

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

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CLOSING REPORT ON AN ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT RELATING TO THE FAILURE BY THE MINISTER OF PUBLIC ENTERPRISES OR A DULY APPOINTED REPRESENTATIVE TO ENSURE THAT THE NATIONAL PORTS AUTHORITY WAS INCOPORATED AS A COMPANY

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List of acronyms:

ADG	The Acting Director-General
CEO	The Chief Executive Officer
CIPC	Companies and Intellectual Properties Commission
Complainant	Mr Jan D Scheepers
Compcom	The Competition Commission
Constitution	The Constitution of the Republic of South Africa, 1996
DPE	The Department of Public Enterprises
Email	Electronic mail correspondence
Mr Mthimkhulu	Mr Brayce Mthimkhulu, the CEO of Siyakhuphuka
Mr Tlhakudi	Mr Kgathatso Tlhakudi, the ADG of the DPE
NPA	The National Ports Authority
NPAA	The National Ports Authority Act No. 12 of 2005
Notice	Discretionary Notice issued in terms of rule 42(1) of the <i>Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018</i> (the Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act, 23 of 1994 (Public Protector Act).
PPSA	Public Protector South Africa
Public Protector Act	Public Protector Act 23 of 1994
RZCH	Royal Zulu Container Hub
SCA	Supreme Court of Appeal
Siyakhuphuka	Siyakhuphuka Investment Holdings (Pty) Limited
The Minister	Minister of Public Enterprises
TNPA	Transnet and Transnet National Ports Authority
The Public Protector	Public Protector of the Republic of South Africa
Transnet	Transnet SOC Limited

1. INTRODUCTION

- 1.1. This is my closing report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] (the Public Protector Act).
- 1.2. The report relates to an investigation conducted in connection with allegations of maladministration and improper conduct relating to the failure by the Minister of Public Enterprises or a duly appointed representative to ensure that the National Ports Authority (the NPA) was incorporated as a company as envisaged by the National Ports Authority Act, 2005 [Act No. 12 of 2005].
- 1.3. A copy of the closing report is provided to Mr Jan D Scheepers (the Complainant), the Minister of Public Enterprises, Mr Pravin Gordhan (the Minister) and the Acting Director-General (the ADG) of the Department of Public Enterprises (the DPE), Mr Kgathatso Tlhakudi, in terms of section 8(3) of the Public Protector Act, 1994.

2. THE COMPLAINT

- 2.1. The complaint was lodged by Mr Jan D Scheepers, on 06 May 2019. The Complainant alleged the following:
 - 2.1.1. The Minister of Public Enterprises, neglected his constitutional obligation of ensuring that the NPA was incorporated as a company in terms of section 3(2) of the National Ports Authority Act, 2005 [Act No 12 of 2005] (the NPAA, 2005).
 - 2.1.2. The Complainant also alleged that, instead of ensuring that the NPA was incorporated as a company, the Minister of Public Enterprises, Mr Pravin Gordhan (the Minister) or a delegated official permitted Transnet SOC Ltd (Transnet) to integrate the NPA as an operating division of Transnet.

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- 2.1.3. This, he said, compelled the NPA to execute Transnet's strategy and corporate goals, including increasing its market share and protecting volumes against new entrants and thus taking over the NPA for its strategic and competitive purposes.
- 2.1.4. It is the Complainant's contention that, the conduct and/or omission enabled Transnet to prevent Royal Zulu Container Hub's (the RZCH) initiative to install a global container terminal at Port of Richards Bay, in the KwaZulu-Natal Province, which was aimed at making KwaZulu-Natal an attractive investment destination for industrialists wanting to serve all world markets and which would result in job creation and economic growth for the communities of KwaZulu-Natal.
- 2.2. As a consequence, the Complainant approached the Public Protector and requested that an investigation be instituted with a view to determine whether the conduct of the Minister or a duly appointed representative to ensure that the NPA was incorporated as a company as envisaged by the NPAA, 2005, constituted maladministration and improper conduct.
3. **Based on the analysis of the complaint and the allegations contained therein, the following issue was identified and investigated:**
- 3.1. Whether the Minister of Public Enterprises or a duly appointed representative failed to take the necessary steps to ensure that the NPA was incorporated as a company as envisaged by the NPAA, 2005, and if so, whether the conduct constituted maladministration and improper conduct.

4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1. The mandate of the Public Protector

3.1.1. The Public Protector is an independent constitutional institution, established in terms of section 181(1)(a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

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

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

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.”

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

3.1.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.1.5. In the matter of the ***President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)***, the court held as follows, when confirming the powers of the Public Protector:

3.1.5.1. The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);

3.1.5.2. The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82);

3.1.5.3. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101):

- (a) Conduct an investigation;
- (b) Report on that conduct; and
- (c) To take remedial action.

3.1.5.4. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (Paragraph 104);

3.1.5.5. The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105);

- 3.1.5.6. The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108); and
- 3.1.5.7. *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112).
- 3.1.5.8. The DPE is an organ of state and its conduct amounts to conduct in state affairs, as a result, the matter falls within the ambit of the Public Protector's mandate. The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.
- 3.1.6. Section 6(9) of the Public Protector Act, 1994 provides that, "*Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned*".
- 3.1.7. In the case between **South African Bureau of Standards v The Public Protector, the North Gauteng High Court 34290/15Â) [2019] ZAGPPHC 101** (27 March 2019) the court held that-

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

3.1.8. As supplementary jurisprudence in respect of the issue of “*special circumstances*” it is clear that in the case between ***Gordhan v Public Protector and Others [2020] ZAGPPHC 777 (17 December 2020)*** the North Gauteng High Court held that-

“In view of the provisions of section 6(9) and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this complaint.”

3.1.9. Therefore, regarding the exercise of the discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitutes ‘special circumstances’, some of the special circumstances that were taken into account to exercise the discretion favourably to accept this complaint, include the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether this office would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether a refusal to investigate perpetuates the violation of section 195 of Constitution; whether any remedial action will redress the imbalances of the past. What constitutes ‘special circumstances’ depends on the merits of each case.

3.1.10. In this instance, the special circumstances that the Public Protector took into account were the fact that the conduct and/or omission, as alleged by the Complainant, still persists to date.

- 3.1.11. Admittedly, in terms of section 6(9) of the Public Protector Act, the Public Protector is barred from entertaining complaints reported after two (2) years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported does not, in itself, bar the Public Protector from investigating. Instead, it is mainly the interest of justice that dictates whether it should be investigated or not. In this case, it is in the interest of justice to investigate and establish whether the Minister or a delegated official failed to execute their constitutional duties in ensuring that the NPA was incorporated as a company as envisaged by section 3(3) of the NPAA, 2005.
- 3.1.12. Since the incident or matter concerned occurred more than two years prior to the reporting of the matter to the Public Protector, the Public Protector has exercised her discretion in terms of section 6(9) of the Act to entertain the complaint based on the following special circumstances as envisaged in Rule 10(1) of the Public Protector Rules-
- (a) *“The Complainant provided sufficient and compelling information with prima facie evidence of alleged or suspect improper or prejudicial conduct;*
 - (b) *The nature of the complaint reveals the possibility of un-remedied maladministration or injustice...”*
- 3.1.13. In the circumstances, the Complainant provided sufficient information with *prima facie* evidence of alleged or suspected improper or prejudicial conduct by the Minister or a duly delegated official of the DPE. It also follows that, the nature of the complaint reveals the possibility of maladministration and improper conduct of the Minister or a duly appointed representative of the DPE.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The Public Protector conducted a preliminary investigation into the matter in terms of section 7(1) of the Public Protector Act, 1994 [Act No. 23 of 1994], to determine the merits of the complaint and also to determine how the matter concerned should be dealt with.

4.1.2. The investigation process included the assessment of the complaint, electronic mail (e-mail) communication between the Public Protector's Office and the Complainant, the ADG of the DPE, Mr Kgothatso Tlhakudi, as well as conducting legal research and relevant documents.

4.1.3. All relevant documents and correspondence were obtained and analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the preliminary investigation.

4.2. Approach to the investigation

4.2.1. The investigation was approached using an enquiry process that seeks to find out:

4.2.1.1. What happened?

4.2.1.2. What should have happened?

4.2.1.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

- 4.2.1.4. In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?
- 4.2.2. 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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.
- 4.2.3. The Supreme Court of Appeals (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do. In the case of ***The Public Protector v Mail and Guardian***¹ the court stated that,
- “The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances”.*
- 4.2.4. In this particular case, the factual enquiry principally focused on whether or not the Minister or a duly appointed representative failed to ensure that the NPA was incorporated as a company as envisaged by the NPAA, 2005, which enabled Transnet to prevent the RZCH's initiative to install a global container terminal at Port of Richards Bay, in the KwaZulu-Natal Province, aimed at job creation and economic growth for the communities of KwaZulu-Natal Province.
- 4.2.5. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Minister or duly appointed representative to prevent maladministration and improper conduct.

¹ (422/10 [2011] ZASCA 108 (1 June 2011))

4.2.6. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3. The Key Sources of information

4.3.1. Documents

4.3.1.1. A copy of the Complainant's complaint document dated 03 May 2019;

4.3.1.2. A copy of a White Paper on the National Transport Policy in terms of Notice 1409 of 2002, published in Government Gazette Number 23715 of 8 August 2002;

4.3.1.3. A copy of an undated Royal Zulu Container Hub's Proposal for the installation of global container terminal at Port of Richards Bay, in the KwaZulu-Natal Province;

4.3.1.4. A copy of a letter dated 13 January 2010 from Siyakhuphuka Investment Holdings (Pty) Limited addressed to the former Minister of Public Enterprises, Ms Barbara Hogan;

4.3.1.5. A copy of a letter dated 02 March 2010 from the former Minister of Public Enterprises, Ms Barbara Hogan titled "*Richards Bay container terminal, unlawful action by Transnet*" addressed to Mr Prince Mthimkhulu of Siyakhuphuka Investment Holdings (Pty) Limited;

- 4.3.1.6. A copy of a letter dated 05 March 2010 from Mr Prince Mthimkhulu of Siyakhuphuka Investment Holdings (Pty) Limited titled “*Richards Bay container terminal, unlawful action by Transnet*” addressed to the former Minister of Public Enterprises, Ms Barbara Hogan and the former Minister of Transport, Mr Sibusiso Ndebele;
- 4.3.1.7. A copy of a letter dated 20 April 2011 from Mr Brayce Mthimkhulu titled “*Richards Bay Container Terminal*” addressed to the former Minister of Public Enterprises, Mr Malusi Gigaba;
- 4.3.1.8. A copy of a letter dated 06 September 2018, from Jacques Roos Attorneys titled “*Siyakhuphuka Investment Holdings (Pty) Limited/Ports Regulator of South Africa, Transnet SOC, Minister of Public Enterprises and Minister of Transport (Durban High Court Case No. 5520/2016)*” addressed to Transnet, National Ports Authority, National Ports Regulator, Minister of Public Enterprises, Minister of Transport, Minister of Co-operative Governance;
- 4.3.1.9. A copy of a letter dated 02 November 2011 from the former Minister of Public Enterprises, Mr Malusi Gigaba addressed to Mr Brayce Mthimkhulu of Siyakhuphuka;
- 4.3.1.10. A copy of the Ports Regulator of South Africa’s Record of Decision dated 15 July 2015;
- 4.3.1.11. A copy of Notice 1143 of 2015 published in the Government Gazette No. 39411 dated 13 November 2015;
- 4.3.1.12. A copy of the Competition Tribunal of South Africa’s Reasons for Decision in an Exception Application in a matter between *Siyakhuphuka Investments Holdings (Pty) Ltd v Transnet SOC Ltd and Transnet National Ports Authority* under Case Number CRP163Oct15/PIL089Apr17;

- 4.3.1.13. A copy of the High Court of South Africa, KwaZulu-Natal Local Division, Durban's judgment in a matter between *Siyakhuphuka Investments Holdings (Pty) Ltd v Ports Authority of South Africa, Transnet SOC Ltd, Minister of Public Enterprises and Minister of Transport* under Case No. 5520/2016;
- 4.3.1.14. A copy of the Minister of Public Enterprises Confirmatory Affidavit in a matter in the High Court of South Africa, KwaZulu-Natal Local Division, Durban's judgment in a matter between *Siyakhuphuka Investments Holdings (Pty) Ltd v Ports Authority of South Africa, Transnet SOC Ltd, Minister of Public Enterprises and Minister of Transport* under Case No. 5520/2016;
- 4.3.1.15. A copy of the Competition Appeal Court of South Africa's judgement in a matter between *Siyakhuphuka Investments Holdings (Pty) Ltd and Transnet SOC Ltd and Transnet National Ports Authority* under Case Number 158/CAC/Nov17 delivered on 03 July 2018;
- 4.3.1.16. A copy of a letter dated 07 September 2018 from Mr Selatswa Masenya in the Office of the Minister titled "*Settlement proposal/Siyakhuphuka Investment Holdings (Pty) Limited/Ports Authority of South Africa*";
- 4.3.1.17. A copy of a letter dated 16 November 2018 from Mr Martin Potgieter of Potgieter Kunene Xaba Attorneys titled "*Siyakhuphuka Investments Holding: The Ports Regulator of South Africa and Others (Case No. 5520/2016*" addressed to Jacques Roos Attorneys;

4.3.2. Correspondence

- 4.3.2.1. A copy of a letter dated 12 February 2020, from the Public Protector addressed to the Acting Director-General of the Department of Public Enterprises, Mr Kgathatso Tlhakudi;

4.3.2.2. A copy of a response letter dated 18 August 2020, from the ADG of the DPE, Mr Kgathatso Tlhakudi addressed to the Public Protector.

4.3.2.3. A copy of letter dated 12 February 2020, from the Public Protector addressed to the Companies and Intellectual Properties Commission (the CIPC), Senior Manager: Facilities and Security Mr Andre Oosthuizen;

4.3.2.4. A copy of the Public Protector's Discretionary Notice dated 4 May 2021, addressed to the Complainant;

4.3.2.5. A copy of a response to the Discretionary Notice dated 12 May 2021, from the Complainant addressed to the Public Protector

4.3.3. **Legislation and other prescripts**

4.3.3.1. The Constitution of the Republic of South Africa, 1996;

4.3.3.2. The Public Protector Act, 1994 [Act No. 23 of 1994];

4.3.3.3. The National Ports Authority Act, 2005 [Act No. 12 of 2005];

4.3.3.4. The Competition Act, 1998 [Act No. 89 of 1998]

4.3.4. **Websites**

4.3.4.1. www.dpe.gov.za;

4.3.4.2. www.transport.gov.za;

4.3.4.3. www.transnet.net;

4.3.4.4. www.compcom.co.za

4.3.5. **Case Law**

4.3.5.1. *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017);*

4.3.5.2. *Public Protector v Mail and Guardian (422/10) [2011] ZASCA 108 (1 JUNE 2011)*;

4.3.5.3. *South African Bureau of Standards v The Public Protector, the North Gauteng High Court 34290/15Â) [2019] ZAGPPHC 101 (27 March 2019)*;

4.3.5.4. *Gordhan v Public Protector and Others [2020] ZAGPPHC 777 (17 December 2020)*

4.3.6. **Public Protector's Touchstones**

4.3.6.1. **The Public Protector's Report No. 06 of 2020/2021**, issued on 16 September 2020, following an investigation into allegations of maladministration and improper conduct in connection with the decision by the former Minister of Energy, Ms Tina Joemat-Pettersson to approve the sale of ten (10) million barrels of the strategic fuel reserves held by the Strategic Fuel Fund Association.

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

5.1. **Whether the Minister of Public Enterprises or a duly appointed representative failed to take the necessary steps to ensure that the NPA was incorporated as a company as envisaged by the provisions of the NPAA, 2005, and if so, whether the conduct constituted maladministration and improper conduct:**

Common Cause Issues

- 5.1.1. It is not disputed that the former President of the Republic of South Africa, His Excellency President Thabo Mbeki, by notice in the Government Gazette Number 27863 dated 04 August 2005, assented to the publication of the National Ports Act, 2005 [Act No. 12 of 2005].
- 5.1.2. The purpose of the Act was to provide for the establishment of the National Ports Authority and the Ports Regulator; to provide for the administration of certain ports by the National Ports Authority; and to provide for matters connected therewith.
- 5.1.3. It is also not disputed that the NPA operates as a port landlord, managing, controlling and administering the South African ports system. Its core services include the maintenance and provision of port infrastructure, as well as the provision of maritime operations, such as pilotage, towage (tug assistance), dredging, and lighthouse and navigational services.
- 5.1.4. It is further not disputed that Transnet Port Terminals is a division of Transnet, South Africa's state-owned freight transport company which owns and operates sixteen (16) terminal operations situated across seven (7) South African Ports.
- 5.1.5. Operations are divided into major market sectors, namely containers, bulk, break bulk and automotive and organised into three geographical regions, namely Eastern Cape, Western Cape and Kwa-Zulu Natal Provinces.
- 5.1.6. It is further not disputed that, Siyakhuphuka Investments Holdings (Pty) Limited (Siyakhuphuka) had been operating a cargo terminal and container freight station which later turned to logistical services at the outer reaches of the port at Richards Bay, Kwazulu-Natal.

Issue in Dispute

- 5.1.7. The issue for determination was whether or not the Minister of Public Enterprises or a duly appointed representative failed to take the necessary steps to ensure that the NPA is incorporated as a company as envisioned by the provisions of the NPAA, 2005.
- 5.1.8. In essence, the Complainant alleged that, the Minister of Public Enterprises neglected his constitutional obligation of ensuring that the NPA was incorporated as a company as envisaged by the provisions of section 3(2) of the NPAA, 2005.
- 5.1.9. The Complainant also alleged that, instead of ensuring that the NPA was incorporated as a company, the Minister or a duly appointed representative permitted Transnet to integrate NPA as an operating division of Transnet.
- 5.1.10. This, the Complainant said, compelled the NPA to execute Transnet's strategy and corporate goals, including increasing its market share and protecting volumes against new entrants and thus taking over the NPA for its strategic and competitive purposes.
- 5.1.11. It is the Complainant's contention that, the failure by the Minister of Public Enterprises or a duly appointed representative to ensure that the NPA was incorporated as a company enabled Transnet to prevent him and his consortium, RZCH, to conduct a global container terminal at Port of Richards Bay, KwaZulu-Natal Province.
- 5.1.12. On 12 February 2020, a letter in terms of section 7(4)(a) of the Public Protector Act, 1994 was issued to the ADG of the DPE, Mr Kgathatso Tlhakudi (Mr Tlhakudi) requesting him to provide a response to the allegations made by the Complainant, as well as documentation and information pertinent to the matter under investigation.

5.1.13. On 19 August 2020, Mr Tlhakudi responded to the letter referred to supra and stated in paragraph 5 that:

“It must be noted that the matter currently under investigation by the Public Protector is also a subject of litigation in the High Court of the Republic of South Africa (Durban Division of the High Court)”.(sic)

5.1.14. In addition, Mr Tlhakudi stated for the record that, *“The Complainant has been filing the matter in different fora, including but not limited to, the Ports Regulator of South Africa, the Competition Commission, the Competition Tribunals and now with the High Court of the Republic of South Africa (Durban Division of the High Court) and the Public Protector South Africa”.*(sic)

5.1.15. Mr Tlhakudi conceded that the NPA was not incorporated as a company as yet and that the NPA was a division of Transnet. As a corollary to this, Mr Tlhakudi advised that the request for the Memorandum of Incorporation, Shareholder Compact and a list of Board of Directors and Shareholders should be directed to Transnet on the basis that the shareholding Minister would have, under the circumstances, concluded the agreements with Transnet.

5.1.16. Notwithstanding the above, it was established from independently sourced documentation that, on 8 August 2002, the former Minister of Transport, Mr Abdulah Mahommed Omar and the former Minister of Public Enterprises, Mr Jeff Radebe, issued a White Paper on the National Transport Policy.

5.1.17. The purpose of the National Transport Policy referred to herein above was to ensure affordable, internationally competitive, efficient and safe port services based on the application of commercial rules in a transparent and competitive environment applied consistently across the transport system.

5.1.18. It was noted that the objective of the National Transport Policy was, inter alia, to ensure that,

“South Africa's commercial ports system becomes globally competitive; safe and secure, operating at internationally accepted levels of operational efficiency, in a manner that supports the goals and objectives of the Reconstruction and Development Plan and the Growth, Employment and Redistribution strategy. Additionally, to serve the economy and meet the needs of port users in a manner that is economically and environmentally sustainable”.

5.1.19. It was also noted that, with the new dispensation, the then NPA within Transnet would be positioned outside Transnet, in line with the restructuring programme of Transnet, as approved by the Minister of Public Enterprises. Further that, the NPA would then be established as a new State owned corporate entity.

5.1.20. Further to that, it was noted that in terms of the National Transport Policy, the Ministry and Department of Transport were assigned the responsibility to, inter alia:

- (a) Develop and maintain the national commercial policy;*
- (b) Develop and maintain the port regulatory framework;*
- (c) Develop and maintain the port legislative framework;*
- (d) Exercising a monitoring role in terms of the above-mentioned points”.*

5.1.21. It was further noted that, in terms of the National Transport Policy, the role of the Ministry and the DPE was to, *inter alia*,

- (a) Facilitate the implementation of the policy together with other relevant policies;*
- (b) Develop guidelines to enable concessioning of the port operations; and*

(c) *Ensure that concessioning schemes are based on international open, transparent, objective and non-discriminatory bidding processes in order to attract the widest possible response and warrant the selection of the best proposal.*

5.1.22. In addition, it was established that, on 04 August 2005, the former President of the Republic of South Africa, His Excellency President Thabo Mbeki, by notice in Government Gazette² assented to the publication of the NPAA, 2005.

5.1.23. The purpose of the Act was to provide for the establishment of the NPA and the Ports Regulator, the administration of certain ports by the NPA and to provide for matters connected therewith.

5.1.24. It was also established that, on 25 January 2008, RZCH, a consortium consisting of Siyakhuphuka Investments Holdings (Pty) Ltd, submitted a proposal to Transnet (which was subsequently rejected), as the shareholder of NPA, for a concession to operate a container terminal at the Port of Richards Bay, which would include the following:

5.1.24.1. Berths 606, 607 and 608 and the terminal area behind those berths at the Port of Richards Bay be made available for a container hub terminal for a minimum volume of containers as may be required by Transnet;

5.1.24.2. RZCH, with an international container terminal operator as partner be granted the concession to provide, operate and manage this terminal. The international partner is to be chosen in conjunction with the NPA and the shipping line or lines to be serviced;

5.1.24.3. The concession be granted with minimum delay in order to enable the necessary equipment to be ordered without delay and that Transnet will take the required steps to make the said area available by the end of the lead time for procuring and deploying the required equipment;

5.1.24.4. Alternatively, that the NPA would embark on a process of providing additional break bulk berths at the East end of the seven series break bulk berths and that RZCH with its international partner, be allowed meanwhile to proceed with the procurement process for equipment to run concurrently with Transnet's process for providing the additional berths, and

5.1.24.5. Transnet, as shareholder of the NPA, will commit to provide additional two berths, 605 and 604 (300 meters each) as and when volume guarantees justify this. At this stage the indication is that it will be required 24 months after the commissioning of the first two berths.

5.1.25. It was noted that, following the rejection of Siyakhuphuka's proposal, on 13 January 2010, the Chief Executive Officer (CEO) of Siyakhuphuka, Mr Brayce Mthimkhulu (Mr Mthimkhulu) addressed a letter titled "*Richards Bay Container terminal, unlawful action by Transnet*" to the former Minister of Public Enterprises, Ms Barbara Hogan and copied the former President of the Republic of South Africa, His Excellency President Jacob Zuma. In the letter, Mr Mthimkhulu highlighted what he had considered to be non-compliance to the NPAA, 2005 by Transnet.

5.1.26. In paragraph 3 of the letter, Mr Mthimkhulu states as follows:

"We firmly believe that Government' objectives are firstly defined by the transport policies of Government as translated by the Acts of Parliament.

Any actions by Transnet in conflict with those can certainly not aim to serve the needs of the Country. That is why our correspondence was addressed to the Minister of Public Enterprises as we became aware that your department and the department of Transport were equally concerned about the alleged unlawful behaviour of Transnet since December 2005". (sic)

- 5.1.27. As a result, the Complainant, acting on behalf of Siyakhuphuka, lodged a complaint with the Ports Authority of South Africa in terms of section 47(a)-(c) of the NPAA, 2005 read with Directive 2(1) issued in terms of section 30(3) of the NPAA, 2005, alleging that Transnet failed to follow a fair and transparent process with regard to the provision of access to ports and ports facilities, as well as the operation of a container terminal in Richards Bay.
- 5.1.28. It was noted that on 15 July 2015, the Ports Authority of South Africa issued a Record of Decision in which it concluded that, the Complainant failed to prove that the proposal submitted was unique and that no similar proposals were submitted to Transnet or Siyakhuphuka was the sole provider of the services. As a consequence, the Ports Authority of South Africa concluded that it lacked jurisdiction to rule thereon. Further, that the argument should be left for determination by a competent court.
- 5.1.29. It was further established that, following the issuing of the Record of Decision, on 27 October 2015, Siyakhuphuka referred the matter to the Competition Commission in terms of section 51(1) of the Competition Act, 1998.
- 5.1.30. On 13 November 2015, the Competition Commission (the Compcom) issued a notice of non-referral in terms of section 51(3) and (4) of the Competition Act, 1998, as amended, indicating that on 27 October 2015, it had received a complaint referral from Siyakhuphuka against Transnet and Transnet National Ports Authority (TNPA), following the Complainant's allegation that the respondents are engaged in a prohibited practice in contravention of section 4, 5 and 8 of the Competition Act, 1998.
- 5.1.31. It was also noted that, following the notice of non-referral, Transnet and TNPA (respondents) filed exception application in the Competition Tribunal of South Africa.

5.1.32. According to the information received, TNPA requested that various points of law arising consequent to the complaint referred by Siyakhuphuka in terms of section 51(1) of the Competition Act, 1998 be determined by the Competition Tribunal of South Africa before the matter could proceed on the merits.

5.1.33. In terms of the exception application the respondents sought clarity on, amongst others, the following points in law:

- (a) *“Whether the duties imposed on the Second Respondent in terms of the Ports Act to regulate and administer ports, and in particular to conclude agreements in terms of section 56 thereof or to issue licences in terms of section 57 and 65 thereof, are subject to the jurisdiction of the Competition Act;*
- (b) *Whether the facts alleged by the Complainant in its initial affidavit (assuming such facts to be correct), disclosed an abuse of dominance either by the First Respondent , as defined in section 8 of the Competition Act;*
- (c) *Whether the facts raised by the Complainant in paragraph 4-10 of its Supplementary Affidavit (assuming such facts to be correct), disclosed a prohibited practice in terms of sections 4,5 and 8 of the Competition Act;*
- (d) *In as much as the events referred to in paragraphs 4-10 of the Complainant’s Supplementary Affidavit have not been considered or investigated by the Competition Commission, whether the Tribunal may consider the same;*
- (e) *Whether, even if on all facts by the Complainant should prove to be true, it is entitled to the relief set out in paragraph 35.1 of its Supplementary Affidavit;*

- (f) *Whether, having regard to the provisions of section 56 of the National Ports Act, the Tribunal has jurisdiction to make the order sought in paragraph 35.2 of the Complainant's Supplementary Affidavit". (sic)*

5.1.34. It was also noted that, on 17 October 2017, the Competition Tribunal of South Africa dismissed the exception application brought by Siyakhuphuka under Case Number: CRP163Oct15/PIL089Apr17, as well as a referral under Case Number CRP163Oct15. In dismissing the exception application and the referral without costs, the Competition Tribunal of South Africa stated as follows:

"[30] It is clear from the above cases that the CAC and the Tribunal rightly adopted the approach that the Competition Act is of no application in administrative law disputes. Therefore, the appropriate forum for the complainant to approach is the High Court in order to review the decision of TNPA. This the complainant has correctly done and the matter is currently pending in the Kwa-Zulu-Natal High Court Local Division, Durban. The complainant, therefore, erred in approaching the Tribunal for relief as the Tribunal in fact and in law it does not have jurisdiction to hear the matter.

[31] Although the inaction by the Minister of Transport and the Minister of Public Enterprises, contrary to sections 4(10 and 492) of the Ports Act, and its failure to establish National Ports Authority (Pty) Ltd is undesirable, this is a matter for Parliament to determine and not the Competition Tribunal".(sic)

5.1.35. Following the dismissal referred to above, Siyakhuphuka launched an appeal with the Competition Appeal Court of South Africa, contending that the Competition Tribunal of South Africa misconstrued the nature of its complaint and that this error resulted in the Tribunal upholding the respondents' points *in limine*.

5.1.36. Further that, even on the Tribunal's own (mis)characterisation (*sic*) of the complaint, the Tribunal ought to have dismissed the exception that the Tribunal did not have jurisdiction to consider the complaint. Consequently, in its judgment delivered on 03 July 2018, the Competition Appeal Court of South Africa per Mnguni JA held that:

"[38] I am persuaded that both the first and second complaints, properly construed, fall within the Competition Act and the Tribunal's exclusive jurisdiction because in each of the complaints the conduct alleged pertains to an abuse of the first respondent's dominant position and its refusal to grant access to the appellant to an essential facility.

[39] Having carefully considered the appellant's complaint, I am satisfied that it is squarely based on alleged anti-competitive conduct under Chapter 2 of the Competition Act, abuse of dominant position and refusal to provide access to an essential service in violation of s 8 of the Act. To my mind these are matters of competition which are better dealt with by the Competition Commission.

In the circumstances I find that the Tribunal erred in its conclusion that it did not have the jurisdiction to adjudicate the appellant's complaint and that the complaint was a public law complaint beyond the jurisdiction of the competition authorities".

5.1.37. It was further established that, following the Competition Appeal Court of South Africa, on 30 January 2019, the Complainant filed an amended Notice of Motion in the High Court of South Africa (KwaZulu Natal Division of the High Court), seeking an order directing the Shareholding Minister (the current Minister of Public Enterprises) to comply with section 3 and 4 of the NPAA, 2005 by:

- 5.1.37.1. *Ensuring that the necessary steps are taken for the incorporation of the National Ports Authority as a company contemplated in section 3(3) of the National Ports Act, 2005 within a period of three (3) months of the date of such order; (Own Emphasis)*
- 5.1.37.2. *Determining a date in terms of section 27(1) of the National Ports Act, 2005 after consultation with the Minister of Transport and with the concurrence of the Minister of Finance, on which all assets, liabilities, rights and obligations of Transnet in respect of National Ports Authority of South Africa vest in the National Ports Authority (Pty) Ltd; and*
- 5.1.37.3. *Directing the Minister to report back to the High Court of South Africa (Durban Division of the High Court) every three (3) months regarding the progress taken in compliance with the order and steps taken to ensure the independence of the National Ports Authority whilst the unbundling occurs. (sic)*
- 5.1.38. In line with rule 42(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto*, 2018 (the Public Protector Rules), on 4 May 2021, the Complainant was informed in writing of the intended closure of the complaint and was accordingly given an opportunity to make representations in connection therewith within fourteen (14) days of delivery of the notification.
- 5.1.39. On 12 May 2021, the Complainant submitted, for the Public Protector's consideration, representations regarding the closure of the matter under investigation. The Complainant stated as follows:
- “Reading the discretionary notice of 4 May 2021 by the Public Protector (hereinafter referred to as the PP), the complainant in its humble opinion, came to the conclusion that the investigation and the subsequent notice represents a thorough and well researched investigation.*

Not only did it arrive at a clear conclusion but it pointed out the severe implications of the non-compliance with our constitution by the Minister of Public Enterprises". (sic)

- 5.1.40. The Complainant also contends, amongst others, that the only action outstanding was for the Public Protector to take remedial action with a view to remedy the breach of the Constitution by the Minister of Public Enterprises, a breach which according to the Complainant still persists.
- 5.1.41. In addition, the Complainant contends that, the objective of the National Transport Policy was, *inter alia*, to ensure that, South Africa's commercial ports system becomes globally competitive; safe and secure, operating at internationally accepted levels of operational efficiency, in a manner that supports the goals and objectives of the Reconstruction and Development Plan and the Growth, Employment and Redistribution strategy.
- 5.1.42. Additionally, to serve the economy and meet the needs of port users in a manner that is economically and environmentally sustainable. This he said, depends on the Minister of Public Enterprises' execution of his Constitutional duty placed upon him emanating from the NPAA, 2005.
- 5.1.43. It was noted that, on 22 June 2021 the President of the Republic of South Africa, His Excellency President Matamela Cyril Ramaphosa (the President) announced in the media briefing held in Cape Town the establishment of an independent NPA with its own Board of Directors appointed by the Minister of Public Enterprises.
- 5.1.44. This, the President said was done with a view to accelerate the implementation of structural economic reforms which have gained momentum and crucial to enabling a strong economic recovery, and to placing the South African economy on a faster and more sustainable growth trajectory.

5.1.45. Further that, these reforms were necessary to modernise and transform the South African network industries to increase efficiency, reduce costs and make the country's exports more competitive and accelerate the creation of jobs.

Application of the relevant law and prescripts

5.1.46. **The Constitution of the Republic of South Africa, 1996** [Act No. 108 of 1996] (the Constitution, 1996), which is the supreme law of the Republic and confers upon the President the power to appoint Ministers and the assignment of their powers and functions.

5.1.47. In terms of section 91(1) of the Constitution, Cabinet consists of the President, as Head of the Cabinet, Deputy President and Ministers. Section 91(2) of the Constitution, 1996 provides that, the President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.

5.1.48. Section 92(2) of the Constitution, 1996 provides that, Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Section 92(3)(a) of the Constitution, 1996 provides that, Members of the Cabinet must act in accordance with the Constitution.

5.1.49. It is manifest that, by virtue of being appointed by the President to Cabinet, the Minister of Public Enterprises is entrusted with the responsibility of implementing legislation, developing and implementing policies relevant to his/her portfolio, directing and coordinating the work of the Department of Public Enterprises (the Department), preparing and initiating legislation relevant to the Department and performing other functions as called for by the Constitution or legislation.

- 5.1.50. Therefore, the failure by the Shareholding Minister to act in accord with the above Constitutional principles, was not in accord with the provisions section 92(3)(a) of the Constitution, as stipulated above. The failure thereof goes against the objects of section 92(3)(a), especially the requirement of acting in accordance with the Constitution.
- 5.1.51. **The National Ports Act, 2005 [Act No. 12 of 2005]**, is the key legislation which seeks to provide for the establishment of the National Ports Authority and the Ports Regulator, as well as to provide for the administration of certain ports by the National Ports Authority and to provide for matters connected therewith.
- 5.1.52. In terms of section 1 of the NPAA, 2005, a Shareholding Minister means the Minister of Public Enterprises or a duly appointed representative, whilst the National Ports Authority (Pty) Ltd means Transnet subsidiary company contemplated in section 3(2).
- 5.1.53. Section 3(2) of the NPAA, 2005 states that, as soon as this Act takes effect the Shareholding Minister must ensure that the necessary steps are taken for the incorporation of the NPA as a company contemplated in subsection (3).
- 5.1.54. Section 3(3) of the NPAA, 2005 states that, the Registrar of Companies must register the memorandum and articles of association and incorporate National Ports Authority of South Africa under the name “*National Ports Authority (Pty) Ltd*” with Transnet as the sole member and shareholder.
- 5.1.55. It is therefore manifest that, the responsibility of ensuring that the NPA was incorporated a company resides with the Shareholding Minister, in this instance, the Minister of Public Enterprises or a duly appointed representative.

- 5.1.56. Evidence attesting that, the Registrar of Companies had indeed registered the Memorandum and Articles of Association and incorporated the NPA under the name National Ports Authority (Pty) Ltd following the necessary steps taken by the Shareholding Minister or a duly appointed representative could not be found by the Public Protector.
- 5.1.57. The failure by the Shareholding Minister or a duly appointed representative to act in in line with the legislative principles above, is not in in line with the provisions section 3(2) of the NPAA, 2005, as stipulated above.
- 5.1.58. The failure goes against the objects of section 3(2) of the NPAA, 2005, especially the requirements that as soon as the NPAA, 2005 takes effect the Shareholding Minister must ensure that the necessary steps are taken for the incorporation of the NPA as a company.
- 5.1.59. Section 47(1) of the NPAA, 2005 provides that, *“Any complaint against the Authority must be lodged with the Regulator in the manner directed under section 30(3)”*.
- 5.1.60. Section 47(1) (a)-(c) of the NPAA, 2005 provides that;
- “A complaint against the Authority may be based on any ground provided for by the Regulator by direction under section 30(3) or on the ground that-*
- (a) access to ports and port facilities are not provided in a non-discriminatory, fair and transparent manner;*
 - (b) small and medium-sized enterprises owned by historically disadvantaged groups do not have an equitable opportunity to participate in the operation of facilities in the ports environment;*
 - (c) Transnet is treated more favourably and that it derives an unfair advantage over other transport companies”*.

- 5.1.61. **The National Ports Authority Directives** issued in terms of section 30(3) of the National Ports Act, 2005, which states in paragraph 2(1) that;
- 5.1.62. *“Any person whose rights or interests are adversely affected by any action of or failure to act by the Authority may lodge a complaint against the Authority with the Regulator on any of the grounds specified in section 47(2)(a), 47(2)(b) or 47(2)(c) of the Act, or on the ground that the Authority has failed to carry out, has unfairly carried out or has misapplied itself to any of the functions of the Authority set out in section 11 of the Act”.*
- 5.1.63. It is manifest that, the Complainant appropriately lodged a complaint on behalf of his company i.e. Siyakhuphuka, with the National Ports Regulator in connection with what he had considered to be the unfair and non-transparent processes with regard to the provision of access to ports and ports facilities in line with the provisions of section 47(1) of the NPAA, 2005 read with paragraph 2(1) of the National Ports Authority Directives.
- 5.1.64. **The Competition Act, 1998** [Act No. 89 of 1998], which provides for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court.
- 5.1.65. Section 51(1) thereof provides that, *“If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant concerned may refer the matter directly to the Competition Tribunal”.*

5.1.66. Section 51(3) and (4) thereof provides that, *“The Chairperson of the Competition Tribunal must, by notice in the Gazette publish each referral made to the Tribunal. The notice published in terms of subsection (3) must include the name of the firm whose conduct is the subject of the referral; and the nature of the conduct that is the subject of the referral”*.

5.1.67. It is thus manifest that, following the non-referral notice issued by the Competition Commission, the Complainant appropriately self-referred the complaint on behalf of his company i.e. Siyakhuphuka, directly to the Competition Tribunal in line with section 51(1) of the Competition Act, 1998.

5.1.68. Principles in previous findings of the Public Protector in a similar investigation (Touchstones)

5.1.68.1. **The Public Protector’s Report No. 06 of 2020/2021**, on an investigation into allegations of maladministration and improper conduct in a matter between Mr Pieter van Dalen, MP, Adv Anton de Waal Alberts, MP and the former Minister of Energy, Ms Tina Joemat-Pettersson.

5.1.68.2. The report relates to allegations of maladministration and improper conduct in connection with the decision by the former Minister of Energy, Ms Tina Joemat-Pettersson to rotate and subsequently sell ten (10) million barrels of strategic fuel reserves held by the Strategic Fuel Fund Association in a closed bidding process in 2015 and 2016, in contravention of the provisions of section 54(2)(d) of the Public Finance Management Act No.1 of 1999, as well as the Central Energy Fund Act No. 38 of 1977.

5.1.68.3. Having had regard to the evidence as well as the regulatory framework determining the standard that should have been complied with by the former Minister of Energy, the Public Protector found that the procurement process employed during the sale of the strategic fuel reserves was not in line with the provisions of section 217 of the Constitution, 1996 read with the Strategic Fuel Fund Association Procurement Policy.

5.1.68.4. In addition, the Public Protector found that the issues raised by the Complainants were the subject of litigation before the Western Cape Division of the High Court under Case Number 21771/2018.

5.1.68.5. Consequently, the Public Protector took a conscious decision to allow the judicial process to take its course and for the court to make a competent pronouncement on the matter, which the Public Protector would by law be bound to in any event.

The conclusions that could be made based on the application of the law to the facts:

5.1.69. Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it can be concluded that, the NPA was not incorporated as a company as envisaged in section 3(3) of the NPAA, 2005 until a pronouncement was made by the President of the Republic of South Africa, His Excellency President Matamela Cyril Ramaphosa on 22 June 2021, of the incorporation of the NPA as a company.

6. REASONS FOR CLOSURE

6.1. The evidence obtained and considered during the investigation indicates that the issue raised by the Complainant is currently the subject of litigation before the High Court of South Africa (KwaZulu-Natal Division of the High Court) Durban under Case Number 5520/2016.

6.2. In addition, the President of the Republic of South Africa, His Excellency President Matamela Cyril Ramaphosa has since remedied the anomaly by announcing the establishment of an independent NPA with its own Board of Directors appointed by the Minister of Public Enterprises.

- 6.3. In accord with the principles of the Public Protector's previous findings in a similar investigation, as well as considering the Complainant's representations I took a conscious decision to allow the judicial process to take its course and for the court to make a competent pronouncement on the matter, which I would by law be bound to in any event.
7. **KINDLY TAKE NOTICE THAT** in terms of section 7(2) of the Public Protector Act, 1994, the contents of this letter are confidential. No person may disclose the content hereof without the authorisation of the Public Protector and any person who breaches the confidentiality of this document "*... shall be guilty of an offence*" which is punishable, upon conviction, with "*a fine not exceeding R40 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment*" as contemplated in section 11 of the Act.
8. Should there be any enquiries of responses to this closing report, you are kindly requested to approach the Lead Investigator of the matter, **Mr Masekela Maphosa**, who is contactable at 012 **366 7100** alternatively at **MasekelaM@pprotect.org** quoting the above reference number.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 02/08/2021

Assisted by: Mr Masekela Maphosa (Senior Investigator: Investigations Branch)