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NPO NO: 070-681

Adv. Thuli Madonsela
Private Bag X677
Pretoria
0001
By Email

4th April 2016

Dear Adv Madonsela,

Re: The possible irregular dilution of the remedial action ordered by you in your “Secure in Comfort” report on Nkandla in the wording of Orders 5 and 6 of the unanimous Constitutional Court judgment in the matter handed down on 31 March 2016.

1. We are concerned, as we explained at our meeting in Cape Town on 1 April 2016, that the wording of the court order in the Nkandla matter may be interpreted in such a way as to dilute, erroneously and irregularly so, the effect of the remedial action you require of the President in relation to measures implemented at Nkandla by the Department of Public Works at taxpayers’ expense which do not relate to security.
2. We respectfully refer you to para [10] of the judgment where the relevant part of your report is quoted with approval and without qualification by the Court. We ask you to compare clauses 11.1.1 and 11.1.2 of your report with the provisions of orders 5 and 6 of the order handed down on 31 March 2016.
3. In its discussion of the remedial action required in all the circumstances the Court does not disclose any basis for diluting your report by unilaterally changing your wording “*and which include*” as a reference to five examples of measures which do

Patron: Archbishop Emeritus Desmond Tutu

Trustees: S Christie; G Williams; T Dunne

Directors: P Hoffman, SC.; Adv G Lloyd-Roberts; Adv C Shone, B Malherbe; A Hamilton; C Moore

not relate to security to “*namely ...only*” which suggest, in order 5, a closed and exclusive list of measures that do not relate to security.

4. This suggestion is compounded by the use of the words “*those measures*” in the two orders in a manner that ambiguously seems to indicate that “*those measures*” are confined only to the five examples of the most egregious measures unrelated to security that you mentioned as examples in your report’s clause 11.1.1.
5. Your report itself makes it abundantly clear that the five examples you cite are but the tip of the iceberg of expenditure incurred that does not relate to security. In this regard the various professional fees, the air-conditioning supplied, the upgrade to the sewerage system at Nkandla and the extensive paving, estimated to have cost in excess of R 40 million, are but a few expensive instances in which all or part of the expenditure incurred is not related to security.
6. If the President and the National Treasury are going to interpret orders 5 and 6 of the judgment as being limited in a way not foreshadowed either in your report or in the body of the judgment itself, it is going to be necessary to approach the court to clarify and, if necessary, amend its order so that proper effect is given to the binding and enforceable nature of the remedial action you have specified.
7. We attach a letter to the Secretary General of the ANC in which we raise, inter alia, the matter of the interpretation of the court order.
8. Obviously, if the President is advised to heed our plea and lets it be known that he accepts that the court order does not irregularly dilute your remedial action, then no harm will have been done.
9. Conversely, if the President seeks to narrowly construe the orders so as to limit his personal liability to the five items mentioned in order 5, then it will be necessary for you to defend the integrity, dignity and effectiveness of your office again.
10. It is not for us to say how you should go about doing so; there are various methods and strategies available including negotiation, mediation and further litigation to clarify the position.
11. For now, please regard this letter as an official letter of complaint that the wording of orders 5 and 6 has, or may have, irregularly diluted the ambit and effect of your remedial actions as specified in clauses 11.1.1 and 11.1.2 of your “Secure in Comfort” report.
12. We would respectfully suggest that you take the matter of our complaint up with the Treasury and, of course, with the President. If both show respect for the true ambit of your report and construe the provisions of orders 5 and 6 in a way that does not limit the work required of Treasury to the five items set out in order 5, our complaint will be satisfied.

13. If, however, either of them interprets the orders to mean that the President is somehow magically absolved from repaying a reasonable percentage of all the other measures implemented at Nkandla, over and above the five items set out in order 5, then it will be necessary for you, and possibly the applicants in both matters, to apply to court to correct the erroneous interpretation of the order upon which the President and/or the Treasury may seek to rely. As we have pointed out to the ANC, the matter is urgent in that tight time limits have been set by the court.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'F. M. G.', written on a light-colored background.

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