
"Allegations of irregular recruitment and appointment processes of Director: Human Resource Capacity and Development"

REPORT NO: 81 of 2019/2020
ISBN NO: 978-1-928507-42-0

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR RECRUITMENT PROCESSES OF DIRECTOR: HUMAN RESOURCE CAPACITY AND DEVELOPMENT BY THE MPUMALANGA DEPARTMENT OF EDUCATION
TABLE OF CONTENTS

Executive Summary.............................................................................................................3
1. INTRODUCTION.............................................................................................................10
2. THE COMPLAINT.........................................................................................................11
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR.................................12
4. THE INVESTIGATION....................................................................................................16
5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.............................................................................................................22
6. FINDINGS....................................................................................................................46
7. REMEDIAL ACTION.....................................................................................................49
8. MONITORING................................................................................................................50
Executive Summary

(i) This is a report of the Public Protector 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 appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution following an investigation into allegations of improper conduct, maladministration and prejudice suffered by the Complainant relating to the failure by the South African Social Security Agency (SASSA) in Mpumalanga to pay for services rendered by the Complainant’s company.

(iii) On 22 October 2015, I received a complaint from an anonymous complainant (the Complainant). The complaint was based on a newspaper article published in the City Press newspaper dated 21 September 2015.

(iv) In essence the Complainant submitted a City Press newspaper article, dated 21 September 2015, which stated that:

(aa) "The Mpumalanga education authorities allegedly lowered the requirements of a director’s post in the Department of Basic Education (DBE) to suit newly elected deputy president of the ANC Youth League Desmond Moela. The DBE had advertised the post in a circular in July, in which it was stated that the educational requirements for the position were an “appropriate recognised bachelor’s degree or a diploma or Grade 12 plus extensive appropriate experience”...

(bb) An investigation has, however, found Moela’s attempt for a three year qualification was at Tshwane University of Technology in 2009, where he failed
all three subjects he had registered for. He eventually dropped out of the university the following year, after passing only three of six subjects. This means Moela's highest educational qualification could only be a Grade 12 certificate, which makes him ineligible for appointment as a senior manager in the public service.

(cc) The main educational requirements for appointment in senior management in the public service is called the required vocational qualification—a post matric three-year qualification..."

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

(a) Whether the Department improperly and irregularly lowered the required standard for the position of Director: Human Resource Capacity Development to suit Mr Desmond Moela;

(b) Whether the Department failed to follow proper recruitment and selection processes in the appointment of Mr Desmond Moela; and

(c) Whether the taxpayers and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr D Moela.

(vi) The investigation entailed interviews, meetings and correspondence with the relevant officials of the Department as well as exchange of and the analysis of relevant documentation, conducted research, and consideration and application of relevant laws, policies, regulatory framework and jurisprudence. This was done with a view to making a determination of maladministration, prejudice and improper prejudice and impropriety in terms of powers conferred on me by the Constitution and the Public Protector Act.
(vii) The investigation process included an exchange of correspondence, inspection and analysis of all relevant documents and application of all relevant laws, policies and related prescripts and interviews were also conducted with the Complainant, witnesses and relevant officials of the Department.

(viii) Key laws and policies taken into account to determine if there had been maladministration, prejudice and/or improper conduct by the Department, were principally those imposing administrative standards and procedures that should have been complied with by the Department, such as section 11(1) of the Public Service Act which provides that due regard shall be given to equality and democratic values as enshrined in the Constitution when making appointments.

(ix) Having regard to the evidence uncovered during the investigation, the regulatory framework determining the standard the Department should have complied with, I therefore make the following findings:

(a) Regarding whether the Department improperly and irregularly lowered the required standard for the position of Director: Human Resource Capacity Development to suit Mr Desmond Moela.

(aa) The allegation that the Department improperly and irregularly lowered the required standard for the position of Director: Human Resource Capacity Development to suit Mr Desmond Moela, is substantiated.

(bb) The Department failed to explain why the requirements for the position of Director: Human Resource Capacity Development were lower than those of all other Director positions advertised during the period between February and July 2014. The position of Director: Human Resource Capacity Development was the only post at Senior Management level that required a grade 12 qualification. Therefore, the requirements for this post were not in
line with the standard for a post at a Senior Management level such as a Director. It can therefore be concluded that the standard for this particular post was deliberately lowered to accommodate the appointment of Mr Moela.

(cc) The conduct of the Department is in violation with section 11(1) and (2) of the Public Service Act and Chapter 1B(a) and (g) of the Public Service Regulations.

(dd) The conduct of the Department constitute improper conduct as envisaged in the 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 Department failed to follow proper recruitment and selection processes in the appointment of Mr Desmond Moela**

(aa) The allegation that the Department failed to follow proper recruitment and appointment procedures in the appointment of Mr Desmond Moela, is substantiated.

(bb) When the Department advertised the position of Director: Human Resource Capacity Development in the City Press newspaper on 6 July 2014, it included "extensive experience" as a requirement. The shortlisting of Mr Moela who only had a Grade 12 and without extensive experience, which would have compensated for lack of an educational qualification such as a Degree or Diploma, denied any of the shortlisted candidates the opportunity to occupy the post. Mr Moela never occupied the position after he was appointed.

(cc) It was therefore unfair, unequitable and improper for the Department to then shortlist and subsequently appoint Mr Moela, who only met the Grade 12
requirement, but did not meet other post requirements reflected in the advertise-ment. It was improper for the Department, particularly Mrs Mhlaba-ne, to have considered the DPSA circular dated 19 September 2012 (which was advisory in nature and not prescriptive) to justify the shortlisting and appointment of Mr Moela.

(dd) The conduct of Mrs Mhlabane, was in violation of the policy statement in paragraphs 1.1 and 2.4.3 and 2.5.7 of the Recruitment Policy.

(ee) Such conduct 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.

(c) **Regarding whether the Tax Payers and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr D Moela**

(aa) The allegation that the Department and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr D Moela, is substantiated.

(bb) The conduct of the Department, particularly the former HOD Mrs Mhlabane to advertise a position with lowered qualifications resulted in financial misconduct as prescribed in section 81 of the PFMA. Therefore, a charge of financial misconduct must be investigated in terms of the statutory or other conditions of employment applicable to the former Accounting Officer in terms of section 84 of the PFMA.

(cc) The conduct of the Department, particularly the former HOD Mrs Mhlabane resulted in the Department suffering financial prejudice by failing to comply with proper recruitment processes.. The recruitment cost incurred for the
position of Director: Human Recourse Capacity and development was R 8 847.02 plus S&T claims submitted by the shortlisted candidates who were not from around Nelspruit. The appointment of Mr Moela further prejudiced the other seven candidates who were overlooked for the position, a conduct which resulted in loss of an employment opportunity, at least for one candidate had proper recruitment processes been followed.

(dd) Such conduct 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.

(x) In light of the above, and having taken into account evidence before me, the appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

(a) The HOD of the Department of Education must ensure that:

(aa) Within thirty (30) working days from the date of this report, the job description of the position of Director: Human Resource Capacity Development is reviewed and the required minimum qualifications are aligned with the guidelines for the appointment of senior managers in the public service.

(bb) Within sixty (60) working days from the date of this report, the Chief Financial Officer (CFO) investigate the fruitless and wasteful expenditure and declare same in their financial statement to Provincial Treasury.

(cc) Within sixty (60) working days from the issuing of the investigation report by the CFO, appropriate action against any implicated official is taken.
(dd) Within sixty (60) working days from the date of this report, initiate a judicial review process contemplated in terms of section 6 and 7 of PAJA to set aside the appointment of Mr Moela on the basis that he was irregularly appointed to a post of a Director: Human Resource Capacity Development without having the required extensive experience and the fact that the standard for this particular post was deliberately lowered to accommodate his appointment as he did not have a degree or diploma.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR RECRUITMENT AND APPOINTMENT PROCESSES OF DIRECTOR: HUMAN RESOURCE CAPACITY AND DEVELOPMENT BY THE MPUMALANGA DEPARTMENT OF EDUCATION

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 section 8(1) 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 and implement remedial action:

1.2.1. Member of the Executive Council (MEC) for the Department of Education, Mr BA Majuba;

1.2.2. The Acting Head of the Department of Education in Mpumalanga, Mr JR Nkosi;

1.2.3. The Former Head of the Department of Education in Mpumalanga, Mrs MOC Mhlabane.

1.2.4. A copy of the report could not be provided to the Complainant to inform him/her of the outcome of my investigation because the Complainant chose to remain anonymous.

1.3. The report relates to an investigation into the alleged improper conduct in the appointment of Mr Desmond Moela (Mr Moela) to the position of Director: HR
Capacity Development by the Mpumalanga Department of Education (the Department)

2. THE COMPLAINT

2.1. The On 22 October 2015, an anonymous complaint was received by my Office. The complaint was based on a newspaper article published in the City Press newspaper dated 21 September 2015.

2.2. The Complainant submitted the said newspaper article, in which the following allegations were made:

2.2.1. "The Mpumalanga education authorities allegedly lowered the requirements of a director’s post in the Department of Basic Education (DBE) to suit newly elected deputy president of the ANC Youth League Desmond Moela. The DBE had advertised the post in a circular in July, in which it was stated that the educational requirements for the position were an “appropriate recognised bachelor’s degree or a diploma or Grade 12 plus extensive appropriate experience”...

2.2.2. An investigation has, however, found Moela’s attempt for a three year qualification was at Tshwane University of Technology in 2009, where he failed all three subjects he had registered for. He eventually dropped out of the university the following year, after passing only three of six subjects. This means Moela’s highest educational qualification could only be a Grade 12 certificate, which makes him ineligible for appointment as a senior manager in the public service.

2.2.3. The main educational requirements for appointment in senior management in the public service is called the required vocational qualification—a post matric three-year qualification..."
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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

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

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

(b) to report on that conduct; and

(c) To take appropriate remedial action."

3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4. 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.

3.5. 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(5); 2016(5) BCLR 618 (CC); 2016(3) SA 580 (CC) (31 March **Page**
Chief Justice Mogoeng stated the following, when confirming the powers of 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 value 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 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 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. In the matter of the President of the Republic of South Africa v Office of the
Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA
100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December
2017), the court held as follows, when confirming the powers of the Public
Protector:
3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71);

3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question (paragraph 82);

3.7.3 Taking remedial action is not contingent upon a finding of impropiety 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.

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

3.7.5 The primary role of the Public Protector is that of an investigator and no an adjudicator. Her role is not to supplant the role and function of the Court (paragraph 105);

3.7.6 The fact that there is no firm findings on the wrong doing, this 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 107-108);

3.7.7 Prima facie evidence which point to serious misconduct is a sufficient basis for the Public Protector to take remedial action (paragraph 112);
3.8 Mpumalanga Department of Education (the Department) is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate to investigate.

3.9 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

4.1.1. The investigation of the complaint 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.

4.1.2. The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to investigate and report my findings regarding any complaint lodged.

4.1.3. The investigation entailed interviews, meetings and correspondence with the relevant officials of the Department as well as exchange of and the analysis of relevant documentation, conducted research, and consideration and application of relevant laws, policies, regulatory framework and jurisprudence. This was done with a view to making a determination of maladministration, prejudice and
improper prejudice and impropriety in terms of powers conferred on me by the Constitution and the Public Protector Act.

4.1.4. My investigation team also interviewed Ms N de Bruin (Director: HR Provisioning) on 16 February 2017 and the former HOD Mrs M Mhlabane on 20 April 2017.

4.1.5. During the investigation process, I served two notices in terms of section 7(9) of the Public Protector Act (section 7(9) notice) to the former HOD Mrs MOC Mhlabane and the Acting HOD Mr JR Nkosi on 2 July 2019 to afford them an opportunity to respond to my intended findings. The response from the former HOD was received through her attorneys on 8 July 2019 where she requested an extension. The response from Mr Nkosi was received on 12 July 2019 and his submissions contained therein were factored in this report.

4.1.6. Mrs Mhlabane's initial request for an extension was granted and her response was expected on 22 August 2019. However, on 19 August 2019 another extension was again requested by Mrs Mhlabane through her attorneys due to the passing of her mother. She was again granted the extension to submit her response on 12 September 2019. Her response was only received on 19 September 2019. The response from Ms Mhlabane was taken into account and also factored in this report.

4.2. Approach to the investigation

4.2.1. When I conduct an investigation, the mandate given to me, requires that I conduct an enquiry on the merits of the complaint that transcends lawfulness and include considerations of equality, good administration and proper conduct.

4.2.2. As with every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
4.2.2.1 What happened?

4.2.2.2 What should have happened?

4.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?

4.2.2.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.3 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. In this particular case, the factual enquiry principally focused on whether or not the Department acted irregularly in the appointment of Mr Moela as the Director: Human Capacity Development.

4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met the Department to prevent any improper conduct, maladministration and prejudice.

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

4.2.6 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.

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

4.3.1. Whether the Department improperly and irregularly lowered the required standard for the position of Director: Human Resource Capacity Development to suit Mr Desmond Moela;

4.3.2. Whether the Department failed to follow proper recruitment and selection processes in the appointment of Mr Desmond Moela; and

4.3.3. Whether the Department and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr D Moela.

4.4. **The Key Sources of information**

4.4.1. **Documents**

4.4.1.1 A copy of a memorandum (with attached Annexure A) from the Director General: DPSA to all Heads of National and Provincial Departments and Organisational Components, dated 19 September 2002;

4.4.1.2 A copy of a DPSA directive from the Director General: DPSA to all Heads of National and Provincial Departments, dated 27 November 2011;
4.4.1.3 A copy of an advertisement for the position of Director: Human Resource Capacity Development, dated 6 July 2014;

4.4.1.4 A copy of a memorandum from the HOD: MDOE to the MEC of Education, dated 4 September 2014;

4.4.1.5 A copy of an Executive Council Memorandum, dated 19 November 2014;

4.4.1.6 A copy of a memorandum from the Head of Department to the MEC for Education, dated 19 November 2014;

4.4.1.7 A copy of an assessment report for Mr Desmond Moela, dated 14 November 2014;

4.4.1.8 A copy of an assessment report for Ms Dina Mosia, dated 14 November 2014;

4.4.1.9 Copies of application forms for all shortlisted candidates;

4.4.1.10 Copies of Curriculum Vitae and qualifications of all shortlisted candidates;

4.4.1.11 A copy of a circular from the HOD: MDOE to all Deputy Director Generals, Chief Directors, Directors and District Managers, Principals and School Governing Bodies and all employees, dated 28 November 2012;

4.4.1.12 A copy of the advertisements for the posts of Director: Office of the HOD, Director: Curriculum Enrichment, Director: Management Information and Technology dated 06 July 2014;

4.4.1.13 A copy of the advertisement of the post of Director: Strategic Planning and Co-ordination dated 1 June 2014;

4.4.1.14 A copy of the advertisement of the posts of Director: General Education and Training, Director: HR Benefits and Employee Wellness dated 2 February 2014;

4.4.1.15 A copy of a memorandum to all Deputy Directors-General, Chief Directors, Directors/ District Director, Line Managers, Principals, School Governing Bodies and all employees from the Head of Department, dated 28 November 2012;

4.4.1.16 A copy of the Departments Employment Equity Plan 2012 - 2015, dated 28 November 2012;

4.4.1.17 A copy of the Departments Recruitment Policy, dated 17 December 2011;
4.4.1.18 A copy of the final score sheets for the interviewed candidates, dated 18 November 2014;

4.4.1.19 A copy of a letter from the Public Protector to the Department of Public Service and Administration, dated 15 May 2017;

4.4.1.20 A copy of a letter from the Department of Public Service and Administration to the Public Protector, dated 11 July 2017.

4.4.2 Correspondence sent and received

4.4.2.1 A copy of a letter dated 14 December 2015 from the Public Protector to the Department;

4.4.2.2 A copy of a letter dated 4 February 2016 from my office to the Department;

4.4.2.3 A copy of a letter dated 29 February 2016 from my office to the Department;

4.4.2.4 A copy of a letter dated 25 April 2016 from my office to the Department;

4.4.2.5 A copy of a letter dated 9 May 2016 from the Department to my office;

4.4.2.6 A copy of a letter dated 19 May 2016 from my office to the Department;

4.4.2.7 A copy of a letter dated 17 August 2016 from my office to the Department;

4.4.2.8 A copy of a letter dated 20 August 2016 from the Department to my office;

4.4.2.9 A copy of a letter dated 2 February 2017 from my office to the Department;

4.4.2.10 A copy of a letter dated 13 March 2017 from my office to the Department;

4.4.2.11 A copy of a letter dated 28 April 2017 from my office to the Department;

4.4.2.12 A copy of a letter dated 10 May 2017 from the Department to my office;

4.4.2.13 A copy of a letter dated 12 May 2017 from my office to the Department;

4.4.2.14 A copy of a letter dated 12 May 2017 from my office to the Department;

4.4.3 Meetings held

4.4.3.1 Meeting between Public Protector and Ms N de Bruin (Director: HR Provisioning) on 16 February 2017;
4.4.3.2 Meeting between the Public Protector and Mrs M Mhlabe on 20 April 2017;

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996;
4.4.4.2 The Public Service Act, 1994;
4.4.4.3 Public Service Regulations;
4.4.4.4 The Public Finance Management Act, 1999; and
4.4.4.5 The Mpumalanga Department of Education Recruitment Policy, 2011.

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

5.1. Regarding whether the Department improperly and irregularly lowered the required standard for the position of Director: Human Resources Capacity Development to suit Mr Desmond Moela.

*Common cause issues*

5.1.1. It is common cause that, in her capacity as the former Head of Department, Mrs Mhlabe recommended the appointment of Mr Moela to the position of Director: Human Resources Capacity Development, whose highest educational qualification at the time was a Grade 12 certificate.

5.1.2. It is also common cause that the requirements for the position of Director: Human Resources Capacity Development, advertised on 6 July 2014, were lower compared to other Director posts advertised during the same period.
5.1.3. It is not disputed that Mr Moela is and/or was the Provincial Chairperson of the ANC Youth League in Mpumalanga Province and the Deputy President of the ANC Youth League nationally at the time the Director position in question was advertised.

_Issue in dispute_

5.1.4. It is in dispute that the Department tempered with the requirements of the position of Director: Human Resources Capacity Development, in order to accommodate or suit a particular individual or candidate.

5.1.5. The Complainant alleged that the Department lowered the requirements of a Director’s post to suit Mr Moela. This was due to the fact that Mr Moela, whose highest educational qualification was a Grade 12 certificate, did not meet the educational requirements for appointment to a senior management post that required a vocational qualification or a post matric three year qualification.

5.1.6. On the other hand, the former HOD contended in a letter dated 9 May 2016 that the Department took into consideration the circular from the Department of Public Service and Administration (DPSA) dated 19 September 2002, which indicated that most Departments still applied the inflexible and outdated recruitment practices where in particular, specific educational qualifications or years of experience are stated as appointment requirements with the result that candidates who do not meet these specific requirements are prejudiced.

5.1.7. The Department added in the same letter that the use of the abovementioned practice was identified by the Department as often discouraging and excluding potentially suitable candidates, particularly from disadvantaged backgrounds. Candidates from disadvantaged backgrounds might not possess the specific qualifications or have the required years of experience but could have the
required competencies by virtue of exposure to alternative courses and/or practical work experience. The qualification requirements for a position must be interpreted to permit recognition of equivalent competency (prior learning through practical experience).

5.1.8. The Department stated that according to the Department’s qualification requirements, the advertising of the position of Director: Human Resources Capacity Development was in line with the prevailing prescripts applicable at the time.

5.1.9. The Department also argued that Mr Moela was shortlisted because he met the requirements in terms of the advert. He is in possession of a Senior Certificate and had partially completed a Diploma in Public Management and Administration. Mr Moela also had more than 9 years’ experience in the Public Service.

5.1.10. I have noted with interest that the Department also advertised a position of Director: HR Benefits and Employee Wellness on 2 February 2014. The requirements of the position were:

(a) An appropriate recognised Bachelor’s degree or diploma or equivalent qualification as well as extensive appropriate experience in the field of Human Resource Management.

(b) Proven outstanding managerial and service delivery competency.

(c) In depth knowledge and understanding of education policies and legislation, in particular policy frameworks governing pertaining to human resource management.

(d) In depth knowledge of policies, systems, processes, procedures and best practices pertaining to HR Benefits administration, HR Performance management and Employee Health and wellness, etc.
5.1.11. On 1 June 2014, the Department advertised two Director positions namely, Director: Office of the HOD and Director: Strategic Planning and Co-ordination. Both advertisements did not make provision for a Grade 12 requirement but instead required 3 year Bachelor’s degrees or appropriate recognised Bachelor’s degree/Diploma, respectively.

5.1.12. On 6 July 2014, the Department advertised (excluding the re-advertised Director: Office of the HOD and the matter at hand, Director: Human Resource Capacity Development) other Director Positions.
(a) Director: Curriculum Enrichment, required an appropriate recognised Bachelor’s degree or equivalent qualification;
(b) Director: Management Information and Technology, required an appropriate recognised Bachelor’s degree/diploma or equivalent qualification in Information Technology plus a minimum of 3 years appropriate management experience;

5.1.13. My observation from the above information as received from the Department is that, the Director: Human Resource Capacity Development was the only Director position advertised between February and July 2014, which accommodated a Grade 12 qualification.

5.1.14. An example of a Job Description obtained on 11 June 2019 from the Department for post of Director, indicated both the job specific and general job requirements and duties and mentioned amongst others the following as general requirements.
(a) A Degree at NQF level 7 plus a minimum requirement of 5 years’ experience at middle/senior managerial level;
(b) Proven outstanding managerial and service delivery competency;
(c) Sound knowledge and understanding of the PFMA and Financial Regulations;
(d) Proven communication and interpersonal skills at all level; and
(e) Sound analytical and problem solving skills.

5.1.15. It can clearly be noted from the above paragraph that a Grade 12 Certificate is not part of the requirement for a Director position.

5.1.16. In a document attached to the DPSA circular of 19 September 2002, marked as Annexure A, it is stated under RIGID REQUIREMENTS STATED IN ADVERTISEMENTS, that certain categories of employees were exempted from the educational qualifications requirement in terms of the following:

Acceptance of alternative qualifications, under which it is stated that:

"Until 30 June 1999, the Public Service Commission and the various Provincial Service Commission had on an ad hoc basis and according to merit sanctioned the relaxation/acceptance of alternative educational qualifications to those prescribed in the personnel administrative standards for purposes of the appointment/promotion of a candidate/employee. In respect of national departments, the Public Service Commission had delegated its powers to heads of departments subject to the following conditions:

(a) Standards must not be lowered;
(b) There must be sufficient evidence that the person will be able to carry out the duties attached to the relevant post level satisfactorily;
(c) Special circumstances must exist that justify a deviation from the prescribed measures;
(d) The labour market must be duly tested and no other persons who comply with the prescribed requirements must be available to fill the post;"
(e) No employee may be prejudiced by the relaxation...”

5.1.17. The Department’s reliance on the DPSA circular dated 19 September 2002 (the DPSA Circular) clearly does not eliminate the fact that the requirements of the post were lowered, an act which resulted in prejudice to the other candidates who were more qualified than Mr Moela and who were also from previously disadvantaged backgrounds. The conditions set out by the Commission above with specific reference to (c), (d) and (e) were ignored.

5.1.18. There is no evidence provided by the Department to confirm that the market was tested and that no other persons who complied with the prescribed requirements could be found. Failure by the Department to test the market as stated above resulted in the other candidates being prejudiced or overlooked for the position of Director.

Application of the relevant law

5.1.19. Section 195 (1) of the Constitution of the Republic of South Africa, 1996, provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. It requires inter alia a high standard of professional ethics and accountable public administration which is impartial, fair and transparent. It also requires good human-resource management and career-development practices, to maximise human potential.

5.1.20. Subsection (1)(i) further state that Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
5.1.21. The process followed by the Department of Education in determining the requirements for the post in question and the subsequent appointment of Mr Moela was expected to be transparent, fair or without bias. A high standard of professional ethics and fairness dictates that the candidate who meet the requirements which include educational qualifications, relevant experience and obtains the highest score had to be considered for appointment. Lowering the educational qualifications to accommodate one person while there are suitably qualified individuals with relevant experience, who are also from the previously disadvantaged group, cannot be regarded as being of a high standard of professional ethics and accountable.

5.1.22. Subsection (1)(i) mentioned above implies that the Department, is expected to practice good and fair human resource management practices. The Department had an opportunity to recruit the best suitable candidate.

5.1.23. Section 11(1) of the Public Service Act states the following:

"11(1) In the making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.

(2) In the making of any appointment in terms of section 9 in the public service-

(a) All persons who applied and qualify for the appointment concerned shall be considered; and

(b) the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act 55 of 1998), the
imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.”

5.1.24. The implication of the above provision is that appointment of candidates in the Public Service should be based on the candidates' training, skills, competence, knowledge and the need to redress. However, I do not see how the appointment of Mr Moela was done to fulfil the requirements of the Employment Equity Act as he was not different from the other candidates. He was of the same race and gender was not an issue and he was not even disabled.

5.1.25. The Public Service Regulations states the following:

Chapter 1B (b)
“Competence- means the blend of knowledge, skills, behaviour and aptitude that a person can apply in the work environment, which indicates a person’s ability to meet the requirements of a specific post.”

Chapter 1B (g)
“Inherent requirements of job- means competencies that, according to evidence, an employee needs in order to carry out a job.”

Chapter 1, Part VII C.1.1
“An executing authority shall determine composite requirements for employment in any post on the basis of the inherent requirement of the job.”

Chapter 1, Part VII C.1.2
“An executing authority shall-
(a) Record the inherent requirements of a job;
(b) Ensure that the requirements for employment do not discriminate against persons historically disadvantaged; and...."

Chapter 4, Part II A
"The recruitment, selection and appointment of persons to the SMS, shall take place in accordance with section 11 of the Act..."

5.1.26. The implication of the above is that in determining the inherent requirements for a job, the executive authority has a duty to determine what the employee needs to have in order to carry out the job, taking into account the competency of the applicant, in doing so the executive authority should not discriminate against persons previously disadvantaged. It can be argued that other candidates in this matter were discriminated against in that they presented the higher and most required qualifications and experience compared to Mr Moela.

5.1.27. Chapter 7 of the Mpumalanga Department of Education Employment Equity Plan, 2012-2015 states the following:

"The following affirmative action measures shall be applied to ensure the meeting of equity targets:

For purposes of this plan, applicants from designated groups shall qualify for a job as a result of any one of or any combination of the following:

a) Formal qualifications;
b) Prior learning;
c) Relevant experience; or
d) Capacity to acquire, within a reasonable time, the ability to do the job."
5.1.28. The implication of the above is that in appointing a candidate, taking into account the affirmative action measures, the Department should consider the formal qualification, prior learning, relevant experience or capacity of the candidate to acquire, within a reasonable time, the ability to do the job.

Conclusion

5.1.29. Based on the evidence obtained above, it can be concluded that the standard set out in the Constitution was not followed as the process to lower the qualifications for the position of Director: Human Resource Capacity Development was not transparent or fair and further that it did not cultivate a culture of good human resources management practice as required in section 195(1) of the Constitution.

5.1.30. It can also be concluded that the lowering of the qualifications for the position of Director: Human Resource Capacity Development was not in compliance with other prescripts such as the Constitution, the Public Service Act, the Ministerial Handbook and the Education Employment Policy and Public Finance Management Act.

5.1.31. It is evident that the lowering of the standard for the post of Director: HR Capacity Development prejudiced the other candidates.

5.2. Regarding whether the Department failed to follow proper recruitment and selection processes in the appointment of Mr Desmond Moela.
Common cause issues

5.2.1. The Department advertised the position of Director: Human Resources Capacity Development in the City Press newspaper on 6 July 2014 with the closing date of 24 July 2014.

5.2.2. The requirements for the position of Director: Human Resources Capacity Development were listed as follows:

(a) A three-year relevant Degree or Diploma or Grade 12 plus extensive appropriate experience.
(b) Proven outstanding managerial and service delivery competency
(c) In-depth understanding of Provincial Skills Development needs espoused in the Provincial Human Resources Development Strategy and the Mpumalanga Economic Growth and Development Path.
(d) In-depth knowledge policies, systems, processes, procedures and best practices pertaining to Capacity Development.
(e) Advance planning, organizing, reporting and project management skills.
(f) Strong interpersonal, networking, written and verbal communication skills at all levels.
(g) Proven ability to work with different stakeholders both in the public and private sectors.
(h) Excellent analytical and strategic thinking capabilities
(i) Sound financial management skills and etc.

5.2.3. Mr Moela applied for the position of Director: Human Resources Capacity Development, was shortlisted, interviewed together with seven (7) other candidates and subsequently appointed to the position.

5.2.4. Mr Moela had the following qualifications when he was shortlisted:
(a) Grade 12;
(b) Certificate of Competence for Supply Chain Management (Introduction to SCM, Demand and Acquisition Management);
(c) Certificate in Asset Miscellaneous;
(c) Certificate in Asset Management;
(d) Code 08 drivers licence; and
(e) Combined 11 years’ experience in the field of Supply Chain Management, Transformation, and Parliamentary Liaison.

5.2.5. The other seven (7) candidates had the following qualifications:

<table>
<thead>
<tr>
<th>Name and Surname</th>
<th>Qualifications and Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Mosia DE (Ms)</td>
<td>Primary Teacher Diploma (SPTD); FDE. Educational Guidance; Bacchaleus of Education (BEd)(Hons) in Educational Guidance; Post Graduate Diploma in HIV and AIDS Management; Post Graduate Diploma in Public Management; MED- educational guidance (Psycho-educational Programme Development); PhD (Doctor of Philosophy) in Curriculum and Instrumental Design and Development; Certificate of Competence in Eduetel Skills Development; Computer Literacy; assessor certificate in design and development outcomes based; Certificate in Facilitation and mentoring (Eduetel); Deputy Chief Education Specialist at the Department of Education from April 2008 to date; A Subject Advisor at the Department of Education from May 2005 to March 2008; An Acting Education Specialist from January 2000 to March 2005; A Developer of LTSM for Bateleur Publishers from January 1999 until January 2004;</td>
</tr>
<tr>
<td>2. Lukhele SA (Mr)</td>
<td>National Diploma in Human Resource Management; B-TECH in Human Resource Management; A Training Officer from April 2004 to December 2007; A Senior Training Officer from January 2008 until</td>
</tr>
</tbody>
</table>

| 3. Maphungela PN | Baccalaureus Artium (BA); Higher Diploma In Education; BEd Educational Management; ACE- Life Orientation; Deputy Chief Education Specialist for the Department of Education from January 2013 to date; Senior Education Specialist for the Department of Education from December 2006 until December 2012; An Educational Specialist (Life Orientation) from August 2004 until November 2006; An Educator for the Department of Education from February 1994 until August 2004. |

| 4. Hlebela CT | Bachelors of Arts; Higher Education Diploma; National Diploma in Human Resource Management; B-TECH In Human Resource Management; Master's in Public Administration; 12 years as Educator for the Department of Education from 12 January 1995 until 30 April 2007; An HRD Practitioner for the Department of Social Development from 03 May 2007 until 31 December 2010; An Assistant Manager: Policy Analyst from January 2011 until December 2012; Acting Manager (EXCO Secretariat from January until December 2013; Manager (Planning and programme Management) for the office of the Premier from January 2014 to date. |


| 6. Baloyi HA | Master of Business Administration; Master of Development; BA. Honors in Human Resource Development; BEd Honors; BA. in |
Education; Diploma in Human Resource Management; Diploma in Industrial Relation; Diploma in Marketing; Certificate in Leadership Training for Sustaining Development (Societies in Transition, Lead-Malawi); Certificate in Leadership Training for Sustaining Development (Greening our Economies, Lead-Canada); Certificate in Leadership Training for Sustaining Development (The Population Environment and Development Nexus- Lead RSA); Certificate in Policy Development and Management (Regenesys) Certificate in applied Population Science, training and research; Certificate in Strategic Planning; Certificate in Monitoring, Evaluation and Reporting; Certificate in Managing by Project Flight Simulation for Leaders; Certificate in HIV & AIDS, Certificate in Computer Training; Certificate in Train the Trainer; Certificate in Project Management. Head of Research, Chief Education Specialist from July 2008 to date; Deputy Chief Education Specialist from March 2006 to June 2008; Senior Education Specialist from September 2004 to February 2006; Education, Training and Development Specialist from July 2003 to August 2004; Education Management Development Specialist from January to June 2003; Curriculum Advisor for Geography from January 2000 to December 2002; Programme Manager from 1998 to 1999; Lecturer from 1993 to 1997; An Educator from 1988 to 1992.

7. Shongwe LL
Diploma in General Nursing; Diploma in Midwifery; Bcur. Degree, Majoring in Management, Education and Industrial Psychology; Post Graduate Diploma in Primary Healthcare; Master’s in Public and Development Management; Post Graduate certificate in Advanced Management and Development Management; Professional Nurse from 1983 to 1989; Senior Professional Nurse from 1990 to 1998; Chief Professional Nurse from 1998 to 2002; Human Resource Development Manager from 2002 to date.

5.2.6. It is therefore, evident that all the other candidates were more qualified for the position, had experience in the field of Human Resource Development or and Education and are all from the designated group. Mr Moela does not have a qualification and management experience in the field of Education and or
Human Resources Management/Development despite acting as Manager in the office of the former MEC.

5.2.7. The duties of the position were, *amongst others*, listed as:

(a) Conduct research on human resource development, skills audit and coordinate the delivery of training programmes, including ABET for all spheres of government in the Province;

(b) Manage the conducting of a needs analysis impact on skills audit and net return on investment as well as the development of and implementation of capacity development policies and e-learning;

(c) Manage the monitoring of compliance in respect of training programmes with relevant legislations;

(d) Develop and manage training database;

(e) Manage the monitoring of the implementation of training programmes; and

(f) Manage the development of curriculum programmes and ensure quality assurance thereof.

*Issues in dispute*

5.2.8. What is in dispute is whether the Department followed proper recruitment processes in appointing Mr Desmond Moela to the position of Director: Human Resource Capacity Development.

5.2.9. The Complainant argued that the recruitment process and appointment of Mr Desmond Moela was irregular in that he did not meet the standard educational qualifications for senior management positions and should therefore not have been shortlisted.
5.2.10. The former HOD, Mrs Mhlabane submitted a memorandum titled “Report on the shortlisted candidates for Director: Human Resource Capacity Development”, on 3 September 2014, directed to the MEC for Education requesting approval of shortlisted candidates.

5.2.11. The memorandum stated that the Department had shortlisted the candidates based on criteria. The criteria took into consideration:

- (a) The qualifications of candidates;
- (b) The number of years of experience in a middle/senior management position;
- (c) Experience in the education sector;
- (d) Female candidates were also given an opportunity to deal with gender issues in terms of the Employment Equity Act;
- (e) Candidates with disability who meet the minimum requirements were also considered.

5.2.12. The list of candidates was approved by the MEC for Education on 4 September 2014. The candidates were:

- (a) Mr HA Baloyi;
- (b) Mr CT Hlebela;
- (c) Mr SA Lukhele;
- (d) Ms PN Maphungela;
- (e) Ms LE Mhlongo;
- (f) Mr DL Moela;
- (g) Ms DE Mosia;
- (h) Ms LL Shongwe.

5.2.13. Mr Moela submitted his application form and CV on 23 July 2014. He indicated that he had a Grade 12 Senior Certificate, Asset management, Asset
Miscellaneous and Supply Chain Management certificates. He further indicated that he was at that time doing a course in Public Management and Administration through UNISA and passed the following modules:

(a) The nature, content and SCPB;
(b) Public Resource Management;
(c) Public Supply Chain Management;
(d) Public Office Management;
(e) Public Information Management;
(f) The structure and functions of Public.

5.2.14. Mr Moela’s work experience is listed as having been employed by Second Seen Consultants and Associates from 2003 and 2005 (designation unknown). His duties included:

(a) Managing tender procurement of the company;
(b) Managing the Masoyi housing processes;
(c) Communication/liasing with beneficiaries;
(d) Co-ordinating meetings between the company and the affected Department, housing and Mbombela Municipality;
(e) Writing reports to all stakeholders;
(f) Budgeting for the company.

5.2.15. Mr Moela also worked at the Department of Education as a Chief Administrative Clerk: Procurement Supply Chain Management, from 2005 to 2008. His duties included:

(a) Administering all tender processes;
(b) Managing all relevant procedures of tenders;
(c) Report writing for management;
(d) Playing an advisory role to the Manager: SCM;
(e) Assisting in doing research within procurement;
(f) Provide related management information;
(g) Awarding tenders through proper channels;
(h) Rendering demands and acquisition management services;
(i) Monitoring all tender processes;
(j) Communicating role with the section;
(k) Doing research on the current trends of supply chain policies.

5.2.16. Mr Moela further stated in his Curriculum Vitae that from the position of Chief Administrative Clerk at the Department, he then was appointed as Acting Assistant Manager: Transformation (2008-2009), Parliamentary Liaison Officer in the office of the MEC and Acting Manager (Director SL 13) in the office of the MEC. He stated his duties as the Acting Manager in the office of the MEC as follows:

(a) Co-ordinate the administrative functions in the office of the MEC;
(b) Fulfil the role of personal assistant to the MEC and act as a representative when directed to do so;
(c) Attend to issues of the cabinet;
(d) Ensure adequate research and briefing to facilitate meeting of the MEC’s obligations;
(e) Manage the diary of the MEC;
(f) Accompany the MEC on official trips as required;
(g) Develop, manage and maintain efficient linkage between the office of the MEC and all internal and external departmental stakeholders;
(h) Design, develop and maintain an orderly and efficient system and archive in the office of the MEC;
(i) Supervise, manage staff and the office;
(j) Deal with parliamentary issues of the Department.
5.2.17. Mr Moela further indicated that he was a member of the African National Congress Youth League (ANCYL) and was at the time the Provincial Chairperson.

5.2.18. In the submission for appointment directed to the MEC titled "Executive Council Memorandum" approved on 19 November 2014, the former HOD indicated that the interviews for the position of Director: Human Resource Capacity Development were conducted on 5 November 2014. The best performing candidates were Mr Moela and Ms DE Mosia, who were ranked on their performance and response to questions in the interview. The two candidates were subjected to a competency assessment and the results thereof combined with the interview scores to reach a final score.

5.2.19. In the said memorandum the former HOD, Mrs Mhlabane stated that in terms of the DPSA Circular dated 8 March 2013, on the implementation of the Cabinet's Decision taken in November 2012 the due date for achieving targets set of 50% women appointed in Senior Management Posts in the Public Service was postponed up to 31 March 2014. It can therefore be argued that the Department had the opportunity to address their employment equity since they had 15 females and 19 males at Senior Management level. However, despite this target Mrs Mhlabane still went ahead and recommended Mr Moela for appointment. The memorandum was approved by the MEC of Education on 19 November 2014.

5.2.20. A meeting was held with Managers in the Human Resources and Development of the Department on 30 May 2017. They are Messrs Kendrick Matsane, Moses Lubisi and Goodman Matjiele. They indicated that Mr Moela never occupied the position of Director: Human Resource Capacity Development after he was appointed. He continued working at the MEC's office.
Application of relevant law

5.2.21. Section 195(1) (a) and (f) of the Constitution provides that:

"Public Administration must be governed by the democratic values and principles enshrined in the Constitution including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.
(b) ...
(c) ...
(d) ...
(e) ...
(f) Public administration must be accountable."

5.2.22. These principles enjoin the Department and its officials to exercise a high level of professionalism and ethics, including accountability in the performance of their duties.

5.2.23. The Mpumalanga Department of Education Recruitment Policy of December 2011 (Recruitment Policy) was established to ensure the promotion of, amongst others, fairness, equity, transparency, effective placement of personnel to enhance good governance and resource utilisation.

5.2.24. The Policy Statement contained in paragraph 1.1 of the Recruitment Policy state that "the Mpumalanga Department of Education is committed to achieving a workforce that is representative of the South African people by applying open, honest, objective and transparent processes in the filling of post with a view to appoint the most appropriate candidates who in terms of their personal and skills profiles shall enhance the Department's capacity to deliver on its operational needs".
5.2.25. It is not clear why Mr Moela was appointed as he was not the most appropriate candidate and it is not clear how he was going to enhance the capacity of the Department to deliver on its needs as he had the lowest qualifications and he did not have the extensive and relevant experience in the position. That is probably why he never occupied the position he was appointed to.

5.2.26. The Recruitment Policy also states the following:

**Paragraph 1.4**

"Mpumalanga Department of Education shall only appoint those candidates that meet the minimum requirements as stipulated in the advertisement and or the creation of the post".

**Paragraph 2.4.3**

"(a) Through effective advertising, the Department shall ensure that all potential applicants, especially persons from designated groups, are considered for employment on the basis of their skills, competencies, experience, prior learning and level of training.

(b) The language and style of the advertisement for a post shall be clear and simple, to attract candidates from all sectors of the population, especially the previously disadvantaged groups.

(c) An advertisement for a post as a minimum requirement shall specify:

(d) …;

(e) The inherent requirements of the post- Qualifications shall be defined in terms of educational qualification, recognition of prior learning, relevant experience, knowledge and skills..."
Paragraph 2.5.7

b. Shortlisting process

The Chairperson shall remind all members of the principles to be applied, taking into consideration:

(i) *Merit - Selection on merit is fundamental in ensuring the recruitment and appointment of the highest calibre candidates in the Department. The persons shortlisted shall be best suited on the basis of skills, knowledge, experience, abilities, personal attributes and also the need to achieve a representative and diverse workforce;*

(ii) *Inherent requirements of the post - The Selection Committee shall use the following guidelines in determining the suitability for shortlisting of the candidates: relevant experience, qualifications and prior learning, ability to acquire experience in short space of time. (Note: Qualifications in this case shall also include equivalent skills and experience and not formal qualifications only)*.

5.2.27. The above clause places an obligation upon the Department and in particular the shortlisting panel, to give consideration to the candidates' relevant experience, qualifications and prior learning, ability to acquire experience in a short space of time. The Department was expected to recruit and appoint candidates who meet the minimum requirements in the advertisement and qualify for the post. It should be noted that qualifications include experience.

5.2.28. In this case, the Department cannot be said to have shortlisted the best suited person on the basis of skills, knowledge, experience, abilities nor can it be said to have recruited and appointed a person of the highest calibre in the Department, as required by paragraph 2.5.7 of the Recruitment policy.
Conclusion

5.2.29. Based on the evidence obtained, it can be concluded that the appointment of Mr Moela was not in compliance with the Recruitment Policy. His experience was not inherent to the position to which he was appointed nor was it extensive or appropriate. I have also taken note of the fact that although Mr Moela had worked in the Department, however his experience is in Supply Chain Management and not in Human Resources. In addition, he is not even pursuing a formal qualification, a degree as required by the DPSA framework on the appointment of Senior Managers in the Public Service.

5.3. Regarding whether the Department and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr D Moela.

Common cause issues

5.3.1. It is common cause that Mr Moela was appointed to the position of Director: Human Resource Capacity Development, however, he did not occupy the said position. He remained in the office of the MEC as Acting Manager but he was receiving a salary of a Director.

5.3.2. It is further common cause that all the (7) shortlisted candidates were more qualified for the position and were all from the designated group that was previously disadvantaged, however they were all overlooked for the position.

Application of relevant law

5.3.3. Section 81(1) of the PFMA provides that:
“(1) An accounting officer for a department or a constitutional institution commits an act of financial misconduct if that accounting officer willfully or negligently-

(a) …

(b) makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless and wasteful expenditure.”

5.3.4. The implication of the above provision is that, Mrs Mhlabane, as the former Accounting Officer, committed financial misconduct when she failed to follow proper recruitment procedures thereby causing the Department to incur an irregular expenditure by appointing Mr Moela as Director: Human Resource Capacity Development, a position that was not supposed to be advertised in its current form, beig the only Director post with a grade 12 requirement.

5.3.5. Section 81(2) of the PFMA provides that:

(2) An official of a department, a trading entity or a constitutional institution to whom a power or duty is assigned in terms of section 44 commits an act of financial misconduct if that official willfully or negligently fails to exercise that power or perform that duty.

5.3.6. Mr Moela, having been appointed to the position of Director: Human Resource Capacity Development by the former HOD, Mrs Mhlabane, failed to occupy the position as appointed and continued to work as Acting Manager in the office of the MEC which is however, a senior management post at salary level 13 as well.

5.3.7. Section 84 of the PFMA states that “a charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in
section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official…"

5.3.8. The above section of the PFMA provides that an investigation needs to be initiated into the financial misconduct stipulated under section 81 of the Act.

Conclusion

5.3.9. Based on the evidence gathered, it can thus be concluded that the Department and the seven (7) candidates who were overlooked for the position suffered prejudice as a result of the appointment of Mr Moela.

6. FINDINGS

Having regard to the evidence obtained during the investigation, and the regulatory framework determining the standard the Department should have complied with, I therefore make the following findings:

6.1. **Regarding whether the Department improperly and irregularly lowered the required standard for the position of Director: Human Resource Capacity Development to suit Mr Desmond Moela.**

6.1.1. The allegation that the Department improperly and irregularly lowered the required standard for the position of Director: Human Resource Capacity Development to suit Mr Desmond Moela is substantiated.

6.1.2. The Department could not provide reasons for lowering the requirements for the position of Director: Human Resource Capacity Development compared to the other Director positions advertised during the period between February and July
2014. The position of Director: Human Resource Capacity Development was the only post at Senior Management level that required a grade 12 qualification. Therefore, the requirements for this post were not in line with the standard for a post on a Senior Management level such as a Director. It can therefore be concluded that the standard for this particular post was deliberately lowered to accommodate the appointment of Mr Moela.

6.1.3. The conduct of the Department is in violation with section 11(1) and (2) of the Public Service Act and Chapter 1B (a) and (g) of the Public Service Regulations.

6.1.4. The conduct of the Department constitute 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 Department failed to follow proper recruitment and selection processes in the appointment of Mr Desmond Moela.

6.2.1. The allegation that the Department failed to follow proper recruitment and appointment procedures in the appointment of Mr Desmond Moela, is substantiated.

6.2.2. When the Department advertised the position of Director: Human Resource Capacity Development in the City Press newspaper on 6 July 2014 it included "extensive experience" as a requirement. The shortlisting of Mr Moela who only had a Grade 12 and without extensive experience, which would have compensated for lack of an educational qualification such as a Degree or Diploma, denied all the shortlisted candidates the opportunity to occupy the post. Mr Moela never occupied the position after he was appointed.
6.2.3. It was therefore unfair, unequitable and improper for the Department to then shortlist and subsequently appoint Mr Moela, who only had the Grade 12 requirement, but did not meet other post requirements reflected in the advertisement. It was improper for the Department, particularly Mrs Mhlabane, to have considered the DPSA circular dated 19 September 2012 (which was advisory in nature and not prescriptive) to justify the shortlisting and appointment of Mr Moela.

6.2.4. The conduct of Mrs Mhlabane, was in violation of the policy statement in paragraphs 1.1 and 2.4.3 and 2.5.7 of the Recruitment Policy.

6.2.5. Such conduct 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.

6.3. Regarding whether the Department and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr D Moela

6.3.1. The allegation that the Department and other candidates suffered prejudice as a result of the alleged irregular appointment of Mr D Moela, is substantiated.

6.3.2 The conduct of the Department, particularly the former HOD Mrs Mhlabane, to advertise a position with lowered qualifications resulted in financial misconduct committed as prescribed in section 81 of the PFMA. Therefore, a charge of financial misconduct must be investigated in terms of the statutory or other conditions of employment applicable to the former Accounting Officer in terms of section 84 of the PFMA.

6.3.3 The conduct of the Department, particularly the former HOD Mrs Mhlabane resulted in the Department suffering financial prejudice by failing to comply with
proper recruitment processes. The recruitment cost incurred for the position of Director: Human Recourse Capacity and development was R 8 847.02 plus S&T claims submitted by the shortlisted candidates who were not from around Nelspruit. The appointment of Mr Moela further prejudiced the other seven candidates who were overlooked for the position, a conduct which resulted in loss of an employment opportunity, at least for one candidate had proper recruitment processes been followed.

6.3.4 Such conduct 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.

7. **REMEIAL ACTION**

In light of the above, and having taken into account evidence before me, the appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

7.1. **The HOD of the Department of Education must ensure that:**

7.1.1 Within thirty (30) working days from the date of this report, the job description of the position of Director: Human Resource Capacity Development is reviewed and that the required minimum qualifications are aligned with the guidelines for the appointment of senior managers in the public service.

7.1.2 Within sixty (60) working days from the date of this report, the Chief Financial Officer (CFO) investigate the fruitless and wasteful expenditure and declare same in their financial statement to Provincial Treasury.
7.1.3 Within sixty (60) working days from the issuing of the investigation report by the CFO, appropriate action against any implicated official is taken.

7.1.4 Within sixty (60) working days from the date of this report, initiate a judicial review process contemplated in terms of section 6 and 7 of PAJA to set aside the appointment of Mr Moela on the basis that he was irregularly appointed to a post of a Director: Human Resource Capacity Development without having the required extensive experience and the fact that the standard for this particular post was deliberately lowered to accommodate his appointment as he did not have a Degree or Diploma.

8 MONITORING

8.1 The HOD of the Department of Education must, within fifteen (30) working days from the date of the issuing of this report, submit to my office the implementation plan with timelines indicating how the remedial actions referred to in paragraph 7 above will be implemented.

8.2 I wish to bring to your attention that in line with the Constitutional Court judgement in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Other; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Acting Regional Executive Manager of SASSA, unless they obtain a Court order directing otherwise.