



REPORT NO: 34 of 2020/2021

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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF CONTRAVENTION OF REGULATION 27(2) OF THE DISASTER MANAGEMENT ACT 2002, BY MR MZWANDILE MASINA, THE EXECUTIVE MAYOR, CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

1. INTRODUCTION

- (i) This closing report is issued 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.
- (ii) The report relates to an investigation into allegations of the contravention of Regulation 27(2) of the Disaster Management Act 2002, by Mr Mzwandile Masina, the Executive Mayor of the City of Ekurhuleni Metropolitan Municipality.
- (iii) The complaint was lodged by Mr Mike Waters, MP, the Gauteng Chairperson of the Democratic Alliance Party (the Complainant) on 20 March 2020.

2. In essence, the Complainant alleged as follows:

- 2.1 On 18 March 2020, Mr Mzwandile Masina (Mr Masina), the Mayor of the Ekurhuleni Metropolitan Municipality delivered the State of the City address of the City of Ekurhuleni;

- 2.2 In his address, Mr Masina stated that the Municipality would be purchasing vaccines for the Corona Virus pending approval from the Municipal Command Council from Cuba and elsewhere (unspecified);
- 2.3 The statement made by Mr Masina during the State of the City Address was in contravention of the Regulations issued in terms of Section 27(2) of the Disaster Management Act, 57 of 2002, (issued by Ms Nkosazana Dlamini-Zuma, Minister of Co-operative Governance and Traditional Affairs) on 17 March 2020, which regulations prohibit any person from publishing false information regarding the Corona Virus;
- 2.4 Mr Masina deliberately deceived the residents of Ekurhuleni and the wider public into believing that there was indeed a vaccine available at the time, and thus transgressed the Regulations. Dr Zweli Mkhize, the Minister of Health, and Minister Dlamini-Zuma were forced to state publicly that no vaccine existed at the time.
3. The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, 1994 (Public Protector Act), which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.
4. In *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.¹ The Constitutional Court further held that: “*When remedial action is binding, compliance is not optional, whatever reservations the affected party might*

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

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.”²

5. Based on an analysis of the complaint, the following issue was identified to inform and focus the investigation:

5.1 Whether Mr Mzwandile Masina contravened Regulation 27(2) of the Disaster Management Act, in his State of the City Address when he indicated that the City of Ekurhuleni would be purchasing vaccines for the Corona Virus pending approval from the Municipal Command Council from Cuba and elsewhere.

6. THE INVESTIGATION

6.1 The Investigation Process

6.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act. 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. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a matter through alternative dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

6.1.2 Key laws and policies taken into account to help the Public Protector to determine if there had been improper conduct by Mr Masina were principally those relating to disaster management in respect of the Covid-19 pandemic.

6.2 Approach to the investigation

² Supra at para [73].

- 6.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
- 6.2.1.1 What happened?
 - 6.2.1.2 What should have happened?
 - 6.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?
 - 6.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct.
 - 6.2.1.5 The question regarding what happened is resolved through a factual enquiry on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

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

7.1 Whether Mr Mzwandile Masina contravened Regulation 27(2) of the Disaster Management Act, 2002, in his State of the City Address when he indicated that the City of Ekurhuleni would be purchasing vaccines for the Corona Virus

Common cause issues

- 7.1.1 Mr Masina delivered the State of the City Address (SOCA) on 18 March 2020 at the OR Tambo Government Precinct in Germiston.

- 7.1.2 The SOCA is delivered annually by the Mayor of the City of Ekurhuleni wherein the Mayor accounts to the residents of Ekurhuleni City for the work the City has done, and its plans to accelerate service delivery in the year ahead.
- 7.1.3 Dr Nkosazana Dlamini-Zuma published the Covid-19 regulations on 25 March 2020 and they were subsequently signed on 25 March 2020.
- 7.1.4 On 11 December 2020, a discretionary notice in terms of Rule 42 of the Public Protector Rules was sent to the Complainant informing him that the Public Protector has no jurisdiction over the matter. The response to the discretionary notice was due within fourteen (14) days from receipt of the discretionary notice by the Complainant. However, the Complainant failed to respond to the discretionary notice.

Application of relevant legal framework

- 7.1.5 Section 11(5)(a) and (c) of the Regulations of the Disaster Management Act 57 of 2002, states that *“Any person who published any statement, through any medium, including social , media, with the intention to deceive any other person about –*
- (a) Covid-19*
- (c) Any measure taken by the Government to address Covid-19, commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment”.*
- 7.1.6 The Regulations are guidelines that dictate how the provisions of the Act are applied and they are required to be published in the Government Gazette. In the light of the wording of section 11(5)(a) and (c) of the Regulations of the Disaster Management Act as outlined above, it is common cause that the publication of deceitful Covid-19 statements

through any medium is a considered to be a criminal offence, if it is proven that the person making such a statement had the intention to deceive any other person, as prescribed in the regulations.

7.1.7 The Disaster Management Regulations further provide that a person, when found guilty of such an offence, is liable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment.

7.1.8 It is trite law that the offences envisaged in section 11(5) (a) and (b) of the regulations and the envisioned penalty prescribed in section 11(5)(c), are subject to the procedure laid out in criminal law and the Criminal Procedure Act, 1977 as amended.

7.1.9 Accordingly, only a court of law is empowered to adjudicate on criminal liability and impose a fine upon conviction, for any breach of the Disaster Management Regulations.

7.1.10 Consequently, the Public Protector is prohibited from conducting an investigation into any conduct, which may in terms of the provisions described in section 11 of the regulations of the Disaster Management Act *supra*, fall within the ambit of the South African Police Service and further adjudication before a court of law.

Conclusion

7.1.11 Having regard to all the above-mentioned legal prescripts and factual evidence canvassed in this matter, it can be concluded that the Public Protector does not have jurisdiction to investigate this matter.

8 REASONS FOR CLOSURE

8.1 Having considered the allegations made against Mr Mzwandile Masina, the applicable provisions of the Regulations in terms of the Disaster

Management Act, the powers conferred upon the Public Protector by the Constitution and the Public Protector Act, the Public Protector is not empowered to conduct an investigation into this matter or pronounce on the alleged improper conduct of Mr Masina.

8.2 Only a court of law is able to adjudicate on the alleged criminal conduct of Mr Masina with regards to the alleged contravention of the Disaster Management Regulations.

8.3 In the circumstances, an investigation by the Public Protector into this matter, would be deemed *ultra-vires*, unlawful and subject to a possible review for judicial overreaching. The South African Police Service is vested with the jurisdiction to investigate such criminal complaint and to further refer the matter to the National Prosecuting Authority, should it be established that sufficient evidence exists to substantiate grounds for prosecution and final determination before a court of law.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 18 February 2021

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