointed by the Minister as her Special Advisor.
- 3.2 Subsequent to his appointment, media reports which claimed that he was permanently prohibited from practising law in the State of Connecticut in the United States of America, surfaced.
- 3.3 The media reports contained allegations that he faced ethical misconduct and criminal charges, including forgery and larceny and that he was regarded as a fugitive from justice in the United States of America.
- 3.4 During the course of this investigation Mr Ngobeni resigned from his position as Special Advisor in December 2011, which rendered the outcome of the Public Protector's investigation of academic value.





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#### 4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

##### 4.1 The Constitution

4.1.1 The Public Protector was established in terms of Chapter 9 of the Constitution to strengthen constitutional democracy.

4.1.2 In terms of this chapter, the Public Protector has the power 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 impropriety, to report on that conduct, and to take remedial action.<sup>1</sup>

The institution has additional powers, as regulated by national legislation, amongst others, the Public Protector Act, 1994 (the Act).

##### 4.2 The Public Protector Act, 1994

4.2.1 In terms of section 6(4) of the Act<sup>2</sup>, the Public Protector has the power to investigate, on own initiative or on receipt of a complaint, amongst others, any alleged maladministration in connection with the affairs of government at any level and abuse of power or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct by a person performing a public function, or an act or omission by a person performing a public function, which results in unlawful or improper prejudice to any other person.

4.3 The allegation of the irregular appointment of the Special Advisor to the Minister falls within the powers and jurisdiction of the Public Protector to investigate.

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<sup>1</sup> Section 182(1)(a)(b) and (c)

<sup>2</sup> Public Protector Act, 1994



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## 5. THE INVESTIGATION

### 5.1 Investigation rational and methodology

If the Public Protector decides to conduct or proceed with an investigation, the mandate given to her requires of her to conduct an enquiry on the merits of the complaint that transcends lawfulness and include considerations of equity, good administration and proper conduct. This investigation was conducted in terms of section 7 of the Public Protector Act and comprised of three components, namely-

- a) An enquiry into what happened;
- b) Establishing what should have happened; and
- c) Determining if there is a discrepancy between what happened and what should have happened.

### 5.2 The key sources of information

- 5.2.1 Written and telephonic communication between the complainant, the Minister, and the Public Protector;
- 5.2.2 A Meeting between the Minister and the Public Protector on 6 October 2010;
- 5.2.3 Representations by Mr Ngobeni and his legal team; and
- 5.2.4 Written communications with INTERPOL and the State of Connecticut, Danielson Superior Court (Office of the Clerk).

### 5.3 Legislation and other prescripts

- 5.3.1 The relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:
  - 5.3.1.1 The Constitution;
  - 5.3.1.2 The Public Protector Act;



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- 5.3.1.3 The Public Service Act 103 of 1994;
  - 5.3.1.4 The Defence Act 42 of 2002 ;
  - 5.3.1.5 The National Strategic Intelligence Act 39 of 1994;
  - 5.3.1.6 The National Strategic Intelligence Amendment Act 87 of 2002;
  - 5.3.1.7 Recognition of Foreign Legal Qualifications and Practice Act, 1993;
  - 5.3.1.8 *The Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers; and*
  - 5.3.1.9 The Provisions of the Minimum Information Security Standards (MISS)

#### 5.4 Issues to be considered by the Public Protector

The following legal issues were matters for the Public Protector's consideration:

- 5.4.1 Was Mr Ngobeni a fugitive from justice, prohibited from practising law in certain states in the United States of America and facing a series of criminal charges and if this was the case;
- 5.4.2 Was Mr Ngobeni appropriately vetted and did the Minister contravene any legislation, regulations or procedures by appointing him in such circumstances; and
- 5.4.3 Did Mr Ngobeni's appointment otherwise comply with legislation, regulations or procedures for the appointment of a Special Advisor to the Executive.

## 6. EVIDENCE OBTAINED DURING THE INVESTIGATION

- 6.1 On 6 October 2010, the Minister met with the Public Protector. The Public Protector was informed that Mr Ngobeni was vetted by Military Intelligence as required by his job description. The Minister then undertook to make



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available all relevant information and documentation relating to the issues under investigation. This was later done.

6.2 On 6 December 2010, representations were made by Mr Ngobeni and his legal team, Messrs Xulu and Masuku from Xulu Liversage Inc.

6.3 The Public Protector recorded the following evidence from the information and documents received and the representations made:

6.3.1 Mr Ngobeni was appointed as Special Advisor with effect from 1 July 2009. The appointment was in terms of Section 12A of the Public Service Act, 1994, (the Public Service Act) as amended, and subject to the provisions of clause 15 of the Employment Contract;

6.3.2 He is eligible to practise law in the Republic of South Africa by virtue of a Ministerial exemption granted in terms of the Recognition of Foreign Legal Qualifications and Practice Act, 1993<sup>3</sup> which exempts holders of foreign qualifications from the requirements contained in the Admission of Advocates Act, 1964 and the Attorneys Act, 1979. *He has however, elected not to enrol with either the bar or the law society* (emphasis added) Enrolment is not a requirement of his job as an advisor;

6.3.3 During November 2009, the Democratic Alliance submitted to the then Minister of Education, *an internal question paper A1-2007* which asked amongst other things, about Mr Ngobeni's alleged arrest, disciplinary charges and the suspension to practise law in the State of Connecticut in the United States of America. He was at that time employed by the University of Cape Town as Deputy Registrar: Legal Services and Secretariat;

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<sup>3</sup> Act no. 114 of 1993

- 6.3.4 The University appointed Dr Barney Jordaan to investigate and report on "*Paul Ngobeni's position in relation to his interim suspension...subsequent disbarment...the criminal charges he may yet face (one having been dismissed on his application...)*";

*Dr Barney Jordaan stated in paragraph 5 of his report that: "...as for the criminal charges, these allegations are at this stage unproven and are all connected to Mr Ngobeni's continuing to practise while under suspension. Mr Ngobeni has entered a defence to the allegations against him and has filed papers to that effect. He thus far has been unsuccessful in challenging part of the foundation on which the allegations are based..."*

- 6.3.5 The records of the investigation reflect that Mr Ngobeni resigned from the Connecticut Bar on 29 November 2007 in an open Court and on the record. The Court vacated an *in absentia* order of disbarment and accepted Mr Ngobeni's voluntary resignation. In that matter, the judge stated: "*...judgment of disbarment has been vacated and ... a resignation has been accomplished...the record will be clear that Mr Ngobeni hasn't been disbarred, that the final resolution is by way of his resignation....*". A copy of the full transcript was attached;

- 6.3.6 In 2007, the Massachusetts Bar Council initiated proceedings for "reciprocal discipline" in which it was sought to have the "Order of the Superior Court, Judicial District of Hartford, accepting the lawyer's resignation from the Bar of the State of Connecticut" accepted by the Massachusetts Court. The Court initially reserved and reported the case, without decision, to determine whether reciprocal discipline requested by the Bar Council may be imposed. In accordance with a Prescript Opinion, S J 10178, which was entered in Full Court on February 13, 2009, the Court entered an order on 16 April 2009, which ordered that: "*the*



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*Connecticut resignation is hereby accepted as reciprocal disciplinary sanction."*

The Court rejected the suggestion that the resignation must be permanent. It expressly stated that Mr Ngobeni was eligible for reinstatement to the practice of law in Massachusetts after the expiration of eight years from the date of the Court judgement;

6.3.7 Mr Ngobeni did enter a defence to allegations against him and filed a request for reconsideration of the Court's ruling of 15 November 2007, which granted his Motion to Dismiss in part and denied it in part. He also filed a renewed Motion to Dismiss on jurisdictional grounds, which were overlooked by the Court in its earlier ruling. He stated in his motion that: "*in the event the said motion to dismiss on jurisdictional grounds is denied, Defendant has every intent of lodging an interlocutory appeal which may obviously impact the scheduling of pre-trial in the above matter.*" The Court granted his request for a postponement of a hearing scheduled for December 2007 while his motion was under consideration. The Court subsequently scheduled a pre-trial hearing before 1 February 2008 but before issuing a ruling on the renewed motion to dismiss and request for reconsideration;

6.3.8 Mr Ngobeni then immediately filed a motion for postponement of the February 2008 hearing. The Court granted his request for a postponement of the hearing scheduled for 1 February 2008 while his motion of November 2007 was under consideration. However, the Court issued a ruling on his motions to dismiss and for reconsideration, which he received on 15 February 2008. He immediately filed a motion for Extension of Time to file Appeal on 26 February 2008. The Court subsequently granted him leave to lodge the interlocutory appeal which would, if successful, dispose of the entire criminal prosecution. On 10



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March 2008, Mr Ngobeni then filled his appeal which was forwarded to and received by the Appellate Clerk's office;

- 6.3.9 On 8 September 2008, the State of Connecticut Appellate Court sent a letter to Mr Ngobeni at a Cape Town address stating: *"Please be advised that the PUB 85-1 hearing in the above captioned matter, scheduled for Wednesday, September 17, 2008 at 10h00 and has been marked off."*
- 6.3.10 Mr Ngobeni informed the Court of his decision to leave the United States of America. His whereabouts were known and he continued to enter and leave the United States of America freely. No date of the hearing of the appeal was communicated to him; and
- 6.3.11 The position of Special Advisor to the Minister of Defence does not require the incumbent to be eligible to practise law. It is only required of the Special Advisor to be vetted.
- 6.4 The International Police Organisation (INTERPOL) was approached to verify representations and assertions made by both Mr Ngobeni and his legal team. Further, to also determine his criminal status. In a letter dated 21 March 2011, the Executive Director of Interpol, C Lebelo responded as follows: *"Please be informed that checks were done on the Interpol database and no record was found on the subject."*
- 6.5 The Public Protector approached the State of Connecticut, Danielson Superior Court (Office of the Clerk) to verify the alleged fugitive status of Mr Ngobeni. In their reply on 12 September 2011, the Deputy Chief Clerk responded as follows: *"The current status of this matter remains as a rearrest (S of Connecticut v Paul Ngobeni W11D-CR06-129997). Mr Ngobeni was to appear at the Danielson, Connecticut Court, 120 School Street, Danielson, Connecticut on March 28, 2008. He failed to appear in Court and the Hon. Anton Robania ordered the rearrest of Mr Ngobeni with a bond amount of \$10,000. The rearrest warrant and new charge of failure to appear, in*



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*violation of Connecticut General Statute 53a-172, are still active as of today's date." A copy of the warrant of arrest was attached.*

## **7. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

7.1 This part of the report deals with an analysis of the evidence and information relied upon, as supported by the relevant official documentation, to conclude what happened from the factual description and to establish, from an application of the relevant legislation and other legal prescripts, what should have happened.

7.2 The following facts are established from the investigation:

7.2.1 Mr Ngobeni was appointed as the Special Advisor to the Minister of Defence and Military Veterans and from the documents received, this appointment was made in terms of Section 12A of the Public Service Act.

7.2.2 The results of an inquiry by the University of Cape Town, as well as information from INTERPOL, indicated that Mr Ngobeni is not a fugitive from justice as no record was found on the subject on their database.

7.2.3 Mr Ngobeni has entered a defence to the allegations against him and has filed an interlocutory appeal with the State of Connecticut Appellate Court which, if successful, would have disposed of the entire criminal prosecution. This process was not finalised as Mr Ngobeni left the USA and informed the Court accordingly. No final date of the hearing of the appeal was communicated to him.

7.2.4 This matter has therefore not been disposed of and the records of the State of Connecticut, Danielson Superior Court still reflect that Mr Ngobeni failed to appear in Court on 28 March 2008 and that a warrant of arrest has been issued. A new charge on failure to appear has been pressed against him.



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- 7.2.5 Mr Ngobeni was subjected to a vetting process by the South African Defence Force: Defence Intelligence, and provided with a security clearance.
- 7.3 The Public Protector lodged a supplementary enquiry to establish if the vetting process was legitimate as it appeared that the National Intelligence Agency (NIA) was, in terms of section 2A of the National Strategic Intelligence Act and the Defence Act, responsible for the security screening of persons in the South African National Defence Force (SANDF). It was not clear on what basis the SANDF was able to take responsibility for the security screening/vetting of persons within their jurisdiction.
- 7.3.1 The Department of Defence and Military Veterans confirmed that the State Security Agency (SSA) (formerly referred to as NIA and South African Secret Service (SASS)) was established in terms of section 209 of the Constitution which distinguishes the intelligence divisions of the SANDF and South African Police Service (SAPS) as autonomous entities. However, the co-ordination of all intelligence services, which includes that of the SANDF and the SAPS, brings the mutual co-operation, through national legislation, into effect.
- 7.3.2 Section 2k (2) of the National Strategic Intelligence Amendment Act, 2002 provides:

*"The (National Intelligence) Agency shall be responsible for security screening of persons contemplated in subsection (1) and on request of the South African Police Service, the Service or the National Defence Force, persons employed by, applicants to or persons rendering a service to the South African Police Service, the Service or the Department of Defence",*

This provision makes the mutual co-operation possible as prescribed in section 35 of the Defence Act:



*"The Intelligence Division must co-operate with any other intelligence service or body created by or under any other law".*

7.3.3 The vetting jurisdiction in the Department of Defence and Military Veterans resides with the Defence Intelligence as provided by section 37 of the Defence Act and section 2 (4) (c) of the National Strategic Intelligence Act. Whilst these provisions vest an autonomous mandate in respective intelligence structures, the complexity of intelligence functions poses typical cross-field activities whereby intelligence cooperation curbs the potential security gap. This implies that whenever the military mandate overlaps onto civilian intelligence, co- ordination is achieved through intelligence exchange.

7.3.4 The application of paragraph 30 of the MISS which states that *"Screening institutions are those institutions (SAPS, NIA SASS or SANDF) that, in terms of the rationalisation agreement, are responsible for the security screening/vetting of persons within their jurisdictions"* is upheld as the agreement which directs the Department of Defence and Military Veterans to conduct the security screening/vetting of its own personnel.

## **8. LEGAL AND REGULATORY FRAMEWORK**

8.1 The regulatory framework within which this matter is to be assessed is as follows:

### **8.1.1 The Public Service Act 103 of 1994 (Public service Act)**

#### **8.1.1.1 Section 9 - Appointments in public service**

*An executive authority may appoint any person in his or her department in accordance with this Act and in such manner and on such conditions as may be prescribed.*

#### **8.1.1.2 Section 10 - Qualifications for appointment**



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*No person shall be appointed permanently, whether on probation or not, to any post on the establishment in a department unless he or she-*

*(a) is a South African citizen or permanent resident; and*

*(b) is a fit and proper person.*

8.1.1.3 Section 12A - Appointment of persons on grounds of policy considerations

*1) "Subject to the provisions of this section, an executing authority may appoint one or more persons under a special contract, whether in a full-time or part-time capacity -*

*a) To advise the executing authority on the exercise or performance of the executing authority's powers and duties;*

*b) To advise the executing authority on the development of policy that will promote the relevant department's objectives; or*

*c) To perform such other tasks as may be appropriate in respect of the exercise or performance of the executing authority's powers and duties."*

8.1.1.4 An "employee" is defined in section 1 of the Public Service Act as:

*"a person contemplated in section 8, but excludes a person appointed in terms of section 12A." (emphasis added)*

8.1.2 *The Ministerial Handbook: A Handbook for Members of the Executive and Presiding Officers*

*The Ministerial Handbook as approved by Cabinet in 2003 and subsequently amended provides for the following:*



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- 8.1.2.1 Paragraph 2: *"The provision to appoint Special Advisers in terms of section 12A of the Public Service Act, 1994, as amended, is limited to two full-time equivalent positions for each Minister and Premier, unless Cabinet or the relevant Provincial Executive Council approves a higher number up to two additional full-time equivalents for each Minister and Premier because of work requirements. The President and Deputy President may appoint as many Special Advisers as they may see fit. Cabinet may also reduce the number of Special Advisers that Ministers and Premiers may employ."*<sup>4</sup>
- 8.1.2.2 Paragraph 5: *"Only South African citizens should be appointed as Special Advisers. All candidates for appointment as Special Advisers "should be subjected to a security clearance before appointment. If an Executing Authority wishes to deviate from this requirement, the matter must be submitted to the President."*
- 8.1.2.3 Paragraph 10: *"The standard contract attached as Annexure X, as approved by Cabinet is entered into between the Special Adviser and the Executing Authority concerned. The duration of the contract shall be agreed upon and be limited to the term of the political principal."*
- 8.1.2.4 Paragraph 11: *"Executing Authorities must submit proposals/recommendations for the appointment of individual Special Advisers to the Minister for the Public Service and Administration for approval of the individual's compensation level before the appointment/upgrade is affected."*
- a) ...
  - e) ...

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<sup>4</sup> Annexure F, paragraph 2 of the *Dispensation for the Appointment and Remuneration of Person's (Special Advisers) appointed to Executive Authorities on Grounds of Policy Consideration in terms of Section 12A of the Public Service Act, 1994*



f) Paragraph 14: *Executing Authorities must ensure that the Special Adviser obtains the necessary security clearance before he/she is appointed.* (emphasis added)

8.1.3 The National Strategic Intelligence Act 39 of 1994 (the National Strategic Allegiance Act)

8.1.3.1 Section 2A - "Security screening investigations", provides as follows:

(1) *The relevant members of the National Intelligence Structures may conduct a security screening investigation in the prescribed manner to determine the security competence of a person if such a person-*

(a) *is employed by or is an applicant to an organ of state; or*

(b) *is rendering a service or has given notice of intention to render a service to an organ of state, which service may-*

(i) *give him or her access to classified information and intelligence in the possession of the organ of state;*

(2) *The (National Intelligence) Agency shall be responsible for security screening of persons contemplated in subsection (1) and, on request of the South African Police Service, the Service or the National Defence Force, persons employed by, applicants to or persons rendering a service to the South African Police Service, the Service or the Department of Defence.*

(3) *Notwithstanding the provisions of subsection (2), the Agency may request the assistance of the South African Police Service or the National Defence Force in the performance of the function contemplated in subsection (2)."*

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#### 8.1.4 The Minimum Information Security Standards (MISS)

##### 8.1.4.1 Par 19: EMPLOYER INSTITUTION

*The institution, whether a public, parastatal or private undertaking (where applicable), that employs any worker, official or officer who actually has, or may probably have, access to classified matters.*

##### 8.1.4.2 Par 30: "SCREENING/ VETTING INSTITUTIONS"

*Screening institutions are those institutions (the SA Police Service, the National Intelligence Agency, South African Secret Service or the SA National Defence Force) that, in terms of the rationalisation agreement, are responsible for the security screening/vetting of persons within their jurisdictions.*

##### 8.1.4.3 Par 34: SECURITY CLEARANCE

*An official document indicating the degree of security competence of a person.*

##### 8.1.4.4 Par 35: SECURITY COMPETENCE

*This is a person's ability to act in such a manner that he does not cause classified information or material to fall into unauthorised hands, thereby harming or endangering the security or interests of the State. Security competence is normally measured against the following criteria: susceptibility to extortion or blackmail, amenability to bribes and susceptibility to being compromised due to compromising behaviour, and loyalty to the state / institution.*

##### 8.1.4.5 Par 38: SECURITY SCREENING/VETTING

*The systematic process of investigation followed in determining a person's security competence.*



#### 8.1.5 Recognition of Foreign Legal Qualifications and Practice Act, 1993.

Section 2(1) of the Act provides inter alia that: *"Notwithstanding anything to the contrary the Minister may, on the recommendation of the panel, unconditionally or on such conditions as he may in each case determine*

- a) *exempt an applicant from –*
  - 1) *a requirement referred to in Section 3(2)(a)(i) of the Admission of Advocates Act, 1964 (Act no. 74 of 1964); or*
  - 2) *the requirement for the degree referred to in Section 2(1) (a) of the Attorneys Act, 1979 (Act no 53 of 1979); and from the provisions of Section 15(1) (b) (iii) (aa); (iv) and (v) of the Act.*
- b) *Exempt an applicant who has practised as a legal practitioner in another country, or an applicant referred to in Section 15(1) (b) (iv) of that Act;*

#### 8.1.6 The Defence Act 42 of 2002 (the Defence Act)

8.1.6.1 Section 35 of the Defence Act provides that the Intelligence Division of the Defence Force must ensure Co-operation with other intelligence services:

*"The Intelligence Division must co-operate with any other intelligence service or body created by or under any other law".*

## 9. CONCLUSION

9.1 Mr Ngobeni is not prohibited from practising law in South Africa.

9.2 Mr Ngobeni was vetted by the Military Intelligence in accordance with the law. The Minister specifically showed the Public Protector the vetting confirmation and related documents. Both the Minister and the documents



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confirmed that the vetting relied on Mr Ngobeni's version regarding the circumstances of his departure from the United States of America.

- 9.3 No records declaring Mr Ngobeni as a fugitive could be found on the INTERPOL database. This is not surprising as INTERPOL does not list all fugitives from justice and certainly not those responsible for minor infractions.
- 9.4 It was established that Mr Ngobeni has since resigned from the Department of Defence and Military Veterans.
- 9.5 Mr Ngobeni is a fugitive from justice in the United States of America in that he has failed to appear in Court in the State of Connecticut. A warrant of arrest has been issued.
- 9.6 The Government of the Republic of South Africa and Mr Ngobeni entered into an employment contract in accordance with Section 12A (3) (a) of the Public Service Act, as amended.
- 9.7 The Minister complied with the applicable legislation, regulations and procedures in the appointment of Mr Ngobeni as her Special Advisor.

## **10 FINDINGS**

The Public Protector's findings are the following:

- 10.1 Mr Ngobeni has failed to appear in Court in the State of Connecticut and he is a fugitive from justice in the United States of America.
- 10.2 While the allegation that Mr Ngobeni is disbarred from practicing law in the State of Connecticut in the United States of America is substantiated, he did resign following a process that sought to disbar him.



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- 10.3 Mr Ngobeni was vetted in accordance with the applicable provisions of the law. However, the vetting process was not sufficiently thorough as it did not go beyond his word and deal with his fugitive status.
- 10.4 The Complainant's allegations that Mr Ngobeni's appointment as the Special Advisor to the Minister was irregular and that he was not vetted are unsubstantiated. The Minister accordingly did not fail to comply with the relevant legislation, regulations and procedures for processing the Special Advisor's appointment.
- 10.5 The Minister did not contravene any legislative prescript in Mr Ngobeni's appointment and she is accordingly not responsible for any maladministration.

## **11. REMEDIAL ACTION**

- 11.1 The appropriate remedial action to be taken in terms of section 182 1) (c) of the Constitution is that the Department of Defence and Military Veterans must take necessary steps to tighten its vetting processes in order to ensure that the gaps, such as those found in Mr Ngobeni's vetting process, are not experienced in respect of other appointees.

## **12. MONITORING**

- 12.1 The Department of Defence and Military Veterans must submit an action plan in respect of the implementation of the remedial action referred to in paragraph 11 above, to the Public Protector, within 30 days of the date of this report.



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12.2 Thereafter, a progress report must be submitted to the Public Protector within 60 days from the date of this report indicating the progress made with the implementation of the remedial action referred to in paragraph 11 above.

12.3 The Public Protector will monitor the progress made in this regard on a quarterly basis.

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**ADV. T. N. MADONSELA**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE:**

*Assisted by: Adv M G Matimolane, Senior Investigator: Service Delivery*