

MEDIA STATEMENT

Date: Friday, 30 June 2023

For immediate release

Attention: Editors / News desks



Accountability • Integrity • Responsiveness
Justice • Good Governance

Subject: Acting Public Protector Releases Investigation Reports

It is truly humbling and encouraging to witness your interest in the work of our institution. The Public Protector South Africa (PPSA) is South Africa's most crucial constitutional institution that is designed and established to strengthen our constitutional democracy and bolster the efforts of the people of South Africa, in exacting accountability in the exercise of state power and control over state resources through administrative scrutiny.

We utilize media briefings to keep the people of South Africa abreast of the developments in our investigations and to fulfil our obligation under section 182(4) of the Constitution, to be accountable to all persons and communities. Without the involvement of the media, this would not be possible. We, therefore, take this opportunity to express our gratitude for your presence here today.

We have invited you here today to publish findings in respect of **12 (twelve)** investigations recently concluded by the institution, and signed at the level of the Public Protector, for the first quarter of the **2023/2024** financial year. The total number of reports, concluded by the institution in this quarter is **1425** (one thousand four hundred and twenty-five) and encompass matters that we classify as Good Governance and Integrity, Early Resolution and predominantly Service Delivery related matters. These investigations are concluded and signed by PPSA officials ranging, from our Executive Managers, who are seated here today, and our Provincial Representatives who are stationed in the respective provinces.



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I take this opportunity to thank the entire team for their sterling work in overseeing and ensuring the finality of these matters, many of which have had an invaluable impact on the lives of many people of South Africa.

As an institution, having learned from the judgments of yester year, we have been steadily improving the quality of our investigations, by amongst other things, establishing rigorous quality assurance processes, revising our assessment procedure and creating a training regimen for our staff at all levels, both in our core business and support services. The results have revealed themselves gradually through improved working relationships with our stakeholders, a sharp decrease in litigation stemming from our reports and improved cooperation between the PPSA and parties to investigations.

We are confident that now, more than ever before, our reports are built to last and are prepared for any degree of legal scrutiny. With the interventions that we have put in place, we can only improve further, in leaps and bounds.

We have also successfully rolled out our Case Management System, which represents a significant step in our goal of digitising the institution. The system has made it easier for us to track our workload, and respond timeously to affected and implicated persons during the course of investigations. We continue to migrate our brown folder files into digital form and look forward to the completion of this phase of our digitisation project. This will also improve the turn-around times of our investigations.

The reports communicate the results of our investigations and provide accountability and a degree of transparency to the public for the office. The goal is to clearly and concisely communicate the complaint, what evidence was obtained, examined, found relevant and significant, the laws governing them, and the analysis conducted to reach the conclusions found in the reports.



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The findings of these reports are published in terms of section 182(5) of the Constitution, read with sections 8(1) and 8(2A) (a) of the Public Protector Act No. 23 of 1994.

In terms of this legal framework, the PPSA's investigation reports must be published and findings must be made known to any person in a manner the Public Protector deems fit, unless exceptional circumstances require that the reports be kept confidential.

At this point it is prudent to emphasize the approach to our investigations which includes an analysis of the relevant documentation, interviews and application of the relevant laws, regulatory framework and prescripts. We approach our investigations using an enquiry process that seeks to determine:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Executive Ethics Code and/or does that deviation amounts to maladministration or other improper conduct?
- (d) In the event of a violation of the Executive Ethics Code and/or maladministration and improper conduct, what remedial action should be taken?

The question regarding what happened is resolved through a factual enquiry carried out by gathering sufficient information and evidence, obtained from the parties and independently sourced by the PPSA Investigation Team, to enable the issue(s) to be adequately addressed by proving or disproving matters relevant to the issue(s) being investigated.



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This information is then assessed to establish the reliability and admissibility of the evidence.

I now, in no particular order, take you through a summary of the reports issued during this quarter.

The balance of 6 (six) reports signed at the level of the Public Protector are:

- Report No:01 of 2023/2024 -Mufamadi v Department of Military Veterans
- Report No:02 of 2023/2024 -Mashaba v Ekurhuleni Municipality
- Report No 03 of 2023/2024 - Andani v University of Cape Town
- Report No 04 of 2023/2024 -Hlela v Transet
- Report No 05 of 2023/2024 -Sithole // Performing Arts Centre of the Free State
- Report No 06 of 2023/2024 -Magagula v National Lottery Commission
- Report No 08 of 2023/2024 -Maimela v Mushwana
- Report No 09 of 2023/2024 -Sebogodi v Sol Plaatje Municipality
- Report No 10 of 2023/2024 -Human v State Security Agency
- Report No 11 of 2023/2024 -Maloka v Mpumalanga Department of Education

They can all be accessed on the Public Protector South Africa website - www.pprotect.org

REPORT NUMBER 07 of 2023/24 is a Closing Report that relates to an investigation into allegations that the President of the Republic of South Africa, Mr Cyril Matamela Ramaphosa (the President) and the Minister of Justice and Correctional Services, Mr Ronald Lamola (the Minister), violated section 175(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and the Executive Ethics Code, in the appointment of the Judge President of the Gauteng Division of the High Court, Johannesburg, Judge President Dunstan Mlambo (Judge Mlambo) as an Acting Justice of the Constitutional Court of South Africa (the Constitutional Court).

In this matter, we received two complaints from Ms. Phapano Phasha and from Mr Floyd Shivambu, on 07 February 2022 and 25 March 2022, respectively.



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Ms. Phasha alleged that:

- On 30 April 2021, the Chief Justice of the Constitutional Court, Mogoeng Mogoeng (former Chief Justice) recommended Deputy Judge President Madondo and Judge Rogers to act as Judges of the Constitutional Court, and the Minister responded two months later on 02 July 2021, to the then Acting Chief Justice of the Constitutional Court, Chief Justice Zondo (Chief Justice Zondo) that Judge Mlambo be one of the candidates to be considered and recommended to the President for appointment to act at the Constitutional Court;
- On 09 July 2021, Chief Justice Zondo informed the Minister that it was too late for him to give concurrence that Judge Mlambo be recommended to the President for appointment as an acting judge of the Constitutional Court. However, on 08 November 2021, Chief Justice Zondo capitulated and concurred that Judge Mlambo be recommended to the President for appointment as acting judge of the Constitutional Court;
- During the interviews for the position of Chief Justice, which were held in January 2022 by the Judicial Service Commission (JSC), Chief Justice Zondo was asked about the decision of the Minister to suggest Judge Mlambo to him as one of the candidates to be recommended to the President for appointment as acting judge. Chief Justice Zondo responded that the action of the Minister was not a norm and was unusual; and
- That the action of the Minister can be perceived as a violation of section 175(1) of the Constitution, which provides that:

“The President may appoint a woman or a man to serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice”.



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Mr. Shivambu's related complaint alleged that:

- A response by Judge Mlambo during the interviews for the position of Chief Justice of the Constitutional Court in January 2022, that he was told that the President was the person behind his appointment to act in the Constitutional Court, is circumstantial evidence pointing to the conclusion that Judge Mlambo was the candidate preferred by the Minister and/or the President for the position of Chief Justice; and
- The conduct of the Minister and the President were unlawful and unethical and aimed at judicial capture, and a manipulation of the rules to ensure that Judge Mlambo gained an unfair advantage in the selection process for Chief Justice. Therefore, their conduct amounts to a breach of the Executive Ethics Code, as well as section 96 of the Constitution, including the relevant oaths of office taken by the two Cabinet members.

The issue for determination was whether the Minister of Justice and Correctional Services, Mr Lamola, violated section 175(1) of the Constitution when he suggested Judge Mlambo to Chief Justice Zondo for concurrence and recommending him to the President, for an acting appointment in the Constitutional Court of South Africa, and if so, whether such conduct was unlawful and unethical and contravened sections 96(1) and (2)(b) of the Constitution, and clause 2(1)(b) and (c) of the Executive Ethics Code.

The following conclusion was reached:

Section 175(1) allows the President to appoint an acting Constitutional Court judge under certain circumstances, while section 175(2) empowers the Minister of Justice to appoint acting judges of other courts. In both cases, the appointments are made without consulting the Judicial Services Commission (JSC), but with the concurrence of the Chief Justice (in the former instance) and



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after consultation with the senior judge of the particular division (in the latter instance).

The Constitutional Court¹ dealt with the appointment of acting judges during the certification proceedings of the text of the Constitution, and stated that:

“The appointment of acting Judges is a well-established feature of the judicial system in South Africa. Such appointments are made to fill temporary vacancies which occur between meetings of the JSC, or when Judges go on long leave, are ill or are appointed to preside over a commission. These appointments are necessary to ensure that the work of the Courts is not disrupted by temporary vacancies or the temporary absence or disability of particular Judges.”

Section 175(1) of the Constitution does not dictate, who, between the Minister and the Chief Justice should suggest the judges to act in the Constitutional Court, but requires that there should be an agreement between the Minister and the Chief Justice before the judges are recommended to the President.

It is therefore not clear whether the remarks of the Chief Justice regarding the Minister’s actions being contrary to *“the norm and unusual”* were made in respect of the appropriateness of the particular recommendation, as the Chief Justice would have undoubtedly been aware that the Minister is constitutionally authorised and obliged to recommend an acting appointment with the concurrence of the Chief Justice.

The Constitutional Court also dealt with the provision allowing for the appointment of an acting Constitutional Court judge. At the time of the certification proceedings, the provision required the appointment to be made by the President

¹ In re Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC) par 131



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on the recommendation of the Minister, acting with the concurrence of the Chief Justice. The Constitutional Court dealt with the objection as follows:

*“Appointment of an acting Judge to the Constitutional Court ... is in a special category. The Minister of Justice and Chief Justice & President of the Supreme Court of Appeal] are members of the JSC and the requirement that there **be agreement between** them as to the person to be appointed meets any reasonable concern that the power of appointing an acting Constitutional Court Judge might be abused.”*

The Constitution was subsequently amended. The amended section 175(1) requires the President to make the appointment on the recommendation of the Minister and the Chief Justice only. The amended provision therefore only requires the concurrence of one senior judge, and not two, as was previously required.

It should be noted that, when Chief Justice Zondo did not give his concurrence to the Minister, the Minister did not proceed to recommend to the President that Judge Mlambo be appointed as acting judge of the Constitutional Court for the period 01 August 2021 to 30 September 2021. The Minister therefore did not contravene section 175(1) of the Constitution.

Section 96(1) and (2)(b) of the Constitution require a member of cabinet, in this instance the Minister, to act in accordance with the Executive Ethics Code and to not act in any way that is inconsistent with his office or expose himself to any situation involving the risk of a conflict between his official responsibilities and private interest respectively.

Whereas in terms of clause 2.1 of the Executive Ethics Code, the Minister is required to perform his duty, including his constitutional obligations, diligently and



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honestly, in this instance, his duty to recommend judges to the President for appointment of acting judges in the Constitutional Court.

The Complainant's contention is that the conduct of the Minister in suggesting Judge President Mlambo to Chief Justice Zondo to be recommended to the President for acting appointment in the Constitutional Court for the period 01 August 2021 to 30 September 2021, was to give him an unfair advantage to be appointed Chief Justice of the Constitutional Court, therefore breached sections 96(1) and (2)(b) of the Constitution read with clause 2.1 of the Executive Ethics Code.

The investigation revealed that it was not the first time Judge President Mlambo was identified for an acting appointment in the Constitutional Court. The evidence further reveals that he was appointed as acting judge of the Constitutional Court for the period 16 January 2022 to 30 March 2022. On both occasions, he was suggested by the former Chief Justice and he declined. He was later suggested by Chief Justice Zondo. He accepted and he was appointed as acting Justice in the Constitutional Court. At all occasions it was not the Minister who suggested him to be appointed as acting justice in the Constitutional Court.

The Minister suggested to Chief Justice Zondo to consider Judge President Mlambo for concurrence, to enable the Minister to recommend him to the President for acting appointment in the Constitutional Court for the period of 01 August 2021 to 30 September 2021.

Chief Justice Zondo did not give concurrence and Judge President Mlambo was neither recommended by the Minister nor appointed by the President as acting justice of the Constitutional Court. However, Judge President Mlambo was on recommendation of Chief Justice Zondo, appointed by the President as acting justice in the Constitutional Court for the period 16 January 2022 to 31 March 2022, on recommendation by the Minister dated 23 November 2021.



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Section 175(1) of the Constitution requires the Minister, with the concurrence of the Chief Justice, to recommend judges to the President for appointment as acting judges in the Constitutional Court. The conduct of the Minister in particular, that is, to suggest the name of Judge President Mlambo for acting appointment to Chief Justice Zondo, was not inconsistent with section 175(1) of the Constitution.

Therefore, the conduct of the Minister in this regard was not in breach of section 96(1) and (2)(b) of the Constitution, and clause 2.1 of the Executive Ethics Code. Accordingly it was found that the allegation that the Minister of Justice and Correctional Services, violated section 175(1) of the Constitution when he suggested Judge President Mlambo to Chief Justice Zondo for concurrence, and recommending him to the President for acting appointment in the Constitutional Court, and therefore breached section 96(1) and (2)(b) of the Constitution; and clause 2(1)(b) and (c) of the Executive Ethics Code, **is not substantiated.**

On the Second issue, whether the President, Mr MC Ramaphosa, violated section 175(1) of the Constitution, when he appointed Judge President D Mlambo as acting judge of the Constitutional Court of South Africa, and if so whether such conduct was in breach of section 96(1) and (2)(b) of the Constitution, and clause 2(1)(b) and (c) of the Executive Ethics Code.

The following conclusions were reached:

Section 96(1) and (2)(b) of the Constitution requires a member of cabinet, in this instance the President, to act in accordance with the Executive Ethics Code and not to act in any way that is inconsistent with his office or expose himself to any situation involving the risk of a conflict between his official responsibilities and private interests.



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Furthermore, in terms of clause 2.1 of the Executive Ethics Code, the President was required to perform his duty including his constitutional obligations, in this instance, the appointment of acting judges in the Constitutional Court, diligently and honestly.

Section 175(1) of the Constitution enjoins the President in appointing acting judges in the Constitutional Court, to do so on recommendation of the Minister acting with the concurrence of the Chief Justice. The President appointed Judge President Mlambo to act in the Constitutional Court for the period 16 January 2022 to 31 March 2022. This was after Judge President Mlambo was recommended to the President by the Minister on 23 November 2021 acting in concurrence with Chief Justice Zondo.

When appointing Judge President Mlambo, who was recommended by the Minister acting with the concurrence of Chief Justice Zondo, the President fulfilled his constitutional duty in terms of section 175(1) of the Constitution, as required by section 96(1) and (2)(b) of the Constitution read with clause 2.1 of the Executive Ethics Code, which requires the President to perform his constitutional obligations diligently, honestly, and in the best interest of good governance.

The President appointed Judge President Mlambo as acting justice of the Constitutional Court for the period 16 January 2022 to 30 March 2022 on receipt of the recommendation from the Minister dated 23 November 2021, indicating that he had the support of Chief Justice Zondo, in terms of section 175(1) of the Constitution.

We could not find evidence that the President had violated section 175(1) of the Constitution at the time he appointed Judge President Mlambo as acting justice in the Constitutional Court.



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Therefore, no evidence could be found to support the allegation that the conduct of the President in this regard was in breach of section 96(1) and (2)(b) of the Constitution, and clause 2.1 of the Executive Ethics Code.

Accordingly the allegation that the President violated section 175(1) of the Constitution, when he appointed Judge President Mlambo as acting judge of the Constitutional Court of South Africa, and therefore breached section 96(1) and (2)(b) of the Constitution; and clause 2(1)(b) and (c) of the Executive Ethics Code, **is not substantiated.**

It should be noted that upon being served with the Notice in terms of Rule 41(1) Ms Phasha indicated that she withdraws her complaint, whereas Mr Shivhambu (MP) did not respond to the Notice.

Report No 12 of 2023/24

During the course of June 2022, complaints were lodged with the Public Protector South Africa in respect of allegations of violation of the Executive Ethics Code against the President of the Republic of South Africa, Mr MC Ramaphosa (the President), as well as allegations of improper conduct against members of the SAPS in terms of the Public Protector Act.

The Complaints were lodged by Mr. Vuyolwethu Zungula (Mr. Zungula) and Mr. John Steenhuisen (Mr. Steenhuisen), who are Members of the National Assembly in terms of the Executive Members Ethics Act, 1998 (EMEA) as well as by Mr. Elias Muller (Mr. Muller) and Mr. Simphiwe Ndlovu (Mr Ndlovu), who are ordinary members of the public in terms of the Public Protector Act.²

² In a matter of *Public Protector and Others v President of the Republic of South Africa and Others* [2021] ZACC [19] the court held at Paragraph 17 that: "A member of the public cannot be a complainant in relation to a complaint submitted in terms of section 4 of the Members Act. However, this does not mean that a member of the public can never complain about a breach of the code."



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We received two written complaints dated 02 and 03 June 2022 from Mr Zungula, in connection with allegations that the President, had violated the Executive Ethics Code 2000 published by proclamation in Government Gazette: No 21399 Notice No 41 Regulation 6853 (Executive Ethics Code), in relation to the housebreaking with the intent to steal and theft of cash in foreign currency that took place on or about 09 February 2020 at Phala Phala farm, Waterberg in the Limpopo Province.

Further to the complaint from Mr Zungula, we subsequently received three (3) more similar complaints in June 2022, from other complainants namely, Mr Steenhuisen, Mr Ndlovu, and Mr Muller.

All the complaints were based on the affidavit of Mr Arthur Fraser (Mr Fraser), the former Director General of the State Security Agency (SSA), which was in the public domain and circulating around various media platforms, indicating, amongst other things, that Mr Fraser had laid criminal charges against the President at the Rosebank Police Station in Gauteng.

The complaints were then consolidated into one file, to avoid duplication of investigations as the facts arose from the same incident and are *mutatis mutandis*. The complainants were all notified accordingly, of this development.

An objection was raised by Mr Zungula to this method of dealing with the matter. The objection was premised on the notion that the consolidation of the complaints would have the effect of prolonging the investigation.

In response thereto, Mr Zungula was advised that the Public Protector Act conferred on the Public Protector, the sole discretion to determine the format and

Where this occurs, the Public Protector must investigate the complaint in accordance with the Public Protector Act and not in terms of section 3 of the Members Act". See also section 4(3) of the EMEA.



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procedure to be followed in conducting any investigation, with due regard to the circumstances of each case and that this position had been reiterated by the Supreme Court of Appeal.³

This aspect is dealt with more elaborately in the report. At this stage, it suffices to say that the investigation process was inevitably going to be informed by the provisions of sections 6 and 7 of the Public Protector Act, which on their own carry no inherent risk of delays into the course which the investigation pattern may follow, regardless of whether the matter is pursued under EMEA or the Public Protector Act.

Furthermore, PPSA is on record in its presentation to Cabinet on 24 May 2017, that amongst others, on the challenges faced in complying with the statutory requirement to finalise and report on EMEA investigations within a period of 30 days, due to factors such as the internal capacity constraints and the scope of investigations of this nature.

This challenge is, however, mitigated by section 3(3) of EMEA which permits the PPSA to report to the President or the Premier in circumstances where an investigation will not be completed in 30 days.

The substance of the objections to the approach to the PPSA's reporting obligations in terms of the EMEA, is informed by an interpretation of the relevant legislative framework, which is within the exclusive prerogative of the Acting Public Protector, as is the case presently.

Mr Zungula's insistence that an interim report be released on the merits of the complaint, prior to the completion of the investigation was therefore deemed as

³ *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa* (308/2017) [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) (15 March 2018) at paragraph 37.



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contrary to the legal standards that ought to be complied with, as have been applied by all Public Protectors since the promulgation of the EMEA.

The investigation was conducted in terms of section 182(1) of the Constitution read with section 3 of the EMEA and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, the application of relevant laws, case law, and related prescripts. All the relevant information relied upon to reach the conclusions detailed in the report are specified in the report.

The investigation looked into the conduct of number of persons, namely:

- The President of the Republic of South Africa, Mr Ramaphosa;
- The National Commissioner of the SAPS, Gen. Fannie Sehlale Masemola;
- The former National Commissioner of the SAPS, Gen. Khehla Sitole;
- The former Special Adviser to the President, Mr Bejani Chauke;
- The Head of the Presidential Protection Services, Major-General. Wally Rhooode; and
- An official of the Presidential Protection Services, Sgt Hlulani Rekhoto.

Other persons, to whom the notice delivered on 10 March 2023, as well as the final report being issued today, have been delivered to are:

- The Speaker of the National Assembly, Ms. Nosiviwe Mapisa Nqakula
- The Minister of Police, Mr. Bheki Cele; and
- All the complainants in the matter.

With the complaint having been lodged, partly by Members of the National Assembly under the EMEA, there is no discretion to consider whether or not to investigate a matter, as the EMEA provisions in this regard, are peremptory.

The alleged improper conduct by the President involving a potential violation of the Executive Ethics Code, was therefore investigated under section 3(1) of the EMEA.



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Although Mr. Ndlovu and Mr. Muller's complaints relate to the same allegations, that on 09 February 2020, there was a theft of millions of US dollars stored within the President's private residence at Phala Phala farm, their complaints are not covered by section 4(1) of the EMEA.⁴

Section 4(3) of the EMEA indicates that nothing in the section may prevent the Public Protector from investigating any complaint by a member of the public in accordance with the Public Protector Act. Messrs Ndlovu and Muller's complaints were accordingly dealt with in terms of the Public Protector Act.

The factual enquiry principally focused on whether or not the President violated the Executive Ethics Code as a result of the alleged housebreaking with the intent to steal and theft of cash in foreign currency that took place on or about 09 February 2020, at Phala Phala farm and/or acting in a way that is inconsistent with his office in the manner that he dealt with the alleged crime.

Another part of the factual inquiry principally focused on whether the members of the SAPS failed to comply with and uphold their statutory and constitutional duties in relation to the events that followed the housebreaking with the intent to steal and theft of cash in foreign currency, which took place at Phala Phala farm.

The enquiry regarding what should have happened, focused on the law or rules that regulate the standard that should have been met by the President to comply with the Executive Ethics Code, and by the members of the SAPS to act in

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Section 4(1) of EMEA states that the Public Protector must investigate, in accordance with section 3, an alleged breach of the code of ethics on receipt of a complaint by—

- (a) the President, a member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister: or
- (b) the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.



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accordance with the standard expected in the proper performance of their constitutional and statutory functions.

The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the improper conduct

This approach included a variety of methods such as an exchange of documentation between the PPSA, the President, the Speaker of the National Assembly, Mr Fraser, various state institutions, managers of Phala Phala farm as well as other individual witnesses, who are in possession of information which has a bearing on the investigation of this matter.

It is acknowledged that when the details of the Phala Phala farm incident came to light in 2022, multiple oversight mechanisms sprang into action, sometimes working collaboratively, sometimes in parallel, which resulted in several institutions and oversight bodies simultaneously being seized with the investigation of the same matter in accordance with their own functions and mandates. These included:

- (a) The South African Revenue Services;
- (b) The South African Reserve Bank;
- (c) The Directorate of Priority Crime Investigation;
- (d) The Financial Intelligence Centre;
- (e) The Independent Police Investigative Directorate;
- (f) The Independent Panel appointed by the South African Parliament, in terms of Section 89 of the Constitution, in October 2022.

The laws and policies that informed the investigations included but were not limited to the following:

- The Constitution of the Republic of South Africa, 1996;
- Public Protector Act, 1994;
- The Executive Members Ethics Act, 1998;
- The Tax Administration Act, 2011;
- The Currency and Exchanges Act, 1933;
- The International Cooperation in Criminal Matters Act, 1996;



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- The Exchange Control Regulations made in terms of section 9 of the CEA were promulgated by Government Notice R.1111 of 1 December 1961 and amended up to Government Notice No. R.445 in Government Gazette No. 35430 of 8 June 2012.
- The Prevention and Combating of Corrupt Activities Act, 2004;
- The Customs and Excise Act, 1964;
- The Presidential Handbook: November 2015;
- The Policy on Risk Management System Protection Packages (RIMAS)
- The South African Police Service Act, 1995;
- Trust Property Control Act, 1998;
- Basic Conditions of Employment Act, 1997; and
- Prevention of Organised Crime Act, 1998;

Various case law which is cited in the report was considered.

The analysis of the complaint led to the identification of three issues for the investigation:

- Whether the President of the Republic of South Africa, Mr MC Ramaphosa acted in a manner that is inconsistent with his office in dealing with the alleged housebreaking with the intent to steal and theft of cash in foreign currency that took place on or about 09 February 2020 at Phala Phala farm, Waterberg in the Limpopo Province and thus abused state resources, exposed himself to any situation involving a risk of a conflict between his constitutional duties and obligations and his private interests arising from or affected by his alleged paid work in violation of clause 2.1(b) and (d) and clause 2.3(d), (f) and (g) of the Executive Ethics Code;
- Whether the President failed to report the alleged crime that took place at Phala Phala farm on or about 09 February 2020 and abused his power in utilising state resources by causing the Presidential Protection Services (PPS) to be deployed to Phala Phala farm and to investigate a housebreaking with the intent to steal and theft of cash in foreign currency at Phala Phala farm, thus violating clause 2.3(d) and (f) of the Executive Ethics Code; and whether such conduct constitutes improper conduct as contemplated in



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section 182(1) of the Constitution and abuse of power as contemplated in section 6(4)(a)(ii) of the Public Protector Act; and

- Whether the members of the South African Police Service (SAPS) attached to the PPS acted improperly by investigating the alleged housebreaking with the intent to steal and theft of cash in foreign currency, which took place on or about 09 February 2020 at Phala Phala farm, Waterberg in the Limpopo Province, and if so, whether such conduct constitutes improper conduct as contemplated in section 182(1)(a) of the Constitution and maladministration as contemplated in section 6(4)(a)(i) of the Public Protector Act.

On the first issue, being the question of whether:

The President of the Republic of South Africa acted in a manner that is inconsistent with his office in dealing with the alleged housebreaking with the intent to steal and theft of cash in foreign currency that took place on or about 09 February 2020 at Phala Phala farm, Waterberg in the Limpopo Province and thus exposed himself to any situation involving a risk of a conflict between his constitutional duties and obligations and his private interests arising from or affected by his alleged paid work in violation of clause 2.1(b) and (d) and clause 2.3(d),(f) and (g) of the Executive Ethics Code.

Upon analysis it was considered that the President's response is a denial of allegations that he undertook *paid work* outside his Cabinet duties. The President denied any breach of the Code of Ethics and section 96(2)(a) and (b) of the Constitution. He stated that he does not work for Ntaba Nyoni or Phala Phala farm and was not paid for anything. The concepts of *paid work and/or remunerated work* are not defined in the Constitution, EMEA or the Code of Ethics.



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In order to arrive at the decision whether the President breached the Constitution and the Code of Ethics, it is pertinent to interpret and determine the meaning of the concept ***“undertakes any other paid work” and/or receive remuneration for any work or service other than for the performance of their functions as members of the Executive*** (own emphasis).

The modern approach to interpretation is neatly summarised as follows by the Constitutional Court⁵:

“The interpretation of the Act must be guided by the following principles:

- a) *Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.*
- b) *This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.*
...”

In the matter of the *Public Protector and Others v President of the Republic of South Africa and Others*⁶, the court stated that *“the Constitution, the Members Act, and the Code exist for the purpose of enhancing or enabling the attainment of justice, giving substance to our founding values and ensuring*

⁵ Minister of Police and Others v Fidelity Security Services (Pty) Limited 2023 (3) BCLR 270 (CC) at para 34

⁶ [2021] ZACC [19] at para 170.



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compliance with high ethical standards and constitutional obligations. They are not to be interpreted in a way that impedes the realisation of these critical objectives. Courts should not therefore inadvertently enable schemes designed to or that could unintentionally frustrate the fulfilment of ethical imperatives and constitutional obligations by allowing legal sophistry or technicalities to obscure commonsensical realities”.

Section 1 of the Basic Conditions of Employment Act⁷ states that “*remuneration*” means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State, and “*remunerate*” has a corresponding meaning.

In terms of section 30(6)(a) of the Companies Act 71 of 2008, as amended, “*...remuneration includes – fees paid to directors for services rendered by them to or on behalf of the company, including any amount paid to a person in respect of the person’s acceptance of the office of director...*”

Section 1 of the Occupational Health and Safety Act (OHSA) provides that “*employer*” means, subject to the provisions of subsection (2), any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him. OHSA also defines “*remuneration*” as any payment in money or in kind or both in money and in kind, made or owing to any person in pursuance of such person's employment.

The OHSA further defines “*employment*” or “*employed*” as meaning employment or employed as an employee. The OHSA further defines “*work*” to mean work as an employee or as a self-employed person, and for such purpose an employee is deemed to be at work during the time that he is in the

7 Act 75 of 1997.



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course of his employment, and a self-employed person is deemed to be at work during such time as he devotes to work as a self-employed person.

The Guide on managing other Remunerative Work in the Public Service⁸ states that, to have an interest in a business is not work *per se*. There has to be evidence of a physical or mental effort contributing to the operations of the business over a period of time. Over a period of time means the event continues for a period of time without stopping.⁹

According to the affidavit of Gen. Rhode, the President declined the permanent deployment of PPS personnel and technology at the Phala Phala farm on the basis that he is not always there.

Having assessed the definition or meaning of *paid work or remunerated work*, it is prudent to state that applicable sources in the main, refer to employees in the employ of the state, rather than specifically to the Members of the Executive. However, for the purposes of this investigation and determining the ordinary meaning of the relevant statutory provisions, these guidelines serve as the only source for interpretation of the concept of *paid work or remunerated work*.

In the case at hand, the meaning of the words ***paid work or remunerated work*** appear to be plain, as well as in harmony with the syntax in which it occurs. The wording should therefore be interpreted in line with its ordinary grammatical meaning.

Objectively viewed, these words mean that a Member of Cabinet must not, regardless of the form of work or agreement in place, be paid or receive

⁸ Guide on Managing other Remunerative Work in the Public Service by the Department of Public Service and Administration, June 2020 at page 10.

⁹ <https://dictionary.reverso.net/english-cobuild/continuously+over+a+period+of+time>, accessed on 26 June 2023.



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remuneration in respect of any work, other than work related to his or her duties as a Member of Cabinet.

The only prohibition that arises from the scheme of section 96(2)(a) of the Constitution and from clause 2.3(g) of the Code of Ethics is narrow and focused, and that is to say a Member of Cabinet may not do other work, for which he or she gets paid or receives remuneration.

Within this context it is imperative that consideration be given to the purpose of the prohibition of undertaking other paid work. This is one of the most important considerations which ultimately informs whether or not there has been a violation of the provisions of the Code.

That purpose can only be to ensure that Members of the Executive give their undivided attention to their jobs as a part of the Executive and to prevent them from becoming distracted by other work that they could earn remuneration from.

In other words, the prohibition is on earning other active income – in the sense that it is income earned in exchange for work or services that would distract the member concerned from fulfilling their functions in government.

At the same time, when read in context, the EMEA and the Code recognise, realistically, that Members of the Executive will hold financial interests. These other interests will in most instances also produce income for the members concerned – such as rent received from immovable property owned by the member and leased out, or dividends received as a shareholder in a listed or private company. Members are required to disclose these interests in terms of section 2(c) of the Act and paragraph 5 of the Code.

In the Code there is therefore nothing *per se* problematic with members of the executive holding financial interests which may provide them with another



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source of passive income, i.e. income which they receive without having to undertake work or provide services.

What is prohibited is the active involvement of members in the enterprises which produce the income – because that would divide their attention from their official duties.

Very often determining this issue will be a matter of degree and the dividing line between passive (or permitted) involvement and active (prohibited) involvement will be difficult to draw.

Declaration of Financial Interests

While the President acknowledged that he still retains certain interests in Phala Phala farm as a game and cattle farming operation, he submitted that he does not “conduct any other paid work” on or in relation to the farm as envisaged in section 96(2)(a) of the Constitution.

On 07 October 2022, the PPSA Investigation Team, inspected the Register of Financial Interests of the President, in particular the period between 01 April 2019 to 31 March 2020 financial year. The President’s financial interests and member’s interests held in Ntaba Nyoni and Tshivhase Trust were declared. The value and the nature thereof were also disclosed in the financial register kept in the office of the Secretary to Cabinet.

On the remuneration part of the Register of Financial Interests of the President, it was observed that the President declared that he received no remuneration other than as a member of Executive during the reporting period 2020 as required in terms of paragraph 5.6 of the Executive Ethics Code.

The President indicated further that he instructed Mr Steyn Speed of his office to ensure compliance with Executive Ethics Code, as required by paragraph 8.1 and that he is aware of the provisions of the Executive Ethics Code regarding the proper conduct expected of the Members of the Executive.



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The President's interest in Ntaba Nyoni and Tshivase Trust are described as "*registrable interests*" and records inspected indicated that he has declared this investment as *financial interests* which he has in corporate entities.

In terms of paragraph 6 of the Code of Ethics, **financial interests** refer to registrable interests that must be disclosed such as:

- (a) Shares and other financial interests in companies and other corporate entities;
- (b) Sponsorships;
- (c) Gifts and hospitality other than that received from a spouse or permanent companion or family member;
- (d) Benefits;
- (e) Foreign travel other than personal visits paid for by the member, or official travel paid for by the state, or travel paid for by the member's party;
- (f) Land and immovable property, including land or property outside South Africa; and
- (g) Pensions.

No evidence could be found, indicating that the President either works at Phala Phala farm or receives remuneration from Phala Phala farm.

The Executive Ethics Code creates a distinction between the concepts of **paid work/remuneration** as contemplated in paragraph 2.3(g) of the Code of Ethics and **financial interests** as described in paragraph 6 of the Code of Ethics.

The objective of this distinction in the Code of Ethics is to separate the paid work/remuneration as envisaged in an employer-employee relationship as opposed to shares and other financial interests in companies and other



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corporate entities. The purpose of the distinction is clear, namely to avoid a risk of competing demands on the time required for public responsibilities, undue influence on political behaviour and conflict between constitutional duties.

Evidence arising from the inspection of the President's register for financial interests reveals that the President retains *financial interests* in Ntaba Nyoni as described paragraph 6 of the Code of Ethics.

While not conclusive, these facts certainly point towards the President being more actively involved in the management of the affairs of the CC than he appears to let on in his general submissions.

There are, of course, other facts which point away from the President being involved in paid work. For one thing, he neither draws a salary from the Ntaba Nyoni CC nor receives any distributions (only the repayment of a soft loan). He evidently is not often physically present at the farm.

Risk of a conflict of interest

Paragraph 2.3(f) of the Executive Ethics Code and section 96(2)(b) of the Constitution stipulate that members of the Executive may not expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.

The aim of these provisions is to prohibit conduct that is inconsistent with a Member's office, or that which exposes a Member to any situation involving the risk of a conflict between his/her official responsibilities and private interests.

A conflict of interest is a situation in which a person has a duty to more than one person or organization, but cannot do justice to the actual or potentially



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adverse interests of both parties.¹⁰ According to the King IV Report on Corporate Governance in South Africa 2016¹¹, a conflict of interest, used in relation to members of the governing body and its committees, occurs when there is a direct or indirect conflict, in fact or in appearance, between the interests of such member and that of the organisation. It applies to financial, economic and other interests in any opportunity from which the organisation may benefit, as well as use of the property of the organisation, including information.

The Organisation for Economic Co-Operation and Development (OECD) is a unique forum where governments of various democracies work together to address the economic, social and environmental challenges of globalisation.

South Africa is a key member state to the OECD, having joined on 16 May 2007. The OECD is also at the forefront of efforts to understand and help governments respond to new developments and concerns, such as corporate governance, managing conflict of interests and to seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies. In its report/toolkit titled “*Managing Conflict of Interest in the Public Sector*”, emphasis is placed on the pressing need to properly manage perceived or potential conflict of interest and provides *inter alia*:

“A conflict of interest is not necessarily corruption, which is understood as “actual abuse of public office for private advantage”. But a conflict does have the potential for corrupt conduct. Conflicts between private interests and public duties of public officials must therefore be correctly identified, appropriately managed, and effectively resolved. Left unresolved, a conflict of interest can result in corrupt conduct, abuse of public office, misconduct, breach of trust, or unlawful action. More importantly,

¹⁰ <https://www.bing.comOxford+dictionary+meaning+of+conflict+of+interests> accessed on 14 February 2023.

¹¹ King IV Report on Corporate Governance in South Africa 2016 at page 11.



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*public confidence in the integrity of public institutions can also be seriously damaged”.*¹²

A conflict of interest is not in itself misconduct, however, failing to recognise it or manage it appropriately is, at best, improper. The private interest of an official assumes a public dimension only if and when it impinges on or is perceived to impinge on some action or decision the official must take in the course of duty. If this occurs, the official becomes ‘conflicted’ and must promptly consider the proper ethical path to take in the particular case.¹³

The Western Cape High Court¹⁴ held that the test regarding a conflict of interest-

“rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interest, by making a profit at that other’s expense.”

There are many different views on the definition of ‘a conflict of interest’. However, the common theme present in all definitions relates to a clash between the official or business duties of the decision maker concerned and his/her personal interests. The official or business interests are often described as the primary interests, while the personal interests are regarded as secondary interests.¹⁵

12 OECD: Managing Conflict of Interest in the Public Sector – ISBN 92-64-01822-0 – © OECD 2005 at page 8.

13 Conflict of interest in the public sector Ombudsman for Victoria, Australia March 2008 at page 70.

14 Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another (12476/2015) [2015] ZAWCHC 113; 2015 (6) SA 338 (WCC) (4 August 2015) at page 33.

15 As applied by the Public Protector in the State of Capture Report issued 14 October 2016: Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses.



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Primary interest refers to the principal goals of the profession or activity and the duties of public office. Secondary interest includes not only financial gain but also such motives as the desire for professional advancement and the wish to do favours for family and friends, but conflict of interest rules usually focus on financial relationships because they are relatively more objective, fungible, and quantifiable.

Again, paragraph 3 of the Code makes it clear that not all interests held by a member of the executive will give rise to a conflict for purposes of the Code. The existence of a secondary interest is therefore not treated as wrong in itself, but becomes objectionable when believed to have greater weight than the primary interests.

The conflict in a conflict of interest exists whether or not a particular individual is actually influenced by the secondary interest. It exists if the circumstances are reasonably believed (on the basis of past experience and objective evidence) to create a risk that decisions may be unduly influenced by secondary interests.

Again, as this provision makes clear, not all interests held by a member of the executive will give rise to a conflict for purposes of the Code. This is clear when regard is had to paragraph 3.6, which requires a member to dispose of an interest in a company or corporate entity or profit-making enterprise, or place it in the management of an independent person, if that interest “*may give rise to a conflict of interest in the performance of that member’s functions as a member of the Executive*”.

The President contended that he has been advised that the kind of interests he retains in Phala Phala farm as a game and cattle farming operation, does not give rise to a risk of a conflict of interest or expose him to any situation involving the risk of a conflict between his official responsibilities and his



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private interests. He retained assets, which he believed would not give rise to a conflict of interest, including his member's interest in the CC that operates Phala Phala. He also remains both a trustee and beneficiary of the Tshivhase Trust, which owns the farm property.

In the abstract, ownership of a farm or corporate entity that runs a business on a farm is very unlikely to give rise to a conflict of interest in the performance of a member's functions as a member of the Executive.

In terms of the evidence placed before us, the day to day operations of Phala Phala Wildlife are managed by Mr von Wielligh as the general manager with the assistance of about 40 employees, though occasionally when the President visits the farm they would seek advice from him and he would give guidance. The buffalo sale transaction between Mr Ndlovu and Mr Hazim took place in the absence of the President, thus indicating that he is not involved in the ordinary business decision making, largely.

The evidence revealed that the President held discussions with farm managers, notably, regarding the disposal of certain animals due to them being substandard.

Considering the evidence in its entirety and the application of the law, there is no basis to exalt such deliberations to a degree where it can be held that there existed a real or potential conflict of interests on the part of the President regarding his duty as the Head of Cabinet and his interests in game and cattle farming at Phala Phala farm in violation of the Code.

No evidence could be found to underpin a finding or a conclusion that the President's comments or utterances in this regard were a continuous act to be considered or construed as active involvement in the business or paid work.



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Aggregated against the standard imposed by the Executive Ethics Code, it is found that there is no basis upon which to conclude that the President contravened clause 2.1(b) and (d), clause 2.3(d), (f) and (g) of the Executive Ethics Code, including the period following the alleged theft of US dollars that took place on or about 09 February 2020, from his private house at Phala Phala farm in Waterberg, Limpopo.

Therefore, the evidence does not support the allegation that the President's financial interests in game and cattle farming at Phala Phala farm exposes him to any situation involving the risk of a conflict between his official responsibilities and his private interests.

Accordingly, the allegation that the President improperly and in violation of the provisions of the Executive Ethics Code exposed him to any risk of a conflict between his constitutional duties and obligations and his private interests arising from or affected by his alleged paid work at Phala Phala farm, is **not substantiated**.

On the second issue:

Evidence indicates that Phala Phala farm was not listed as the President's private residence on which there was a fulltime deployment of PPS personnel at the time of the crime of housebreaking with the intent to steal and theft, because the President chose not to have it listed, as he seldom visits the farm. This, according to the President was intended to mitigate the use of state resources.

According to Gen. Rhode, since his appointment on 01 June 2018, he attempted to persuade the President that PPS personnel should be deployed at the farm, as the President visits it as one of his private residences. Gen Rhode stated that when the President was not at Phala Phala farm, there were no SAPS or PPS members to prevent breaches of security. Gen.



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Rhoope further indicated that the President has always refused the deployment of PPS personnel and technology at the farm.

Having regard to the applicable prescripts, notwithstanding the President's initial refusal to have PPS deployed at Phala Phala farm, paragraph 12 of the Presidential Handbook, read together with the PPS Policy prescribes that the SAPS must take full responsibility for the protection and security of the President at all times during his term of office. These prescripts stipulate further that protection and security measures of the President include, *inter alia*, regular security assessment in conjunction with intelligence agencies and static protection at all official and private residences and office accommodation used from time to time during his term of office.

According to the evidence of Gen. Rhoope, Mr Ndlovu, Mr von Wielligh and the President, on 10 February 2020, there was a security breach by intruders at Phala Phala farm, which the President reported to Gen. Rhoope on the same day. Thereafter, Mr Ndlovu reported to the President that the money from the sale of game was stolen from the President's residence at Phala Phala farm. After confirming same, on 02 March 2020 the President reported the theft of money from the sale of game to Gen. Rhoope.

Having considered the response of Mr Zungula, the contention that the President was the only person, as a member of the CC, to report a crime as directed by section 34(1) of PRECCA, is not supported by a proper reading of the relevant section, and that both Messrs Von Wielligh and Ndlovu too, were persons of authority mandated to report the theft as envisaged in section 34(4)(e) and (i) of PRECCA and had an obligation, as persons with the personal knowledge of the crime, to report the housebreaking.



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Section 34(1)(e) and (i) of PRECCA places the duty on certain persons to report certain offences. Failure to report is an offence. In this case, the Public Protector is not empowered to pronounce on the merits and demerits of the alleged crime and to make findings in respect thereof because the offence does not fall within section 6(4)(a) of the Public Protector Act. The matter is being investigated by the public body which is tasked with criminal investigations, namely the DPCI.

In a letter dated 26 April 2023, Gen. Masemola confirmed to the Investigation Team that on 22 August 2022, Mr von Wielligh opened a case namely, Bela Bela CAS 299/08/2022 for housebreaking and theft that took place on 09 February 2020.

In considering Mr Steenhuisen's submission for the Public Protector to reject the notion and evidence that the President did not instruct, consent to, or otherwise know of the unlawful investigations by members of the SAPS, the Public Protector heeded the advice of the Constitutional Court that, where evidence is inconclusive or incongruent, she is obliged to carefully evaluate it to determine the truth. This decision affirms that the objective of investigations by the Public Protector is to discover the truth.¹⁶ Where the investigation yields disparate pieces of evidence which do not fit into place, the Public Protector must continue digging until the true picture emerges. The Court further noted that when the versions placed before the Public Protector diverged on some of the relevant issues, she could not without more evidence prefer one version over the other – *“(t)he truth is established by facts and not one's preference”*.¹⁷

16 Public Protector and Others v President of the Republic of South Africa and Others [2021] ZACC [19] at paragraph 77.

17 Public Protector and Others v President of the Republic of South Africa and Others [2021] ZACC [19] at paragraph 79.



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The Constitutional Court¹⁸ furthermore warned that the Public Protector has no place summarily dismissing any information. His or her function is to weigh the importance or otherwise of the information and if appropriate to take steps that are necessary to determine its truth.

To this end and having identified witnesses who were interviewed and approached for information and their testimony, this report sets out in detailed form the evidence of each witness. These include the President, the Managers of Phala Phala farm, as well as the members of the SAPS involved.

The evidence was obtained by means of a pro-active and systematic investigative process and was thoroughly scrutinised. The substantive evidence and information at the disposal of the Public Protector is corroborative of each other on all relevant issues and cannot, on a balance of probabilities be construed or perceived as inconclusive or congruent, or summarily dismissed.

Determination of the origin and exact amount of money stolen from Phala Phala farm was not within the scope of the investigation of the Public Protector. It is therefore incorrect to surmise that the office of the Public Protector seems to be satisfied with the quantity and origin of the foreign currency stolen. The focus of the investigation was only on the three distinct issues identified in this report.

The concept of *abuse of power* is not defined in the Public Protector Act, however, in terms of the dictionary meaning it is defined as wrongful use of a position of authority to influence employees, students, colleagues, or

18 Public Protector and Others v President of the Republic of South Africa and Others [2021] ZACC [19] at paragraph 76.



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volunteers (e.g. coercion to participate in activities or decision making, in violation of laws, regulations, or policies).¹⁹

In the matter of *Gigaba v Minister of Police and Others*²⁰ Sardiwalla J gave an example of “*abuse of power*” as an instance in which powers, given to public authorities to be used for certain purposes, are wrongly used by them to achieve another unauthorised ulterior purpose. In this case the court held that the involvement of the Hawks/DPCI in a trivial domestic spat amounted to the *abuse of power* by Mr Gigaba as a former Minister in using the State administration for his own personal benefit with the intention to intimidate the applicant.

In determining this issue, evidence was evaluated to establish if the conduct of the President can be equated to an abuse of his position of power and whether he utilised state resources, which included deployment of PPS members to Phala Phala farm and to investigate the crime of housebreaking with the intent to steal and theft without a registered case to recover the stolen money.

In response to the Notice, Mr Steenhuisen stated that the President consented to, or knew of the use of PPS resources beyond its mandate. Mr Steenhuisen insisted that the President acquiesced, either actively or passively, in the abuse of power and PPS resources. Mr Steenhuisen did not furnish any evidence to support this contention. No evidence could be found to prove that the President was aware of the investigation of the crime by Gen. Rhoode.

¹⁹ <https://www.lawinsider.com/dictionary/abuse-of-power> accessed on 16 February 2023.

²⁰ (43469/2020) [2021] ZAGPPHC 55; [2021] 3 All SA 495 (GP) (11 February 2021) at para 75 and 77.



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As a result, a finding cannot be made that assumes a position with respect to the President's state of mind, without empirical evidence to support the allegation that he consented to the use of PPS resources beyond their mandate and for an ulterior purpose.

Regarding the third issue:

On 20 October 2022, Sgt Rekhoto stated on record during the interview with the Investigation Team, that while he and Gen. Rhooode interviewed Mr. David Joseph at Phala Phala farm, David admitted that he arranged with his Namibian friends from Cape Town, who subsequently broke into the President's private residence at Phala Phala farm and stole cash in US dollars. According to Sgt Rekhoto, David was given a share of thirty thousand rand (R30, 000) and he was angry that he was not given enough money for his role.²¹

The interviews conducted with suspects at Phala Phala farm in March 2020 were also confirmed to the Investigation Team by Gen. Rhooode himself on record.²² It was further revealed by Gen Rhooode in paragraphs 2 and 4 of his supplementary affidavit, dated 01 September 2022, that when he interviewed Mr Joseph in March 2020, he read his constitutional rights to him. These rights are understood to be read to a person who is arrested, detained or accused, in terms of section 35 of the Constitution. The act of reading these rights to Mr Joseph is indicative of an interaction between a police officer conducting a criminal investigation and a suspect.

21 Page 73 of the transcript record of an interview between Sgt Rekhoto and the Public Protector on 20 October 2022.

22 Page 17 to 21 of the transcript record of an interview between Gen Rhooode and the Public Protector on 11 November 2022.



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The information disclosed to both Sgt Rekhoto and Gen. Rhooode by Mr Joseph during the interviews held on 03 and 04 March 2020, places a legal duty on them as police officers in terms of section 13(2) and (3) of the SAPS Act to report to the commanding officer or to perform such duty in a manner that is reasonable in the circumstances.

It is trite and a settled fact that *“Housebreaking with an intent to steal and Theft”* is a common law offence in South Africa. The Supreme Court of Appeal in the matter between the *S v Pakane and Others*²³ (paragraph 30) held that a rigid interpretation of section 13(2) of the SAPS Act that may amount to an interpretation that a member of the SAPS has no legal reporting duty to report other crimes (that are not created in regulations – such as the shooting incident in question) *“is a brazen perversion of the section which cannot be countenanced, least from law enforcement officers”*.

The Court stated that this duty flows from section 205(3) of the Constitution and is affirmed by the SAPS Act.

Therefore, Gen. Rhooode and Sgt Rekhoto were legally obliged to act in line with the provisions of section 13(2) and (3) of the SAPS Act upon becoming aware that a crime namely, a common law offence of housebreaking with an intent to steal and theft had been committed and more so when suspects made admissions to them during an interview in respect of the same crime/offence.

According to the evidence, Gen. Rhooode reported this incident to Gen. Mfazi,²⁴ who was neither his commanding officer nor part of DPCI, as

²³ S v Pakane and Others (43/07) [2007] ZASCA 134; [2007] SCA 134 (RSA) ; 2008 (1) SACR 518 (SCA) (28 September 2007)

²⁴ Paragraphs 9 and 17 of the supplementary affidavit of Gen. Rhooode dated 2022-09-11.



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contemplated in section 34 of PRECCA. Gen. Rhooode indicated during his interview with the Investigation Team, that he opted to report this matter to Gen. Mfazi as the head of Crime Detection Services and also because the National Commissioner was busy with performance assessments. Gen. Rhooode further stated another reason for reporting to Gen Mfazi was that their offices were in the same corridor.²⁵

However, in terms of the SAPS' approved National and Provincial Organisational Structure for 2020-2021 financial year, Gen. Rhooode as the Component Head of the PPS reports directly to the National Commissioner of the SAPS.

Evidence further indicates that Gen. Rhooode conducted an investigation, assisted by Sgt Rekhoto, Mr Trevor Fredericks and Nick to investigate this incident without a case having been registered on SAPS' CAS. It is important to note although Mr Fredericks and Nick assisted Gen. Rhooode to conduct his investigation, they were not members of the SAPS.²⁶

The evidence and objectively ascertainable facts around the activities of Gen. Rhooode, Sgt Rekhoto and Nick do not support the assertion that these were primarily aimed at conducting a threat assessment in respect of the President or his private residence at Phala Phala farm in accordance with the applicable legislative framework.

It is noted from the following statement by Gen. Rhooode, which confirms the investigation of crime, the tracing and following of money stolen from Phala Phala, as contained in his supplementary affidavit:

25 Page 41 to 43 of the transcript record of an interview between Gen Rhooode and the Public Protector on 28 October 2022.

26 Paragraph 10 of the supplementary affidavit of Gen. Rhooode dated 2022-09-11.



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“When I was in Cape Town around 10 or 11 March 2020, I received a call from Sgt Rekhoto who told me that he had found out from certain sources that the perpetrators of theft had bought new cars. He said that the cars had been bought from Barons in Culemborg, Cape Town. Shortly after receiving the call from Sgt Rekhoto, he picked me up at my office in Garmor House opposite Parliament. We drove to Barons motors and spoke to the manager who confirmed that on 14 February 2020, a Mr Mukekeni had purchased a 2019 Ford Ranger and supplied further details in relation to the purchase of the vehicle”.²⁷

The above extract from Gen. Rhooode’s supplementary affidavit is corroborated by the affidavit of Mr Marlie, who was the Car Sales Manager at Barons in Culemborg, Cape Town, which indicates that the police officer requested details of the sale transaction, identity and residential address of the buyer.

Furthermore, the report compiled by Sgt Rekhoto only addresses issues related to the crime of housebreaking with the intent to steal and theft at Phala Phala farm. The report by Sgt Rekhoto is clearly tabulated into three distinct headings which focus on crime as follows:

- (a) Role Players in the planning and commission of crime;
- (b) Background of what transpired until the commission of the crime; and
- (c) Surveillance and gathering of information of individuals connected therewith.

It is noted that the report by Sgt Rekhoto specifies each suspect, the role played by each during the commission of the crime and what was bought with the money they stole from Phala Phala farm. This report by Sgt Rekhoto does

27

Paragraph 18 of the supplementary affidavit of Gen. Rhooode dated 2022-09-11.



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not make any remarks, conclusions and findings about any threat and risk assessments to the personal safety of the President or his family.

While Sgt Rekhoto in his response to the Notice contends that he was merely acting on the instruction of his superiors, it is a trite principle of law that employees are not under any obligation to obey unlawful or illegal instructions. Employers including SAPS, have developed job descriptions in order to assign certain tasks to certain units/employees in order to promote efficiency and accountability. In the circumstances, a job description should have guided Sgt Rekhoto's refusal to perform certain tasks if he believed it fell outside the scope of his job description. In the matter of *City of Cape Town v Nkomo and Others*²⁸ the Labour Court confirmed that employees are not obliged to obey unlawful instructions.

In light of the above, the refusal to obey an instruction to do work that was unlawful or that Sgt Rekhoto legitimately felt he was not qualified to perform could not have been held to constitute insubordination. The fact that Sgt Rekhoto acted on his superior's instruction (Gen. Rhooode), could not by itself have justified his conduct to obey unlawful instructions. An employee is under no obligation to obey an unlawful instruction. If he obeys an unlawful instruction, he does so at his own risk.²⁹

Observations by the Public Protector

It is noted that Mr Chauke, who is neither in the employ of the SAPS nor covered by the RIMAS Policy, travelled to Namibia on 25 to 26 June 2020, accompanied by Gen. Rhooode using PPS resources, with the approval of Gen. Sitole.

28 (C 913/2014) [2015] ZALCCT 12 (18 June 2015 at paragraph 15, read with *Ellerines Holdings v CCMA and Others* [1999] JOL 5078 (LC) at paragraph 45.

29 *Ellerines Holdings v CCMA and Others* [1999] JOL 5078 (LC) at paragraph 45.



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The request for the trip approval was signed and submitted by Gen. Rhoode on 24 June 2020 and it is clear from paragraph 1 of the memorandum seeking approval for the trip, that Gen. Rhoode would be accompanying Mr Chauke to Namibia from 25 June 2020 until 26 June 2020.

However, in terms of the evidence, no link or *nexus* could be established between this trip to Namibia and the investigation that was conducted by the PPS in respect of the crime of housebreaking with the intent to steal and theft, committed at Phala Phala farm on or about 09 February 2020.

Remedial Action

The PP is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct highlighted in this report, where adverse findings are made.

With due regard to the evidence, the regulatory framework determining the standard that members of the PPS namely, Gen. Rhoode and Sgt Rekhoto should have complied with, hereby the following remedial action in terms of section 182(1)(c) of the Constitution, is taken:

The Minister of the South African Police Services:

Must take note of the findings of maladministration and improper conduct against the SAPS as highlighted in this report, in connection with the allegation that the members of the SAPS attached to PPS acted improperly by investigating the crime of housebreaking with the intent to steal and theft, which took place on or about 09 February 2020 at Phala Phala farm, in line with the authority vested on the Minister of Police, in terms of section 206 of the Constitution.



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The National Commissioner of the SAPS:

Must within **(60) sixty calendar** days from the date of receipt of this report ensure that appropriate action is initiated against Gen. Rhooode and Sgt Rekhoto for contraventions of the SAPS prescripts as highlighted in this report, in line with the provisions of section 40 of the SAPS Act and Regulation 6 of the SAPS Discipline Regulations, 2016.

Within **(90) ninety** calendar days from the date of receipt of this report, develop an appropriate PPS directive, instruction, policy or such other prescript within the statutory powers vested in the National Commissioner in terms of section 11 of the SAPS Act and section 207(2) of the Constitution, directing how the PPS members must manage crimes reported directly to them by the VIP's under their protection.

MONITORING

The SAPS are to provide a report to the PPSA on the implementation of the remedial action within **60 calendar days** from the date of this report.

The importance of the implementation of the Public Protector's Remedial Action is no better evidenced than through the amazing work of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, which is a product of the Remedial Action of the PPSA.

Given the magnitude of the commitment and efforts that have gone into of the work of the Zondo Commission, the Commission's findings would be the logical starting point for any retrospective understanding of the existence, nature and extent of state capture or prospective remedial measures to prevent a recurrence. The Commission's findings on the mechanisms and



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causes of state capture, and in particular institutional weaknesses in the state, provide a strong foundation for implementing critical reforms.

Ethical leadership in the public sector, including the Government agencies and SOE's affected or involved in State Capture, is a critical foundation to curb corruption and ensure good governance. Leadership should be participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive, and follow the rule of law. This could ensure that corruption is minimised, the views of communities are taken into account and the voices of the most vulnerable in society are heard in decision-making.

For the Public Protector this journey is however, far from over. As stated in the Report, the PPSA will continue to monitor the remedial action.

At this juncture, I take this opportunity to confirm, that we have received Parliament's progress report, as at 26 June 2023, on their Implementation Plan of the remedial action stemming from the State of Capture Report as well as the progress.

These reports are expected to provide progress on the President's broad commitment to reforms in the areas of whistle-blower protection and incentivisation, procurement reform, the capacitation and strengthening of law enforcement and other accountability institutions, the professionalization of the public administration, and the protection of public institutions from abuse.

We confirm that Parliament has advised inter alia, that the National Assembly has requested the Minister of Justice and Correctional Services to investigate possible shortcomings in the legal framework regulating the ethical conduct applicable to Executive Members, including specific aspects of the Remedial Action in paragraph 8.9 of the State of Capture Report, as it relates to the Executive Members Ethics Act, 1998, that may require legislative amendment, and to introduce these to Parliament as a matter of urgency. As for the transversal code of conduct for all employees of the state, the Department of Public Service and



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Administration indicates that the code was actually reviewed extensively in 2016. Currently Public Service Regulations of 2016 of the Public Service Act, 1994, are being updated to bring them in line with the Public Administration Management Act, 2014.

Coupled with the amendments to the Public Protector Act that we have submitted to the Minister of Justice and Correctional Services on 5 June 2023. We are confident that the work of the PPSA will soon, more than ever before produce its intended purpose of truly being a vanguard of South Africa's Constitutional Democracy.

Once again, on behalf of the Public Protector South Africa, I express my gratitude to members of the media for making it possible for us to share our work with the nation, the continent and indeed the world.

We also extend our thanks to the various departments that have cooperated with the PPSA during our investigations.

Thank you to the people of South Africa for your patience in allowing us to complete our work, and to all those watching and listening via TV, social media streams and radio for taking the time to witness the work of the PPSA today.

I would like to thank the PPSA team across the country for the valiant efforts you have put into holding our name high and serving the People of South Africa.

Adv. Kholeka Gcaleka

Acting Public Protector - Republic of South Africa

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