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PUBLIC PROTECTOR'S ADVISORY REPORT ON AN INVESTIGATION INTO AN INTO ALLEGATIONS OF FAILURE TO PURSUE DISCIPLINARY ACTION AGAINST OFFICIALS OF THE DEPARTMENT OF CORRECTIONAL SERVICES IMPLICATED IN THE COMMISSION OF INQUIRY INTO STATE CAPTURE RELATING TO TENDERS AWARDED TO AFRICAN GLOBAL OPERATIONS, PREVIOUSLY KNOWN AS BOSASA (BOSASA).

INDEX

1.	INTRODUCTION	3
2.	THE COMPLAINT.....	3
3.	THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR.....	4
4.	THE INVESTIGATION.....	7
5.	THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.....	12
6.	REMEDIAL MEASURES.....	15

1. INTRODUCTION

- 1.1 This is the Public Protector's advisory report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, No. 108 of 1996, (the Constitution) and published in terms of section 8(1) of the Public Protector Act, No. 23 of 1994, (the Public Protector Act).
- 1.2 The report communicates the findings on an investigation into allegations of failure to pursue disciplinary action against officials of the Department of Correctional Services (the Department) implicated in the Commission of Inquiry into State Capture (the Commission) relating to tenders awarded to African Global Operations, previously known as Bosasa (BOSASA).
- 1.3 The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution), which gives the Public Protector the power to investigate any alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action.

2. THE COMPLAINT

- 2.1. The complaint in this matter was lodged by Mr P Kganare (the Complainant), the late General Secretary of Congress of the People (COPE) on 26 March 2019.
- 2.2. The Complainant alleged *inter alia*:
 - 2.2.1 That the former Minister of Justice and Correctional Services issued a statement that he will be suspending officials implicated in evidence before the Commission, however the only official that has since been suspended is Dr Khotso De Wee;

- 2.2.2 That no such suspensions or disciplinary hearings have been instituted against Ms Grace Molatedi, the former Free State Regional Commissioner of Correctional Services who was implicated by Mr Angelo Agrizzi, during his testimony at the Commission;
- 2.2.3 That during the former Minister's stay in Port Elizabeth, at the home of the late Mr Gavin Watson, the then Chief Executive Officer (CEO) of BOSASA, the BOSASA catering tender was discussed and arrangements were finalised regarding the extension of the contract; and
- 2.2.4 Further, that the catering contract between BOSASA and the Department was investigated by the Special Investigating Unit (SIU), and the former Minister had failed to take cognisance of that investigation, resulting in the Department continuing its contract with BOSASA.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1. The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs, or in the public administration in any sphere of government.
- 3.2. Section 182(2) directs that the Public Protector has additional powers and functions as prescribed by national legislation.
- 3.3. In terms of section 6(4)(c)(ii) of the Public Protector Act, the Public Protector may, if he or she deems it advisable, refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.
- 3.4. Section 8 of the Public Protector Act deals with the publication of findings by the Public Protector after an investigation has been conducted. Accordingly, it reads: *The Public Protector may, subject to the provisions of subsection*

(3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

3.5. *Phorego (2017)* notes that there are different interpretations of the word “recommendations”.¹ In any discourse about what the legislature could have intended, it is possible that those involved might engage in a literal interpretation of the particular wording as used in a particular legal provision.² The Supreme Court Of Appeal distinguished between “mere recommendations, which an organ of State may accept or reject”, and binding remedial action as envisaged in section 182(1)(c) of the Constitution.³

3.6. *In the EFF matter*⁴ (Nkandla judgement) the Constitutional Court stated that the remedial action taken in a particular case, will be informed by the subject-matter of the investigation and the type of findings made.

3.7. Of cardinal significance about the nature, exercise and legal effect of the remedial power is the following:

“... (f) **Only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken;**

(g) *Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken; and*

¹ For example, in www.oxforddictionaries.com, the word is defined as “a suggestion or proposal as to the best course of action, especially one put forward by an authoritative body”. Of course there are other meanings which are not important for our purposes. Furthermore, at www.merriam-webster.com, recommendations are defined as a “suggestion as to what should be done”.

² Powers of the Public Protector : are its findings and recommendations legally binding? *Phorego, Molefhi Solomon*. URI: <http://hdl.handle.net/2263/65709>

³ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* (393/2015) [2015] ZASCA 156; [2015] 4 All SA 719 (SCA); 2016 (2) SA 522 (SCA) (8 October 2015)

⁴ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)

(h) *Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power is **binding or not** or what its legal effect is, **would be a matter of interpretation** aided by context, nature and language.”* (Emphasis added)

3.8. The Constitutional Court further noted that all the powers set out in section accord and are harmoniously coexistent with section 182 –

*“..... referring a matter to an appropriate body or authority **or making suitable recommendations** to remedy the complaint; and resolving any complaint by ‘any other means that may be expedient in the circumstances’, are all regulatory and additional powers. And they are consistent with and flow from the constitutional power ‘to take appropriate remedial action’ and provision for ‘additional powers and functions’.”* (Emphasis added)

3.9. The Constitutional Court concluded that –

*“... what legal effect the appropriate remedial action has in a particular case, depends on the nature of the issues under investigation and the findings made. As common sense and section 6 of the Public Protector Act suggest, mediation, conciliation or negotiation may at times be the way to go. Advice considered appropriate to secure a suitable remedy might, occasionally, be the only real option. **And so might recommending** litigation or a referral of the matter to the relevant public authority **or any other suitable recommendation**, as the case might be. **The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow.** (Emphasis added)*

3.10. However, the fact that the Public Protector may in appropriate circumstances propose a non-binding “*recommendation*” or remedy, does not mean that organs of state may accept or reject them at whim. The Constitutional Court explained in the matter of *Economic Freedom Fighters v Speaker of the*

National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11 that the legal effect of these remedial measures are “ *that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow.*” While remedial action provided for in section 182(1)(c) is legally binding and may be not disregarded by an organ of State, a non-binding recommendation or remedial measure as envisaged in section 6(4)(c)(ii) of the Act is left to the discretion of the relevant functionary but in a way that does not undermine or trump the mandate of the Public Protector. A decision by an organ of state whether or not to accept the Public Protector’s remedial measures in terms of section s6(4)(c)(ii) constitutes the exercise of public power and must therefore not be irrational. (*South African Broadcasting Corporation v Democratic Alliance* 2016 2 SA 522 (SCA)).

3.11. The Minister of Justice and Correctional Service is an organ of state and the conduct of the institution amounts to conduct in state affairs, and as a result, the matter falls within the ambit of the Public Protector’s mandate.

3.12. The Public Protector’s powers and jurisdiction to investigate, report and take appropriate remedial action was not disputed by any of the parties.

3.23 **Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:**

3.23.1 Whether the former Minister of Justice and Correctional Services, Adv. Michael Masutha, failed to pursue disciplinary action against the Department of Correctional Service officials implicated in the Commission, and if so whether such conduct amounts to improper conduct and maladministration.

4. THE INVESTIGATION

4.1 The investigation process

4.1.1 The investigation was conducted in terms of section 182(1)(a),(b) and(c) of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

4.2 Approach to the investigation

4.2.1 The approach to the investigation included an analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

4.2.2 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.2.1 What happened?

4.2.2.2 What should have happened?

4.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to a maladministration and improper conduct?

4.2.2.4 In the event of improper conduct or maladministration, what would it take to remedy the wrong occasioned by the said improper conduct or maladministration.

4.2.2.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation.

4.2.2.6 In this particular case, the factual enquiry principally focused on whether or not the alleged conduct by the former Minister constituted maladministration.

4.2.2.7 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Municipality to prevent the maladministration.

4.2.3 The following were taken into consideration regarding the allegation that Adv. Michael Masutha, the former Minister improperly engaged Mr Gavin Watson in respect of the catering tender, as well as that he failed to take cognisance of the Special Investigating Unit (SIU) report when the tender was awarded to African Global Operations :

4.2.3.1 Adv. Michael Masutha (the former Minister) served as the Minister of the Justice and Correctional Services from 26 May 2014 until 25 May 2019. Mr Gavin Watson, the Chief Executive Officer of BOSASA, passed away in a car accident on 26 August 2019.

4.2.3.2 The minutes of a Parliamentary Justice and Correctional Services Portfolio Committee meeting held on 27 February 2019 indicate the following in respect of the former Minister's response to a question from Adv Breytenbach:

“ About his meeting with a Watson brother, in 2016 during an ANC rally, he received a call from a cadre who offered the Minister accommodation since his office was struggling to find accommodation as it was such a busy time in Port Elizabeth. He accepted the offer gratefully. On the morning of his departure, he called his colleague to thank him and his colleague insisted that he thank the owners of the place himself as they were already on the way to the accommodation. Upon the arrival of the two gentlemen, one of which one was Mr Watson, he thanked them. However, they insisted that the Minister deal with a procurement issue they had with the department. In his response, the Minister made it clear that he did not deal with Supply Chain Management matters. After that encounter, he never met any of the Watson brothers again”

4.2.3.3 In respect of the Department's contracts with BOSASA the former Minister submitted *inter alia* during the proceedings of the meeting that:

- 4.2.3.3.1 The contractual relationship for the catering services between BOSASA and the Department dated back to 2004, and his account would be confined to that relationship;
- 4.2.3.3.2 He was advised that the outsourcing of catering emanated from the Jali Commission in 2001 which recommended that Department outsource its catering. The Department proceeded to act on the recommendation to procure catering from BOSASA in 2004, which was extended and renewed over a period of time. The last renewal took place in 2017 and stretched to 2020 as the end date;
- 4.2.3.3.3 In 2009, the SIU issued a report following a proclamation that was issued in 2006 by the President instructing the SIU to investigate the irregularity in the procurement of catering services by BOSASA in 2004. Based on its findings, the SIU made recommendations that required action:
- 4.2.3.3.4 Two of the most senior officials were found to have engaged in acts of impropriety in the procurement of those services, namely the then Commissioner and the Chief Financial Officer (CFO) of the Department. The recommendation was that disciplinary action was required to be taken against the two officials;
- 4.2.3.3.5 By the time the SIU Report was issued, the Commissioner had left the Department so he could not be subjected to disciplinary action. However, the CFO was dismissed as a result of the disciplinary hearing;
- 4.2.3.3.6 There was a further recommendation that criminal charges be pursued. The other recommendation was for the recovery of any loss by the Department arising from the impropriety or irregular procurement;
- 4.2.3.3.7 There were certain aspects that could have been dealt with which did not feature in the SIU Report and this included blacklisting the service provider (BOSASA) from continuing to render services to the Department and generally the state;

- 4.2.3.3.8 He was yet to receive any information that suggests that the current contract ending in 2020 is tainted by the same acts of impropriety. If the Department was aware of any impropriety in the current contract, it would have requested to deal with the matter appropriately; and
- 4.2.3.3.9 Upon receiving information that BOSASA had filed with the Master's Office for liquidation, the Department intensified its efforts to restore in-sourced catering. Subsequently, the Department issued a 30-day termination notice to Bosasa for breach of contract for filing for liquidation.
- 4.2.4 Subsequent to the meeting, the Portfolio Committee issued a media statement on 27 February 2019 stating that the current National Commissioner started interacting with BOSASA in November 2018 to provide reasons as to why they should not be put on a restricted list of companies that should not be considered to do business with government. Further that since BOSASA has applied for voluntary liquidation that provides grounds for termination of contract with the Department. Also, that a notice had already been given to BOSASA by the Department to terminate the contract.
- 4.2.5 This investigation therefore focussed on the allegation relating to whether the former Minister, Adv. Michael Masutha, failed to pursue disciplinary action against officials of the Department of Correctional Service implicated in the Commission.

4.3 Key sources of information

4.3.1 Documents

- 4.3.1.1 Minutes of a Parliamentary Justice and Correctional Services Portfolio Committee meeting, held on 27 February 2019
- 4.3.1.2 Copy of the Media Statement dated 27 February 2019, issued by the Parliamentary Communication Services on behalf of the Chairperson of the

Portfolio Committee on Justice and Correctional services, Ms Madipoane Mothapo;

- 4.3.1.3 Copy of the Subpoena. dated 31 May 2021, issued in terms of section 7(4)(a) of the Public Protector Act 23 of 1994

4.3.2 Correspondence sent and received

- 4.3.2.1 Copy of the request for information letter dated 9 July 2019, from the Public Protector to the Minister of Justice and Correctional Services;
- 4.3.2.2 Copy of the affidavit dated 15 June 2021, from the Minister of Justice and Correctional Services to the Public Protector;

4.3.3 Legislation and other prescripts

- 4.3.3.1 The Labour Relations Act, 1995

4.3.4 Case Law

- 4.3.4.1 *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017);*
- 4.3.4.2 *Public Protector and Mail & Guardian Ltd: (2011) ZASCA 108 (1 June 2011)* at paragraph 9;
- 4.3.4.3 *Gordhan v Public Protector and Others [2020] ZAGPPHC 777;*

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS:

- 5.1 **Regarding whether the former Minister, Adv. Michael Masutha, failed to pursue disciplinary action against the Department of Correctional Service officials**

implicated in the Commission, and if so whether such conduct amounts to improper conduct and maladministration

Common cause issues

5.1.1 It is common cause that a number of employees of the Department, including Ms TG Molatedi (Ms Molatedi) were implicated by Mr A Agrizzi's testimony at the Commission.

Issues in dispute

5.1.2 The Complainant submitted that the former Minister issued a statement that he will be suspending officials named in the Commission, however the only official that has since been suspended is Dr Khotso De Wee.

5.1.3 It is the Complainant's contention that no such suspension or disciplinary hearing has been instituted against the former Free State Regional Commissioner, Ms Molatedi who was implicated by Mr Angelo Agrizzi, during his testimony at the Commission;

5.1.4 Upon receipt of the complaint, a letter dated 9 July 2019 was submitted by the Public Protector to the current Minister of Justice and Correctional Services, Mr Ronald Lamola (the Minister) requesting him to provide a response to the allegations.

5.1.5 Subsequent to several attempts to obtain a response, on 31 May 2021 a subpoena was issued to the Minister directing him to reply.

5.1.6 On 15 June 2021 the Minister submitted an affidavit responding to the allegations with supporting documentation. He submitted that the National Commissioner of the Department of Correctional Services (the National Commissioner) wrote letters, dated 13 February 2019 and 14 February 2019 to all implicated officials including Ms Grace Molatedi to provide an explanation in respect of the some of the allegations made during the proceedings of the Commission.

- 5.1.7 The Minister submitted that some employees responded to the allegations and some are no longer in the employ of the Department. Further that Ms Grace Molatedi was one of the officials who provided a response on a letter dated 21 February 2019.
- 5.1.8 The Minister further submitted that he is still awaiting the Commission to provide him with the sworn affidavit of Mr A Agrizzi in order to enable him and/or the National Commissioner to determine if there are any grounds to proceed with the purported disciplinary action against the implicated officials. The Minister stated that in letter dated 23 January 2019, the Commission undertook to provide the statement of Mr A Agrizzi once he has completed his testimony.
- 5.1.9 The Minister submitted further that the National Commissioner has made follow-up with the Commission in respect of their undertaking to provide the statement of Mr A Agrizzi and as such is still awaiting a response from the latter.

Application of the relevant law and prescripts

The Labour Relations Act, 1995

- 5.1.10 Section 185(a) and (b) of the Labour Relations Act stipulates that every employee has the right not to be unfairly dismissed and subjected to unfair labour practice.
- 5.1.11 Schedule 8, Code of Good Practice of the Labour Relations Act deals with some of the key aspects of dismissals for reasons related to conduct and capacity. Schedule 8 emphasizes substantive and procedural fairness. Substantive fairness refers to plausible and impartial reasonableness for instituting disciplinary action, consistent or in compliance with the department's code and procedure, policies as well as other relevant labour legislation, while procedural fairness refers to the correct processes that need to be followed, step-by-step, to ensure that the employee's rights are not violated during a disciplinary process.

Conclusion

- 5.1.12 After assessing all the evidence and information, the investigation revealed the matter did receive the attention of the former Minister and the Department, even though some of the matters may still be pending.
- 5.1.13 This is evident from the letters dated 13 and 14 February 2019 that were issued by the Department to the implicated officials, including Ms Grace Molatedi, prior to the complaint being lodged with the Public Protector.
- 5.1.14 The decision to suspend or take disciplinary action against officials is subject to the provisions Section 185(a) and (b) of the Labour Relations Act that stipulates that every employee has the right not to be unfairly dismissed and subjected to unfair labour practice.
- 5.1.15 On 1 March 2022 the Commission handed over to the Presidency its report on the inquiry into BOSASA, which was and accordingly made public.

6. RECOMMENDATIONS

Taking into account that the Department did pursue oral evidence of Mr Agrizzi and that written evidence from the Commission was not availed to it at the time. It is recommended, in terms of the Public Protector's powers in section 6(4)(c)(ii) of the Public Protector Act that the Minister of Justice and Correctional consider and inform the Public Protector within sixty days from the date of the report on appropriate remedial measures to deal properly with the subject-matter of investigation, including –

- 6.1.1 Taking urgent steps to intervene and ensure that the National Commissioner of the Department acquires all relevant evidence, and statements from the Commission, on the transactions involving officials of the Department, that are identified as unlawful, irregular or improper in the final reports of the Commission,

- 6.1.2 On receipt of the information from the Commission ensure that the National Commissioner of the Department analyse the evidence in order to identify all officials of the Department implicated by the evidence, and if required, take the necessary action in terms of section 38 of the PFMA, including criminal charges or institute disciplinary action as may be appropriate.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 30/03/2022

Assisted by Ms Vanessa Mundree, Provincial Representative:

Free State Provincial Office