

**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: 58 of 2022/23**

**ISBN: 978-1-991244-10-9**

**INVESTIGATION INTO ALLEGATIONS OF FAILURE AND/OR UNDUE DELAY BY THE  
ERSTWHILE SPEAKER OF THE NATIONAL ASSEMBLY, MS THANDI MODISE, TO  
INVESTIGATE A COMPLAINT LODGED BY MR FREDDIE NYATHELA**

<b>TABLE OF CONTENTS</b>		
<b>ITEM</b>	<b>DESCRIPTION</b>	<b>PAGE</b>
	<b>LIST OF ACRONYMS</b>	<b>3</b>
<b>1.</b>	<b>INTRODUCTION</b>	<b>4</b>
<b>2.</b>	<b>THE COMPLAINT</b>	<b>4</b>
<b>3.</b>	<b>POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR</b>	<b>6</b>
<b>4.</b>	<b>THE ISSUES IDENTIFIED FOR INVESTIGATION</b>	<b>7</b>
<b>5.</b>	<b>THE INVESTIGATION</b>	<b>7</b>
<b>6.</b>	<b>THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS</b>	<b>12</b>
<b>7.</b>	<b>FINDINGS</b>	<b>30</b>
<b>8.</b>	<b>CONCLUSION</b>	<b>31</b>

**LIST OF ACRONYMS**

<b>AGSA</b>	Auditor-General of South Africa
<b>Complainant</b>	Mr Freddie Nyathela
<b>Constitution</b>	The Constitution of the Republic of South Africa, 1996
<b>Department</b>	Department of Arts and Culture
<b>Notice</b>	Notice issued in terms of rule 41(1) of the <i>Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto</i> , 2018
<b>OISD</b>	Office on Institution Supporting Democracy
<b>Portfolio Committee</b>	Portfolio Committee on Arts and Culture
<b>Public Protector Act</b>	Public Protector Act 23 of 1994
<b>SARA</b>	South African Roadies Association
<b>OISD</b>	Office on Institution Supporting Democracy
<b>Standing Committee</b>	Standing Committee on the Auditor-General
<b>PPIPPLA</b>	Powers, Privileges and Immunities of the Parliament and Provincial Legislature Act 4 of 2004

## 1. INTRODUCTION

- 1.1. This is a closing report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), 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 Matters Incidental thereto, 2018* as amended<sup>1</sup> (the Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act.
- 1.2. The report is submitted to the following recipients in terms of sections 8(1) and (3) of the Public Protector Act:
  - 1.2.1. The Complainant, Mr Freddie Nyathela;
  - 1.2.2. The Speaker of the National Assembly, Ms Nosiviwe Mapisa-Nqakula;
  - 1.2.3. The erstwhile Speaker of the National Assembly, Ms Thandi Modise; and
  - 1.2.4. The Deputy Speaker of the National Assembly, Mr Lechesa Tsenoli.
- 1.3. The report relates to an investigation into allegations of failure and/or undue delay by the erstwhile Speaker of the National Assembly, Ms Thandi Modise (Ms Modise), to investigate a complaint lodged by the President of the South African Roadies Association (SARA), Mr Freddie Nyathela (the Complainant).

## 2. THE COMPLAINT

- 2.1. The complaint was lodged with the Public Protector on 11 March 2020. The Complainant alleged the following:
  - 2.1.1. That, during 2015, SARA lodged a complaint with the Public Protector against the Department of Arts and Culture (the Department) regarding its failure to fulfil its commitments to SARA, resulting in a Settlement Agreement being

---

<sup>1</sup> Published under Government notice No 945, Government Gazette 41903 of 14 September 2018 and Amended in Government Notice No 1047, Government Gazette 43758 dated 2 October 2020.

- concluded between the Public Protector, the Department and SARA. However, the Department failed to comply with the terms and conditions of the Settlement Agreement.
- 2.1.2. That, on 26 February 2016, he lodged a complaint with the Chairperson of the Portfolio Committee, Ms X Tom (Ms Tom) in terms of section 17(2) of the Powers, Privileges and Immunities of the Parliament and Provincial Legislature Act 4 of 2004 (PPIPPLA) against four (4) officials of the Department, namely; Ms Monica Newton (Ms Newton), Mr Vusi Ndima (Mr Ndima), Dr M Jokweni (Dr Jokweni) and the former Acting Director-General, Mr Vuyo Jack (Mr Jack);
- 2.1.3. That, on 21 June 2019, he lodged a complaint with the erstwhile Speaker of the National Assembly, Ms Thandi Modise (Ms Modise), requesting urgent intervention and resolution of the complaint he had lodged with Ms Tom in 2016;
- 2.1.4. That, in an email dated 21 June 2019 to Ms Modise, he informed her of the dishonesty and misdirection experienced by SARA from the four (4) officials of Parliament, namely; Mr Momelezi Sikweyiya (Mr Sikweyiya), Mr Nathi Mjenxane (Mr Mjenxane), Adv Zuraya Adhikarie (Adv Adhikarie) and Ms Tom. On 24 June 2019, SARA received an acknowledgement letter from the Registrar in the office of Ms Modise, Mr Shaun Edem;
- 2.1.5. That, he enquired from Ms Modise through an email dated 25 August 2019, wherein he informed her that SARA was awaiting a response from her, however, she failed to attend to his complaint;
- 2.1.6. That, in an email dated 18 September 2019, he escalated his complaint to the Deputy Speaker of the National Assembly Mr L Tsenoli (Mr Tsenoli), wherein he requested his intervention in the complaint that he lodged with Ms Modise, as she was neither responding, nor attending to his complaint;
- 2.1.7. That, on 06 December 2019, he received a response from Mr Tsenoli dated 08 November 2019, wherein he referred to the Complainant's letter dated 17 September 2019, that he raised a complaint against senior officials of the Department, who allegedly presented dishonest statements to Parliament;

- 2.1.8. That, his complaint only related to a request for urgent assistance from Ms Modise to intervene and resolve his matter and that he never raised the complaint that Mr Tsenoli referred to;
- 2.1.9. That in the said letter, Mr Tsenoli further informed him that in the minutes of the Portfolio Committee meeting held on 25 October 2019, which he had attended, and wherein he was given an opportunity to make a representation, with the AGSA in attendance, it was recorded that he informed the said Committee that he reported his complaint to the Minister of Arts and Culture, the National Treasury and the Public Protector;
- 2.1.10. That, he never attended a meeting of the Portfolio Committee on 25 October 2019, and the assertion that he was given an opportunity to make representations with the AGSA in attendance was not true. The AGSA was not in attendance at the meeting of the Portfolio Committee held on 25 October 2019;
- 2.1.11. That, he responded to Mr Tsenoli and requested him to review his letter dated 08 November 2019, since the contents were not true. However, Mr Tsenoli failed to respond. He alleged that since Ms Modise failed to resolve his complaint and Mr Tsenoli submitted false information to him in responding to the complaint, such conduct amounts to maladministration.

### **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 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 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 additional powers and functions prescribed by national legislation.
- 3.4. Section 6(4) of the Public Protector Act, 1994 (Public Protector Act) regulates the manner in which the powers conferred by section 182 of the Constitution may be exercised in respect of government at any level.
- 3.5. The affairs of Parliament constitute conduct in public affairs and fall within the ambit of the Public Protector. The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

#### **4. ISSUE IDENTIFIED FOR INVESTIGATION**

- 4.1. Based on analysis of the complaint, the following issue was identified to inform and focus the investigation:
  - 4.1.1. Whether Ms Modise failed and/or unduly delayed to investigate a complaint lodged by the Complainant on 21 June 2019 against four (4) Parliamentary officials, and if so; whether such conduct amounts to improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

#### **5. THE INVESTIGATION**

##### **5.1. Methodology**

- 5.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

5.1.2. The Public Protector Act confers on the Public Protector, the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

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

5.2.1. The process involved sourcing information and documents from the Complainant, Ms Modise, Mr Tsenoli and Ms Mapisa-Nqakula.

5.2.2. The analysing of documents, and examination of regulatory instruments, including constitutional provisions, legislation, regulations and relevant court decisions.

5.2.3. The investigation was approached using an enquiry process that seeks to determine:

- (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 maladministration, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?

5.2.4. 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 the alleged conduct was inconsistent with the applicable prescripts.

5.2.5. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Parliament.



### 5.3. The Investigation Process

- 5.3.1. A preliminary investigation was conducted in terms of section 7(1) of the Public Protector Act, which sought to determine the merits of the complaint, allegation or information, and the manner in which the matter should be dealt with, including whether a “full scale” investigation was justified.
- 5.3.2. Upon receipt of the complaint, in line with the Public Protector Rules, prior to commencing the investigation, the Public Protector issued a letter of enquiry dated 11 June 2020 to the Complainant for clarity and to confirm the issues he raised in his complaint.
- 5.3.3. The Complainant responded to the Public Protector through an email dated 26 June 2020, wherein he alleged that his complaint was lodged against Ms Modise only, in that, she failed to investigate a complaint he lodged with her on 21 June 2019, relating to the *“dishonesty and misdirection experienced by SARA at the hands of at least 4 Parliamentary officials, Mr Momelezi Sikweyiya, Mr Nathi Mjenxane, Advocate Zuraya Adhikarie and Ms X Tom”*. The Complainant stated that his complaint did not include Mr Tsenoli.
- 5.3.4. In the circumstances, the Public Protector proceeded with a full scale investigation into the alleged failure and/ or undue delay by Ms Modise to attend to the complaint lodged by the Complainant.
- 5.3.5. In line with section 7(4)(b) of the Public Protector Act, the investigation process commenced with correspondence to Ms Modise, the erstwhile Speaker of Parliament, Ms Mapisa-Nqakula, the current Speaker and Mr Tsenoli, the Deputy Speaker, on 17 December 2021.
- 5.3.6. The method followed in conducting the investigation included:
- (a) Communication by telephone, letters and emails; and
  - (b) Obtaining records or documents relevant to the investigation which were in the possession or under control of a state institution.

#### 5.4. Key sources of information

##### 5.4.1. Documents and e-mail correspondence

- 5.4.1.1. Copy of a Legal Opinion dated 13 February 2017 addressed to Ms. X Tom, Chairperson of the Portfolio Committee of Arts and Culture from the Legal Advisor and Adv A Gordon, Acting Senior Legal Advisor;
- 5.4.1.2. Copy of a letter dated 22 March 2017 from the Chairperson of Portfolio Committee on Arts and Culture, Ms XS Tom, addressed to the Complainant;
- 5.4.1.3. Copies of several emails from officials of parliament relating to the period of 24 October 2017 to 11 July 2018 about “SARA’s *legitimate complaint filed on 26 February 2016*”;
- 5.4.1.4. Copy of a letter dated 17 September 2019 from the Complainant, addressed to Mr SL Tsenoli;
- 5.4.1.5. Copies of several emails from the Complainant relating to the period of 06 October 2017 to 21 June 2019;
- 5.4.1.6. Copy of the Minutes of the meeting of the Standing Committee on the Auditor General of South Africa dated 25 October 2019;
- 5.4.1.7. Copy of a letter dated 08 November 2019 from Mr SL Tsenoli addressed to the Complainant;
- 5.4.1.8. Complaint letter from the Complainant dated 13 January 2020;
- 5.4.1.9. Letter from the Public Protector dated 11 June 2020 addressed to the Complainant;
- 5.4.1.10. Response email from the Complainant dated 22 June 2020;

- 
- 5.4.1.11. Copy of an email from the Complainant dated 22 June 2020;
- 5.4.1.12. Copy of a letter from the Public Protector dated 17 December 2021 addressed to Ms Modise;
- 5.4.1.13. Copy of a letter from the Public Protector dated 17 December 2021, addressed to Mr Tsenoli;
- 5.4.1.14. Copy of a letter dated 17 December 2021, from the Public Protector addressed to Ms Mapisa-Nqakula;
- 5.4.1.15. Copy of a response letter from Mr Tsenoli, received by the Public Protector on 10 February 2022;
- 5.4.1.16. Copy of a response letter addressed to the Public Protector dated 7 February 2022 from Ms Mapisa-Nqakula;
- 5.4.1.17. Copy of a response letter addressed to the Public Protector dated 14 February 2022 from Ms Modise;
- 5.4.1.18. Notice issued in terms of Rule 41(1) of the Public Protector Rules from the Public Protector dated 21 September 2022, addressed to the Complainant; and
- 5.4.1.19. Copy of the Complainant's email dated 17 October 2022 to the Public Protector.
- 5.4.2. **Recordings**
- 5.4.2.1. Recordings of the Portfolio Committee on Arts and Culture from Parliament, received in a form of a universal serial bus (USB) by the Public Protector from PostNet on 10 March 2022.

#### 5.4.3. **Legislation and other prescripts**

5.4.3.1. The Constitution of the Republic of South Africa, 1996 (Constitution);

5.4.3.2. The Public Protector Act 23 of 1994 (the Public Protector Act);

5.4.3.3. The Powers, Privileges and Immunities of the Parliament and Provincial Legislature Act 4 of 2004 (PPIPPLA).

#### 5.4.4. **Notice issued in terms of Rule 41(1) of the Public Protector Rules**

5.4.4.1. On 21 September 2022, a Notice in terms of Rule 41(1) of the Public Protector Rules was issued to the Complainant to provide him with an opportunity to make further submissions in relation to the proposed closure of the investigation. Rule 41(1) of the Public Protector Rules provides that when the Public Protector intends concluding a complaint by means of a closing report provided for in Rule 40(b), the Complainant shall be informed in writing accordingly, and be given an opportunity to make representations in connection with the intended closure of the complaint, within fourteen (14) days of delivery of the notification.

5.4.4.2. A response was received from the Complainant on 17 October 2022, and has been duly considered by the Public Protector.

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

6.1. **Whether Ms Modise failed and/or unduly delayed to investigate a complaint lodged by the Complainant on 21 June 2019 against four (4) Parliamentary officials, and if so; whether such conduct amounts to improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

*Common cause issue*

- 6.1.1. On 21 June 2019, on behalf of SARA, Mr Graeme Gilfillan (Mr Gilfillan) lodged a complaint with the office of the Speaker in terms of section 17(2) of the PPIPPLA, against four parliamentary officials namely, Mr Sikweyiya, Mr Mjexane, Adv Adhikarie and Ms Tom.

*Issue in dispute*

- 6.1.2. The issue for the Public Protector's determination was whether Ms Modise failed to investigate the complaint lodged by the Complainant on 21 June 2019.

*Complainant's version*

- 6.1.3. In an email dated 26 June 2020, the Complainant alleged that Ms Modise failed to investigate a complaint that he lodged with her on 21 June 2019, relating to "dishonesty and misdirection experienced by SARA" at the hands of the above officials.

*Response received from Ms Mapisa-Nqakula*

- 6.1.4. On 17 December 2021, the Public Protector raised the allegations with Ms Modise, Ms Mapisa-Nqakula and Mr Tsenoli.
- 6.1.5. In a letter dated 07 February 2022 to the Public Protector, Ms Mapisa-Nqakula submitted that she did not have any knowledge of the details of the matter under investigation.
- 6.1.6. Ms Mapisa-Nqakula referred the Public Protector to a letter dated 17 December 2021, from Mr Xaso, an official in the office of the Secretary to the National Assembly in response to the allegations by the Complainant.

*Response received from Mr Masibulele Xaso*

- 6.1.7. In the correspondence dated 17 December 2021, Mr Xaso stated that on 25 February 2016, the Deputy Secretary to the National Assembly Table Division, wrote to the Complainant in response to his enquiry for information regarding the processing of allegations of a breach of section 17(2) of the PPIPPLA, by officials of the Department. He further stated that the allegations could not be taken lightly as they could have serious consequences for the said officials, and advised the Complainant to write to Ms Modise and present his complaint and evidence in support thereof.
- 6.1.8. Furthermore, that through a letter to Ms Tom dated 26 February 2016, Mr Gilfillan who headed the Business Affairs of SARA, submitted allegations against the four (4) officials of the Department, namely; Ms Newton, Mr Ndima, Dr Jokweni and Mr Jack.
- 6.1.9. In addition, Mr Xaso submitted that on 21 June 2019, the office of the Speaker received correspondence from Mr Gilfillan, wherein he requested Ms Modise's intervention with respect to his allegations that senior officials of the Department breached section 17(2) of PPIPPLA, when they appeared before the Portfolio Committee.
- 6.1.10. Mr Xaso further stated that in support of his complaint to the office of the Speaker, Mr Gilfillan attached copies of various documents, including a letter dated 30 January 2015 from Mr Jack, addressed to the Office on Institution Supporting Democracy (OISD), Ms Elmarie Lewis, wherein Mr Gilfillan alleged that their complaint was never attended to.
- 6.1.11. Furthermore, Mr Xaso submitted that the letter dated 30 January 2015 was a response to enquiries made by the OISD, relating to progress made by the Department in implementing the Settlement Agreement signed by SARA and the Department that was facilitated by the Public Protector. Mr Xaso also stated that, Mr Jack in passing, remarked that the relationship between the Department and SARA was often fractious, based on SARA's unrealistic expectations relating to the level of support the Department could provide to it.

- 6.1.12. He averred that in the said correspondence from Mr Gilfillan, he did not substantiate the allegations that the officials of the Department acted dishonestly during their interaction with the Portfolio Committee, except to merely make the allegation.
- 6.1.13. He highlighted that in previous correspondence and in Portfolio Committee meetings concerning the implementation of the Settlement Agreement, there was always a dispute of fact between SARA and the Department, as SARA always accused the officials of the Department of being dishonest, when they differed in the interpretation of issues in dispute.
- 6.1.14. Mr Xaso submitted further that the said allegations were made by SARA at the time the Portfolio Committee was engaging SARA and the Department regarding the implementation of the Settlement Agreement, therefore, the Committee was aware of the allegations by the time it concluded the engagements on this matter in March 2017.
- 6.1.15. Furthermore, Mr Xaso contended that during the said engagements, it became apparent that the Portfolio Committee could not assist the Department and SARA to resolve their dispute. The Department submitted that it was not allowed by law to assist SARA with the renovations endorsed by the Settlement Agreement. This was supported by the Department's legal opinion.
- 6.1.16. He further provided that prior to the conclusion of engagements between SARA and the Department, the Portfolio Committee sought legal advice on the matter from Parliament's Legal Services. Subsequently, it received a legal opinion dated 13 February 2017, signed by Mr Mjenxane and countersigned by the acting Senior Legal Advisor, Adv Gordon (Adv Gordon).
- 6.1.17. The essence of the legal opinion was that "*the Settlement Agreement reached between SARA and the Department was contractual in nature, and therefore it was governed by private law*". The Committee was precluded from intervening in the matter, and therefore, SARA had a right to approach the Court if it was

not satisfied with the manner in which the Department implemented the Settlement Agreement.

6.1.18. Mr Xaso provided the Public Protector with a copy of the said legal opinion, wherein it was opined as follows:

*“10 Our analysis of the Constitution and the law indicates that there is no constitutional or legislative relationship between the Department of Arts and Culture and SARA. The relationship purports to be a contractual one. Enforcing contractual rights and obligations between contracting parties falls beyond the mandate of the Portfolio Committee on Arts and Culture.*

*11 In the event that SARA is of the view that the Department may have breached the terms of a valid contract, a court of law and not the Portfolio Committee on arts and culture would be the proper forum for it to vindicate its rights as set out in the alleged contract”. (sic)*

6.1.19. He also stated that on 23 March 2017, Ms Tom wrote to SARA and informed it about the Portfolio Committee’s decision based on the legal opinion. He provided the Public Protector with a copy of the letter, however, it was dated 22 March 2017. In the letter, Ms Tom responded to the Complainant regarding his complaint relating to the Department and SARA.

6.1.20. Mr Xaso stated that Ms Tom further advised the Complainant in the letter that the Portfolio Committee is part of the legislative arm of the state and does not dictate how the executive organ and its entities should carry out its business activities, and that it would continue to hold the executive to account for its activities in line with the Constitution, applicable law, rules, procedure and conventions. He attached a copy of the legal opinion, dated 13 February 2017 to the letter that was issued to the Complainant.

6.1.21. Mr Xaso added that the Complainant was informed that if he was not satisfied with the outcome, as he expressed his rejection of the response when it was communicated to him, he had alternative options that he could pursue.



- 6.1.22. Mr Xaso submitted that the oversight function is performed by either the House or its Committees, and not the Speaker, and in this instance, the Committee did its oversight work and it was seized with SARA's matter for a period of three (3) years.
- 6.1.23. He further submitted that between the period of 2012 and 2014, the matter was handled by the Portfolio Committee on Justice and Correctional Services. Therefore, it was not correct that there was no response from the Committee on this matter.
- 6.1.24. He highlighted that a complaint in terms of section 17(2) of PPIPPLA, is a criminal complaint and it should be referred to the appropriate law enforcement agency.
- 6.1.25. He submitted that in the email dated 21 June 2019, Mr Gilfillan included allegations of dishonesty and misdirection that SARA suffered at the hands of the Parliamentary officials, namely; Mr Sikweyiya, Mr Mjexane, Adv Adhikarie and Ms Tom. The said officials interacted with the Complainant and/or SARA, when SARA's matter was deliberated upon by the Portfolio Committee, and after the engagements were concluded.
- 6.1.26. He further submitted that Ms Tom was a Member of Parliament and the Chairperson of the Committee, who enjoyed parliamentary privilege in the House or its Committees. Therefore, a breach of section 17(2) of PPIPPLA, would not have been applicable to her actions or submissions in the course of her parliamentary duties as she was covered by parliamentary privileges in line with the provisions of PPIPPLA.
- 6.1.27. Mr Xaso stated that Mr Sikweyiya's role in the matter was to reiterate what was communicated by Ms Tom, through a letter issued to the Complainant dated 23 March 2017. Mr Mjexane provided a legal opinion, dated 13 February 2017, and Adv Adhikarie who managed Mr Mjexane, approved the said legal opinion.

- 6.1.28. Mr Xaso confirmed that Mr Tsenoli replied to the Complainant through a letter, dated 08 November 2019. He referred to SARA's letter dated 17 September 2019, which was a complaint against senior officials of the Department.
- 6.1.29. He further stated that the Portfolio Committee did not make a finding that the said officials of the Department presented dishonest statements to Parliament. He averred that, neither the Committee of the sixth Parliament nor its predecessor came to the conclusion that they were lied to, as they could have laid criminal charges against the said officials. Therefore, the allegations against the officials of the Department are opinions of SARA.
- 6.1.30. He also submitted that the response from Mr Tsenoli to the Complainant inadvertently stated that the minutes of the meeting held on 25 October 2019 were that of the Committee whereas the correct position was that the minutes were those of the meeting of the Standing Committee on the Auditor-General (Standing Committee), which was held on that date and attended by the Complainant and the then Auditor-General, the late Mr Kimi Makwetu (Mr. Makwetu).
- 6.1.31. He asserted that the minutes of the Standing Committee indicated that the Complainant and Mr Makwetu were given an opportunity to address the Standing Committee on the complaint which SARA had lodged with the AGSA, regarding SARA's application for funding to the National Arts Council. During the Standing Committee meeting, the Complainant indicated that he had also lodged a complaint with the Minister of Arts and Culture, the National Treasury and the Public Protector. Mr Xaso referred the Public Protector to the minutes of the Standing Committee.
- 6.1.32. According to Mr Xaso, a meeting was held on 25 October 2019, by the Standing Committee. During the said meeting, the Complainant and Mr Makwetu were given an opportunity to address the Standing Committee on the complaint that SARA had lodged with the AGSA, regarding SARA's application for funding to the National Arts Council.

- 6.1.33. He further stated that Mr Tsenoli's letter dated 08 November 2019, erroneously made reference to the minutes of the Portfolio Committee, instead of the Standing Committee.
- 6.1.34. Mr Xaso averred that Ms Modise did not receive a complaint dated 26 February 2016, regarding SARA's allegations against the officials of the Department who were accused of being in breach of section 17(2) of PPIPPLA. Instead of writing to Ms Modise as advised by the Deputy Secretary on 25 February 2016, Mr Gilfillan wrote to Ms Tom on 26 February 2016.
- 6.1.35. He submitted that the office of Ms Modise received a letter of complaint dated 21 June 2019, relating to allegations by SARA that senior officials of the Department misled and misrepresented information to the Portfolio Committee. The Committee found that the Department acted within its legislative mandate regarding its decisions in connection with SARA, and it did not find that the said officials had lied or deliberately misled the Portfolio Committee. The said outcome was communicated to SARA by the Portfolio Committee, which acted on behalf of Parliament.
- 6.1.36. He further mentioned that based on the Portfolio Committee's decision and the communication to the Complainant by Parliament, any further correspondence and attempts to overturn that decision was not necessary. Furthermore, that there was neither a need for an investigation into the conduct of the parliamentary officials, nor to issue a report as SARA's complaint was dealt with by the Portfolio Committee.

*Response from Mr Tsenoli*

- 6.1.37. In an undated letter to the Public Protector, Mr Tsenoli submitted that he had an opportunity to peruse Ms Mapisa-Nqakula's response, dated 07 February 2022, addressed to the Public Protector. He stated that he realised that some of the issues that the Investigation Team raised were similar to the ones raised with him. In this regard, he aligned himself to the response from Ms Mapisa-Nqakula and would respond to issues which related to his office.

6.1.38. Mr Tsenoli responded as follows to the allegations:

- 6.1.38.1 That, he received the Complainant's letter dated 17 September 2019, wherein he requested him to intervene to resolve the complaint he lodged with Ms Modise in terms of section 17(2) of PPIPPLA, which makes it an offence to deceive a House or Committee, or produce false, untrue, fabricated or falsified documents. He confirmed receipt of the Complainant's letter in a correspondence dated 08 November 2019;
- 6.1.38.2 That, he informed the Complainant that *"Minutes of a meeting of the Committee on Arts and Culture on 25 October 2019, show that you attended this meeting and were given an opportunity to make a presentation, with the Auditor-General in attendance. It is also recorded that in that meeting you informed the Committee that you reported your grievances to the Minister of Arts and Culture, the Public Protector and National Treasury, and that you are still awaiting the outcome of their investigation. I wish to advise that, to avoid further duplication of processes, we should all await the outcome of the investigation by those three authorities"*;
- 6.1.38.3 That, it was not a true reflection that the officials of the Department presented dishonest statements to Parliament. This issue was considered by Parliament whilst the engagements on SARA's dispute with the Department was still being considered by the Portfolio Committee. He corroborated Mr Xaso that at the conclusion of the Committee's consideration of the matter, it did not make any finding that the said officials presented dishonest statements to Parliament;
- 6.1.38.4 He further stated that in his response letter dated 8 November 2019, he inadvertently stated that the minutes of the meeting held on 25 October 2019 were that of the Portfolio Committee, whereas they were for the Standing Committee, which was held on the same date, and was attended by both the Complainant and Mr Makwetu.

- 6.1.38.5 That, the Standing Committee concluded that since the Complainant informed it that he lodged a complaint with the Public Protector regarding the matter, it would await the outcome of the said investigation by the Public Protector; and
- 6.1.38.6 That SARA's complaint was dealt with by Parliament through the Standing Committee, however, the Complainant was not satisfied with the outcome.
- 6.1.39. Mr Tsenoli submitted that it was not necessary to conduct an investigation into the conduct of Parliamentary officials as the Complainant did not request his intervention in this regard. Furthermore, that the Complainant had informed the Standing Committee that he reported his complaint to the Minister of Arts and Culture, National Treasury and the Public Protector, hence he informed the Complainant to avoid duplication.

*Response from Ms Thandi Modise*

- 6.1.40. In a letter dated 14 February 2022 to the Public Protector, Ms Modise submitted that she was informed that the Portfolio Committee had the submission from SARA and it concluded that the officials of the Department acted within its legislative mandate, and that the said Committee did not find any reason to believe that the officials had deliberately misled it, as alleged by the Complainant.
- 6.1.41. Ms Modise stated that the said decision was communicated to SARA and advised to seek legal recourse should SARA deem the Portfolio Committee's decision unsatisfactory.
- 6.1.42. She averred that the Speaker of the National Assembly does not perform an oversight role, and that when a complaint of this nature is received by the Speaker, it is referred to the relevant structure, in this instance, the Portfolio Committee to deal with the complaint, in line with its mandate and responsibility.
- 6.1.43. Ms Modise asserted that the matter was dealt with adequately within the confines of the work of the Committee, which acted on behalf of Parliament.

*Analysis of evidence obtained*

- 6.1.44. The Public Protector established from the evidence obtained, in the form of internal communications in the Speaker's office, that the Complainant, on behalf of SARA, exchanged e-mails with Parliamentary officials, in particular Messrs Skewiya and Mjenxane, Ms Nojosi and Adv Adhikarie.
- 6.1.45. In an e-mail dated 25 February 2016, by the Undersecretary: National Assembly Table Division, Mr Nazeem Ismail (Mr Ismail) to the Complainant, Mr Ismail took the latter through the provisions of PPIPPLA and concluded by stating that:
- "The matter which you are raising cannot be taken lightly as the accusations could have serious consequences for the officials concerned. In this instance you could write to the Speaker to raise your concern and present the evidence to support the accusations".*
- 6.1.46. In addition, evidence at the Public Protector's disposal confirmed that the Complainant and Mr Gilfillan communicated with different officials of Parliament through emails at different times from 06 October 2017 to 06 September 2019, regarding SARA's complaint filed on 26 February 2016. The communication included e-mails exchanged between the Complainant and Mr Mjenxane from 06 October 2017 to 04 December 2017, and similar e-mails between the Complainant and Mr Sikweyiya, which all related to SARA's 2016 complaint.
- 6.1.47. In an email dated 15 November 2017, Mr Mjenxane proposed to meet the Complainant in Cape Town at his (the Complainant's) own expense, in an effort to engage SARA on its initial complaint of 2016. However, the Complainant indicated to Mr Mjenxane that he was not willing to pay for his travel costs as Parliament should pay for it.
- 6.1.48. The investigation established that Ms Tom, who received SARA's complaint against the officials of the Department on 26 February 2016, referred the complaint to Parliament's Legal Services for a legal opinion. The legal opinion dated 13 February 2017 opined that the Settlement Agreement reached between SARA and the DAC was contractual in nature, and therefore, the

Committee was precluded from intervening in the matter, and SARA may approach the courts for recourse against the DAC.

6.1.49. On 23 March 2017, Ms Tom communicated the Portfolio Committee's decision to the Complainant, based on the legal opinion. In so doing, the Committee complied with its obligations in terms of section 56 of the Constitution.

6.1.50. The investigation further found that, by an e-mail in February 2016, Mr Ismail, the Undersecretary for the National Assembly Table Division stated as follows to the Complainant, regarding his complaint:

*"The matter which you are raising cannot be taken lightly as the accusations could have serious consequences for the officials concerned. In this instance you could write to the Speaker to raise your concern and present the evidence to support the accusations".*

6.1.51. Furthermore, it is evident from the emails that the Complainant also approached the then Speaker Ms Baleka Mbete (Ms Mbete) on the same issues between 11 July to 02 November 2018, resulting in Ms Mbete referring the Complainant's email or complaint to Mr Skweyiya on 17 January 2019.

6.1.52. Mr Skweyiya, communicated with the Complainant, as per email dated 22 January 2019, informing him that the office of the Speaker has referred his matter to the head of Legal Services of Parliament to attend to his complaint as per the extract of the email below which stated that:

*"...Kindly be advised that office of the Speaker referred your matter to head of Legal Services of Parliament to attend to it and expect a contact from her for clarity of information. I hope and trust they will attend to it and please acknowledge receipt of this e-mail". (sic)*

6.1.53. The Complainant responded through an e-mail to Mr Sikweyiya on the same date, and copied several officials of Parliament, stating as follows:



*“... Thanks for the e-mail; the communication below and attached refers. SARA hopes that finally the Head of Legal Services of Parliament will attend to this long dragging matter without fear or favour. Please could the Office of the Speaker also note that this matter was once referred to Parliament Legal Adviser, Mr Nathi Mjenxane (see communication below) by the Chairperson of the Committee on Arts and Culture Ms X Tom, without any genuine way forward to bring this unfortunate matter to finality. SARA looks forward to hear from the Head of Legal Services of Parliament, as advised by the office of the Speaker. Please advise any questions”. (sic)*

6.1.54. The foregoing was followed by email exchanges between the Complainant and Mr Sikweyiya on 05 February 2019 and 12 March 2019, respectively.

6.1.55. In an e-mail dated 18 June 2019 to the Complainant, Mr Sikweyiya stated as follows: *“Good day Mr Nyathela, Office of the Speaker dealt with your matter, according to Ms Nojosi you claim that your matter was not attended to. On the 5<sup>th</sup> February 2019, I sent you an e-mail with regard to your matter, the following was contained in that letter:*

- 1. There were number of people /departments who dealt with your matter and offered you some advice off which you were not happy;*
- 2. The relevant department that is Arts and Culture did advice you what to do again you were not happy;*
- 3. The Portfolio Committee assigned Parliament Legal Services unit led by Mr Nathi Mjenxane to advice on the matter; they contacted you and offered a written advice you were not happy. The Legal services unit offered to meet with you in JHB you were not happy;*
- 4. Speaker’s office together with Parliament Legal services advised you to explore other avenues include approaching the courts of law;*
- 5. And lastly the office of the Speaker advices you again that you should explore other avenues including the courts.*

*NB Parliament and Speaker core business is to pass laws; oversight; public participation; co-operative governance and international relations.” (sic)*



- 6.1.56. Evidence before the Public Protector confirms that Mr Graeme Gilfillan (Mr Gilfillan), acting on behalf of the Complainant/SARA addressed an email dated 21 June 2019, to the office of the then Speaker, Ms Thandi Modise (Ms Modise), using the 'Speaker Speaker' email address and copied Ms Nogolide Nojosi (Ms Nojosi).
- 6.1.57. Mr Shaun Edem (Mr Edem), the Registrar in the Office of the Speaker, responded to Mr Gilfillan stating, *inter alia*, that the matter will be “referred to the Executive Director, Ms Nogolide Nojosi, for further processing”.
- 6.1.58. Though the investigation confirmed that the Complainant, through Mr Gilfillan, lodged a complaint on 21 June 2019, however, the email was sent to the Speaker’s office and not directly to Ms Modise. As indicated above, Mr Edem acknowledged receipt of the complaint but also advised Mr Gilfillan that Ms Nojosi would process the matter further. Therefore, according to evidence, the handling of the Complainant’s matter was assigned to Ms Nojosi, the Executive Director in the Speaker’s office.
- 6.1.59. This information is further corroborated by an email dated 06 September 2019, to Ms Nojosi, in which Ms Modise was copied, stating as follows:
- “Dear Ms Nojosi, Thanks for our telephone contact of the afternoon, As per your request; please find communication below dated 21 June 2019 at 07:22 AM, addressed to the Honourable Speaker Ms Modise, from SARA’s Business Affairs, which you were copied. SARA looks forward to finally receive a genuine response from the Office of the Speaker”. (sic)*
- 6.1.60. This email once more confirms that Ms Nojosi was entrusted with the Complainant’s matter. The Complainant concludes the email by stating that SARA looks forward to a “response from the Office of the Speaker” and not the Speaker herself.
- 6.1.61. On 25 August 2019, an e-mail was sent from “Copyright” to the Speaker in which several parties, including Ms Nojosi and Adv Mkhwebane were copied.

In this correspondence, SARA expressed several misgivings about what had been stated in a media article.

- 6.1.62 Furthermore, whilst the investigation also established that the complaint lodged with the Speaker's office included the Complainant's dissatisfaction with the conduct of the four (4) parliamentary officials namely; Ms Tom, Mr Sikweyiya, Mr Mjexane and Adv Adhikarie, who according to the Complainant, misdirected Parliament, however, there is no information provided to the Public Protector indicating that the Complainant furnished evidence to the Speaker's office or to Ms Modise to substantiate his accusations against the parliamentary officials, as advised by Mr Ismail. In addition, the Complainant also did not provide such evidence directly to the Investigation Team in order to ascertain the veracity of his complaint that the parliamentary officials contravened section 17(2) of PPIPPLA.
- 6.1.63 Therefore, the legal opinion dated 13 February 2017 which stated that the Settlement Agreement reached between SARA and the DAC was contractual in nature, and therefore, it was governed by private law and that the Complainant/SARA should approach the courts if they were unhappy about the manner the DAC implemented the agreement remains in force.
- 6.1.64 The Public Protector further notes that the complaint lodged by Mr Gilfillan on 21 June 2019, was preceded by a detailed response from Mr Skweyiya to the Complainant dated 18 June 2019, wherein the latter advised him that according to Ms Nojosi, the Office of the Speaker dealt with his matter. In the same email Mr Skweyiya further advised the Complainant that "*Parliament and Speaker core business is to pass laws; oversight; public participation; co-operative governance and international relations.*"
- 6.1.65 In his response, Mr Xaso stated that the Committee found that the Department acted within its legislative mandate regarding its decisions in connection with SARA, and it did not find that the said officials had lied or deliberately misled the Portfolio Committee. He further submitted that based on the Portfolio Committee's decision and the communication to the Complainant by Parliament, any further correspondence and attempts to overturn that decision

was not necessary. Furthermore, that there was neither a need for an investigation into the conduct of the parliamentary officials, nor to issue a report, as SARA's complaint was dealt with by the Portfolio Committee.

*Complainant's Response to the Notice issued in terms of Rule 41(1) of the Public Protector Rules*

6.1.66 In an email dated 17 October 2022, from the Complainant to the Public Protector, he submitted, *inter alia*, that "SARA has reviewed the Notice as attached and whilst SARA is not in agreement with the findings as detailed in the Notice, SARA will not oppose the Public Protector's findings as detailed in the Notice nor make any representations in that regard".

6.1.67 The Public Protector has noted the Complainant's submission in this regard and although in his response the Complainant has indicated his disagreement with the Public Protector's provisional findings as contained in the Notice, he did not provide the basis for that divergence or provide any further information or evidence that would vary the Public Protector's decision to close the investigation into this matter.

*Application of the relevant law*

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

6.1.68 In terms of section 56 of the Constitution, the National Assembly or any of its committees may—"(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions".

6.1.69 Section 195(1) of the Constitution provides that public administration in every sphere of government must be underpinned by amongst others, the following democratic values and principles-

(a) A high standard of professional ethics must be promoted and maintained.

6.1.70 Having regard to the above provision, the officials of Parliament dealt with SARA's Complaint and responded to the Complainant through Mr Sikweyiya on 18 June 2019.

6.1.71 On 18 June 2019, Mr Sikweyiya informed the Complainant that he should approach the court to seek the resolution of his complaint. This was in line with the provisions of section 195(1)(a) of the Constitution in the execution of their duties.

6.1.72 **The Powers, Privileges and Immunities of the Parliament and Provincial Legislature Act 4 of 2004 (PPIPPLA).**

6.1.72.1 Section 17(2) of PPIPPLA provides that:

*“ A person who:-*

*(a) Threatens or obstructs another person in respect of evidence to be given before a House or committee;*

*(b) Induces another person*

*(i) to refrain from giving evidence to or producing a document before a House or committee; or*

*(ii) to give false evidence before a House or committee;*

*(c) assaults or penalises or threatens another person or deprives that person of any benefit on account of the giving or proposed giving of evidence before a House or committee;*

*(d) with intent to deceive a House or committee, produces to the House or committee any false, untrue, fabricated or falsified document; or*

*(e) whether or not during examination under section 15, wilfully furnishes a House or committee with information, or makes a statement before it, which is false or misleading, commits an offence and is liable to a fine or imprisonment for a period not exceeding two years or to both the fine and imprisonment”.*

6.1.72.2 In terms of PPIPPLA, it is a criminal offence to present false and dishonest statements to Parliament and its committees.

6.1.72.3 Therefore, the allegations that the Complainant raised against the officials of the Department and Parliament in terms of section 17(2) of PPIPPLA, had serious ramifications and required to be supported with evidence.

#### *Conclusion*

6.1.73 It is evident from the several email correspondence canvassed above that different officials of Parliament communicated with the Complainant and Mr Gilfillan regarding the complaint lodged by SARA in February 2016.

6.1.74 In light of the above, the allegation by the Complainant that his complaint in terms of PPIPPLA was not attended to by Parliament is not supported by the evidence before the Public Protector.

6.1.75 Furthermore, whilst the investigation did not obtain information that Ms Modise responded directly to the Complainant, there is sufficient information before the Public Protector that parliamentary officials, including Ms Nojosi attended to his complaint.

## 7. FINDINGS

Having regard to the evidence, regulatory framework determining the standard Parliament should have complied with, the Public Protector makes the following findings:

### 7.1 **Whether Ms Modise failed and/or unduly delayed to investigate a complaint lodged by the Complainant on 21 June 2019 against four (4) Parliamentary officials, and if so; whether such conduct amounts to improper conduct in terms of section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

7.1.1 The allegation that Ms Modise failed and/or unduly delayed to investigate complaints lodged in terms of section 17(2) of PPIPPLA by SARA during February 2016 and June 2019, is not substantiated.

7.1.2 It is evident from several emails obtained and analysed during the course of the investigation that the Complainant's complaint lodged in terms of PPIPPLA during February 2016 and June 2019, were attended to by Parliamentary officials.

7.1.3 Furthermore, that the Speaker's office, including the Deputy Speaker, Mr Tsenoli, communicated with the Complainant regarding his complaint, however, the Complainant was dissatisfied with the outcome of the process.

7.1.4 Consequently, Ms Modise's conduct does not constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

**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.



---

**ADV KHOLEKA GCALEKA**  
**THE ACTING PUBLIC PROTECTOR**  
**OF THE REPUBLIC OF SOUTH AFRICA**  
**DATE: 30 DECEMBER 2022**

*Assisted by: Ms. Ponatshego Mogaladi*  
*Executive Manager: Investigations Branch*