

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NUMBER: 59529/2013

In the matter between:

THE MINISTER OF POLICE	First Applicant
THE MINISTER OF PUBLIC WORKS	Second Applicant
THE MINISTER OF DEFENCE	Third Applicant
THE MINISTER OF STATE SECURITY	Fourth Applicant
and	
THE PUBLIC PROTECTOR	Respondent

REPLYING AFFIDAVIT

I, the undersigned

NKOSINATHI EMMANUEL MTHETHWA

do hereby make oath and state that:

1. I am the Minister of Police appointed in terms of sections 91 and 206 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") and the first applicant with my address as c/o the State Attorney Pretoria 316 Salu

Building Cnr Thabo Sehume and Francis Baard Streets, Pretoria and I am duly authorised to depose to this affidavit on behalf of all the applicants.

1.1. The facts contained herein are, unless the context otherwise indicates, within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

1.2. Any legal submissions that are made by me are made on the advice of my legal representatives.

1.3. I have deposed to the founding affidavit and wish to reply to the affidavit of the respondent. However, before dealing with contents of the answering affidavit ad seriatim, I wish to make the following preliminary remarks regarding the further conduct of this application. On Friday 8 November 2013, we as applicants approached this Honourable Court on an urgent basis primarily to interdict the respondent from releasing the provisional report to affected/implicated and interested parties before receiving and considering our written comments. We also asked the Court for an extension of time to submit our written comments by 15 November 2013. We also sought ancillary prayers in paragraphs 2.3, 2.4 and 3 of the Notice of Motion. The respondent asked for the application to be postponed to 15 November 2013 in order to give her time to file opposing papers. The respondent gave an undertaking that pending the finalisation of the application, she will not release the provisional report to the affected/implicated and interested parties, although she refused to have the undertaking made an order of court. For the above reasons, the relief contained in prayers 2.1 and 2.2 have become academic and will not be persisted with. In

paragraph 40 of the answering affidavit she makes a further undertaking that our comments will be considered and integrated into the provisional report before it is released to the affected/implicated and interested parties. We welcome the undertaking and for this reason the relief sought in prayers 2.3, 2.4 and 3 will not be persisted with. The only issue before this Honourable Court will be that of costs.

2. **AD PARAGRAPH 1**

2.1. I admit the identity of the respondent.

2.2. I deny that the content is both true and correct.

3. **AD PARAGRAPH 4**

3.1. In this paragraph the respondent broadly says that:

3.1.1. the applicants had to disclose a series of meetings held prior to the release of the provisional report;

3.1.2. the alleged Nkandla irregularities have been in the public domain for nearly four years and have received wide publicity in the national media;

3.1.3. the applicants have had a considerable period to identify precisely what constitute security concerns prior to the release of the report in order to identify in advance any areas of legitimate

concern regarding disclosure in order to speedily comment on the provisional report; and

3.1.4. there was an arrangement between the respondent and the applicants over three months ago in terms of which the applicants were on notice to expect the provisional report and the applicants to personally respond with specific concerns.

3.2. The respondent is incorrect on each of these contentions. With regard to the first, the applicants had no obligation to overburden the founding papers with the narrative of meetings that were held with the respondent prior to the release of the provisional report when the very basis of the urgent application was her own unsolicited letter dated 1 November 2013 advising the applicants to make comments on matters that could impact on or could compromise the security of the President and should therefore be omitted. I am aware that the respondent has been at pains to give a different interpretation to this letter in the media after the urgent application was filed and she seeks to do so again in her answering affidavit. Unfortunately the contents of this letter are unambiguous to the extent that any interpretation the respondent seeks to import to it leads to absurdity.

3.3. The second applicant established a task team to investigate these procurement and other related irregularities in October 2012. The findings of the task team were released to the public in January 2013. This fact has not been disclosed by the respondent in her answering affidavit.

- 3.4. The third issue is difficult to fathom because properly understood the respondent suggests that the applicants ought to have prepared themselves way in advance to address security concerns in her provisional report before it was released to us. What she suggests incorrectly is that the applicants could have pre-empted the contents of her provisional report and that it could have had contained security breaches.
- 3.5. The respondent is also incorrect on the fourth issue in that the applicants were not at any stage placed on notice by the respondent to receive the provisional report. The first time I became aware that the provisional report was ready was in the public domain where the respondent was quoted to have allegedly said that “she did not know who to submit the report to”. This alleged confusion on her part arose despite that in the meeting of the 8th August 2013 she assured us that the provisional report would be provided to us as the security cluster before she distributes it to affected/implicated and interested parties. In our meetings with the respondent we advised her of the legal requirement of not disclosing sensitive matters that may compromise national security. It was on that basis that there was a mutual understanding, between us and the respondent of this requirement and as a result she made an undertaking to provide the provisional report to us first. On Friday 1 November 2013, I received a telephone call from the respondent requesting my whereabouts as she wanted to deliver the provisional report to me personally. Later that day her subordinate delivered four envelopes at my house which contained the provisional

report for myself and the second, third and fourth applicants, undercover of a letter dated 1 November 2013. I deny that there was any arrangement or agreement between us and the respondent that we were required to personally comment without the assistance of our respective senior security officials in our various departments on the provisional report. We continued to handle this matter in the normal government process.

3.6. Save as aforesaid I deny the content of this paragraph.

4. **AD PARAGRAPH 5**

4.1. I deny the content of this paragraph.

4.2. In amplification of my denial hereof, I point out to the contents of the letter dated 1 November 2013 which directly contradict this averment by the respondent that her report does not raise concerns of a legitimate kind regarding security. In the letter, the respondent specifically invites us to identify any matter in the report which in our view could have an impact on or could compromise the security of the President which require omission from the report. If this was the view that was held, by the respondent, that her report does not raise legitimate security concerns there would have been no reason for her to have invited us to make comments in the manner she proposed in the letter.

4.3. I take issue with the last part of this paragraph in which the respondent suggests that we required few hours or at most two days to provide written comments to her report. It is difficult to understand how matters of security that impact on the safety of the President will require such an extremely short period of time to address especially given the respondents untenable view that those matters were to be raised by us personally without the assistance of our security experts. It was impossible to address security concerns arising from a 357 page report in a matter of 5 days hence we requested additional time to properly address those concerns. In fact when the respondent was served with the urgent application at 8h45am at her offices she apparently issued a press statement 15 minutes later informing the public that she would require a postponement due to an extremely short notice given to her to file opposing papers. In effect the respondent had at least four hours until when the matter was heard at 14h00 to respond to an 11 page affidavit. The respondent requested an indulgence to file her answering affidavit by Tuesday 11th November, some four days after she received the papers.

5. **AD PARAGRAPH 6**

5.1. I deny the content of this paragraph.

5.2. The contents of this paragraph are misleading for the following reasons:

- 5.2.1. On 1 November 2013 the respondent gave the applicants until 6 November 2013 to make written comments on her report.
- 5.2.2. On 4 November 2013, the second applicant addressed a letter on behalf of all the applicants requesting the respondent to grant the applicants an extension of time until 15 November 2013.
- 5.2.3. On 5 November 2013, the respondent declined to grant the extension to the 15th but granted it to the 8th November 2013 which effectively was a two day extension.
- 5.2.4. On 7 November 2013, the second applicant addressed a letter on behalf of all the applicants requesting the respondent to accede to the request of an extension of time until 15 November 2013 to submit written comments on her report. That letter was somewhat for logistical reasons only transmitted to the respondent at 14h00 by email. The respondent was afforded an opportunity to make a written undertaking by 15h00 not to release the provisional report to affected/implicated and interested persons as she had already communicated to the press that the provisional report would be released to affected/implicated and interested persons on Saturday 9 November with or without the applicants' comments.
- 5.2.5. On the same day around 15h00 Mathebula of the state attorney telephoned the respondent's office and spoke to Advocate Fourie who confirmed receipt of the letter and that the respondent was out of town but he had sent the message to her.

5.2.6. In the afternoon of the same day the second applicant, sent a text message to the respondent saying that *“Dear Advocate Madonsela I have been and am still trying to get hold of u telephonically about the letter I sent to you at about 13h00 today 7 Oct(sic) 2013 regarding our plea for extention(sic). I request as soon as you receive this message please phone me back”*. The respondent did not contact the second applicant after this message was sent.

5.2.7. On or about 6pm on the same day, Mr Mathebula contacted Advocate Fourie and enquired as to the respondent’s attitude to the letter. Advocate Fourie informed Mr Mathebula that he had received no response from the respondent.

5.2.8. On 7 November 2013 at around 8h45am Mr Mathebula contacted Advocate Fourie again and enquired as whether the respondent had responded to our request and was informed that no response was given and that the respondent was on her way to the office. It was at this stage that Mr Mathebula requested Advocate Fourie to accept the urgent application, which application was not yet issued at Court. When Mr Mathebula served the papers on her office, Advocate Fourie, did not indicate to him that the respondent was formulating a response. This is contrary to what the respondent stated in her media statement dated 11 November 2013, a copy of which is annexed hereto marked **“NEM6”**. Had Mr Mathebula been informed that

the respondent was formulating a response he certainly would have awaited such response before serving any papers. In any event, my understanding of the respondent's attitude in her answering affidavit is that we were not entitled to any extension.

5.3. In and around 13h00, on 8 November 2013, the respondent's attorney telephoned our counsel requesting that the matter be postponed to Friday with an agreed timetable on the filing of papers. For the postponement, counsel was informed that the respondent was giving an undertaking not to release the report pending the finalisation of the application. The request by the respondent and the undertaking suited the applicants because the primary objective of the urgent application was to interdict the release of the report before written comments were submitted to the respondent and that objective was achieved.

6. **AD PARAGRAPH 7**

6.1. I deny the content of this paragraph.

6.2. The applicants requested an extension because they needed it in order to provide the respondent with comprehensive comments. The applicants are in a position to finalise their written comments and have them submitted to the respondent by Friday 15 November 2013.

7. **AD PARAGRAPH 8**

7.1. This application is not about whether or not there is any proper basis for the applicants to be concerned that there existed security matters in the content of the provisional report which ought not to be disclosed to interested parties. The respondent has already conceded in her letter of 1 November 2013 that we are entitled to make written comments on issues relating to security of the President in the provisional report.

7.2. This application is about the respondent's refusal to grant the applicants an extension of time to submit those written comments which she has invited us to submit. In order for the Court to determine this issue, it certainly does not require a perusal of the contents of the provisional report which the respondent has already determined that it is confidential. Apart from that, the question of whether or not there exists matters of security concerns which ought to be addressed and therefore omitted from the provisional report is not for the Court to decide at this stage. The respondent is also attempting to defer to the Court what she had already communicated to the applicants that it is her duty to decide based on our written comments whether there is any basis for our concerns on matters of security. It will be argued at an appropriate time, when the need arises, that the respondent not being an expert on matters of security cannot be an arbiter on whether or not there exists a security breach from the contents of the provisional report. It was for that very reason, in my understanding, that the

respondent invited the applicants as the relevant departments entrusted with matters of national security in the Republic.

- 7.3. Should the respondent arrogate to herself that power to determine whether or not there is a breach of security arising from the contents of her provisional report, I am advised that she will in law be acting *ultra vires* her powers and the law.
- 7.4. It is for the above reasons that the applicants deemed it not necessary in their application to refer to the contents of the provisional report or to attach it as same would have defeated the very purpose to which the applicants seek to protect which is the confidentiality of classified information which is prevented from being released to third parties in contravention of appropriate legislation. As a result there was no need for the applicants to have asked for an in camera hearing. The respondent has attached the confidential provisional report to her answering affidavit without leave of the Court and without any request for an in camera hearing. The applicants object to the filing of the provisional report at this stage. The filing of the provisional report at this stage serves no legitimate purpose because the respondent is obliged in terms of her own self-initiated process of receiving written comments from us, to take them into account which may result in her provisional report being revised. It is not for the Court at this stage to pre-empt that outcome.

8. **AD PARAGRAPHS 9 - 10**

- 8.1. The contents of these paragraphs are irrelevant to the issue that the Court is called upon to decide.
- 8.2. Insofar as the assertion that the respondent has a discretion to determine whether the provisional report deals appropriately with any security sensitive information is misplaced. The fourth applicant and to some extent the first and third applicant have the statutory responsibility for national security. The respondent does not have the competence to determine whether or not a matter is likely to prejudice national security.
- 8.3. The respondent does not take this Court into her confidence by explaining what prejudice would be suffered as the provisional report has been outstanding for the past year.
- 8.4. The applicants have no intention whatsoever to interfere with the functioning of the office of the respondent or her independence. The only interest the applicants have in this matter is where security issues arise we have a constitutional obligation to preserve national security which ordinarily include the security of the Head of State. This cannot be interpreted to be interference with the office of the respondent.
- 8.5. The mere fact that the respondent says she will invite the affected/ implicated and interested persons to peruse the report in her offices does not provide the necessary safeguard with regard to the disclosure of classified and confidential information which is currently contained in

the report. However, the applicants welcome the respondent's desire to release the report to affected/implicated and interested persons after all the security concerns that would have been raised in our written comments have been addressed and omitted from the report. The applicants have no desire to dictate to the respondent when and how to release the provisional report.

9. **AD PARAGRAPH 12**

9.1. The contents of this paragraph are not relevant to the issue for determination by the Court at this stage. However, the allegations that the respondent and her investigation team were obstructed and frustrated in performing her functions are not correct. This is a matter which if needs be would be dealt with at an appropriate time and cannot be dealt with within such limited time provided to the applicants to file their affidavit. I wish to emphasise that it is not relevant.

10. **AD PARAGRAPH 14**

10.1. The contents of this paragraph are inadmissible and should therefore be struck out as being irrelevant and vexatious because the respondent seeks to deal with the content of the provisional report which is confidential and no leave of the court has been sought. The applicants object to the reception of this evidence into the record because it is

prejudicial to us especially as we are still in the process of finalising the written comments to be submitted to the respondent.

10.2. Our apprehension is that given the allegations in this paragraph the respondent will not approach our comments with an open mind. Apart from that all of these allegations which are denied, relate to matters prior to the release of the report which are not relevant to this application and to which we have not been invited to respond to. However we have decided that we should give her an opportunity to consider our comments as she has now undertaken to do so, and it is for this reason that we have decided not to persist with the ancillary prayers in paragraphs 2.3, 2.4 and 3 of the Notice of Motion.

10.3. Mr Tshivhase who is the acting state attorney disputes the allegations and will deal with it at the appropriate time.

11. **AD PARAGRAPH 15**

11.1. The applicants wish to state that a small group of senior security officials, all of whom have the necessary security vetting, have been provided with the provisional report at a secure location to deal with the security measures contained in the provisional report. At no stage are the security experts allowed to leave the secure location with the provisional report.

11.2. I deny the allegations contained in this paragraph.

12. **AD PARAGRAPH 16**

12.1. I deny the content of this paragraph.

12.2. The applicants have always cooperated with the investigation of the respondent.

12.3. This paragraph is not relevant to this application and is dealt with in the comments to be submitted to the respondent on the security breaches.

13. **AD PARAGRAPH 17**

13.1. I deny the content of this paragraph.

13.2. It was the respondent who suggested that the security cluster be given an opportunity to view the provisional report in order to determine whether there are any security breaches that need to be omitted from the provisional report.

14. **AD PARAGRAPH 18**

14.1. I deny that the respondent or any of her investigators are security experts with the necessary experience to deal with the security concerns. Again, we should state that it is our constitutional mandate to deal with national security issues and this is what we are seeking to do in this application.

14.2. I deny the allegations contained in this paragraph.

15. **AD PARAGRAPH 19**

15.1. I deny the content of this paragraph.

15.2. I repeat paragraph 10.1 above.

16. **AD PARAGRAPH 20**

16.1. The content of this paragraph is denied.

16.2. It is the respondent who suggested that the provisional report be provided to the security cluster to deal with any security concerns which may arise in the provisional report.

17. **AD PARAGRAPHS 21 - 22**

17.1. I deny the content of this paragraph.

17.2. The applicants have no intention of abrogating the functions of the respondent. However, it is the applicants' constitutional mandate to ensure national security and not that of the respondent. Thus it would be unlawful for the applicants not to consider the provisional report in light of its duty to protect the security of the state and the safety of the President.

17.3. I repeat paragraph 11.1 above.

18. **AD PARAGRAPHS 23 - 25**

18.1. It is the applicants' prerogative to choose how to perform their functions within the constraints of the law. At no stage does the letter of 1 November 2013 suggest that the applicants were not entitled to consult security experts, within their respective departments, to deal with any security concerns in the provisional report. The respondent has made the report available to her lawyers without the consent of the applicants. This conduct breaches her own confidentiality of the report.

18.2. I repeat paragraph 11.1 above.

18.3. I deny the allegations contained in these paragraphs.

19. **AD PARAGRAPH 26**

19.1. The respondent is misconstruing what the applicants contend in paragraph 18 of the founding affidavit.

19.2. Any classified and/or confidential information contained in the provisional report cannot be released without the authorisation of the fourth respondent, as it is the obligation of the fourth respondent to ensure the protection from disclosure of such information in terms of the Protection of Information Act.

19.3. I deny the content of this paragraph.

20. **AD PARAGRAPH 27**

20.1. I deny the content of this paragraph.

20.2. I state that the claims of classified information were made by the second applicant as he was authorised to speak on behalf of all the applicants as can be seen from annexure “**NEM4**”.

20.3. I repeat paragraph 10.1 above.

21. **AD PARAGRAPH 28**

21.1. The classified and top secret information extracted by the respondent in her provisional report, and in some instances copied verbatim, is governed by the Minimum Information Security Standards and it is those classified and top secret documents and/or extracts that require the Minister to authorise its further publication.

21.2. I deny the content of this paragraph.

22. **AD PARAGRAPHS 29 - 30**

22.1. I fail to see the relevance of the above paragraphs to this application.

22.2. I deny that the conduct of the second applicant is contradictory. As I understand it, from the second applicant, the documents that were

tendered to the Mail & Guardian did not contain classified and top secret information.

22.3. I deny the content of these paragraphs.

23. **AD PARAGRAPHS 31 – 32**

23.1. I fail to see the relevance of these paragraphs and these paragraphs are denied.

23.2. The Mail & Guardian application is one in terms of the Promotion of Access to Information Act and has no relevance to this application.

24. **AD PARAGRAPH 33**

24.1. I deny the allegations contained in this paragraph.

24.2. I note that the documents provided to the respondent were not redacted and differed to those documents given to the Mail & Guardian. I further state that the reason for this was to assist the respondent in her investigation and to show good faith on the part of the applicants in assisting the office of the respondent as a constitutionally mandated institution.

25. **AD PARAGRAPH 34**

25.1. I deny the allegations contained in this paragraph.

25.2. I repeat what I have stated above in paragraph 24.

25.3. The respondent is misleading this honourable Court. The documents provided to Mail & Guardian were limited to bid adjudication minutes, contracts between the Department of Public Works and various service providers, invoices submitted to the department by contractors, progress payment advises, variation orders and motivations, final accounts and internal memoranda of the department dealing with requests of funds and reallocation of funds.

26. **AD PARAGRAPH 35**

26.1. I am advised that the third page of “**NEM3**” was omitted in error.

26.2. I further note that the applicants are not barring the release of the provisional report. However, we are constitutionally mandated to protect national security and it is for this reason only that we requested additional time to provide the respondent with a comprehensive list of security breaches together with the relevant justifications for their omission from her provisional report.

26.3. I deny the allegations contained in this paragraph.

27. **AD PARAGRAPH 39**

27.1. The content of this paragraph is incoherent and not clear and is denied.

28. **AD PARAGRAPH 40**

28.1. We welcome the undertaking made by the respondent that our comments will be considered and integrated before finalising the provisional report and granting the implicated parties and complainants access to the report.

28.2. For this reason we will not be persisting with prayers 2.3, 2.4 and 3 as contained in the Notice of Motion.

28.3. Our interpretation of her statement was that she would release the provisional report whether we were able to meet her deadline or not, hence the urgent need to approach this honourable Court for interdictory relief.

28.4. Save as aforesaid the content of this paragraph is denied.

29. **AD PARAGRAPH 41**

29.1. The facts and timelines imposed by the respondent speak for themselves and I accordingly deny the content of this paragraph.

29.2. I repeat what I have stated above.

30. **AD PARAGRAPH 45**

30.1. I am advised that the Constitution of the Republic of South Africa, provides that in section 182(5), the exceptional circumstances is to be determined in terms of national legislation and not only the Public Protector Act.

30.2. I deny the content of this paragraph.

31. **AD PARAGRAPHS 46-47**

31.1. I deny the allegations contained in these paragraphs.

31.2. I repeat what I have stated above.

32. **AD PARAGRAPH 48**

32.1. I deny the content of this paragraph.

32.2. I repeat what I have stated above.

33. **AD PARAGRAPH 49**

33.1. The allegations contained in this paragraph will be dealt with in the comments on the provisional report. Again, I reiterate that this application is not about the content of the provisional report and our comments related thereto will be submitted to the respondent on the 15th November 2013.

33.2. Save as aforesaid the content of this paragraph is denied.

34. **AD PARAGRAPH 50**

34.1. I repeat paragraph 21.1 above.

34.2. I deny the content of this paragraph.

35. **AD PARAGRAPH 51**

35.1. I repeat paragraph 33.1 above.

35.2. I deny the content of this paragraph.

36. **AD PARAGRAPH 53**

36.1. I repeat paragraph 11.1 above.

36.2. The content of this paragraph is denied.

37. **AD PARAGRAPHS 56 - 57**

37.1. I deny the allegation contained in this paragraph.

37.2. I refer to what I have stated above.

WHEREFORE, applicants persist with the relief as contained in the notice of motion.

DATED AT PRETORIA ON THIS THE 13TH DAY OF NOVEMBER 2013

DEPONENT

I CERTIFY THAT THE DEPONENT SATISFACTORILY IDENTIFIED HIMSELF TO ME, HAS ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, WHICH WAS SIGNED AND SWORN TO BEFORE ME AT PRETORIA ON THE 7TH DAY OF NOVEMBER 2013 AND HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH WHICH OATH HE CONSIDERS TO BE BINDING ON HIS CONSCIENCE.

COMMISSIONER OF OATHS