

REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTIONS 8(1) AND 8(2)(b)(i) OF THE PUBLIC PROTECTOR ACT, 1994



**PUBLIC PROTECTOR
SOUTH AFRICA**

Report No: 34 of 2008/9

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE MISAPPROPRIATION OF PUBLIC FUNDS BY THE DEPUTY MINISTER OF HOME AFFAIRS, MR M K N GIGABA MP

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Executive summary

- (i) The Office of the Public Protector conducted an investigation on own initiative into allegations that the Deputy Minister of Home Affairs, Mr M K N Gigaba MP, misappropriated public funds.
- (ii) It was alleged that Mr Gigaba sent flowers to his wife at the expense of the Department of Home Affairs (the Department) and that the Office of the Deputy Minister paid for flight tickets and car rental of several private individuals, on several occasions.
- (iii) The finalisation of the investigation was delayed because of an enquiry into these allegations by the Parliamentary Portfolio Committee on Home Affairs and the failure of Mr Gigaba to cooperate properly with the Office of the Public Protector.
- (iv) The investigation revealed that the allegations of misappropriation of public funds by Mr Gigaba were investigated by the accounting officer of the Department, as he was required to do in terms of the Public Finance Management Act, 1999. It was noted that the error in respect of the flowers sent to his wife was admitted and that the expenditure concerned had been reimbursed by Mr Gigaba.
- (v) From the investigations and deliberations of the Portfolio Committee, it appeared that the financial control mechanisms of the Office of the Deputy Minister need to be improved.
- (vi) No further evidence of irregular, unauthorised or fruitless and wasteful expenditure by the Office of the Deputy Minister could be found.

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- (vii) Mr Gigaba's failure, without any just cause, to cooperate properly, diligently and without delay with the investigation was improper and unnecessarily delayed the conclusion thereof, which was in the public interest.
- (viii) The key findings made from the investigation were that:
- (a) The expenditure incurred by the Office of the Deputy Minister in respect of flowers sent to Mr Gigaba's wife was irregular and fruitless and wasteful; and
 - (b) The allegations relating to travelling expenses incurred by the Office of the Deputy Minister were unfounded.
- (ix) The Public Protector recommended that
- (a) The Speaker of the National Assembly takes appropriate steps to ensure that Mr Gigaba's failure to comply with his constitutional obligation to cooperate properly with the Office of the Public Protector is addressed; and
 - (b) The Director General of the Department improves the financial control mechanisms of the Office of the Deputy Minister of Home Affairs.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE MISAPPROPRIATION OF PUBLIC FUNDS BY THE DEPUTY MINISTER OF HOME AFFAIRS, MR M K N GIGABA MP

1. INTRODUCTION

This report is submitted to the National Assembly, the President of the Republic of South Africa, the Minister of Home Affairs and the Director General of the Department of Home Affairs, in terms of the provisions of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and sections 8(1) and 8(2)(b)(i) of the Public Protector Act, 1994 (the Public Protector Act). It relates to an investigation into allegations of the misappropriation of public funds by the Deputy Minister of Home Affairs, Mr M K N Gigaba, MP.

2. BACKGROUND

- 2.1 In July 2007, several reports appeared in the media¹ alleging that Mr Gigaba misappropriated public funds by sending bouquets of flowers to his wife at the expense of the Department of Home Affairs (the Department). It was also alleged that Mr Gigaba established a private organisation known as "*The Malusi Gigaba Institute of Leadership*", which is managed from his ministerial office. The Deputy Minister's Office allegedly paid for the flight tickets and car rental of several individuals associated with this organisation, on several occasions.
- 2.2 In his response to the allegations, Mr Gigaba reportedly admitted that he had sent flowers to his wife, as alleged. He indicated that he would reimburse the Department for the expense.
- 2.3 As far as the other allegations were concerned, the Office of the Deputy Minister responded as follows:

¹ See *Beeld* of 27 July 2007, *Sunday Sun* of 29 July 2007 and *Mail and Guardian Online* of 28 July 2007

“The Deputy Minister, in performing his official duties, has invited a number of people to official meetings and at certain points for various advice. Some of these have travelled at departmental expense”

and

“It is important to reiterate that ministers and their deputies are not personally responsible for administration and use of finances in their offices. This is done by support staff.”

3. THE DECISION TO CONDUCT AN INVESTIGATION

Due to the seriousness of the allegations made against Mr Gigaba, it was regarded as being in the public interest for the Public Protector to conduct an investigation on own initiative into the said averments, in terms of sections 6 and 7 of the Public Protector Act, and to report thereon to the National Assembly and the President.

4. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE ALLEGATIONS MADE AGAINST THE DEPUTY MINISTER

4.1 Section 182(1) of the Constitution provides that the Public Protector has the power, as regulated by national legislation to:

4.1.1 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;

4.1.2 Report on that conduct; and

- 4.1.3 Take appropriate remedial action.
- 4.2 In terms of section 182(2), the Public Protector has additional powers, as prescribed by national legislation.
- 4.3 Section 6(4)(a) of the Public Protector Act, 1994 provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged maladministration in connection with the affairs of government at any level and any alleged abuse of power or other improper conduct by a person performing a public function.
- 4.4 The allegations made against the Deputy Minister therefore fall within the powers and jurisdiction of the Public Protector to investigate and to do so on own initiative.

5. THE INVESTIGATION

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

- 5.1 Consideration of the relevant media reports containing the allegations made against Mr Gigaba;
- 5.2 Correspondence with Mr Gigaba;
- 5.3 Correspondence with the Chairperson of the Parliamentary Portfolio Committee on Home Affairs;
- 5.4 Consideration of the Minutes of the meeting of the Parliamentary Portfolio Committee on Home Affairs, held on 13 November 2007;

- 5.5 Correspondence with the Director General of the Department;
- 5.6 Consideration of information and reports submitted by the Director General; and
- 5.7 Consideration and application of the relevant provisions of the Constitution, the Public Protector Act, the Public Finance Management Act, 1999 (PFMA) and the *Handbook for Members of the Executive and Presiding Officers*.

6. THE INITIAL RESPONSE OF THE DEPUTY MINISTER

- 6.1 Mr Gigaba was informed of the investigation and his response to the allegations requested, on 6 September 2007.
- 6.2 He responded on 12 September 2007 and stated that:

"I am certainly willing to co-operate with your preliminary investigations, but at this stage I am unfortunately unable to provide you with detailed responses to the allegations contained in your letter. As you will appreciate, I am not involved in the day-to-day disbursement of expenses by my office. I have therefore requested an audit precisely so that I can respond to these allegations, and where incorrect payments have been made, take the appropriate remedial action.

I have requested the Director General to give me an indication as to when the investigation into payments from my office will be finalized. I will revert to you once I have this information. I undertake to furnish you with a copy of the report once it has been handed to me, as well as a detailed response to the allegations."(emphasis added)

7. THE CONSIDERATION BY THE PARLIAMENTARY PORTFOLIO COMMITTEE ON HOME AFFAIRS OF THE ALLEGATIONS AGAINST THE DEPUTY MINISTER

- 7.1 Shortly after the investigation commenced, it was reported by the media that the Parliamentary Portfolio Committee on Home Affairs (the Portfolio Committee) was attending to the allegations made against Mr Gigaba.
- 7.2 In order not to duplicate efforts and the associated costs and to allow Parliament, to whom the Deputy Minister is accountable², to deal with the matter concerned in terms of its rules and prescripts, it was decided to suspend the investigation pending the outcome of the deliberations of the Portfolio Committee.
- 7.3 The Chairperson of the Portfolio Committee was requested to submit the Minutes of the relevant meeting where the matter was discussed and Mr Gigaba was informed in writing on, 16 October 2007, that the investigation would be held in abeyance pending the outcome of the Parliamentary process.
- 7.4 From the Minutes of the Portfolio Committee meeting held on 13 November 2007 that was provided by the Chairperson, it appeared that the matter concerned was discussed under the heading: *"Presentation by the Minister and the Director General-The current developments of the Deputy Minister's alleged travelling and flowers issues"*.
- 7.5 It was recorded in the Minutes that:

² See section 93(2) of the Constitution

"The Minister mentioned that the Deputy Minister bought flowers for his wife for Valentine's Day. The amount involved is R1020. The Deputy Minister has acknowledged the mistake and will pay the money back. The amount of money was disputed by Mr Lowe of the Democratic Alliance. He mentioned that the amount involved is more than R3000. Regarding the travelling expenses by the youth to meet the Deputy Minister, the discussions the youth had with the Deputy Minister had nothing to do with the Malusi Gigaba Leadership Academy. It was agreed that the matter has been resolved and there would be no further discussion about the Deputy Minister's travelling and flower issues. The Minister will only verify the amount and provide more information on the flight details of the travel by the youth and report back to the Committee. The Committee recommended that the Minister should put in place a proper monitoring and controlling mechanism so that this kind of situation does not happen again."
(emphasis added)

8. CONTINUING WITH THE INVESTIGATION

- 8.1 On 31 January 2008, Mr Gigaba was advised that as it did not appear from the Minutes of the relevant meeting of the Portfolio Committee, referred to above, that he had provided a detailed explanation in respect of all the allegations made against him and as the report of the audit that he commissioned was clearly not submitted to the Portfolio Committee, it was decided to continue with the investigation.
- 8.2 Mr Gigaba was requested to submit a copy of the said audit report, repeating similar requests forwarded to him on 21 November 2007 and 8 January 2008, to which he failed to respond.
- 8.3 In his reply, received on 28 February 2008, Mr Gigaba merely repeated that he had requested the Department to investigate the allegations.

- 8.4 Mr Gigaba conceded that a mistake was made in respect of the payment made by the Department for flowers sent to his wife and indicated that he had already settled his debt in this regard.
- 8.5 As far as the allegations relating to the *Malusi Gigaba Institute for Leadership* were concerned, Mr Gigaba stated that:

"I informed the Portfolio Committee that the Malusi Gigaba Institute for Leadership (MGIL) never existed, other than as an idea. I decided not to form this organization and it was never registered with the relevant government department as per the requirement of the law. Therefore, there is no official record anywhere of the existence of such a company. The idea of MGIL came from people I had engaged for a developmental programme targeting young people in my Parliamentary Constituency allocated to me by Parliament, in Baberton, and my area of origin, Mandeni."

9. FURTHER ATTEMPTS TO OBTAIN INFORMATION FROM MR GIGABA

- 9.1 On 5 March 2008, Mr Gigaba was advised that his failure to cooperate with the Office of the Public Protector in the investigation by submitting a copy of the report of the audit that he requested and his detailed comments on the allegations made against him, when repeatedly requested to do so, was most disconcerting. He was referred to his failure to respond to letters addressed to him on 8 October 2007, 16 October 2007, and 21 November 2007.
- 9.2 Mr Gigaba was referred to a letter addressed to him on 31 January 2008 in which his lack of cooperation was specifically referred to and the fact that a response to this letter was only received on 28 February 2008 after repeated calls were made to his office, advising that a subpoena to direct him to appear before the Public Protector was about to be issued.

- 9.3 The said letter of 5 March 2008 referred Mr Gigaba to the constitutional imperative of cooperation with the Office of the Public Protector that applies to all organs of state and he was afforded an opportunity to explain the reasons for his failure to comply in this regard, in order for the matter to be reported to Parliament.
- 9.4 Despite having been reminded in writing on 7 April 2008 and 14 May 2008 of his failure to reply to the letter of 5 March 2008, no such response was received from Mr Gigaba to date.

10. THE CONSTITUTIONAL AND LEGAL OBLIGATION OF ALL ORGANS OF STATE TO COOPERATE WITH THE PUBLIC PROTECTOR

- 10.1 Section 181(3) of the Constitution provides that all organs of state must assist and protect, *inter alia*, the institution of the Public Protector to ensure its independence, impartiality, dignity, and effectiveness.
- 10.2 Section 237 provides that all constitutional obligations must be performed diligently and without delay.
- 10.3 The supremacy of the Constitution is provided for in section 2 of the Constitution, as follows:
- "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."* (emphasis added)
- 10.4 In terms of section 11(3) of the Public Protector Act, any person who, without just cause, refuses or fails to comply with a request of the Public Protector for information relating to a matter being investigated, shall be guilty of an offence.

11. THE ROLE OF THE ACCOUNTING OFFICER OF THE DEPARTMENT

- 11.1 The allegations of the misappropriation of public funds referred to in this report pointed at irregular and or fruitless and wasteful expenditure, as contemplated by the definitions thereof contained in section 1 of the PFMA.
- 11.2 Irregular expenditure is defined as expenditure, other than unauthorized expenditure, incurred in contravention of the Act. The PFMA does not provide for the expenditure of public funds on private matters such as purchasing flowers for a spouse or paying for the transportation and accommodation of private individuals with no official association to the business of the Department concerned.
- 11.3 Fruitless and wasteful expenditure means expenditure which was made in vain and would have been avoided had reasonable care been exercised.
- 11.4 The accounting officer of the Department is responsible for the effective, efficient, economical and transparent use of the resources of the Department. He/she must prevent unauthorised, irregular and fruitless and wasteful expenditure and must take appropriate steps should such expenditure occur³.
- 11.5 Section 40 of the PFMA provides that the accounting officer for a Department must keep full and proper records of the financial affairs of the Department in accordance with any prescribed norms and standards.
- 11.6 The Executive Authority of the Department is, by virtue of the provisions of section 1 of the PFMA, the Minister of Home Affairs. Deputy Ministers are appointed, in terms of section 93 of the Constitution, to assist Ministers. It

³ Section 38 of the PFMA

therefore follows that a Deputy Minister is not empowered by law to issue any directives that might have financial implications to the accounting officer without the support and approval of the relevant Minister and that the expenditure incurred by the Office of the Deputy Minister is subject to the approval and oversight of the Director General, as the accounting officer.

12. THE REPORTS OF THE DIRECTOR GENERAL OF HOME AFFAIRS ON INVESTIGATIONS INTO THE ALLEGATIONS

12.1 During the investigation, the Director General of the Department, Mr M Msimang, submitted a report, dated 6 September 2007, on an investigation conducted into the allegations of the misappropriation of public funds, made against Mr Gigaba.

12.2 The Director: Financial Administration, who conducted the investigation, reported that:

“My review/investigation was made difficult by the fact that I do not have custody of order books issued to Deputy Minister’s Office for corporate travel and accommodation needs and the voluminous transactions processed on BAS for accommodation and corporate travel as well as inconsistent description for item allocations as per Standard Charts of Accounts that restrict characters during the capturing process. This matter makes the identification of service rendered and the recipient of such service very difficult because settlements of invoices only reflect the payee and not the official who travelled or was accommodated. I had to resort to manually pulling individual invoices to determine what the service was rendered for.”

12.3 It was found that the total expenditure incurred by the Office of the Deputy Minister in respect of accommodation, domestic air travel and car rental for the period 2005 to 2008, was as follows:

ITEM	2005/6	2006/7	2007/8
Accommodation	R 471 181	R 965 239	R 303 511
Air travel	R 2 802 764	R 2 515 536	R 1 451 743
Car rental	R 536 821	R 702 299	R 217 059

- 12.4 It was also found that the Office of the Deputy Minister incurred expenditure in the amount of R 1020.30 for floral arrangements for Mr Gigaba's wife, which was *"in contravention of the official entertainment policy."*
- 12.5 No records could be found of any payment that was made to the *Malusi Gigaba Institute of Leadership*.
- 12.6 Invoices reflecting payments of R5626 for accommodation and traveling of Mr M Mawela, which were dated prior to his appointment in the Department, were highlighted as a discrepancy. No records could be found of expenditure incurred for car rental in respect of Mr Mawela prior to his appointment as an intern in the Office of the Deputy Minister on 1 September 2006.
- 12.7 It was furthermore found that the Office of the Deputy Minister incurred expenditure amounting to R 34 644.70 for *"Carol Chiloane, Khusela Sangoni and Lindiwe Majozi who do not appear to be on the payroll of Home Affairs nor in the list of interns maintained by the Directorate Human Resource Development."*
- 12.8 According to the Director General, Mr Gigaba only responded to the report of 6 September 2007 on 16 July 2008, i.e 10 months later.
- 12.9 As far as the finding relating to the purchasing of flowers for his wife was concerned, Mr Gigaba's response was that:

"My Office had opened an account with a floral company where they would order flowers in cases related to the Department. Where personal matters were concerned, they would make the order and bring the invoices to me to settle. In the above-mentioned case, they did not bring the account back to me as it was a personal matter. It must be remembered that the Deputy Minister does not handle financial and administration matters related to his work directly. Where such anomalies are identified, he needed to have immediately been notified so that the accounts could be reimbursed back to the Department rather than send them to the media thus creating an unfortunate and malicious impression that he would use state resources for personal reasons. This impairs the integrity and standing of the Deputy Minister."

12.10 Mr Gigaba again confirmed that the Department had been reimbursed for the expense relating to the flowers.

12.11 As far as the expenditure incurred in respect of Mr Mawela was concerned, Mr Gigaba explained that it related to him travelling to Pretoria on 17 June 2006 to be interviewed for an internship in the Office of the Deputy Minister.

12.12 According to Mr Gigaba, Ms Lindiwe Majosi *"is the minder of the Deputy Minister's child and is allowed by the Ministerial Handbook to (sic) certain privileges relating to travelling and accommodation"*.

12.13 In relation to the expenditure incurred for the travelling and accommodation of Mesdames Chiloane and Sangoni, Mr Gigaba stated that:

"Ms Carol Chiloane and Ms Khusela Sangoni travelled to Cape Town so as to render their voluntary assistance to the Deputy Minister in preparation for both the Budget Vote and June 16 as well as Ministry guests to attend the budget vote of the Department of Home Affairs, and then Ms Chiloane proceeded further

to KZN as part of continuing with voluntary assistance that they had both undertaken to offer to the Deputy Minister in preparation for youth month activities as this was June, National Youth Month.”

12.14 It was noted that the copy of the report referred to in paragraph 12.1 above that was submitted during the investigation, was not approved by the Director General. He was consequently requested to indicate if it was in fact approved and whether he was satisfied with the explanations provided by the Deputy Minister.

12.15 The said report also indicated that further investigation would be conducted into the corporate travel expenditure of the Office of the Deputy Minister and the Director General was requested to provide the results thereof.

12.16 The Office of the Director General responded on 19 August 2008, indicating that the report of 6 September 2007 was approved by the Director General.

12.17 On 18 September 2008, the Director General advised that the further investigation of the travel expenditure of the Office of the Deputy Minister for the period 1 January 2005 to December 2007, found no expenditure that could be deemed irregular, fruitless and wasteful or unauthorised.

13. FURTHER INFORMATION REQUESTED FROM MR GIGABA

13.1 Mr Gigaba was requested, on 15 October 2008, to clarify the following issues in respect of his comments on the report of the Director General, referred to in paragraphs 12.11 and 12.13 above:

- 13.1.1 In what capacity Mesdames Sangoni and Chiloane assisted him, as indicated, and whether or not they were/are employees of the Department;
- 13.1.2 If they were not employed by the Department, why it was necessary to obtain their services. Could the same assistance not have been provided by employees of the Department? On what basis were they invited as guests to attend the *"budget vote of the Department of Home Affairs"*?
- 13.1.3 The basis on which the Department paid for their travelling expenses. Whether the Department also paid for their accommodation and who approved the expenditure;
- 13.1.4 The total cost to the Department for the assistance that the 2 ladies provided to him; and
- 13.1.5 The details of Mr Mawela's internship in his office.
- 13.2 In his response, dated 7 November 2008, Mr Gigaba stated that Mesdames Sangoni and Chiloane are very experienced in the field of communication and events management. They are/were not employees of the Department. The preparations for the Budget Vote presentation of the Minister and the associated events overstretched the human resource capacity of the Department. As the said 2 ladies indicated their willingness to voluntarily assist the Office of the Deputy Minister in the preparations, it was decided to utilize their services, which were offered free of charge, for the said events and the planning of activities of the Department relating to *"Youth Month"*.
- 13.3 The only expense incurred by the Department was their travelling and accommodation costs, which amounted to R 27 662.90 and was approved by the Head of Administration of the Office of the Deputy Minister.

- 13.4 As far as Mr Mawela is concerned, Mr Gigaba explained that the Department has an internship programme that was designed to assist young people to acquire work experience which would improve their chances of acquiring employment. The Department endeavours to comply with the targets set in this regard by the Department of Public Service and Administration and posts for interns were accordingly advertised.
- 13.5 Mr Mawela was part of the group of interns that was engaged in 2006 and he was placed in the Office of the Deputy Minister.

14. OBSERVATIONS MADE FROM THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

- 14.1 The allegations of the misappropriation of public funds by Mr Gigaba, referred to in this report were investigated by the accounting officer of the Department, as he was required to do in terms of the PFMA.
- 14.2 From the internal investigation and the deliberations of the Portfolio Committee it appeared that the financial control mechanisms of the Office of the Deputy Minister need to be improved.
- 14.3 The expenditure incurred by the Department relating to flowers sent to the wife of the Deputy Minister amounted to irregular and fruitless and wasteful expenditure that could have been avoided had proper financial controls been in place. It was noted that the error was admitted and the expenditure reimbursed by Mr Gigaba.

- 14.4 There was no indication in the responses received from Mr Gigaba or the Director General of any action taken against the official(s) in the Office of the Deputy Minister for failing to ensure reimbursement by Mr Gigaba of the public money spent in respect of the flowers sent to his spouse.
- 14.5 Paragraph 9.1.1 of the *Handbook for Members of the Executive and Presiding Officers* provides for air travel costs of child minders to be paid by the Department. The explanation provided by Mr Gigaba in respect of the traveling costs of Ms Majozi (see paragraph 12.12 above) was in line with this provision.
- 14.6 No evidence of any irregular, unauthorised or fruitless and wasteful expenditure, other than that referred to in paragraph 14.3 above could be found.
- 14.7 It is expected of Ministers and Deputy Ministers as members of the Executive, to set examples of how all organs of state should respect and support constitutional institutions, such as the Public Protector. Failure to cooperate with an investigation by the Office of the Public Protector is inconsistent with the Constitution and therefore unlawful and might even amount to criminal conduct.
- 14.8 Mr Gigaba's failure, without any just cause, to cooperate properly, diligently and without delay with the investigation by the Office of the Public Protector referred to in this report, was improper and unnecessarily delayed the conclusion thereof, which was in the public interest.
- 14.9 Many of the requests for information sent to him during the investigation were never replied to.

14.10 The report on the internal investigation that was conducted into the allegations was already available in September 2007, but was not forwarded to the Public Protector, as promised by Mr Gigaba. As a matter of fact, it appeared that he only attended to it internally 10 months later. The investigation was concluded with the assistance of the Director General.

15. KEY FINDINGS

From the investigation of the allegations of misappropriation of public funds made against Mr Gigaba, it was found that:

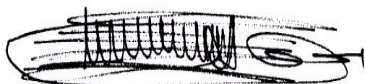
- 15.1 The expenditure incurred by the Office of the Deputy Minister in respect of flowers sent to Mr Gigaba's wife was irregular and fruitless and wasteful; and
- 15.2 The allegations relating to the travelling expenses incurred by the Office of the Deputy Minister were unfounded.

16. RECOMMENDATIONS

In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, it is recommended that:

- 16.1 The Speaker of the National Assembly takes appropriate steps to ensure that Mr Gigaba's failure to comply with his constitutional obligation to cooperate properly with the Office of the Public Protector is addressed; and

16.2 The Director General of the Department improves the financial control mechanisms of the Office of the Deputy Minister of Home Affairs.



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

Date: 18 February 2009

Assisted by: Adv C H Fourie

Head: Special Investigations