

# ROCKING THE BOAT

*Report on an investigation into allegations of abuse of power and victimisation of alleged whistle-blower Ms Fikile Hlatshwayo-Rouget by the KwaZulu-Natal Provincial Treasury resulting in her alleged unfair dismissal.*

*Report No: 4 of 2016/17*



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***"Whistle-blowers are not impipis, a derogatory term reserved for apartheid era police spies....Employees who seek to correct wrongdoing, to report practices and products that may endanger society or resist instructions to perform illegal acts, render a valuable service to society and the employer..."***

***Employees have a responsibility to disclose criminal and other irregular conduct in the workplace Public servants have an obligation to report fraud, corruption, nepotism, maladministration and other offences. A company can have a cause of action against its directors for failing in their duty to report wrongdoing"***

***Tshishonga V Minister of Justice And Constitutional Development And Another (JS898/04) [2006] ZALC 104; [2007] 4 BLLR 327 (LC) (26 DECEMBER 2006) AT [168] AND [168] Pillay DJ***

## Executive Summary

- (i) "Rocking the Boat" is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- (ii) The report communicates my findings and remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of abuse of power and victimization of alleged whistle-blower Ms Fikile Hlatshwayo-Rouget (the Complainant), by the KwaZulu-Natal Provincial Treasury (Treasury), resulting in her unfair suspension and subsequent dismissal.
- (iii) The Complainant is a 37 year-old woman and former Senior General Manager Fiscal Resource (Deputy Director General Finance) at the KZN Treasury who holds a Master's degree in Development Finance. She is currently a doctorate fellow on the Development of Tourism Strategy for Poverty Alleviation at the University of KwaZulu-Natal. She is married with two children and has used the time she has since being dismissed by the Treasury to publish a book. The Complainant, who has been unemployed for the last three (3) years since being dismissed by the Treasury, joined Treasury after working for various institutions such as the Development Bank of Southern Africa, the University of Cape Town, National Treasury and Allan Gray Limited. The Complainant had never been

dismissed or subjected to a disciplinary enquiry by any of her previous employers until the challenged dismissal.

- (iv) The Complainant was appointed as a Senior General Manager: Fiscal Resource on 05 July 2013, and employed from 1 August 2013 to 30 October 2013. She initially lodged the Complaint with the Public Protector in September 2013 then went to the Special Investigation and lodged the Complaint again on 05 January 2014. She alleged that the Head of Department, Mr Smiso Magagula (the HOD) and the former MEC for Finance, Ms Ina Cronje (MEC Cronje) suspended and later dismissed her under pretext charges, following her making a protected disclosure regarding suspected corruption, conflict of interest, maladministration and related procurement irregularities within the Treasury, shortly after joining the Treasury.
- (v) The main allegations were that the KZN Treasury:
  - (a) Improperly dismissed her without a disciplinary inquiry or any due process, following her making a protected disclosure to the HOD, Mr Magagula, her immediate supervisor and Ms Mapula Motaung, the Head of Internal Audit regarding what she considered to be irregular procurement activities. These allegedly involved excessive procurement and overpayment of consultants referred to as “*Infrastructure Crack Teams*” and the funding by Treasury of non-core business activities such as Air Shows and the Durban North Sea Jazz Festival, in which some Treasury functionaries had undisclosed interests;
  - (b) Subjected her to occupational detriment involving unduly suspending and later dismissing her under pretext charges trumped up between her immediate supervisor, the HOD and her subordinates, Mr Farhad Cassimjee, Dr Clive Coetzee and Ms Tania Stielau, whereas the real

reason for her dismissal was her whistle-blowing and refusal to countenance irregular and corrupt procurement transactions;

- (c) Failed to properly attend to her disclosure of suspected irregular and corrupt practices by Treasury and other functionaries, among them Dr Coetzee who reported to her, which practices included irregular execution of projects that were not part of Treasury's core business;

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

- (a) Whether Treasury improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosures Act No. 26 of 2000 (PDA);
- (b) Whether Treasury improperly suspended and later dismissed the Complainant in retaliation against her protected disclosure, amounting to an occupational detriment as envisaged in the PDA; and
- (c) Whether the Complainant was prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place her as close as possible to where she would have been had there been no improper conduct by the Treasury or its functionaries.

(vii) The investigation was conducted in the form of an inquisitorial process, which included correspondence with the former MEC Cronje and current MEC Belinda Scott (MEC Scott) and officials of the Treasury, mainly the HOD and Internal Audit functionaries. Also included, was correspondence with the Special Investigation Unit (SIU) which secured a presidential proclamation to investigate the allegations of corruption, conflict of interest, abuse of state funds and related irregularities regarding the air shows and the Durban North Sea Jazz Festival, excessive use and overpayment of consultants, and related irregularities. Interviews were also

conducted and at the conclusion of the investigation, persons, who appeared to be implicated by evidence were served with notices advising them of such and giving them an opportunity to challenge such evidence and defend themselves.

- (viii) Applicable prescripts regulating protected disclosures, employee rights, work place disciplinary procedures and the role and responsibilities of the Treasury have been considered and the conduct of the Treasury measured against these.
- (ix) The standard applied to assess the propriety or impropriety of the conduct of state functionaries is principally as set out in Section 195 of the Constitution which stipulates the basic values and principles governing public administration. The provisions of the PDA were also taken into account, primarily because the Public Protector is one of the institutions authorised under the PDA to receive protected disclosures, thus serving as “*safe harbour*” for those wishing to make disclosures of suspected improprieties in the exercise of state power and control over public resources. While the PDA does not specifically instruct the Public Protector, Auditor General and others to investigate the content of a disclosure, it is a given that such disclosure needs to be followed up, particularly in the light of section 195 of the Constitution as interpreted by the Constitutional Court in *Khumalo vs MEC for Education Kwazulu Natal*<sup>1</sup>.
- (x) On receipt of the complaint, it was initially referred to the Public Service Commission which returned claiming it had no jurisdiction. An attempt was made to conciliate the matter starting with a request that the Complainant be retained or the post kept vacant pending the finalisation of the investigation. MEC Cronje initially undertook not to fill the post until the investigation is concluded however when MEC Scott took over she refused to reinstate the Complainant as agreed and the post was later filled while the Public Protector process was held in abeyance pending processes at the General Public Service Sector Bargaining Council (GPSSBC). Unfortunately after a prolonged process involving

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<sup>1</sup> 2013 ZACC 49

postponement, the Treasury successfully challenged the jurisdiction of the GPSSBC.

- (xi) The Treasury also challenged the Public Protector's jurisdiction, with its attorney Mr Potgieter arguing very strongly and persistently that a matter such as this belongs to the courts where it can be dealt with appropriately using established procedures in the courts. The Treasury and Mr Potgieter were duly referred to section 182 of the Constitution and the Public Protector Act which specifically insulate only court decisions and judicial functions, respectively, from the jurisdiction of the Public Protector. Significantly, section 182 gives the Public Protector power to investigate any conduct in state affairs that is alleged or suspected to be improper or prejudicial, to report on that conduct and to take appropriate remedial action
- (xii) The attention of the two MECs and Mr Potgieter was further drawn to the fact that it was, in my considered view, the intention of the architects of our democracy that when ordinary citizens with limited means seek to exact accountability in the exercise of state power and control over public resources there is an accessible mechanism that levels the playing field between them and the mighty state which has enormous resources and time in its hands.
- (xiii) Treasury further challenged the reinstatement and compensation amount arguing that the Complainant had been partly an author of her misfortune for taking her matter to the bargaining council and that the labour court only gives 12 months compensation. While it may be true that the Bargaining Council turned out not to be the right forum for the Complainant, it must be borne in mind that the remedial action seeks to place her as close as possible to where she would have been had there not been maladministration or improper conduct by Treasury.
- (xiv) It is my considered view that arguments that insist that an unemployed Complainant who has lost everything due to whistle-blowing must go to court are quite disheartening in so far as it displays lack of appreciation of the power

imbalance between the mighty state and the ordinary person of little means often referred, in Public Protector discourses as Gogo Dlamini. It is of particular concern that during the investigation the Treasury was advised that the Complainant abandoned the court process and returned to the Public Protector because she ran out of funds. An argument that insists she must go to court, effectively advises the Complainant to simply abandon her claim. Surely that can't be right.

- (xv) A consideration of the role of the Public Protector regarding the protection of alleged whistle-blowers, must also take into account that the framers of the PDA specifically singled out the Public Protector and the Auditor General as “safe harbours” for whistle-blowers for a reason. That reason must, in my considered view, include the ability to use the power the Public Protector has to investigate and redress maladministration and other forms of improper conduct.
- (xvi) Regarding the alleged suspension and subsequent dismissal of the Complainant, the Treasury did not deny that the Complainant was suspended and later dismissed without a hearing or a prior written warning and that she was informed that her dismissal was because she was hierarchical and abrasive. Treasury also conceded no change management process had been put in place to help the Complainant and the older General Managers reporting to her adjust to the change. The change involved having three older persons, a white man, Indian man and white woman reporting to a young black female after a long period of reporting directly to the HOD.
- (xvii) The matter disputed by Treasury is the allegation that the Complainant was dismissed on pretext charges in retaliation for whistle-blowing and in violation of the Protected Disclosures Act. Significantly, the head of Internal Audit, Ms Mapula Motaung, who is the person to whom the alleged disclosure was made, admits that the disclosure was made as alleged.
- (xviii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

**(a) Regarding whether Treasury improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosures Act (PDA):**

- (i) The Complainant made a protected disclosure within two weeks of her employment to the Head of Internal Audit, Ms Motaung and at Ms Motaung's request, submitted on **15 September 2013**, a dossier following an internal investigation. The disclosure was duly made as defined in section 1 of the PDA, and its contents were subsequently shared by Ms Motaung with the HOD Mr Magagula, who was the Complainant's immediate supervisor.
- (ii) Disclosures were also made directly by the Complainant to General Managers reporting to the Complainant on **27 September 2013** and to her immediate supervisor and Accounting Officer, HOD Mr Magagula, on unspecified dates.
- (iii) The Treasury's successive Executive authorities, MECs Cronje and Scott and its Accounting Officer Mr Magagula, unduly refused to acknowledge that the Complainant made a protected disclosure about alleged excessive use of consultants, corruption, tender irregularities and abuse of state funds. They chose to limit their intervention to a disclosure made before her and whose limited content was the alleged excessive and discriminatory award of tenders and other contracts to white consulting firms.
- (iv) When Treasury finally investigated the content of the disclosure by the Complainant it was too late to meaningfully arrest some of the improprieties, including alleged corrupt activities by one of the General Managers reporting to her, Dr Coetzee and abuse of state funds through

events such as Air Shows and payment of R25 million for a Durban North Sea Jazz Festival that never took place, some of which have since been confirmed as improper by a Treasury commissioned forensic investigation and the SIU.

- (v) Treasury's delay in taking action regarding the Complainant's disclosure diminished if not extinguished entirely the chances of recovering improperly paid out state funds, including the payment for the Durban North Sea Jazz Festival which never took place.
- (vi) The conduct of Mr Magagula, the HOD, is specifically in violation of section 38 of the Public Finance Management Act No. 1 of 1999 (PFMA) and section 195(1) of the Constitution.
- (vii) The conduct of former MEC Cronje is specifically in violation of the Executive Ethics Code and accordingly inconsistent with sections 95 and 96(1) of the Constitution.
- (viii) By failing to deal with a protected disclosure duly made in compliance with the PDA, Treasury acted unlawfully in violation of section 3 of the PDA, section 3 and 4 of Prevention and Combating of Corrupt Activities Act and section 7 of the Prevention of Organised Crime Act. Such conduct is ultimately inconsistent with the provisions of section 195(1) of the Constitution.
- (ix) The conduct of Treasury and the relevant state functionaries accordingly constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged section 182 of the Constitution.

**(b) Regarding whether Treasury improperly suspended and later dismissed the Complainant which conduct amounted to an occupational detriment envisaged in section 3 of the PDA:**

- (i) The Complainant was suspended on 30 October 2013 and finally dismissed on 17 December 2013 without any prior warning, written or verbal, and without being given an opportunity to make representations, defend herself or make amends, regarding her alleged hierarchical and abrasive management style.
- (ii) The dismissal followed a string of events that commenced with a confrontation on 27 September 2013, between the Complainant and her branch employees, regarding the procurement and appointment of Crack Teams, involvement of Treasury in major events (which include *inter alia*, Air shows, Durban North Sea Jazz Festival and Commemoration of Prisoners of War) for services she believed to constitute overreaching the mandate of Treasury, conflict of interest and corruption.
- (iii) Shortly before the suspension, the Complainant received a memorandum dated 04 October 2013 titled '*Concerns With Regard To Your Conduct And Performance*', in which Mr Magagula already indicated she was not fit for office. The same memorandum purported to have been sent on the basis of letters of complaint or grievances received on the same day by Mr Magagula, from Dr Coetzee and the other two General Managers reporting to the Complainant.
- (iv) The suspension and subsequent dismissal of the Complainant on the basis of trivial charges was irrational, unreasonable and unfair and can justifiably be seen as a charade that sought to get the Complainant out of the way by the MEC Cronje and Mr Magagula who at the time believed and chose to stand by Dr Coetzee, whom she had accused of corrupt

activities, an accusation since confirmed by the Treasury commissioned forensic investigation and by the SIU.

(v) The subjection of the Complainant to harassment, suspension and dismissal constitutes a violation of the probation clause in the Complainant's contract of employment, paragraph 2 of the Treasury's Disciplinary Code<sup>2</sup>, paragraph C of Treasury's grievance procedure<sup>3</sup>, section 13 (5) of the Public Service Act No. 103 of 1994, section 187 and schedule 8 of the Labour Relations Act No. 66 of 1995 (LRA), section 3(1) and (2) of the Promotion of Administrative Justice Act No. 3 of 2000 and sections 33(1) and (2) Constitution while constituting an "occupational detriment" which is prohibited under section 3 of the Protected Disclosure Act 26 of 2000.

(vi) The conduct of Treasury and specifically the acts and omissions of former MEC Cronje and HOD Mr Magagula constitute maladministration and, abuse of power, as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

**(c) Whether the Complainant was prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place her as close as possible to where she would have been had there been no improper conduct by the Treasury or its functionaries:**

(i) The allegation that the complainant was prejudiced is substantiated.

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<sup>2</sup> Disciplinary Code and Procedures for the Public Services ( Resolution 2 of 1999)

<sup>3</sup> Grievance Rules for the Public Service (Resolution 14 of 2002)

- (ii) Due to Treasury's improper conduct involving the failure to comply with section 3 of the PDA, the Complainant unduly suffered immense financial, emotional and social prejudice mainly involving:
  - (aa) Unfair loss of remuneration legally due to her over the past three years;
  - (bb) Emotional pain and suffering and consequent therapy fees;
  - (cc) Financial expenses relating to fighting her intended discharge and dismissal mainly in the form of legal fees, transport and communication costs;
  - (dd) Loss of social capital that accompanies being unemployed compounded by adverse listing as dismissed in the Public Service PERSAL system resulting in her remaining unemployed three years on; and
  - (ee) Inconvenience to her family and security concerns relating to the improperly handled disclosure.

**(xix) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where she would have been had the improper conduct or maladministration not occurred, while addressing administrative deficiencies in the Treasury, is the following:**

**A. The MEC must ensure the following remedial action is implemented:**

- (a) The Complainant is reinstated to her position within 30 days from the date of issuing of this report;

- (b) The Complainant is paid all monies that would have been due to her had she not been dismissed, together with interest calculated at the applicable rate as prescribed by the Minister of Justice and Constitutional Development in terms of section 1 (2) of the Prescribed Rate of Interest Act No. 55 of 1975 within 30 days from date of issuing of this report;
- (c) The Complainant is compensated for financial losses incurred by virtue of incidental expenses related to her dismissal within 60 days from date of issuing of this report and upon submission of proof thereof;
- (d) The Complainant is provided with a letter of apology regarding her unfair dismissal;
- (e) The Complainant is offered further therapeutic support, if required, for suffering the occupational detriment as a whistle-blower;
- (f) The Complainant be provided with support and employees reporting under her through an appropriate change management leadership intervention that incorporates mainstreaming gender and provides all team members with knowledge, values and skills to manage diversity and embrace whistle-blowing;
- (g) Review and or develop, institutionalize and implement Departmental Standard Operating Procedures for handling Probation and Whistle-Blowers; and
- (h) Ensure that all Treasury staff members are trained on compliance with Supply Chain Management Policies and related Standard Operating Procedures.

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**B. The Premier is to ensure that:**

- (a)** the MEC implements the remedial action within the stipulated timelines and reports to the Provincial Legislature and the Public Protector on the outcome;
  
- (b)** Any challenges regarding implementation are debated in the Provincial Legislature, with input from the Public Protector, before any legal action is considered in line with cooperative governance and prevention of further prejudice to the Complainant.

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT INVOLVING MALADMINISTRATION AND VICTIMISATION OF AN ALLEGED WHISTLE-BLOWER BY THE KWAZULU NATAL PROVINCIAL TREASURY IN VIOLATION OF THE PROTECTED DISCLOSURES ACT**

**1. INTRODUCTION**

1.1. *“Rocking the Boat”* is my report in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of Section 8(1) of the Public Protector Act to:

1.2.1 The Premier of KwaZulu-Natal Province, the Honourable Willies Mchunu MPL;

1.2.2 The MEC for Finance in KwaZulu-Natal, Ms Belinda Scott MPL

1.2.3 The Head of Department for the KwaZulu-Natal Provincial Treasury, Mr S Magagula

1.2.4 A copy of the report is also submitted to the Complainant Ms Fikile Hlatshwayo-Rouget in terms of section 8(3) of the Public Protector Act.

1.3 The report communicates the outcomes of an investigation into allegations of abuse of power and victimisation of alleged whistle-blower Ms Fikile Hlatshwayo-Rouget (the Complainant), by the KwaZulu-Natal Provincial Treasury (Treasury) ending in her unfair dismissal.

## **2 THE COMPLAINT**

**2.1.** The Complainant initially lodged the Complaint with the Public Protector in September 2013 then went to the Special Investigation and lodged the Complaint again on 05 January 2014 alleging that:

2.1.1. She was employed by Treasury as a Senior General Manager: Fiscal Resource on 05 July 2013, effective from 1 August 2013 to 30 October 2013;

2.1.2. The HOD and the former MEC Cronje suspended and later dismissed her under pretext charges following her making a protected disclosure regarding suspected corruption, conflict of interest, maladministration and related procurement irregularities within Treasury, shortly after joining the Treasury;

2.1.3. Prior to her joining the Treasury, she had worked for various institutions such as the Development Bank of Southern Africa, University of Cape Town, National Treasury and Allan Gray Limited. Until the challenged dismissal, the Complainant had never been dismissed or subjected to a disciplinary enquiry by any of her previous employers;

2.1.4. That Treasury has since made an adverse listing of her name on the Public Service's employment Persal system indicating that she was dismissed and as a result she is unable to find employment in the Public Service;

2.1.5. The details of the Complainant's allegations included that the Treasury:

2.1.5.1 Improperly dismissed her without a disciplinary inquiry or any due process, following her making a protected disclosure to the HOD, Mr Magagula, her immediate supervisor and Ms Mapula Motaung, the Head of Internal Audit regarding what she considered to be irregular procurement activities. These involved allegedly excessive procurement and overpayment of consultants

referred to as "*Infrastructure Crack Teams*" and the funding by Treasury of non-core business activities such as Air Shows and the Durban North Sea Jazz Festival in which some Treasury functionaries had undisclosed interests;

2.1.5.2 Subjected her to occupational detriment involving unduly suspended and later dismissing her under pretext charges trumped up between her immediate supervisor, the HOD and her subordinates, Mr Farhad Cassimjee, Dr Clive Coetzee and Ms Tania Stielau, whereas the real reason for her dismissal was her whistle-blowing and refusal to countenance irregular and corrupt procurement transactions;

2.1.5.3 Failed to properly attend to her disclosure of suspected irregular and corrupt practices by Treasury and other functionaries, among them Dr Coetzee who reported to her, which practices included irregular execution of projects that are not part of Treasury's core business;

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

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

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

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

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action."*

- 3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed in 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 and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5. Treasury is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within my ambit of investigation.
- 3.6. The Public Protector's power and jurisdiction to investigate and take appropriate remedial was disputed by Treasury. The MEC submitted that that the Complainant has referred the matter to the Labour Court and the Public Protector is not an appropriate forum to adjudicate the fairness of the Complainant's dismissal. In her response letter to my section 7(9) letter she submitted as follows:

***"THE PUBLIC PROTECTOR HAS INTRUDED INTO THE LABOUR COURT'S JURISDICTION***

8. *The decision taken by the former MEC and Treasury to dismiss the Complainant are binding administrative decisions. These decisions remain binding and of full force and effect until they are reviewed and set aside by a review court or by the Labour Court. Until the decisions have been set aside they remain of full force and effect, and must be given effect to.*
9. *The Public Protector has stepped into the shoes of the Labour Court, and has made findings of fact and ordered remedial action. This goes beyond the intended powers of the Public Protector, and intrudes on the functions of the*

*courts. The consequence thereof is that the Public Protector has intruded on to the rights of the parties to have their disputes determined by a court.*

10. *Under the cloak of powers to "take appropriate remedial action" the Public Protector ordered the retrospective reinstatement of the Complainant (thus providing her with three years compensation) and has ordered the payment of the Complainant's legal fees and expenses, including for therapeutic support. In so doing the Public Protector has exceeded her authority –*

*10.1. The Labour Court has sole jurisdiction to deal with disputes arising from dismissals.<sup>2</sup> The proposed finding made by the Public Protector amounts to a finding of an unfair dismissal, and intrudes onto the Labour Court's sole jurisdiction.*

*10.2. Proceedings were already underway in the Labour Court, and in accordance with the maxim of *lis pendens* those proceedings should have been finalised. Effectively the Complainant has been "forum shopping".*

*10.3. The Labour Court has capped compensation for unfair dismissal as the maximum of twelve month's remuneration, and twenty-four month's remuneration for employees whose dismissals are found to be automatically unfair in cases where the dismissal contravenes the Protected Disclosures Act.*

- 3.7. It must respectfully pointed out that the argument presented by Treasury is not supported by law. Of particular importance is that the argument ignores choice of law by the Complainant, who has chosen to challenge the conduct of Treasury as a form of maladministration and the violation of the PDA as opposed to an unfair labour practice. In the same way that an incidence may give rise to civil and criminal action, an incident may give rise to labour and improper conduct questions.

- 3.8. The investigation is informed by the provisions of section 181(2) of the Constitution and the Public Protector Act. The Public Protector has jurisdiction in terms of the Constitution to investigate **any conduct** in state affairs or in the public administration which is alleged or suspected to be improper or to result in impropriety or prejudice.
- 3.9. Section 2 of the Constitution provides that: *“the 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.”* (own emphasis)
- 3.10. MEC Scott contended that section 157(1) of the LRA provides that the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or in terms of any other law are to be determined by the Labour Court. However, it should also be noted that section 157(1) is subject to the Constitution.
- 3.11. Since section 182(1) of the Constitution provides that: *“the Public Protector has the power as regulated by the national legislation 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”,* therefore, in terms of section 2 of the Constitution, the Public Protector is not precluded by section 157(1) of the LRA to investigate this matter (own emphasis).
- 3.12. In light of the above, MEC Scott’s argument against the Public Protector’s jurisdiction to investigate this matter, cannot be sustained.
- 3.13. MEC Scott also submitted that the decision of the former MEC Cronje is *Functus Officio* and it can only be reviewed and set aside by the Labour Court. Section 10(1) of the Interpretation Act No. 45 of 1961 provide that: *..”When a law confers*

*a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.”* According to Cora Hoexter<sup>4</sup> *“this provision could be interpreted as allowing for the free variation or revocation of non-legislative acts, in accordance with the proposition that effective daily administration is inconceivable without continuous exercise and re-exercise of statutory powers and the reversal of decision made previously.*

- 3.14.** Our courts have repeatedly found that decisions can be reviewed on the basis of legality and irrationality. In the recent decided case of *Democratic Alliance v Acting National Director of Public Prosecutions and Others*<sup>5</sup> in a unanimous judgement, Ledwaba JP correctly found that illegal and irrational decision are reviewable. He referred to earlier decision of the SCA where Navsa JA concluded that decision to discontinue prosecution can be reviewed on the basis of illegality and irrationality<sup>6</sup>.
- 3.15.** Interpretation of section 10(1) merely enables administrators to exercise their powers anew in different situations not to revisit or revoke their existing decision whenever they like<sup>7</sup>. The rule of law requires administrators to have lawful authority for everything they do.
- 3.16.** But in my view a more fundamental question is whether you are *functus officio* when in fact you have not performed a function properly. It is my considered view that the answer must be in the negative.

<sup>4</sup> Cora Hoexter *Administrative Law in South Africa* 2 ed (2012).

<sup>5</sup> (19577/2009) [2016] ZAGPPHC 255; 2016 (2) SACR 1 (GP) □; [2016] 3 All SA 78 (GP); 2016 (8) BCLR 1077 (GP) (29 April 2016)

<sup>6</sup> *DA v Acting National Director of Public Prosecution and Another* (288/11) [2012] ZASCA 15; 2012 (3) SA 486 (SCA); [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613 (SCA) (20 March 2012)

<sup>7</sup> See Cora Hoexter

**3.17.** I therefore submit that MEC Scott is empowered to revisit the decision of former MEC Cronje, if that decision was taken based on error.

## **4. THE INVESTIGATION**

### **4.1 Methodology**

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3. The methodology used was that of an inquisitorial process. The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act. However after fruitless attempts to conciliate, the matter was escalated into an investigation.

### **4.2. Approach to the investigation**

4.2.1. When the Public Protector conducts an investigation, the mandate requires the conduct of an enquiry on the merits of the complaint that transcends lawfulness and includes considerations of equity, good administration and proper conduct.

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

- 4.2.2.1. What happened?
  - 4.2.2.2. What should have happened?
  - 4.2.2.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
  - 4.2.2.4. In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?
- 4.2.3. The enquiry regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not Treasury acted improperly in relation to the Complainant's discharge and exit processes and the impact thereof, as well as whether her dismissal is attributable to her reporting improprieties within Treasury.
- 4.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Treasury or organ of state to prevent maladministration and prejudice.
- 4.2.5. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.3. On analysis of the complaint, the following issues were considered and investigated:**
- 4.3.1. Whether Treasury improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosures Act (PDA);

- 4.3.2. Whether Treasury improperly suspended and later dismissed the Complainant in retaliation against her protected disclosure which amounted to an occupational detriment as envisaged in the PDA; and
- 4.3.3. Whether the Complainant was prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place her as close as possible to where she would have been had there been no improper conduct by the Treasury or its functionaries.

#### **4.4. The Key Sources of information**

##### **4.4.1. Documents**

- 4.4.1.1. Written complaint submitted by Ms Hlatshwayo-Rouget dated 05 January 2014;
- 4.4.1.2. The Complainant’s curriculum vitae;
- 4.4.1.3. Complainant’s appointment letter dated 05 July 2013;
- 4.4.1.4. Memorandum from the HOD to the Complainant dated 04 October 2013;
- 4.4.1.5. Memorandum from the Complainant to the HOD dated 11 October 2013;
- 4.4.1.6. Letter from the HOD dated 30 October 2013;
- 4.4.1.7. The Ruling of the Appeal Tribunal for the KZN Provincial Treasury ;
- 4.4.1.8. Final letter of dismissal from former MEC Cronje;

- 4.4.1.9. The Ruling of the General Public Service Sectoral Bargaining Council;
- 4.4.1.10. A memo issued by the Head of Labour Relations, ECDSD dated 15 July 2005;
- 4.4.1.11. The Complainant's Persal file marked 53220161 and the contents thereof;
- 4.4.1.12. Report submitted by the MEC dated 14 March 2016;
- 4.4.1.13. Documents obtained from the Special Investigation Unit relating to the Durban North Sea Jazz Festival.

#### **4.4.2. Interviews and meetings conducted**

- 4.4.2.1. Interviews with the Complainant;
- 4.4.2.2. Interview with MEC Scott on 15 March 2016;
- 4.4.2.3. Interview with the HOD on 14 April 2016;
- 4.4.2.4. Interview with Ms Motaung on 12 April 2016;
- 4.4.2.5. Interview with employees who work under Internal Audit Unit on 16 April 2015;

#### **4.4.3. Correspondence sent and received**

- 4.4.3.1. A letter from the Public Protector to MEC Scott dated 23 September 2014;
- 4.4.3.2. A letter from MEC Scott, to the Public Protector dated 09 October 2014;
- 4.4.3.3. A letter from MEC Scott to the Public Protector dated 19 January 2015;

4.4.3.4. A letter from MEC, Scott to the Public Protector dated 03 February 2016;

4.4.3.5. A letter from MEC Scott to the Public Protector dated 26 August 2016;

4.4.3.6. A letter from MEC Scott to the Public Protector dated 28 August 2016;

**4.4.4. Legislation and other prescripts:**

4.4.4.1. The Constitution of the Republic of South Africa, 1996;

4.4.4.2. Protected Disclosures Act No. 26 of 2000;

4.4.4.3. Labour Relations Act No. 66 of 1995;

4.4.4.4. Public Service Act No. 103 of 1994;

4.4.4.5. Public Service Disciplinary Code: Public Service Coordinating Bargaining Council Resolutions No. 2 of 1999 as amended by Resolution No. 4 of 2000;  
and

4.4.4.6. Prescribed Rate of Interest Act No. 55 of 1975.

**5 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

**5.1 Regarding whether the Complainant made a protected disclosure as defined in section 1 of the Protected Disclosures Act (PDA), which was improperly handled by Treasury**

5.1.1. It is common cause that the Complainant was appointed as Senior General Manager: Fiscal Resource by Treasury on 05 July 2013 and commenced employment on 1 August 2013. She reported directly to the HOD, Mr Simiso Magagula who in turn reports to MEC Scott. Under her were three General Managers *viz* Mr Cassimjee, Dr Coetzee and Ms Stielau.

5.1.2. It is also common cause that within two weeks of joining the Treasury, the Complainant reported alleged irregularities, including abuse of state funds and suspected corruption involving excessive and overpayment of consultants, staging of air shows and other projects beyond the remit of Treasury. The Complainant further submitted that on 15<sup>th</sup> of September 2013 she together with Mr Andile Luthuli handed over a bundle of documents which was evidence relating to her allegations, to Ms Motaung, the Senior General Manager responsible for Internal Audit.

5.1.3. It has not been disputed that the Complainant fingered one of the General Managers reporting to her, Dr Coetzee, as being behind the scheme in question. She had queried some of expenses she believed to be questionable activities and refused to approve payment for same in a memorandum submitted for these by Dr Coetzee, and that as a result of the above, the relationship between the Complainant and Dr Coetzee soured.

5.1.4. It has also not been disputed that no action was taken against Dr Coetzee immediately after the Complainant's disclosure and that on one occasion thereafter, he was appointed to act as the Head of Department to whom his immediate supervisor, the Complainant was required to report, while the HOD was away.

5.1.5. It is common cause that the key impugned projects namely, Durban International North Sea Jazz Festival and the Air Shows which the Complainant believed were outside the scope of Treasury, have since been found to indeed be outside the scope of Treasury, and that subsequent investigations have since confirmed the allegations of irregularities, conflict of interest and corruption she had disclosed.

5.1.6. It is also common cause that the Complainant reported the alleged improper conduct regarding excessive use of consultants, Air Shows, the North Sea Jazz Festival and other improprieties to the SIU and the Public Protector before her dismissal and that subsequent investigations by the SIU and a consultancy engaged by the Treasury, confirmed the allegations against Dr Coetzee, who was later placed on suspension. These investigations and MEC Scott's personal view as submitted during the investigation, further confirmed that Treasury had overreached its mandate by organizing Air Shows and other line function activities. They also confirmed that Treasury's involvement in the procurement of the Durban North Sea Jazz Festival was improper and that payment of R25 000 000.00 to Soft Skills Communications CC towards the Festival that never took place, by the Department of Economic Development and Tourism, constitutes abuse of state funds, which funds Treasury is according to MEC Scott and HOD Magagula, in the process of clawing back.

5.1.7. What is disputed by Treasury is the allegation by the complainant that:

- (i) She made a protected disclosure to the HOD and the Head of Internal Audit although it admits that she did provide the information she alleges to have provided to Ms Motaung, the Head of Internal Audit;
- (ii) Nothing was done to follow up on the protected disclosure;

(iii) She was subjected to an occupational detriment for her disclosure and refusal to participate in what she saw as irregular and possibly corrupt procurement practices, involving among others, appointment of Crack Teams and Treasury's coordination and payment of national events such as air shows and the Durban North Sea Jazz Festival, which transcend its remit.

5.1.8. When MEC Scott appeared before me in terms of Section 7(4)(a) of the Public Protector Act No 23 of 1994 on 15 March 2016, she did not deny that the Complainant disclosed irregularities to the HOD or Ms Motaung, but stated that at that stage there was already an anonymous letter received from a whistle-blower four (4) days after the Complainant was appointed. While she initially submitted that the investigations relating to Commemoration of Prisoners of War, the Durban North Sea Jazz Festival and KwaZulu-Natal Sharks Board by the SIU and the Internal Audit were not triggered by the Complainant's disclosure but by receipt of the earlier anonymous letter from an unknown whistle-blower, she later conceded that that disclosure had been limited to what was referred to as the exclusive and excessive appointment of white consultants.

5.1.9. She submitted that the HOD had denied that the Complainant made any disclosure to him whether formally or informally but did not deny that both the Complainant and Mr Coetzee had apprised her about their disagreement with each other regarding the justifiability of certain procurement activities and payments towards the same.

5.1.10. The Complainant's version of events was however confirmed by Ms Motaung during the interview held on 12 April 2016 advising that the Complainant's disclosure went far beyond the anonymous tipoff received shortly before her appointment. Ms Motaung confirmed that she had received an anonymous complaint on 11 July 2013 which made an allegation that *"for the past two years white owned-companies are getting the work and black companies would get*

*the tail-end of the little projects, if any at all...Big white owned companies are dominating the appointments”.*

- 5.1.11. She further confirmed that the complainant together with one of the Deputy Managers, Mr Andile Luthuli, had a meeting with her on 15 September 2013 where she handed over a dossier of evidence that showed that Dr Coetzee was having corrupt relationships with service providers. The evidence also related to allegations of irregular conduct in the formation and appointment of Infrastructure Crack Teams. Ms Motaung conceded that the information received from Complainant and Mr Luthuli was more detailed than anonymous complaint and was used to proceed with investigation by Ernest and Young Consultants.
- 5.1.12. MEC Scott conceded that most of the allegations of scope overreaching by Treasury, conflict of interest and other procurement irregularities, including corruption had since been confirmed through subsequent investigations. The confirmed allegations, included irregular procurement of the Durban North Sea Jazz Festival which never took place despite the payment of R 25 000 000. 00 towards it, which constitutes fruitless and wasteful expenditure. She further conceded that Treasury played some role in the project, which included its HOD and MEC Cronje attending a similar event in the Port of Rotterdam, the Netherlands, and billing the trip under the project.
- 5.1.13. MEC Scott also advised that investigations had confirmed allegations of a corrupt relationship or at best a conflict of interest on the part of Dr Coetzee regarding the Air Shows, advising that his own aircraft also participated in the Air Shows, together with others of former colleagues from when he served as an aviator in the South African National Defence Force. She further advised that she did not see these as part of Treasury’s core business and had canned same.

- 5.1.14. When Mr Magagula, the HOD appeared before me on the 14<sup>th</sup> of April 2016, he denied that the Complainant ever made any disclosure to him. However, he conceded that Ms Motaung had informed him about the disclosures made by the Complainant and conceded that such disclosures transcended what had been disclosed by a whistle-blower shortly before the Complainant assumed her position.
- 5.1.15. He further conceded that no immediate action was taken against Dr Coetzee arguing that a person has to be presumed innocent until proven guilty following an appropriate adjudicative process. When asked if it was not risky to keep someone in the system who is alleged to be illicitly siphoning government money, he could not provide an answer.
- 5.1.16. Both MEC Scott and Mr Magagula conceded that they had since been presented with incontrovertible evidence of Dr Coetzee's being guilty of the improprieties the Complainant had accused him of, but that he was still in the system pending a criminal process. MEC Scott advised that she had suspended him but later lifted the suspension allegedly because she felt he no longer posed a threat regarding hiding or obscuring information.
- 5.1.17. When asked why the Complainant was not given the same fair treatment of being presumed innocent, neither of them provided a rational explanation. Nor was any sound explanation proffered for the justification of the urgency behind a complaint being lodged on the same day while she was at a training course, her being charged that day and suspended within a week thereafter. No explanation was given regarding what damage her continued presence would have posed to the workplace.
- 5.1.18. Mr Magagula submitted further that he was informed by Ms Motaung that there was a letter received from a whistle-blower which raised allegations of impropriety within the Complainant's unit prior to the Complainant's

commencement of employment. He alleged that he was not aware of the contents of the whistleblowing except the fact that there was something wrong in the Infrastructure Unit. While he submitted the Complainant never mentioned any improprieties to him, he conceded that he was advised about these allegations by Ms Motaung.

- 5.1.19. Mr Magagula conceded that he did nothing about both the allegations made before the Complainant's appointment and those made after her appointment, which he argued he was not aware had been made by her. He submitted that he only became aware of her alleged disclosure when he read the Complainant's papers when the case was at the Bargaining Council. Yet both the Complainant and Ms Motaung said not only did they tell him about the allegations, Ms Motaung also informed him that the source of the allegations was the Complainant.
- 5.1.20. Of significance is the fact that the allegations were the source of the discord between the Complainant and Dr Coetzee and aspects of these were included in his letter of grievance to Mr Magagula. I find it improbable to believe that Mr Magagula never heard of these allegations, or was unaware that the source was the Complainant. I further find it improbable to believe that it is mere coincidence that the meeting between Dr Coetzee and MEC Cronje that triggered the HOD's intervention that led to the letters of the 4<sup>th</sup> of October 2013 and his letter to the Complainant on the same date, took place on 27 September 2013, the same day the Complainant had an uncomfortable meeting about tenders with Dr Coetzee and her other subordinates.
- 5.1.21. I have extreme difficulty in believing Mr Magagula's version of events, which includes that at no stage during his dealings with the Complainant did she mention anything being wrong within the Infrastructure Unit. If she had not voluntarily offered the information, she would at least have made reference to such in giving her side of her story regarding the conflict with Dr Coetzee.

- 5.1.22. Equally puzzling is that in his evidence during his interview, Mr Magagula stated that he never enquired from the Complainant if she was aware of the allegations against Dr Coetzee, although she was his immediate supervisor. He alleged that he considered this unnecessary and directly proceeded as HOD to request Ms Motaung to proceed with the investigation against Dr Coetzee on being advised by her about the said allegations. It is puzzling why as HOD Mr Magagula would not alert the branch head to alleged irregularities in her unit given the fact that if such continued she could have been caught up in them. The only logical deduction I am inclined to make is that Mr Magagula did not ask the Complainant because he knew she was aware of the alleged irregularities, and was in fact the source of or someone who believed the allegations to be true. In fact, Mr Magagula himself said he did not doubt the testimony of Ms Motaung who submitted during this investigation that she had requested the Complainant to conduct an investigation since her branch was involved, and had advised the HOD accordingly.
- 5.1.23. In the circumstances I am persuaded by the version of the Complainant and Ms Motaung, which version I must indicate is also corroborated by written and oral submissions by 16 members of Internal Audit made to me between 2014 and 2015. I must say I was surprised that both the HOD and MEC Scott professed never to have heard from Internal Audit that there were alleged procurement improprieties suspected, including corruption.
- 5.1.24. I am accordingly convinced that the Complainant did make a disclosure of what she believed to be improprieties by Dr Coetzee and other state functionaries in the Treasury and organs of state in the KwaZulu-Natal Province, and that this was not investigated by the HOD and the MEC at the helm of the Treasury at the material time. Such protected disclosure was not handled as such by Treasury, particularly, MEC Cronje and HOD Magagula, but only by the head of Internal Audit Ms Motaung.

5.1.25. In her response to my section 7(9) letter, MEC Scott argued that my proposed findings are not supported by the information at her disposal. She argued further that there are numerous factual errors in the provisional report and it is factually incorrect that the Complainant is a whistleblower. The MEC then reiterated her earlier submission and submitted that the position of Treasury has not changed.

**5.2. Regarding whether Treasury improperly suspended and later dismissed the Complainant in retaliation to her protected disclosure, which amounted to an occupational detriment as envisaged in the PDA, the evidence I have points to the following:**

5.2.1. It is common cause that the Complainant was suspended by the HOD within six (6) weeks of employment without ever having received any written notification of any impropriety on her part, or of any intention to dismiss, save for the letter of the HOD presented to her on 04 October 2013. This took place while she was on a training course, and followed from written allegations from three General Managers reporting to her. These allegations were received by the HOD on the same day he wrote to the Complainant, indicating his intention to dismiss her on account of such grievance.

5.2.2. It is also common cause that before the letter of 04 October 2013, Mr Magagula as the Complainant's supervisor never gave her any written notification of her unsatisfactory conduct and/or warning that should such conduct not improve, he would dismiss her.

5.2.3. It is common cause that on 30 October 2013, the Complainant received a dismissal letter from MEC Cronje through Senior Manager: Human Resources. The MEC stated that the circumstances were such as to warrant discharge from

the department during probation on one month’s notice as provided for in section 13(5)(a) of the Public Service Act.

- 5.2.4. It is further common cause that on 07 November 2013, the Complainant submitted a letter of appeal to MEC Cronje and on 18 November 2013 she received a letter from the HOD informing her to stay at home. The appeal was dismissed on 18 December 2013.
- 5.2.5. It is also common cause that at the time of dismissal, no performance agreement had been concluded with the Complainant and that no performance appraisal had taken place.
- 5.2.6. It is also common cause that the only disciplinary step taken before the Complainant’s suspension is the notice of intention to suspend from Mr Magagula as HOD, e-mailed to the Complainant on 04 October 2013 while she was still on a training course. In such letter he advised her that: ...*“your performance, management style and conduct demonstrate that you are not suitable to hold your post, and that very serious consideration should be given to terminating your services during your probationary period”*.
- 5.2.7. Also common cause is that prior to being dismissed by the Treasury, within two (2) months of employment, the Complainant had a steady career in the financial field and had never been dismissed from work.
- 5.2.8. What was disputed by MEC Scott and HOD Magagula is that the Complainant’s suspension and subsequent dismissal constitute victimisation in retaliation for her whistle-blowing and refusal to participate in what she viewed as improper and corrupt activities by Dr Coetzee and others.
- 5.2.9. They submitted that she was suspended and subsequently dismissed solely because of her fractured relationship with her subordinates due to her

*"hierarchical and abrasive management style"* while she maintained that Treasury's conduct was in retaliation against her as a whistle-blower. The investigation had to confirm whether her dismissal was attributable to her whistle-blowing and if so whether such dismissal could be regarded as an *"occupational detriment"* as defined in section 1 of the PDA and in violation of section 3 of the PDA<sup>8</sup>.

5.2.10. However, the HOD could not provide evidence of his having warned the Complainant about the said improper attitude. The only evidence dating prior to the written complaint of 04 October 2013 is one where all parties agreed, that one of the General Managers reporting to the Complainant, Mrs Stielau took offence at being told she had disappeared after she had admittedly left the premises without seeking permission from or informing the Complainant. MEC Scott and Mr Magagula, however, did not deny that it was wrong of subordinates to leave during working hours without advising the immediate supervisor. They denied having knowledge that the Complainant had since apologised in writing to Ms Stielau and had produced correspondence confirming same.

5.2.11. Of significance is that MEC Scott and Mr Magagula did not deny that in the absence of a change management intervention, having a young black woman of African descent coming into a department and supervising three older colleagues, two of whom were white (male and female) and one Indian (male), who for a long time were reporting directly to the HOD, was bound to result in a measure of ructions that would need to be managed sensitively. They also did not deny that some of the General Managers continued to access and seek the HOD' authorisation directly, despite the Complainant's insertion into the leadership value chain.

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<sup>8</sup> Act 26 of 2000

- 5.2.12. MEC Scott and Mr Magagula also did not deny that it was the responsibility of top management to help manage the change entailed in the Complainant's arrival which upset the status quo. Of significance to me was MEC Scott saying during the interview of 15 March 2016, that having worked with the senior people, who had become the Complainant's subordinate for a long time without problems, she was bound to believe and to choose them over the Complainant whose value was yet to be proven. However, she did not deny that such trust had been betrayed by Dr Coetzee, who had turned out to have been doing what the Complainant had accused him of.
- 5.2.13. The Complainant's submission that on 27 September 2013, she met with Ms Stielau and Dr Coetzee to discuss problems within their units and informed Dr Coetzee that she would not tolerate any corruption, was not contested by Treasury. In addition, there was no denial of her allegation that immediately after the meeting of 27 September 2013, Dr Coetzee went to the former MEC Cronje, giving her cause to suspect that something was going to come up, because Ms Motaung had already met the MEC.
- 5.2.14. She further stated that on the same day at about 16h30 the former MEC Cronje allegedly instructed the HOD to meet with Ms Stielau and Ms Ida Zwane, General Manager: Corporate Service, in order to draft letters of complaints from the three General Managers. She further stated that soon thereafter but before 04 October 2016, she received an email from Dr Coetzee which said the MEC was not happy with her. While the Complainant's sequence of events has not been denied, the denial is that the events that followed constitute retaliation against her triggered by and seeking to protect Dr Coetzee following her whistle-blowing.
- 5.2.15. MEC Scott confirmed that there was a close relationship between MEC Cronje and Dr Coetzee and that the MEC had, among other things, attended the impugned Air show, that were organised by Dr Coetzee with his former

colleagues from the aviation industry. MEC Scott further did not deny that Dr Coetzee had complained about the Complainant's management style including her refusal to sign for transactions she questioned with her predecessor, MEC Cronje, and on her arrival at that point she had been persuaded by Dr Coetzee's version of events.

5.2.16. It is common cause that the Complainant attended a training course three days after her uncomfortable interaction with Dr Coetzee and other General Managers, between the 30<sup>th</sup> of September and 04<sup>th</sup> of October 2013 and that upon her return on 07 October 2013, Mr Magagula informed her via email that the three General Managers were no longer reporting to her. On the same day she received a memorandum from the HOD dated 04 October 2013 titled "*Concerns with regard to your conduct and performance*". The memorandum announced its purpose as being "*....to raise concerns that I have about your conduct and work performance*".

5.2.17. In the aforementioned letter the HOD indicated that he had "*....received written complaints from Senior and highly valued staff members about your hierarchical and abrasive management style....*" and that attempts to counsel did not lead to change in approach and style. He proceeded to state specific concerns relating to the Complainant's alleged management style and referred to specific examples.

5.2.18. In his concluding remarks at paragraph 18 the HOD stated as follows:

*"I have the very real concern that your performance, management style and conduct demonstrate that you are not suitable to hold your post, and that very serious consideration should be given to terminating your services during your probation period."*

5.2.19. Worth noting from the contents of Mr Magagula's letter of 04 October 2013 is that as HOD and immediate supervisor, he specifically indicated in his letter that he had already formulated a view that the Complainant was not suitable for her post and that consideration should be given to the termination of her employment, yet he had never written to her in warning about her conduct before. Also important to note is that on her return to her office on 07 October 2013 Dr Coetzee's problem of the Complainant refusing to authorise his transactions was resolved without her being asked why she had refused, as Dr Coetzee and his colleagues were unilaterally removed, albeit temporarily, from her authority as line manager. It is fair to conclude that she was no longer able to carry out her threat of 27 September 2013 to refuse to sign what she regarded as corrupt transactions.

5.2.20. In a letter dated 11 October 2013, the complainant responded to the HOD's memorandum stating that she had applied herself diligently and professionally in a manner befitting her roles and responsibilities. Her view was that a different and more equitable approach would need to be adopted. She stated that:

***"...any shortcomings in my respectful view, may be addressed by evaluation, counselling, instruction, training, mentoring or the like. None of these have been either offered or suggested..."***

5.2.21. Of interest is that, by his own admission during the interview on 15 April 2016, Mr Magagula admitted that he never took up the Complainant's suggestion regarding alternatives to dismissal such as evaluation, counselling, instruction, training and mentoring. He confirmed that in his response letter dated 18 October 2013 he informed the complainant that:

***"...you are a very senior manager employed at a very senior level and are very well paid. It should not be necessary or train a senior person employed at managerial level. ...given the complaints of the three senior managers and at***

*least one threatened resignation I do not believe that a decision on this matter can be delayed any longer."*

- 5.2.22. Worth noting further, is that when interviewed, Mr Magagula confirmed that he had thought that the pre-dismissal options presented by the Complainant were not necessary in the circumstances. He was also unable to provide an answer regarding why mediating between the complainant and her subordinates was not an option.
- 5.2.23. Both Mr Magagula and the Complainant confirmed that he proceeded to request a private meeting in order to explore a settlement agreement, which was refused by the Complainant. The Complainant submitted that after taking advice from her attorneys she sent a letter to the HOD on 22 October 2013 informing him that she was unable to meet with him privately to discuss his proposal on her exit.
- 5.2.24. When Mr Magagula was asked during the investigation why a speedy exit was imperative, Mr Magagula said it was to restore smooth operations to ensure productivity in his department, whose work is crucial to provincial government but did not provide a convincing answer regarding why conciliation could not have achieved the same outcome. His apparent lack of faith in the possibility of the smoothing of relations is even more baffling, given that the Complainant had apologised in writing to the one subordinate, Mrs Stielau, who had taken offence at language used in reference to her leaving the work place without advising her supervisor as "sneaking out".
- 5.2.25. It is disconcerting that evidence in relation to the grievance letters submitted on 04 October 2013 by the three subordinates of the Complainant reveals that the letters were prepared on the same day, have similar style and a copy of the same letters was found to have been generated on Dr Coetzee's computer by

the SIU during their investigation. When confronted about the possibility of collusion, both MEC Scott and Mr Magagula appeared to be unconcerned.

- 5.2.26. Given the fact that Dr Coetzee had an axe to grind with the Complainant so to speak and by the Treasury’s own admission, I cannot help but conclude that he is the one who orchestrated the escalation of complaints against the Complainant and the urgency of her dismissal. Given what we now know regarding Dr Coetzee’s alleged misconduct, the conclusion that Dr Coetzee wanted the Complainant gone with speed to stop her from rattling his cage regarding the Air Shows and Crack Teams improprieties, is also inescapable.
- 5.2.27. It appears from the evidence that Mr Magagula and MEC Scott either knew and approved of what was going on with the Air Shows, Durban North Sea Jazz Festival and appointment of Crack Teams, among others, or preferred not to know given that all that was investigated at the time was the allegation of white companies’ getting a lion’s share of Treasury tenders and other contracts. Given their reaction to the Complainant, and their zealous pursuit of her speedy exit, It is difficult not to conclude that Mr Magagula and former MEC Cronje preferred at the time to keep the status quo and had no appetite for a person who was rocking the boat, and were accordingly eager to sacrifice her so as to keep things as they were before she came.
- 5.2.28. There is accordingly no escaping the conclusion that the source of the Complainant’s troubles was principally the fact that she was poking her nose into the improper conduct of Dr Coetzee and the funding and execution by Treasury of non-core business activities such as the Air Shows and consequently that she lost her job because of this. While it is true that the charge sheet focused on her *“hierarchical and abrasive management style”*, the conclusion is inescapable that the charges on the basis of which she was dismissed were mere pretext.

5.2.29. In her response to my section 7(9) letter, the MEC reiterated her earlier submission that the Public Protector is not the appropriate forum to consider this matter, but the Labour Court. She further submitted that the facts set out in the section 7(9) are not sustainable, stating the following:

- (a) *The Complainant commenced service on 1 August 2013. By that stage the internal audit unit had already received the anonymous complaint and investigations had already commenced;*
- (b) *It is correct that the Complainant and her colleague Andile Luthuli met with Ms Motaung however, the documents submitted does not support that the Complainant is a whistle blower. The documents handed to Ms Motaung were copies of emails which state appointment of "crack teams". These documents supported the earlier allegations that the Complainant claims she whistle blew;*
- (c) *Inspection of file support that the Complainant was not a whistle blower, but at best present when Andile Luthuli handed over a file;*
- (d) *It is correct that the anonymous complaint was limited to the exclusive and excessive appointment of white consultants. Furthermore, the file handed to Ms Motaung had no mention of the projects referred to;*
- (e) *The is no evidence that the Complainant's alleged improper conduct relating to the air shows , commemoration of prisoners of war, the North Sea Jazz Festival and the Sharks board;*
- (f) *There is no evidence that the Complainant fingered Dr Coetzee and refused to approve payments, or that this caused their relationship sour.*

(g) *There is no evidence that nothing was done to investigate the various irregular activities.*

5.2.30. Significantly the MEC ignores the evidence of Ms Motaung why says the two came to her to whistle-blow and that the content went beyond earlier allegations. She further ignores Ms Motaung's admission that she sent the two to go back and prepare a comprehensive report, which was duly prepared and covered more than the previous allegations.

5.2.31. Surprisingly, the MEC referred to the inspection of the file submitted to Ms Motaung by the Complainant and the absence of information relating to other irregular activities that the Complainant reported. Also worth noting is that the content of the disclosure corresponds with the subject of the dispute between her Complainant and Mr Clive Coetzee, who after the disagreement sent an e-mail indicating that he had reported her to the MEC who was not happy with her. That disagreement was according to her about her refusal to sign authorization for expenditure on the items she questioned which items are the same as those in the dossier. It's also worth noting that Mr Luthuli reported to the Complainant and it is accordingly not farfetched for her to have gone with him to Ms Motaung to discuss both their concerns. In the circumstances, I find the version of MEC Scott to be the improbable, in the circumstances.

**5.3. Whether the Complainant was improperly prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place her as close as possible to where she would have been had there been no improper conduct by the Treasury or its functionaries.**

5.3.1. The key area of prejudice that I have discerned relates to the handling of what all the parties concede was an employee grievance against the Complainant. Mr Nkomo, the Head of Legal Services also conceded during his appearance before me with Mr Magagula, that the allegations by three General Managers

were a grievance rather than misconduct, but offered no explanation why the grievance procedures were not followed.

- 5.3.2. One of the areas examined regarding prejudice in the handling of the grievance is the evidence in the form of correspondence leading to the Complainant's dismissal, and written and oral submissions by MEC Scott and Mr Magagula, during the investigation.
- 5.3.3. It is not clear why the Treasury took a decision to believe existing employees that reported to the Complainant when a grievance between them emerged. MEC Scott said it was because she had worked with the Treasury officials while in the Provincial Legislature and had no reason to doubt their version, while Mr Magagula said he too had a fractured relationship with the Complainant, though he did not provide any record or witness to prove that. It cannot be denied that such conduct clearly placed the Complainant at a disadvantage, which was compounded by the fact that no hearing or mediation platform was presented for the colleagues to each articulate their version of events, in each other's presence, thus providing an opportunity to test the veracity of same.
- 5.3.4. Even regarding the disclosure, right up to the hearing, both MEC Scott and Mr Magagula denied that the Complainant was the one who disclosed the allegations of various improprieties, including suspected conflict of interest and possible corruption on the part of Dr Coetzee and Treasury's alleged improper overreaching regarding its remit.
- 5.3.5. MEC Scott and Mr Magagula insisted that the Complainant's disclosure was not protected disclosure and had not initiated the Department's investigation into alleged improprieties regarding Air Shows, Durban North Jazz Festival and appointment of Crack Teams as the disclosure leading to such predated her appointment.

- 5.3.6. Evidence in the form of the dossier used by Ms Motaung, Head of Internal Audit and the testimony of Ms Motaung herself proves the contrary. Under examination, both MEC Scott and Mr Magagula, eventually conceded that the initial whistle-blowing, which predated the Complainant’s appointment, was limited to allegations regarding exclusive and excessive engagement of “*white consultants*” and did not cover the Air Shows, North Sea Jazz Festival and other alleged serious improprieties, including conflict of interest and corruption. They further conceded that these allegations resonated with the content of Dr Coetzee’s grievance regarding what the Complainant allegedly accused him of and which offended him, leading to his complaint to former MEC Cronje, who took up the matter with Mr Magagula as HOD.
- 5.3.7. Both MEC Scott and Mr Magagula admitted that Dr Coetzee was the initiator and coordinator of the Air Shows and that there has since been confirmation of allegations of conflict of interest, corruption and a Treasury mandate overreach in connection therewith. They also conceded that a proper hearing could have afforded the Complainant the opportunity to present her side of the story, including her alleged whistle-blowing and confrontations with Dr Coetzee in connection with these matters.
- 5.3.8. The HOD conceded that it was logical to conclude that Dr Coetzee might have had a motive to remove the Complainant from the system. He further conceded that it would be logical to conclude that a person who has a reason to remove the Complainant would heighten other people’s awareness of the unpleasantness to support such a move.
- 5.3.9. I was not able to obtain a cogent explanation as to why, after it had been established that there was a *prima facie* case of dishonest handling of public finances against Dr Coetzee, which posed a risk of continued loss of state funds and possible concealment or destruction of evidence, he was not immediately suspended, yet the Complainant was speedily suspended for rudeness. Even

more puzzling is that by MEC Scott's own admission, she eventually suspended Dr Coetzee, but after an administrative investigation concluded and found him guilty of corruption, he was reinstated pending his prosecution by the National Prosecuting Authority on such charges.

5.3.10. It is my considered view that had MEC Cronje and/ or Mr Magagula as HOD instituted an investigation into the allegations made by Dr Coetzee and his colleagues against the Complainant, this would have provided an opportunity for the Treasury to get into the broader allegations regarding the alleged improprieties by Dr Coetzee and those regarding the Treasury undertaking project activities beyond its remit. Treasury's failure to conduct such investigation clearly prejudiced the Complainant in that she was denied an opportunity to present her evidence.

5.3.11. The second area of prejudice needing examination is the failure to implement an open grievance process when the Complainant's subordinates complained against her. No explanation has been given for such and clearly that prejudiced the Complainant in that the version of the subordinates was preferred to hers, thus denying her an equal opportunity to be heard.

5.3.12. MEC Scott indicated in her written submission dated 14 March 2016 that she had been advised by a Senior Counsel that the Complainant was dismissed fairly and the dismissal was not connected to the alleged disclosure. She further stated that the said advice had confirmed that due process was unnecessary when an employee was still on probation.

5.3.13. However, Mr Magagula conceded that although he personally believed that the Complainant's management style was inappropriate and undermined the general managers reporting to her, and that he had verbally told her so previously, he had never warned her that such constituted misconduct for which he could dismiss her. He submitted that when he approached the legal advisors

of Treasury he was advised that he could not just fire her and there should be counselling and every complaint about the Complainant should be in writing. He further conceded that although the three General Managers lodged complaints in writing at his behest, following such advice, he did not follow this with counselling, coaching or training as advised but proceeded with the letter he wrote to her which already threatened dismissal.

5.3.14. Mr Magagula justified his rush to dismiss on the grounds that after holding a discussion with the Complainant, following his letter of 04 October 2013 he was of the view that the Complainant did not understand the nature of the discussions as she was not listening to what he was saying. He further submitted that the Complainant's written representations gave him the impression that she thought there was nothing wrong with her conduct and thus there was no point in a hearing. However, he could not explain, what could have been lost by Treasury had a grievance hearing or process taken place bringing the parties face to face with each other. But he did concede that had such hearing taken place, the Complainant would have had an opportunity to link her discord with Dr Coetzee to what she saw as improper transactions involving Air Shows, appointment Crack Teams, the Durban North Sea Jazz festival and others. In the circumstances, there is no escaping that this was prejudicial to the Complainant.

5.3.15. When confronted with a question regarding the existence of a Code of Conduct or any written instructions regarding management style, Mr Magagula submitted that he held the view that by virtue of being a Senior Manager, the Complainant was expected to know what was expected of her. He added that the Code of Conduct did require civility, an argument also made by MEC Cronje<sup>9</sup>. However, under examination, the HOD conceded that as the Complainant's supervisor he did not ensure that the complainant as the probationer knew the performance

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<sup>9</sup> Chapter 2 of the Public Service Regulations, 2001

standards and other requirements for obtaining confirmation of probation in order to comply with the probation policy.

- 5.3.16. While Mr Magagula conceded that the Code of Good Practice<sup>10</sup> was not complied with when he discharged the Complainant, he did not explain why it was not followed. Mr Magagula claimed an external legal advisor advised that in the circumstances this was justified as he had previously engaged the Complainant and pointed out that he considered her management style to be “*abrasive and hierarchical*”, disrupting smooth operations at Treasury and accordingly inappropriate. He did not, however, provide evidence of dates, minutes or any written or recorded confirmation of any such discussion with the Complainant about her conduct prior to the events that occurred while she was away for training and which quickly escalated to her dismissal.
- 5.3.17. He further conceded that not only was there no performance contract, but that there had been no evaluation of the Complainant’s performance against such contract or anything, including a draft contract he claimed probably existed with a view to being signed within 6 months as prescribed.
- 5.3.18. Mr Magagula conceded further that he should have handled the grievance differently as an administrator and investigated the allegations levelled by the three General Managers against the Complainant. He attributed his failure to institute a grievance process to the fact that he too, having worked with the Complainant, had concluded that he could not work with her. He admitted that he had no written or recorded evidence of her improprieties or of his pointing out such to her and advising her of adverse action he was considering taking against her should her allegedly improper conduct persist.

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<sup>10</sup> Schedule 8 of the Labour Relations Act, 1995

- 5.3.19. The third area of prejudice relates to gender based prejudice and responsibilities of public functionaries to lead change management to embrace gender and other forms of diversity.
- 5.3.20. When confronted about his responsibilities as the HOD and the Complainant's immediate supervisor, regarding change management, Mr Magagula conceded that in view of the country's history, having a young African female from outside suddenly supervise older colleagues, a white male, white female and Indian male, may have posed diversity management challenges that needed change management and leadership intervention to assist all to embrace diversity. He conceded that it was his duty as HOD to ensure a smooth transition of the supervision of the three general managers from him to the Complainant, but that not a single meeting ever took place to facilitate such.
- 5.3.21. Of significance is the admission by both Mr Magagula and the MEC that the three general managers had reported to him directly for a long time before she was appointed. They also admitted that the General Managers continued to approach the HOD directly on some matters, and that he took an arbitrary decision to have them report back to him after receiving their written complaint on 04 October 2013, which was communicated to the Complainant on her return to work on 07 October 2013.
- 5.3.22. The HOD further conceded that as the accounting officer of the Department he had an obligation to ensure that the three General Managers were ready for and adapted readily to the change that occurred as a result of the Complainant's appointment. It is my considered view that in failing to ensure such smooth change management, the Complainant was left to her own devices in taking managers out of their comfort zones which disadvantaged her.
- 5.3.23. The HOD further conceded that had he held a hearing, he would have known that the Complainant had apologised to her other subordinate, Ms Stielau,

before the matter was escalated with other grievances to the former MEC Cronje. The HOD did not deny that Dr Coetzee met the former MEC Cronje and informed the Complainant that the former MEC Cronje was not happy with her. He does not deny that he discussed the matter with the MEC and then requested the three General Managers to put their complaint in writing.

- 5.3.24. The fourth key area of prejudice, relates to possible personal loss that may have been suffered by the Complainant. It is common cause that the Complainant is currently unemployed which has changed her family from a dual income family to a single income family.
- 5.3.25. She and her husband, who is a university lecturer, have had to double the mortgage on their home to finance legal fees and to close the financial gap caused by her lack of an income.
- 5.3.26. It is also common cause that the complainant has incurred legal costs dating back from having legal representation to fight her suspension to the point where efforts were made to place her matter in the Labour Court, where according to her, the proceedings were halted when she ran out of funds.
- 5.3.27. It is further common cause that the complainant has since removed her matter from the roll of the Labour Court and is now solely relying on the outcome of this investigation.
- 5.3.28. According to her written submission dated 30 July and 04 August 2016, the Complainant's loss includes financial, emotional and social losses connected to and considered to be as result of her dismissal. Regarding these, she submitted confirmation of the refinancing of her house escalating her bond by 68% (R1.5m) and a breakdown of legal fees (**R124 072.58** at time of withdrawal of case from the Labour Court). Her quantification of loss further included costs relating to telephone expenses, data and transport incurred in pursuit of the

case. She also outlined non-pecuniary costs such as pain and suffering relating to the psychological and emotional impact of the dismissal which she perceives as whistle-blower victimisation. Regarding the emotional and psychological impact, she has also indicated that she has incurred medical costs relating to therapy as a result of the dismissal and what she perceives as her "blacklisting" from employment in the KwaZulu-Natal Government on account of her whistle-blowing.

5.3.29. The investigation did not have the Complainant psychologically assessed, but I have taken notice of the fact that it is common that when a person loses something under circumstances she or he perceives as victimization, this results in such person being psychologically and emotionally wounded. Regarding whether or not such is justified in the circumstances, will be pronounced upon in the findings.

5.3.30. Regarding remedial action, the Complainant has requested reinstatement and payment of all monies she would have earned had she not been victimised for whistle-blowing, plus legal costs and other incidental costs as outlined above. The Complainant has further requested an apology for her treatment and that a policy for handling of whistle-blowers be immediately put in place to prevent a recurrence of what she considers as having happened to her. I will deal with her request in the findings and remedial action.

## **6 RESPONSIBILITIES OF THE TREASURY UNDER THE LAW AND RELATED PRESCRIPTS**

### **6.1 Regarding whether Treasury improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosures Act (PDA):**

6.1.1. For the Complainant's conduct to be dealt with under and be considered worthy of the protection afforded employees under the PDA, her act(s) which she

alleges to constitute a protected disclosure, should comply with the definition of a protected disclosure under the PDA.

- 6.1.2. In terms of section 1 of the PDA "**disclosure**" means "**any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of inter alia that a criminal offence has been committed, is being committed or is likely to be committed, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject, or that a miscarriage of justice has occurred, is occurring or is likely to occur**". It is my view that the conduct the Complainant disclosed to Ms Mapula Motaung and/or Mr Magagula falls under the definition of a protected disclosure as envisaged in section 1 of the PDA.
- 6.1.3. Regarding the Complainant's qualification to make a protected disclosure, she was qualified to do so regardless of being newly appointed. In terms of section 1 of the PDA, an "*employee*" means "*any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer*".
- 6.1.4. Clearly Treasury also qualifies as an employer under the PDA as section 1 defines an "*employer*" as "*any person who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person; or who permits any other person in any manner to assist in the carrying on or conducting of his, her or its business, including any person acting on behalf of or on the authority of such employer*".
- 6.1.5. Section 1 further defines that "**impropriety**" means any conduct which falls within any of the categories referred to in paragraphs (a) to (g) of the definition

of "disclosure" and that the alleged "*impropriety*" should include perceived violation of any law or legislation, in this case it was that of the Prevention and Combatting of Corrupt Activities Act, Prevention of Organised Crime Act 12 of 2004, Public Finance Management Act 1 of 1999 and of the Constitution, 1996, among others.

- 6.1.6. Section 1 of the Protected Disclosures Act, defines a "*protected disclosure*" as a disclosure made to inter alia an employer in accordance with section 6. Section 6(1) of the Protected Disclosures Act provides that any disclosure made in good faith by the employee to the employer and substantially in accordance with any procedure prescribed, or authorized by the employee's employer for reporting or otherwise remedying the impropriety concerned or where there are no prescribed procedures, is a protected disclosure. There is no doubt that the Complainant made the disclosure in good faith as not only did she report the perceived impropriety as soon as she became aware of same, she also conducted the investigation and submitted a report on 15 September 2013 to Ms Motaung. She took action to prevent in her unit what she considered to be impropriety, which action culminated in the confrontation with Dr Coetzee and/or his colleagues on 27 September 2013.
- 6.1.7. Regarding whether Treasury handled the Complainant's protected disclosure improperly, we have to establish whether or not Treasury was obliged to act in a certain way, following the disclosure.
- 6.1.8. We must accept that the PDA per se is not helpful regarding the duty of an employer following a protected disclosure other than that such employee should not suffer an occupational detriment.
- 6.1.9. The Constitutional Court on the other hand, has been clear in its interpretation of section 195 of the Constitution as imposing, among others, the duty on all public functionaries to take action to prevent or arrest an irregularity as soon as

the attention of such public functionary has been drawn to such an irregularity.<sup>11</sup> The PFMA further requires the Accounting Officer, which Mr Magagula is as HOD, to take measures to protect public funds and to ensure compliance with public prescripts. Section 38 specifically requires the initiation of criminal action for abuse of public finances.

- 6.1.10 It has to be accepted that the Complainant was a public functionary and was duty bound to act on suspected impropriety in her branch, which responsibility evidence shows she discharged or tried to discharge. She also reported the matter to the SIU, which led to the investigation that confirmed most of the alleged improprieties.
- 6.1.11 Mr Magagula, as HOD also had the same duty and so did MEC’s Cronje and Scott. Based on the evidence, I am unable to conclude that MEC Cronje and Mr Magagula discharged their responsibilities as implicit under the PDA read with the PFMA and section 195 of the Constitution. On the evidence and primarily by his own admission, Mr Magagula did nothing. He said he left everything to Ms Motaung. Even more puzzling is that by cutting out the Complainant after 04 October 2013, he removed her as a filter to ensure that public funds were not used improperly, including through corrupt practices and matters outside the mandate or remit of Treasury.
- 6.1.12 On the evidence, only MEC Scott eventually partially complied with her responsibilities under the law as implicit in the PDA taken with other laws, particularly section 195 of the Constitution. She took action to ensure that Dr Coetzee was suspended and specifically investigated. His case was ultimately referred to the police and the NPA. However, her defence of failure to suspend and discipline Dr Coetzee on the grounds of awaiting the outcome of criminal proceedings and bringing him back from suspension for the same reason, is at

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<sup>11</sup> In *Khumalo versus MEC for Education* the Constitutional Court said at Par 35 that a public functionary who is alerted to an irregularity or impending irregularity has a responsibility to arrest such irregularity.

odds with the law. The Labour Relations Act does not prohibit internal disciplinary proceedings and possible dismissal pending criminal proceedings. If it were so, it would take years to dismiss people as the criminal justice system takes its course, sometimes up to 10 years. Criminal investigations do not necessarily mean that an employee may not be found guilty under the internal Disciplinary Procedures. With Internal disciplinary hearing the employer is only required to prove the employee's guilty on the balance of probabilities unlike in criminal cases where it should be beyond reasonable doubt. In *Nyalunga v PP Webb Construction* the court held that<sup>12</sup>:

*“..An employer who finds himself in the same position as the respondent is obliged to hold an inquiry. An employer would normally, on a suspicion of theft, suspend the employee on full pay until such time as the inquiry can be held. Whether the employer holds an inquiry before a criminal charge has been dealt with by the ordinary courts, or subsequent to the court's decision on charge of theft, is a decision which every employer must take according to the facts of each particular case”*

In line with the Disciplinary Code and Procedures for Public Service the act of misconduct purported to have been committed by Dr Coetzee falls under various acts of misconduct listed. In terms of the Code if an alleged misconduct justifies a more serious form of disciplinary action than provided in paragraph 513, the employer may initiate disciplinary enquiry. Paragraph 7 lays down time frames for the enquiry to be conducted. In this case Treasury did not comply with the Code.

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<sup>12</sup> (1990) IRLR 89

<sup>13</sup> Paragraph refers to verbal warning and written warnings in the event the misconduct is not of serious in nature.

**6.3. Whether Treasury improperly suspended and later dismissed the Complainant in retaliation to her protected disclosure which amounted to an occupational detriment as envisaged in the PDA**

6.3.1. Treasury has a duty in terms of section 1 of the PDA, to ensure that the Complainant did not suffer an occupational detriment, as section 3 provides that no employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.

6.3.2. An occupational detriment in relation to the working environment of an employee means inter alia **being dismissed, suspended**, demoted, harassed or intimidated; being threatened with any of the actions referred to paragraphs (a) to (g) of the definition of "occupational detriment" of the definition of protected disclosure; **being otherwise adversely affected in respect of his or her employment, profession** or office, including employment opportunities and work security.

6.3.3. The question to be answered was whether the **suspension** and subsequent **dismissal** of the Complainant qualify to be regarded as treatment constituting an occupational detriment as envisaged in section 1 of the PDA. To be regarded as such the conduct has to be included in the above list, which in this case, is suspension and dismissal. In fact I would say even the prejudging and unilateral withdrawal of her powers as supervisor on hearing one side of the story neatly fit into the definition of occupational detriment.

6.3.4. However, being part of the list is not enough, there still has to be a clear and cogent link between the disclosure and the treatment regarded by the Complainant as an occupational detriment or victimisation. In other words, there should be no other reasonable and rational reason for the treatment in question or suspension or dismissal in the Complainant's case.

- 6.3.5. Of particular importance is the employer’s failure to investigate the disclosures. In this case Dr Coetzee’s alleged improprieties and the other alleged excesses of Treasury were not decisively investigated by Mr Magagula and MEC Cronje until long after the Complainant reported the matter to the SIU and had herself been dismissed. One of the consultants accused of getting the lion’s share of tenders and other contracts was appointed to investigate that allegation only and not the Air Shows, Durban North Sea Jazz Festival and others, which were only disclosed by the Complainant.
- 6.3.6. The importance attached to failure to investigate the content of the protected disclosure was highlighted by Davis JA in *Minister for Justice and Constitutional Development and Another v Tshishonga*<sup>14</sup>. He confirmed the interpretation of Pillay J in the earlier judgment of the Labour Court where in a comprehensive and careful judgment, Pillay J found for the respondent. In justification of the award, the court set out a number of considerations which it took account of and stated the following:
- “9.4 A failure by the employer to investigate a disclosure and subsequent retaliation are factors which ‘count against’ the employer.*
- 9.5 The fact that a whistle-blower takes risks when making disclosures is a factor that ‘must be acknowledged.’”*
- 6.3.7. There is no doubting that the events that began on 27 September 2013 culminated in the Complainant’s being suspended and eventually dismissed. The official story is that she was dismissed for her abrasive and hierarchical management style. Did her behavior warrant such penalty, dismissal, which is reputedly the equivalent of the death penalty in labour law? On the evidence

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<sup>14</sup> (JA6/07) [2009] ZALAC 5; [2009] 9 BLLR 862 (LAC); (2009) 30 ILJ 1799 (LAC) (2 June 2009)

Treasury failed to show that other options, including counselling were considered. Most notable is the misguided argument submitted on behalf of Treasury by Mr Magagula that procedural fairness is not a requirement when someone is on probation and that senior managers do not need counselling, coaching and other forms of guidance before dismissal.

- 6.3.8. To arrive at a conclusive answer regarding a possible breach of section 3 by Treasury, we have to enquire whether Treasury had a duty to protect the Complainant from occupational detriment as defined in section 1 of the PDA after she disclosed to Ms Motaung, Mr Magagula and later to her staff on 27 September 2013. In the Public Protector report titled “*They Called it Justice*” Report No 23 of 2012/13, the answer was affirmative.
- 6.3.9. The central reasoning underpinning the *They Called it Justice* report is that once an employee has whistle-blown they are prone to be subjected to retaliation and it is the responsibility of top management, including the Executive authority, should she or he be aware of such whistle-blowing, to take measures to exact accountability against alleged wrongdoers while implementing measures to ensure as far as possible, that the alleged wrongdoers do not abuse their power to silence a whistle-blower or retaliate against him or her.
- 6.3.10. The approach takes into account that it is very rare that a person would be dismissed or punished for whistle-blowing and that the occupational detriment principally takes the form of pretext charges.
- 6.3.11. The question that arises is how to distinguish pretext from legitimate charges. For example, does it mean once a person has whistle-blown, they are untouchable? Not at all. National and global jurisprudence, including *Motha* and *Tshishonga*, tend to compare the treatment of the whistle-blower with normal prescripts outlining disciplinary, incapacity and grievance procedures. If there is

an unexplained deviation and the measures taken against the whistle-blower cannot be rationally explained, subsection to an occupational detriment is inferred.

6.3.12. In the case at hand, there is also no doubt that as an accused employee, the Complainant received less favourable and in fact more draconian treatment for a minor infraction compared to Dr Coetzee. There is also no precedent at Treasury or elsewhere of dismissal for the reasons advanced for the Complainant's dismissal. There is also no doubt that clause 2 of Treasury's Disciplinary Code was ignored as was part B of the grievance procedure and the Complainant's contract of employment. It is inevitable to conclude that paragraph 2 of Resolution 4 of 2000: Disciplinary Code and Procedures for the Public Service, was also violated by the failure to follow due process, principally relating to not providing the complainant a fair hearing to defend herself.

6.3.13. Treasury submitted that an attorney advised that since the Complainant was still on probation there was no need for the formalities required with regard to procedural fairness. But the fact that the Complainant was still on probation did not give Treasury a license to circumvent the dictates of fairness and due process. Treasury still had a duty to comply with section 13(5) of the Public Service Act, which provides that notwithstanding anything contrary contained in subsection 2 or in any collective agreement contemplated in section 18(b) of the Public Service Laws Amendment Act, 1998, but subject to the provisions of subsection 6, an officer who is serving a probation may be discharged from the public service by the person having the power of discharge, whether during or after the period of probation by (a) giving of one month's written notice to such office; or (b) forthwith, but subject to the provisions of the Labour Relations Act, 1996 if his or her conduct or performance is unsatisfactory.

6.3.14. Treasury also had a duty to comply with The Public Service Regulations, 2003, Part V11E which requires that the Supervisor of a probationer shall ensure that:

- (i) the probationer, at the commencement of the probationary period, knows the performance standards and other requirements for obtaining confirmation of probation;
- (ii) the probationer, on a quarterly basis, receives written feedback on her or his performance and compliance with other requirements;
- (iii) if necessary, the probationer receives training, counselling or other assistance to meet the requirements for confirmation;
- (iv) the probationer receives written confirmation of appointment at the end of the probationary period if she or he has been found suitable for the relevant post; and
- (v) When **dismissal as a result of poor performance is considered, the probationer is afforded the opportunity to state her or his case, during which process the probationer may be assisted by a personal representative, including a colleague or a trade union representative.**

6.3.15. Treasury's conduct constitutes a gross violation of the above, primarily because the very first letter to the Complainant, curiously sent the same day the grievance letters were received from her subordinates and 7 days after her meeting of 27 September 2013 where she said she would not sign for questionable transactions, contained pronouncements that prejudged her and already indicated that dismissal was being considered.

6.3.16. Not only was prejudging her against the PDA and LRA in the circumstances, it was at odds with section 33 of the Constitution, which read with the Promotion of Just Administrative Action Act 3 of 2000 (PAJA) guarantees all, including the Complainant, the right to just administrative action.

6.3.17. In the circumstances, I am convinced that the charges against the Complainant were pretext charges following a decision already made to get her out of the system on account of her protected disclosure. The lack of due process was also unjustifiable and unfair. Treasury accordingly subjected the Complainant to an occupational detriment in violation of the provisions of section 3 of the PDA.

6.3.18. The Complainant’s dismissal accordingly constitutes a violation of section 3 of the PDA. Since, in terms of section 187(1)(h) of the Labour Relations Act, a dismissal is automatically unfair if the reason for dismissal by the employer is a contravention of the PDA, on account of an employee having made a protected disclosure as defined in the Protected Disclosures Act, the dismissal also violates the principle of fairness which is a requirement in the exercise of public power under section 195 of the Constitution.

**6.2 Whether the Complainant prejudiced by the Treasury’s conduct as envisaged in section 6(4)(a)(v) of the Public Protector Act.**

6.2.1 In determining whether the Complainant was prejudiced by the Treasury’s conduct, I took into account the Public Protector Touchstones in “*They Called it Justice*”, taking into account the positive response and remedial deal offered by then Minister of Justice Hon. Jeff Radebe following the release of the provisional report. I was further guided by court jurisprudence, particularly the guidelines provided by Davis AJA in the *Tshishonga* matter where Davis AJA said, among others:

- (i) “All ‘developments’ up to and after the occupational detriment contribute ‘cumulatively’ towards the assessment of compensation.

- (ii) *Subjection to an occupational detriment for whistle-blowing is generally and on the facts of the present case in particular 'a very serious form of discrimination' and such 'merits a very high award'.*
- (iii) *A failure by the employer to investigate a disclosure and subsequent retaliation are factors which 'count against' the employer.*
- (iv) *The fact that a whistle-blower takes risks when making disclosures is a factor that 'must be acknowledged'.*
- (v) *The manner in which a disclosure is made is also a relevant factor.*
  
- (vi) *The conduct of the employer in resolving/not resolving the dispute."*

6.2.2 In the circumstances the Complainant's legal journey from the receipt of the HOD's letter of 07 October 2013 threatening to dismiss her and the Public Protector's attempts to conciliate a settlement to her dismissal and related socio-legal costs, had to be taken into account. Key matters taken into account include:

- (i) Loss of remuneration calculated to approximately R3 400 000.00
  
- (ii) Legal fees estimated at approximately R200 000.00;
  
- (iii) Therapy fees at approximately R168 000.00 ;
  
- (iv) Logistical costs of pursuing the case in respect of transport, telephone and data calculated to approximately R256 000.00; and
  
- (v) Emotional pain and suffering.

6.2.3 Treasury has argued vehemently against the remedial action indicated as likely to be taken in the notice issued in terms of section 7(9) of the Public Protector Act. The argument presented is essentially that the recourse is excessive as

courts only give 12 months and further that the delay was partly the Complainant's fault because she wrongly took the matter to the Bargaining Council. The Treasury's submission includes the following:

*"...the proposed remedial action would be contrary to the permitted maximums, and grossly unreasonable:*

- (a) The Public Protector is contemplating reinstating the complainant. This would entail her being retrospectively reinstated with three years back pay. This exceeds the maximum permitted amount.*
- (b) The remedial action fails to take into account the delays in finalising this matter that arose due to no fault of the Provincial Treasury. (For example, if the matter has been properly referred to the Labour Court then it could have been expeditiously concluded and the back pay would have been considerably less. Instead the Public Protector has failed to consider delays not attributable to Treasury, such as the Complainant's abortive referral to the Bargaining Council, and lengthy delays in finalising the matter. The Provincial Treasury should not be liable for such costs.*
- (c) The Public Protector seeks to refund the complainant for her legal fees and "all expenses incurred due the improperly handled protected disclosure". This is vague and all encompassing. In addition it fails to take into account the considerable legal costs were wasted by the Complainant persisting in referring the matter to the Bargaining Council, when it had no jurisdiction, and when this had been drawn to her attention by my attorneys.*
- (d) The finding with regard to "therapeutic support" has been made without any evidence, and without the opportunity to test the Complainant's complaints.*

(e) *The finding that employees under the Complainant require "change leadership" has been made without interviewing any of those employees, with the effect that the finding has been made without any evidence and in the absence of due process.*

11. *The foregoing demonstrates that the Public Protector should not have intruded on the jurisdiction of the Labour Court, and the proceedings commenced therein should have been finalised.*

12. *Not only is this a matter of law, but as a matter of public policy any disgruntled employee should not be permitted to "forum shop", and submitted their grievances to a multiplicity of jurisdictions."*

6.2.4 I must record that I respectfully disagree with the Treasury. In a recent case of *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*<sup>15</sup> Nkabinde J delivering a majority judgment for the Constitutional Court and held that the LRA does not require a "capping" of the extent to which the retrospective effect of reinstatement order can be made, provided the date is not before the date of dismissal. She further held that this construction of the LRA accords with Constitutional Principles of labour law, statutory interpretation and international law. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. The Public Protector report titled "They called it Justice", a similar approach was taken regarding reinstating the Complainant. Public Protector remedies seek to ensure that the Complainant or any prejudiced person is placed as close as possible to where she or he would have been had

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<sup>15</sup> (CCT 88/07) [2008] ZACC 16; [2008] 12 BLLR 1129 (CC); 2009 (1) SA 390 (CC) ; (2008) 29 ILJ 2507 (CC) ; 2009 (2) BCLR 111 (CC) (25 September 2008)

government acted properly. Limiting a remedy to 12 months would not achieve that prepares. Treasury also misses the point regarding the legal fees. Such fees are not to redress the delay but rather to redress the consequences of maladministration or improper conduct being the failure to properly respond to a protected disclosure and thus having to put the Complainant as close as possible to where she would have been had the protected disclosure been handled properly.

6.2.5 It must also be borne in mind that it is almost impossible for whistle-blowers to be integrated into employment because their dismissal, usually on pretext charges, negatively brands a whistle blower as snitch or in Zulu, an "Impimpi", which diminishes their trustworthiness. It is important accordingly that remedies don't only discourage the subjection of whistle-blowers to occupational detriments but also helps rebrand employees who whistle-blow using appropriate channels as do-gooders. This will contribute immensely to encouraging other whistle-blowers to stick their necks out with a view to helping to stem out improper conduct, particularly fraud and corruption.

## 7. FINDINGS

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

### **7.1 Regarding whether Treasury improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosures Act (PDA):**

7.1.1 The Complainant made a protected disclosure within two weeks of her employment to the Head of Internal Audit, Ms Motaung and at Ms Motaung's request, submitted on **15 September 2013**, a dossier following an internal investigation. The disclosure was duly made as defined in section 1 of the PDA,

and its contents were subsequently shared by Ms Motaung with the HOD Mr Magagula, who was the Complainant's immediate supervisor.

- 7.1.2 Disclosures were also made directly by the Complainant to General Managers reporting to the Complainant on **27 September 2013** and to her immediate supervisor and Accounting Officer, HOD Mr Magagula, on unspecified dates.
- 7.1.3 The Treasury's successive Executive authorities, MECs Cronje and Scott and its Accounting Officer Mr Magagula, unduly refused to acknowledge that the Complainant made a protected disclosure about alleged excessive use of consultants, corruption, tender irregularities and abuse of state funds. They chose to limit their intervention to a disclosure made before her and whose limited content was the alleged excessive and discriminatory award of tenders and other contracts to white consulting firms.
- 7.1.4 When Treasury finally investigated the content of the disclosure by the Complainant it was too late to meaningfully arrest some of the improprieties, including alleged corrupt activities by one of the General Managers reporting to her, Dr Coetzee and abuse of state funds through events such as Air Shows and payment of R25 million for a Durban North Sea Jazz Festival that never took place, some of which have since been confirmed as improper by a Treasury commissioned forensic investigation and the SIU.
- 7.1.5 Treasury's delay in taking action regarding the Complainant's disclosure diminished if not extinguished entirely the chances of recovering improperly paid out state funds, including the payment for the Durban North Sea Jazz Festival which never took place.
- 7.1.6 The conduct of Mr Magagula, the HOD, is specifically in violation of section 38 of the Public Finance Management Act No. 1 of 1999 (PFMA) and section 195(1) of the Constitution.

- 7.1.7 The conduct of former MEC Cronje is specifically in violation of the Executive Ethics Code and accordingly inconsistent with sections 95 and 96(1) of the Constitution.
- 7.1.8 By failing to deal with a protected disclosure duly made in compliance with the PDA, Treasury acted unlawfully in violation of section 3 of the PDA, section 3 and 4 of Prevention and Combating of Corrupt Activities Act and section 7 of the Prevention of Organised Crime Act. Such conduct is ultimately inconsistent with the provisions of section 195(1) of the Constitution.
- 7.1.9 The conduct of Treasury and the relevant state functionaries accordingly constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged section 182 of the Constitution.
- 7.2 Regarding whether Treasury improperly suspended and later dismissed the Complainant which conduct amounted to an occupational detriment as envisaged in section 3 of the PDA:**
- 7.2.1 The Complainant was suspended on 30 October 2013 and finally dismissed on 17 December 2013 without any prior warning, written or verbal, and without being given an opportunity to make representations, defend herself or make amends, regarding her alleged hierarchical and abrasive management style.
- 7.2.2 The dismissal followed a string of events that commenced with a confrontation on 27 September 2013, between the Complainant and her branch employees, regarding the procurement and appointment of Crack Teams, involvement of Treasury in major events (which include *inter alia*, Air shows, Durban North Sea Jazz Festival and Commemoration of Prisoners of War) for services she believed to constitute overreaching the mandate of Treasury, conflict of interest and corruption.

- 7.2.3 Shortly before the suspension, the Complainant received a memorandum dated 04 October 2013 titled "*Concerns With Regard To Your Conduct And Performance*", in which Mr Magagula already indicated she was not fit for office. The same memorandum purported to have been sent on the basis of letters of complaint or grievances received on the same day by Mr Magagula, from Dr Coetzee and the other two General Managers reporting to the Complainant.
- 7.2.4 The suspension and subsequent dismissal of the Complainant on the basis of trivial charges was irrational, unreasonable and unfair and can justifiably be seen as a charade that sought to get the Complainant out of the way by the MEC Cronje and Mr Magagula who at the time believed and chose to stand by Dr Coetzee, whom she had accused of corrupt activities, an accusation since confirmed by the Treasury commissioned forensic investigation and by the SIU.
- 7.2.5 The subjection of the Complainant to harassment, suspension and dismissal constitutes a violation of the probation clause in the Complainant's contract of employment, paragraph 2 of the Treasury's Disciplinary Code<sup>16</sup>, paragraph C of Treasury's grievance procedure<sup>17</sup>, section 13 (5) of the Public Service Act No. 103 of 1994, section 187 and schedule 8 of the Labour Relations Act No. 66 of 1995 (LRA), section 3(1) and (2) of the Promotion of Administrative Justice Act No. 3 of 2000 and sections 33(1) and (2) Constitution while constituting an "*occupational detriment*" which is prohibited under section 3 of the Protected Disclosure Act 26 of 2000.
- 7.2.6 The conduct of Treasury and specifically the acts and omissions of former MEC Cronje and HOD Mr Magagula constitute maladministration and, abuse of power, as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

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<sup>16</sup> Disciplinary Code and Procedures for the Public Services ( Resolution 2 of 1999)

<sup>17</sup> Grievance Rules for the Public Service (Resolution 14 of 2002)

**7.3 Whether the Complainant was prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act and if so what would it take to place her as close as possible to where she would have been had there been no improper conduct by the Treasury or its functionarie**

7.3.1 The allegation that the complainant was prejudiced is substantiated.

7.3.2 Due to Treasury's improper conduct involving the failure to comply with section 3 of the PDA, the Complainant unduly suffered immense financial, emotional and social prejudice mainly involving:

- (a) Unfair loss of remuneration legally due to her over the past three years;
- (b) Emotional pain and suffering and consequent therapy fees;
- (c) Financial expenses relating to fighting her intended discharge and dismissal mainly in the form of legal fees, transport and communication costs;
- (d) Loss of social capital that accompanies being unemployed compounded by adverse listing as dismissed in the Public Service Persal system resulting in her remaining unemployed three years on; and
- (e) Inconvenience to her family and security concerns relating to the improperly handled disclosure.

**8. REMEDIAL ACTION**

**The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view to placing the Complainant as close as possible to where she would have been had the improper conduct or maladministration not**

**occurred, while addressing administrative deficiencies in the Treasury, is the following:**

8.1. The MEC must ensure the following remedial action is implemented:

8.1.1. The Complainant is reinstated to her position within 30 days from the date of issuing of this report;

8.1.2. The Complainant is paid all monies that would have been due to her had she not been dismissed, together with interest calculated at the applicable rate as prescribed by the Minister of Justice and Constitutional Development in terms of section 1 (2) of the Prescribed Rate of Interest Act No. 55 of 1975 within 30 days from date of issuing of this report;

8.1.3. The Complainant is compensated for financial losses incurred by virtue of incidental expenses related to her dismissal within 60 days from date of issuing of this report and upon submission of proof thereof;

8.1.4. The Complainant is provided with a letter of apology regarding her unfair dismissal;

8.1.5. The Complainant is offered further therapeutic support, if required, for suffering the occupational detriment as a whistle-blower;

8.1.6. The Complainant be provided with support and employees reporting under her through an appropriate change management leadership intervention that incorporates mainstreaming gender and provides all team members with knowledge, values and skills to manage diversity and embrace whistle-blowing;

8.1.7. Review and or develop, institutionalize and implement Departmental Standard Operating Procedures for handling Probation and Whistle-Blowers; and

8.1.8. Ensure that all Treasury staff members are trained on compliance with Supply Chain Management Policies and related Standard Operating Procedures.

**8.2 The Premier is to ensure that:**

(c) the MEC implements the remedial action within the stipulated timelines and reports to the Provincial Legislature and the Public Protector on the outcome;

(d) Any challenges regarding implementation are debated in the Provincial Legislature, with input from the Public Protector, before any legal action is considered in line with cooperative governance and prevention of further prejudice to the Complainant.

**9. MONITORING**

9.1. The Hon. Premier and MEC Scott are to submit an action plans to the Public Protector indicating their intentions regarding the implementation of the remedial action referred to in paragraphs 8.1 to 8.2.2 above within 30 days of the date of this report.

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**ADV T N MADONSELA**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**

**DATE:** \_\_\_\_\_

*Assisted by: Mr N Raedani, Senior Investigator; and*  
*Ms L Sekele Senior Manager*  
*Complaints and Stakeholder Management*