

**TRACY SISCHY
ATTORNEYS
PROKUREURS**

Public Protector
Attention: Ms T.A Häderli
By e-mail: theresah@pprotect.org

44 Olympic Road
Blairgowrie
Randburg
2194
Docex 121, Randburg
Tel: 011 886 0242
Fax: (011) 886 1391
Cell: (082) 332 8072
E-mail: tsischy@absamail.co.za

Our Ref: A0226/Buthelezi
Your Ref: 7/2 –20693/10

Date: 19/09/2011

Dear Sir

Re: MR. SIBUSISO BUTHELEZI

1. We refer to your letter dated 30 May 2011, and your follow-up e-mail of 31 August 2011.
 - 1.1 We note that your heading to your letter reads: “*Mr S. Buthelezi: Termination of service in respect of employment with the Department...*”. It should be noted that this heading could cause confusion as the root of our client’s complaint is NOT the termination of his appointment.
2. Mr Buthelezi requests that the Harris report be set aside because:
 - 2.1 In terms of the parties settlement agreement.
 - 2.2 In terms of PAJA and/or the Constitution and/or the Public protector Act 23 of 1994 and in terms of public interest, all of which dictates that our client should receive administrative action that is lawful, reasonable and procedurally fair.

Settlement agreement between Buthelezi and the Department presented by MEC Nkosi

Ad paragraph 1.3

3. In paragraphs 5 – 6 thereof the learned Public protector summarises the crux of Mr Buthelezi's 1st part of his complaint.
4. Annexure A to the settlement agreement states "*The Department withdraws **all** charges against Mr Buthelezi*". There are 2 sets of charges against Buthelezi namely:
 - 4.1 Charges raised in the Harris report;
 - 4.2 Charges raised in the disciplinary hearing.
5. The Oxford dictionary states that the word **all** is a combining word which means "*completely*", "*all inclusive*" and that its intention is to the highest degree, and the example it gives is "*all powerful*". It is therefore quite clear that it refers to both sets of charges. If it was the intention of the Department to make it the one or the other it would have stated same. It is therefore an express written material term of the agreement and not just implied.
6. Paragraph 2 of Annexure A states *that "The Department lifts the suspension"*. This shows further that Mr Buthelezi's termination is not under a cloud of charges, whether as ventilated in the Resolve Group report or in terms of the disciplinary hearing.
7. The payment itself of 12 months is the maximum allowed in law for "*unfair dismissal*" and in itself serves as an acknowledgement that there is no cloud of charges.
8. The Department in paragraph 11.1 of the agreement state that it "*will not*:
 - 8.1 At **any time** make any:
 - 8.1.1 Adverse;

8.1.2 *Untrue; or*

8.1.3 *Misleading statement” about Buthelezi.*

8.2 *Adverse according to the Oxford dictionary means:*

8.2.1 *“Negative and unpleasant”*

8.2.2 *“not likely to produce a good result” and it provides an example namely:*

8.2.2.1 *“They have attracted strong adverse criticism”.*

9. It is obvious that both the charges against Buthelezi considered in the Resolve Group report and the charges in the disciplinary hearing would be negative and unpleasant, and not likely to produce a good result, and in terms of the agreement the Department is accordingly prohibited from releasing the Resolve Group report, or publishing it in it's totality or portions thereof or circulating it.

10. *Our client therefore needs an investigation in terms of paragraphs 11 to 12 below:*

11. *That the Department of Roads and Transport and Premier Mokonyane has breached the agreement as follows:*

11.1 *It failed to withdraw the charges against Buthelezi ventilated in the Resolve Group report as it was contractually obliged to do.*

11.2 *It released, published and circulated the Resolve Group report which it contractually was prohibited from doing.*

11.3 *The fact that the Resolve Group was released by Premier Mokonyane for political gain constitutes an abuse of power, and the Department of Roads and Transport and Premier Mokonyane should issue a media release apologise publicly for it's conduct in paragraphs 11 to 11.2 above.*

12. *Further that the investigation against Jacobs be completed.*

13. The Public Protector in paragraphs 4.3.2 – 4.3.4 of its aforesaid letter states various caselaw that a settlement agreement is as final and if it was made an order of court.
14. Mr Buthelezi requires that his settlement agreement with the state be honoured and that the Honourable Public Protector enforces it as per paragraph 11 – 11.3 above.
15. The Public Protector states that it will take remedial action as to the department's failure as the media release and internal circular isn't in accordance with the announcement set out in Annexure A to the settlement agreement, which Mr Buthelezi appreciates. Mr Buthelezi summarised the relief sought under paragraph 87 below.

Ad paragraph 5.1.4 of the learned Public protector's letter

16. The Public Protector is however concerned that the Department will rely on the arbitration clause to state that the Public Protector doesn't have jurisdiction.
17. The Public Protector was not a party to the agreement and is not limited thereto.
18. If Mr Buthelezi appointed an attorney and arbitrator to take legal action and/or to sit as a presiding officer in its claim against the state his legal action would be limited to the state's conduct in breach of the settlement agreement and fall within the private sphere. Such attorney and/or arbitrator would receive remuneration and be bound to its mandate.
19. The Honourable Public protector's function is that of oversight over organs of state, it has a wide discretion to investigate and it finds its authority in the constitution and Public Protector Act and not from the complainant itself as a legal representative does, nor is it bound to an complainant's instruction as an attorney is. The Public Protector exercises its powers not for remuneration as a legal representative or

arbitrator, but to comply with its legislative function. From paragraph 93 below it is clear that Mr Buthelezi has 9 complaints. An arbitrator would be limited to the settlement agreement and would only be able to deal with paragraphs 93.1 – 93.1.2, 93.2, and possible paragraph 93.8 and not paragraphs 93.3, 93.4, 93.5, 93.6, and 93.7. Rather than splitting the issues and asking the arbitrator to deal with only certain aspects of the relief sought as summarised such as in paragraph 93 below, and to pay the arbitrator and his own legal representative to assist with same, Mr Buthelezi asks the Public Protector to deal with all the issues. The Public Protector's legislative authority is in any event far bigger than that of a private arbitrator.

Public Protector's jurisdiction

20. The Public Protector is created by the constitution and in terms of the preamble to the Public Protector Act has the power "*to investigate any conduct in state affairs, or in the public administration of any sphere or government, that is alleged or suspected to be improper or have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action in order to strengthen and support constitutional democracy in the Republic*".
21. In other words if there is a suspicion of improper conduct or prejudice the Public Protector can take appropriate remedial action.
22. The Public Protector Act states that the Public Protector should perform its functions in good faith, without fear, favour, bias or prejudice. We further quote herewith Sections 4 (a) (i), (ii), (iii), (v) and 5 (a), (b), (d) and 7 of the Public Protector Act.

“(4) *The Public Protector shall, be competent:-*

- (a) *to investigate, on his or her own initiative or on receipt of a complaint, any alleged:-*

- (i) **maladministration** in connection with the affairs of government at any level;
 - (ii) **abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;**
 - (iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or Section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004, with respect to public money;
 - (v) act or omission by a person in the employ of government at any level, or person performing a public function, **which results in unlawful or improper prejudice to any person.**
- (5). In addition to the powers referred to in subsection (4), the Public Protector shall on his/her own initiative or on receipt of a complaint be competent to investigate any alleged:-
- (a) maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (Act 1 of 1999)
 - (b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person **performing a function connected with his or her employment** by an institution or entity contemplated in paragraph (a);
 - (d) **Act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.**

(7). *The Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged attempt to do anything which he or she may investigate under subsections (4) or (5)."*

23. Section 7 of the Public Protector Act is clear. The learned Public Protector has a wide discretion. The Public Protector doesn't obtain its authority from Mr Buthelezi. It derives its authority from the Public Protector Act and the Constitution. The state would only be in a position to allege that the Public Protector shouldn't intervene if the state complied with its part in the agreement. As a result of the state's breach Mr Buthelezi calls on the Public Protector. More especially as the Public protector is free and its mandate isn't limited to the scope of the parties settlement agreement.

24. From the above it is clear that in terms of the settlement agreement alone the state agreed to withdraw whatever charges it may have had against Buthelezi as ventilated in the Harris report or in subsequent disciplinary hearing charges. Only in the event that the Public Protector finds that Buthelezi's interpretation of the settlement agreement is incorrect he states as follows:

The Harris report is not in compliance with PAJA, and/or the Constitution and/or the Public Protector Act nor is it in the public interest

25. Mr Buthelezi discussed same at length in his letter of 9 March 2010 under the following headings:

25.1 *Reason for investigation by Resolve Group and scope of investigation.*

25.2 *Procedural fairness.*

25.3 *Unequal treatment (in comparison with Jacobs).*

25.3.1 *Re: The time periods.*

25.3.2 *All allegations against Buthelezi was considered not so with Jacobs.*

25.4 *Bias against Buthelezi.*

26. **We will therefore consider 25.1 – 25.4 above with the learned Public Protector’s answers thereto.**

26.1 **Reason for investigation by Resolve Group and scope of investigation.**

26.1.1 The Honourable learned Public Protector states that the Resolve Group was entitled to investigate Jacobs’ charges against Buthelezi in terms of the terms of reference dated 30 September 2008 signed by Mr M. Mokoena. We attach hereto as **Annexure X1** questions from the DA to the Gauteng Premier dated 21 November 2008 *inter alia* with regards to Advocate Peter Harris mandate. The Premier on 2 December 2008 goes on record to state in it's answer to Parliament that Advocate Harris’s brief was to investigate allegations by **Buthelezi** against the MEC and other officials.

26.1.2 This document was therefore after the letter dated 30 September 2008 referred to by the learned Public Protector and is therefore the final mandate. It further shows that it was the intention of both Premier Mokonyane and the Gauteng Department of Roads and Transport to investigate the then MEC, and not Buthelezi. It is further confirmed with a higher authority than Harris, namely PARLIAMENT!

26.2 The learned Public Protector then considers the following:

26.2.1 In the 2nd paragraph of page 5 of Annexure D1 to our client’s letter of 9 March 2010 it states that the Department advised the Resolve Group **not to investigate the allegations made by Buthelezi against Jacobs in his statement dated 25 May 2009. This is clearly capricious and procedurally unfair to Mr Buthelezi.**

26.3 Our client is appreciative of the fact that the learned Public Protector undertakes to ascertain from the Department what transpired regarding it's investigation into the outstanding issues raised in the Harris report regarding Mr Harris.

- 26.4 From the Harris report it is clear that some issues against MEC Jacobs were not properly investigated and some issues were not investigated at all.
27. Kindly read Annexure J to our client's letter of 9 March 2010 as if specifically inserted herein and specifically paragraphs 4 – 17 thereof. It refers *inter alia* to page 26 of Mr Harris's findings which we attach hereto as **Annexure A** and quote an extraction thereof.
28. ***Mr Buthelezi's "allegations in relation to the Kempton Park Hospital issue against the MEC are very serious..... (the) investigation in relation to this particular issue should be conducted."***
29. In terms of Section 5(b) the Public Protector is enabled to investigate the "*improper conduct or undue delay by a person performing a public function.....*". We attach hereto as **Annexure X2** questions asked by the DA on 12 May 2010 (about a year after the Harris report) to the Premier about the Kempton Park Hospital Project and the Premier's reply to Legislature dated 31 May 2010. The Premier states therein that the investigation was finalised in the Resolve Group supplementary report. If this is a different report to the June 2009 report, our client is not aware of this report and request a copy of this report and that it's findings be scrutinised by the Public Protector. If it is the same report the Resolve Group clearly states that it must be completed.
30. Harris state that due to a lack of time the Kempton Park Hospital issue wasn't fully investigated.
31. Mr Harris further recommended that the following allegations against the MEC in respect of Pricewaterhouse Coopers (PWC) who was appointed by the MEC be investigated. Due to lack of time Harris wasn't able to consider it properly namely:
- 31.1 *The MEC's turn around strategy (TAS).*

31.2 *PWC/Dornier contract.*

31.3 *PWC and Ukuba management scandal.*

32. Page 297 – 303 of the Harris report is attached hereto as **Annexure B**. In terms thereof PWC allegedly overspent with **7 Million Rand** on Jacob's "Turn around strategy".

33. It further allegedly overcharged with a further **R7 500 000,00** in terms of page 302 of Annexure B which work constituted plagiarism.

34. It is therefore in the public interest that these charges be investigated.

35. In annexure B, Harris gives further particulars of 31.1 – 31.3 above which must be investigated. We mention some of them as follows:

35.1 That an official on behalf of the MEC tries to trick the DAC to authorise a project under the auspices that it's only R34 million Rand when it was in fact a 70 million Rand project (see page 30 of Annexure B).

35.2 That the MEC's appointment of PWC marked a public display of the MEC's interference in the operations of the Department (page 299 of Annexure B).

35.3 That the MEC attempted to implement the MEC's Management Dashboard which if successful would usurp Buthelezi's powers as HOD.

36. It is in the public interest that the MEC's over expenditure of 14,5 million as set out in paragraphs 11 and 12 and the MEC's alleged aforesaid unethical behavior at the time be investigated.

37. We attach hereto an **extract of Mr Buthelezi's statement**, as **Annexure C** from which the following can be gleaned:

37.1 The North West Government was liable to pay **104 million Rand** to Bus operators. The Bus operators erroneously sued the Gauteng Department of Roads and Transport. Mr Buthelezi wanted to oppose same.

- 37.2 If the Gauteng Department of Roads and Transport paid same it would not have sufficient funds to pay it's own Gauteng Bus operators. Neither was the Gauteng Department of Roads and Transport in a position to consider the merits of the North West Bus Operator's claim. Mr Buthelezi wanted to oppose the law suit and wanted to resolve the dispute through mediation and arbitration.
- 37.3 The MEC then overrode Buthelezi's decision and instructed the Department **NOT** to oppose the legal action causing losses of 104 million Rand, interest and legal fees excluded. Again it is in the public interest that same be investigated.
38. The above allegations constitutes maladministration and our client requests that the Learned Public Protector investigate same under Section 4(a) (i), (ii), (iii),(v) and 5(b) and (d) of the Public Protector Act 23 of 1994 as quoted above.
39. **It is further in the public interest that the Department be compelled to follow the Harris report's recommendation that the issues set out in Annexure J be re-opened and investigated until completion.**

Procedural fairness

40. The Public Protector first considers if Buthelezi's complaint is quintessentially a matter rooted in the Labour Law.
41. Our client denies that the Harris investigation is exclusively a labour issue. Mr Buthelezi's code of his complaint has always been about the fairness and reasonableness of the Resolve Group investigation and not as a labour issue. Rather than it being a labour issue it's an abuse of power.
42. **Buthelezi humbly submits that Chirwa's case cannot be compared to Mr Buthelezi's case as it deals with an unfair dismissal which was first heard by the CCMA and which is unrelated to Mr Buthelezi's**

complaint. In the event that the learned Public Protector doesn't come to the same finding Mr Buthelezi states as follows:

Chirwa's labour matter

43. Should one have regard to the Chirwa's Case she was dismissed due to incapacity and she referred the matter to the CCMA. Instead of proceeding with the CCMA she lodged a case with the High Court.
44. Chirwa's claim is based on an unfair dismissal. An unfair dismissal is a violation of the Labour Relations Act and the Labour Relations provides a set of carefully drafted rules and structures to address this violation and to remedy same. The employer if found guilty would have to pay compensation.
45. Ms Chirwa first referred the matter to the CCMA and then abandoned same.

Judge Skweyiya found inter alia:

- (a) Chirwa's claim of unfair dismissal was based on a violation of the labour Relations Act.
- (b) Further Chirwa had access to procedures, institutions and remedies designed to deal with this specific alleged procedural unfairness.

(a) Was there a violation of the Labour Relations Act?

Fair Procedure

46. There was a violation of the **Labour Law** is as per **Annexure D** attached hereto. "*Section 188(1) (b) of the Labour Relations Act requires that a dismissal for misconduct must be effected in accordance with fair procedure.*" **A fair procedure entails a fair disciplinary enquiry.**

47. Fair procedure entails a fair investigation, which Mr Buthelezi advise that it wasn't. When addressing labour issues commissioners have to ask, "was the employers conduct substantively fair"? Item 4(1) of the Code of Good Practice requires that:
- (a) the employee should be entitled to a reasonable time to prepare the response to the charge. The question of whether or not the employee was offered sufficient time to prepare is a factual one which Mr Buthelezi discussed in his letter of 9 March 2010 and will be addressed more fully further below. Mr Buthelezi advises that he wasn't entitled to reasonable time to prepare.
 - (b) The Employee is entitled to state a case in response to the charges leveled against him. If the employee isn't given a proper opportunity to respond to the charges and obtain evidence, witnesses and the like it prejudices his rights to state his case properly and on the same level as the other employee which is what happened to Mr Buthelezi. This was dealt with in Buthelezi's letter of 9 March 2010 and will be ventilated more fully below. Mr Buthelezi advised that he wasn't able to state his case properly due to *inter alia* having insufficient time.

Unequal treatment of employees

48. Further below Mr Buthelezi also complains about how he and Mr Jacobs was treated unequally. Basson in pages 118,119 and 120 attached hereto as **Annexure E** of her book called essential Labour law states the following:
- 48.1 "Contemporaneous inconsistency is where employees who breach the same rule contemporaneously or at roughly the same time are not all disciplined. The unfairness is based on the proposition that similar cases should be treated similarly. If the employer does not do this, the inference may be drawn that the employer administers discipline in an arbitrary or discriminatory way. The employer must as far as possible treat

employees the same for similar offences. In other words the employer must be consistent when meeting out discipline.”

49. It is therefore erroneous to state that the labour laws does not require of employers to treat employees fairly in investigations.
50. From the above it can be seen that as with Chirwa there was a violation of the Labour Laws. This is however where the similarity stops.

(b) Does Buthelezi’s complaint have a remedy in Labour Law?

51. As the learned Public Protector has clearly pointed out, there is no remedy provided by the Labour Law for Mr Buthelezi’s complaint. Buthelezi’s claim is not rooted in Labour Law.
52. Mr Buthelezi further asks that the Harris recommendation be followed and that charges against Harris be investigated to completion, which the CCMA or Labour Court doesn’t have the jurisdiction to do.

Judge Ngcobo’s finding with Chirwa was as follows:

53. Ngcobo agreed with Skweyiya in terms of paragraph (a) and (b) above and emphasised that Mr Chirwa had a remedy in the Labour Relations Act. The learned Public Protector agrees that Mr Buthelezi has no remedy in the Labour Relations Act.
54. Judge Ngcobo further states that if the remedy lay in the Labour Relations Act that termination of the employment contract does not constitute administration but was more concerned with Labour Relations.
55. The question according to the Honourable Judge Ngcobo is:
 - 55.1 Was there a violation of the Labour Relations Act.
 - 55.2 Does the complaint have a **remedy** in Labour law.

- 55.3 Is the complainant rooted in the Labour Law i.e. is it **more** concerned with Labour law and employment relations?
- 55.4 That unfair dismissals are rooted in Labour Law, as it deals with the termination of an employment agreement. .

Application of Judge Ngcobo's finding to Mr Buthelezi's complaint

56. Mr Buthelezi has no remedy in Labour law. The Labour Law only provides guidance as to determine if the investigation was procedurally fair. Mr Buthelezi's case is not rooted in Labour law.
57. It is noted that the learned Public Protector bolded paragraph (c) (iv) on page 10 of it's letter, which states that the conduct of the employer in terminating the employment contract does not constitute administration.
- 57.1 Our client' complaint is not about the termination of the employment agreement more especially as it was by mutual consent but that the investigation wasn't reasonable and procedurally fair in terms of PAJA, and/or the Constitution, and/or the Public Protector Act and in terms of public interest .
58. **Buthelezi humbly submits that Gcaba's matter cannot be compared to Mr Buthelezi's complaint as Gcaba's matter is about an unfair labour practice which Gcaba first referred to his Sectoral Bargaining Council, withdrew the dispute and then referred to the Honourable High Court. In the event that the learned Public Protector doesn't come to the same finding Mr Buthelezi states as follows:**

Gcaba's labour matter

59. The learned Public Protector then discussed Gcaba. Mr Gcaba had an unfair labour practice which he first referred to the Bargaining Council, he then later abandoned the referral to the Bargaining Council and referred it to the High Court, which was dismissed and ended up in the Constitutional Court.

60. The Constitutional Court stated the following:

60.1 *That the High Court's jurisdiction will only be used in matters which are to be determined by the Labour Court for example unfair dismissals*

60.2 *The Constitutional Court accepts that the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law.*

60.3 *Further that once a set of carefully crafted rules and structures have been created for effective and speedy resolution of disputes and the protection of rights in a particular area of law it is preferable to use that particular system.*

60.4 *It further asks if Gcaba's claim was essentially rooted in the Labour Relations Act, and found that it was.*

Gcaba's labour matter applied to Buthelezi.

61. One cannot put Mr Buthelezi's complaint in the category of that of Gcaba's:

61.1 Gcaba's claim relates to an unfair labour practice.

61.2 The Labour Relations Act provided a remedy for Mr Gcaba. He could address same to a Bargaining Council which he initially did but then withdrew same. The Public Protector correctly points out that there is no remedy provided for Mr Buthelezi in the Labour Relations Act.

61.3 There are no carefully drafted rules and structures created by the Labour Relations Act that protects Mr Buthelezi's right to a fair and reasonable investigation.

- 61.4 The Constitutional Court itself says that even if it may have application in the labour law that it may threaten or violate different constitutional rights and give rise to different causes of action in law which is the case here.
62. It is clear that our client's complaint is NOT essentially rooted in Labour Law.
63. The learned Honourable Public Protector then in paragraph ix on page 12 states that the constitutional court held that the failure to promote Mr Gcaba did not amount to administration as:
- (a) it was quintessentially a labour relations matter.
 - (b) and that the impact thereof was felt mainly by Mr Gcaba with little or no direct consequences for any other citizens.
64. As stated before Mr Buthelezi's complaint cannot quintessentially be a Labour Law matter as there are no policies, procedures or remedies available to him as a result of the violation of his Labour law rights.
65. From what is set out more fully herein and especially in paragraphs 27 – 39 above it is clear that it is of consequence to other citizens. It is of great concern to citizen should one look at the amounts involved namely R114 million. Mr Buthelezi has attached various newspaper articles about same which reflects the public's interest. Same was further considered in parliament sessions as per Annexure X1 – X2 attached.

Labour Relations Amendment Bill

66. As same is not an act yet same is not considered herein.

Jurisdiction of the High Court

67. It is not clear why the learned Public Protector places such a heavy reliance on what the jurisdiction of the High Court is, as the matter is not before the Honourable High Court, and the Public Protector's jurisdiction is very different from that of the High Court.

The Constitution

68. The learned Public Protector then highlights in the bottom Section of paragraph viii that Section 35 of the Constitution does not regulate Labour Law issues between the state as employer with its employee. As it is not rooted in the Labour Law this concern is not relevant.

The Public Protector Act

69. The Public Protector Act in terms of Sections 5 (b) and (d) specifically makes the Public Protector competent to investigate issues related to employment. We have further set out above that the Harris investigation against Buthelezi amounts to maladministration, abuse, an unjustifiable exercise of power, and it is further capricious, discourteous improper conduct. The manner in which the investigation was conducted results in unlawful and improper prejudice to Mr Buthelezi. The operations of the Department, and the investigation against the MEC, especially where it relates to millions of Rand affects the public. The Public Protector is therefore enabled by the Public Protector Act to resolve this complaint by any means in an expedient fashion.
70. One should not take on armchair approach but look at the situation as it was. Senior officials are involved namely the HOD and MEC, and senior investigators were involved who charged tens/hundreds of thousands of Rands to render its first report and took from about September 2008 to June 2009 being 9 months. The Resolve Group holds itself out to be experts in this field and there is no reason why the investigation should not be fair or unbiased, and why the Department, the MEC and the Premier shouldn't expect same.

71. The Public Protector therefore has the authority to address Buthelezi's complaint in terms of PAJA and/or the Constitution and/or the Public Protector Act and public interest.

Unequal treatment

Time periods

72. The Public Protector is visibly silent about the fact that Buthelezi was treated poorly in comparison with Jacobs. The unequal treatment is material. The state cannot treat one employee different to another. Kindly refer to paragraph 48.1 above and Annexure E attached as aforesaid.
73. It cannot be condoned that Jacobs was given 4 months to attend to his second statement and Buthelezi was given a month and a week to attend his statement. This adversely affected Buthelezi's ability to obtain evidence, and witness statements and to defend himself on the same level as Jacobs was able to.
74. Mr Harris in various instances in his report asked for more time to investigate the allegations made by Mr Buthelezi against the MEC in his statement dated 22 May 2011. See *inter alia* **Annexure A** and paragraph 6.4.1 on page 303 of **Annexure B**.
75. Harris advises in paragraph 6.4.1 of Annexure B attached as aforesaid that the MEC also asked for an extension. **Therefore Buthelezi, the MEC and Harris all believed that the investigation wasn't ripe for conclusion and/or closure thereof.**

All allegations against Buthelezi was considered not so with Jacobs

76. Kindly refer to paragraph 48.1 above which states that employers have to treat employees consistently, and that similar cases should be treated similarly failure to so this will draw the inference that employer's administers discipline discriminatory. It will also have the result that the

parties couldn't present their case on the same level, causing severe prejudice to Mr Buthelezi.

77. Kindly refer to paragraphs 31 and 39 above where Harris advises that the charges against the MEC were not fully investigated due to lack of time. Kindly refer to paragraph 26.2.1 above. The state tells Harris not to investigate allegations against MEC as set out in Buthelezi's statement of 25 May 2009. In Annexure X1 Premier Mokonyane advised Legislature that she would cause the charges against Harris be investigated to completion.
78. MEC Jacobs in Annexure X1 expressed to Parliament that he wants the investigation against him to be conducted and finalised. The Parliament in Annexure X2 sought the finalisation of the investigation against the MEC and in particular with regards to the Kempton Park matter. Kindly see paragraphs 26.4 – 39 and our client's letter of 9 March 2010 and in particular Annexure J thereto.

Bias against Buthelezi/ Prejudice suffered by Buthelezi/ Improper conduct by the state

79. According to Basson in paragraph 48.1 above unequal treatment draws the inference of arbitrary and discriminatory treatment which is also bias. The Department's instruction to Harris as per paragraph 26.2.1 above to investigate all charges against Buthelezi and not all charges against Jacobs reflects bias.
80. The Department's instruction is in violation of its undertakings to Legislature as per Annexure X1 and X2. As per Annexure X1 above the MEC Jacobs welcomed the investigation and he would have handed in further statements to assist with the investigation was it not for the fact that the investigation against Jacobs was terminated prematurely.
81. Kindly refer to paragraphs 31 – 41 of Buthelezi's letter of 9 March 2010. Buthelezi requests that the learned Public Protector carefully considers

the Resolve Group's report contained in an arch lever file, which is in the possession of the Public Protector to consider as to whether the Department and the investigators themselves treated Buthelezi and Jacobs with different yardsticks. At date hereof the learned Public protector has not expressed an opinion thereon. In the event that it was because the Public protector wanted to read the Harris report together with the documents requested in 5.1.1 to 5.1.3 the learned Public Protector would not be able to express an opinion at date of the letter namely 30 May 2011. It would only be able to do so after receiving the requested documents which it duly did after it's request, and any opinion expressed in it's letter of 30 May 2011 could only serve as an interim opinion.

82. The learned Public protector is generally silent on the issue of bias, and Buthelezi requests a response thereto.
83. In terms of the Public Protector Act the Learned Public Protector has to consider the prejudice suffered by Buthelezi DURING the investigation and AFTER the investigation.
84. The Department of Roads and Transport allowed the MEC to use the media as a platform to smear Buthelezi's name and to influence the investigation.
85. Examples of issues under investigation which were ventilated in the media are: in annexures E,M,N,O and P to Buthelezi's letter of 9 March 2010, and see annexure SB4 to Buthelezi's letter of 25 August 2011.
86. On 3 May 2010 Premier Mokonyane personally made the Resolve Group public, which report was prior thereto confidential. She did so to further her own political campaign. Mokonyane after the investigation made the MEC the new head of her Provincial Planning Commission and has to the best of Buthelezi's knowledge stopped any further investigation against Jacobs.

87. Buthelezi has since the Harris report been considered and short listed for various senior positions, in the public and private sector. No one was however willing to appoint Buthelezi as a result of his poor public image caused by the Harris report and exploited by Premier Mokonyane. Buthelezi has therefore been prejudiced financially, and socially.
88. The learned Public Protector cannot be silent that Mokonyane exploited Buthelezi's private life for political gain.
89. The Public Protector is then rightfully concerned that the Department breached the parties settlement by issuing a media release in conflict with the parties settlement agreement causing further prejudice to our client.
90. We attach hereto a further article by The Star dated 23 June 2011 as **Annexure F** which 2 years after the fact still expresses a concern about the Resolve Group's Report which sheds Buthelezi in a bad light. The Star is not the first newspaper to state that Premier Mokonyane used the Harris report for political gain in the race to become ANC Gauteng Chairperson, which took place a few days after she made public the Resolve Group report. This has to stop, and the learned Public Protector cannot be silent about this.
91. Mr Buthelezi's complaint is not about "unfair labour practice". Buthelezi's complaint is about the abuse of power and failure by the investigators to conduct their investigation in a fair, transparent and balanced manner. Mr Buthelezi is also concerned about the following:
- 91.1 E-mail and statement 1 issued by Buthelezi
There is no evidence that the Peter Harris bothered to investigate the issues Buthelezi raised in his e-mails and statement 1.
- 91.2 Statement 2 issued by Buthelezi
Besides a detailed response to the MEC's submission, Buthelezi raised a number of issues under Point in Limine. There is no evidence that the

peter Harris bothered to investigate the additional issues he raised in his Point in Limine and statement 2.

91.3 Statements 3,4 and 5 issued by Buthelezi

There is no evidence that the Peter Harris bothered to investigate the issues Buthelezi raised in his Points in Limine

91.4 2x Letters to the Premier from Buthelezi

The Premier never bothered to respond to Buthelezi's letters raising concerns about the process. The Premier never even acknowledged receipt of his letters.

92. Mr Buthelezi acknowledges the learned Public Protector's request that the relief sought by him be summarised.

93. **The relief sought by Mr Buthelezi can be summarised as follows:**

93.1 *That the Department of Roads and Transport represented by MEC Nkosi and Premier Mokonyane has breached the agreement as follows:*

93.1.1 *It failed to withdraw the charges against Buthelezi ventilated in the Resolve Group report as it was contractually obliged to do.*

93.1.2 *It released, published and circulated the Resolve Group report which it contractually was prohibited from doing.*

93.1.3 *The fact that the Resolve Group was released by Premier Mokonyane for political gain constitutes an abuse of power, and Premier Mokonyane and the Department of Roads and Transport should issue a media release to apologise publicly it's conduct in paragraphs 93.1 – 93.1.2 above and for any injustice he suffered as a result thereof.*

93.1.4 **Alternatively to paragraphs 93.1 – 93.1.2 above.** *That the Department sets aside the investigation by on the grounds that the investigation was not reasonable and procedurally fair, and the gross injustice he suffered as a result thereof.*

- 93.2 *That Premier Mokonyane and the Department of Roads and Transport is prohibited from releasing further information to the media or doing anything to encourage any circulation, publication or distributing the Harris report and any further adverse information or material about Mr. Buthelezi.*
- 93.3 *That the Public Protector subpoena from Willem Heath a copy of it's report with regards to the Resolve Group's findings.*
- 93.4 *As volunteered from the learned Public Protector to ascertain from the Department of Roads and Transport and Premier Mokonyane what transpired regarding it's investigation into issues raised in the Harris report regarding Jacobs which was not investigated to completion.*
- 93.5 *That the concerns raised by Jacobs and subsequently Resolve Group investigation against Mr. Buthelezi personally should have remained internal and not have inter alia leaked to the media, and that Mokonyane be sanctioned for releasing the Harris report.*
- 93.6 *Further that the investigation against Jacobs be completed, as set out more fully in Annexure J to our client's letter of 9 March 2010.*
- 93.7 *Should one have regard to Annexure X2, the Premier states therein that the investigation was finalised in the Resolve Group supplementary report. If this is a different report to the June 2009 report, our client is not aware of this report and request a copy of this report and that it's findings be scrutinised by the Public Protector. If it is the same report the Resolve Group clearly states that the investigation against Jacobs must be completed as per paragraph 89.5 and that it is NOT completed as alleged.*
- 93.8 *Mr Buthelezi seeks the following relief in terms of the incorrect media release and the internal circular issued by the Department of Roads and Transport.*

93.8.1 As representative of the Department of Roads and transport, MEC Nkosi (who signed the settlement agreement on behalf of the Department) and Premier Mokonyane failed to release a media statement as per Annexure A to the agreement. Mr Buthelezi accordingly seeks the following relief:

93.8.1.1 An apology from MEC Nkosi acting on behalf of the Department of Roads and Transport and Premier Mokonyane acting personally for the fact that it didn't issue a media release as per Annexure A internally and to the Media (as attached as Annexure Z to Buthelezi's letter of 27 May 2011).

93.8.1.2 A retraction statement of it's internal circular attached as Annexure T to Buthelezi's letter of 27 May 2011 and a retraction of it's media release at the time.

93.8.1.3 The issuing of a fresh internal circular and media release in terms of Annexure A to the settlement agreement.

94. Our client's rights are reserved in full.

95. Kindly revert.

Yours faithfully

Tracy Sischy