

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



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**INVESTIGATION INTO ALLEGATIONS OF VIOLATION OF SECTION 175(1) OF  
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND THE  
EXECUTIVE ETHICS CODE BY THE PRESIDENT OF THE REPUBLIC OF SOUTH  
AFRICA AND BY THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES  
WHEN APPOINTING THE JUDGE PRESIDENT OF THE GAUTENG DIVISION OF  
THE HIGH COURT AS ACTING JUSTICE OF THE CONSTITUTIONAL COURT OF  
SOUTH AFRICA**



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## LIST OF ACRONYMS AND ABBREVIATIONS

<b>ACRONYMS AND ABBREVIATIONS</b>	<b>DESCRIPTIONS</b>
<b>ACJ</b>	Acting Chief Justice
<b>CJ</b>	Chief Justice
<b>Constitutional Court</b>	Constitutional Court of the Republic of South Africa
<b>DJP</b>	Deputy Judge President
<b>DCJ</b>	Deputy Chief Justice
<b>DoJ&amp;CS</b>	Department of Justice and Correctional Services
<b>EFF</b>	Economic Freedom Fighters
<b>JP</b>	Judge President
<b>JSC</b>	Judicial Service Commission
<b>MP</b>	Member of Parliament
<b>Mr Shivambu</b>	Mr Tinyiko Floyd Shivambu
<b>Ms Phasha</b>	Ms Phapano Phasha
<b>Public Protector Act</b>	Public Protector Act, 1994
<b>PPSA</b>	Public Protector of the Republic of South Africa
<b>President</b>	Mr Matamela Cyril Ramaphosa
<b>The Minister</b>	Mr Ronald O Lamola



## 1. INTRODUCTION

- 1.1 This is a Closing 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) and Rule 40(b) of the *Rules Relating to Investigations by the Public Protector and Matter Incidental thereto*, 2018, as amended (the Public Protector Rules) as promulgated in terms of section 7(11) of the Public Protector Act.
- 1.2 The report relates to an investigation into allegations that the President of the Republic of South Africa, Mr CM Ramaphosa (the President) and the Minister of Justice and Correctional Services, Mr RO Lamola (the Minister), violated section 175(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the Executive Ethics Code, in the appointment of the Judge President of the Gauteng Division of the High Court, Judge President Dunstan Mlambo (Judge Mlambo) as an Acting Justice of the Constitutional Court of South Africa (the Constitutional Court).
- 1.3 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act, to the following persons:
- 1.3.1 The President of Republic of South Africa, Mr Matamela Cyril Ramaphosa (the President);
- 1.3.2 The Minister of Justice and Correctional Services, Mr Ronald O Lamola (the Minister);
- 1.3.3 The Chief Justice of the Constitutional Court, Judge Ramond Zondo (Chief Justice Zondo);
- 1.3.4 The Judge President of the Gauteng Division of the High Court, Dunstan Mlambo (Judge Mlambo);



- 1.3.5 The Complainant, Ms Phapano Phasha (Ms Phasha), the Chairperson of the Anti-Poverty Forum; and
- 1.3.6 The Complainant, Mr Tinyiko Floyd Shivambu (Mr Shivambu), Member of Parliament (MP).

## **2. THE COMPLAINT**

2.1. The Public Protector received two complaints, namely from Ms Phasha and from Mr Shivambu, on 07 February 2022 and 25 March 2022, respectively.

2.2. Ms Phasha alleged that:

2.2.1 On 30 April 2021, the Chief Justice of the Constitutional Court, Mr Mogoeng Mogoeng (former Chief Justice) recommended Deputy Judge President Madondo and Judge Rogers to act as Judges of the Constitutional Court, and the Minister responded two months later on 02 July 2021, to the then Acting Chief Justice of the Constitutional Court, Chief Justice Zondo (Chief Justice Zondo) that Judge Mlambo be one of the candidates to be considered and recommended to the President for appointment to act at the Constitutional Court;

2.2.2 On 09 July 2021, Chief Justice Zondo informed the Minister that it was too late for him to give concurrence that Judge Mlambo be recommended to the President for appointment as an acting justice of the Constitutional Court. However, on 08 November 2021, Chief Justice Zondo capitulated and concurred that Judge Mlambo be recommended to the President for appointment as acting justice of the Constitutional Court;

2.2.3 During the interviews for the position of Chief Justice, which were held in January 2022 by the Judicial Service Commission (JSC), Chief Justice Zondo was asked about the decision of the Minister to suggest Judge Mlambo to him as one of the candidates to be recommended to the



President for appointment as acting justice. Chief Justice Zondo responded that the action of the Minister was not a norm and was unusual; and

- 2.2.4 The action of the Minister can be perceived as a violation of section 175(1) of the Constitution, which provides that:

*“The President may appoint a woman or a man to serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice”.*

- 2.3. A related complaint was received from Mr Shivambu, who alleged that:

- 2.3.1 A response by Judge Mlambo during the interviews for the position of Chief Justice of the Constitutional Court in January 2022, that he was told that the President was the person behind his appointment to act in the Constitutional Court, is circumstantial evidence pointing to the conclusion that Judge Mlambo was the candidate preferred by the Minister and/or the President for the position of Chief Justice; and

- 2.3.2 The conduct of the Minister and the President were unlawful and unethical and aimed at judicial capture, and a manipulation of the rules to ensure that Judge Mlambo gained an unfair advantage in the selection process for Chief Justice. Therefore, their conduct amounts to a breach of the Executive Ethics Code, as well as section 96 of the Constitution, including the relevant oaths of office taken by the two Cabinet members.

### **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.

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

*“The Public Protector has the 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 the additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.4 Ms Phasha is not a member of the National Assembly, therefore in terms of section 4(1) of the EMEA her complaint could not be investigated in terms of the EMEA. Accordingly, her complaint was investigated in terms of 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.

3.5 Mr Shivambu is a member of the National Assembly and his complaint was investigated in terms of the EMEA.

3.6 Section 3(1) of the Executive Members’ Ethics Act, 1998 (EMEA) directs that *“the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4.”*



- 3.7 Section 4(1)(a) of the EMEA, provides 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.*”;
- 3.8 In the matter at hand, the complaint, while lodged in terms of section 4(1)(a) of the EMEA, referred to alleged violations of the Act, to wit, section 2(2)(a) of the EMEA. The Public Protector considered the dictum in the matter of “*Public Protector and Others v President of the Republic of South Africa and others*”<sup>1</sup> wherein the Court held that:
- 3.8.1 “*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 authorize the Public Protector **to investigate a violation of the Act itself but limits her authority to investigate a breach of the code**” (Added emphasis).*
- 3.9 The Public Protector subsequently considered whether she is empowered to proceed with an investigation into a complaint lodged in terms of section 3 of the EMEA, if the complaint lodged in terms of section 4(1) does not refer to an alleged specific breach of the Code. In this regard, the following issues were taken into account:
- 3.9.1 The guidance from the Constitutional Court<sup>2</sup> is not clear whether it is mandatory for the complaint to allege and contain details of a breach of the

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<sup>1</sup> [2021]ZACC[19] at para 11.

<sup>2</sup> *Supra*.





Code, or whether it is preferred. On the other hand, the Constitutional Court distinguished between requirements of a predominantly imperative nature (“*must*”)<sup>3</sup> and those which are more discretionary (“*should*”)<sup>4</sup> –

*“The form prescribed for the complaint is that it **must** be in writing and **must** contain the name and address of the complainant. It **should** also set out full particulars of the alleged breach of the code and the identity of the person against whom the complaint is lodged.”* (added emphasis)

3.9.2 On the other hand, the Constitutional Court seems to suggest that the authority of the Public Protector to investigate a complaint in terms of section 4(1) of the EMEA is dependent on the alleged breach of the Code being mentioned or referred to in the complaint-

*“For its part, the Members’ Act authorizes the Public Protector to investigate alleged breaches of the Code only. Even so, the Public Protector may undertake an investigation only after receipt of a complaint envisaged in Section 4 of the Members’ Act. Although there have been alleged breaches of the Code, none related to the general affairs of the CR17 campaign. In fact, **there is no mention of the CR17 campaign in the complaints received by the Public Protector.** Accordingly, the Members’ Act too did not empower the Public Protector to investigate the affairs of the CR17 campaign”* (Added emphasis); and

3.9.3 At the same time, the High Court in the matter of **Lekwene and Another v The Public Protector of South Africa and Others**<sup>5</sup> found that there are no

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3 Which is “to be construed as *peremptory* rather than *directory* unless there are other circumstances which negate this construction” – vide *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (PTY) Ltd* 2004 (1) SA 308 (SCA) at para 32.

4 Which denotes a guideline or recommendation whenever non-compliance with the specification is permissible, vide <http://www.websters-online-dictionary.org/definitions/should?cx=partner-pub-0939450753529744%3Av0qd01-tdlq&cof=FORID%3A9&ie=UTF-8&q=should&sa=Search#922>.

5 (1303/2021)[2022] ZANHC 22 (7 March 2022).



merits in any contention that it was not proper and competent for the Public Protector to investigate a matter in terms of the EMEA, because the complaint did not state that the provisions of the Code were breached. The Court emphasized that:

*“In Economic Freedom Fighters<sup>[6]</sup>, the Constitutional Court has already pronounced that the Public Protector carries very wide powers that leave no lever of government power above scrutiny, coincidental embarrassment and censure. Section 3(4) of the Ethics Act provides: ‘When conducting an investigation in terms of this section, the Public Protector has all the powers vested in the Public Protector in terms of the Public Protector Act.’”*

- 3.10 Since the complaint fell within the ambit of section 4(1) of the EMEA, being a complaint lodged by a Member of the National Assembly against a Cabinet Member, the President and the Minister of Justice and Correctional Services, it was resolved that it fell within the purview and jurisdiction of matters that should be investigated by the Public Protector. The scope of the investigation primarily focused on the potential breach of clauses 2(1)(b) and (c) of the Code, which is aligned to section 2(2)(a) of the EMEA, as mentioned in the complaint.

#### **4. ISSUES IDENTIFIED FOR INVESTIGATION**

- 4.1. Based on the analysis of the complaint, the following issues were identified and investigated:
- 4.1.1 Whether the Minister of Justice and Correctional Services, Mr RO Lamola, violated section 175(1) of the Constitution when he suggested Judge Mlambo to Chief Justice Zondo for concurrence and recommending him to the President, for an acting appointment in the Constitutional Court of South

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6 *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580(cc) at para 58.



Africa, and if so, whether such conduct was unlawful and unethical and contravened sections 96(1) and (2)(b) of the Constitution, and clause 2(1)(b) and (c) of the Executive Ethics Code; and

4.1.2 Whether the President, Mr MC Ramaphosa, violated section 175(1) of the Constitution, when he appointed Judge President Mlambo as acting justice of the Constitutional Court of South Africa, and if so, whether such conduct was in breach of section 96(1) and (2)(b) of the Constitution, and clause 2(1)(b) and (c) of the Executive Ethics Code.

4.2 A notice in terms of Rule 42(1) (Rule 41(1) under the amended Rules) (the Notice) of the Public Protector Rules, communicating the Public Protector's findings on the issues outlined above, was served on the Complainants on 09 June 2023. The purpose of the Notice was to provide the Complainants the opportunity to submit additional information or evidence to rebut the evidence which the Public Protector had at that time. Ms Phasha responded by indicating that she is withdrawing her complaint. No response was received from Mr Shivambu.

## **5. THE INVESTIGATION**

### **5.1 Methodology**

5.1.1. The investigation was conducted in terms of sections 182 of the Constitution, read with sections 3 and 4 of the EMEA and sections 6 and 7 of the Public Protector Act.

### **5.2 Approach to the investigation**

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



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- 5.2.2 The investigation was approached using an enquiry process that seeks to determine:
- 5.2.2.1 What happened?
  - 5.2.2.2 What should have happened?
  - 5.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of section 175(1) of the Constitution or the Executive Ethics Code?
  - 5.2.2.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong?
- 5.2.3 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.
- 5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by both the Minister and the President to prevent maladministration and improper conduct.
- 5.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration and improper conduct.
- 5.3 **Key Sources of Information**
- 5.3.1 **Correspondence sent and received**
    - 5.3.1.1 Letter of complaint from the Complainant, Ms Phasha, dated 07 February 2022;
    - 5.3.1.2 Letter of complaint from the Complainant, Mr Shivambu, dated 25 March 2022;



- 5.3.1.3 Letter from the Acting Public Protector to the Minister, dated 15 September 2022;
- 5.3.1.4 Letter from the Acting Public Protector to Chief Justice Zondo, dated 15 September 2022;
- 5.3.1.5 Letter from the Acting Public Protector to the President dated, 15 September 2022;
- 5.3.1.6 Response letter from the Minister to the Acting Public Protector, dated 30 September 2022;
- 5.3.1.7 Response letter received from the President to the Acting Public Protector, dated 17 October 2022; and
- 5.3.1.8 Response letter received from Chief Justice Zondo to the Acting Public Protector, dated 28 November 2022.

### 5.3.2 **Applicable law**

- 5.3.2.1 Constitution of the Republic of South Africa, 1996;
- 5.3.2.2 Executive Members' Ethics Act, 1998;
- 5.3.2.3 Executive Members' Ethics Code, 2000; and
- 5.3.2.4 Public Protector Act, 1994.

## **6 THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS**

**6.1 Whether the Minister of Justice and Correctional Services, Mr RO Lamola, violated section 175(1) of the Constitution when he suggested Judge Mlambo to Chief Justice Zondo for concurrence and recommending him to the President, for an acting appointment in the Constitutional Court of South Africa, and if so, whether such conduct was unlawful and unethical and contravened sections 96(1) and (2)(b) of the Constitution, and clause 2(1)(b) and (c) of the Executive Ethics Code**



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*Common cause*

- 6.1.1 The Minister received a letter dated 30 April 2021, from the former Chief Justice informing him about the vacant positions at the Constitutional Court. In his letter to the Minister, the former Chief Justice recommended Deputy Judge President Ml Madondo (DJP Madondo) and Judge OL Rodgers for acting appointments at the Constitutional Court.
- 6.1.2 On 02 July 2021, the Minister wrote a letter to Chief Justice Zondo, informing him about the letter dated 30 April 2021 received from the former Chief Justice. In the letter, the Minister suggested to Chief Justice Zondo that Judge Mlambo be considered as one of the two Justices to be submitted to the President for consideration.

*Issue in dispute*

- 6.1.3 The issue for the Public Protector's determination is whether the Minister violated section 175(1) of the Constitution when he suggested Judge Mlambo to Chief Justice Zondo for recommendation to the President for appointment to act in the Constitutional Court.

*The Complainants' versions*

- 6.1.4 Ms Phasha contends that the Minister deviated from the names of the two Judges proposed by the former Chief Justice for acting appointment at the Constitutional Court. Therefore, she alleges, the conduct of the Minister is in contravention of section 175(1) of the Constitution.
- 6.1.5 Mr Shivambu contends that the Minister's decision to suggest Judge Mlambo to Chief Justice Zondo to be recommended to the President for appointment as an acting justice for the Constitutional Court, was unlawful and unethical, as this was intended to give Justice Mlambo an unfair advantage as he was the Minister's preferred candidate for the position of



the Chief Justice. According to Mr Shivambu, this conduct of the Minister is in contravention of section 96 of the Constitution and clause 2.1 of the Executive Ethics Code.

*Minister RO Lamola's response*

- 6.1.6 The Minister was requested to respond to the allegations levelled against him through a letter dated 15 September 2022. The Minister, in his response dated 30 September 2022, stated that:
- 6.1.6.1 He denies the allegations that he violated the provisions of section 175(1) of the Constitution when he proposed the name of Judge Mlambo to Chief Justice Zondo for concurrence, with a view to recommending Judge Mlambo to the President for consideration for the position of acting justice of the Constitutional Court;
- 6.1.6.2 In terms of the Department's established practice, all requests pertaining to the appointment of judges are received by the Department's Court Services Branch and routed to him in the form of a memorandum for consideration and further processing;
- 6.1.6.3 It occasionally occurs that the Chief Justice and/or Heads of the Courts communicate with him directly regarding acting appointments. This happens whenever there are delays in processing the acting appointments. He had never received a call from the former Chief Justice, the then Acting Chief Justice, Madam Justice Khampepe and/or Chief Justice Zondo, about the delay to finalise acting appointments;
- 6.1.6.4 On 21 April 2021, the Department received a letter from the former Chief Justice informing him about his long leave. The letter was processed and routed to the President, including the facilitation of the appointment of Madam Justice Khampepe to act in the position of Acting Chief Justice;



- 6.1.6.5 On 30 April 2021, he received a letter from the former Chief Justice requesting acting appointments for the periods commencing from 01 June 2021 to 01 August 2021. For the period 01 June 2021 to 30 July 2021, there was a concurrence for Judge President Tlaetsi and Judge Pillay to be appointed for a further acting period. However, for the period 01 August 2021 to 30 September 2021, he had to apply his mind, hence he suggested Judge Mlambo to be one of the two judges to be recommended to the President for consideration for the period starting on 01 August 2021;
- 6.1.6.6 The former Chief Justice's leave commenced soon after he received the letter, and he had to engage Chief Justice Zondo to obtain concurrence for Judge Mlambo's recommendation, hence he issued a letter dated 02 July 2021 to Chief Justice Zondo; and
- 6.1.6.7 In a letter dated 09 July 2021, Chief Justice Zondo did not object to the suggestion that Judge Mlambo be considered for an acting appointment at the Constitutional Court. However, he indicated that Judge Mlambo was previously approached to avail himself for an appointment as an acting justice of the Constitutional Court and he indicated that he was not available. He further indicated that Judge Presidents were previously given an opportunity to act as Judges of the Constitutional Court.

*Supporting documents received from the Minister*

- 6.1.7 The Minister provided copies of the correspondence between himself, the former Chief Justice, Chief Justice Zondo and the Presidency. The letters were perused and the following was noted:

6.1.7.1 *Letter dated 30 April 2021 from former Chief Justice to the Minister*

- (i) In the letter dated 30 April 2021, the former Chief Justice informed the Minister about four existing vacancies in the Constitutional Court for the period 01 June to 30 September 2021. He suggested that Judges Tlaetsi





and Pillay be appointed for further acting with effect from 01 June 2021 to 30 September 2021; and

- (ii) The former Chief Justice suggested Deputy Judge President Mjabuliseni Isaac Madondo (Justice Madondo), and Judge Owen Lloyd Rodgers (Justice Rodgers) to the Minister to be recommended to the President for acting appointment in the Constitutional Court with effect from 01 August 2021 until 30 September 2021.

6.1.7.2 *Letter dated 01 June 2021 from the President appointing acting justices*

- (i) In the letter dated 01 June 2021, the President re-appointed Justices Tlaletsi and Pillay as acting justices at the Constitutional Court for the period 01 June 2021 to 30 September 2021.

6.1.7.3 *Letter dated 02 July 2021 from the Minister to Chief Justice Zondo*

- (i) The Minister referred to the names of the two Justices proposed for Acting appointments, Justices Madondo and Rodgers, however, he indicated that having applied his mind to the request, he recommended that Judge Mlambo be one of the two judges to be recommended to the President to be considered for acting justices of the Constitutional Court. He also stated that Judge Mlambo and Judge Madondo be recommended for the period 01 August 2021 to 30 September 2021.

6.1.7.4 *Letter dated 09 July 2021 from Chief Justice Zondo to the Minister*

- (i) In the letter, Chief Justice Zondo confirmed his telephonic discussion with the Minister, where he informed the Minister that Judge-Presidents were not excluded from consideration for acting appointments in the Constitutional Court, and mentioned that Judge-President Tlaletsi was acting at the time;



- (ii) He further stated that Judge-President Dustan Mlambo was previously approached and requested to avail himself for appointment as an Acting Justice of the Constitutional Court, but he indicated that he was not available; and
- (iii) He further confirmed that the Minister had already agreed to recommend the appointment of Justice Rodgers as an acting justice of the Constitutional Court for the period 01 August to 30 September 2021, and that it was already late to replace Justice Rogers at the time because the third term of the Court was left with three weeks.

6.1.7.5 *Letter dated 08 November 2021 from Chief Justice Zondo to the Minister*

- (i) In the letter, Chief Justice Zondo informed the Minister about the vacancies in the Constitutional Court for the period starting December 2021 until March 2022. He further gave concurrence for the following Judges to be recommended to the President for consideration and appointment:
  - (a) Justice Rodgers for the period November 2021 to 09 December 2021 and from 11 December 2021 to 15 January 2022;
  - (b) Justice Pillay and Justice Tlaetsi for the period November 2021 to January 2022; and
  - (c) Justice Mlambo and Justice Unterhalter for the period 16 January 2022 to 31 March 2022.

*The President's response*

- 6.1.8 On 15 September 2022, the Public Protector requested the President to respond to the allegations levelled against him. The President responded in a letter dated 17 October 2022 and amongst others, provided copies of the correspondence between himself and the Minister. The letters were perused and the following was noted:



6.1.8.1 *Letter dated 23 November 2021 from the Minister to the President*

- (i) In the letter dated 23 November 2021, the Minister, acting with the concurrence of Chief Justice Zondo, recommended to the President the names of the Judges for appointment as acting justices at the Constitutional Court for the period 1 December 2021 to 31 March 2022, as follows:
- (a) Justice Rodgers for the period 01 to 09 December 2021 and from 11 December 2021 to 15 January 2022;
  - (b) Justice Tlaetsi for the period 01 December 2021 to 31 January 2022;
  - (c) Justice Pillay for the period 01 December 2021 to 15 January 2022; and
  - (d) Justice Mlambo and Justice Unterhalter for the period 16 January 2022 to 31 March 2022.

6.1.8.2 *Letter dated 30 November 2021 from the President appointing acting justices*

- (i) The President, acting on the recommendation of the Minister in terms of section 175(1), appointed the above-mentioned Justices as recommended by the Minister.

*Chief Justice Zondo's response*

- 6.1.9 On 15 September 2022, the Public Protector requested Chief Justice Zondo to respond to the allegations levelled against the Minister. On 28 November 2022, Mr Allister Slingers, Director: Executive Support Services in the Private Office of the Chief Justice, on behalf of Chief Justice Zondo, responded and indicated that the Chief Justice declines to comment on allegations that the Minister had violated the Constitution. In responding on what Chief Justice Zondo meant when he said, "*What the Minister had done was not the norm or was unusual*", he meant the normal and grammatical meaning of the words "*not the norm or unusual*".



*Notice in terms of Rule 41(1) of the Public Protector Rules*

- 6.1.10 On 08 June 2023 a Notice in terms of Rule 41(1) of the Public Protector Rules was furnished to the Complainants to afford them the opportunity to make representations in connection with the intended closure of the complaint.
- 6.1.11 On 09 June 2023, Ms Phasha responded via email correspondence and indicated that she is withdrawing her complaint. No response was received from Mr Shivambu.

*Applicable law*

**Constitution of the Republic of South Africa, 1996**

- 6.1.12 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 Minister 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 interest”.*

- 6.1.13 Section 175(1) of the Constitution provides that:

*“(1) The President may appoint a woman or a man to serve as an acting Deputy Chief Justice or Judge of the Constitutional Court if there is a vacancy in any of those offices, or if the person holding such an office is absent. The appointment must be made on the recommendation of the*



*Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice ...”*

### **Executive Ethics Code, 1998**

6.1.14 Clause 2.1 of the Executive Ethics Code provides, *“inter alia”* that:

*“2.1 A member of the Executive must, to the satisfactory 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;*
- (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.*

### *Analysis*

6.1.15 Section 175(1) allows the President to appoint an acting Constitutional Court judge under certain circumstances, while section 175(2) empowers the Minister of Justice to appoint acting justices of other courts. In both cases, the appointments are made without consulting the Judicial Services Commission (JSC), but with the concurrence of the Chief Justice (in the former instance) and after consultation with the senior judge of the particular division (in the latter instance).

6.1.16 The Constitutional Court<sup>7</sup> dealt with the appointment of acting justices during the certification proceedings of the text of the Constitution, and stated that:

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7 In re Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC) par 131



*“The appointment of acting justices is a well-established feature of the judicial system in South Africa. Such appointments are made to fill temporary vacancies which occur between meetings of the JSC, or when Judges go on long leave, are ill or are appointed to preside over a commission. These appointments are necessary to ensure that the work of the Courts is not disrupted by temporary vacancies or the temporary absence or disability of particular Judges.”*

6.1.17 Section 175(1) of the Constitution does not dictate, who, between the Minister and the Chief Justice should suggest the judges to act in the Constitutional Court but requires that there should be an agreement between the Minister and the Chief Justice before the judges are recommended to the President.

6.1.18 It is therefore not clear whether the remarks of the Chief Justice regarding the Minister’s actions being contrary to *“the norm and unusual”* were made in respect of the appropriateness of the particular recommendation, as the Chief Justice would have undoubtedly been aware that the Minister is constitutionally authorised and obliged to recommend an acting appointment with the concurrence of the Chief Justice.

6.1.19 The Constitutional Court also dealt with the provision allowing for the appointment of an acting Constitutional Court judge. At the time of the certification proceedings, the provision required the appointment to be made by the President on the recommendation of the Minister acting with the concurrence of both the President of the Constitutional Court and the Chief Justice. The Constitutional Court dealt with the objection as follows:

*“Appointment of an acting justice to the Constitutional Court ... is in a special category. All three [Minister of Justice, Chief Justice & President of the Constitutional Court] are members of the JSC and the requirement that there **be agreement between** them as to the person to be appointed meets*



*any reasonable concern that the power of appointing an acting Constitutional Court Judge might be abused.”*

- 6.1.20 Subsequently, the Constitution was amended. The amended section 175(1) requires the President to make the appointment on the recommendation of the Minister and the Chief Justice only. The amended provision therefore only requires the concurrence of one senior judge, and not two, as was previously required.
- 6.1.21 It should be noted that, when Chief Justice Zondo did not give his concurrence to the Minister, the Minister did not proceed to recommend to the President that Judge Mlambo be appointed as acting justice of the Constitutional Court for the period 01 August 2021 to 30 September 2021. The Minister therefor did not contravene section 175(1) of the Constitution.
- 6.1.22 Section 96(1) and (2)(b) of the Constitution requires a member of the cabinet, in this instance the Minister, to act in accordance with the Executive Ethics Code and not to act in any way that is inconsistent with his office or expose himself to any situation involving the risk of a conflict between his official responsibilities and private interest respectively.
- 6.1.23 Whereas in terms of clause 2.1 of the Executive Ethics Code, the Minister is required to perform his duty, including his constitutional obligations diligently and honestly, in this instance, his duty to recommend judges to the President for appointment of acting justices in the Constitutional Court.
- 6.1.24 The Complainant's contention is that the conduct of the Minister in suggesting Judge Mlambo to Chief Justice Zondo to be recommended to the President for acting appointment in the Constitutional Court for the period 01 August 2021 to 30 September 2021, was to give him an unfair advantage to be appointed Chief Justice of the Constitutional Court, therefore breached sections 96(1) and (2)(b) of the Constitution read with the clause 2.1 of the Executive Ethics Code.



6.1.25 The investigation revealed that it was not the first time Judge Mlambo was identified for an acting appointment in the Constitutional Court. The evidence further reveals that he was appointed as acting justice of the Constitutional Court for the period 16 January 2022 to 30 March 2022. On both occasions, he was suggested by the former Chief Justice and he declined. He was later suggested by Chief Justice Zondo. He accepted and he was appointed as acting justice in the Constitutional Court. At all occasions it was not the Minister who suggested him to be appointed as acting justice in the Constitutional Court.

#### *Conclusion*

6.1.26 The evidence obtained by the Public Protector reveals that whenever there are vacancies in the Constitutional Court, the Chief Justice informs the Minister about such vacancies, suggests the names, and gives his concurrence to the Minister, to enable the Minister to recommend such names to the President.

6.1.27 For the period 01 August 2021 to 30 September 2021, the Minister suggested Judge Mlambo to Chief Justice Zondo to give concurrence, and he did not concur with the Minister's suggestion. Accordingly, the Minister did not recommend Judge Mlambo to the President for appointment as an acting justice in the Constitutional Court for the period 01 August 2021 to 30 September 2021.

6.1.28 On 08 November 2021, Chief Justice Zondo suggested to the Minister that Judges Mlambo and Unterhalter be recommended for appointment as acting justices of the Constitutional Court for the period 16 January 2022 to 31 March 2022. The Minister recommended their appointment to the President and Justices Mlambo and Unterhalter were appointed for the period 16 January 2022 to 31 March 2022.





6.1.29 The Public Protector could not find evidence that the conduct of the Minister in this instance, to suggest Judge Mlambo to Chief Justice Zondo to give concurrence, contravened sections 96(1), 96(2)(b), and 175(1) of the Constitution or clause 2.1 of the Executive Ethics Code.

**6.2 Whether the President, Mr MC Ramaphosa, violated section 175(1) of the Constitution, when he appointed Judge President D Mlambo as acting justice of the Constitutional Court of South Africa, and if so whether such conduct was in breach of section 96(1) and (2)(b) of the Constitution, and clause 2(1)(b) and (c) of the Executive Ethics Code**

*Common cause*

6.2.1 The President received several recommendations from the Minister to appoint acting justices to the Constitutional Court. On 23 November 2021, he received a recommendation from the Minister to appoint acting justices for the period December 2021 to March 2022, and Judge Mlambo was one of the recommended candidates.

6.2.2 On 30 November 2021, the President appointed Judge Mlambo as acting justice of the Constitutional Court for the period 16 January 2022 to 30 March 2022.

*Issues in dispute*

6.2.3 The issue for the Public Protector's determination is whether the President breached sections 96(1) and (2)(b) of the Constitution and clause 2.1 of the Executive Ethics Code when he appointed Justice Mlambo as acting justice of the Constitutional Court.

*The Complainants' versions*



- 6.2.4 Ms Phasha contends that the President violated section 175(1) of the Constitution when appointing Judge Mlambo as acting justice in the Constitutional Court.
- 6.2.5 Mr Shivambu regarded the decision of the President to appoint Judge Mlambo as acting justice in the Constitutional Court, as being unlawful and unethical and contravening section 96 of the Constitution and clause 2.1 of the Executive Ethics Code, as Justice Mlambo was the President's preferred candidate for the position of Chief Justice.

*The President's version*

- 6.2.6 The Public Protector, through a letter dated 15 September 2022, requested the President to respond to the allegations levelled against him. He responded in a letter dated 17 October 2022, stating that:
- 6.2.6.1 He read the complaint lodged with the Public Protector against him and he disputes the allegations that Judge Mlambo was his preferred candidate for the position of Chief Justice of the Constitutional Court and that he was behind his appointment as acting justice of the Constitutional Court. He did not instruct Chief Justice Zondo to appoint Judge Mlambo as an acting justice of the Constitutional Court;
- 6.2.6.2 He ensures that the prescribed process on the appointment of the acting justices of the Constitutional Court is followed whenever he appoints acting justices;
- 6.2.6.3 On 23 November 2021, he received a submission from the Minister for the appointment of acting justices of the Constitutional Court. In his submission, the Minister indicated that Chief Justice Zondo had informed him of the expiry of the acting term of Justices Rogers, Pillay and Judge President Tlaletsi. It was also indicated to him that these Justices should be appointed for a further term for the period 11 December 2021 to 15 January 2022;



- 6.2.6.4 Justices Mlambo and Unterhalter were also recommended for appointment for the period 16 January 2022 to 30 March 2022. He had therefore followed the process prescribed in section 175(1) of the Constitution when appointing the five judges as acting justices of the Constitutional Court.

*Notice in terms of Rule 41(1) of the Public Protector Rules*

- 6.2.7 On 08 June 2023, Rule 42(1) and Rule 41(1) Notices were issued to the Complainants, inviting them to submit representations on why the Public Protector should not proceed to close the investigation as prescribed by the Public Protector Rules which provides that:

*“[W]hen the Public Protector intends concluding a complaint by means of a closing report [...] the complainants shall be informed in writing accordingly and be given an opportunity to make representation in connection with the intended closure of the complaint within 14 days of delivery of the notification”.*

- 6.2.8 In terms of Rule 41(2) the Public Protector may, if the Complainant has not responded within the prescribed timeframe of fourteen (14) days, proceed with the closing of the investigation.
- 6.2.9 Ms Phasha stated on 09 June 2023 that she was withdrawing her complaint and Mr Shivambu did not respond to the Notice. Thus, neither Complainants submitted any evidence to the contrary of the Notice issued.
- 6.2.10 The Public Protector will not pursue this investigation any further on the basis that the allegations made by the Complainants were not supported by evidence.

*Applicable law*



- 6.2.11 The legal framework as discussed under the first issue is *mutatis mutandis* applicable to this issue.

*Analysis*

- 6.2.12 Section 96(1) and (2)(b) of the Constitution requires a member of the cabinet, in this instance the President, to act in accordance with the Executive Ethics Code and not to act in any way that is inconsistent with his office or expose himself to any situation involving the risk of a conflict between his official responsibilities and private interest.
- 6.2.13 Furthermore, in terms of clause 2.1 of the Executive Ethics Code, the President was required to perform his duty including his constitutional obligations, in this instance, the appointment of acting justices in the Constitutional Court, diligently and honestly.
- 6.2.14 Section 175(1) of the Constitution enjoins the President in appointing acting justices in the Constitutional Court, to do so on recommendation of the Minister acting with the concurrence of the Chief Justice. The President appointed Judge Mlambo to act in the Constitutional Court for the period 16 January 2022 to 31 March 2022. This was after Judge Mlambo was recommended to the President by the Minister on 23 November 2021 acting in concurrence with Chief Justice Zondo.
- 6.2.15 When appointing Judge Mlambo, who was recommended by the Minister acting with the concurrence of Chief Justice Zondo, the President fulfilled his constitutional duty in terms of section 175(1) of the Constitution, as required by section 96(1) and (2)(b) of the Constitution read with clause 2.1 of the Executive Ethics Code, which requires the President to perform his constitutional obligations diligently, honestly, and in the best interest of good governance.

*Conclusion*



- 6.2.16 The evidence before the Public Protector reveals that the President appointed Judge Mlambo on 30 November 2021 as acting justice in the Constitutional Court for the period 16 January to 30 March 2022. This was after the President received a recommendation letter dated 23 November 2021 from the Minister, who received the concurrence of Chief Justice Zondo.
- 6.2.17 The Public Protector's investigation could not find evidence that the President acted unlawfully or unethically, with the aim of capturing the judiciary or that he manipulated the law to ensure that Judge Mlambo gained an unfair advantage in the selection process for the position of Chief Justice.

## 7 FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that should have been complied with and the impact thereof on good administration, the Public Protector makes the following findings:

### 7.1 **Whether the Minister of Justice and Correctional Services, Mr RO Lamola, violated section 175(1) of the Constitution when he suggested Judge Mlambo to Chief Justice Zondo for concurrence and recommending him to the President, for an acting appointment in the Constitutional Court of South Africa, and if so, whether such conduct was unlawful and unethical and contravened section 96(1) and (2)(b) of the Constitution, and clause 2(1)(b) and (c) of the Executive Ethics Code**

- 7.1.1 The allegation that the Minister of Justice and Correctional Services, violated section 175(1) of the Constitution when he suggested Justice Mlambo to Chief Justice Zondo for concurrence, and recommending him to the President for acting appointment in the Constitutional Court, and therefore breached section 96(1) and (2)(b) of the Constitution; and clause 2(1)(b) and (c) of the Executive Ethics Code, **is not substantiated.**



- 7.1.2 The Minister suggested to Chief Justice Zondo to consider Justice Mlambo for concurrence, to enable the Minister to recommend him to the President for acting appointment in the Constitutional Court for the period of 01 August 2021 to 30 September 2021. Chief Justice Zondo did not give concurrence and Judge Mlambo was neither recommended by the Minister nor appointed by the President as acting justice of the Constitutional Court. However, Judge Mlambo was on recommendation of Chief Justice Zondo, appointed by the President as acting justice in the Constitutional Court for the period 16 January 2022 to 31 March 2022, on recommendation by the Minister dated 23 November 2021.
- 7.1.3 Section 175(1) of the Constitution requires the Minister, with the concurrence of the Chief Justice, to recommend judges to the President for appointment as acting justices in the Constitutional Court. The conduct of the Minister in particular to suggest the name of Justice Mlambo for acting appointment to Chief Justice Zondo, was not inconsistent with section 175(1) of the Constitution.
- 7.1.4 Therefore, the conduct of Minister in this regard was not in breach of section 96(1) and (2)(b) of the Constitution, and clause 2.1 of the Executive Ethics Code.
- 7.2 Whether the President, Mr MC Ramaphosa, violated section 175(1) of the Constitution, when he appointed Judge President Mlambo as acting justice of the Constitutional Court of South Africa, and if so whether such conduct was in breach of section 96(1) and (2)(b) of the Constitution, and clause 2(1)(b) and (c) of the Executive Ethics Code**
- 7.2.1 The allegation that the President, Mr. MC Ramaphosa, violated section 175(1) of the Constitution, when he appointed Judge President Mlambo as acting justice of the Constitutional Court of South Africa, and therefore



breached section 96(1) and (2)(b) of the Constitution; and clause 2(1)(b) and (c) of the Executive Ethics Code, **is not substantiated.**

7.2.2 The President appointed Justice Mlambo as acting justice of the Constitutional Court for the period 16 January 2022 to 30 March 2022 on receipt of the recommendation from the Minister dated 23 November 2021, indicating that he had the support of Chief Justice Zondo, in terms of section 175(1) of the Constitution.

7.2.3 The Public Protector could not find evidence that the President had violated section 175(1) of the Constitution at the time he appointed Justice Mlambo as acting justice in the Constitutional Court.

7.2.4 Therefore, no evidence could be found to support the allegation that the conduct of the President in this regard was in breach of section 96(1) and (2)(b) of the Constitution, and clause 2.1 of the Executive Ethics Code.

## 8. CONCLUSION

8.1 The Public Protector considers this matter finalised and cannot take it further. Should any party wish to challenge this decision, they are at liberty to explore legal remedies at their disposal.

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**ADV KHOLEKA GCALEKA**  
**ACTING PUBLIC PROTECTOR OF**  
**THE REPUBLIC SOUTH AFRICA**  
**DATE: 30 JUNE 2023**

*Assisted by: Adv Elsabe de Waal*

*Senior Manager: PII Inland*