



Media Release

Tuesday, 5 November 2013

Public Protector responds to criticism regarding the Nkandla provisional report

The Public Protector has noted concerns reported in the media in relation to her report on investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the Nkandla private residence of President Jacob Zuma in KwaZulu-Natal.

On the issue of the uncertainty regarding the competent authority to receive a report that is a result of an investigation conducted in terms of the Executive Members' Ethics Act, the Public Protector would like to remind concerned parties that the Constitution gives her the power to "take appropriate remedial action."

In this regard, taking issue with the fact that remedial action addressing the very uncertainty referred to above was yet to be fully implemented more than three after the Public Protector brought it to the attention of competent authorities cannot have any intention other than to ensure that the directives of a constitutional institution that has the responsibility to strengthen constitutional democracy are heeded in the interest of good governance.

The Public Protector is of the strong view that her role is not simply to indicate remedies in a report and move away. If her office is to make a meaningful contribution and stay true to its constitutional mandate, the Public Protector has a responsibility to follow up on implementation of remedial action or the office will be rendered a gate to nowhere.

On the issue of not favouring the President with a copy of the provisional report issued on Friday, it was made clear that organs of state within the Security Cluster made a special request to have access to the report ahead of all the other parties, including respondents and complainants. This was purely for purposes of establishing whether or not the report will compromise the security of the President. It was in this regard that we acceded to their request because we take issues that relate to the security of the Head of State seriously.

In the same statement, we made it clear that the parties that received the report have until Wednesday, November 6, 2013 to submit their comments. The Public Protector would soon thereafter share the report with the rest of the parties for comments on the merits of investigation, unlike the parties that currently have the report, whose sole interest is the President's security considerations. The Presidency will then be one of the respondents to receive the report once the security issues have been considered.

The report could not, at that stage, be given to one respondent (the Presidency) and not others because the position was and still is that if it is given to the one respondent, all other parties must also get it. This approach would not have worked in so far as the request of the organs of state within the Security Cluster is concerned.

On the issue of media reports that the Public Protector suggested that the public would be "disappointed" by the outcome of the investigation, it is important to highlight the fact that the Public Protector was responding to a line of questioning that presumed that she will make adverse findings against the President. Refusing to be drawn into the content of the report as indicated in the said media reports, the Public Protector suggested to the reporter that it may well be that what people are expecting to be the outcome is not the case. This cannot be equated to bias; it is in fact the opposite. Having said that, speculative reporting is to be expected because of the gravity of the public interest in the investigation.

It is worth noting, however, that the concerned parties have not condemned the possibly unlawful conduct of certain government officials who are being quoted as anonymous sources in the media, claiming to have seen the content of the report and sharing what they purport to be the findings of the Public Protector.

Also worth noting is the emergence of consistent and unwarranted attacks on the office of the Public Protector by certain quarters of the political spectrum as the Public Protector nears the completion of her investigation into this matter. It is the motives that inform these attacks that should be questioned.

The Public Protector wishes to assure members of the public of her independence and impartiality; and that she will continue to exercise her powers and perform her functions without fear, favour or prejudice as required by the Constitution. While noting the overwhelming public interest in the report, the Public Protector calls on members of the public to exercise patience and allow due processes to unfold, paving the way for the release of the report.

Like all other provisional reports issued by the Public Protector, the report in question is confidential. The Public Protector will only be in a position to release the report to the public after having received comments from all parties, considered them and, to an extent possible, integrated them into the report.

Public Protector assures the people of South Africa of her independence, impartiality

Public Protector Adv. Thuli Madonsela would like to assure the people of South Africa of her office's continued independence and impartiality.

“We conduct all of our investigations and, where appropriate, prepare reports without fear, favour or prejudice,” she said.

The Public Protector invited all persons interested in the Nkandla investigation to await the final report and read it carefully to determine whether her office keeps its commitment.

Meanwhile, organs of state within the Security Cluster, who were last Friday favoured with the Nkandla provisional report, have been granted an extension to submit their comments by Friday, November 8, 2013. This followed their request for more time, to go through the report.

The said organs of state earlier made a special request to have access to the report before it is shared with the rest of the parties, with a view to commenting on whether or not it compromises the security of the President.

The rest of the parties, including respondents and complainants, will get the report as soon as possible thereafter. However, complainants and some of the respondents will only be invited view the report at the Public Protector’s offices, in the presence of members of the investigation team due to security reasons. This will either take place in Pretoria or Cape Town.

The Public Protector would like to reiterate the point that, like all other provisional reports issued by her office, the report is confidential. She will only be in a position to release the report to the public after having received comments from all parties, considered them and, to an extent possible, integrated them into the report.

Friday, 8 November 2013

Public Protector receives court papers regarding Nkandla provisional report

The Public Protector on Friday, November 08, 2013, shortly before 9H00, received court papers indicating the state’s intention to interdict and restrain her from releasing her provisional report on the security upgrades at the President’s private home in Nkandla, KwaZulu-Natal to affected, implicated and interested parties for comments.

The state’s application for a court order in this regard is set to be heard in the North Gauteng High Court in Pretoria on Friday, November 8, 2013 at 14H00. The Public Protector has briefed the lawyers representing her office to request a postponement to allow her to prepare a proper response.

The Public Protector was due to receive comments on the report from organs of state within the Security Cluster on Friday, November 08, 2013. This follows a special request made by the organs of state in question to have access to the report ahead of all other parties, with a view to only establishing if the report would compromise the security of the President or not.

The report was shared with the said parties on Friday, November 1, 2013, with a return date of Wednesday, November 6, 2013. The deadline was subsequently extended to Friday, November 08, 2013, following a request from the organs of state concerned.

Due to the overwhelming public interest in the matter, the Public Protector will hold a media briefing in due course. Details in this regard will be announced.

Saturday, 9 November 2013

Public Protector to clarify issues relating to the court action on the Nkandla provisional report

The Public Protector will on Monday, November 11, 2013 issue a comprehensive statement, clarifying the issues that led to the court action on her provisional report regarding the security upgrades at the President's private home in Nkandla, KwaZulu-Natal. The statement will also clarify why the Public Protector is taking the position she is taking on the process. A media briefing will be held after the matter has gone to court on Friday (November 15, 2013). Details about the briefing will be communicated in due course.

Monday, 11 November 2013

Public Protector clarifies issues relating to the Nkandla provisional report court bid

The Public Protector respects the court process relating to her provisional report on the investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the Nkandla private residence of President Jacob Zuma in KwaZulu-Natal.

As such, the Public Protector will not anticipate in her remarks the outcome of the application. However, the Public Protector wishes to clarify the reasons that led to her unwillingness to granting the organs of state concerned more time than the five days she had given them and the rationale behind her opposition of the security cluster's court bid.

On the reluctance to grant the state a longer extension, the Public Protector was of the view that acceding to the request would be an injustice on the affected and implicated parties. She was, as indicated in her letter to Minister Thulas Nxesi on 5 November 2013, concerned that leaving the report in the hands of the security cluster for an unduly extended period would prejudice in particular those that she has made provisional adverse findings against and those she has quoted as having provided her with evidence and who, to date, have not received the report. It would also not be in the public interest if the security cluster has exclusive possession of the report. These concerns were expressed to the Minister, who offered no solutions to them.

Despite these concerns, the Public Protector was in the process of reconsidering her position, in the interest of keeping the spirit of cooperation that she has been trying to engender every time she encountered obstacles in the investigation.

However, the security cluster gave the Public Protector no opportunity to do so because the letter requesting more time arrived on the afternoon (around 14H00) of Thursday, November 7, 2013, indicating that if she did not respond in an hour, it would be assumed that she was declining. The

Public Protector was out of town on the day and the state was made aware of this. She only got the information later than night. A response had been prepared when the Public Protector received court papers shortly before 09H00 on Friday, November 8, 2013.

Regarding the basis for opposing the concerned organs of state's court bid, it is now public knowledge that the deadline of the November 15, 2013 for comments has already been *de facto*-granted in that it was the Public Protector who asked for the postponement of the matter and she determined the exact number of days.

The public may want to know why she opposes the extension if it has been granted, *de facto*. The Public Protector opposes the application on two grounds. The first is that the security cluster says it has a right to a provisional report and the other being that the court papers are in effect asking for an extension that goes beyond the 10 working days requested in the two letters to her. The security cluster requests that they be given further opportunity to peruse the "revised" provisional report to determine whether all the security concerns would have been addressed and if not be granted further opportunity to make written comments within seven days. In the event the Public Protector does integrate all of the concerns raised, the security cluster requests leave to approach the court. (See attached flow chart.)

The Public Protector will clarify in detail in court papers why she believes the security cluster's request is unlawful, unconstitutional and violates the independence of her office.

The Public Protector would further like to put it on record, again, that it was not her who voluntarily decided to share the report in question with the concerned organs of state ahead of other parties as has been suggested. It was, in fact, these organs of state that made a special request to the Public Protector, advancing the reasons that they wanted to ensure that the content does not compromise the security of the President.

The attached flowchart shows how a provisional report of the Public Protector is normally handled, how the current report was handled at the request of the state and how the state has now, in court papers, demanded that the report be handled.

Wednesday, 13 November 2013

Public Protector files opposing affidavit in response to the court interdict by the security cluster

Public Protector Adv. Thuli Madonsela on Tuesday afternoon filed an opposing affidavit at the North Gauteng High Court in Pretoria in response to an application filed last Friday by organs of state with in the security cluster.

The concerned organs of state sought to interdict and restrain the Public Protector from releasing her provisional report on the security upgrades at the President's private home in Nkandla, KwaZulu-Natal to affected, implicated and interested parties for comments.

The court will hear the matter on Friday, November 15, 2013.

Thursday, 14 November 2013

Public Protector welcomes Security Cluster Ministers' withdrawal of their court bid against her

Public Protector Adv. Thuli Madonsela welcomes the decision by the Ministers of Police, Defence, State Security and Public Works to abandon their urgent application against her, due to be heard in the Pretoria High Court on 15 November 2013. The only arguments that will be heard by the Court relate to costs.

The Ministers had asked the Court to order the Public Protector not to disclose her provisional report regarding alleged irregularities in public expenditure at Nkandla to implicated persons and to the complainants in the matter. They had invoked the personal safety of the President and the security of the State as grounds for their application.

Such disclosure – under strictly-supervised circumstances to protect any confidentiality – is one applied by the Public Protector in accordance with the procedure she has devised to balance fairness to implicated and affected parties and any issue of confidentiality that may exist in any particular matter, with the openness and transparency required by the Constitution.

The powers given to the Public Protector in this regard are pursuant to section 182 of the Constitution and *inter alia* sections 6(4)(a)(i) and 6(4)(b)(iii), 7(1)(a) and (b), 7(2) and 7(9)(a) of the Public Protector Act 23 of 1994.

The Minister's abandonment of their application comes after an affidavit filed by the Public Protector answering the contentions advanced by the Ministers as to why the Court should intervene to prohibit her from carrying out these functions.

The decision by the Ministers not to pursue the application is welcomed both in the interests of co-operative governance and in recognising the autonomy and independence of the Public Protector. The Public Protector shall accordingly continue on course to complete the Nkandla investigation and final report, following consideration of any responses by the implicated and other affected parties to whom the provisional report will be disclosed.

The Public Protector will indicate the timelines once she has assessed the amount of work to be done with regard to evaluating the submissions expected from the Ministers on Friday, November 15, 2013.

Friday, 15 November 2013

Public Protector welcomes Security Cluster Ministers' withdrawal of the orders they sought against her

Yesterday the Ministers of Police, Public Works, Defence and State Security indicated in their replying affidavit that the series of five orders they had sought against the Public Protector were abandoned. The Ministers however stated that they required the Public Protector to pay the legal costs occasioned by their application.

The attorneys for the Public Protector, Adams & Adams, called upon the State Attorney to file the necessary notice of withdrawal in terms of High Court procedure and in addition to undertake to pay the legal costs incurred by the Public Protector in opposing the application.

This morning a formal notice of withdrawal was received by the Public Protector, together with a tender to pay the legal costs, including the costs of two counsel.

When the Court convened at 10h00 this morning, this notice and tender of costs were recorded by the judge.

The Public Protector welcomes the abandonment by the Ministers of orders they had sought entitling them to vet a report by her. She reaffirms her commitment to complete, in compliance with law, the investigation and final report relating to the Nkandla project. In this regard it is also noted with appreciation that the Ministers in their replying affidavit filed yesterday “have no desire to dictate to [the Public Protector] when and how to release the provisional report.”

For the Public Protector, this is the important principle on the basis of which the application was opposed. Section 182 of the Constitution, read with section 181, provides that the Public Protector’s powers are to be exercised independently and without fear, favour or prejudice. Further, that other organs of State “must assist and protect” the Public Protector to ensure her independence and effectiveness. Section 182 confers on the Public Protector, the power to investigate any alleged or suspected improper conduct in state affairs or the public administration, to report on that conduct and to take appropriate remedial action. There is no provision for sharing that power with another person or entity. Section 181(4) states explicitly that “no person or organ of State may interfere with the functioning of [the Public Protector].” Also, in terms of the Public Protector Act, it is the Public Protector’s sole discretion to determine how to conduct her proceedings and to make findings.

“It is unfortunate in this regard that in an affidavit filed by the Acting State Attorney, Pretoria a request was made to the Court to refer what I stated in my affidavit regarding past obstruction experienced in the investigation ‘to the Bar Council for further investigation’, in relation to my own conduct,” the Public Protector said.

“I welcome the fact that no such request in the event was addressed to the presiding judge, and nothing further has been said in support of it. I and my team cannot allow ourselves to be intimidated in any way in the course of any investigation.”

The Public Protector hopes that a co-operative relationship with all parties involved in the investigation will be restored and subsist, without the incurrence of yet further legal costs to be borne by the tax-payer.