

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



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**Report No: 137 of 2019/20**

**ISBN: 978-1-928507-97-0**

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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE  
VIOLATION OF THE EXECUTIVE ETHICS CODE AND THE POWERS, PRIVILEGES  
AND IMMUNITIES OF PARLIAMENT AND PROVINCIAL LEGISLATURES ACT, 2004  
BY THE FORMER MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES, MR  
SENZENI ZOKWANA**

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## 1. INTRODUCTION

- 1.1. This is a closing report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution) read with section 3(3) of the Executive Members' Ethics Act, 1998 [Act No. 82 of 1998] 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 is submitted in terms of section 3(2)(a) of the Executive Members' Ethics Act to His Excellency, President Matamela Cyril Ramaphosa.
- 1.3. Copies of the report are provided to Mr Pieter van Dalen (Mr Van Dalen), the Complainant in the matter, and the former Minister of Agriculture, Forestry and Fisheries, Mr Zokwana in terms of section 8(3) of the Public Protector Act, 1994.
- 1.4. The report relates to an investigation into allegations of the violation of the Executive Ethics Code and the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 [Act No. 4 of 2004], by the former Minister of Agriculture, Forestry and Fisheries, Mr Senzeni Zokwana (Mr Zokwana).

## 2. THE COMPLAINT

- 2.1. The complaint was lodged in terms of section 4(1) of the Executive Members' Ethics Act, 1998, by the Democratic Alliance Member of Parliament and Deputy Shadow Minister of Agriculture, Forestry and Fisheries, Mr Van Dalen on 06 July 2018.
- 2.2. Mr Van Dalen referred in his letter of complaint to a written Parliamentary Question [NW1279E] that he posed to the Minister of Agriculture, Forestry and Fisheries, Mr Zokwana on 25 June 2018, and his written reply thereto, is as follows:

*“Whether any abalone was removed from the departmental stores without following proper procedures in the past three financial years; if so; in each case,*

- (a) On what date did each incident take place;*
- (b) What is the total monetary value of that was removed;*
- (c) What are the details of government officials who were involved in the removal of abalone;*
- (d) Who gave permission for the removal of abalone;*
- (e) For what purpose was the abalone removed;*
- (f) Whether investigations and/or criminal charges have been launched against the officials and other who are implicated; and*
- (g) What steps have been taken against the officials and others who were involved” (sic)*

2.3. It is the contention of Mr Van Dalen that, by misleading and making misrepresentations to Parliament through his reply to a Parliamentary Question, Mr Zokwana breached the Executive Ethics Code and the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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

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

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

*(b) to report on that conduct; and*

*(c) to take appropriate remedial action.”*

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

3.4 Section 4(1)(a) of the Executive Members' Ethics Act, directs *inter alia* that, the Public Protector...*“must investigate in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the President, a Member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet Member or Deputy Minister...”*

3.5 The complaint was lodged by a Member of the National Assembly against a Cabinet Member and therefore had to be investigated by the Public Protector.



- 3.6 In terms of section 3 of the Executive Members' Ethics Act, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member within thirty (30) days of the receipt of the complaint. If the Public Protector reports at the end of this period that the investigation has not yet been completed, she must submit another report when the investigation has been completed.
- 3.7 The Public Protector accordingly reported to the President on 25 July 2018, that her investigation of the complaint had not been completed and that she would submit the report when the investigation was finalised.
- 3.8 Section 3(5)(a) of the Executive Members' Ethics Act, provides that the President must within a reasonable time, but not later than fourteen (14) days after receiving the report of the Public Protector, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
- 3.9 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:
- 3.9.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);
- 3.9.2 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);

- 3.9.3 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.
- 3.9.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (paragraph 104);
- 3.9.5 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);
- 3.9.6 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
- 3.9.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112).
- 3.10 The conduct of Mr Zokwana, as a Member of Cabinet falls within the ambit of the Public Protector mandate as provided by section 4(1)(a) of the Executive Members' Ethics Act, 1998. The Public Protector's power to investigate the complaint and take appropriate remedial action was not disputed by Mr Zokwana.

## 4. THE INVESTIGATION

### 4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 3 and 4 of the Executive Members' Ethics Act, read with sections 6 and 7 of the Public Protector Act.

4.1.2. Section 4(1)(a) of the Executive Members' Ethics Act, 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 of Deputy Minister..."*

### 4.2. Approach to the investigation

4.2.1. Like every Public Protector investigation, 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. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct of Mr Zokwana constitutes a violation of the Executive Ethics Code.
- 4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the former Minister of Agriculture, Forestry and Fisheries, Mr Senzeni Zokwana to prevent the violation of the Executive Ethics Code.
- 4.3. **Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation.**
- 4.3.1. Whether the former Minister of Agriculture, Forestry and Fisheries deliberately or inadvertently misled Parliament in his response to a Parliamentary Question Number [NW1279E] of 25 June 2018, and if so, whether the conduct constituted a breach of the Executive Ethics Code;
- 4.4. **The Key Sources of Information**
- 4.4.1. **Documents**
- 4.4.1.1. Copies of the Complainant's claim documents;
- 4.4.1.2. A copy of a Mr Pieter van Dalen's Parliamentary Question number 1185[NW1279E];
- 4.4.1.3. A copy of the Director: Monitoring and Surveillance, Fisheries Management Branch, Mr Nkosinathi Dana dated 14 February 2018, addressed to the Acting Director General of DAFF;



#### 4.4.2. Correspondence Sent and Received

4.4.2.1. A copy of the Public Protector's letter dated 25 July 2018, addressed to His Excellency, President Matamela Cyril Ramaphosa;

4.4.2.2. A copy of the Public Protector's letter 25 July 2018, addressed to Mr Zokwana;

4.4.2.3. A copy of a the Public Protector's letter dated 07 August 2018, addressed to the South African Police Service's Head of the Directorate for Priority Crimes Investigation, Lieutenant-General Seswantsho Lebeya;

4.4.2.4. A copy of the Public Protector's letter dated 02 October 2018, addressed to Mr Zokwana;

4.4.2.5. A copy of Mr Zokwana's letter dated 02 April 2019, addressed to the Public Protector;

#### 4.4.3. Legislation and other prescripts

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

4.4.3.2. The Executive Members' Ethics Act, 1998 (Act No. 82 of 1998);

4.4.3.3. The Public Protector Act, 1994 (Act No. 23 of 1994);

4.4.3.4. The Executive Ethics Code

#### 4.4.4. Websites

4.4.4.1. [www.daff.gov.za](http://www.daff.gov.za);

4.4.4.2. [www.publicprotector.org](http://www.publicprotector.org);

- 4.4.4.3. [www.parliament.gov](http://www.parliament.gov);
- 4.4.4.4. <https://city-press.news24.com/News/state-agents-in-abalone-scandal-20180421>;
- 4.4.4.5. <https://www.businesslive.co.za/bd/national/2018-06-20-officials-accused-in-abalone-poaching-case-are-back-at-work/>;

#### 4.4.5. Case Law

- 4.4.5.1. *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);*
- 4.4.5.2. *Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs 2000 (2) SA 1 (CC)*

### 5. THE DETERMINATION OF ISSUES IN RELATION TO SUCH EVIDENCE AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS:

- 5.1. **Regarding whether the former Minister of Agriculture, Forestry and Fisheries deliberately or inadvertently misled Parliament in his response to a Parliamentary question posed on 25 June 2018, and if so, whether the conduct constituted a breach of the Executive Ethics Code;**

#### Common Cause Issue

- 5.1.1. It is not disputed that, Mr Zokwana was appointed by the former President of the Republic of South Africa, Mr Jacob Zuma on 21 May 2014, to the Portfolio of Minister of Agriculture, Forestry and Fisheries, a position which he held until 07 May 2019.

Issue in Dispute

- 5.1.2. The issue for my determination was whether the former Minister of Agriculture, Forestry and Fisheries deliberately or inadvertently misled Parliament in his response to a Parliamentary question posed on 25 June 2018, and if so, whether the conduct constituted a breach of the Executive Ethics Code.
- 5.1.3. It was noted from the information received during the investigation that, on 25 June 2018, Mr Van Dalen posed a question to the Minister of DAFF seeking clarity on whether any abalone was removed from the departmental stores without following proper procedures in the past three financial years; if so; in each case,
- 5.1.3.1. *On what date did each incident take place;*
- 5.1.3.2. *What is the total monetary value of that was removed;*
- 5.1.3.3. *What are the details of government officials who were involved in the removal of abalone;*
- 5.1.3.4. *Who gave permission for the removal of abalone;*
- 5.1.3.5. *For what purpose was the abalone removed;*
- 5.1.3.6. *Whether investigations and/or criminal charges have been launched against the officials and other who are implicated; and*
- 5.1.3.7. *What steps have been taken against the officials and others who were involved?*

- 5.1.4. Minister Zokwana's reply was as follows:
- 5.1.4.1. *Yes, abalone has been stolen from the departmental stores through armed robbery incidents in the past three financial years.*
- 5.1.4.2. *The incidents took place on the 29th of October 2015, the 18th of December 2017 and 15 May 2018.*
- 5.1.4.3. *The estimated monetary value of the abalone that was stolen was approximately R16.5 million.*
- 5.1.4.4. *To our knowledge no government officials were involved in any of the theft incidents. The incidents were reported to the relevant authorities. All matters were reported to the police for investigation.*
- 5.1.4.5. *Abalone was stolen through armed robbery therefore in our knowledge no permission was given for the removal of the abalone.*
- 5.1.4.6. *The abalone was not removed for any official purpose.*
- 5.1.4.7. *To our knowledge no government officials are being investigated and/or criminal charges launched against any government official relating to the incidents mentioned.*
- 5.1.4.8. *Nothing necessitated the taking of steps against any departmental official pertaining to the theft of abalone relating to the incidents mentioned since in our knowledge no departmental official was involved.*

5.1.5. In accordance with the provisions of section 7(4)(a) of the Public Protector Act, 1994, letters dated 25 July 2018 and 2 October 2018 respectively, were issued to the former Minister of Agriculture, Forestry and Fisheries, Mr Zokwana, requesting for the submission of a response to allegations made by the Complainant.

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- 5.1.6. On 2 April 2019, Mr Zokwana responded to the letter referred to herein above and vehemently denied that he had, in his written reply to a Parliamentary Question 1185 posed by Mr Van Dalen, directly or indirectly or as alleged committed any violation of the Executive Ethics Code, the Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 and the Prevention of Corrupt Activities Act, 2004.
- 5.1.7. In his response, Mr Zokwana continued by stating that, my inquiry appeared to be in relation to Paragraph (g) of his written reply, namely, *“whether disciplinary steps were taken against officials in the department implicated in the incidents of the theft of abalone from government stores?”*
- 5.1.8. He further stated that his response to Mr Van Dalen’s question at that time was that no evidence had surfaced that pointed to departmental complicity or involvement in the thefts and the matters had been reported to the police for investigation. Further that, at that time, he was not aware that any officials in the department have been implicated.
- 5.1.9. Mr Zokwana also emphasised that should any employee of the DAFF be implicated in any criminal activity, the requisite internal disciplinary procedures would be instituted. He also stated that he was not aware of any *“leaked documents”* or memorandum detailing allegations of impropriety against officials of the department in relation to the theft of abalone from government stores. Further that, if such indeed existed, they should be referred to the police to aid in the investigations that were underway.

- 5.1.10. It was further noted that, His Excellency, President Cyril Matamela Ramaphosa, in accordance with the provisions of section 50(1) of the Constitution, 1996, and a resolution of the National Assembly adopted on 21 February 2019, dissolved the National Assembly.
- 5.1.11. Further that, on 25 February 2019, in accordance with the provisions of section 49(1) of the Constitution, 1996 read with section 17 of the Electoral Act, 1998 (Act No. 73 of 1998), President Cyril Matamela Ramaphosa declared 8 May 2019, (Proclamation Number 8 of 2019, published in the Government Gazette No. 42250 dated 26 February 2019) as the date of the election of the National Assembly.
- 5.1.12. It was further noted that, following the democratic elections, on 29 May 2019, President Cyril Matamela announced a list of new Cabinet Members with the exception of Mr Zokwana, thus ending his tenure as the Minister of the former Department of Agriculture, Forestry and Fisheries.
- 5.1.13. It was also established during the investigation that, the issue raised by Mr Van Dalen is the subject of a separate investigation conducted by my office under reference number 7/2-010270/18, following the receipt of a complaint lodged by the Democratic Alliance's Member of Parliament, Ms Beverley Schäfer on 27 September 2018.

#### Application of the relevant laws and prescripts

#### The Constitution, 1996

- 5.1.14. The Constitution, 1996 which is the supreme law of the Republic. Section 91(1) of the Constitution states that the Cabinet consists of the President, as head of the Cabinet, Deputy President and Ministers. Section 96(1) of the Constitution provides that Members of the Cabinet must act in accordance with a code of ethics prescribed by national legislation.

### **The Executive Members' Ethics Act No. 98 of 1998**

- 5.1.15. The Executive Members' Ethics Act, 1998, is the key legislation providing a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils.
- 5.1.16. Section 2(1) of the Executive Members' Act, 1998, 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"*.
- 5.1.17. Section 4(1)(a) of the Executive Members' Ethics Act, 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 of Deputy Minister..."*

### **Executive Ethics Code**

- 5.1.18. Clause 2.3 (a) of the Executive Ethics Code provides that, *"Members of the Executive may not wilfully mislead the legislature to which they are accountable"*.

### **Conclusion**

- 5.1.19. Based on the information and documentation obtained during the investigation and the application of the legal framework to the facts of the matter, it is concluded that, the issue raised by the Complainant has become moot following the removal of Mr Zokwana as a Minister.

## 6. FINDINGS

6.1. **Regarding whether the former Minister of Agriculture, Forestry and Fisheries deliberately or inadvertently misled Parliament in his response to a Parliamentary question posed on 25 June 2018, and if so, whether the conduct constituted a breach of the Executive Ethics Code:**

6.1.1. I did not conduct a further investigation into the allegation that the former Minister of Agriculture, Forestry and Fisheries, Mr Zokwana deliberately or inadvertently misled Parliament in his response to a Parliamentary question posed on 25 June 2018, on the basis that he was removed by His Excellency President Cyril Matamela, as the Minister of Agriculture, Forestry and Fisheries, on 29 May 2019, and as a result, the Executive Members' Ethics Act, 1998 and the Code of Conduct for Members of the Executive ceased to be applicable to him.

6.1.2. It was however noted from the preliminary investigation conducted that, the theft of abalone allegedly by officials of the department and/or any other person is currently the subject of an investigation, which is at an advanced stage, by the South African Police Service (SAPS) Directorate for Priority Crimes Investigation (HAWKS) under Maitland CAS number 11/05/2018.

6.1.3. Further that, the issue above is the subject of a separate investigation conducted by my office under reference number 7/2-010270/18, following the receipt of a complaint lodged by the Democratic Alliance's Member of Parliament, Ms Beverley Schäfer on 27 September 2018.

## 7. REASONS FOR CLOSURE

7.1. In terms of section 7(1)(a) of the Public Protector Act 1994, the Public Protector had to determine on the basis of what was found from the preliminary investigation, how the matter should be dealt with.



- 7.2. The pursuance of the matter and remedial action that I may consider should adverse findings be made from a further investigation will serve no judicious purpose on the basis that the issue has become moot consequent to the removal of Mr Zokwana as a Member of Cabinet and thus the President would not be able to take any action contemplated by the Executive Members' Ethics Act against Mr Zokwana.
- 7.3. The principle of mootness was echoed in the Constitutional Court in ***National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs***<sup>1</sup> para 21 footnote 18 remarked:
- "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law".*
8. Notice in terms of Rule 42(1) of the Public Protector Investigation Rules published in Government Gazette No. 41903 dated 14 September 2018, was issued to Mr Pieter van Dalen on 9 December 2019, with the return date for the submission of responses set for 10 January 2020, affording him the opportunity to submit further representations on why the Public Protector should not proceed to close this matter. Notwithstanding the above, Mr Pieter van Dalen did not submit his representations.

Kind regards,



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**ADV. BUSISIWE MKHWEBANE**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**

DATE: 28/02/2020

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<sup>1</sup> 2000 (2) SA 1 (CC)