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

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE ETHICS CODE BY THE MINISTER OF POLICE, MR BHEKOWAKHE HAMILTON CELE WHEN HE INSTRUCTED THE FORMER NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE, GENERAL KHEHLA JOHN SITOLE TO SUSPEND THE INVESTIGATION AND INTENDED SUSPENSIONS OF CERTAIN MEMBERS OF THE SOUTH AFRICAN POLICE SERVICE CRIME INTELLIGENCE

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LIST OF ACRONYMS

ACRONYMS AND ABBREVIATIONS	DESCRIPTION
Complainant	Dr Mbuyiseni Ndlozi, MP
ConCourt	Constitutional Court
EFF	Economic Freedom Fighters
EMEA	Executive Members' Ethics Act, 1998 (EMEA)
Executive Ethics Code	Executive Ethics Code, 2000 published by proclamation in Government Gazette: No 21399 Notice No 41 Regulation 6853
General Sitole / National Commissioner	National Commissioner of the South African Police Service
IGI	Inspector-General of Intelligence
Investigating Team	Public Protector South Africa Investigating Team.
LRA	Labour Relations Act, 66 of 1995, as amended.
The Minister	Minister of Police, Mr Bhekokwakhe Hamilton Cele, MP
MP	Member of Parliament
OIGI	Office of the Inspector-General of Intelligence
Oversight Act	Intelligence Service Oversight Act, 40 of 1994
PDA	Protected Disclosure Act, 26 of 2000, as amended.
PFMA	Public Finance Management Act, 1 of 1999, as amended.
PPE	Personal protective equipment
Public Protector Act	Protector Act, 23 of 1994, as amended.
Public Protector Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018, as amended.
SAPS	South African Police Service
SAPS Act	South African Police Service Act, 68 of 1995,as amended.
SAPS-CI	South African Police Services Crime Intelligence

ACRONYMS AND ABBREVIATIONS	DESCRIPTION
SAPU	South African Policing Union and Others v Minister of Police and Others (66522/2020) [2021] ZAGPPHC 10 (8 January 2021)
SSA	Secret Service Account
SSA Act	Secret Service Account Act, 56 of 1978
SSSBC	Sectoral Bargaining Council.

1. INTRODUCTION

1.1 This is a 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) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted in terms of sections 8(1) read with section 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation to affected parties and for such persons to note the outcome of the investigation:

1.2.1 The Minister of Police, Mr Bhekokwakhe Hamilton Cele, MP (the Minister).

1.3 A copy of the report is also provided to the Complainant, Dr Mbuyiseni Ndlozi, MP who lodged the complaint with the Public Protector.

1.4 The report relates to an investigation into allegations of violation of the Executive Ethics Code by the Minister when he instructed the former National Commissioner of the South African Police Service, General Khehla John Sitole (Gen Sitole) to suspend the investigation and intended suspensions of certain members of the South African Police Service Crime Intelligence.

2. THE COMPLAINT

2.1 The complaint to the Public Protector was lodged by the Economic Freedom Fighters' (EFF) Member of Parliament, Dr Mbuyiseni Ndlozi, MP (the Complainant) in terms of section 4(1) of the Executive Members' Ethics Act, 1998, (EMEA) through a letter dated 13 January 2021. In his complaint, the Complainant requested the Public Protector to investigate the following:

2.1.1 Whether Minister Cele did not "*abuse his power or guilty of political interference*" when he issued a letter instructing General Sitole to halt the suspension of Lieutenant-General Peter Jacobs (Lt Gen Jacobs) of the SAPS-CI following allegations of irregular awarding of personal protective equipment (PPE) contracts and thereby violate section 2(2)(a)(i) of EMEA;[1]

2.1.2 Whether the conduct of the Minister, in directing General Sitole to halt the suspension of Lt Gen Jacobs, did not amount to "*defeating the ends of justice*" in that he sought to interfere with General Sitole's investigation against Lt Gen Jacobs; and

2.1.3 Whether Minister Cele is linked in any way to the company under investigation by General Sitole following the award of PPE tender for which Lt Gen Jacobs is under investigations and thereby in violation of section 2(2) of EMEA.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (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 –

[1] (2) The code of ethics must—
(a) include provisions requiring Cabinet members, Deputy Ministers and MECs—
(i) at all times to act in good faith and in the best interest of good governance.

(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) of the Constitution directs that the Public Protector has the additional powers and functions prescribed by national legislation.

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

3.5 In the matter at hand, the complaint, while lodged in terms of section 4(1)(a) of EMEA referred to alleged violations of the Act, to wit, sections 2(2) of the EMEA and more specifically section 2(2)(a)(i).The Public Protector considered the dictum in the matter of *Public Protector and Others v President of the Republic of South Africa and Others*[2] wherein the court denoted that:

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

2 [2021] ZACC [19].

3.6 The Public Protector subsequently considered whether it 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 or allege specific breaches of the Code. In this regard the following issues were taken into account:

3.6.1 The guidance from the ConCourt[3] is not clear whether or not it is mandatory for the complaint to allege and contain details of a breach of the Code, or whether it is preferred. On the other hand the ConCourt distinguished between requirements of a predominantly imperative nature ("must")[4] and those which are more discretionary ("should")[5] –

"*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*"

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

"For its part, the Members Act authorises 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

3 Public Protector and Others v President of the Republic of South Africa and Others [2021] ZACC [19].

4 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.

5 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.

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

3.6.3 At the same time, the High Court in the matter of *Lekwene and Another v The Public Protector of South Africa and Others*[6] found that there are no merits in any contention that it was not proper and competent for the Public Protector to investigate a matter in terms of EMEA because the complaint did not state that the provisions of the Code were breached. The Court emphasised that:

"In Economic Freedom Fighters[7] 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[9] 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."

3.7 Since the complaint generally 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 Minister, 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 clause 2(1)(c) of the Code, which is aligned to section 2(2)(a) of the EMEA as mentioned in the complaint.

3.8 In terms of section 3 of EMEA, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member

6 (1303/2021) [2022] ZANCHC 22 (7 March 2022).

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

within 30 days of the receipt of the complaint. If the Public Protector reports at the end of this period that the investigation has not yet been completed, she must submit another report when the investigation has been completed.

4 ISSUES IDENTIFIED FOR INVESTIGATION

4.1 Whether the Minister of Police, Mr. Bhekowakhe Hamilton Cele, MP violated the Executive Ethics Code when he instructed the National Commissioner of the South African Police Service, General Khehla John Sitole, to suspend the investigation and intended suspension of certain members of the South African Police Service Crime Intelligence until he had received a report from the Inspector-General of Intelligence; and

4.2 Whether the directive by the Minister of Police**,** Mr Bhekokwakhe Hamilton Cele, MP instructing General Sitole to suspend the investigation and intended suspensions of certain members of the SAPS-CI, following the alleged irregular awarding of the personal protective equipment contracts by the SAPS-CI, was premised on the alleged personal interest he held in the companies appointed by SAPS-CI, and if so, whether such conduct was in breach of the Executive Ethics Code.

5 THE INVESTIGATION

5.1 Methodology

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

5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

5.2 Approach to the investigation

5.2.1 The approach to the investigation included the exchange of documents between the Complainant, the Minister, General Sitole and the Office of the Inspector-General of Intelligence (OIGI), analysis of the relevant documentation, consideration and application of the relevant law, regulatory framework and prescripts.

5.2.2 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 violation of the Executive Ethics Code?

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. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct of the Minister constitutes a violation of the Executive Ethics Code.

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 the Minister to prevent violation of the Executive Ethics Code.

5.3 Key sources of information

5.3.1 Documents and e-mail correspondence

5.3.1.1 Letter of complaint from the Complainant dated 13 January 2021;

5.3.1.2 Letter from the Public Protector to the Minister dated 06 May 2021;

5.3.1.3 Response letter from the Minister to the Public Protector dated 24 May 2021;

5.3.1.4 Letter from the Public Protector to the Minister dated 03 June 2021;

5.3.1.5 Copy of the IGI Report to the Minister dated 11 May 2021;

5.3.1.6 Letter from the Public Protector to General Sitole dated 3 June 2021;

5.3.1.7 Response from General Sitole to the Public Protector dated 16 August 2021;

5.3.1.8 Letter from the Public Protector to IGI dated 02 March 2022;

5.3.1.9 Response letter from the IGI to the Public Protector dated 14 March 2022;

5.3.1.10 Copy of the Preliminary Report of the IGI dated 27 November 2020;

5.3.1.11 Copy of a letter from Minister Cele to the IGI dated 01 December 2020;

5.3.1.12 Copy of a letter from General Sitole to the IGI dated 02 December 2020;

5.3.1.13 Copy of a letter from Minister Cele to the IGI dated 15 December 2020;

5.3.1.14 Copy of a letter from the IGI to General Sitole dated 21 December 2020;

5.3.1.15 Copy of Letter from the IGI to the Minister dated 22 December 2020;

5.3.1.16 Copy of a SAPS Report of Lt. Gen. Vuma dated 08 February 2021;

5.3.1.17 Copy of a Second PPE Report of the IGI dated 30 April 2021;

5.3.1.18 Copy of Lt Gen Jacobs disclosure dated 18 January 2019;

5.3.1.19 Copy of Lt Gen Jacobs disclosure dated 02 October 2020;

5.3.1.20 Copy of Lt Gen Jacobs disclosure dated18 November 2020;

5.3.1.21 Letter from the Public Protector to the Companies and Intellectual Property Commission (CIPC) dated 03 June 2021;

5.3.1.22 Copy of an affidavit[8] of Ms MV Lepule from the CIPC to the Public Protector dated 08 June 2021;

5.3.1.23 Response letter to section 7(9) Notice by Minister dated 24 June 2022; and

5.3.1.24 Response letter to Rule 41 Notice by the Minister dated 14 December 2022.

5.3.2 **Legislation and other prescripts**

5.3.2.1 Constitution of the Republic of South Africa, 1996; (the Constitution)

5.3.2.2 Executive Members' Ethics Act, 28 of 1998 (EMEA);

[8] In term of section 212 of section 212(3) the Criminal Procedure Act, 51 of 1977, as amended.

5.3.2.3 Public Protector Act, 23 of 1994 (Public Protector Act)

5.3.2.4 Intelligence Service Oversight Act, 40 of 1994 (Oversight Act)

5.3.2.5 South African Police Service Act, 68 of 1995 (SAPS Act);

5.3.2.6 Protected Disclosure Act, 26 of 2000, as amended (PDA;

5.3.2.7 Public Finance Management Act, 1 of 1999 (PFMA); and

5.3.2.8 Secret Services Account Act, 1978 (SSA Act).

5.3.3 **Case Law**

5.3.3.1 South *African Policing Union and Others v Minister of Police and Others (66522/2020) [2021] ZAGPPHC 10 (8 January 2021) (SAPU);* and

5.3.3.2 *Independent Institute of Education (Pty) Ltd v Kwa-Zulu Natal Law Society and Others 2020 (2) SA 325 (CC).*

5.3.4 **Notice in terms of Rule 41(1) of *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018,* as amended (the Public Protector Rules)**

5.3.4.1 Notices it terms of Rule 41(1) of the Public Protector Rules (Rule 41 Notice) dated 16 May 2022 and 12 December 2022, in respect of the two issues identified were delivered to the Complainant to make submissions, if any. However, the Complainant did not make further submissions for consideration by the Public Protector in this regard.

5.3.5 **Notice issued in terms of section 7(9)(a) of the Public Protector Act**

5.3.5.1 On 09 June 2022, a notice in terms of section 7(9)(a) of the Public Protector Act was issued to the Minister to provide an opportunity for a response on the likely adverse findings and proposed remedial action. Sections 7(9)(a) of the Public Protector Act provide that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations regarding same.

5.3.5.2 A response from the Minister dated 15 June 2022 was received by the Public Protector on 24 June 2022. The response and information/ evidence submitted in response to the notice in terms of section 7(9)(a) of the Public Protector Act, were duly considered by the Public Protector in relation to the substance of the allegations and the grounds for adverse findings made against the Minister.

5.3.5.3 The Minister made further submission to the section 7(9)(a) Notice, which upon consideration by the Public Protector prompted the issuing of the second Rule 41 Notice to the Complainant, and the Minister.

5.3.5.4 As already alluded to above, the Complainant also did not make further submission in respect of the second Rule 41 Notice dated 12 December 2022. However, the Minister responded to the observations made in Rule 41 Notice dated 12 December 2022 and the Public Protector duly considered his response in relation to the substance of the observations made in the said notice.

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 Police, Mr. Bhekowakhe Hamilton Cele, MP violated the Executive Ethics Code when he instructed the National Commissioner of the South African Police Service, General Khehla John Sitole, to suspend the investigation and intended suspension of certain members of the South African Police Service Crime Intelligence until he had received a report from the Inspector-General of Intelligence

Common cause issues

6.1.1 The Minister, through a letter dated 01 December 2020, issued a directive to General Sitole advising him to put in abeyance all investigations and suspension of certain members of the South African Police Service Crime Intelligence (SAPS-CI), namely, Lt Gen Jacobs, Brigadier LA Lombard, Colonel I Walljee, Major General MJ Lekalakala and Colonel BW Matamela who were implicated in the IGI report (implicated officials).

6.1.2 Notwithstanding the aforesaid directive, the National Commissioner suspended the implicated officials of the SAPC-CI between 08 and 10 December 2020.

Issues in dispute

6.1.3 The issue for determination is whether the Minister breached the Executive Ethics Code when he instructed General Sitole to suspend the investigation and intended suspension of the implicated officials, until he had received the IGI report.

The Complainant's version

6.1.4 In his complaint, the Complainant questioned whether the Minister abused his power or was guilty of political interference when he issued a letter to General Sitole, to halt the suspension of Lt Gen Jacobs of the Crime Intelligence, following allegations of irregular awarding of the PPE contracts. In view of the aforesaid, the question was whether the Minister violated section 2(2)(a)(i) of EMEA[9].

[9] "(2) The code of ethics must—
(a) include provisions requiring Cabinet members, Deputy Ministers and MECs—
(i) at all times to act in good faith and in the best interest of good governance."

6.1.5 The Complainant further questioned whether the conduct of the Minister, in writing to General Sitole to halt the suspension of Lt Gen Jacobs, did not amount to "*defeating the ends of justice*" in that he sought to interfere with the National Commissioner's investigation, against Lt Gen Jacobs.

The Minister's response

6.1.6 The Public Protector, through a letter dated 06 May 2021, requested the Minister to respond to the allegations levelled against him. The Minister responded through a letter dated 24 May 2021.

6.1.6.1 The Minister contended that that interpreting section 7(7)(f) of the Oversight Act at the time, he held the strong view that the report by Dr Dintwe should have been submitted to him first, as the Minister of Police.

6.1.6.2 The Minster referred to section 7(7) of the Oversight Act, which states that the functions of the IGI, in relations to the Service are -

(a) "to monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence;
(b) to review the intelligence and counter-intelligence activities of any Service;
(c) to perform all functions designated to him or her by the President or any Minister responsible for a Service;
(cA) to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgressions of the Constitution, laws and policies referred to in paragraph (a), the commission of an offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and

Combating of Corrupt Activities Act, 2004, and improper enrichment of any person through an act or omission of any member

(d) to submit the certificates contemplated in subsection (11)(c) to the relevant Ministers;

(e) to submit reports to the Committee pursuant to section 3(1)(f); and

(f) to submit reports to every Minister responsible for a Service pursuant to the performance of functions contemplated in paragraphs (a), (b), (c) and (cA): Provided that where the Inspector-General performs functions designated to him or her by the President, he or she shall report to the President."

6.1.6.3 The Minister stated that in interpreting the above provisions, he wrote to General Sitole advising him to place all investigations and intended suspensions in abeyance, until he was furnished with the report from the IGI.

6.1.6.4 According to the Minster, his understanding was that all the previous reports and annual certificates issued by the IGI were communicated directly to the Minister of Police and not to the National Commissioner. Therefore, it was unheard-of at the time, for the IGI to send a report directly to the National Commissioner.

6.1.6.5 The Minister indicated that "*In terms of the Act, I have a responsibility towards Parliament. The intention was, therefore, not to interfere with the duties of the National Commissioner, but merely an effort to give effect to the provisions of the Act, as interpreted by me at the time.*"

6.1.6.6 He also indicated that the IGI only issued his final report on 30 April 2021, five (5) months after the suspension of the SAPS officials and the release of the PPE Preliminary Report. This potentially meant that not all affected or implicated persons were treated with the same intensity, attention and/or fairness.

6.1.6.7 The Minster further submitted that, at the time, he was also aware that Lt Gen Jacobs had made various protected disclosures involving General Sitole, amongst others. In this regard, Lt Gen Jacobs raised his reservation about the impartiality of General Sitole in his representation against his precautionary suspension, due to the fact that he was involved in the investigation against senior staff members of the SAPS, including the National Commissioner.

The IGI's response

6.1.7 The Public Protector, through a letter dated 02 March 2022, requested the former Inspector General of Intelligence (IGI), Dr SI Dintwe (Dr Dintwe) to provide information and documents that would assist the Investigation Team in addressing the issues raised by the Complainant. Dr Dintwe responded the Public Protector through a letter dated 14 March 2022.

6.1.7.1 Dr Dintwe stated that the OIGI conducted an investigation into allegations of irregularities during the procurement of PPE, using the Secret Service Account (SSA)[10] by the SAPS-CI.

6.1.7.2 Following the said investigation, the OIGI issued a report dated 27 November 2020, to General Sitole titled "***First Report: Utilisation of Secret Service Account (SSA), Procurement of Personal Protective Equipment (PPE)"*** (PPE Preliminary Report). The PPE Preliminary Report contained the following recommendations:

(a) *"The National Commissioner should consider complying with section 85(1)(b) of the PFMA read with paragraph 4.1.1 of the National Treasury Regulations, 2005, which makes provision for the initiation of appropriate investigation and the implementation of appropriate*

[10] Section 2 of the Secret Service Act, 56 of 1978 provides that funds appropriated in terms of this Act shall be utilized for the secret services and for expenses in connection therewith.

action for any possible fraudulent activity in accordance with the relevant South African Police Service Discipline Regulations.

(b) *There is a need for in-depth investigation of the procurement in question. It is thus recommended that the National Commissioner should consider suspension of persons involved in these transactions in terms of the South African Police Service Discipline Regulations, 2016. This will allow unhindered in-depth criminal and disciplinary investigation including the access of information by the OIGI.*

(c) *That any possible acts of contravention of procurement prescripts should be dealt with in terms of the disciplinary procedures of the SAPS-CI and also be reported to relevant law enforcement agencies, such as the Special Investigating Unit (SIU) with the requisite skills to trace the money flow, the Hawks as well as the NPA for the prosecution of any potential criminality.*

(d) Another investigation be conducted by the Counter Intelligence in the SAPS-CI; as this will not be parallel to the investigation by the OIGI and both can only play a complimentary role."

6.1.7.3 Subsequent to the issuing of the PPE Preliminary Report, Dr Dintwe stated that he received correspondence dated 01 and 15 December 2020, from the Minister, in which, he was advised that General Sitole would not consider the PPE Preliminary Report until such time that The Minister had been furnished with the same report as envisaged in section 7(7)(f) of the Intelligence Service Oversight Act, 40 of 1994[11] (Oversight Act). The letter dated 15 December 2020 from the Minister to the IGI recorded in part that:

[11] Which provides that one of the functions of the IGI in relation to the Service is "*to submit reports to every Minister responsible for a Service pursuant to the performance of functions contemplated in paragraphs (a), (b), (c) and (cA): Provided that where the Inspector-General performs functions designated to him or her by the President, he or she shall report to the President*."

"*Despite my letter sent to the Inspector –General of Intelligence on 1 December 2020, to date the Inspector-General; has not responded to me. Instead, the Inspector General has given report to the National Commissioner of the South African Police Service, General KJ Sitole*.

General Sitole has confirmed in writing in a letter dated 4 December 2020 that he received a report from the Inspector-General.
Subsequently employees have been suspended. I still hold a strong view that in terms of section 7(7)(f) of the Intelligence Oversight Act, 1994 (Act No. 40 of 1994) the report should be given to the Minister of Police as the law provides.

Any other person in possession of the report might therefore be in contravention of the Act, including the Inspector-General by furnishing the report to the National Commissioner.

I still direct that the report be provided to me, the Minister of the Police, in this regard. I am still getting Counsel on how to process the contravention of the Intelligence Oversight Act 1994."

6.1.7.4 On 02 December 2020, Dr Dintwe stated that he received further correspondence from General Sitole advising that the PPE Preliminary Report could not be implemented officially. The said letter from General Sitole titled "***First Report: Utilisation of Secret Service Account (SSA), Procurement of Personal Protective Equipment (PPE)***" stated *inter alia* that:

"*Kindly note that the report as stated above cannot be officially implemented due to reasons stated by the letter from the Minister of Police. Your advice on the matter will be highly appreciated*."

6.1.8 Dr Dintwe referred to a letter dated 21 December 2020 and titled "***Comments of the Inspector of Intelligence (IGI): Instruction of the Minister to Halt Disciplinary processes"***, in which, he responded to General Sitole stating *inter alia* that:

2.1. …To this end, the Inspector-General of Intelligence (IGI) has been engaging the National Commissioner of South African Police Services (SAPS), General KJ Sitole with whom the importance of regular and structured interaction between the offices of the National Commissioner and the OIGI was stressed. It was emphasised during these interactions that the National Commissioner of Police is an important stakeholder in the execution of the legal mandate of the Inspector-General of Intelligence (IGI), owing to the responsibilities and powers of general superintendence, naturally extends to Crime Intelligence Division as part of the SAPS. It is confirmed that the IGI has been interacting with the Office of the National Commissioner on the IGI investigation process of the alleged irregular procurement in the SAPS-CI and further that such interactions should be commonplace and expected.

3.1.1 …The mentioned interactions and relationship of the two offices is viewed as an obvious manifestation of the powers and responsibilities vested on the National Commissioner of Police in terms of section 11 of the South African Police Act, 1995 (Act 68 of 1995) in so far as it relates to the oversight legal mandate of the IGI on the SAPS-CI as empowered by section 7(7) of the Intelligence Service Oversight Act, 1994 (Act 40 of 1994). This legally imposed common possibilities and interest in respect of the SAPC-CI by the National Commissioner on the one hand, and the IGI on the other, enjoins closer cooperation between the two institutions does not require explicit and specific reference and mention by statutes. It should be seen and understood as an obvious legal imperative

owing to the architecture of the institutions of the OIGI, the SAPS-CI and the National Commissioner of Police. In other words, it is implicit and inherent in the design of the organisational superintendence of the intelligence oversight mandate on the SAPS-CI as vested on the OIGI on the other, that both the IGI and the National Commissioner should routinely meet to report on relevant organisational issues pertaining to the SAPS-CI and in accordance with the requirements of respective legal mandate and in pursuit of edification of the latter.

3.1.2 Any possible express legal provision broaching the need for cooperation should be regarded as needless amplification, meant for those unable to readily gather the obvious. In light of the organisational design of the three organisations (OIGI), Office of the National Commissioner and the SAPSCI), and the absence of any express mention to forbid interactions of the two offices. It should be understood that the legislature cannot be overburdened with the task of legislating the obvious and self-evident such as the expected cooperation and regular meetings between the National Commissioner and the IGI.

3.1.5 *It is surmised that possession of any information (both verbal and written) by the National Commissioner received from the OIGI pertaining to the matter relating to the procurement process under scrutiny or other matters not necessarily related to this, does not contravene any known legal prescript*.

IGI Report in terms of Section 7(7)(f) of the Oversight Act

3.3.1 …*It is opined that the mentioned IGI report in terms of section 7(7)(f) of the Oversight Act is not intended to be a report on routine, tactical and mundane SAPC-CI issues, but is rather envisioned to encompass*

broader strategic matters emanating from the routine work of the IGI and those matters emanating from the related interactions with the National Commissioner of the Police. It is averred that the substance of the IGI reports in respect of the section 7(7)(f) of the Oversight Act was never intended to be the exclusive preserve of the Minister of Police. It is worth noting that provisions of sections the Oversight Act does not place any legal requirement of action on part of the Minister of Police as opposed to urgent legal responsibilities placed on the National Commissioner as the 'accounting officer' as is explained hereunder.

Instruction for National Commissioner to Stop Investigation

3.3.1 *In the above-mentioned letters of the Minister of Police to the National Commissioner and the IGI, the Minister indicated that the National Commissioner is instructed to halt any investigation pertain to the procurement of the PPEs until such time that the Minister has been provided with the mentioned section 7(7)(f) IGI report and '…until directed by me…' In the opinion of the IGI, the mentioned instruction to the National Commissioner appear to be peculiar and odd especially taking into account the legal design relating to the management of discipline in the SAPS and the SAPS-CI and the related authority. The rationale for the mentioned instruction to halt the investigation has not been detailed to enable the IGI to appreciate attendant dynamics (if any) between the Office of the National Commissioner and the Office of the Minister of Police. The OIGI is not privy to possible entrenched practices in the SAPS regarding management of discipline that may have occasioned the Minister to occasionally '…direct…' the timing of the exercise of the responsibility vested in the National Commissioner regarding management of discipline in the SAPS*.

3.3.2 The opinion held is that there does not appear to be coherent and rational connection between the provision of section 7(7)(f) IGI report to the Minister as explained above and the legal authority of 'management of discipline' in the SAPS as vested on National Commissioner. Nothing could be reasonably surmise and deduced from the mentioned provision of the Oversight Act, suggesting that the Oversight Act or the mentioned provisions of the Oversight Act trumps the legal authority of the National Commissioner to manage discipline in the SAPS and the SAPC-CI. As matters appear to be what they are currently, it seems that the Minister is appropriating to himself the powers that he does not have regarding the timing of the exercise of the duty to discipline certain members of the SAPS or the SAPS-CI (or even the actual eventual disciplining of SAPS members). It is surmised that the possibility that the instruction on to the National Commissioner might be, unconstitutional, unlawful and ultra vires."

3.3.3 …

Conclusion

4.1 The IGI holds the opinion that the instruction of the Minister of Police to the Commissioner lacks legal basis.

4.2 The Report envisaged in section 7(7)(f) which is strategic in nature will (sic) submitted to the Minister of Police as and when it is completed. It is noteworthy that this report becomes eminent when there are specific recommendations made for the Minister's consideration."(Sic).

6.1.9 Dr Dintwe indicated that he responded to the letters from the Minister through a letter dated 22 December 2020 and titled "*INVESTIGATION INTO PROCUREMENT OF PERSONAL PROTECTIVE EQUIPMENT*

(PPE) IN THE SOUTH AFRICAN POLICE SERVICE-CRIME INTELLIGENCE (SAPS-CI): SECRET SERVICE ACCOUNT", wherein he stated *inter alia* that:

2. *In respect of the letter of 01 December 2020, we wish to point out that this Office held a view that the said letter did not require a response from the office of the Inspector-General of Intelligence (OIGI). The reason for this is that the essence of that was to inform Inspector-General of Intelligence (IGI) of the decision already taken by the Honourable Minister, which decision was duly noted. In part, the said letter read thus: "Kindly noted that until such time that I been furnished with a report, as per section 7(7)(f) of the Intelligence Service Oversight Act,1994 (Act 40 of 1994), the matter will not be considered by the South African Police Service management, until directed by me". In light of this, the IGI's informed view in respect of the letter of 01 December 2020 was only for noting the contents thereof*.

3. *It is the IGI's submission that the engagements between this Office and the Office of the National Commissioner is provided for in the Intelligence Services Oversight Act, 1994 (Act 40 of 1994) (Oversight Act). Section 1 of the Oversight Act stipulates that the Head of a Service means the Head of the Intelligence Division of the Intelligence Division of the South African Police Service, but for purposes of financial and administrative accounting, the head of the Intelligence Division of the South African Police Service means the National Commissioner.*

4. *Consequent to the aforementioned superintendence role of the National Commissioner, regular engagements between the Offices of the National Commissioner should be obvious and naturally expected. These engagements may include correspondence and factual reports which are not necessarily for the attention of the Minister of Police. In*

other words, any correspondence between the IGI and the Heads of Services does not take place under the ambit of section 7(7)(f) of the Oversight Act. The differentiation of these legislative imperatives is premised on the fact that the IGI may recommend further action either to the Head of Service or the Minister hence the intended recipient of the IGI's correspondence would differ depending on the issue at hand.

5. *The Honourable Minister will be provided with the report as envisaged in section 7(7)(f) of the Oversight Act. It is worth remarking though, that the report to the Minister will be different from any other correspondence between the IGI and the Head of Services who is the National Commissioner in this instance. The said report to the Honourable Minister is not expected to included routine, technically and mundane issues. Instead, the report to the Honourable Minister, which report will be submitted in due course, is envisioned to encompass broader strategic matters and will include recommendations relevant and to be considered by the incumbent of the Office of the Minister of Police."(sic)*

6.1.10 Dr Dintwe further stated that he issued a second report[12] to General Sitole dated 30 April 2021 titled ***Second Report: Utilisation of Service Account (SSA), Procurement of Personal Protective Procurement Equipment (PPE)"*** (The Second Report). The Second Report made the following recommendations:

(a) "*The National Commissioner should consider complying with section 85(1)(b) of the PFMA read with paragraph 4.1.1 of the National Treasury Regulations, 2005, which makes provision for the initiation of appropriate investigation and the implementation of appropriate action for any possible fraudulent activity in accordance with the relevant South African Police Service Discipline Regulations;*

[12] Containing fifty-three (53) pages.

(b) *Any possible acts of contravention of procurement prescripts should be dealt with in terms of the disciplinary procedures of the SAPS-CI and also be reported to the relevant law enforcement agencies which have the requisite skills to trace the flow of money, such as the Special Investigating Unit (SIU);*

(c) *This investigation attracted unprecedented media reporting, but of even more concern is that some of the media reports disclosed sensitive Crime Intelligence Information. In light of this, a consideration should be made for a counterintelligence investigation to establish how these leakages occurred and to dissuade further such recurrences in future and*

(d) *It is further recommended that all cases where criminality is suspected and pointed to in terms of this report, the National Commissioner as a Head of Service in terms of the Oversight Act, should consider reporting these matters to the Directorate for Priority Crimes Investigations (DPCI) and/or the Investigative Directorate (ID)."*

6.1.11 Dr Dintwe further submitted that he issued a report to the Minister dated 11 May 2021 titled "***Report on Investigation in terms of Section 7(7)(f) of the Intelligence Services Oversight Act, 1994 (Act 40 of 1994): Alleged Irregularities Relating to Procurement of Personal Protective Equipment (PPE) in the South African Police Service :Crime Intelligence (SAPS-CI)"*** (Section 7(7)(f) Report.) The recommendations in the aforementioned report to the Minister mirrored those contained in the Second Report.

General Sitole's response

6.1.12 The Public Protector, through a letter dated 03 June 2021, requested General Sitole to make submissions in respect of the matter under investigation. In his response dated 16 August 2021, General Sitole referred the Public Protector to a correspondence between him and the Minister.

6.1.13 General Sitole reported that in a letter dated 01 December 2020, the Minister instructed him to place in abeyance all investigations and intended suspension of certain members of the SAPS: CI.

6.1.14 General Sitole referred to his response to the Minister dated 04 December 2020, which *inter alia r*ecorded that:

6.1.14.1 The PFMA enjoined him as the Accounting Officer of the SAPS to act on allegations of financial misconduct. It could be surmised that the IGI also held the view that its preliminary findings were to be brought to his attention as the Accounting Officer so that he could take the appropriate steps in terms of the Disciplinary Regulations;

6.1.14.2 In this regard, the disciplinary action that he had initiated was separate and independent process from the IGI's duty to submit a report to the Minister in terms of the Oversight Act. In view of the aforesaid, he would have been failing in his duties as the Accounting Officer, if he were to hold the disciplinary process in abeyance until such time as the ÍGI submits his final report to the Minister;

6.1.14.3 Section 40 of the South African Police Service Act, 68 of 1995(SAPS Act) read with Regulation 8 of the SAPS Disciplinary Regulations "*imposes a legal duty to take disciplinary action against an employee of the SAPS, if the employer, on reasonable grounds suspects the employee concerned of*

having committed an alleged misconduct, and in the present case, I, in my official capacity as the employer, sincerely believe that such a legal requirement has been met, hence I have taken a decision to the matter investigated" (sic);

6.1.14.4 While he appreciated the Minister's intention to place all investigations and intended suspensions in abeyance, as the Accounting Officer of the SAPS, he had verified the facts and the law on the matter with the aim of executing the Minister's directive, and found that it is not within his powers to hold the matter in abeyance; and

6.1.14.5 He was of the view that the suspension of the ongoing investigation and the intended suspension against the affected and implicated officials would be an attempt, on his part, to "*wilfully and knowingly defeat or obstruct the course of justice"*.

6.1.15 General Sitole submitted that following the issuing of the PPE Preliminary Report by the IGI on 30 November 2020, he appointed Lieutenant General FN Vuma (Lt. Gen Vuma) to conduct an internal investigation against the implicated parties in terms of Regulation 8(1) of the SAPS Discipline Regulations, published by the Minister in Government Gazette No. 40389 on 1 November 2016 (Discipline Regulations).

6.1.16 General Sitole availed copy of Lt. Gen. Vuma's report dated 08 February 2021 titled "*INVESTIGATION INTO A GROUP MISCONDUCT IN TERMS OF REGULATION 8(1) OF THE SOUTH AFRICAN POLICE SERVICE DISCIPLINE REGULATIONS, 2016: LT GEN JACOBS, MAJOR GEN LEKALAKALA, BRIGADIER LOMBARD, COLONEL GOPAL, COLONEL MATAMELA AND COLONEL WALLJEE: HQ DR 02/2020"* which he had approved on the same date. The report recommended that the implicated officials be charged in terms of section 1 of the Discipline Regulations.

Independent Evidence Obtained

6.1.17 In ***South African Policing Union and Others v Minister of Police and Others (66522/2020) [2021] ZAGPPHC 10*** **(8 January 2021)** (SAPU), it was noted that the implicated officials were served with notices of the intended suspension and were invited to make written submissions in this regard. The implicated officials submitted their written representations which were duly considered by the National Commissioner who took the decision to suspend them.

6.1.18 The implicated officials were suspended by General Sitole between 08 and 10 December 2020.

6.1.19 The implicated officials challenged their suspensions in SAPU case. Amongst other things, the implicated officials (the applicants) wanted the court to determine "*whether section 7(7) of the Intelligence Services Oversight Act, No. 40 of 1994 ("the ISO Act") provide that the General Sitole, as the employer, may not suspend employees (the second to seventh applicants) until the IGI submits a report to the Minister, and until the Minister recommends their suspensions."*[13]

6.1.20 The Minister was cited as the first respondent but did not oppose the application and was to abide by the decision of the court.

6.1.21 The applicants' case was contained in para 17 of the judgment. In para 17.11, the applicants' contention was that:

> *"17.9 In conclusion it is then the case of the applicants that the failure of the National Commissioner to wait for the IGI to furnish the report to the Minister thus impinged on section 7(7) of the ISO Act, and the relevant provisions of the Secret Service Act 56 of 1978 and*

13 Par 5

National Strategic Intelligence Act 39 of 1994, in which framework the Discipline Regulations fall to be interpreted. For this reason, the suspensions are unlawful and should be set aside."

6.1.22 The court in adopting a broad approach to contextualizing legislative provisions, contended that section 7(7) of Oversight Act cannot be read in isolation.

6.1.23 The court indicated that the applicants were premature in approaching the court on the provisions of section 7(7) of the Oversight Act because the investigations by both the IGI and Lt. Gen Vuma had not been completed.

6.1.24 The Court contended that the the applicants' sole reliance on section 7(7) is misconstrued as section 7(11) also makes provision for reports to be submitted by the National Commissioner to both the Minister and the IGI.

6.1.25 The court denoted at para 64 that "*It is clear from a textual reading of section 7(7) that the provision does not regulate the second to seventh applicants' suspensions at all, nor does it create the preconditions sought to be read in by them. It does not provide that in the absence of the IGI submitting a report to the Minister, and in the absence of a decision by the Minister which is communicated to the National Commissioner, the National Commissioner will have no power of suspension*."

6.1.26 The court further highlighted the following:

72. There is nothing in the ISO Act that prohibits or precludes the National Commissioner from initiating disciplinary action – or an internal investigation for that matter – in the event that he becomes aware of serious allegations of misconduct committed by senior officials within the SAPS. It follows that he needs to act swiftly in execution of his mandate.

6.1.27 Subsequently, the court held that:

"76. *Suspensions of this nature are at the prerogative of the employer. In this case, the National Commissioner is the employer of the second to seventh applicants. The Minister's role is circumscribed and does not extend to the day-to-day employment-related affairs of the SAPS*.

81. It follows that, the National Commissioner is not only entitled to act against the second to seventh applicants' alleged misconduct, but is obliged to do so by law, specifically section 51 read with section 86 of the PFMA."

6.1.28 The Court ultimately dismissed the application by the applicants or implicated officials.

6.1.29 It was further noted that in the Labour Court of South Africa, Johannesburg (Labour Court) Case no: J194/21[14] the applicants (Lt Gen Jacobs, First Applicant; Maj. Gen Lekalakala, Second Applicant; Brig. Lombard, Third Applicant; Col Gopal, Fourth Applicant; and Col Walljee, Fifth Applicant, approached the Labour Court on urgent basis seeking an order interdicting the SAPS's internal disciplinary enquiry against the applicants, including the delivering verdict, pending the outcome of the disputes referred by the applicants to the Safety and Security Sectoral Bargaining Council (SSSBC) in terms of the section 188A(11) of the Labour Relations Act, No. 26 of 2002, as amended, (PDA).

6.1.30 Nkutha-Nkontwana, J at para 8 denoted that:

"*The applicants approached the SSSBC in terms of section 188A(11) of the LRA to request a pre-dismissal arbitration in terms of section 188A of the LRA due to their belief that National Commissioner Sitole's decision to*

[14] Not reportable.

institute the disciplinary enquiry against them constitutes an occupational detriment in terms of the Protected Disclosure Act, (PDA)"

6.1.31 The Labour Court highlighted that Lt Gen. Jacobs raised his reservation about the impartiality of General Sitole for the first time in his representation against his precautionary suspension due to the fact that he had been embroiled in investigations against senior staff members of the SAPS, including the National Commissioner. To this extent, Lt Gen. Jacobs suggested that an independent person be appointed to decide on the issues relating the disciplinary action taken against him.

6.1.32 At para 25 of the judgement, Nkutha-Nkontwana, J Ruled that :
"*In my view, to the extent that the applicants, in good faith, hold a view that the instituting the disciplinary enquiry against them offends the PDA, section 188A(11) is correctly invoked. It follows that the internal disciplinary enquiry should terminate and the disciplinary action against the applicants be undertaken in terms of section 188A, a hearing already scheduled for 24 March 2020 before the SSSBC."*

The Minister's responses to a notice in terms of section 7(9) of the Public Protector Act

6.1.33 The Minister submitted that in terms of section 207(2) of the Constitution, the National Commissioner must exercise control over and manage the SAPS in accordance with the national policy determined by the Minister of Police and subject to the directions of the Minister of Police. It is therefore implied that the Minister of Police can issue directions to the National Commissioner.

6.1.34 Referring to section 7(7)(f) of the Oversight Act, the Minister contended that the section was clear that the IGI had to submit reports, including reports on investigations conducted in terms of section 7(7)(cA) of the Oversight

Act, to him as the Minister responsible for the SAPS-CI. Further that there was *"Nowhere in this section reference is made to routine, tactical, mundane or strategic as opined by the IGI".*

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

6.1.35 A Rule 41 Notice containing the Public Protector's observations was delivered to both the Complainant and the Minister on13 December 2022. However, no further submission was received from the Complainant in this regard.

6.1.36 In his response dated 14 December 2022, the Minister did not agree with the observation made in paragraph 8.2 of the Rule 41 Notice dated 12 December 2022.

6.1.37 The Minister contended that the National Commissioner was the 'Head of Service' of the Intelligence of the SAPS for financial and administrative functioning. Since the matter at hand related to the financial functioning of the SAPS-CI, it was his considered view that the IGI could not have assumed that the National Commissioner, as the Head of Service, was not possibly implicated at the time.

6.1.38 The Minister further submitted that in terms of the Secret Service Act, 1978, no intended secret service shall be carried if the Minister, with the concurrence of the President, did not approve the intended secret service. This therefore implies that the Minister has an oversight responsibility in respect of the management of the budget allocated to the SAPS-CI.

6.1.39 Having regard to the above and in view of good governance, the Minister indicated that his expectation was that the IGI should have submitted the report first to him, as provided for section 7(7)(f) of the Oversight Act.

Application of the relevant law to the merits

The Constitution of the Republic of South Africa,1996 (Constitution)

6.1.40 In terms of section 206 (1) of the Constitution a member of the Cabinet must be responsible for policing and must determine national policing policy after consulting the provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives. It is common cause that the Minister is the Cabinet member contemplated in the above-mentioned section.

6.1.41 Section 207 of the Constitution provides that:

(1) "*The President as head of the national executive must appoint a woman or a man as the National Commissioner of the police service, to control and manage the police service;*

(2) The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing."

6.1.42 It is common cause that General Sitole was appointed in accordance with section 207(1) of the Constitution.

6.1.43 The implication of subsection 2 is that the National Commissioner exercises control and manages the SAPS through policy and through the Minister's directives. On the other hand the Minister is responsible for determining national policing policy in line with section 206 of the Constitution and the overall execution of the SAPS's mandate, in relation to key pieces of legislation.[15]

[15] See para 67 of the SAPU case.

6.1.44 However, the question that arise is whether the Minister's letter dated 01 December 2020 which directed General Sitole to place all investigation and intended suspensions of the implicated parties in abeyance fell within the ambit of section 207(2) as contended by the Minister. It is the Public Protector's considered view that, in the circumstances, the aforesaid subsection did not empower the Minister to issue the impugned instruction to the National Commissioner.

6.1.45 Section 96 of the Constitution provides that:

(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

(a) *"act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests."*

6.1.46 The complaint to the Public Protector was premised on the fact that the Minister as a cabinet member responsible for the Police is enjoined to act ethically and abide by the above provisions of the Constitution.

Executive Members' Ethics Act, 28 of 1998 (EMEA)

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

6.1.48 Section 2(1) of EMEA reads thus:

"*The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with*

which Cabinet members, *Deputy Ministers and MECs must comply in performing their official responsibilities."*

6.1.49 Section (2)(2)(a)(i) of the EMEA which is referred to in the complaint, provides that the code of ethics must include provisions requiring Cabinet members, Deputy Ministers and MECs to, *inter alia*, "*at all times to act in good faith and in the best interest of good governance*."

Executive Ethics Code

6.1.50 The general standards which the members of the Executives[16] must comply with are contained in clause 2.1 of the Executive Ethics Code which states that:

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

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

6.1.51 Clause 2.2 provides that "*In deciding whether members of the Executive complied with the provisions of clause 2.1, the President or Premier, as the*

[16] Section 1 of the Executive Ethics Code provide that "*Member of the Executives' means a Cabinet member, a Deputy Minister or a Member of a Provincial Executive Committee, and "member' and 'Executive' have corresponding meanings."*

case may be, must take into account the promotion of an open, democratic and accountable government."

Criminal law

6.1.52 In this case it should be noted that the Minister's conduct of instructing General Sitole to put in abeyance the investigation and suspensions of the SAPS-CI officials who were implicated in the PPE Preliminary Report was alleged by the Complainant to amount to an act of defeating the course of justice and by extension, amounts to a breach of the Executive Ethics Code.

6.1.53 In the South African Criminal Law and Procedure,[17] the crime of defeating the ends of justice is defined as follows: "*Defeating or obstructing the course of justice consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice*."

6.1.54 The available evidence shows that despite the impugned instruction by the Minister, General Sitole still proceeded with the suspension of the implicated officials and the investigation against them.

The Intelligence Service Oversight Act, 40 of 1994 (Oversight Act)

6.1.55 Section 7(7) of the Oversight Act states that the functions of the IGI are, in relations to the Service-

(a) "to monitor compliance by any Service with the Constitution, applicable laws and relevant policies on intelligence and counter-intelligence;

(b) …;

[17] Milton J, Hunt P.M.A, South African Criminal Law and Procedure Vol 2, Juta & Co., Kenwyn [South Africa], 1996, pg.41.

(c) …;

(cA) to receive and investigate complaints from members of the public and members of the Services on alleged maladministration, abuse of power, transgressions of the Constitution, laws and policies referred to in paragraph (a), the commission of an offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and improper enrichment of any person through an act or omission of any member

(d) …;

(e) …

(f) to submit reports to the Committee pursuant to section 3(1)(f); and to submit reports to every Minister responsible for a Service pursuant to the performance of functions contemplated in paragraphs (a), (b), (c) and (cA): Provided that where the Inspector-General performs functions designated to him or her by the President, he or she shall report to the President."

6.1.56 In terms of the Oversight Act, '*services*' means the Agency, the Intelligence Division of the National Defence Force and the Intelligence Division of the South African Police Service. The National Commissioner is one of the Heads of the *'service'* as defined in the Act.

6.1.57 The IGI has certain statutory monitoring and compliance duties, for which he is directly accountable to the Minister. This includes monitoring compliance with applicable laws and relevant policies on, as in the present case, alleged maladministration. This is an express obligation in terms of section 7(7)(cA) read with section 7(7)(a) of the Oversight Act.

6.1.58 Section 7(7)(f) of the Oversight Act also requires the IGI to submit reports to the responsible Minister pursuant to the investigation conducted in terms of section 7(7)(cA). Section 7(7A) of the Oversight Act provides that the

reports of the IGI contemplated in subsection 7(7)(f), in respect of monitoring and reviewing, shall contain the findings and recommendations of the IGI.

6.1.59 The relationship between the IGI and the National Commissioner (as Head of the Service) is set out in section 7(8)(a) of the Oversight Act. Since the IGI reports to the Minister in terms of section 7(7)(f), the IGI is empowered to demand from the relevant Head of Service (in this instance, the National Commissioner) and its employees such intelligence, information, reports and explanations deemed necessary for the performance of his functions.

6.1.60 The National Commissioner, as the Head of service for the SAPS-CI, must in terms of section 7(11)(a) of the Oversight Act, submit to the Minister, a report in respect of every period of 12 months or such lesser period as is specified by the Minister responsible for that Service, on the activities of crime intelligence and copy the IGI.

6.1.61 The National Commissioner is also enjoined by section 7(11)(b)(i) of the Oversight Act, to report to the IGI regarding any unlawful intelligence activity or significant intelligence failure of that Service and any corrective action that has been taken or is intended to be taken in connection with such activity or failure. Section 7(11)(b)(ii) provides that the National Commissioner shall submit the report referred to in subparagraph (i) to the IGI within a reasonable period after such unlawful intelligence activity or significant intelligence failure came to his or her attention.

6.1.62 As soon as practicable after the IGI receives the report mentioned in section 7(11)(a), the IGI is in turn enjoined by section 7(11)(c) to submit to the Minister, a certificate stating the extent to which the IGI is satisfied with the report and whether anything done by that service is in the opinion of the IGI

unlawful, or involves an unreasonable or unnecessary exercise of power by the state.

6.1.63 Further steps as directed by the Oversight Act will then follow, which includes submitting the report of the IGI to the Joint Standing Committee of Intelligence so that it can carry out its functions in terms of section 3 of the Oversight Act.

6.1.64 The IGI is entitled to receive complaints and investigate complaints from the public or a member of the Service,[18] regarding alleged maladministration and other transgressions committed in the Service, including the SAPS-CI. The IGI investigated allegations of irregularities relating to the procurement of the PPE from the Secret Service Account in the SAPS-CI. The IGI issued the PPE Preliminary Report, dated 27 November 2020 to General Sitole and not to the Minister.

The Public Finance Management Act, 1 of 1999 (PFMA)

6.1.65 Section 36 of the PFMA enjoins every department to have an accounting officer, in which case the National Commissioner assumes that role at the SAPS.

6.1.66 Section 38(1) of the PFMA enumerates general responsibilities of an accounting officer of a department such as the SAPS and provides amongst others that the accounting officer:

(h) "must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—

(i) contravenes or fails to comply with a provision of this Act;

[18] The Oversight Act defines Service as "*the Agency, the South African Secret Service, the Intelligence Division of the National Defence Force and the Intelligence Division of the South African Police Service*".

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure."

6.1.67 It is manifest that the above provisions require the accounting officer to take effective and appropriate disciplinary steps against officials who contravenes the PFMA. The PPE Preliminary Report contained preliminary findings that suggested that the implicated officials had offended the provisions of the PFMA. This prompted General Sitole to initiate disciplinary investigation though Lt. Gen Vuma and place the implicated officials on precautionary suspensions.

The South African Police Service Act, 68 of 1995 (SAPS Act)

6.1.68 Section 11(1) of the SAPS Act stipulates that "*The National Commissioner shall exercise control over and manage the police service in accordance with section 207(2) of the Constitution of the Republic of South Africa, 1996.*"

6.1.69 Section 24(1)(g) of the SAPS Act, empowers the Minister of Police to make different regulations in respect of a variety of topics, including but not limited to:

(i) "the institution and conduct of disciplinary proceedings or inquiries;

(ii) conduct by members that will constitute misconduct;

(iii) the provisions, if any, of the Criminal Procedure Act, 1977 (Act 51 of 1977), that shall apply mutatis mutandis to disciplinary proceedings or inquiries under this Act;

(iv) the attendance by a member or any witness, of such disciplinary proceedings or inquiries;

(v) the circumstances under which such disciplinary proceedings or inquiries may be conducted or proceeded with in the absence of the member accused of misconduct or affected by such an inquiry".

6.1.70 Section 40 reads thus *"Disciplinary proceedings may be instituted in the prescribed manner against a member on account of misconduct, whether such misconduct was committed within or outside the borders of the Republic."*

The South African Police Service Discipline Regulations 2016[19] (the Discipline Regulations)

6.1.71 Regulation 5(3) of the Discipline Regulations provides that:

(3) "*An employee will be guilty of misconduct if he or she*

(a) fails to comply with, or contravenes an Act, regulation or legal obligation;
(b) performs any act or fails to perform any act with the intention;
(i) to cause harm to or prejudice the interests of the Service, be it financial or otherwise;
(ii) to undermine the policy of the Service; or
(iii) not to comply with his or her duties or responsibilities;
(c) wilfully or negligently mismanages the finances of the State;
(t) conducts himself or herself in an improper, disgraceful and unacceptable manner;
(v) incites other employees to unlawful conduct or conduct in conflict with accepted procedure."

6.1.72 Regulation 8(1) of the Discipline Regulations provides that *"[a] supervisor must ensure that the investigation into the allegations of misconduct is*

[19] Published by the Minister in Government Gazette No. 40389 on 01 November 2016.

completed within thirty (30) calendar days or as soon as practically possible thereafter, and if satisfied that the alleged misconduct is of a serious nature and justifies the holding of a disciplinary hearing, refer the outcome of the investigation to the employer representative within seven (7) working days to initiate a disciplinary enquiry. The employee must be informed of the alleged misconduct and pending investigation."

6.1.73 Regulation 10 of the Discipline Regulations allows the National Commissioner to place an employee on suspension as a precautionary measure, which regulation reads thus:

(1) "A suspension or temporary transfer is a precautionary measure.

(2) The National, Provincial or Divisional Commissioner may suspend or temporarily transfer an employee, provided that before effecting such a suspension or transfer such an employee is afforded a reasonable opportunity to make written representations.

(3) The employer may after having afforded an employee a reasonable opportunity to make written representations and after consideration of the representations, suspend with full remuneration, or temporarily transfer an employee as a precautionary measure on conditions, as may be determined.

(4) After an employee is suspended with full remuneration or temporarily transferred as a precautionary measure, the employer must hold a disciplinary hearing within sixty (60) calendar days from the commencement of the suspension. Upon the expiry of the sixty (60) calendar days the chairperson of the hearing must decide whether the suspension or temporary transfer should continue or be terminated and if the suspension or temporary transfer continues, it should not be more than thirty (30) calendar days where after, the suspension or temporary transfer is automatically uplifted."

6.1.74 The implication of the above provisions is that the National Commissioner has the power to institute disciplinary process against members of the SAPS-CI.

Protected Disclosure Act, 26 of 2000, as amended (PDA)

6.1.75 Section 3 of the PDA specifically prohibits any employer from subjecting any employee to an occupational detriment on account, or partly on account, of having made a protected disclosure.

6.1.76 The Minister contended that the implicated parties had made certain disclosures to him. However, notwithstanding the request to do so, the Minister did not provide the actual dates on which the disclosures were made him. It could therefore not be determined if the disclosures were made to the Minister before or after the impugned directive was made.

Secret Services Account Act, 1978 (SSA Act)

6.1.77 The SSA Act deals with the establishment of the SSA.

6.1.78 Section 2 of the SSA Act provides that:

(1) *"The Secretary to the Treasury shall, subject to the Administration of, provisions of this Act, be responsible for the administration of the account: Provided that the accounting officer of a Department of State to which any moneys have been made available in terms of subsection (3), shall be accountable for the moneys so made available."*

6.1.79 *In casu the* allegations that were investigated by the OIGI concerned the usage of the SSA funds to procure PPE by the SAPS-CI. The implication of subsection 2 of the SSA Act is that the National Commissioner was

accountable for the funds which were made available to the SAPS-CI in this regard.

6.1.80 The Minister contended that the matter that was referred to the National Commissioner related to the financial functioning of the SAPS-CI and therefore the IGI could not have assumed that the National Commissioner was possibly not implicated at the time.

6.1.81 However, in the SAPU case, the court also denoted that the National Commissioner is the Head of SAPS-CI for financial and administrative accounting. Thus in matters involving financial and administrative accounting, the IGI is required to communicate with the National Commissioner[20]. The Public Protector noted that the Minister, in the SAPU case, elected to abide by the decision of the court. The Public Protector is also not aware of any court challenge levelled by the Minister against the outcome of the SAPU case.

6.1.82 It was also noted that the PPE Preliminary Report did not implicate General Sitole in the awarding of the PPE contrast to the successful bidders. It is the Public Protector's considered view that the Minister's view that the IGI should have not directed the PPE Preliminary Report to General Sitole is not supported by circumstances of this case nor the SSA Act he sought reliance on.

Independent Institute of Education (Pty) Ltd v Kwa-Zulu Natal Law Society and Others[21]

6.1.83 The ConCourt in this case expressing itself through Theron J denoted that:

20 At para 60.

21 2020 (2) SA 325 (CC).

"It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature". Statutes dealing with the same subject matter, or which are in pari materia, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system."

6.1.84 Having regard to above case, the Minister's interpretation of section 7(7) of the Oversight should have inculcated other applicable statutes which specifically deal with the issue of discipline in the SAPS. It was therefore inadequate for the Minister to simply only consider the provisions of section 7(7)(f) of the Oversight Act in isolation.

Public Protector Act, 23 of 1994

6.1.85 Section 8(1) of the Public Protector Act provides that the Public Protector may, subject to the provisions of subsection (3) in the manner she deems fit, make known to any person, any finding, point of view or recommendation in respect of a matter investigated by her.

Analysis of evidence

6.1.86 It is common cause that General Sitole initiated an investigation through Lt. Gen. Vuma against the implicated officials after receiving the PPE Preliminary Report, dated 27 November 2020 from the IGI. The investigation by Lt. Gen. Vuma culminated in a report, dated 08 February 2021 which was submitted to General Sitole.

6.1.87 Section 207 of the Constitution, read with section 11 of the SAPS Act grants the National Commissioner powers to exercise control over and manage the SAPS. The National Commissioner is specifically made responsible for the maintenance of an impartial, accountable, transparent and efficient police service, as well as the recruitment, appointment, promotion, and transfer of all the members of SAPS. Section 24(1)(g) of the SAPS Act endows the Minister of Police with powers to make regulations which amongst others, include those that deal with disciplinary processes.

6.1.88 The question whether General Sitole was within his right to initiate disciplinary investigation and to suspend the implicated officials was sufficiently dealt with in the SAPU case[22], wherein the court agreed with the actions of General Sitole. The Court referred to the fact that section 7(11)(b)(i) provides for a situation where the National Commissioner shall report to the IGI regarding any unlawful intelligence activity or significant intelligence failure of that Service and any corrective action that has been taken or is intended to be taken in connection with such activity or failure, which "*for all purposes include the precautionary suspensions of members, the current investigation by Lieutenant General Vuma and any disciplinary process (if any) that might follow.*"

6.1.89 It was established that the investigation and the suspensions of the implicated officials were made in accordance with the Discipline Regulations. It was also confirmed in the SAPU case that General Sitole had the power to suspend the implicated parties in terms of section 40 of the SAPS Act, read with Regulations 4, 5, 8 and 10 of the Discipline Regulations.

[22] *South African Policing Union and Others v Minister of Police and Others* (66522/2020) [2021] ZAGPPHC 33 (8 January 2021).

6.1.90 As the accounting officer, General Sitole was also legally required to act where there has been contravention or failure to comply with a provision of the PFMA. The aforesaid includes acts which undermine the financial management and internal control system of SAPS, irregular expenditure or fruitless and wasteful expenditure. Failure to comply with the relevant provisions attracts severe consequences for an accounting officer.

6.1.91 The IGI derives his mandate from the Constitution and the Oversight Act. This Act provides for the appointment of Inspectors General of Intelligence and defines the IGI's functions. As already mentioned, the National Commissioner is the 'Head of Service' in terms of the Oversight Act. The National Commissioner is the Head of the Intelligence Division of SAPS for financial and administrative accounting. The Court emphasised in the SAPU case[23] that in matters involving financial and administrative accounting, the IGI is required to communicate with the National Commissioner.

6.1.92 In this matter, the main question that arise is whether in dispensing with the impugned directive, the Minister acted in good faith and in the best interest of good governance as envisaged in the Executive Ethics Code.

6.1.93 The Minister was only issued with the section 7(7)(f) Report, dated 11 May 2021 and not the PPE Preliminary Report. The Minister held the view that the IGI should have submitted the PPE Preliminary Report first to him, in line with section 7(7)(f) of the Oversight Act. It was this understanding which prompted the Minister to address a letter, dated 01 December 2020 to General Sitole requesting him to place all investigations and intended suspensions in abeyance because he had not been issued with the same report.

[23] *Ibid.*

6.1.94 The Minister contended that his intention was therefore not to interfere with the duties of General Sitole, but merely to give effect to the Oversight Act, as he understood it.

6.1.95 The Minister further contended that the impugned directive was consistent with section 207(2) of the Constitution, which empowers him to issue directions to the National Commissioner. Whereas this section empowers the National Commissioner to exercise control over and to manage the SAPS, in line with national policy and directives of the Minister of Police, it is unclear whether the impugned directive is what is envisaged by this section. This is because it is trite that the power to enforce discipline in the SAPS vests with the National Commissioner.

6.1.96 The Minister also submitted that his instruction was also predicated on the fact that Lt. Gen Jacobs had made protected disclosures and raised his reservation about the impartiality of General Sitole in his representation against his precautionary suspension, due to the fact that he was involved in the investigation against senior staff members of the SAPS, including General Sitole. Section 7 of the PDA permits the Minister as a member of Cabinet to receive from an employee any disclosure made in good faith. However, the Minister did not adduce evidence regarding the dates on which the protected disclosures where made to him.

6.1.97 It should be noted that section 3 of the PDA prohibits employers from subjecting employees to disciplinary processes on the account of having made a protected disclosure.

6.1.98 It is worth noting that the Labour Court in case no: J194/21, accepted that Lt. Gen Jacobs had made a protected disclosure to the Minister. The Labour Court held that the initiation of the disciplinary action against the implicated parties offended the provisions of the PDA on account of the protected disclosures that implicated, amongst others, General Sitole.

Consequently, it was held that the disciplinary enquiry against the implicated officials should be conducted in accordance with section 188A(11) of the Labour Relations Act.

6.1.99 Furthermore, the Minister's submission was that all previous reports and annual certificates issued by the IGI were communicated directly with the Minister of Police and not the National Commissioner. Therefore, the impugned directive to General Sitole was in an effort to give effect to the Oversight Act.

6.1.100 Through a letter, dated 02 December 2020, General Sitole informed Dr Dintwe that he was unable to implement his recommendation because of the instruction received from the Minister and asked for advice in this case. In his letter, dated 21 December 2020 to General Sitole, Dr Dintwe was of the view that the Minister's instruction to General Sitole lacked legal basis.

6.1.101 However, General Sitole, through a letter, dated 04 December 2020 to the Minister, motivated why the Minister should understand his decision not to adhere to his instruction to place the investigation and intended suspensions in abeyance.

6.1.102 It was noted that Dr Dintwe explained to the Minister the rationale for directly liaising with General Sitole through a letter, dated 22 December 2020 following receipt of a second letter from the Minister, dated 15 December 2020.

6.1.103 Notably, there was a divergence of views between the Minister, General Sitole, the IGI, and the implicated parties regarding the interpretation of section 7(7) of the Oversight Act. Notwithstanding the divergent views, the Minister's directive to General Sitole to place the investigation and suspensions in abeyance was not implemented.

6.1.104 As already alluded to above, the Court confirmed in the SAPU case, based on applicable regulatory framework, that there was nothing unlawful in the conduct of General Sitole in instituting disciplinary investigations and suspensions of implicated officials. The Court stated that-

"The National Commissioner has the power to suspend the second to seventh applicants in accordance with his entitlement to do so in terms of section 40 of the SAPS Act read with Regulations 4, 5, 8 and 10 of the Discipline Regulations. Furthermore, the National Commissioner is obliged by section 51 read with section 86 of the PFMA to take appropriate action in cases of procurement irregularities and flouting of Treasury Regulations. For the applicants to allege otherwise (on the basis that the whole process in terms of section 7(7) of the ISO Act should first be exhausted) would defeat this whole purpose.[24]"

6.1.105 The Court clearly held that the interpretation advanced by the applicants, that section 7 of the Oversight Act requires the IGI to submit a report to the Minister and that the Minister must first take a decision on the veracity of the allegations contained in the report before the National Commissioner may take any decision on the question of the employees' suspension, was not correct.

6.1.106 To the extent that Minister's impugned directive to General Sitole to suspend processes pending the receipt of the report from the IGI, was informed by a similar interpretation that section 7(7)(f) of the Oversight Act required the report by Dr Dintwe to be submitted to him first (as advanced in his submissions to the Public Protector), such an interpretation would be unsustainable against the Public Protector's own interpretation of the relevant legislation, but more importantly, on the findings and observations made by the Court that -

[24] At paragraph 69 of the judgment.

(a) The PPE Preliminary Report was not a report as envisaged in section 7(7)(f) of the Oversight Act and it would have been premature to rely on the report for the purposes intended by the Act –

"Until such time as the investigations by Lieutenant General Vuma and/or the IGI is concluded it would be premature to decide whether the alleged misconduct or violations relates to intelligence and counter-intelligence as provided for in section 7(7)(a), or constitutes maladministration as provided for in section 7(7)(cA) or whether same is catered for in terms of section 7(11)(a) and/or (b) of the ISO Act."[25];

(b) The relationship between the Minister, the Commissioner and the IG is not hierarchical in nature to the extent that the IGI and Minister's functions and obligations in terms of the Oversight Act are not intended to " *fetter the National Commissioner's authority*" in relation to operational issues including discipline of SAPS members[26]; and

(c) That by suggesting that disciplinary action can only be taken once the Minister has made some kind of decision based on the IGI's report, such interpretation "*further deprives the National Commissioner of his powers, undermines his prerogative on matters of discipline in the employment realm, and undermines his ability to meet his obligations as set out in the SAPS Act and the PFMA.*"[27]

6.1.107 It follows that the Minister's directive to General Sitole was *ultra vires* the empowering provisions relied on by the Minister. The Public Protector does not need to deal with the consequences of the directive in terms of its validity, as the fact that the directive was subsequently ignored by General

[25] At paragraph 33 of the judgment.
[26] At paragraph 7.7 of the judgment.
[27] At paragraph 71 of the judgment.

Sitole leave the matter moot in that the disciplinary processes against the implicated officials were administered within the auspices of the LRA.

6.1.108 The next step for the Public Protector is to evaluate the impugned conduct of The Minister against the relevant standards of the Code to determine if such conduct is in breach or violation thereof. In this regard the Public Protector noted the following guidelines issued by the Courts in respect of the test to be applied –

(a) The Public Protector cannot make "*sweeping statements*" pertaining to the purported breaches of clauses of the Code and has to specify, analyse and reflect in her report whether or not the conduct in question "*has breached the entire list*", or whether or not there are "exact transgressions of specific clauses of the Code.[28]

(b) The Public Protector "*could only have come to the conclusion that the Ethics Code was breached if there were sufficient facts to support it* "– therefore if here is a rational connection between the Public Protector's decision and the reasons for the decision.[29]

(c) The Public Protector should reflect on the essential elements of the prohibition in the relevant clause of the Code, in order to pronounce a conclusion that can be clearly understood and is in line with the test that must be applied to determine whether there has been a violation.[30]

28 *Lekwene and Another v The Public Protector of South Africa and Others (1303/2021) [2022] ZANCHC 2*2 (7 March 2022)

29 Premier of the Western Cape Province v Public Protector & Another (771/2020) [2022] ZASCA 16; [2022] 2 All SA 95 (SCA); 2022 (3) SA 121 (SCA) (7 February 2022)

30 Public Protector and Others v President of the Republic of South Africa and *Others* (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021)

(d) The Public Protector should also take head of the member's intention in evaluating the conduct against the standards that he/ she has determined. [31]

6.1.109 Against this background the Public Protector noted that the complaint of a violation of sections 2(2) and 2(2)(a)(i) of the EMEA and by extension, a breach of the Code, is premised on the contention that the impugned directive amounted to abuse of power, political interference and/or defeating the ends of justice. Notably, while the Public Protector does not purport to usurp the authority of the National Director of Public Prosecution on the potential offences referred to, the required intent by the Minister to have acted in the improper manner and for the improper purpose as alleged, is not borne from the supporting evidence and facts at the disposal of the Public Protector.

6.1.110 As stated, the elements of the relevant paragraph(s) of the Executive Ethics Code that the Public Protector has identified for the purpose of determining whether or not the Minister breached or violated the Code, relate to issues of acting in good faith and in the best interest of good governance:

6.1.110.1 **"Good faith"** (Latin: *bona fides*) is defined as "*a sincere intention to be fair, open, and honest, regardless of the outcome of the interaction.*"[32]The opposed concepts are bad faith, *mala fides* (duplicity) and perfidy (pretense).

6.1.110.2 The Constitutional Court[33] held that where a matter is left to the discretion or the determination of a public officer and his/ her discretion is exercised

31 *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021).

32 Garger, John. "Translating Arguendo and Bona Fide from Latin to English." *Bright Hub Education*. Bright Hub Inc., 5 January 2012.

33 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).

or his/ her judgment expressed duly and honestly, but he/ she mistakenly applied himself/ herself to the question which has been left to his discretion, it may still pass the muster of good faith even if the decision is inequitable or wrong. Indicators of mala fide would include ulterior and improper motives, "*if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute*."

6.1.110.3 The courts have also emphasised that in order to be rational, a decision must be based on accurate findings of fact and correct application of the law. A wrong or mistaken interpretation of a provision in a statute constitutes an error of law, but *per se* is not an irregularity [34] In the matter of the *Airports Company,* the Supreme Court of Appeal held that-

"… *it cannot be said that the wrong interpretation of a regulation would prevent the Administrator from fulfilling its statutory function or from considering the matter left to it for decision. On the contrary, in interpreting the regulations the Administrator is actually fulfilling the function assigned to it by the statute".*

6.1.110.4 In terms of the general standard for breaches or violations of the Executive Ethics Code, it cannot be not enough to merely show that the empowering statute has been incorrectly interpreted when a member of the Executive exercised a statutory power or function. A reflection of the case law over any specific period will undoubtedly reflect the number of instances where members of the Executive, including the President have been taken to task before courts of law where they have acted, taken decisions, or promulgated legislation under an incorrect interpretation of the empowering statutes, without any call for sanctions or censure in terms of EMEA.

[34] *Genesis Medical Scheme v Registrar of Medical Schemes and Another* (CCT139/16) [2017] ZACC 16; 2017 (9) BCLR 1164 (CC); 2017 (6) SA 1 (CC) (6 June 2017).

Conclusion

6.1.111 Considering the composite information discoursed above, there is no evidence that the Minister was dishonest or acted in bad faith when he issued the impugned directive. The available evidence supports the contention that the impugned directive was based on the Minister's *bona fide, but mistaken* interpretation of section 7(7) of the Oversight Act and consideration of the protected disclosures.

6.1.112 It was noted that the Minister also considered that the issues of protected disclosure which were made by the implicated officials, which the Labour Court in case no: J194/21, accepted to have been made, amongst others, against General Sitole.

6.1.113 Ultimately, there is no evidence at the Public Protector's disposal that the impugned directive was made in bad faith and in contravention of paragraph 2.1(c) of the Executive Ethics Code and/or with the intention to circumvent the rule of law.

6.2 Whether the directive by the Minister of Police, Mr Bhekokwakhe Hamilton Cele, MP instructing the National Commissioner to suspend the investigation and intended suspensions of certain members of the SAPS-CI, following the alleged irregular awarding of the personal protective equipment contracts by the SAPS-CI, was premised on the alleged personal interest he held in the companies appointed by SAPS-CI, and if so, whether such conduct was in breach of the Executive Ethics Code

Common cause issues

6.2.1 The Minister, through a letter dated 01 December 2020, instructed the National Commissioner to put in abeyance all investigation and intended suspensions relating to his investigation into the procurement of PPE by the SAPS-CI using the SSA[35] .

6.2.2 On 27 November 2020, the IGI alerted the National Commissioner regarding allegations of PPE procurement irregularities using the SSA [36] in the SAPS-CI.

6.2.3 Pursuant to the above, on 30 November 2020, the National Commissioner appointed Lt. Gen Vuma) to conduct an internal investigation against the implicated officials in terms of Regulation 8(1) of the SAPS Discipline Regulations.

6.2.4 The investigation regarding the alleged procurement was conducted by the IGI who subsequently issued his final report on 30 April 2021.

Issue in dispute

6.2.5 The issue for the Public Protector's determination was whether the directive by the Minister instructing the National Commissioner to suspend the investigation and intended suspensions of certain members of the SAPS-CI, following the alleged irregular awarding of the personal protective equipment contracts by the SAPS-CI, was premised on the alleged personal interest he held in the companies appointed by SAPS-CI.

35 Amongst other things, the issue was that the Secret Service Account Act, 56 of 1978 did not provide for the utilization of the secret service account funds for national disasters or any other matter that is not secret service or expenses connected therewith.

36 Section 2 of the Secret Service Act, 56 of 1978 provides that funds appropriated in terms of this Act shall be utilized for the secret services and for expenses in connection therewith.

The Complainant's version

6.2.6 The Complainant's allegation was that the Minister's instruction to the National Commissioner might have been predicated on the fact that he was linked to the company(ies) that were awarded the PPE contracts by the SAPS-CI. Therefore, the Minister's conduct in this regard was in violation of the Executive Ethics Code.

Media Reports

6.2.7 According to an article that appeared on Radio 702's website[37], News24 investigative journalist, Jeff Wicks, was quoted saying:

"*We have managed to establish that the Crime Intelligence slush fund was used to channel R1,4-million and thereabouts to three companies to purchase PPE in March and April last year. That's when South Africa was still in the midst of the first wave or it was fast approaching.*

The three companies that received the money are: Harbour Protection Services, operated by a former policeman who has been discharged from the service for killing one of his subordinates in the course of an arrest.

The second company, Tanicol, is operated by another former policeman. What is interesting is that our sources tell us he is married to a police officer who is still in active duty and is assigned to Crime Intelligence Unit.

[37] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi2rP6d8aP0AhUDolwKHU8GCsEQFnoECAkQAQ&url=https%3A%2F%2Fwww.702.co.za%2Farticles%2F406401%2Fslush-fund-abuse-goes-on-as-ex-cops-score-big-in-crime-intelligence-ppe candal&usg=AOvVaw2i4xXaV_CqWHYYJVWC7kTy.

The third firm is someone of an outlier in that no link to a police officer could be established but they were paid a marginal fee of R300, 000 for hand sanitiser."

The IGI's response

6.2.8 The Public Protector, through a letter dated 02 March 2022, requested the IGI to provide information and documents that would assist the Investigation Team in addressing the issues raised by the Complainant. Dr Dintwe responded the Public Protector through a letter dated 14 March 2022.

6.2.9 Dr Dintwe stated that the OIGI conducted an investigation into allegations of irregularities during the procurement of PPE, using SSA by the SAPS-CI. Following the said investigation, the OIGI issued PPE Preliminary Report to General Sitole, which was made availed to the Public Protector.

6.2.10 The PPE Preliminary Report made adverse findings against Lt. Gen. Jacobs, Maj. Gen Lekalakala, Brig. Lombard Col Walljee, Col Matamela, Brig. Chan Goolam and Lt Col. Nathan Giness Naidoo, Capt. Tanya Naidoo (Capt. Naidoo) regarding the procurement of the PPE by the SAPS-CI.

6.2.11 The PPE Preliminary Report identified three companies that were awarded the PPE contracts by SAPC-CI, namely, Tanicol Group (Pty) Ltd (Tanicol Group), Harbour Protection Services (Pty) Ltd (Harbour Protections Services) and Viomed (Pty) Ltd (Viomed).

6.2.12 The PPE Preliminary Report revealed that Enver Salie, linked with Harbour Protections Services, was a former Lieutenant Colonel in the SAPS: KwaZulu-Natal and was discharged in July 2018.

6.2.13 The PPE Preliminary Report also revealed that Capt. Naidoo was linked with Tanicol Group and was still attached to SAPS-CI in KwaZulu-Natal. Mr Seelan Gopaul Naidoo was also the director of the Tanicol Group and a

former member of the SAPS. The IGI also found that due to the fact that Capt. Naidoo was still in active service, she failed to declare her business interest in Tanicol Group resulting in a case of a possible conflict of interest.

6.2.14 The PPE Preliminary Report further revealed that the procurement of services from Tanicol Group, Harbour Protection Services and Viomed was irregular.

6.2.15 The PPE Preliminary Report did not reveal any further links between the former and current SAPS members and the three companies that received the PPE contracts from the SAPS –CI.

Response from the National Commissioner

6.2.16 Subsequent to his response to the Public Protector dated 16 August 2021, General Sitole also availed to the Public Protector, a copy of a report dated 08 February 2021 (SAPS Report).

6.2.17 According to the SAPS Report, the investigation traversed amongst other things the allegations of procurement irregularities relating to the procurement of PPE from the SSA of the SAPS-CI.

6.2.18 The SAPS Report recorded that the total procurement of PPEs from the SSA was allocated as follows:

Service Providers	**Total Amount**	**Head Quarters**	**Limpopo**	**Free State**	**Kwa-Zulu Natal**
Tanicol Group	R556 560	R430 000	R8 860	R30 200	R87 500
Harbour Protection Services	R590 850	R461 250	R31 500	R58 500	R39 600
Viomed	R320 000	R300 000			R20 000

TOTAL	**R1 467 410**	**R1 191 250**	**R40 360**	**R88 700**	**R147 100**

Evidence independently obtained

6.2.19 The Public Protector further conducted investigation to establish if there were any links between the three companies that awarded the PPE contracts by the SAPS-CI and the Minister.

6.2.20 Through a letter dated 03 June 2021, the CIPC was requested to provide details pertaining to the directorship of the companies listed below. The CIPC and the Central Supplier Database records showed that the previous and/or current ownership and/or directorship of the three companies were held as follows:

Company Name	**Director Name**	**Director Name**
Tanicol Group	Tanya Naidoo	Seelan Gopaul Naidoo
Harbour Protection Services	Enver Salie	Shamima Mohamed Varachia
Viomed	K Govender	P Naidu

6.2.21 The CIPC documents at the Public Protector's disposal revealed that Enver Salie, who was identified as the former Lieutenant by the PPE Preliminary Report, was at some stage the Director of Harbour Protections Services.

6.2.22 It was observed that both Captain Naidoo and Mr SG Naidoo were directors at Tanicol Group and Captain Naidoo was still in the employ of the SAPS as indicated in the PPE Preliminary Report.

6.2.23 The Public Protector further conducted financial investigation which sought to establish if there was any available evidence to link the Minister with the three companies that were awarded the PPE contracts by the SAPS-CI.

Application of the relevant law to merits

6.2.24 Section 96(2) of the Constitution provides that the Members of the Cabinet and Deputy Ministers may not—

"act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests."

6.2.25 The provisions of section 96(2) are crystallised in the Executive Ethics Code cited below which forms the basis of the current investigation of the Public Protector as envisaged in section 3 of the EMEA.

6.2.26 Paragraph 2.3 of the Executive Ethics Code provides that Members of the Executive may not-

(f) "expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests."

6.2.27 In essence, the Complainant's contention was that the Minister may have issued a directive to the National Commissioner in order to protect the interests he held in the companies that were awarded the PPE contract by the SAPS-CI.

6.2.28 It was noted that the IGI's report did not link the Minister and/or his family with the alleged irregular awarding of the PPE contracts by the SAPS-CI.

6.2.29 The investigation conducted by the Public Protector also did not establish any connection between the Minister and his family with the three

companies that benefited from the awarding of the PPE contracts by the SAPS-CI.

Conclusion

6.2.30 In view of the foregoing, there was no evidence indicating that the Minister exposed himself to a situation involving the risk of a conflict between his official responsibilities and his private interests.

7. FINDINGS

Having regard to the evidence as well as the regulatory framework determining the standard that should have been complied with by the Minister, the Public Protector makes the following findings:

7.1 Whether the Minister of Police, Mr Bhekokwakhe Hamilton Cele, MP violated the Executive Ethics Code when he instructed the National Commissioner of the South African Police Service, General Khehla John Sitole, to suspend the investigation and intended suspensions of certain members of the South African Police Service Crime Intelligence (SAPS-CI) until he had received a report from the Inspector-General of Intelligence

7.1.1 The allegations that the Minister violated the Executive Ethics Code when he instructed General Sitole to suspend the investigation and intended suspensions of implicated officials until he had received a report from the IGI is unsubstantiated.

7.1.1 The Minister's impugned directive issued to General Sitole, through a letter dated 01 December 2020, was not implemented because General Sitole proceeded to suspend and continued with the disciplinary investigation against the implicated officials.

7.1.2 The Minister's impugned directive was based on his *bona fide* but incorrect interpretation of section 7(7)(f) of the Oversight Act which provides that the findings of the investigation conducted by the IGI in terms of section 7(7)(cA) should be availed to the minister concerned.

7.1.3 There was no evidence that the Minister acted in bad faith and therefore acted in violation of paragraph 2.1(c) of the Executive Ethics Code which requires him to act in good faith and in the best interest of good governance.

7.1.4 In these circumstances, the conduct of the Minister is not inconsistent with section 96(2)(b) of the Constitution.

7.2 **Whether the directive by the Minister of Police, Mr Bhekokwakhe Hamilton Cele, MP instructing General Sitole to suspend the investigation and intended suspensions of certain members of the SAPS-CI, following the alleged irregular awarding of the personal protective equipment contracts by the SAPS-CI, was premised on the alleged personal interest he held in the companies appointed by SAPS-CI, and if so, whether such conduct was in breach of the Executive Ethics Code**

7.2.1 The allegations that the directive by the Minister instructing General Sitole to suspend the investigation and intended suspensions of certain members of the SAPS-CI, following the alleged irregular awarding of the personal protective equipment contracts by the SAPS-CI, was premised on the alleged personal interest he held in the companies appointed by SAPS-CI, is unsubstantiated.

7.2.2 The Public Protector could not find evidence linking the Minister with the three companies that were awarded the PPE contracts by the SAPS-CI.

7.2.3 The Public Protector could also not find evidence that the Minister acted in a way that is inconsistent with his position and/or exposed himself to a

situation involving the risk of a conflict between his official responsibilities and his private interests.

7.2.4 The conduct of the Minister was not inconsistent with section 96(2)(b) of the Constitution.

7.2.5 Therefore, the conduct of the Minister was not in breach of clause 2.3(f) of the Executive Code of Ethics.

8. OBSERVATIONS

8.1 In terms of section 8(1) of the Public Protector Act, the Public Protector may, subject to the provisions of subsection (3) in the manner she deems fit, make known to any person, any finding, point of view or recommendation in respect of a matter investigated by her.

8.2 Having regard to the evidence obtained during the investigation as well as the clarity provided by the court in the matter of the *South African Policing Union and Others v The Minister of Police and Others*[38] the Public Protector makes the observation that the Minister's interpretation of his powers in terms of the Oversight Act, read with the PFMA, the SAPS Act and Disciplinary Regulations, is not sustained in law.

8.3 The Public Protector noted the judgement in the SAPU case which the Minister resolved to abide by and did not challenge either. Notably, Minnaar AJ at paragraph 64 denoted that:

> *64. It is clear from a textual reading of section 7(7) that the provision does not regulate the second to seventh applicants' suspensions at all, nor does it create the preconditions sought to be read in by them.* ***It does not provide that in the absence of the IGI submitting a report to***

[38] (66522/2020) [2021] ZAGPPHC 10 (8 January 2021).

the Minister, and in the absence of a decision by the Minister which is communicated to the National Commissioner*, the National Commissioner will have no power of suspension.[Added Emphasis].*

8.4 *The Court subsequently held as follows:*

78. Suspensions of this nature are at the prerogative of the employer. In this case, the National Commissioner is the employer of the second to seventh applicants. The Minister's role is circumscribed and does not extend to the day-to-day employment-related affairs of the SAPS.

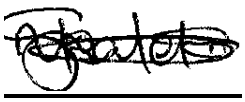
81. It follows that, the National Commissioner is not only entitled to act against the second to seventh applicants' alleged misconduct, but is obliged to do so by law, specifically section 51 read with section 86 of the PFMA.

8.5 Therefore the circumstances of the matter dictate that the Minister should have been more circumspect and addressed the issue under investigation differently by ensuring that he applies the provisions of section 7(7) of the Oversight Act in a manner that is consistent with other relevant legislation regulating the powers of the National Commissioner and the OIGI.

9 CONCLUSION

9.1 On 16 May 2022 and 03 November 2022 respectively, the Complainant was afforded the opportunity to respond to Rule 41(1) Notices. He did not respond to the notice and accordingly the Public Protector hereby proceeds to close the matter in line with the provisions of Rule 41(2) of the Public Protector Rules.

9.2 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
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 30 DECEMBER 2022

Assisted by: Ms Ponatshego Mogaladi
Executive Manager: Investigations Branch