
PUBLIC PROTECTOR SOUTH AFRICA

REPORT No. 98 OF 2019/20


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EXECUTIVE SUMMARY

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report communicates my findings and appropriate remedial that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper and irregular appointment of the Chief Financial Officer (CFO) of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL), Mr Cornelius Machiel Smuts (Mr Smuts) in 2007.

(iii) The Investigation was conducted in terms of section 182(1)(a) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(iv) On analysis of the complaint, the following issues were identified and investigated:

(aa) Whether the CRL irregularly appointed Mr Smuts as the CFO when he was not suitably qualified for the position.

(bb) Whether the CRL suffered prejudice as a result of the irregular appointment of Mr Smuts in the circumstances.
(v) The investigation process included an exchange of correspondence and analysis of all relevant documents and application of all relevant laws, policies and related prescripts and interviews were also conducted with the complainant and relevant officials of the CRL.

(vi) Key laws and policies taken into account to determine if there had been maladministration into allegations of improper and irregular appointment of the CFO of the CRL, Mr Smuts in 2007. Those were the following:

(a) The Constitution of the Republic of South Africa, 1996 (the Constitution);

(b) The Public Protector Act, 23 of 1994 (the PPA);

(c) The CRL Rights Commission Act No. 19 of 2002;

(d) Public Finance Management Act 01 of 1999 (PFMA);

(e) Promotion of Administrative Justice Act 3 of 2000 and


(vii) Notices in terms of section 7(9) of the Public Protector Act were issued to Mr TE Mafadza, the Chief Executive Officer of CRL, Ms P Madiba, former CEO of CRL Rights, dated 20 August 2019 and to Prof DL Musona, the chairperson of CRL on 20 August 2019.

(viii) Response to a section 7(9) notice received from Mr Mafadza of CRL dated 11 September 2019.

(ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:
(a) **Regarding whether the CRL irregularly appointed Mr Smuts as the CFO when he was not suitably qualified for the position:**

(aa) The allegation that the CRL irregularly appointed Mr Smuts as the CFO when he was not suitably qualified for the position, is substantiated.

(bb) Evidence at my disposal revealed that according to Job Vest’s preliminary shortlist report submitted to the former CEO of CRL: Ms Madiba, Mr Smuts did not have the required academic qualifications for the post.

(cc) Notwithstanding this fact, the former CEO, Ms Madiba allowed and approved the shortlisting and interviewing of Mr Smuts for the position of CFO in contravention of the Recruitment Policy of CRL. Ms Madiba further approved the appointment of Mr Smuts, although he did not meet the minimum job requirements in terms of the advertisement.

(dd) The interview panel highlighted in its interview remarks to Ms Madiba, to take into consideration in her final decision that Mr Smuts did not have the requisite qualifications and experience required for the position of the CFO, however Ms Madiba still appointed Mr Smuts to the position of CFO at CRL.

(ee) Ms Madiba further failed to participate in the interview panel as required in the Recruitment Policy. The conduct of the CRL, particularly Ms Madiba, during the recruitment and selection of Mr Smuts amounts to contravention of paragraphs 40, 42 and 43 of the Recruitment Policy. The Recruitment Policy provides that the selection criteria used by the CRL shall conform to the specifications of the job. Candidates who comply with the requirements of the advert shall be shortlisted and interviewed by a panel constituted of Human Resources Officer, the CEO, Members of the CRL, and Heads of Departments.

(ff) The failure and contravention by the CRL and in particular that of Ms Madiba, constitutes improper conduct as envisaged in section 182(1)(a) of the
Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(gg) It is noted however, that Ms Madiba has since retired and is longer in the employ of CRL. Also of significant note is that Mr Smuts has since acquired his Master’s degree in Business Leadership obtained from University of South Africa on 17 May 2016. Furthermore, Mr Smuts has served CRL as a CFO for a period of over ten years and he did well during the interviews in 2006 and scored the highest of all candidates and was placed at number one.

(hh) My ultimate finding therefore, is that although Mr Smuts was irregularly appointed as the CFO of CRL in 2007, he now satisfies all the inherent requirements of the post, since he has acquired both the qualification and experience commensurate with the advertisement, albeit expo facto.

(b) Regarding whether the CRL suffered prejudice as a result of the irregular appointment of Mr Smuts in the circumstances:

(aa) The allegation that the CRL suffered prejudice as a result of the irregular appointment of Mr Smuts in the circumstances, is substantiated.

(bb) A cumulative amount of R9 849 336 (Nine million eight hundred and forty nine thousand rand) inclusive of taxable income such as Pay as You Ears (PAYE) has been paid to Mr Smuts by CRL since his irregular appointment in 2007.

(cc) An appointment made in contravention of applicable legal framework invariably results in irregular expenditure. The CRL and in particular, Ms Madiba irregularly appointed Mr Smuts and as a result payment of salaries made to him is irregular and in contravention of section 38(1)(c) of PFMA.

(dd) Such failure and contravention by CRL and in particular Ms Madiba, constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

INTRODUCTION

1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation and implement remedial action:

1.2.1 The Minister of Justice and Constitutional Development, Mr Ronald Lamola;

1.2.2 The Chairperson of the CRL, Prof DL Musona;

1.2.3 The CEO of CRL, Mr Edward Mafadza, and

2. THE COMPLAINT

2.1 The complaint was lodged with my office on 13 October 2016 by an anonymous Complainant.
The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following.

With regard to this particular matter, I find it compelling to accentuate that my remedial action should not be conflated or blurred with a sentencing within the context of a criminal sanction which is mainly predicated or fixated on infliction of a punishment or retributive discomfort. As a constitutional body modelled on an institution of an ombudsman, mine is to restore or promote good governance, integrity and assist all organs of state to administer their affairs in fair, rational and a lawful manner. It follows therefore that every complaint requires a practical or effective and a unique remedy that is in sync with its own peculiarities and merits.

The CEO of the CRL:

Within sixty (60) working days from the date of this report, s/he initiate a judicial review process contemplated in terms of sections 6 and 7 of the PAJA to remedy and regularise the appointment of Mr Smuts on the basis that he was irregularly appointed to a post of a CFO without having the minimum academic requirements and requisite experience for the post in 2007, which qualification and experience Mr Smuts has since acquired albeit ex post facto.

Within sixty 60 working days of the issue of this report, all CRL officials who are involved in the Recruitment and Selection processes, attend a workshop on PAJA, Recruitment and Selection Policy as well as related legal prescripts of the CRL and Public Service Regulations governing recruitment.

Within sixty (60) working days from the date of this report, disclose all irregular expenditure to the National Treasury incurred by CRL in connection with the irregular appointment of Mr Smuts to the position of a CFO.
2.2 Complainant alleged *inter alia* that:

2.2.1 The CRL recruited Mr Smuts in 2007, as a CFO whilst he was not qualified for that position;

2.2.2 Mr Smuts did not have the required academic qualifications for the position of the CFO as advertised by the CRL at the time; and

2.2.3 Mr Smuts also did not have the required experience in terms of the CFO post advertisement and that he continues to show a high level of incompetence to this position by abusing his subordinates, who are more experienced and qualified than him.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the 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 as regulated by national legislation:

(a) 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;

(b) To report on that conduct; and

(c) To take appropriate remedial action."

3.3 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.
3.4 The Public Protector’s powers are further regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purpose of an investigation.

3.5 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

3.6 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);

3.7 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);

3.8 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at paragraph [76].
empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68).

3.9 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69).

3.10 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70).

3.11 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71).

3.12 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence, (paragraph 71(a)).

3.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)).

3.14 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
3.15 The remedial action taken by the Public Protector has a binding effect (para 76). The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences" (paragraph 73).

3.16 The CRL is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector's mandate.

3.17 The jurisdiction of the Public Protector was not disputed by CRL in this matter.

3.18 Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.19 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar this me from investigating. Instead, it is mainly the interests of justice that dictate whether I should investigate the matter or not. It is axiomatic that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there
is a huge public interest in the public administration or in the governing of public affairs.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1)(a), (b) and (c) of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?
4.2.1.2.1 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?

4.2.1.2.2 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeal\(^2\) (SCA) made it clear that it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

4.2.3 In this particular case, the factual enquiry primarily focused on whether or not there was improper conduct or maladministration in the appointment of the CFO of the CRL, Mr Smuts in 2007.

4.2.4 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the CRL to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and policies taken into account to determine if there had been improper conduct or maladministration in the appointment of the CRL’s CFO, Mr Smuts, and prejudice to the CRL were principally those imposing administrative standards that should have been complied with by the CRL or its officials.

4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct, corruption, conflict of

\(^2\) Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA),
interests and irregular appointment. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the CRL or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.2.6 In the case of conduct failure as was the case in this matter, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

4.2.7 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

4.3 On analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.3.1 Whether the CRL irregularly appointed Mr Smuts as the CFO when he was not suitably qualified for the position;

4.3.2 Whether the CRL suffered prejudice as a result of the irregular appointment of Mr Smuts in the circumstances.

4.4 The Key Sources of information

Correspondences between the Public Protector and the CRL:

4.4.1 A copy of a complaint’s letter from the Complainant dated 05 October 2016;

4.4.2 A copy of the allegations letter dated 21 November 2016, to Mr Edward Mafadza (Chief Executive Officer of the CRL);
4.4.3 A copy of a response email dated 22 November 2016, from the Chief Executive Officer of CRL, Mr Edward Mafadza;

4.4.4 A copy of a response letter dated 12 January 2017, signed by the Chief Executive Officer of the CRL, Edward Mafadza;

4.4.5 A copy of a letter dated 13 February 2017, from the Public Protector, addressed to Chief Executive Officer, Mr Edward Mafadza;

4.4.6 A copy of an Email/letter dated 23 February 2017 from Mr Edward Mafadza to the Public Protector;

4.4.7 A copy of an Email/letter dated 04 May 2017 from Public Protector addressed to Mr Edward Mafadza in relation to concerns with regards to communication channels between the Public Protector and the CRL;

4.4.8 A copy of a Subpoena in terms of section 7(4)(a) and (b) of the Public Protector Act, 1994, addressed to Chief Executive Officer Mr Edward Mafadza, dated 19 May 2017.

4.4.9 A copy of a letter dated 08 May 2017 from the CRL, signed by Ms Thoko Mkhwanazi-Xaluva (the former Chairperson of the CRL);

4.4.10 A copy of a letter dated 23 August 2018, addressed to Chief Executive Officer, Mr Edward Mafadza from the Public Protector;

4.4.11 A copy of a letter dated 28 August 2017, signed by Chief Executive Officer Mr Edward Mafadza;

4.4.12 A copy of an Email/letter dated 26 June 2018, addressed to Chief Executive Officer Mr Edward Mafadza from the Public Protector;
4.4.13 A copy of a Schedule of Salary Packages for the term of Mr Smuts' appointment. dated 03 August 2018.

4.4.14 A copy of a submission to seek approval to appoint an external service provider for response handling of the advertised position of the CRL, dated 12 September 2006;

4.4.15 A copy of a criteria used for short-listing, for post Ref. No. OJH02 (Chief Financial Officer) dated 27 October 2006;

4.4.16 A copy of the amended short-list of the candidates from the CFO position. Dated 06 December 2006;

4.4.17 A copy of a Regret List for the CFO position. Dated 12/10/2006;

4.4.18 A copy of the interview questions (interview pack) for the position of CFO for different candidates. Dated 19 December 2006;

4.4.19 A copy of a letter dated 29 January 2007, addressed to the former CEO of CRL: Ms Madiba from the Human Resource Officer, Mr Motjopye, presenting a recommendation of the interview committee to appoint a suitable candidate for the position of CFO;

4.4.20 A copy of a letter of appointment for the CFO, Mr Cornelius Smuts, signed by the former CEO of CRL, Ms P Madiba. Dated 02 February 2007;


4.5 Legislation and other legal prescripts

4.5.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);

4.5.2 The Public Protector Act, 23 of 1994 (the PPA);
4.5.3 The Public Finance Management Act 01 of 1999 (PFMA);

4.5.4 The CRL Rights Commission Act No. 19 of 2002;

4.5.5 Public Finance Management Act 01 of 1999; (PFMA).

4.5.6 Promotion of Administrative Justice Act 3 of 2000; and

4.5.7 Labour Relations Act 66 of 1995.

4.6 Case law

4.6.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) and

4.6.2 Public Protector vs Mail and Guardian, 2011(4) SA 420 (SCA).

4.6.3 President of the RSA vs SARFU 1999(4) SA 147(CC).

4.6.4 Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of Republic of South Africa and Others 1999 (4) SA 788 (T).

4.6.5 S v Makwanyane and another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665 at paragraph 156.

4.6.6 Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013).

4.6.8 Principal Immigration Officer vs Hawabu 1936 AD 26.

4.7 **Notices issued in terms of section 7(9) of the Public Protector Act and responses received.**

4.7.1 A notice was issued to Mr TE Mafadza, the Chief Executive Officer of CRL, dated 20 August 2019;

4.7.2 A notice was issued to Ms P Madiba, former CEO of CRL Rights, dated 20 August 2019; and

4.7.3 A notice was issued to Prof DL Musona, the chairperson of CRL on 20 August 2019.

4.7.4 Response to a section 7(9) notice received from Mr Mafadza of CRL dated 11 September 2019.

4.7.5 No notice was issued to the CFO, Mr Smuts (however Mr Mafadza/CEO of CRL clarified as the accounting officer anything relating to Mr Smuts’s qualifications and further provided my team with copies of the same).

5 **THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO APPLICABLE LEGAL PRESCRIPTS**

5.1 Regarding whether the CRL irregularly appointed Mr Smuts as the CFO when he was not suitably qualified for the position:
Common Cause Issues

5.1.1 The post of a CFO was advertised by the CRL through a recruitment company known as Job Vest, with reference number OJH01, in national media (Rapport newspaper), with a closing date of 9 October 2006.

5.1.2 According to the post advertisement, the position required an appropriate recognised degree or post graduate qualification plus extensive appropriate experience at Senior Management level\(^3\).

5.1.3 According to a letter dated 13 November 2006 from Job Vest\(^4\), the criteria used for shortlisting was as follows:

(a) An appropriate recognised degree or post graduate qualification;
(b) A minimum of 7 years’ experience at a Senior and Middle management level of which two years must be at senior level;
(c) Experience in managing skilled professionals;
(d) Excellent Project management experience/Practical Finance and Accounting skills;
(e) Knowledge of PFMA/Government budget Cycle/Government systems and structures;
(f) Knowledge of Corporate Governance Performance Management and monitoring Public Service Transformation;
(g) Strong financial, auditing and accounting background;
(h) Advanced computer literacy and
(i) Valid driver’s licence.

5.1.4 In terms of the memorandum dated 12 September 2006 which was submitted to my office by Mr Mafadza on 28 August 2017, the post advertisement,

\(^3\) Clear and unambiguous requirements set out for the post advertisement.

\(^4\) Which is signed off by Mbali Xaba of Job Vest.
response handling and shortlisting for this job were outsourced by CRL to Job Vest Resourcing Company in order to alleviate the tedious process and pressures of sorting out CV's that might delay appointment.

5.1.5 In terms of the memorandum dated 6 December 2006 submitted to my office by Mr Mafadza on 28 August 2017, the proposed shortlist was received by CRL on 31 October 2006 from Job Vest. On receipt of a proposed shortlist with thirteen (13) names for this position received by CRL from Job Vest, the Human Resource Officer: Mr BM Motjopye submitted the same list to the former CEO of Phumla Madiba (Ms Madiba).

5.1.6 According to Mr BM Motjopye, the preliminary shortlist compiled by Job Vest was scaled down, to six (6) candidates for interviews with due regard to staff demographics within CRL. The following candidates were shortlisted and interviewed:

(a) Mr I Boardman
(b) Mr L Phiri
(c) Ms SA Ntshongwana
(d) Mr A Asmal
(e) Mr CM Smuts
(f) Mr MG Gunqisa

5.1.7 The interviews were held on 19 December 2006. The panel for interviews was made up of the following members:

(a) Mr Kruger of the Commission for Gender Equality (CGE),
(b) Ms Ngwenya of the South African Human Rights Commission (SAHRC)
(c) Ms Mboweni-Marais, a CRL Commissioner.

5.1.8 No amendments were made to the above six (6) name shortlist and Commissioner Mboweni-Marais chaired the interview proceedings. The first
candidate was called in at 09:30 and all candidates had been interviewed by 14:40.

5.1.9 After deliberations by the interview panel it was decided that the following candidates be recommended to the position of CFO. The recommended candidates in order of their scores were as follows:

(a) Mr C Smuts
(b) Ms SA Ntshongwana
(c) Mr L Phiri

5.1.10 An appointment letter for Mr Smuts was signed by Ms Madiba, the former CEO of CRL, on 5 February 2007, in which she formally informed Mr Smuts of his appointment to the position of CFO.

**Issues in Dispute**

5.1.11 It was argued by the Complainant that Mr Smuts did not qualify for the position of CFO at the time, as he did not meet the requirements of the post which required a recognised degree or post graduate qualification as well as extensive appropriate experience at senior and middle management level.

5.1.12 The Complainant further contended that Mr Smuts worked as a Financial Administrator at his previous employer (Provincial Treasury, Free State) and therefore lacked financial management experience at senior management level.

5.1.13 In terms of the shortlist from Job Vest referred to by Mr BM Motjopye above, it is noted that Mr Smuts was marked as not having the required qualification and experience. Despite these remarks/comments, Mr Smuts’ name was still placed on the final shortlist.

5.1.14 According to the minutes of the interview submitted to my office by Mr Mafadza on 28 August 2017, it is indicated that the interview panel recommended that
the following should be considered by the CEO (Ms Madiba) in her final decision:

"Mr Smuts lacks the appropriate qualification degree and experience at Senior Management level, whilst he has performed well in the interview".

5.1.15 Furthermore, according to the above contemplated minutes of the interview submitted by CRL to my office, the interview panel further expressed its reservations with regard to the following anomalies during the interview process:

a) "The CEO not being available for the interviews while it is an established practice that CEO's are available and actively participate in interviews of senior positions such as this one as the CFO reports directly to the CEO.

b) That people should not be invited for interviews if they do not comply with the requirements of the position in terms of the job advertisement".

5.1.16 Subsequent to the above recommendations as expressed by the CRL's interview panel for this post, a memorandum dated 29 January 2007, was compiled by Mr B Motjopye to the former CEO (Ms P Madiba). The following was highlighted in this memorandum:

(i) That the interview panel generally accepted that the top three (3) candidates would be recommended to the CFO position for appointment, however the following shortfalls were identified among the three candidates and should be noted when making the appointment:

(a) "Mr Smuts holds a National Diploma in Government Finance and has worked for the Provincial Treasury in Free State for over ten (10) years as a financial administrator. He performed well in the interviews but lacks a required degree and financial management experience at a Senior Level. (own emphasis added)"

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(b) **Ms Ntshongwana** is the Finance and Operations Manager at the University of Cape Town since 2001. She holds a Bachelor of Commerce degree and her career has always been in Financial Management. Ms Ntshongwana is well qualified but lacks knowledge with regard to the Public Finance Management Act (PFMA).

(c) **Mr Phiri** is highly qualified with a Master’s Degree in Business Administration. He has enormous experience within the field of Finance at Senior Management level. The panel felt that Mr Phiri is a job hopper and might not be ideal for this position”.

5.1.17 Notwithstanding the above reservations expressed by the interview panel and as amplified by Mr B Motjopye in the memorandum referred to above, Ms Madiba signed the memorandum on 31 January 2007, approving Mr Smuts’ appointment as the CFO for CRL with immediate effect.

5.1.18 Ms Madiba responded to the allegations as per the letter dated 2 July 2019 and amongst other things she raised was that this complaint was lodged ten years after the appointment of Mr Smuts, thereby questioning my discretion or decision to investigate this matter after this long\(^5\). In the same response\(^6\), Ms Madiba also disputed the allegations that Mr Smuts did not qualify for the post and sought to argue how Job Vest could have shortlisted Mr Smuts when he did not meet the requirements. Ms Madiba further contended that Job Vest as a specialised institution would have been well versed with policies applicable at the time.

5.1.19 Ms Madiba further referred me to the shortlist where the name of Mr Smuts appeared, so that I could see how Job Vest addressed the issue of Mr Smuts’

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\(^5\) This is issue is adequately addressed by Section 6(9) of the Public Protector Act as discussed in paragraph 5 and 6 (ibid).

\(^6\) Paragraph 10.1 of Ms Madiba’s response dated 02 July 2019.
experience and qualification. With regard to her absence from interviews, Ms Madiba indicated that she took a conscious decision to let the interviews proceed in her absence given the fact that Mr Smuts was an internal candidate who was her right hand. According to Ms Madiba, she wanted to avoid a potential conflict of interest since she believes in the principle of objectivity.

**Application of the Relevant Legal Prescripts**

**Constitution**

5.1.20 Section 2 of the Constitution\(^7\) lays the foundation for the control of public power. It provides that:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

5.1.21 Section 195(1) of the Constitution provides amongst other things that Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) "A high standard of professional ethics must be promoted and maintained.

(b) ...........................................

(c) ...........................................

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) ...........................................

(f) Public administration must be accountable

(g) Transparency must be fostered

\(^7\) Constitution of the Republic of South Africa, 1996
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated”.

5.1.22 As can be seen from the constitutional provisions above, section 195 of the Constitution provides for important values to guide decision-makers in the context of public-administration. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if needs be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a).

5.1.23 The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law. Equally so, in a seminal case of S v Makwanyane, Ackermann J characterised the new constitutional order in the following terms:

“We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order”.

5.1.24 Ms Madiba’s conduct was at odds and in conflict with the above Constitutional requirements, by allowing Mr Smuts to be included on the shortlist when he did not meet the minimum requirements of the position of the CFO as detailed in

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5 Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 1999 (4) SA 788 (T) at paragraph 20.

6 S v Makwanyane and another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665 at paragraph 156.
the job advertisement. There is therefore a reasonable apprehension that such an act by Ms Madiba was not transparent or it was unfair.

5.1.25 The case of Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal\textsuperscript{10} raised an important constitutional issue relating to the state’s obligation to comply with the requirements of the rule of law under section 1(c) of the Constitution in the context of public-sector employment. This case followed after the Task Team report sanctioned by MEC found that Mr Khumalo did not meet the minimum requirements relating to supervisory experience stated in the advertisement of the post he was appointed to. The MEC subsequently approached the court to set aside the appointment of Mr Khumalo.

5.1.26 The Labour Court further held that section 195 of the Constitution compelled the MEC, in the public interest, to avoid and eliminate illegalities in public administration. The principle of legality is applicable to all exercises of public power and not only to “administrative action” as defined in Promotion of Administrative and Justice Act (PAJA).\textsuperscript{11} The rule of law is a founding value of our constitutional democracy.

5.1.27 It is therefore neither fair nor in compliance with the dictates of transparency and accountability for an official in the employ of the state to mislead applicants and the public about the requirements or criteria it intends to use to fill a post. The formulation and application of requirements for a particular post is a minimum prerequisite for ensuring the objectivity of the appointment process. Persons who do not meet the requirements for a post ought not to be appointed.

\textsuperscript{10} (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013).

\textsuperscript{11} Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 58-9.
5.1.28 To this end, I find it appropriate to pause here for a moment and underscore that, customarily organs of state operate within certain regulatory policy framework which guides the day to day procedural operations and administrative activities. Of particular note is that, although departmental/organisational policies such as Recruitment Policies cannot be exalted to a strict legal code such as an Act of parliament or legislation, such policies are invariably crafted to mirror and compliment the objects of the main legislation. Policies are duly adopted by the organisation as a guiding document and a lodestar for a particular procedure and are normally binding on its employees. I am therefore inclined to apply and consider departmental/organisational policies during the course of my investigation to determine the extent to which policies have been complied with by government officials in the execution of their official administrative duties.

5.1.29 In terms of Paragraphs 3 and 4 of the CRL’s 2007 Human Resources Procedures, Recruitment and Selection Policies, (hereinafter referred to as Recruitment Policy) the CEO is the accounting officer of the CRL and is responsible for administrative functions of the Commission.

5.1.30 Paragraphs 40, 42 and 43 of the Recruitment Policy also provide that the selection criteria of the CRL shall conform to the specifications of the job. Candidates who comply with the requirements of the advert shall be shortlisted and interviewed by a panel constituted as follows:

(a) Human Resources Officer;
(b) The CEO;
(c) Members of the Commission; and
(d) Heads of Departments.

5.1.31 Contrary to the regulatory guidelines in terms of the Recruitment Policy, Mr Smuts was shortlisted whilst he did not comply with the requirements of the job.
advert. Similarly, Ms Madiba did not form part of the interview panel as required in terms of the Recruitment Policy.

5.1.32 Evidence in my possession as per preliminary short list drafted by Job Vest which was submitted by CRL to my office, reveals that Mr Smuts did not have the required qualification and experience. Notwithstanding such reservations indicated by Job Vest, the CRL and in particular Ms Madiba kept Mr Smuts’ on the shortlist without any explanation to justify it.

5.1.33 It is further noted in the memorandum dated 6 December 2006 that Ms P Madiba approved the preliminary shortlist from Job Vest which had the name of Mr Smuts. Ms Madiba further commented on this memo and stated that:

“It is very important that interviews are conducted and the post is filled in January 2007”. Ms Madiba subsequently signed this memo on 13 January 2006.

5.1.34 In my view, the objective of the Recruitment and Selection Policy is to ensure that the candidate who best meets the selection criteria is appointed. That being the case, it was expected of the CRL to maintain a high standard of professional ethics when handling its recruitment and selection processes.

5.1.35 As the Accounting Officer, and performing her functions in the public interest, the former CEO, Ms Madiba should, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration. In keeping with her duty to uphold the rule of law, Ms Madiba was not permitted to circumvent the express provisions of the Recruitment and Selection Policy as well as the requirements of the advertisement.
Conclusion

5.1.36 It also follows, as a corollary to the express terms of the selection criteria and the job advertisement that those who do not qualify for the post are not entitled to be considered.

5.1.37 That being so, I am persuaded to conclude that the CRL failed to comply with its own Recruitment Policy which demands that the selection criteria should comply with the job specifications in terms of the advertisement. In light of the evidence currently at my disposal, Mr Smuts ought not to have been short listed for the post of the CFO at CRL.

Response to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994

5.1.38 On 14 May 2019, I issued Ms Madiba and CRL with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to afford them an opportunity to respond to my provisional findings. Section 7(9)(a) of the Public Protector Act provides that:

“If it appears to the Public Protector during the course of an 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 person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

5.1.39 I now turn to consider the responses submitted regarding the section 7(9) notices (hereinafter referred to as notice). I have made an effort to deal with each and every aspect raised in the responses. However, where it appears that I have not addressed or dealt with every averment raised in the response that
should not be misconstrued as an admission of any kind of the averments contained therein.

5.1.40 A response was received by my office on the 11 September 2019 from Mr Mafadza. The CRL disputed my provisional finding that Mr Smuts was appointed without the qualification envisaged in the post advertisement. The upshot of CRL’s rebuttal was that in terms of the Relative Value Coefficient (RVQ)\textsuperscript{12} and National Qualifications Framework (NQF) levels as issued by South African Qualification Authority (SAQA) and circulated by Department of Public Service and Administration (DPSA) as at 27 March 2007, the description/ratings of the RVQ and NQF qualifications on a conversion table read as follows:

<table>
<thead>
<tr>
<th>Description of qualification found on RVQ levels</th>
<th>RVQ level</th>
<th>NQF level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Certificate, Diploma or Bachelor’s Degree requiring a minimum period of study of three years.</td>
<td>RVQ 13</td>
<td>NQF 6</td>
</tr>
<tr>
<td>Bachelor’s Degree requiring a minimum period of study of four years, An Honours Degree or equivalent Postgraduate Certificate acquired subsequent to a qualification with value RVQ 14.</td>
<td>RVQ 14</td>
<td>NQF 7</td>
</tr>
</tbody>
</table>

5.1.41 CRL correctly asserted that as a constitutional body, it was and continues to be bound by the provisions of the Public Service Act\textsuperscript{13} and the Regulations promulgated under this Act. CRL contended that the advertisement for the post of the CFO when referring to “appropriate recognised degree or post graduate

\textsuperscript{12} Sic.
\textsuperscript{13} Act 103 of 1994.
qualification” envisaged NQF 6 or NQF 7. Further, that Mr Smuts had a National Diploma which is contemplated in the table by DPSA above, as NQF 6.

5.1.42 In my view, the academic requirements in the advertisement for the post of the CFO were formulated in a simple, straightforward language and without any ambiguity namely, “appropriate recognised degree or post graduate qualification” (our emphasis). Objectively assessed, the advertisement was not only specific but also explicit with an academic requirement of degree or post graduate qualification. The advertisement did not make mention of NQF 6 or 7, nor did it mention a Diploma.

5.1.43 It is submitted therefore, that the advertisement should be understood in its literal/textual context and be duly accorded its grammatical meaning. Nothing appears to be vague, misleading or absurd in the phrasing/wording of the advertisement to warrant any other wider interpretation which CRL now seeks to import ex professo. The advertisement carries no other connotations to the contrary, save the requirement of a degree or post graduate qualification. I am satisfied about the balance between the grammatical and overall contextual meaning as phrased in the actual advertisement.

5.1.44 It is the primary rule of interpretation that if the meaning of the words is clear, it should be put into effect and indeed be equated with the intention of the drafter, writer, author or legislature as the case may be. Only if the so called plain meaning is ambiguous, vague or misleading or only if the strict literal interpretation would result in absurd results, then a deviation to avoid such absurdity may be justifiable. This is also known as golden rule of interpretation.14

5.1.45 Accordingly, the submission by CRL which seeks to introduce or import completely new words such a Diploma into the advertisement, by all means falls to be rejected. Had the drafters of the advertisement intended to accommodate

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14 Botha C Statutory Interpretation 3rd Edition (1998 Juta & Company) on page 27. See also Principal Immigration Officer vs Hawabu 1936 AD 26).
candidates with Diplomas, they would probably have been specific or explicit as they did with the requirement of a degree or post graduate qualification.

5.1.46 CRL failed to respond or deal with the finding that Mr Smuts only had three months experience in his then role as Acting CFO and therefore lacked the required extensive experience at a senior management level. The advert stated 7 years’ experience on a Senior and Middle Management level of which 2 years should be on senior level. On this aspect, CRL has not gone far enough to show that Mr Smuts met the post’s requirements. To this end, it is submitted that Mr Smuts was irregularly appointed and that any provisions of the Public Service Act must be read in the context of the state’s obligations under section 195(1)(i) of the Constitution.

5.1.47 Having so concluded, I pause to acknowledge the fact that Mr Smuts has since acquired his Master’s degree in Business Leadership obtained from University of South Africa on 17 May 2016. CRL’s CEO has furnished my office with a copy of this degree on 25 September 2019.\textsuperscript{15} I further acknowledge that Mr Smuts has successfully served CRL in the position of the CFO for more than ten years following his appointment. In the light of the current circumstances, it can be submitted that Mr Smuts now satisfies all the requirements of the post of CFO albeit \textit{ex post facto}.

5.2 Regarding whether the CRL suffered prejudice as a result of the irregular appointment of Mr Smuts in the circumstances:

\textbf{Common Cause Issues}

5.2.1 On 3 August 2018, Mr Mafadza submitted upon request to my investigation team the following historical payment record, captured in a table below as an indication of salary packages paid to Mr Smuts since his appointment in 2007 to date:

\textsuperscript{15} Albeit, acquired \textit{Expo Facto}.
<table>
<thead>
<tr>
<th>Date</th>
<th>All inclusive package</th>
<th>PDMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 February 2007 to 31 December 2007</td>
<td>R 502 725</td>
<td>None</td>
</tr>
<tr>
<td>1 January 2008 to 31 August 2008</td>
<td>R 540 429</td>
<td>None</td>
</tr>
<tr>
<td>1 September 2008 to 31 December 2008</td>
<td>R 557 133</td>
<td>None</td>
</tr>
<tr>
<td>1 January 2009 to 31 December 2009</td>
<td>R 624 867</td>
<td>One notch</td>
</tr>
<tr>
<td>1 January 2010 to 31 December 2010</td>
<td>R 672 297</td>
<td>One notch</td>
</tr>
<tr>
<td>1 January 2011 to December 2011</td>
<td>R 716 499</td>
<td>One notch</td>
</tr>
<tr>
<td>1 January 2012 28 February 2012</td>
<td>R 759 975</td>
<td>One notch</td>
</tr>
<tr>
<td>1 March 2012 to 31 March 2013</td>
<td>R 763 776</td>
<td>One notch</td>
</tr>
<tr>
<td>1 April 2013 to 31 March 2014</td>
<td>R 818 646</td>
<td>One notch</td>
</tr>
<tr>
<td>1 April 2014 to 31 March 2015</td>
<td>R 882 441</td>
<td>One notch</td>
</tr>
<tr>
<td>1 April 2015 to 31 December 2015</td>
<td>R 944 940</td>
<td>One notch</td>
</tr>
<tr>
<td>1 January 2016 to 31 March 2017</td>
<td>R 997 476</td>
<td>One notch</td>
</tr>
<tr>
<td>1 April 2017 to Date</td>
<td>R 1 068 132</td>
<td>One notch</td>
</tr>
</tbody>
</table>

5.2.2 From the above table, an approximated and a cumulative total of R 9 849 336
(Nine million eight hundred and forty nine thousand rand) inclusive of taxable
income such as Pay As You Earn (PAYE) has been paid to Mr Smuts.

**Issues in Dispute**

5.2.3 The Complainant argued that the appointment of Mr Smuts was improper and as
such amounts to improper prejudice to other qualifying candidates.
5.2.4 This contention by the Complainant has not been challenged or disputed by CRL/Mr Mafadza, except for an indication that Ms Madiba is no longer in the employ of CRL. Similarly, CRL led no evidence nor availed any record which seeks to justify the shortlisting of a less qualified candidate.

5.2.5 My submission to the above factual dispute is that, the short listing of a candidate who does not meet the set selection criteria shall ordinarily fly against the face of the objectives of the Recruitment and Selection Policy. Such shortlisting would then be arbitrary and irrational. The CRL had set out clear requirements to be met for the contested post of CFO. It follows therefore that, fairness in the selection process had to prevail during the screening of all candidates against the set requirements.

5.2.6 It is worth mentioning that Mr Smuts has served the CRL well over the past 10+ years and he has also obtained a Master’s degree in Business Leadership from the University of South Africa.

Application of the Relevant Legal Prescripts

5.2.7 Section 31 (1) of the CRL Act\textsuperscript{16} provides that the chief executive officer is the accounting officer of the CRL.

5.2.8 Section 31(2) of CRL Act provides that the chief executive officer is responsible for:

(a) "The formation and development of an efficient administration;"

(b) The organisation, control and management of all staff, including persons;

(c) The maintenance of discipline in respect of the staff; and

(d) The carrying out of the decisions of the Commission".

5.2.9 Section 31(3) of the CRL Act provides that as accounting officer is responsible for:

(a) All income and expenditure of the Commission;
(b) ........................................................
(c) Proper and diligent compliance with the Public Finance Management Act.

5.2.10 Section 15 (1) and (2) of the CRL Act lays down the Code of Conduct of the members of the CRL which is stated as follows: A member of the Commission must:

(a) Perform the functions of office-

(i) .....................;
(ii) In good faith; and
(iii) Without fear, favour or prejudice;

(b) ..............................................;

(c) ..............................................;

(c) May not act in any other way that compromises the credibility, impartiality, independence or integrity of the Commission.

(2) Any member of the Commission who contravenes or fails to comply with subsection (1) is guilty of misconduct.

5.2.11 Section 3(1)(c) of the Public Finance Management Act, 1999 (PFMA) provides that this Act applies to Constitutional Institutions and the CRL is one such constitutional body contemplated herein.
5.2.12 Section 36(1)(b) of the PFMA provides that a chief executive officer of a constitutional institution must be the accounting officer of that institution.

5.2.13 Section 38(1)(a) of the PFMA provides that the accounting officer for a department, constitutional institution or trading entity must have and maintain effective, efficient and transparent systems of financial and risk management and internal control. The CRL developed and adopted its Recruitment Policy as an effective and efficient measure of selecting and recruiting staff.

5.2.14 Section 38(1)(c) of the PFMA states that the accounting officer for an institution must prevent unauthorised, irregular, fruitless and wasteful expenditure or losses resulting from criminal conduct.

5.2.15 Section 1 of the PFMA defines an irregular expenditure as:

"Expenditure other than unauthorised expenditure that is incurred in contravention of or that is not in accordance with a requirement of any applicable legislation…"

5.2.16 Ms Madiba was expected to ensure that CRL appoints the CFO in line with its Recruitment Policy in order to avoid irregularities but also to act in good faith as envisaged in section 15 and 31 of the CRL Act.

5.2.17 According to evidence at my disposal Ms Madiba allowed the shortlisting of Mr Smuts for the post of CFO despite the lack of required qualifications and experience. Ms Madiba further failed to be part of the interview panel as contemplated in the Recruitment Policy. I am unable to reconcile Ms Madiba’s conduct in the circumstances with the ideals envisaged in sections 15 and 31 of the CRL Act.

5.2.18 A wrong appointee might have a negative impact in the organisation, hence it is crucial for the leadership to apply its mind when appointing employees. A
“bad hiring decisions could not only negatively affect a company financially, but could also harm employee morale and result to time loss due to grievance, disputes and litigation processes”\textsuperscript{17}.

5.2.19 Section 6(1) and (2) of PAJA provides for a Judicial Review of Administrative Action as follows:

“(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) …

(ii) …

or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

\textsuperscript{17} Bressler MS 2014 at page 2 \textit{Building the winning organisation through high-impact hiring}. 
(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself –

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to –

(ea) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the
empowering provision, in pursuance of which the administrative action was
purportedly taken, is so unreasonable that no reasonable person could have so
exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful".

5.2.20 Section 7(1) of PAJA provides for a Judicial Review of Administrative Action
as follows:

"Any proceedings for judicial review in terms of section 6(1) must be instituted
without unreasonable delay and not later than 180 days after the date—"

5.2.21 Section 158(1)(h) of the Labour Relations Act which regulates the powers of
the Labour Court provides as follows:
"The Labour Court may review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law".

5.2.22 In the Khumalo and Another vs MEC of Education KZN\textsuperscript{18} case, the court outlined the process to be followed when a responsible functionary is embarking on a process of remedying an administrative irregularity. It appears from the evidence available at my disposal that Mr Smuts's appointment was tainted with reviewable irregularity which may have to see the accounting officer CRL embark on either a judicial review or approach the Labour Court to cure the defects that occurred during the appointment of Mr Smuts within the stipulated time frame namely, 180 days of being aware of such irregularities.

5.2.23 \textit{Administrative Action} is defined in section 1 of the PAJA to include—

"Any decision taken by—

(a) an organ of state, when—

(i) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect".

5.2.24 It is axiomatic that CRL is an organ of state envisaged by section 239 of the Constitution\textsuperscript{19}. Further that its decisions in this instance amounted to administrative action as contemplated above.

\textsuperscript{18} Supra.
\textsuperscript{19} Constitution of the Republic of South Africa 1996.
Conclusion

5.2.25 It follows that, CRL incurred irregular expenditure due to the appointment of Mr Smuts as its CFO since it was done in contravention of applicable legislation and policies.

5.2.26 Notwithstanding the fact that Mr Smuts is rendering a commendable job to the CRL, the salary being paid to him invariably amounts to irregular expenditure since the processes followed in his appointment were improper, and is in contravention of applicable legal/policy framework as he did not qualify for the position of a CFO in terms of the minimum requirements stipulated in the advertisement at the time of his appointment.

6. FINDINGS

After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been complied with, I make the following adverse findings against the CRL:

6.1 Regarding whether the CRL irregularly appointed Mr Smuts as the CFO when he was not suitably qualified for the position:

6.1.1 The allegation that the CRL irregularly appointed Mr Smuts as the CFO when he was not suitably qualified for the position, is substantiated.

6.1.2 Evidence at my disposal revealed that according to Job Vest’s preliminary shortlist report submitted to the former CEO of CRL: Ms Madiba, Mr Smuts did not have the required experience and academic qualifications for the post.

6.1.3 Notwithstanding this fact, the former CEO, Ms Madiba allowed and approved the shortlisting and interviewing of Mr Smuts for the position of CFO in contravention of the Recruitment Policy of CRL. Ms Madiba further approved

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the appointment of Mr Smuts, although he did not meet the minimum job requirements in terms of the advertisement.

6.1.4 The interview panel commented in its interview remarks to Ms Madiba to take into consideration in her final decision that Mr Smuts did not have the requisite qualifications and experience required for the position of the CFO, however Ms Madiba still appointed Mr Smuts to the position of CFO at CRL.

6.1.5 Ms Madiba further failed to participate in the interview panel as required in the Recruitment Policy. The conduct of the CRL, particularly Ms Madiba, during the recruitment and selection of Mr Smuts amounts to contravention of paragraphs 40, 42 and 43 of the Recruitment Policy. The Recruitment Policy provides that the selection criteria used by the CRL shall conform to the specifications of the job. Candidates who comply with the requirements of the advert shall be shortlisted and interviewed by a panel constituted of Human Resources Officer, the CEO, Members of the CRL, and Heads of Departments.

6.1.6 Such failure and contravention by the CRL and in particular that of Ms Madiba constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.1.7 However, Ms Madiba has since retired and is longer in the employ of CRL. Also of significance is that Mr Smuts has since acquired his Master’s degree in Business Leadership obtained from University of South Africa on 17 May 2016. Furthermore, Mr Smuts has served CRL as a CFO for a period of over ten years and he did well during the interviews in 2006 and was placed as number one on the list.

6.1.8 My ultimate finding therefore, is that although Mr Smuts was irregularly appointed as a CFO of CRL in 2007, he now satisfies all the inherent requirements of the post, since he has acquired both qualification and experience commensurate with the advertisement, albeit *ex post facto.*
Regarding whether the CRL suffered prejudice as a result of the irregular appointment of Mr Smuts in the circumstances:

6.1.9 The allegation that the CRL or any other person suffered prejudice as a result of the irregular appointment of Mr Smuts in the circumstances, is substantiated.

6.1.10 A cumulative amount of R 9 849 336 (Nine million eight hundred and forty nine thousand rand) inclusive of taxable income such as Pay As You Earn (PAYE) has been irregularly paid to Mr Smuts by CRL since his irregular appointment in 2007.

6.1.11 An appointment made in contravention of applicable legal framework invariably results in irregular expenditure. The CRL and in particular Ms Madiba irregularly appointed Mr Smuts and as a result payment of salaries made to him is irregular and in contravention of section 38(1)(c) of PFMA.

6.1.12 Such failure and contravention by CRL and in particular Ms Madiba constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

With regard to this particular matter, I find it compelling to accentuate that my remedial action is not cast in stone. Neither should my remedial action be conflated or be blurred with a sentencing within the context of a criminal sanction which is mainly predicated or fixated on infliction of a punishment or retributive discomfort. As a constitutional body modelled on an institution of an ombudsman, mine is to restore or promote good governance, integrity and assist all organs of state to administer their affairs in fair, rational and a lawful manner. It follows therefore that every complaint requires a practical or effective and a unique remedy that is in sync with its own peculiarities and merits.
The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

The CEO of the CRL

7.1.1 Within sixty (60) working days from the date of this report, s/he initiate a judicial review process contemplated in terms of sections 6 and 7 of the PAJA to remedy and regularise the appointment of Mr Smuts on the basis that he was irregularly appointed to a post of a CFO without having the minimum academic requirements and requisite experience for the post in 2007, which qualification and experience Mr Smuts has since acquired albeit *ex post facto*.

7.1.2 Within sixty (60) working days of the issue of this report, all CRL officials who are involved in the Recruitment and Selection processes including all the senior management, attend a workshop on PAJA, Recruitment and Selection Policy as well as related legal prescripts of the CRL and Public Service Regulations governing recruitment.

7.1.3 Within sixty (60) working days from the date of this report, disclose all irregular expenditure to the National Treasury incurred by CRL in connection with the irregular appointment of Mr Smuts to the position of CFO.

8. MONITORING

8.1.1 The CEO of the CRL should submit a progress report comprising of the enforcement of the abovementioned remedial actions to my office within 30 working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above were implemented.
8.1.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others[2016]ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Head of the Department, unless they obtain an Interim Interdict or Court Order directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 06/01/2020

Assisted by VX Dlamini (Gauteng Provincial Office)