



PUBLIC PROTECTOR
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MUSIRHELELI WA VANHU • MUTSIRELEDZI WA VHATHU
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Hon Mr M V Sisulu, MP
Speaker of the National Assembly
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The Honourable Speaker

SUBMISSION TO THE SPEAKER OF THE NATIONAL ASSEMBLY: REQUEST TO CONSTITUTE THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT IN TERMS OF SECTION 2A(5) OF THE PUBLIC PROTECTOR ACT, 1994 TO REVIEW THE CONDITIONS OF SERVICE OF THE DEPUTY PUBLIC PROTECTOR.

1. SUBMISSION

1.1 A submission is hereby made to request the honourable Speaker of the National Assembly to constitute the Portfolio Committee on Justice and Constitutional Development in terms of section 2A(5) of the Public Protector Act, 1994 with the view to

1.1.1 Review the determination of the remuneration and other terms and conditions of the Deputy Public Protector dated 4 August 2005 ;and

1.1.2 To report to and advise the National Assembly in regard thereto.

2. LEGAL REQUIRMENTS AND PROCEDURES RELATING TO THE DETERMINATION OF THE CONDITIONS OF SERVICE OF THE DEPUTY PUBLIC PROTECTOR

2.1.1 Section 2A of the Public Protector Act, 1994 establishes the post of the Deputy Public Protector and regulates matters such as appointment, remuneration and other terms and conditions of employment, vacancies in office and removal from office of the Deputy Public Protector.

2.1.2 Section 2(A)(5) of the Public Protector Act, 1994 provides that the *“remuneration and other terms and conditions of employment of the Deputy Public Protector shall from time to time be determined by the National Assembly upon the advice of the committee”*.

3. THE APPOINTMENT OF AND CURRENT CONDITIONS OF SERVICE OF THE DEPUTY PUBLIC PROTECTOR

3.1 Adv M Shai was appointed as the Deputy Public Protector with effect from 1 December 2005.

3.2 The Portfolio Committee on Justice and Constitutional Development, having been constituted in terms of Section 2A (5) of the Public Protector Act, 1994 and having considered the matter of the remuneration and conditions service of the Deputy Public Protector, recommended on 4 August 2005 as follows:

3.2.1 *That the Deputy Public Protector shall receive an all inclusive flexible remunerative package of R619, 434.00.*

3.2.2 *That the said remuneration package should be structured within the following guidelines:*

Basic Salary 60% R371 660

Flexible Portion 40% R247 774

3.2.3 *That the flexible portion comprises of:*

Medical Aid

Bonus (13th Cheque)

Housing Allowance

Car Allowance (maximum of 25% of total package) and

Cash Allowance

Which could be structured in any combination whatsoever.

3.2.4 *All other conditions of service and service benefits, including annual increments; subsistence and travel expenditure and all leave be determined in terms of Public Service Act, 1994 (Act No. 103 of 1994), as those provisions apply to the Senior Management Service.*

4. PRACTICAL IMPLICATIONS AND IMPACT OF THE CURRENT DETERMINATION BY THE NATIONAL ASSEMBLY

4.1 The salary level determined by the National Assembly

- 4.1.1 The abovementioned conditions of employment as determined by the National Assembly equated the Deputy Public Protector to the 5th personal notch of the salary level of a Chief Director (Level 14) in the Public Service;
- 4.1.2 In March 2007, the then Public Protector revised the Deputy Public Protector's salary to be in line with the then appointed Senior Managers in the Office of the Public Protector thus avoiding an anomaly of having a situation where Senior Managers were earning more than the Deputy Public Protector.
- 4.1.3 In 2007 the Public Protector appointed a Chief Executive Officer (CEO) with effect from 1 February 2007. This presented the Office of the Public Protector with a serious challenge to structure the conditions of service of the CEO. In order to offer a market related remuneration package at a higher level than the highest post level that existed on the approved establishment, namely level 14 – Chief Director, the remuneration and conditions of service of the CEO had to be determined at the level of a Deputy Director-General in the Public Service (level15).

4.1.4 This meant that the remuneration levels of the Deputy Public Protector had to be adjusted accordingly. However, in terms of the structures determined by the National Assembly, it is not possible to structure total remunerative package of the Deputy Public Protector in such a manner that it matches the remuneration of package of the CEO.

4.1.5 As a result, the Deputy Public Protector is currently earning less than the CEO.

4.2 Certain conditions of service and service benefits applicable to the SMS cannot be applied to the position of the Deputy Public Protector.

4.2.1 Some of the procedures and arrangements in respect of leave of absence from office cannot be complied with as prescribed because the Deputy Public Protector does not report to the Head of Department (CEO).¹

4.2.2 The appointment of the Deputy Public Protector is in essence a contract appointment for a period of 7 years (renewable for one additional term), which means that the Deputy Public Protector's service would not be terminated on the grounds provided for by the Public Service Act, 1994 and would not qualify for the termination benefits applicable to SMS members, such as the payment of post retirement medical assistance.

4.2.3 At the same time the conditions of service for SMS members do not make any provision for the type of gratuity that is payable to the Public Protector upon vacation of the position at the expiry of his/ her term, in lieu of pension.

4.2.4 As far as official journeys are concerned, the current determination implies that the Deputy Public Protector should be limited to the conditions applicable to members of the SMS in relation to:

4.2.4.1 The procedures for approving an official journey;

4.2.4.2 Acceptable means and class of transport;

4.2.4.3 Expenditure allowances and limits; and

¹ SMS Handbook Chapter 3 Remuneration and conditions of Service 1/12/2003

- 4.2.4.4 Compensation for accommodation and other costs during an official journey inside and outside the Republic.
- 4.2.5 The process and requirements of **performance management and development** for members of the SMS are determined by the Minister for the Public Service and Administration (MPSA) in terms of Part III.B3 of Chapter 4 of the Public Service Regulations, 2001 (PSR).
- 4.2.5.1 Chapter 4 of the PSR provides for the establishment of the SMS. Paragraph A, Part III states that the performance of all members of the SMS will be managed through a Performance agreement (PA), which should be linked to the department's strategic plan. Paragraph B states that all members of the SMS shall enter into a PA by not later than 31 March annually, which will define key responsibilities and priorities, encourage improved communication and enable the supervisor to assess the work of the member of the SMS.
- 4.2.5.2 It is however, not appropriate, as indicated below, in view of the position and stature of the Deputy Public Protector, to expect her to enter into a performance agreement with the CEO and it is not possible to conclude a PA with any other authority, including the National Assembly.
- 4.2.5.3 Provision is however made for the payment of an annual allowance in respect of ... appointed on contract.²

4.3 The position and stature of the Deputy Public Protector

- 4.3.1 The SMS dispensation consists of a single remuneration scale for senior managers and senior professionals employed in the Public Service. It contains the measures and prescripts on the remuneration and other conditions of service that apply to **officials** in the Public Service.
- 4.3.2 In terms of the Corporate Governance protocol and the Legal and Policy Framework of the Public Service as informed by, Inter alia, the Public Service Act, 1994 and the Public Finance Management Act, 1999, the public sector institutions

² To be discussed with DPP - requires info

(including National Departments, Provincial Departments and Constitutional Institutions) fall under that the direct control of an executive authority. The executive authority provides leadership and exercises oversight on policy implementation, performance, integrated planning, budgeting and service delivery, with accountability and responsibility vested in the functionaries (officials) directly involved with the performance of the functions in question.

- 4.3.3 The Public Protector is the head of the Office of the Public Protector and is accountable to Parliament for the functioning of the Office as the Executive Authority.
- 4.3.4 The Public Protector Act, 1994 provides that the Deputy Public Protector shall have such powers as the Public Protector may delegate to him or her and that the Deputy Public Protector will perform the functions of the Public Protector if he or she is unable to do so.³ The **Ad Hoc Committee on Operational Problems in the Office of the Public Protector** (the *Ad Hoc* Committee) concluded that *“the Committee accepts that the Public Protector is indeed obliged to delegate powers to the Deputy Public Protector.”*⁴
- 4.3.5 The *Ad Hoc* Committee noted *“the high level of skills and qualifications required of the person to be appointed as Deputy Public Protector”* - which are identical to the requirements for the appointment of the Public Protector, namely *“a South African citizen who is a fit and proper person to hold such office, and who-*
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- (b) *is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or*
 - (c) *is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or*
 - (d) *has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or*

³ Sections 2A(6) and (7) of the Public Protector Act, 1994.

⁴ Second Report of the Ad hoc Committee on Operational Problems in the Office of the Public Protector, dated 28 June 2007

- (e) *has, for a cumulative period of at least 10 years, been a member of Parliament; or*
- (f) *has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years.*⁵

4.3.6 It was therefore concluded by the *Ad Hoc* Committee that *“when the Deputy Public Protector performs a function on behalf of the Public Protector, he or she acts in the place of the Public Protector and the function is regarded as having been performed by the Public Protector.”*

4.3.7 The role and function of the CEO and senior managers (SMS) in the Office of the Public Protector focus mainly on the operations of the Office, ensuring that it is run efficiently and effectively and in accordance with the strategic decisions of the Public Protector.

4.3.8 The Deputy Public Protector is therefore not a public servant and therefore not part of the Senior Management Service but a Public Office Office-Bearer who exercises delegate powers of the Public Protector and when the Public Protector is unable to exercise her powers, Acts as the Public Protector.

4.3.9 In terms of section 2(2) of the Public Protector Act, 1994 the remuneration and other terms and conditions of employment of the **Public Protector** *“shall from time to time be determined by the National Assembly upon the advice of the committee: Provided that such remuneration-*

- (a) *shall not be less than that of a judge of a High Court; and*
- (b) *shall not be reduced, nor shall the terms and conditions of employment be adversely altered, during his or her term of office.”*
(emphasis added)

4.3.10 The remuneration and benefits of the Public Protector were consequently, determined in accordance with the conditions of service of Public Office Bearers in so far as they relate to judges and the judiciary. The remuneration level, benefits and allowances of the Public Protector are currently determined in accordance with the recommendations of the Independent Commission for the remuneration of

⁵ Section 1A(3) and 2A(4) of the Public Protector Act, 1994

Public Office Bearers by virtue of section 8(4) and (5) of the Independent Commission for the Remuneration of Public Office Bearers Act, 1997. As the remuneration and conditions of service of the Public Protector have, since the appointment of the first Public Protector, been determined at the level of a Judge of the Supreme Court of Appeal, the current grade and pay level of the Public Protector has been determined at **JC 2** of the remuneration levels of the judiciary⁶.

5 CONCLUSION

- 5.1 It is therefore submitted that the current remuneration and conditions of service of the Deputy Public Protector, present the Office of the Public Protector with a number of challenges as referred to above.
- 5.2 It is furthermore submitted that the fact that the position of Deputy Public Protector is linked to the conditions of service and service benefits of members of the SMS in the Public Service, is inappropriate, unfair and unbecoming of her position.
- 5.3 In view of the afore-mentioned discussion it is submitted that Adv Shai, as incumbent of the position of Deputy Public Protector, has suffered financial prejudice as a result of the fact that since her appointment she could not receive all the service benefits payable to members of the SMS, and did not receive the benefits and allowances that were paid to Public Office Bearers in a similar position to her.

6. PROPOSAL

- 6.1 It is therefore proposed that the Speaker of the National Assembly constitute the **Portfolio Committee on Justice and Constitutional Development in terms of section 2A(5) of the Public Protector Act, 1994 with the view to urgently:**
 - 6.1.1 Review the determination of the remuneration and other terms and conditions of the Deputy Public Protector dated 4 August 2005;

⁶ Government Notice 1107 GOVERNMENT GAZETTE, 15 OCTOBER 2008, Gazette No.31513: Independent Commission for the Remuneration of Public Office Bearers Act, 1997: Recommendations on salaries, allowances and benefits of public office bearers for the fiscal year commencing 1 April 2008

6.1.2 Consider aligning the conditions of service of the Deputy Public Protector with the conditions of service and service benefits of the Public Protector, with a provision that such remuneration shall not be less than that of a judge of the High Court directly below the grade and salary level applicable to the Public Protector in terms of the Remuneration of Public Office Bearers Act, 1997 read with the Judge's Remuneration and Condition of. Employment Act, 2001;

6.1.3 Consider such measures as it may deem fit to address the past discrepancies in the conditions of service and service benefits which might have caused financial prejudice to the current Deputy Public Protector, adv M Shai;

6.1.4 And to report to and advise the National Assembly on its findings and recommendations.

7. FURTHER INFORMATION/ SUBMISSIONS

7.1 Should the Honourable Speaker agree to the request, the Public Protector will furnish the Committee with any additional information or submissions that might be required.

I thank you for your kind consideration in this regard and look forward to your favourable response at your earliest convenience.

Best Wishes



ADV T N MADENSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Cc Adv M Shai, Deputy Public Protector
Mr A Nel, Deputy Minister of Justice and Constitutional Development
Adv N A Ramatlhodi: Chairperson: Portfolio on Justice and Constitutional Development