

**TRACY SISCHY
ATTORNEYS
PROKUREURS**

**Public Protector
By hand
Hillcrest Office Park
174 Lunnon Street
Cnr Banket , Brooklyn
Pretoria**

**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:

Date: 12/08/2011

Dear Sir/Madam

**RE: BUTHELEZI / IGNATIUS JACOBS 7 BILLION OVERSPEND ON
GAUTRAIN**

1. We represent Mr. Sibusiso Buthelezi who instructed us as follows.
2. Mr. Buthelezi was the former Head of Department for the Department of Roads and Transport (the Department) until 30 November 2009. The Gautrain project was ongoing during our client's tenure.
3. On 26 July 2011 the Star published an article titled "*water delays Gautrain*". It further had a picture from 2008 showing the water seepage at the Johannesburg Park Station tunnel.
4. The article reports on the fact that there is a water seepage and in flow of water into the tunnel between Park Station in Johannesburg CBD and Rosebank, causing the Gautrain to be inoperable between Johannesburg Park Station and Rosebank.
5. The article further reports that an engineer indicates that it can take 10 months and around a R100 million to repair.

6. The Gautrain was a private public partnership between the Department, the Bombela Concession Company “Bombela” and the Lenders. The Department entered into a contract in terms of which Bombela would implement the Gauteng Rapid Link Project referred to as the Gautrain for a fixed sum of 24 billion Rand.
7. We quote from column 2 and 3 of the Star publication as follows:

“ However, the water problem means the tunnel does not meet the minimum standard in the concession agreement between Gauteng and Bombela. The agreement states that “there shall be no discernible flow of water through the tunnel lining” and that the tunnel must be sufficiently watertight to ensure the safety of the power supply, the maintenance of the track geometry, and that the hydrological conditions around the tunnel are not disturbed. There may not be more water inflow than 10 litres per minute per metres”.

8. The question is, on what basis was Bombela paid for work done on this section of the track/tunnel, if the work was not up to standard?
9. The Department through the tender process appointed an Independent Certifier who would represent the Department, Bombela and the Lenders.
10. The functions of the Independent Certifier were defined as the following:
 - 10.1 To certify that the construction of the Project has been executed in accordance with the milestones agreed in terms of the Concession Agreement;
 - 10.2 To undertake a multi-disciplinary review, monitoring and inspection of services relating to design, construction, manufacture, installation and commissioning of the Project and associated work to enable the Independent Certifier to execute its certification service;

- 10.3 The issuing of interim payment certificates generally on a monthly basis based on verification of statements submitted by the Concessionaire.
11. The Independent Certifier can clearly however not fully represent the Department and tax payers interest as it also represents the Contractors and the Lenders, all who would want to be paid as soon as possible.
12. The Independent Certifiers insurance cover was only 20 million Rand, which was insufficient for a project of 24 billion Rand.
13. Mr. Buthelezi in his then capacity as HOD had to take into account the provisions of the PFMA, and in particular Regulation 8.4. This Regulation imposes huge responsibility on the accounting officer ("HOD") to implement proper control measures. Regulation 8.4 states:
 - 13.1 "*An officer must maintain appropriate measures to ensure that transfers and subsidies to entities are applied for their intended purposes. Such measures may include:-*
 - 13.2 *Regular reporting procedures;*
 - 13.3 *Internal and external audit requirements and, where appropriate, submission of audited statements;*
 - 13.4 *Regular monitoring procedures;*
 - 13.5 *any other control measures deemed necessary".*
14. The Gautrain Inspectorate namely MNS Attorneys was therefor appointed in September 2006. This was supported by MEC Jacobs, the MEC for Roads and Transport at their time who also recommended that Dornier be one of the subcontractors which recommendation was accepted.
15. The Gautrain Inspectorate would basically minimise the risk. For example Bombela would invoice the Department after completing a certain milestone, such as completing the tunnel between Park Station and

Rosebank. The Independent Certifier would recommend payment if it believed that the work was done. The Gautrain Inspectorate would do a sample by for example checking a portion of the tunnel and it would do a report and advise if it recommends payment or not.

16. The Gautrain Project Inspectorate was also required to do regular progress reports. To do same it would have to investigate the work done by Bombela. This reports would be submitted to the Director General of the National Department of Transport, and to other legislative institutions.
17. The Gauteng Project Inspectorate would also mirror the functions of the Independent Certifier as set out in paragraphs 10.1 – 10.3 above, but with the sole objective of protecting Government's interest, which includes Project Management to monitor if Bombela attains the milestones as required in the required, financial accounting to ensure that it costs remains within the contractually agreed amounts, quality testing, operational integration and the like.
18. The appointment of the Gautrain Project Inspectorate was also required in terms of the DORA Act (Division of Revenue Act no 1 of 2007) which requires accountability for funds against voted budget and obligations against milestones.
19. As a result of the magnitude of the project and the billions of Rands involved there was a Gautrain Political Committee made up of various senior politicians to oversee the project, of which MEC Jacobs was a member.
20. After the Gautrain Project Inspectorate monitored the progress of the Gauteng for a period of about 10 months, it picked up issues which the Independent Inspectorate's reports failed to pick up on in its report of July 2007 and it *inter alia* made the following criticism:
 - 20.1 **The Gautrain Project Inspectorate questioned the design standard(s) used by Bombela.**

- 20.2 It expressed the concern that Bombela missed a number of key milestones.**
- 20.3 It also expressed concern that Bombela's invoices was not correct in terms of the contract signed.**
21. The Gautrain Political Committee had a standing arrangement that it would meet every few months to consider the Gautrain progress and the next meeting was on or about 6 August 2007.
22. The critical report caused consternation and if it was made public it would place MEC Jacobs in a poor light as it is a multi billion Rand project with a high public profile.
23. Mr. Buthelezi in his capacity as HOD for the Department of Roads and Transport was delegated to monitor the Gautrain, and Mr Buthelezi in that capacity sent the July 2007 report to the Political Committee for consideration.
24. MEC Jacobs then presented to the Gautrain Political Committee that this report must be withdrawn as it is "*biased and factually inaccurate*". Further that the Gautrain Project Inspector's appointment must be terminated. MEC Jacobs was a member of the Political Committee, and the latter accepted his recommendation.
25. MEC Jacobs in an attempt to muzzle Buthelezi from exposing any further problems in the Gautrain recommended to the Political Committee that the monitoring and reporting delegation be removed from Buthelezi and moved to the Gautrain Project office which MEC Jacobs could more easily influence.
26. In hindsight it appears that Mr. Buthelezi was correct in appointing a Gautrain Project Inspectorate to minimise the risk of the Department.

27. **This 10 months delay is one of the many delays reported on the Gautrain Project. The costs of the Gautrain was fixed to 24 billion Rand. At the date hereof it has exceeded same already with 7 billion Rand and in terms of the Star's article the costs will increase with another 100 million Rand.**
28. It is also concerning that the Independent Certifier only had insurance for 20 million Rand, which is a drop in the bucket for this multi billion Rand Project.
29. Having effectively throttled the Gautrain Project Inspectorate by questioning its purpose at the Gautrain Political Committee, MEC Jacobs did not end there, he went to discredit this noble initiative further by laying a complaint with the Resolve Group led by Peter Harris against Mr. Buthelezi.
30. Mr. Harris was appointed by the former premier of Gauteng, Mr. Mbhazima Shilowa to investigate allegations made by Mr. Buthelezi and the former MEC of Public Transport, Roads and Works, Mr Ignatius Jacobs ("the MEC") against one another.
31. The Resolve Group and Peter Harris found in their final report (of June 2009) that "*it appears as thought Buthelezi appointed the aforesaid attorney to oversee the work of Dornier. This appears, on the face of it, wasteful and unnecessary expenditure*".
32. On the basis of these allegations, the MEC has alleged that Mr. Buthelezi has violated the PFMA, in particular section 38(1) b and c, which required that the accounting officer should ensure that the Department's resources are used effectively, efficiently, economically and transparently. The key finding by Peter Harris in this regard was that ... "*MNS should not have been granted the authority to subcontract Dornier*" ... and that ... "*The fact that the Department enters into a further three year contract with another consultant is concerning and again illustrates that the Department relies heavily on the use of consultants*".

33. As the MEC and Peter Harris should have acknowledged, the Gautrain project is a massive and complex project and Mr. Buthelezi would have failed in his duty had he not put in place a sound monitoring and reporting regime to ensure value for money.
34. In July 2009, Mr. Buthelezi wrote a memo to the Premier of Gauteng, Mrs. Nomvula Mokonyane (“the Premier”). The purpose of this memo was to provide the Premier with his response to the findings of Mr Peter Harris as contained in his unsigned report of 8 June 2009 (“the Report”). The thrust of this document was, amongst others, to contest some of the findings that he considered inaccurate and misleading. To date he has received no acknowledgement of receipt of the said memo.
35. **Wherefore Mr Buthelezi requests that the Public Protector investigate the following:**
 - 35.1 The 7 billion Rand plus overspend on the Gautrain Project;
 - 35.2 The many delays suffered in the project and which currently is expected to take another 10 months;
 - 35.3 That MEC Jacobs was negligent when he recommended to the Political Committee that the report be withdrawn and that the Gautrain Project Inspectorate’s mandate be terminated.
 - 35.4 That the Gautrain Project Inspectorate was appointed to minimise the state’s risk, and that MEC Jacobs recommendation to the Political Committee to terminate their appointment was in breach of his duties in terms of the PFMA and Regulation 8.4 thereof specifically, and in breach of the DORA Act.
 - 35.5 The Independent Certifier had to ensure that the construction of the project was executed in accordance with the milestones, time periods, and amounts contracted on.

- 35.5.1 How could Bombela be paid for this section of the track / tunnel between Johannesburg Park Station and Rosebank when its work wasn't up to standard.
- 35.6 Premier Nomvula Mokonyane failed to respond to Buthelezi's letter or to take into consideration the need for Gautrain Project Inspectorate which failure caused several delays and billions of Rands in losses.
36. As Mr. Buthelezi is no longer employed by the Department he does not have access to the controversial July 2007 report. Same can however be obtained from MNS attorneys. Their details are as follows:

Mncedisi Ndlovu Sedumedi Inc. Attorneys

Mr Mncedisi Ndlovu can be contacted on: 083 266 7853

Mr Sedumedi can be contacted on: 083 381 4926

E-mail: mncedisi@ndlovu-sedumedi.co.za

Address: 2nd Floor, Ten Sixty Building

No. 35 Pritchard Street

Johannesburg

37. Kindly acknowledge receipt hereof.

Yours faithfully

Tracy Sischy

**To the Public Protector
9th Floor, Sinodale Centre Building
228 Visagie Street, Pretoria**

Accepted on _____ August 2011.

Signed

Full names

Capacity