Allegations of maladministration, abuse of power and improper conduct by the former Executive Officer of the Financial Services Board
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Executive Summary

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

(ii) The report communicates my findings and the remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into the allegations of maladministration, abuse of power and improper conduct by the former Executive Officer (EO) of the Financial Services Board (FSB), Adv. D P Tshidi, as well as systemic corporate governance deficiencies at the FSB.

(iii) The FSB is a Public Entity listed in Schedule 3 of the Public Finance Management Act, 1999.

(iv) The Executive Officer of the FSB is the principle regulator of the financial industry in South Africa. The various statutes regulating the industry vest in the Registrar a range of powers, inter alia, the power to instruct inspectors in terms of section 3 of the Inspection of Financial Institutions Act, 80 of 1998, to inspect the affairs of a financial institution or associated financial institution, and the power to apply to the High Court for the appointment of a curator to take control of and manage the whole or any part of the business of a financial institution in terms of section 5(1) of the Financial Institutions (Protection of Funds) Act, 28 of 2001.¹

(v) On 1 April 2018, the FSB was converted into a new Regulator, the Financial Sector Conduct Authority (FSCA). The transformation marks the formal implementation of the Twin Peaks model of financial sector regulation.

(vi) The Public Protector received a complaint from Mr. Julius Sello Malema, the President of the Economic Freedom Fighters (EFF) on 11 April 2017, in which complaint he alleged *inter alia* that the former EO: -

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¹ Executive Officer: Financial Services Board v Dynamic Wealth Ltd & others (888/10) [2011] ZASCA 193 (16 November 2011) at para [1].
(aa) In his recommendation for the appointment of curators to administer pension funds under curatorship, acted improperly in that he favoured a particular attorney Mr. Anthony Mostert, whom, in his appointment as a Curator, unduly paid himself an amount in excess of R188 million in curator fees;

(bb) Misled Parliament when responding to questions and his answers were designed specifically to mislead Parliament. On notification based on records obtained from the Parliament’s Hansard transcription service, the Board of the FSB intentionally ignored evidence against him and failed to take the necessary steps despite being presented with same;

(cc) In a criminal matter relating to his improper relationship with Mr. Mostert and which emanated from falsified reports relating to curatorship, persistently refused to answer questions for fear of incriminating himself;

(dd) Attended clandestine meetings with malicious intent, in that during the period of the criminal trial held during or about December 2010, he attended secret meetings with Mr. Mostert and his Counsel, Adv. Van Tonder;

(ee) Abused power in that he threatened and bullied various financial institutions into withdrawing civil action against Mr. Mostert, in which he allegedly threatened to withdraw their operating licences;

(ff) Facilitated breaches of the Inspection of Financial Institutions Act, in that he allowed the falsification of inspection reports and allowed the State Prosecutor, Adv. D’Oliveira to sit alongside the FSB Inspector, Cor Potgieter;

(gg) Allowed non FSB – personnel, Adv. L van Tonder, to complete Inspection Reports;
(hh) The FSB failed to accept and investigate disclosures made by whistle-blowers as envisaged in the Protected Disclosures Act, 2000. A case in point was the Board’s failure to take action to avoid the loss of over R100 million in SACCAWU pensioners’ money;

(ii) Failed to ensure reporting in accordance with court orders;

(jj) The FSB failed to respond to concerns raised and written requests for assistance made by Cadac Pension Fund members;

(kk) The FSB failed to recover and / or take any action against the former Chief Financial Officer (CFO), Mr. Dawood Seedat, in respect of misappropriation and unconscionable use of public funds; and

(ll) Failure by the FSB Board to take necessary steps against the EO, conduct constituting a violation of its fiduciary duties towards the institution (FSB).

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

(aa) Whether there were improprieties and / or irregularities in the nomination of curators by the Executive Officer of the FSB, to be appointed by the court, to take control of, and to manage the whole or any part of the business of the institution, on such conditions and for such period as the court deems fit, and if so, whether such conduct constitute maladministration and improper conduct;

(bb) Whether the Executive Officer of the FSB failed to discharge his regulatory duty to properly manage the possible or perceived conflict of interest between Mr Mostert’s role as a curator and the appointment of his own law firm to assist in the administration of pension funds placed under
curatorship and whether such failure was to the detriment of the pension funds; in return;

(cc) Whether the EO of the FSB misled the Minister of Finance when he provided misleading answers in respect of written Parliamentary Questions posed to the Minister of Finance and if so, whether such conduct constitutes maladministration and improper conduct; and

(dd) Whether Mr. Tshidi acted improperly and / or irregularly in the performance of his duties as the EO of the FSB, and if so, whether such conduct constitutes maladministration, abuse of power and improper conduct.

(viii) The investigation process was conducted through meetings and interviews, as well as correspondence exchanged between the Public Protector and the Complainant, as well as the FSB; Messrs. Cowan Harper Attorneys; Messrs. Mostert Attorneys; Alexander Forbes Pension Fund Administrators; Sanlam and Messrs. June Marks Attorneys; as well as inspection of all relevant documents and analysis and application of all relevant laws, and related prescripts.

(ix) Key laws taken into account to help the Public Protector determine if there had been maladministration by the FSB and improper conduct by the EO were principally those imposing administrative standards that should have been upheld by the FSB. Those are the following:

a. The Financial Institutions (Protection of Funds) Act, 2001 which outlines the procedure to the followed for the appointment of curators, as well as the discretion of the court to make an order regarding the powers; duties and remuneration of a curator which had been provisionally or finally appointed;
b. Section 50 of the Public Finance Management Act which obliges an Accounting Officer of a Public Entity to disclose all material facts which may influence the decisions or actions of the Accounting Authority to the Legislature, and to not act in any way which is inconsistent with the responsibility assigned to the Accounting Authority in terms of the Act;

c. The King IV Code on Corporate Governance which recommends that members of a governing body must act in good faith and in the best interests of the organisation. In addition, it recommends that such members should act ethically beyond mere legal compliance.

(x) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:

(a) Regarding whether there were improprieties and / or irregularities in the nomination of curators by the Executive Officer of the FSB, to be appointed by the court, to take control of, and to manage the whole or any part of the business of the institution on such conditions and for such period as the court deems fit, and if so, whether such conduct constitute maladministration and improper conduct:

(aa) The allegation that there were improprieties and / or irregularities in the nomination of curators by the EO of the FSB, to be appointed by the court, to take control of, and to manage any part of the business of the institution, on such conditions and for such period as the court deems fit, is substantiated;

(bb) It is accepted that it is the exclusive prerogative of the courts to appoint curators to administer pension funds placed under curatorship. The former EO of the FSB, however, nominates and recommends a suitable candidate for appointment as such, taking into account a person's experience in the skills necessary to act as a curator;
(cc) The explanation which was provided by the former EO was that Mr Mostert’s appointment in all the pension funds as indicated, was logical because of the commonality of the loss suffered by the various funds and his knowledge thereof;

(dd) The courts had already indicated that it would not easily deviate from a nomination made by the Registrar;

(ee) The former EO did not provide any proof to suggest that he ever considered the suitability of another candidate, with due regard to the requirements of skills transfer and Black Economic Empowerment;

(ff) The conduct of the former EO constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether the Executive Officer of the FSB failed to discharge his regulatory duty to properly manage the possible or perceived conflict of interest between Mr. Mostert’s role as a curator and the appointment of his own law firm to assist in the administration of pension funds placed under curatorship and whether such failure was to the detriment of the pension funds:

(aa) The allegation that the Executive Officer of the FSB failed to discharge his regulatory duty to properly manage the possible or perceived conflict of interest between Mr. Mostert’s role as a curator and the appointment of his own law firm to assist in the administration of pension funds placed under curatorship is substantiated;

(bb) The court, in *Executive Officer of the Financial Services Board v Cadac Pension Fund: In Re: Executive Officer of the Cadac Pension Fund & Others* already determined that there was a conflict of interest between Mr Mostert’s role as a curator and his using of his own law firm to litigate on behalf of the pension
funds under his curatorship. The court reiterated that the impression was created that Mostert was benefitting twice, as a curator and as an attorney.

(cc) The former EO of the FSB failed to properly manage this conflict of interest;

(dd) The conduct of the former EO constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(c) Regarding whether the EO of the FSB misled the Minister of Finance when he provided misleading answers in respect of written Parliamentary Questions posed to the Minister of Finance and if so, whether such conduct constitutes maladministration and improper conduct:

(aa) The allegation that the EO of the FSB misled the Minister of Finance when he provided misleading answers in respect of written Parliamentary Questions posed to the Minister of Finance, is substantiated;

(bb) Ministers rely on advice from Heads of Administration to provide them with correct information regarding departments of entities that they are responsible for;

(cc) By furnishing the Minister with incorrect information, the EO violated section 50 of the Public Finance Management Act 1 of 1999 (PFMA);

(dd) The conduct of the former EO constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
(d) Regarding whether Mr. Tshidi acted improperly and / or irregularly in the performance of his duties as the EO of the FSB, and if so, whether such conduct constitutes maladministration, abuse of power and improper conduct:

(aa) The allegation that Mr. Tshidi acted improperly and / or irregularly in the performance of his duties as the EO of the FSB, is substantiated;

(bb) Due to the nature of the position that the former EO held, he was required to always act with the utmost integrity, and in a manner which encouraged a high level of ethics and trust. As the "face" of the Regulator, he was required to hold himself to a higher standard than those that he regulated;

(cc) The conduct that he was accused of, suggested that he acted in a manner which placed into question his bona fides, integrity and whether he acted in the best interests of the organisation that he represented;

(dd) The conduct of the former EO constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(xi) The appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, with the view to remedying the improper conduct and maladministration, is the following: -

(aa) The FSCA to, within 90 days from date of this report, start the process of inviting curators through a competitive and transparent bidding process as envisaged in section 217 of the Constitution with a view to ensuring that there FSCA has a wider and representative number of curators to nominate from;

(bb) The FSCA to, within 90 days from the date of this report, develop and adopt a Policy to regulate the nomination process of curators;
(cc) The Commissioner of the FSCA to, within 30 days from date of this report take corrective action against the officials implicated in this report and put in corrective measures to avoid recurrence;

(dd) The Minister of Finance to note my findings and remedial action and ensure that the FSCA implements the remedial action.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, ABUSE OF POWER AND IMPROPER CONDUCT BY THE FORMER EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD, ADV. D P TSHIDI, AS WELL AS SYSTEMIC CORPORATE GOVERNANCE DEFICIENCIES AT THE FINANCIAL SERVICES BOARD

1. INTRODUCTION

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

1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation:

   1.2.1 The Minister of Finance, Mr Tito Mboweni;

   1.2.2 The member of the Transitional Management Committee of the Financial Sector Conduct Authority and former Executive Officer of the Financial Services Board, Adv. D P Tshidi;

   1.2.3 The Commissioner of the Financial Sector Conduct Authority and former Chairperson of the Board, Mr. Abel Sithole;

   1.2.4 Mr. Anthony Mostert of Messrs. Mostert Attorneys;

1.3 A copy of the report is also provided to Mr. J S Malema, the Complainant, to inform him about the outcome of this investigation.

1.4 Section 7(9) letters were previously written to Messrs. Tshidi and Mostert, to enable them to respond to the Public Protector’s provisional findings.

1.5 This report relates to an investigation into allegations of maladministration, abuse of power and improper conduct by the former Executive Officer (EO) of the Financial Services Board (FSB), Adv. D P Tshidi, as well as systemic corporate governance deficiencies at the FSB.
2. THE COMPLAINT

2.1 The Public Protector received a complaint from Mr. Julius Sello Malema, the President of the Economic Freedom Fighters (EFF) on 11 April 2017, in which complaint he alleged *inter alia* that the former EO: -

2.1.1 In his recommendation for the appointment of curators to administer pension funds under curatorship, acted improperly in that he favoured a particular attorney, only known by the name and style, Mr. Anthony Mostert, whom, in his appointment as a curator, unduly paid himself an amount in excess of R188 million in curator fees;

2.1.2 Misled Parliament when responding to questions and his answers were designed specifically to mislead Parliament. On notification based on records obtained from the Parliament’s Hansard transcription service, the Board of the FSB intentionally ignored evidence against him and failed to take the necessary steps despite being presented with same;

2.1.3 In a criminal matter relating to his improper relationship with Mr. Mostert and which emanated from falsified reports relating to curatorship, he persistently refused to answer questions for fear of incriminating himself;

2.1.4 Attended clandestine meetings with malicious intent, in that during the period of the criminal trial held during or about December 2010, he attended secret meetings with Mr. Mostert and his Counsel, Adv. Van Tonder;

2.1.5 Abused power in that he threatened and bullied various financial institutions into withdrawing civil action against Mr. Mostert, in which he allegedly threatened to withdraw their operating licences;

2.1.6 Facilitated breaches of the Inspection of Financial Institutions Act, in that he allowed the falsification of inspection reports and allowed the State Prosecutor, Adv. D’Oliveira to sit alongside the FSB Inspector, Cor Potgieter;
2.1.7 Allowed non FSB – personnel, Adv. L van Tonder, to complete Inspection Reports;

2.1.8 The FSB failed to accept and investigate disclosures made by whistle-blowers as envisaged in the Protected Disclosures Act, 2000. A case in point was the Board’s failure to take action to avoid the loss of over R100 million in SACCAWU pensioners’ money;

2.1.9 Failed to ensure reporting in accordance with court orders;

2.1.10 The FSB failed to respond to concerns raised and written requests for assistance made by Cadac Pension Fund members;

2.1.11 The FSB failed to recover and / or take any action against the former Chief Financial Officer (CFO), Mr. Dawood Seedat, in respect of misappropriation and unconscionable use of public funds; and

2.1.12 Failure by the FSB Board to take necessary steps against the EO, conduct constituting a violation of its fiduciary duties towards the institution (FSB).

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

3.1. The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2. Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and
3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5. In the Constitutional Court, (in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers the Public Protector:

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

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

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69);

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

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

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

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.9 “Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”
3.7 The Financial Services Board (FSB) is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector’s mandate to investigate.

3.8 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action on certain aspects of the complaint was disputed by both Messrs. Tshidi and Mostert of Mostert Attorneys. In response to my section 7(9) Notice which was served on them in November 2018, both parties indicated that: -

3.8.1 The issue regarding whether there was any conflict of interest between Mr. Mostert’s role as a curator and the appointment of his own law firm to assist in the administration of pension funds placed under curatorship and in return, whether the FSB defended its contingency fees to the detriment of pension funds, was taken on appeal to the Supreme Court of Appeal, and therefore, as the Court had already dealt with the matter, I was precluded from investigating same in line with the provisions of sections 182(3) of the Constitution of the Republic of South Africa, 1996, read with section 6(6) of the Public Protector Act, 1994; and

3.8.2 That the matters which were reported to my office arose more than two (2) years ago and that I did not indicate in my section 7(9) Notice which “special circumstances” I took into account when I exercised my discretion favourably to accept the complaint for investigation. In this regard and in my correspondence to Rooth & Wessels dated 15 February 2019, I explained that section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation. Mr Tshidi specifically alleged that the reasons advanced for accepting a
complaint older than two years, provided in a letter addressed to his attorneys dated 15 February 2019, renders the circumstances “special” as per the requirements of the Public Protector Act.

3.8.3 In addition, it was alleged by both Messrs. Tshidi and Mostert that I have persistently refused to accept that the true identity of the Complainant is in actual fact Mr Simon Nash, former Chairperson of the Cadac Pension Fund. It was alleged that the allegations are part of a “smear campaign” to discredit Messrs. Mostert and Tshidi. Section 6(1) of the Public Protector Act provides inter alia that any matter in respect of which the Public Protector has jurisdiction may be reported to the Public Protector by any person. I have indicated in all my correspondence that the complaint was lodged by the EFF. In any event, it is immaterial who the allegations emanate from.

3.8.4 In addition, it was alleged by Mr Tshidi that I decided to not hear any evidence under oath, but to adjudicate on the matter based in hearsay evidence from the Complainant, evidence which was not given under oath and remained untested by cross-examination. In this regard, I should note that I follow an inquisitorial process in my investigations.

3.9 I also deal with these responses relating to my powers and jurisdiction to investigate more fully below in the evidence, specifically when I discuss the responses which I received from Messrs. Tshidi and Mostert to my section 7(9) Notice.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182 of the Constitution and 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.

4.1.3. This complaint was classified as a Good Governance and Integrity complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act, 1994.

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 improper conduct and/or maladministration?

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

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry principally focused on whether and to what extent the former EO of the FSB fulfilled his regulatory responsibilities.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration and prejudice.
4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the undue delay and maladministration.

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

4.3.1. Whether there were improprieties and / or irregularities in nomination of curators by the Executive Officer of the FSB, to be appointed by the court, to take control of, and to manage the whole or any part of the business of the institution on such conditions and for such period as the court deems fit, and if so, whether such conduct constitutes maladministration and improper conduct;

4.3.2. Whether the EO of the FSB failed to discharge his regulatory duty to properly manage the possible or perceived conflict of interest between Mr. Mostert’s role as a curator and the appointment of his own law firm to assist in the administration of pension funds placed under curatorship and whether such failure was to the detriment of the pension funds; in return, whether the FSB defended his contingency fees to the detriment of pension funds;

4.3.3. Whether the EO of the FSB misled the Minister of Finance when he provided misleading answers in respect of written Parliamentary Questions posed to the Minister of Finance and if so, whether such conduct constitutes maladministration and improper conduct; and

4.3.4. Whether Mr. D P Tshidi acted improperly and or irregularly in the performance of his duties as the EO of the FSB and if so, whether such conduct constitutes maladministration, abuse of power and improper conduct.

4.4. The Key Sources of Information

4.4.1. Documentation
4.4.1.1 Letter of complaint received from the Economic Freedom Fighters with supporting documents dated 15 March 2017;

4.4.1.2 Letter from Mr Tshidi to Mr Campbell dated 25 March 2009;

4.4.1.3 Letter from Elena Fomo to June Marks dated 10 July 2011;

4.4.1.4 Letter from Mr Tshidi to Dr Johan van Zyl dated 25 March 2009;

4.4.1.5 Letter from Mr Tshidi to Dr Johan van Zyl dated 28 April 2009;

4.4.1.6 Graphic presentation of Audio recordings and transcripts from December 2010 to April 2011;

4.4.1.7 Documents received from Sanlam dated 22 and 23 March 2018;

4.4.1.8 Copies of transcripts and audio recordings received from Cowan-Harper Attorneys on 03 April 2018;

4.4.1.9 Documents from the Complainant’s Attorneys on 25 March 2019.

4.4.2. Correspondence Sent and Received

4.2.2.1 Letter from PPSA investigator to Mr J S Malema acknowledging his receipt of complaint lodged dated 11 April 2017;

4.2.2.2 Email from PPSA investigator to Ms Kubheka requesting her acknowledgement to the letter attached dated 11 April 2017;

4.2.2.3 Email received by PPSA investigator from Ms Kubheka acknowledging the letter received dated 12 April 2017;

4.2.2.4 Letter from PPSA investigator to Mr Tshidi dated on 26 June 2017;

4.2.2.5 Letter received by PPSA investigator from Mr Tshidi with supporting annexures dated 4 July 2017;

4.2.2.6 Letter from PPSA investigator to Mr Tshidi dated 06 July 2017;

4.2.2.7 Email from PPSA investigator to Mr Tshidi and Minnette Van der Merwe dated 27 June 2017;
4.2.2.8 Email from PPSA investigator to Mr Tshidi dated 10 July 2017;
4.2.2.9 Letter from PPSA investigator to Mr Malema dated 27 October 2017;
4.2.2.10 Letter from PPSA investigator to Ms Kubheka dated 27 October 2017;
4.2.2.11 Letter from PPSA investigator to Mr Tshidi dated 02 November 2017;
4.2.2.12 Letter from PPSA investigator to Mr Tshidi arranging a meeting dated 03 November 2017;
4.2.2.13 Email from PPSA investigator to Ms van der Merwe requesting an urgent meeting with Mr Tshidi dated 03 November 2017;
4.2.2.14 Email received by PPSA investigator from Ms van der Merwe acknowledging the email sent;
4.2.2.15 Letter from Public Protector to Mr Sithole dated 02 November 2017;
4.2.2.16 Email from PPSA investigator to Mr Sithole requesting for a meeting dated 03 November 2017;
4.2.2.17 Email received by PPSA investigator from Mr Sithole acknowledging the email sent, dated 03 November 2017;
4.2.2.18 Email from PPSA investigator to Mr Sithole dated 03 November 2017;
4.2.2.19 Email received by PPSA investigator from Ms van der Merwe indicating the availability of Mr Sithole and Mr Tshidi dated 08 November 2017;
4.2.2.20 Email from PPSA investigator to Ms van der Merwe acknowledging the receipt of the email dated 08 November 2017;
4.2.2.21 Letter received by PPSA investigator from Ms van der Merwe dated 21 November 2017;
4.2.2.22 Email from PPSA investigator to Mr Tshidi dated 27 November 2017;
4.2.2.23 Email from PPSA investigator to Ms van der Merwe dated 27 November 2017;
4.2.2.24 Email received by PPSA investigator from Ms van der Merwe acknowledging the receipt of email dated 27 November 2017;
4.2.2.15 Email from PPSA investigator to Ms van der Merwe dated 27 November 2017;
4.2.2.16 Email received by PPSA investigator from Ms Rantsho dated 27 November 2017;
4.2.2.17 Letter from PPSA investigator to Mr Mostert informing him about the investigation and allegation made against him dated 28 November 2017;
4.2.2.18 Email from PPSA investigator to Ms Rantsho dated 28 November 2017;
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<td>Email received by PPSA investigator from Ms van der Merwe dated 01 December 2017;</td>
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<td>4.2.2.23</td>
<td>Email from PPSA investigator to Ms van der Merwe acknowledging the receipt of email dated 07 December 2017;</td>
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<td>4.2.2.24</td>
<td>Email from PPSA investigator to Ms Kubheka dated 18 December 2017;</td>
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<td>4.2.2.25</td>
<td>Email received by PPSA from Mr Gardee, Secretary - General (Economic Freedom Fighters) dated 19 January 2018;</td>
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<td>4.2.2.26</td>
<td>Email received by PPSA investigator from Mr Gardee dated 23 January 2018;</td>
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<td>4.2.2.27</td>
<td>Email received by PPSA investigator from Mr Gardee dated 24 January 2018;</td>
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<tr>
<td>4.2.2.28</td>
<td>Email from PPSA investigator to Mr Gardee dated 30 January 2018;</td>
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<tr>
<td>4.2.2.29</td>
<td>Email from PPSA investigator to Ms Rantscho dated 14 February 2018;</td>
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<tr>
<td>4.2.2.30</td>
<td>Email received by PPSA from Ms Rantscho acknowledging the email receipt dated 21 February 2018;</td>
</tr>
<tr>
<td>4.2.2.31</td>
<td>Email from PPSA investigator to Ms Rantscho dated 26 February 2018;</td>
</tr>
<tr>
<td>4.2.2.32</td>
<td>Email from PPSA investigator to Mr Gardee dated 05 March 2018;</td>
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<tr>
<td>4.2.2.33</td>
<td>Email received by PPSA investigator from Ms Kubheka dated 08 March 2018;</td>
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<td>4.2.2.34</td>
<td>Email from PPSA investigator to Ms Kubheka dated 08 March 2018;</td>
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<td>4.2.2.35</td>
<td>Email from PPSA investigator to Ms Kubheka dated 09 March 2018;</td>
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<td>4.2.2.36</td>
<td>Email from PPSA investigator to Dr van Zyl dated 13 March 2018;</td>
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<td>4.2.2.37</td>
<td>Email from PPSA investigator to Santam dated 13 March 2018;</td>
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<td>4.2.2.38</td>
<td>Email received by PPSA investigator from Ms Bester dated 13 March 2018;</td>
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<td>4.2.2.39</td>
<td>Email from PPSA investigator to Ms Bester acknowledging the receipt of the email;</td>
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<tr>
<td>4.2.2.40</td>
<td>Email received by PPSA investigator from Ms Kubheka dated 13 March 2018;</td>
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<tr>
<td>4.2.2.41</td>
<td>Email from PPSA investigator to Ms Kubheka acknowledging the email dated 13 March 2018;</td>
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<tr>
<td>4.2.2.42</td>
<td>Email from PPSA investigator to Ms Kubheka dated 13 March 2018;</td>
</tr>
</tbody>
</table>
4.2.2.43  Email received by PPSA investigator from Ms Bester dated 13 March 2018;
4.2.2.44  Email by PPSA investigator to Mr Campbell dated 14 March 2018;
4.2.2.45  Email received by PPSA investigator from Ms Kubheka dated 14 March 2018;
4.2.2.46  Email from PPSA investigator to Ms Kubheka acknowledging the receipt of the email dated 15 March 2018;
4.2.2.47  Email from PPSA investigator to Ms Rantsho dated 16 March 2018;
4.2.2.48  Email received by PPSA investigator from Ms Marks dated 16 March 2018;
4.2.2.49  Email from PPSA investigator to Ms Marks dated 16 March 2018;
4.2.2.50  Email received by PPSA investigator from Ms Marks dated 16 March 2018;
4.2.2.51  Email received by PPSA investigator from Ms Marks dated 16 March 2018;
4.2.2.52  Email from PPSA investigator to Ms Marks acknowledging the receipt of email dated 16 March 2018;
4.2.2.53  Email received by PPSA investigator from Ms Fourie dated 16 March 2018;
4.2.2.54  Email received by PPSA investigator from Mr van Zyl dated 16 March 2018;
4.2.2.55  Email from PPSA investigator to Ms Fourie acknowledging her email dated 16 March 2018;
4.2.2.56  Email received by PPSA investigator from Ms Fourie dated 16 March 2018;
4.2.2.57  Email from PPSA investigator to Ms Fourie dated 16 March 2018;
4.2.2.58  Email received by PPSA investigator from Ms Rantsho (Mostert Attorneys) with an attached letter dated 20 March 2018;
4.2.2.59  Email from PPSA investigator to Ms Fourie dated 22 March 2018;
4.2.2.60  Email received by PPSA investigator from Ms Naude dated 26 March 2018;
4.2.2.61  Email from PPSA investigator to Ms Naude dated 26 March 2018;
4.2.2.62  Letter received by PPSA investigator from Alexander Forbes dated 27 March 2018;
4.2.2.63  Letter received from Messrs Andrew Darfoor and Bruce Campbell of Alexander Forbes dated 27 March 2018;
4.2.2.64  Email from PPSA investigator to Ms Rantsho acknowledging the letter received dated 28 March 2018;
4.2.2.65  Email from PPSA investigator to Ms Rollason dated 16 April 2018;
4.2.2.66  Email from PPSA investigator to Ms Naude dated 16 April 2018;
4.2.2.67 Email received by PPSA investigator from Ms Naude acknowledging the email dated 16 April 2018;
4.2.2.68 Letter received from Adv. W J de Bruyn dated 18 April 2018;
4.2.2.69 Letter received from Cowan Harper Attorneys dated 19 April 2018;
4.2.2.70 Email from PPSA investigator to Ms Naude dated 01 June 2018;
4.2.2.71 Email from PPSA investigator to Ms Kubheka dated 04 June 2018;
4.2.2.72 Letter received from the EFF dated 20 June 2018;
4.2.2.73 Letters to Mr Malema and Mr Gardee of the EFF dated 03 July 2018.
4.2.2.74 Letter from Messrs Mostert Attorneys dated 15 January 2019;
4.2.2.75 Letter from Messrs Rooth & Wessels Attorneys acting on behalf of Mr Tshidi dated 21 January 2019;
4.2.2.76 Letter received from Messrs Rooth & Wessels Attorneys dated 15 February 2019;
4.2.2.77 Letter from the Public Protector to Messrs Rooth & Wessels Attorneys dated 15 February 2019;
4.2.2.78 Letter from Messrs Rooth & Wessels Attorneys acting on behalf of Mr Tshidi dated 28 February 2019;
4.2.2.79 Letter from Messrs Mostert Attorneys dated 06 March 2019.

4.4.3 Interviews, Meetings and Inspections in loco

4.4.3.1 Meeting held with Mr Tshidi on 22 November 2017;
4.4.3.2 Meeting held between the PPSA investigator and Ms June Marks on 29 November 2017;
4.4.3.3 Meeting between the PPSA investigator and Mr Anthony Mostert on 05 December 2017.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
4.4.4.2 Public Protector Act, 23 of 1994 (PPA);
4.4.4.3 The Financial Institutions (Protection of Funds) Act, 28 of 2001;
4.4.4.4 Financial Services Board Act, 90 of 1990;
4.4.4.5 Inspection of Financial Institutions Act, 80 of 1998;
4.4.4.6 The Public Finance Management Act, 1 of 1999.

4.4.5 Case Law

4.4.5.1 Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others [2016] ZACC 11; 31 March 2016;
4.4.5.2 Executive Officer of the Financial Services Board v Dynamic Wealth Ltd [2012] 1 All SA 135 (SCA);
4.4.5.3 Executive Officer of the Financial Services Board v Cadac Pension Fund: In Re: Executive Officer of the Financial Services Board v Cadac Pension Fund & Others (2010/50596) [2013] ZAGPJHC 401 (13 December 2013);
4.4.5.4 Mostert and Others v Nash & Another (604/2017) and (597/2017) [2018] ZASCA 62 (21 May 2018);
4.4.5.5 Nash & Another v Director of Public Prosecutions & Others (22324/17) [2019] ZAGPJHC 29 (4 February 2019);
4.4.5.6 AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343 (CC).
5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether there were improprieties and/or irregularities in the nomination of curators by the Executive Officer of the FSB, to be appointed by the court, to take control of, and to manage the whole or any part of the business of the institution on such conditions and for such period as the court deems fit, and if so, whether such conduct constitute maladministration and improper conduct:

Common Cause facts

5.1.1 It is not disputed that it is the role of the FSB to nominate curators for appointment to administer pension funds under curatorship and it is also not disputed that it is the role of the courts to make such appointments.

Issues that are in dispute

5.1.2 The issue for my determination is whether there were any improprieties and/or irregularities in the nomination of curators to administer pension funds placed under curatorship.

5.1.3 I corresponded with the EO on 26 June 2017 and informed him of the allegations levelled against him. I received a response on 04 July 2017 that did not really address the allegations.

5.1.4 On 3 November 2017, I corresponded with the EO again and provided him with further particulars to enable him to respond. He responded on 21 November 2017 and explained the process for the appointment of curators in particular, his role as the Registrar and the prerogative of the court to appoint a suitable candidate as a curator.
5.1.5 With regard to the appointment of Mr Mostert, he confirmed his recommendation and proposal for Mr Mostert to be appointed in the capacity of a curator for the ‘Ghavalas funds’ because of his knowledge, experience and success in previous curatorship’s relating to pension funds.

5.1.6 In connection with the remuneration of curators on a contingency basis, the EO stated that there was only one curatorship application where the Court determined that the curator’s remuneration should be on a contingency basis which was due to the fact that there were no funds in the pension funds involved.

5.1.7 With regard to the appointment of Mr Mostert as well as his experience and expertise as a curator, he stated that, Mr Mostert has over time since 1998 been appointed as curator or one of the co-curators of a number of pension funds. When the Registrar decided to have the CAF Pension Fund (controlled by the Korsten brothers) placed under curatorship, a senior Johannesburg attorney, Mr David Wandrag, was selected to become the curator.

5.1.8 Mr Wandrag was known to the Head, at the time, of the FSB’s legal department. He recommended Mr Mostert as a suitable person to be appointed in his stead as Mr Mostert already then held the reputation of being one of the outstanding commercial lawyers in Johannesburg. He was then nominated for appointment by the Deputy Registrar of Pension Funds, Mr Andre Swanepoel.

5.1.9 According to the EO, Mr Mostert was nominated as curator for the SACCAWU National Provident Fund in 2002, and thus replaced 24 trustees and during his curatorship, the membership of the pension fund increased from 52 000 to over 100 000 members and the assets of the Fund increased from R2.3 billion to more than in excess of R6 billion.

5.1.10 He stated that, Mr Mostert’s proven success as curator paved the way for his appointment in a number of closely related curatorship applications and that all the
curatorship's in which Mr Mostert was appointed, were problematic. According to the EO, for an institution to be placed under curatorship, it should possess sufficient assets and not only to fund the curatorship but to ensure worth-while distributions to those who suffered loss.

5.1.11 He defended the appointment of Mr Mostert by stating that his appointment in the curatorships that followed the 'Ghavalas Funds', was a logical seen against the commonality of the loss the underlying pension funds had suffered: They had all been illegally stripped of assets which they were legally owned, for the benefit of their participating employers or the shareholders of such employers who were in a position of control of the funds but surely not entitled to 'access' assets of the funds for their own benefit.

5.1.12 According to the EO, all but one of the Ghavalas Funds had been the victim of an unlawful asset-stripping methodology, and in addition, the Registrar's office was also defrauded in that, the section 14 transfer of business or amalgamation of pension funds which were approved, had not been given effect to. By contrast, a parallel transaction was implemented in which the "transferor" fund lost its accumulated surplus assets to the employer. This apparently came to the attention of the Registrar from inspections conducted in the early 2000's.

5.1.13 A total of eight inspections, with the exception of the Mitchell Cotts Fund, were conducted by Inspector Cor Potgieter, and between 7 March 2005 and 12 September 2006, seven inspection reports were signed off. The FSB, so it was contended, then took a decision to apply to have all the funds consecutively placed under curatorship over the period 15 March 2005 to 4 October 2006.

5.1.14 The EO confirmed that Mr Mostert was appointed as a provisional curator of the Sable Industries Pension Fund on 27 March 2006. With regard to the fees paid to Mr Mostert, he explained that, in the curatorship applications of the Datakor Pension Fund, the Datakor Retirement Fund and the Cortech Pension Fund, a problem
surfaced relating to the absence of money to fund the curatorship. In their reports back to the court, the three provisionally appointed curators, of which Mr Mostert was one, requested that ways and means be found to finance the curatorship.

5.1.15 According to the EO, sometime into the curatorship, the two lead curators reported to the Registrar that they, and their firms, had spent substantial amounts of their own resources to fund the curatorship, and that, although money stood to be recovered, it would only happen after many years.

5.1.16 After discussions with the Registrar, a proposal was made that the curators would carry the risk involved in the curatorship, all the associated costs including counsel fees and actuarial costs and that their firms would also operate without charging fees, against a percentage of recoveries being paid to be divided between the curators and their respective practices. In addition, the FSB would, from its resources, advance R1 million to fund the curatorship on condition that this “advance” be refunded as a first charge on recoveries.

5.1.17 The agreement was found acceptable by the FSB, and was taken to Court, as the Court has the prerogative to set curators’ remuneration. The Order fixed the percentage at 25%. On 16 October 2008, the parties entered into a Memorandum of Understanding (MoU) in terms of which the following was agreed pertaining to fees:-
<table>
<thead>
<tr>
<th>NAME OF PENSION FUND</th>
<th>% PAYABLE FROM DATE OF APPOINTMENT TO DATE OF LIQUIDATION OF PENSION FUND</th>
<th>% PAYABLE FROM DATE OF LIQUIDATION OF PENSION FUND</th>
<th>ATTORNEY FEES PAYABLE TO ALMOSTERT &amp; COMPANY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mitchell Cotts</td>
<td>As determined by the Court Orders</td>
<td>10% (excl. VAT) on all assets recovered in terms of section 28(A)(1) of the Pension Funds Act</td>
<td></td>
</tr>
<tr>
<td>Picbel Groep</td>
<td>As determined by the Court Orders</td>
<td>10% (excl. VAT) on all assets recovered in terms of section 28(A)(1) of the Pension Funds Act</td>
<td></td>
</tr>
<tr>
<td>VoorsorgFonds</td>
<td>As determined by the Court Orders</td>
<td>16.66% (excl. VAT) based on the value of the assets recovered in terms of section 28(A)(1) of the Pension Funds Act, payable immediately on any recovery of assets</td>
<td>From date of appointment to 01 Oct 2008:</td>
</tr>
<tr>
<td>Lucas SA Pension Fund</td>
<td>As determined by Court Orders</td>
<td>16.66% (excl. VAT) based on the value of the assets recovered in terms of section 28(A)(1) of the Pension Funds Act, payable immediately on any recovery of assets</td>
<td>Collectively not exceed R3.6million (excl. VAT), to be apportioned between the funds proportionately to expenditure incurred in relation to each fund.</td>
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<td></td>
<td></td>
<td>Future fees:</td>
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<td></td>
<td></td>
<td>Not exceed R2million (excl. VAT) per annum for the funds collectively.</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>From 01 October 2008, the fee of R2 million to be increased by the percentage equal to CPI.</td>
</tr>
<tr>
<td>NAME OF PENSION FUND</td>
<td>% PAYABLE FROM DATE OF APPOINTMENT TO DATE OF LIQUIDATION OF PENSION FUND</td>
<td>% PAYABLE FROM DATE OF LIQUIDATION OF PENSION FUND</td>
<td>ATTORNEY FEES PAYABLE TO AL MOSTERT &amp; COMPANY</td>
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</tr>
<tr>
<td>Prestolite Fund</td>
<td>As determined by Court Orders</td>
<td>16.68% (excl. VAT) based on the value of the assets recovered in terms of section 28(A)(1) of the Pension Funds Act, payable immediately on any recovery of assets</td>
<td>From date of appointment to 01 Oct 2008: Collectively not exceed R3.6million (excl. VAT), to be apportioned between the funds proportionately to expenditure incurred in relation to each fund. <strong>Future fees:</strong> Not exceed R2million (excl. VAT) per annum for the funds collectively. <strong>From 01 October 2008,</strong> the fee of R2 million to be increased by the percentage equal to CPI.</td>
</tr>
<tr>
<td>Power Pack Fund</td>
<td>As determined by Court Orders</td>
<td>16.68% (excl. VAT) based on the value of the assets recovered in terms of section 28(A)(1) of the Pension Funds Act, payable immediately on any recovery of assets</td>
<td>From date of appointment to 01 Oct 2008: Collectively not exceed R3.6million (excl. VAT), to be apportioned between the funds proportionately to expenditure incurred in relation to each fund. <strong>Future fees:</strong> Not exceed R2million (excl. VAT) per annum for the funds collectively. <strong>From 01 October 2008,</strong> the fee of R2 million to be increased by the percentage equal to CPI.</td>
</tr>
<tr>
<td>NAME OF PENSION FUND</td>
<td>% PAYABLE FROM DATE OF APPOINTMENT TO DATE OF LIQUIDATION OF PENSION FUND</td>
<td>% PAYABLE FROM DATE OF LIQUIDATION OF PENSION FUND</td>
<td>ATTORNEY FEES PAYABLE TO AL MOSTERT &amp; COMPANY</td>
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<tr>
<td>Sable Pension Fund</td>
<td>16.68% (excl. VAT) based on the value of the assets recovered</td>
<td>16.68% (excl. VAT) based on the value of the assets recovered in terms of section 28(A)(1) of the Pension Funds Act, payable immediately on any recovery of assets</td>
<td>From date of appointment to 01 Oct 2008: Collectively not exceed R3.6million (excl. VAT), to be apportioned between the funds proportionately to expenditure incurred in relation to each fund. Future fees: Not exceed R2million (excl. VAT) per annum for the funds collectively. From 01 October 2008, the fee of R2 million to be increased by the percentage equal to CPI.</td>
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<tr>
<td>Datakor Pension Fund</td>
<td>In terms of Court Orders of 21 April 2006, 02 August 2005 and 13 September 2006; save for the limitation on the contingency fee of 25% (excl. VAT), applicable to assets collectively recovered for the benefit of these funds up to R140million, and 16.88% (excl. VAT) on all assets recovered thereafter</td>
<td>16.68% (excl. VAT), based on the value of the assets recovered in accordance with section 28(A)(1) of the Pension Fund Act, save that for recoveries up to 140million, the remuneration shall be 25%. Remuneration due and payable in respect of the first 140million shall not exceed R35million</td>
<td>13 September 2005 – 30 September 2008: Nil Future fees: Not to exceed R1million (excl. VAT) per annum collectively for funds. From 01 October 2009: Fee increased by a percentage equal to CPI.</td>
</tr>
<tr>
<td>NAME OF PENSION FUND</td>
<td>% PAYABLE FROM DATE OF APPOINTMENT TO DATE OF LIQUIDATION OF PENSION FUND</td>
<td>% PAYABLE FROM DATE OF LIQUIDATION OF PENSION FUND</td>
<td>ATTORNEY FEES PAYABLE TO AL MOSTERT &amp; COMPANY</td>
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<tr>
<td>Datakor Retirement Fund</td>
<td>In terms of Court Orders of 21 April 2006, 02 August 2005 and 13 September 2006; save for the limitation on the contingency fee of 25% (excl. VAT), applicable to assets collectively recovered for the benefit of these funds up to R140 million, and 16.88% (excl. VAT) on all assets recovered thereafter</td>
<td>16.68% (excl. VAT), based on the value of the assets recovered in accordance with section 28(A)(1) of the Pension Fund Act, save that for recoveries up to R140 million, the remuneration shall be 25%. Remuneration due and payable in respect of the first R140 million shall not exceed R35 million</td>
<td>13 September 2005 – 30 September 2008: Nil</td>
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<td>Future fees: Not to exceed R1 million (excl. VAT) per annum collectively for funds.</td>
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<td>From 01 October 2009: Fee increased by a percentage equal to CPI</td>
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<tr>
<td>Cortech Pension Fund</td>
<td>In terms of Court Orders of 21 April 2006, 02 August 2005 and 13 September 2006; save for the limitation on the contingency fee of 25% (excl. VAT), applicable to assets collectively recovered for the benefit of these funds up to R140 million, and 16.88% (excl. VAT) on all assets recovered thereafter</td>
<td>16.68% (excl. VAT), based on the value of the assets recovered in accordance with section 28(A)(1) of the Pension Fund Act, save that for recoveries up to R140 million, the remuneration shall be 25%. Remuneration due and payable in respect of the first R140 million shall not exceed R35 million</td>
<td>13 September 2005 – 30 September 2008: Nil</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Future fees: Not to exceed R1 million (excl. VAT) per annum collectively for funds.</td>
<td></td>
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<tr>
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<td></td>
<td>From 01 October 2009: Fee increased by a percentage equal to CPI</td>
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5.1.17 By 30 July 2013, Mr Simon Nash however, alleged in letter addressed to the FSB Board that Mr Mostert had spent R20 million of Cadac Pensioners' money, with only a R3 million default judgment against Ms June Marks to show for the expenditure.

5.1.18 The Complainant through Adv De Bruyn, suggested that, initially, in one or two of the Ghavala matters, there were “token” co-curators, but they very soon disappeared off the radar and, at best, insignificant amounts of fees were passed on to them. He accused Mr Mostert of running a proverbial “one man show.”

5.1.19 By 2011, Mr Mostert was alleged to have earned in person and / or through his firm, approximately R240 million (R188 million in curator fees and R45 million in legal fees) over the previous six years. Further, it was suggested that the amounts earned by Mr Mostert between 2011 and 2019 was not known, as both Messrs. Mostert and Tshidi steadfastly refused to make any disclosure whatsoever of the amounts earned.

5.1.20 The fee agreement in the Sable matter was alleged to have earned Mr Mostert approximately R30 million by November 2011. This was the fee agreement which was later set aside by the Court.

Mr Tshidi’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.1.19 The EO submitted a response to my notice in terms of section 7(9) of the Public Protector Act through his attorneys, Rooth & Wessels Inc. on 21 January 2019.

5.1.20 In his response, he indicated that it had never been suggested that Mr Mostert was not a suitably qualified and experienced person, and that Mr Mostert previously demonstrated his skills in conducting forensic investigations and litigation. Mr. Tshidi further indicated that the nomination of Mr Mostert did not fall foul of the legal framework alluded to. The courts appointed Mr Mostert having regard to his curriculum vitae attached to the applications and upon being satisfied that he was a suitable candidate, and that Mr Tshidi did not understand my quarrel with the court’s findings regarding his suitability. They further indicated that my section 7(9) notice concluded, without substantiation that there were improprieties in the nomination and recommendation of the curators.
5.1.21 Rooth & Wessels further submitted that the nomination of one suitably experienced and skilled person as a curator in funds affiliated by the same unlawful scheme is reasonable, rational and logical. In addition, it was indicated that I have failed to appreciate that following the first of the Ghavalas Fund, the Mitchell Cotts Fund, being placed under curatorship, the subsequent court applications dealt with the 'similar applications' and the common elements of the Ghavalas option and motivated Mr Mostert's appointment in this regard.

5.1.22 In addition, Mr. Tshidi submitted that my section 7(9) Notice failed to set out any specific impropriety in the nomination of Mr Mostert in any of the curatorships for which he had been proposed. They suggested that my notice in terms of section 7(9) merely speculated that there could be prejudice to other candidates who could be suitable for selection as well. This then overlooks the fact that the nomination and appointment of a curator is about serving the interests of investors, and not about accommodating other candidates.

5.1.23 Rooth & Wessels then indicated that there was no suggestion that there were other candidates who were rejected or discriminated against by Mr Tshidi. Further that there was no evidence of the alleged bias towards Mr Mostert against other candidates. Mr Mostert was, in some instances, nominated together with other candidates and therefore the finding was simply speculation.

5.1.24 It was suggested that the finding ignored that Mr Mostert was introduced to the Deputy Registrar of Pension Funds, Mr Andre Swanepoel, by a senior Johannesburg attorney, Mr Dawid Wandrag, in 1998. In the Mitchell Cotts Fund, Mr Mostert was appointed co-curator with Ms Sheila Mphalele, and in the three Datakor funds, Mr Mostert was appointed as co-curator with Ms Sheila Mphahlele and Mr Wandrag. In the Pickbel fund, Mr Mostert was appointed as co-curator with Mr Wandrag, and later Mr Jay Pema. In addition, the founding affidavit in the curatorship application for the Powerpack Fund was made by a different deponent, Mr Jurgen Boyd, Deputy Registrar of Pension Funds at the time, who also proposed Mr Mostert.
5.1.25 Mr Tshidi further highlighted that my section 7(9) notice failed to indicate why his explanation of Mr Mostert’s nomination for appointment in all the Ghavalas funds was rejected. Further that as far as the Cadac Pension Fund was concerned, I failed to appreciate what served as the motivation for Mr Mostert’s appointment.

*Mr Mostert’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994*

5.1.26 Mr Mostert responded on 15 January 2019 to my s7(9) notice as follows:

5.1.26.1 In 1998, his first appointment as a curator was of the CAF Pension Fund, having been unsuccessful in the High Court in a claim against a large insurance company. With minimum funds available and at risk, he appealed to the Supreme Court of Appeal (SCA) and in 2001, succeeded in recovering monies in excess of R80 million for pensioners. Despite this, he was not rewarded in any way by any special fees, and that his ordinary fees, at the prevailing hourly rate, were only charged when he made the recovery;

5.1.26.2 Thereafter, he was appointed as the curator of the SACCAWU National Provident Fund in 2002. During this curatorship, he investigated irregular transactions, some involving fraud in excess of R500 million, and he made recoveries in excess of R500 million during the curatorship of this fund. During the curatorship, he was able to increase the membership of the fund from 52 000 members to over 100 000 members and the assets of the fund increased from R2.3 billion to in excess of R6 billion;

5.1.26.3 In 2005, he was appointed as the curator of the Mitchell Cotts Pension Fund, which he described as the first ‘victim’ of the Ghavalas Scheme. As a result of the curatorship and the ongoing investigations, the curatorship of seven (7) other pension funds followed. Mr Mostert thus contended that his appointment in the subsequent Ghavalas funds was a natural progression of the appointment that
occurred in the Mitchell Cotts Fund, and should be considered as one appointment albeit it involved several pension funds;

5.1.26.4 Other than these appointments and the Cadac Fund, which was interrelated to the Ghavalas fund, he had not been appointed as a curator and / or liquidator in any other matters.

5.1.26.5 Mr Mostert thereafter contended that, both Sable and Power Pack were denuded of all of their assets, the result being that there were no monies to conduct the curatorships in terms of order of the High Court whereby assets of the funds would be used to finance the curatorships. It was then that the FSB followed an earlier High Court decision delivered in the Datakor Funds, where the court authorised him and his co-curators to continue with the curatorship on the basis of an increased curatorship / liquidator’s fee, providing that he personally financed and continued with the curatorship at his own risk with no guarantee of receiving any refund of monies expended, or in fact recovering the curator and / or liquidator’s fees.

5.1.26.6 He further indicated that, in 2008, a Memorandum of Understanding (MOU) was entered into between the FSB and the curators regulating the payment of future fees. In some instances, where the pension funds had assets, remuneration was on an hourly basis and in respect of funds where there were no assets, an increased curatorship / liquidator’s fee applied if and when recoveries were made.

5.1.26.7 In respect of the Sable and Power Pack funds, the statutory 10% on recoveries in terms of the Pension Funds Act was increased by the Registrar with a premium of 6.66%, which increase is permitted in terms of the Act. The same fee structure applied as with other pension funds which had no assets and were in liquidation, save that a portion of the first recovery of the three Datakor Funds in respect of two curators was directed to be 25% of the recoveries made by the court, and thereafter reduced by the MOU to 16.66% (consisting of the statutory fee of 10%, plus increased premium of 6.66%).
5.1.26.8 Mr. Mostert argued that, if the curators and / or liquidators had not agreed to act on an increased fee, and at risk, the FSB would have had to close its files and there would have been no recoveries made, to the detriment of thousands of former pension fund members.

5.1.26.9 In addition, he argued that, having regard to the oversight function of the courts in respect of curatorships and the remedy available to every interested party in terms of sections 5(8) and (9) of the Financial Institutions Act, to set aside or alter the decision made by the curator or the Registrar and to cancel the appointment of a curator on good cause shown, no such steps had been taken by any interested party, save for the application to remove him as the curator of the Cadac Pension Fund.

5.1.26.10 In a subsequent response received from Mr Mostert dated 06 March 2019, Mr Mostert reiterated that during the course of my investigation, I only had one interview with him on 05 December 2017, during which interview he highlighted the following to me:

5.1.26.10.1 That his appointment as curator was in terms of the orders of court, and which specifically provided for him to engage his law firm, A L Mostert and Company; and

5.1.26.10.2 The facts pertaining to his remuneration as curator in the Funds that had been agreed with by the FSB.

5.1.26.10.3 He further reiterated that I was precluded from investigating his nomination and appointment as curator of various funds, in terms of section 6(6) of the Public Protector Act, as his appointments were made in accordance with orders of the High Court. On good cause shown by an interested party, the High Court may set aside a decision made or action taken by a curator and cancel the appointment of a curator in terms of sections 5(8) and (9) of the Financial Institutions Act.
5.1.26.10.4 Mr Mostert acknowledged that it was indeed the FSB who recommends to the court a suitably qualified and experienced person, and indicated that he was such a person, and that he had demonstrated his skills and ability to carry out investigations and litigation. According to him, the High Court also thought him to be a suitable candidate, having regard to his experience and qualifications set out in his curriculum vitae which accompanies the application. His appointments, so he contended, was therefore reasonable and logical, especially giving his experience and understanding of the Ghavalas Scheme.

The Application of the relevant law

5.1.27 Pension funds are creatures of statute governed by, inter alia, the provisions of the Pensions Fund Act, 1956, the Financial Services Board Act, 1990, the Financial Institutions (Protection of Funds) Act, 2001 and the Inspection of Financial Institutions Act, 1998.²

5.1.28 The interaction between these various pieces of legislation has been set out as follows by Nicholls J in matter of Executive Officer of the Financial Services Board (the FSB) v Cadac Pension Fund: In Re: Executive Officer of the Financial Services Board v Cadac Pension Fund & Others³:

"3.1 The Financial Services Board is established in terms of the FSB Act. Pension funds approved and registered by the FSB in terms of the applicable legislation are required to comply with all relevant statutory provisions to ensure that such entities conduct their business in such a manner that the assets of members entrusted to them are protected. Section 13 of the FSB Act provides for the appointment of an executive officer. In terms of section 3 of the PF Act the executive officer also serves as the Registrar of pension funds. The Registrar has

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³ Ibid.
a right to apply to court for the appointment of a curator to take control of and manage the business of a pension fund.

3.2 The appointment of a curator is brought in terms of section 5(1) of the FI Act which provides that the Registrar may, on good cause shown, apply to court for the appointment of a provisional curator to take control of, and to manage the whole or any part of, the business of an institution. A court may also simultaneously grant a rule nisi calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.

3.3 Section 5(6) provides that the curator acts under the control of the Registrar, and may apply to the Registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution. [...] Section 5(9) provides that the court may, on good cause shown, cancel the appointment of the curator at any time.”

5.1.33 Even though curators are appointed by the Court, the FSB is expected to recommend to the Court a suitably qualified and experienced person. Such recommendation should be made taking into account a person’s experience in the skills necessary to act as a curator, such as conducting forensic investigations, financial accounting and litigation.

5.1.34 Section 5(1) of the Financial Institutions (Protection of Funds) Act, 2001, provides that:

“The registrar may, on good cause shown, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.”
5.1.35 In terms of section 5(5) of the same Act, the court can make an order with regard to *inter alia*, the powers and duties of the curator, as well as the remuneration of a curator provisionally or finally appointed.

5.1.36 Section 5(6) further provides that the curator acts under the control of the Registrar who made the application, and may apply to that Registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution.

5.1.37 In *Executive Officer of the Financial Services Board v Dynamic Wealth Ltd*[^4] the court held that “*given the onerous duties that the Registrar discharges, a court should not easily deviate from whom the Registrar has recommended.*”

*Conclusion*

5.1.38 Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that there were improprieties in the nomination and recommendation of candidates for appointment as curators for pension funds placed under curatorship.

5.1.39 EO / Registrar of the FSB was biased towards the nomination of Mr Mostert and his law firm to the prejudice of other candidates who could be suitable for selection as well.

5.2 Regarding whether the EO of the FSB failed to discharge his regulatory duty to properly manage the possible or perceived conflict of interest between Mr Mostert’s role as a curator and the appointment of his own law firm to assist in the administration of pension funds placed under curatorship and whether such failure was to the detriment of the pension funds:

**Common Cause facts**

5.2.1 It is not in dispute that Mr Mostert was recommended by the Registrar for appointment as a curator for various pension funds which were placed under curatorship and that he would appoint his own law firm to assist in the administration of those pension funds which are placed under curatorship.

5.2.2 The court ruled as per the judgment delivered by Nicholls J in matter of Executive Officer of the Financial Services Board (the FSB) v Cadac Pension Fund: In Re: Executive Officer of the Financial Services Board v Cadac Pension Fund & Others.\(^5\)

The court held that:

"It is disturbing that Mostert litigated in what was described as a lavish scale, using the services of his own law firm, AL Mostert Inc at the expense of the CPF. I am mindful that paragraph 5.9 of the Court Order permitted him to do so on the basis of the firm’s depth of knowledge of the Ghavala transactions.

While I accept Mostert is the repository of invaluable information regarding the CPF and should therefore not be removed as curator at this late stage, I do not accept that only his law firm can litigate on his behalf.

Mostert must be capable of transferring his wealth of knowledge to another law firm in which he has no financial interest. That his legal firm is best placed to deal with the Ghavala transactions notwithstanding, the appointment of a law firm in which a

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curator has a direct interest, creates the perception that the curator is benefitting twice, both a curator and as lawyer. (sic) This practice should be frowned upon. Accordingly the rule should not be confirmed with regard to the use of the services of A L Mostert Inc.

5.2.3 In the matter of Mostert and Others v Nash and Another,⁶ the majority of a full bench of the Supreme Court of Appeal found that, although the contingency fee agreement entered into between Mr Mostert and the FSB, specifically in respect of the Sable Industries Pension Fund, was inconsistent with paragraph 9 of the curatorship order and therefore unlawful, there was in principle, and subject to obtaining the approval of the court in terms of section 5(5)(c) of the Financial Institutions Act, no objection to a fee agreement for a curator involving the payment of a percentage of the amounts recovered in the course of the curatorship.

5.2.4 In paragraph 78 of the said judgment, the court remarked: -

"[…] [A] different basis for remuneration needs to be determined between Mr Mostert and the FSB. I wish to make it clear that this does not exclude a fee determined as a percentage of the amounts recovered for the benefit of the Sable Fund, provided that the fee so determined is reasonable, having regard to the risk undertaken, the work involved, the uncompensated costs to Mr Mostert and his firm in performing the work and the like."

Mr Tshidi’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.2.5 In response to this issue, Mr Tshidi, in correspondence dated 04 December 2018, indicated that the judgment and cost order of Nicolls J was taken on appeal to the Supreme Court of Appeal (SCA), which appointed two independent curators to act as co-curators with Mr Mostert.

5.2.6 The cost orders made by Nicolls J were also set aside, and the SCA ordered that the question of costs should revert to the High Court after the two independent curators had reported on the costs issue after they had completed their investigation. The current status of this matter was that papers had been drafted and were awaiting finalisation by Counsel to approach the High Court for a fresh costs order as ordered by the SCA.

5.2.7 In addition, Mr. Tshidi alluded that the remuneration order set by the court in the curatorship of the Sable Industries Pension Fund had also been subjected to consideration by the SCA. The SCA found nothing wrong in law for the court determining the curator's remuneration on a contingency basis, e.g. by way of a percentage of recoveries made by the curator, as long as such basis is reasonable. Subsequently, an application had been drafted and filed in the Gauteng Division of the High Court on 23 November 2018 under case number 10545/2006, to sanction an agreement between the curator and the Financial Sector Conduct Authority, successor of the FSB.

5.2.8 In the response received from Rooth & Wessels on behalf of Mr Tshidi dated 21 January 2019, highlighted that the initial complaint was that there was a conflict between the Cadac Pension Fund and the Sable Pension Fund and that it was therefore improper to appoint Mr Mostert as the curator of Cadac when he was already the curator of Sable. Nicholis J found this to be wrong and described it as a "red herring."

5.2.9 Mr Tshidi, in his former capacity as the Registrar, and in his separate capacity as EO, did not appoint Mr Mostert's law firm, Mr Mostert did so, authorised by the court orders under which he was appointed. In all the funds, except the Cadac Fund, the court confirmed the Rule Nisi, including the part of the order authorizing the curators to engage such assistance of legal, accounting, actuarial, administrative or other professional nature as they may deem reasonably necessary and to defray expenses for that purpose from the assets of the funds concerned. The provisional
order in the Cadac Fund specifically mentioned Mr Mostert's law firm, but did not confirm same in the final order.

5.2.10 Mr Tshidi suggested that I was precluded from making any finding in relation to these orders, in terms of section 6(6) of the Public Protector Act.

5.2.11 In addition, he suggested that the Registrar could not "manage" the curator acting in terms of a valid court order as suggested in my section 7(9) Notice. The finding that Mr Mostert's using his own law firm in litigation was conflicted, indicated a misunderstanding on my part as of the concept of "conflict of interest." Both Mr Mostert, his law firm, and their Counsel, had the same objective, namely to achieve the best result for the pension funds they represented. More so because Mr Mostert’s remuneration depended in the success of the recovery.

5.2.12 In addition, it was submitted that there was in fact, a commonality of interest between Mr Mostert and his firm. The public duty of Mr Mostert to recover on behalf of the pension funds and his private interests of his firm to be paid for undertaking the recovery work, were not in conflict at all. The criticism of Nicholls J of Mr Mostert and his firm was not based on any "conflict" but on the prolixity of Mr Mostert's affidavit filed in the Cadac curatorship application, and what was alleged to be a lavish scale of litigation in a matter which focused on his own appointment. For this reason, Mr Mostert was denied his costs, an order which was later set aside by the Supreme Court of Appeal.

5.2.13 Mr Tshidi then took due cognizance of the criticism expressed by Nicholls J and promulgated rules on the conduct of curators in 2015, in which the FSB recognized that there may be circumstances where it might not be professionally proper for a curator to use his own law firm. Such propriety is different from what is alleged to be a conflict of interest, as the rules did not place an absolute prohibition on curators to use their own law firms in conducting curatorships.

5.2.14 It was further contended that there was no suggestion that the remuneration paid to Mr Mostert or his law firm was unreasonable, amounted to enrichment or
constituted unprofessional conduct when viewed against the work undertaken in respect of the Ghavalas Funds over more than a decade.

5.2.15 The applications regarding allegations that the FSB was not authorized to enter into the fee agreements with Mr Mostert suggested that the FSB was not so authorized by its empowering statute and that by entering into the agreements, the FSB acted irrationally or so unreasonable that no reasonable person would have so acted.

Mr. Mostert’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.2.16 Mr Mostert indicated that there were four important considerations to take into account when considering whether there had been any conflict between him acting as a curator and briefing his own law firm to undertake litigation on behalf of the funds under his curatorship. These were the following: -

1) It was more economical for the curator to provide services through his law firm as it would curb a duplication of costs and cause consequent inevitable delays;

2) With regard to the Ghavalas funds, he was specifically authorized by the High Court to utilize his own firm;

3) Since his first curatorship, all curatorships had been conducted through his firm and one fee was charged through the company, thus no separated or additional curatorship fee was ever charged, and accordingly, no duplication of costs occurred;

4) That his law firm conducted curatorships on risk where some of the funds were stripped of assets and did not have the financial ability to conduct the curatorship. He contended that, if this had not been the case, he personally would have to finance the fees and disbursements of an outside attorney.
5.2.17 He further indicated that the allegation of a 33.3% fee on recoveries was a proposal which was never implemented.

5.2.18 He indicated that:

"Your findings are biased towards Mostert with particular regard to his appointment as Curator of the Ghvalas Funds and is contrary to Court findings in each fund where the Court found that Mostert was the appropriate candidate and that it was justified that he be so appointed due to the commonality of the perpetrators and the methodology of the fraud perpetrated in each fund, and that accordingly in the circumstances insofar as litigation was concerned, he was permitted to use his own law firm by order of the Court."

5.2.19 Mr Mostert's contention was that the matter had already been adjudicated by the High Court and the SCA, and on that basis alone, I should dismiss the complaint. In this regard, he referred me to the judgment delivered by Matojane J under case number 34664/2017 dated 14 August 2018; the judgment delivered by the SCA under case number 20106/2014 and the judgment of the SCA under case number 604/2017, delivered on 21 May 2018.

5.2.20 In a later supplementary response to my section 7(9) Notice dated 06 March 2019, Mr Mostert indicated that all the fee arrangements were dealt with and approved in terms of the orders of the High Court. The only matter where his fees as a curator were brought into question were the fee arrangements stipulated in the court orders pertaining to his appointment as curator in the Sable Fund. He reiterated that such has been dealt with by the Supreme Court of Appeal, which indicated in its ruling that fee arrangements need to be agreed between the FSCA (previously the FSB), and Mostert, and where necessary, the court should be approached to sanction same.
5.2.21 The rest of Mr Mostert’s supplementary response largely corresponds with the response provided by Mr Tshidi, as discussed herein above.

**Conclusion**

5.2.22 The court already determined that there was a conflict of interest between Mr Mostert being a curator and using his own law firm to litigate on behalf of the pension funds under his curatorship. It can thus be concluded that the EO failed to properly manage this conflict.

5.3 Whether the former EO of the FSB misled the Minister of Finance when he provided misleading answers in respect of written Parliamentary Questions posed to the Minister of Finance and if so, whether such conduct constitutes maladministration and improper conduct:

**Common Cause facts**

5.3.1 Parliamentary Questions were asked in the National Assembly on 4 September 2009, 18 and 25 February 2011, 21 April 2011 and 12 September 2014 for written reply by the Minister of Finance.

5.3.2 The Heads of Administration assist Ministers with information to enable them to reply to questions asked in parliament.

**Issues that are in dispute**

5.3.3 The issue for my determination is whether in providing responses to questions asked in Parliament, the EO and Registrar of the FSB, Mr Tshidi misled the Minister of Finance whether deliberately or inadvertently.

5.3.4 In the event that the EO misled the Minister as alleged, what would be the consequences to the Minister as he would have misled Parliament.
5.3.5 The Complainant alleged that Mr Tshidi misled the Minister of Finance when he provided false answers in respect of written Parliamentary Questions posed to the Minister of Finance. In this regard, the Complainant alleged that, in a sitting of the National Assembly on 4 September 2009, the Hon. Dr D T George, MP, of the Democratic Alliance, asked the following written Parliamentary Question, under reference number PQ 1061, to the Minister of Finance:

"(1) Whether any companies were placed under curatorship by the Financial Services Board during the period 1 January 2004 up to the latest specified date for which information is available; if so, what are (a) their names, (b) the amount(s) (i) involved and (ii) recovered in each case and (c) the amount of fees earned by each curator to date, on either contingency or fee basis;

(2) whether all companies have been restored to health; if not, which companies (a) have been put into liquidation and (b) are still under curatorship?"

5.3.6 In his reply, the Minister of Finance is alleged to have stated that:

"(1) Yes.

(a), (b)(i)(ii) and (c) are provided by the Financial Services Board (FSB) on the table attached herewith as Annexure: A.

With the exception of the Datakor Fund curators (who were remunerated on a contingency basis as there were no assets left in the fund from which to pay them), all other curators are being remunerated on a fee basis in accordance with the norms of their professions. Currently, the FSB has placed a cap on the fees of curators of an agreed amount per month to ensure that this remuneration is contained within reasonable limits."
It is my view that we need to further review the system of compensation for curators, to bring it in line with more acceptable standards, and to reduce the incentive for stretching out the period of curatorship as they are paid an hourly rate.

(2) No.

(a) and (b) are provided by the Financial Services Board on the table attached herewith as Annexure: A.”

5.3.7 The Complainant contended that the written reply as provided is not the truth, as:

“On 20 September 2010 Tshidi swore in an affidavit under oath that there was a contingency agreement with respect to the Sable Industrial Pension fund, with an informal agreement concluded in 2006 and a second agreement concluded in October 2008. At the Nash criminal trial the contingency agreement of Sable dated 10 August 2008 was handed up reflecting that Mostert and the firm AL Mostert shall jointly be entitled to 33.3% contingency out of recoveries.”

5.3.8 In his response to my enquiries dated 21 November 2017, Mr Tshidi indicated that:

“8.6 The Sable Fund was not one of the Funds dealt with on a contingency basis applied to the Datakor Funds. It was initially agreed between the Registrar’s office (by the DEO of Pensions, Mr Jurgen Boyd, and the appointed curator, Mr Mostert), that a contingency arrangement would apply to the Sable Fund, but this agreement was never implemented. It was superseded by an agreement between the said parties that the Fund was to be placed under liquidation under the administration of Mr Mostert as liquidator.”

5.3.9 He then refers me to the content of the Court order granted by the High Court on 6 June 2006⁷, which was the return date for the preliminary curatorship order issued in respect of the Sable Fund. At paragraph 6, the Court orders that the remuneration of

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⁷ Executive Officer of the Financial Services Board v Sable Industries Pension Fund (2006/10545).
the liquidator be subject to the provisions of section 28A of the Pension Funds Act (which provides for the Registrar’s discretion to reduce or increase the remuneration of a liquidator). The liquidation and the increased fee of 16.6%, which is 6.6% above normal liquidator’s remuneration, was formalised in the 2008 MoU reached between the parties.

5.3.10 Mr Tshidi further stated that:

“8.9 The mischief in the unfounded allegation that the Executive Officer had lied to Parliament is exposed when the question that was posed to the Minister is properly considered.

The question was whether any companies (sic) were placed under curatorship over the period 1 January 2004 up to September 2009 and if so...’(c) the amount of fees earned by each curator to date, on either a contingency or fee basis.’

8.10 The question, therefore, focused on the amount and basis of the fees earned by the curators. Since the 2006 agreement with Mr Mostert in the Sable was never given effect, no fees had been earned on that basis. The answer by the Minister was perfectly correct. Attention is also directed to the fact that the Minister’s answer was worded in the present tense, i.e. ‘all other curators are being remunerated on a fee basis in accordance with the norms of their profession’. [...] (own emphasis)

8.11 For the sake of completeness I should allude to the court application referred to by the Minister in par8 of his reply to Parliament on 12 September 2014- [...]. The judgment of Tuchten J in that case was to the effect that the 16.6% arrangement in the October 2008 agreement was in conflict with the terms of the Contingency Fees Act and therefore void.
However, Mostert was not ordered to repay any fees earned by him in terms of the relevant provision and, on the contrary, the judgment allowed an opportunity for an agreement between the FSB and Mostert to rectify the legality of their agreement which provided for a 16.6% commission of recoveries to Mostert as liquidator of the Sable Fund.

8.12 The agreement envisaged by the Judge has meanwhile been arrived at notwithstanding that some legal-technical aspects of the judgment is presently on appeal to the SCA, which appeal is still pending.”

5.3.11 In the analysis of my evidence, I determined that on 10 August 2006, Mr J A Boyd, the Deputy Executive Officer of the FSB, wrote to Mr Mostert under the heading “SABLE INDUSTRIES PENSION FUND 12/8/20317/1: CONTINGENCY FEE:”

“With reference to your facsimile dated 7 August 2006, I wish to confirm that, for the work done by the curator and A L Mostert and Company Incorporated relating to the Sable Industries Pension Fund, since the date upon which the fund was placed under curatorship, which includes the exercise of the duties of the curator as well as any legal work undertaken by A L Mostert and Company Inc, the curator and the aforesaid law firm shall be jointly entitled to 33.33% (i.e. 16.67 per cent each) of all amounts recovered for the benefit of the aforesaid Fund, upon the further undertaking that all disbursements of the curator and the said law firm, shall be paid by the said law firm and or the curator out of any recovery made on behalf of the Fund, failing which shall be paid by the said law firm and or the curator out of own funds.”

5.3.12 In another sitting of the National Assembly held on 18 February 2011, the Hon. Dr D T George, MP, of the Democratic Alliance, asked the following written Parliamentary Question to the Minister of Finance, under reference number 314 [NW338E]: -

“What (a)(i) is the number and (ii) are the names of the pension funds to which a certain person (name furnished) has been appointed as curator, (b) is the amount in fees
received by the person for each fund and (c) amount of recovered monies is paid to each specified pension fund."

5.3.13 In his reply, the Minister of Finance is alleged to have stated that:

"The detail of the curator/liquidator fees, remuneration and expenses incurred in respect of all these funds (excluding the Cadac Pension Fund which was only recently placed under provisional curatorship) were provided in response to Parliamentary question number 1061 during October/November 2009 (copy appended)."

5.3.14 It was the Complainant's contention that this answer was misleading as the contingency agreements for the Sable Pension fund were not disclosed in the said response. Further thereto and according to the complainant, on 20 September 2010, Mr Tshidi deposed to an affidavit wherein he stated under oath that there was a contingency agreement with regard to Sable Pension Fund with an informal agreement having been concluded in 2006 and a second agreement concluded in October 2008.

5.3.15 On the same date, the Minister of Finance was posed another written Parliamentary Question under reference number 313 [NW337E] by the Hon. Dr. D T George, MP of the Democratic Alliance:

"Whether the Financial Services Board proposes the appointment of any specific curator when the High Court appoints pension fund curators; if not, (a) why not and (b) what are the criteria used to appoint a specific curator; if so; what are the relevant details?"

5.3.16 In his reply, the Minister of Finance is alleged to have stated that:

"The Financial Services Board (FSB) has informed as follows. (sic)"
Curators are appointed by a Court under the provisions of section 5 of the Financial Institutions (Protection of Funds) Act, No 28 of 2001, on application by the Executive Officer of the FSB (the Registrar). Curatorship orders are initially provisional, and available to all interested parties, as well as the public (such orders are often also published by the media) before they are confirmed as final orders. In terms of the provisional orders interested parties are invited to show cause inter alia why the appointment of the proposed curators should not be confirmed. This is how our judicial process works, and I am merely outlining what normally happens, as indicated by the FSB.

The provisions of the Financial Institutions Act do not specify any requirement for the identification of curators. However, though not obliged to accept or take names of possible curators proposed by any party, the court normally allows the FSB to propose names to consider for the appointment when an application is brought before the High Court. Hence the Registrar conventionally identifies and nominates proposed curators for consideration and appointment by the Court. In making application for the appointment of curators, the Registrar attaches the proposed individuals’ CV’s to the Court papers and the Court has to be satisfied that they are suitable candidates.

The remedy of curatorship is a regulatory tool at the disposal of the Registrar. The appointment of a curator is by the court, and not an outsourcing of a function or service which would require a tender process. This regulatory tool is generally initiated by the Registrar under the circumstances which demand urgent regulatory intervention in the interests of the investors or the public. As such, curatorship applications are generally brought on an urgent basis. The exigencies of any particular case simply do not allow for a ‘tender process’ and may unduly delay urgent regulatory action.

The Honourable Member should note the right of the Financial Services Board to take action against those financial service operators accused of breaking the law and/ or
accused of misusing policy-holders' funds and savings. In performing this duty, the law recognizes that financial service regulators have to act as soon as they become aware of such accusations or allegations.

(a) Not applicable.

The purpose of a curatorship order is to freeze all funds involved, and then to investigate the allegations whilst protecting the funds identified to be at risk. So when the FSB acts to secure a curatorship, they are often not aware of all the facts at that stage, and it would be unreasonable to expect otherwise. Neither can one expect a set of general criteria for taking such actions, as the FSB has to also exercise its judgment when it becomes aware of information on a licensed (or unlicensed and illegal) financial service provider.

To the extent possible, given the often ad hoc nature of such a process, and given the need for urgent intervention in most such instances, the Registrar takes into account the contents of any inspection report or information that informed the decision to apply for the appointment of a curator. This entails an assessment of the skills and expertise required to address the specific problems applying to an institution, the irregularities and contraventions identified during an initial inspection.

(b) In identifying curators for the consideration of a court, the Registrar generally takes the following considerations into account:

- The task that curators need to undertake in each instance given the peculiar facts uncovered during an inspection;
- The ability and experience of a curator in recovering funds, and the need to limit costs in order to maximise the amount of funds recovered;
- The independence of management and control exercised by a curator; and
- **The expertise introduced or capable of introduction into the affected financial institution.**

5.3.17 It was the Complainant's contention that the answers provided by the Minister of Finance, ostensibly on information provided to him by Mr Tshidi, was incorrect as, in the case of the Cadac Pension Fund, Mr Mostert requested to be appointed as the curator, and the application was prepared by himself, together with his team.

5.3.18 In addition, it was alleged that, when the FSB Board was shown the evidence from the Hansard transcripts, the Board chose to ignore this.

5.3.19 In his response to my office dated 21 November 2017, Mr Tshidi explained that;

"9.10 When it became evident that an urgent application for the curatorship of the Cadac Fund had to be launched, it so happened that both the in-house lawyers of the FSB who were acquainted with curatorship applications, were absent on leave. The one lawyer, Mr Wessels, was, however, on his way back to Pretoria. In consultation with Mr Wessels, the FSB arranged with Advocate Van Tonder who had been involved in the Ghavalas curatorships to compile the Cadac facts in the form of a draft curatorship application.

9.11 Mr Wessels was back in office on the Monday and received the draft in the morning. He consulted Mr Tshidi and the inspector referred to (the latter by telephone in Limpopo), settled the draft received and got the final documents ready for signature on the Tuesday (21 December 2017). Adv Van Tonder moved the application after hours and the order was granted.

9.12 At no stage did an FSB official tasked with the application speak to Mr Mostert on the Monday or Tuesday and no information was on those days received from him, nor was he present. However, it was a most logical consequence that Mostert should be nominated curator with the knowledge he had already gained of the Cadac and Sable affairs."
9.13 As far as the complainant refers to the evidence given by Mr Tshidi at his criminal trial concerning the preparation of the Cadac curatorship matter, the matter has not yet been ruled on by the Magistrate. It is, however, significant that the complainant before the Public Protector selectively phrases the questions posed to Mr Tshidi. The questions related to the involvement of Mr Mostert in the preparation of the curatorship application, i.e. the legal drafting.

9.14 Contrary to the questions posed, the complainant’s response (captured under paragraph 5.3.8 of your letter under reply) extends the ambit to ‘Mr Mostert and his team prepared the curatorship application.’ The position of Advocate Van Tonder who was asked to prepare a preliminary draft of the application has been explained in the Cadac curatorship application. Conveniently, the complainant has neglected to provide that answer to your office.”

5.3.20 He stated that what is recorded in the Hansard reports of 4 September 2009 related to the entities placed under curatorship since 2004, the amounts involved and recovered and the amount of the curator’s fees on either a contingency or a fee basis.

5.3.21 According to the EO, the Sable curatorship was not dealt with on a contingency basis as applied to the Datakor funds. The informal arrangement with Mr Boyd in 2006 was never implemented and ultimately replaced by the terms of the Memorandum of Understanding of October 2008.

Mr Tshidi's response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.3.22 Rooth & Wessels, on behalf of Mr Tshidi, submitted a response in January 2019 indicating that my Notice in terms of section 7(9) determined that the 10 August 2006 agreement existed. It was then suggested that I ignored evidence that the agreement was never implemented and was superseded, or amended, in October 2008. Mr Tshidi was, when informing the Minister, of the view that a contingency fee agreement such
as the October 2008 agreement, which applied when the Minister gave the answer to PQ1061, was in accordance with the norms of the attorney's profession.

5.3.23 In *Mostert v Nash* 2018 (5) SA 409 (SCA), the Supreme Court of Appeal had held that it was not unlawful for an attorney to enter into a contingency fee agreement for non-litigious work such as being a curator.

5.3.24 Parliament was never misled as to the amount of remuneration earned. Neither Parliament nor the Minister ever complained to the FSB that they had been misled or given wrong information. In fact, Mr Tshidi deposed to an affidavit in 2010 dealing with the earlier – 2006 – informal agreement which had been superseded by the 2008 Memorandum of Understanding on the curator's remuneration. In response to a further PQ in 2014, this was again traversed.

*The Application of the relevant law*

5.3.25 Section 50(1)(c) of the Public Finance Management Act, 1999 (PFMA) the Accounting Authority of a Public Entity must, on request, disclose to the Executive Authority responsible for that Public Entity or the Legislature to which the Public Entity is accountable, all material facts, including those reasonable discoverable, which may in any way influence the decisions or actions of the Executive Authority or that Legislature.

5.3.26 In addition, section 50(2)(b) of PFMA provides that:

“A member of an accounting authority, […], may not use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.”

5.3.27 Section 3 of the Financial Services Board Act, 1990, outlines that one of the functions of the Board of the FSB is to advice the Minister on matters concerning
financial institutions and financial services, either of its own accord or at the request of the Minister.

**Conclusion**

5.3.28 Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that indeed, the EO misled the Minister of Finance. Ministers rely on advice from the Heads of Administration to provide them with correct information regarding departments or entities that they are responsible for.

5.3.29 Therefore, in providing a Minister with incorrect information, an official exposes the Minister to a risk of inadvertently misleading Parliament.

5.4 **Regarding whether Mr D P Tshidi acted improperly and or irregularly in the performance of his duties as the EO of the FSB and if so; whether such conduct constitutes maladministration, abuse of power and improper conduct:**

**Common Cause facts**

5.4.1 Mr Tshidi was the Executive Officer and Registrar of the FSB and as a Registrar, it was *inter alia*, one of his duties to nominate and recommend suitable candidates for appointment as curators by the courts to administer pension funds that have been placed under curatorship.

**Issues that are in dispute**

5.4.2 The issue for my determination is whether in executing his functions and responsibilities as the Executive Officer and Registrar of the FSB, Mr Tshidi acted in a proper manner.
It was inter alia alleged that the EO attended clandestine meetings with malicious intent

5.4.3 It has been alleged that the EO improperly attended clandestine meetings with malicious intent where privileged information was secretly obtained from an opponent's former attorney in an attempt to intimidate his opponents. The allegations were that on 15 and 16 December 2010, Mr Mostert, together with Adv. Van Tonder (Mr Mostert's Counsel) and Mr Tshidi, attended a meeting with Ms June Marks, the former attorney for the Cadac Pension Fund. The meeting was alleged to have taken place during the criminal trial of Mr Nash who was accused of fraud following the alleged stripping of surpluses from the Sable Industries Pension Fund and the Power Pack Pension Fund. Mr Nash was also the Chairman of the Cadac Pension Fund.

5.4.4 The EO is alleged to have been required to give evidence in the uncompleted criminal matter of Mr Nash and it was alleged that during the said meetings, vast amounts of privileged information was secretly obtained from Ms June Marks. It was further alleged that the EO was a party to various attempts to intimidate his opponents at these meetings.

5.4.5 In his replying affidavit filed in the matter between the Executive Officer of the Financial Services Board and the Cadac Pension Fund and Antony Louis Mostert N.O. in the South Gauteng High Court (case number 50596/2010), signed and commissioned on 5 October 2011, Mr Tshidi reiterated that:

"4.21 In the absence of my own two lawyers, I cannot be faulted for asking Adv van Tonder, who was present, to attend to the preliminary drafting of the application and collating of the supporting documentation. We all knew at the time that one of my lawyers, Mr Wessels, was returning over the weekend that followed and would work on the draft application before it was presented to Court."
4.22 I did not instruct Mr Mostert to draft the application, and do not know whether he was consulted in the drafting of any preliminary draft affidavit. As far as I am concerned Mr Mostert played no part in the drafting of the application, nor in my decision to bring the application.

4.23 On Monday 20 December 2010 Mr Wessels was back in office and in the course of the day worked on the initial draft founding affidavit prepared with the assistance of Adv van Tonder. After consultation with Mr Wessels, and no one else, I finally decided to bring the application for curatorship.

4.24 Eventually, on Monday 20 December 2010 late afternoon, Mr Jean Polson and Adv van Tonder came across to the FSB with the draft founding affidavit then available. Mr Wessels and I sat at a meeting together with these two gentlemen for some hours working through, amending and adding to the draft affidavit from its beginning until the end.

4.25 Early on Tuesday 21 December 2010 a further draft of the founding affidavit was received from Adv van Tonder and settled by Mr Wessels, along with a notice of motion and draft order, all the attachments being delivered during the day. Mr Wessels was satisfied and I was given the final draft founding affidavit to read with the draft order and attachments to the founding affidavit, including the confirmatory affidavit by Mr Ryan Neale, the inspector then already signed by him.

4.26 Everything being to my satisfaction I signed the papers late on Tuesday before a commissioner of oaths whereafter they were collated and photostated. Mr Wessels advised that Mr Mostert’s firm ought not to represent the FSB in launching the application. I accordingly asked Mr Polson to arrange with attorneys Martini Patlansky, who had previously represented the FSB, to do so. The application was moved during the evening of 21 December 2010 by Adv van Tonder.
4.27 Mr Mostert was neither present at the meeting on 20 December 2010 nor consulted by me as to whether a curatorship application should be brought.

4.28 There is simply no substance in the suggestion of impropriety on my part or Mr Mostert’s part, as to how the application came to be prepared and what it contained; or the allegation that Mr Mostert dominated my decision to launch the application. […].”

5.4.6 The evidence however suggests that, on 15 and 16 December 2010, just days before the curatorship application for the Cadac Pension Fund was moved, Mr Mostert, together with Adv. Van Tonder and Mr Tshidi, attended a meeting with Ms June Marks, the former attorney for the Cadac Pension Fund. The discussions of the meeting was transcribed by RealTime Transcriptions on 16 May 2011. On the transcription Mr Mostert is quoted on page 22 thereof as saying that:

“We’ve just been discussing things. What we think is the best here is if she can establish what documents he has got and instead of seeing with the report, (sic) which will take a long time, if somehow they can just bring the documents back here and we will work through them, we’ll finish it tonight. **We will do the application** and if she can just establish what we’ve got so far and not even bother about the report further…” (own emphasis)

5.4.7 In his replying affidavit filed in the matter between the Executive Officer of the Financial Services Board and the Cadac Pension Fund and Antony Louis Mostert N.O. in the South Gauteng High Court (case number 50596/2010), the EO stated that;

“4.10 I have been advised, and as a qualified lawyer believe, that what Ms Marks divulged on 15 and 16 December 2010 was not in the nature of a breach of professional privilege. Nor can anything be taken up in the founding affidavit be categorised as such.
4.11 The ‘legal advice’ allegedly given by Ms Marks to her client, and which was supposedly disclosed to Mostert ‘and his legal team’, is summarized at Record: p 4754, paragraph 5.45. Apart from that not being ‘advice’ protected by professional privilege (as defined in the Inspection Act or at common law), none of this ‘advice’ was per se relied upon in the curatorship application.

4.12 The same applies to the inspection report compiled by Mr Ryan Neale. Cadac fund documentation, such as minutes of trustee meetings, accounts rendered to the Fund, and other documents attached to the main report in support of the inspector’s findings, including those that found their way as attachments to the founding affidavit, do not in my respectful submission, constitute legal advice which enjoys protection as being privileged items.

4.13 This claim of ‘breach of professional privilege’, employed to cast doubt on the integrity of both the inspection and the curatorship application, is devoid of merit and will be addressed further in legal argument.”

5.4.8 Mr Neale’s affidavit, filed in the matter between the Executive Officer of the Financial Services Board and the Cadac Pension Fund and Antony Louis Mostert N.O. in the South Gauteng High Court (case number 50596/2010), stated that:

"7. [...] Mr Tshidi also requested that I meet with him and Ms. Stander at Mr. Mostert’s offices on the morning of 16 December 2010. [...]"

8. On 16 December 2010 I arrived at the offices of Mr. Mostert before Mr. Tshidi. On arrival I proceeded to the board room where I came across a woman unknown to me at the time. On further interaction I realized that the woman present in the board room was Ms. June Marks.

9. On the arrival of Mr. Tshidi I left the room and requested to have a private meeting with Mr. Mostert and Mr. Tshidi in another conference room. I then
indicated to Mr. Mostert and Mr. Tshidi that I was not comfortable being in the presence of Ms. Marks as information that I had gathered suggested that there were irregularities regarding the legal fees paid by the fund in relation to the work of Ms. Marks, and that I wished to schedule a separate formal interview under oath with Ms. Marks. Mr. Tshidi requested that I remain in attendance at the meeting. My attendance at the meeting was of a passive nature and I did not provide any information regarding the inspection to Ms. Marks. Information was provided to Mr. Tshidi when requested from me. This information consisted of confirmation of whether or not I had certain documents in my possession. I cannot recall which specific documents were referred to.

10. At the meeting various issues regarding the fund were discussed. The legal fees paid to Ms. Marks were, however, not mentioned in my presence during the meeting not were any matters regarding legal privilege mentioned in my presence. I left the board room on various occasions and was therefore not privy to all discussions. I did not canvass any additional information regarding the inspection from Ms. Marks or any other person present during the meeting.

11. The only additional information relevant to my inspection that was gathered at the meeting was a confirmation that mortgage bonds that recently been registered over the properties in which the fund had invested. Attached (marked ‘A’) is a copy of the only document provided to me during the meeting. This document was not requested by me but was handed to me by Mr. Polson. The document was not received directly from Ms. Marks by me.”

5.4.9 In the same transcription of Real Time Transcriptions dated 16 May 2011, on page 11 thereof, Ms Marks was quoted as saying “...I'm not going to give you Vivienne's report because that would be very, get them very suspicious.” Later in the same transcript, she is quoted as saying “[l] think I'm going to be hiding out for a while before anyone figures out who provided some of the documents.”
5.4.10 The audio recording of the meetings were made available to me, and the Complainant contended that the recording has been accepted as admissible evidence.

*It was alleged inter alia that the EO abused his power in that he threatened and bullied various financial institutions into withdrawing civil action against Mr Mostert, in which he allegedly threatened to withdraw their operating licences:* -

5.4.11 With regard to allegations that the EO abused his office and his position by threatening to withdraw the FSP (section 14) licences of *Sanlam* and *Alexander Forbes* should they fail to enter into settlement agreements with Mr Mostert, the Complainant alleged that the EO had, to the benefit of Mr Mostert (who was alleged to have earned a contingency fee by virtue thereof), used his office and position to threaten and intimidate large institutions, to wit: *Sanlam* and *Alexander Forbes*, with the possible withdrawal of their Financial Services Provider (FSP) licences (Section 14 Licences), unless these institutions withdrew from litigation against Mr Mostert and the FSB, and pay “settlement payments” to Mr Mostert.

5.4.12 It was alleged that amounts of money in public funds were paid to Mr Mostert allegedly totalling R560 million, and he was alleged to have personally pocketed approximately 25% (R140 million), plus legal fees paid to his law firm. Legal representatives of both *Sanlam* and *Alexander Forbes* were said to have complained to the EO that the letter which was sent by him to their clients constituted a “threat” to use the statutory powers of the FSB against these companies, should they act contrary to what was required by the FSB.

5.4.13 In support of the allegation, the Complainant submitted similar letters, under the signature of the EO in his capacity as the Registrar of Pension Funds, which were written to Messrs. Bruce Campbell, the Group Chief Executive (GCE) of Alexander
Forbes and Dr Johan van Zyl, the Chief Executive Officer (CEO) of Sanlam, dated 25 March 2009.

5.4.14 An extract from the letter(s) reads as follows:

3. On the 16th of February 2009, Mr Peter Ghavalas pleaded guilty to various counts of fraud (and other charges) relating to the manner in which applications for the said section 14 certificates were prepared and presented to the Registrar for the transfer of business to, or amalgamation of the Funds with, [...].

4. Mr Ghavalas’ plea of guilty, [...] have left me as the Registrar with unquestionable certainty that the section 14 certificates referred to were applied for and obtained by fraudulent misrepresentations to the office of the Registrar of Pension Funds. [...] 

5. The Registrar of Pension Funds would never have granted approval to the schemes and issued the various section 14 certificates had the true facts been known or disclosed to him.

[...]

1. Given the very strict duties that you as a fund administrator owe to each of the Funds, and to the Registrar, it is not inappropriate for me to advise in circumstances as serious as these that the degree of your co-operation on this issue will be closely scrutinized by this Office as part of an over-all assessment of appropriate administrative action to be considered in due course in relation to the participation of regulated entities, and of officials representing them, in the events now uncovered."

5.4.15 On 16 April 2009, Sanlam responded as follows: -
“8. Finally, I must mention that I am somewhat surprised by paragraph 10 of your letter. It is difficult not to interpret it as a veiled threat to use your statutory powers against Sanlam if we do not act as requested to. Sanlam as a responsible financial institution desires to have a good and co-operative relationship with our regulator. We would find it very unfortunate if our relationship with the Financial Services Board is in any way jeopardised by the fact that Sanlam and your office have different views on these matters.” (own emphasis)

5.4.16 The EO then again writes to Sanlam on 26 April 2009, and stated that:

“I refer to your letter dated 16 April 2009 and must express my extreme disappointment at Sanlam’s response. Instead of accepting responsibility for the culpable conduct of senior employees and officials of Sanlam and certain of its subsidiaries and their participation in the massive fraud perpetrated with the assistance of Mr. Ghavalas, Sanlam has resorted to legal technicalities which have the effect of frustrating the recovery of monies which should have been paid to pensioners.

[...]”

7 [...] I value a constructive relationship with pension fund administrators. However, such a relationship is based upon trust and good faith. Your failure to assist in unravelling the consequences of the frauds raises concerns about Sanlam’s sincerity. I sincerely trust that my concerns can be addressed and allayed.”

5.4.17 The EO responded to this allegation on 21 November 2017, and indicated that:

“11.1 The duty to make recoveries on behalf of the pension funds which had suffered loss, lies with the curator.”
11.2 The curator does so without the need to consult with the FSB but he may of course do so as he works under the control of the Registrar.

11.3 It is rule rather than the exception, that acts of dishonesty committed by authorised entities such as insurers or financial service providers, which come to light during a curatorship, will be sanctioned by the regulator. The curator, in turn, has no say in this apart from reporting thereon to the Court and to the FSB.

11.4 Mostert had independently from the FSB instituted action against Sanlam, Alexander Forbes, the Lifecare Pension Fund and Company, and many other institutions or individuals. Assessing the quantum of claims and pursuing or settling claims with the defendants, was the curator's domain.

11.5 The FSB must ensure that market players in the financial service sector are fit and proper, as also their directors and key individuals, and will take regulatory action where necessary.

11.6 In certain instances derived from information coming from the curator's action, and other independent sources, the regulator will in its discretion pursue regulatory action against institutions. Usually the regulator confronts the market player with facts in his possession, asks for an explanation and may eventually ask the entity to show cause why regulatory action against it should not follow.

11.7 Due process needs to be followed by the regulator and if the licensed entity disagrees with the regulator it will oppose regulatory action or approach the Court to review the Registrar's decision. The entity also has an opportunity to file an appeal against the Registrar's decision to the FSB Appeal Board, presided over by former judges of the Constitutional Court and the Supreme Court of Appeal.
That the EO inter alia facilitated breaches of the Inspection of Financial Institutions Act and allowed inspection reports to be drafted by non FSB personnel, Adv L van Tonder

5.4.18 With regard to allegations that the EO improperly facilitated breaches of the Inspection of Financial Institutions Act, 80 of 1998, the complainant stated that the EO falsified Inspection Reports, and in addition, that he allowed Inspection Reports to be completed by non-FSB personnel, specifically Adv. Lucas van Tonder. It was further alleged that the EO allowed the State Prosecutor, Adv. D'Oliveira, to sit alongside the FSB Inspector, Mr Cor Potgieter, during inspections. This constituted, so it was alleged, an active breach of the Inspection of Financial Institutions Act.

5.4.19 The EO, Mr Boyd and Mr Seedat abused the process of inspections, falsified Inspection Reports and ensured pre-determined outcomes of inspections, particularly by former and current FSB employees to wit: Cor Potgieter, Karen van Heerden and Ryan Neale.

5.4.20 In this regard, the Complainant again referred me to the transcription of the meeting which took place between Messrs. Mostert; Van Tonder; Tshidi and Ms June Marks on 15 December 2010. It appears from the record thereof that the inspection report sought to be relied on to make the application to place the Cadac Pension Fund under curatorship, was not yet finalised. The relevant portions of the record read as follows:

"MR VAN TONDER: There's very serious implications here for Boyd So, and the fact that she wants to rush back there and complete the report, that's not what they should be doing, they should bring everything they have right here, and they should be doing the application. They shouldn't go and finish their report.

[...]

VAN TONDER: They should bring everything they have, as it is and we should work with the application. We don't need the report finished for a
successful application. What is it about? They should bring everything they have.

MOSTERT: They were going to establish how far he's got.

[...]

MOSTERT: He's apparently partially completed the report. So must go and see what they've got. [...]."

5.4.21 In a replying affidavit, filed in the matter between the Executive Officer of the Financial Services Board and the Cadac Pension Fund and Antony Louis Mostert N.O. in the South Gauteng High Court (case number 50596/2010), the EO stated in paragraph 4.8 that --

"By the time Ms Marks made her revelations to Mr Mostert in the presence of the FSB on 15 December 2010, all but the actual text of the inspection report had been prepared in the readiness for a curatorship application." (own emphasis)

5.4.22 In an affidavit deposed to by Mr Neale, the FSB inspector, filed in the same matter before the South Gauteng High Court, Mr Neale stated: -

"2. I was appointed to conduct an inspection of the affairs of the Cadac Pension Fund on 19 October 2010. The scope of my investigation was limited to matters regarding the legal fees paid by the fund, the appointment of the legal representatives of the fund, the investments of the fund and the financial soundness of the fund.

5. On 15 December 2010 notices were issued to the trustees of the fund, In terms (sic) of the Inspection of Financial Institutions Act, for them to be interviewed on 18 January 2011 for purposes of the inspection. (own emphasis)
6. On the afternoon of 15 December 2010 I received a phone call from Ms. Stander of our legal department who indicated that she was with Mr. Tshidi at the offices of Mr. Mostert, and that Mr. Tshidi requested that I provided him with a progress report on the inspection. Ms. Stander further indicated that she and Mr. Tshidi would be at the FSB offices later in the afternoon and that she would assist me in finalizing the progress report. I indicated to Ms. Stander that I had already made progress in drafting the inspection report and that the finalization of a progress report would not take long. Ms. Stander’s assistance was limited to formatting the report and compiling the annexures. The content of the report was not altered in any way by Ms. Stander.

7. On the evening of 15 December 2010 the progress report was finalized and Mr. Tshidi requested that I e-mail a copy of the report to Mr. Mostert, Mr. Polson and Adv. Van Tonder which I did. Mr. Tshidi also requested that I meet with him and Ms. Stander at Mr. Mostert’s offices on the morning of 16 December 2010. (own emphasis)

...  

12. Ms. Marks was interviewed by me for purposes of the inspection on 24 January 2011. Ms. Marks’ legal representative, Advocate Louw, asked whether the meeting of 24 January 2011 was related to the meeting held on 16 December 2010. He was informed that the interview was being held for purposes of completing the inspection report and that at the time of the meeting of 16 December 2010 only an interim report had been completed. […] (own emphasis)

5.4.23 In correspondence dated 30 July 2013 from Mr Simon Nash to the FSB Board, Mr Nash alleged that: -

"21. On 30 July 2012 Ryan Neale, an employee of the FSB and duly appointed inspector in terms of the Inspections Act made an affidavit in which he stated the following:
‘I have been requested by Advocate van Tonder to depose to this affidavit in response to an allegation that he (Adv Van Tonder) compiled the inspection report into the affairs of the Cadac Pension Fund. Adv Van Tonder had no part in drafting neither the progress inspection report not the final inspection report. I have eventually finalised the inspection and provided a final inspection report to the Registrar on 6 May 2011. I state categorically that both the progress report of the affairs of the Fund as at 15 December 2010 and the final report dated 6 May 2011 were drafted by me and no one else.

I proceeded to draft my inspection report as the information was gathered and analysed. On the evening of 15 December 2010 I finalized a progress inspection report, and upon request of Mr Tshidi, the Registrar of Pension Funds, I e-mailed a copy of the progress inspection to amongst others Advocate Lucas Van Tonder. Adv Van Tonder acted for the Registrar of Pension Funds in an application to place the Fund under curatorship.’

Neil’s (sic) affidavit is false in a number of respects. Firstly, Van Tonder himself is on record as stating that he did assist in the drafting of the report but was not responsible for the full report. Secondly Van Tonder was not on brief at the time of drafting from any attorney acting on behalf of the FSB, in particular not from Marthini Patlansky Attorneys, who were the FSB’s attorneys in the application for the appointment of a curator for the Cadac Pension Fund. The affidavit from Neale emanates from accusations that Van Tonder assisted with and drafted the CPF inspection report during, pursuant or subsequent to the irregular consultations on 15 and 16 December 2010.

In, inter alia, paragraphs 12.3, 13, 19, 25.2, 25.4 and 25.5 in his Answer to a Complaint by me of unprofessional conduct to the Johannesburg Bar Council (yet to be adjudicated upon), Van Tonder makes it clear that during these consultations he was on brief from Mostert. When Neale, on the evening of 15
December 2010, e-mailed a copy of the progress inspection report to Van Tonder, Van Tonder was on brief from Mostert, who did not act for the Registrar of Pension Funds in the Cadac Curatorship Application.

This is all founded, inter alia, upon the relevant inspector, viz, Potgieter, having been ‘assigned’ (constituting a crime in terms of the Act) to the National Prosecuting Authority ('the NPA') in 2001, years before the finalisation of any of his own inspection reports and contrary to and in flagrant disregard of the provisions of the Inspections Act. Potgieter himself was the FSB functionary who actually signed off and approved the section 14 applications giving authority for the transactions to proceed. Yet 10 years after his approvals, the FSB saw fit to appoint him as a so-called ‘independent’ inspector to investigate the very transactions he had personally approved.”

5.4.24 In addition, the Complainant through Adv De Bruyn, submitted that Mr Tshidi disseminated Inspection Report compiled by Cor Potgieter to the NPA prior to the reports being completed, signed off and considered by the Registrar. According to him, by 8 February 2005 when Mr Tshidi wrote to the then Director of Public Prosecutions, only the Mitchell Cotts Inspection Report dated 17 November 2000 had been referred to the Registrar. In addition, he suggested that, in 2011, during a criminal trial, Mr Tshidi’s evidence suggested that Registrar had considered and signed off the Inspection Reports. No Minutes however could be produced that this indeed took place.

5.4.25 Adv De Bruyn further contended that, during March 2005, Mr Jan D’Oliveira was a Consultant for the FSB in respect of the Ghavalas matters. He was involved in the inspections, and during December 2005, he was appointed as the lead prosecutor in the criminal matter.

*That the FSB inter alia failed to accept and investigate disclosures made by whistle-blowers as envisaged by the Protected Disclosures Act, 2000, as the*
Board allegedly failed to take action to avoid the loss of over R100 million in SACCAWU’s pensioners’ money

5.4.26 In connection with allegations that the EO and the FSB Board improperly failed to act on information of a whistle-blower in relation to the alleged loss of over R100m of SACTWU pensioners’ money, the complainant stated that the FSB failed to act and/or institute action in the matter of Trilinear where, despite warnings from a whistle-blower, the FSB failed to act to prevent the loss of over R100million of SACTWU’s pensioners’ money. In this regard, the Complainant referred my investigation team to inter alia, the following news article which reported about the allegation:

5.4.27 On 11 June 2011, the website Security.co.za reported under the heading “Financial board knew of union fund plundering” that: -

“THE FINANCIAL Services Board (FSB) was warned three years ago that Cosatu workers’ provident fund money was being looted, but failed to act in time to stop it. And more than a year later, when FSB inspectors reported on the financial mess, the board apparently failed to refer the matter for prosecution. Instead, the fund manager continued operating, while millions more were siphoned out of the funds.

... Now an FSB report (sic) shows that the board received an anonymous tip-off in June 2008 about problems in Trilinear’s management of the Sactwu funds and possible pay-offs to Trilinear officials. The report shows that the whistleblower warned the FSB that Trilinear had invested the money in unlisted entities like iLima, Canyon Springs and the SA Wine Industry Trust (Sawit).

Seven months later, in January 2009, the FSB finally instructed its inspectors to look into it.”
5.4.28 I also took cognisance of the following news extracts related to the same issue:

5.4.28.1 The *Business Day inter alia* reported on 11 June 2013 under the heading "*Financial Services Board no help when pensions lost*" that:

"Let me turn to the Trilinear debacle, which resulted in the surprise resignation of deputy economic development minister Enoch Godongwana. Trilinear managed five provident funds for the Southern African Clothing and Textile Workers Union. ...

That was the tip of this iceberg. It seems that more than R400m of pension fund money belonging to 20,000 union members disappeared. Some of the money seems to have been stolen, some misappropriated, some invested in suspicious projects. Some just evaporated.

The FSB suspended Trilinear from November 2007 to May 2008 for failing to submit financial statements. During this period, Trilinear continued investing clients' money in disregard of the suspension.

*The FSB did nothing.*

*In June 2008, a month after the suspension on Trilinear was lifted, a whistle-blower told the FSB of pay-offs to Trilinear officials, and the investment of pension monies in unlisted entities that were unable to make repayments. The FSB only responded seven months later, in January 2009."* (own emphasis)

5.4.29 On 28 March 2012 the Business Report, under the heading "*SA system can only gain from FSB's Trilinear decisions*" it was further reported *inter alia* that:

"Even before this, the FSB had itself suspended Trilinear as a financial services provider from November 2007 to May 2008 for failing to submit financial
statements. During its suspension Trilinear nonetheless appeared to carry on investing clients’ money in blatant disregard of the suspension.

In June 2008, one month after the suspension had been lifted, the FSB received a whistle-blower’s tip-off concerning Trilinear’s management of Southern African Clothing and Textile Workers’ Union (Sactwu) funds and possible pay-offs to Trilinear officials.

The whistle-blower indicated that ridiculous fees had been paid to a company called Trilinear Specialised Finance.

The FSB was warned that Trilinear had invested the money via loans in unlisted entities. Further, these entities were unable to repay the loans because of their poor financial position.

Having already given Trilinear a suspension, it might have been expected that the FSB would treat the whistle-blower’s assertions with concern. Yet it took the FSB a full seven months, until January 2009, before it appointed inspectors to look into the matter.” (own emphasis)

5.4.30 In response to this allegation, the EO indicated in his correspondence to me of 21 November 2017 that the FSB was, at that stage, a defendant in an action in which the Pep Limited Provident Fund claimed damages of approximately R70million based on an alleged failure of duties by the FSB and the Registrar. The matter had been set down for hearing during April 2018 and was thus sub judice.

That the EO inter alia failed to ensure reporting in accordance with Court Orders

5.4.31 With regard to allegations that the EO failed to ensure that Mr Mostert reported about Mr Nash criminal case as ordered by the Court, the Complainant stated that the EO
failed to manage and monitor Mr Mostert and had also failed to ensure the submission of regular curator reports as stipulated in the Court Orders in terms of which Mr Mostert was appointed curator.

5.4.32 It was further alleged that the EO lied about these reports in the media, as well as in Court. The Complainant brought this to the attention of the FSB Board, who had failed to take any action.

5.4.33 A letter dated 10 May 2013 from the members of the Cadac Pension Fund, to the EO stated that:

"The Cadac curatorship court order also requires the interim curator to file proper reports every 6 months. He should have filed 5 detailed reports to the FSB. Please provide us with these as it is the right of the members to review them. We suspect you have not received reports as required by the court order."

5.4.34 On 6 June 2013, the EO responded to the above comment, indicating that:

"A second leg of the inspection of the affairs of the CPF running parallel with the other inspection was also carried out. The two inspection reports contain findings of malpractices, irregularities and even dishonesty in the administration of the CPF precursorship which not only vindicated the curatorship of the Fund but should be of real concern to you as members. As members of the CPF, you are, in terms of the provisions of section 9 of the Inspection of Financial Institutions Act, 1998, entitled to receive copies of the two inspection reports from the Registrar. The reports will be made available to any member who requests them."

That the EO failed to respond to concerns raised and written requests for assistance made by Cadac Pension Fund members
5.4.35 With regard to allegations that the EO failed to protect the rights of the Cadac Pension Fund members, the Complainant alleged that the EO purposefully failed to respond meaningfully to written requests from all the members of the Cadac Pension Fund, that their rights and wishes for their own protection be independently investigated and addressed.

5.4.36 Instead of protecting members and their investments, both Messrs. Tshidi and Sithole (the Chairperson of the Board) had, for a period of over seven (7) years, allowed Mr Mostert, to blatantly ignore their most basic rights and destroy the finances of the fund.

5.4.37 The evidence submitted by the Complainant in support of this allegation, suggests that, on 11 March 2013, the members of the Cadac Pension Fund instructed Werksmans Attorneys to write to the interim curator to obtain the following:

"A proper set of accounts of the Fund from the date December 2010 to the current date. Since the curatorship we have not been allowed proper access to the Administrators and have been left entirely in the dark regarding the welfare of the Fund. We request that the latest audited financial statements also be sent to us by the Administrators.

That we receive detailed information from him on the investments of the assets of the fund.

The Interim Curator to provide us with a detailed statement of all the costs that have been incurred by him in legal fees from the date of his appointment. We request that these be broken down into all the various categories of litigation that he has commenced since his appointment.

The interim Curator is to provide a statement to us on the current state of affairs of the litigation with regards to the original application for curatorship"
5.4.38 On 10 May 2013, Mostert Attorneys addressed correspondence to members of the Cadac pension Fund, explaining that, because there were no rule amendments which changed the status of the Fund and its membership since 2003, the Cadac Pension Fund could not have taken any new members and was not permitted to receive any contributions. It then indicated that the matter is under investigation and that they will be kept informed of further developments.

5.4.39 On the same date, namely 10 May 2013, Cadac Pension Fund members wrote to Mr Tshidi, seemingly in response to the letter received from Mostert Attorneys, the relevant portion of which reads as follows:

"... We attach the letter sent to Mr Mostert specifically asking him to provide the members details of:-

- The legal fees incurred by the Fund since his curatorship and details of who was paid and what the matters were for
- The progress on the sequestration of Marks
- The progress on litigation regarding two issues cited by Mr Tshidi as the cause for the curatorship viz the legal fees and the property transaction
- The curatorship fees paid monthly to Mr Mostert
- All up-to-date benefit statements for each member of the Fund
- The financial statements of the Fund
- Where the Fund assets are invested

The response from Mr Mostert is extraordinary. It ignores all of our requests for information and goes on to effectively threaten dismissal of various members from being members of the Fund. Not only this, but Mr Mostert has banned all contact between members and the Fund administrators.

[...]
Therefore, we strongly request that the FSB send 3 people to Cadac premises to come and hear from the individual members, about their serious concerns regarding their own interests and welfare. [...]”

5.4.40 On 6 June 2013, Mr Tshidi responded in the following terms: -

“14. You are no doubt aware that within days of the curatorship order, the CPF became embroiled in litigation the reason for which, and the extent of which, cannot be placed at the door of Mr Mostert.

14.1 He was compelled to seek an order to compel persons who had refused to furnish him with information required for his investigation, to do so.

14.2 Persons referred to in the papers as ‘independent trustees’ of the CPF and who purport to represent you as members of the Fund, launched a counter-application to oust Mr Mostert as curator.

14.3 A similar application by the ‘independent trustees’ has been launched to join Mr Mostert in his personal capacity to the proceedings so that he could be held personally responsible for all the legal costs.

[...]

16. All these matters, consolidated into one, are on the roll for hearing on 12 August 2013. Most of the issues raised by you are directly or indirectly relevant to what will be adjudicated by the Court, and are sub judicé.

[...]

18. Mr Mostert has furnished me with a copy of a comprehensive report dated 24 October 2012, to which was attached an actuarial report dated 23 October 2012
by Mr Vivian Cohen. The latter report explains why benefit statements should not be issued in circumstances where it is uncertain on what basis the Fund is being administered, i.e. a defined benefit or a defined contribution fund. This problem also has its origin in the past.

19. I find it extremely strange that in your letter under reply no mention has been made of these reports. For the record I have attached copies of those reports hereto and await your explanation as to why reference to them was not made in your letter. The report by the provincial curator contains details of the litigation in which the CPF was engaged at the time, including the proceedings against Miss Marks.

[...] 

20. Finally, a few answers to specific questions or allegations raised by you:

(a) I have no evidence of Mr Mostert having acted against the interests of the members.

(b) Mr Mostert’s reporting on the curatorship has been more than adequate.

(c) Miss June Marks is not employed by Mr Mostert.

(d) Draft financial statements for CPF have been lodged by Mr Mostert with the Registrar’s office. The Registrar’s office realises that final statements cannot be drafted until the uncertainties surrounding the Fund have been resolved.

(e) There has been an invitation in Mr Mostert’s letter of 23 April 2013 for members to communicate directly with him should they have any inquiries or difficulties.”

5.4.41 On 5 July 2013, members of the Cadac Pension Fund wrote to the Board of the FSB, highlighting: -
"For our protection we have asked our lawyers to write to Mr Mostert. This asks him why we do not get benefit statements, how he pays out members who leave the fund, where the fund money is invested, the financial state of the fund, the legal fees he has paid to Mostert Attorneys, his curatorship fees, why we are prevented from access to the fund administrators, why her has not sequestrated Mrs Marks etc. He refused our requests for information. We have asked Mr Tshidi, but he also ignored our requests, and then only after nearly 4 weeks has sent a letter obviously written to him by Mr Mostert.

We appeal to you as individual members of the Board of the FSB to take action to protect our personal wellbeing and to take the steps necessary to replace Mr Mostert with an independent curator."

5.4.42 On 9 July 2013, Mr Tshidi responded to the members of the Cadac Pension Fund, reiterating that he responded comprehensively in his letter dated 6 June 2013.

5.4.43 In his response to my enquiries relating to this issue, Mr Tshidi indicated on 21 November 2017 that: -

"14.1 The allegation is untrue.

14.2 The FSB is in possession of a pack of correspondence included in the bundle of documents recording letters received from the Cadac Pension Fund members and quick responses to such letters.

14.3 [...] The curator also addressed communications to the members [...]"

5.4.44 The evidence submitted by Mr Tshidi indicated that, as the Registrar he wrote to the Cadac Pension Fund members four times, namely 06 June 2013; 09 July 2013; 21
August 2013 and 21 August 2014. Mr Mostert also wrote to them four times, namely 24 October 2012; 10 May 2013; 11 July 2013 and 14 May 2015.

*That the EO inter alia improperly nominated a curator who was found to be a delinquent Director by the High Court*

5.4.45 In connection with regard to allegations that the FSB improperly appointed a curator who was found to be a delinquent director by the High Court, the Complainant stated that Mr Dines Gihwala, was recommended for appointment by the FSB, but was later found to be a delinquent Director by the High Court. The Complainant contended that this Court judgment necessitated his removal from various curatorships to which he had been appointed, but the FSB failed to take any action to remove Gihwala following the judgment. No-one at the FSB was censured for this according to the Complainant.

5.4.46 In this regard, the complainant made reference to the judgment delivered by Fourie J in *Grancy Property Limited and Another v Gihwala and Others; In re: Grancy Property Limited and Another v Gihwala and Others* (1961/10; 12193/11) [2014] ZAWCHA 97 (26 June 2014) where the court declared Mr Dines Gihwala a delinquent director as contemplated in section 162(5)(c) of the Companies Act, 2008.

5.4.47 Mr Dines Gihwala was appointed as the co-curator of infamous Fidentia in 2007, when its former Chief Executive Officer, J Arthur Brown, was accused of misappropriating billions of funds administered by the firm, including funds belonging to wives and orphans of mine workers.

5.4.48 In his response to the allegations, Mr Tshidi explained as follows;

"15.2 This statement concerning the aberration of the former curator of Fidentia, Mr Dines Ghiwala, is correct."
On being found not competent to hold office as a director of companies in 2014, Mr Gihwala, immediately resigned his position of co-curator of the Fidentia Group which in its high days operated mainly in the Cape.

15.3 The nomination of Mr Gihwala as a suitable appointee as curator, was made by a former Executive Officer of the FSB, Mr Rob Barrow, some seven years earlier in 2007.

15.4 Mr Gihwala was at the time known to the FSB, having represented certain parties as lawyer and for some or other purpose visiting the FSB. Mr Gihwala was then the Senior Partner of a large firm of attorneys Cliffe Dekker Hofmeyr based at the firm’s Cape Town office. He was not a young man, had a good reputation and in every respect regarded as fit and proper for appointment as curator. His co-curator was an experienced accountant.

15.5 After a few years into the curatorship (which commenced on 1 February 2007) the FSB became aware of a case in the Cape High Court in which adverse remarks had been made concerning the integrity of Mr Gihwala in a matter completely unrelated to the Fidentia curatorship.

15.6 The Registrar (then Mr Tshidi) confronted Mr Gihwala and asked his explanation on what had been said in the Cape High Court case. The Registrar saw fit to refer all the information received to Senior Counsel at the Cape Bar whose advice was that there were not sufficient facts to ask Mr Ghiwala to resign office, nor to approach the Court for the cancellation of his appointment as curator.

15.7 The matter resolved itself when the Judgment referred to [...] dated 3 November 2011 became known, upon which Mr Gihwala summarily resigned of his own accord. The Registrar immediately moved for the appointment of another curator in his stead.
15.8 Nothing has been found to have been committed irregularly by Mr Ghiwala while serving as co-curator of the Fidentia Companies."

That the FSB failed to recover and / or take any action against the former Chief Financial Officer (CFO), Mr Dawood Seedat, in respect of alleged misappropriation and unconscionable use of public funds

5.4.49 In connection with whether the FSB improperly failed to take action against its former Chief Financial Officer (CFO) who was allegedly involved in corrupt activities, the complainant alleged that the former CFO of the FSB, Mr Dawood Seedat, was caught on camera taking millions of Rand from a businessman. The insert was alleged to have been broadcasted on Investigative Journalism program Carte Blanche.

5.4.50 It was further alleged that no charges were laid against Mr Seedat, and that he was merely allowed to resign from the FSB. According to the complainant, Mr Seedat's conduct brought the FSB into disrepute and should have been investigated by the Board of the FSB.

5.4.51 In his response to the allegation dated 21 November 2017, Mr Tshidi stated that: -

"16.2 The individual was first appointed to the FSB's Inspectorate where he had made good progress and soon became Head of Inspectorate.

16.3 He displayed a pleasant personality and was well qualified as a CA. He served the FSB with great excellence, dedication and professionalism. With effect from 1 March 2009, still at a young age, he was deservedly promoted to the position of the Chief Financial Officer which he filled with distinction.

16.4 On 3 June 2014 he wrote to the Executive Officer that serious allegations of corruption had been levelled at him, which he categorically denied and
undertook to cooperate fully in any investigation which the FSB might be undertaking.

16.5 'In the interest of preserving the integrity of the FSB' (as he put it) he tendered his resignation with immediate effect. On the same day the Executive Officer accepted his resignation.

16.6 On 9 October 2014 the Executive Officer wrote to the former CFO's attorney that in-depth investigations carried out by the FSB auditors revealed no irregularities in respect of the former CFO's work at the FSB and that an appropriate press release had been issued."

Mr. Tshidi’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994

5.4.52 In his response to my Notice in terms of section 7(9) of the Public Protector Act, 1994, Mr Tshidi’s legal team indicated that they were in possession of an e-mail communication from a certain Mr Paul O’Sullivan to Ms June Marks, seeking the changing of previous evidence under oath and in which she confirmed the genuineness of the disputed transcription which was provided to my office by the Complainant.

5.4.53 Mr Tshidi indicated that the general basis for the application which followed the 15 and 16 December 2010 meetings, was that a vast amount was stolen from the Cadac Fund and used to pay for Mr. Nash’s criminal defence. He further denied that a single piece of privileged information was received at the meetings or at all. Mr Tshidi relied on the judgment given by Fisher J in Nash & Another v Director of Public Prosecutions & Others (22324/17) [2019] ZAGPJHC 29 (04 February 2019) to reiterate this point. Mr Mostert, in his supplementary response to my office dated 06 March 2019, suggested principally the same as what had been alluded to by Mr Tshidi.

5.4.54 Advocate Van Tonder was alleged to have acted on Mr Tshidi’s instructions to attend to the preliminary draft of the application which was settled by Mr Tshidi and the FSB’s
internal legal advisers. Advocate Van Tonder, representing the FSB, thereafter moved the order. Advocate Van Tonder is an independent advocate and now Senior Counsel at the Johannesburg Society of Advocates and there was no conflict of interest which would have been a professional bar to Advocate Van Tonder accepting the brief even where he had in the past acted on instruction of Mr Mostert in some of the Ghavala's funds.

5.4.55 With regard to the threats to withdraw licenses, Mr Tshidi indicated that the letter to Sanlam dated 25 March 2009, did not contain any improper demand from the Registrar.

5.4.56 In respect of the allegation relating to the falsification of inspection reports, the inspector, Mr Ryan Neale, had stated under oath that he alone was the author of the report. Cor Potgieter and Karen van Heerden had finalised their reports prior to the meeting of 15 December 2010. These reports, so it was suggested, was finalised many years prior to this meeting and as a result thereof applications were successfully made to place the Ghavala Funds under curatorship.

5.4.57 Mr Tshidi acknowledged that Mr Neale's report had not been finalised when the Cadac curatorship application was brought. He contended that the extracts of the transcript quoted, contains part of a conversation when none of the FSB personnel was present.

5.4.58 With regard to the allegations concerning SACTWU, Mr Tshidi was of the opinion that none of the media reports implicate him personally, and that media reports do not constitute evidence. In addition, he is currently involved in litigation regarding the allegations, which matter had been set down for 7 October 2019.

5.4.59 Mr Tshidi denied that he failed to ensure reporting or failed to protect members and their investments. In addition, he denied that he allowed Advocate Van Tonder to fiddle with FSB matters.

5.4.60 Mr Tshidi indicated that he did not nominate Mr Ghiwala, but he was nominated by Mr Barrow, the then EO of the FSB. He further indicated that the nomination in 2007 of a
senior attorney from an eminent law firm with no indication of any previous conduct which rendered him unfit, can never be said to be irregular.

**Mr. Mostert’s response to my Notice in terms of section 7(9) of the Public Protector Act, 1994**

5.4.61 In his letter to me dated 15 January 2019, Mr Mostert indicated that:

"Another facet which has featured prominently [...] has been what has been termed the ‘clandestine’ transcript of recordings allegedly made by June Marks, [...] the former attorney representing Nash-related pension funds. This document, [...] has been discredited as to its accuracy by the very instigator thereof Marks, and has been proved beyond reasonable doubt to have been ‘doctored’ upon the instruction and instance of Nash’s wife, Forno-Nash. [...]”

5.4.62 In Mr Mostert’s supplementary response to my office dated 06 March 2019, he attached extracts of email correspondence between Mr Simon Nash, his wife, Ms Forno-Nash and Ms June Marks. In this regard, it appears that on 16 May 2011, Mr Nash wrote to Ms June Marks and indicated that:

"[...] June, what we need to do is to EDIT THE TAPES------I cannot send them to anyone with all the personal allegations on them [...]”

5.4.63 In a later email on the same date, Mr Nash indicated to Ms Marks:

"[...] However, to submit the tapes (to anyone) they need to be (sic) cleaned up. [...]”

5.4.64 On 10 July 2011, Ms Elena Forno-Nash wrote to Ms June Marks, indicating:

"Please gather sections from the transcripts of the 15th and 16th which show Tshidi and Mostert etc. discussing the proposed curatorship of the fund. Cut and paste these into one document showing only these relevant sections.”
5.4.65 He further indicated that, with regard to the Sable Industries Pension Fund, and all of the other funds which formed part of the 'Ghavalas scheme,' the court held that as a pre-requisite to making recoveries, the section 14 certificates in terms of the Pension Funds Act which had been fraudulently obtained, had to be set aside. The FSB was successful in setting aside all of the section 14 certificates in respect of the other 'Ghavalas funds,' except for the Sable certificate, which had been opposed, and was currently on appeal.

5.4.66 In his supplementary response to my Notice in terms of section 7(9), and as a general response to my Notice, Mr Mostert reiterated his contention that the complaint which was received was not bona fide, but was part of a "smear campaign" by Mr Simon Nash.

5.4.67 According to him, in relation to the Sable Fund, the FSB brought an application to set aside the section 14 certificate issued by the Registrar of Pension Funds, which had been issued based on fraudulent representations made for the issue of same. Similar applications were brought by the FSB to set aside the section 14 certificates issued by the Registrar in respect of each of the pension funds in which the Ghavalas Scheme was used to unlawfully remove surpluses. These applications were all successful and finalised, save for the application brought to set aside the section 14 certificate issued for the Sable Fund. The section 14 license was later set aside by the court in May 2017.

The Application of the relevant law

5.4.68 The role and functions of the Executive Officer and Registrar of the FSB are regulated in the Financial Services Board Act 97 of 1990 as amended, as well as the Financial Services Laws General Amendment Act 45 of 2013. The FSB is a financial regulatory agency responsible for the non-banking financial services industry in the Republic of South Africa.
5.4.69 It is an independent body that supervises and regulates the financial services industry in the public interest. It is responsible for amongst others, the retirement funds. In particular ensuring that the regulated entities comply with the relevant legislation as well as capital adequacy requirements to promote financial soundness of these entities and thereby protecting the investing community.

5.4.70 It is the responsibility of the Board to appoint a fit and proper person in the position of an Executive Officer and Registrar of the Board who would be responsible for the day to day running of the regulator and anyone who is aggrieved by the decision of the Executive Officer should approach the Appeals Board which is an independent tribunal whose members are duly appointed by the Minister of Finance.

5.4.71 Section 50(2)(a) of the Public Finance Management Act, 1999 (PFMA), provides that a member of an Accounting Authority may not act in a way that is inconsistent with the responsibilities assigned to an Accounting Authority in terms of the Act.

5.4.72 The King IV Code on Corporate Governance recommends that members of a governing body must act in good faith and in the best interests of the organisation. In addition, it recommends that members of a governing body should act ethically beyond mere legal compliance.

5.4.73 In AAA Investments (Pty) Ltd v Micro Finance Regulatory Council the Constitutional Court per Langa CJ noted:

"[...] It is as well to note that accountability is a central value of our Constitution. This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable. [...]"

8 2007 (1) SA 343 (CC) at [89].
Conclusion

5.4.74 Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that, the EO and Registrar of the FSB, Mr Tshidi acted irregularly in the performance of his duties.

6. FINDINGS

After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the FSB and its EO, I now make the following findings: -

6.1 Regarding whether there were improprieties and / or irregularities in the nomination of curators by the Executive Officer of the FSB, to be appointed by the court, to take control of, and to manage the whole or any part of the business of the institution on such conditions and for such period as the court deems fit, and if so, whether such conduct constitute maladministration and improper conduct:

(aa) The allegation that there were improprieties and / or irregularities in the nomination of curators by the EO of the FSB, to be appointed by the court, to take control of, and to manage any part of the business of the institution, on such conditions and for such period as the court deems fit, is substantiated;

(bb) It is accepted that it is the exclusive prerogative of the courts to appoint curators to administer pension funds placed under curatorship. The former EO of the FSB, however, nominates and recommends a suitable candidate for appointment as such, taking into account a person's experience in the skills necessary to act as a curator;

(cc) The explanation which was provided by the former EO was that Mr Mostert's appointment in all the pension funds as indicated, was logical because of the
commonality of the loss suffered by the various funds and his knowledge thereof;

(dd) The courts had already indicated that it would not easily deviate from a nomination made by the Registrar;

(ee) The former EO did not provide any proof to suggest that he ever considered the suitability of another candidate, with due regard to the requirements of skills transfer and Black Economic Empowerment;

(ff) The conduct of the former EO constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Executive Officer of the FSB failed to discharge his regulatory duty to properly manage the possible or perceived conflict of interest between Mr. Mostert’s role as a curator and the appointment of his own law firm to assist in the administration of pension funds placed under curatorship:

(aa) The allegation that the Executive Officer of the FSB failed to discharge his regulatory duty to properly manage the possible or perceived conflict of interest between Mr. Mostert’s role as a curator and the appointment of his own law firm to assist in the administration of pension funds placed under curatorship, I substantiated;

(bb) The court, in Executive Officer of the Financial Services Board v Cadac Pension Fund: In Re: Executive Officer of the Cadac Pension Fund & Others already determined that there was a conflict of interest between Mr Mostert’s role and a curator and his using of his own law firm to litigate on behalf of the pension funds under his curatorship. The court reiterated that the impression was created that Mostert was benefitting twice, as a curator and as an attorney.

(cc) The former EO of the FSB failed to properly manage this conflict of interest;
(dd) The conduct of the former EO constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3 Regarding whether the EO of the FSB misled the Minister of Finance when he provided misleading answers in respect of written Parliamentary Questions posed to the Minister of Finance and if so, whether such conduct constitutes maladministration and improper conduct:

(aa) The allegation that the EO of the FSB misled the Minister of Finance when he provided misleading answers in respect of written Parliamentary Questions posed to the Minister of Finance, is substantiated;

(bb) Ministers rely on advice from Heads of Administration to provide them with correct information regarding departments of entities that they are responsible for;

(cc) By furnishing the Minister with incorrect information, the EO violated section 50 of the PFMA;

(dd) The conduct of the former EO constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.4 Regarding whether Mr. Tshidi acted improperly and / or irregularly in the performance of his duties as the EO of the FSB, and if so, whether such conduct constitutes maladministration, abuse of power and improper conduct:

(aa) The allegation that Mr. Tshidi acted improperly and / or irregularly in the performance of his duties as the EO of the FSB, is substantiated;
(bb) Due to the nature of the position that the former EO held, he was required to always act with the utmost integrity, and in a manner which encouraged a high level of ethics and trust. As the “face” of the Regulator, he was required to hold himself to a higher standard than those that he regulated;

(cc) The conduct that he was accused of, suggested that he acted in a manner which placed into question his bona fides, integrity and whether he acted in the best interests of the organisation that he represented;

(dd) The conduct of the former EO constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. **REMEDIAL ACTION**

The appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, with the view to redressing the consequences of improper conduct and maladministration, is the following:

7.1 The FSCA to, within 90 days from date of this report, start the process of inviting curators through a competitive and transparent bidding process as envisaged in section 217 of the Constitution with a view to ensuring that there FSCA has a wider and representative number of curators to nominate from;

7.2 The FSCA to, within 90 days from the date of this report, develop and adopt a Policy to regulate the nomination process of curators;

7.3 The Commissioner of the FSCA to, within 30 days from date of this report take corrective action against the officials implicated in this report and put in corrective measures to avoid recurrence;

7.4 The Minister of Finance to note my findings and remedial action and ensure that the FSCA implements the remedial action.
8. MONITORING

8.1 The Public Protector will monitor compliance with her outstanding remedial action contained in this report, on a monthly basis until such time as her remedial action has been complied with in full.

ADV BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28/03/2019
Assisted by: GGI