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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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MISUSE OF PUBLIC FUNDS ALLOCATED BY PARLIAMENT AS POLITICAL PARTY ALLOWANCE BY THE MEMBER OF PARLIAMENT (MP) MS PEMMY MAJODINA, DURING THE AWARD OF THE PERSONAL PROTECTIVE EQUIPMENT (PPE) TENDER TO HER SON'S PRIVATE COMPANY.

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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 (the Constitution), and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report communicates the findings and appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of misuse of public funds allocated by Parliament as political party allowance by the Member of Parliament, Ms Pemmy Majodina (Ms Majodina), during the award of the personal protective equipment (PPE) tender to her son's private company.

(iii) The complaint was lodged with the Public Protector South Africa (Public Protector) on 26 April 2021 by Mr Mervin Dirks, MP for the African National Congress (the Complainant). In essence, the Complainant argued that public funds allocated by Parliament as political party allowances are being misused by Ms Pemmy Majodina to benefit her family and the Parliament has not put adequate control mechanism in place to avert misuse of public funds allocated by it as political party allowances.

(iv) Based on the analysis of the allegations made and information obtained, the following issue was identified for investigation:

(a) Whether the award of the PPE tender for the supply of thermometers worth R52 500.00 using public funds by the Office of the African National Congress (ANC) Parliamentary Caucus, to a company owned by Ms Majodina's son, amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

(b) Whether Ms Majodina created a post of a Graphic Designer in the Office of ANC's Parliamentary Caucus using public funds and employed her son without following due processes and if yes, whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

(c) Whether Ms Majodina abused public funds using the office of an ANC's Parliamentary Caucus on car rentals despite receiving monthly car allowances and if yes, whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and

(d) Whether the Parliament has failed and/or unduly delayed to put adequate control regulatory measures in place to ensure transparency, accountability and sound management and expenditure of its finances; if not whether such amounts to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(v) The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act. It included exchange of correspondences with Ms Pemmy Majodina, the Parliament, analysis of the relevant documentation and information obtained during the investigation as well as consideration and application of the relevant laws and prescripts. Evidently, the above provisions only empower the Public Protector to investigate any conduct in state affairs or in the public administration. This means the scope of the power is limited to state affairs and affairs of the public administration. There can be no doubt that procurement of PPE's by the ANC, which is a political party does not amount to public affairs as envisaged in these provisions. The fact that ANC is a ruling party does not make it a part of the public administration and the ruling party and the state does not become one entity.[1]

[1] *Public Protector and Others v President of the Republic of South Africa and Others* [2021] ZACC [19] at Paragraph 103.

(vi) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding the allegation that the award of the PPE tender for the supply of thermometers worth R52 500.00 using public funds by the Office of the African National Congress (ANC) Parliamentary Caucus, to a company owned by Ms Majodina's son, amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

(b) Regarding the allegations that Ms Majodina created a post of a Graphic Designer in the Office of ANC's Parliamentary Caucus using public funds and employed her son without following due processes and if yes, whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and

(c) Regarding the allegation that Ms Majodina abused public funds using the office of an ANC's Parliamentary Caucus on car rentals despite receiving monthly car allowances and if yes, whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(aa) The affairs of the ANC do not fall within the scope of matters to be investigated by the Public Protector as contemplated under section 182(1) of the Constitution. It follows therefore that the Public Protector makes no finding against Ms Majodina in the above three issues, numbered a to c.

(d) Regarding whether the Parliament has failed and/or unduly delayed to put adequate control regulatory measures in place to ensure transparency, accountability and sound management and expenditure of its finances; if

not whether such amounts to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

(aa) The allegation that the Parliament has failed and/or unduly delayed to put adequate control regulatory measures in place to ensure transparency, accountability and sound management and expenditure of its finances, is **substantiated.**

(bb) It was conceded by the Speaker during the course of this investigation that the Executive Authority of Parliament has not yet issued regulations contemplated in terms of section 34 of the FMPPLA. The Speaker submitted that Parliament is still in a process of adopting the draft regulations which are yet to be presented to the Joint Standing Committee on the Financial Management of Parliament.

(cc) The FMPPLA is a national legislation which came into force in 2009. It is now 13 (thirteen) years later and the Parliament has not yet passed the regulations as contemplated by FMPPLA.

(dd) As a result of the absence of regulations required of Parliament in terms of section 34 of the FMPPLA, the Public Protector finds that the Parliament has failed and/or unduly delayed to comply with the dictates of its own legislation namely, FMPPLA.

(ee) The Public Protector further finds that the Policy on Political Party Allowances presented by Parliament was approved by the Presiding Officer in 2005. The Public Protector was not furnished with evidence or proof that the same policy was made in terms of FMPPLA, published for public comment and evidence or proof of periodical review as envisaged in terms of section 65(3) of FMPPLA.

(ff) The conduct of the Executive Authority of Parliament accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.

(vii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

To the Speaker of Parliament acting jointly with Chairperson of the National Council of Provinces as the Executive Authority of Parliament:

(aa) **Within one hundred and ninety (190) working days** from the date of the final report, the Speaker of Parliament acting jointly with the Chairperson of the National Council of Provinces as contemplated in section 5(1) and (2) of the Financial Management of Parliament and Provincial Legislatures Act of 2009, takes appropriate steps to make the regulations concerning the allocation and use of any funds provided by Parliament to political parties or to Members of Parliament, as envisaged in terms of section 34 of the MFPPLA.

To the Secretary to Parliament as the Accounting Officer:

(aa) Periodically ensure the reviewing of the regulations as contemplated in terms of section 65(3)(b) of FMPPLA.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MISUSE OF PUBLIC FUNDS ALLOCATED BY PARLIAMENT AS POLITICAL PARTY ALLOWANCE BY THE MEMBER OF PARLIAMENT (MP) MS PEMMY MAJODINA, DURING THE AWARD OF THE PERSONAL PROTECTIVE EQUIPMENT (PPE) TENDER TO HER SON'S PRIVATE COMPANY.

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 published in terms of section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of investigation and the remedial action:

1.2.1 The Speaker of the National Assembly, Honourable Nosiviwe Mapisa-Nqakula;

1.2.2 The Chairperson of the National Council of Provinces, Honourable Amos Masondo;

1.2.3 The Acting Secretary to Parliament; Ms Ms Baby Tyawa and

1.2.4 The National Head of Directorate of Priority Crimes Investigations, General Godfrey Lebeya;

1.2.5 The Complainant, Mr Mervin Dirks.

2. THE COMPLAINT

2.1. The complaint was lodged with the Public Protector South Africa (Public Protector) on 26 April 2021 by Mr Mervin Dirks, MP for the African National Congress (the Complainant).

In the main, the Complainant alleged *inter alia*:

2.2. The award of the PPE tender for the supply of thermometers worth R52 500.00 by the African National Congress (ANC) Constituency offices, to the company owned by Ms Majodina's son, Mr Thandolwethu Mkhonto we-Sizwe Majodina is, on face value, in contravention of section 217 of the Constitution;

2.3. Public funds were utilised for this tender and that this gives the Public Protector the necessary authority/jurisdiction over the subject matter of the complaint; as such funds emanate from National Treasury and devolve to Parliament which in turn allocates same as allowances to political parties represented in Parliament;

2.4. Ms Majodina created a post of a Graphic Designer in her office and employed her son to it without following due process and that this deed expresses gross nepotism and disrespect of this public office;

2.5. Ms Majodina abused constituency funds on car rentals despite receiving monthly car allowances; and

2.6. The office of the ANC caucus in Parliament received **R286, 5 million** in 2020/21 which should be utilised to assist Members of Parliament to conduct an active oversight over the Executive and its departments as well as constituency work. The Public Protector is requested to investigate this allocation in order to reveal how much was spent on PPEs and other tenders in this financial year (2020/2021), which will give an indication of who are the service providers to the office of the Chief Whip.

2.7. In essence, the Complainant argued that public funds allocated by Parliament as political party allowances are being misused by Ms Pemmy Majodina to benefit her family and the Parliament has not put adequate control mechanism in place to avert misuse of public funds allocated by it as political party allowances.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1) (a) of the Constitution 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 legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the powers to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 In the matter of the *Economic Freedom Fighters* v *Speaker of the National Assembly and Others: Democratic Alliance* v *Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that

the remedial action taken by the Public Protector has a binding effect.[2] The Constitutional Court further held that:

"*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."*[3]

3.5.1 In the above-mentioned constitutional matter, Mogoeng CJ, stated amongst other things the following, when confirming the powers of the Public Protector:

3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the *Constitution* cannot properly be upheld or enhanced (paragraph 67);

3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.5.5 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);

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2 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
3 *Supra* at para [73].

3.5.6 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);

3.5.7 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);

3.5.8 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a);

3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d); and

3.5.10 *"Appropriate"* means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e).

3.6 In the matter of the *President of the Republic of South Africa vs 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:

3.7 The constitutional power is curtailed in the circumstances wherein there is conflict with obligations under the constitution (para 71);

3.8 The Public Protector has 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 (para 82);

3.9 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 (para 100 and 101):

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

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

3.11 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 (para 105);

3.12 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 (para107 and 108); and

3.13 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).

3.14 The Parliament is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector's mandate.

3.15 The jurisdiction of the Public Protector was not disputed by the Parliament in this matter.

4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of sections 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 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.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

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

4.2.1.5 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.

4.2.1.6 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the department to prevent improper conduct and/or maladministration as well as prejudice.

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

4.3 **On analysis of the complaint and the available information, the following issue was identified and investigated:**

4.3.1 Whether Whether the award of the PPE tender for the supply of thermometers worth R52 500.00 using public funds by the Office of the African National Congress (ANC) Parliamentary Caucus, to a company owned by Ms Majodina's son, amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

4.3.2 Whether Ms Majodina created a post of a Graphic Designer in the Office of ANC's Parliamentary Caucus using public funds and employed her son without following due processes and if yes, whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

4.3.3 Whether Ms Majodina abused public funds using the office of an ANC's Parliamentary Caucus on car rentals despite receiving monthly car allowances and if yes, whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and

4.3.4 Whether the Parliament has failed and/or unduly delayed to put adequate control regulatory measures in place to ensure transparency, accountability and sound management and expenditure of its finances; if not whether such amounts to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

4.4 **The Key Sources of information**

4.4.1 **Documents and letters exchanged**

4.4.1.1 A copy of a letter of response to the section 7(9) notice from the Speaker of Parliament to the Public Protector dated 05 May 2022;

4.4.1.2 A copy of the notice issued in terms of the Public Protector Act, 1994 issued by the Public Protector on 28 April 2022 to Speaker of Parliament, the Acting Secretary to Parliament and the ANC Chief Whip, Ms P Majodina;

4.4.1.3 A copy of letter from the Public Protector: Adv Busisiwe Mkhwebane dated 07 February 2022, addressed to Speaker of National Assembly: Ms. NN Mapisa-Nqakula;

4.4.1.4 A copy of letter from Speaker of National Assembly: Ms. NN Mapisa-Nqakula dated 25 January 2022, addressed to the Public Protector: Adv Busisiwe Mkhwebane;

4.4.1.5 A copy of letter from the Public Protector: Adv Busisiwe Mkhwebane dated 17 December 2022, addressed to Speaker of National Assembly: Ms. NN Mapisa-Nqakula;

4.4.1.6 A copy of letter from the Public Protector's official in the capacity of an Acting Executive Manager: Mr. Vusumuzi Xolani Dlamini dated 11 November 2021, addressed to the Acting Secretary to Parliament: Ms P.N Tyawa;

4.4.1.7 A copy of a letter from the Acting Secretary to Parliament: Ms P.N Tyawa dated 11 June 2021, addressed to the Public Protector: Adv Busisiwe Mkhwebane;

4.4.1.8 A copy of Section 7(4)(b) letter in terms the Public Protector Act, 1994 dated 18 May 2021, addressed to the ANC Chief Whip, Ms Penny Majodina;

4.4.1.9 A copy of acknowledgement of complaint letter from the Public Protector: Busisiwe Mkhwebane dated 18 May 2021, addressed to Member of Parliament: Mr Mervyn Dirks;

4.4.1.10 A copy of Section 7(4)(b) letter in terms the Public Protector Act, 1994 dated 18 May 2021, addressed to the Acting Secretary to Parliament: Ms P.N Tyawa;

4.4.1.11 A copy of a letter from the Public Protector's official in the capacity of Manager: Registry and Call Centre: Ms Juliet Nkabinde dated 26 April 2021, addressed to SCOPA Whip: Mr Mervyn Dirks.

4.4.2 **Email Correspondence sent and received**

4.4.2.1 Email dated 05 May 2022 from the office of the Speaker of Parliament to the Public Protector;

4.4.2.2 Email dated 05 May 2022 from the Public Protector to the office of the Speaker of Parliament;

4.4.2.3 Email dated 03 May 2022 from the office of Speaker of Parliament to the Public Protector;

4.4.2.4 Email dated 29 April 2022 from the Public Protector to the office of the Speaker of Parliament;

4.4.2.5 Email dated 07 February 2022 from the Public Protector to the office of the Speaker of Parliament;

4.4.2.6 Email dated 25 January 2022 from the office of the Speaker of Parliament to the Public Protector

4.4.2.7 Email dated 19 December 2021 from the Public Protector to the office of the Speaker of Parliament;

4.4.2.8 Email dated 08 June 2021 from the Acting Spokesperson to the ANC Parliamentary Caucus: Ms Nomfundo Mthethwa, addressed to Public Protector South Africa (PPSA) responding to the documents request;

4.4.2.9 Email dated 08 June 2021 from Public Protector South Africa (PPSA), addressed to Nomfundo Mthethwa titled *"Opening Account Document";*

4.4.2.10 Email dated 04 June 2021 from Moodliar Janitha to Public Protector South Africa (PPSA) with regards to VAF (Nedcredit);

4.4.2.11 Email dated 04 June 2021 from Moodliar Janitha to Public Protector South Africa (PPSA) with regards to Credit Card Statements;

4.4.2.12 Email dated 03 June 2021 from Moodliar Janitha to Public Protector South Africa (PPSA) with regards to opening account documents and statements for the open transactional accounts;

4.4.2.13 Email dated 19 May 2021 from Public Protector South Africa (PPSA), addressed to Moodliar Janitha containing the subpoena documents;

4.4.2.14 Email dated 19 May 2021 from Moodliar Janitha to Public Protector South Africa (PPSA) acknowledging the receipt of the subpoena documents;

4.4.2.15 Email dated 03 May 2021 from the Complainant Mr Mervyn Dirks to Public Protector South Africa (PPSA) with regards to the complaint against the ANC Chief Whip;

4.4.2.16 Email dated 24 April 2021 from the Complainant SCOPA Whip: Mr Mervyn Dirks to the Protector South Africa (PPSA) with regards to the complaint against the ANC Chief Whip.

4.4.3 **Legislation and other legal prescripts**

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

4.4.3.2 The Public Protector Act, 23 of 1994;

4.4.3.3 The Financial Management of Parliament and Provincial Legislatures Act 10 of 2009 (FMPPLA);

4.4.3.4 Special Investigating Units and Special Tribunals Act 74 of 1996;

4.4.3.5 Policy on Political Parties Allowances, July 2005;

4.4.4 **Case law considered**

4.4.4.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);*

4.4.4.2 *President of the Republic of South Africa vs 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);*

4.4.4.3 *South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC) and*

4.4.4.4 *Public Protector v Mail & Guardian Ltd (422/10) [2011] ZASCA 108 (1 JUNE 2011).*

4.4.5 **Notices issued in terms of section 7(9) of the Public Protector Act, 23 of 1994.**

4.4.5.1 A notice was issued by the Public Protector in terms of section 7(9) of the Public Protector Act to the Speaker of the National Assembly, Hon Nosiviwe Mapisa-Nqakula on 29 April 2022, affording her an opportunity to respond to the information and evidence obtained during the investigation. She responded on 05 May 2022, indicating that she accepts the recommendations as set out in the Notice and she further copied the Chairperson of the National Council of Provinces, Honourable Amos Masondo in her response.

4.4.5.2 A copy of the notice was also provided to the Acting Secretary to Parliament; Ms Ms Baby Tyawa on 29 April 2022.

4.4.5.3 A copy of the notice and a referral letter was also sent by the Public Protector to the National Head of the Directorate of Priority Crimes Investigation (DPCI), Gen Godfrey Lebeya on 26 May 2022. A response was received on 30 May 2022.

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

5.1 **Regarding whether the award of the PPE tender for the supply of thermometers worth R52 500.00 using public funds by the Office of the African National Congress (ANC) Parliamentary Caucus, to a company owned by Ms Majodina's son, amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;**

Common cause issues

5.1.1 The ANC is a political party and a voluntary association where the relationship between the party and its members is regulated by contract of a unique nature as it is not a body established by statute.[4]

5.1.2 The office of the Chief Whip of the ANC Parliamentary Caucus is the central coordination point of all the activities of ANC in Parliament. Ms Majodina is the current Chief Whip of the ANC in Parliament. The ANC Caucus consists of all ANC Members of Parliament in the National Assembly and the National Council of Provinces.[5]

5.1.3 The principal tasks of caucuses of political parties are to keep MPs of each political formation informed about the parliamentary programme and to enable the MPs to discuss and agree on the approach of their parties to all matters on the parliamentary agenda. They also serve as the organ within which those elected by Caucus to parliamentary positions account to the organisation as well as serving as institutions that ensures the accountability of members of Caucus. Caucuses also serve as the point of contact between the MPs and the leadership of the organisation to which they belong.[6]

5.1.4 Political parties are often the structures through which citizens express their right to political participation; the expression of their hopes and aspirations; their fears and uncertainties; and the articulation of the future they desire for themselves. In other respects, political parties live in the public consciousness of a society as their work is so fundamentally public in nature and is, at least theoretically, meant to be aligned to the public good. Our constitutional order places executive power in the hands of political parties and it is therefore difficult to imagine a democracy without political parties.[7]

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4 See *Ramakatsa and Others v Magashule and Others* [2012] ZACC 31; 2013 (2) BCLR 202 (CC) at para 79.

5 https://www.ancparliament.org.za/content/anc-parliamentary-caucus, accessed on 15 November 2021.

6 https://www.ancparliament.org.za/content/anc-parliamentary-caucus, accessed on 15 November 2021.

7 Magashule v Ramaphosa and Others (2021/23795) [2021] ZAGPJHC 88; [2021] 3 All SA 887 (GJ) (9 July 2021) at para 2-3.

Issues in dispute

5.1.5 The Complainant submitted that the award of the PPE tender for the supply of thermometers worth R52 500.00 by the ANC Parliamentary Constituency offices, to a company owned by the Ms Majodina's son, Mr Thandolwethu Mkhonto we-Sizwe Majodina is, on face value, in contravention of section 217 of the Constitution.

5.1.6 The Complainant further contended that public funds were utilised for this tender and that this gives the Public Protector the necessary authority/jurisdiction over the subject matter of the complaint; as such funds emanate from National Treasury and devolve to Parliament which in turn allocates same as allowances to political parties represented in parliament.

5.1.7 On 18 May 2021, a letter was issued by the Public Protector to the Secretary of Parliament: Ms Baby Tyawa (Ms Tyawa) and to Ms Majodina and requesting a response to the allegations made, as well as the submission of documentation pertinent to this investigation.

5.1.8 Ms Tyawa, through a correspondence dated 21 June 2021, responded to the allegations and submitted the following documentation for the Public Protector's perusal:

5.1.8.1 Policy on use of Political Party Allowances;

5.1.8.2 Correspondence from the Acting Secretary to Parliament dated 14 December 2020 and 29 March 2021 respectively, on the increase in allocations of Leadership and Administrative Allowance;

5.1.8.3 Declaration by the African National Congress, dated 8 July 2020, in terms of clause 8.12.3 (c) of the Policy on Party Allowances (as approved on 20 July 2005);

5.1.8.4 Financial Statements of the African National Congress as at 31 March 2019;

5.1.8.5 Report of Independent Auditors on Financial Statements of the African National Congress; and

5.1.8.6 Accounting Policies of the African National Congress.

5.1.8.7 Ms Tyawa further indicated the following in her response:

"Political parties are audited by independent auditors and their procurements, supply chain management and recruitment/selection policies fall outside of Parliament's control. In this regard, you could approach the ANC Caucus Office to request copies of these documents."

5.1.8.8 Ms Majodina responded to the allegations as per the letter dated 26 May 2021 and indicated *inter alia, that*:

"The background to the procurement of the thermometers was necessitated by the advent of Covid- 19 which saw a rise in the number of our PCO staff affected by Covid - 19. Our offices are the political hub of the interface between the ANC and the public. Faced by a pandemic and valuing the health and safety of both the public and our Parliamentary Constituency staff, our Finance Unit needed to invoke emergency dispensation as outlined in Section 193 of the ANC Parliamentary Caucus Supply Chain Management Policy (page 74) which state the following: "The conditions warranting Emergency dispensation should include the existence of one or more of the following:

193.1. the possibility of human injury or death
193.2. the prevalence of human suffering or deprivation of rights

Section 194 of the ANC Parliamentary Caucus supply chain management policy further explains that " the prevailing situation (COVID – 19 prevalence and rising cases), should be of such a nature it could not be alleviated by interim measures, in order to allow time for the formal procurement process (page 75)

Section 195 of the ANC Parliamentary Caucus supply chain management policy, states that in an emergency and where time was of the essence, the emergency shall be immediately addressed…

In soliciting for the supply and provision of the thermometers, the Head of the Finance Unit, invoked this provision of the ANC Parliamentary Caucus supply chain management policy

Thus, there was no tender as the allegation inaccurately state by Mr Mervin Dirks. If there was a tender, there would have been a bid process" (sic).

5.1.9 According to the allocation letter[8] furnished to the Public Protector by Ms Majodina, the ANC Parliamentary Caucus received a total of **R 274, 333,178.00** (two hundred and seventy four million, three hundred and thirty three thousand, one hundred and seventy eight rand) in the 2020/2021 financial year.

5.1.10 Ms Majodina further argued in her response that a *Caucus does not fall under the category of institutions that can be referred to as state or any of its institutions*. That notwithstanding, Caucus has its own internal Supply Chain Management policies, which mirror state procurement policy.

5.1.11 Ms Majodina submitted further that the ANC Parliamentary Caucus performs its own public function as defined in the Policy on Political Parties Allowances and that its finances are audited by private auditors and not by the Auditor General South Africa (AGSA).

5.1.12 It was further explained by Ms Majodina that, the amount of funds spent on PPEs in that financial year is a subject of an audit that is currently underway and the service providers were **King Mzimshe Trading and Navern – Tech,** a company based in Durban.

[8] Dated 16 March 2020 and signed off by Secretary of Parliament: Ms Tyawa.

5.1.13 According to Companies and Intellectual Property Commission (CIPC) entity search for King Mzimshe Trading with Enterprise No: K20117382730, Mr Khayalethu Mkhontowesizwe Majodina is the active director of this company.

5.1.14 Furthermore, in terms of the written confirmation furnished by the Department of Home Affairs (DHA) to the Public Protector, ***Mr Khayalethu Mkhontowesizwe Majodina is a biological son to Ms Pemmy Castelina Majodina***.

5.1.15 On 15 January 2021, King Mzimshe Trading issued a payment instruction bill or an invoice to the ANC National Caucus in Parliament. The description in terms of the invoice in possession of the Public Protector can be summarised as per the table below:

Description	**Rate**	**Quantity**	**Amount**
Thermometers	R350,00	150	R52 500.00

5.1.16 The following amounts were observed credited from a source referenced as ANC CAUCUS into the Nedbank Account[9] in the name of **King Mzimshe Trading (Pty) Ltd**:

To Account Name	**Credit Reference**	**Amount**	**Transaction Date**
King Mzishe Trading (Pty) Ltd	ANC CAUCUS Inv 17	R7,600.00	28 January 2021
King Mzishe Trading (Pty) Ltd	ANC CAUCUS	R7,018.00	03 March 2021

[9] Nedbank statements in possession of the Public Protector.

King Mzishe Trading (Pty) Ltd	ANC CAUCUS	R 59,400.00	10 March 2021
King Mzishe Trading (Pty) Ltd	ANC CAUCUS	R6,927.00	11 March 2021

5.1.17 In summary and from the above infographic presentation, it may be concluded that **King Mzimshe Trading (Pty) Ltd** which is owned by the son of Ms Majodina was paid a total of **R80,945.00** (Eighty thousand nine hundred and forty five rand) by ANC Parliamentary Caucus only between January 2021 and April 2021.

Application of the Relevant Legal Framework

5.1.18 Section 182(1) of the Constitution is the source of the Public Protector's power and it provides:

"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."

5.1.19 The above provision empowers the Public Protector to investigate any conduct in state affairs or in the public administration. This means the scope of the power is limited to state affairs and affairs of the public administration. There can be no doubt that procurement of PPE's by the ANC, which is a political party does not amount to public affairs as envisaged in this provision. The fact that it is a ruling party does not make it a part of the public

administration and the ruling party and the state does not become one entity.[10]

5.1.20 Section 6(4)(a) of the Public Protector Act provides that:

"The Public Protector shall, be competent—

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged—

(i) maladministration in connection with the affairs of government at any level."

5.1.21 While the above provisions of the Public Protector Act list additional powers of the Public Protector in section 6, evidently none of the powers flowing from section 6 of the Public Protector Act cover the affairs of the ANC.

5.1.22 Public money is not defined in the Public Protector Act, however, according to section 1 of the Special Investigating Units and Special Tribunals Act[11] *'public money'* means any money withdrawn from the National Revenue Fund or a Provincial Revenue Fund, as contemplated in the Constitution, and any money acquired, controlled or paid out, by a State institution.

5.1.23 When the Parliament paid political party allowances to the ANC or any other party in terms of the section 57(2)(c) of the Constitution, the Parliament's obligations are thereby lawfully discharged. Once in the hands of the ANC, it is money lawfully paid by Parliament and by corollary also lawfully received by ANC. At this stage, the ANC is free to utilise the money in accordance with its own private policies and constitution.

5.1.24 If the ANC unlawfully misuses that money, it would be an unlawful misuse of its own allocated constituent's money and not an unlawful misuse of public money of a Parliament. This is the same approach that was followed in *South*

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10 *Public Protector and Others v President of the Republic of South Africa and Others* [2021] ZACC [19] at Paragraph 103.

11 Act 74 of 1996.

African Association of Personal Injury Lawyers v Heath.[12] In this case the Court held that when the RAF pays compensation to a private law firm of attorneys, as agent for the claimant, the RAF's obligations to the claimant are thereby lawfully discharged. In the hands of the private law firm of attorneys it is money lawfully paid and received, in which the State institution no longer has a legal interest. If the private law firm of attorneys unlawfully appropriates that money, it would be an unlawful appropriation of the client's money and not an unlawful appropriation of money of a State institution.

5.1.25 Similarly, it was concluded by the court in *''Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZASCA 108 (1 JUNE 2011)'' that once the money came into the hands of *Imvume Management (Pty) Ltd (Imvume) and ANC it ceased* to be *'public money' and fell outside investigatory mandate of the Public Protector*.[13]

5.1.26 To improperly pay public money, and to improperly receive public money, each seems to be quintessentially an 'improper act with respect to public money'.However, this is an entirely distinguishable case, as the Complainant never alleged that the Parliament improperly paid public money to the ANC. There was also no indication from available evidence placed in front of the Public Protector which suggests that Parliament acted unlawfully in paying political party allowance to ANC. It stands to reason therefore that there is no suggestion that payments made by the Parliament to the ANC caucus, were in any way improper or unlawful.

5.2 **Regarding whether Ms Majodina created a post of a Graphic Designer in the Office of the ANC's Parliamentary Caucus using public funds and employed her son without following due processes and if yes whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;**

Factual Matrix

12 *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) at para 59.

13 *Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZASCA 108 (1 JUNE 2011) at para 93.

5.2.1 The Complainant submitted that Ms Majodina created a post of a Graphic Designer in her office and employed her son to it without following due process and that this deed expresses gross nepotism and disrespect of this public office.

5.2.2 Ms Majodina adequately replied to the above allegation and clarified that during the Fifth Caucus (2014 – 2019), the position of Caucus Graphic Designer was occupied by an incumbent from Mpumalanga namely, Mr Vusi Phethla (Mr Phethla) who resigned before the end of term due to trauma he suffered outside of the office.

5.2.3 Further that, due to the nature of the trauma that led to Mr Phethla's sudden resignation, the position of Graphic Designer was filled through Headhunting. Mr Nkosomzi Bavu filled the position in September 2020 under the Sixth Administration, as per Recruitment Policy of the ANC which was also attached in Ms Majodina's submission for Public Protector's perusal.

5.2.4 No further evidence was tendered by the Complainant to gainsay the above response by Ms Majodina. The Complainant's allegations that Ms Majodina employed her son to the post in this regard were also not corroborated by other form of independent evidence. In the absence rebuttal or corroboration, it follows that Ms Majodina's submission should stand.

Application of the Relevant Legal Framework

5.2.5 The relevant provisions of the applicable legal framework referred to in paragraph above in **Paragraph 5.1.18 to 5.1.26** apply *mutatis mutandis* to this issue. For the sake of brevity the same applicable legal framework shall not be regurgitated here.

5.2.6 **Regarding whether Ms Majodina abused public funds using the office of an ANC's Parliamentary Caucus on car rentals despite receiving monthly car allowances and if yes whether such amounted to improper**

conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

Factual Matrix

5.2.7 With regard to the above allegation as made by Complainant, Ms Majodina responded to the Public Protector and indicated that as part of the duties of her office, staff travels extensively. Such travels entail the conduct of its political responsibilities, perform Constituency Outreach duties, attend Caucus meetings, other political meetings that complement the work of Caucus as well as visit bereaved family members to extend condolences on behalf of the ANC Parliamentary Caucus.

5.2.8 According to Ms Majodina, when such visits are conducted, car rental services are utilized. It was argued by Ms Majodina that, in its full sense this includes herself as a Chief Whip, her Deputy as well as the Chair of Caucus. All the three political office bearers, undertake political trips in pursuit of political duties and that is done through car rental services. It was then refuted by Ms Majodina that, the allegation that her office abused this system is flimsy; malicious and without any basis.

5.2.9 No further evidence was tendered by Complainant to gainsay the above response by Ms Majodina. The Complainant's allegations in this regard were also not corroborated by other form of independent evidence. In the absence rebuttal or corroboration, it follows that Ms Majodina's submission should stand.

Application of the Relevant Legal Framework

5.2.10 The relevant provisions of the applicable legal framework referred to in paragraph above in **Paragraph 5.1.18 to 5.1.26** apply *mutatis mutandis* to this issue. For the sake of brevity the same applicable legal framework shall not be regurgitated here.

Conclusions on the above three issues

5.2.11 Having considered the evidence obtained during the investigation and the applicable regulatory framework it may be concluded that the Public Protector cannot conduct further investigation into this matter as the affairs of the ANC do not fall within the scope of matters to be investigated by the Public Protector under section 182(1) of the Constitution.

5.3 **Regarding whether the Parliament has failed and/or unduly delayed to put adequate control regulatory measures in place to ensure transparency, accountability and sound management and expenditure of its finances; if not whether such amounts to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**

Common cause issue

5.3.1 Parliament provides the financial and administration support to each political party represented in the Assembly in proportion to its representation so as to enable the party to perform the functions as required by Policy on Political Party Allowances.

5.3.2 The funds allocated to political parties by Parliament are public funds received from National Treasury during each annual budget appropriation. It is also common cause, the funds allocated by National Treasury are not always sufficient, as a result the Parliament often utilize retained earnings and/or diverting funds from operational expenses of Parliament to ensure that the shortfalls are funded.

5.3.3 The Parliament has made the following allocation or funding to the ANC in the financial 2020/2021:

2020/2021 ANC Allowance Allocation as per the Policy	Amount Allocated
Party Leadership Allowance	R3 899 308.00
Party Administrative Allowance	R65 047 642.00
Constituency Allowance	R205 554 962.00
Total Amount	**R274 501 911.00**

Issues in Dispute

5.3.4 The substratum of the dispute brought before the Public Protector are allegations of abuse of public funds by the leader of ANC caucus in parliament. As a result, the issue for Public Protector's determination is whether the Parliament has put adequate control regulatory measures in place to ensure transparency, accountability and sound management of the expenditure of its finances.

5.3.5 In response to the above question, the Speaker of the National Assembly Ms NN Mapisa-Nqakula (the Speaker) submitted a letter to the Public Protector dated 25 January 2022. In this letter, the Speaker pointed out *inter alia:*

5.3.6 That to date, the Executive Authority of Parliament has not issued regulations in terms of section 34 of the Financial Management of Parliament and Provincial Legislatures Act, 2009 that deals with issue of support for members and political parties. However, the matter is ongoing and regulations are in the pipeline. The Speaker further attached as Annexure E of her response copy of draft regulations that must still be presented to the Joint Standing Committee on Financial Management of Parliament.[14]The Speaker further submitted that in the absence of regulations, matters relating to political party funding are managed in terms of the Policy on Political Parties Allowances read together with Financial Management of Parliament and Provincial Legislatures Act, 2009.

[14] Paragraph 2.4 of the Speaker's response letter dated 25 January 2022.

Response(s) to the Notice issued in terms of the provisions of section 7(9)(a) of the Public Protector Act:

5.3.7 The Speaker replied in writing to a Notice issued in terms of section 7(9) of the Public Protector Act[15] as per letter dated 05 May 2022 and indicated *inter alia:*

"I have noted the content of your Interim Report and I would like to indicate that I accept your finding in relation to Parliament as set out in paragraph 13 of the Report, in as far as I represent the Executive Authority of Parliament in relation to the National Assembly. I also accept your recommendation in this regard as set out in paragraph 16".

5.3.8 The Speaker further copied the Chairperson of the Council of Provinces in her said response letter and requested the Public Protector to slightly amend the recommendations to include both the Chairperson of the Council of Provinces and the Speaker of the National Assembly in order to act jointly as Executive Authority of Parliament.

5.3.9 On 30 May 2022, the Head of DPCI replied to notice indicating that he has not identified a matter that requires attention of his office and he requested the Public Protector to assist him by pointing specifics that has been identified in this matter.

Application of the Relevant Legal Framework

5.3.10 Section 41(1)(c) of the Constitution states amongst other things that:

[15] Section 7(9)(a) of the Public Protector Act provides that:
"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances".

"All spheres of government and all organs of state within each sphere must— provide effective, transparent, accountable and coherent government for the Republic as a whole…"

5.3.11 Section 42(1) of the Constitution provides for a Parliament of the Republic of South Africa which consists of the National Assembly and National Council of Provinces.

5.3.12 Section 57(2)(c) of the Constitution stipulates that the Rules and Orders of the National Assembly must provide for—

(c) financial and administrative assistance to each party represented in the Assembly in proportion to its representation, to enable the party and its leader to perform their functions in the Assembly effectively;

5.3.13 The above constitutional provisions simply means that political parties represented in Parliament are entitled to an amount of public money for their political activities.[16] The political parties receive the money in proportion to the number of seats they hold.

5.3.14 Section 34 of **Financial Management of Parliament and Provincial Legislatures Act (FMPPLA)**[17] is titled **Support for Members and Political Parties** and further states *inter alia,* that:

Section 34(1) of **FMPPLA** -

"*The Executive Authority*[18] *must make regulations concerning the allocation and use of any funds provided by Parliament to political parties or to Members of Parliament*.

16 See also section 23 of the Political Party Funding Act, 2018, as well as section 34(5) of the Financial Management of Parliament and Provincial Legislatures Act, 2009 which both provide for funding of represented political parties by legislatures.

17 Act No. 10 of 2009

18 Means the Speaker of the National Assembly and the Chairperson of the National Council of Provinces, acting jointly as per section 1 of Act 10 of 2009.

5.3.15 Section 34(3) of **FMPPLA** states that:

"The regulations must—

(a) regulate the allocation of funds in an equitable manner;

(b) specify the purposes for which funds may be used;

(c) provide for the prompt payment of funds into a bank account;

(d) stipulate the responsibilities of the Members of Parliament and parties to account for allocated funds;

(e) establish a procedure according to which Members of Parliament and parties account for the use of funds;

(f) prescribe a format for financial statements for accounting for the use of funds;

(g) require parties to submit audited financial statements in the prescribed format to the Accounting Officer;

(h) Provide for the recovery of funds spent irregularly; and

(i) establish a dispute resolution procedure".

5.3.16 It suffices to mention that the above provisions of FMPPLA are couched in peremptory terms which demand absolute compliance therewith. The wording of this legal provision carries the defined meaning unless the context indicates otherwise and in this instance there is no indication to the contrary. Given the dictatorial and the commanding tenor of section 34(1) of FMPPLA, it follows therefore that the Executive Authority of Parliament had to comply with these legal provisions by making regulations concerning the allocation and use of any funds provided by Parliament to political parties or to Members of Parliament as required by FMPPLA.

5.3.17 Section 65(1) of the **FMPPLA** states amongst other things that the Executive Authority may issue regulations not inconsistent with this Act concerning—

(a) any matter in respect of which this Act authorises regulations or policy;
(b) ……;
(c) ……;
(d) ……;
(e) ……;
(f) the financial management of the provision of support services and constituency funding to political parties represented in Parliament;[19]

5.3.18 Section 65(3) of the **FMPPLA** stipulates as follows:

"*The Accounting Officer must—*
(a) ensure that drafts of regulations required by this Act are prepared;
(b) periodically review regulations[20] *made in terms of the Act; and*
(c) when appropriate, ensure that draft amendments are prepared"

5.3.19 Section 65(5) of **FMPPLA** states that the Executive Authority must ensure that a draft of any proposed regulations dealing with any matter contemplated in section 34 or Chapter 6 of the FMPPLA is published for public comment.

5.3.20 It is submitted that the above provisions of the FMPPLA do no more than to emphasise beyond reasonable doubt that the Executive Authority of Parliament is indeed legally obligated to make the regulations as envisaged by section 34(1) of FMPPLA, publish them for public comment and further review them periodically.

5.3.21 Section 35(1) of the **FMPPLA** provides amongst other things that:

"Before transferring any funds from Parliament to any other entity, the Accounting Officer must—

19 Our underlining.
20 Our underlining.

(a) obtain a written assurance from the entity that it implements effective, efficient and transparent financial management and internal control systems….."

5.3.22 The Parliament has its own **Policy on Political Parties Allowances[21] (the Policy),** which indicates the on its introduction *inter alia***:**

"A Constituency Allowances was paid to political parties since about 1978 as a result of Cabinet decision. The system of political party allowances was introduced to enable political parties represented in Parliament to set up infrastructure for the benefit of the constituents".

5.3.23 **Clause 3 of the Policy** is titled Policy Statements and states the following:

"Parliament commits itself to provide financial and administrative assistance to each party represented in the Assembly in proportion to its representation; and to enable the party and its leader to perform their functions in the Assembly effectively".

5.3.24 The **purpose of the Policy is stated in Clause 4.1** and indicates amongst that, it is to make funds available to political parties to enable them to participate effectively in Parliament and Provincial Legislatures.

5.3.25 **Clause 8.3. of the Policy** states that the Secretary of the Parliament must provide financial and administrative assistance to each party represented in the National Assembly in proportion to its representation to enable the party to effectively perform its functions in the National Assembly. Payments must only be made to a registered party and only be paid into the bank account opened in the name of the party for this purpose.

5.3.26 In terms of **Clause 8.8 of the Policy**, money paid to a party as constituency allowance may only be used to defray expenditure with regard to items

[21] Approved on 20 July 2005.

listed in Annexure A of this Policy[22]. A party may use constituency allowances to cover reasonable travel and subsistence of a member if:

(a) The party designated that particular member to a sector or more than one geographical area (constituency) and
(b) Such expenses are reasonably required to enable a member to render a service to constituents, for example, to visits different areas or constituency offices.

5.3.27 **Clause 8.9 of the Policy** regulates the political party staff recruitment, payment supervision, termination and states amongst other things that:

8.9.1 Political parties are to recruit and manage their own support staff in line with the applicable legislation.

8.9.2 Contracts of employment must be entered into between political parties and political parties support staff before personnel are engaged.

8.9.3 Political parties are responsible for ensuring that support staff are paid timeously and at a contracted rate of remuneration. Parliament cannot be held responsible for proper remuneration of political party support staff.

5.3.28 In terms of **Clause 8.13 of the Policy**, all parties must appoint a Leader of the Party or Chief Whip as accounting officer to manage their Party Leader, Party Administration and Constituency Allowance receipts and properly administer disbursements from these allowances. The records must reflect:

(c) Records of all transactions involving allocated moneys;
(d) Records of all assets acquired with allocated money and
(e) Records of all commitments entered into in respect of allocated moneys.

[22] Annexure A includes a wide variety of expenditure items such as payment of salaries, travel costs, accommodation expenditure, training, stationery, advertising, rental, reasonable services, normal administration of office etc.

5.3.29 According to **Clause 8.14 of the Policy,** the financial statement must comprise:

(f) A balance sheet as at 31 March of every financial year (or the other date if the party ceases to function or be registered);
(g) An income and expenditure statement for the financial statement (or the other date if the party ceases to function or be registered) and
(h) A cash flow statement at the balance sheet date.

5.3.30 **Clause 8.15 of the Policy**, requires for a submission of audited financial statements and states the following:

8.15.1 A party must, before 30 May of each year submit an audited financial statements in respect of the application of the Constituency Allowance for the year ending 31 March;

8.15.2 The Secretary of the Parliament must either in full or in part reject audited financial statements submitted by the party in terms of the policy. A party that feels aggrieved by the decision of Secretary to Parliament may deal with the matter in terms of paragraph 12 of the Policy.

18.15.3 If the Secretary to Parliament rejects certain items included in the audited financial statements, he or she must withhold the amount equal to the amount queried until such time as he or she has received satisfactory responses to the queries. Such action by Secretary to Parliament is also subject to a grievance procedure in paragraph 12 of the Policy.

5.3.31 As indicated earlier on, the Speaker in her response to the Public Protector sought to argue that in the absence of regulations, matters relating to party funding are managed in terms of the Policy read together with FMPPLA.

5.3.32 It becomes apposite at this point to distinguish between a Regulation and a Policy. A regulation has the effect of a law and is considered as a restriction that is imposed by authorities, to make people follow the desired code of conduct. Regulations are gazetted and passed in terms of the enabling legislation which in this instance would be FMPPLA and regulations have the force of a law. It is therefore open to doubt if same cannot be said about policies.

5.3.33 On the other hand, the FMPPLA does not explicitly prescribe all the regulatory procedures envisaged by section 34(1), however it mandates the Executive Authority of Parliament to make regulations, ostensibly to placate this regulatory gap.

Conclusions

5.3.34 Based on the Speaker's own concession that the Executive Authority of Parliament has not yet issued regulations contemplated in terms of section 34 of the FMPPLA, it may be concluded that the Parliament has failed and/or unduly delayed to comply with the dictates of the FMPPLA.

5.3.35 It further bears mentioning fact that the FMPPLA is a national legislation which came into force in 2009. It is now 13 (thirteen) years later and the Parliament has not yet passed the regulations as contemplated by FMPPLA.

5.3.36 It is also noted that the Policy on Political Party Allowances alluded to by the Speaker was approved by the Presiding Officer in 2005. The Public Protector was not furnished with evidence or proof that same was made in terms of FMPPLA, published for public comment and evidence or proof of periodical review as envisaged in terms of section 65(3) of FMPPLA.

6 FINDINGS

6.1.1 **Regarding the allegation that the award of the PPE tender for the supply of thermometers worth R52 500.00 using public funds by the**

Office of the African National Congress (ANC) Parliamentary Caucus, to a company owned by Ms Majodina's son, amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

6.1.2 **Regarding the allegations that Ms Majodina created a post of a Graphic Designer in the Office of ANC's Parliamentary Caucus using public funds and employed her son without following due processes and if yes, whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and**

6.1.3 **Regarding the allegation that Ms Majodina abused public funds using the office of an ANC's Parliamentary Caucus on car rentals despite receiving monthly car allowances and if yes, whether such amounted to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**

The affairs of the ANC do not fall within the scope of matters to be investigated by the Public Protector as contemplated under section 182(1) of the Constitution. It follows therefore that the Public Protector makes no finding against Ms Majodina in the above three issues, numbered 6.1.1 to 6.1.3.

6.2 **Regarding whether the Parliament has failed and/or unduly delayed to put adequate control regulatory measures in place to ensure transparency, accountability and sound management and expenditure of its finances; if not whether such amounts to improper conduct as envisaged in terms of section 182 of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**

6.2.1 The allegation that the Parliament has failed and/or unduly delayed to put adequate control regulatory measures in place to ensure transparency, accountability and sound management and expenditure of its finances, is **substantiated.**

6.2.2 It was conceded by the Speaker during the course of this investigation that the Executive Authority of Parliament has not yet issued regulations contemplated in terms of section 34 of the FMPPLA. The Speaker submitted that Parliament is still in a process of adopting the draft regulations which are yet to be presented to the Joint Standing Committee on the Financial Management of Parliament.

6.2.3 The FMPPLA is a national legislation which came into force in 2009. It is now 13 (thirteen) years later and the Parliament has not yet passed the regulations as contemplated by FMPPLA.

6.2.4 As a result of the absence of regulations required of Parliament in terms of section 34 of the FMPPLA, the Public Protector finds that the Parliament has failed and/or unduly delayed to comply with the dictates of its own legislation namely, FMPPLA.

6.2.5 The Public Protector further finds that the Policy on Political Party Allowances presented by Parliament was approved by the Presiding Officer in 2005. The Public Protector was not furnished with evidence or proof that the same policy was made in terms of FMPPLA, published for public comment and evidence or proof of periodical review as envisaged in terms of section 65(3) of FMPPLA.

6.2.6 The conduct of the Executive Authority of Parliament accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.

7 REMEDIAL ACTION

The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

7.1 To the Speaker of Parliament acting jointly with Chairperson of the National Council of Provinces as the Executive Authority of Parliament:

7.1.1 **Within one hundred and ninety (190) working days** from the date of the final report, the Speaker of Parliament acting jointly with the Chairperson of the National Council of Provinces as contemplated in section 5(1) and (2) of the Financial Management of Parliament and Provincial Legislatures Act of 2009, takes appropriate steps to make the regulations concerning the allocation and use of any funds provided by Parliament to political parties or to Members of Parliament, as envisaged in terms of section 34 of the MFPPLA.

7.2 To the Secretary to Parliament as the Accounting Officer:

7.2.1 Periodically to ensure the reviewing of the regulations as contemplated in terms of section 65(3)(b) of FMPPLA.

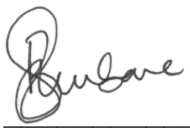
7.3 The appropriate recommendation in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks) is as follows:-

7.3.1 The Public Protector, in terms of section 6 (4) (c) (ii) of the Public Protector Act, refer to the Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks) this matter for consideration of criminal investigation where it appears crimes may have been committed in relation to this matter.

8. MONITORING

8.1 The Secretary to Parliament must submit an Implementation Plan to the Public Protector **within thirty (30) working days** from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 The submission of the implementation plan and the implementation of the remedial action taken shall in the absence of a court order be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 31/05/2022

Assisted by Mr Vusumuzi Dlamini and Mr Rodney Mataboge
Chief Investigators, Head office