

**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 NUMBER: 107 of 2021/22**

**ISBN NUMBER: 978-1-998955-64-0**

**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF VIOLATION  
OF THE EXECUTIVE ETHICS CODE PROMULGATED IN TERMS OF SECTION 2(1)  
EXECUTIVE MEMBERS' ETHICS ACT, 1998 BY MR PRAVIN GORDHAN, MP DURING  
HIS TENURE AS THE MINISTER OF FINANCE.**

## Executive Summary

- (i) This is a closing report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), section 3 of the Executive Members' Ethics Act, 1998 (EMEA) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- (ii) The report communicates the findings on an investigation of a complaint of a breach of the Executive Ethics Code by the Minister of Public Enterprises, Mr Pravin Gordhan, MP (Minister) in that the Minister tried to influence the appointment of his friend, Judge Dhaya Pillay (Judge Pillay) into a position of responsibility in the judiciary, viz. the Supreme Court of Appeal (SCA) during a meeting with the former Chief Justice, Mr Mogoeng Mogoeng in Cape Town.
- (iii) The complaint was lodged with the Public Protector in terms of section 4(1) of EMEA by the Economic Freedom Fighters' (EFF) Member of Parliament (MP), Deputy President and Chief Whip Mr Nyiko Floyd Shivambu (the Complainant) through a letter dated 16 April 2021.
- (iv) In his letter of complaint, the Complainant indicated the following:
  - (a) During the Judicial Service Commission (JSC) interviews held on 13 April 2021, Mr Mogoeng Mogoeng (the former Chief Justice) revealed that on 6 April 2016, he met with the Minister<sup>1</sup> at the Twelve Apostles Hotel and Spa, Victory Street, Camps Bay, Cape Town;
  - (b) During the said meeting, the Minister misled the former Chief Justice into believing that the meeting was for official purposes, whilst his intention was to

---

<sup>1</sup> When he was still holding a position of Minister of Finance.

abuse the position of his authority in order to influence the appointment of his friend, Judge Dhaya Pillay (Judge Pillay), into a position of responsibility in the judiciary, viz. the Supreme Court of Appeal; and

- (c) The former Chief Justice then realised that the Minister abused his power to benefit Judge Pillay after the latter confirmed her proximity to and friendship with him during the recent JSC interviews.
- (v) In conclusion, the Complainant's submission was that the Minister's meeting with the former Chief Justice concerning the JSC process, amounted to an abuse of a position of authority in order to benefit Judge Pillay, and/or failure to act in accordance to the Executive Ethics Code.
- (vi) On analysis of the complaint, the following issue was identified and investigated:
  - (a) Whether the Minister of Public Enterprises, Mr Pravin Gordhan, abused his position of authority in order to influence the appointment of his friend, Judge Dhaya Pillay when he met with former Chief Justice Mogoeng Mogoeng on 6 April 2016 in Cape Town, and thus breached the Executive Ethics Code.
- (vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the following findings are made:
  - a) Regarding whether the Minister of Public Enterprises, Mr Pravin Gordhan, abused his position of authority in order to influence the appointment of his friend, Judge Dhaya Pillay when he met with the former Chief Justice, Mogoeng Mogoeng on 6 April 2016 in Cape Town, and thus violated the Executive Ethics Code

- (aa) The allegations that the Minister, abused his position of authority in order to influence the appointment of his friend, Judge Dhaya Pillay when he met the former Chief Justice on 6 April 2016, in Cape Town, and thus violated the Executive Ethics Code, could not be corroborated.
- (bb) By reason of the fact that when the Minister and the former Chief Justice met in 2016, the spokesperson for the JSC had already announced the interview results and it was already public knowledge that Judge Pillay did not make it, it would therefore be factually or legally impossible for the Minister to have influenced the outcome of the interview that had already been concluded. Therefore, the conduct of the Minister could not be regarded to have been in breach of paragraphs 2.1(c) and (d) and 2.3(b) of the Executive Ethics Code.
- (viii) In light of the foregoing, there is no remedial to be taken by the Public Protector as contemplated in section 182(1)(c) of the Constitution.



## **CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A BREACH OF THE EXECUTIVE ETHICS CODE ISSUED IN TERMS OF SECTION 2(1) EXECUTIVE MEMBERS' ETHICS ACT, 1998 BY MR PRAVIN GORDHAN, MP DURING HIS TENURE AS THE MINISTER OF FINANCE**

### **1. INTRODUCTION**

- 1.1 This is a closing report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), section 3 of the Executive Members' Ethics Act, 1998 (EMEA) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 The report relates to an investigation of a complaint of a violation of the Executive Ethics Code by the Minister of Public Enterprises, Mr Pravin Gordhan, MP (Minister) in that the Minister tried to influence the appointment of his friend, Judge Dhaya Pillay (Judge Pillay) into a position of responsibility in the judiciary, viz. the Supreme Court of Appeal (SCA) during a meeting with the former Chief Justice, Mr Mogoeng Mogoeng in Cape Town.
- 1.3 The report is submitted to His Excellency, President Matamela Cyril Ramaphosa (the President) in terms of section 3(2)(a) read with section 3(3) of the Executive Members' Ethics Act, 82 of 1998 (EMEA).
- 1.4 Copies of the report are also provided to the Deputy President of the Economic Freedom Fighters, Mr Floyd Shivambu, MP, who lodged the complaint (Complainant), the Minister, former Chief Justice Mogoeng Mogoeng and the Secretary General of the Judicial Service Commission (JSC), Mr Sello Chiloane and terms of section 8(3) of the Public Protector Act.

## 2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector by the Complainant in terms of section 4(1) of EMEA in a letter, dated 16 April 2021.

2.2 In his letter of complaint, the Complainant indicated the following:

2.2.1 During the JSC interviews held on 13 April 2021, former Chief Justice Mogoeng Mogoeng revealed that on 6 April 2016, he met with the Minister<sup>2</sup> at the Twelve Apostles Hotel and Spa, Victory Street, Camps Bay, Cape Town;

2.2.2 During the said meeting, the Minister misled the former Chief Justice into believing that the meeting was for official purposes, whilst his intention was to abuse the position of his authority in order to influence the appointment of his friend, Judge Pillay, into a position of responsibility in the judiciary, viz. the SCA; and

2.2.3 The former Chief Justice then realised that the Minister abused his power to benefit Judge Pillay after the latter confirmed her proximity to and friendship with him during the recent JSC interviews.

2.3 The Complainant proceeded to refer to paragraph 2.1 of the Executive Ethics Code which provides that:

2.1 *“Members of the Executive must to the satisfaction of the President or the Premier, as the case may be*

*(a) perform their duties and exercise their powers diligently and honestly;*

*(b) fulfill all the obligations imposed upon them by the Constitution and law; and*

---

<sup>2</sup> When he was still holding a position of Minister of Finance.

- (c) *act in good faith and in the best interest of good governance; and*
- (d) *act in all respects in a manner that is consistent with the integrity of their office or the government.”*

2.4 The Complainant further referred to paragraph 2.3 of the Executive Ethics Code which provides that the members of the Executive may not “...(c) *act in a way that is inconsistent with their position; (d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;...(f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.”*

2.5 In conclusion, the Complainant’s submission was that the Minister’s meeting with the former Chief Justice concerning the JSC process, amounted to an abuse of a position of authority in order to benefit Judge Pillay, and/or failure to act in accordance to the Executive Ethics Code as quoted above.

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

2.6.1 Whether the Minister of Public Enterprises, Mr Pravin Gordhan, abused his position of authority in order to influence the appointment of his friend, Judge Dhaya Pillay when he met with former Chief Justice Mogoeng Mogoeng on 6 April 2016 in Cape Town, and if so breached the Executive Ethics Code.

### **3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

*“The Public Protector has power as regulated by national legislation –*

- (a) 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,*
- (b) to report on that conduct ; and*
- (c) to take appropriate remedial action”.*

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 Section 4(1)(a) of the EMEA, provides *inter alia* that, the Public Protector “...*must investigate in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the President, a Member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister...*”

3.5 This complaint was lodged by a Member of the National Assembly against the Minister and therefore it fell within the purview and jurisdiction of matters that should be investigated by the Public Protector.



## **4 THE INVESTIGATION**

### **4.1 Methodology**

4.1.1 The investigation into the complaint was conducted in accordance with section 182(1) of the Constitution, read with sections 3 and 4 of the EMEA and sections 6 and 7 of the Public Protector Act.

### **4.2 Approach to the investigation**

4.2.1 The approach to the investigation included 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:

(a) What happened?

(b) What should have happened?

(c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to a breach of the Executive Ethics Code?

(d) In the event of a breach, what action should be taken?

4.2.3 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. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct of the Minister constitutes an abuse of position

of authority in order to influence the appointment of his friend, Judge Pillay, and/or failure to act in accordance to the Executive Ethics Code.

4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the Minister to prevent violation of the Executive Ethics Code and resultant maladministration and improper conduct.

4.3 At the outset of the investigation, it was noted by the Public Protector South Africa (PPSA) investigation team that, the origin of the complaint was the alleged breach of paragraphs 2.1 and 2.3 of the Executive Ethics Code by the Minister in April 2016 i.e. five (5) years before the complaint was lodged with the Public Protector.

4.4 Section 6(9) of the Public Protector Act, 1994 provides that:

*“Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned”.*

4.4.1 Admittedly, in terms of section 6(9) of the Public Protector Act, the Public Protector is barred from entertaining complaints reported after two (2) years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two (2) years before being reported does not, in itself, bar the Public Protector from investigating.

4.4.2 Instead, it is mainly the interest of justice that dictates whether the matter should be investigated or not.

4.4.3 In the case between *South African Bureau of Standards v The Public Protector, 34290/15* [2019] ZAGPPHC 101 (27 March 2019) the High Court held that-

*“As with most claims and complaints, there is for good reason, time-frames within which such must be instituted or laid. In this instance, the Public Protector Act has set a time-limit of 2 years. Entertaining a complaint which is older than 2 years certainly calls for exceptional circumstances. The underlying reason for time-frames is the trite maxim; justice delayed is justice denied. Underpinning this principle is the prejudice parties suffered when time has lapsed. To mention, but a few; no finality of a matter, evidence lost, memories failing and legislation and policies evolving.”*

4.4.4 As supplementary jurisprudence in respect of the issue of “*special circumstances*” it is clear that in the case between *Gordhan v Public Protector and Others [2020] ZAGPPHC 777 (17 December 2020)* the North Gauteng High Court held that, “*In view of the provisions of section 6(9) and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this complaint.*”

4.4.5 In this instance, the special circumstances that the Public Protector took into account was the fact that the conduct and/or omission, as alleged by the Complainant, was the breach of the Executive Ethics Code by a current Cabinet Member and that it related to the appointment of a member of the judiciary. Therefore, it was regarded as being in the interest of justice and that of the public at large that the complaint be investigated.

4.4.6 The President was informed about the investigation and that it might not be concluded within the thirty (30) day period as prescribed by section 3(2)(a) of the EMEA in a letter dated 9 December 2021. Consequently, the Public Protector undertook to submit the report as envisaged in section 3(3) of EMEA.

## 4.5 The Investigation Process

4.5.1 The approach to the investigation included an exchange of documentation in the form of inquiry or allegations letters between the Public Protector, the Complainant, the Minister, the former Chief Justice on 11 June 2021 and the Secretary General of the JSC, Mr Sello Chiloane on 2 August 2021.

4.5.2 A Discretionary Notice in terms of Rule 42(1) of the Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018 (the Public Protector Rules), as promulgated under section 7(11) of the Public Protector Act, was issued to the Complainant 31 January 2022. He did not respond.

4.5.3 All relevant documents and correspondence were obtained and analysed and relevant laws, policies and related prescripts were considered and applied throughout the investigation.

## 4.6 Key Sources of information

### 4.6.1 Correspondence and documents

4.6.1.1 Complaint letter of Mr Floyd Shivambu, MP dated 16 April 2021.

4.6.1.2 Letter from the Public Protector to Mr Floyd Shivambu, MP dated 20 May 2021.

4.6.1.3 Letter from the Public Protector to His Excellency, President MC Ramaphosa dated 9 December 2021.

4.6.1.4 Allegations letter from the Public Protector to Minister Pravin Gordhan, MP dated 11 June 2021.

4.6.1.5 Letter from the Public Protector to former Chief Justice Mogoeng Mogoeng dated 11 June 2021.

- 4.6.1.6 Response from former Chief Justice, Mogoeng Mogoeng to the Public Protector dated 02 August 2021.
- 4.6.1.7 Response from Minister Pravin Gordhan to the Public Protector dated 25 August 2021
- 4.6.1.8 Letter from the Public Protector to the Secretary General of the Judicial Services Commission, dated 02 August 2021.
- 4.6.1.9 Response from the Secretary General of the JSC, Mr Sello Chiloane to the Public Protector dated 27 August 2021.
- 4.6.1.10 Copy of the JSC Interviews Transcript dated 13 April 2021.
- 4.6.1.11 A Discretionary Notice from the Public Protector to Mr Floyd Shivambu on 31 January 2022.
- 4.6.1.12 Letter from the National Prosecuting Authority dated 11 August 2021.

#### 4.7 **Legislation**

- 4.7.1 Constitution of the Republic of South Africa, 1996.
- 4.7.2 The Executive Members' Ethics Act, 82 of 1998.
- 4.7.3 The Executive Ethics Code
- 4.7.4 The Public Protector Act, 23 of 1994.

### **5 THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS:**

- 5.1 **Whether the Minister of Public Enterprises, Mr Pravin Gordhan, abused his position of authority in order to influence the appointment of his friend, Judge Dhaya Pillay when he met with the former Chief Justice Mogoeng Mogoeng on 6 April 2016 in Cape Town, and thus violated the Executive Ethics Code**

### Common cause issues

- 5.1.1 Judge Pillay was part of the candidacy for the appointment to the position of a judge in the SCA in 2016 and was interviewed by the JSC.
- 5.1.2 It is also not in dispute that Judge Pillay's candidacy was not successful as her name was not amongst those recommended for appointment when the announcements were made on the outcome of the interviews,
- 5.1.3 The Minister met with former Chief Justice Mogoeng Mogoeng on 6 April 2016 at the Twelve Apostles Hotel and Spa, Victory Street, Camps Bay in Cape Town and engaged in discussions.
- 5.1.4 Issues in dispute
- 5.1.5 The issue for determination was whether during the said meeting the Minister acted in breach of the Executive Ethics Code in his discussions and conversation with the former Chief Justice, in particular in connection with Judge Pillay.
- 5.1.6 The Complainant alleged that the Minister's meeting with the former Chief Justice concerning the JSC process amounted to an abuse of a position of authority in order to benefit Judge Pillay, and/or failure to act in accordance with the Executive Ethics Code, as referred to above.
- 5.1.7 It is also the Complainant's assertion that the question which the Minister allegedly asked the former Chief Justice related to Judge Pillay's performance during an interview for a vacancy at the Supreme Court of Appeal.

### The former Chief Justice's response to the allegations



- 5.1.8 The former Chief Justice responded to the Public Protector's letter of 11 June 2021 through an affidavit deposed on 2 August 2021 and stated that:
- 5.1.8.1 The complaint lodged by the Complainant against the Minister is, according to the Public Protector's letter, based on what he said during the 13 April 2021 JSC interviews concerning the meeting he had with the Minister in 2016.
- 5.1.8.2 He stood by what he said during those interviews. He proposed that the PPSA should seriously consider obtaining the recording or transcript of the JSC interview of Judge Pillay. That would enable the Public Protector to deal with the complaint on the basis of what he actually said.
- 5.1.9 He also indicated that the recording of Judge Pillay JSC's interview is a true and correct reflection of what he said, in relation to the complaint being investigated by the Public Protector.

#### **The JSC's Secretary's response to the Public Protector's letter**

- 5.1.10 As suggested by the former Chief Justice, the Public Protector through a letter dated 2 August 2021 requested the Secretary of the JSC, Mr Sello Chiloane to avail the audio recordings and/or transcript of the JSC interviews held on 13 April 2021.
- 5.1.11 On 27 August 2021, the Secretary of the JSC, Mr Chiloane responded and submitted a transcript of the JSC interviews of 13 April 2021.
- 5.1.12 The following is an extract from the JSC transcript and is part of former Chief Justice's interview questions to Judge Pillay (verbatim):

- 5.1.12.1 *“I noticed when Honourable Singh asked you following from the comments that he read whether you were a friend or a close acquaintance of Mr Hanekom, and Minister Gordhan. You said with respect to Mr Hanekom no, I am not his friend. And then with regard to Minister Gordhan you said “Do know Mr Gordhan, There is now way could not know him”.*
- 5.1.12.2 *It was after Mr Honourable Malema asked you in a more pointed way again whether you were friends that you admitted friendship. Let me tell you where I am going to. During the last interview for the Constitutional Court that you attended and while the JSC programme was running, my office got a call from the office of Minister Gordhan seeking appointment with me. And I was a bit surprised we had never met except at the meeting of Heads of the Arms of the State where he had to brief us as Minister of Finance, regarding the true state of the fiscus at the time so that we embark on the cost cutting measures that you might be aware we tried to introduce afterwards.*
- 5.1.12.3 *He came, I took a break from the JSC proceedings. And I really don't know what the purpose of the meeting was. I don't have a clear recollection I think there was something about the Tax Ombudsman, but what stuck to my mind and left me puzzled was the following: He asked me a question he said, “how did my friend Dhaya Pillay perform.” And we had just caused the spokespersons to announce the results and I told him because it was public knowledge that you did not make it.*
- 5.1.12.4 *And the thing has stayed with me it got renewed as Honourable Singh read the question to you. As Honourable Malema engaged you and I said, why did Honourable Gordhan make an effort to meet me? We are not friends I don't know him from anywhere except from television, why did he make a trip? Seek an audience with me just to ask me “how my friend Dhaya Pillay performed”. So, it is in that context that concern regarding relationship with Honourable*



*Minister Gordhan arises and my concern regarding your initial response which didn't seem to admit or acknowledge friendship arises. (emphasis added)*

5.1.12.5 *Now I'll put to you what others have probably put to you so that you can deal with it and be satisfied that you've dealt with it. It doesn't have to be a long answer.*

5.1.12.6 *Is it potentially compromising to judicial independence and impartiality for a Minister or a senior politician to be keenly interested in the upward mobility or to look like he or she is keenly interested in the upward mobility of a judge? And let me explain I am raising it because you remember there was an issue about friendship between a politician and a judge not so long ago. It seems to be an issue. That's why I want you to deal with it. Just in your own words. Just deal with it as briefly as you can without compromising the quality of your answer (sic)".*

### **The Minister's response to the allegations**

5.1.13 In his response to the Public Protector's letter dated 11 June 2021, the Minister through a letter dated 25 August 2021, stated (verbatim) as follows:

5.1.13.1 *"I have only ever met engaged the Chief Justice in my official and professional capacity on several occasions, regarding matters such as:*

*(a) Recommendations of the Commission on the Remuneration of Public Office Bearers, at a time when the fiscus was constrained due to the impact of the global financial crisis which impacted on South Africa in 2009 and beyond;*

- (b) *As a courtesy, on the appointment of retired judges to perform certain functions (for example, on the appointment of retired Judge Ngoepe as the Tax Ombudsman);*
- (c) *The separation of the budget of the judiciary from that of the Department of Justice (concluded in 2015);*
- (d) *The judgment of the Constitutional Court in the matters of the EFF and the DA v the Speaker of the National Assembly and Others, delivered on 31 March 2016. In this judgment the court required that the National Treasury (NT) should determine the “reasonable percentage” of the “reasonable cost” of certain non-security upgrades at the residence of the former President of the Republic. The NT had required guidance on the practical implementation of “reasonable percentage” and “reasonable cost” for which the Constitutional Court had imposed a 60 day deadline; and*
- (e) *In the event, the NT officials meticulously executed the directives of the Court and reported its determination of a personal tax liability (about R7, 8 million) to the Court. According to my records, the Chief Justice agreed to meet me in Cape Town on 6 April 2016.*
- (f) *On the matter of the Tax Ombud, Judge Ngoepe was appointed by me, as Minister of Finance after the appropriate consultations during September 2013, for a period of three years. His appointment would have come to an end in September 2016. It was my intention to renew his contract for a further 3 years commencing October 2016 and I conveyed this intention to the Chief Justice.*
- (g) *As I recall, after completion of the cordial discussion with the Chief Justice in April 2016 on the matters for which the meeting was requested, I, in passing, did refer to Judge Daya Pillay’s interview with the JSC when it was*

*considering the filling of vacancies for the Supreme Court of Appeal. The CJ responded. I then left. I reiterate that I did not meet the Chief Justice in April 2016 to discuss Judge Pillay. The enquiry about Judge Pillay was purely incidental to the purpose of the meeting.*

*(h) Judge Pillay is a friend, a political activist and a comrade of long standing. She was also the life partner of the late Mr Yunus Mohamed (who passed away in 2008) a close comrade in the anti-apartheid struggle with whom I had worked in the formation of civic organizations later in the United Democratic Front, and in the ANC underground during the 1970s and the 1980s.*

*(i) In any event, as the Chief Justice himself indicated in the JSC interviews of 13 April 2021, that by the time I met him, **“It was public knowledge that you “Judge Pillay” did not make it”** (emphasis added)*

5.1.13.2 *As a member of the Executive branch of the state I am very conscious of the fact that our democracy is based on the separation of powers and the relative independence of the judiciary, legislature and executive.*

5.1.13.3 *I want to state emphatically that I would never, and nor did in anyway seek to influence the Chief Justice or the JSC in the appointment of judges, whose independence I have always respected.*

5.1.13.4 *I refute Mr Shivambu’s allegations that I acted in violation of section 2.1 and 2.3 the Executive Ethics Code and that my meeting with the Chief Justice amounted to an abuse of a position of authority to benefit Judge Pillay.*

5.1.13.5 *Any representation, wilfully or not, of the 6 April 2016 meeting with the Chief Justice, by political actors who want to defend state capture and corruption, is highly regrettable*

5.1.13.6 *I hope that this clarifies my engagement with the Chief Justice and the fact that it is not in violation of the Executive Ethics Code (sic)”.*

5.1.14 In the main, the issue raised by the Complainant, was whether the Minister tried to abuse his position of authority to influence the appointment of Judge Pillay during his meeting with the former Chief Justice. In order to try and answer this question, due regard was given to the legislative framework highlighted hereunder.

#### **Application of the relevant law**

#### **The Constitution of the Republic of South Africa, 1996 (the Constitution).**

5.1.15 Section 96 of the Constitution provides that:

- (1) *Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.*
  
- (2) *Members of the Cabinet and Deputy Ministers may not—*
  - (a) *...;*
  - (b) ***act in any way that is inconsistent with their office***, or expose themselves to any situation involving the risk of a conflict between their ***official responsibilities*** and private interests; or
  - (c) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.....”*

## **The Executive Members' Ethics Act, 1998**

5.1.16 The Executive Members Ethics Act (EMEA) is the national legislation referenced in section 96(1) of the Constitution and the bedrock of the Executive Ethics Code.

5.1.17 Section 2(1) of EMEA read thus:

*“The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.*

5.1.18 The general standards which the members of the Executives<sup>3</sup> must comply with are contained in paragraph 2.1 of the Executive Ethics Code which provides that:

*2.1 “Members of the Executive must to the satisfaction of the President or the Premier, as the case may be-*

- (a) perform their duties and exercise their powers diligently and honestly;*
- (b) fulfil all the obligations imposed upon them by the Constitution and law;*
- (c) act in good faith and in the best interest of good governance;*
- (d) act in all respects in a manner that is consistent with the integrity of their office or the government.”*

---

<sup>3</sup> Member of the Executives means a Cabinet member, a Deputy Minister or a Member of a Provincial Executive Committee, and 'member' and 'Executive' have corresponding meanings.

5.1.19 Paragraph 2.2 provides that *“In deciding whether members of the Executive complied with the provisions of clause 2. 1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government.*

5.1.20 Paragraph 2.3 of the Executive Ethics Code provides that:

2.3 *“Members of the Executive may not-*

- (a) *Deliberately or inadvertently mislead the President, or the Premier or, as the case may be; the legislature.*
- (b) *act in a way that is inconsistent with their position;*
- (c) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;*
- (d) *use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;*
- (e) *expose themselves to any situation involving the risk of a conflict between their official responsibilities and their financial and/or personal interests;*
- (f) *receive remuneration for any work or service other than for the performance of their functions as Members; or*
- (g) *make improper use of any allowance or payment properly made to them, or disregard the administrative rules, which apply to such allowances or payments.”*

5.1.21 In the case of *Public Protector and Others v President of the Republic of South Africa and Others (CCT 62/20) [2021] ZACC 19 (1 July 2021) (the President case)*. In paragraph 11, the court denoted that:

*“Section 3 empowers the Public Protector to investigate any breach of the code. The scheme that emerges from the reading of this provision is that the Public Protector’s power to investigate is subject to a formal complaint. **This suggests that the scope of an investigation is determined by the breach of the code contained in the complaint.** It is important to note that section 3 does not authorise the Public Protector to investigate a violation of the Act itself but limits her authority to investigating a breach of the code.”(emphasis added)*

- 5.1.22 The above provisions both in the Constitution and the EMEA, are the guiding principles against which the conduct of the members of the Executives has to be gauged when the Public Protector has to make a determination on the conduct that is purported to have violated the Executive Ethics Code.
- 5.1.23 In his complaint, the Complainant did allege violation of a paragraphs 2.1 and 2.3 of the Executive Ethics Code, but without indicating any corroborating information/documentation to support his complaint, which was lodged in terms of section 4(1) of the EMEA, requesting the Public Protector to investigate the Minister’s alleged improper conduct, as contained in the utterances of the Chief Justice during the JSC interviews on 13 April 2021.
- 5.1.24 Notwithstanding the above, it was noted that the Constitution and the Executive Ethics Code require the Minister to conform to the prescribed ethical standards when performing his official functions. It was not disputed that Minister met former Chief Justice in Cape Town, but the content of their discussion could be sourced only from their versions, respectively, with no corroboration by a third party.
- 5.1.25 The Minister made a submission in response to the allegations that he breached the Executive Ethics Code when he made an attempt to influence the former Chief Justice in the appointment of his friend, Judge Pillay. He has without denying to

have met the former Chief Justice and for reasons that he advanced, vehemently denied the suggestion that he had tried to influence the Chief Justice as alleged.

- 5.1.26 On the other hand, the former Chief Justice is steadfast in his account of what transpired on that day in April 2016, and expressed how he felt in that he found it puzzling that the Minister would take a trip just to come and ask him how his friend, Judge Pillay fared in the interviews.
- 5.1.27 So, apart from the confirmation that a meeting did take place between the former Chief Justice and the Minister in 2016, the Public Protector is unable to make any determination on the contents of their conversation, which was not recorded by any of the parties.
- 5.1.28 There was also no other person present at this meeting except themselves, there is thus no corroboration of what was discussed by them, except of what they purport to have talked about and conveyed to each other.

### ***Conclusion***

- 5.1.29 In view of the foregoing, the Minister's meeting with the former Chief Justice in 2016, is not denied by both parties to have taken place, including the content of their deliberations about Judge Pillay, but no sound conclusion can be drawn as to the intention and purpose thereof, especially on the question of an alleged attempt to influence the former Chief Justice in the appointment of Judge Pillay.
- 5.1.30 Crucially, when the two met, it was already announced and made public knowledge that Judge Pillay did not make it, as such the Minister could not have possibly influenced the outcome of the already finalised process.



5.1.31 The Complainant did not make further submissions in response to the Discretionary notice that was issued to him on 31 January 2022 in terms of rule 42(1) of the Public Protector Rules. He therefore did not dispute nor challenge the evidence, findings and conclusion contained in the notice, and therefore, we have closed our file.

## 6. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that Minister Gordhan should have complied with and the impact thereof on good administration and ethical conduct, the following findings are made:

### 6.1 **Regarding whether the Minister of Public Enterprises, Mr Pravin Gordhan, abused his position of authority in order to influence the appointment of his friend, Judge Dhaya Pillay when he met with former Chief Justice Mogoeng Mogoeng on 6 April 2016 in Cape Town, and thus violated the Executive Ethics**

6.1.1 The allegations that the Minister, abused his position of authority in order to influence the appointment of his friend, Judge Dhaya Pillay when he met the former Chief Justice on 6 April 2016, in Cape Town, and thus breached the Executive Ethics Code, could not be corroborated.

6.1.2 By reason of the fact that when the Minister and the former Chief Justice met in 2016, the spokesperson for the JSC had already announced the interview results and it was already public knowledge that Judge Pillay did not make it, it would be factually or legally impossible for the Minister to have influenced the outcome of the interview that had already been concluded.

6.1.3 Therefore, the conduct of the Minister could not be regarded to have been in breach of paragraphs 2.1(c) and (d) and 2.3(b) of the Executive Ethics Code

## 7 REMEDIAL ACTION

7.1 In light of the foregoing, there is no remedy to be taken by the Public Protector as contemplated in section 182(1)(c) of the Constitution and will thus not pursue the matter any further and finalise this matter by means of a closing report.

8 Kindly note that the Public Protector is now *functus officio* in the matter and cannot take the matter any further. Should any party wish to challenge this decision they are at liberty to approach a court of law and lodge an application for a judicial review of the matter.



---

**ADV BUSISIWE MKHWEBANE**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**

**DATE:** 30/03/2022

*Assisted by: Mr Rodney Mataboge: Chief Investigator, Head Office*