

**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 No: 32 of 2008/9

**REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF
MISAPPROPRIATION OF PUBLIC FUNDS BY THE GAUTENG
PROVINCIAL DEPARTMENT OF SOCIAL DEVELOPMENT**

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Executive summary

- (i) The Office of the Public Protector investigated a complaint lodged by a Member of Parliament, in connection with an advertisement placed in a newspaper by the Gauteng Department of Social Development (the Department). The advertisement contained an edited version of the 2008 Budget Vote Speech of the Member responsible for Social Development of the Provincial Executive Committee (MEC), presented to the Gauteng Provincial Legislature.
- (ii) It was alleged that a reference to the African National Congress (ANC) in the said speech, as published in the advertisement, was improper and unlawful as it amounted to party political propaganda paid for by public funds.
- (iii) The investigation established that:
 - (a) The Department is constitutionally obliged to inform the public that it serves of the performance of its functions and how the public funds allocated to it would be spent;
 - (b) The expenditure incurred in placing the advertisement in question in a newspaper to inform the public of the contents of the MEC's speech, cannot be regarded as unauthorized or irregular;
 - (c) It is not unusual or improper for political heads of departments to refer to their perceptions of the achievements of the political party that they represent, when they address legislatures on matters of public interest;

- (d) The expenditure incurred could only be regarded as fruitless and wasteful in terms of the Public Finance Management Act, 1999, if it could be found that it was made in vain and would have been avoided had reasonable care been taken;
 - (e) The main context of the speech, as advertised, was to inform the public of the achievements, programmes and plans of the Department;
 - (f) The two references to the ANC (as it also appeared in the advertisement) did not impact on the purpose of the speech, as the reasonable overall impression of the ordinary reader would be of information relating to the operations and core business of the Department, rather than of political propaganda; and
 - (g) Under the circumstances, the expenditure incurred in respect of the advertisement was not made in vain and cannot be regarded as fruitless and wasteful.
- (iv) From the investigation it was found that the allegation of misappropriation of public funds by the Gauteng Department of Social Development is unfounded.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF MISAPPROPRIATION OF PUBLIC FUNDS BY THE GAUTENG PROVINCIAL DEPARTMENT OF SOCIAL DEVELOPMENT

1. INTRODUCTION

- 1.1 This report is submitted to the Gauteng Provincial Legislature in terms of the provisions 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 It relates to an investigation into an allegation of the misappropriation of public funds by the Gauteng Department of Social Development.

2. BACKGROUND

- 2.1 On 24 June 2008, an advertisement appeared in the *Sowetan* newspaper under the heading: "*THE MEC FOR SOCIAL DEVELOPMENT MR KGAOGELO LEKGORO PRESENTED A BUDGET VOTE TO THE LEGISLATURE AND BELOW IS THE EDITED VERSION OF HIS SPEECH*" (Annexure A).
- 2.2 Apart from the edited text of Mr Lekgoro's speech, the advertisement contained a picture of him, a picture of what appeared to be the cover page of the speech and a block in which the following statement made in the speech was highlighted in bold print:

"The ANC has been consistent in implementing its policy in government".

3. THE COMPLAINT

On 27 June 2008, a Member of Parliament, Ms H Weber, lodged a complaint with the Office of the Public Protector in connection with the said advertisement. She stated that:

"The advertisement carries a reference to the ANC (African National Congress). It reads as follows. The ANC has been consistent in implementing its policy in government. Once more we lay bare our attempts to yet provide a better life for all our province for scrutiny before this august house." The italicized part is (sic) in this quote is conspicuously emboldened and coloured in red in the advertisement. This clearly makes the advertisement a public relations exercise for the ANC, yet it is supposed to be an advertisement of the Department of Social Development.

Our objection stems from the fact that this advertisement is paid for by the public's (sic) money yet it is abused to pay for a (sic) party political propaganda. A reading of the advertisement passes off as an ANC advertisement. Expenditure of taxpayers' money for party political gains (sic) is a contravention of the Public Finance Management Act.

We therefore request an investigation into the possible abuse of public funds to pursue party political gains (sic) as is apparent in the advertisement we refer to." (emphasis added)

4. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT

- 4.1 In terms of section 182(1) of the Constitution, the Public Protector has the power 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.

- 4.2 The Public Protector has the additional powers and functions prescribed by national legislation¹.
- 4.3 Section 6(4) of the Public Protector Act empowered the Public Protector to investigate, *inter alia*, complaints of maladministration in connection with the affairs of government at any level. He/she also has the powers to investigate any improper conduct by a person performing a public function.
- 4.4 On conclusion of an investigation, the Public Protector has to report on the matter concerned and take appropriate remedial action².
- 4.5 The Public Protector therefore has the jurisdiction and powers to investigate the complaint of misappropriation of public funds lodged against the Gauteng Department of Social Development (the Department).

5. THE INVESTIGATION

The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act. It comprised:

- 5.1 Consideration and evaluation of the advertisement placed by the Department in the *Sowetan* of 24 June 2008;

¹ Section 182(2) of the Constitution

² See section 182(1)(b) and (c)

- 5.2 Correspondence with the Member responsible for Social Development of the Executive Council of the Gauteng Provincial Government (MEC);
- 5.3 Consideration of the information and documentation submitted by the MEC; and
- 5.4 Consideration and application of the relevant provisions of the Public Finance Management Act, 1999 (PFMA) and the Public Protector Act.

6. THE RESPONSE OF THE MEC

- 6.1 The MEC, Mr K Lekgoro, responded to the complaint as follows:

"Allow me to illustrate that the opening paragraphs of the Budget Vote Speech to the Gauteng Legislature, drew attention of the Legislature to the fact that the policy position and mandate of the electorate to the ANC as a party leading government. It alluded to the implementation of government programmes as a reflection of uniformity and consistency that has been sustained from the historical positions of the ANC as an organisation leading government. The speech identified the importance and the correctness accountability and legislature oversight hence it said 'once more we lay bare our attempts to yet provide a better life for all in our province for scrutiny before this august house', referring to the legislature. What the general public had demanded during elections through the ballot amounts to what saw the ANC being elected to lead government.

The speech drew inference from the ANC Freedom Charter of 1955, the Ready to Government (sic) document of 1992, the Reconstruction and Development Programme document of 1994 as reference to and the basis of what constitutes the aspirations of the people. I identified

where the current government's mandate came from and the correctness of the principles that call for accountability of all government programmes to the legislature. The budget vote speech as a policy perspective detailing what government is going to do this year and what the department is going to deliver is in itself a matter of public interest arising from the implementation of the above mentioned policies.

It is in this context that the advert which is about the speech was published in order to empower the Gauteng public to know what social development will be doing in the current financial year. We believe that it also puts more power in the hands of ordinary citizens to know what the department has committed itself to do in order to hold it accountable on its commitments. It empowers communities to speak out against slow or lack of government service delivery."

- 6.2 The MEC denied that the advertisement amounted to party political propaganda. He expressed the view that in a democratic dispensation the ruling party sets parameters for policy which he, as the political head of the Department, has to comply with.
- 6.3 Mr Lekgoro contended that: *"Unless the public knows what I am doing they cannot be in a position to evaluate me correctly or fairly."*
- 6.4 From the response of the MEC, it also appeared that the advertisement consisted of an edited version of the said speech, which was prepared mainly from information submitted to him by the Head of the Department.

7. THE APPROVAL OF THE PROCUREMENT OF THE ADVERTISEMENT AND THE ASSOCIATED EXPENDITURE

- 7.1 The relevant records of the Department indicate that the procurement of the advertisement in question was approved by the Chief Director: Corporate Services of the Department.
- 7.2 The financial responsibility in terms of the Departmental Financial Delegations of Authority, was that of the Acting Director: Communications, who approved the cost of the advertisement in the amount of R 65 076, 10 on 20 June 2008.

8. THE RELEVANT PROVISIONS OF THE PUBLIC FINANCE MANAGEMENT ACT, 1999

- 8.1 Section 36(2) provides that the Head of a Department is its accounting officer.
- 8.2 The accounting officer is, in terms of section 38 responsible for the effective, efficient, economical and transparent use of the resources of the Department. He/she must take effective steps to prevent unauthorized, irregular and fruitless and wasteful expenditure. Once such expenditure is discovered, the accounting officer has to take appropriate steps against the responsible official of the department.
- 8.3 Ms Weber did not indicate whether she regarded the expenditure associated with the advertisement as irregular, unauthorized or fruitless and wasteful. However, from the context of her complaint, it appeared that she was of the view that it could have constituted fruitless and wasteful expenditure as it was incurred for the purposes of party political propaganda.

8.4 Fruitless and wasteful expenditure is defined by the PFMA³ as:

“expenditure that was made in vain and would have been avoided had reasonable care been exercised.”

8.5 Irregular expenditure means expenditure, other than unauthorized expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including provincial legislation providing for procurement procedures.

8.6 Section 1 also defines unauthorized expenditure as:

- (a) Overspending of a vote or a main division within a vote;
- (b) expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division.

9. THE CONSTITUTIONAL IMPERATIVE OF PROPER PUBLIC ADMINISTRATION

9.1 Section 195 of the Constitution provides that the public administration in every sphere of government must be governed by the democratic values and principles enshrined in the Constitution, including, *inter alia*, the following principles:

9.1.1 People’s needs must be responded to and the public must be encouraged to participate in policy making;

9.1.2 Public administration must be accountable; and

³ Section 1

9.1.3 Transparency must be fostered by providing the public with timely, accessible and accurate information.

10. THE ADVERTISEMENT

10.1 The advertisement represented an edited version of the 2008 Budget Vote Speech of the MEC presented to the Gauteng Legislature.

10.2 The edited speech consisted of 35 paragraphs, the overall majority of which related directly to the core business of the Department.

10.3 Only 2 direct references were made to the ANC, in the following sentences:

"The ANC has been consistent in implementing its policy in government."

and

"To this end our department has been tasked by the ANC and government provincial makgotla to prepare ground for the realization of a household register that would be able to tell the situation of each identified vulnerable household in the province."

10.4 The following sentence referred to in the complaint of Ms Weber, appeared in the first paragraph of the speech:

"Once more we lay bare our attempts to yet provide a better life for all in our province for scrutiny before this august house."

- 10.5 Ms Weber was clearly under the impression that the “we” in this sentence referred to the ANC. From the next sentences it is however, obvious that the reference was to the Department:

“We do so after rigorous and far more detailed scrutiny by the portfolio committee. On that score I would like on behalf of the social development department to thank the honourable members of the portfolio committee for their relentless monitoring of our work.”

- 10.6 In the first three paragraphs of the speech, the MEC made reference to several documents of the ANC, including the *Freedom Charter*. It is however, apparent from the context of the whole edited speech that the point made was that these policy documents of the ruling party formed the basis of the social welfare policy of the Provincial Government, that the Department was obliged to apply and implement.
- 10.7 All the subsequent paragraphs gave an indication of how the Department complied and intend to comply with government policy and programmes relating to the social development of residents of the province of Gauteng.

11. OBSERVATIONS

The following observations were made from the investigation:

- 11.1 The Department is constitutionally obliged to inform the public that it serves of the performance of its functions and how the public funds allocated to it would be spent in their interest;

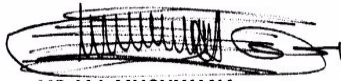
- 11.2 There is no indication in the complaint and the evidence and information obtained during the investigation that the expenditure incurred in placing an advertisement in a newspaper to inform the public of the contents of the budget vote speech of the MEC, was unauthorized or irregular.
- 11.3 The two references to the ANC in the speech cannot be regarded as propaganda. The first such reference stated the view of the MEC and the second was a statement of fact.
- 11.4 It is not unusual or improper for political heads of departments to refer to their perceptions of the achievements of the political party that they represent, when they address legislatures on matters of public interest.
- 11.5 The expenditure incurred in the placing of the advertisement could only be regarded as fruitless and wasteful in terms of the PFMA if it could be found that it was made in vain and would have been avoided had reasonable care been taken.
- 11.6 Ms Weber's view that "*a reading of the advertisement passes off as an ANC advertisement*" is not supported by the context of the MEC's speech. The main context thereof was to inform the public of the achievements, programmes and plans of the Department.
- 11.7 The two references to the ANC cannot be selectively viewed in isolation. Despite the emphasis that was placed on the first statement, these statements did not impact on what was clearly the purpose of the speech and its edited publication as an advertisement. The view is held that the reasonable overall impression of the ordinary reader of the advertisement would be of information relating to the operations

and core business of the Department, rather than of political propaganda.

- 11.8 Under the circumstances, the expenditure incurred in respect of the advertisement was not made in vain and cannot be regarded as fruitless and wasteful.

12. FINDING

From the investigation it was found that the allegation of misappropriation of public funds by the Gauteng Department of Social Development is unfounded.



ADV M L MUSHWANA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 18 February 2009

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