

**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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**INVESTIGATION INTO ALLEGATIONS OF BREACH OF THE EXECUTIVE ETHICS
CODE PROMULGATED IN TERMS OF SECTION 2(1) OF THE EXECUTIVE
MEMBERS' ETHICS ACT, 1998 BY THE FORMER MINISTER OF POLICE, MR
BHEKOKWAKHE HAMILTON CELE**

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LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS/ ABBREVIATION	DESCRIPTION
Annual Report	SAPS Annual Report 2021/22 Financial Year
Complainant	Mr Andrew Whitfield
Constitution	The Constitution of the Republic of South Africa, 1996
Criminal Procedure Act	Criminal Procedure Act, 1977 as amended
EMEA	Executive Members Ethics Act, 1998
MEC	Member of the Executive Council
Mr Cele	Former Minister Bhekokwakhe Hamilton Cele
National Instruction 1/2016	National Instruction 1/2016, The use of force in effecting an arrest
Public Protector Act	Public Protector Act, 1994
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, 1995 as amended
SAPS Regulations	South African Police Service Employment Regulations, 2018
The Code	Executive Ethics Code 2000 published by proclamation in Government Gazette: No 21399 Notice No 41 Regulation 6853

Executive Summary

- (i) 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 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act), as well as Rule 40(b) of the Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018 as amended (Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act.
- (ii) The report relates to an investigation into allegations that the former Minister of Police, Mr Bhekokwakhe Hamilton Cele (Mr Cele) acted in breach of clause 2.1(b)-(d) and 2.3(c) of the Executive Ethics Code¹ (the Code), during his address to members of the SAPS at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated that *"shoot to kill and ask questions later"*,
- (iii) The complaint was lodged by the Democratic Alliance, Shadow Minister of Police: Mr Andrew Whitfield (the Complainant) on 18 November 2022. In his letter of complaint, the Complainant requested an investigation in terms of Section 4(1)(a) of Executive Members' Ethics Act, 1998 (EMEA) into the conduct of Mr Cele, emanating from a comment that he made on 15 November 2022, when addressing a crowd at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain, where he allegedly stated that:

"Shoot first and ask questions later. When you get into a war, you're not even going to ask who started the war. You go shoot and ask later."

Criminals have declared war. Don't go around and ask them who started the war, when you find the war when you find the people raping women, where you find people breaking into the houses, where you find stealing in

¹ The Executive Members' Ethics Act provides for a Code of Ethics No. 21399 Notice No. 41 Regulation 6853.

the houses, stealing the shops, raiding the shops, raiding the banks don't ask questions who started. Join the war, shoot, and kill". (sic)

- (iv) In essence, the Complainant alleged that:
 - (a) The Criminal Procedure Act, 1977 (Criminal Procedure Act), provides clear guidelines on the appropriate and proportionate use of force by police officers and a statement of this nature would incite young and fresh police officers of the South African Police Service (SAPS) to do exactly what Mr Cele told them what to do;
 - (b) The Constitution is very clear and no person may be arbitrarily deprived of their rights and the Bill of Rights is the cornerstone of South African law and is entrenched in the Constitution. When Mr Cele made the comments, he allegedly violated a number of principles in the Bill of Rights thereby breaching the provisions of the Code in that he has not fulfilled his obligations under the Constitution, has neither acted in good faith nor in the best interest of good governance and there was as lack of integrity in saying "shoot to kill";
 - (c) Mr Cele was supposed to uphold the rule of law and to follow the provisions of the Constitution, the utterances have no place in South Africa, let alone in the President's Cabinet and have gone against the following principles in the Bill of Rights:
 - i. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
 - ii. Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected;
 - iii. Section 11 provides that everyone has a right to life;

- iv. Section 12 provides that everyone has a right to freedom and security of the person; and
 - v. Section 35(3) provides that every accused person has a right to a fair trial.
- (d) The Complainant further specifically referred to the following provisions of the Code that Mr Cele allegedly breached:
 - i. Clause 2.1(b)–(d) of the Code provides that members of the Executive must, to the satisfaction of the President or the Premier, as the case may be, fulfil all the obligations imposed upon them by the Constitution and the law, act in good faith and in the interest of good governance, act in all respects in a manner that is consistent with the integrity of their office or the government; and
 - ii. Clause 2.3(c) of the Code provides that Members of the Executive may not act in a way that is inconsistent with their position.
- (v) On analysis of the complaint, the following issue was identified to inform and focus the investigation:
 - (a) Whether Mr Cele failed to fulfil the obligations imposed on him by the Constitution and the law and did not act in good faith or in the best interest of good governance nor in a manner that is consistent with the integrity of his office and position, during his address to members of the SAPS at the launch of the Western Cape’s Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated that “*shoot to kill and ask questions later*”, thereby violating the Constitution and breaching clauses 2.1(b)-(d) and 2.3(c) of the Executive Ethics Code.
- (vi) On 14 June 2024, a Notice in terms of Rule 41(1) of the Public Protector Rules was issued to the Complainant, Mr CM Ramaphosa, President of

the Republic of South Africa (the President) and Mr Cele to provide an opportunity to make submissions in relation to the proposed closure of the investigation. No response was received from the Complainant, the President and Mr Cele.

- (vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the following findings are made:
- (a) **Whether Mr Cele failed to fulfil the obligations imposed on him by the Constitution and the law and did not act in good faith or in the best interest of good governance nor in a manner that is consistent with the integrity of his office and position, during his address to members of the SAPS at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated that "*shoot to kill and ask questions later*", thereby violating the Constitution and breaching clauses 2.1(b)-(d) and 2.3(c) of the Executive Ethics Code.**
- (aa) The allegation that Mr Cele failed to fulfil all the obligations imposed upon him by the Constitution and the law and not acted in good faith or in the best interest of good governance nor in a manner that is consistent with the integrity of his office and position, during his address to members of the SAPS at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated "*shoot to kill and ask questions later*", **is not substantiated.**
- (bb) The utterances made by Mr Cele on 15 November 2022, were predicated on the rising number of murders of SAPS members for the period as reflected in the SAPS Annual Report. The context of the statement centred around the necessity for members of the SAPS to protect themselves in dangerous situations and emphasised the need for self-defence in life-threatening situations as regulated by applicable legislation and the National

Instruction 1/2016, The use of force in effecting an arrest (National Instruction 1/2016).

- (cc) Accordingly, the utterances were not at variance with the provisions of sections 205(2) and (3), 206(1) of the Constitution and section 49(2) of the Criminal Procedure Act, read with chapters 4,5 and 6 of the National Instruction 1/2016, which permits the use of deadly force in certain instances.
- (dd) Based on the standard imposed by the Code, the Public Protector finds that there is no basis upon which to conclude that Mr Cele breached clauses 2.1(b)–(d) and 2.3(c) of the Code.
- (viii) The Public Protector considers this matter as finalised and cannot take it further.

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 empowers the Public Protector to make known the findings of an investigation to affected parties (including the Complainant) for such persons to note the outcome of the investigation:
 - 1.2.1. Mr CM Ramaphosa, President of the Republic of South Africa;
 - 1.2.2. Mr Bhekokwakhe Hamilton Cele, former Minister of Police, and
 - 1.2.3. Mr Andrew Whitfield, the Complainant.
- 1.3. The report relates to an investigation into allegations that the former Minister of Police, Mr Bhekokwakhe Hamilton Cele (Mr Cele) acted in breach of clause 2.1(b)-(d) and 2.3(c) of the Executive Ethics Code (the Code), during his address to members of the SAPS at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated, *"shoot to kill and ask questions later"*.

2. THE COMPLAINT

- 2.1. The investigation emanates from a complaint lodged by the Democratic Alliance, Shadow Minister of Police: Mr Andrew Whitfield (the Complainant) on 18 November 2022. The Complainant requested an investigation in terms of Section 4(1)(a) of EMEA into the conduct of Mr Cele, emanating from a comment that he made on 15 November 2022, when addressing a

crowd at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain, where he allegedly stated:

"Shoot first and ask questions later. When you get into a war, you're not even going to ask who started the war. You go shoot and ask later.

Criminals have declared war. Don't go around and ask them who started the war, when you find the war when you find the people raping women, where you find people breaking into the houses, where you find stealing in the houses, stealing the shops, raiding the shops, raiding the banks don't ask questions who started. Join the war, shoot, and kill". (sic)

2.2. The Complainant further alleged that:

2.2.1. The Criminal Procedure Act, 1977 (Criminal Procedure Act), provides clear guidelines on the appropriate and proportionate use of force by police officers and a statement of this nature would incite young and fresh police officers of the South African Police Service (SAPS) to do exactly what Mr Cele told them what to do;

2.2.2. The Constitution is very clear and no person may be arbitrarily deprived of their rights and the Bill of Rights is the cornerstone of South African law and is entrenched in the Constitution. When Mr Cele made the comments, he allegedly violated a number of principles in the Bill of Rights thereby breaching the provisions of the Code in that he has not fulfilled his obligations under the Constitution, has neither acted in good faith nor in the best interest of good governance and there was a lack of integrity in saying *"shoot to kill"*;

2.2.3. Mr Cele was supposed to uphold the rule of law and to follow the provisions of the Constitution, the utterances have no place in South Africa, let alone in the President's Cabinet and have gone against the following principles in the Bill of Rights:

- 2.2.3.1. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
- 2.2.3.2. Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected;
- 2.2.3.3. Section 11 provides that everyone has a right to life;
- 2.2.3.4. Section 12 provides that everyone has a right to freedom and security of the person; and
- 2.2.3.5. Section 35(3) provides that every accused person has a right to a fair trial.
- 2.2.4. The Complainant further specifically referred to the following provisions of the Code that Mr Cele allegedly breached:
 - 2.2.4.1. Clause 2.1(b)–(d) of the Code provides that members of the Executive must, to the satisfaction of the President or the Premier, as the case may be, fulfil all the obligations imposed upon them by the Constitution and the law, act in good faith and in the interest of good governance, act in all respects in a manner that is consistent with the integrity of their office or the government; and
 - 2.2.4.2. Clause 2.3(c) of the Code provides that Members of the Executive may not act in a way that is inconsistent with their position.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

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

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action”.*

3.3. Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which states amongst others that, the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.4. Section 3(1) of the EMEA directs that *“the Public Protector must investigate any alleged breach of the code of ethics on receipt of a complaint contemplated in section 4”.*

3.5. Section 3(4) of EMEA provides that *“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, 1994”.*

3.6. 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...”*

- 3.7. It is also important to note that the investigation, as envisaged in section 4(1) of EMEA, must relate to the breach of the Code, by Cabinet members, Deputy Ministers and members of the Executive Council (MECs).
- 3.8. Paragraph 1 of the Code provides 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.*”
- 3.9. Paragraph 2.1 of the Code encapsulates the general standards which the members of the Executive must comply with, to the satisfaction of the President or the Premier, whichever case is applicable.
- 3.10. In paragraph 11 of the ***Public Protector and Others v President of the Republic of South Africa and Others*** [2021] ZACC [19] 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.”*
- 3.11. The complaint was lodged by Mr Whitfield who is a member of the National Assembly in terms of EMEA against Mr Cele who was at the time a member of Cabinet and therefore the complaint fell within the purview and jurisdiction of matters that should be investigated by the Public Protector. The alleged breach of the Code is contained in the complaint and determines the scope of the investigation.

4. ISSUE IDENTIFIED FOR INVESTIGATION

- 4.1. Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
 - 4.1.1. Whether Mr Cele failed to fulfil the obligations imposed on him by the Constitution and the law and did not act in good faith or in the best interest of good governance nor in a manner that is consistent with the integrity of his office and position, during his address to members of the SAPS at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated that "*shoot to kill and ask questions later*", thereby violating the Constitution and breaching clauses 2.1(b)-(d) and 2.3(c) of the Executive Ethics Code.

5. THE INVESTIGATION

5.1. Methodology

- 5.1.1. The Investigation was conducted in terms of section 182 of the Constitution read with sections 3 and 4 of the EMEA and 6 and 7 of the Public Protector Act.
- 5.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

5.2. Approach to the investigation

- 5.2.1. The approach to the investigation included an exchange of documentation between the Public Protector, the Complainant and Mr Cele.

- 5.2.2. All relevant documents and correspondence were obtained and analysed, relevant laws, policies and related prescripts were considered and applied throughout the investigation.
- 5.2.3. The investigation was approached using an enquiry process that seeks to determine:
- (a) What happened?
 - (b) What should have happened?
 - (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of section 182(1)(a) of the Constitution and a breach of clause 2.1(b)-(d) and 2.3(c) of the Code?
 - (d) In the event of a violation of the Constitution or breach of the Code, what remedial action should be taken?
- 5.2.4. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence is evaluated and a determination is made on what happened based on a balance of probabilities. In this particular case, the factual enquiry principally focused on whether the alleged conduct was inconsistent with the applicable prescripts. In this case, the factual enquiry focused on whether Mr Cele breached clause 2.1(b)-(d) and 2.3(c) of the Executive Ethics Code as a result of uttering the statement *“shoot to kill and ask questions later”*.
- 5.2.5. The enquiry regarding what should have happened focuses on the law or rules that regulate the standard that should have been met by Mr Cele in order to comply with the Constitution and the Code. Evidence is evaluated and a determination is made on what happened based on a balance of

probabilities. In this case, the factual enquiry focused on whether or not the alleged conduct of Mr Cele constitutes a breach of the Code.

- 5.2.6. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the alleged improper conduct.

5.3. **Key sources of information**

- 5.3.1. Complaint letter, dated 17 November 2023;
- 5.3.2. Allegations letter to Mr Cele, dated 31 August 2023;
- 5.3.3. Letter to Mr MC Ramaphosa informing him of the investigation, dated 31 August 2023;
- 5.3.4. Response letter from Mr Cele, dated 14 September 2023; and
- 5.3.5. Notice in terms of Rule 41(1) issued to the Complainant, dated 14 June 2024.

5.4. **Legal framework**

- 5.4.1. The Constitution, 1996;
- 5.4.2. The Public Protector Act, 1994;
- 5.4.3. Executive Members Ethics Act, 1998;
- 5.4.4. Criminal Procedure Act, 1977 as amended;
- 5.4.5. South African Police Service Act, 1995 as amended;
- 5.4.6. Executive Ethics Code 2000 published by proclamation in Government Gazette: No 21399 Notice No 41 Regulation 6853;

5.4.7. South African Police Service Employment Regulations, 2018; and

5.4.8. National Instruction 1/2016, The use of force in effecting an arrest.

5.5. **Independently sourced information**

5.5.1. South African Police Service Annual Report 2021/22 Financial Year.

5.6. **Case law**

5.6.1. *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* [2020] 3 All SA 190 (GP);

5.6.2. *S v Walters* 2002 2 SACR 105 (CC);

5.6.3. *Golding v Torch Printing and Publishing Co (Pty) Ltd and Others* 1949 (4) SA 150 (C); and

5.6.4. *Cele v Avusa Media Ltd* (08/10831) [2013] ZAGPJHC 15; [2013] 2 All SA 412 (GSJ) (14 February 2013).

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

5.7.1. Rule 41(1) of the Public Protector Rules provides that when the Public Protector intends concluding an investigation by means of a closing report provided for in Rule 40(b), the Complainant shall be informed in writing accordingly and be given an opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notification.

5.7.2. Rule 41(2) of the Public Protector Rules provides that the Public Protector may, if the Complainant has not responded within the prescribed time frame of 14 days, proceed with the closing of the file.

5.7.3. On 14 June 2024, a Notice in terms of Rule 41(1) was issued to the Complainant. The Complainant acknowledged receipt of the Notice on the same date, however, he did not make any further submission in respect of the matter. Accordingly, the Public Protector is proceeding to close the matter in terms of Rule 41(2).

6. THE DETERMINATION OF THE ISSUE IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

6.1. **Whether Mr Cele failed to fulfil the obligations imposed on him by the Constitution and the law and did not act in good faith or in the best interest of good governance nor in a manner that is consistent with the integrity of his office and position, during his address to members of the SAPS at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated that "*shoot to kill and ask questions later*" thereby violating the Constitution and breaching clauses 2.1(b)-(d) and 2.3(c) of the Executive Ethics Code**

Common cause

6.1.1. On 15 November 2022, Mr Cele attended the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain and in his speech, he told the members of the SAPS to "*shoot first and ask questions later*".

Issue in dispute

- 6.1.2. The issue for determination by the Public Protector is whether Mr Cele by uttering the words “*shoot first and ask questions later*”, during his address to members of the SAPS, violated the provisions of the Constitution and breached the general standards as outlined in the Code that required him to act in good faith and in the interest of good governance, act in all respects in a manner that is consistent with the integrity of his office or the government and in so doing acted in a way that was inconsistent with his position as the Minister of Police at the time.

Complainant's version

- 6.1.3. The Complainant alleged that Mr Cele failed to fulfil all the obligations imposed upon him by the Constitution and the law and did not act in good faith or in the best interest of good governance nor in a manner that is consistent with the integrity of his office and position during his address to members of the SAPS, at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated that “*shoot first and ask questions later*”.
- 6.1.4. The Complainant further contended that Mr Cele was supposed to uphold the rule of law and sections 9(1), 10, 11, 12 and 35(3) of the Constitution which provides for the right to equality before the law and equal protection and benefit; the right to dignity, the right to life and freedom and security of the person as well as the right to a fair trial as enshrined in the Bill of Rights.
- 6.1.4.1. Furthermore, Mr Cele allegedly violated Clause 2.1(b)–(d) of the Code which provides that members of the Executive must, to the satisfaction of the President or the Premier, as the case may be, fulfil all the obligations imposed upon them by the Constitution and the law, act in good faith and

in the interest of good governance, act in all respects in a manner that is consistent with the integrity of their office or the government; and

- 6.1.4.2. Clause 2.3(c) of the Code provides that Members of the Executive may not act in a way that is inconsistent with their position.
- 6.1.4.3. The Complainant averred *inter alia* that the utterances have no place in South Africa, let alone in the President's Cabinet.

Response from Mr Cele

- 6.1.5. On 31 August 2023, the Public Protector sent a letter to Mr Cele requesting him to respond to the allegations. In his response dated 14 September 2023, Mr Cele stated that:
 - 6.1.5.1. He denies the allegations as set out in the Public Protector's letter dated 31 August 2023 and the statement made by him on 15 November 2022, at the launch of the Western Cape Safer Festive Season Campaign must be assessed in the context of the law, the Constitution, section 49 of the Criminal Procedure Act and case law, as well as the backdrop of the alarming rate of police killings in South Africa;
 - 6.1.5.2. According to the latest crime statistics released, the number of police officers killed almost doubled during the first quarter of 2023/24 and thirty-one (31) police officers were murdered in the three (3) months preceding the response, up from eighteen (18) in the same period last year;
 - 6.1.5.3. Section 49 of the Criminal Procedure Act does not require a member of the SAPS to become a victim first before he/she is permitted to use deadly force. In this regard, the section specifically states that a mere threat of serious violence to the arrestor or any other person or a suspicion based on reasonable grounds that a suspect committed a crime involving the infliction of serious bodily harm, permit an arrestor, such as the SAPS to

resort to deadly force in addition to the requirement that such force must be reasonably necessary and proportional in the circumstances;

- 6.1.5.4. The Constitutional Court in *State v Makwanyane and Another 1995 (3) SA 391 (CC)* stated that where a choice has to be made between the lives of two or more people the life of the innocent is given preference over the life of the aggressor. To deny the innocent person the right to act in self-defence would deny that individual his or her right to life. The same is true where lethal force is used against a hostage taker who threatens the life of the hostage;
- 6.1.5.5. The Court stated further that it is permissible to kill the hostage taker to save the life of the innocent hostage, but only if the hostage is in real danger. The law solves problems such as these through the doctrine of proportionality, balancing the rights of the aggressor against the rights of the victim and favouring the life of the innocent, over the life of the guilty. But there are strict limits to the taking of lives, in the event of circumstances that have been described and the law insists upon these limits being adhered to;
- 6.1.5.6. The complaint must also be seen against the backdrop of previous statements he made where he emphasised compliance with the law prior to the complaint lodged with the Public Protector. Furthermore, no SAPS officer should die in the hands of criminals, with a gun in their possession. The officers must protect their lives and that of their fellow officers, using the firearms within the ambit of the law, guns are the tools of trade and must be used;
- 6.1.5.7. In 2019, he requested amendments to section 49 of the Criminal Procedure Act, at a Ministerial Crime Retreat Session, which he held with top management and senior managers of the SAPS in Mpumalanga. Section 49 of the said Act is one of the aspects of law that requires attention in order

to enhance legal certainty among members of the SAPS, as to the exact circumstances when they can rely on the protection of the said section;

- 6.1.5.8. In 2020, he wrote to Mr Ronald Lamola, the former Minister of Justice and Correctional Services and requested amendment to the provisions of section 49 to enhance legal certainty and to allow law enforcement officers, who are subject to more rigorous training and control measures than ordinary members of society, to be permitted to use deadly force in circumstances which reasonably appear to be necessary to prevent the commission of an offence by a suspect in possession of a firearm which presents an imminent danger to death, a permanent loss, impairment of a limb or organ of the members of the SAPS or another person; and
- 6.1.5.9. The statement was made in the context of the above developments and principles of the law and was never aimed at inciting members of the SAPS to contravene the law. He merely emphasised the current legal position and warned the so-called “*young and fresh police officers*” to take heed of the law and to defend themselves from ruthless criminals, when under attack.

Independently sourced information

South African Police Service Annual Report 2021/22 Financial Year (SAPS Annual Report)

- 6.1.6. The approved SAPS Annual Report provides information relating to the SAPS members murdered during 2018/19 to 2021/22 as follows:

SAPS members murdered during 2018/19 to 2021/22

Province	2018/19	2019/20	2020/21	2021/22
Eastern Cape	11	10	16	12
Free State	3	2	4	6
Gauteng	17	16	9	21

Kwazulu-Natal	18	20	21	32
Limpopo	1	4	3	3
Mpumalanga	4	6	2	9
North West	4	1	3	3
Northern Cape	3	1	2	1
Western Cape	9	10	17	11
Head Office	6	6	4	12
Total	76	76	81	110

Media statements

- 6.1.7. The context and explanation provided by Mr Cele is consistent with other media statements that he has made on the subject on the fate of members of the SAPS when dealing with violent armed suspects. On 12 May 2023 and 25 November 2023, he similarly urged members of the SAPS not to hesitate to use their resources to defend themselves and the communities and to use force which is proportional to the threat.
- 6.1.8. In the statement issued on 25 November 2023, it was indicated that the latest crime statistic showed that thirty-five (35) members of the SAPS were killed on and off duty between July and September 2023.

Applicable law

The Constitution, 1996

- 6.1.9. Section 7(1) and (2) of the Constitution provides that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the right of all people in our country and affirms the democratic values of human dignity, equality and freedom and that the state must respect, protect, promote and fulfill the rights in the Bill of Rights.

- 6.1.10. Section 36(1) provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

*“(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.”*

- 6.1.11. 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-
(b) act in any way that is inconsistent with their office...”*

- 6.1.12. Section 205(2) and (3) provides that the national legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces and the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

- 6.1.13. Section 206(1) provides that a member of the Cabinet² must be responsible for policing and must determine national policing policy after consulting the

² Member of Cabinet meaning Minister of Police.

provincial governments and taking into account the policing needs and priorities of the provinces as determined by the provincial executives.

Executive Members Ethics Act, 1998

- 6.1.14. Section 1 of the EMEA provides that Cabinet means the Cabinet referred to in section 91(1) of the Constitution³. The Public Protector is empowered, in terms of section 3 of the EMEA, to investigate breaches of the Code when a complaint is made in terms of section 4 of the EMEA.
- 6.1.15. Section 2(1) of EMEA provides that *“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”*.
- 6.1.16. Section 4(1) of the EMEA provides that the Public Protector must investigate in accordance with section 3, an alleged breach of the Code on receipt of a complaint by the President, a member of National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet Member or Deputy Minister.

The Executive Ethics Code

- 6.1.17. The general standards which the members of the Executive⁴ must comply with are contained in clause 2.1 of the Code, which provides that:

³ Cabinet means Members of the Cabinet and Deputy Ministers.

⁴ Member of the Executive means a Cabinet member, a Deputy Minister or a Member of a Provincial Executive Committee, and ‘Member’ and ‘Executive’ have corresponding meaning.

“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.”*

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

6.1.19. Clause 2.3(c) provides that Members of the Executive may not act in a way that is inconsistent with their position.

Criminal Procedure Act, 1977 as amended

6.1.20. Section 49(1)(c) of the Criminal Procedure Act provides that for the purposes of this section, deadly force means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

6.1.21. Section 49(2) states that if any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in

addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

- (a) the suspect poses a threat of serious violence to the arrestor or any other person; or
- (b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

South African Police Service Act, 1995 as amended (SAPS Act)

- 6.1.22. Section 1 of the SAPS Act defines member as any member of the Service referred to in section 5(2), and including any person appointed in terms of any other law to serve in the Service and in respect of whom the Minister has prescribed that he or she be deemed to be a member of the Service for the purpose of this Act.

National Instruction 1/2016, The use of force in effecting an arrest

- 6.1.23. The purpose of this instruction is to regulate the use of force by a member to effect the arrest of a suspect as provided for in section 49 of the Criminal Procedure Act.
- 6.1.24. The National Instruction 1/2016 on the use of force in effecting an arrest defines lethal force as any force which is likely to result in the death of the suspect and includes the use of a firearm to shoot at a suspect, irrespective of which body part of the suspect was aimed at, also referred to as “*deadly force*”.

- 6.1.25. Chapter 4 of the National Instruction 1/2016 provides for the requirement for the use of force in effecting arrest, in that section 49 of the Criminal Procedure Act provides that force may only be applied to a person if it is clear that an attempt to arrest him or her is being made.
- 6.1.26. Force may only be used if the suspect resists the attempt or flees or resists the attempt and flees. The degree of resistance that the suspect offers will usually determine the degree of force that may be applied to overcome the resistance and to prevent the suspect from fleeing.
- 6.1.27. The circumstances must be such that the suspect cannot be arrested without the use of force. Force may only be used after the suspect has been warned that force will be used unless he or she stops the resistance or attempts to flee but fails or refuses to do so. The only exception is where the unlawful action immediately endangers the life of a person or persons and requires immediate action.
- 6.1.28. Chapter 5 provides for the use of minimum *force* which is reasonable and proportional in the circumstances.
- 6.1.29. Chapter 6 provides that the use of force to effect an arrest, which may result in the death of the suspect, will only be justifiable under the circumstances provided in section 49 of the Criminal Procedure Act.

Applicable case law

- 6.1.30. The provisions of section 49(2) of the Criminal Procedure Act were discussed in the case of *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* [2020] 3 All SA 190 (GP), wherein the Court remarked albeit *obiter dictum* in paragraph 74 of the judgment that security forces are only entitled to use the minimum force that is reasonable in the performance of their official duty.

- 6.1.31. In paragraph 146 of the judgment, the Court held that members of the SAPS, South African National Defence Force (SANDF) and Metro Police Department (MPD) remain bound by section 13(3)(b) of the SAPS Act, read with section 20(1)(a) of the Defence Act, 2002, to use only the minimum force that is reasonable to perform an official duty.
- 6.1.32. The Constitutional Court in *S v Walters* 2002 2 SACR 105 (CC) stated that force during arrest should be reasonable and necessary as required by the Bill of Rights. The Court emphasised that force should only be used where it meets the criteria of proportionality, necessity and imminent danger.
- 6.1.33. In *Golding v Torch Printing and Publishing Co (Pty) Ltd and Others* 1949 (4) SA 150 (C) at 167 the Court made it clear that with respect to the meaning to be derived from the content of a media article (or statement), such meaning must be ascertained having full regard to the context of the article.
- 6.1.34. In the matter of *Cele v Avusa Media Ltd* (08/10831) [2013] ZAGPJHC 15; [2013] 2 All SA 412 (GSJ) (14 February 2013), the Court emphasised, quoting the *Golding judgement* above, that accordingly, '*the article must be read as a whole and individual words such as "shoot to kill" must not be singled out and interpreted out of context.*'

Analysis

- 6.1.35. The evidence before the Public Protector revealed that Mr Cele made a statement on 15 November 2022, at the Western Cape's Safer Festive Season Campaign in Mitchells Plain, wherein he informed the members of the SAPS to "*shoot first and ask questions later*", which he conceded to in his response to the Public Protector dated 14 September 2023. Mr Cele as the former Minister of Police was, in terms of section 206(1) of the Constitution, responsible for policing and must determine national policing

policy taking into account the policing needs and priorities of the provinces, as determined by provincial executives.

- 6.1.36. Mr Cele contended that the statement was made within the context of the prevalence of murder of SAPS members by criminals and no members of the SAPS should die in the hands of criminals, with firearms in their possession and they must protect their lives and that of their fellow officers, within the confines of the applicable laws. These utterances were made in line with the provisions of section 49(2) of the Criminal Procedure Act which states that the arrestor may only use deadly force if the suspect poses serious violence to the arrestor or any other person.
- 6.1.37. The Court in *Golding v Torch Printing and Publishing Co (Pty) Ltd and Others* stated that the meaning to be derived from the content of a media article (or statement), must be ascertained having full regard to the context of the article. This was also confirmed in *Cele v Avusa Media Ltd (08/10831)* where the Court emphasised, that *the* article must be read as a whole and individual words such as "*shoot to kill*" must not be singled out and interpreted out of context. The court further held that there is no suggestion in the article that the plaintiff advocated indiscriminate use of force against members of the public by the police⁵. On the contrary, the plaintiff was talking, as the MEC for Community Safety and Liaison in KwaZulu-Natal, about the need for the police to take action against violent criminals at a time when the province was headed for the position of most dangerous province in the country.
- 6.1.38. The court further held that⁶ views may differ on whether the plaintiff's call for the police to use deadly force was a courageous and necessary stance against crime or whether it was an imprudent position to adopt. Having regard to the content and meaning of the article, both these views are

⁵ Paragraph 30

⁶ Paragraph 38

equally probable. It is settled law, in this regard, that where words or conduct are capable of more than one meaning, the courts apply the normal standard of proof in civil cases i.e. a balance of probabilities. Where an allegedly defamatory statement is equally capable of bearing more than one meaning, one that is innocent and another that is defamatory, the court must adopt the non-defamatory meaning. This principle was highlighted in Channing where the Court held that:

“...A Court dealing with a defamation case is not entitled, where the matter complained of is capable of more than one reading, to adopt a defamatory interpretation in preference to a non-defamatory one. If a newspaper article is equally capable of both types of interpretation, he argued, the plaintiff must fail”.

- 6.1.39. In the Cele matter, Kathree-Setiloane J held that the test is not whether, to the Court itself, after it has had the benefit of a careful analysis of the article, the article seems to bear one meaning rather than another or seems equally capable of bearing both meanings. The enquiry relates to the manner in which the article would have been understood by those readers of it whose reactions are relevant to the action, and who are sometimes referred to as the ordinary readers.
- 6.1.40. This case becomes relevant to this matter as the court in dismissing Mr Cele’s claim for defamation found that the readers would not “think less” of the plaintiff for encouraging the police to take a tough stance against criminals. The court held that the article would have been read and understood in its full context.
- 6.1.41. Similar to this matter, Mr Cele uttered these words as then Minister of Police at a period when the killing of police members in the country was by criminals was escalating at an alarming rate. Therefore, one would presume that an “ordinary reader” would adopt a cautious approach that this

statement was not intended to advocate for indiscriminate but rather a tough stance on crime and for the police to take action against violent criminals.

- 6.1.42. The evidence in the form of the SAPS Annual Report reflects that the statistics of the murders of the SAPS members for the period 2018/19 to 2021/22 rose from seventy-six (76) in 2018/19 to one hundred and ten (110) in 2021/22, respectively. Mr Cele made these and similar utterances thereafter, in the context of the alarming rate of the murders of the SAPS members, based on the escalation as of 31 March 2022.
- 6.1.43. It should be noted that the provisions of section 205(2) of the Constitution provides for the establishment of the powers and functions of the police service in order to discharge its responsibilities effectively and the duties of the SAPS in terms Section 205(3) is to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.
- 6.1.44. Section 49 of the Criminal Procedure Act provides a framework for the use of force by the members of the SAPS as contemplated in section 205 of the Constitution. This is amplified in chapters 4, 5 and 6 of the National Instruction 1/2016. The said guidelines were also reiterated in *Khosa and Others v Minister of Defence*.
- 6.1.45. The provisions of section 49(2) of the Criminal Procedure Act were discussed by the Constitutional Court in *S v Walters 2002 2 SACR 105 (CC)* where it was stated that force during arrest should be reasonable and necessary as required by the Bill of Rights. The Court emphasised that force should only be used where it meets the criteria of proportionality, necessity and imminent danger.

- 6.1.46. It is manifest that members of the SAPS may not unjustifiably infringe on the fundamental rights of a suspect, except in accordance with section 36(1) of the Constitution which provides for reasonable and justifiable limitation of the Bill of Rights in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the rights, the importance of the purpose of the limitation and the nature and extent of the limitation.
- 6.1.47. Whilst the Public Protector is cognisant that Mr Cele's utterances may be capable of more than one reading, where on one hand, it may be interpreted as advocating for the police to use deadly force whilst on the other hand as a tough stance against crime and a call to stop the killing of police, adopting a non-defamatory meaning to the words may be appropriate under the circumstances. Therefore, a reasonable person, including the police should construe this statement within the context of a response to violent criminals when executing their duties and not an order to kill at will when they are faced with deadly force.
- 6.1.48. On 14 June 2024, a Notice in terms of Rule 41(1) was issued to the Complainant giving him an opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notification.
- 6.1.49. The Complainant acknowledged receipt of the Notice on the same date, however, he did not make any further submission in respect of the matter.

Conclusion

- 6.1.50. In the circumstances, there is no evidence before the Public Protector to prove that utterances made by Mr Cele violated the applicable legal prescripts.

- 6.1.51. In terms of clauses 2.1(b)–(d) and 2.3(c) of the Code, Mr Cele, as a member of the Executive is required to fulfil all the obligations imposed upon him by the Constitution and the law, act in good faith and in the best interest of good governance and act in all respects in a manner that is consistent with the integrity of his office or the government, as well as not act in a way that is inconsistent with his position. The contention by the Complainant that Mr Cele acted in breach of the Code cannot be sustained.
- 6.1.52. Accordingly, the Public Protector finds no basis upon which to conclude that Mr Cele's statement on 15 November 2022 breached clauses 2.1(b)–(d) and 2.3(c) of the Code.

7. FINDINGS

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

- 7.1. **Whether Mr Cele failed to fulfil the obligations imposed on him by the Constitution and the law and did not act in good faith or in the best interest of good governance nor in a manner that is consistent with the integrity of his office and position, during his address to members of the SAPS at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated that "*shoot to kill and ask questions later*" thereby violating the Constitution and breaching clauses 2.1(b)–(d) and 2.3(c) of the Executive Ethics Code**
- 7.1.1. The allegation that Mr Cele failed to fulfil all the obligations imposed upon him by the Constitution and the law and not acted in good faith or in the best interest of good governance nor in a manner that is consistent with the integrity of his office and position, during his address to members of the

SAPS at the launch of the Western Cape's Safer Festive Season Campaign in Mitchells Plain on 15 November 2022, where he stated "*shoot to kill and ask questions later*", **is not substantiated.**

- 7.1.2. The utterances made by Mr Cele on 15 November 2022, were predicated on the rising number of murders of SAPS members for the period as reflected in the SAPS Annual Report. The context of the statement centred around the necessity for members of the SAPS to protect themselves in dangerous situations and emphasised the need for self-defence in life-threatening situations as regulated by applicable legislation and the National Instruction 1/2016.
- 7.1.3. Accordingly, the utterances were not at variance with the provisions of sections 205(2) and (3), 206(1) of the Constitution and section 49(2) of the Criminal Procedure Act, read with chapters 4,5 and 6 of the National Instruction 1/2016, which permits the use of deadly force in certain instances.
- 7.1.4. Based on the standard imposed by the Code, the Public Protector finds that there is no basis upon which to conclude that Mr Cele breached clauses 2.1(b)–(d) and 2.3(c) of the Code.

8. CONCLUSION

- 8.1.1 The Public Protector proceeds to close the matter in line with Rule 41(2) of the Public Protector Rules which provides that the Public Protector may, if the Complainant has not responded within the prescribed time frame of 14 days, proceed with the closing of the file.

- 8.2 The Public Protector considers this matter as finalised and cannot take it further.



ADV KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE:30 SEPTEMBER 2024

Assisted by: Ms Ponatshego Mogaladi
Executive Manager: Investigations