REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE LIMPOPO PROVINCIAL DEPARTMENT OF EDUCATION TO APPOINT MS BR HLUNGWANI TO A PERMANENT POSITION IN 2016
INDEX

Executive Summary .................................................................3

1. INTRODUCTION ......................................................................9

2. THE COMPLAINT ..................................................................9

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR ......11

4. THE INVESTIGATION ............................................................15

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE
   EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD
   TO THE APPLICABLE LAW AND PRESCRIPTS ............................20

6. FINDINGS .............................................................................29

7. REMEDIAL ACTION ................................................................30

8. MONITORING ......................................................................31
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, (the Constitution) and published in terms section 8(2A)(a) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution following an investigation into allegations of failure by the Limpopo Provincial Department of Education (the Department) to appoint Ms BR Hlungwani to a permanent position in April 2016.

(iii) On 23 March 2017, I received a complaint from Ms BR Hlungwani (the Complainant) who was a temporary teacher at Muninginisi Primary School with a request that I intervene and investigate what she perceived as maladministration relating to the alleged failure by the Department to appoint her to a permanent teacher position in April 2016.

(iv) The Complainant alleged that:

(a) She worked as a temporary teacher at Muninginisi Primary School (School) from September 2015;

(b) On 08 March 2016, the Department advertised six teaching posts at the School. Out of the six, five posts were permanent and one was temporary;

(c) She applied for a permanent substantive teaching post number 05 for foundation phase, was shortlisted and interviewed on 24 March 2016;

(d) On 28 March 2016, she received a call from the School’s Principal, Mr MS Mbombi (the Principal), informing her that she was appointed to teaching post number 05;
(e) On 29 March 2016, she and five other successful candidates completed appointment forms upon an instruction from the Principal;

(f) In April 2016, four candidates received their appointment letters, but she and another candidate did not receive theirs. When she made enquiries in this regard, the Principal told her that the Department verbally told him that the two posts had been frozen;

(g) The matter was reported to the Circuit Manager, Mrs K Machumele (Mrs Machumele), by the South African Democratic Teachers Union (SADTU) and no response was received;

(h) On 24 November 2016, she went to the District office in Giyani and could not be assisted. She was then referred to the Department’s Deputy Director: Finance, Mr MC Sambo (Mr Sambo), who informed her that the post was still vacant and that she would be appointed on a permanent basis; and

(i) Furthermore, on 06 February 2017, she went to the Department in the Polokwane office to see the Director of Human Resources, Mr Langa LM (Mr Langa), but was assisted by Ms Mashala (Ms Mashala) who referred her to the District Senior Manager, Dr LL Mafenya, but still could not be assisted.

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

(a) Whether the Limpopo Provincial Department of Education improperly failed to appoint the Complainant to a permanent position in April 2016; and

(b) Whether the Complainant was improperly prejudiced by the Limpopo Provincial Department of Education in the circumstances.
(viii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the Department and prejudice caused to the Complainant were principally those imposing administrative standards that should have been complied with by the Department during the recruitment process. Those are the following:

(aa) Section 23(1) of the Constitution provides, amongst others, that: "Everyone has the right to fair labour practice";

(bb) The Education Labour Relations Council: Collective Agreement No.1 of 2008 (ELRC Collective Agreement) which provides guidelines for sifting, shortlisting and interview procedures; and

(cc) Section 3(a) and (c) of the Employment of Educators Act, 76 of 1998 (EEA) which, amongst others, regulates the appointment, promotion or transfer of any educator.

(ix) On 01 August 2018, I issued a notice (Notice) in terms of section 7(9)(a) of the Public Protector Act to, amongst others, the Superintendent General of the Department, Ms NB Mutheiwana (Ms Mutheiwana), to enable her to respond to the preliminary adverse findings.

(x) In response to my Notice in a letter dated 04 October 2018, Ms Mutheiwana indicated that her office conducted an investigation and conceded that there was an oversight on the part of the Department to appoint the Complainant to a permanent post and that there would be consequence management on the implicated employees.

(xi) She also provided my office with a report dated 05 October 2018 indicating how her office intended to place the Complainant as close as possible to where she would have been had there not been maladministration or improper conduct. According to the report, the Department conceded that it failed to appoint the
Complainant which resulted in her losing an opportunity to be appointed permanently and to earn income for the period 01 January 2017 to 15 October 2017.

(xii) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:

(a) **Regarding whether the Limpopo Provincial Department of Education improperly failed to appoint the Complainant to a permanent position in 2016:**

(aa) The allegation that the Department improperly failed to appoint the Complainant to a permanent position in 2016 is substantiated.

(bb) The Complainant applied for an advertised permanent post number 5 and was shortlisted. She was accordingly interviewed on 24 March 2016. The interview panel recommended her as the appointable candidate. The School Governing Body improperly failed to submit the interview panel's recommendation to the Head of the Department.

(cc) The conduct of the Department was in contravention of section 23(1) of the Constitution and sections 11.3 and 11.5 of the ELRC Collective Agreement.

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

(b) **Regarding whether the Complainant was improperly prejudiced by the Limpopo Provincial Department of Education in the circumstances:**

(aa) The allegation that the Complainant was improperly prejudiced by the Department’s conduct is substantiated.
(bb) The Complainant lost out on potential salary, pension benefits and all other benefits for permanent employees when she was due for permanent appointment in April 2016. The Complainant’s services as a substitute educator was terminated on 31 December 2016.

(cc) Had the Complainant been appointed to a permanent post, she would have earned a salary of a permanent teacher and all applicable benefits. She would have been entitled to a gross salary of R20 475.00, including applicable benefits of 9 months calculated as follows:

<table>
<thead>
<tr>
<th>Period</th>
<th>Notch</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/04/2016</td>
<td>31/12/2016</td>
<td>R245 700.00</td>
</tr>
</tbody>
</table>

(dd) Secondly, the Complainant was unemployed between January 2017 and 15 October 2017, and only employed to another permanent teaching post on 16 October 2017. She received no income for the period between January 2017 and 15 October 2017.

(xiv) The appropriate remedial action that I am taking is in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

The Superintendent General of the Limpopo Provincial Department of Education must ensure that:

(aa) A letter of apology is submitted to the Complainant within 30 working days from the date of the report, for the improper prejudice caused on her as a result of the Department’s failure to appoint her to a permanent position in April 2016;
(bb) The Complainant is paid the difference of a salary between a temporary teacher and permanent teacher with all benefits attached to the post calculated from April 2016 when she was due for permanent appointment until 31 December 2016 when the temporary appointment ended, taking into account the Notch progression, together with interest calculated at a rate determined by the Minister of Justice in terms of the Prescribed Rate of Interest Act 55 of 1975, within 30 working days from the date of this report;

(cc) The Complainant is further compensated a full salary and all the benefits she lost, calculated from January 2017 when she was unemployed until 16 October 2017 when she was appointed as a permanent teacher, taking into account the Notch progression; together with interest calculated at a rate determined by the Minister of Justice in terms of the Prescribed Rate of Interest Act 55 of 1975, within 30 working days from the date of this report;

(dd) within 30 working days of this report, disciplinary action is taken against any official who caused the improper failure to appoint the Complainant to a permanent position in April 2016; and

(ee) within 30 days of this report, civil action is instituted against any official, whether still in the employ of the Department or not, to recover any financial loss incurred by the Department as a result of the improper failure to appoint the Complainant.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE BY THE LIMPOPO PROVINCIAL DEPARTMENT OF EDUCATION TO APPOINT MS BR HLUNGWANI TO A PERMANENT POSITION IN 2016

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(2A)(a) of the Public Protector Act 23 of 1994 (the Public Protector Act).

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

1.2.1 The Member of the Executive Council for Education, Honourable MI Kgetjepe;

1.2.2 The Superintendent General of the Limpopo Provincial Department of Education, Ms NB Mutheiwana (Ms Mutheiwana); and

1.2.3 A copy of the report is also provided to Ms BR Hlungwani to inform her of the outcome of my investigation.

1.4 The report relates to an investigation into allegations of failure by the Limpopo Provincial Department of Education (the Department) to appoint Ms BR Hlungwani to a permanent position in April 2016.

2. THE COMPLAINT

2.1 On 23 March 2017, I received a complaint from Ms BR Hlungwani (the Complainant) who was a temporary teacher at Muningini Primary School with a request that I intervene and investigate what she perceived as maladministration
relating to failure by the Department to appoint her to a permanent teacher position in April 2016. She alleged that:

2.1.1 She worked as a temporary teacher at Muninginis Primary School (School) from September 2015;

2.1.2 On 08 March 2016, the Department advertised six teaching posts at the School. Out of the six posts, five were permanent and one was temporary;

2.1.3 She applied for permanent substantive teaching post number 05 for foundation phase, was shortlisted and interviewed on 24 March 2016;

2.1.4 On 28 March 2016, she received a call from the School's Principal, Mr MS Mbombi (Principal), informing her that she was appointed to teaching post number 05;

2.1.5 On 29 March 2016, she and five other successful candidates completed appointment forms upon an instruction from the Principal;

2.1.6 In April 2016, four candidates received their appointment letters, but she and another candidate did not receive theirs. When she made enquiries in this regard, the Principal told her that the Department verbally told him that the two posts had been frozen;

2.1.7 The matter was reported to the Circuit Manager, Mrs K Machumele (Mrs Machumele), by the South African Democratic Teachers Union (SADTU) and no response was received;

2.1.8 On 24 November 2016, she went to the District office in Giyani and could not be assisted. She was then referred to the Deputy Director: Finance, Mr MC Sambo (Mr Sambo), who informed her that the post was still vacant and that she would be appointed permanently; and
2.1.9 Furthermore, on 06 February 2017, she went to the Department in the Polokwane office to see the Director of Human Resources, Mr LM Langa (Mr Langa), but was assisted by Ms Mashala (Ms Mashala) who referred her to the District Senior Manager, Dr LL Mafunya, but still could not be assisted.

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

3.1 **The mandate of the Public Protector**

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

3.1.2 Section 182(1) of the Constitution provides that:

> “The Public Protector has the power as regulated by national legislation, -
> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
> (b) to report on that conduct; and
> (c) to take appropriate remedial action.”

3.1.3 Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.1.4 The Public Protector’s powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute
resolution mechanism as well as subpoena persons and information from any 
person in the Republic for the purposes of an investigation.

3.1.5 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 
the Constitutional Court per Mogoeng CJ held that the remedial action taken by 
the Public Protector has a binding effect.¹ The Constitutional Court further held 
that: "When remedial action is binding, compliance is not optional, whatever 
reservations the affected party might have about its fairness, appropriateness or 
lawfulness. For this reason, the remedial action taken against those under 
investigation cannot be ignored without any legal consequences."²

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

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

3.1.8 Taking appropriate remedial action is much more significant than making a mere 
endeavour to address complaints as the most the Public Protector could do in 
terms of the Interim Constitution. However sensitive, embarrassing and far-
reaching the implications of her report and findings, she is constitutionally 
empowered to take action that has the effect, if it is the best attempt at curing the 
root cause of the complaint (paragraph 68);

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

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
² Supra at para [73].
3.1.10 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);

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

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

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

3.1.14 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).

3.1.15 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no. 91139/2016 (13 December 2017), the Court held as follows:

3.1.15.1 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as
it will render the power to take remedial action meaningless or ineffective.
(Paragraphs 85 and 152);

3.1.15.2 There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92);

3.1.15.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101);
(a) Conduct an investigation;
(b) Report on that conduct; and
(c) To take remedial action.

3.1.15.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (Paragraph 104);

3.1.15.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Paragraph 105).

3.1.16 To this end, I would like to emphasise that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of civil damages or sorry money given its adjudicative and judicial nature. The office of the Public Protector is an office modelled on an institution of an ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption, maladministration and

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3 Sedumo et al vs Rustenburg Platinum Mines Limited et al, 2008(2) SA 24 (CC) at 235.
prejudice⁴. It is therefore trite that the decisions of the Public Protector are administrative actions⁵.

3.1.17 The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108);

3.1.18 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action. (Paragraph 112);

3.1.19 The Limpopo Provincial Department of Education is an organ of state and its conduct amounts to conduct in state affairs. This matter, falls squarely within the ambit of the Public Protector’s mandate.

3.1.20 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.

4. THE INVESTIGATION

4.1 Methodology

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

⁴ Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa 1996(4) SA744 (CC) at 16.
⁵ Minister of Home Affairs et al vs Public Protector et al 2017(2) SA 597 (GP).
4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.1.3 The investigation was conducted by way of correspondences, meetings and interviews with the Complainant and the relevant Department officials, analysis of the relevant documentation and consideration and application of the relevant laws, and regulatory framework.

4.2 Approach to the investigation

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

(a) What happened?
(b) What should have happened?
(c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?
(d) In the event of maladministration or improper conduct, what would it take to remedy the wrong or to place the Complainant as close as possible to where she would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeals\(^6\) (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

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\(^6\) *Public Protector versus Mail and Guardian*, 2011(4) SA 420 (SCA).
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 or complied with by the Department to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had a state organ complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the Limpopo Provincial Department of Education improperly failed to appoint the Complainant to a permanent position in April 2016; and

4.3.2 Whether the Complainant was improperly prejudiced by the Limpopo Provincial Department of Education in the circumstances.

4.4 The key sources of information

4.4.1 Documents

4.4.1.1 A copy of the Department’s approval to advertise post Numbers 03, 05, 07, 28 and 29 at the School.

4.4.1.2 A copy of the advertisement for teaching post No. 05 at the School dated 08 March 2016.

4.4.1.3 A copy of the Complainant’s Curriculum Vitae and qualifications.
4.4.1.4 A copy of the Declaration by members of the interview committee signed on 16 March 2016.

4.4.1.5 A copy of the attendance register for the interview committee members present during the shortlisting session (SL-1 FORM) signed on 24 March 2016.

4.4.1.6 A copy of the ranking of the candidates by the interview committee (RF-1 FORM) signed on 24 March 2016.

4.4.1.7 A copy of the brief motivation by the interview committee for each candidate interviewed (RF-1 FORM).

4.4.1.8 A copy of the attendance register for the interview committee members to rank candidates. (RF-1 FORM).

4.4.1.9 A copy of the recommendation of candidates for appointment by the School Governing Body to the Head of the Department (RF-2 FORM).

4.4.1.10 A copy of the attendance register for the School Governing Body to the Head of the Department (RF-1 FORM) signed on 28 March 2016.

4.4.1.11 A copy of the hand written minutes taken during shortlisting and interviews.

4.4.1.12 A copy of the particulars of the post signed on 29 March 2016.

4.4.1.13 A copy of the acceptance of contract for educator's post signed on 29 March 2016.

4.4.1.14 A copy of the assumption of duty signed on 29 March 2016.
4.4.1.15 A copy of the Department’s report on the investigation into allegations of failure by the Department to employ the Complainant on a permanent basis, dated 27 June 2017.

4.4.1.16 Copies of my section 7(9)(a) notices (Notice) to implicated officials dated 30 July 2018.

4.4.2 Correspondence sent and received

4.4.2.1 A letter of enquiry from my Office to the Department dated 18 April 2017.

4.4.2.2 A letter from Mr IM Mhlongo to my Office dated 21 June 2017.

4.4.2.3 A letter from my Office to Mr Shishavele dated 30 August 2017.

4.4.2.4 Letter from Mr Shishavele to my Office dated 07 September 2017.

4.4.2.5 Email from my Office to Mr Mhlongo on 24 October 2017.

4.4.3 Legislation and other prescripts

4.4.3.1 The Constitution.

4.4.3.2 The Public Protector Act.

4.4.3.3 The Employment of Educators Act 76 of 1998.

4.4.3.4 The Education Labour Relations Council: Collective Agreement No.1 of 2008.

4.4.4 Interviews

4.4.4.1 A meeting by my investigation team with Mr Mhlongo at Giyani District of the Department on 21 June 2017.
4.4.4.2 A meeting between the Department officials, the Principal, interview panel members, Circuit Manager and my investigation team on 28 June 2017.

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 the Limpopo Provincial Department of Education improperly failed to appoint the Complainant to a permanent position in 2016:

Common cause issues

5.1.1 The School requested permission from the Department to employ educators for post numbers 03, 05, 07, 28 and 29 and approval was granted on 04 March 2016. The School subsequently advertised substantive teaching post number 5 on 08 March 2016.

5.1.2 The Complainant applied for post number 05, was shortlisted and interviewed together with five other candidates for the same position and she was the recommended appointable candidate.

5.1.3 The School Governing Body (SGB) did not submit the RF-2 Form with recommendations in order of preference to the Head of the Department (HOD) for the Complainant’s appointment. The Complainant was not appointed in the position.

5.1.4 In response to my Notice in a letter dated 04 October 2018, Ms Mutheiwana, indicated that her office conducted an investigation upon receipt of my Notice. She conceded that there was an oversight on the part of her Department to appoint the
Complainant and that there would be consequence management on the implicated employees.

5.1.5 She also provided my office with a report dated 05 October 2018 indicating how her office intends to place the Complainant as close as possible to where she would have been had there not been for the maladministration or improper conduct.

_Issues in dispute_

5.1.6 The Complainant argued that the Department improperly failed to appoint her to a permanent position in April 2016. She indicated that despite being on a temporary post, the Department should have appointed her on a permanent post in April 2016 following the successful interview process.

5.1.7 My investigation team raised the matter with the Department on 18 April 2017 and the Department’s Assistant Director: Human Resource, Mr IM Mhlongo (Mr Mhlongo), responded in a letter dated 27 June 2017 as follows:

"...Interviews were conducted for post number 5 at the school and recommendations were not submitted to our office for consideration and approval to appoint. The reason for not submitting is that the recommended candidate namely Hlungwani BR was still engaged as a substitute educator at the same school."

5.1.8 According to Mr Mhlongo, had the Department received the recommendations before post number 05 became redundant, the Complainant would have been appointed and she would have enjoyed the benefits of being shifted in terms of section 6 of the Employment of Educators Act, 1998 (EEA) to another school.

5.1.9 During a meeting between my investigation team and the Department on 28 June 2017, the Principal indicated that he did not submit the recommendations about
the Complainant's permanent appointment because he was verbally instructed by the Department's Human Resources Officer, Mr MB Shishavele (Mr Shishavele), from the Mopani District not to submit the recommendation because the Complainant was still appointed as a substitute teacher on promotional post number 27 at the School.

5.1.10 The Principal further indicated that he wrote a letter to the Department on 29 March 2016 recommending that the Complainant be moved from a substitute post to permanent post number 5. He also indicated that he personally approached the Department when he realised a delay to address the matter. He reported that the Department advised him to wait until the Complainant's contract lapsed at the end of August 2016. On expiry of the contract on 31 August 2016, the Department renewed her temporary contract for a further four months from 01 September 2016 to 31 October 2016 and again from 01 November 2016 to 31 December 2016.

5.1.11 Mr Shishavele was telephonically interviewed on 30 August 2017 and he responded in a letter dated 07 September 2017 wherein he denied the allegations and indicated that:

"I don't give instructions to principals, neither to give them advices behind my Supervisor's concern [sic]."

5.1.12 Contrary to the reason that he had advanced in a letter dated 27 June 2017 indicating why the Complainant was not appointed, Mr Mhlongo confirmed in a telephone conversation with my investigation team on 06 November 2017 that the Department did not have a policy and/or legislation that prohibited a candidate who is appointed as a substitute teacher on a promotional post from being appointed as a permanent teacher.

5.1.13 In response to my Notice dated 30 July 2018, Ms Mutheiwa indicated that because the Complainant is currently employed permanently at Dumani Primary School with effect from 16 October 2017, her office offers to compensate her a
salary of a permanent educator position plus benefits backdated from 01 January 2017 to 15 October 2017, determined as follows:

<table>
<thead>
<tr>
<th>Period</th>
<th>Notch</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/01/2017</td>
<td>31/03/2017</td>
<td>R61 425.00</td>
</tr>
<tr>
<td>01/04/2017</td>
<td>15/10/2017</td>
<td>R142 253.55</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>R203 678.55</td>
</tr>
</tbody>
</table>

5.1.14 The above settlement seeks to compensate the Complainant with only a salary of a permanent educator position plus benefits backdated from 01 January 2017 to 15 October 2017. However, the evidence above indicates that the Complainant’s services as a substitute educator was terminated on 31 December 2016 and should have been appointed to a permanent position following the successful interview process in April 2016 and therefore her compensation should be backdated from April 2016 to 15 October 2017.

Application of the relevant law

5.1.15 Section 23(1) of the Constitution provides that everyone has the right to fair labour practice. Unfair labour practice is defined as any unfair act or omission that arises between an employer and an employee involving:

a) Unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.
5.1.16 In the matter of *De Nysschen v General Public Service Sectoral Bargaining Council and Others* (JR1531/03) [2006] ZALC 96; [2007] 5 BLLR 461 (LC) (24 November 2006), the court held that the “failure of the third respondent to promote the applicant to the post of Executive Resources Management and Development Manager, constituted an unfair labour practice and ordered that the applicant be remunerated at the level of Chief Director (level 14) with retrospective effect as from 1 July 2002.”

5.1.17 In the matter of *Ga-Segonyana Local Municipality v Venter N.O. and Others* (JR961/13) [2016] ZALCJHB 391 (11 October 2016), paragraph 18, the court held that “it is trite that in an unfair labour practice dispute relating to promotion, the onus is on the employee to show that a higher post existed for which he or she was a contender, and that the employer refused or failed to promote the employee to that post for an unfair reason.”

5.1.18 In *City of Cape Town v SA Municipal Workers Union on behalf of Sylvester & others* (2013) 34 ILJ 1156 (LC); it was held that “the overall test is one of fairness, and that in deciding whether or not the employer had acted unfairly in failing or refusing to promote the employee, relevant factors to consider include whether the failure or refusal to promote was caused by unacceptable, irrelevant or invidious considerations on the part of the employer; or whether the employer’s decision was motivated by bad faith, was arbitrary, capricious, unfair or discriminatory; whether there were insubstantial reasons for the employer’s decision not to promote; whether the employer’s decision not to promote was based upon a wrong principle or was taken in a biased manner; whether the employer failed to apply its mind to the promotion of the employee; or whether the employer failed to comply with applicable procedural requirements related to promotions.”

5.1.19 In the circumstances, the Department was obliged to appoint the Complainant by virtue of the fact that she had attended an interview and had been recommended for appointment by the interview panel.
5.1.20 The Education Labour Relations Council (ELRC): Collective Agreement No.1 of 2008 (the Collective Agreement) provides guidelines for sifting, shortlisting and interview procedures.

5.1.21 In terms of section 10.6 of the ELRC Collective Agreement the Interview Committee shall conduct the interview of candidates and at the end of the interviews, rank them in the order of scores obtained, together with a brief motivation and immediately submit on the same day on RF-1 FORM, to the SGB for its recommendation to the HOD.

5.1.22 In terms of section 11.3 of the ELRC Collective Agreement, the SGB shall submit in order of preference to the Head of the Department, a list of at least three names of recommended candidates; and/or fewer than three candidates in consultation with the HOD.

5.1.23 Section 11.5 of the ELRC Collective Agreement provides that the SGB must within two working days after receiving the interview results submit recommendations in order of preference on RF-2 FORM to the HOD.

5.1.24 Section 3(a) and (c) of the EEA provides that:

(a) “Any appointment, promotion or transfer to any post or the educator establishment of a public school may only be made on the recommendations of the governing body of the public school;

(b) …

(c) The governing body must submit in order of preference to the Head of Department, a list of at least three names of recommended candidates or fewer than three candidates in consultation with the Head of Department.”

5.1.25 It was expected of the SGB to establish an interview panel to shortlist, interview and recommend a suitable candidate according to order of preference and submit
within 2 days of receiving the interview results, a list to the HOD for appointment. In the case of the Complainant, the recruitment and selection process was followed, but the recommendations were not submitted to the HOD.

5.1.26 In terms of section 13.1 of the ELRC Collective Agreement, the Department shall make the final decision on appointment subject to, satisfying itself that the Department’s recruitment and appointment procedures were followed, and that the decision was in compliance with the EEA, South African Schools Act, 1996 (SASA), Labour Relations Act (LRA) and Education Laws Amendment Act, 2005 (ELAA).

Conclusion

5.1.27 Based on the evidence, it can be concluded that the Department contravened the Department’s recruitment and selection processes and procedures by not submitting the interview panel’s recommendations to the HOD.

5.1.28 It can be concluded further that:

5.1.28.1 The Department’s failure or refusal to appoint the Complainant was caused by unacceptable, irrelevant or invidious considerations on the part of the department;

5.1.28.2 The Department provided insubstantial reasons for its decision not to appoint the Complainant;

5.1.28.3 The Department’s decision not to appoint the Complainant was based upon a wrong principle or was taken in a biased manner;

5.1.28.4 The Department failed to apply its mind to the appointment of the Complainant; and
Lastly, the Department failed to comply with applicable procedural requirements related to appointments.

5.2 Regarding whether the Complainant was prejudiced by the Limpopo Provincial Department of Education in the circumstances:

*Common cause issues*

5.2.1 The Complainant underwent a successful interview on 24 March 2016 and was not appointed as recommended by the interview panel. Failure to process the appointment of the Complainant was confirmed by Mr Mhlongo and the Principal.

5.2.2 The Complainant lost out on salary, pension benefits and all other benefits for permanent employees when she was due for permanent appointment in April 2016. Between April 2016 and December 2016, she earned a fluctuating nett salary of between R17 699.57 and R23 458.72 as a substantive teacher with no benefits.

5.2.3 She was unemployed between January 2017 and 15 October 2017, and was only employed to another post as a permanent educator at Dumani Primary School on 16 October 2017 and earns a gross salary of R21 908.25 including applicable benefits. She was unemployed for ten months, would have been entitled to a gross salary of R203 678.55 including applicable benefits for ten months, calculated as follows:

<table>
<thead>
<tr>
<th>Period</th>
<th>Notch</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/01/2017</td>
<td>31/03/2017</td>
<td>R245 700.00</td>
</tr>
<tr>
<td>01/04/2017</td>
<td>15/10/2017</td>
<td>R262 899.00</td>
</tr>
</tbody>
</table>
5.2.4 In response to my Notice, Ms Mutheiwana conceded that her Department failed to appoint Ms Hlungwani to a permanent position and such failure resulted in her losing an opportunity to be permanently appointed and earn income from 01 January 2017 to 15 October 2017.

_Issues in dispute_

5.2.5 The Complainant argued that the Department’s improper failure to appoint her to a permanent educator position caused her financial prejudice from April 2016, the date on which she was supposed to be appointed a permanent teacher, until 16 October 2017, when she was appointed a permanent teacher at another school. The financial prejudice should however take into consideration the fluctuating salary she earned whilst being a substitute teacher.

5.2.6 In response to my Notice, Ms Mutheiwana indicated that her Department offers to compensate Ms Hlungwani a salary of a permanent educator position plus benefits backdated from 01 January 2017 to 15 October 2017.

5.2.7 However, the evidence gathered indicates that the Complainant’s services as a substitute educator was terminated on 31 December 2016 and should have been appointed to a permanent position following the successful interview process in April 2016 and therefore her compensation should be backdated from April 2016 to 15 October 2017.

_Consideration_

5.2.8 Based on the evidence gathered, it can be concluded that the Complainant suffered prejudice as a result of the Department’s failure to process her appointment as a permanent teacher.
6. FINDINGS

6.1 Regarding whether the Limpopo Provincial Department of Education improperly failed to appoint the Complainant to a permanent position in 2016:

6.1.1 The allegation that the Department improperly failed to appoint the Complainant to a permanent position in 2016 is substantiated.

6.1.2 The Complainant applied for an advertised permanent post number 5 and was shortlisted. She was accordingly interviewed on 24 March 2016. The interview panel recommended her as the appointable candidate. The SGB improperly failed to submit the interview panel’s recommendation to the HOD.

6.1.3 The conduct of the Department was in contravention of section 23(1) of the Constitution and sections 11.3 and 11.5 of the ELRC Collective Agreement.

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

6.2 Regarding whether the Complainant was improperly prejudiced by the Limpopo Provincial Department of Education in the circumstances:

6.2.1 The allegation that the Complainant was improperly prejudiced by the Department’s conduct is substantiated.

6.2.2 The Complainant lost out on potential salary, pension benefits and all other benefits for permanent employees when she was due for permanent appointment in April 2016. The Complainant’s services as a substitute educator was terminated on 31 December 2016.
6.2.3 Had the Complainant been appointed to a permanent post, she would have earned a salary of a permanent teacher and all applicable benefits. She would have been entitled to a gross salary of R20 475.00 including applicable benefits of 9 months calculated as follows:

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<thead>
<tr>
<th>Period</th>
<th>Notch</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/04/2016</td>
<td>31/12/2016</td>
<td>R245 700.00</td>
</tr>
</tbody>
</table>

6.2.4 Secondly, the Complainant was unemployed between January 2017 and 15 October 2017, and only employed to another permanent teaching post on 16 October 2017. She received no income for the period between January 2017 and 15 October 2017.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that I am taking is in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

The Superintendent General of the Limpopo Provincial Department of Education must ensure that:

7.1.1 A letter of apology is submitted to the Complainant within 30 working days from the date of the report, for the improper prejudice caused on her as a result of the Department’s failure to appoint her to a permanent position in April 2016;

7.1.2 The Complainant is paid the difference of a salary between a temporary teacher and permanent teacher with all benefits attached to the post calculated from April 2016 when she was due for permanent appointment until 31 December 2016 when the temporary appointment ended, taking into account the Notch
progression, together with interest calculated at a rate determined by the Minister of Justice in terms of the Prescribed Rate of Interest Act 55 of 1975, within 30 working days from the date of this report;

7.1.3 The Complainant is further compensated a full salary and all the benefits she lost, calculated from January 2017 when she was unemployed until 16 October 2017 when she was appointed as a permanent teacher, taking into account the Notch progression; together with interest calculated at a rate determined by the Minister of Justice in terms of the Prescribed Rate of Interest Act 55 of 1975, within 30 working days from the date of this report;

7.1.4 Within 30 working days of this report, disciplinary action is taken against any official who caused the improper failure to appoint the Complainant to a permanent position in April 2016; and

7.1.5 Within 30 days of this report, civil action is instituted against any official, whether still in the employ of the Department or not, to recover any financial loss incurred by the Department as a result of the improper failure to appoint the Complainant.

8. MONITORING

8.1 I will require the Superintendent General to submit an implementation Plan to my office within 15 working days from the date of this report indicating how the remedial actions referred to in paragraph 7 above will be implemented.

8.2 The submission of the Implementation Plan and the implementation of my remedial actions shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.