COLLATERAL DAMAGE

Report relates to an investigation into the alleged maladministration and abuse of power by the Board of the Estate Agency Affairs Board through its termination of the contract of employment of Mrs Nomonde Tantaswa Mapetla, former Chief Executive Officer of the EAAB without instituting a disciplinary hearing

Report No: 9 of 2016/17
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"The principle of legality is applicable in all exercise of public power and not only in administrative action" as defined in PAJA. It requires that all exercises of public power are, at minimum, lawful and rational."

Justice Skweyiya in Khumalo and Others v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49

Executive Summary

(i) "Collateral Damage" is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act, No 23 of 1994.

(ii) The report relates to an investigation into the alleged maladministration and abuse of power by the Board of the Estate Agency Affairs Board (the EAAB Board) through its termination of the contract of employment of Mrs Nomonde Tantaswa Mapetla, former Chief Executive Officer of the EAAB (the Complainant) without instituting a disciplinary hearing. The Complainant was suspended without being given a notice of suspension on the pretext of a pending investigation into the running of the affairs of her office in conducting the activities of the entity. She was later dismissed without a disciplinary hearing for the initial allegations for which she was suspended, which were later pronounced on in the Delloite Report as having been without substance.

(iii) The Complainant is a professional woman of 61 years of age who has had an illustrious career, having previously been employed as Business Development Manager at Eskom from 1992 to 1998; Deputy Director General of the Department of Public Enterprises from 1998 to 2000; Chief Executive Officer (CEO) of Enterprise South Africa: Tshwane from 2000 to 2002; and Executive Manager Corporate Services: National Electricity Regulator of South Africa (NERSA) from 2002 to 2004. She was appointed as CEO of the EAAB on 16 November 2004 on a contract for a period of three years ending on 15 November 2007, which was renewed by former Chairman of the board, Mr Dumisa Hlatshwayo on 15 July 2008 for a further three
year period ending 15 July 2011. Her performance appraisals by various boards over the past six years prior to her suspension and dismissal were rated above average, within the range of 80% to 90%. When she first joined the EAAB, the entity operated on an unsustainable R7.4 million deficit which she turned around to a profit of R27 million and had delivered the organisation from qualified audit findings to clean audits for six successive financial years. She holds a Post Graduate Diploma in Economics from the Economics, Institute in Boulder, Colorado, USA; a Bachelor of Arts (BA) Economics and Accounting from the National University of Lesotho; a Master of Arts in Economics from the Ball State University, Indiana, USA; and a Master of Business Administration from the De Montfort University, Leicester, United Kingdom. The Complainant, 55 at the time, was suspended without a notice of suspension and ultimately dismissed inconsistently with paragraphs 3(4) and 4(1) of the Code of Good Practice: Dismissal, paragraph 4.1.3.4 of the EAAB Service Manual as well as section 3 of the Protected Disclosures Act. At the time of her suspension, the Complainant was investigating suspected unethical conduct by several estate agents which included Wendy Mechanick, Lew Geffen and Seeff. She was a director at Finbond, a position she gave up as result of her dismissal by the EAAB Board and has since her dismissal been unemployed.

(iv) In the main, the Complainant alleged that she was suspended without a notice of suspension on 17 February 2011 through a letter signed by the former Chairman of the EAAB, Mr Thami Bolani (Mr Bolani), following a board resolution, 11 days later, on 28 February 2011, dismissed without a charge sheet following a board resolution of Sunday, 27 February 2011. Her dismissal was allegedly on the instruction of the Minister of Trade and Industry, Dr Rob Davies, MP, for having caused discomfort in the industry, which included the investigation of Wendy Mechanick and several other estate agents, for abuse of the trust fund, which led to her alleged victimisation by the EAAB Board. The Complainant further alleged that she was improperly suspended and dismissed by an improperly constituted board of 11 members instead of 15 members.
(v) The EAAB Board did not dispute that the Complainant was suspended without a notice of suspension to make representation and ultimately dismissed without charges being presented against her by the Board, which constituted of 11 members. The EAAB Board also did not dispute that at the time of her dismissal, the Complainant was engaged in the investigation of several estate agents which included Wendy Mechanick, and that the latter’s matter was subsequently taken to court, resulting in her being struck off the roll.

(vi) While the EAAB Board did not dispute that it suspended the Complainant without her being afforded an opportunity to responded to the intended suspension and did not present charges against the Complainant when it suspended and dismissed her, it submitted that the board followed the EAAB’s Human Resources Policies and Conditions of Employment Service Manual: 2005 (EAAB Service Manual) when it suspended her and that her dismissal was justified as the Complainant had breached a material condition of her suspension by communicating its contents to the media. While the letter of suspension stated that failure to adhere to the conditions set therein would lead to corrective action being taken against her, a punitive action of dismissal was taken without consideration of corrective action envisaged in the letter of suspension.

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

1) Whether the EAAB Board was improperly constituted.

2) Whether the EAAB Board improperly suspended the Complainant.

3) Whether the Complainant was improperly dismissed.

4) Whether the Complainant’s dismissal was on the instructions of the Minister of Trade and Industry.
5) Whether the EAAB Board victimised the Complainant for pursuing and uncovering abuse of funds by Estate Agents.

6) Whether the Complainant suffered any prejudice.

7) If all or some of the above were answered affirmatively, what would it take to place the Complainant as close as possible to where she would have been had the improper conduct not occurred.

(viii) The investigation process commenced with a preliminary investigation with a view to establish the gist of the complaint and was followed by a formal investigation conducted through meetings and interviews with the Complainant and relevant officials of the EAAB and former members of the board, media research, inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts.

(ix) In arriving at the findings, I have been guided by the standard approach adopted by the Public Protector South Africa as an institution, which simply involves asking: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If there is a discrepancy, does the conduct amount to maladministration or improper conduct? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

(x) As is customary, the "what happened" enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. To arrive at a finding on what happened, the investigation, like all others, relied on oral and documentary submissions by the Complainant and the EAAB Board. Correspondences were sent to, and/or received from the Complainant, Minister Davies, the DTI as well as the EAAB. The question regarding what should have happened on the other hand, relates to the standard that should have been complied with by the EAAB Board.
(xi) In determining the standard that the EAAB Board should have complied with to avoid improper conduct or violation of the relevant legal regulatory framework, I was guided, as is custom, by the Constitution, national legislation, applicable code and related regulatory instruments, as outlined hereinafter.

(xii) Key laws and policies taken into account to help me determine if there had been maladministration and abuse of power by the EAAB Board and prejudice to the Complainant were principally those imposing administrative standards that should have been upheld by the EAAB Board or its members when it suspended and dismissed the Complainant. In regard to the composition of the board, I was guided by sections 3(1), (2) as well as 4(4) and 4(6) of the Estate Agency Affairs Act, No 112 of 1976, and section 195 of the Constitution. Regarding the suspension of the Complainant, I was guided by sections 7, 23, 33 and 195 of the Constitution, section 3 of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA) as well as; section 185 of the Labour Relations Act, No 66 of 1995, as amended; paragraphs 2(1), 3(4) and 4(1) of Code of Good Practice: Dismissal; and Paragraphs 4.1.3.3 and 4.1.3.4 of the EAAB Service Manual. Regarding the improper dismissal of the Complainant on the instructions of the Minister of Trade and Industry, I was guided by the same laws and prescripts applied in relation to the suspension of the Complainant mentioned above. Regarding whether the board victimised the Complainant for pursuing and uncovering abuse of trust funds by the Estate Agents, I was guided by the Protected Disclosures Act, No 26 of 2000 (PDA)and sections 7, 10, 23, 33 and 195 of the Constitution. Regarding whether the Complainant suffered any prejudice, I was guided by sections 7, 10, 23 and 33 of the Constitution.

(xiii) The investigation included correspondence and interviews at its commencement and during its progress. The allegations were brought to the attention of: - Minister Davies on 8 April 2011 and 18 October 2011; the Director-General of the DTI, Mr Lionel October on 31 August 2011; the erstwhile Chairman of the EAAB Board, Mr Thami Bolani on 15 August 2011; former Chairperson of the EAAB Board, Mrs
Tryphina Dube on 15 November 2012; and the Chief Executive Officer of the EAAB, Mr Brian Chaplog on 16 November 2012 and 31 May 2016.

(xiv) All the information and evidence gathered during interactions with the Complainant, Minister Davies, Messrs October, Bolani, Chaplog, Sigaba and Mmotong as well as Mesdames Dube and Bulo were taken into account in an effort to reconstruct what happened and if what happened was in line with the rules. I have also issued Notices in terms of section 7(9) of the Public Protector Act during April 2016 as well as a Provisional Report during September 2016, and served them on former members of the EAAB Board, informing them of my provisional findings, of the EAAB Board being implicated in the matter being investigated and that such implication might be to their detriment or that an adverse finding pertaining to them might result, and further affording them the opportunity to respond in connection therewith. A Provisional Report was also served on Minister Davies on 19 September 2016 for his comments and response.

(xv) Having considered the evidence uncovered during the investigation and the regulatory framework, I make the following findings:

1. Regarding the alleged improper constitution of the Board:

(a) The allegation that the Board was improperly constituted is substantiated.

(b) The Board that suspended and later dismissed the Complainant comprised 11 members instead of 15 members, and was appointed in October 2010 and inaugurated on 8 December 2010.

(c) The appointment of an 11 member board is inconsistent with section 3(1) and 3(2) of the Estate Agency Affairs Act which enjoins the minister to appoint 15 members to the Board.
(d) However, in view of section 4(6) of the EAAB Act which provides that no decision taken by at least six members of the Board will be invalid on the basis that the board was constituted by less than 15 members, the constitution of the Board by 11 members was not invalid.

(e) The conduct of Minister Davies in appointing 11 instead of 15 members is inconsistent with the provisions of section 3(1) and (2) of the Estate Agency Affairs Act and constitutes maladministration as envisaged in section 182(1) (a) of the Constitution and improper conduct as envisaged in section 6(5) (a) of the Public Protector Act.

2. Regarding the alleged improper suspension of the Complainant:

(a) The allegation that the EAAB Board improperly suspended the Complainant is substantiated.

(b) The Complainant was suspended on 17 February 2011 through a notice of suspension signed by Mr Bolani, following a 7 member Board Resolution to this effect purportedly pending an investigation to be conducted against her regarding suspected mismanagement by her office in the running of the affairs of the organisation.

(c) No notice of intention to suspend was given nor was there a prior notice from the Board or the Chairperson given to her regarding Board concerns over her management of the EAAB; instead she had received glowing performance reviews, rating her performance at between 80% - 90%.

(d) At the time of her suspension the Complainant was investigating suspected unethical conduct by several estate agents which included the entity of Ms Wendy Mechanik who was a longstanding board member of the EAAB, a matter which had been discussed with difficulty at the board.
(e) Her suspension was inconsistent with paragraphs 4.1.3.3 and 4.1.3.4 of the EAAB Service Manual, to justify a summary suspension.

(f) The suspension of the Complainant was also improper, in contravention of the section 188 of the Labour Relations Act, section 3 of PAJA and sections 7, 10, 23 (1), 33(1) and (2) and 195(1) of the Constitution.

(g) The EAAB’s conduct accordingly constitutes maladministration as envisaged in section 6(5)(a) of the Public Protector Act and improper conduct and as envisaged in section 182(1)(a) of the Constitution.

3. Regarding the alleged improper dismissal of the Complainant:

(a) The allegation that the Complainant was improperly dismissed by the EAAB Board is substantiated.

(b) The Complainant was dismissed on 28 February 2011 through a letter written by Mr Bolani purportedly for violating the conditions of her suspension following a Board Resolution of seven members taken on 27 February 2011 allegedly for the irrevocable and irretrievable breakdown of a relationship of trust.

(c) The reason for the dismissal was at odds with the letter of suspension that she was said to have violated, as paragraph 3 of the said letter stated that failure to adhere to its conditions would result in corrective action. At the time of her dismissal the Complainant had made at least one member of the Board and other key role players in the estate agency sector uncomfortable.

(d) The failure by the Chairperson and the Board to follow due process when dismissing the Complainant was inconsistent with paragraph 4.1.3.4 the EAAB’s Human Resources Manual read with paragraphs 3(4) and 4(1) of the
Code of Good Practice: Dismissal, section 3 of PAJA and sections 7, 10, 23(1), 33 (1) and (2) and 195 (1) of the Constitution.

(e) The conduct of the Chairperson and the Board accordingly constitutes maladministration, improper conduct and abuse of power as envisaged in section 182(1) (a) of the Constitution and section 6(5) (a) and (b) of the Public Protector Act.

4. Regarding the termination of the Complainant’s contract of employment by the EAAB Board on the alleged instruction of Minister of Trade and Industry:

(a) The Complainant’s allegation that she was dismissed on the instruction of Minister Davies could not be verified and is therefore not substantiated. What was verified was that there were some people in the industry that were unhappy over the inspections and subsequently took the matter to court.

(b) Accordingly I am unable to conclude that there was any violation or improper conduct on the part of the Minister regarding the allegation.

5. Regarding the alleged victimisation of the Complainant for pursuing and uncovering abuse of funds by Estate Agents:

(a) The allegation that the Complainant was victimised by the EAAB Board is substantiated.

(b) It is clear that at the time of her suspension there was never a complaint from the Board or the Minister regarding her performance. On the contrary, she had received positive performance appraisals. I have not been provided with any rational reasons for her hasty suspension and dismissal. She was at the
time, in the process of conducting inspections of agencies including an agency of one of the Board members.

(c) In the absence of rational reasons and evidence warranting suspension and dismissal, I can only infer that the reason for her dismissal stemmed from the investigations and inspections she had initiated.

(d) Accordingly, the conduct of the Board was in violation of section 3 of the PDA, which protects whistleblowers from occupational detriment and therefore constitutes abuse of power as envisaged in section 6(5)(b) of the Public Protector Act.

6. Regarding the alleged prejudice suffered by the Complainant:

(a) The allegation that the Complainant suffered prejudice as a result of her suspension and dismissal by the EAAB Board is substantiated.

(b) The Complainant lost the possibility of her contract being considered for renewal. She had a legitimate expectation of extension of her contract.

(c) The suspension and dismissal was widely reported in the media and therefore tarnished the Complainant’s reputation and reduced her chances of being employed. As such, despite her illustrious career, she remains unemployed and has not been invited to join a paying directorial position. The Complainant suffered occupational detriment as envisaged in section 3 of the Protected Disclosures Act as a result of the suspension and dismissal. The conduct of the EAAB Board constitutes abuse of power as well as unfair and capricious conduct as envisaged in section 6(5) (b) of the Public Protector Act.
(x) With a view to placing the Complainant where she would have been, the remedial action I take in terms of section 182(1) (c) of the Constitution is to require:

(a) The Chairman of the EAAB Board to ensure:

1) The EAAB considers the report and renders an apology to the Complainant for the improper termination of her contract of employment; and

2) The EAAB publicises the apology in the media, particularly those in which the Complainant’s suspension and dismissal by the EAAB Board was reported.

(b) The Minister of Human Settlements to:

1) Take cognizance of the findings regarding the maladministration by the EAAB Board relating to irregularities mentioned in the report.

2) Apologize in writing to the Complainant within 30 days for the way she was treated

3) Ensure that the current EAAB Board considers the report and further reprimands the former members in terms of section 83(4) of the PFMA for the maladministration mentioned in the report by imposing a sanction that might be appropriate under the circumstances, even if it is by suspension of the members concerned from membership of or eligibility for reappointment to the EAAB Board for a reasonably determinable period.

4) Ensure that the EAAB Board is, at all times and/or within a reasonable time as and when a vacancy arises, constituted of 15 members as required by section 3(1) and (2) of the Estate Agency Affairs Act.
The Chief Executive Officer of the EAAB:

1) Together with the Board, add a provision to paragraph 4.1.3.3 of the EAAB Service Manual requiring the EAAB or Board when suspending employees, to give them sufficient notice of the nature and purpose of the intended suspension, a reasonable opportunity to make a representation and a clear and adequate notice of the right to request reasons for the intended suspension in order to comply with the labour laws.

2) Together with the Board, evaluate the effectiveness of the EAAB’s internal control and monitoring systems and introduce strict measures for compliance with the requirements of lawful, reasonable and procedurally fair labour processes to avoid future recurrence of the transgressions referred to in the report.
REPORT ON AN INVESTIGATION INTO THE ALLEGED MALADMINISTRATION AND ABUSE OF POWER BY THE ESTATE AGENCY AFFAIRS BOARD IN THE TERMINATION OF THE EMPLOYMENT CONTRACT OF MRS NOMONDE TANTASWA MAPETLA AS THE CHIEF EXECUTIVE OFFICER

1. INTRODUCTION

1.1 "Collateral damage" is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) read with section 8(1) of the Public Protector Act, No 23 of 1994 (the Public Protector Act) following an investigation into a complaint lodged by Mrs Nomonde Tantaswa Mapetla (Mrs Mapetla), the Complainant, alleging maladministration and abuse of power by the Board of the Estate Agency Affairs Board.

1.1.1 The Estate Agency Affairs Board (EAAB) is an important and strategic organ of state chaired by a non-executive chairman and its handling of estate agents’ activities in the public interest has implications for the efficient and effective control as well as regulation of the multibillion rand estate agency industry and as a public regulator has implications for the country’s economy. The EAAB is listed as a Public Entity in terms of Schedule 3, Part A of the Public Finance Management Act 1 of 1999 (PFMA). It is controlled by the EAAB Board, which in terms of section 49(2)(b) of the PFMA is its Accounting Authority which has the obligation to discharge the responsibility of managing the EAAB in an effective, efficient and accountable manner.

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act 23 of 1994, to the following persons:

1.2.1 The Minister of Human Settlements, Honourable Lindiwe Sisulu;
1.2.2 The Chairman of the Board of the Estate Agency Affairs Board (EAAB Board), Professor Kwandiwe Kondlo;

1.2.3 The Chief Executive of the Estate Agency Affairs Board, Mr Brian Chaplog;

1.3 Copies of the report are also provided to the following persons:

1.3.1 The Minister of Trade and Industry, Dr Rob Davies MP;

1.3.2 Former Chairpersons of the EAAB Board, Mr Thami Bolani and Ms Tryphina Dube;

1.3.3 The following former EAAB Board Members:

1.3.3.1 Mr Mohsien Hassim; Ms Anne Fry; Mr Sindile Faku; Ms Mpho Molefe; Mr Ms Ina Wilken; Mr Aubrey Ngcobo; Mr Shaheed Peters; Mr Lesly Seshabela; Ms Segoale Mojapelo; and

1.3.4 The Complainant, Mrs Nomonde Tantaswa Mapetla.

2. THE COMPLAINT

2.2 The Complainant, Mrs Nomonde Tantaswa Mapetla, lodged a complaint at the Public Protector’s Head Office on 4 April 2011, which was supplemented by information from her Attorneys, Messrs Langa Attorneys on 8 June 2011, alleging that the former Chairman of the EAAB, Mr Thami Bolani, acting on behalf of an improperly constituted board of 11 members, improperly suspended her on 17 February 2011 without being given the opportunity to make a representation against the intended suspension and later dismissed her without being charged on 28 February 2011 on the approval of the Minister of Trade and Industry, Dr Rob Davies, MP for her anti-corruption or whistle blowing activities at
the EAAB which lead to the investigation of certain major Estate Agents for abuse of the trust fund resulting in her suffering prejudice by victimisation.

2.3 The Complainant is a professional woman of 61 years of age, previously employed as Business Development Manager at Eskom from 1992 to 1998; Deputy Director General of the Department of Public Enterprises from 1998 to 2000; Chief Executive Officer (CEO) of Enterprise South Africa: Tshwane from 2000 to 2002; Executive Manager Corporate Services: National Electricity Regulator (NERSA) from 2002 to 2004. She was appointed as CEO of the EAAB on 16 November 2004 on a contract for a period of three years ending on 15 November 2007, which was renewed by former Chairman of the board, Mr Dumisa Hlatshwayo on 15 July 2008 for a further three year period ending 15 July 2011. Her performance appraisals by various boards over the past six years prior to her suspension and dismissal were rated above average, in the range of 80% to 90%. When she first joined the EAAB, the entity operated on an unsustainable R7.4 million deficit which she turned around to a profit of R163 million and had delivered the organisation from qualified to clean audits for six successive financial years. She holds a Diploma in Economics from the Economics Institute, Boulder, Colorado, USA; Bachelor of Arts (BA) Economics and Accounting from the National University of Lesotho; Master of Arts in Economics, Ball State University, Indiana, USA and a Master of Business Administration, from De Montfort University, Leicester, United Kingdom. The Complainant was suspended without a notice of suspension and ultimately dismissed inconsistently with paragraphs 3(4) and 4(1) of the Code of Good Practice: Dismissal, paragraph 4.1.3.4 of the EAAB Service Manual as well as section 3 of the Protected Disclosures Act. At the time of her suspension, Complainant was investigating suspected unethical conduct by several estate agents which included Wendy Mechanick, Lew Geffen and Seeff prior to her dismissal by the board at the age of 55. She has since her dismissal been unemployed in spite of her qualification and experience.
2.4 The Complainant was a non-executive director of Finbond, which position she gave up with immediate effect on 8 March 2011 due to the reputational damage caused by media reports on her suspension and dismissal by the EAAB.

2.5 Upon assumption of duty at the EAAB, the Complainant embarked on transformation of the EAAB by establishing among others the Education and Training department, introducing internal financial controls and policies, raised fees for the sustainability of the EAAB fund by increasing the levies paid by estate agents and advocated for the application of section 32A of the Estate Agency Affairs Act enforcing inspections of the Estate Agents Trust Accounts.

2.6 She further introduced the anti-corruption and whistle blowing activities during the period 2009/2010. She turned the EAAB from being technically insolvent to a financially stable organisation.

2.7 The new EAAB Board Members were appointed earlier during 2010 following the appointment of an interim board in 2006 and the new Board was inaugurated on 8 December 2010, the day it held its first meeting. At that time, the Board consisted of 11 members.

2.8 During that meeting, a report about Wendy Mechanick was tabled and issues of the appropriation of about R28 million from the trust fund by certain estate agents was discussed. The Board was then advised to apply the law and take the Wendy Mechanick matter to court.

2.9 The Board Minutes of 9 February 2011 indicate that there was a discussion about the appointment of a media house to deal with the establishment of a media communications strategy and to assist the Board with public relations work.

2.10 It was further indicated that the matter was not pursued as the Complainant, as then CEO, advised the Board that Mr Piliso, a media management specialist had been appointed by the Head of Marketing for a period of three months. It stated
that the Complainant advised that she had never met Mr Piliso and that the Board should express the support to management when it appointed service providers.

2.11 During an Executive Committee (Exco) meeting of 16 February 2011, which was supposed to be held on Monday 14 February 2011 but moved forward, a number of new Trust Account reports were discussed, including Lew Geffen, Seeff and additional estate agencies. At the meeting, the Executive Manager Legal Compliance was tasked to follow up on inspections of the said reports. The minutes of the meeting however reflect the opposite, namely that the investigation was not to be continued with. The minutes were incorrectly dated 14 February 2011, the date when there was no meeting held.

2.12 On 17 February 2011, two months and nine days after the Board’s inauguration and a day after the tabling of the reports of the investigation on the Geffen and Seeff estate agencies at the Executive Committee Meeting, in an apparent HR meeting where no members were invited, the Complainant was called in and served with a suspension letter by Mr Bolani. Thereafter a meeting of staff members was called wherein the Complainant’s suspension was announced.

2.13 According to the letter dated 17 February 2011, the Complainant was suspended with immediate effect pending the findings of the board’s sanctioned investigation into suspected mismanagement of her office in the running of the activities of the organisation. The Complainant challenged the statement of mismanagement of her office and Mr Bolani undertook to provide her with detailed reasons for her suspension in writing by no later than 14:00 on Friday 18 February 2011.

2.14 The conditions of the Complainant’s suspension prohibited her from discussing the nature, contents and scope of her suspension with any other employees or the media and she was further forbidden from entering the premises and communicating with staff of the EAAB.
2.15 The suspension letter did not provide a return date, but according to the Complainant, she could only be suspended for a period of 10 working days and was entitled to return to work thereafter as the EAAB Service Manual stipulated that suspended employee would automatically return to work if no charges were preferred against him/her within a period of 10 calendar days.

2.16 On 20 February 2011, the Sunday Times reported: “Boss of Estate agency board suspended” – “Probe into yet another top player leads to Nomonde Mapetla’s downfall”. Complainant also received several calls from various journalists enquiring about the suspension and she referred them to the Chairman of the Board.

2.17 On 22 February 2011, five days after the suspension, the Complainant’s Attorneys, Kwinana & Partners Inc addressed a letter to Mr Bolani raising a concern of their client (the Complainant) regarding the Sunday Times report titled: “Breaking News: Shock as Estate Agents Board Boss is suspended” reading further on page two that “Boss of Estate agency board suspended. Probe into yet another top player leads to Nomonde Mapetla’s downfall”.

2.18 Another concern was that four days after her suspension, on 21 February 2011, the Complainant received an sms from a journalist from e-news channel, Robyn Kriel requesting her to respond to the allegation that she was suspended and further advising her that Mr Bolani would be speaking on camera at 1 pm on e-news.

2.19 A further concern raised was of the Complainant receiving a call on 21 February 2011 from Moneyweb inviting her to comment on the Board’s comment that a private company was to be hired to conduct an investigation into her case, which was news to her.
2.20 The Attorneys also raised concerns of the unfairness and unlawfulness of the suspension as well as the improper constitution of the EAAB Board by 11 instead of 15 members.

2.21 On 23 February 2011, the Office of the Minister of Trade and Industry acknowledged receipt of a letter from the Complainant's Attorneys of 22 February 2011 regarding the issues raised.

2.22 On 25 February 2011, three days after serving the letter from the Complainant's Attorneys to Mr Bolani, a letter dated 25 February 2011 from Knowles Hussain Lindsay Inc was served on the Complainant's Attorneys to advise that they were acting on behalf of the EAAB and were taking instructions from their client and they would revert to them regarding their letter of 22 February 2011.

2.23 On 28 February 2011, 10 days after her suspension, five and three days after receiving letters from the Office of the Minister of Trade and Industry and the EAAB's Attorneys respectively, the Complainant's Attorneys received a letter of dismissal of the Complainant dated 27 February 2011, stating that a duly constituted meeting of the EAAB Board resolved to terminate the employment contract of the Complainant with immediate effect for reasons of the indisputable fact that the employment relationship of confidence and trust between the parties had irrevocably and irretrievably broken down.

2.24 The letter further provided that the Complainant be paid the amount of all remuneration and benefits that she would have received until the termination date of her contract, being 15 July 2011.

2.25 In a further attempt to resolve the impasse, the Complainant approached the South Gauteng High Court under Case No: 8760/11 with an urgent application challenging the composition, and to set aside the decision of the EAAB Board as well as for her reinstatement as CEO.
2.26 On 1 March 2011, the Complainant’s Attorneys in a bid to have a retraction of the decision to terminate the Complainant's employment, addressed a letter to Mr Bolani challenging the validity of the constituted board and its decision to suspend and dismiss the Complainant, further stating that since her suspension, the EAAB had waged a public campaign accusing their client among others of "mismanagement" and "corporate governance issues" without affording her the opportunity to answer and pending the outcome of the alleged investigation against her.

2.27 However, on 11 March 2011, the South Gauteng High Court turned down the Complainant's application on the basis that the matter was not urgent.

2.28 In a despairing move to enforce her rights further, and due to the cost implications involved in challenging the matter, the Complainant, through her legal representatives Messrs Langa Attorneys faxed the Complainant's complaint form to the Public Protector on 1 April 2011 for investigation of the conduct of the EAAB Board and for the relief sought as stated herein above. A supporting letter from Langa Attorneys dated 4 April 2011 was also sent to me to corroborate the complaint.

2.29 A media report by Fin24 of 10 March 2012 quoted the Complainant as having said that:

"There appears, overwhelmingly, to be a direct linkage between certain anti-corruption or whistle-blowing activities upon which I had embarked in the period immediately preceding my suspension, which may fit the definition of 'protected disclosure'."

2.30 On 8 April 2011, I received a letter from Minister Davies who raised a concern that several media reports regarding his alleged involvement in the EAAB decision to terminate the employment contract of the Complainant and denying the said
allegations. To this end, Minister Davies referred to the Department of Trade and Industry (DTI) statement quoting that "Minister Davies has noted malicious allegations suggesting that Ms Mapetla was dismissed by the EAAB on his instruction and or indirect influence as unfounded, malicious and libelous. Minister Davies wishes to dismiss the allegations with the contempt it deserves and categorically denies involvement or a desired interest in having Mapetla Dismissed".

2.31 The Minister however confirmed that the DTI asked an independent company to investigate and report on the circumstances leading to the Complainant's dismissal. He emphasised that at no stage during their meeting did he suggest or infer to Mr Bolani that the Complainant's contract be terminated and that witnesses who attended the meeting could confirm that.

2.32 The Complainant states that her attempts to reach the Minister after she was suspended failed.

2.33 On 11 April 2011, I acknowledged receipt of Minister Davies' letter and advised him that I had not as yet concluded a preliminary investigation, but that as soon as a formal investigation commenced, Minister Davies and other parties implicated would be advised accordingly.

2.34 I have during the course of the investigation afforded former members of the board the opportunity to respond to notices issued in terms of section 7(9) of the Public Protector Act.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing of improper conduct in state affairs.
3.2 Section 182 of the Constitution provides that:

"The Public Protector has the power as regulated by 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 The Public Protector's powers are regulated and amplified by the Public Protector Act, No 23 of 1994 which states, among others, that the Public Protector has power to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.4 The Public Protector Act also confers on the Public Protector the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism. Section 182(2) directs that the Public Protector has additional powers prescribed by national legislation.

3.5 Section 7(1)(b)(i) provides that the format and procedure to be followed in conducting an investigation shall be determined by the Public Protector with due regard to the circumstances of each case.

3.6 According to section 6(5) (a) and (b) of the Public Protector Act, the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate:

3.6.1 Maladministration in connection with the affairs of any institution in which the state is the majority or controlling shareholder or of any public entity as defined in section 1 of the Public Finance Management Act, No 1 of 1999 (PFMA); and
3.6.2 Abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution as defined in paragraph 3.4.1 herein above.

3.6.3 The EAAB is a Public Entity listed under Part A of Schedule 3 to the PFMA and the complaint lodged against it of maladministration and abuse of power relate to allegations of improper conduct in state affairs and accordingly falls within the ambit of the Public Protector.

3.7 Jurisdiction and power to investigate was disputed by the EAAB Board, which through its Attorneys of record, Knowles Husain Lindsay Inc, stated in a letter to the Public Protector dated 26 August 2011, based on the urgent application launched in the South Gauteng High Court as well as a dispute of alleged unfair dismissal referred to the CCMA by the Complainant, that:

"our client believes that it would be inappropriate and prejudicial for the Public Protector to conduct a parallel process of investigation and adjudication to the abovementioned two sets of litigation already set in motion by Mrs Mapetla…

Mrs Mapetla is in any event obliged to exhaust her legal remedies before engaging the Public Protector in what is essentially a labour dispute (section 6(3) of the Public Protector Act 23 of 1994)."

3.8 Mr Aubrey Ngcobo, a former Board member argued in his response dated 4 October 2016 to the Public Protector's Provisional Report that as Complainant referred the matter to the CCMA where it was settled, it seems like a double jeopardy for the EAAB Board to be sanctioned twice for the same offence, whether it is unfair suspension or maladministration. He asserted that while there is nothing in the relevant Act that precludes the Public Protector from probing a
matter which is being pursued anywhere, it could not be in the interest of the
administration of justice to have a matter being adjudicated under different guises
and that what the Public Protector seeks to do is to erode the functions of the
CCMA and to create doubt over certainty of findings and that the Public
Protector’s finding would undo the settlement reached at the CCMA.

3.9 Evaluation of the arguments on investigative powers and jurisdiction

3.9.1 I must indicate that while I agree on the requirements of the provision of section
6(3) of the Public Protector Act, requiring that all reasonable steps be taken to
exhaust legal remedies, the section is more permissible than peremptory.

3.9.2 I could only conclude that the arguments regarding the perceived gaps in the
investigation process stem from the misconception of the mandate, powers and
functions of the Public Protector as enshrined in section 182 of the Constitution
and section 6 and 7 of the Public Protector Act.

3.9.3 Furthermore, having considered the steps taken by the Complainant in an attempt
to resolve the matter by approaching her Attorneys, Messrs Kwinana & Partners,
the steps they have taken in engaging the EAAB Board through correspondences,
the Application lodged with the South Gauteng High Court are sufficient to indicate
that reasonable steps were taken as required by section 6(3) of the Public
Protector Act.

3.9.4 I may also point out that no law prohibits the Public Protector from investigating a
matter because it is a subject of the proceedings in another forum. I have
therefore, in terms of the provisions of section 182 of the Constitution and sections
6 and 7 of the Public Protector Act decided to investigate the allegations raised by
the Complainant.

3.9.5 It will therefore be a discretionary matter for me to decide if I would accept a
complaint for investigation where the matter is also the subject of judicial
proceedings and where allegations of bad administration are an issue. I therefore do not agree with the Mr Ngcobo’s point of view as stated above.

4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act.

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 gives the Public Protector the authority to investigate and report on her findings regarding any complaint lodged.

4.1.3 The affected parties were served with section 7(9) notices and the Provisional Report regarding the investigation to afford them the opportunity to respond to the issues and engage with my team if they so wished.

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:

a) What happened?

b) What should have happened?

c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration and/or improper conduct?
d) In the event of a deviation, what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the 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, through correspondence, interviews, meetings and documents. In this particular case, the factual enquiry principally focused on whether or not the EAAB Board acted in the manner alleged by the Complainant.

4.2.3 The source of evidence principally included institutional documents consisting of correspondence. Viva voce evidence was received from certain witnesses, mainly the Complainant, former Chairpersons of the EAAB Board, CEO as well as Company Secretary of the EAAB during interviews. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

4.2.4 The enquiry regarding what should have happened, focused on the law or rules that regulate the ethical standard that should have been met or complied with by the EAAB Board as regulated by the Labour Relations Act and other regulatory frameworks, with implications for applicable labour relations standards, to prevent the improper conduct or violation of the Labour relations Act. In this case, key reliance was placed on the EAAB’s Human Resources Policies and Conditions of EAAB Service Manual: 22 February 2005 (EAAB Service Manual) in addition to the Labour Relations act and the Constitution.

4.2.5 The enquiry regarding the remedy or corrective action seeks to explore options for redressing injustice or prejudice suffered or damage caused as a consequence of improper conduct involving maladministration, unethical conduct or any other impropriety. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the EAAB Board
or organ of state complied with the regulatory framework setting the applicable standards for proper conduct or good administration.

4.2.6 The same is done where the wrongful conduct negatively affects the general populace. However, in appropriate circumstances, the remedial or corrective action primarily seeks to prevent a recurrence or to 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 focused on compliance with the law and prescripts relating to the propriety of the conduct of the EAAB Board regarding the suspension and termination of the Complainant's contract of employment by the board concerned which was constituted by a quorum constituted out of 11 and not 15 members as prescribed by section 3 of the Estate Agency Affairs Act.

4.3 On analysis of the complaint and allegations, the following issues were considered and investigated:

4.3.1 Whether the EAAB Board was improperly constituted.

4.3.2 Whether the EAAB Board improperly suspended the Complainant.

4.3.3 Whether the Complainant was improperly dismissed.

4.3.4 Whether the Complainant's dismissal was on the instructions of the Minister of Trade and Industry.

4.3.5 Whether the EAAB Board victimised the Complainant for pursuing and uncovering abuse of funds by Estate Agents.

4.3.6 Whether the Complainant suffered any prejudice.
4.3.7 If all or some of the above were answered affirmatively, what would it take to place the Complainant as close as possible to where she would have been had the improper conduct not occurred.

4.4 Key sources of information

4.4.1 Documents

4.4.1.1 EAAB Website: www.eaab.org.za;

4.4.1.2 Written complaint lodged with the Public Protector dated 4 April 2011;

4.4.1.3 Letter of suspension from the EAAB Board to the Complainant dated 17 February 2011;

4.4.1.4 Letter of termination of Contract dated 28 February 2011;

4.4.1.5 Employment contracts of the Complainant signed in 2004 and 2008 respectively;

4.4.1.6 Letter from Mr Sindile Faku dated 11 August 2010;

4.4.1.7 Affidavit of Mrs Mapetla dated 28 February 2011;

4.4.1.8 Affidavit of Mr Thami Bolani dated 7 March 2011;

4.4.1.9 Affidavit of Mr Sindile Faku dated 7 March 2011;

4.4.1.10 Replying affidavit of Mrs Mapetla dated 8 March 2011;

4.4.1.11 Letter from Kwinana & Partners dated 22 February 2011;
4.4.1.12 Letter from Minister Rob Davies dated 4 April 2011;

4.4.1.13 Letter from Mr. Sindile Faku dated 17 October 2011;

4.4.1.14 Settlement Agreement between EAAB and Mrs Mapetla dated 10 October 2011;


4.4.2 Correspondence between the Public Protector and:

4.4.2.1 The Honourable Minister dated 8 April 2011 and 18 October 2011;

4.4.2.2 The Director-General of Department of Trade and Industry, Mr Lionel October dated 31 August 2011;

4.4.2.3 The erstwhile Chairperson of the EAAB, Mr Thami Bolani dated 15 August 2011;

4.4.2.4 The Chief Executive Officer of the EAAB, Mr Brian Chaplong dated 16 November 2012,

4.4.2.5 The Director of Langa Attorneys, Mr. Temba Langa dated 4 April 2011; and

4.4.2.6 Knowles Husain Lindsay Incorporated dated 26 August 2011.

4.5 Interviews and meetings

Interviews (including telephonic interview) were conducted with:

4.5.1.1 Mrs Mapella, the Complainant on 7 November 2012; 15 June 2016 and 5 July 2016;
4.5.1.2 Mr. Brian Chaplog: CEO and former CFO of the EAAB on 21 November 2012;

4.5.1.3 Mr. Nkululeko Ndebele: Secretary of the EAAB on 21 November 2012 and 20 July 2016;

4.5.1.4 Mr. Thami Bolani: Former Chairman of the EAAB in October 2011;

4.5.1.5 Ms Tryphina Dube: Former Chairperson of the EAAB on 20 November 2012;

4.5.1.6 Ms Lindiwe Bulo: Former Executive Legal and Compliance of the EAAB on 7 July 2016;

4.5.1.7 Silence Mmotong: Chief Financial Officer of the EAAB on 7 July 2016; and

4.5.1.8 Mr Nikita Sigaba: Chief Risk Officer of the EAAB on 20 July 2016.

4.6 Notices were issued in terms of section 7(9) of the Public Protector Act, 1994, to:

4.6.1 Former Chairman of the EAAB Board, Mr Thami Bolani on 17 March 2016;

4.6.2 Former Chairperson of the EAAB Board, Ms Tryphina Dube on 12 April 2016; and to

4.6.3 The following former members of the EAAB Board:

4.6.3.1 Ms Anne Fryon 12 April 2016;

4.6.3.2 Mr Sindile Faku on 12 April 2016;

4.6.3.3 Ms Mpho Molefe on 12 April 2016;
4.6.3.4 Mr Ms Ina Wilken on 12 April 2016;
4.6.3.5 Mr Aubrey Ngcobo on 12 April 2016;
4.6.3.6 Mr Shaheed Peters on 12 April 2016;
4.6.3.7 Mr Lesly Seshabela at on 12 April 2016; and
4.6.3.8 Ms Segoale Mojapelo at on 12 April 2016.

4.6.3.9 Mr M Hassim, former member of the EAAB Board could not be served with the Notice as I did not have his contact details.

Responses to Notices issued in terms of section 7(9) of the Public Protector Act, 1994 were received from:

4.6.3.10 Ms Anne Fry on 4 May 2016;
4.6.3.11 Mr Aubrey Ngcobo on 6 May 2016;
4.6.3.12 Ms Segoale Mojapelo on 6 May 2016;
4.6.3.13 Ms Ina Wilken on 6 May 2016;

4.7 Legislation and other legal prescripts

Acts

4.7.1 The Constitution of the Republic of South Africa;
4.7.2 The Public Protector Act, No 23 of 1994;
4.7.3 The Public Finance Management Act, No 1 of 1999;
4.7.4 Promotion of Administrative Justice Act, No 3 of 2000;
4.7.5 The Labour Relations Act, No 66 of 1995;

4.7.6 The Basic Conditions of Employment Act, No 75 of 1997;

4.7.7 The Estate Agency Affairs Act, No 112 of 1976;

4.7.8 The Protected Disclosures Act, No 26 of 2000

Codes

4.7.9 The Code of Good Practice: Dismissal of 1995 issued in terms of the Labour Relations Act, No 65 of 1995

Policies


Case Law

4.7.11 Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49;

4.7.12 Cash Paymaster Services, North-West (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR1609/06) [2008] ZALC 168.

4.7.13 Mogothle v Premier of the North West Province & another [2009] 4 BLLR 331 (LC)
5 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

5.1 Issues not in dispute

5.1.1 During the investigation, the Complainant and the EAAB agreed that the Board was constituted of 11 members, five from the estate agency industry and one each from compliance, consumer, real estate valuation, finance, legal and investment fields respectively when it was inaugurated in December 2010 and during the time when the Complainant was suspended and dismissed. The EAAB did not deny that Complainant was suspended without a notice and later dismissed 10 days after the suspension without a hearing. It was not disputed that on 17 February 2011, the Complainant was called by Mr Bolani and served with a letter of suspension without being afforded the opportunity to make a representation against the intended suspension. The parties further did not dispute that after her suspension, Deloitte & Touch was appointed by the Board to conduct an investigation relating to the Complainant. The parties further did not dispute that after the suspension of the Complainant, reports appeared in the media about her suspension. The parties also did not dispute that correspondence was exchanged between the EAAB’s Attorneys and the Complainant’s Attorneys of record regarding the said suspension. It was also not disputed that on Sunday, 27 February 2011 a special meeting of the Board was held in which it was resolved that the Complainant’s contract be terminated with immediate effect and that on 28 February 2011, the letter of termination of the Complainant’s contract was served on her Attorneys of record. It was also not disputed that the Complainant had through correspondence from her Attorneys to the EAAB and a court application to the South Gauteng High Court attempted to enforce her rights to have the decisions to suspend and dismiss her by the EAAB Board set aside. It was not disputed that the Wendy Mechanick matter was investigated prior to Complainant’s suspension and that other major estate agencies, the Lew Geffen and Seeff were under investigation by the EAAB at the time when Complainant was dismissed by the EAAB Board.
5.2 Regarding the alleged improper constitution of the Board

5.2.1 Issue in dispute

5.2.1.1 The key issue for my factual determination was whether or not the EAAB Board consisting of 11 members was improperly constituted.

5.2.1.2 The Complainant asserted in her complaint that the Constitution of the board by 11 members prior to its inauguration in December 2010 as well as during the time of her suspension and dismissal was improper. Messrs Brian Chaplog: CEO and former CFO of the EAAB and Nkululeko Ndebele: Secretary of the EAAB Board conceded that since December 2009, the EAAB Board consisted of ordinary members and others were appointed during September/October 2010.

5.2.1.3 The confirmation of the assertion by the Complainant regarding the constitution of the board was also corroborated by Ms Bulo and Mr Mmotong during their interviews with members of the investigation team on 7 July 2016.

5.2.1.4 Minister Davies admitted in his response dated 18 October 2011 to my enquiry on the matter that he was aware of the Complainant’s suspension and dismissal but denied that at the relevant time the EAAB Board was improperly constituted.

5.2.1.5 In his response to my Provisional Report issued in September 2016, Minister Davies admitted that the Board that suspended the Complainant consisted of 11 members and was appointed in October 2010. However, he denied that his conduct in appointing 11 instead of 15 members is inconsistent with the provision of section 3(1) and (2) of the Estate Agency Affairs Act and that it was improper.

5.2.1.6 He asserted that prior to the appointment of the Board members he in terms of the provisions of the Estate Agency Affairs Act invited nominations of suitable candidates for appointment as members of the EAAB Board as contemplated in
section 3(1) and (2) of the Estate Agency Affairs Act to which various individuals and organisations sent through nominations by submission of written applications and comprehensive CVs. Correspondence were entered into and interviews conducted with shortlisted candidates. Minister Davies asserted that having concluded the interview process, and as the objects of the Act and the Constitution placed an onus on him to act rationally and reasonably, he took a view not to appoint the full 15 members merely to comply with the numerical provisions of the Act. The appointment of only 11 board members who fulfilled all the criteria instead of 15 board members was according to Minister Davies rational, reasonable and justifiable in the circumstances.

5.2.1.7 In a supplementary response dated 3 October 2016, the DTI stated that it wished to add that on a proper reading of section 3(1) and (2) of the Estate Agency Affairs Act, the section did not envisages that at the given time there should not be a vacancy at the board as it was the case in this matter and there is no evidence to suggest that the Minister unreasonably did not or delayed unreasonably to fill in the vacancies.

5.2.1.8 In his response dated 11 October 2016 to the Public Protector’s Provisional Report, Mr Bolani conceded that when he was appointed to the Board during 2010 it did not have 15 members, but that it operated well without any issues from the Complainant or the DTI. He said the Board was informed right at the beginning that it needed a quorum of about seven members to transact legally and that it transacted legally for long periods of time without fifteen members as long as there was a quorum. He asserted that the Complainant never raised any issues about the composition of the board during his time at the EAAB and that if same was an issue, it should have been raised especially during the time when the Board had to sanction action against Ms Mechanik. He questioned why the Complainant brought the issue at the time of her suspension and the termination of her contract. He asserted that there were reasons advanced by the EAAB or the Deputy Director General of the DTI why only twelve members were appointed.
He conceded that according to the Estate Agency Affairs Act, five members of the board had to be consumer representatives and that as informed, there were not enough quality applications for board membership received from consumer representatives. He further stated that the Complainant had no problems presiding over the first meeting of the Board where he was elected Chairman of the Board.

5.2.1.9 Having considered the evidence received, I accept that the EAAB Board was constituted of 11 members as alleged by the Complainant.

5.2.1.10 The EAAB website showed at the time of completion of the investigation that the EAAB Board consisted of 10 members.

5.3 Regarding the alleged improper suspension of the Complainant

5.3.1 Issue in dispute

5.3.1.1 The key issue for my factual determination was whether or not the suspension of the Complainant without being afforded the opportunity to make a representation was improper.

Complainant’s case

5.3.1.2 The Complainant asserted that she was appointed by The EAAB on 16 November 2004 for a period of three years ending on 15 November 2007. Her contract was renewed on 15 July 2008 for a further three years ending on 15 July 2011 by Mr Dumisa Hlatshwayo, the then Chairman of the Board of the EAAB. The Board was subsequently chaired by Mr Joseph Nyembe when it was ordered to resign by the former Minister of Trade and Industry, Minister Mphahlwa, for alleged irregularities and failure to comply with the PFMA.
5.3.1.3 Upon assumption of duty at the EAAB, the Complainant embarked on transformation of the EAAB by establishing among others the Education and Training department, introducing internal financial controls and policies, raised fees for the sustainability of the EAAB fund by increasing the levies paid by estate agents and advocated for the implementation of section 32A of the Estate Agency Affairs Act by enforcing inspections of the estate agencies.

5.3.1.4 The Complainant’s assertions were corroborated by Ms Lindiwe Bulo, former Executive Legal and Compliance at the EAAB during her interview with the investigation team on 7 July 2016.

5.3.1.5 The Complainant alleged to have resuscitated the anti-corruption and whistleblowing activities during the period 2009/2010 which were not enforced at the time she assumed office. She alleged to have turned the EAAB from having a deficit account to being a financially stable organisation. Ms Bulo confirmed the assertions which were also corroborated by Messrs Ndebele, Chaplog, Mmotong and Sigaba during their respective interviews with the investigation team.

5.3.1.6 The former members of the EAAB Board were appointed earlier during 2010 following the appointment of an interim board in 2006 and the new Board was inaugurated on 8 December 2010, the day it held its first meeting. At that time, the Board consisted of 11 members. The Complainant alleged to this end that the EAAB Board could not have been conversant with the running of her office at that stage and could therefore not have been eager to commission an investigation against her.

5.3.1.7 She stated further that during the Board’s meeting on 8 December 2010, a report about Wendy Mechanick was tabled and issues of the appropriation of about R28 million from the trust fund by certain estate agents was discussed. The Board was advised at that meeting to take the Wendy Mechanick matter to court.
5.3.1.8 The Board Minutes of 9 February 2011 indicates that there was a discussion about the appointment of a media house to deal with the establishment of a media communications strategy and to assist the Board with public relations work. This came as a result of the DTI’s concern as communicated by Mr Bolani, regarding the handling of the adverse publicity about the EAAB resulting from the difficulties experienced by estate agents in renewing their fidelity certificates.

5.3.1.9 It was further indicated that the Complainant, as then CEO, advised the Board that Mr Pilusa, a media management specialist had been appointed by the Head of Marketing for a period of three months. It provided that the Complainant advised the Board that she had never met Mr Piliso and that the Board should express the support to management when it appointed service providers.

5.3.1.10 It was also noted from Mr Bolani’s comments that the Minister raised concerns of dissatisfaction about complaints relating to registrations which the EAAB Board attributed to amongst others shortage of board members as well as lack of proper communication of activities and successes to the DTI.

5.3.1.11 During a Management Committee meeting of 16 February 2011, which was supposed to be held on a Monday but was moved forward, new reports were tabled about Geffen and Seeff estate agencies and the Complainant instructed that the investigations on them as well as others be continued by the Executive Legal Compliance. The minutes of the meeting however stated the opposite that the investigation not to be continued with. The minutes were incorrectly dated 14 February 2011, the date when there was no meeting held.

5.3.1.12 The assertions were corroborated by Ms Bulo as well as Mr Ndebele during their interviews with the investigation team.

5.3.1.13 The Complainant stated that on 17 February 2011, about two months and nine days after the Board’s inauguration and a day after the tabling of the reports of the investigation on the Geffen and Seeff estate agencies at Management Committee Meeting which was an apparently an HR meeting, the Complainant was called in
and served with a suspension letter by Mr Bolani. Staff members were thereafter advised of her suspension.

5.3.1.14 The suspension letter dated 17 February 2011 provided that the Complainant was suspended with immediate effect pending the findings of the board’s sanctioned investigation into suspected mismanagement of her office in the running of the activities of the organisation. The Complainant alleged that she challenged the statement of mismanagement of her office and Mr Bolani undertook to provide her with detailed reasons for her suspension in writing by no later than 14:00 on Friday 18 February 2011.

5.3.1.15 The Complainant asserted that, as a condition of her suspension, she was prohibited from discussing the nature, contents and scope of her suspension with any other employees or the media and she was further forbidden from entering the premises and communicating with staff of the EAAB.

5.3.1.16 The suspension letter did not provide a return date, but according to the Complainant, she could only be suspended for a period of 10 working days and was entitled to return to work thereafter in terms of the EAAB’s Service Manual which entitles an employee to return to work if no charges are preferred against him/her within 10 calendar days.

5.3.1.17 Due process was not followed nor was the Complainant advised or questioned about the suspected wrongdoing at any stage leading to her suspension. None of the corrective actions envisaged in the EAAB’s Human Resources policies and the Labour Relations Act were accorded the Complainant before her suspension and subsequent dismissal.

5.3.1.18 Although the EAAB conceded that the Complainant was suspended without being given the opportunity to make a representation, it disputed that the suspension was improper. The reason advanced by the EAAB was that the Complainant was suspended following a resolution of the Board and pending the investigations
sanctioned into the suspected mismanagement of her office in the running of the activities of the EAAB.

5.3.1.19 This assertion is corroborated in the letter of suspension dated 17 February 2011 which provides among others that:

"You are hereby notified that you are suspended from work with immediate effect [17 February 2011], pending the findings of the Board sanctioned investigations into the suspected mismanagement by your office in the running of the activities of the organization. It is the Board’s opinion that your presence will obstruct the objectivity in conducting this investigation. Your suspension is with full pay.

However, it could not be confirmed by Messrs Chaplog, Ndebele, Mmotong and Ms Bulo during their interviews with members of the investigation team that the Complainant was suspended for the reasons advanced by the Board. The Complainant also disputed this assertion by the Board.

5.3.1.20 The Deloitte Report states at paragraph 4 of the Executive Summary that the initial allegations made against Complainant by the EAAB Board were without substance. Mr Ngcobo conceded in his response dated 4 October 2016 to the Public Protector’s Provisional Report that “some” of the allegations were found to lack substance but however argued that others, such as the allegation of the abuse of a credit card, were upheld. Suffice to point that there were a number of allegations found to be without substance, which had formed part of the basis for the actions of the EAAB Board taken against the Complainant.

5.3.1.21 Mr Bolani stated in his response to the Provisional Report that the Board did not agree on the issue of “procedural unfairness” with the lawyers but agreed on a compromise because they wanted to end the dispute and limit costs. He further stated that the board had earlier before the investigation into Ms Mechanik sought
legal advice on the consequences of not renewing the contract of the Complainant and were legally advised that the Board was within its rights not to renew the contract of the Complainant and believed the CEO was aware of this process as the legal opinion was presented to the Board by the Executive Manager, Clive Ashpol.

5.3.1.22 Mr Bolani asserted that Complainant was provided with an opportunity to make representations before the letter of suspension was served on her and that he personally informed her that the Board members who had served on the board longer than he had levelled serious allegations against her that included the abuse of company credit cards and others. He said he was however not even aware at the time that there was a company credit card. He alleged to have read to the Complainant and asked her to comment on some of the allegations that were made against her in front of other Board members and further informed her that the board had no alternative but to investigate the allegations but she declined to comment.

5.3.1.23 The assertions by Mr Bolani seem strange because none of the Board members who responded to the section 7(9) Notices and the Provisional Report of the Public Protector mentioned this in their responses. Also, none of the witnesses interviewed mentioned these facts to indicate that the allegations were made by the long serving members of the Board.

5.3.1.24 Mr Bolani advised at having been informed by Board members and Mr Clive Ashpol that the EAAB had a ten day suspension policy to allow for unfettered investigations against any employee and indicated that Complainant was allowed to return to her position after ten days, if the investigation was not concluded. He said the request made to the Complainant was that the matter be treated confidentially as the Board did not want it leaked to the media because of the damage it would create. Mr Bolani further argued that the suspension letter was served on the Complainant after he had read to her the list of allegations against
her and asking her to respond and reminded her of the 10 day suspension policy of the EAAB.

5.3.1.25 I accordingly could not find from the evidence that sound reasons had been put forward warranting the Complainant's suspension, nor that due process had been followed in this regard in affording the Complainant opportunity to make representations accordingly.

5.4 Regarding the alleged improper dismissal of the Complainant:

5.4.1 Issue in dispute

5.4.1.1 The key issue for my factual determination was whether or not the dismissal of the Complainant without being served with a charge sheet was improper.

5.4.1.2 The Complainant alleged in her complaint that she was dismissed by the Board for her anti-corruption and whistles blowing activities. She alleged to have applied the whistle blowing activity which the Board was lax about prior to her assumption of duty at the EAAB. To this end, she stated that the Wendy Mechanick case was investigated and dealt with in terms of the law by the EAAB and further that investigations against other major estate agents were also carried on, among others, the Lew Geffen and Seeff estate agencies. The Complainant asserted that her dismissal amounted to occupational detriment as there was a direct linkage between the anti-corruption or whistle-blowing activities she had embarked in prior to her suspension.

Complainant's case

5.4.1.3 The Complainant denied the assertion made by the EAAB Board as to the reasons for her dismissal, and maintained that the actual reasons therefor were not outlined in her letter of dismissal or provided to her. She asserted that her initiating investigations into possible abuse of the trust fund by certain estate
agents, among others Wendy Mechanick, Lew Geffen and Seeff, were the actual reasons for her suspension and dismissal.

5.4.1.4 She further maintained that management had previously conducted inspections of Trust Accounts of estate agents in 2007 and subsequent to the findings thereto a whistleblower system was established by management and due to the interim board at that time, the Whistleblower hotline was only effected in 2010 when the new Board was appointed by the Minister. Management conducted more than 30 inspections and about four relatively large investigations as well as one audit in 2010. Consequently, Complainant denied that the establishment of a hotline in the EAAB was within the Board’s sphere, and disputed the assertion by Mr Bolani in this regard.

5.4.1.5 The Complainant asserted that on 20 February 2011, the Sunday Times reported: “Boss of Estate agency board suspended” – “Probe into yet another top player leads to Nomonde Mapetla’s downfall”. She further stated that she received several calls from various journalists enquiring about the suspension and she referred them to the Chairman of the Board.

5.4.1.6 She asserted further that on 22 February 2011, five days after the suspension, her Attorneys, Kwinana & Partners Inc addressed a letter to Mr Bolani raising a concern from the Complainant regarding the Sunday Times report titled: “Breaking News: Shock as Estate Agents Board Boss is suspended” reading further on page two that “Boss of Estate agency board suspended. Probe into yet another top player leads to Nomonde Mapetla’s downfall”.

5.4.1.7 Another concern was that four days after her suspension, on 21 February 2011, she received an sms from a journalist from e-news channel, Robyn Kriel requesting her to respond to the allegation that she was suspended and further advising her that Mr Bolani would be speaking on camera at 1 pm on e-news. She further alleged to have received a call on 21 February 2011 from Moneyweb
inviting her to comment on the Board’s comment that a private company was to be hired to conduct an investigation into her case, which was news to her.

5.4.1.8 On 25 February 2011, three days after serving the letter from the Complainant’s Attorneys to Mr Bolani, a letter dated 25 February 2011 from Knowles Hussain Lindsay Inc was served on the Complainant’s Attorneys to advise that they were acting on behalf of the EAAB and were taking instructions from their client and would revert regarding their letter of 22 February 2011.

5.4.1.9 None of the witnesses interviewed could confirm the assertion by the Board on the actual reasons for the Complainant’s dismissal.

5.4.1.10 The Board disputed the Complainant’s assertion and countered that it took the decision to dismiss the Complainant due to a breach of the conditions of her suspension outlined in the suspension letter, by talking to the media. Mr Bolani also argued that the Complainant intentionally went to the media and sought to tarnish the Board’s image by providing false information to the press and later accused the Board of having spoken to the media. Mr Bolani further stated that the Complainant wanted to portray herself as “a selfless and lone individual battling against big and corrupt business and without whom the industry is doomed by corrupt board” against whom an injustice was done.

5.4.1.11 The Complainant dismissed the allegations as a scapegoat by the Board not to indicate the actual reasons, which she said related to her victimisation for her whistle-blowing and anti-corruption activities.

5.4.1.12 According to Mr Bolani, the Complainant had very little to do with the Wendy Mechanik matter. He asserted to this end that the Complainant’s involvement was limited to a few radio and newspaper interviews after the matter was taken to court pursuant to a forensic investigation commissioned by the Board after it received a threat from the informant to report the matter to the press. He alleged that this happened six months after the matter was reported to the Complainant who did
not do anything about it until the Board got to learn about it from the informant. The Complainant disputed the allegation.

5.4.1.13 In his response dated 11 October 2016 to the Public Protector’s Provisional Report, Mr Bolani stated as follows:

"INVESTIGATION INTO THE SUSPECTED UNETHICAL CONDUCT BY SEVERAL ESTATE AGENCIES"

It is unfortunate that the suspension of the CEO happened during the period when the investigation into Ms Wendy Mechanik was being finalised by the EAAB (assisted by Knowles, Hussein and Lindsay Inc). This investigation became a convenient excuse to suggest that the CEO was being victimized for having taking tough action against errant big estate agencies. Nothing could be further from the truth.

What are the facts?

To my knowledge, the investigation into Wendy Mechanik was only instituted by the EAAB after a whistle-blower's report was submitted to the organisation in 2009 or early 2010. The whistle-blower was an employee of Ms Mechanik. According to the former EAAB chairperson Mr Sindile Faku, the whistle-blower had to threaten media exposure before the organisation took action. It is no secret that the CEO and Ms Mechanik enjoyed a very close relationship. Before every board and committee meeting, the two used to meet privately in the office of the CEO. Ms Mechanik was the only board member who 'enjoyed' this privilege.

The board fully supported the organisation in taking strong action against unscrupulous estate agents. We felt that it was our responsibility to do so. It was therefore not a challenge for me, as board chairperson at the time, to vote with attorney Gavin Schar and EAAB executive manager Clive Ashpol for the investigation into Ms Mechanik to be made public. To us, it was important that this
matter be made public and a strong message sent to estate agents that the organisation was no longer tolerant of unfair business practices in the industry. Mrs Mapetla was in the USA at the time attending a conference. EAAB executive manager Ms Lindiwe Bulo represented her at the meeting. She spoke to Mrs Mapetla over the phone and voted against making the investigation public.

The first time I heard about an investigation against Lewis Geffen was on Sunday 20 February 2011. This was contained in the article of the Sunday Times titled "Boss of Estate Agency suspended – probe into yet another top player leads to Nomonde Mapetla’s downfall." To this day, I still have no idea where the journalist got the information from.

I immediately contacted Mr Clive Ashpol, who informed me and other board members that there was no investigation against Lewis Geffen. The EAAB then received a letter threatening legal action against the EAAB by the lawyers of Mr Geffen. The board mandated Mr Ashpol to respond to the lawyers and distance the EAAB from the information that was contained in the article of the Sunday Times.

I have no recollection whatsoever of any information that was tabled before the board concerning the investigation into Seeff. Mr Seeff visited the EAAB offices occasionally and I would have known if any investigation had been initiated against his company.

I was also informed by Clive Ashpol and Portia Mofikoe that the EAAB Whistle-Blower Hotline aimed at fighting corruption in the industry was the initiative of Mrs Lilibeth Moolman. Mrs Moolman is a well-known consumer activist who served on the board as a consumer representative before my time. It was also the same Mrs Moolman who constantly criticized EAAB for lack of a consumer education programme.

It is therefore unfortunate that the office of the PP is even prepared to consider without any evidence that the investigation against Wendy Mechanik was behind
the suspension and termination of the CEO contract. As I have mentioned, the board was not aware of any other investigation.

The only reasons that led to the suspension and termination of the contract of the CEO are only contained in my affidavit and supporting affidavits of board members to the South Gauteng High Court under case No: 8760/11.

The same reasons were advanced individually by members of the board to an independent company that was commissioned by the department of trade and industry to investigate circumstances leading to the suspension and dismissal of the CEO. We were informed by email of the dti DDG Zodwa Ntuli that the investigation had cleared us of any wrong doing.

I therefore propose that this finding be referred for a review because it is grossly unfair to the EEAB board.”

5.4.1.14 Mr Bolani contended that it was only after the news was leaked to the media that the board met and decided that the relationship between the board and the Complainant had been completely destroyed as the Board firmly believed that the Sunday Times had been contacted by her. He said Mr Clive Ashpol was then tasked with the responsibility of obtaining legal opinion on the way forward and according to the legal advice they received, the Board was legally entitled to terminate the contract of the Complainant; consider paying her all her benefits (salary, pension, medical aid etc) until the end of her contract, which was undertaken; and not hold a disciplinary hearing seeing that the Board had already ‘taken’ a decision not to renew the contract. He contended that the Complainant only had about six months remaining on her contract.

5.4.1.15 It is unfortunate that the Board relied on that advice to act improperly against the Complainant and that does not absolve it from liability towards the Complainant. The contention by Mr Bolani can therefore not stand. Mr Bolani’s contention that in
his view the EAAB did not improperly dismiss the Complainant nor abuse its position or act negligently can also not be sustained.

5.4.1.16 Mr Bolani asserted that a special board meeting was called on Sunday, 27 February 2011 for reasons that the Complainant waged a public attack against the EAAB wherein the Board decided to terminate her employment for breaking the trust by breaching the conditions of her suspension and destroying any possibility of the resumption of a proper working relationship between the parties. However, the Complainant’s response in this regard was that she only responded to the media to defend her good name and reputation which she was entitled to do after the Board had breached its own terms of the suspension letter by discrediting her in the media.

5.4.1.17 Mr Ndebele, in response to the question whether the meeting was properly constituted or not responded that the board secretary was not part of the meeting and it was anomalous for the meeting to be held under the circumstance. The Complainant also disputed that the meeting was properly convened.

5.4.1.18 The letter of termination of the Complainant’s contract dated 28 February 2011 reads among others that:

"We wish to advise that it has been resolved by a duly constituted meeting of the Estate Agency Affairs Board ("EAAB") that the three year Fixed Term Contract of Employment entered into by and between The Estate Agency Affairs Board as employer and your abovementioned client as employee on 15 July 2008 (copy attached for your easy reference) be terminated with immediate effect, that is to say, with effect from the date of delivery of this letter, having regard to the indisputable fact that the requisite employment relationship of confidence and trust between the parties has irrevocably and irretrievably broken down. The EAAB has resolved, further that the contract forthwith be terminated by paying your abovementioned client the amount of all remuneration and benefits that she would have received from date of termination of the contract until date provided for in the contract, namely, 15 July 2011. Arrangements will, accordingly,
be made to ensure that all payments that may be due to your client as from the
date of delivery of this letter until 15 July 2011 are paid into her bank account of
record with the EAAB as soon as possible”

5.4.1.19 Mr Aubrey Ngcobo, former member of the EAAB Board, in his response dated 6
May 2016 to my Section 7(9) Notice maintained that I intended to find without
interrogating all the parties affected, that the termination of the Complainant’s
employment without a disciplinary hearing was unfair. He argued that:

“Prima facie such a dismissal could be unfair. However, subjecting the matter to
evidence, both oral and written, could yield different results. This is exactly why
fora such as the courts and CCMA exist. My view therefore is that the finding of
the Public Protector, is premature and lacks legal support”.

5.4.1.20 I find Mr Ngcobo’s argument incomprehensible that subjecting the matter to both
oral and written evidence could yield different results, for reason that I have
allowed him the opportunity to respond to the issue concerned. He could therefore
have provided me in his response dated 6 May 2016 with the relevant information
disproving the relevant finding, if he wished to do so, as he did with other issues
raised.

5.4.1.21 Mr Ngcobo stated in his response of 18 May 2016 to the Public Protector’s email
regarding a “proposed” meeting with a view to afford him the opportunity to
provide oral evidence, that:

“I never proposed a meeting.
I indicated clearly that due to the passage of time, I feel that justice has been
unduly delayed.
In any event my e-mail to you sufficiently covers my position.”
5.4.1.22 Mr Ngcobo further asserted that there is no unfair dismissal to complain about as same was settled at the CCMA. I disagree with this view as there are ancillary issues attached to this subject.

5.4.1.23 I must also emphasise that section 7 of the Public Protector Act provides me with the powers to determine the format and the procedure to be followed in conducting any investigation having due regard to the circumstance of the case and in affording persons that might be implicated in the matter the opportunity to respond in connection therewith in any manner that may be expedient under the circumstances.

5.4.1.24 Having considered the assertion by Mr Ngcobo, I perused the employment contract of Mrs Mapetla and verified that the employer had the right to summarily terminate the employment relationship prior to the termination date for any reason based on serious misconduct of the employee or for any cause recognised in law as sufficient, or on notice for a reason related to the employee's poor work performance, provided that the employer complied in all respect with the employer's internal policies and procedures as well as the provisions of the Labour Relations Act and the Code of Good Practice on Dismissal (my emphasis).

5.4.1.25 According to the evidence received, the EAAB Board failed to apply proper procedures when it dismissed the Complainant without a charge sheet. No proper disciplinary process was followed.

5.4.1.26 A letter from the EAAB's Attorneys dated 26 August 2011 provided that:

"Mrs Mapetla's fixed term contract was terminated pursuant to a resolution of the board of the EAAB..."
5.4.1.27 The minutes of the meeting of the 27 February 2011 indicates that the following members were not present at the meeting when the decision to terminate the Complainant was taken:

(a) Mrs A Fry;
(b) Mr A Ngcobo;
(c) Mr S Peters; and
(d) Ms I Wilken.

5.4.1.28 I have noted during my investigation that pursuant to the Complainant’s dismissal, she, in an attempt to enforce her rights by challenging the suspension and dismissal, engaged in different fora ending at the CCMA with the EAAB settling the dispute with an amount of R3 million on the following conditions:

“The applicant agrees to withdraw the CCMA case no GAJB87346/11 set down for arbitration on 17 October 2011.

The EAAB understands that this amount is non-taxable out of court capital settlement and will record it under code 3609 if it is required to do so. The EAAB do not take responsibility should this be incorrect.

The respondent/employer shall pay the amount set out in paragraph 5.2.2 to the bank account of Nomonde Tantaswa Mapetla...being the bank account of the applicant/employee, in full an (sic) final settlement of the CCMA case, detailed above, against the respondent/employer.”

5.4.1.29 I have noted the evidence of Ms Tryphina Dube, former Chairperson of the EAAB Board who succeeded Mr Bolani that the subsequent payment of the amount of R3 million to the Complainant during September 2011 was carried out on the advice of the EAAB’s Attorneys as the Complainant had a strong case against the EAAB Board. In her response dated 30 September 2016 to the Public Protector’s
Provisional Report, Ms Dube stated that in her opinion the EAAB Board implemented the legal opinion of its Attorneys and paid Complainant as it acted in the best interest of the EAAB by settling the matter than going the legal route which would have caused the EAAB more negative publicity.

5.4.1.30 Mr Faku objected against the settlement of the Complainant’s CCMA claim by the EAAB for the amount of R 3 million in a letter dated 17 October 2011 addressed to former Chairperson of the EAAB Board, Ms Dube.

5.4.1.31 I have noted that when the decision was taken, Mr Bolani was no longer the Chairman of the EAAB Board.

5.4.1.32 During interviews with Messrs Chaplog, CEO of the EAAB and Ndebele, Company Secretary of the EAAB, both conceded that the EAAB settled the claim of the Complainant because it could not, in defending the claim, rely on the reasons for the dismissal of the Complainant contained in Mr Bolani’s Answering Affidavit of 7 March 2011 deposed in opposing the Complainant’s Application to the South Gauteng High Court, Johannesburg relating to the dismissal concerned against the EAAB Board.

5.4.1.33 Ms Anne Fry, former member of the EAAB Board, stated among others in her response dated 4 May 2016 to the Public Protector’s Section 7(9) Notice that the “proposed settlement” with the Complainant was based on considerations that she breached the terms of her suspension and deliberately discredited the EAAB in various publications; instituted action in the labour court; made false allegations in various news publications; brought an urgent application in the High Court and laid a complaint with the Public Protector.

5.4.1.34 Ms Fry further stated that the decision to settle the matter was taken to curb the cost of prolonged litigation which would far outweigh the costs of settlement of the
matter, as well as the possibility of irretrievable harm that would be caused to the EAAB's reputation.

5.4.1.35 Ms Fry further indicated that the decision to settle the matter was taken with a view to mitigate and conclude any bad press that had been received by the EAAB and bring an end to the matter.

5.4.1.36 I find this reasoning to be a compromise of the duties of the EAAB Board in favour of expediency which action cannot pass the test of validity in law which requires the Accounting Authority to prevent irregular expenditure or fruitless and wasteful expenditure.

In her response dated 24 September 2016 to the Public Protector's Provisional Report of September 2016, Ms Fry thanked the Public Protector for affording her the opportunity to response but referred to her earlier response of the 4th of May 2016 and noted that as she did not have the documents and minutes of the meetings she was unable to comment on the report any further.

5.4.1.37 Mr Ngcobo asserted in his response of the 6th of May 2016 regarding the settlement that the former members of the EAAB Board “to a large extent were opposed to it”. This assertion poses a difficult challenge in enabling me to conclude with reasonable certainty as to who of the members of the EAAB Board commissioned the settlement concerned and who were against it. However, this issue was not for my factual determination.

5.4.1.38 I am nevertheless mindful that the EAAB Board, as the Accounting Authority, is responsible to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

5.4.1.39 As the Complainant was paid for the remainder of her contract, the only logical conclusion appears to be that payment of the amount of R3 million could not have
been additional for her term of contract as it would have amounted to payment for 
an irregularly extended contract term, but for collateral damages occasioned by 
the infringement of her personal rights.

5.4.1.40 The issue of an irregularly extended contract finds reference in Cash Paymaster 
Services, North-West (Pty) Ltd v Commission for Conciliation, Mediation and 
Arbitration and Others [2008] ZALC 168. The case involved the dismissal for 
misconduct of an employee employed on a fixed term contract which was 
terminated one month away to its expiry date. On arbitration, the Arbitrator 
extended the contract of employment beyond the date of its expiry. The Court held 
on review that the Commissioner had exceeded her powers and set aside part of 
the arbitration award which extended the contract of employment beyond the 
period agreed to between the parties. The Court ordered the employer to pay the 
employee an amount equivalent to the employee’s remuneration for the unexpired 
portion of the contract. In this case, Molahlehi J held that the commissioner in 
extending the contract of the respondent committed a gross irregularity.

5.4.1.41 I have noted the indication by former EAAB Board member, Ms Ina Wilken, of the 
roles and functions of the board, cited in her response to my Office dated 6 May 
2016 as follows:

"Exercise leadership, enterprise, integrity and judgment in directing the Board to 
achieve continuing prosperity and to act in the best interest of the Board while 
respecting the principles of transparency and accountability. 
Ensuring the integrity and adequacy of the accounting and financial systems and 
that the Board complies with all relevant and applicable accounting standards.

Maintaining the highest standards of probity, integrity, responsibility and 
accountability and ensuring that affair balance is found between conforming to 
corporate governance principles and the performance of the Board."

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Ms Wilken, to a greater extent, affirmed in her response the reasoning advanced by Ms Fry relating to the decision by the EAAB Board to settle the matter of the Complainant.

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5.4.1.42 In her correspondence dated 26 September 2016, responding to the Public Protector’s Provisional Report of September 2016, Ms Wilken referred to her previous email and further stated that she felt that as the board they had carefully considered all their options with great care and had no other alternative after being advised by their legal advisors that going ahead and not conceding to pay Ms Mapetla the amount in question could be costly for the EAAB and could tarnish the image of both the EAAB as well as the Department of Trade and Industry. She did not comment on other issues raised in the report as she alleged not to be in possession of the minutes regarding the discussions prior to and after Mrs Mapetla’s termination of employment.

5.4.1.43 Ms Segoale Mojapelo, former member of the EAAB Board, also to a greater extent, affirmed in her response dated 6 May 2016 to the Section 7(9) Notice, the reasoning advanced by Ms Fry and Ms Wilken relating to the decision by the EAAB Board to settle the matter of the Complainant. Of importance to note, Mesdames Fry, Wilken and Mojapelo affirmed the position that the EAAB Board agreed to implement the legal opinion from Attorneys Knowles, Hussein & Lindsay Inc. to settle the matter.

5.4.1.44 In further affirming the above assertion, Ms Mpho Molefe, former EAAB Board member stated in her response dated 6 October 2016 to the Public Protector’s Provisional Report that the Board decided to implement the legal opinion to settle the matter by agreement with Complainant’s Attorneys as the matter was attracting too much media attention and making it impossible for the Board to continue with its daily activities and mandate.
5.4.1.45 Mr Shaheed Peters, former EAAB Board member stated amongst others in his response of 30 September 2016 to the Public Protector’s Provisional Report that he had learnt a lot about how to handle board pressure and about all parties who appeared to be what they appeared not to be. He said that they were misled on all fronts and his statement is backed up by the evidence in the report and that the statements made by both Mr Bolani and Mrs Mapetla are questionable. He however conceded that Mrs Mapetla should have been given the opportunity to make representation in terms of the law and that the only remedial action he would support is giving Mrs Mapetla an apology.

5.4.1.46 The EAAB’s Annual Report for the financial year ended 2012/2013 noted the amount of R 3 million paid to the Complainant and captured it as fruitless and wasteful expenditure in paragraph 27 of the notes to the financial statements.

5.5 Regarding the alleged improper dismissal of the Complainant on the instructions of the Minister of Trade and Industry:

5.5.1 Issue in dispute

5.5.1.42 The key issue for my factual determination was whether or not the Complainant’s contract of employment was terminated through the approval of Minister Davies.

Complainant’s case

5.5.1.43 Complainant alleged that she was dismissed by the EAAB Board on the instruction of Minister Davies for causing discomfort in the industry through the investigation of several estate agencies for the misuse of trust funds.

5.5.1.44 In his evidence, Minister Davies denied that the termination of the Complainant’s contract of employment was executed through his instruction as alleged.
5.5.1.45 According to Minister Davies’ response dated 8 April 2011 to my inquiry regarding the allegation, the DTI earlier released a statement in response to the allegation concerned, which provided that:

“Minister Davies has noted malicious allegations suggesting that Mrs Mapetla was dismissed by the EAAB on his instruction and or indirect influence as unfounded, malicious and libelous. Minister Davies wishes to dismiss the allegations with the contempt it deserves and categorically denies involvement or a desired interest in having Mapetla dismissed.”

5.5.1.46 The DTI indicated in its supplementary response dated 3 October 2015 that the forensic investigation report by Gobodo (Pty) Ltd into the suspension and termination of contract of the CEO of the EAAB by the Board exonerated the board of any wrongdoing regarding to the process to suspend and terminate the contract of the complainant. The report had no influence on my investigation.

5.5.1.47 Witnesses who were interviewed could not confirm or deny the allegation as they did not have direct evidence in that regard. However, it was stated that Mr Bolani used to claim to have had meetings with the Minister which the EAAB officials did not have knowledge of.

5.5.1.48 The Board Minutes of 9 February 2011 noted that Mr Bolani had stated that the Minister was not happy with the performance of the EAAB. However, it could not be confirmed if Mr Bolani said he had the instruction of the Minister to dismiss the Complainant.

5.5.1.49 As a result of lack of sufficient information to substantiate the allegation, I have to conclude that the Complainant’s contract of employment was not terminated through the instruction of Minister Davies.

5.5.1.50 Mr Bolani stated in his response to the Provisional Report that he fully agreed with the finding of the Public Protector on this matter. He stated that he believed it was
very mischievous for the Complainant to make the claim and that the meeting that he and Mr Faku had with the Minister which Complainant was obliged to attend dealt only with the issue of the FFC which is detailed in the High Court Affidavit. He further indicated that he had never spoken or met the Minister before that meeting or thereafter and that their contact with the DTI was always through the office of the DDG, Zodwa Ntuli.

5.6 Regarding the alleged victimisation of the Complainant by the EAAB Board for pursuing and uncovering abuse of funds by Estate Agents

5.6.1 Issue in dispute

5.6.1.42 The issue for my factual determination was whether or not the EAAB Board victimised the Complainant for pursuing and uncovering abuse of funds by estate agents.

5.6.1.43 Mr Bolani denied that the Complainant was suspended and dismissed for her anti-corruption and whistle-blowing activities and specifically stated that she had little to do with the investigation of the Wendy Mechanick saga. The argument is also articulated by Mr Ngcobo who argued that Complainant could not have blown the whistle and acted on it and he described the finding on the Provisional Report regarding this issue as vague and embarrassing.

5.6.1.44 Looking at the evidence received as well as the assertions by the Complainant, the Board was appointed in October 2010 and its first meeting was on the 8th December 2010 on the day of its inauguration. The Wendy Mechanick report was tabled and investigations into other estate agents were also discussed. On the 9th of February 2011, during a Board meeting, Mr Bolani reported that the Minister was not happy with the performance of the EAAB. He further gave an indication that the EAAB provided an explanation that the performance was due to the fact that the board was running without a full complement. On 16 February 2011, a
meeting was held wherein the Board took a decision to investigate the Complainant and on 17 February 2011, the Board suspended the Complainant on the basis that an investigation was to be conducted against her office in the running of the affairs of the EAAB. On 27 February 2011, nine day after the suspension, a special meeting without the CEO and the company secretary's presence was called and a decision to terminate the Complainant's employment was taken.

5.6.1.45 According to the Deloitte Report on the investigation of the Complainant dated 19 August 2011, Deloitte & Touche was engaged on 22 February 2011 to conduct the investigation against the Complainant regarding operational aspects of the EAAB, five days after the suspension of the Complainant on 17 February 2011. The scope of the investigation also covered allegations of financial mismanagement in respect of suspicion of a cheque of payment of R400 000 allegedly made to an executive staff member and a cheque payment of R10 000 in favour of the Complainant's husband; the Complainant's non-compliance with the travel policy and abuse of corporate credit card; the Complainant's non-compliance with the procurement policy in respect of the appointment of a media company and the sale of the EAAB building, whether due process was followed.

5.6.1.46 The Deloitte Report stated at paragraph 4 of the Executive Summary that the allegations referred to herein above were without substance.

5.6.1.47 The review and analysis done by Deloitte on the Complainant's other employment matters were not part of the initial brief mentioned in paragraph 2 of Deloitte's Report under the title Scope and Methodology. For purpose of the issue under investigation, I have not delved into them.

5.6.1.48 This brings me to the main question of the actual reasons for the Complainant's suspension and dismissal.
5.6.1.49 The reasons about the investigation into mismanagement of the Complainant’s running of the affairs of the organisation cannot be supported by the evidence outlined herein above. The fact that the investigation by Deloitte was commissioned after the Complainant was suspended and that after her dismissal, Deloitte investigation revealed that the allegations against her were without substance leaves much to be desired.

5.6.1.50 Having regard to the evidence received, I have to, in the absence of conclusive reasons, accept the assertion by the Complainant that she was victimised in her suspension and dismissal as she was unfairly treated without valid reasons.

5.7 Regarding whether the Complainant suffered any prejudice

5.7.1 Issue in dispute

5.7.1.42 The issue for my factual determination was whether or not the Complainant suffered any prejudice as a result of her suspension and dismissal by the EAAB Board.

Complainant’s case

5.7.1.43 The Complainant was suspended through an alleged Board Resolution of 17 February 2011 without being given the opportunity to make a representation why she should not be suspended. The reasons for the suspension were said to be a pending investigation into the running of the affairs of the EAAB by the Complainant. The investigation company, Deloitte & Touche was engaged on 22 February 2011 after the Complainant was suspended.

5.7.1.44 The Complainant was cleared on the initial investigation commissioned by the board regarding the alleged mismanagement of her office in the running of the organisation and despite such absolution, she was not reinstated.
5.7.1.45 The EAAB Board asserted that it complied with its policies in effecting the suspension despite the Complainant asserting that her rights to a fair labour process had been tampered with by the EAAB Board in not affording her the opportunity to make a representation against the intended suspension.

5.7.1.46 The Complainant was also dismissed on 27 February 2011 without being served with a charge sheet. The Complainant asserted further that her rights to a fair labour process were infringed and as a result of the suspension and dismissal followed by media reports, she become unemployable because her prospective employers could not hire her due to the reports of her dismissal by the EAAB Board.

5.7.1.47 The Complainant asserted further that she was a non-executive director of Finbond, the position she gave up with immediate effect on 8 March 2011 due to the reputational damage caused by media reports on her improper suspension and dismissal by the EAAB and as a result of the EAAB Board’s conduct, she has since remained unemployed.

5.7.1.48 The assertions by the EAAB Board relating to the suspension and dismissal of the Complainant were not corroborated by evidence received. From the evidence, it appears that the Complainant suffered prejudice as a result of her suspension and dismissal emanating from her protected disclosure relating to the investigation of certain estate agencies, among them a long standing member of the EAAB Board. The Complainant’s evidence has to a greater extent been corroborated by the evidence received and therefore leads to a conclusion that she had suffered occupational detriment as alleged.

5.7.1.49 Complainant had a legitimate expectation that her contract would be extended as she had been doing well in her duties but as a result of her suspension and dismissal by the EAAB Board, she is unemployed and has not received invitations to serve on any board or to be appointed in a paying directorial position. As a result of actions of the EAAB Board, she suffered loss of income for a period of
five years, discomfort and emotional pain. She further incurred unnecessary legal costs.

5.7.1.50 Mr Bolani conceded in his response to the Provisional Report that the Complainant is a well-educated person and has had an illustrious career. However he argued that things went wrong at the EAAB and that they had been wrong even before he became a member of the Board. He asserted to have sensed tension between the Complainant and Board from his first day and recalled in his first year as a board member, the Complainant telephoned him on more than one occasion requesting him to protect her against the Board and that he was sure either one or two other board members did receive similar calls. He asserted that Complainant had laid a harassment complaint against a board member, Mr Jawitz, but the DTI did not entertain the complaint and Mr Jawitz served his full term on the Board.

5.7.1.51 Mr Bolani asserted that the Public Protector’s Provisional Report stated that there are no findings against the CEO by the Deloitte investigation. This fact is incorrect as the Provisional Report stated that the Deloitte Report indicates that the initial allegations were without substance. Mr Bolani indicated that on going through the Executive Summary of the Deloitte Report only, he picked up some findings that are worth mentioning:

- No board approval for the renewal of her three year employment contract;
- There were no proper policies and procedures and guidance from management for the issuing of FFC’s. I am sure the PP office should have been provided with the copy of the Carte Blanche M-NET programme that really shocked the industry;
- The unauthorised use of company cards;
- Poor management of the Call centre; and
- And others.

5.7.1.52 Even if there may be certain negative findings against the Complainant, the relevant investigation and findings came after the suspension and therefore did not justify the flouting of the labour laws by the EAAB Board.
5.7.1.53 Mr Bolani stated that in light of the Carte Blanche report and other findings in the Deloitte Report, he does not understand how the Complainant's performance appraisal ratings of between 85 - 95% mentioned in the Provisional Report could be justified. I am nonetheless of the view that this is justified by the evidence received during the investigation. He stated his account of facts regarding the matter as follows:

“I received a call from the office of the CEO inviting me to meet with her. I travelled to the EAAB only to be presented with a request by the CEO to travel to the USA. I did approve the request though I indicated that this was a matter of the board to approve and not the chairperson alone to deal with. I requested that a travel policy be developed as soon as possible. A few days later I was again invited to go the EAAB. This time it was to conduct an unplanned performance appraisal of the CEO. I found out that the CEO had already completed and signed the forms. All I was expected to do was just to put my stamp to it. I was unhappy about this and politely declined to be used. I advised the CEO that I was not aware of relevant policies that govern this process. I also advised her that the matter should be tabled before the HR Sub-committee of the board.

I informed the CEO that my biggest concern was the transformation of the industry. If I am not mistaken, black agents at the time constituted less than 7% of the total licensed number of agents in the country. The other issue that was of concern to me and other board members was the issuance of FFC’s. I was prepared to sit and discuss performance appraisal of the CEO as long as those two issues were adequately covered.

The PP report raises the question of whether the CEO suffered any prejudice as a result of the action of the board. I can confirm the following:

- The board had received legal advice on the issue of the non-renewal of the CEO contract from a major legal firm. The CEO must have been aware of this
and she could not therefore be realistically expecting her contract to be renewed. As I indicate above, the relationship between her and some board members was not healthy. In fact, the previous contracts were renewed by chairpersons acting without the consent of the board members as pointed out in the findings of the Deloitte Report.

- You refer in the report to the damage that was done to the reputation of the CEO by newspaper reports. In truth, the person who suffered most as a result of bad newspaper reports was myself. My only crime was to implement vigorously the decisions of the board.

- My daughter had to change schools after a terrible Star newspaper article that accused me of sleeping with the EAAB PR lady. I believed, and still do, that the source of that article was the CEO, Bryan Chaplog and female members of the board who I had not allowed to fly to Cape Town to attend a workshop with estate agents. My mother, who is now in her mid-80s, was badly affected by these false media articles. My youngest sister had to confront a fellow Anglican Church goer for writing inaccurate articles for the Sunday Independent newspaper. Interestingly, he never denied anything. I was approached by people who informed me that they had been approached to write newspaper articles that aimed to discredit me. As a consumer activist I sat on a number of boards. I had to resign from all of them.

- The big question that we need to answer here is who was behind this negative media campaign, and for what purpose. Who really benefited from it? I recall a discussion I had with the dti DDG Zodwa Ntuli about the same problem. She warned me that the EAAB was notorious for media leaks.

- One day I was invited by Consumer Commissioner Mamodupi Mohlala to take part in the celebrations to mark World Consumer Rights Day at their offices in Centurion. Before the meeting, she whispered to me that the CEO of the EAAB Bryan Chaplog had confessed that they had leaked damaging information about me to the media. They were also asked to lay a criminal charge against me by ministers Patel and Davies who were unhappy with my ‘counter-revolutionary’ comments about the merger between Massmart and Walhmart, as were reported by the City Press in April or May 2011.

- COSATU issued a statement condemning the EAAB. When the spokesperson was challenged by the EAAB trade union, he simply said he was following orders.

- Besides the dti, it was only the office of the Deputy President Kgalema Monthlante that gave us a hearing on the matter. We were informed by the
advisor of the Deputy President that ANC members were mobilised to phone the Presidency and protest about the 'counter-revolutionaries' who had 'hijacked' the EAAB from the movement.

- The CEO was paid her full benefits from the time her contract was terminated and the date when her contract was to expire (1 July).

The finding that supports the CEO on this matter also needs to be reviewed, in my opinion.”

5.7.1.54 Regarding the R3 million settlement, Mr Bolani's account of events as outlined in his response to the Provisional Report is as follows:

“The decision of the Public Protector on this matter is surprising, to say the least.

I first reproduce here an email written by Gavin Schar of Knowles, Husain and Lindsay Inc. The email is dated 08 May 2012 at 12:45. It was written to Ms Ina Wilken who was serving as the EAAB chairperson at the time.

Ms Wilken had written to lawyers to seek clarity on developments since she was mostly absent from board meetings due to ill-health - during the time I was at the EAAB.

“Dear Ms Wilken

Thank you for your email.

The matter of settlement is not entirely correctly recorded in your e-mail under reply. I shall try to set out briefly the relevant factors giving rise to a settlement and how it came to be (as there is a long history and context which is relevant). Of course what I say below is simply a summary and based on memory and I am more than happy to discuss it in more detail or to clarify anything should you wish. In this regard –
1. Ms Mapetla launched an urgent high court application against the EAAB. This application was opposed by the EAAB. Before the final order was granted the parties were in discussions to settle the matter. Those discussions came to nought (mainly because Ms Mapetla wanted in the order of R5m to settle);

2. Eventually the high court dismissed “Part A” of Ms Mapetla’s application with costs;

3. Pursuant to the foregoing Ms Mapetla launched con / arb proceedings in the CCMA. The EAAB opposed same;

4. It was always my and counsel’s considered view that substantively the EAAB was entitled to “terminate” the employment contract, but that procedurally there may have been a case against the EAAB given the way it did so. In this regard, in terms of the CCMA Rules even if Ms Mapetla was successful in the arbitration the most she was entitled to, financially in the way of an award, was 12 months of her past salary, which, as I recall, was in the order of R1.4m at the time. (I pause to note that initially Ms Mapetla had sought a 24 month salary award, but she eventually reduced her “formal” claim to 12 months and within what is contemplated by the Rules);

5. Notwithstanding the above, counsel and I were of the further opinion, because Ms Mapetla had been paid each month between her “termination” and the date when her contract was to expire (1 July if I recall correctly), that even if Ms Mapetla was to be awarded a full 12 months salary award (because the EAAB had terminated her contract in a procedurally unfair way) that the 12 months should be reduced by the number of payments received by Ms Mapetla between the date of “termination” and 1 July 20102 (4 or 5 in total I think). As such, we advised that best case for Ms Mapetla was in the order of 6 – 8 months;
6. In addition to the aforesaid (and based on the costs order granted against Ms Mapetla in the high court litigation) Ms Mapetla still owed (and to my knowledge still does) the EAAB R100 000 plus interest. As such we advised the EAAB that the 7 months (which in our view was the best case for Ms Mapetla) should be further reduced by R100 000;

7. When we went for conciliation at the CCMA the parties actively discussed settlement of the matter. This was done within the bounds of the advice counsel and I had given. Eventually no settlement was concluded and a certificate of no resolution was issued by the CCMA;

8. Ms Mapetla then applied for arbitration. At the hearing of the matter the presiding officer again raised the issue of settlement and attempted to "resolve" the matter by speaking with the parties. Again the EAAB put a settlement on the table in line with our aforementioned advice. Again this was rejected by Ms Mapetla, although the parties did come very close this time and we in fact prepared a draft settlement agreement which was circulated between the parties. That settlement was along the lines we had discussed and advised but waived the claim for R100 000 to "sweeten" the deal;

9. Pursuant to Mr Bolani's resignation as the chairman of the EAAB a meeting was called with counsel, me, Mr Chaplog, Ms Dube and Mr Ashpol. The purpose of the meeting was to bring Mr Chaplog and Ms Dube fully up to speed with the matter and to take instructions from them;

10. After that meeting I suggested that it may be a good idea for the parties to resume their settlement discussions (there was obviously bad blood between Mr Bolani and Ms Mapetla and I thought "new faces" may result in a settlement now being accepted") I was told this was a good idea, but I was then not involved in the further settlement discussions that I understood took place; and
11. On 7 October 2011 I was notified in an email by Mr Chaplog, as the acting CEO, that the EAAB had concluded a settlement with Ms Mapetla. I was requested to prepare a settlement agreement and I was given the financial settlement amount and the essential terms. I have not received a signed copy of same back and cannot tell if it was ever signed.

In the light of the above, it is correct that counsel and I did advise that a settlement should be concluded primarily because of our concern that the EAAB may have been at risk for procedural unfairness and because legal costs were mounting. In short we were of the view that a commercial settlement was well worth considering if it meant settling all the many issues on the table. However, we certainly did not support (nor were we aware of until after the fact) a settlement of R3m. It has always been our view that between 6 and 8 months plus legal costs was the risk facing the EAAB.

I trust the above is of assistance”.

The above letter correctly summarizes the position of the EAAB board at that time. Though we did not agree with the lawyers on the issue of procedural unfairness, we accepted their advice in order to bring the matter to an end and limit costs.

Mr S Faku informed me that the decision to pay the CEO R3m was improper. In fact, he has provided proof to the PP office that he objected to this decision taken by the board that had less than 15 members. According to him, the decision to settle for R3m was imposed on the board by the CEO Bryan Chaplog (a well-known ally of Ms Mapetla) and Ms T Dube, who had succeeded me as chairperson of the board. Perhaps, this explains the point raised in the email by Gavin Schar, that he never received a signed copy of the agreement even though he drafted it. Figures must have been changed without informing him.
Though I was not part of the decision-making process on the R3m pay out, I can add the following:

One evening I received a telephone call from a senior cabinet minister. I have known the minister since we were growing up at KwaMashu in Durban. I was surprised when he brought up the issue of the CEO, and remember asking him why he was enquiring when this was a matter of the dti. After a few tense minutes of discussion, we agreed that I should send him the high court affidavit as I had nothing to add. That same evening I did email the affidavit to a strange Gmail address that he provided me. I was definitely not his official or Gmail with his name. Maybe it went to his advisor, I could not tell.

Two days later, he phoned again in the evening. This time he simply suggested that we pay the CEO R3m and they will let us continue our activities undisturbed. I made it clear to him that such an outcome was wrong and that I will rather leave the board than do something that I did not agree with.

The savage media attacks against me continued unabated. It is interesting that the journalist who first wrote in the Sunday Times about the victimization of the CEO was also the one who informed me about the outcome of the dti ‘investigation” against myself. I declined to comment as I was never provided with a copy of that report.

It is therefore clear to me that the amount of R3m that was paid to the CEO was negotiated somewhere else and simply imposed on the board.”
5.7.1.55 The evidence by Mr Bolani above has been noted and considered. However, it
does not absolve the EAAB Board from liability and does not change the situation
regarding the accountability of the Board for its actions. Taking into account the
responses by other Board members, it does not make a significant impact on the
general evidence received regarding this subject. It is debatable why Ms Wilken
did not point to this evidence in her earlier response of 6 May 2016 to the Notice
issued in terms of section 7(9) of the Public Protector Act. The logical conclusion
is that the Board took the decision.

5.7.1.56 Mr Ngcobo argued in his response that the fact that Complainant received glowing
performance reviews did not entitle her to reappointment. He however stated that
that did not stop the Board from adopting a fair, transparent and open selection
process and that she would have been entitled to apply for the position. He
asserted further that Complainant could at the most have had a legitimate
expectation to be fairly considered for extension of his contract and not a
legitimate expectation of her contract being extended. Regarding the prejudice
allegedly suffered by Complainant he argued that Complainant accepted
compensation in the amount of R3 million and the matter cannot be revisited by
the Public Protector. To the contrary, he states in his response as follows:

"My response dated 6 May 2016 referred to in your quotation is selective and
misrepresents my views. It does not reflect what I believe was the sinister manner
in which Messrs Chaplog and Ndebele engineered the R3 million settlement whilst
obscuring the process from the Board.

Indeed your latest report omits earlier concerns about the settlement. I am led to
the conclusion that you wish to shield Chaplog and Ndebele from any retribution,
whilst portraying the Board in a bad light."
I recommend that an investigation be conducted into the circumstances under which Mapetla was granted a R3m settlement, with specific reference to the roles played (or not played) by Ndebele, Sigaba and Chaplog.”

5.7.1.57 The assertion above by Mr Ngcobo is without substance. The evidence received, including the responses from Mesdames Dube, Wilken, Fry, Mojapelo and Molefe which I need not repeat is to the effect that the EAAB Board agreed to implement the legal opinion from Attorneys Knowles, Hussein & Lindsay Inc. to settle the matter. However, to dispel further doubt, I refer to the response of Ms Molefe dated 6 October 2016 to the Public Protector’s Provisional Report which provides that:

“The decision to settle with former EAAB CEO was a joint decision by former Board (EAAB). The decision was based on the legal opinion which was sought from the Board Attorneys at that time. Knowles Hussein and Lindsay Inc. The Board decided to implement the legal opinion as the matter was attracting too much media attention and making it impossible for the Board to continue with its daily activities and mandate. The matter was settled by agreement through her Attorneys and the Board Attorneys. For further information, please refer to the minutes of the EAAB Board meetings at that time.”

6 THE ADMINISTRATIVE STANDARDS THAT SHOULD HAVE BEEN COMPLIED WITH

6.1 Regarding the alleged improper constitution of the Board:

6.1.1 Having concluded that the EAAB Board consisted of 11 members when it suspended and dismissed the Complainant, the issue to adjudicate was whether or not the Board was properly constituted.
6.1.2 To arrive at a fair conclusion, I had to test the composition of the EAAB Board and its authority to make binding decisions against the requirements of the Estate Agency Affairs Act and make a determination.

6.1.3 The composition of the Board is regulated by section 3(1) and (2) of the Estate Agency Affairs Act which enjoins the Minister to appoint 15 members of the board consisting of five from the estate agency industry, five from civil society representing consumer interest and five from related professions and institutions such as legal, financial institution, property owners and developers and in terms of the Estate Agency Affairs Act, the decisions of the EAAB Board remains valid despite a shortage in its membership. The legal framework I considered appropriate is sections 4(4) relating to the determination of a quorum and 4(6) of the Estate Agency Affairs Act providing for the regulation and validation of the EAAB Board decisions. The section provides that no decision taken by the board or act performed under the authority of the board shall be invalid merely by reason of a vacancy on the board or of the fact that any person not entitled to sit as a member of the board, sat as a member of the board at the time the decision was taken or the act was authorised, if the decision was taken or the act was authorised by the majority of the members of the board present at the time and who were entitled to sit as members of the board.

6.1.4 Having considered all relevant information before me I could not find convincing evidence to conclude that the composition of the EAAB Board by 11 members was unlawful and therefore rendered its decisions invalid.

6.1.5 I have considered the provisions of section 3(1) and (2) of the Estate Agency Affairs Act which required the Minister to appoint 15 members to constitute a board. Evidence shows that since its inception in October 2010, the Board consisted of 11 members contrary to the provisions of section 3. The reasoning of the Minister in appointing 11 instead of 15 members of the Board is not convincing to justify a deviation from the requirement of section 3(1) and (2) of the Estate
Agency Affairs Act. The conduct of the Minister in appointing 11 members and allowing it to run for a considerable time without filling the vacant positions was not in line with the provisions of section 3(1) and (2) of the Estate Agency Affairs Act.

6.1.6 I have further noted with concern the evidence that the EAAB Board from time to time consisted of less than 15 members contrary to the provisions of section 3(1) and (2) of the Estate Agency Affairs Act. The EAAB Website showed at the time of completion of the investigation that the EAAB Board consisted of 10 members.

6.2 Regarding the alleged improper suspension of the Complainant:

6.2.1 Having concluded that the Complainant was suspended without being given the opportunity to make a representation, the issue to be adjudicated was whether or not the EAAB Board’s conduct was improper.

6.2.2 To arrive at a fair conclusion, I had to test the process followed by the EAAB Board in suspending the Complainant against the requirements of sections 7(2), 23(1), 33(1) and 195 of the Constitution; section 3 of PAJA; section 185 of the Labour Relations Act; paragraphs 2(1), 3(4) and 4(1) of the Code of Good Practice: Dismissal; as well as Paragraph 4.1.3.3 of the EAAB Service Manual and make a determination.

6.2.3 Section 7(2) of the Constitution obliges state institutions to respect, protect, promote and fulfill the rights in the Bill of Rights. While section 23(1) provide for the right to fair labour practices, section 33(1) of the Constitution read with section 3 of PAJA provides for administrative action that is lawful, reasonable and procedurally fair. Section 195 obliges the public administration to be governed by democratic values and principles enshrined in the Constitution.

6.2.4 Failure by the EAAB Board to afford the Complainant the opportunity to make a representation against the proposed suspension was in conflict with the audi
*alteram partem rule* and thereby violated Complainant’s right to dignity accorded in terms of section 10 of Chapter 2 of the Bill of Right and was also in conflict with section 3 of PAJA and sections 23 (1) and 33(1) of the Constitution prescribing the standard for procedural fairness.

6.3 Regarding the alleged improper dismissal of the Complainant:

6.3.1 To arrive at a fair conclusion, I had to test the process followed by the EAAB Board in suspending the Complainant against the requirements of the legal framework set out in paragraph 6.2 above.

6.3.2 The Protected Disclosures Act 26 of 2000 protects whistleblowers from being subjected to occupational detriment. Section 3 of the Act specifically prohibits the employer from subjecting employees to occupational detriment for making a protected disclosure.

6.3.3 The EAAB Board did not provide the Complainant with a charge sheet and also did not afford her the opportunity to make a representation when it terminated her employment contract and therefore did not comply with the procedure outlined in its EAAB Service Manual as well as section 188(1) (b) of the Labour Relations Act read with paragraphs 3(4) and 4(1) of the Code of Good Practice: Dismissal, paragraph 4.1.3.4 of the EAAB Service Manual and thereby acted in conflict with section 3 of PAJA read with sections 23 (1) and 33(1) of the Constitution which prescribe the standard of procedural fairness to be complied with.

6.3.4 The EAAB Board in this regard also failed to apply the *audi alteram partem rule* and thereby violated the Complainant’s right to dignity accorded in terms of section 10 of Chapter 2 of the Bill of Right.
6.4 Regarding the dismissal of the Complainant on the alleged instruction of the Minister of Trade and Industry

6.4.1 Having concluded that the EAAB Board terminated the Complainant’s contract of employment, the issue to be adjudicated was whether or not the termination was executed on the instruction of Minister Davies.

6.4.2 To arrive at a fair conclusion I had to test the information received from Minister Davies, the EAAB, witnesses interviewed and Complainant against the Ministers' powers in terms of the Estate Agency Affairs Act and then make a determination on a balance of probabilities.

6.4.3 The Minister’s powers in relation to the Board are contained in the Estate Agency Affairs Act. Section 3 thereof relates to the appointment of board members and section 8 touches on the approval by the Minister of the exercising of certain powers by the Board. However, the Act does not make provision regarding the dismissal of the CEO by the Minister.

6.4.4 It follows that an instruction from the Minister to the EAAB Board to dismiss the Complainant would have been *ultra vires*.

6.4.5 The information received does not support the allegation that the Complainant was dismissed through the instruction of Minister Davies and it could not be confirmed that he breached the provision of the Estate Agency Affairs Act or any other law in relation thereto.

6.5 Regarding the alleged victimisation of the Complainant by the EAAB Board for pursuing and uncovering abuse of funds by Estate Agents

6.5.1 Having concluded that the Complainant was unfairly suspended and dismissed by the EAAB, the issue to be adjudicated was whether or not the EAAB Board
victimised the Complainant for pursuing and uncovering abuse of funds by Estate Agents.

6.5.2 To arrive at a fair conclusion, I had to test the EAAB Board’s manner of the suspension and dismissal of the Complainant with the requirements for fair labour process.

6.5.3 Had the Complainant been suspended and dismissed for valid reasons, the requirement of section 3 of PAJA would have applied. The Complainant would have been informed of the reasons for the suspension, afforded the opportunity to make a representation and provided with the charge sheet.

6.5.4 The compliance framework I considered appropriate was section 3 of PAJA regulating fair administrative action and section 7(2) of the Constitution protecting the rights in the Bill of Rights.

6.5.5 The Protected Disclosures Act protects whistleblowers from being subjected to occupational detriment. Section 3 of the Act specifically prohibits the employer from subjecting employees to occupational detriment for making a protected disclosure.

6.5.6 The manner in which the Complainant was suspended and dismissed was in contravention of section 3 of PAJA and sections 7(2), 23(1) and 33(1) of the Constitution which is sufficient an indication that she was victimised and subjected to occupational detriment in violation of section 3 of the Protected Disclosures Act.

6.6 Regarding the alleged prejudice suffered by the Complainant:

6.6.1 Having concluded that the Complainant was unfairly suspended and dismissed by the EAAB, the issue to be adjudicated was whether or not she suffered prejudice as a result thereof.
6.6.2 To arrive at a fair conclusion, I had to test the manner in which the EAAB Board carried out the suspension and dismissal of the Complainant with the requirements for fair labour process.

6.6.3 Had the Complainant been suspended and dismissed for valid reasons, the requirement of section 3 of PAJA would have applied. The Complainant would have been informed of the reasons for the suspension, afforded the opportunity to make a representation and provided with the charge sheet.

6.6.4 The compliance framework I considered appropriate was section 3 of PAJA regulating fair administrative action and section 7(2) and 10 of the Constitution that safeguards the rights and dignity enshrined in the Bill of Rights.

6.6.5 The manner in which the Complainant was suspended and dismissed was in contravention of section 3 of PAJA and sections 7(2), 10, 23(1) and 33(1) of the Constitution which is sufficient indication that she was prejudiced.

7 FINDINGS

My findings are the following:

7.1 Regarding the alleged improper constitution of the Board:

7.1.1 The allegation that the Board was improperly constituted is substantiated.

7.1.2 The Board that suspended and later dismissed the Complainant comprised 11 members instead of 15 members, and was appointed in October 2010 and inaugurated on 8 December 2010.

7.1.3 The appointment of an 11 member board is inconsistent with section 3(1) and 3(2) of the Estate Agency Affairs Act which enjoins the minister to appoint 15 members to the Board.
7.1.4 However in view of section 4(6) of the EAAB Act which provides that no decision taken by at least six members of the Board will be invalid on the basis that the board was constituted by less than 15 members, the constitution of the Board by 11 members was not invalid.

7.1.5 The conduct of Minister Davies in appointing 11 instead of 15 members is inconsistent with the provisions of section 3(1) and (2) of the Estate Agency Affairs Act and constitutes maladministration as envisaged in section 182(1) (a) of the Constitution and improper conduct as envisaged in section 6(5) (a) of the Public Protector Act.

7.2 Regarding the alleged improper suspension of the Complainant:

7.2.1 The allegation that the EAAB Board Improperly suspended the Complainant is substantiated.

7.2.2 The Complainant was suspended on 17 February 2011 through a notice of suspension signed by Mr Bolani, following a 7 member Board Resolution to this effect purportedly pending an investigation to be conducted against her regarding suspected mismanagement by her office in the running of the affairs of the organisation.

7.2.3 No notice of intention to suspend was given nor was there a prior notice from the Board or the Chairperson given to her regarding Board concerns over her management of the EAAB; instead she had received glowing performance reviews, rating her performance at between 80% - 90%.

7.2.4 At the time of her suspension the Complainant was investigating suspected unethical conduct by several estate agents which included the entity of Ms Wendy Mechanik who was a longstanding board member of the EAAB, a matter which had been discussed with difficulty at the board.
7.2.5 Her suspension was inconsistent with paragraphs 4.1.3.3 and 4.1.3.4 of the EAAB Service Manual, to justify a summary suspension.

7.2.6 The suspension of the Complainant was also improper, in contravention of the section 188 of the Labour Relations Act, section 3 of PAJA and sections 7, 10, 23 (1), 33(1) and (2) and 195(1) of the Constitution.

7.2.7 The EAAB’s conduct accordingly constitutes maladministration as envisaged in section 6(5)(a) of the Public Protector Act and improper conduct and as envisaged in section 182(1)(a) of the Constitution.

7.3 Regarding the alleged improper dismissal of the Complainant:

7.3.1 The allegation that the Complainant was improperly dismissed by the EAAB Board is substantiated.

7.3.2 The Complainant was dismissed on 28 February 2011 through a letter written by Mr Bolani purportedly for violating the conditions of her suspension following a Board Resolution of seven members taken on 27 February 2011 allegedly for the irrevocable and irretrievable breakdown of a relationship of trust.

7.3.3 The reason for the dismissal was at odds with the letter of suspension that she was said to have violated, as paragraph 3 of the said letter stated that failure to adhere to its conditions would result in corrective action. At the time of her dismissal the Complainant had made at least one member of the Board and other key role players in the estate agency sector uncomfortable.

7.3.4 The failure by the Chairperson and the Board to follow due process when dismissing the Complainant was inconsistent with paragraph 4.1.3.4 the EAAB’s Human Resources Manual read with paragraphs 3(4) and 4(1) of the Code of
Good Practice: Dismissal, section 3 of PAJA and sections 7, 10, 23 (1), 33 (1) and (2) and 195 (1) of the Constitution.

7.3.5 The conduct of the Chairperson and the Board accordingly constitutes maladministration, improper conduct and abuse of power as envisaged in section 182(1) (a) of the Constitution and section 6(5) (a) and (b) of the Public Protector Act.

7.4 Regarding the termination of the Complainant’s contract of employment by the EAAB Board on the alleged instruction of Minister of Trade and Industry:

7.4.1 The Complainant’s allegation that she was dismissed on the instruction of Minister Davies could not be verified and is therefore not substantiated. What was verified was that there were some people in the industry that were unhappy over the inspections and subsequently took the matter to court.

7.4.2 Accordingly I am unable to conclude that there was any violation or improper conduct on the part of the Minister regarding the allegation.

7.5 Regarding the alleged victimisation of the Complainant for pursuing and uncovering abuse of funds by Estate Agents:

7.5.1 The allegation that the Complainant was victimised by the EAAB Board is substantiated.

7.5.2 It is clear that at the time of her suspension there was never a complaint from the Board or the Minister regarding her performance. On the contrary, she had received positive performance appraisals. I have not been provided with any rational reasons for her hasty suspension and dismissal. She was at the time, in
the process of conducting inspections of agencies including an agency of one of
the Board members.

7.5.3 In the absence of rational reasons and evidence warranting suspension and
dismissal, I can only infer that the reason for her dismissal stemmed from the
investigations and inspections she had initiated.

7.5.4 Accordingly, the conduct of the Board was in violation of section 3 of the PDA,
which protects whistleblowers from occupational detriment and therefore
constitutes abuse of power as envisaged in section 6(5)(b) of the Public
Protector Act.

7.6 Regarding the alleged prejudice suffered by the Complainant:

7.6.1 The allegation that the Complainant suffered prejudice as a result of her
suspension and dismissal by the EAAB Board is substantiated.

7.6.2 The Complainant lost the possibility of her contract being considered for renewal.
She had a legitimate expectation of extension of her contract.

7.6.3 The suspension and dismissal was widely reported in the media and therefore
tarnished the Complainant's reputation and reduced her chances of being
employed. As such, despite her illustrious career, she remains unemployed and
has not been invited to join a paying directorial position. The Complainant
suffered occupational detriment as envisaged in section 3 of the Protected
Disclosures Act as a result of the suspension and dismissal.
The conduct of the EAAB Board constitutes abuse of power as well as unfair and
capricious conduct as envisaged in section 6(5) (b) of the Public Protector Act.
8 REMEDIAL ACTION

With a view to place the Complainant where she would have been, the remedial action I take in terms of section 182(1) (c) of the Constitution is to require:

8.1 The Chairman of the EAAB Board to ensure:

8.1.1 The EAAB considers the report and renders an apology to the Complainant for the improper termination of her contract of employment; and

8.1.2 The EAAB publicises the apology in the media, particularly those in which the Complainant’s suspension and dismissal by the EAAB Board was reported.

8.2 The Minister of Human Settlements to:

8.2.1 Take cognizance of the findings regarding the maladministration by the EAAB Board relating to irregularities mentioned in the report.

8.2.2 Apologize in writing to the Complainant within 30 days for the way she was treated

8.2.3 Ensure that the current EAAB Board considers the report and further reprimands the former members in terms of section 83(4) of the PFMA for the maladministration mentioned in the report by imposing a sanction that might be appropriate under the circumstances, even if it is by suspension of the members concerned from membership of or eligibility for reappointment to the EAAB Board for a reasonably determinable period.
8.2.4 Include in the Minister’s oversight activities with the EAAB Board as a State Owned Entity, the monitoring of implementation of remedial action taken in pursuit of the findings in terms of powers conferred under section 182(1)(c) of the Constitution.

8.2.5 Ensure that the EAAB Board is, at all times and/or within a reasonable time as and when a vacancy arises, constituted of 15 members as required by section 3(1) and (2) of the Estate Agency Affairs Act.

8.3 The Chief Executive Officer of the EAAB:

8.3.1 Together with the Board, add a provision to paragraph 4.1.3.3 of the EAAB Service Manual requiring the EAAB or Board when suspending employees, to give them sufficient notice of the nature and purpose of the intended suspension, a reasonable opportunity to make a representation and a clear and adequate notice of the right to request reasons for the intended suspension in order to comply with the labour laws.

8.3.2

8.3.3 Together with the Board, evaluate the effectiveness of the EAAB’s internal control and monitoring systems and introduce strict measures for compliance with the requirements of lawful, reasonable and procedurally fair labour processes to avoid future recurrence of the transgressions referred to in the report.

9 MONITORING

9.1 The Minister of Human Settlements to submit an implementation plan indicating how the remedial action referred to in paragraph 8.1 above will be implemented, within 30 days from date of this report.
9.2 The Chairman of the EAAB Board to submit an implementation plan indicating how the remedial action referred to in paragraph 8.2 above will be implemented within 30 days from the date of this report.

9.3 The Chief Executive Officer of the EAAB to submit an implementation plan indicating how the remedial action referred to in 8.3 above will be implemented within 30 days from the date of this report.

9.4 All actions requested in my report as part of the remedial action I have taken in terms of my powers under section 182(1) (c) of the Constitution to be finalised within three months and a final report presented to my office.

ADV THULI MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

Date: 14/10/2016

Assisted by: Governance and Integrity Branch – Head Office