

**CLOSING REPORT 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, 23 OF 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE
DELAY BY THE STATE SECURITY AGENCY TO PAY ALTERNATIVE AFRICA
INSTITUTE FOR SERVICES RENDERED**

TABLE OF CONTENTS

LIST OF ACRONYMS	3
1. INTRODUCTION	4
2. THE COMPLAINT	4
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	10
4. ISSUE IDENTIFIED FOR INVESTIGATION	11
5. THE INVESTIGATION	11
6. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS:	14
7. FINDINGS	31

LIST OF ACRONYMS

AAI	Africa Alternative Institute
ADR	Alternative Dispute Resolution
CER	Centre for Emerging Researchers
CIPC	Companies and Intellectual Property Commission
Constitution	Constitution of the Republic of South Africa, 1996
DDG	Deputy Director-General
DG	Director-General
GCC	General Conditions of Contract
ID	Investigating Directorate
PFMA	Public Finance Management Act, 1999
PPSA	Public Protector South Africa
PP Rules	Rules relating to investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended
Public Protector Act	Public Protector Act No 23 of 1994
SSA	State Security Agency

1. INTRODUCTION

- 1.1 This is a Closing Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution), section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act) and Rule 40(b) of the Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018, as amended (the Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act.
- 1.2 The report relates to an investigation in connection with allegations that the State Security Agency (SSA) unduly delayed to pay the Africa Alternative Institute (AAI) for services rendered from May 2018 to March 2019, in the amount of fourteen million, two hundred and sixty-four thousand, six hundred and eighty-four Rands and forty-two cents (R14 264 684, 42), excluding interest accrued on the arrears.
- 1.3 The report is submitted to the following persons in terms of sections 8(1) and 8(3) of the Public Protector Act:
- 1.3.1 The Director General for the SSA, Ambassador Thembisile Majola;
- 1.3.2 The Director of the Investigative Directorate within the National Prosecuting Authority of South Africa, Adv Andrea Johnson; and
- 1.3.3 The Complainant, Dr Mukovhe Masutha.

2. THE COMPLAINT

- 2.1. Dr M Masutha (Dr Masutha), in his complaint letter dated 30 October 2020 alleged the following:

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- 2.1.1 That the SSA has unduly delayed to pay him for services rendered by his company (AAI), from May 2018 to March 2019, in connection with the verification of the students from the Universities of Johannesburg, Venda, Free State and KwaZulu-Natal.
- 2.1.2 That during the 2016/17, 2017/18 and 2018/19 financial years, AAI entered into an agreement with the SSA to implement a project aimed at providing intelligence, that is, information that meets the stated and understood needs of policy makers, which the AAI collected, processed and narrowed to meet those needs, to reduce uncertainty and to provide the SSA with decision-making advantage. In this agreement, the AAI was represented by its Director, Dr Masutha and the SSA was represented by former Director-General (DG), Mr Arthur Fraser, Mr James Ramabulana, the Deputy Director-General (DDG) for Research and Analysis and Mr Joe Kudzingana, the Administrator for the 2018/19 financial year.
- 2.1.3 That with the AAI's deliverables defined in the agreement, the SSA was responsible for paying for services rendered by the AAI on a monthly basis, based on a jointly designed and costed Implementation Plan. The project was approved for the financial year 2016/17, 2017/18 and 2018/19 and ran fairly smoothly until May 2018, with both parties implementing and honouring their end of the agreement.
- 2.1.4 That for the 2018/19 financial year, the AAI was paid in March, April and May 2018. After May 2018, the AAI started experiencing a breach of the agreement when the SSA failed to honour its payment on time. The AAI continued to work around the clock to meet all the deliverables at its own cost, to ensure that the production and services are met as per the agreement with the SSA.
- 2.1.5 That in 2019, the AAI wrote to President Cyril Ramaphosa (the President) to seek his intervention to resolve what clearly was,; unjust and illegal treatment

by the SSA. The AAI wrote to the President because it had interacted with him during his time as the Deputy President on multiple occasions during research and policy development as part of this project.

- 2.1.6 That following the President's intervention, the SSA instituted an internal investigation team led by Advocate Nelson Kekana (Adv Kekana) to establish facts, evaluate the project and make recommendations to the new DG, Mr Loyiso Jafta (Mr Jafta) about this project. Dr Masutha also met with Adv Kekana and four other SSA officials during the investigation and gave all the documentation that was requested from him. Later, Dr Masutha was informed that Adv Kekana concluded his investigation and submitted a report to Mr Jafta, recommending that the SSA should honour its financial obligations to the AAI given that all the deliverables had been rendered in terms of the agreement.
- 2.1.7 That on 14 February 2019, the AAI spoke to former Minister Letsatsi-Duba who indicated that to her knowledge, the AAI's funds were withheld because the AAI had not submitted the documents requested by the SSA, to which Dr Masutha responded and indicated that he had submitted all the required documents; and that Adv Kekana had completed his work and furnished his recommendations to the office of the Director-General.
- 2.1.8 That in light of the above response by Dr Masutha, Minister Letsatsi-Duba convened a meeting with Mr Jafta, Mr Brett (General Manager), Mr Inzo Ismael and others. For purposes of the meeting, Dr Masutha printed all the documents he had submitted to Adv Kekana and fortunately, Adv Kekana's Report was also tabled in the meeting. At the onset of the meeting, Mr Jafta said that they could not find any document or a person who knows about the AAI-SSA Project and its existence within the SSA.
- 2.1.9 That after a brief presentation by Dr Masutha, Mr Jafta indicated that the research, strategy, policy and advisory services rendered to the SSA were not

in question and that the payment for this would be made to the AAI. Mr Jafta further indicated that he could not wrap his mind around the deliverable: “Development of Strategic Human Resources and Talent Targeting” which includes the enrolling of rural and township youth into scarce and critical skills at various higher institutions and the related cost implications. To satisfy himself, Mr Jafta said he would write to the former DG, Mr Fraser, to establish the existence of this project within SSA. This was particularly comforting to the AAI as Dr Masutha believed it would put the matter to rest.

- 2.1.10 That on 28 February 2019, Mr Jafta wrote to Mr Fraser and the latter responded on 5 March 2019, after which Mr Jafta assured Dr Masutha that the matter would be resolved. However, this did not take place despite the corroboration and correspondence by Mr Fraser to Mr Jafta.
- 2.1.11 That on 19 March 2019, Dr Masutha was called to a meeting with Mr Jafta and Mr Brett, Cavitha and two others. In this meeting, Mr Jafta confirmed that the AAI would be paid the funds relating to the development of “*Strategic Human Resources*” in so far as it relates to different students enrolled at different universities. To achieve this, it was agreed that Mr Brett would authenticate the status of each student and then make payment directly to each university. Dr Masutha provided Mr Brett with the student’s identity information, fee statements and contact persons at each university.
- 2.1.12 That with regard to the rest of the outstanding payments due to the AAI, Mr Jafta indicated that he would first verify with the DDG, Mr Ramabulana, and Mr Kudzingana that the AAI’s deliverables were delivered and that the claim is consistent with the internal project’s approval process.
- 2.1.13 That to this extent, Mr Jafta requested Dr Masutha to send him the invoices that separated the two amounts namely, one to be paid to the universities and the other to be paid directly to the AAI for work done. When Dr Masutha followed

- up, Mr Ramabulana indicated that not a single person in the DG's office had come to him to verify anything and that he would always be in a position to assist the SSA with information related to this project.
- 2.1.14 That on the other hand, Mr Kudzingana, as the project administrator indicated that all the information requested from him had been given to Mr Brett.
- 2.1.15 That having run out of options, Dr Masutha sought legal assistance from a firm of attorneys to write to the SSA, with a view to litigate if this matter remained unresolved. The SSA offered to settle the matter out of court after a meeting between Mr Brett and Dr Masutha on 14 August 2019. Dr Masutha met with Mr Brett again on 18 September 2019, for the same purpose of reaching an out of court settlement and Mr Brett requested additional information from Dr Masutha to be sent via email that will enable him to submit an internal payment requisition for the AAI's funds to be released. Dr Masutha submitted all the requested additional information via the supplied email address.
- 2.1.16 That during the meeting Mr Brett sought to negotiate a reduction of the settlement amount citing budget constraints for the SSA. Noting the budget constraints as proposed by Mr Brett, Dr Masutha welcomed the idea to work with the SSA to find amicable ways to settle the amount owed to institutions of higher learning. Following meetings with Mr Brett, Dr Masutha had another meeting with Mr Jafta at the Irene Mall on 31 October 2019, where the latter reiterated his intention to settle the matter out of court as soon as possible and that Dr Masutha must continue to liaise with Mr Brett and give him all the information he needs.
- 2.1.17 That on 25 November 2019, Dr Masutha had a follow-up meeting with Mr Brett and that is where the latter confirmed that no additional information is required and that the matter would be resolved soon. After this meeting, Mr Brett never got back to Dr Masutha and the last communication was on 21 January 2022,

where Mr Brett apologised for the delay and promised to meet Dr Masutha on 27 January 2021. Dr Masutha had also escalated the matter to the former Minister of the SSA, Ms Ayanda Dlodlo for her intervention, however, the matter remains unresolved.

- 2.1.18 That Dr Masutha further informed the Public Protector that the SSA is indebted to the AAI in the amount of fourteen million, two hundred and sixty-four thousand, six-hundred and eighty-four Rand and forty-two cents (R14 264 684-42), excluding interest accrued on the arrears for such services. According to Dr Masutha, the services rendered by the AAI to the SSA fell within the ambit of the Covert Support Unit and contractual matters also fell within the realm of covert structures governed by stringent security rules and practices.
- 2.1.19 That Dr Masutha indicated that the matter remains stubbornly unresolved as SSA continues to wilfully and unlawfully, disregard their own internal processes (e.g. Kekana report) that has found and verified the services rendered by AAI and confirmed the debt owed by SSA to AAI. In addition, all interventions by the former and current Minister of State Security, as well as interventions by President Ramaphosa, are arbitrarily and unlawfully undermined all at the expense of AAI.
- 2.1.20 That as a result, the AAI has suffered substantial financial losses to the tune of fourteen million, two hundred and sixty-four thousand, six-hundred and eighty-four Rand and forty-two cents (R14 264 684,42) - excluding arrears interest calculated thereon - as well as reputational damage and loss of income attributed to maladministration by the SSA and its Director General, Mr Jafta.
- 2.1.21 Dr Masutha requested the office of the Public Protector to investigate this complaint and assist to obtain justice, a fair outcome, a resolution and payment for services rendered by the AAI to the SSA, restitution of the SSA's professional

integrity and compensation for damages suffered by the AAI over the past three years.

3. 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 body established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

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

“The Public Protector has 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 legislation.

3.1.4 Section 6(4) of the Public Protector Act, 1994 (Public Protector Act) regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

3.1.5 Section 6(4)(a) of the Public Protector Act states that the Public Protector shall,

be competent to investigate on his or her own initiative or on receipt of a complaint any alleged maladministration, abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function.

4 ISSUE IDENTIFIED FOR INVESTIGATION

Based on the analysis of the complaint, the following issue was identified and investigated:

- 4.1 Whether the SSA has unduly delayed to pay the AAI for services rendered from May 2018 to March 2019 in the amount of fourteen million, two hundred and sixty-four thousand, six-hundred and eighty-four Rand and forty-two cents (R14 264 684,42) excluding interest accrued on the arrears, and if so whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution, maladministration and/or undue delay as envisaged in section 6(4)(a) of the Public Protector Act.

5 THE INVESTIGATION

5.1 Methodology

- 5.1.1 The investigation into the complaint was conducted in accordance with section 182(1) of the Constitution, read with sections 6 and 7 of the Public Protector Act.
- 5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

5.2 Approach to the investigation

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

5.2.1.1 What happened?

5.2.1.2 What should have happened?

5.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?

5.2.1.4 In the event of maladministration, undue delay or improper conduct, what would it take to remedy the wrong and what action should be taken?

5.2.2 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.

5.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the organs of state and officials involved to prevent improper conduct and/or maladministration as well as prejudice.

5.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration, where possible and appropriate.

5.3 The Investigation Process

5.3.1 The approach to the investigation included an exchange of documentation with relevant persons and a meeting between the Public Protector, the SSA, the Investigating Directorate of the National Prosecuting Authority (ID) and Dr

Masutha. All relevant documents and correspondence were obtained and analysed and relevant laws, policies and related prescripts were considered and applied throughout the investigation.

5.3.2 The Public Protector South Africa (PPSA) has concluded the investigation and based on the information and evidence obtained during the course thereof, and is now in a position to make findings.

5.4 The key sources of information

Documents and correspondences exchanged

5.4.1 Copy of the original complaint, dated 30 October 2020, signed by Dr Masutha;

5.4.2 Allegations letter from the PPSA to the SSA, dated 10 February 2021;

5.4.3 Allegations letter from the PPSA to the SSA, dated 09 March 2022, signed by Ms P Mogaladi;

5.4.4 Response from the SSA to the PPSA, dated 26 April 2022 and signed by Ambassador T Majola;

5.4.5 Subpoena from the PPSA dated 17 December 2021 to Mr Arthur Fraser;

5.4.6 Affidavit from Mr Arthur Fraser to the PPSA, dated 18 January 2022;

5.4.7 Letter sent by PPSA to the Investigating Directorate of the National Prosecuting Authority on 09 May 2022;

5.4.8 Response from the Investigating Directorate of the National Prosecuting Authority to PPSA, dated 07 June 2022;

5.4.9 Notice in terms of Rule 42(1) from the PPSA dated 19 July 2022 directed to Dr Masutha; and

5.4.10 E-mail from Dr Masutha dated 09 August 2022 attaching an unsigned response letter directed to the PPSA.

5.5 Meetings/Interviews held

5.5.1 Virtual meeting held between the PPSA and the SSA on 16 February 2022.

5.6 Legislation and other prescripts

5.6.1 The Constitution of the Republic of South Africa, 108 of 1996;

5.6.2 The Public Protector Act, 23 of 1994;

5.6.3 The Public Finance Management Act 1 of 1999; and

5.6.4 National Prosecuting Authority Act 32 of 1998.

5.7 Case Law

5.7.1 *Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others* (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111 (29 September 2020).

6. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS:

6.1 Regarding whether the SSA unduly delayed to pay the AAI for services rendered from May 2018 to March 2019 in the amount of fourteen million, two hundred and sixty-four thousand, six hundred and eighty-four Rand and forty-two cents (R14 264 684,42) excluding interest accrued on the arrears, and if so whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution, maladministration and/or undue delay as envisaged in section 6(4)(a) of the Public Protector Act.

Common cause issue

6.1.1 The AAI is a private entity duly registered with the Companies and Intellectual Property Commission of the Republic of South Africa (CIPC) and it is being represented by its Director namely, Dr Masutha in this case. The AAI's mandate is to provide research, strategy, policy and advisory services amongst other things.

Issue in dispute

6.1.2 The issue for the Public Protector's determination was whether the SSA has unduly delayed to pay AAI for services rendered from May 2018 to March 2019 in the amount of fourteen million, two hundred and sixty-four thousand, six hundred and eighty-four Rand and forty-two cents (R14 264 684,42), excluding interest accrued on the arrears. As a result, the Public Protector raised the allegations with the SSA for a response.

Response from Mr Arthur Fraser, former DG of SSA

6.1.3 Mr Fraser responded through an affidavit to the Public Protector, dated 18 January 2022:

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- 6.1.3.1 That the strategic partnership or agreement between the SSA and the AAI, which started during the tenure of the former DG of the SSA, Ms Sonto Kudjoe, was confirmed;
- 6.1.3.2 That this was an operational agreement and accordingly, it will not be in the same form and content as an agreement with a service provider that is rendering service outside the operational domain;
- 6.1.3.3 That he also endorsed the same project as he had no reason to doubt it from his predecessor, Ambassador Sonto Kudjoe and that the document that outlines the AAI's business plan objectives, deliverables and project timelines remains in the SSA's possession;
- 6.1.3.4 That during his tenure, he reduced the resource allocation to the AAI's project and transferred the project to the Deputy Director-General for Analysis who is still employed by the SSA;
- 6.1.3.5 That he is aware that Mr Jafta continued to utilise the services of the AAI and even expanded the scope of its work post Mr Arthur Fraser's departure from the SSA;
- 6.1.3.6 That it is not factual and truthful to say that there is no documented agreement between the SSA and AAI outlining the terms of agreement, deliverables, duration, remuneration or termination of operational utilisation of the AAI by the SSA.

Response from Mr Sinthumule James Ramabulana: Deputy Director-General of SSA

6.1.4 Mr Ramabulana submitted in an affidavit dated 29 October 2021, that several business related meetings took place between himself and Dr Masutha and that he was assigned the task by the then Director-General, Mr Arthur Fraser. He stated that his responsibilities involved communicating information requirements of the SSA and to receive reports generated by the Centre for Emerging Researchers (CER) and/or the AAI, led by Dr Masutha.

6.1.5 Mr Ramabulana further stated that without having seen a signed contract between the SSA and the CER or AAI, the impression he gained through speaking to Mr Arthur Fraser was that there existed a formal relationship between these institutes and the SSA. According to Mr Ramabulana, the relationship was managed through the office of the then Director-General, Mr Arthur Fraser.

Response from Mr Maanda Joseph Kudzingana: General Manager and Head of Cover Support Unit in the Office of the Director-General of SSA Mr A Fraser:

6.1.6 In the affidavit dated 29 October 2021, Mr Kudzingana indicated that his responsibility in this project was to manage resources and to assist both the line manager in dealing with products and the Director-General as the project sponsor on the project. Mr Kudzingana further stated that the project was already existing before his appointment and the person who was responsible for operations and administration among others was “Mr SD” in the Office of the Director-General of the SSA. According to Mr Kudzingana, he was briefed about this project but there was no file handed to him for reference purposes.

Response from the SSA:

- 6.1.7 The Public Protector received a response dated 27 October 2021 from the then acting Director-General of the SSA, Ambassador T Msimang, wherein he states that the SSA cannot attest to any documented agreement between the SSA and the AAI, or the parties to such agreement, terms of such agreement, deliverables, duration, remuneration or termination thereof.
- 6.1.8 Ambassador Msimang averred that in the absence of such documentation, the SSA is unable to assist the Public Protector with this investigation. Ambassador Msimang further requested the Public Protector to seek assistance and get a copy of such agreement together with an outline of services rendered and payment that the AAI says is due.
- 6.1.9 A further correspondence seeking more information was sent to the SSA by the Public Protector Investigation Team on 09 March 2022. A response was received from Ambassador T Majola, the current DG of the SSA on 26 April 2022. In her response, the DG informed the Public Protector Investigation Team that the process for the appointment of the AAI was not authorised as per the SSA's directives and further that Dr Masutha was not registered as per the operational directives which govern the management of "Humint".
- 6.1.10 Ambassador T Majola further disputed the legitimacy of Adv Kekana's report and indicated that Adv Kekana opted to draft the report without soliciting input from fellow team members. She stated that this anomaly by Adv Kekana culminated in the issuance of a collective report on 22 February 2019, and another dated 10 August 2019, drafted by the entire team. Ambassador Majola further stated that Adv Kekana's report was rejected on other aspects of the investigation such as its failure to reflect compliance with internal processes and not merely referred to discussions held with Dr Masutha.

6.1.11 Furthermore, it was submitted by Ambassador T Majola that Dr Masutha's claim, which emanates from Project Academia, is a subject of an investigation by the Investigation Directorate (ID) of the National Prosecuting Authority (NPA), which investigation is still pending. According to Ambassador T Majola, it is clear that Dr Masutha's claim emanates from a project that was not authorised as per SSA standard operational directives which is a direct violation of internal prescripts governing the conducting of operational projects.

6.1.12 Ambassador T Majola further stated that payment of Dr Masutha's claim, which is based on an unauthorised project would amount to fruitless and wasteful expenditure and thus be in violation of section 38 of the Public Finance Management Act, 1999. Ambassador T Majola confirmed that there is no legal justification for the payment of a project, which falls outside of the SSA directives and is unauthorised; and that the project is still the subject of an investigation by the ID. She concluded that the SSA is not in a position to take further action on this matter before the finalisation of the investigation by the ID.

Response from the ID:

6.1.13 On 09 May 2022, the Public Protector followed up with the Director of the ID to verify if indeed they are investigating this matter as alleged by the SSA. On 08 June 2022, the Director of the ID, Adv Andrea Johnson, replied to the Public Protector and confirmed that they have authorised the investigation into allegations of serious high profile or complex corruption within the SSA.

Responses to a Discretionary Notice issued in terms of Rule 41(1) of the Public Protector Rules:

6.1.14 Rule 41(1) of the Public Protector Rules provides that when the Public Protector intends concluding a complaint by means of a closing report the Complainant shall accordingly be informed in writing 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.

6.1.15 On 19 July 2022, the PPSA served Dr Masutha with a Notice issued in terms of Rule 41(1) of the Public Protector Rules to afford him an opportunity to reply thereto. On 1 August 2022, Dr Masutha responded to the Notice and indicated *inter alia*:

“Grounds for Advocate Gcaleka to reconsider her draft decision to discontinue investigating our complaint: unjust and inconsistent with constitutional obligation to act without fear, favour or prejudice. We now turn to reasons why your draft decision to discontinue the investigation into our complaint against maladministration, political manipulation and abuse of power by the leadership of the Agency should be reviewed and set aside. In summary, we believe your draft decision is unjust and inconsistent with your obligation to act without fear, favour or prejudice. We firmly argue that your decision panders to political manipulation of a state agency and perpetuates the political manipulation of a Public Protector office, an office constitutionally established to protect the public from the kind of lynching that the agency has inflicted on the AAI for nearly 5 years. We provide the following information as grounds to review your draft decision to discontinue this investigation:

Reason 1: *Inaccurate characterisation of common cause by Adv Gcaleka Your characterisation of the existence of an agreement between the AAI and the SSA in paragraph 6.1.2 of page 8 of your letter dated the 19th of July 2022 as “common cause” is false, contradictory and panders to political manipulation. You state that: “It is also not in dispute that in 2016/17, 2017/18 and 2018/19 financial years when Mr Arthur Fraser was still the Director-General of SSA, the AAI entered into an agreement with the SSA to implement a project aimed at providing intelligence, that is, information that meets the stated and understood needs of*

policymakers, which AAI collected, processed and narrowed to meet those needs, to reduce uncertainty and to provide the SSA with decision making advantage”.

The above statement is both false and contradictory. The existence of a documented agreement between the AAI and the Agency is clearly in dispute. It is false because on the 2nd of November 2021, Mr Maoka, your investigator, wrote to the AAI and indicated that, after being subpoenaed by the office of the Public Protector, the then Acting Director- General Amb Msimanga had written back to the Public Protector’s Office disputing the existence of an agreement between the SSA and the AAI. It is therefore both convenient and contradictory for your office to now suggest that this matter is or was not in dispute. If the SSA has suddenly changed its mind about having or not having an agreement with the AAI, such information has not been conveyed to us by you as you did with other communications. Advocate Gcaleka, you continue to contradict your characterisation of the agreement between the AAI and the SSA as common cause on page 9 (paragraph 6.1.6) and page 10 (paragraph 6.1.7) when you confirm that : “The Public Protector has received a response dated 27 October 2021 from then SSA’s Acting Director-General: Ambassador T Msimang (Msimang) wherein the latter stated SSA cannot attest to any documented agreement between SSA and AAI, nor the parties to such agreement, terms of such agreement, deliverables, duration, remuneration or termination thereof. Msimang averred that in the absence of such documentation, SSA is unable to assist the Public Protector with this investigation”.

The above excerpts from your letter dated the 19th July 2020 clearly show that the existence of an agreement between the AAI and SSA was never common cause. Of particular importance, we note here that the existence of an agreement between the SSA and the AAI is being presented as common cause only after the former Director General, the DDG for Analysis and the Project Administrator

presented office of the Public Protector with Affidavits not only supporting the AAI's complaint but further contradicting the response from Msimang. Importantly, you received these affidavits during the first half of the year 2022, after Msimang's response. Thus, for you to characterize the existence of an agreement between the AAI and the SSA as common cause is untruthful, protective of the SSA and panders to political manipulation. At this point, we wish to repeat that your office is in possession of affidavits from the former Director General, a Deputy Director General and a Project Administrator (both still employed by the SSA) affirming the existence of an agreement between the AAI and the SSA, a jointly developed and costed Project Implementation Plan /Business Plan, and confirmation that all agreed upon deliverables were delivered by the AAI to the SSA during the 2018/19 financial year.

We also submit that your investigators are in possession of a letter from former DG Fraser that indicate that acting DG Jafta did not accept a handover from him as his predecessor. This means that Amb Majola could not have received a complete handover from the previous acting Director Generals before her. The implications of this absence of handovers is obvious. The AAI should not have to suffer due to the Agency's internal challenges.

Reason 2: *Your draft decision relies on inaccurate information presented by Amb T Majola - We present new and omitted evidence on page 10 (paragraph 6.1.8), you state that: "In her response, the current DG of SSA informed the Public Protector's team that the process for the appointment of AAI was not authorized as per the SSA's directives and further that Dr Masutha was not registered as per operational directives which govern the management of Humint".*

Firstly, *with regard to the appointment of the AAI not being "authorized as per SSA's directives". We are happy to present you with new evidence. In order to reconsider your draft decision, we refer you to Mr Joe Kudzingane (a project*

administrator and current employee of the SSA) who is in possession of all the authorisation documentation that contradict the above assertion by Amb Majola. Mr Joe Kudzingane is in possession of the authorisation document that Amb Majola claims to not have access to. Advocate Gcaleka, this should be a fairly simple process given that the office of the Public Protector has already obtained an initial affidavit from him. The documents from Mr Kudzingane will present new evidence from inside the SSA that contradict the inaccurate version you rely on for your draft decision. As requested by you, to the extent that we are able to present this new evidence, you should be in a position to reconsider your draft decision.

Secondly, *we are happy that Amb Majola confirms that Dr Masutha was not a so-called operative of the SSA. This contradicts one Mr Mufamadi who has suggested otherwise elsewhere. Dr Masutha is former Policy and Strategy Analyst at the City of Tshwane’s Division of Economic Intelligence, later a Policy and Strategy Analyst in the SSA’s Division of Economic Intelligence and more recently a Manager: Research, Strategy and Policy Analysis at the Governing Party’s Headquarters. All these roles couldn’t be further from “operational directives that govern management of Humint”. However, having said that, we wish to remind you Advocate Gcaleka and Amb Majola that this dispute is between the SSA and the AAI (a private company that delivered undisputed research, strategy and analysis work), not an individual.*

Thirdly, *acting without fear, favour or prejudice, Amb Majola’s questioning of the legitimacy of her own Office’s Investigative Report is misleading and should be rejected, set aside and not be relied on in your choice of continuing or not continuing with this investigation. This report belongs to the Office of the Director General, the office that she now occupies. We wish to also stress that it is disingenuous to make us respond to every Director General that leads the Agency. The AAI did not enter into an agreement with an individual but the*

Agency as a government department. To the extent that the Investigative Report was instituted by the Office of the Director General, that makes this report the product of the current Director General, not the investigator they now seek to scapegoat. Top Secret As a way of background, at the beginning of 2019 the AAI wrote to President Ramaphosa and asked for his oversight and intervention to resolve what was clearly an unjust and illegal lynching of the AAI.

We wrote to the President because he had, on multiple occasions, interacted with the AAI on the research and policy development part of this project during his time as Deputy President (as indicated under Evidence B). Following President Ramaphosa's intervention, the office of the Director General set up an internal team of investigators to establish the facts and evaluate the project and make recommendations on the way forward. In February 2019, we met with Advocate Kekana and about four of his investigators with all the documentation they requested that we bring to the agency's HQ. Less than a week later we were informed by Advocate Kekana that his team had corroborated our statement and supporting documentation we submitted, and that his team had submitted a report to the office of the Director General. Following a telephonic conversation, former SSA Minister Letsatsi-Duba convened a meeting on the 15th of February 2019. We learnt during this meeting with the former Acting Director General Loyiso Jafta, Former DDG Inzo Ismail, Brett Freeme (former Acting head of SO) and the former Minister that the Investigative Report not only vindicated us of any wrongdoing, it recommended that the agency honour its financial obligations to the AAI given that all the deliverables had been delivered as per the agreement.

The following evidence directly contradicts Amb Majola's version: a. The Investigative report was not only instituted by her own office, it is the product of her own office. To show that the Report is not Adv Kekana's baby, in the meeting of the 15th February 2019 (convened by Minister Letsatsi-Duba), the report was actually tabled by Brett Freeme (former acting head of SO) not Adv Kekana. The

two members of Advocate Kekana's team were also present in this meeting, particularly one Cavitha Maharaj. b. After a brief presentation and the Investigative report being tabled, then acting DG Jafta confessed that the Research, Strategy, Policy and Advisory Services rendered by the AAI to the Agency were not in question as this he had already corroborated this with DDG James Ramabulana and that the payment for these services would be made to the AAI. To satisfy himself, acting DG Jafta indicated that he would write to former DG Fraser to establish the existence of this project within the agency.

Your office Advocate Gcaleka, is in possession of Jafta's inquiry letter to former DG Fraser (dated 28th February 2019) as well as former DG Fraser's response to that letter (dated 5th of March 2019). Your possession of these two letters should therefore nullify Amb Majola's attempt to rewrite the history of the SSA's own internal Investigation Report that, amongst other things, vindicated the AAI of any wrongdoing. Crucially, your investigators are in possession of digital communication dated 4th of March 2019, in which then acting DG Jafta wrote to us and assured us that the matter would soon be resolved and that only one item was outstanding, presumably he was referring to the response from the former DG.

Fourthly, *nothing directly contradict Amb Majola's version more than the SSA's attempt to settle with the AAI outside of litigation through Mr Brett Freeme. After receiving our legal summons to declassify documents crucial to this matter, the SSA, through Brett Freeme and at the instruction of the then acting DG Jafta, phoned Dr Masutha on the 14th August 2019 and requested that we meet and discuss the settlement. Dr Masutha once again spoke to Brett on the 19th of August 2019 to confirm the purpose of our meeting. The AAI has already handed over to the Public Protector's Investigators Whatsapp and Signal communications between Brett Freeme and Dr Masutha as evidence of these meetings in an effort to settle.*

We met with Brett on the 18th of September 2019 at Life Grand Café Mall of Africa, where he indicated that he had been sent by the DG to reach a settlement. He requested that I send him additional information to gertrudemkhize@gmail.com, which we did. During these meetings Brett sought to negotiate the settlement amount down citing the agency's budget constraints. On the 22nd of September 2019 I sent Brett the information he requested and he acknowledged receipt of the email and responded on the 2nd of October 2019 requesting additional information. We responded on the 4th of October 2019 with the information he requested. We have also submitted evidence of this to the Public Protector's investigators.

Reason 3: Minister Dlodlo and Confirmation of Political Manipulation *We are in possession of Whatsapp communication from former Minister Ayanda Dlodlo who confirmed to us that there is evidence of political manipulation, maladministration and abuse of power in an effort to lynch the AAI. If required, we are able to safely provide this evidence to the Public Protector.*

The Independent Investigative Directorate's investigation

During an Alternative Dispute Resolution (ADR) virtual hearing held on 16 February 2022 at 10h00, your own investigators indicated that they were hearing from the SSA's Ms Maetsane of this investigation for the first time. Secondly, your investigator Mr Dlamini, indicated that this sudden information would not prejudice the investigation into our claim against the agency. We are therefore beyond shocked at your office's sudden change of mind in this regard. As your investigators indicated during this ADR meeting with the SSA, there is no basis for discontinuing the investigation into our claims simply because the SSA has decided to institute its 4th investigation in five years. Advocate Gcaleka, the consequences of your draft decision to discontinue investigating our complaint

because the agency has instituted another investigation against the AAI are obvious for everyone to see.

The agency has investigated its own relationship with the AAI for nearly five years now. After nearly 2 years, with all the evidence presented above and more, your draft decision is to discontinue investigating our claims simply because the agency has instituted its 4th investigation is clearly unjust and inconsistent with your constitutional mandate to act without fear, favour and prejudice. The implications of your draft decision are that: for as long as a government department does not want to pay for goods and services received from a business, they simply need to institute investigation after investigation for half a decade or more in order to avoid paying for services received.

Conclusion: *We believe you should reconsider your draft decision because of the evidence presented above. However, whether you rule in our favour or not, we have already won. Although it is continuously sabotaged here and there, the free higher education policy remains a reality entrenched in the minds and aspirations of the marginalized. For us, our complaint to you was never necessarily about consulting fees owed to us, but rather standing up to treacherous bullies who continue to politically manipulate and weaponize the agency in pursuit of narrow factional ends. For us it was and will always be about standing up to what we believe in and allowing the chips to fall where they may. We believe whatever decision you reach, at some point Justice will be served”.*

Analysis of the response from the AAI:

- 6.1.16 The PPSA has duly taken cognisance of the above submission by Dr Masutha in response to the Notice issued in terms of Rule 42(1) of the Public Protector Rules. However, it can be noted from the response of 09 March 2022 from Ambassador T Majola that the SSA is not necessarily denying the existence of

a contract between the AAI and the SSA. Ambassador T Majola is rather disputing the validity or legality of the alleged contract, in a sense that it emanates from a project that was not authorised as per the SSA standard operational directives, which, according to her, is a direct violation of internal prescripts governing the conducting of operational projects.

- 6.1.17 Ambassador T Majola clearly indicated to the Public Protector that payment of Dr Masutha's claim, given the illegality of the contract, would amount to fruitless and wasteful expenditure prohibited in terms of section 38 of the Public Finance Management Act, 1999 as it falls outside of the SSA directives and is unauthorised. Additionally, Ambassador Majola stated that the AAI's project is still a subject of a criminal investigation by the Investigating Directorate of the National Prosecuting Authority (NPA) of South Africa. As a result, the SSA is not in a position to take further action on this matter before the finalisation of the criminal investigation by the ID of the NPA.
- 6.1.18 The Public Protector's Investigation Team verified the criminal investigation with the ID, which was confirmed on 08 June 2022.
- 6.1.19 Given the above contentions advanced by Ambassador T Majola on the legality of the contract between AAI and SSA, the outstanding dispute is not so much about the existence or non-existence of the contract but the legality thereof. In as much as the Public Protector is in possession of evidence by way of affidavits from Mr Arthur Fraser, Mr James Ramabulana and Mr Joe Kudzingana, that corroborate Dr Masutha's allegation that there existed a business relationship between the SSA and the AAI, this evidence alone does not extend to the validity and/or legality of the contract between the AAI and the SSA. The legality of the agreement and/or contract is now being impugned by the current SSA's DG Ambassador T Majola.

Application of the relevant law

- 6.1.20 It is apparent from the evidence alluded to above that the AAI and the SSA are involved in a contractual dispute involving the validity of the contract and a monetary claim. It follows, therefore, that should it not be possible to amicably settle a dispute by means of mediation, it may be settled in a South African court of law.
- 6.1.21 The National Treasury in its document dated July 2010, provides for the Government Procurement, General Conditions of Contract (GCC). In terms of the GCC, its purpose is to draw special attention to certain general conditions applicable to government bids, contracts and orders, and to ensure that clients are familiar with regard to the rights and obligations of all parties involved in doing business with the government.
- 6.1.22 Paragraph 27 of the GCC provides for the settlement of disputes. This paragraph provides that if any dispute or difference of any kind whatsoever arises between the purchaser and the supplier in connection with or arising out of the contract, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.
- 6.1.23 The GCC further stipulates that, if after thirty (30) days, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the purchaser or the supplier may give notice to the other party of his intention to commence with mediation. No mediation may be commenced unless such notice is given to the other party. Should it not be possible to settle a dispute by means of mediation, ***it may be settled in a South African court of law.***

- 6.1.24 The *contractual principle* was confirmed in the *GEMS*¹ matter, where the Public Protector was investigating allegations of failure or refusal by GEMS to recognise the complainant as a beneficiary under the medical aid scheme. In this matter, the Supreme Court of Appeal (SCA) found amongst things that “the relationship between members and the scheme is essentially one of a contractual nature”. In rejecting the mandate of the Public Protector, the SCA opined that the nature of the complaint, has the consequence that the jurisdictional preconditions for an investigation in terms of sections 6(4) and (5) have not been met. At the end, the SCA found the Public Protector does not have the statutory power to investigate the complaint.
- 6.1.25 In a same way, the nature of the relationship between the SSA and the AAI is essentially one of contractual nature. It goes without saying that the Public Protector cannot lawfully embark on an investigation which does not fall within her statutory remit. Such an investigation would be unlawful.
- 6.1.26 To this end, it is apposite to add that the Public Protector may not be an appropriate forum to adjudicate contractual disputes between the parties, the legality of the contract, civil claims or to determine compensation as requested by the AAI.
- 6.1.27 As already indicated, the Public Protector received confirmation from the ID that they have authorised an investigation in terms of section 28(13) read with section 28(1) of the National Prosecuting Act, 1998 into allegations of serious high profile or complex corruption within the SSA.

¹ Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111 (29 September 2020) at Paragraph 22 and 38.

6.1.28 Section 28 of the National Prosecuting Authority Act² is titled ***Inquiries By Investigating Directorate*** and stipulates *inter alia*:

(1)(a) “If the Investigating Director has reason to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an investigation on the matter in question, whether or not it has been reported to him or her in terms of section 27”.

6.1.29 As a result, the Public Protector would heed the caution by declining to engage in a parallel investigation in this matter which is a subject of an ongoing criminal investigation by another competent authority. This is due to obvious reasons of avoiding the potentiality of misaligned findings between the Public Protector and the ID of the NPA and unnecessary duplication of resources.

Conclusion

6.1.30 In view of the foregoing, it is concluded that it would not be prudent for the Public Protector to continue with this investigation.

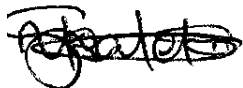
7. FINDINGS

7.1 In view of the foregoing, the PPSA closes this investigation based on the following findings:

7.1.1 Notably, a contractual dispute involving the validity or legality of the contract as revealed by evidence, a claim for money, compensation and reputational damage as requested by Dr Masutha in this matter may best be settled in the court of law.

² Act 32 of 1998.

- 7.1.2 The SSA has referred this matter to the ID criminal investigation. As a result the Public Protector will not engage on a parallel investigation in this matter which is a subject of an ongoing criminal investigation by another competent authority, namely the ID. This is necessary to avoid duplication and the possibility of misaligned findings between and PPSA and other state institutions.
- 7.1.3 The ID has confirmed that it is conducting an investigation into allegations of serious high profile or complex corruption within the SSA, which includes the issues related to this matter.
8. It is important to note that the Complainant can approach a court of law for judicial review if there is a belief that the decision by the Public Protector to close the file was wrong because it was based on irrelevant evidence or information, inaccurate facts, errors of the law and if there is new evidence which has the potential to yield a different result.



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

Assisted by: Mr Vusumuzi Dlamini
Chief Investigator: Investigations Branch