NOT ABOVE BOARD

Report of the Public Protector on an investigation into alleged maladministration by the Eastern Cape Gambling and Betting Board in relation to the appointment of the Chief Executive Officer of the Board

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## INDEX

**Executive summary**  3

1. **INTRODUCTION**  6

2. **THE COMPLAINT**  6

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**  8

4. **THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR**  9

5. **THE INVESTIGATION**  10

6. **EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**  12

7. **EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION**  24

8. **LEGAL AND REGULATORY FRAMEWORK**  27

9. **ANALYSIS AND CONCLUSION**  28

10. **FINDINGS**  34

11. **REMEDIAL ACTION**  36

12. **MONITORING**  36
Executive Summary

(i) "Not Above Board" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report communicates the Public Protector's findings and directives on remedial action following an investigation into the alleged maladministration by the Eastern Cape Gambling and Betting Board (the Board) relating to the alleged irregular appointment of the Chief Executive Officer of the Board, Mr Zwane. The complaint submitted by Mr R on 22 February 2010, was that the Board should not have appointed Mr Zwane to the position of CEO. It was said that he had failed to disclose that he had an intimate relationship with a public employee at the time of his application. It was further alleged that when he was subsequently dismissed and the matter taken by him to the Commission for Mediation and Arbitration (CCMA), the Chairperson settled improperly without a Board resolution. It was further alleged that the Board wrongfully failed to implement the findings and recommendations of an external investigation that advised that Mr Zwane be subjected to disciplinary action and criminal charges.

(iii) The Public Protector considered and investigated the following issues:

(a) Was Mr Zwane's appointment as CEO improper on the basis that;

(b) The Board failed to comply with section 6(k) of the Eastern Cape Gambling and Betting Act which disqualified him;

(c) Mr Zwane did not meet the minimum requirements for the position of CEO;

(d) The Board failed in its duty to take action in line with the recommendations of the Cyber X Consulting report which recommended disciplinary action
against Mr Zwane and that a criminal investigation be instituted into his conduct; and

(e) He was not appointed by the Board in “consultation with responsible Member” as required by section 12(1) of the Gambling and Betting Act.

(iv) The investigation process included correspondence, interviews with the relevant parties, and the perusal of documentation received. Applicable legislation, relevant case law, policies and prescriptions, were also considered and applied.

(v) The Public Protector’s findings are the following:

(a) The allegation that Mr Zwane was appointed despite having failed to disclose information that disqualified him from appointment to the position of CEO in terms of section 6(k) of the Gambling and Betting Act has merit. Although section 6 deals with Board members who are appointed by the responsible Member whereas the CEO is a member by reason of his position, nothing in the Act seems to distinguish his position from other Board members. The Board’s actions in this regard were improper and constitute maladministration.

(b) At the time of appointment, Mr Zwane had a National Diploma obtained in 1997 and the required years of applicable experience, which meets the requirements as advertised. The advertised requirement was “An appropriate Bachelor’s degree or equivalent qualification with at least 5 years’ experience (preferably) in Administration, Leadership or management at a senior management level”. The allegation that Mr Zwane did not meet the minimum requirements for the position of CEO as advertised is accordingly, without merit.

(c) The Board did not authorise the then Chairperson to act on its behalf at the CCMA as required under section 11(5) of the Gambling Board Act, 1997, and as a result the settlement agreement was finalised improperly, without the
required authority. The conduct of the chairperson was accordingly unlawful and the settlement reached invalid. The Chairperson’s conduct was accordingly improper and constitutes maladministration.

(d) The Board failed to properly consult with the MEC on the appointment of Mr Zwane and this amounts to non-compliance with the provisions of section 12(1)(a) of the Gambling and Betting Act. The Board’s conduct was improper and constitutes maladministration.

(f) The allegation that Mr Zwane’s appointment was improper has been substantiated. The Board’s appointment of Mr Zwane constitutes improper conduct and an act of maladministration.

(vi) Appropriate remedial action to be taken as envisaged under section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act is the following:

(a) The Chairperson of the Board should take urgent steps to ensure that procedures and legal prescripts are complied with for future appointments in compliance with the Gambling and Betting Act, and indicate what procedures have been put in place to avoid a recurrence.
REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION BY THE EASTERN CAPE GAMBLING AND BETTING BOARD WITH REGARD TO THE APPOINTMENT OF THE CHIEF EXECUTIVE OFFICER OF BOARD

1. INTRODUCTION

1.1 "Not Above Board" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 It is submitted to the Member of the Executive Council responsible for Economic and Environmental Affairs (the MEC) in the Eastern Cape Provincial Government, Mr M Jonas and the Chairperson of the Eastern Cape Gambling and Betting Board, Adv. N Mayosi, in terms of section 8(1) of the Public Protector Act.

1.3 A copy of the report is also provided to the Complainant in terms of section 8(3) of the Public Protector Act.

1.4 The report relates to an investigation into the alleged maladministration by the Eastern Cape Gambling and Betting Board (the Board) with regard to the appointment of the Chief Executive Officer (CEO) of the Board.

2. THE COMPLAINT

2.1 Mr Redman approached the Public Protector on 22 February 2010 regarding the appointment of Mr R M Zwane as the CEO of the Board.
2.2 The Board appointed Mr Zwane as an investigator on 1 August 2003. He was then promoted to Compliance and Licensing Manager within six months and on 12 December 2006, he was appointed as Acting CEO.

2.3 The reasons for the complaint were set out in a report commissioned by the Board, which contained certain allegations against Mr Zwane. The gist of the complaint relates to the unsuitability of Mr Zwane to occupy the post, as well as the manner of his appointment.

2.4 In particular, it was alleged that:

2.4.1 The CEO of the Board was appointed despite having failed to disclose information which disqualified him from appointment to the position in terms of section 6(k) of the Eastern Cape Gambling and Betting Act, 1997 (The Gambling and Betting Act);

2.4.2 A report by Cyber X Consulting commissioned by the Board into the affairs of the Board recommended that a criminal investigation be conducted into Mr Zwane’s actions and that disciplinary proceedings be instituted against him but this did not happen; and

2.4.3 Mr Zwane was appointed as CEO despite not meeting the minimum requirements for the position of CEO of the Board.

2.5 On 3 May 2010, Mr Redman’s attorney wrote to the Public Protector, and indicated the following:

"I act for Mr Redman who reported a complaint to your office about alleged maladministration in the Eastern Cape Gambling and Betting Board."
Mr Redman has left the Eastern Cape Gambling and Betting Board and in terms of a settlement agreement, the Board accepted Mr Redman's resignation on condition that he withdrew his complaint.

My instructions were to advise you, as I hereby do, that Mr Redman's further pursuit of his complaint against his employer would constitute a breach of the aforesaid settlement agreement and Mr Redman accordingly withdraws his complaint.

I trust that you will find the above in order.”

2.6 Given the nature of the issues raised and their implications for good governance, the Public Protector elected to proceed with the investigation on own initiative in terms of section 6(4)(a) of the Public Protector Act.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector was established under section 181 of (a) of Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that the Public Protector has the power 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, to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector have additional powers prescribed in legislation.

3.3 The Public Protector Act further empowers the Public Protector to investigate and redress maladministration and related improprieties in the conduct of state
affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4 The complaint relates to the conduct of the Eastern Cape Gambling Board, which is an organ of state. Its conduct amounts to conduct in state affairs, and therefore falls within the jurisdiction and powers of the Public Protector to investigate.

3.5 Although Mr Redman withdrew his complaint through his attorney, in the letter dated 3 May 2010, the Public Protector elected to continue to investigate the allegations as an own initiative investigation, in pursuit of section 7(1)(a) of the Public Protector Act. This decision was informed by the nature of the allegations, which warranted investigation.

3.6 Mr Redman also later renewed his interest in the matter.

3.7 The jurisdiction of the Public Protector was not disputed by any of the parties.

4. **THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR**

4.1 The following were issues considered by the Public Protector:

4.1.1 Was Mr Zwane’s appointment as CEO improper on the basis that:

4.1.2 The Board failed to comply with section 6(k) of the Eastern Cape Gambling and Betting Act, which disqualified him;

4.1.3 Mr Zwane did not meet the minimum requirements for the position of CEO;

4.1.4 The Board failed in its duty to take action in line with the recommendations of the Cyber X Consulting report which recommended disciplinary action against Mr Zwane and that a criminal investigation be instituted into his conduct; and
4.1.5 He was not appointed by the Board in "consultation with responsible Member" as required by section 12(1) of the Gambling and Betting Act.

5. THE INVESTIGATION

The investigation was conducted in terms of section 7 of the Public Protector Act and involved the following key sources of information:

5.1. Interviews and Meetings

5.1.1 Telephonic interviews and a personal interview with Mr Redman and his attorney on 9 April 2010;

5.1.2 An interview with a former Board member, Ms K Canca;

5.2 Correspondence

5.2.1 Correspondence with the then Chairperson of the Board, Mr S Majombozi; dated 5 March 2010;

5.2.2 Correspondence to the MEC responsible for the Department of Economic Development and Environmental Affairs, Mr M Jonas dated 13 August 2010. The correspondence indicated that the Public Protector was aware from newspaper reports that he was conducting an investigation into the appointment of Mr Zwane as the CEO of the Board and also enquiring whether such appointment was done "in consultation with" him as the responsible member as required by section 12(1) (a) of the Gambling and Betting Act.

5.2.3 Correspondence from the MEC responsible for the Department of Economic Development and Environmental Affairs, Mr M Jonas dated 16 February 2011.
The correspondence stated that the MEC wished to bring to Public Protector’s “attention that recent developments [had] necessitated [his] office to assume full responsibility for all communications with your office until this matter has been addressed to your satisfaction. As a result of inter alia of the outcome of a forensic investigation and subsequent legal opinion, I have requested all members of the existing Board to tender their resignations effective from 31 March 2011...”

5.3 Documentation received from the Chief of Staff in the MEC’s office on 14 October 2011.

5.4 Legislation and other prescripts

5.4.1 Eastern Cape Gambling and Betting Act, 1997 (the Gambling and Betting Act);

5.4.2 Labour Relations Act, 1995;

5.4.3 Public Service Act, 1994;

5.4.4 *MEC Department of Education Kwazulu Natal v Khumalo and Ritchie* (D749/08) [2010] ZALC 76 (6 July 2010);

5.4.5 *Khumalo and Ritchie v MEC for Education: Kwazulu Natal* case number DA3/2011 (judgment delivered on 29 August 2012); and

5.4.6 *McDonald 7 Others v Minister of Minerals and Energy & Others* (2007) JOL 2008 3 (C).
6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 It was established from the interviews conducted by the Public Protector South Africa, and by perusal of a forensic report by Ernst and Young, as well as a report by Mr J Buchner, an admitted Advocate and Director of STBB Consulting contracted by the MEC to review some of the issues around Mr Zwane’s appointment, that the position of the CEO was advertised by Leaders Unlimited with a closing date of 3 March 2008.

6.2 The advertisement indicated as a requirement, “An appropriate Bachelor’s degree or equivalent qualification with at least 5 years’ experience (preferably) in Administration, Leadership or management at a senior management level...”

6.3 Mr Zwane’s curriculum vitae as submitted then, indicated as his Achievements under the heading Education, “1997 National Diploma in Accounting. Majors as follows Accounting [and] Commercial Law”.

6.4 Following interviews, the Board resolved at a meeting in June 2008, to recommend Mr Zwane for appointment as CEO.

6.5 A letter dated 11 July 2008 from the Board was addressed to the then MEC Mr Sogoni recommending Mr Zwane’s appointment as CEO. Amongst the annexures, accompanying the letter, was a report from the Board titled Recruitment and Appointment of a CEO for the Board (the Report).

6.6 The Report indicated that during the interviews, Mr Zwane and another candidate was tied, and that following deliberations by Board members, a decision was taken to present Mr Zwane to the MEC as the preferred candidate for the position of CEO.
6.7 The Report went on to state that during these deliberations, the Board expressed concern about Mr Zwane’s leadership abilities, but preferred him to the other candidate due to his relevant experience.

6.8 The Report also noted that in final consultation with Mr Tsume from Leaders Unlimited, the Acting Chairperson of the Board had been advised that in his interview with Mr Tsume, Mr Zwane had disclosed a possible contravention of section 6(k) of the Gambling and Betting Act, which deals with persons disqualified from being members of the Board.

6.9 In his response dated 23 July 2008, the MEC indicated that after due and careful consideration; he was of the view that the Board’s recommendation of Mr Zwane’s appointment as CEO could not be supported. Amongst the reasons the MEC gave for his decision, were the following:

6.9.1 The CEO of the Board is an ex-officio member of the Board and as such, is subject to the disqualifications contained in section 6 of the Act;

6.9.2 Mr Zwane’s acceptance of the post of Acting CEO before the advertisement of the post in 2008 was improper given his subsequent admission that he had at all material times been living as husband and wife, with one Ngwane, a public servant;

6.9.3 Mr Zwane had been under a legal obligation to disclose, at the time of acceptance of this acting appointment, his disqualification in terms of the provisions of section 5(2)\(^1\) as read with section 6(b) and (k) of the Act; and

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\(^1\) Section 5 deals with the appointment of Board members by the responsible member, but provides in subsection 2 that the CEO is an ex-officio member not entitled to vote.
6.9.4 In failing to do so, Mr Zwane had not only acted in contravention of the Gambling and Betting Act, but had also failed to demonstrate the high levels of responsibility and integrity required of a CEO of the Board.

6.10 The MEC further stated that it appeared evident that Mr Zwane applied for the vacant post of CEO and participated in the recruitment process under circumstances where he did or should have known that he was under obligation to fully and frankly disclose his domestic relationship with a public servant. Further, that it appeared he either wilfully or negligently misled the interviewing panel of the Board in respect of this relationship and that, in the view of the MEC, Mr Zwane’s subsequent conduct in declaring the relationship in a letter dated 28 June 2008, fell woefully short of the full, frank and timeous disclosure merited by such a potentially important issue. Further, that such conduct constituted reasonable and proper grounds for the MEC’s refusal to sanction the recommendations made by the Board and finally that leadership qualities are a requirement for appointment as CEO of the Board, and the Board had reservations about Mr Zwane’s qualities in this respect.

6.11 The MEC then advised that the recruitment process should start afresh, and that the Board should look into Mr Zwane’s conduct.

6.12 Cyber X Consulting was then retained by the Acting Chairperson of the Board, Ms K Canca, to look into the possible disqualification of the appointment of Mr Zwane as CEO of the Board.

6.13 During December 2008, Cyber X Consulting presented a report to the Board on the investigation. The report alluded to various other disciplinary transgressions by Mr Zwane, and the Board extended the mandate to include these further alleged transgressions. Messrs Nompozolo and Notshe were requested to assist Mr Nel of Cyber X Consulting with the further investigation.
6.14 Following the presentation of the Cyber X Consulting’s report, the Board advised Mr Zwane on 10 December 2008 that he was being relieved of his position as Acting CEO. On 11 December 2008, he was served with a Notice of Intention to Suspend requiring him to show reason by 16h00 the next day, why he should not be suspended. He was suspended on 12 December 2008 and remained on suspension until 1 August 2009.

6.15 On 19 December 2008, Mr Zwane referred a dispute to the Commission for Conciliation Mediation and Arbitration (the CCMA) (case number ECEL 78-09) claiming the withdrawal of the suspension, and his reinstatement to the position of Acting CEO and/or Compliance and Licensing Manager. He also referred another dispute to the CCMA (case number ECEL 94-09) regarding his promotion to the post of CEO.

6.16 After the extended investigation by Cyber X Consulting, a report dated 20 March 2009 and titled "Misconduct Investigation: Mr R Zwane CEO of the Board" was presented to the Chairperson of the Board. The report indicated that there was enough evidence to proceed with a disciplinary enquiry against Mr Zwane.

6.17 Mr Nompozolo informed Mr Zwane’s legal representatives, Routledge Modise Attorneys by letter dated 23 March 2009 that he was acting on behalf of the Board, and that the latter had “decided to institute disciplinary proceedings against your client Robin Mabutho Zwane”. The letter indicated the date of the disciplinary hearing as 31 March 2009, and included a copy of the charge sheet. The dates of 30 June 2009 and 1 to 3 July 2009 were agreed upon between the parties as the dates for the proceedings. The matter did not proceed on 30 June as Mr Zwane’s representatives presented a medical certificate that he was not feeling well, and the matter was remanded indefinitely.
6.18  Mr Zwane's disputes at the CCMA were settled as follows:

6.18.1  Case number ECEL 78-09 was settled on 23 July 2009 on the basis that the Board agrees to pay Mr Zwane a sum of money equivalent to two months' salary and to pay his legal costs to date, as well as Mr Zwane resuming his duties in the position of Compliance and Licensing Manager as of 1 August 2009. The agreement was signed by the Chairperson, Mr Majombozi, on behalf of the Board and witnessed by Advocate Cossie, a member of the Board.

6.18.2  Case number ECEL 94-09 was settled on the basis that the agreement signed on 9 October 2009, was in full and final settlement of the dispute regarding Mr Zwane's appointment as CEO. The agreement was that Mr Zwane would be appointed as CEO of the Board with effect from 1 November 2009, and that his appointment would be for a contract period of five years capable of renewal. The settlement agreement further stated that the "parties consent to this agreement being made an arbitration award in terms of section 142A(1) of the Labour Relations Act". This was repeated in the attachment to the agreement, which stated, "... this agreement will be made an award of the CCMA".

6.19  After interviews with former Board members, Ernst and Young reported to the MEC as follows:

6.19.1  Ms K Canca indicated that the Board did not resolve to appoint Mr Zwane as the CEO of the Board.

6.19.2  Advocate Cossie indicated that Mr Majombozi reported to the Board at a meeting in Johannesburg on 3 November 2009 that the second CCMA dispute was settled on 9 October 2009, and that Mr Zwane was to be appointed as CEO of the Board. She further indicated that many of the members of the Board were upset about this since none of its members had been given a mandate to settle the second CCMA dispute with Mr Zwane.
6.19.3 Mr Ntsonkota indicated that the Board had resolved that he and Mr Majombozi should deal with the second matter at the CCMA. He and Mr Majombozi subsequently attended to the CCMA matter on 9 October 2009, when it was settled. They obtained the mandate to do this at a Board meeting that took place in Swaziland and at which it was decided that Mr Zwane was in fact not disqualified from becoming the CEO.

6.20 No copy of a resolution of the Board mandating the settlement of the second CCMA dispute through the appointment of Mr Zwane as CEO is available.

6.21 The disciplinary enquiry was never finalised after its postponement on 30 June 2009, and there is no formal resolution of the Board authorising its abandonment.

6.22 In the course of investigating the appointment of Mr Zwane as CEO of the Board, the MEC sought a legal opinion from Advocate R B Wade, SC, regarding the possible conduct of disciplinary proceedings against Mr Zwane. The opinion was provided on 06 October 2010.

6.23 The gist of Advocate Wade's opinion is that the excessive delay in pursuing the disciplinary charges against Mr Zwane has significantly compromised the Board's ability to fairly pursue disciplinary action against him. He quotes a number of decided cases where the courts and CCMA have decided on this issue and states:

"It has in this regard now become trite law that a disciplinary hearing 'must be convened as soon as possible after the incident which led to the disciplinary action so that the facts are still fresh in the minds of the parties and their

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witnesses. Another reason why disciplinary hearings should be held expeditiously is that otherwise the employer may be deemed to have waived its right to dismiss for the charge alleged\(^3\).

6.24 Regarding whether he was consulted by the Board in the appointment of Mr Zwane as CEO, MEC Jonas indicated by letter dated 14 October 2011 as follows:

"(a) I was consulted by the Chairperson of the Board (Mr Majombozi) on 6 November 2009 regarding the appointment of Mr Zwane;

(a) Mr Majombozi indicated that the Board of Directors recommended his appointment following the conclusion of an investigation into alleged misconduct;

(b) Mr Majombozi made it clear to me that a forensic investigation performed by a company called Cyber X provided no substantive grounds to charge Mr Zwane for misconduct;

(c) He also indicated that Zwane referred the pending disciplinary enquiries to the CCMA for relief as the Board failed to proceed with any action against Zwane for almost 1 year;

(d) Mr Majombozi continued to inform me that the CCMA ruled in favour of Zwane by awarding him a 5-year contract (being the relief sought by him)".

\(^3\) Grogan, Workplace Law (Seventh Edition) at 173.
6.25 He continued to indicate:

"I had no reason not to rely on the information communicated to me by the Chairperson of the Board.

(a) On 9 November 2009, I received a letter from the Chair of the Board confirming the consultative meeting of the 6th and confirming the appointment of Mr Zwane for a Five-year fixed term contract. This letter confirmed:

(aa) The fact that Mr Zwane had been suspended on 12 December 2008 and that the charges were preferred against him.

(bb) Following his suspension Mr Zwane referred two matters to the CCMA, one for unfair and un-procedural suspension and the second for failure to promote;

(cc) The Board lost both cases and as a result, the Board was ordered to reinstate Mr Zwane on 1 August 2009 and pay compensation and in the second case a settlement was reached to the effect that he be appointed from 1 Nov 2009.

(dd) Mr Zwane was given his letter of appointment on 30 November 2009"

6.26 The MEC then indicated that the legal opinion of Advocate Wade was clear that "the MEC ought not to insist that the Gambling Board take further steps in relation to the issues referred to in the charge sheet" and that "it also became clear from the reading of the opinion that the Board never lost the disciplinary cases at the CCMA but actually agreed to settle same".
6.27 The South African Qualifications Authority (SAQA) evaluates qualifications to determine their level. Information provided on their official website indicates that in 2008, the lowest National Qualifications Framework (NQF) level for a bachelor’s degree was level 6. In 2008, Mr Zwane held the qualification of a National Diploma in Accounting. According to the SAQA website, the National Diploma: Accounting, offered by the Durban University of Technology has an old NQF level and a new NQF level of 6 (it remains unchanged). A Bachelor of Administration: Political Studies obtainable from Vista University, and a Bachelor of Commerce: Law obtainable from Rand University have an old NQF level of 6.

6.28 The Public Protector’s provisional report, issued in terms of section 7(9) of the Public Protector Act, dated 10 November 2012 was sent to the MEC responsible for Economic and Environmental Affairs in the Eastern Cape Provincial Government, the Chairperson of the Eastern Cape Gambling and Betting Board and the Complainant for their comments. Comments were only received from the MEC and the Complainant. Only the MEC’s comments raise fundamental issues, and will be quoted verbatim below.

6.29 The MEC’s response is dated 14 January 2012 and states:

"It is important to note, from the onset that the current Board of Directors have not been privy to the events which formed the basis of your report, and my office is ready for further consultation with your office on this matter.

Our response to the findings contained in your Report

You stated that the allegation that Mr. M. Zwane was appointed despite having failed to disclose information, which disqualified him from appointment to the position of CEO in terms of section 6(k) of the Gambling and Betting Act, has
merit. You continue that nothing in the Act seems to distinguish his position from other Board members.

I don't agree with your conclusion. The Act is very clear and specific in this respect and there is no justification for providing a broader meaning to Section 6(k) than what is specifically stated in the Act. Section 6 clearly and unequivocally refers to members of the board, whereas Section 12 deals with staff of the Board. Section 12(a) stipulates the position of the CEO as being staff of the Board and the remainder of Section 12 clearly articulates the disqualification criteria, which apply to the staff (as opposed to the Board of Directors) of the Board. Our views as stated above are supported by legal opinion as well as in the report prepared by forensic investigators Ernst & Young.

I therefore fail to understand why you ascribe a broader definition to a member of the Board than what the Act allows for.

You stated in part (ii)(c) of the Executive Summary that the Board did not authorise the then Chairperson to act on its behalf at the CCMA and as a result the settlement agreement was finalised improperly, without the required authority and is thus invalid.

The present board members were not privy to the CCMA settlement negotiations. After perusing the Ernst and Young forensic report as well as the opinion prepared by Advocate Wade (SC) there appears to be doubt as to whether the former Chairperson had the necessary mandate from the Board to enter into settlement negotiations with the CEO at the CCMA. What is important for the current Board is to view the implications of such settlement on the status of the existing employment relationship with Mr M Zwane.
It is common cause that a settlement was reached at the CCMA, and that the interests of the board were ostensibly represented by the then Chairperson. Mr M. Zwane concluded a settlement with his Employer in terms of which he inter alia entered into a 5-year contract of employment with the Board.

The settlement was reached in 2009 and in the same year a 5-year contract of employment was entered into with Mr M. Zwane as CEO. Any decision by the Board to retrospectively repudiate the employment contract of Mr M Zwane will subject the Board to legal risks including a possible claim for constructive dismissal. Nothing contained in your Provisional Report suggests that the responsibility vested with Mr M Zwane to verify the authenticity of the mandate, which the Board delegated to its former Chairperson to negotiate and conclude a settlement.

Mr M. Zwane’s employment relationship is protected by fair administrative action, and declaring the settlement invalid, as suggested by you will render the appointment of Mr M. Zwane null and void with legal consequences.

I have accordingly been informed by my legal advisors that even if it is found that the Chairperson exceeded his mandate or delegated power to settle, that the settlement reached cannot ipso facto be declared invalid as suggested by you. Such action will constitute an unfair labour practice and certainly expose the Board and Department to unnecessary legal action and damages.

You stated in (ii)(a) that the MEC must take urgent steps to ensure that the Board reconsiders the appointment of Mr. M. Zwane as CEO in accordance with the Gambling and Betting Act.

It is important to note that the responsibility to appoint and determine the terms and conditions of employment of the CEO vests with the Board. Section 12(a)
requires the Board to appoint the CEO in consultation with the responsible Member.

It is therefore doubtful if it is legal or practical for the MEC to take urgent steps to ensure the Board reconsiders the appointment of Mr Zwane" as suggested by you. The board has consulted with me in a decision involving the tenure of employment of the CEO, but it is necessary to record that your recommendation is not within the spirit of the relevant provisions contained in the Gambling and Betting Act (Eastern Cape). The outcomes of the forensic report including legal advice on the implications of the previous Board’s actions were extensively considered by my office as well as the current Board, and your comment is therefore noted within the ambit and spirit of the Act.

The legal opinion, which was prepared in October 2012 by Advocate Wade (SC), dealt with the prospects of the Board re-initiating disciplinary proceedings against the CEO. The opinion did not deal with the possible implications of setting aside the settlement agreement on the contract of employment of Mr. M. Zwane.

You stated in (ii)(b) that the Chairperson of the Board should take steps to ensure that the procedures and legal prescripts are complied with for future appointments in compliance with the prescripts and provisions contained in the Act.

As responsible member and executive authority I have done what was deemed necessary within the ambit of the law to address the administrative irregularities which surrounded the process of appointment of the CEO. Such action included a comprehensive forensic investigation followed by the involvement of senior counsel to advise on the correct and legally defensible procedure to remedy the process.
The Board of Directors was replaced and the current board was required to sharpen its internal procedures to ensure that a similar incident does not repeat itself.

Finally, it is with great concern that we have learnt that independent journalist Eddie Botha is already in possession of your draft report which was deemed confidential, at least until a final report has been approved. We wish to suggest that you investigate this matter internally to determine how such information was leaked to the media.

I hope that these inputs are of assistance and will enable you to conclude this matter.

Yours faithfully

MR MCEBISI JONAS (MPL)
MEC: ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM"

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 In 2008, the lowest NQF level for a bachelor’s degree was level 6. For the qualification that Mr Zwane held, which was a National Diploma in Accounting to be equivalent to a bachelor’s degree, it would have had to be at the very least at NQF level 6 as well. According to information provided on the SAQA website, the National Diploma: Accounting, offered by the Durban University of Technology has an old NQF level and a new NQF level of 6 (it remains unchanged). A Bachelor of Administration: Political Studies obtainable from Vista University, and a Bachelor of Commerce: Law obtainable from Rand University have an old NQF level of 6. It is therefore clear that the diploma that
Mr Zwane held in 2008, was at the time equivalent to an appropriate Bachelor’s degree as required in the advertisement.

7.2 Although the MEC indicated that Mr Majombozi consulted him on 6 November 2009, it is clear that the so-called “consultation” undertaken does not meet the requirements of the Gambling and Betting Act. In McDonald & others v Minister of Minerals and Energy & others⁴ the court held that “where the law requires a functionary to act ‘in consultation with’ another functionary, this... means that there must be a concurrence between the functionaries, unlike the situation where a statute requires a functionary to act ‘after consultation with’ another functionary... this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary”.

7.3 Similarly, in an opinion prepared by Advocate Jeremy Gauntlett SC, for the Freedom Under Law, he dealt with the meaning of consultation, after referring to decided case law and came to the following conclusion:

“Consultation entails a process in which more than one person confers.
There must be a consideration of the pros and cons of a matter.
It may be formal or informal.
It may further be oral or in writing.
The essence of consultation is a communication of ideas on a reciprocal basis”.

7.4 In the present case, the “consultation” with the MEC took place a month after the Chairperson had entered into a settlement agreement with Mr Zwane about his appointment. The information provided to the MEC created the impression that the Board had lost its case regarding the promotion of Mr Zwane. The MEC was effectively provided with a fait accompli. This rendered the “consultation” a mere formality, and it can therefore not be said that the Board

⁴ (2007) JOL 2008 3 (C) at 10
and the MEC were in concurrence regarding the appointment of Mr Zwane as CEO.

7.5 Divulging wrong information during consultation can also not be said to amount to communication of ideas on a reciprocal basis.

7.6 With regard to the CCMA settlement agreement the authorisation of the then Chairperson of the Board to attend the CCMA hearing on behalf of the Board cannot be traced to the Board through a formal resolution. The Gambling and Betting Act is very clear regarding decision-making by the Board. Section 11(5) of this Act states that “the decision of a majority of members present at a meeting of the Board shall constitute a decision of the Board...”. For a decision to be that of the Board therefore, it must have been taken by a majority of members present at a meeting of the Board. An act by the Chairperson of the Board, which is not promised on a decision of the Board, cannot be regarded as a decision of the Board. Where therefore, as in the present case, the Chairperson takes a decision, which is not mandated by the Board, this cannot be regarded as a decision of the Board.

7.7 This raises the question of who effectively appointed Mr Zwane to the position of CEO and whether such person had the authority to make the appointment through the settlement at the CCMA.

7.8 Regarding proceeding with disciplinary action against Mr Zwane, there is abundant case law for the view that given the time that has lapsed, and the conduct of the Board in this matter, the likelihood of Mr Zwane raising a valid defence to the charges is high.⁵

⁵ See cases referred to in footnote 2 above.
8. LEGAL AND REGULATORY FRAMEWORK

8.1 Eastern Cape Gambling and Betting Act, 1997 (the Gambling and Betting Act)

8.1.1 Section 5(2) of the Act states that “(i)n addition the chief executive officer of the Board shall ex officio be a member of Board, but shall not be entitled to vote.”

8.1.2 Section 6 deals with persons disqualified from being members of the Board and under subsection (k) includes a person who “is a family member, partner or associate, of a person contemplated in paragraph (b), (e) or (f)” of the section…”

8.1.3 Section 11(5) states that “the decision of a majority of members present at a meeting of the Board shall constitute a decision of the Board…”

8.1.4 Section 12(1) provides that “the Board shall in the performance of its functions, be assisted by-
(a) a chief executive officer appointed by the Board in consultation with the responsible Member”.

8.2 Labour Relations Act, 1995

8.2.1 Section 142A(1) states that “the Commission may by agreement between the parties or on application by any party, make any settlement agreement in respect of any dispute that has been referred to the Commission, an arbitration award”.

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6 Paragraphs (b), (e) and (f) deal with persons who at the relevant times are, or during the preceding 12 months were public servants, have any direct or indirect interest in any gambling activity or any other business or enterprise that may conflict with the proper performance of their duties as members of the Board and their partners or associates hold offices in or with, or are employed by any person or company, organization or other body which has an interest contemplated in (e) respectively.

7 The responsible Member is the Member of the Executive Council responsible for the Department of Economic and Environmental Affairs.
8.3 Public Protector Act, 1995

8.3.1 Section 7(9) of the Public Protector Act provides that:

“If it appears to the Public Protector during the course of investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such a person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

9. ANALYSIS AND CONCLUSION

9.1 Mr Zwane’s qualification of a National Diploma in Accounting is equivalent to a bachelor’s degree, both being at NQF level 6. His qualification therefore met the requirements of the advertisement for the post of CEO.

9.2 The consultation that took place between the MEC and the Chairperson of the Board, Mr Majombozi, does not meet the requirements of section 12(1)(a) of the Gambling and Betting Act. Section 12(1)(a) provides that the Board shall in the performance of its functions, be assisted by a chief executive officer appointed by the Board in consultation with the responsible Member. The manner in which Mr Zwane was appointed can be seen as an attempt to circumvent the requirements of the law.

9.3 The decision to settle the matter regarding the promotion of Mr Zwane was not sanctioned by the Board, and was not made “in consultation with” the responsible member as required by the Gambling and Betting Act. It can therefore be regarded as an improper decision as it was taken without the required authority.
9.4 In the case of *MEC Department of Education Kwazulu Natal v Khumalo and Richie*:

9.4.1 The court was seized with an application by the MEC asking the court to set aside appointments in terms of the Labour Relations Act. Mr Khumalo had been appointed to a position even though he did not meet the minimum requirements for the position. Mr Ritchie who met the requirements, but was not shortlisted, launched an unfair promotion dispute. Mr Ritchie was then granted protected promotion to the same position through a settlement agreement. Eleven other employees, some of whom had not been shortlisted, also claimed promotion to the same post.

9.4.2 Faced with this onslaught, but after a long delay, the MEC then applied to the Labour Court to intervene to remedy the irregularities presented by the case, in that firstly, there was a person in a post who should have never been promoted to it, and secondly, there was an agreement to grant a protected promotion to another employee that the department had never authorised and was therefore illegal.

9.4.3 The MEC’s view was that she was *functus officio* since her officials had exercised a public power in granting the promotion, and only the court could remedy the situation.

9.4.4 The employees claimed that that the employer’s claim had prescribed after three years. In the event that prescription did not apply, the employer’s delay in bringing the application was excessive. Both employees had since acquired vested rights that could not easily be taken away from them. Regarding the settlement with Mr Ritchie, it was claimed that the settlement agreement with him was *res judicata*. Aside from fraud or an error of law, the MEC could not challenge a settlement agreement.

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9 (D749/08) [2010] ZALC 76 (6 July 2010)
On the point of *res judicata*, the court decided that while there is a general rule not to interfere in these agreements, this principle does not apply to agreements concluded unethically, illegally and contrary to the values of openness, accountability and efficiency. Any such agreement would be a nullity and *res judicata* would not apply.

Regarding the doctrine of *functus officio*, the court held that although this is important to enable certainty in decision-making, the converse is also true. If allowing a bad decision to stand would result in injustice, it must be revoked. The court stated that case law clearly creates an obligation to reverse an illegal decision at the instance of the MEC. The MEC had a duty, to expressly disavow reliance on a wrongfully taken decision and the doctrine of *functus officio* does not bar her undoing manifest irregularities. The court further observed that there was a duty on managers to correct irregularities and that this did not involve asking the court’s assistance to do so. The court granted the MEC’s application and overturned the two promotions.

This decision of the Labour Court was taken on appeal to the Labour Appeal Court in *Khumalo and Ritchie v MEC for Education: Kwazulu*\(^9\). The Labour Appeal Court, per Zondi AJA stated as follows:

"There is no doubt that the MEC was not only entitled but also duty-bound to approach a Court to set aside her own irregular administrative act (*Municipality Manager: Qaukeni Local Municipality and Another v FG General Trading CC* 2010 (1) SA 356 (SCA) at para 23 and authorities cited therein). This is also because it is a fundamental principle of the rule of the law that the exercise of public power is only legitimate where lawful.

But the fact that an administrative act is unlawful does not necessarily follow that it had to be set aside. In reviewing and considering whether to set aside an

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\(^9\) Case number DA3/2011. The judgment was delivered on 29 August 2012.
administrative action, Courts are imbued with a discretion and may in the exercise thereof refuse to order the setting aside of an administrative action, notwithstanding substantive grounds being present for doing so. (Oudekraal (Pty Ltd v City of Cape Town and Others 2010 (1) SA 333 (SCA). Sections 172 (1) (b) of the Constitution and 8 of PAJA are statutory provisions providing the source of the Courts’ discretion…

The Court made it clear in Sapela…that in deciding whether or not to exercise its discretion against the grant of the substantive relief it will have regard to the failure by the aggrieved party to institute review proceedings within a reasonable time and whether there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. It will also be guided by considerations of pragmatism and practicality. The Constitutional Court in Bengwenyama Minerals (Pty) Ltd…pointed out however that when making the choice of a just and equitable remedy in terms of PAJA it would be important to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful…

I agree…that the Court a quo was wrong: firstly in approaching the matter on the basis that it did not have a discretion to refuse the setting aside of the impugned decisions. It appeared to have adopted the view that once it was found that the impugned decisions are unlawful they have to set aside. Secondly, the Court a quo does not appear to have given a proper consideration to the legal effect of the MEC’s delay in bringing the review application on the impugned decisions…

…in para 35 of the judgment the Court a quo says:
“Decisions based on ignorance, mistake or fraud should be reversed in the public interest…”
This approach by the Court a quo is clearly wrong and contrary to the line of cases in which the Courts have reiterated that in reviewing and considering whether it will be just and equitable to set aside an administrative decision, they have a discretion…

The mere fact that the impugned decision is based on ignorance, mistake or fraud does not necessarily mean that it has to be set aside. In appropriate circumstances a Court will decline, in the exercise of its discretion, to set aside an invalid administrative action in order to avoid or minimise injustice when legality and certainty collide…

While it may be true that the review is aimed at setting aside an invalid act on the basis that it fails to satisfy the principle of legality, sometimes practical considerations would require finality, rendering it less desirable to set aside an invalid act. That would be a case where an invalid administrative action act has over a period of time remained unchallenged and third parties have arranged their affairs in accordance therewith and its setting aside may cause them injustice. *(Eskom Holdings Ltd v New Reclamation Group (Pty) 2009 SA 628 (SCA) at para 9)*…

The fact that the agreement in terms of which Ritchie was granted protected promotion was made an award of the Bargaining Council does not preclude the setting aside of his promotion as the award was based on the agreement which was unlawfully concluded”.

9.6 It is clear from the above that the Board could legally challenge the settlement that was entered into with Mr Zwane by the Chairperson of the Board without any demonstrable legal authority or mandate to do so.

9.7 However given the decision of the Labour Appeal Court referred to above, it is not desirable to have the matter reviewed for the following reasons:
9.7.1 The appointment of Mr Zwane has remained unchallenged over a long period;

9.7.2 It is conceivable that Mr Zwane has arranged his affairs in accordance with the decision and having the decision set aside would cause him injustice. It is possible for example, that he has not sought similar employment elsewhere based on his current employment with the Eastern Cape Gambling and Betting Board; and

9.7.3 For these reasons it is neither pragmatic nor practical to have the appointment reviewed.

9.8 Regarding the MEC's response to the provisional, the response was noted and analysed:

9.8.1 While the response is thorough, systematic and meticulous, many of the arguments are flawed both in fact and in law. Regarding the MEC's contention that the Public Protector is ascribing a broader definition to “a member of the Board” than what the Gambling and Betting Act allows for. Section 12 of the Act mentions the CEO as one of the staff members who assist the Board in the performance of its functions. However, he is not the only staff member who does so in terms of the Act. Other staff members include “persons appointed by the Chief Executive Officer” and “officers and employees placed at the disposal of the Board under section 15(3) of the Public Service Act, 1994”\(^{10}\). Yet, the Act is very clear that he is the only staff member who is also a member of the Board. There is therefore no reason why the disqualifications that are contained in section 6 should not apply to him, in his capacity as a Board member, in addition to the disqualification that applies to him in terms of section 12(5), in his capacity as a staff member. Furthermore, his membership of the Board is dealt with in terms of section 5, which deals with “Constitution of the Board”.

\(^{10}\) Section 12(1) (b) and (c) of the
9.8.2 The fact that the present members of the Board were not privy to the events which form the basis of the Public Protector's report, or to the CCMA settlement agreements has no bearing on the remedial action to be taken. The Board, in its capacity as a Board, has certain responsibilities in terms of the Gambling and Betting Act. It should not matter who the members of the Board are, or when the matter that needs attention arose.

9.8.3 It is not clear how the doubt regarding the legality or practicality of the MEC ensuring that the Board takes steps to reconsider the appointment of Mr Zwane would have arisen. By his own admission, the MEC is the "responsible member and executive authority" regarding and over the Board. Furthermore, "responsible member" is defined in Chapter 1 of the Gambling and Betting Act, as "the member of the Executive Council responsible for the administration of [the] Act". This issue has become moot given the amendment on my remedial action in line with the decision of the Labour Appeal Court referred to above.

9.8.4 I note and commend the MEC for requiring the current Board to sharpen its internal procedures to ensure that a similar incident does not repeat itself regarding the appointment of the CEO.

10. **FINDINGS**

The Public Protector's findings are the following:

10.1 The allegation that Mr Zwane was appointed despite having failed to disclose information, which disqualified him from appointment to the position of CEO in terms of section 6(k) of the Gambling and Betting Act, has merit. Although section 6 deals with Board members who are appointed by the responsible Member whereas the CEO is a member by reason of his position, nothing in the Act seems to distinguish his position from other Board members. The Board's actions in this regard, were improper and constitute maladministration.
10.2 At the time of appointment, Mr Zwane had a National Diploma obtained in 1997 and the required years of applicable experience, which meets the requirements as advertised. The advertised requirement was "An appropriate Bachelor's degree or equivalent qualification with at least 5 years' experience (preferably) in Administration, Leadership or management at a senior management level". The allegation that Mr Zwane did not meet the minimum requirements for the position of CEO as advertised is, accordingly, without merit.

10.3 There is no Board resolution or minutes confirming that the Board authorised the then Chairperson to act on its behalf at the CCMA as required under section 11(5) of the Gambling board Act, 1997, and as a result, the settlement agreement was finalised improperly, without the required authority. The conduct of the Chairperson was accordingly unlawful and the settlement reached invalid. The Chairperson's conduct was, accordingly, improper and constitutes maladministration.

10.4 The Board failed to properly consult with the MEC on the appointment of Mr Zwane and this amounts to non-compliance with the provisions of section 12(1)(a) of the Gambling and Betting Act. The Board's conduct was improper and constitutes maladministration.

10.5 The allegation that Mr Zwane's appointment was improper has been substantiated. The Board's appointment of Mr Zwane constitutes improper conduct and an act of maladministration.
11. REMEDIAL ACTION

Appropriate remedial action to be taken in terms of 182(1) (c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is the following:

11.1 The Chairperson of the Board should take urgent steps to ensure that procedures and legal prescripts are complied with for future appointments in compliance with the Gambling and Betting Act, and indicate what procedures have been put in place to avoid a recurrence.

11.2 It is too late to take action to rectify Mr Zwane’s irregular appointment and the appointment should accordingly, be deemed condoned by the Board and the MEC.

12. MONITORING

12.1 The Public Protector requires an implementation plan from the Chairperson of the Board indicating the steps that have been taken and the procedures that have been put in place in line with the remedial action in paragraph 13 above within 30 days from the date of this report.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30 APRIL 2013
Assisted by Mr L R Ndou, Executive Manager: Service Delivery