

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

**Undue Delay, Improper Conduct, Gross Negligence and Maladministration by the
Minister of Police and South African Police Service in its failure to Provide Whistle-
Blowers with Security at State Expense after it was Recommended that they needed
Protection.**

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY, GROSS
NEGLIGENCE, IMPROPER CONDUCT AND MALADMINISTRATION BY THE MINISTER
OF POLICE AND THE SOUTH AFRICAN POLICE SERVICES IN FAILING TO PROVIDE
WHISTLE-BLOWERS WITH SECURITY PROTECTION AT STATE EXPENSE
FOLLOWING THE EXPOSE OF ALLEGATIONS OF MALADMINISTRATION,
CORRUPTION AND THE UNCONSCIONABLE EXPENDITURE OF PUBLIC FUNDS BY
THE UMZIMKHULU LOCAL MUNICIPALITY IN CONNECTION WITH THE RESTORATION
OF THE HERITAGE OF THE DILAPIDATED UMZIMKHULU MEMORIAL HALL**

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Executive Summary

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.
- (ii) The report communicates my findings and an appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of undue delay, gross negligence, maladministration and improper conduct by the Minister of Police and the South African Police Service (SAPS) in failing to provide security protection at state expense to two whistle-blowers involved and who assisted the Public Protector in the investigation into allegations of maladministration, corruption and the unconscionable expenditure of public funds by the uMzimkhulu Local Municipality in connection with the restoration of the heritage of the dilapidated uMzimkhulu Memorial Hall.
- (iii) The investigation was initiated following publications by various media outlets relating to allegations of maladministration, corruption and the unconscionable expenditure of public funds by the uMzimkhulu Local Municipality in connection with the restoration of the heritage of the dilapidated uMzimkhulu Memorial Hall. The investigation was prompted by allegations that a Councillor of the uMzimkhulu Local Municipality, Cllr Sindiso Magaqa was killed for having exposed and/or enquired about the allegations of corruption in the construction of the hall in particular the fact that the amount of money in public funds that had already been spent by the municipality is not commensurate with the work that had already been done and completed in the construction of the hall.
- (iv) During the investigation, I had an interview session with two whistle-blowers, *Messrs. Les Stuta and Thabiso Zulu*, held in Pretoria on 28 September 2017. The two gentlemen were speakers at the funeral of the late Cllr Magaqa and at the funeral, they made allegations of corruption at Umzimkhulu Local Municipality, in particular concerning the refurbishment of uMzimkhulu Memorial Hall.

- (v) At the interview they raised the question of their safety in that they feared for their lives, that they may be assassinated for the revelations they made at the funeral regarding the allegations of corruption at the uMzimkhulu Municipality and thus requested that I assist them in ensuring that the state provided them with security at state expense. Messrs. Zulu and Stuta's speeches at the funeral of Cllr Sindiso Magaqa were captured on video and can be accessed on the following links;

<https://www.youtube.com/watch?v=MNOsVkJRI-w>

<https://www.youtube.com/watch?v=MCEnt5S7CCk&t=11614s>

- (vi) After being requested to assist the whistle-blowers to be provided with security protection at state expense due to the sensitivity of their exposures, I took up the matter with the relevant Departments charged with and/or responsible for the assessment and provision of security in the Republic who are the South African State Security Agency (SSA) and the South African Police Services (SAPS) respectively.
- (vii) **Based on the analysis of the allegations contained in the media reports, the requests from the whistle-blowers as well as information that came to my attention from various sources, I identified the following issue to inform and focus this investigation:**
- (a) Whether the Minister of Police and the South African Police Services failed to provide security protection at state expense to whistle-blowers, Messrs. Les Stuta and Thabiso Zulu who assisted the Public Protector in the investigation of this matter and if so; whether such conduct constitutes undue delay, improper conduct, maladministration and gross negligence on the part of the SAPS.

- (viii) The investigation process was conducted through correspondence and interviews with the whistle-blowers, Messrs. Les Stuta and Thabiso Zulu; as well as correspondence and meetings with relevant officials from the SAPS, including but not limited to the former Minister of Police, Mr Fikile Mbalula, the current Minister of Police, Hon Bheki Cele, the Chief of Staff of the Minister of Police, Ms Sharon Gaehler, officials from SAPS Crime Intelligence, namely Captain Regina Masemola; Colonel Gretha Grobler; Lieutenant Colonel Bheki Zulu, and the Staff Officer in the Office of the National Commissioner, Colonel Tumelo Nkhahle; as well as an inspection of all relevant documents and analysis and application of all relevant laws, and related prescripts.
- (ix) Key laws taken into account to help the Public Protector determine if there had been undue delay, gross negligence and maladministration by the SAPS were principally those imposing administrative standards that should have been upheld by the SAPS. Those are the following:
- a. Section 205(3) of the Constitution of the Republic of South Africa, 1996, which outlines the objects of the police service as to prevent, combat and investigate crime, to maintain public order, to protect the inhabitants of the Republic and their property, and to uphold the Constitution;
 - b. Section 237 of the Constitution which provides that any Constitutional duty must be performed diligently and without delay;
 - c. Section 13(3)(a) of the SAPS Act, 1995 which provides that “[a] member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.”; and

- d. According to the SAPS Code of Conduct, members of the SAPS further commit themselves to the creation of a safe and secure environment for all people in South Africa by amongst others, preventing action which may threaten the safety and security of any community. In order to achieve this, members of the SAPS undertake to render a responsible and effective service of high quality which is accessible to every person.
- (x) Having considered the evidence uncovered during the investigation, as against the relevant regulatory framework, the complaints received as against the concomitant response by the SAPS and the SSA, I now make the following findings.
- (a) **Whether the Minister of Police and the South African Police Services failed to provide security protection at State expense to the whistle-blowers, Messrs. Les Stuta and Thabiso Zulu who assisted the Public Protector in the investigation of this matter and if so; whether such conduct constitutes undue delay, improper conduct, maladministration and gross negligence on the part of the SAPS.**
- (aa) The allegation that the Minister of Police and the SAPS failed to provide Messrs. Les Stuta and Thabiso Zulu security with protection at state expense due to threats to their lives following the exposé of alleged corrupt activities in the uMzimkhulu local Municipality pertaining to the refurbishment of uMzimkhulu Memorial Hall **is substantiated**;
- (bb) The Minister of Police in particular, as well as the SAPS and the SSA were requested in November 2017 to conduct Security Threat Assessments on Messrs. Stuta and Zulu. The SAPS conducted the assessments in mid-December 2017 and the SSA in April 2018. Since December 2017 SAPS has failed to provide the Assessment Report and neither have they provided Messrs. Stuta and Zulu with the required security protection;

- (cc) Messrs. Stuta and Zulu are living in fear for their lives. They are unable to enjoy living a normal life as they are always afraid that they may be assassinated at any time. They had to abandon their homes in uMzimkhulu and are currently living in Durban and Kokstad respectively.
- (dd) The failure by the Minister of Police and the SAPS to provide security protection for Messrs. Stuta and Zulu exposes them to a risk of being assassinated. It also exposes the SAPS and the South African Government to a risk of unnecessary legal claims and financial losses as their families could decide to claim against government for damages for the loss of their lives should they be assassinated;
- (ee) The Minister of Police and the SAPS's conduct falls short of the standard of service delivery that a citizen of the Republic of South Africa would expect, as outlined in the Constitution of the Republic of South Africa, the SAPS Act and its Code of Conduct. SAPS's failure to protect the two whistle-blowers could have dire consequences, which had been communicated to SAPS on numerous occasions.
- (ff) The Minister of Police and the SAPS's conduct in dealing with my request to provide protection to the two whistle-blowers can only be described as grossly negligent, and a slap in the face to the very people that members of SAPS are employed to protect;
- (gg) The Minister of Police and the SAPS's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay, gross negligence and maladministration as envisaged in section 6(4)(a) of the Public Protector Act.
- (hh) The Minister of Police and the SAPS's conduct could have resulted in unnecessary loss of lives due to their tardiness and negligence in rendering assistance to inhabitants such as the two whistle-blowers.

- (xi) **The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the gross negligence, undue delay, improper conduct and maladministration referred to in this report is the following: -**

The President to take urgent and appropriate steps to;

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

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

- (aa) Provide me with a copy of the Security Threat Assessment conducted by the SAPS Crime Intelligence in December 2017, within three (3) days from the date of this report;
- (bb) Ensure that the recommendations of the SAPS's Security Threat Assessment, and the Security Threat Assessment conducted by the State Security Agency is fully implemented within seven (7) days from the date of this report and ensure that Messrs Zulu and Stuta are provided with the requisite security at state expense; and

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

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

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

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY, IMPROPER CONDUCT, GROSS NEGLIGENCE AND MALADMINISTRATION BY THE MINISTER OF POLICE AND THE SOUTH AFRICAN POLICE SERVICES TO PROVIDE SECURITY PROTECTION AT STATE EXPENSE TO WHISTLE-BLOWERS WHO ASSISTED THE PUBLIC PEOTECTOR IN THE INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, CORRUPTION AND THE UNCONSCIONABLE EXPENDITURE OF PUBLIC FUNDS BY THE UMZIMKHULU LOCAL MUNICIPALITY IN CONNECTION WITH THE RESTORATION OF THE HERITAGE OF THE DILAPIDATED UMZIMKHULU MEMORIAL HALL

1. INTRODUCTION

- 1.1. This is my report as the Public Protector in terms of Section 182 (1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and Section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation: -
 - 1.2.1. The President of the Republic of South Africa, His Excellency President Matamela Cyril Ramaphosa;
 - 1.2.2. The Minister of Police, Hon. Mr. Bheki Cele, MP;
 - 1.2.3. The Minister of State Security Agency, the Hon. Ms Dipuo Letsatsi- Dube
 - 1.2.4. The National Commissioner of Police, General Khehla John Sithole;
 - 1.2.5. Messrs Les Stuta and Mr Thabiso Zulu.

- 1.3 This report relates to an investigation into allegations of undue delay, gross negligence, improper conduct and maladministration by the Minister of Police and the SAPS to provide security protection at state expense to two whistle-blowers who were involved and assisted the Public Protector in the investigation into allegations of maladministration, corruption and the unconscionable expenditure of public funds by the uMzikhulu Local Municipality in connection with the restoration of the heritage of the dilapidated uMzikhulu Memorial Hall.

2. THE COMPLAINT

- 2.1 On 20 September 2017, I decided to conduct an investigation on Own Initiative following publications by various media outlets of allegations of maladministration, corruption and unconscionable use of public funds by the uMzikhulu local Municipality resulting in the killing of Councillors who dared to question the expenditure relating to the refurbishment of the uMzikhulu Memorial Hall,
- 2.2 It was alleged that there was maladministration, corruption and unconscionable use of public funds by the uMzikhulu Local Municipality in connection with the restoration of the heritage of the dilapidated uMzikhulu Memorial Hall. I decided to investigate the matter as the allegations attracted a lot of by the public interest. The other consideration was the seriousness of the allegations of imprudent use of public funds, as well as allegations of killing of Councillors who may have blown the whistle about the matter.
- 2.3 Various media reports were published following the shooting on 13 July 2017 of the late Councillor Sindiso Magaqa, as well as speeches that were made *inter alia* by Messrs. Thabiso Zulu and Les Stuta at his funeral held on 16 September 2017. The *Mercury* newspaper publication of 1 November 2016 reported under the title, ***“Project drains millions”*** that:

“ONE of KwaZuluNatal’s best-run councils, Umzimkhulu, has been accused of wasting taxpayers’ money in a failed construction project that has already seen millions go down the drain.

In late 2013, the southern KZN municipality awarded East London-based Loyiso Consultants a R17.9 million contract to upgrade the town’s ‘memorial hall’ over 18 months. But three years later, the upgrade is nowhere near completion and a contractor has allegedly abandoned the project.

Another company was awarded R14 million in April this year to ‘complete’ it.

A high- ranking municipal insider told The Mercury the whole project was ‘scandalous’ and required urgent investigation.

The project was initially meant to be concluded in June last year but was extended for ‘six to nine months’, a June 2015 quarterly report states. In the report, municipal manager Zweliphansi Sikhosana concedes that the project has been delayed because Loyiso Consultants have not met ‘contractual obligations’.

Some of the reasons given for the slow progress by Sikhosana include a funding shortfall and the lengthy metal strike in 2014.

Restoration

A description of the project indicates that the upgrade would have seen ‘the restoration of the heritage of the dilapidated building’. Offices, a community hall, cafe and gym would have been added.

The municipal insider alleges that Loyiso Consultants ‘abandoned’ the project when millions had already been spent. In 2014, the company asked that the municipality pay a subcontractor, Sifiso Building Consultants, directly. The reason for the request is not clear except that Loyiso Consultants ‘deemed it expedient’.

In April this year, Buyeye Consulting was appointed to complete the abandoned project.

But in February, two months before that, Buyeye Consulting was paid R354 000 by the municipality.

'It's a mystery. Why was Buyeye already being paid even before the company was appointed? What's more concerning is that the municipality then paid Buyeye R3 million before the company set foot on the site; even today, there is no construction taking place. All these monies have gone down the drain,' the source said.

The Mercury has seen the project's schedule of payment for the second contractor. The company was appointed on April 29. Between April 1 and 4, eight people were each paid amounts of between R1 300 and R15 500. It is not clear what the monies were for.

It is understood that the company was paid R 650 000 on June 10. Later, on June 29 and 30, the company received payments of R 1.6 million and R1.7 million. 'If you are in the construction industry, you will know that it is almost impossible to make two claims – not to mention three – in the same month. When was the necessary evaluation and certification of the work done completed? It cannot be done in 24 hours,' he said.

Efforts to get comment from Loyiso Consultants and Buyeye Consulting were unsuccessful at the time of publication.

Umzimkhulu spokesman Willie Mgcina said of the R17.9 million awarded to Loyiso Consultants, only R9 million had been used.

'The amount left after the termination of Loyiso Consultants' contract is R8.8 million,' he said.

During construction, 'there were various problems encountered ... emanating from non-performance or poor performance' which led to the termination of the contract in February.

Thiat was after it became 'apparent the contractors were not performing well'.

The R14 million to Buyeye was due to 'financial escalation due to longer time taken to finish the project'. He said questions about the project were 'just intended to tarnish' the reputation of Umzimkhulu, since the municipality was one of the best-performing in the province." (sic)

- 2.4 On 16 September 2017, the *Mail & Guardian* newspaper published another article titled, ***"Magaqa died because he did not approve of looting"*** and stated that;

"Fresh allegations that former ANC Youth League secretary general Sindiso Magaqa was killed for attempting to expose rampant corruption in the Umzimkhulu Local Municipality have been exposed at his funeral in the Southern KwaZulu-Natal town today.

Magaqa (34), who died two weeks ago from injuries sustained in a hit on him and two other councillors from the town in July, was laid to rest amid a heavy security presence in response to raised tensions overs his murder.

The ANC top brass, led by Treasurer General Zweli Mkhize, turned out for the funeral, held on the same sports field where Umzimkhulu speaker Khaya Thobela was buried in May after he too was assassinated.

ANC chairperson Sihle Zikalala who, like Mkhize, addressed the funeral, attended along with secretary Super Zuma and most of the provincial executive committee, despite the High Court ruling on Tuesday setting aside the result of the provincial conference that elected them.

Finance Minister Malusi Gigaba, presidential hopeful Nkosazana Dlamini-Zuma, Small Business Minister Lindiwe Zulu and former ANCYL treasurer Pule Mabe also attended, with Zulu arriving by helicopter about an hour after the proceedings started.

The funeral was divided into three sections, the first and second addressed by the leader of the Methodist Church, to which Magaqa belonged, his family and the Umzimkhulu

community. The third was run by the ANC, with Mabe, Zikalala and Mkhize all invoking Magaqa's name in a call for unity in the governing party.

Family speaker Les Sutha, also a local ANC activist, pulled no punches in his lengthy address, which made leadership uncomfortable as he challenged them to deal with both Magaqa's killing and the corruption he had fought against.

Magaqa, he said, 'did not approve of looting' and would force his comrades in the ANC and council to confront it.

Sutha said Magaqa had blown the whistle about corruption in the upgrade of the Umzimkhulu Memorial Hall, for which an Eastern Cape contractor who is 'somebody in council's brother-in-law' had been paid without doing the job.

Calling on the leadership to assist in dealing with the corruption, Sutha said 'we will give you everything you need to prove it.'

'Come investigate. We will support you. Please stop these who are killing our people. There are people here who love power too much,' Sutha said.

Addressing the thousands of mourners in the marquee, Zikalala said Magaqa's murder had caused 'despondency' in the ANC.

He said Magaqa and his comrades had caused a 'strategic shift' in the 'very conservative' ANC in 2012 with their campaign for economic transformation which they had started in 2008.

Likewise, the ANC Women's League if it wanted to end 'sexism' in the party, had to 'struggle' towards this end, an apparent reference to the campaign to elect Dlamini-Zuma as ANC president in December.

Mkhize, whose address had to be cut short as the marquee was hammered by howling winds, called for unity and told mourners the killers would be found and jailed.

Magaqa died two weeks ago after seemingly having recovered from the bullet wounds he sustained in an ambush in Umzimkhulu in July. A proportional representative councillor for Umzimkhulu since his return from the political wilderness, Magaqa had

been vocal about corruption in the Umzimkhulu Municipality and the Harry Gwala District Municipality under which it falls.

The Hawks said his week they are awaiting the results of ballistics and other tests to see if two alleged cash-in-transit robbers who were shot in a recent foiled heist were involved in his shooting.

Magaqa was shot along with two other ANC councillors, Jabu Mzizi and Nonsikelelo Mafa outside a general dealer in the southern KwaZulu-Natal town.

The attack followed the murder of another ANC councillor, Mdu Shibase in May. Two weeks before Shibase (39) was killed, the speaker of the municipality, Thobela, who was also deputy secretary of the ANC region, was also gunned down.” (sic)

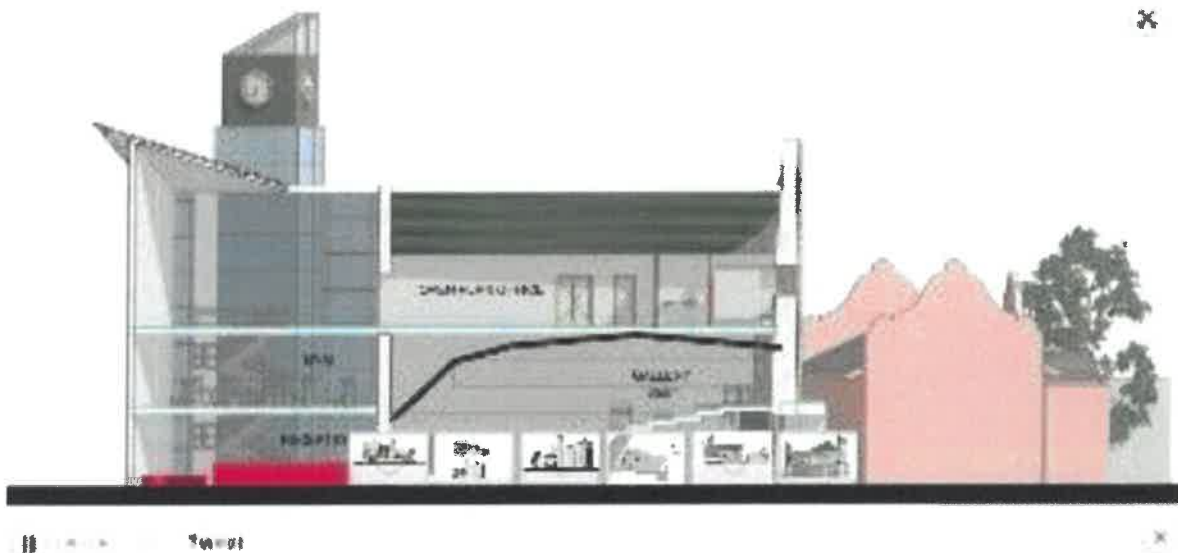
- 2.5 On 28 September 2017, I had an interview session with two whistle-blowers, Messrs. Les Stuta and Thabiso Zulu, held in Pretoria. The two gentlemen made speeches at funeral of the late Cllr Magaqa. While giving speeches at the funeral, they allegations of corruption at Umzimkhulu Local Municipality in particular concerning the refurbishment of uMzimkhulu Memorial Hall. The speeches of Messrs. Les Stuta and Tabiso Zulu at the funeral of Councillor Sindiso Magaqa can be viewed on links provided below;

<https://www.youtube.com/watch?v=MNOsVkJRI-w>

<https://www.youtube.com/watch?v=MCEnt5S7CCk&t=11614s>

- 2.6 At the interview they raised the question of their safety that they fear for their lives that they may be assassinated for the revelations they made at the funeral regarding the allegations of corruption at the uMzimkhulu Municipality and thus requested that I assist them in ensuring that the state provided them with security at state expense.

- 2.7 After being requested to assist the whistle-blowers to be provided with security protection at state expense due to the sensitivity of their exposures, I took up the matter with the relevant Departments charged with and/or responsible for the assessment and provision of security in the Republic.
- 2.8 During the period November 2016 to September 2017, various media houses had widely reported about the allegations of corruption and the reckless use of public funds by the uMzimkhulu Local Municipality in the procurement and payment of service providers who were involved in the project relating to the restoration of the heritage of the dilapidated Memorial Hall. In this regard, it has been alleged, *inter alia*, that: -
- 2.8.1 A tender for the upgrading and refurbishment of the uMzimkhulu Memorial Hall was awarded to *Loyiso Consulting* on 21 August 2012 for an amount of R 1338 190.20.
- 2.8.2 On 15 November 2013, the Municipality awarded another tender amounting to R17.9 million, for the upgrade and refurbishment of the Memorial Hall over a period of eighteen (18) months to *Loyiso Consulting*. (the same company) However, since then, the project had not been completed and the contractor was alleged to have abandoned the project. It was further alleged that *Mr Loyiso Magqaza*, the Director of *Loyiso Consulting*, was inappropriately linked and/or associated to a Senior Municipal Official by the name of *Ms Kumbuza Dweba*, who at the time of the awarding of the contract was the Director responsible for Infrastructure Development at the Municipality,
- 2.8.3 it was further alleged that the tender for the refurbishment of the hall ballooned from a budgeted amount of R17.9million to R37million despite the fact that the work that has been done and completed was not commensurate with the amount of money that has been paid to date. After, completion, the hall was expected to look like the drawing hereunder;



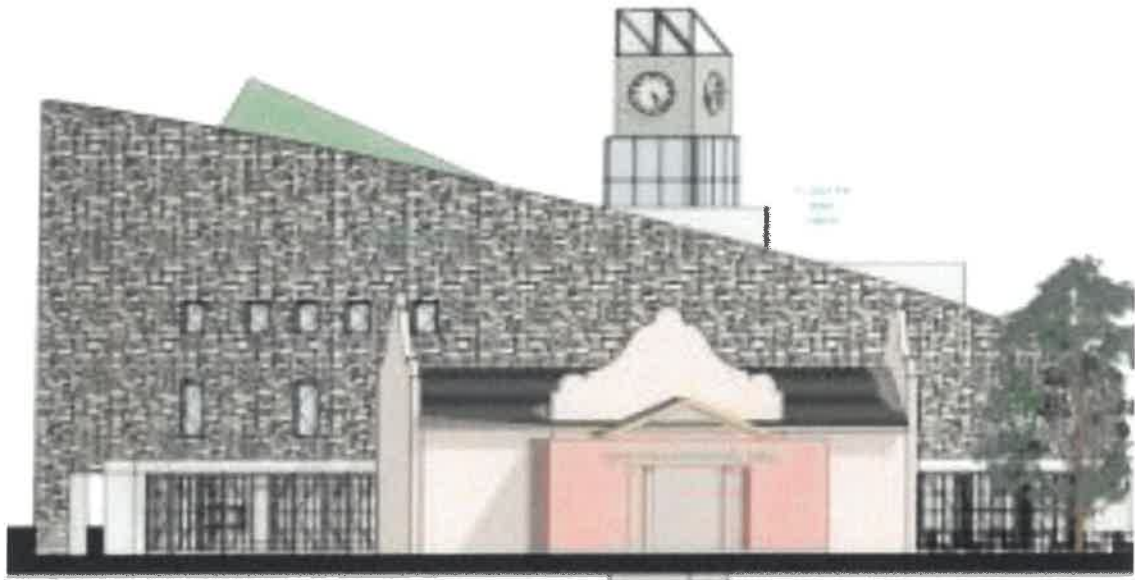
2.8.4 When *Loyiso Consulting* could not complete the project and abandoned it, the entity ceded its rights to an entity by the name and style, *Sfiso Building Contractors*, and thus requested the Municipality to pay the remaining R15 million of the contract directly to the latter. Despite *Sfiso Building Contractors* having been the contractor on site at the time, the Municipality had no contractual relationship with this entity. *Sfiso Building Contractors* also abandoned the project without completion.

2.8.5 Despite the fact that the municipality paid millions of rands to refurbish the hall, the picture below depicts the state as at the time of the investigation in December 2017 when the Public Protector decided that no further expenditure of public funds shall be incurred towards the refurbishment of the hall pending the outcome of her investigation into the allegations made by the whistle-blowers;



2.8.6 On 04 March 2016, the Municipality advertised a tender for the completion of the Memorial Hall under reference number KZN435/15/16/022/INFR, which was ostensibly awarded to *Buyeye Consulting* on 29 April 2016 at a cost to the Municipality of R14 525 018.05 to be completed over a period of ten (10) months.

2.8.7 The hall was designed by *IDC Architects* and it was expected that on completion, it will look like the design hereunder;



2.8.8 According to the information obtained during my preliminary investigation, it was established that, following the appointment of *Buyeye Consulting*, the municipality made various upfront payments to this entity, despite the fact that it had not at that stage set foot on the construction site. It was alleged that the entity was paid three (3) huge sums of money on three (3) consecutive days, R6 million, R7 million and R3 million.

2.8.9 It was further alleged that, between the 10 and 30 June 2016, *Buyeye Consulting* was paid the following amounts, R650 000.00, R1.6 million and R1.7 million respectively. These payments were allegedly made without the entity submitting Progress Payment Certificates as proof of work already completed.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

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

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

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

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

3.5. In the constitutional court, (in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)***), Chief Justice Mogoeng stated the following, when confirming the powers the public protector:

- 3.5.1 Complaints are lodged with the Public Protector **to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);
- 3.5.2 An appropriate remedy must mean **an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced**. (para 67);
- 3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, **she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint** (para 68);
- 3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their **nature, context and language**, to determine what course to follow. (para 69) ;
- 3.5.5 Every complaint requires **a practical or effective remedy** that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);
- 3.5.6 The Public Protector's power to take appropriate remedial action **is wide** but certainly not unfettered. What remedial action to take in a particular case, will be informed by the **subject-matter of investigation** and the **type of findings made**. (para 71);
- 3.5.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps.

3.5.8 Nothing in these words suggests that **she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;** (para 71(a));

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

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

3.6 The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, *“When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*

3.7 The SAPS is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector’s mandate to investigate.

3.8 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1. Methodology

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

- 4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.
- 4.1.3. This complaint was classified as a Good Governance and Integrity complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.

4.2. Approach to the investigation

- 4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

- 4.2.1.1. What happened?

- 4.2.1.2. What should have happened?

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

- 4.2.1.4. In the event of improper conduct or maladministration what would it take to remedy the wrong occasioned by the said improper conduct or maladministration?

- 4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry focused on whether and to what extent the SAPS fulfilled its responsibilities.

- 4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration and prejudice. In this case, key reliance was placed on legislation, prescripts and policies regulating the SAPS's responsibility to protect citizens and prevent violence.

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

4.3 Based on the analysis of the allegations contained in the media reports as well as information that came to my attention from various sources, I identified the following issue to inform and focus this investigation:

4.3.1 Whether the Minister of Police and the South African Police Services failed to provide security protection at State expense to whistle-blowers, Messrs. Les Stuta and Thabiso Zulu who assisted the Public Protector in the investigation of this matter and if so; whether such conduct constitutes undue delay, improper conduct, maladministration and gross negligence on the part of the SAPS.

4.3. The Key Sources of Information

4.3.1. Documentation

4.3.1.1 Copy of Security Threat Assessment Report compiled by the State Security Agency, issued on 11 May 2018.

4.3.2. Correspondence exchanged;

4.3.2.1 Email from the Public Protector's investigator to Mr Zulu dated 18 September 2017;

4.3.2.2 Email from the Public Protector's investigator to Mr Zulu dated 21 September 2017;

4.3.2.3 Email from the Public Protector's investigator to Mr Stuta dated 21 September 2017;

4.3.2.4 Email received from Mr Stuta dated 21 September 2017;

4.3.2.5 Email received from Mr Zulu dated 25 September 2017;

- 4.3.2.6 Email from the Public Protector's investigator to Mr Zulu dated 26 September 2017;
- 4.3.2.7 Email received from Mr Zulu dated 26 September 2017;
- 4.3.2.8 Email from the Public Protector's investigator to Mr Zulu dated 26 September 2017;
- 4.3.2.9 Email received from Mr Zulu dated 26 September 2017;
- 4.3.2.10 Email received from Mr Zulu dated 26 September 2017;
- 4.3.2.11 Email from the Public Protector's investigator to Mr Zulu dated 27 September 2017;
- 4.3.2.12 Email from the Public Protector's investigator to Messrs Zulu and Stuta dated 27 September 2017;
- 4.3.2.13 Email from the Public Protector's investigator to Mr Zulu dated 27 September 2017;
- 4.3.2.14 Email from the Public Protector's investigator to Mr Stuta dated 27 September 2017;
- 4.3.2.15 Email received from Mr Zulu dated 14 November 2017;
- 4.3.2.15 Email from the Public Protector's investigator to Mr Zulu dated 15 November 2017;
- 4.3.2.16 Email received from Mr Zulu dated 15 November 2017;
- 4.3.2.17 Letter from the Public Protector to the former Minister of Police, Mr Fikile Mbalula dated 16 November 2017;
- 4.3.2.18 Letter from the Public Protector to the former Minister of State Security, Adv. Bongani Bongo dated 16 November 2017;

- 4.3.2.19 Letter from the Public Protector to Mr Zulu, dated 16 November 2017 and electronically transmitted on 17 November 2017;
- 4.3.2.20 Email received from Mr Zulu dated 20 November 2017;
- 4.3.2.21 Acknowledgement letter received from the Minister of State Security dated 22 November 2017;
- 4.3.2.22 Acknowledgement letter received from the Ministry of Police dated 24 November 2017;
- 4.3.2.23 Email from the Public Protector's investigator to Mr Zulu dated 28 November 2017;
- 4.3.2.24 Email sent from the Public Protector's investigator to Messrs Stuta and Zulu dated 05 December 2015;
- 4.3.2.25 Email received from Mr Zulu dated 19 December 2017;
- 4.3.2.26 Letter from the Public Protector to the former Minister of State Security, Adv. Bongani Bongo on 19 February 2018;
- 4.3.2.27 Email received from Mr Zulu dated 01 March 2018;
- 4.3.2.28 Email from the Public Protector's investigator to Lt. Col. Bheki Zulu dated 02 March 2018;
- 4.3.2.29 Email received by the Public Protector's investigator from Lt. Col. Bheki Zulu dated 02 March 2018;
- 4.3.2.30 Email received by the Public Protector's investigator from Captain Regina Masemola dated 05 March 2018;
- 4.3.2.31 Email from the Public Protector's investigator to Messrs Stuta and Zulu dated 28 March 2018;
- 4.3.2.32 Letter from the Public Protector to the Minister of State Security, Hon. Ms. Letsatsi-Duba, MP, dated 05 April 2018;

- 4.3.2.33 Letter from the Public Protector to the Minister of Police, Hon. Mr. Bheki Cele, MP, dated 05 April 2018;
- 4.3.2.34 Email received from Ms Sharon Gaehler, the Chief of Staff of the Minister of Police, dated 09 April 2018;
- 4.3.2.35 Email received from Ms Heibre van Wyk of the State Security Agency dated 09 April 2018;
- 4.3.2.36 Email from the Public Protector's investigator to Mr Zulu dated 10 April 2018;
- 4.3.2.37 Email with attached letter sent to the Director-General of the State Security Agency dated 10 April 2018;
- 4.3.2.38 Acknowledgement received from Ms Mmathapelo Mmitshane of the Office of the Director-General of the State Security Agency dated 11 April 2018;
- 4.3.2.39 Email with attached letter received from Ms Magrietha Pieterse of the State Security Agency dated 13 April 2018;
- 4.3.2.40 Email from the Public Protector's investigator to Ms Magrietha Pieterse of the State Security Agency dated 13 April 2018;
- 4.3.2.41 Email from the Public Protector's investigator to Ms Sharon Gaehler dated 13 April 2018;
- 4.3.2.42 Email received from Mr Zulu dated 14 April 2018;
- 4.3.2.43 Email from the Public Protector's investigator to Ms Sharon Gaehler dated 16 April 2018;
- 4.3.2.44 Email received from Ms Sharon Gaehler dated 17 April 2018;
- 4.3.2.45 Email received from Mr Zulu dated 27 April 2018;
- 4.3.2.46 Email from the Public Protector to Mr Zulu dated 27 April 2018;

- 4.3.2.47 Email from Colonel Tumelo Nkhahle to the Public Protector dated 28 April 2018;
- 4.3.2.48 Email received from Colonel Tumelo Nkhahle to Major – General Langa, and copied to the Public Protector dated 28 April 2018;
- 4.3.2.49 Email received from Mr Zulu dated 30 April 2018;
- 4.3.2.50 Email received from Mr Zulu dated 05 May 2018;
- 4.3.2.51 Email from the Public Protector's investigator to Ms T Mbambo and Mr M Mbuso of the State Security Agency dated 07 May 2018;
- 4.3.2.52 Email from the Public Protector's investigator to Ms Sharon Gaehler dated 07 May 2018;
- 4.3.2.53 Email received from Ms Sharon Gaehler dated 07 May 2018;
- 4.3.2.54 Email from the Public Protector's investigator to Mesdames Regina Masemola and Gretha Grobler of SAPS Crime Intelligence dated 08 May 2017;
- 4.3.2.55 Email received from Captain Regina Masemola dated 09 May 2018;
- 4.3.2.56 Email received from Mr Mbuso Mthembu of the State Security Agency dated 09 May 2018;
- 4.3.2.57 Email from the Public Protector's investigator to Colonel Tumelo Nkhahle dated 10 May 2018;
- 4.3.2.58 Email from the Public Protector's investigator to Colonel Nkhahle, the Staff Officer in the Office of the National Commissioner of Police, dated 11 May 2018;
- 4.3.2.59 Email from Col. Nkhahle to Colonel Ali Mathebula, copied to the Public Protector's investigator, dated 11 May 2018;
- 4.3.2.60 Email from Col. Nkhahle to the Provincial Commissioner, KwaZulu-Natal, copied to the Public Protector's investigator, dated 11 May 2018;

- 4.3.2.61 Email received from Ms Sharon Gaehler dated 11 May 2018;
- 4.3.2.62 Email from the Public Protector's investigator to Colonel Nkhahle dated 16 May 2018;
- 4.3.2.63 Email from the Public Protector's investigator to Colonel Tumeol Nkhahle and Ms Sharon Gaehler dated 24 May 2018;
- 4.3.2.64 Email from the Public Protector's investigator to Mr Zulu dated 28 May 2018;
- 4.3.2.65 Email received from Mr Zulu dated 28 May 2018;
- 4.3.2.66 Email received from Mr Zulu dated 29 May 2018;
- 4.3.2.67 Email from the Public Protector's investigator to Mr Zulu dated 29 May 2018;
- 4.3.2.68 Email received from Mr Zulu dated 30 May 2018;
- 4.3.2.69 Email received from Mr Zulu dated 31 May 2018;
- 4.3.2.70 Emails received from Mr Zulu dated 03 June 2018;
- 4.3.2.71 Email received from Mr Zulu dated 05 June 2018;
- 4.3.2.72 Email received from Mr Zulu dated 08 June 2018;
- 4.3.2.73 Email received from Mr Zulu dated 02 July 2018;
- 4.3.2.74 Email from the Public Protector's investigator to Mr Zulu dated 02 July 2018;
- 4.3.2.75 Email from the Public Protector's investigator to Mr Zulu dated 02 July 2018;
- 4.3.2.76 Email received from Mr Zulu dated 02 July 2018;
- 4.3.2.77 Email received from Mr Zulu dated 05 July 2018;
- 4.3.2.78 Email from the Public Protector's investigator to Mr Zulu dated 05 July 2018;
- 4.3.2.79 Email received from Mr Zulu dated 05 July 2018;

4.3.2.80 Letter received from the Legal Resources Centre on behalf of their client, Mr Zulu, dated 5 May 2018, received on 06 July 2018;

4.3.2.81 Letters from the Public Protector to the Legal Resources Centre, as well as the institution by the name Frontline Defenders, dated 25 July 2018.

4.3.3. Interviews, Meetings and Inspections *in loco*

4.3.3.1 Meeting with Messrs. Stuta and Zulu on 28 September 2017;

4.3.3.2 Meeting with Colonel Gretha Grobler and Captain Regina Masemola of SAPS Crime Intelligence on 04 December 2017;

4.3.3.3 Meeting with Ms Thokozani Mbambo and Mr Musa Mthembu of the State Security Agency on 19 April 2018.

4.3.4. Legislation and other prescripts

4.3.4.1 The Constitution of the Republic of South Africa, 1996;

4.3.4.2 The Public Protector Act, 23 of 1994;

4.3.4.3 The South African Police Service Act, 66 of 1995.

4.3.5. Policy Documents

4.3.5.1 The SAPS Code of Conduct, available on <http://www.saps.gov.za>.

4.3.6. Case Law

4.3.5.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT143/15;

CCT171/15) [2016] ZACC 11; (2016) (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016);

4.3.5.2 *South African Police Service v Police and Prisons Civil Rights Union and Another* (CCT89/10) [2011] ZACC 21 (9 June 2011).

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

5.1 Whether the Minister of Police and the South African Police Services failed to provide security at state's expense to whistle-blowers, to wit: Messrs. *Les Stuta and Thabiso Zulu* who assisted the Public Protector in the investigation of this matter and if so; whether such conduct constitute undue delay improper conduct, maladministration and gross negligence that could result in loss of lives: -

Issues that are Common Cause

It is not disputed that;

- 5.1.1 Messrs. Les Stuta and Thabiso Zulu, were the whistle-blowers in this matter and that, I had an interview session with them in Pretoria on 28 September 2017.
- 5.1.2 Security Threat Assessments were conducted into the two gentlemen by both the SSA and the SAPS though the latter appear to be reluctant to furnish me with a copy thereof despite confirmations from members of the SAPS involved.
- 5.1.3 The issue for determination by the Public Protector is whether the the Minister of Police and the SAPS should have provided security protection at state expense to Messrs

Les Situta and Tabiso Zulu on becoming aware through the security threat assessments of both the SSA and the SAPS that their lives were in danger and; whether the conduct of the Minister of Police and the SAPS was correct by ignoring calls for assistance from the Public Protector.

- 5.1.4 On 16 November 2017, I corresponded with the former Ministers of Police and State Security, Mr Fikile Mbalula and Adv. Bongani Bongo respectively, thus requesting their assistance to conduct a Security Threat Assessment on the whistle-blowers with a view to ascertain whether they were in need of the provision of security at State expense. In my correspondence to them, I wrote;

“...I kindly request the Minister to assist in conducting a Security Threat Assessment on Messrs. Situta (sic) and Zulu with a view to considering whether they can be offered security by the State.”

- 5.1.5 The correspondence was forwarded to the Ministers on 17 November 2017. On 21 November 2017, the former Minister of Police, Mr Fikile Mbalula, wrote to me and stated that,

“I have instructed SAPS management to conduct necessary analysis and required intervention in accordance with our standard operating procedures. I undertake to update you on the progress and assure you of the seriousness I take (sic) this matter.”

- 5.1.6 On 22 November 2017, the former Minister of State Security, Adv. Bongani Bongo acknowledged receipt of my correspondence and undertook to conduct a Security Threat Assessment on the two whistle-blowers.

5.1.7 Subsequently, on 04 December 2017, consultations were made with Colonel Gretha Grobler and Captain Regina Masemola of the SAPS Crime Intelligence Services. The purpose of the meeting was to explain the nature of the investigation, the threats received by the whistle-blowers, and the assistance which could be provided by the SAPS. On 2 March 2018, Lt. Col. Bheki Zulu of the SAPS corresponded with my office and stated that: -

“A Comprehensive Threat Assessment was indeed conducted by this office and reports were submitted to the relevant Desk of the Intelligence Analysis and Coordination (IAC) at Crime Intelligence Head Office.

I consulted with Regina MASEMOLA (sic) from that Desk who confirmed receipt of the reports. She told me that the Assessment Reports were forwarded to the SAPS Protection and Security Services (PSS) for implementation of the recommended police / security interventions.

She also committed herself to communicate with your office on Monday 2018-03-05, to provide clarity on this matter.”

5.1.8 The Complainants confirmed that on 11 December 2017, Lt. Col. Bheki Zulu from the Crime Intelligence Services arrived at an arranged venue in Pietermaritzburg and Kokstad to conduct a Security Threat Analysis on them. They further confirmed that the State Security Agency met with them on or about 14 December 2017. On 05 March 2018, Captain Regina Masemola of the SAPS Crime Intelligence Services corresponded with my office and wrote: -

“Please take note that the threat and risk assessments for the above mentioned principals was concluded and feedback was sent to the Division Protection and Security Services on 9 February 2018.”

- 5.1.9 Following a Cabinet reshuffle announced by His Excellency, President Matamela Cyril Ramaphosa on 26 February 2018, Mr Bheki Cele was appointed to the portfolio of a Minister responsible for the Police Services in the Republic of South Africa. On 05 April 2018 and when I could not receive any further assistance from the SAPS, I corresponded with Minister Cele thus requesting assistance with the provision of security at state expense for the two whistle-blowers, as well as requesting that a meeting on 19 April 2018 to enable me to brief him regarding the matter.
- 5.1.10 I also corresponded with the new Minister of State Security, the Hon. Ms. Dipuo Letsatsi-Duba with a request that we meet on 19 April 2018 so as to engage on the matter.
- 5.1.11 Acknowledgements of receipt were received from Ms Sharon Gaehler, the Chief of Staff of the Minister of Police, and from Ms Heibre van Wyk of the SSA. The correspondence to the Minister of State Security was also escalated to the Director-General of the State Security Agency on 10 April 2018.
- 5.1.12 On 13 April 2018, Ms Magrietha Pieterse in the Minister of State Security's office confirmed the Minister's availability for us to meet on 19 April 2018. However, due to unforeseen circumstances, the meeting did not materialise, instead the Minister delegated Ms Thokozani Mbambo and Mr Musa Mthembu from her office to assist.
- 5.1.13 Indeed, the said officials assisted and met the whistle-blowers and a Security Threat Assessment report was issued by the State Security Agency on 11 May 2018. In the report, it is recorded that in its investigation of the matter, the State Security recommended that: -

“4.1 Based on the above findings, the security assessment investigation conducted on the security and life threatened of Mr Thabiso Zulu and Mr Lesley Situta concludes that these two individuals urgently require protection from the State; and:

4.2 It is recommended that Mr Zulu and Mr Situta be protected by individual private protectors.”

5.1.14 In connection with the request for assistance by the Police, on 17 April 2018, the Chief of Staff for the Minister of Police, Ms Sharon Gaehler indicated that Minister Cele was in Umtata hosting MINMEC and as such could not meet with me on the proposed date of 19 April 2018 and thus suggested a date and time in May 2018. On 27 April 2018, I received an e-mail from the Complainant informing and lamenting about the continued life threatening calls they were receiving. Mr Zulu in particular shared his frustration about receiving death threats and the fact that his life was not safe.

5.1.15 On 28 April 2018 the Staff Officer in the National Commissioner’s office, Colonel Tumelo Nkhahle addressed correspondence to the Provincial Commissioner of the South African Police Services in KwaZulu-Natal Major General B P Langa and stated that: -

“1...

2. By the direction of the National Commissioner of Police General K J Sithole find herein appended a threat report from the Office of the Minister of Police for your urgent attention.

3. Kindly engage all the relevant stakeholders including the Office of the Public Protector.”

5.1.16 Despite the above instruction, I did not receive any communication from the Provincial Commissioner's office in KwaZulu-Natal. On 07 May 2018 my office communicated with Minister Cele's office in particular the Chief of Staff, Ms Sharon Gaehler, who indicated that she had been communicating with my Chief of Staff where she confirmed Wednesday 09 May 2018 after a Cabinet meeting which was held in Cape Town. This meeting did not take place and we had to reschedule as I was out of the country.

5.1.17 Thereafter, Ms Gaehler suggested a meeting on 16 May 2018 after a Cabinet meeting that was to be held in Cape Town. The meeting also did not materialise. The Minister of Police thereafter requested the National Commissioner of Police to attend to the matter.

5.1.18 On 17 May 2018, Minister Cele was interviewed on Power FM 98.7 in connection with the provision of security protection for the two whistle-blowers. He however denied receipt of any correspondence or request for the protection of the two gentlemen. He was of the view that the provision of protection for the two-whistle-blowers was a competence of the Department of Justice and stated with certainty that he never received the request. The interview with Minister Cele is available on the following link;

<http://soundcloud.com.powerfm987/bheki-celesley-plans-to-fight-crime>

5.1.19 During the investigation, it also came to my attention that there are other institutions such as the Moerane Commission of Inquiry and Ms Mary De Haas of the Violence Monitor who also reported the plight of these whistle-blowers to the SAPS but in vain. In this regard, the *Mail & Guardian* newspaper of 24 November 2017 published an article titled, "**Assassins target Moerane witnesses**",

5.1.20 On 4 June 2018, I issued the Minister of Police, Hon. Bheki Cele with a Notice in terms of section 7(9) of the Public Protector Act, 1994, thus affording him an opportunity to respond to what could be my findings in the matter and to present evidence to me which would persuade me against making findings of undue delay, improper conduct, maladministration and gross negligence which could result in the loss of lives.

5.1.21 Section 7(9)(a) of the Public Protector Act, 1994 provides that;

“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.” (my emphasis)

5.1.22 Despite the due date for response being the 22 June 2018, the Minister of Police failed to respond to the Notice. Efforts were made to solicit a response from him but in vain. Additional efforts were made to ensure that the response from the Minister was received and these efforts also failed. On 5 July 2018, the Chief of Staff of the Public Protector also approached the Chief of Staff of the Minister to enquire about the Minister’s response to the section 7(9) Notice issued by the Public Protector. She was referred to Adv. Simu of the SAPS Legal Services who also knew nothing about the Minister’s response to the notice.

The Application of the relevant laws and prescripts

The Constitution of the Republic of South Africa, 1996

- 5.1.23 The South African Police Service is governed by Chapter 11 of the Constitution which stipulates that the South African Police Service has *inter alia* a responsibility to protect and secure the inhabitants of the Republic and their property, create a safe and secure environment for all people in South Africa as well as prevent anything that may threaten the safety or security of any community.
- 5.1.24 Section 92(1) of the Constitution provides that, “*...Ministers are responsible for the power and functions of the Executive assigned to them by the President*”
- 5.1.25 Section 92(3) of the Constitution provides that, “*Members of the Cabinet must act in accordance with the Constitution*”
- 5.1.26 Section 199(1) of the Constitution provides that “[t]he security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.”
- 5.1.27 Section 199(5) further obliges the security services to act, teach and require their members to act in accordance with the Constitution and the law.
- 5.1.28 Section 205 provides generally for the establishment and structure of the South African Police Service and section 205(3) in particular outlines the objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.

5.1.29 Section 12(1)(c) guarantees the right to freedom and security of a person, which includes the right to be free from all forms of violence from either public or private sources.

5.1.30 Section 237 provides that any Constitutional duty must be performed diligently and without delay.

5.1.31 Therefore, in terms of the Constitution, the Minister of Police and the SAPS, have a duty and an obligation to protect all inhabitants of the Republic including the two whistle-blowers and the Minister is duty bound to provide leadership and guidance to the Department and the Minister is expected to exercise his functions in accordance with the Constitution.

The South African Police Service Act, 1995 (SAPS Act)

5.1.32 The Preamble to the Act provides that, “**WHEREAS** the Constitution of the Republic of South Africa, 1996, requires national legislation to provide for the establishment, powers and functions of the South African Police Service to function in accordance with national policing policy and the directions of the Cabinet member responsible for policing;

WHEREAS there is a need to provide a police service throughout the national territory to—

- (a) ensure the safety and security of all persons and property in the national territory;
- (b) uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution;”

5.1.33 Chapter 2 of the SAPS Act regulates Ministerial services and provides for the establishment of a Secretariat to be called the Secretariat for Police whose functions would inter alia be to advise the Minister

5.1.34 Section 14 of the SAPS Act authorises the National or Provincial Commissioner to employ members for service in preservation of life, health or property.

5.1.35 Section 13 of the SAPS Act further provides that: -

- “(1) Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official.*
- (2) Where a member becomes aware that a prescribed offence has been committed, he or she shall inform his or her commanding officer thereof as soon as possible.*
- (3)(a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.”*

5.1.36 The two whistle-blowers are living in fear of their lives that they may be assassinated at any time hence they requested security protection from the state. This is not an exaggeration as some of their colleagues and comrades were killed by unknown persons. This has led to the establishment by the Minister of Police and the SAPS of a Task Team to investigate these killings as the concern is real and not imaginary. The SAPS therefore has a duty to ensure the safety and security of all persons in the Republic including Messrs Les Stuta and Thabiso Zulu.

The SAPS Code of Conduct

5.1.37 According to the SAPS Code of Conduct, Police officials commit themselves to the creation of a safe and secure environment for all people in South Africa by amongst others, preventing action which may threaten the safety of any community.

5.1.38 In realisation of the aforesaid commitment, the members of SAPS shall at all times uphold the Constitution and the law and cooperate with the community, government at every level and all other related role-players.

5.1.39 In order to achieve a safe and secure environment for all people of South Africa, members of SAPS undertake to render a responsible and effective service of high quality which is accessible to every person and continuously strive towards improving this service, uphold and protect the fundamental rights of every person, act impartially, courteously, honestly, respectfully, transparently and in an accountable manner, exercise the powers conferred upon them in a responsible and controlled manner and work actively towards preventing any form of corruption and to bring the perpetrators thereof to justice.

5.1.40 In ***South African Police Service v Police and Prisons Civil Rights Union and Another***¹ the Constitutional Court per the *dictum* of Nkabinde J stated that: “[t]he SAPS owes a duty to the public in relation to their safety and security. If the duty is not discharged, other entrenched rights might be affected adversely...”

5.1.41 From the evidence uncovered, as well as the legislative framework outlined herein, it is clear that the SAPS has a constitutional and statutory duty to protect the two whistle-blowers. The Minister of Police is the Executive Authority responsible for the Police in the Republic and therefore, the most senior police official. The portfolio entrusted on him thus placed an even greater duty upon him, as his conduct has the power to erode public confidence in the SAPS.² The failure of the SAPS to provide the requisite protection to the two whistle-blowers can only be regarded as grossly negligent.

¹ (CCT89/10) [2011] ZACC 21 (9 June 2011).

² This argument is based on a similar argument presented by ***Freedom Under Law*** in its Heads of Argument filed in the North Gauteng High Court in the matter *Freedom Under Law v NDPP and Others* Case Number 26912/12.

5.1.42 It is the duty of the Police to ensure a safe and secure environment in the Republic.

Conclusion

5.1.43 The Minister of Police and the South African Police Services failed to provide security protection at state's expense to whistle-blowers, Messrs. Les Stuta and Thabiso Zulu, who assisted the Public Protector in the investigation of this matter. This is despite the fact that both the Constitution and the SAPS Act requires them to ensure the safety and security of all persons in the Republic.

5.1.44 They therefore had a constitutional and statutory obligation to protect the two whistle-blowers particularly when they were made aware that their lives were in danger. The Minister of Police as the Executive Authority entrusted by the President to look after the Police Services portfolio was therefore grossly negligent in not ensuring that the two whistle-blowers were provided with the requisite security.

6. FINDINGS

Having considered the evidence obtained during the investigation as against the relevant regulatory framework, I make the following findings:

- 6.1 **Regarding whether the Minister of Police and the South African Police Services failed to provide security protection at state's expense to whistle-blowers, to wit: Messrs. *Les Stuta and Thabiso Zulu* who assisted the Public Protector in the investigation of this matter and if so; whether such conduct constitute undue delay, maladministration, gross negligence and improper conduct that could have resulted in the loss of lives:**

- 6.1.1. The allegation that the Minister of Police and the SAPS failed to provide Messrs. Les Stuta and Thabiso Zulu security with protection at state expense due to threats to their lives following the exposé of alleged corrupt activities in the uMzimkhulu local Municipality pertaining to the refurbishment of uMzimkhulu Memorial Hall **is substantiated**;
- 6.1.2. The Minister of Police in particular, as well as the SAPS and the SSA were requested in November 2017 to conduct Security Threat Assessments on Messrs. Stuta and Zulu. The SAPS conducted the assessments in mid-December 2017 and the SSA in April 2018. Since December 2017 SAPS has failed to provide the Assessment Report and neither have they provided Messrs. Stuta and Zulu with the required security protection;
- 6.1.3. Messrs. Stuta and Zulu are living in fear for their lives. They are unable to enjoy live a normal life as they are always afraid that they may be assassinated at any time. They had to abandon their homes in uMzimkhulu and are currently living in Durban and Kokstad respectively.
- 6.1.4. The failure by the Minister of Police and the SAPS to provide security protection for Messrs. Stuta and Zulu exposes them to a risk of being assassinated. It also exposes the SAPS and the South African Government to a risk of unnecessary legal claims and financial losses as their families could decide to claim against government for damages for the loss of their lives should they be assassinated;
- 6.1.5. The Minister of Police and the SAPS's conduct falls short of the standard of service delivery that a citizen of the Republic of South Africa would expect, as outlined in the Constitution of the Republic of South Africa, the SAPS Act and its Code of Conduct. SAPS's failure to protect the two whistle-blowers could have dire consequences, which had been communicated to SAPS on numerous occasions.

- 6.1.6. The Minister of Police and the SAPS's conduct in dealing with my request to provide protection to the two whistle-blowers can only be described as grossly negligent, and a slap in the face to the very people that members of SAPS are employed to protect;
- 6.1.7. The Minister of Police and the SAPS's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and undue delay, gross negligence and maladministration as envisaged in section 6(4)(a) of the Public Protector Act.
- 6.1.8. The Minister of Police and the SAPS's conduct could have resulted in unnecessary loss of lives due to their tardiness and negligence in rendering assistance to inhabitants such as the two whistle-blowers.

7. REMEDIAL ACTION

The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the gross negligence, undue delay, improper conduct and maladministration referred to in this report is the following: -

7.1. The President to take urgent and appropriate steps to;

- 7.1.1. Reprimand the Minister of Police, Mr Bheki Cele for his lapse in judgment regarding the failure of the SAPS to provide the two whistle-blowers with security protection after a determination was made that they required it as well as the grossly negligent manner in which the whole issue of the provision of security to Messrs Stuta and Zulu was handled which could as a consequence have led to unnecessary loss of lives; and:

7.1.2. To ensure that an incident of this nature does not reoccur and that Ministers take heed of the warnings of this nature to avoid catastrophic results that may occur due to lack of insight and non-action by Members of the Executive who are responsible for various Departments and other organs of state.

7.2. The Minister of Police to take urgent and appropriate steps to –

7.2.1 Provide me with a copy of the Security Threat Assessment conducted by the SAPS Crime Intelligence in December 2017, within three (3) days from the date of this report;

7.2.2 Ensure that the recommendations of the SAPS's Security Threat Assessment, and the Security Threat Assessment conducted by the State Security Agency is fully implemented within seven (7) days from the date of this report and ensure that Messrs Zulu and Stuta are provided with the requisite security at state expense; and

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

7.3. The National Commissioner of Police to take urgent and appropriate steps to

7.3.1 Ensure that SAPS adopts Standard Operating Procedures (SOP's) on how requests to conduct Security Threat Assessments should be dealt with, and the timeframe within which such recommendations should be implemented, within three (3) months from date of this report; and

7.3.2 Ensure that instructions from the Minister in his capacity as the Executive Authority of the Department of Police are carried out without delay.

7.3.3 To ensure that an incident of this nature does not happen again and that Ministers take heed of the warnings of this nature to avoid catastrophic results that may occur due to lack of insight and non-action by Members of the Executive who are responsible for various Departments and other organs of state.

8. MONITORING

- 8.1 The Director-General in the Presidency to report on the progress of the implementation of the remedial action within 30 days of this report;
- 8.2 The Minister of Police to report to the President and the Public Protector on the progress with the implementation of the remedial action within 30 days of this report; and
- 8.3 The National Commissioner of Police to report to the Public Protector and the Minister of Police on the progress with the implementation of the remedial action within seven (7) days of the release of this report.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 10/08/2018

Assisted by: The Good Governance and Integrity Branch