

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA TO UPHOLD THE CONSTITUTION IN THAT HE FAILED TO PROVIDE PROTECTION TO WHISLTE-BLOWER, MR THABISO ZULU, EVEN THOUGH HE HAD UNDERTAKEN TO DO SO

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1. INTRODUCTION

1.1. This is a closing report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] (the Public Protector Act).

1.2. The report relates to an investigation conducted following a complaint lodged by Mr Thabiso Zulu (the Complainant) on 24 April 2020.

1.3. A copy of the closing report is provided to the following persons in terms of section 8(3) of the Public Protector Act, 1994:

1.3.1. Mr Thabiso Zulu (the Complainant in the matter);

1.3.2. The SAHRC; and

1.3.3. The President, Mr Cyril Ramaphosa

1.3.4. The Minister of State Security, Ms Ayanda Dlodlo

1.4. THE COMPLAINT

1.4.1. The allegations made by the Complainant are that:

1.4.1.1 After the assassination attempt on his life on 26 October 2019, he spoke to the Minister of State Security, Ms Ayanda Dlodlo (Minister Dlodlo), who promised him that she was going to brief the President on his matter;

- 1.4.1.2 Minister Dlodlo sent him a text message informing him that the President wanted to talk to him and that Minister Dlodlo even called him again to inform him that the President was on the line;
- 1.4.1.3 The President then promised him that he was to be taken to a place of safety, and that he would be provided with protection;
- 1.4.1.4 He received a text message from the Presidency's spokesperson Ms Khusela Diko (Ms Diko) informing him that the National Commissioner of SAPS, General Khehla Sitole had deployed police protection for him at hospital, but that this was also not true; and
- 1.4.1.5 The President had however, failed to provide him with security protection, despite having undertaken to do so.

2. Based on the analysis of the complaint and the allegations contained therein, the following issue was identified to inform and focus the investigation:

- 2.1. Whether, the President failed to uphold the Constitution, by not providing Mr Thabiso Zulu with security protection, even though he had personally undertaken to do so.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

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

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

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

3.4 The Public Protector conducted a preliminary investigation into the complaint in terms of section 7(1) (a) of the Public Protector Act to determine the merits of the complaint and how the matter should be dealt with.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 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 relating to allegations of improper conduct or maladministration.

4.1.3. A Discretionary Notice was issued to the Complainant on 24 February 2021 , in terms of Rule 42(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018* (the Public Protector Rules) in respect of a preliminary investigation conducted in terms of section 7(1) of the Public Protector Act.

- 4.1.4. The Complainant was accordingly advised of the intention to finalise the matter by way of a closing report. The Complainant was further advised that should he however be in possession of evidence which contradicts the findings contained in the Discretionary Notice, he was afforded an opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notice.
- 4.1.5. On 24 February 2021, the Complainant responded to the notice by way of an email contending *inter alia* that, he never asked to speak to the President. Further that it is demonstrated through timeline of calls and texts of Minister Dlodlo that, it was the President who wanted to talk to him. He stated that Minister Dlodlo sent him a text message telling him that she had briefed the President, and that the President wanted to talk to him. The Complainant further argued that the Public Protector ought to have subpoenaed the President's cellphone records to confirm the incident.
- 4.1.6. The argument made by the Complainant cannot be accepted. In as much as there might be disagreements as to who called whom, or how the events unfolded leading to the President talking to the Complainant, it is still not possible to determine the contents of the conversation between the Complainant and the President.
- 4.1.7. Furthermore, it would be difficult to establish in what way the President failed to uphold the Constitution when according to the President's affidavit he stated that SAPS would assess the situation and thereafter make a determination based on their assessment for protection of the Complainant.

4.2. Approach to the investigation

4.2.1 The approach to the investigation commenced by analysis of all the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

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

4.2.2.1 What happened?

4.2.2.2 What should have happened?

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

4.2.2.4 In the event of improper conduct and/or maladministration, what would it take to remedy the wrong, but for the maladministration or improper conduct?

4.2.2.5 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.

4.2.2.6 The Supreme Court of Appeals (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for the parties to provide all of the evidence as judicial officers do. In the case of *The Public Protector v Mail and Guardian*¹ the court stated that, "*The Public Protector is not a passive adjudicator between citizens and the state, relying upon*

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

evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances.”

- 4.2.2.7 In this particular case, the factual enquiry principally focused on whether the conduct of the President constituted maladministration, improper conduct and thus failure to uphold the Constitution.
- 4.2.2.8 The enquiry regarding what should have happened, focuses on the prescripts regulating the standard that should have been met by the President to prevent maladministration and/or improper conduct.
- 4.2.2.9 The enquiry regarding remedial action seeks to explore options for redressing the consequences of maladministration and/or improper conduct.
- 4.2.2.10 The Presidency is an organ of state and its conduct amounts to conduct in state affairs. This matter therefore falls within the Public Protector’s jurisdiction. The jurisdiction of the Public Protector to investigate this matter has not been disputed by the President.

4.3. **The Key Sources of information**

4.3.1. **Documents**

- 4.3.1.1. Documents received from the South African Human Rights Commission relating to the Complainant on 20 May 2020.

4.3.2. **Correspondence sent and received**

- 4.3.2.1. Correspondence received from the Complainant on 3 May 2020, 5 May 2020, 6 May 2020, 8 May 2020, respectively;

- 4.3.2.2. Correspondence sent to the South African Human Rights Commission requesting information dated 19 May 2020;
- 4.3.2.3. Correspondence exchanged between the Public Protector South Africa and the South African Human Rights Commission on 20 May 2020;
- 4.3.2.4. Discretionary Notice dated 23 February 2021 sent to Complainant on 24 February 2021; and
- 4.3.2.5. Email received from Complainant in respect of Discretionary Notice on 24 February 2021.

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 President failed to uphold the Constitution, by not providing the Complainant with security protection, even though he had undertaken to do so

Common cause issues

- 5.1.1 It is common cause that the Complainant is a whistle-blower in exposing allegations of maladministration, corruption and the unconscionable expenditure of public funds by the Umzimkhulu Local Municipality in connection with the restoration of the heritage of the dilapidated Umzimkhulu Memorial Hall
- 5.1.2 On 10 August 2018 the Public Protector issued a "*Report on an investigation into allegations of undue delay, gross negligence, improper conduct and maladministration by the Minister of Police and the South African Police*

Services in failing to provide whistle-blowers with security at state expense following the expose allegations of maladministration, corruption and the unconscionable expenditure of public funds by the Umzimkhulu Local Municipality in connection with the restoration of the heritage of the dilapidated Umzimkhulu Memorial Hall”

5.1.3 In that report the following remedial action was taken:

“The President to take urgent and appropriate steps to;

- (aa) Reprimand Minister Bheki Cele for his negligence and lapse in his judgment regarding this matter resulting in the SAPS failure to provide the two whistle-blowers with security after a determination was made that they require same as well as the gross negligent manner in which the whole issue of the provision of security to Messrs Stuta and Zulu was handled which could as a consequence lead to unnecessary loss of lives.*
- (bb) To ensure that an incident of this nature does not happen again and that Ministers take heed of the warnings of this nature to avoid catastrophic results that may occur due to lack of insight and non-action by Members of the Executive who are responsible for various Departments and other organs of state.*

The Minister of Police to take urgent and appropriate steps to -

- (aa) Provide me with a copy of the Security Threat Assessment conducted by SAPS Crime Intelligence in December 2017, within three (3) days from the date of this report;*
- (bb) Ensure that the recommendations of the SAPS’s Security Threat Assessment, and the Security Threat Assessment conducted by the State Security Agency is fully implemented within seven (7) days from date of*

this report and ensure that Messrs Zulu and Stuta are provided the requisite security at state expense; and

- (cc) Issue a written apology to the whistle-blowers, apologising for the delay to provide them with the requisite security, and including comprehensive reasons explaining its delay to implement the recommendations of SAPS's Security Threat Assessment, as well as the Security Threat Assessment conducted by the State Security Agency, within seven (7) days from date of this report;*

The National Commissioner of Police take urgent and appropriate steps to:

- (aa) Ensure that SAPS adopts Standard Operating Procedures (SOP's) on how requests to conduct Security Threat Assessments should be dealt with, and within which timeframe such recommendations should be implemented within three (3) months from date of this report; and*
- (bb) Ensure that instructions from the Minister in his capacity as the Executive Authority of the Department of Police are carried out without delay”.*

5.1.4 The Public Protector was advised by Senior Counsel to withdraw her opposition of the review application in light of the order that was granted in favour of the Complainant in a separate application which was lodged by him in which he sought protection from the Police. Thus, the report was set aside unopposed.

Issues in dispute

5.1.5 The Complainant alleged that during a telephonic conversation with the President on 27 October 2019, The President undertook to provide him with security protection but had failed to do so, and as such the President had failed to uphold the Constitution.

- 5.1.6 The issue for the Public Protector's determination is whether the President failed to uphold the Constitution by not providing the Complainant with protection, even though he had undertaken to do so.
- 5.1.7 The Complainant was contacted to clarify the allegations of the complaint and to obtain evidence relating to the calls and text messages between him and the relevant persons alluded to in his complaint.
- 5.1.8 The Complainant responded by submitting various emails as evidence of text messages and calls made between him, Minister Dlodlo and Ms Diko.
- 5.1.9 Whilst conducting a preliminary investigation, it was established that the SAHRC had launched an application to the Pretoria North Gauteng High Court in March 2020, following a complaint from the Complainant that he was being denied security protection, wherein the Minister of Police, the National Commissioner of Police, the Minister of Justice and the Office of the President were cited as respondents. The court ruled that the Minister of Justice is to provide the Complainant with protection.
- 5.1.10 The Complainant further indicated in his communication that the President and Minister Dlodlo deposed confirmatory affidavits around their conversations with him, which formed part of the court records in the above matter.
- 5.1.11 The Complainant also stated that he had complied with the court order on 24 April 2020 and that the Witness Protection Programme was not suitable for his condition and needs, and therefore decided to ask to be discharged from it on 3 May 2020.
- 5.1.12 In order to assess the response of the President and Minister Dlodlo in respect of the allegations made by the Complainant, the Public Protector approached the SAHRC to provide documents in respect of the relevant affidavits and other information that would assist in making a determination on the matter.

- 5.1.13 On 20 May 2020, the SAHRC submitted information containing the answering affidavit of the President, and confirmatory affidavits of Minister Dlodlo and Ms Diko.
- 5.1.14 In his affidavit, dated 15 March 2020, with regard to the telephonic conversation that he had with the Complainant on 27 October 2019, the President recorded that, Minister Dlodlo handed him her mobile phone, and informed him that the Complainant was on the line and asked to speak to the President.
- 5.1.15 The President denied that he undertook to provide the Complainant with security protection at state expense, and that he made a commitment that police protection would be provided to the Complainant. The President further confirmed in the affidavit that he made it clear that SAPS would assess the situation and thereafter make a determination based on their assessment.
- 5.1.16 Minister Dlodlo's affidavit, dated 16 March 2020, states that she confirms that the Complainant telephoned her and asked to speak to the President, and that she handed the cellphone to the President. She stated that she did not overhear the conversation between the Complainant and the President, and could not confirm or deny whether any undertakings were made to the Complainant.
- 5.1.17 Minister Dlodlo further stated that she confirms that the Complainant informed her that he feared for his safety and requested security protection at state expense. She denied granting his request, and stated that she undertook to speak to the Minister of Police to bring the matter to his attention.
- 5.1.18 According to the affidavit, dated 16 March 2020 by Ms Diko, she states that on 26 October 2019, she was informed by a journalist that the Complainant had been shot and admitted to hospital, and further that, he feared for his life and believed that he was not safe in hospital. Ms Diko stated that she informed the President's Security Advisor, Mr Charles Nqakula, about the cellphone call.

- 5.1.19 She stated further that Mr Nqakula informed her that he had spoken to the National Commissioner, South African Police Service (SAPS) and asked her to contact the National Commissioner directly to inform him of the Complainant's current status.
- 5.1.20 She stated that she contacted the National Commissioner, who informed her that police officers had been deployed to the hospital and that they will only be able to provide the Complainant protection whilst he was in hospital.
- 5.1.21 Ms Diko stated that she repeatedly tried to contact the Complainant on his mobile phone number, provided by the journalist, but there was no answer to her calls. The journalist informed her that the Complainant was apparently very scared and suspicious and was not disclosing his location to anyone.
- 5.1.22 She stated that she sent the Complainant a text message, informing him that she tried to get hold of him, and further that the National Commissioner had deployed police officers to the hospital for his protection and that he ought to return to the hospital as soon as possible.
- 5.1.23 She stated further that the Complainant responded to the message informing her that he had discharged himself from hospital and at the time that he left the hospital, no police officers were present. Ms Diko stated that the Complainant told her that he was fine and had spoken to the President.

6. CONCLUSION

- 6.1 Having regard to the evidence obtained during the investigation as well as the regulatory framework determining the standard that should have been complied with by the President, it is my view that the matter may not be pursued any further.

- 6.2 Although the Answering Affidavit of the President confirms that on 27 October 2019, he had a conversation with the Complainant on Minister Dlodlo's mobile phone, the President denied that he undertook to provide him with security protection at the expense of the state, and/or that he made a commitment that police protection would be provided to the Complainant.
- 6.3 The President further indicated in the Answering Affidavit that he stated to the Complainant that SAPS would assess the situation and thereafter make a determination based on their assessment.
- 6.4 Apart from the confirmation that a telephonic conversation did take place between the Complainant and the President, the Public Protector is unable to make any determination on the contents of the conversation between him and the President and /or the alleged commitment made by the President.
- 6.5 However, having taken further notice of the subsequent events that transpired, that is, the statements of Ms Dlodlo and Ms Diko as contained in their respective affidavits, I am inclined to conclude that their conduct and that of Mr Charles Nqakula, the Security Advisor to the President, seem to corroborate the contentions by the President as deposed to in his affidavit, in that:
- 6.5.1 Minister Dlodlo seem to have been in the company of the President or in the same vicinity as the President when the Complainant contacted her because according to her statement, she was able to hand over her cellphone to the President when the Complainant requested to speak to him.
- 6.5.2 Minister Dlodlo further contends not to have overheard the conversation between the Complainant and the President, however, it can be concluded that the President did not escalate the Complainant's request for protection to the level of the Minister of State Security. Instead Minister Dlodlo confirmed that the Complainant informed her that he feared for his safety and requested security protection at state expense. She denied granting the Complainant his request,

and stated that she undertook to speak to the Minister of Police to bring the matter to his attention.

6.5.3 Ms Diko stated that after receiving a call from a journalist advising that the Complainant had been shot and admitted to hospital, and further that, he feared for his life and believed that he was not safe in hospital. She informed the President's Security Advisor, Mr Charles Nqakula, about the cellphone call.

6.5.4 Ms Diko further stated that Mr Nqakula informed her that he had spoken to the National Commissioner, South African Police Service (SAPS) and asked her to contact the National Commissioner directly to inform him of the Complainant's current status.

6.5.5 Thereafter, she contacted the National Commissioner, who informed her that police officers had been deployed to the hospital and that they will only be able to provide the Complainant protection whilst he was in hospital.

6.5.6 Ms Diko contended that she repeatedly tried to contact the Complainant on his mobile phone number, provided by the journalist, but there was no answer to her calls, where after she sent the Complainant a text message, informing him that she tried to get hold of him, and further that the National Commissioner had deployed police officers to the hospital for his protection and that he ought to return to the hospital as soon as possible.

6.5.7 Although it is not clear whether Ms Diko had discussed this matter with the President prior to engaging Mr Nqakula, or that Mr Nqakula himself, as the Security Advisor to the President had sought guidance from him, which prompted the referral of the matter to the National Commissioner of SAPS, it is however noted that Mr Nqakula also considered such a request for protection to fall within

the domain of the National Commissioner and/or entailed his involvement in such instances.

6.5.8 The National Commissioner also responded positively, though with conditions, by deploying the police to the hospital to provide protection to the Complainant.

6.5.9 Furthermore, although the Complainant informed Ms Diko that he had discharged himself from hospital and further that he had spoken to the President, it does not appear that the President had considered himself personally bound to directly take any action to ensure that protection was provided to the Complainant.

7. REASONS FOR CLOSURE

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

7.2 Based on the complaint and analysis of the documentation received, the Public Protector has come to the conclusion that It would therefore be improper to pursue the matter further and make any pronouncement on the allegation that the President failed to uphold the Constitution, based on an alleged promise he made to the Complainant as no evidence of such an undertaking could be established.

7.3 It is also unclear how the conduct of the President in this regard would constitute failure to uphold the Constitution on his part.

7.4 Furthermore, when the Complainant was finally provided with such protection, he personally asked to be removed from it for personal reasons thereby rendering the basis for his complaint to the Public Protector inconsequential.

- 7.5 In light of the afore-going, the Public Protector has therefore decided not to pursue the matter further and finalise it by means of a closing report.
- 7.6 Kindly take note that the Public Protector is now *functus officio* and cannot take the matter any further.
- 7.7 Kindly be advised that you may approach the High Court for a judicial review of the Public Protector's decision should you be dissatisfied with the outcome of the investigation.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 26/09/2021

Assisted by Ms Vanessa Mundree, Provincial Representative: PII Inland