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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, ABUSE OF POWER, WHISTLE BLOWER VICTIMISATION, UNFAIR LABOUR PRACTICE AND IRREGULAR APPOINTMENT OF AN EMPLOYEE BY THE NATIONAL DEVELOPMENT AGENCY (NDA).
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EXECUTIVE SUMMARY

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

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration, abuse of power, whistle blower victimisation, unfair labour practice and irregular appointment of an employee by the National Development Agency (NDA).

(iii) The complaint was lodged with my office on 12 April 2012 by Ms Matshepo Mobeng (Complainant).

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

(v) 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.¹ The Constitutional Court further held that: "When remedial action is

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
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”.

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

(a) Whether the NDA improperly or irregularly appointed Ms Moono to the position of Acting Company Secretary without following due processes.

(b) Whether the NDA improperly or irregularly appointed Ms Moono to the position of Assistant Company Secretary without following due processes.

(c) Whether the NDA subjected the Complainant to verbal abuse and victimisation during certain Board meetings in retaliation for her objections to the appointment of Ms Moono as the Assistant Company Secretary.

(d) Whether the Complainant was unduly influenced and pressurised by the NDA officials to enter into a Settlement Agreement which terminated her employment contract with the NDA.

(e) Whether the Complainant, the NDA or any other party suffered improper prejudice in the appointment of Ms Moono.

2 Supra at para [73].
The investigation process included an exchange of correspondence and an analysis of all relevant documents and application of all relevant laws, policies and related prescripts. Interviews were also conducted with the Complainant in person, through emails and telephone. Relevant officials of the NDA were also interviewed.

Key laws and policies taken into account to determine if there had been maladministration, abuse of power, whistle blower victimisation, unfair labour practice and irregular appointment of an employee by the NDA and whether prejudice was suffered by the Complainant or taxpayers, were principally those imposing administrative standards that should have been complied with by the NDA. Those are the following:

(a) Constitution of the Republic of South Africa, 1996 (the Constitution);

(b) The Public Protector Act, 23 of 1994 (the PPA);

(c) The Public Finance Management Act, 1 of 1999 (PFMA);

(d) The Companies Act, 71 of 2008;


(f) The Labour Relations Act, 66 of 1995;

(g) The National Development Agency Recruitment and Selection Policy.

Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:
(a) Regarding whether NDA improperly or irregularly appointed Ms Moono to the position of Acting Company Secretary without following due processes.

(aa) The allegation that the NDA improperly or irregularly appointed Ms Moono to the position of temporary Acting Company Secretary without following due processes is substantiated.

(bb) On 16 November 2009, the NDA appointed Ms Neo Moono (Ms Moono) on a temporary contract of employment as Acting Company Secretary without such post being advertised and without Ms Moono applying for the post. Ms Moono was merely invited to an interview by Ms Rashida Issel, the former Chief Operating Officer of the NDA (Ms Issel) and subsequently was appointed to the position.

(cc) Additionally, Ms Moono did not possess any legal or finance qualifications and had not worked as a Company Secretary or for the NDA prior to her appointment, which could have equipped her with the experience and laws relevant to the NDA. Lack of the academic qualifications and experience did not make Ms Moono an ideal candidate for the position of a Company Secretary as envisaged in sections 86 and 88 of the Companies Act 71 of 2008.

(dd) This conduct by the NDA and in particular Ms Issel failed to live up to the dictates and the guidelines of the Recruitment Policy of the NDA which demands that all vacant positions will be advertised for a minimum of two (2) weeks to attract the best pool of applicants."
(ee) Such failure by the NDA and in particular Ms Issel, 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 NDA improperly or irregularly appointed Ms Moono to the position of Assistant Company Secretary without following due processes.

(aa) The allegation that the NDA improperly or irregularly appointed Ms Moono to the position of permanent Assistant Company Secretary without following due processes is unsubstantiated.

(bb) On 8 February 2010, the NDA advertised the position of Assistant Company Secretary as a non-legal post with a closing date of 26 March 2010. Ms Moono applied for this advertised post and she was shortlisted, interviewed and appointed to the position of permanent Assistant Company Secretary with effect from 1 June 2010.

(cc) The NDA Board had changed and adjusted the inherent job requirements of the post of an Assistant Company Secretary from legal to an administrative capacity. As a result, the post of Assistant Company was advertised as an administrative post to focus on administrative duties. This was confirmed by the former Chairperson of the Board, Bishop Malusi Mpumlwana. Mr S Lewatle (Mr Lewatle), who is the former Human Resources Executive at the NDA also confirmed the resolution of the Board to this effect.

(dd) It is further clear from the Companies Act 71 of 2008 that entities like the NDA act through their Board of Directors which are
empowered to exercise all the powers and perform any of the functions of the company. Accordingly, the NDA Board exercised its statutory powers and took a decision to adjust the requirements of the post of an Assistant Company Secretary. There was no law which provided for something to the contrary. The NDA Board did not therefore contravene any law or policy in changing or adjusting the job profile and inherent requirements for the post of an Assistant Company Secretary.

(ee) The vehement disapproval and objection of Ms Moono’s appointment to a position of Assistant Company Secretary by the Complainant on the basis that Ms Moono had no legal or finance qualification was therefore mistaken. There is no legal requirement in terms of the Companies Act or any other legal prescript which demands that an Assistant Company Secretary should be legally or financially qualified.

(ff) Accordingly, this conduct by NDA or its Board did not constitute 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 NDA subjected the Complainant to verbal abuse and victimisation during certain Board meetings in retaliation for her objections to the appointment of Ms Moono as permanent Assistant Company Secretary.

(aa) The allegation that the NDA subjected the Complainant to verbal abuse and victimisation during certain Board meetings in retaliation
for her challenging the appointment of Ms Moono as a permanent Assistant Company Secretary is unsubstantiated.

(bb) Whereas, the weight of evidence given by Ms Lunga Mangcu, Mr Lewatle, and Mr Thami Ngwenya, does establish a prima facie belief that there was a constant exchange of rather harsh or obnoxious words from Dr Vuyelwa Nhlapo (Dr Nhlapho) and Mr M Kekana towards the Complainant over the appointment of Ms Moono, which could have contributed to a total breakdown of the working relationship and led to the Complainant being charged and suspended.

(cc) However, the subsequent labour dispute/charging and suspending of the Complainant was partially addressed by the Complainant’s ultimate conclusion of the Settlement Agreement at CCMA with the NDA.

(dd) Accordingly, the conduct of Dr Vuyelwa Nhlapo and Mr M Kekana of resorting to harsh or obnoxious words, charging and suspending the Complainant was not traversed any further for the purpose of this investigation and the conclusion of the settlement agreement did not constitute 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.

(d) Regarding whether the Complainant was unduly influenced and pressurised by the NDA officials to enter into a Settlement Agreement which terminated her employment contract with the NDA.
(aa) The allegation that the Complainant was unduly influenced and pressurised to enter into a Settlement Agreement which terminated her employment contract with the NDA is unsubstantiated.

(bb) Evidence at my disposal revealed that on 19 February 2019, the Complainant and the NDA (as represented by Dr Nhlapo and Mr Lewatle) concluded a Settlement Agreement under the auspices of the CCMA as per Case Number GAJB 208113. Part of the Settlement Agreement was that the NDA shall pay the Complainant an amount of R 997 686.06 (Nine hundred and ninety seven thousand, six hundred and eighty six rand) less statutory deductions. The NDA paid the said amount to the Complainant, no later than 12 March 2013, as complied with the terms of the Settlement Agreement.

(cc) The signing of this Settlement Agreement was facilitated and presided over by Commissioner: Bibi Fatima Shaikh (Ms Shaikh) acting under the aegis of the CCMA as empowered by Labour Relations Act 66 of 1995.

(dd) I was not able to find any proof of undue influence, coercion or actual violence which could have forced the Complainant to sign the Settlement Agreement against her will.

(ee) Equally, I am satisfied that when the Complainant entered into the settlement agreement, she was fully aware of the nature of proceedings that she had attended, had fully understood the terms and conditions of the agreement she had entered into and the consequences thereof.
(ff) As for the Settlement Agreement itself, I express no view of my own save to advise for a judicial review to the Labour Court should the Complainant still feel prejudiced by its conclusion.

(gg) Accordingly, the conduct by NDA or its officials did not constitute 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

(e) Regarding whether the Complainant, NDA or any other party suffered improper prejudice in the circumstances.

(aa) The allegation that the Complainant, the NDA or any other party suffered improper prejudice in the circumstances is substantiated.

(bb) Ms Moono was paid a total of R 365, 894.55 for this position of temporary Acting Company Secretary as a result of an irregular recruitment process.

(cc) The payment of such salary constitutes irregular expenditure by the NDA as this appointment was made in contravention of the applicable rule/policies and or legal codes namely Paragraph 4 of the NDA Recruitment Policy and section 51 of the PFMA.

(dd) By failing to advertise this post as required by the Recruitment policy, the NDA also prejudiced other potential applicants who could have expressed their interests in the post had it been duly advertised.
This conduct by NDA and in particular Ms Issel 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.

The appropriate remedial actions that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

**The CEO of the NDA must take appropriate steps to ensure that:**

(aa) Within sixty (60) working days from the date of this report provide training to all NDA Human Resource Management staff and other officials who are involved in the NDA Recruitment and Selection processes;

(bb) Within sixty (60) working days from the date of this report, disclose all the irregular expenditure to the Provincial Treasury and to the Auditor General incurred by the NDA in connection with the irregular appointment of Ms Moono to a position of temporary Acting Company Secretary.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, ABUSE OF POWER, WHISTLE BLOWER VICTIMISATION, UNFAIR LABOUR PRACTICE AND IRREGULAR APPOINTMENT OF AN EMPLOYEE BY THE NATIONAL DEVELOPMENT AGENCY (NDA).
1. INTRODUCTION

1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act 23 of 1994 (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 The Minister of Social Development: Mrs Lindiwe Zulu;

1.2.2 The Acting Director-General of the Department of Social Development: Mr Mzolisi Toni;

1.2.3 The Chief Executive Officer of the National Development Agency: Mrs Thamo Mzobe;

1.2.4 The Chairperson of the Board of the National Development Agency: Ms L Dlamini;

1.2.5 A copy of the report is also provided to the Complainant to inform her about the outcome of the investigation.

2. THE COMPLAINT

2.1 The complaint was lodged with my office on 12 April 2012 by Ms Matshepo Mobeng (Complainant).

2.2 The Complainant alleged inter alia that:
2.2.1 That she was employed as a Company Secretary by the NDA and that her duties were to research and advise the NDA Board (Board) on all corporate governance, compliance and legal issues.

2.2.2 In 2011, the Chief Executive Officer (CEO) of the NDA and the Chairperson of the Board conspired to appoint Ms Neo Moono (Ms Moono) as an Assistant Company Secretary despite the fact that Ms Moono did not have the required qualifications for the post, namely legal and/or financial qualifications or a degree, which is a requirement for a person to serve as an Assistant Company Secretary. Ms Moono only had matric and few short course certificates. Further, that Ms Moono had fared badly during the interviews. The Complainant averred that she had recommended that Ms Moono be appointed in an administrative capacity, however her advice was rejected.

2.2.3 The Chairperson of the Board, Bishop M Mpumlwana chaired a meeting of the corporate governance subcommittee which appointed Ms Moono. She further submitted that the changing of the initial job advertisement which required a legal qualification and/or finance was done in order to suit Ms Moono’s lack of relevant qualifications and experience.

2.2.4 Further, that she challenged the appointment of Ms Moono and thereafter her victimisation commenced. The Complainant was subsequently suspended and charged with insubordination, non-performance and underwent a disciplinary hearing which did not find her guilty on both charges. The Complainant believes the charges were a retaliation for reporting the NDA and speaking out about this alleged irregular appointment of Ms Moono.
2.2.5 Notwithstanding the outcome of the disciplinary hearing, the succeeding, now former Chairperson of the Board, Mr M Kekana (Mr Kekana) and the former CEO of the NDA: Ms V Nhlapo (Ms Nhlapo), proceeded to terminate her contract of employment with the NDA. The termination letter cited the breakdown of the relationship and trust between the Complainant and the NDA, as the reason for termination, regardless of the fact that she was not found guilty.

2.2.6 Furthermore, that she was subjected to relentless various forms of verbal abuse on different occasions by Mr Kekana and Ms Nhlapo. At one stage she was told that:

2.2.7 "Who do you think you are, I am going to clean you out until you are left with nothing, and I can destroy you. If you are not happy, the door is open, you can leave".

2.2.8 Such statements were made during the Board meetings in full view of other colleagues and were intended to humiliate her.

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) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.

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

3.5 In the 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. 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”.

3.6 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 (paragraph 68).

3.7 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).

3.8 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).

3.9 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 (paragraph 71).

3.10 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 (paragraph 71(a)).

3.11 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)).
3.12 "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)).

3.13 The remedial action taken by the Public Protector has a binding effect (para 76). 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 (para 73).

3.14 The NDA is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector’s mandate.

3.15 The jurisdiction of the Public Protector was not disputed by the NDA in this matter.

3.16 Regarding the exercise of my discretion in terms of section 6(9) of the Public Protector Act to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute 'special circumstances', some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, include 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 persists; 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 constitute ‘special circumstances’ depends on the merits of each case.

3.17 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly the interests of justice that dictate whether I should investigate the matter or not. In this case, I submit that there is a huge public interest in the manner in which public administration or governing of public affairs are handled.

3.18 The appointment of public officials and the management of expenditure of public funds in government departments like the NDA would inordinately generate huge public interest and scrutiny. The community, other applicants and public servants themselves would be keen to know or enquire into the just, fairness or transparency of the processes followed in the filling of such key and strategic positions government entities such as the NDA.

3.19 Realising the importance of promoting accountability and openness which lies at the core of the founding provisions of our Constitution. Mindful of the need to strengthen constitutional democracy and driven by an inclination towards promoting basic values and principles governing public administration as envisaged both in sections 181 and 195 of our Constitution apiece. Appreciating the importance of advancing Promotion of Administrative Justice Act\(^3\) (PAJA) and its corresponding section 33 of our Constitution, I duly

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\(^3\) Act 3 of 2000.
decided to exercise my discretion in favour of this complaint. For all these reasons I concluded that it was in the interests of justice to investigate and determine the merits or demerits of this complaint.

4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of sections 182(1)(a), (b) and (c) of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

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 amounts to maladministration or other improper conduct?
4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

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

4.2.3 In this particular case, the factual enquiry primarily focused on whether or not there is cronyism, maladministration, mismanagement of funds and irregular recruitment processes at schools in District 14.

(vii) The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the NDA to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and policies taken into account to determine if there had been maladministration, abuse of power, whistle blower victimisation, unfair labour practice and irregular appointment of an employee at the NDA and prejudice to the Complainant and the NDA were principally those imposing administrative standards that should have been complied with by the NDA or its officials.
(viii) The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration, abuse of power, whistle blower victimisation, unfair labour practice and irregular appointment of an employee at the NDA and improper conduct. Where a complainant and the NDA has suffered prejudice, the idea is to place them as close as possible to where they would have been had the NDA complied with the regulatory framework setting the applicable standards for good administration.

4.2.4 In the case of conduct failure as was the case in this matter, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

4.2.5 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

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

4.3.1 Whether the NDA improperly or irregularly appointed Ms Moono to the position of Acting Company Secretary without following due processes.

4.3.2 Whether the NDA improperly or irregularly appointed Ms Moono to the position of Assistant Company Secretary without following due processes.
4.3.3 Whether the NDA subjected the Complainant to verbal abuse and victimisation during certain Board meetings in retaliation for her objections to the appointment of Ms Moono as the Assistant Company Secretary.

4.3.4 Whether the Complainant was unduly influenced and pressurised by the NDA officials to enter into a Settlement Agreement which terminated her employment contract with the NDA.

4.3.5 Whether the Complainant, the NDA or any other party suffered improper prejudice in the appointment of Ms Moono.

4.4 The Key Sources of information

Correspondence sent and received

4.4.1 A complaint form from the Complainant dated 12 April 2012;

4.4.2 A request for information letter dated 13 December 2018 from the Public Protector addressed to the CEO of the NDA;

4.4.3 Acknowledgement of receipt dated 19 December 2018 from Ms Mandlakazi Qeqe, PA to the CEO;

4.4.4 A response letter from the CEO of the NDA dated 05 February 2019;

4.4.5 A request of further information letter dated 08 February 2019 from the Public Protector to the CEO of the NDA;

4.4.6 A copy of the attendance register of the meeting between the Public Protector and the Complainant, held on 14 February 2019;
4.4.7 A request of information letter dated 21 February 2019 from the Public Protector to the Human Resources Manager of the CCMA, Mr Joseph Mathebula;

4.4.8 A request of information letter dated 21 February 2019 from the Public Protector to the Registrar of the CCMA, Ms Nanakie Maroti;

4.4.9 A copy of an Affidavit from the CCMA Commissioner, Ms Bibi Fatemah Shaikh, dated 16 April 2019;

4.4.10 A copy of Ms Moono’s Curriculum Vita from the NDA;

4.4.11 A copy of the attendance register of the conciliation meeting between the Complainant and the NDA, held on 19 February 2018 in the hospices of the CCMA;

4.4.12 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 07 March 2019, addressed to Ms Lunga Manqcu;

4.4.13 A copy of the attendance register of the meeting between the Public Protector and Ms Lunga Manqcu, held on 08 March 2019;

4.4.14 A copy of letter dated 15 March 2019, received from the CEO of NDA;

4.4.15 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 14 March 2019, addressed to Ms Bibi Fatemah Shaikh;

4.4.16 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 14 March 2019, addressed to Mr Sam Lewatle;
4.4.17 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 14 March 2019, addressed to Mr Malose Kekana;

4.4.18 A copy of the attendance register of the meeting between the Public Protector and Mr Sam Lewatle, held on 19 March 2019;

4.4.19 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 19 March 2019, addressed to Ms Hajra Mansour;

4.4.20 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 19 March 2019, addressed to Mr Thami Ngwenya;

4.4.21 A request of further information letter dated 22 March 2019, from the Public Protector to the CEO of the NDA;

4.4.22 A copy of a letter dated 25 March 2019, received from Zarina Walele Attorneys;

4.4.23 A copy of a letter dated 27 March 2019, received from the CEO of the NDA;

4.4.24 A copy of a letter dated 28 March 2019, addressed to Zarina Walele Attorneys;

4.4.25 A copy of the attendance register of the meeting between the Public Protector, Ms Hajra Mansour and Mr Thami Ngwenya, held on 02 April 2019;

4.4.26 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 11 April 2019, addressed to Ms Bibi Fatemah Shaikh;
4.4.27 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 11 April 2019, addressed to Ms Neo Moono;

4.4.28 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 11 April 2019, addressed to Mr Malose Kekana;

4.4.29 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 11 April 2019, addressed to Dr Vuyelwa Nhlapo;

4.4.30 A copy of a letter dated 17 December 2014 from NDA to Ms Moono;

4.4.31 A copy of the attendance register of the meeting between the Public Protector, Ms Moono assisted by Ms Fikile Niccolene Sithole, held on 16 April 2019;

4.4.32 A copy of the attendance register of the meeting between the Public Protector and Ms Bibi Fatemah Shaikh, held on 17 April 2019;

4.4.33 A copy of the attendance register of the meeting between the Public Protector and Dr Vuyelwa Nhlapo, held on 24 April 2019;

4.4.34 A copy of a Notice issued in terms of Section 7(4) of the Public Protector Act dated 02 May 2019, addressed to Bishop Malusi Mpumlwana;

4.4.35 A copy of the attendance register of the meeting between the Public Protector and Bishop Malusi Mpumlwana, held on 14 June 2019;

4.4.36 A copy of the attendance register of the meeting between the Public Protector and Mr Malose Kekana assisted by Mr Berry Farber, held on 23 May 2019;

4.4.37 A copy of a letter dated 25 May 2010 from NDA to Ms Moono;
4.4.38 A copy of the report and recommendation on the Recruitment, Selection and Appointment of the Assistant Company Secretary dated 25 May 2010;

4.4.39 A copy of the NDA Recruitment and Selection Policy dated 16 July 2010;

4.4.40 A copy of the termination of employment letter dated 14 January 2013, from the NDA to the Complainant;

4.4.41 A copy of an affidavit dated 23 July 2019, received from Bishop Malusi Mpumlwana;

4.4.42 A copy of a permanent employment agreement for Assistant Company Secretary dated 25 May 2010, from NDA to Ms Moono;

4.4.43 A copy of a disciplinary enquiry judgment in the matter between the NDA and the Complainant, dated 25 October 2012;

4.4.44 A copy of the organisational diagnosis for the NDA dated 14 January 2011;

4.4.45 A copy of an Assistant Company Secretary advertisement;

4.4.46 A copy of a permanent employment agreement for Company Secretary dated 21 June 2010, from the NDA to the Complainant;

4.4.47 A copy the NDA Job Evaluation Policy dated 08 August 2010;

4.4.48 A copy of an Acting Company Secretary agreement dated 16 February 2012, from the NDA to Ms Moono;

4.4.49 A copy of the Probation Ending and Confirmation of permanent appointment for an Assistant Company Secretary dated 13 December 2011, from the NDA to Ms Moono;
4.4.50 A copy of undated Job Profile for an Assistant Company Secretary;

4.4.51 A copy of a Preliminary Shortlisting for an Assistant Company Secretary dated 24 October 2011;

4.4.52 A copy of the submission of the payment of Acting Allowance for Company Secretary dated 28 May 2010;

4.4.53 A copy of the Settlement Agreement between the Complainant and the NDA,

4.4.54 An email response of notice issued in terms of section 7(9)(a) of the Public Protector Act, dated 19 November 2019 from Mr Malose Kekana;

4.4.55 An email response of notice issued in terms of section 7(9)(a) of the Public Protector Act, dated 25 November 2019 from Ms Moono; and

4.4.56 An email response of notice issued in terms of section 7(9)(a) of the Public Protector Act, dated 26 November 2019 from Ms Rashida Issel;

4.5 **Legislation and other legal prescripts**

4.5.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);

4.5.2 The Public Protector Act, 23 of 1994 (the PPA);

4.5.3 The Public Finance Management Act 1 of 1999 (PFMA);

4.5.4 The Companies Act, 71 of 2008;
4.5.5  The National Development Agency Act, 108 of 1998;
4.5.6  The Labour Relations Act, 66 of 1995;
4.5.7  The National Development Agency Recruitment and Selection Policy.

4.6  Case law

4.6.1  Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);

4.6.2  Gamede MA vs The Public Protector (992646/2015) [2018] ZAGPPHC 865;2019(1) SA 491(GP);and

4.6.3  Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 1999 (4) SA 788 (T).

4.7  Interviews/Meetings conducted

4.7.1  Several telephonic and face to face interviews with the Complainant, from 12 April 2012 throughout the investigation;

4.7.2  A meeting with Ms Lunga Mangcu, held on 08 March 2019;

4.7.3  A meeting with Mr Sam Lewatle, held on 19 March 2019;

4.7.4  A meeting with Ms Hajra Mansour, Mr Thami Ngwenya and Ms Rashida Issel, held on 02 April 2019;

4.7.5  A meeting with Ms Neo Moono, held on 16 April 2019;
4.7.6 A meeting with Ms Bibi Fatemah Shaikh, held on 17 April 2019;

4.7.7 A meeting with Dr Vuyelwa Nhlapo, held on 24 April 2019;

4.7.8 A meeting with Mr Malose Kekana, held on 23 May 2019;

4.7.9 A meeting with Bishop Malusi Mpumilwana, held on 14 June 2019

4.7.10 A meeting with Mr M Sithole, Ms S Mkhize, Mr D Phukubje and Ms T Seate of the GDE held on 5 September 2017.

4.8 Notices issued in terms of section 7(9) of the Public Protector Act

4.8.1 A notice was issued to the former Chairperson of the Board of the NDA, Bishop Malusi Mpumilwana, on 19 November 2019;

4.8.2 A notice was issued to the former Chairperson of the Board of the NDA, Mr Malose Kekana, on 19 November 2019;

4.8.3 A notice was issued to the CEO of the NDA, Ms Thamo Mzobe, on 19 November 2019;

4.8.4 A notice was issued to the former Chief Operations Officer of the NDA, Ms Rashida Issel, on 19 November 2019;

4.8.5 A notice was issued to the former CEO of the NDA, Dr Vuyelwa Nhlapo, on 19 November 2019;

4.8.6 A notice was issued to the former Assistant Company Secretary of the NDA, Ms Neo Moono, on 19 November 2019;
5 THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO APPLICABLE LAW AND PRESCRIPTS:

5.1 Whether the NDA improperly or irregularly appointed Ms Moono to the position of Acting Company Secretary without following due processes.

Common Cause issues

5.1.1 Ms Moono was first appointed by the NDA on a temporary contract of employment as an Acting Company Secretary as per appointment letter dated 16 November 2009. This letter was signed by the Human Resources Executive, Mr Samuel Lewatle (Mr Lewatle). Ms Moono accepted the offer on the same letter, on 17 November 2009.

5.1.2 In terms of the appointment letter, Ms Moono was offered a total cost to company remuneration package of R 52 270.65 per month. The duration of Ms Moono’s contract of temporary employment with the NDA commenced on 17 November 2009 and proceeded on a month to month basis, until June 2010, thereby making it a total of seven months.

5.1.3 Ms Moono does not possess any legal qualification.

Issues in Dispute

5.1.4 On 16 April 2019, my investigation team conducted an interview with Ms Moono and afforded her an opportunity to explain how she got appointed to a temporary position of Acting Company Secretary at the NDA.
5.1.5 Ms Moono stated that she did not apply for the position of a Temporary Acting Company Secretary, as there was no advertisement for this post. She indicated that she was in private business at the time which was not doing well, hence she called a few of her former colleagues that had previously worked with her in government, including Ms Rashida Issel (Ms Issel) who was the Chief Operating Officer at the NDA at the time and told them to alert her of any vacancy in their workplace. She thereafter received a call from Ms Issel inviting her to an interview at the NDA for a temporary position of Acting Company Secretary. Ms Moono submitted that she did not apply for this position but accepted the invitation to the interview, which was conducted by Ms Issel and Mr Lewatle. She was subsequently appointed to the position of Acting Company Secretary following the interviews.5

5.1.6 Furthermore, Ms Moono indicated during the interview with my team that she knew Ms Issel as she previously worked with her at the Department of Public Enterprises whereat Ms Issel also held a position of Chief Operating Officer.

5.1.7 Similarly, on 2 April 2019 my investigation team held an interview with Ms Issel and requested her to clarify the process followed in appointing Ms Moono at the NDA. Ms Issel indicated that there was no advertisement for the post of temporary Acting Company Secretary to which Ms Moono was appointed. Ms Issel disputed that she has a personal relationship with Ms Moono and submitted that she only had a professional working relationship, hence she invited her to assist in a temporary capacity.6

5.1.8 My office wrote to the NDA as per letter dated 29 July 2019, requesting them to furnish my team with the copies of the advertisement of the post to which Ms Moono was appointed as a temporary Acting Company

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5 As per a recorded audio interview with Ms Moono at minute 27-33.
6 As per recorded audio at minute 46-55 (recorded interview with Ms Issel).
Secretary. Unfortunately, I was not provided with same despite all the reminders to the NDA.

Application of the Relevant Legal Prescripts

5.1.9 The principle of legality in South African law is enshrined in section 2 of the Constitution\textsuperscript{7}, which provides that:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it, must be fulfilled."

5.1.10 The constitutional principle of legality requires that a decision maker exercises the power conferred upon her/him lawfully, rationally and in good faith.

5.1.11 In Affordable Medicines Trust & Others v Minister of Health & Others\textsuperscript{8} the Constitutional Court held that:

"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power. […] The exercise

\textsuperscript{7} Constitution of the Republic of South Africa, 1996.

\textsuperscript{8} 2005 (6) BCLR 529 (CC) [paras 49, 75 and 77].
of such power must be rationally related to the purpose for which the power was given."

5.1.12 It follows therefore, in the circumstances that the Constitution required the NDA officials to exercise their powers/duties within the regulatory framework governing the appointment of staff when handling this matter. No function or power that is not conferred or authorised by applicable law or policy should have been arbitrarily applied during this process.

5.1.13 The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality.

5.1.14 Section 195(1) of the Constitution provides, amongst others, 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) Services must be provided impartially, fairly, equitably and without bias;
(e) ........;
(f) Public administration must be accountable; and
(g) Transparency must be fostered."

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9 Pharmaceutical Manufacturers Association of SA and Another; In re Ex parte President of the Republic of South Africa and Others 1999 (4) SA 788 (T) at paragraph 20.
5.1.15 It is common cause that the NDA employees are public servants who were expected to maintain a high standard of professional ethics, foster transparency and to be accountable and impartial when recruiting staff.

5.1.16 Section 86(1)(2)(a) of the Companies Act\(^\text{10}\) provides for the mandatory appointment of a company secretary and further states *inter alia*:

>“(1) A public company or state-owned company must appoint a company secretary.

>(2) Every company secretary, irrespective of whether the appointment is made as required by subsection (1) or in terms of a requirement in a company’s Memorandum of Incorporation, as contemplated in sections 34(2) and 84(1)(c)(ii), must –

>(a) *Have the requisite knowledge of, or experience in, relevant laws*” (own emphasis).

5.1.17 It may not be unreasonable to deduce from both the requisite knowledge, experience and duties of the Company Secretary, as enunciated in sections 86 and 88 of the Companies Act, that the legislature intended that a Company Secretary should be a legally or financially qualified person.\(^\text{11}\)

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\(^{10}\) Act 71 of 2008.

\(^{11}\) Duties of company secretary in Section 88 of the Companies Act 71 of 2008 states *inter alia*:

(1) A company’s secretary is accountable to the company’s board.

(2) A company secretary’s duties include, but are not restricted to-

(a) providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;

(b) *making the directors aware of any law relevant to or affecting the company*;

(c) *reporting to the company’s board any failure on the part of the company or a director to comply with the Memorandum of Incorporation or rules of the company or this Act*;
5.1.18 As deduced from evidence at my disposal, Ms Moono is not legally qualified, neither was she experienced in the field of law or finance. It is therefore unclear and inconceivable how she was appointed to act as a Company Secretary without the requisite experience, knowledge of the law or other relevant qualifications. It is also manifestly obvious from evidence that she had not worked for the NDA before on any other capacity, which could have familiarised or equipped her with laws or rules applicable to the mandate of the NDA.

5.1.19 To this end, I find it both significant and compelling to pause here for a moment and underscore that, customarily organs of state operate within certain regulatory policy framework which guides their day to day procedural operations and administrative activities. Of particular note is that, although departmental/organisational policies such as Recruitment Policies cannot be exalted to a strict legal code such as an Act of parliament or legislation, such policies are invariably crafted to mirror or compliment the objects of the main legislation.

5.1.20 Policies are duly adopted by the organisation as a guiding document and a lodestar for a particular procedure and are normally binding on its employees. I am therefore highly inclined to apply and consider departmental/organisational policies during the course of my investigation to determine the extent to which policies have been complied with by government officials in the execution of their official administrative duties.

5.1.21 Paragraph 4 of the Recruitment and Selection Policy of the NDA\(^\text{12}\) (Recruitment Policy) which was provided to my office as one applicable guidelines at the time of this recruitment stipulates the following:

\(^{12}\text{Dated 12 July 2010.}\)
“The organisation will strive to ensure that the widest possible pool of candidates has been attracted through the search and advertising process. All vacant positions will be advertised for a minimum of two (2) weeks to attract the best pool of applicants”.

5.1.22 It appears from the above cited policy provisions/directives that the NDA was required to advertise the position of temporary Acting Company Secretary. However, in this matter the NDA did not advertise this post. Instead, Ms Issel telephonically invited Ms Moono to an interview without following prescribed procedure and without Ms Moono applying for same. This conduct by Ms Issel in conflict with the above policy provisions and the principle of legality enshrined in the Constitution. There is therefore a well-grounded or a reasonable apprehension that such an act by Ms Issel was neither transparent nor impartial or equitable as demanded by section 195 of the Constitution.

5.1.23 Paragraph 5.2.2 of the Recruitment Policy which regulates recruitment through head-hunting stipulates as follows:

“Headhunting as defined in this policy shall not be permitted except in exceptional circumstances. In this regard will only be permitted if:

The position has been advertised in terms of this policy and no appointable candidate has been identified”.

5.1.24 In a letter dated 29 November 2012 addressed to my office, Ms Nhlapo sought to categorise the appointment of Ms Moono to the position of Acting Company Secretary as having been done through a headhunting process. However, it is obvious from the foregoing policy provision that such contention by Ms Nhlapo is contrived and completely misplaced. The policy is unequivocal and unambiguous in its demand for advertisement of all the post before embarking on a headhunting
process, which did not happen in this case. My office was neither furnished with a memorandum or request for deviation to headhunt by the NDA.

**Response to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994**

5.1.25 On 15 November 2019, I signed off and subsequently issued all implicated former and current NDA officials including other parties with direct interest on this matter with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to afford them an opportunity to respond to the allegations against them, particularly in relation to the role each played in this matter. Section 7(9)(a) of the Public Protector Act provides that:

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances".

5.1.26 I now turn to consider the responses submitted regarding the section 7(9) notices (hereinafter referred to as notice/s). I have made an effort to deal with each and every aspect raised in the responses but where it appears that I have not done so, that should not be misconstrued as an admission of any kind of the averments contained therein.
5.1.27 A response was received by my office on the 25 November 2019 from Ms Moono: former Assistant Company Secretary of the NDA.

5.1.28 Ms Moono submitted that she does not agree with my submission in paragraph 13.1.10 of my provisional report. Ms Moono then went on to record in response that she was awarded a Certificate in Public Management and Public Finance Management by Regenesys Business School in 2004. Ms Moono indicated further that she completed a programme for management development at Gordon Institute of Business Science (GIBS) in 2006 and 2007 and that there is a financial management aspect in this programme. Ms Moono also recorded that in 2009, she completed a course from University of Johannesburg (UJ) and that financial management was a critical element of this course.

5.1.29 It was further submitted by Ms Moono that from 2004 to 2007, she worked as Chief of Staff at the Department of Public Enterprises (DPE). She indicated further that there were various state owned entities (SOEs) such as Eskom, South African Airways (SAA), Denel, Transnet, Alexkor which reported to DPE at the time, and that therefore, she gained experience in working with SOEs that reported to the Minister.

5.1.30 Ms Moono submitted further that from 2000 to 2004 she worked in various positions in the Ministry of the Department of Trade and Industry and interacted with various stakeholders including SOEs that reported to the Minister.

5.1.31 The above submission by Ms Moono does not warrant a variation from my interim finding on this issue. This is based on the fact that this position was never advertised and Ms Moono did not apply for it either. Instead, she was handpicked. Evidence at my disposal has also proven that Ms
Moono was not appointed through a headhunting either. Failure by NDA to advertise this post remains a violation of its Recruitment policy and by extension rendered Ms Moono's appointment irregular.

5.1.32 Another response was received by my office on the 26 November 2019 from Ms Rashida Issel: former Chief Operations Officer of the NDA.

5.1.33 Ms Rashida Issel objected to my interim findings and denied any impropriety during the recruitment of Ms Moono on a temporary capacity as Company Secretary at NDA. Ms Issel submitted that the recruitment process was done in line with NDA policies. Ms Issel also requested a copy of the NDA Recruitment and Selection Policy at the time from my office and further demanded me to indicate how she transgressed the said policy. Ms Issel contended Ms Moono's appointment was an urgent temporary assignment and not a permanent placement.

5.1.34 It is worth noting that my provisional report issued to Ms Issel for her to comment on, categorically stated both the basis of my legal and factual findings and including the nature of the legal codes/prescripts breached. It is also appropriate to accentuate that NDA remains the custodian of its own policy documents. As a result, my team advised Ms Issel on 27 November 2019 via an email to request any NDA policy directly from NDA.

5.1.35 At the end, I could not find anything persuasive from Ms Issel's submission or responses and accordingly it falls to be rejected, so I submit.

Conclusion

5.1.1 I am persuaded to conclude that the NDA failed to comply with its own Recruitment Policy which demands that all vacant positions be
advertised for a minimum of two (2) weeks to attract the best pool of applicants”.

5.1.2 Similarly, the NDA failed to adhere to section 86 of the Companies Act\textsuperscript{13} which demands that a Company Secretary must have requisite knowledge of, or experience in relevant laws. Ms Moono did not have the kind of competencies or expertise envisaged in the Companies Act to hold a position of Temporary Company Secretary.

5.1.3 Ms Moono had no legal or financial qualification, neither did she work as Company Secretary elsewhere or for the NDA itself which could have equipped her with the laws relevant to the NDA.

5.2 Whether the NDA improperly or irregularly appointed Ms Moono to the position of Assistant Company Secretary without following due processes.

\textit{Common Cause issues}

5.2.1 On 8 February 2010, the NDA advertised the post of Assistant Company Secretary with a closing date of 26 March 2010. This advert appeared on the NDA website namely, \url{www.nda.org.za} as well as the Star, Sunday Times and City Press newspapers with the following requirements:

\textit{Minimum Qualification: Qualification in Business or Office Administration}

\textit{Essential Experience: At least five to seven years in a company secretarial environment, proven experience in an administrative position at a senior level with extensive minute taking experience.}

\textsuperscript{13} Act 71 of 2008.
Knowledge: Knowledge of legal and regulatory requirements affecting the NDA, Corporate Governance principles. General knowledge of company secretarial duties and responsibilities. Familiarity with system/process documentation and business processes.

Skills and Abilities: Excellent administrative skills, high level of professionalism, good levels of communication, written verbal and presentations, good interpersonal skills, high levels of discretion, good team player, excellent planning, co-ordination and follow through skills, methodical and analytical and high attention to detail.

Main Areas of Responsibility: Assist Company Secretary with organising and overseeing procedures in Board meetings including undertaking the following duties: Formulating meeting agendas with the Chairman and/or the Chief Executive and advising management on content and organisation of memoranda or presentation for the meeting, collecting, organising and distribution of such information, documents or other papers required for the meeting within agreed time frame. Operational Planning, Record Management, Corporate Governance and General Compliance.

5.2.2 Ms Moono applied for the above advertised post and she was shortlisted, interviewed and appointed as per the letter dated 25 May 2010. Ms Moono accepted this appointment and signed the offer on 27 May 2010 and took the position of permanent Assistant Company Secretary with effect from 01 June 2010.

Issues in Dispute

14 On 22 May 2010 and chaired by Ms Marcia Manong.
5.2.3 The Complainant contended that the post of a permanent Assistant Company Secretary required a candidate with legal and/or finance qualifications, CIS certificate and relevant experience, which Ms Moono did not possess at the time of her appointment by the NDA.

5.2.4 Bishop Malusi Mpumlwana (Bishop Mpumlwana) the then Chairperson of the Board of the NDA, indicated as per affidavit dated 23 July 2019, which was submitted to my office, that the NDA Board,\(^ {15} \) acting within its powers, took a decision to amended the inherent job requirements of the post of Assistant Company Secretary. As a result, the post of Assistant Company Secretary was advertised as an administrative post to focus on administrative competencies. According to Bishop Mpumlwana, the Company Secretary was a qualified legal professional already hence it was not necessary for his/her assistant to have legal qualifications as well.

5.2.5 Similarly, Mr Lewatle confirmed to my team during an interview on 19 March 2019, that indeed as Human Resources Executive, he was informed by the decision of the Board\(^ {16} \) to amend the profile or academic requirements for the post of an Assistant Company Secretary.

**Application of the Relevant Legal Prescripts**

5.2.6 The National Development Agency Act\(^ {17} \) (NDAA\(^ {18} \)) establishes the NDA and further provides for its objects\(^ {19} \).

5.2.7 Section 5(1)(a) of the NDAA provides *inter alia*:

\(^ {15} \) As per meeting of 16 October 2009.
\(^ {16} \) As per recorded audio at minute 10:05 (Interview with the Mr Lewatle).
\(^ {17} \) Act 108 of 1998.
\(^ {18} \) Section 2 of NDAA.
\(^ {19} \) Section 3 of the NDAA.
"The NDA acts through a board consisting of six members to represent the Government appointed by the Minister of Finance after consultation with the Minister of Education, Health, Housing, Public Works, Trade and Industry, Welfare and Population Development, Water Affairs and Forestry and such other Ministers as the Minister of Finance considers necessary to consult.

5.2.8 Section 66(1) of the Companies Act\textsuperscript{20} provides that:

"The business and affairs of the company must be managed by or under the direction of its board which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the Companies Memorandum of Incorporation provides otherwise".

5.2.9 From the above, it can be deduced that the NDA acts through its Board of Directors who are empowered to exercise all the powers and perform any of the functions of the company. Accordingly, the NDA Board exercised its statutory powers and took a decision to adjust the requirements of the post of the Assistant Company Secretary and there was no law which provided for something to the contrary.

Conclusion

5.2.10 Based on the evidence and discussion above, I am inclined to conclude that the NDA Board as the ultimate regulatory body had necessary powers to determine in its properly quorate meeting, the kind of competencies and skills it needed for the position of Assistant Company Secretary as

\textsuperscript{20} Act 71 of 2008.
empowered by the NDAA. There is also nothing in law\textsuperscript{21} which provides for the minimum academic requirements for the post of an Assistant Company Secretary, which the Board’s decision could have violated in the process.

5.3 **Whether the NDA subjected the Complainant to verbal abuse and victimisation during certain Board meetings in retaliation for her objections to the appointment of Ms Moono as a permanent Assistant Company Secretary.**

**Common Cause Issues**

5.3.1 It is not in dispute that the Complainant was opposed to the appointment of Ms Moono as the Assistant Company Secretary on the basis that she was not legally qualified.

5.3.2 At the time, the Complainant was the Company Secretary at the NDA and Ms Moono was the Assistant Company Secretary and reported directly to the Complainant.

5.3.3 Furthermore, at the time of her appointment as Assistant Company Secretary, Ms Moono only had various certificates\textsuperscript{22} in administrative fields and had neither a legal nor finance qualification.

**Issues in Dispute**

5.3.4 The Complainant submitted that the appointment of Ms Moono as Assistant Company Secretary by the NDA, despite the fact that she did not have the requisite qualifications in law or finance and the adjustment

\textsuperscript{21} Particularly Companies Act, 2008 or any other legislation.

\textsuperscript{22} Computer, Public Management, Television Presenting, Foundation Management, Small Business Development, Programme for Management and Matric.
of the job profile or academic requirements in order to suit Ms Moono, was tantamount to abuse of power by the NDA Board. The Complainant further submitted that the Companies Act\textsuperscript{23} requires that an Assistant Company Secretary be a legally qualified person.

5.3.5 The Complainant had advised against the appointment of Ms Moono as being irregular and further refused to confirm Ms Moono's probation. Instead, the Complainant had proposed that Ms Moono be appointed as an administrative assistant since she had proven to be a good administrator. However, the NDA Board rejected her advice and proceeded with the appointment of Ms Moono as an Assistant Company Secretary without a legal qualification.

5.3.6 It has also been alleged by the Complainant that, following her objection to the appointment of Ms Moono, she was then subjected to various forms of verbal abuse on different occasions\textsuperscript{24} by Mr M Kekana, the Chairperson of the NDA Board at the time (Mr Kekana) and by the then CEO of the NDA, Dr Vuyelwa Nhlapho (Dr Nhlapho).

5.3.7 Subsequently, the Complainant was suspended and charged with non-performance, dereliction of duty and insubordination with effect from 16 February 2012, by Dr Nhlapho. The Complainant was subsequently charged but was found not guilty. Notwithstanding the outcome of the disciplinary hearing, Dr Nhlapho proceeded to institute action to terminate the employment of the Complainant with the NDA, resulting in a Settlement Agreement being concluded under the auspices of the Council for Conciliation Mediation and Arbitration (CCMA).

\textsuperscript{23} Act 71 of 2008.
\textsuperscript{24} Such as being told that “I can destroy you, who do you think you are”. “If you are unhappy the door is open”.
5.3.8 The Complainant believes that the real reason behind her disciplinary action was her objection to the alleged irregular appointment of Ms Moono and her refusal to countenance this appointment.

5.3.9 On 8 March 2019, my investigation team held an interview with Ms Lunga Mangcu, the former Communications Executives at the NDA (Ms Mangcu). Ms Mangcu confirmed that the Complainant was often subjected to verbal abuse by Mr Kekana during Board meetings and that the working relationship had broken down between the Complainant and the NDA Board.

5.3.10 My investigation team also held an interview with Dr Nhlapho on 24 April 2019 and she denied that the Complainant was subjected to verbal abuse during Board meetings or at any other instance. Dr Nhlapho contended that meetings of the NDA Board were recorded and transcribed and that the record shall assist to establish if indeed there was any verbal abuse towards the Complainant.

5.3.11 However, Dr Nhlapho did concede during the same meeting that Mr Kekana was a harsh person who generally shouted at everybody in management/executive positions, including herself as the CEO. Dr Nhlapho further admitted that the relationship between the Complainant and Mr Kekana was strained at some point over work performance.

5.3.12 On 17 August 2019, the NDA’s current CEO, Thamo Mzobe furnished my office with the previous NDA’s Board minutes/records from 2010 to 2013, following a request. Upon my perusal of the said minutes of the Board meetings for possible abusive or obnoxious language being used towards the Complainant as alleged, it was observed that during the meeting held on 30 July 2012, Mr Kekana did use language that could be considered as harsh in the meeting when he uttered the following words:

25 As per minute number 1: 03 of the recorded audio (interview with Dr Nhlapho).
26 On page 70 of the transcript of the meeting in my possession.
“And we must arrive here with our BMWs, Mercedes Benz and then do nothing. So all I’m imploring you guys is that I’m happy you’re making some progress, I’m happy you’re going somewhere. I’ve given you clear direction on these five issues if you don’t want to do it the door is open, if you want to do it let’s do it and let’s be big and let’s be bold”.

5.3.13 Noteworthy, is that the Complainant was not part of this meeting and it appeared as though she was already on suspension at the time. Additionally, the above words by Mr Kekana did not appear to be directed to a specific individual in the meeting but rather appeared to be generic and may be construed by some as not necessarily abusive.

5.3.14 During an interview with Mr Lewatle on 19 March 2019, he indicated that there was also tension and exchange of heated words between Dr Nhlapho and the Complainant during Executive Committees (EXCO) meetings over the appointment of Ms Moono. According to Mr Lewatle, the Complainant and Dr Nhlapho could not always find each other during EXCO meetings over the issue of Ms Moono, as the Complainant refused to manage her while Dr Nhlapho insisted that she executes her responsibilities. It was also submitted by Mr Lewatle that it is possible that part of the insubordination charges that were later proffered against the Complainant by Dr Nhlapho related to her refusal to manage Ms Moono, as the work relationship between the two had irretrievably broke down at some point.

5.3.15 Likewise, Mr Thami Ngwenya, Senior Researcher at the NDA (Mr Ngwenya) also confirmed to my team during an interview held on 2 April 2019, that indeed, Dr Nhlapho and the Complainant disagreed sharply over the appointment of Ms Moono during EXCO meetings. According to Mr Ngwenya, Dr Nhlapho told the Complainant during an EXCO meeting in relation to a dispute over the appointment of Ms Moono that:
"You have to work with what you find here, don't come here and tell us what to do. That person is appointed in that office and that is it".  

5.3.16 Mr Ngwenya further submitted during the interview that even Dr Nhlapho herself had it very tough, as the NDA Board at the time would not take advice from any professional or listen to anybody. Mr Ngwenya further opined during that the Complainant was most likely frustrated and her subsequent resignation from the NDA could not have been entirely voluntary under these circumstances.

5.3.17 On 23 May 2019, an interview was held with Mr Kekana who refuted the allegations that he verbally abused the Complainant during Board meetings while he was the chairperson of the NDA Board. However, Mr Kekana did highlight that the Complainant’s work performance was not satisfactory and that he often registered his unhappiness to that extent. Mr Kekana further indicated that he moved Ms Moono from the Assistant Company Secretary position to some other capacity within the NDA, as was proposed by the Deputy Public Protector: Advocate Kevin Malunga at the time, in order to manage the broken relationship between the Complainant and Ms Moono.

5.3.18 In the light of the above contradicting submissions, I am further enjoined to determine the law which regulates these facts and disputes in question. Thereafter, I have to make a determination with regard to which version is more probable in the circumstances, having considered all evidence as a mosaic of pieces of proof in its entirety.

Application of the relevant legal prescripts

5.3.19 In the matter between the Minister of Home Affairs v The Public Protector28 my mandate to investigate labour issues was challenged by

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27 Refer to minute 18: 45 of the recorded audio (Interview with Mr Ngwenya).
the Department of Home Affairs (DHA) and the DHA argued that the complaint in question at the time related to unfair labour practice, and as such the complainant had to seek his remedy in the Labour Relations Act 66 of 1995 and that the Labour Court has exclusive jurisdiction in labour matters and thereby sought to oust the Public Protector’s jurisdiction over labour matters, disputes or complaints.

5.3.20 The Court after hearing the matter held that there is no merit in this argument and subsequently bellowed, inter alia, that:

"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 to s 182 of the Constitution and the Public Protector Act to ascertain the bounds of the Public Protector’s jurisdiction. Neither excludes labour matters from her jurisdiction."

5.3.21 Since the investigation of this matter invariably extends to labour issues, I consciously opt to cite the above instructive authority to accentuate my jurisdiction to probe or enquire into labour related issues. Section 182 of the Constitution makes it clear that I have the mandate to investigate any conduct in state affairs. The only express exclusion is the investigatory jurisdiction in relation to decisions of the courts. For the rest, my jurisdiction is extremely wide and my mandate is clear, that I must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance.

5.3.22 Section 195(1) of the Constitution provides, amongst others, that:

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

A high standard of professional ethics must be promoted and maintained”.

5.3.23 There is no gainsaying fact that public service must be governed by high standard of professional ethics, principles, morals and integrity at all the times by all officials employed in public sector, including the NDA.

5.3.24 An objective analysis as well as an assessment of the totality of evidence given by Ms Mangcu, Mr Lewatle, and Mr Ngwenya, does establish a prima facie belief that there was a constant exchange of rather harsh words by Dr Nhlapo and Mr Kekana towards the Complainant over the appointment of Ms Moono, which could have contributed to a total breakdown of the work relationship.

5.3.25 However, the disapproval of Ms Moono’s appointment to a position of Assistant Company Secretary by the Complainant on the basis that Ms Moono had no legal or finance qualification was misplaced or inaccurate and manifestly premised on errors of the law. I could not find any legal requirement in terms of the Companies Act\textsuperscript{30} which demands or suggests that an Assistant Company Secretary should be legally or financially qualified, as argued by the Complainant.

Response to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994

5.3.26 A response was received by my office on the 19 November 2019 from Mr Malose Kekana: former Chairperson of the Board of the NDA.

\textsuperscript{30} Act 71 of 2008.
5.3.27 Mr Kekana argued that there is no evidence that a threat was ever uttered in saying that:

"Who do you think you are, I am going to clean you out until you are left with nothing, and I can destroy you. If you are not happy, the door is open, you can leave".

5.3.28 Mr Kekana submitted in his response to my provisional report that, there can be no fair conclusion that there was an exchange of harsh words due to the appointment of Ms Moono. Mr Kekana averred that under all circumstances any words that could be deemed to have been harsh was in respect of poor performance and not in respect of appointment of Ms Moono.

5.3.29 Mr Kekana further contended that, the credibility of Ms Lunga Mangcu is highly questionable. The report must indicate that Ms Mangcu was dismissed for poor performance and left the organisation under circumstances which were not harmonious, therefore, it is probable that her evidence could be biased in favour of the Complainant.

5.3.30 While I remain willingly receptive to the argument by Mr Kekana which seeks to emphasise that words deemed to be harsh were all said in respect of poor performance, however the complainant could not be found guilty of poor performance in the subsequent disciplinary hearing by NDA.

5.3.31 No response was received by my team from Dr Nhlapo in response or as a comment to my provisional report.

**Conclusion**

5.3.32 Based on the strength of the evidence discussed above, I am persuaded to conclude on a *balance of probability* that the work relationship between
Complainant and the NDA, in particular Dr Nhlapho became so strained as a result of her persistent objections to the appointment of Ms Moono as Assistant Company Secretary, that it eventually led to her being charged and suspended in retaliation for her disapproval.

5.3.33 This conclusion is further supported by the fact that the Complainant was found not guilty of other misconduct/poor performance in her subsequent disciplinary hearing. However, the NDA, represented by Dr Nhlapho and the Complainant mutually resorted to a negotiated settlement and termination of the Complainant’s employment with the NDA on the basis that the working relationship had irretrievably broken down.

5.4 Whether the Complainant was unduly influenced and pressurised by the NDA officials to enter into a Settlement Agreement which terminated her employment contract with the NDA.

Common Cause issues

5.4.1 On 19 February 2019, the Complainant and the NDA (as represented by Dr Nhlapho and Mr Lewatle) concluded a Settlement Agreement under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA) as per Case Number GAJB 208113.

5.4.2 Part of the Settlement Agreement provided that the NDA shall pay the Complainant an amount of R 997 686.06 (Nine hundred and ninety seven thousand, six hundred and eighty six rand) less statutory deductions, by no later than 12 March 2013.
5.4.3 Crucially, the agreement was in full and final settlement of the dispute referred to the CCMA as well as in full settlement of all statutory payments due to the Complainant. Furthermore, the dispute was expressly withdrawn by both parties with an understanding that the Complainant withdraws the referral and abandons the dispute against the respondent/NDA in settlement of her case at the CCMA with the full knowledge that she will not be able to proceed on the same grounds at a later stage.

5.4.4 This Settlement Agreement was facilitated and presided over by Commissioner: Bibi Fatima Shaikh (Ms Shaikh) acting under the aegis of the CCMA.

Issues in dispute

5.4.5 On 14 February 2019, my investigation team held a meeting with the Complainant in order to discuss this matter. During this meeting, the Complainant raised the issue that she concluded the Settlement Agreement at the CCMA under duress as she was under tremendous distress at the time due to the victimisation that was perpetrated towards her by the NDA namely, Dr Nhlapho and Mr Kekana. Complainant further averred that she did not have representation during the negotiations or signing of this Settlement Agreement to enable her to make an informed decision. In essence, the Complainant sought to dispute the validity of the settlement agreement mainly on the grounds that it was signed under duress.

5.4.5 Both Dr Nhlapho and Mr Lewatile vehemently refuted any allegations of impropriety which may suggest that they could have unduly influenced or forced the Complainant to sign the Settlement Agreement. Dr Nhlapho further stated that the Complainant is a legal professional who is proficient
in law. Dr Nhlapho argued that it is highly inconceivable that she as a non-legal person could unduly influence the Complainant at CCMA proceedings.

5.4.6 On 17 April 2019, my team also held an interview with Ms Shaikh who presided over the signing of this Settlement Agreement at the CCMA. Similarly, Ms Shaik refuted the claims of undue influence being exerted to the Complainant to sign the agreement. Ms Shaik submitted an affidavit to my office dated 16 April 2019 in which she emphasised that there was no apparent undue influence by the NDA officials.

5.4.7 According to Ms Shaikh's explanatory affidavit in my possession, she stated that she is bound by professional ethics and under no circumstances would she have forced the Complainant or allow her to be coerced into signing the Settlement Agreement.

5.4.8 Additionally, my office requested the audio recordings/transcripts of this conciliation session from the CCMA on 21 February 2019. The CCMA replied in a letter dated 28 February 2019 which was signed by the Registrar, Ms Nanakie Moroti (Ms Moroti). Ms Moroti indicated that the conciliation processes are without prejudice and therefore are not recorded as the intention is to get both parties to agree on a settlement.

Application of the relevant legal prescripts

5.4.9 Section 112 of the Labour Relations Act\textsuperscript{31} (LRA) establishes the Commission for Conciliation, Mediation and Arbitration (CCMA) as a juristic person.

\textsuperscript{31} Act 66 of 1995.
5.4.10 Section 113 of LRA states that the CCMA is independent of the state, any political party, trade union, employer, employers’ organisation, federation of trade unions or federation of employers’ organisations.

5.4.11 Section 115(1)(a) of LRA stipulates the functions of CMMA inter alia:

“(a) attempt to resolve, through conciliation, any dispute referred to it in terms of this Act”

5.4.12 As can be observed from the foregoing legal provisions, the CCMA is a statutory council duly empowered to conduct conciliation, mediation and arbitration on labour disputes referred to it under LRA.

5.4.13 The Code of Conduct of CCMA Commissioners (the Code) was developed in terms section 117 of the LRA and states inter alia:

“Paragraph 2 and 2.1 of Code provides that in order for conciliation, mediation and arbitration processes to be seen to be fair and just and gain the confidence of the commissioners shall act with honesty, impartially, due diligence and independent of any outside pressure in the discharge of their statutory functions”

5.4.14 Based on the evidence at my disposal, there is nothing which suggests that Ms Shaikhol did not discharge her duties in compliance with the above Code. On the other hand, the Complainant was unable to put forward any concrete evidence to substantiate her claims of duress at the time of her signing of the Settlement Agreement.

5.4.15 In dealing with the allegations of duress to conclude a settlement agreement, the court has in a landmark judgment of Gebenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another\(^{32}\) that:

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\(^{32}\) At para [15].
"A contract may be vitiated by duress where “intimidation or improper pressure renders the consent of the party subjected to duress no true consent”. Compulsion may be exercised by way of physical force, or indirectly, by way of a threat of harm. In order to obtain an order setting aside a contract on the grounds of duress, actual violence or reasonable fear must be shown. The fear must be caused by the threat of some “considerable evil” to the person concerned, or to his, or her, family. The threat or intimidation must be unlawful, or contra bonos mores and the moral pressure used must have caused damage. The burden of proving the existence of duress rests on the party raising it."

5.4.16 There is no basis for a conclusion to be made that the Complainant was subjected to intimidation, compulsion, physical force or improper pressure by Dr Nhlapho or any other person during the signing of the settlement agreement.

Conclusion

5.4.17 In the light of the evidence considered, I was not able to find any proof of undue influence or coercion, which could have compelled the Complainant to sign the Settlement Agreement against her will.

5.4.18 Instead, I am satisfied that the Complainant at the time that she entered into a settlement agreement with the NDA, she was fully aware of the nature of the proceedings and had fully comprehended the terms and conditions of the agreement she had entered into and the consequences thereof.

5.5 Whether the Complainant, the NDA or any other party suffered improper prejudice in the circumstances.
Common Cause issues

5.5.1 The NDA appointed Ms Moono on a temporary contract of employment as an Acting Company Secretary as per appointment letter dated 16 November 2009. In terms of the appointment letter, Ms Moono was offered a total cost to company remuneration package of **R 52 270.65 per month**, for a period of seven months. In total, Ms Moono was paid **R 365, 894.55** for this position.

Issues in dispute

5.5.2 The NDA was required to advertise the position of temporary Acting Company Secretary. However, in this matter the NDA did not advertise this post but instead Ms Issel invited Ms Moono to an interviews without the post being advertised and without Ms Moono applying for same. The conduct of Ms Issel was in conflict with the Recruitment Policy of the NDA and the principle of legality enshrined in the Constitution.

5.5.3 Although evidence at my disposal revealed that the Complainant was subjected to harsh or obnoxious words by Dr Nhlapo for her disapproval of Ms Moono’s appointment as an Assistant Company Secretary, I found no substance that such conduct constituted any prejudice as Ms Moono’s appointment was not in contravention of any law or policy.

5.5.4 Equally, the charges and suspension subsequently proffered against Complainant by the NDA purportedly in retaliation for her constant objection to Ms Moono’s appointment was partially addressed by the signing of the Settlement Agreement at the CCMA.

*Application of the relevant legal prescripts*
5.5.5 In terms section 1 of the Public Finance Management Act\textsuperscript{33} (PFMA) "irregular expenditure" means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

5.5.6 Section 51 of PFMA which regulates the general responsibilities of accounting authorities of public entities provides as follows—

"(1) An accounting authority for a public entity—
(a) must ensure that that public entity has and maintains—
(i) effective, efficient and transparent systems of financial and risk management and internal control;
(ii) ....................................................
(iii) ....................................................
(iv) ....................................................
(b) must take effective and appropriate steps to—
(i) ....................................................
(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses
resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity".

5.5.7 At the time of Ms Moono’s appointment to the temporary position of Acting Company Secretary, Ms Issel was at all material times the acting CEO at the NDA and therefore, the accounting officer as envisaged above.

5.5.8 Paragraph 4 of the Recruitment and Selection Policy of the NDA\textsuperscript{34} (Recruitment Policy) stipulates that:

\textsuperscript{33} Act 1 of 1999
\textsuperscript{34} Dated 12 July 2010.
"The organisation will strive to ensure that the widest possible pool of candidates has been attracted through the search and advertising process. All vacant positions will be advertised for a minimum of two (2) weeks to attract the best pool of applicants".

5.5.9 It is clear from the above cited regulatory policy provisions/directives that the NDA was required to advertise the position of temporary Acting Company Secretary. As evidence disclosed, the NDA did not advertise this post. Similarly, Ms Moono did not apply but was merely invited by Ms Issel to an interview and offered the post in contravention of the regulatory policy provisions. It is submitted therefore that this appointment was made in contravention of the applicable regulatory and legal prescripts of the NDA.

5.5.10 It stands to reason therefore, that the appointment of Ms Moono by the NDA as a temporary Acting Company Secretary was irregular and constituted improper and extreme prejudice to other potentially qualified applicants who could have applied, had it been duly advertised as required by policy. By corollary, any salary payments namely, R 365, 894.55 made to Ms Moono in respect of this position constituted irregular expenditure to the DNA finances as defined above. In turn, this irregular expenditure further caused improper financial prejudice to the NDA.

Conclusion

5.5.11 Based on the above evidence, it can be concluded that the salary paid to Ms Moono in respect of the position of temporary Acting Company Secretary amounted to an irregular expenditure as defined in the PFMA.

5.5.12 This appointment further constituted improper prejudice to other potential applicants who could have applied for the post of temporary Acting Company Secretary at the NDA, had it been duly advertised as required
by its own Recruitment Policy, which prescribes that *all vacant positions will be advertised for a minimum of two (2) weeks to attract the best pool of applicants*.

6. **FINDINGS**

Having regard to the evidence, and the regulatory framework setting the standard that should have been upheld by the GDE and the impact on the complainant, I make the following findings against the GDE:

6.1 **Regarding whether NDA improperly or irregularly appointed Ms Moono to the position of Acting Company Secretary without following due processes.**

6.1.1 The allegation that the NDA improperly or irregularly appointed Ms Moono to the position of temporary *Acting Company Secretary* without following due processes is substantiated.

6.1.2 On 16 November 2009, the NDA appointed Ms Neo Moono (Ms Moono) on a temporary contract of employment as Acting Company Secretary without such post being advertised and without Ms Moono applying for the post. Ms Moono was merely invited to an interview by Ms Rashida Issel, the former Chief Operating Officer of the NDA (Ms Issel) and subsequently was appointed to the position.

6.1.3 Additionally, Ms Moono did not possess any legal or finance qualifications and had not worked as a Company Secretary or for the NDA prior to her appointment, which could have equipped her with the experience and laws relevant to the NDA. Lack of the academic qualifications and experience did not make Ms Moono an ideal candidate for the position of
a Company Secretary as envisaged in sections 86 and 88 of the Companies Act 71 of 2008.

6.1.4 This conduct by the NDA and in particular Ms Issel failed to live up to the dictates and the guidelines of the Recruitment Policy of the NDA which demands that all vacant positions will be advertised for a minimum of two (2) weeks to attract the best pool of applicants”.

6.1.5 Such failure by the NDA and in particular Ms Issel, 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 NDA improperly or irregularly appointed Ms Moono to the position of Assistant Company Secretary without following due processes.

6.2.1 The allegation that the NDA improperly or irregularly appointed Ms Moono to the position of permanent Assistant Company Secretary without following due processes is unsubstantiated.

6.2.2 On 8 February 2010, the NDA advertised the position of Assistant Company Secretary as a non-legal post with a closing date of 26 March 2010. Ms Moono applied for this advertised post and she was shortlisted, interviewed and appointed to the position of permanent Assistant Company Secretary with effect from 1 June 2010.

6.2.3 The NDA Board had changed and adjusted the inherent job requirements of the post of an Assistant Company Secretary from legal to an administrative capacity. As a result, the post of Assistant Company was advertised as an administrative post to focus on administrative duties.
This was confirmed by the former Chairperson of the Board, Bishop Malusi Mpumilwana. Mr S Lewatle (Mr Lewatle), who is the former Human Resources Executive at the NDA also confirmed the resolution of the Board to this effect.

6.2.4 It is further clear from the Companies Act 71 of 2008 that entities like the NDA act through their Board of Directors which are empowered to exercise all the powers and perform any of the functions of the company. Accordingly, the NDA Board exercised its statutory powers and took a decision to adjust the requirements of the post of an Assistant Company Secretary. There was no law which provided for something to the contrary. The NDA Board did not therefore contravene any law or policy in changing or adjusting the job profile and inherent requirements for the post of an Assistant Company Secretary.

6.2.5 The vehement disapproval and objection of Ms Moono’s appointment to a position of Assistant Company Secretary by the Complainant on the basis that Ms Moono had no legal or finance qualification was therefore mistaken. There is no legal requirement in terms of the Companies Act or any other legal prescript which demands that an Assistant Company Secretary should be legally or financially qualified.

6.2.6 Accordingly, this conduct by NDA or its Board did not constitute 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 NDA subjected the Complainant to verbal abuse and victimisation during certain Board meetings in retaliation for her objections to the appointment of Ms Moono as permanent Assistant Company Secretary.**

6.3.1 The allegation that the NDA subjected the Complainant to verbal abuse and victimisation during certain Board meetings in retaliation for her challenging the appointment of Ms Moono as a permanent Assistant Company Secretary is unsubstantiated.

6.3.2 Whereas, the weight of evidence given by Ms Lunga Mangcu, Mr Lewatle, and Mr Thami Ngwenya, does establish a prima facie belief that there was a constant exchange of rather harsh or obnoxious words from Dr Vuyelwa Nhlapho (Dr Nhlapho) and Mr M Kekana towards the Complainant over the appointment of Ms Moono, which could have contributed to a total breakdown of the working relationship and led to the Complainant being charged and suspended.

6.3.3 However, the subsequent labour dispute/charging and suspending of the Complainant was partially addressed by the Complainant’s ultimate conclusion of the Settlement Agreement at CCMA with the NDA.

6.3.4 Accordingly, the conduct of Dr Vuyelwa Nhlapho and Mr M Kekana of resorting to harsh or obnoxious words, charging and suspending the Complainant was not be traversed any further for the purpose of this investigation and the conclusion of the settlement agreement did not constitute 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.
6.4 Regarding whether the Complainant was unduly influenced and pressurised by the NDA officials to enter into a Settlement Agreement which terminated her employment contract with the NDA.

6.4.1 The allegation that the Complainant was unduly influenced and pressurised to enter into a Settlement Agreement which terminated her employment contract with the NDA is unsubstantiated.

6.4.2 Evidence at my disposal revealed that on 19 February 2019, the Complainant and the NDA (as represented by Dr Nhlapho and Mr Lewatie) concluded a Settlement Agreement under the auspices of the CCMA as per Case Number GAJB 208113. Part of the Settlement Agreement was that the NDA shall pay the Complainant an amount of R 997 686.06 (Nine hundred and ninety seven thousand, six hundred and eighty six rand) less statutory deductions. The NDA paid the said amount to the Complainant, no later than 12 March 2013, as complied with the terms of the Settlement Agreement.

6.4.3 The signing of this Settlement Agreement was facilitated and presided over by Commissioner: Bibi Fatima Shaikh (Ms Shaikh) acting under the aegis of the CCMA as empowered by Labour Relations Act 66 of 1995.

6.4.4 I was not able to find any proof of undue influence, coercion or actual violence which could have forced the Complainant to sign the Settlement Agreement against her will.

6.4.5 Equally, I am satisfied that when the Complainant entered into the settlement agreement, she was fully aware of the nature of proceedings that she had attended, had fully understood the terms and conditions of the agreement she had entered into and the consequences thereof.
6.4.6 As for the Settlement Agreement itself, I express no view of my own save to advise for a judicial review to the Labour Court should the Complainant still feel prejudiced by its conclusion.

6.4.7 Accordingly, the conduct by NDA or its officials did not constitute 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.

6.5 Regarding whether the Complainant, NDA or any other party suffered improper prejudice in the circumstances.

6.5.1 The allegation that the Complainant, the NDA or any other party suffered improper prejudice in the circumstances is substantiated.

6.5.2 Ms Moono was paid a total of R 365, 894.55 for this position of temporary Acting Company Secretary as a result of an irregular recruitment process.

6.5.3 The payment of such salary constitutes irregular expenditure by the NDA as this appointment was made in contravention of the applicable rule/policies and or legal codes namely Paragraph 4 of the NDA Recruitment Policy and section 51 of the PFMA.

6.5.4 By failing to advertise this post as required by the Recruitment policy, the NDA also prejudiced other potential applicants who could have expressed their interests in the post had it been duly advertised.
6.5.5 This conduct by NDA and in particular Ms Issel 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

The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

The CEO of the NDA must take appropriate steps to ensure that:

7.1.1 Within sixty (60) working days from the date of this report provide training to all NDA Human Resource Management staff and other officials who are involved in the NDA Recruitment and Selection processes;

7.1.2 Within sixty (60) working days from the date of this report, disclose all the irregular expenditure to the Treasury and to the Auditor General incurred by the NDA in connection with the irregular appointment of Ms Moono to a position of temporary Acting Company Secretary.

8. MONITORING

8.1 The CEO of the NDA must, submit an Implementation Plan to my office within thirty (30) working days from the date of receipt of this report indicating how the remedial action 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 CEO of NDA, unless she obtains an Interim Interdict or Court Order directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 06/01/2020

Assisted by: SV Mothiba and VX Dlamini (Gauteng Provincial Office)