

**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 42 OF 2007/2008

**REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF AN UNDUE
DELAY BY THE OFFICE OF THE MASTER OF THE HIGH COURT,
PRETORIA, IN INVESTIGATING THE LEGALITY AND FEASIBILITY OF
THE CONTRACTS REGARDING THE HARVESTING OF TREES BY THE
SHAKOANENG COMMUNITY TRUST**

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Executive summary

The Office of the Public Protector investigated a complaint by Mr D W Mashego and others, against the Master of the High Court, Pretoria. It was alleged that the Master of the High Court, Pretoria, was unduly delaying the investigation of the legality and feasibility of the contracts regarding the harvesting of trees by the Shakoaneng Community Trust.

The complaint related to a court order that was issued on 26 May 2005 by the High Court (Transvaal Provincial Division), directing the Master *"to urgently make an appointment in terms of section 16 of the Trust Property Control Act, that he as a priority investigates the legality and feasibility of the contracts regarding harvesting of trees."*

Evidence obtained during the investigation indicated that:

- Since the date of the court order, no report was issued by the investigator appointed by the Master, in terms of section 16 of the Trust Property Control Act, because no investigation had been done.
- A period of two years had already elapsed since the date of the court order without any progress in the investigation.
- The investigator appointed by the Master lacked sufficient powers to subpoena witnesses and have their testimony tested under oath at an inquiry similar to those intended in the Insolvency Act. Further that since there was a court case pending in relation to the Shakoaneng Community Trust, the suspended trustees were unwilling to cooperate.

The following findings were made:

- There was an undue delay by the Master of the High Court to comply with the court order of 26 May 2005.
- The Master did not adhere to the urgency of the investigation as ordered by the High Court.
- The Master did not approach the High Court with a report as contemplated in the court order of 26 May 2005 even when it was apparent that the investigator did not have sufficient powers to conduct a proper investigation.
- The Master did not resort to section 19¹ of the Trust Property Control Act, 1988, although section 19 is intended to enforce section 16 of the Act.

The Public Protector recommended that:

- The Master should urgently approach the High Court to obtain extended powers for the investigator to enable him to conduct a proper investigation.
- The Master should make a submission to the Minister of Justice and Constitutional Development to have the Trust Property Control Act, 1988, amended to enable the Master to conduct proper investigations into trust property and related matters.

¹ Section 19 provides that if any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.

REPORT ON AN INVESTIGATION INTO AN ALLEGATION OF AN UNDUE DELAY BY THE OFFICE OF THE MASTER OF THE HIGH COURT, PRETORIA, IN INVESTIGATING THE LEGALITY AND FEASIBILITY OF THE CONTRACTS REGARDING THE HARVESTING OF TREES BY THE SHAKOANENG COMMUNITY TRUST

1. INTRODUCTION

1.1 This report is submitted to the Minister of Justice and Constitutional Development, the Director-General of the Department of Justice and Constitutional Development, as well as the Master of the High Court, Pretoria in terms of the provisions of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution). It relates to an investigation into an allegation of undue delay by the office of the Master of the High Court, Pretoria (the Master) to investigate the legality and feasibility of the contracts regarding the harvesting of trees by the Shakoaneng Community Trust. The investigation by the Master had to be done in terms of section 16 of the Trust Property Control Act, 1988, subsequent to a court order dated 26 May 2005.

2. BACKGROUND

2.1 On 26 May 2005 the High Court (Transvaal Provincial Division) issued a court order in case no 17413/2005 *inter alia* directing the Master "to urgently make an appointment in terms of section 16 of the Trust Property Control Act, that he as a priority investigates the legality and feasibility of the contracts regarding the harvesting of trees." The court order was issued after a number of the trustees of the Shakoaneng Community Trust had approached the court seeking a relief that the complainants in this matter (who were also trustees of the Shakoaneng

Community Trust) be suspended, pending an investigation into the affairs of the trust.

- 2.2 Consequent to the court order, the Master appointed Mr C Wilsnach of Pretorius & Wilsnach Incorporated, as the investigator in terms of section 16 of the Trust Property Control Act per letter dated 22 August 2005.

3. THE COMPLAINT

- 3.1 Subsequently Mr D W Mashego and others lodged a complaint with the Public Protector through his Mpumalanga Provincial Office.
- 3.2 They requested the Office of the Public Protector to investigate the delay by the Master in investigating the legality and feasibility of the contracts regarding the harvesting of trees by the Shakoaneng Community Trust, as ordered by the High Court on 26 May 2005.

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

4.1 The Constitutional mandate

- 4.1.1 The institution of Public Protector was established in terms of section 181(1) of the Constitution, as one of the state institutions mandated to strengthen constitutional democracy.
- 4.1.2 Section 182(1) provides that the Public Protector has the power:

- 4.1.2.1 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;
 - 4.1.2.2 To report on that conduct; and
 - 4.1.2.3 To take appropriate remedial action.
- 4.1.3 Section 182(2) provides that the Public Protector has the additional powers and functions prescribed by national legislation.
- 4.1.4 The Public Protector has jurisdiction to investigate complaints against the office of the Master since the office reside in the Department of Justice and Constitutional Development which is an organ of state in terms of section 239 of the Constitution, 1996.

4.2 The Public Protector Act 23 of 1994

- 4.2.1 Section 6(4) 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:
- 4.2.1.1 Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or improper conduct or undue delay by a person performing a public function; or
 - 4.2.1.2 Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.

- 4.2.2 Section 6(4)(c)(ii) provides that the Public Protector shall be competent, at a time prior to, during or after an investigation, if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting there from or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.
- 4.2.3 In terms of section 7(1)(b)(i) the format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.
- 4.2.4 Section 8(1) provides that the Public Protector may, subject to the provisions of subsection (3)², in the manner he or she deems fit make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.

5. THE INVESTIGATION

- 5.1 The investigation consisted of the following:
- 5.1.1 Consideration and evaluation of the complaint and documents submitted by the complainant;
- 5.1.2 Telephonic enquiries with:

² Section 8(3) provides that the findings of an investigation by the Public Protector shall, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby.

- 5.1.2.1 Mr C Wilsnach, the Master's investigator in the matter, to enquire about the delay in issuing a report as he had undertaken to issue the report within a few days in his letter to the Master dated 6 February 2006.
 - 5.1.2.2 Mr A Doman, the interim trustee of the Shakoaneng Community Trust, to enquire about their intention as interim trustees to approach the court to obtain extended powers for the investigator.
 - 5.1.2.3 Mr E January, the Deputy Master, to establish what the Master does in the case where the investigator is unable to conduct a proper investigation due to limited powers.
- 5.1.3 Correspondence with:
- 5.1.3.1 Ms M de Bruin, in the office of the Master, to provide the Office of the Public Protector with copies of correspondence between the Master and the investigator, Mr C Wilsnach, and copies of correspondence between Mr D W Mashego and the Master.
 - 5.1.4 Consideration and application of the relevant provisions of the Trust Property Control Act, 1988.
 - 5.1.5 Comparative analysis of the relevant provisions of the Trust Property Control Act, 1988 and the Insolvency Act, 1936.

6. A COMPARISON OF THE TRUST PROPERTY CONTROL ACT 57 OF 1988 *VIS-À-VIS* THE INSOLVENCY ACT 24 OF 1936

6.1 Trust Property Control Act 57 of 1988

6.1.1 Section 16 provides that the Master may call upon a trustee to account:

- 6.1.1.1 Subsection (1): A trustee shall, at the written request of the Master, account to the Master to his satisfaction and in accordance with the Master's requirements for his administration and disposal of trust property and shall, at the written request of the Master, deliver to the Master any book, record, account or document relating to his administration or disposal of the trust property and shall to the best of his ability answer honestly and truthfully any question put to him by the Master in connection with the administration and disposal of the trust property.
- 6.1.1.2 Subsection (2): The Master may, if he deems it necessary, cause an investigation to be carried out by some fit and proper person appointed by him into the trustee's administration and disposal of trust property.
- 6.1.1.3 Subsection (3): The Master shall make such order as he deems fit in connection with the costs of an investigation referred to in subsection (2).

6.1.2 Section 19 provides for the failure by a trustee to account or perform duties:

6.1.2.1 If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon him by the trust instrument or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty.

6.2 Insolvency Act 24 of 1936

6.2.1 Section 116*bis* provides for the failure by a trustee to submit an account or to perform duties:

6.2.1.1 Subsection (1): If any trustee fails to submit any account to the Master as and when required by or under this Act, or to submit any vouchers in support of such account or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of an estate, the Master or any person having an interest in the liquidation or distribution of the estate may, after giving the trustee not less than fourteen days' notice, apply to the court for an order directing the trustee to submit such account or any vouchers in support thereof or to perform such duty or to comply with such demand.

6.2.1.2 Subsection (2): The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the trustee *de bonis propriis*.

6.2.2 Section 117 provides for the enforcement of an order of court:

6.2.2.1 Subsection (1): If a trustee has failed to comply with any order of the Court made under section *one hundred and sixteen bis*, the Court may direct that any sum of money which that trustee was ordered to pay be recovered by attachment and sale of the goods of the trustee and may further commit him to prison for contempt of the Court.

6.3 Concluding observations

6.3.1 From the above comparison it is clear that in both instances i.e. under the Trust Property Control Act, 1988³ and the Insolvency Act, 1936⁴, the Master or any person having an interest may apply to the court for an order directing the trustee to comply with the Master's request or demand or perform such duty imposed by the respective Acts.

6.3.2 However, whereas the Insolvency Act, 1936 makes provision for the awarding of costs by the court against the trustee for failing to account or to perform duties imposed by the Act, where the Master or the person having an interest had approached the court for an order directing the trustee to comply or perform such duty, the Trust Property Control Act, 1988 does not have a similar provision.

6.3.3 Furthermore, whereas the Insolvency Act, 1936 provides for the enforcement of the court order issued pursuant to section 116*bis*, the Trust Property Control Act, 1988 does not have a similar provision.

³ Section 19.

⁴ Section 116*bis*.

- 6.3.4 It then follows that the Trust Property Control Act, 1988 compared to the Insolvency Act, 1936 has weak enforcement mechanisms in relation to trustees and their administration and disposal of trust property.

6.4 Comments about the delay with the investigation

- 6.4.1 At the close of the investigation on 10 September 2007, a lengthy telephonic conversation was conducted with Mr E January, the Deputy Master, to establish as to what the Master intended doing about the fact that the Master's investigator had indicated that he needed extended powers in order to be able to conduct a proper investigation. In a letter dated 30 May 2007 addressed to the Master, Mr Wilsnach indicated that it would be impossible to compile a proper report unless he had the powers to subpoena witnesses and have their testimony tested under oath at an inquiry similar to those in the Insolvency Act, 1936. Mr Wilsnach confirmed the above assertion in a telephonic discussion with the author of this report. Mr January also informed the Office of the Public Protector that he agreed with the assertion by the investigator regarding his powers and conceded that the powers of the investigator under section 16 of the Trust Property Control Act, 1988 are in a narrow sense. Mr January also indicated that he was contemplating making an *ex parte* application to the court to be granted powers similar to those in the Insolvency Act, 1936 to enable him to conduct a proper investigation into the matter. Mr January further remarked that the Trust Property Control Act, 1988 in its present form makes it difficult for the Master to conduct proper investigations into trust property and that the Act needs to be

amended to give the Master powers similar to those in the Insolvency Act, 1936.

- 6.4.2 According to Mr January, even if the investigator had resorted to section 19, he could only have obtained a court order compelling the suspended trustees to provide him with documents but without the power to subpoena them and have their testimony tested under oath the investigator could do nothing further. Mr January also indicated that he had approached the Master with the intention of approaching the court to obtain extended powers for the investigator but owing to a lack of funds he was unable to do so.

7. FINDINGS

7.1 Findings

- 7.1.1 From the investigation it was found that the office of the Master did not adhere to the urgency of the investigation as ordered by the High Court.
- 7.1.2 It was also found that the office of the Master did not approach the High Court with a report as contemplated in the court order of 26 May 2005 even when it was apparent that the investigator did not have sufficient powers to conduct a proper investigation.
- 7.1.3 The office of the Master did not resort to section 19 of the Trust Property Control Act, 1988, although section 19 is intended to enforce section 16.

7.2 Key finding

- 7.2.1 There was an undue delay by the office of the Master to comply with the court order of 26 May 2005.

8. RECOMMENDATIONS

8.1 In terms of section 182(1)(c) of the Constitution, 1996 and section 6(4)(c)(ii) of the Public Protector Act, 1994, it is recommended that:

8.1.1 The Master should urgently approach the High Court to obtain extended powers for the investigator to enable him to conduct a proper investigation.

8.1.2 The Master should make a submission to the Minister of Justice and Constitutional Development to consider closing the apparent lacuna in the Trust Property Control Act, 1988.

8.1.3 The Master should report to the Public Protector within 3 months of the date of this report of the steps taken to implement the above recommendations and thereafter report on a monthly basis on the progress in the investigation of contracts regarding the harvesting of trees by the Shakoaneng Community Trust. The Master is also reminded that failure to implement the court order of 26 May 2005 may constitute contempt of court.

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

Date:

Assisted by: M I Matlawe, Investigator