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"Allegations of maladministration and improper conduct by the Independent Development Trust in the suspension and discharge from service of Ms Lulu Pemba"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT BY THE INDEPENDENT DEVELOPMENT TRUST IN THE SUSPENSION AND DISCHARGE FROM SERVICE OF MS LULU PEMBA
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Executive Summary

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, [Act No. 108 of 1996] (the Constitution), and section 8(1) of the Public Protector Act, [No. 23 of 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 maladministration and improper conduct by the Independent Development Trust (IDT) in the suspension and discharge from service of Ms Lindisa Lulu Pemba (the Complainant) from its employ.

(iii) The complaint was lodged with my office on 12 April 2012 as per the complaint form dated same.

(iv) The Complainant is 61 years of age and a former General Manager: Legal Services for IDT.

(v) In the main, the Complainant alleged that she was suspended from her position on pretext of trumped-up charges which were orchestrated for purposes of removing her from her position. Without any investigation being conducted into the allegations levelled against her, she was formally charged and subjected to a disciplinary process which found against her. The IDT failed to set down her application for appeal against the disciplinary findings and instead proceeded to unilaterally process her employment termination documents.
(vi) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the IDT improperly or unlawfully suspended and discharged the Complainant from service; and

(b) Whether the Complainant was improperly prejudiced by the IDT’s conduct under the circumstances.

(vii) Key laws and policies taken into account to determine if there had been maladministration by the IDT were principally those imposing administrative standards that should have been complied with by the IDT. Those are the following:

(a) Section 23 of the Constitution which enshrines the right to fair labour practices; section 185 of the Labour Relations Act, 1995 (the Labour Relations Act) which provides for the right not to be unfairly dismissed or subjected to unfair labour practices and section 186(2)(b) of the Labour Relations Act which defines the meaning of unfair labour practice. The Code of Good Practice: Dismissal and relevant provisions of the IDT’s Policy on Employment Relations of 2000 were relied on and applied to measure the standards which the IDT was supposed to adhere to.

(b) Provisions of sections 181 and 182 of the Constitution read with Section 6 of the Public Protector Act were relied on in affirming my jurisdiction to investigate the matter. The Supreme Court of Appeal Judgment of Minister of Home Affairs vs the Public Protector South Africa¹ was also instrumental in as far as my jurisdiction is concerned together with the Public Protector touchstone, “Collateral Damage”, report no. 09 of 2016/2017.

¹ Minister of Home Affairs vs the Public Protector South Africa 2018 (3) SA 380 (SCA).
(viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:

(a) **Regarding whether the IDT improperly or unlawfully suspended and discharged the Complainant from service:**

(aa) The allegation that the IDT improperly and unlawfully suspended the Complainant and discharged her from service is substantiated.

(bb) The suspension of Ms Pemba was done under the pretext that there would be an impending investigation, which never took place. On the evidence uncovered, Ms Maesela had neither been requested to conduct any investigation into the alleged offenses perpetrated by the Complainant as required by IDT policy, nor was she ever questioned in relation to such investigation prior to formal charges being levelled against the Complainant. Ms Taylor, who was directly involved in the Murray and Roberts issue, was never questioned regarding any such investigation. The IDT failed to set down the Complainant’s appeal to the Disciplinary hearing, yet proceeded to unilaterally process her employment exit papers.

(cc) The conduct of IDT has in the circumstances violated the Complainant’s rights to fair labour practices enshrined in section 23 of the Constitution and the manner in which suspension was handled can be deemed an unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act. In not conducting an investigation into the allegations levelled against the Complainant, the IDT failed to adhere to the standard set by Item 4(1) of the Code of Good Practice: Dismissal as set out in Schedule 8 of the Labour Relations Act and paragraph d (1) of the IDT Policy on Employment Relations dated 12 December 2000. In failing to attend to the Complainant’s appeal of the Disciplinary Hearing outcome within the prescribed period, the IDT further flouted paragraph 1.4 of the IDT Policy on Employment Relations.
(dd) The IDT management’s failure to appear before me when required to do so under subpoena and failure to provide subpoenaed records is a direct violation of section 181(3) and (4) of the Constitution. The IDT’s contentions relating to my alleged lack of jurisdiction to investigate the matter, fails to take into account sections 182 of the Constitution and Section 6(4) of the Public Protector Act. Due regard has also not been given to the Supreme Court of Appeal Judgment of Minister of Home Affairs v The Public Protector South Africa\(^2\) and the Public Protector touchstone “Collateral Damage”, report no. 9 of 2016/2017.

(ee) Such conduct by the IDT 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 IDT’s conduct under the circumstances:

(aa) The allegation that the Complainant was improperly prejudiced by the IDT’s conduct under the circumstances is substantiated.

(bb) On the facts, the Complainant suffered mental and emotional anguish as a result of the conduct of the IDT. In addition to that, her employment prospects and reputation within her profession have been tainted by the irregular suspension which led to her ultimate dismissal.

(cc) The IDT did not heed the pronouncements made by Molahlehi J in the Labour Court matter of South African Post Office case in as far as suspension is concerned. The conduct of the IDT in suspending the Complainant can indeed be understood to have been arbitrary and abusive in nature in accordance with the remarks by

\(^2\) (2018) 2 ALL SA 311 (SCA)
Professor Cheadle in her article "Regulated Flexibility and small business: Revisiting the LRA and the BCEA."

(dd) Such conduct by the IDT 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.

(IX) In light of the above findings I am directing the following appropriate remedial action as contemplated in section 182(1)(c) of the Constitution:

(aa) The appropriate remedial action taken as contemplated in section 182(1)(c) of the Constitution, with a view of remedying the impropriety referred to in this report is the following:

(bb) The Minister of Public Works, Ms Patricia De Lille must, within 30 days of receipt of my report, reprimand the Chairperson of the Board of IDT Mr. Motswaledi and the Chief Executive Officer of IDT Mr. Pakade for failing to appear before the Public Protector when directed by subpoena do so and for failing to provide subpoenaed records which would have served to assist me in my investigation;

(cc) The Chief Executive Officer of IDT, Mr Pakade must, within 30 days of receipt of my report, issue an apology on behalf of the IDT to Ms Pemba for the manner in which her suspension and application for appeal were handled by the IDT.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT BY THE INDEPENDENT DEVELOPMENT TRUST IN THE SUSPENSION OF MS LULU PEMBA

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, 1994 (the Public Protector Act).

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

1.2.1. The Minister of Public Works, Honourable Patricia De Lille;

1.2.2. The Chairman of the Board for the Independent Development Trust, Mr Tlhotse Enoch Motswaledi;

1.2.3. The Chief Executive Officer of the Independent Development Trust, Mr Coceko Pakade;

1.3. A copy of the report is also provided to Ms Lulu Pemba (the Complainant) to inform her about the outcome of my investigation.

1.4. The report relates to an investigation into the alleged maladministration and improper conduct by the Independent Development Trust (IDT) in the suspension of the Complainant from its employ.
2. **THE COMPLAINT**

2.1 The complaint was lodged with my office by Ms Lulu Pemba (the Complainant) on 12 April 2012.

*Background of the complaint*

2.2 In the main, the Complainant alleged the following:

2.2.1 She is sixty one (61) years old and a former employee of the IDT. She worked at the IDT as the General Manager: Legal Services;

2.2.2 On 03 February 2010 she was summoned to the office of her supervisor, Ms Pinkie Maesela, where she was handed a Notice of Suspension by Mr Reckson Mankgele, the IDT’s Labour Relations Officer. Ms Maesela, in the presence of Mr Mankgele indicated that she had no knowledge of the allegations levelled against the Complainant and that she was merely following the instruction of the then Chief Executive Officer, Ms Thembi Nwendamutshu;

2.2.3 The reasons cited for the suspension were that the IDT could consider instituting disciplinary action against her, following an investigation arising from her conduct pertaining to the disclosure of information to Murray and Roberts consequent to their query in respect of a tender award and legal opinions she provided relating to the KwaZulu-Natal Hlabisa Hospital Phase 2 Project and legal opinion relating to the settlement of a matter on which summons had been issued to trustees which were deemed not to have been in the best interest of the IDT;

2.2.4 She was instructed to sign an acknowledgement of receipt of the Notice and to vacate the IDT premises immediately;
2.2.5 On 23 of February 2010, she was telephonically contacted by Ms Loshni Govender, one of her former subordinates and interrogated telephonically relating to the allegations against her. Following this, she requested access to her work laptop to enable her to verify the allegations against her, but was not granted access;

2.2.6 She was then formally charged and a disciplinary hearing set down for 21 May 2010. The hearing was presided over by Adv. N Cassim SC and per the findings dated 11 August 2010, she was found guilty on all charges levelled against her and sanctioned to dismissal with three (3) months compensation; and

2.2.7 She was notified of the outcome of the disciplinary hearing on 25 August 2010 and on 06 September 2010; she lodged an appeal against the findings of the disciplinary hearing. The IDT proceeded to process her termination of employment documents without setting down the appeal for hearing or allowing her an opportunity to appeal the decision as required by the IDT’s internal policies.

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:

"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) provides that the Public Protector has additional powers and functions prescribed by national legislation.

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

3.5 In *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.\(^3\) 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."\(^4\)

3.6 In the above-mentioned Constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:

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

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

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\(^3\) *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

\(^4\) *Supra* at para [73].
3.6.3 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 the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.6.4 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 (paragraph 69);

3.6.5 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 (paragraph 70);

3.6.6 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 the investigation and the type of findings made (paragraph 71);

3.6.7 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 the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (paragraph 71(a));
3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and

3.6.9 "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 (paragraph 71(e)).

3.7 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 2013), the Court held as follows:

a) "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);

b) 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);

c) The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the circumstances (paragraph 79);

d) 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):

I. Conduct an investigation;

II. Report on that conduct; and

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

f) 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);

g) 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);

Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112)."

3.8 The IDT 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.

3.9 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was disputed by the IDT at the onset of my investigation. The issue of my jurisdiction has accordingly been dealt with extensively as a sub-issue to the main issues under investigation, as this was the basis upon which the IDT’s defense to the issues under investigation mostly rested.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.
4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting an investigation into alleged improper conduct or maladministration.

4.1.3 The investigation process included an exchange of correspondence with the Complainant and the IDT. An attempt was also made to resolve the matter through Alternative Dispute Resolution mechanisms, which attempt was unsuccessful, the matter was escalated to a full scale investigation for adjudication.

4.2. **Approach to the investigation**

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

4.2.1.1 What happened?
4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?
4.2.1.4 In the event of impropriety or maladministration, what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the IDT improperly or unlawfully suspended the Complainant from her position and if answered in the affirmative whether the Complainant suffered any prejudice as a result thereof.
4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the IDT to prevent maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration.

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

4.3.1 Whether the IDT improperly or unlawfully suspended the Complainant from her position; and

4.3.2 Whether the Complainant was improperly prejudiced by the IDT's conduct under the circumstances.

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 Complaint form dated 12 April 2012 and detailed notes to the complaint;
4.4.1.2 Notice of Suspension dated 03 February 2010;
4.4.1.3 Undated Charge Sheet;
4.4.1.4 Disciplinary Hearing Findings dated 11 August 2010;
4.4.1.5 Application and Grounds for Appeal of Disciplinary Hearing dated 06 and 07 September 2010 respectively;
4.4.1.6 Subpoena to Chairperson of the Board of IDT Mr Tlhotse Enoch Motswaledi dated 13 November 2018;
4.4.1.7 Subpoena to CEO of IDT Mr Coceko Pakade dated 13 November 2018;

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4.4.1.8 Subpoena to Acting Executive Head: Programme Management Services Unit, Mr Stephen Ntsandeni dated 13 November 2018;

4.4.1.9 Subpoena to IDT Senior Manager: Employee Relations Mr Reckson Mankgele dated 13 November 2018;

4.4.1.10 Notice in terms of Section 7(9) addressed to Mr Tlhotse Motwaledi dated 24 April 2019;

4.4.1.11 Notice in terms of Section 7(9) addressed to Mr Coceko Pakade dated 24 April 2019;

4.4.1.12 Notice in terms of Section 7(9) addressed to Mr Stephen Ntshandeni dated 24 April 2019; and

4.4.1.13 Notice in terms of Section 7(9) addressed to Minister Thulas Nxesi dated 24 April 2019.

4.4.2 Interviews conducted

4.4.2.1 Consultation between the investigation team and the Complainant on 12 April 2012;

4.4.2.2 ADR meeting of 13 March 2017;

4.4.2.3 Consultation between the investigation team and Ms Pinkie Maesela on 11 October 2018;

4.4.2.4 Consultation between the investigation team and Ms Taylor on 11 October 2018; and

4.4.2.5 Subpoena meeting between the Public Protector’s Office and the IDT on 13 December 2018.

4.4.3 Correspondence sent and received

4.4.3.1 A letter from Murray and Roberts to IDT dated 10 December 2009;

4.4.3.2 Letter from IDT to Murray and Roberts dated 10 December 2009;

4.4.3.3 Letter from Murray and Roberts to IDT dated 12 January 2010;

4.4.3.4 Letter from Murray and Roberts to IDT dated 26 January 2010;
4.4.3.5 E-mail from Ms Asanda Taylor to the Complainant dated 27 January 2010;
4.4.3.6 Letter from IDT to the Complainant dated 18 August 2010;
4.4.3.7 E-mail from the Complainant to Ms Pinkie Maesela and Mr Reckson Makgele
dated 08 September 2010;
4.4.3.8 Letter from the Complainant to Assenmacher Attorneys dated 27 September
2010;
4.4.3.9 Letter from IDT to the Public Protector’s Office dated 30 October 2013;
4.4.3.10 Letter from Maphoso Mokoena Attorneys to the Public Protector’s Office dated
12 December 2018;
4.4.3.11 Letter from Maphoso Mokoena Attorneys to the Public Protectors Office dated
09 May 2019;
4.4.3.12 Letter from the Minister of Public Works to the Public Protector’s Office dated
16 May 2019; and
4.4.3.13 Further submission in response to the Section 7(9)(a) Notice from Maphoso
Mokoena Attorneys to the Public Protector’s Office dated 03 July 2019.

4.4.4 Legislation and other legal prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996;
4.4.4.2 The Public Protector Act 23 of 1994;
4.4.4.3 The Labour Relations Act 66 of 1995;
4.4.4.4 The Code of Good Practice: Dismissal, Schedule 8 of the Labour Relations Act;
4.4.4.5 The IDT Policy on Employment Relations dated 12 December 2000;
4.4.4.6 The Supreme Court of Appeal Judgement of Minister of Home Affairs v the
Public Protector of South Africa, case no 308/2017;
4.4.4.7 Public Protector Report No. 09 of 2016/2017 titled “Collateral Damage”;
4.4.4.8 Article: “Regulated flexibility and small business: revisiting the LRA and the
BCEA” by Prof Halton Cheadle, accessed from
https://open.uct.ac.za/bitstream/handle/11427/7352/DPRU_WP06-
109.pdf?sequence=1&isAllowed=y;
4.4.4.9 Labour Court Judgment of South African post Office vs GS Jansen van Vuuren (2008) 8 BLLR 798 (LC);

4.4.4.10 Constitutional Court Judgment of Long v SAB (Pty) Ltd & Others 2019 (6) BLLR 515 (CC).

4.4.4.11 Minister of Home Affairs vs the Public Protector South Africa 2018 (3) SA 380 (SCA).

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

5.1 Regarding whether the IDT improperly or unlawfully suspended and discharged the Complainant from service:

Common cause issues

5.1.1. The Complainant is a former employee of the IDT, who worked as a General Manager in Legal Services from August 2007.

5.1.2 She was suspended from her position on 03 February 2010 by way of a Notice of Suspension dated same.

5.1.3 She was subsequently formally charged and a disciplinary hearing ensued thereafter, which found her guilty on all the charges leveled against her and sanctioned her to dismissal with payment of three (3) months of her salary.
**Issues in dispute**

On the substance of the complaint

5.1.4 The Complainant took issue with the manner in which her suspension which led to her subsequent dismissal was handled by the IDT. She argued that the charges brought against her were orchestrated as a way to create a seemingly justifiable reason for removing her from her position.

5.1.4 During my investigation team’s consultation with the Complainant on 12 April 2012, she provided a background on the events which precipitated her suspension on 03 February 2010. She advised that prior to her suspension she was the top performer in the unit which Legal Services was under and that in the 2008/2009 period she had received a performance bonus. Prior to her suspension, an announcement had been made that she would again be receiving a performance bonus in the 2009/2010 period.

5.1.5 At the heart of the matter of her suspension however, was actually a response to a request for information which her subordinate, Ms Asanda Taylor, the Legal Advisor in her unit, had prepared and sent out to Murray and Roberts when they enquired with the IDT about the Polokwane High Court Construction tender. The IDT’s former Chief Executive Officer (CEO), the late Ms Thembi Nwendamutshu, disagreed with the legal opinion rendered in the matter and the provision of requested information to Murray and Roberts by Ms Taylor, which had been authorised by the Complainant, who was and ultimately suspended and subjected to a disciplinary process.

5.1.6 The letter from Mr PF Martins, the Director at Murray and Roberts to IDT dated 10 December 2009, indicated that Murray and Roberts queried the process of adjudication and award of the Polokwane High Court Tender with the IDT. The
query was responded to by Ms Nwendamutshu through a letter addressed to Murray and Roberts dated 10 December 2009.

5.1.7 On 12 January 2010, Murray and Roberts sent the IDT a follow up enquiry requesting a detailed breakdown of the points allocation per tenderer and when a response was not forthcoming, a reminder letter dated 26 January 2010 was sent, requesting the IDT to revert with the requested information.

5.1.8 E-mail correspondence dated 27 January 2010 from Ms Taylor to the Complainant indicated that she briefed the Complainant about Murray and Roberts request for information and discussions which she had with the Development Programme Services (DPS) team relating to the matter. In her email she advised as follows:

"...Dallip requested legal services to respond to Murray and Roberts letter dated 12 January 2010 requesting the tender adjudication documents relating more specifically the awarding of the tenders on the basis of price and functionality, a detailed breakdown of the points allocation per tenderer was requested.

Dallip was furnished with the opinion on the subject matter on the 22 January 2010, advising him that Murray and Roberts is entitled to the information requested.

On the 26 January 2010, the meeting was called by DPS Team to discuss the opinion. DPS team expressed their concerns about the opinion and that they are not accepting it. There were various options discussed as the way forward and finally it was agreed that Legal Services should respond along the lines of the attached draft letter.

Please find the opinion and the draft letter.
Regards" [sic]
5.1.9 The Complainant advised that in agreement with the content of the legal opinion as being in compliance with, *inter alia*, the Promotion of Access to Information Act, 2000 and the Promotion of Administrative Justice Act, 2000, she authorised that the response enclosing the required information be sent to Murray and Roberts. Ms Taylor accordingly signed the letter and had it dispatched.

5.1.10 Following the above, on 03 February 2010, she was called to the office of Ms Maesela. When she arrived she found Ms Maesela in the presence of Mr Mankgele and was handed her Notice of Suspension and requested to acknowledge receipt. According to the Complainant, Ms Maesela admitted in the presence of Mr Mankgele that she had no idea what the suspension was about and that she was merely following the CEO's instructions.

5.1.11 The reasons for the Complainant’s suspension were articulated as follows as per the Notice dated 03 February 2010:

“the organization may consider to institute disciplinary action against you, following investigation, arising from your conduct and legal opinions or advise expressed, deemed not to have been in the best interest of the organization, pertaining of the following matters: -

1. *Disclosure of information to Murray and Roberts consequent to their query in respect of a tender award,*

2. *Relating to the legal opinion you provided on the KZN Hlabisa Hospital Phase 2 Project,*

3. *Legal opinion provided relating to settling of the matter against which summons were issued to the Trustees...* [sic]

5.1.12 At an interview on 11 October 2018 by my investigation team with Ms Maesela, she confirmed that she had neither been requested to conduct any investigation into the alleged offences by the Complainant nor was she ever questioned for
purposes of any investigation prior to formal charges being leveled against her. Ms Taylor also confirmed that she was never questioned in relation to any investigation despite having first-hand knowledge about the Murray and Roberts issue. Nevertheless, the Complainant was formally charged as per an undated charge sheet in possession of my office. The charge sheet reflected the following offences against her:

1. **Charge 1**
   Gross misconduct, in that you acted in a grossly negligent manner by failing to enter an Appearance to Defend pursuant to an action in the High Court of South Africa, Pietermaritzburg, under Case number: 10874/09, instituted by Langalibalele Joint Venture against the Trustees of the Independent Development Trust.

2. **Charge 2**
   Gross misconduct, in that you acted in a dishonest manner when you were requested, on or about 24 February 2010, by Loshni Govender, whether you have any knowledge in respect of the summons referred to in Charge 1 above, and you stated that you had no knowledge of the summons, in circumstances where you were fully aware of the summons.

3. **Charge 3**
   Gross misconduct, in that you caused and allowed the delivery of a written response, signed by Ms Asanda Taylor, dated 01 February 2010, to Murray & Roberts, including the documents referred to therein, consequent to a letter received from Murray & Roberts dated 12 January 2010, despite the existence of the following material facts and circumstances, pursuant to which you did not have the authority to deliver such letter, alternatively, reasonably considered, ought not to have had the letter delivered, thereby having deprived the Independent Development Trust with the opportunity to deliver a duly considered
and consensus reply to Murray & Roberts, in the face of a potentially sensitive matter, viz:

3.1 in the circumstances where it was specifically understood and agreed to between Ms Asanda Taylor, yourself and members of the DPS Team, particularly, Mr Dallip Bhowani, that Legal Services Department will first draft a letter in reply to the letter of Murray & Roberts of 12 January 2010, and provide such draft letter to the DPS Team for consideration and comment, prior to the dispatch thereof to Murray & Roberts;

3.2 in the circumstances, given that you were fully aware of the difference of views between yourself and the DPS Team as to the contents of the said response letter, you were obliged to have escalated the matter to your line manager Mrs Pinkie Maesela, for consideration, before dispatch of the letter to Murray & Roberts;

3.3 in the circumstances, given that the aforesaid correspondence by Murray & Roberts was addressed to the Chief Executive Officer, you should have ensured that Mrs Maesela and the Chief Executive Officer were fully appraised of the contents of the intended written response to Murray & Roberts before the dispatch thereof, particularly, in the circumstances where you were aware of the fact that the DPS Team had been in discussion with the Chief Executive Officer regarding the matter, and that it was appropriate for the Chief Executive Officer or a designated representative to sign the said letter.

3.4 In circumstances, where you provided Murray & Roberts with information in extent of what was requested by them, in circumstances further, where you were fully aware that the DPS Team was in disagreement with you and unwilling to provide such information to Murray & Roberts.
4. **Charge 4**

Gross misconduct in that you failed to discharge your duties in a manner reasonably expected of you, by not acting diligently and not taking into account practical and other material considerations, apart from legal consideration only, in the interest and support for the Independent Development Trust, thereby progressively causing a distrust by senior management of the value and effectiveness of your opinions and advice, with particular reference to the following matters:

4.1 *KZN Hlabisa Hospital Phase 2 Project where you gave advice to consider cancellation of the tender;*

4.2 *Your proposed settlement of the action instituted by Llale and CO. (Pty) Ltd against the Trustees of the Independent Development trust under Case number: 50666/09 of the High Court of South Africa, Johannesburg; and*

4.3 *Disclosure of information to Murray & Roberts consequent to their queries in respect of the IDT Bid number 001/09-Polokwane High Court." [sic]*

5.1.13 The disciplinary hearing proceeded on the first three (3) charges, with the IDT withdrawing the fourth charge, without any reasons provided. The disciplinary hearing was presided over by Adv. Nasir Cassim SC. It culminated in the Complainant being found guilty on all three (3) charges per the Disciplinary hearing findings dated 11 August 2010 and sanctioned to dismissal with three (3) month’s compensation. A copy of the findings was only provided to the Complainant on 25 August 2010.

5.1.14 Following this verdict, the Complainant lodged an application for appeal against the findings of the Disciplinary hearing as per the application for appeal and
grounds for appeal dated 06 September 2010 with Mr Mankgele on 07 September 2010, approximately 09 days following receipt of the outcome. An email correspondence dated 08 September 2010 between the Complainant, Mr Mankgele and Ms Maesela confirmed the Complainant’s timeous lodgement of her appeal.

5.1.15 The IDT did not set down the Complainant’s appeal within five (5) days of receipt of the Complainant’s application, but instead proceeded to implement the findings of the Disciplinary hearing by processing her employment exit papers. This is evidenced by the correspondence dated 27 September 2010 from the Complainant addressed to the IDT’s attorney of record, Mr Assenmacher, wherein she placed on record the following:

"...2 I have to accept that the IDT, at this stage has no intention of traversing or even commenting on the failure to comply with its own Internal Disciplinary Procedures...

4.2 What seems clear is that your client, IDT, commenced implementing the sanction before the expiry of the ten (10) working day period, as provided for in the Internal Disciplinary Procedures. For some unexplained reason, your client, IDT, elected to commence with the implementation of the sanction with the prejudicial components, as evidenced by:

4.2.1 The unilateral withdrawal of my medical aid membership with Discovery Health. As early as 04 September 2010 I received a SMS from Discovery Health couched in the following terms: “we value you as a member and would like to discuss your withdrawal. Please contact Discovery Health on 0880998877 so that we can help in any way we can”.

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4.2.1 The receipt of an SMS on 06 September 2010, from cell number 0834537730, couched in the following terms "Hi Lulu, please contact me regarding the med aid and prov. fund. I did try you this morning there was no answer. Rgrds Val".

On receipt of Val’s SMS, "I immediately called her to enquire further and she told me that I had to make arrangements to call in at IDT to sign some forms relating to the withdrawal of my medical aid and provident fund. My response was that I had already heard, with dismay, from Discovery Health that "I" had withdrawn. I also informed her that I would not be signing for anything as I was going to appeal against the findings, and the only thing I needed from IDT HR at that time was my IRP5 Form, which I have since received…"

8.1 The five-day period for the appointment and hearing of the appeal has not been complied with at all. It is my contention that for as long as the appeal is pending I am still an IDT employee, who is entitled to all the benefits I had before, including my salary…

8.2 While I do understand the difficulty your client is faced with in implementing this unique sanction, my rights are, in the process being violated…” (sic).

On the issue of Jurisdiction:

5.1.16 The investigation team noted that at the onset of the investigation, the IDT has always taken a stance that my office does not possess the requisite jurisdiction to investigate this matter. This is evidenced by the letter from the IDT to my office dated 30 October 2013, wherein the IDT submitted as follows:

“...We would also like to place on record that we are of the opinion that the complaint is labour related dispute and as a result, we do not believe that your office has the necessary jurisdiction to investigate labour related matter. In
terms of our labour laws, the forums having jurisdiction on labour related matters are the Bargaining Council, CCMA, Labour Court and Labour Appeal Court.

We further confirm that this matter has been finally adjudicated by the CCMA and accordingly the doctrine of Res Judicata is applicable in the matter.”

5.1.17 Nevertheless, for reasons which will be thoroughly expatiated on in the discussion on the applicable law hereunder, I proceeded with investigation and adjudication of the complaint.

5.1.18 On 13 March 2017, an ADR meeting chaired by the Deputy Public Protector, Adv. K Malunga, was held between the Complainant and IDT. At the ADR, the IDT contended the following points in limine:

(a) That as far as they were concerned the matter is res judicata, as it was already decided in a competent forum, being the Commission for Conciliation Mediation and Arbitration (the CCMA) and the Complainant’s dismissal was confirmed as being fair;

(b) The only recourse according to them was for her to bring a review in terms of section 145 of the Labour Relations Act in the Labour Court, therefore my office lacks jurisdiction to investigate the matter; and

(c) In addition to the above, according to the IDT, the Complainant had already lodged a pending review application with the Labour Court, therefore the matter is lis pendens and as a result, my office has no standing to investigate the matter if it is currently before the court.

5.1.19 The issues relating to the merits of the complaint could not be discussed, owing to the fact that much time was spent deliberating on the points in limine. On the
issue of jurisdiction, Adv. Malunga made a ruling to the effect that my office does indeed have jurisdiction over the matter, referring to a Supreme Court of Appeal Judgment of Minister of Home Affairs vs The Public Protector, case number 308/2017, which confirmed the powers of the Public Protector’s authority to investigate labour related matters. There was consensus, however, that a duplication of forums should be avoided in far as the IDT’s defence of _lis pendens_ is concerned, on the suggestion by the IDT, the Complainant was asked to formally withdraw her review before the Labour Court, which she duly did.

5.1.20 It was resolved that since an attempt to mediate the matter was unsuccessful, my office would proceed to adjudicate on the matter. The ADR was adjourned on the basis of the above.

5.1.21 In an effort to gather information for purposes of finalising my investigation, I once again resolved to issue _subpoenas_ dated 13 November 2018 for hearings to be held on 13 December 2018 with key role players within the IDT to come and provide evidence under oath. These _subpoenas_ were issued against the following officials:

(a) The Chairperson of the IDT Board, Mr Tlhotse Enoch Motswaledi;
(b) The IDT’s CEO, Mr Coceko Pakade;
(c) The Acting Executive Head: Programme Management Services Unit, Mr Stephen Ntsandeni; and
(d) The Senior Manager: Employee Relations, Mr Mankgele.

5.1.22 In addition to the attendance of the abovementioned persons, I subpoenaed the following records:

(a) A complete copy of Ms Pemba’s personnel file;
(b) A complete copy of IDT’s disciplinary policy, applicable as at February 2010;
(c) A complete copy of the Investigation Report relating to the alleged transgression of IDT policies perpetrated by Ms Pemba, which informed the basis of instituting disciplinary proceedings against her.

5.1.23 On the evening of 12 December 2018, some hours before the start of the subpoena interviews, my investigation team received correspondence from Maphoso Mokoena Attorneys, acting on behalf of the IDT. The letter contended, inter alia, that my office does not have jurisdiction to investigate the complaint owing to the fact that it had already been pronounced upon by the CCMA. Furthermore, they were instructed by the IDT to launch review proceedings in the High Court to my office’s ruling over the points in limine raised by the IDT at the ADR meeting of 13 March 2017. In closing, they advised that they would be in attendance at the subpoena meeting scheduled for 13 December 2018 to formally place their views on record and expressed that it would be prejudicial to the IDT’s intended review application for my office to proceed with the investigation.

5.1.24 The investigation team noted the utter contempt displayed by the IDT and its failure to co-operate throughout the investigation. This is evidenced by, inter alia, failure by the subpoenaed officials (save for Mr Mankgele), to appear before me when directed to do so by subpoena. In addition to the failure to make appearance, the IDT failed to provide my office with the subpoenaed records listed at paragraph 5.1.22 above.

5.1.25 In light of the above, while having been afforded an opportunity to do so on numerous occasions, the IDT has not wanted to engage the investigation team on the substance of the complaint resorting rather to bringing a High Court review application to challenge the validity of my investigation on the basis of jurisdiction. Be that as it may, nothing in our law prescribes that a High Court challenge by default stays the proceedings of my investigation.
Accordingly, I proceeded to consider the matter. My Notice in terms of Section 7(9)(a) of the Public Protector Act was prepared and issued against parties found to be implicated in wrong doing during the course of my investigations. These parties are namely: Mr Tlhotse Enoch Motswanaedi and Mr Cocoko Pakade, they were afforded a final opportunity to make representations prior to my conclusion of the investigation. My Notice was also provided to the former Minister of Public Works, Mr Thulas Nxesi for noting. On 09 May 2019 my investigation team received a letter from Maphoso Mokoena Attorneys, which responded to the Notice in terms of Section 7(9)(a) issued against the abovementioned parties, I consider the submissions made on behalf of the IDT in the said letter hereunder. I also consider Minister Nxesi’s submissions thereafter.

The IDT’s Reply to the Notice in terms of Section 7(9)(a) dated 09 May 2019:

5.1.27 At paragraph 2 of the IDT’s response, Mr Mojaleta Maphoso of Maphoso Mojaleta Attorneys, writes as follows:

“Your correspondence, which comprises of 33 pages is an inappropriate attempt at answering our client’s pending court application by correspondence. We do not intend to conduct our litigation by correspondence, which is obviously what you are inviting us to do. As a constitutional institution we implore you to do better to respect the rule of law and the courts and to file the necessary court papers dealing with the issues that we raised therein. Accordingly, to the extent that we do not deal with any specific allegation in the letter under reply, same should be regarded as denied and also that, we intend to deal with same before the proper and relevant forum after you file your answering affidavit.”

5.1.28 I understand this to reflect a poor understanding of my role in this matter by the attorneys acting on behalf of IDT, which role is to investigate; report on and
take remedial action on issues of maladministration and improper conduct in state organs. This I am at liberty to do, in as far as the IDT has not obtained a High Court order interdicting finalization of my investigation. Therefore, my investigation runs independent of any court litigation which in effect has not stayed my investigation. In issuing my Section 7(9) Notice, I neither sought to conduct “litigation by correspondence” nor did I seek to answer to the pending court application. A Notice in terms of Section 7(9)(a) by its nature, seeks to afford the IDT an opportunity to make representations prior to my finalization of the investigation, in line with the principle of *audi alteram partem*.

5.1.29 At paragraph 3.3 of IDT’s response it is submitted that:

“Ms Pemba was found guilty of 3 (three) charges and a sanction of dismissal with 3 (three) month salary was recommended to the IDT, which was implemented”

5.1.30 The sanction of dismissal was indeed implemented, however the three (3) months compensation awarded to the Complainant was not effected, supporting the Complainant’s view that the IDT proceeded with implementation of the adverse aspects of the disciplinary hearing.

5.1.31 At paragraph 3.5 of the response, it is submitted as follows:

“Ms Pemba was not satisfied with the outcome of the disciplinary tribunal. She lodged internal appeal against the outcome. Whilst the IDT was busy transcribing the record of the disciplinary hearing for the purposes of processing her internal appeal, Ms Pemba complained that the internal appeal was taking too long, after which she opted to refer the matter to the CCMA. The IDT had no objection to the referral of the matter to the CCMA by Ms Pemba”[sic]
5.1.32 Following the Complainant’s lodgment of the appeal, same should have in line with internal IDT policy been set down by the IDT for hearing within five (5) days, this did not happen. I have further noted that in terms of the IDT’s internal policy, at page 9 of same, it is provided that “any time period referred to in this policy or procedure may be amended by agreement”, the Complainant was never consulted regarding the delayed set down of her appeal hearing, accordingly there was no agreement between the parties for IDT deviating from its own policy for set down of the appeal.

5.1.33 At paragraph 3.8 of the response, it is submitted as follows:

“On 12 April 2012, which was six (6) months after her application before the Labour Court, Ms Pemba decided to lodge a complaint with the office of the Public Protector, despite the pending review application before the Labour Court. It is worth noting that, this was done at the insistence of the Public Protector’s office, in view of the fact that the IDT raised a preliminary point in limine of lis pendens against the investigation that your office curiously decided to conduct”

5.1.34 The Complainant did not lodge her complaint with my office at my insistence. Ms Pemba lodged her complaint with my office, requesting my intervention in the matter owing to the fact that now that she was unemployed, she could no longer afford the costly financial exercise of litigating against an organ of state, of which its legal cost would be funded by state funds. As the Public Protector it was and I maintain still is my duty to intervene.

5.1.35 The Complainant made extensive submissions clarifying her inability to pursue the Labour Court process which she had initiated at the ADR meeting of 13 March 2017, at which she indicated in the presence of Mr Tshepo Rapetswa, legal representative for IDT that she had to abandon the process owing to IDT’s failure to comply with due process and file litigation documents when required
to do so. She submitted that the IDT would delay in filing its papers to a point where they would only do so once she launched applications to compel, and even so, whatever records were filed were insufficient, which would then require that she must engage further with the IDT. She found that the conduct of the IDT in this regard was solely to frustrate the process and delay finalization of the matters, causing her to incur further financial losses in a prolonged litigation process. The IDT at the ADR meeting of 13 March 2017 did not deny these submissions by Ms Pemba.

5.1.36 At paragraph 3.9.4 of the response, it is submitted as follows:

"your office knew fully well that you advised Ms Pemba to withdraw her Labour Court application in order to found jurisdiction to investigate"

5.1.37 The submission that Complainant Ms Pemba was advised by my office to withdraw the Labour Court application in order to found my jurisdiction is wholly incorrect. The Complainant's withdrawal of her matter from the Labour Court was brought about at the suggestion of the IDT's legal representative Mr Tshepo Rapetswa at the ADR meeting of 13 March 2017. At page 21 and 54 of the transcript of the aforesaid meeting, Mr Rapetswa says that owing to the fact that the Complainant had abandoned the Labour Court process, it would then follow that there should be formal withdrawal of the matter from the Labour Court, which the Complainant acceded to in the interest of avoiding a duplication of forums. Mr Rapetswa can thereafter be heard still insisting that the Public Protector lacks jurisdiction on the grounds that the CCMA had already made a determination on the matter of her dismissal.

5.1.38 At paragraph 10 of the letter, reference is made to paragraph 24 of the matter of Long v SAB (Pty) Ltd & others5 dated 19 February 2019 wherein the Constitutional Court determined that where a suspension is precautionary and

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not punitive, there is no requirement to afford the employee an opportunity to make representations. We have noted that in making this determination the court was in fact addressing the requirement for a pre-suspension hearing in the case of a precautionary suspension, which matter is completely unrelated to the facts of this matter.

5.1.39 I find reference to the abovementioned case law irrelevant because at issue is not the IDT’s failure to afford the Complainant an opportunity to make representations prior to her suspension, but rather her suspension under the guise that there would be an impending investigation which she might interfere with, such investigation never happened. On the evidence in my possession, no investigation report could be adduced by the IDT when subpoenaed to do so. Furthermore, on the evidence of Ms Maesela, the Complainant’s manager, she was not involved in any investigation as required by IDT policy following the Complainant’s suspension from her position.

5.1.40 At paragraph 12 of the letter, attorneys for IDT raise the issue of section 6(9) of the Public Protector Act, suggesting that I had no authority to investigate Ms Pemba’s matter owing to the fact that her complaint was lodged with my office more than 2 years following the incident.

5.1.41 On the exercise of my discretion in term of section 6 (9) to entertain matters which are lodged more than two (2) years from the occurrence of the incident, and in deciding what constitutes “special circumstances”, some of the special circumstances that I generally take into account to exercise my discretion favorably to accept the 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; whether the prejudice suffered by the Complainant persist; whether my refusal to investigate perpetuates the violation of section 195 of the Constitution; whether my remedial action will redress the imbalances of the past. What constitutes “special circumstances” depends on the merits of each case.

5.1.42 The IDT will be aware that that the Complainant, prior to approaching my office had been pursuing the exercise of her labour rights, having approached the CCMA and thereafter having referred her matter to the Labour Court on 20 December 2011.

5.1.43 The IDT will further be aware that in terms of the Public Protector Act, particularly section 6(3)(b) thereof, Complainants are required to take all reasonable steps to exhaust legal remedies available in connection with such matter before approaching my office, accordingly it would not only be unjust but it would defy logic for my office to then penalize Complainants by refusing to investigate their complaints owing to the lapse of time which occurred while such Complainants were pursuing other legal remedies at their disposal prior to approaching me.

5.1.44 I find that the time spent by Ms Pemba in pursuance of other legal remedies which were available to her at the time through the litigation route, before she abandoned the process owing to financial constraints and lodging her complaint with my office, to amount to special circumstances which warrant my investigation into the alleged improprieties by the IDT.

5.1.45 At paragraphs 15 and 16 of the letter, attorneys for IDT seek to suggest that my issuance of the subpoenas dated 13 November 2018 against officials of the IDT was not necessary and further that Mr Pakade and Mr Motswaledi, who failed to make appearance were available to my office for engagement.
5.1.46 I maintain that, as at issuance of my final report in this matter, the IDT has failed to co-operate with my investigation and has displayed an arrogant and contemptuous attitude towards my office. It is not for the IDT to dictate to me the manner in which I should conduct my investigations, my decision to issue subpoenas in terms of Section 7(4) of the Public Protector Act is purely my election and is exercised in accordance with my discretionary powers. Accordingly, I made the determination that it was necessary to secure the attendance of Mr Pakade and Mr Motswaledi through subpoena for them to give evidence under oath. The subpoenaed officials save for Mr Mangkele failed to appear before the Public Protector as evidenced by the attendance register dated 13 December 2018.

The former Minister of Public Works' Reply to the Notice in terms of Section 7(9)(a) dated 16 May 2019:

5.1.47 I received the Minister's submission in the matter on 16 May 2019 and duly took same into account in finalizing my investigation. In summation, Minister Nxesi advised as follows:

"I requested the IDT to appraise me of the facts of the matter and to provide me with their version. I have read the IDT's response dated 09 May 2019, directed to the office of the Public Protector. In the circumstances, and for reasons set out above, I believe the IDT is seized with the matter and will abide by whatever decision the Public Protector deems appropriate."

Further events which transpired following issuance of my Section 7(9)(a) Notice:

5.1.48 It is worthy to highlight at this point pertinent further events which took place during the course of my investigation following issuance of my Section 7(9)(a) Notice to implicated parties at the IDT in the matter.
On 24 May 2019 I received a Notice of Motion and Founding Affidavit from Maphoso Mokoena Inc., in terms of which IDT sought to apply to the High Court of South Africa (Gauteng Division, Pretoria) for an order interdicting *inter alia*, me proceeding with the investigation, issuing any subpoenas against the officials of the IDT and/or finalization and/or preparing and/or issuing a report on the said complaint. The urgent application was set down by attorneys for IDT to be heard on 18 June 2019.

I opposed the matter and out of deference for the court process held in abeyance finalization of the investigation pending the sought determination from the court.

On the morning of 18 June 2019 while at court, my legal representatives were advised by legal counsel for the IDT that the IDT was not prepared to proceed with arguments on the matter. It was agreed that it should then follow that the matter be removed from the roll, with the IDT requesting to be afforded a further opportunity to make additional submissions to me in response to the Section 7(9) (a) Notice, that is in addition to their submission dated 09 May 2019, I in the interest of fairness, acceded to the IDT’s request.

It is my considered view that the IDT’s failure to proceed with their application on the day which it had set it down for hearing amounts to frivolous and vexations litigation with a purpose of causing further delays in finalization of my investigation. Nevertheless, I proceed to deal with this further submission which I received from IDT on 03 July 2019, to the extent that it does not amount to arguments in repetition of what was already stated in the IDT’s initial submission of 09 May 2019 and does not amount to assertions of an immaterial and argumentative nature.
The IDT’s further submission of 03 July 2019 in reply to the Section 7(9)(a) Notice:

5.1.53 At paragraph 2.6 it is stated as follows:

"Ms Pemba categorically specified that the relief that she desired was reinstatement to employment position within the IDT. The Public Protector does not have powers to reinstate an employee who was lawfully discharged from service" [sic]

5.1.54 I have powers as bestowed upon me in terms of Section 182(1)(c) of the Constitution to take appropriate remedial action in instances where I find during the course of my investigations that there has been impropriety by any state organ. What is deemed to be appropriate as remedial action will be dependent on the facts and circumstances of each case and such determination remains a prerogative of the Public Protector.

5.1.55 At paragraphs 2.8 and 2.9:

Herein the IDT seeks to raise a new defense by alleging illegitimacy in my offices’ internal review mechanisms, citing that our rules which provide for review mechanisms are flawed because such powers are not derived from legislation. I understand this assertion by the IDT to be a last ditch attempt by the IDT to salvage its cause. With regards to Ms Pemba’s internal review application, it is standard practice within my office to allow Complainants an opportunity to have an adverse decision made in relation to their Complaints reviewed, not only internally but also externally.

5.1.56 In the Complainant’s case the decision to close her matter was based on the letter from IDT dated 30 October 2013 wherein it was submitted that the Public Protector lacks the necessary jurisdiction to investigate labour related matters
and that the matter having been heard in the CCMA should be regarded as *res judicata*. Unfortunately, without testing the strength of such submission and without prior notification to the Complainant, the investigator who was assigned the matter at the time proceeded to close the Complainant's file.

5.1.57 The Complainant exercised her right to apply for review and accordingly lodged her application with my office on 08 June 2015. Following due consideration of her reasons thereto the determination was made for the matter to be re-opened and re-investigated.

5.1.58 I note here and at paragraph 22.4 that IDT alleges illegitimacy to rules relating to review which had not yet been promulgated at the time when Ms Pemba’s internal review was dealt with.

5.1.59 At paragraphs 14 – 20:

On the assertions by IDT that there is no complaint of maladministration relating to the suspension of the Complainant, this is wholly incorrect. IDT places reliance solely on the complaint form and conveniently neglects to take into consideration the undated document titled "*Detailed notes of Complaint*" which accompanies the complaint form. This document details further issues raised by the Complainant during a consultation in regards to *inter alia* the flawed procedure which precipitated her suspension and the events which followed thereafter. For the sake of brevity the content of the "*Detailed notes of the Complaint*" will not be expatiated here as same was already canvassed under chapter 2 of this report.

5.1.60 At paragraphs 23 and 24:

In as far as the assertions that the CCMA took into account the issue of the Complainant’s suspension, I wish to emphasize that the issues of
maladministration and impropriety is in accordance with my mandate relating to the suspension as articulated in my report were not pronounced upon by the CCMA. In any event, my investigation does not seek to review or overturn the CCMA award, it rather seeks to identify and investigate improprieties in the manner in which the IDT conducted itself as far as the cause of action is concerned and to provide appropriate remedies thereto as is constitutionally required of me.

Application of the relevant law

On the substance of the complaint

5.1.61 Section 23 of the Constitution provides as follows:

“Everyone has the right to fair labour practices”

5.1.62 The Constitution enshrines the right to fair labour practices. This right is to be adhered to by all employers and enjoyed by all workers in the national workforce. The IDT carries a constitutional duty to ensure that, in its dealings with its employees, it adheres to this basic human right.

5.1.63 Section 186(2)(b) of the Labour Relations Act provides as follows:

“Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee”.

5.1.64 On the facts of the Complainant’s case, the manner in which she was suspended is deemed to be an unfair labour practice in that on the evidence at hand, she was suspended under the guise that there would be an ensuing
investigation into the allegations against her; however such investigation never took place. Owing to the apparent unfairness in the manner in which the IDT handled the Complainant’s suspension, such conduct can be understood to constitute an unfair labour practice in terms of the above provision.

5.1.65 Item 4(1) and (4) of the Code of Good Practice: Dismissal in Schedule 8 of the Labour Relations Act 66 of 1996 provides as follows under “Fair Procedure”:

“Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal...In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedure”.

5.1.66 The IDT disciplinary process was aligned to comply with the Code of Good Practice and in terms of the code it was required of the IDT to conduct an investigation into allegations against the Complainant prior to instituting a disciplinary process, however this did not happen. The IDT has not advanced any “exceptional circumstances” to justify their failure to conduct an investigation to determine whether there were grounds for dismissal. The IDT, by not investigating the allegations against her, did not comply with the prescripts of the Code of Good Practice.

5.1.67 The IDT Policy on Employment Relations dated 12 December 2000, under paragraph d (1), titled “Procedure”, provides as follows:

“Instances of alleged or apparent employee failure to adhere to IDT standards of conduct and work performance must be investigated by the relevant manager or a person designated by him/her.

The investigation should include:
• Establishing the nature and extent of the failure to adhere to IDT standards of conduct and work performance;
• Deciding whether or not it is necessary to proceed with further investigation, or to decide on whether further motivation, counselling or coaching, on which disciplinary and/or steps should be initiated”.

5.1.68 When the Complainant was suspended on 03 February 2010, on reading of her notice of suspension, it was with the intention that there would be an investigation into certain allegations which had been brought against her. On the evidence adduced by her former manager, Ms Maesela, there was no investigation conducted by her as required by the internal disciplinary policy nor was she ever questioned in her capacity as the Complainant’s manager. Nonetheless, the Complainant was formally charged and disciplined. The IDT ignored my subpoena for the records relating to the investigation which precipitated the Complainant’s suspension. Accordingly, I am inclined to believe that such record does not exist. Failure by the IDT to conduct an investigation into the allegations levelled against Ms Pemba amounts to a flouting of its own internal disciplinary process.

5.1.69 Paragraph 1.4 of the IDT Policy on Employment Relations makes provision for the “Appeal Procedure” and states that:

"Notice of Appeal
Should the employee consider the finding of the hearing and/or the sanction given and/or procedure followed to be unfair, he/she may lodge a written notice of appeal with the Director: Human Resources, setting out the grounds for appeal."
Time scale

Notice of appeal must be give within ten working days after the decision of the disciplinary hearing has been given"(sic).

5.1.70 Evidence in my possession in the form of email correspondence from the Complainant addressed to Mr Mankgele and Ms Maesela dated 08 September 2010 confirmed the timeous lodgement of the Complainant’s appeal against the disciplinary findings.

5.1.71 Paragraph 1.4 of the IDT Policy on Employment Relations goes on further to provide as follows:

"An appeal hearing shall consist of:

- A chairperson
- Such assistants as may be deemed necessary, shall be appointed to hear the appeal within five working days of the appeal being lodged or any longer period agreed with the employee concerned at the time…"

5.1.72 On reading of the above provision, following the lodgement of the appeal application by the Complainant, the hearing of the appeal was meant to be set down within five (5) days following lodgement. The IDT, however, never set the matter down for hearing, leaving the Complainant with no option, but to approach the CCMA for intervention. Non-compliance with the five (5) day requirement on the part of IDT should have been by agreement between the parties as advised on page 9 of its policy; the Complainant was not consulted on the variation of this policy prescript.
On the issue of jurisdiction

5.1.73 Section 181(1)(a), (3) and (4) of the Constitution provides as follows:

"The following state institutions strengthen constitutional democracy in the Republic…The Public Protector…Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions…No person or organ of state may interfere with the functioning of these institutions."

5.1.74 The Office of the Public Protector by its nature is an institution established by the supreme law of the Republic, being the Constitution. Owing to its imperative role in safeguarding the rights of ordinary citizens and in the process strengthening constitutional democracy, other state organs have a constitutional duty to assist the office in executing its mandate. The IDT has, as at the onset, failed to co-operate with the investigation and has gone as far as to obstruct the investigation with premature and unnecessary litigation relating to the matter, raising the defence of lack of jurisdiction in doing so. Subpoenas issued against the IDT’s management were ignored and subpoenaed records were not provided. Be that as it may, the lack of cooperation and contemptuous attitude of the IDT was not allowed to hinder my investigation as that would be to subject the Complainant to further and unnecessary prejudice.

5.1.75 Section 182 of the Constitution, read with Section 6(4) of the Public Protector Act, provide as follows:

"182(1) 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.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

Section 6 (4) of the Public Protector Act provides as follows:

"The Public Protector shall, be competent—

(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged—

(i) maladministration in connection with the affairs of government at any level;

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

5.1.76 In line with the above provisions of the Constitution, my office may investigate any conduct in state affairs alleged to be improper or resulting in impropriety. The conduct of the IDT as alleged by the Complainant falls within the ambit of this constitutional prescript, even if it is labour related.

5.1.77 In response to the IDT’s submission that the Complainant’s matter has already been adjudicated by the CCMA, being a competent forum and consequently dispensed with, thereby making it res judicata and further that in the
circumstances her only recourse is the Labour Court in terms of section 145 of the Labour Relation Act, section 182(3) of the Constitution places only one restriction on the Public Protector’s power, namely that I may not investigate “court decisions”. While the CCMA may have deliberated on the substantive and procedural fairness of the Complainant’s dismissal in the matter, it is my considered view that an arbitration award issued by the CCMA is not a court decision as envisaged in section 182(3) as the CCMA is not provided for as part of the judiciary in terms of section 166 of the Constitution. Furthermore, my role is to investigate maladministration and impropriety relating to her suspension.

5.1.78 In the Supreme Court of Appeal (the SCA) judgement of Minister of Home Affairs vs The Public Protector of South Africa under case number 308/2017 Plasket AJA, at paragraphs 44 and 46 stated the following:

“[44] This attack has two legs. The first is that because Marimi’s complaint was that he was the victim of an unfair labour practice, he had to seek his remedy in the Labour Relations Act 66 of 1995: in the same way as the labour Court has exclusive jurisdiction in labour matters at the expense of the high courts, so too the Public Protector’s jurisdiction was ousted in this case. There is no merit in the argument. The Public Protector is not a court, does not exercise judicial power and cannot be equated with a court. Her role is completely different to that of a court and the jurisdictional arrangements of the courts are entirely irrelevant to a determination of the Public Protector’s jurisdiction. It is necessary to look at s182 of the Constitution and the Public Protector Act to ascertain the bounds of the Public Protectors jurisdiction. Neither excludes labour matters from her jurisdiction…

[46] The only express exclusion of the Public Protector’s investigative jurisdiction is in relation to the decisions of the courts. For the rest, her jurisdiction is extremely wide and her mandate is clear: she must seek out and
effect rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance.”

5.1.79 As evidenced above, the SCA has confirmed that the powers of the Public Protector are only circumscribed by section 182(3) which precludes the Public Protector from investigating court decisions. The SCA has further dispelled the notion that where a complaint stems from the ambit of the Labour Relations Act, it should be to the exclusive handling by entities mentioned in the Labour Relations Act such as the Labour Court. Accordingly, the argument by the IDT that the Complainant’s only recourse in the circumstances should be with the Labour Court has no basis in law.

5.1.80 To further concretise the above legal stand point, consideration was had to the Public Protector Report touchstone “Collateral Damage”, Report no. 9 of 2016/2017 – Report relating to an investigation into the alleged maladministration and abuse of power by the Board of the Estate Agency Affairs Board (EAAB) through its termination of the contract of employment of Mrs Nomonde Tantaswa Mapetla, former CEO of the EAAB without instituting a disciplinary hearing.

5.1.81 In this matter the complainant, who up until her suspension had a stellar performance with EAAB, was suspended without being given a notice of suspension on the pretext of a pending investigation into the running of the affairs of her office in conducting activities of the EAAB. She was later dismissed without a disciplinary hearing for the initial allegations for which she was suspended, which were later pronounced in an independent report to have been without substance.

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

5.1.83 My predecessor disagreed with Mr Ngcobo’s view point. Highlighting that nothing precluded the Public Protector from investigating a matter because it was a subject of the proceedings in another forum, accordingly she decided to investigate the matter in accordance with her powers as set out in section 182 of the Constitution and sections 6 and 7 of the Public Protector Act. Making a finding of impropriety on the complainant’s suspension, dismissal and finding that the EAAB victimised the complainant for pursuing an investigation and uncovering abuse of funds by Estate Agents.

Conclusion

5.1.84 With reference to the substance of the complaint, on consideration of the facts, evidence at my disposal and the applied legal and policy principles, the IDT’s conduct in handling the Complainant’s suspension is considered to be wanting in several respects. The IDT failed to conduct the necessary investigations following Complainant’s suspension and following the Disciplinary process proceeded to implement aspects of the disciplinary findings detrimental to the Complainant without setting down her appeal as required in terms of due process.

5.1.85 In as far as the IDT’s contention on jurisdiction in relation to the matter, this lacks merit as evidenced in the discussion of the above applicable legal
prescripts. Accordingly, I find no valid reason why the IDT could not cooperate with my investigation into the matter.

5.2 Regarding whether the Complainant was improperly prejudiced by the IDT's conduct under the circumstances:

5.2.1 The Complainant was suspended without warning at a time she could be regarded as doing well in her career at the IDT.

5.2.2 She has advanced that the hasty suspension which led to her ultimate dismissal has had a devastating impact on her career owing to the fact that at her age she has found it difficult to be re-employed, as such she has had challenges finding other means of income.

5.2.3 She further indicated that the conduct by the IDT has not only had a detrimental effect on her finances, but her social security as well, owing to the lack of income, she could no longer pay the mortgage on her home and has since had to find other means of accommodation for her and her children. By implication, her general standard of living has since declined and she has had difficulties putting her children through school.

5.2.4 According to the Complainant, the suspension caused her severe mental strain and anguish as she felt that she had not done anything wrong to deserve such heavy handed and arbitrary treatment by the IDT. Failure by the IDT to set her matter down to appeal the disciplinary findings further exacerbated the issue.

5.2.5 The Complainant submitted that had it not been for the conduct of the IDT, with her stellar performance track record, she would have been able to progress through the ranks at the IDT until retirement, unfortunately that was not so.
5.2.6 The IDT has in replication not advanced any submissions relating to the prejudice suffered by the Complainant.

5.2.7 I pause to mention that on the alleged prejudice suffered by the Complainant and in consideration of an appropriate relief for purposes of remedying same, I have taken into account the fact that the Complainant's suspension was precautionary in nature and she was paid for her absence and that it is not the merits of dismissal itself that forms the subject matter of the investigation but rather the processes followed preceding her discharge from service.

Application of the relevant law

5.2.8 In his article, "Regulated flexibility and small business: Revisiting the LRA and the BCEA", at paragraph 7, Professor Halton Cheadle comments as follows:

"It is suspension pending disciplinary action that requires considered review. There are two abuses: arbitrary decisions and the inordinate periods of suspension. Suspension is the employment equivalent of arrest. The only rationale for suspension is the reasonable apprehension that the employees will interfere with investigation or repeat the misconduct. It follows that it is pending a disciplinary enquiry. The employee suffers palpable prejudice to reputation, advancement and fulfilment. These limited reasons for suspension and this prejudice make a compelling case for regulation."

5.2.9 The IDT has not shown any reasonable cause for the urgent suspension which was imposed on the Complainant. While one may argue that the suspension was to avoid having her interference with any investigation which was due to be conducted against her on the charges, on the evidence at my disposal, no such investigation was conducted by the IDT following the suspension, nor has the DTI shown on the evidence that there was a reasonable apprehension that the Complainant would have interfered with the investigation or continued with
the misconduct so alleged, had she not been suspended. The IDT under the circumstances has through the suspension prejudiced the Complainant in that her employment record is now tainted by the suspension and subsequent dismissal and her prospects of re-employment elsewhere have become limited.

5.2.10 In the Labour Court case of *South African Post Office Limited v GS Jansen van Vuuren*⁶, Molahlehi J at paragraph 39 stated as follows relating to the prejudice suffered by employees improperly placed on suspension:

"There is however a need to send a message to employers that they should refrain from hastily resorting to suspending employees when there are no valid reasons to do so. Suspensions have a detrimental impact on the affected employee and may prejudice his or her reputation, advancement, job security and fulfilment. It is therefore necessary, that suspensions are based on substantive reasons and fair procedures are followed prior to suspending an employee…"

5.2.11 The Labour Court has been emphatic about the need for employers to have sound substantive reasons and to follow proper procedures in suspending employees owing to the seriousness of the impact of same on the affected employee. On the evidence adduced, it is evident that there was no thorough consideration of rights of the Complainant by the IDT in suspending her. The decision was arbitrary and based on reasons which were not true because no investigation was conducted following her suspension.

⁶(2008) 8 BLLR 798 (LC)
Conclusion

5.2.12 On the evidence adduced and the legal prescripts considered, the conduct of the IDT in suspending and failing to afford her an opportunity to appeal the sanction of dismissal, caused the Complainant prejudice.

6. FINDINGS

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

6.1 Regarding whether the IDT improperly or unlawfully suspended and discharged the Complainant from service:

6.1.1 The allegation that the IDT improperly and unlawfully suspended the Complainant from her position is substantiated.

6.1.2 The suspension of Ms Pemba was done under the pretext that there would be an impending investigation, which never took place. On the evidence uncovered, Ms Maesela had neither been requested to conduct any investigation into the alleged offenses perpetrated by the Complainant as required by IDT policy, nor was she ever questioned in relation to such investigation prior to formal charges being levelled against the Complainant. Ms Taylor, who was directly involved in the Murray and Roberts issue, was never questioned regarding any such investigation. The IDT failed to set down the Complainant’s appeal to the Disciplinary hearing, yet proceeded to unilaterally process her employment exit papers.

6.1.3 The conduct of IDT has in the circumstances violated the Complainant’s rights to fair labour practices enshrined in section 23 of the Constitution and the manner in which suspension was handled can be deemed an unfair labour practice in terms
of section 186(2)(b) of the Labour Relations Act. In not conducting an investigation into the allegations levelled against the Complainant, the IDT failed to adhere to the standard set by Item 4(1) of the Code of Good Practice: Dismissal as set out in Schedule 8 of the Labour Relations Act and paragraph d (1) of the IDT Policy on Employment Relations dated 12 December 2000. In failing to attend to the Complainant’s appeal of the Disciplinary Hearing outcome within the prescribed period, the IDT further flouted paragraph 1.4 of the IDT Policy on Employment Relations.

6.1.4 The IDT management’s failure to appear before me when required to do so under subpoena and failure to provide subpoenaed records is a direct violation of section 181(3) and (4) of the Constitution. The IDT’s contentions relating to my alleged lack of jurisdiction to investigate the matter, fails to take into account sections 182 of the Constitution and Section 6(4) of the Public Protector Act. Due regard has also not been given to the Supreme Court of Appeal Judgment of Minister of Home Affairs v The Public Protector South Africa\(^7\) and the Public Protector touchstone “Collateral Damage”, report no. 9 of 2016/2017.

6.1.5 Such conduct by the IDT 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 IDT’s conduct under the circumstances:

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

\(^7\)(2018) 2 ALL. SA 311 (SCA)
6.2.2 On the facts, the Complainant suffered mental and emotional anguish as a result of the conduct of the IDT. In addition to that, her employment prospects and reputation within her profession have been tainted by the irregular suspension which led to her ultimate dismissal.

6.2.3 The IDT did not heed the pronouncements made by Molahlehi J in the Labour Court matter of South African Post Office case in as far as suspension is concerned. The conduct of the IDT in suspending the Complainant can indeed be understood to have been arbitrary and abusive in nature in accordance with the remarks by Professor Cheadle in her article "Regulated Flexibility and small business: Revisiting the LRA and the BCEA."

6.2.4 Such conduct by the IDT 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. REMEDIAL ACTION

7.1. The appropriate remedial action taken as contemplated in section 182(1)(c) of the Constitution, with a view of remedying the impropriety referred to in this report is the following:

7.1.1 The Minister of Public Works, Ms Patricia De Lille must, within 30 days of receipt of my report, reprimand the Chairperson of the Board of IDT Mr. Motswaledi and the Chief Executive Officer of IDT Mr. Pakade for failing to appear before the Public Protector when directed by subpoena do so and for failing to provide subpoenaed records which would have served to assist me in my investigation;

7.1.2 The Chief Executive Officer of IDT, Mr Pakade must, within 30 days of receipt of my report, issue an apology on behalf of the IDT to Ms Pemba for the manner in which her suspension and application for appeal were handled by the IDT.
8 MONITORING

8.1 The Minister of Public Works and the Chief Executive Officer of IDT must within fifteen (15) working days from the date of the report, submit an Action Plan to my office indicating how the remedial action at paragraph 7 will be implemented.

8.2 The submission of the Action Plan and the implementation of my remedial action shall, in the absence of a Court Order directing otherwise, be complied with within the period prescribed in my report.

[Signature]

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 26/10/2019