

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

Report 21 of 2018/19

ISBN No 978-1-928366-78-2

“Allegations of a violation of the Executive Ethics Code in the matter between Mr. John Steenhuisen, MP of the Democratic Alliance (DA) and the Minister of Home Affairs, Mr. Malusi Knowledge Gigaba, MP.”

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE
EXECUTIVE ETHICS CODE AND THE CONSTITUTION OF THE REPUBLIC OF SOUTH
AFRICA, 1996 BY THE MINISTER OF HOME AFFAIRS, MR. MALUSI KNOWLEDGE
GIGABA, MP.



INDEX

Executive Summary	3
1. INTRODUCTION	7
2. THE COMPLAINT	9
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	10
4. THE INVESTIGATION	15
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	19
6. FINDINGS	24
7. OBSERVATIONS	25
8. REMEDIAL ACTION	25
9. MONITORING	26



Executive Summary

- i. This is the report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 3(2) of the Executive Members` Ethics Act, (the Executive Members` Ethics Act) read with section 8(2A)(a) of the Public Protector Act, 1994 .
- ii. The report relates to an investigation into the alleged violation of the Constitution, the Executive Ethics Code and the Code of Ethical Conduct and Disclosure of Members` Interests for Assembly and Permanent Council Members, 5th Parliament, 2014 (Parliament Code of Ethics) by the Minister of Home Affairs, Mr. Malusi Knowledge Gigaba, MP (Minister Gigaba).
- iii. This report does not relates to whether it is proper for private company to own an airport which is a national key point in terms of the National Key Point Act, 102 of 1980 and the merits of the matter as deliberated during court proceedings.
- iv. The complaint was lodged with the Public Protector on 22 February 2018 by Mr. John Steenhuisen, MP of the Democratic Alliance (the Complainant) in terms of Section 4(1)(a) of the Executive Members` Ethics Act, 82 of 1998.
- v. Mr. John Steenhuisen, MP attached to his complaint a judgement delivered by the Gauteng Division of the High Court on 14 December 2017 in the matter of Fireblade Aviation (Pty) Ltd v Minister of Home Affairs.
- vi. In terms of the judgement, Judge Tuchten held *inter alia* that:

“...there is no escaping the conclusion that...the Minister has deliberately told untruths under oath’ (my emphasis)

...

By telling a deliberate untruth on facts central to the decision of this case, the Minister has committed a breach of the Constitution so serious that I could characterize it as a violation’ (my emphasis).”



-
- vii. In this regard, it is the contention of Mr. Steenhuisen, MP that Minister Gigaba, “*not only lied under oath but also acted in breach of his constitutional duties*” and the Executive Ethics Code.
- viii. On analysis of the complaint, the following issue was identified and investigated:
- a) Whether the conduct of Minister Gigaba, found to be a violation of the Constitution in *Fireblade Aviation (Pty) Ltd v Minister of Home Affairs and Others*, constitutes a violation of the provisions of the Executive Ethics Code and Code of Ethical Conduct and Disclosure of Members’ Interests for Assembly and Permanent Council Members (Parliament Code of Ethics).
- ix. The investigation process was conducted by an analysis of the relevant documentation and correspondence with Minister Gigaba as well as consideration and application of the relevant laws, regulatory framework and prescripts.
- x. Key laws taken into account to determine whether Minister Gigaba acted in violation of the Executive Ethics Code were principally the Constitution, the Executive Members’ Ethics Act and Parliament Code of Ethics in particular:
- a) Section 96(1) of the Constitution which provides that Members of the Cabinet must act in accordance with a code of ethics prescribed by national legislation.
- b) Paragraph 2.1 of the Executive Ethics Code which states that, “*Members [of the Executive] must... (b) fulfil all the obligations imposed upon them by the Constitution and law; (c) act in good faith and in the best interest of good governance; and (d) act in all respects in a manner that is consistent with the integrity of their office or the government.*”



-
- c) Paragraph 2.3 of the Executive Ethics Code which also state that, *“Members may not (b) act in a way that is inconsistent with their position.”*
 - d) Section 91(2) of the Constitution which bestows on the President the powers to appoint Ministers and to dismiss them.
 - e) Section 92(2) of the Constitution provides that *“Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions”*.
 - f) Paragraphs 4.1.3 and 4.1.4 of the Parliament Ethics Code provide that *“a Member of the Assembly must act on all occasions in accordance with the public trust placed upon them and discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests”*.
 - g) Section 165(4) of the Constitution states that, *“Organs of state, through legislative and other measures, must assist and protect the courts to ensure...effectiveness of the courts.”*
 - h) An *“organ of state”* in terms of Section 239 of the Constitution refers *inter alia* to;
 - a) ...
 - b) *any other functionary or institution—*
 - (i) *exercising a power or performing a function in terms of the Constitution or a provincial constitution; or...*
 - (ii)...



-
- xi. Having considered the evidence and information obtained during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
- a) **Whether the conduct of Minister Gigaba, found to be a violation of the Constitution in *Fireblade Aviation (Pty) Ltd v Minister of Home Affairs and Others*, constitutes a violation of the provisions of the Executive Ethics Code and Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members (Parliament Code of Ethics).**
 - (aa) The allegation that Minister Gigaba violated the Constitution and the Executive Ethics Code when he told an '*untruth under oath*' is substantiated.
 - (bb) As a Member of the Executive, telling an '*untruth under oath*' and before a court of law is a direct violation of section 165(4) of the Constitution, paragraph 2.1 (b)–(d) and paragraph 2.3(b) of the Executive Ethics Code as well as paragraph 4.1.3 and 4.1.4 of the Parliament Code of Ethics.
 - (cc) By breaching the above provisions of the Executive Ethics Code and the Parliament Code of Ethics, Minister Gigaba violated section 96(1) of the Constitution, which states that, "Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
 - (dd) The Minister's aforesaid conduct is also in violation of paragraph 4.1.3 and 4.1.4 of Parliament Code of Ethics, which requires the Minister, as a Member of the National Assembly, to act on all occasions, in accordance with the public trust placed in him and discharge his obligations, in terms of the Constitution, to Parliament and the public at large.



-
- xii. In light of the above findings, the Public Protector is taking the following appropriate remedial actions, as contemplated in section 182(1)(c) of the Constitution.
- a) The President of the Republic of South Africa must take appropriate disciplinary action against Minister Gigaba for violating the Constitution, the Executive Ethics Code and the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members.
 - b) The President of the Republic of South Africa must, in terms of section 3(5)(a) of the Executive Members' Ethics Act, within a reasonable time, but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
 - c) The Speaker of the National Assembly of the Republic of South Africa must, within 14 days of receipt of this Report from President, refer Minister Gigaba's violation of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members to the Joint Committee on Ethics and Members' Interests for consideration in terms of the provisions of paragraph 10 of the Parliament Code of Ethics.
- Xii The President of the Republic of South Africa must advise the Public Protector of action taken by the President within 20 days of the date of this Report.
- Xiii The Speaker of the National Assembly of South Africa must, within 30 days of publication of this report, provide the Public Protector with the implementation plan on steps to be taken against Minister Gigaba for breaching the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members.



REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF A VIOLATION OF THE EXECUTIVE MEMBERS ETHICS CODE AND THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 BY THE MINISTER OF HOME AFFAIRS, MR. MALUSI KNOWLEDGE GIGABA, MP.

1. INTRODUCTION

- 1.1. 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 (the Constitution) and section 3(2) of the Executive Members' Ethics Act, 1998 (the Executive Members' Ethics Act) read with section 8(2A)(a) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of section 3(2)(a) of the Executive Members' Ethics Act to President of the Republic of South Africa, Mr Matamela Cyril Ramaphosa.
- 1.3. Copies of the report are also provided to Mr. John Steenhuisen, MP of the Democratic Alliance (the Complainant), the Minister of Home Affairs, Mr. Malusi Knowledge Gigaba, MP (Minister Gigaba) and the Speaker of Parliament in terms of section 8(2)(b) of the Public Protector Act.
- 1.4. The report relates to an investigation into the alleged violation of the Constitution and the Executive Ethics Code by Minister Gigaba.



2. THE COMPLAINT

2.1. The complaint was lodged with the Public Protector on 22 February 2018 by Mr. John Steenhuisen, MP in terms of Section 4(1)(a) of the Executive Members' Ethics Act.

2.2. In his complaint, Mr. Steenhuisen alleged the following;

"On 14 December 2017, the Gauteng Division of the High Court of South Africa delivered judgement in the matter of Fireblade Aviation (Pty) Ltd v Home Affairs Case No: 85376-2016/93450-2016. The judgement was the result of an application by a private company who sought a declaratory order to compel the Minister to abide by a decision he had taken to grant the company's application to operate a fixed base aviation operation at the Oliver Tambo International Airport.

In this regard, it is essential that I draw your attention to a number of the courts most serious findings against the Minister. Judge Tuchten firstly held that:

*'...there is no escaping the conclusion that...**the Minister has deliberately told untruths under oath**' (my emphasis)*

However, he also finds as follows:

***'The Minister is bound by section 96(2)(b) of the Constitution, not to act in a way that is inconsistent with his office. He is further bound by section 165(4) of the Constitution as an organ of State to assist and protect the court to ensure its effectiveness. By telling a deliberate untruth on facts central to the decision of this case, the Minister has committed a breach of the Constitution so serious that I could characterize it as a violation'** (my emphasis)."*



-
- 2.3. In this regard, it is the contention of Mr. Steenhuisen, MP that Minister Gigaba, *“not only lied under oath but also acted in breach of his constitutional duties”*.
- 2.4. According to Mr. Steenhuisen, Minister Gigaba breached the following provisions of the Constitution and the Executive Ethics Code:
- 2.5. Section 96(1) and (2) of the Constitution which states that *“Members of the Cabinet must act in accordance with a code of ethics prescribed by national legislation and may not act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests”*.
- 2.6. Paragraph 2.1.(a)-(d) of the Executive Ethics Code, which states that *“Members must fulfil all the obligations imposed upon them by the Constitution and law; act in good faith and in the best interest of good governance; and act in all respects in a manner that is consistent with the integrity of their office”*.
- 2.7. He requested the Public Protector to investigate his complaint.

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 the additional powers and functions prescribed by national legislation.

3.4. Section 4(1)(a) of the Executive Members` Ethics Act, provides *inter alia* 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 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...”

3.5. The complaint was lodged by a Member of the National Assembly against a Cabinet Member and therefore this complaint had to be investigated by the Public Protector.

3.6. In terms of section 3 of the Executive Members` Ethics Act, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member within 30 days of the receipt of the complaint. If the Public Protector reports at the end of this period that the investigation has not yet been completed, she must submit another report when the investigation has been completed.



-
- 3.7. The Public Protector accordingly reported to the President on 28 March 2018 that her investigation of the complaint had not been completed and that she would submit the report when it is finalised.
- 3.8. Section 3(5)(a) of the Executive Members' Ethics Act provides that the President must within a reasonable time, but not later than 14 days after receiving the report of the Public Protector, submit a copy thereof and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
- 3.9. In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*¹ the Constitutional Court, per Mogoeng Thomas Reetsang Mogoeng (Chief Justice Mogoeng) CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: "*When remedial action is binding, compliance is not optional, 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.*"
- 3.10 In the above-mentioned judgment, Chief Justice Mogoeng stated the following, when confirming the powers the Public Protector:
- 3.10.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

¹ *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)



-
- 3.10.2 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);
- 3.10.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as was 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, the Public Protector 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);
- 3.10.4 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);
- 3.10.5 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);
- 3.10.6 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);
- 3.10.7 Implicit in the words "*take action*" is that the Public Protector is empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that the Public Protector 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));

- 3.10.8 The Public Protector has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));
- 3.10.9 “*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));
- 3.11 In the matter of the ***President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017)***, the Court held as follows:
- 3.11.1 “*The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective;* (paragraphs 85 and 152 of the judgment)
- 3.11.2 *There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4) (c) (ii) of the Public Protector Act;* (paragraphs 91 and 92 of the judgment)
- 3.11.3 *Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers;* (paragraphs 100 and 101 of the judgment):
- 3.11.3.1 *Conduct an investigation;*
- 3.11.3.2 *Report on that conduct; and*
- 3.11.3.3 *To take remedial action.*



-
- 3.11.4 *The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings; (paragraph 104 of the judgment)*
- 3.11.5 *The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court; (paragraph 105 of the judgment).*
- 3.11.6 *The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct; and (paragraphs 107 and 108 of the Judgment).*
- 3.11.7 *Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action. (paragraph 112 of the judgment).*
- 3.12 The Public Protector's power and jurisdiction to investigate the complaint and take appropriate remedial action was not disputed by Minister Gigaba.

4. THE INVESTIGATION

4.1. Methodology

- 4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 3 and 4 of the Executive Members' Ethics Act, read with sections 6 and 7 of the Public Protector Act.
- 4.1.2. As indicated above, section 4(1)(a) of the Executive Members' Ethics Act, provides 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 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..."



4.2. Approach to the investigation

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

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

4.2.2.1. What happened?

4.2.2.2. What should have happened?

4.2.2.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Constitution and Executive Ethics Code?

4.2.2.4. In the event of a violation, what action should be taken?

4.2.3. 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. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct of Minister Gigaba constitutes a violation of the Constitution and the Executive Ethics Code.

4.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Minister Gigaba to prevent a violation of the Constitution and the Executive Ethics Code.



4.2.5. Based on the analysis of the complaint, and having taken into account the fact that the Minister is also a member of the National Assembly, the following issue/conduct has been identified to inform and focus the investigation:

4.2.5.1. Whether the conduct of Minister Gigaba, found to be a violation of the Constitution in *Fireblade Aviation (Pty) Ltd v Minister of Home Affairs and Others*, constitutes a violation of the provisions of the Executive Ethics Code and Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members.

4.3. The Key Sources of information

4.3.1. Documents

The relevant documents obtained and analysed were primarily:

- 4.3.1.1 Judgement in the matter of *Fireblade Aviation (Pty) Ltd and Minister of Home Affairs and others*, High Court, Gauteng Division, Pretoria, Case No: 85376-2016 (93450-2016), 27 October 2017;
- 4.3.1.2 Judgement: Applicants application for leave to execute the order pending appeal, in the matter of *Fireblade Aviation (Pty) Ltd and Minister of Home Affairs and others*, High Court, Gauteng Division, Pretoria, Case No: 93450-2016, 8 December 2017;
- 4.3.1.3 Digital Audio Recording transcriptions of the judgement in the matter of *Fireblade Aviation (Pty) Ltd and Minister of Home Affairs*, High Court, Gauteng Division, Pretoria, Case No: 85376-2016 (93450-2016), 14 December 2017; and
- 4.3.1.4 Legal Opinion: In Re: Fireblade Proprietary Ltd.'s litigation against the Department of Home Affairs; C Puckrin, SC and K. Premhid, 10 April 2018.



4.3.2. Correspondence sent and received

- 4.3.2.1 Letter from Mr. Steenhuisen, MP to the Public Protector requesting an investigation into alleged impropriety by Minister Gigaba, dated 21 February 2018;
- 4.3.2.2 Letter from the Public Protector to Minister Malusi Gigaba, dated 28 March 2018, requesting his response to the complaint;
- 4.3.2.3 Letter from the Public Protector to President Ramaphosa, dated 28 March 2018, informing the President of the complaint received concerning Minister Gigaba;
- 4.3.2.4 Response received from Minister Gigaba addressed to the Public Protector, dated 20 April 2018; and
- 4.3.2.5 A notice in terms of section 7(9)(a) of the Public Protector Act, 1994 issued on 08 October 2018 to Minister Gigaba.

4.3.3. Websites consulted/ electronic sources

- 4.3.3.1. <https://webcache.googleusercontent.com/search?q=cache:W5fqYcPjw5AJ:https://www.businesslive.co.za/bd/national/2018-03-28-sca-rules-malusi-gigaba-may-not-appeal-in-fireblade-aviation-case/+&cd=1&hl=en&ct=clnk&gl=za;> “*Appeal court turns down Gigaba appeal in Fireblade Aviation case*”, by Genevieve Quintal, 28 March 2018.
- 4.3.3.2. [https://www.iol.co.za/news/south-africa/gauteng/court-again-rules-in-favour-of-oppenheimers-12546761/;](https://www.iol.co.za/news/south-africa/gauteng/court-again-rules-in-favour-of-oppenheimers-12546761/) “*Court again rules in favour of Oppenheimers*” by Zelda Venter, 27 December 2017.



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 Executive Members' Ethics Act, No 82 of 1998.

4.3.4.3 The Executive Ethics Code.

4.3.4.4 The Public Protector Act, No 23 of 1994.

4.3.4.5 Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members (5th Parliament), 2014.

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

5.1. Regarding whether the conduct of Minister Gigaba, found to be a violation of the Constitution in *Fireblade Aviation (Pty) Ltd v Minister of Home Affairs and Others*, constitutes a violation of the provisions of the Executive Ethics Code and Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members:

Common cause issues

5.1.1. It is not in dispute that the High Court ruled that Minister Gigaba 'told an untruth under oath' and in doing so violated section 96(2)(b) of the Constitution which prohibits a 'high officer in the executive' to act in a way that is not consistent with his/her office



and section 165(4) which states that an organ of state should assist and protect the court to ensure its effectiveness.

- 5.1.2. The complaint of Mr. Steenhuisen is premised on the above adverse findings made in the High Court by Tuchten J on 14 December 2017.
- 5.1.3. In the main, Tuchten J summarised the facts as follows, "*The application made by the Applicant [Fireblade] was to operate an international FBO (fixed based aviation operation) at a facility at the Oliver R Tambo International Airport (ORTIA).*

... [T]he applicant required the approval of a great number of state organs, including ultimately the Minister of Home Affairs...Having secured all the permissions...the applicant arranged a meeting with the Minister and that meeting took place on 28th January 2016. The meeting was attended by a number of interested persons, including the Minister himself and his acting chief of staff (sic), and a number of other functionaries and interested persons. At that meeting it is alleged by the applicant (sic), the Minister told the applicant (sic) and those present that he had decided to approve the application and that he had already signed the necessary letter, giving effect to his decision.

...in the affidavit of the Minister in response to this application, he denied ever having approved the application. Potterill J came to the conclusion that the Minister's denial should be rejected on the papers...and that the rejection of the Minister's version must carry with it the conclusion that the Minister has deliberately told untruths under oath.

By telling a deliberate untruth on facts central to the decision of this case, the Minister has committed a breach of the Constitution so serious that I would characterise it as a violation.



For these reasons in my judgement the appeal cannot succeed and it is dismissed with costs...

- 5.1.4. On 7 March 2018, Minister Gigaba's application for leave to appeal to the Constitutional Court was dismissed as well as his application for leave to appeal to the Supreme Court of Appeal on 28 March 2018.
- 5.1.5. In a letter from the Public Protector dated 28 March 2018, Minister Gigaba was informed of the complaint received from Mr. Steenhuisen and requested to respond to the allegations raised against him and to provide relevant documentation and information in this regard.

Issues in dispute

- 5.1.6. In Minister Gigaba's response dated 18 April 2018, he requested *inter alia* that the Public Protector consider a legal opinion which was premised on an understanding that the courts '*misconstrued*' the evidence and that this '*misdirection*' was perpetuated in the Supreme Court of Appeal.
- 5.1.7. In this regard the Public Protector informed the Minister in a notice in terms of section 7(9) of the Public Protector Act, 1994, dated 8 October 2018 that she was unable to accede to his request, since the Public Protector is prohibited in terms of section 182(3) of the Constitution of the Republic of South Africa, 1996, investigate court decisions. By re-examining the evidence brought before the court in an effort '*consider*' the legal opinion provided by the Minister would constitute an investigation of the court decision, which will be a violation of the above provision of the Constitution. The Minister did not respond to my aforesaid section 7(9) notice.
- 5.1.8. Further to the above notice, the Public Protector advised that she was bound by the decisions made in any court of law and until a higher judicial authority proved



otherwise, the ruling made in the High Court, that the Minister violated the Constitution by telling an untruth under oath, was binding.

- 5.1.9. Further to his letter of 18 April 2018, the Minister informed the Public Protector that he intends to re-enrol the application for leave to appeal to the Constitutional Court, since the Constitutional Court's dismissal of the initial application for leave to appeal was conditional.
- 5.1.10. In my notice to the Minister, I observed the Minister's intention to approach the Constitutional Court in this matter, but advised that until such time the appeal is lodged, the High Court ruling prevails.

Application of the relevant legal prescripts

- 5.1.11. The Executive Members' Ethics Act provides for a code of ethics governing ethical conduct of Members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils.
- 5.1.12. Section 96(1) of the Constitution provides that Members of the Cabinet must act in accordance with a code of ethics prescribed by national legislation.
- 5.1.13. Paragraph 2.1 of the Executive Ethics Code states that, "*Members [of the Executive] must... (b) fulfil all the obligations imposed upon them by the Constitution and law; (c) act in good faith and in the best interest of good governance; and (d) act in all respects in a manner that is consistent with the integrity of their office or the government.*"
- 5.1.14. Paragraph 2.3 of the Executive Ethics Code further that, "*Members may not (b) act in a way that is inconsistent with their position.*"



-
- 5.1.15. Section 91(2) of the Constitution provide the President with powers to appoint Ministers and to dismiss them. However, section 92(2) of the constitution provide that *“Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions”*.
- 5.1.16. Parliament of the Republic of South Africa has adopted a Code of Ethical Conduct and Disclosure of Members’ Interests for Assembly and Permanent Council Members (**“Parliament Code of Ethics”**). The Parliament Code of Ethics, in terms of paragraph 2.1 thereof, outlines the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding propriety, integrity and ethical values in their conduct.
- 5.1.17. Paragraph 4.1.3 and 4.1.4 of the Parliament Ethics Code provides that *“a Member of the Assembly must act on all occasions in accordance with the public trust placed upon them and discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests”*.
- 5.1.18. Section 165(4) of the Constitution sates that, *“Organs of state, through legislative and other measures, must assist and protect the courts to ensure...effectiveness of the courts.”*
- 5.1.19. An *“organ of state”* in terms of Section 239 of the Constitution refers *inter alia* to;
- c) ...
 - d) *any other functionary or institution—*
 - (i) *exercising a power or performing a function in terms of the Constitution or a provincial constitution; or...*
 - (ii)...



6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

- 6.1. **Regarding whether the conduct of Minister Gigaba, found to be a violation of the Constitution in *Fireblade Aviation (Pty) Ltd v Minister of Home Affairs and Others*, constitutes a violation of the provisions of the Executive Ethics Code and Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members;**
- 6.1.1. The allegation that Minister Gigaba violated the Constitution and the Executive Ethics Code when he told an 'untruth under oath' is substantiated.
- 6.1.2. As a Member of the Executive, telling an 'untruth under oath' and before a court of law is a direct violation of section 165(4) of the Constitution, paragraph 2.1 (b)–(d) and paragraph 2.3(b) of the Executive Ethics Code as well as paragraph 4.1.3 and 4.1.4 of the Parliament Code of Ethics.
- 6.1.3. By breaching the above provisions of the Executive Ethics Code and the Parliament Code of Ethics, Minister Gigaba violated section 96(1) of the Constitution, which states that, "*Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.*"
- 6.1.4. The Minister's aforesaid conduct is also in violation of paragraph 4.1.3 and 4.1.4 of Parliament Code of Ethics, which requires the Minister, as a Member of the National Assembly, to act on all occasions, in accordance with the public trust placed in him/her and discharge their obligations, in terms of the Constitution, to Parliament and the public at large.



7. OBSERVATIONS

- 7.1 National Key Points are strategic installations as regulated by National Key Points Act, 102 of 1980, such as International airports, military bases which requires special security. Therefore any person employed at such National Key point may be vetted under the National Strategic Intelligence Act, 39 of 1994.
- 7.2 The Executive need to consider processes which should be followed and the level of approvals for utilisation of National Key Points by private companies.

8. REMEDIAL ACTION

The appropriate remedial action I am taking, in accordance with section 182(1)(c) of the *Constitution*, 1996, is as follows:

- 8.1 The President of the Republic of South Africa must take appropriate disciplinary action against Minister Gigaba for violating the Constitution, the Executive Ethics Code and the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members.
- 8.2 The President of the Republic of South Africa must, in terms of section 3(5)(a) of the Executive Members' Ethics Act, within a reasonable time, but not later than 14 days after receiving this report, submit a copy thereof and any comments thereon together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
- 8.3 The Speaker of the National Assembly of South Africa must, within 14 days of receipt of this Report from President, refer Minister Gigaba's violation of the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council



Members to the Joint Committee on Ethics and Members' Interests for consideration in terms of the provisions of paragraph 10 of the Parliament Code of Ethics.

9 MONITORING

- 9.1 The President of the Republic of South Africa must advise the Public Protector of action taken by the President within 20 days of the date of this Report.
- 9.2 The Speaker of the National Assembly of South Africa must, within 30 days of publication of this report, provide the Public Protector with the implementation plan on steps to be taken against Minister Gigaba for breaching the Code of Ethical Conduct and Disclosure of Members' Interests for Assembly and Permanent Council Members.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 31/10/2018

Assisted by: Good Governance and Integrity