
PUBLIC PROTECTOR
SOUTH AFRICA

What is a Protected Disclosure, its importance in the fight against corruption and the role of the Public Protector in terms of the Protected Disclosures Act, 2000.

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REPORT ON AN OWN INITIATIVE INVESTIGATION INTO THE CONDUCT OF THE MEMBERS OF THE USAASA BOARD OF DIRECTORS IN CONNECTION WITH A COMPLAINT LODGED WITH THE PUBLIC PROTECTOR FOR AN INVESTIGATION AS CONTEMPLATED IN THE PROTECTED DISCLOSURES ACT, 2000 AGAINST THE BOARD OF DIRECTORS OF THE UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA (USAASA)
REPORT ON AN OWN INITIATIVE INVESTIGATION INTO THE CONDUCT OF USAASA BOARD OF DIRECTORS IN CONNECTION WITH A COMPLAINT LODGED WITH THE PUBLIC PROTECTOR IN TERMS OF THE PROVISIONS OF THE PROTECTED DISCLOSURES ACT, 2000 AGAINST THE BOARD OF DIRECTORS OF THE UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA (USAASA)

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EXECUTIVE SUMMARY

(i) This is a report of the Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 and published in terms of section 8(1) of the Public Protector Act, 1994 following an own initiative investigation that conducted in terms of sections 6 and 7 of the Public Protector Act, 1994.

(ii) The report communicates the Public Protector's determination, findings and directives on appropriate remedial action to be taken following an improper conduct by the Board of Directors of USAASA for obstructing the Public Protector from investigating complaints lodged in terms of the Protected Disclosures Act, 26 of 2000 and failing to assist the Public Protector in terms of section 181(3) of the Constitution, 1996.

(iii) The complaints were in connection with allegations of maladministration and improper conduct by the Board of Directors of USAASA in respect of the appointment of the Company Secretary for the Agency as well as allegations of corrupt and irregular interference by the Board of Directors in attempts made by the Chief Executive Officer (CEO) to legally set aside the continuation of the unlawful and irregular process embarked upon regarding the Digital Migration in particular the procurement process for the production, manufacturing and distribution of Set Top Boxes. The complaints were lodged by the CEO of USAASA, Mr Lumko Mtimde on 15 May 2018. In his complaint, Mr Mtimde alleged *inter alia* that:

1. The USAASA Board of Directors irregularly appointed a Company Secretary, Ms Selloane Motloung at a salary amounting to R1.3000.000.00 per annum which was above the advertised salary scale and above salary level 13 in the public service resulting in the entity incurring irregular expenditure as the amount was not budgeted for;
REPORT ON AN OWN INITIATIVE INVESTIGATION INTO THE CONDUCT OF USAASA BOARD OF DIRECTORS IN CONNECTION WITH A COMPLAINT LODGED WITH THE PUBLIC PROTECTOR IN TERMS OF THE PROVISIONS OF THE PROTECTED DISCLOSURES ACT, 2000 AGAINST THE BOARD OF DIRECTORS OF THE UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA (USAASA)

2. According to the enabling legislation of the entity in particular section 83(5) of the Electronic Communications Act 36 of 2005, it is the responsibility of the CEO to employ staff for the entity including senior management and such other persons as may be necessary to assist him or her with the performance of the functions of the Agency.

3. Therefore, according to Mr Mtimde, the Board of Directors had no legal authority to appoint the Company Secretary and as such acted ultra vires; and;

4. Mr Mtimde also alleged that, on behalf of USAASA and in his official capacity as the CEO of the Agency, he is involved and actually, central in a protracted litigation that is before the Gauteng High Court in connection with the irregularities in the procurement process that was embarked upon by the Agency for the manufacturing, production and distribution of Set Top Boxes for the Broadcasting Digital Migration and the Board is not supportive of the CEO in the matter despite claims amounting in excess of R250 000.000 against the State.

(iv) Further complaints lodged by Mr Mtimde against the Board related to the following;

5. Altering the panel recommendation to the Accounting Officer regarding salary on the appointment of a Company Secretary in contravention of Section 83(5) and 83(12) of the ECA;

6. In Contravention of Section 83(5) of the ECA, through resolving (against the panel and CEO decision), to include a non-recommended second candidate for appointment as Executive Manager (Operations), in the event of the preferred candidate not accepting;
7. Rescinding the power of the CEO/Accounting officer to appoint staff in terms of Section 83(5) of the ECA;

8. Rescinding the role of the Accounting Officer/CEO as a Director in terms of Section 82B (4) of the ECA;

9. Attempting to suspend the CEO without the referral or recommending to the Minister in terms of Section 82A (1) of the ECA;

10. Appointing a service provider to investigate the CEO in violation of the SCM Policy (Chairperson imposing which service provider to be appointed, no appointment letter, no scope, no SLA);

11. Instructing the CEO to deduct money from 8 employees' salaries in contravention of the Basic Conditions of Employment Act;

12. Instructing the CEO to remove Senior Managers from the union citing the recognition agreement;

13. The CEO's performance assessment was done by Board members who only joined the Agency in December / January 2017 for the period 2016/17;

14. Board members rated the CEO with no regard to the signed performance agreement, KPI's and portfolio of evidence;

15. Board members imposed ratings against the CEO with no engagement against the recommendations of the REM&HR Board Committee;
16. The Chairperson of the Board instructed lawyers to write a dismissal letter to the former Company Secretary in contravention of ECA, USSASA Policy and related regulations;

17. The Chairperson called a service provider to produce a report on the outcome of an investigation against some Board members;

18. The Board and its Chairperson acted in a manner that borders on being operational and interfering with management responsibilities; and

19. The Board incurred expenditure on travelling abroad. Such expenditure was initiated and approved by the Chairperson despite exceeding budgetary threshold and the CEO and the CFO warned the Board against such conduct.

(v) As a result of the above issues raised by Mr Mtimde, he believed and was of the view that the USAASA Board of Directors were abusing their powers, had failed to discharge their fiduciary duties towards the Agency and were thus subjecting him to occupational detriment and victimization as they instituted a Disciplinary Enquiry against him ostensibly based on trumped up charges as he had reported and sought advice from the Minister of Telecommunications and Postal Services, the Auditor-General, the National Treasury and recently, the Public Protector regarding the maladministration and irregularities at USAASA as is required of an Accounting Officer in terms of the law in particular the Public Finance Management Act, 1999.

(vi) He thus lodged the complaints as envisaged by the Protected Disclosures Act and requested that I investigate same.
(vii) On analysis of the complaints lodged by Mr Mtimde, the following issues were identified for consideration and to focus the investigation;

(a) Whether there was any irregularity in the appointment and remuneration of the Company Secretary for USAASA and if so; whether same constitutes maladministration irregular, fruitless and wasteful expenditure;

(b) Whether the procurement process followed for the appointment of service providers who would be responsible for the production, manufacturing and distribution of Set Top Boxes for the Digital Migration was in accordance with a system that is fair, equitable, transparent, competitive and cost effective and if not; whether it constitute maladministration and violation of the provisions of section 217 of the constitution;

(c) Whether the USAASA Board of Directors have in any way acted in a manner that would compromise its fiduciary responsibilities towards the Agency and whether they had always acted in the best interests of the Agency; and;

(d) Whether the complainant was subjected to occupational detriment and if so; whether such a conduct constitutes a violation of the Protected Disclosures Act, 2000 as alleged.

(viii) The complaints and the allegations contained therein were considered and assessed to establish whether it qualifies as a protected disclosure as envisaged by the PDA. A preliminary investigation was conducted prior to approaching the employer. These included consultations with the complainant, perusal and assessment of documents and information provided by the complainant to support his allegations, telephonic interviews, as well as exchange of documentation.
(ix) It also covered the consideration of applicable laws, including the Protected Disclosures Act, 2000 (as amended) which makes provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of the Act, the constitutional provisions, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations, the Electronic Communications Act 36 of 2005, USAASA’s Recruitment and Selection Policy, USAASA’s Delegation of Authority Framework as well as reports such as the King IV Code on corporate governance.

(x) References were also made to principles developed in previous reports issued by the Public Protector dealing with investigations as well as similar procurement investigations. Such principles are referred to as touchstones.

(xi) On receipt of the complaint, I immediately approached the employer (USAASA Board of Directors) on 24 May 2018 and informed them of the receipt thereof and the need to ensure that the whistle-blower was not subjected to occupational detriment. I further requested that they hold in abeyance the disciplinary enquiry which was already underway to allow the investigation to take its course and then if the outcome of the investigation was that the complaint was not a Protected Disclosure, they could proceed with the Disciplinary Enquiry as the allegation of subjection to occupational detriment would have been removed.

(xii) My requests to the USAASA Board of Directors fell on deaf ears, instead, they cast aspersions on the person of the complainant without affording me an opportunity to verify the allegations they were making against the complainant.
(xiii) They also requested that I must not accept the complaint and that prompted me to consider what would the Board in its official capacity as the Employer have been expected to have done in the circumstances and in terms of the PDA having been notified of the existence of a complaint in terms of the PDA. What would a Board in the position of the USAASA Board of Directors would have been expected to do under the circumstances.

(xiv) Further thereto and based on the information and documentation placed before me by the complainant in lodging the complaint vis a vis the conduct of the Board towards the complaint and its attitude towards the investigation, I decided to conduct an investigation on Own Initiative as contemplated in section 6(5)(b) of the Public Protector Act with a view to looking into whether it was correct for the Board to consider it appropriate to advise me that I should not accept a Protected Disclosure and that in their official capacity as the Employer (as defined in the PDA), on becoming aware of an existence of such a complaint lodged with the Public Protector, what would have been expected that the Board would do.

(xv) It goes without saying that, the Act prescribes to the Employer that it must ensure that a Protected Disclosure be investigated once it becomes aware of the existence of one and the Employer should inform the complainant (worker or employee) of the steps that it will take in handling the matter whether it would investigate it itself or refer it for investigation elsewhere.

(xvi) In the event that the Board decided not to investigate the disclosure, the employee is entitled to be informed of that fact and he/she is entitled to be informed of reasons why the employer will not investigate the disclosures.
(xvii) Therefore, on becoming aware that there was a Protected Disclosure that was reported to the Public Protector, the Board should have allowed the investigation to take its course so as to prove or disprove the allegations.

(xviii) The investigation by the Public Protector could have exonerated the Board and, they could have proceeded with whatever process they wanted to take against its employee without this perception of bias, victimization and subjection to occupational detriment.

(xix) Based on the assessment of the conduct of the USAASA Board of Directors, the following is the conduct that I considered relevant for investigation:

i. Whether the USAASA Board of Directors violated the provisions of the Protected Disclosures Act, 2000 by refusing and/or frustrating and/or failure to assist the Public Protector to investigate Protected Disclosures lodged by its CEO, Mr Lumko Mtimde and proceeding with a Disciplinary Enquiry against him despite having been notified of a complaint in terms of the PDA that was lodged with the Public Protector against the Board.

(xx) Having considered the conduct of the USAASA Board, I make the following findings:

a. Regarding whether the USAASA Board of Directors violated the provisions of the Protected Disclosures Act, 2000 by refusing and/or frustrating and/or failure to assist the Public Protector to investigate Protected Disclosures lodged by its CEO, Mr Lumko Mtimde and proceeding with a Disciplinary Enquiry against him despite having been notified of a complaint in terms of the PDA that was lodged with the Public Protector against the Board.
1. The averment that the USAASA Board of Directors violated the provisions of the Protected Disclosures Act, 2000 in proceeding with a Disciplinary Enquiry against the CEO, Mr Lumko Mtimde despite having been notified of the existence of a Protected Disclosure reported for investigation by the Public Protector who requested the Board to hold the process in abeyance pending the investigation of the complaint lodged in terms of the Protected Disclosures Act is substantiated.

2. Indeed, the complainant had made a protected disclosure to the Minister, National Treasury and the Auditor General;

3. The disclosure was made in good faith, as both the National Treasury and the Auditor General advised against the conduct of USAASA Board;

4. The complainant was subjected to occupational detriment by USAASA Board on account of having made a protected disclosure;

5. The Protected Disclosures Act provides for the protection of an employee from being subjected to an occupational detriment on account of having made a protected disclosure. Section 8 of the Protected Disclosures Act is very clear that a disclosure made to the Public Protector in good faith is a Protected Disclosure and she therefore had to investigate it and make a determination. It was not for the USAASA Board to advise the Public Protector against investigating the matter.
6. The USAASA Board was within its rights to take disciplinary steps against any of its employees in the exercise of its functions provided that such action does not amount to victimization or subjection to occupational detriment. However, it is unfortunate that the Board refused to postpone the Disciplinary Enquiry on notification of the existence of a complaint in terms of the Protected Disclosures Act lodged with the Public Protector.

7. The conduct of the USAASA Board was in violation section 3 of the Protected Disclosures Act, which 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, but also section 181(3) of the constitution which placed an obligation on the USAASA Board to assist and protect the Office of the Public Protector to ensure its effectiveness.

8. By proceeding with the disciplinary hearing, in total disregard of the protected disclosure under investigation, the USAASA Board did not only render the Office of the Public Protector ineffective, but the objectives of the PDA, as the Public Protector was unable to ensure proper protection of the employee from being subjected to occupational detriment. The Protected Disclosure Act is not intended to correct or reverse occupational detriment, but its objectives is to prevent an employee to be subjected to such occupational detriment.

9. In the spirit of cooperative governance, it would have been prudent and desirable for the Board to put the disciplinary process on hold to allow the investigation by the Public Protector to continue, in particular considering the reports of the Auditor General (AG) and National Treasury as well as advices from Minister Siyabonga Cwele. This would have allowed the Board an opportunity to negate the allegations levelled against them. The Board did not even afford the Public Protector a request to postpone for seven (7) days to enable her to make a determination on the matter.
10. Based on the information and documents submitted by the complainant, in particular, the allegations of the appointment of the company secretary and the issue surrounding the manufacturing and distribution of set top boxes, it was desirable that the complaints against the Board be investigated and for them to be afforded an opportunity to respond to the allegations and perhaps give reasons for their actions.

11. The Protected Disclosures Act makes provision for procedures in terms of which employees in both the public and the private sector who disclosed information of unlawful or corrupt conduct by their employers or fellow employees, are protected from occupational detriment. Considering the purpose of the Protected Disclosures Act, which is to protect employees from occupational detriment, the Board's conduct for failure to halt the alleged occupational detriment against the complainant was in violation of the Protected Disclosures Act and section 181(3) of the Constitution, which compels the Board to assist the Public Protector to ensure its effectiveness.

12. Accordingly, the conduct of USAASA Board, especially that of the Chairperson, Mr Cawe constitutes an improper conduct as envisaged in section 182(1) of the Constitution, maladministration and undue delay as envisaged in section 6(5)(a) of the Public Protector Act.
The appropriate remedial action to be taken in pursuit of the provisions of section 182(1)(c) of the Constitution is the following:

(a) The Minister of Telecommunications and Postal Services;

(1) To take decisive, and appropriate action against all the Members of the USAASA Board of Directors under the Chairmanship of Mr Mawethu Cawe for the violation of the Protected Disclosures Act, after having been notified of the existence of a complaint lodged in terms of the Act and the defiance of the Public Protector referred to in this report, which defiance is in violation of section 181(3) of the Constitution, 1996 as well as failure to heed the advices provided to them by the National Treasury and the Auditor-General in connection with the unnecessary, reckless and unconscionable use of public funds in the remuneration of the Company Secretary on a salary scale exceeding the advertised remuneration package.

(2) Ensure that the legal costs incurred by USAASA after they were made aware of the existence of a Protected Disclosure lodged with the Public Protector as well as costs incurred for the Disciplinary Enquiry be recovered from the Individual members of the USAASA Board of Directors under the Chairmanship of Mr Mawethu Cawe.

(3) Consider whether under the circumstances dealt with in this report, it would not be appropriate and justifiable to file a high Court Application for the declaration of the entire USAASA Board of Directors under the Chairmanship of Mr Mawethu Cawe to be declared Delinquent Directors for the irregular, unnecessary, reckless and unconscionable expenditure of public funds allocated to USAASA on legal costs; and;
(4) In consultation with the Director: National School of Government as well as the Department of Public Service and Administration, to conduct in-depth training for all newly appointed Board Members of entities that fall under his authority on the Protected Disclosures Act, in particular its purpose, effect and meaning to employers prior to taking office; and;

(5) Disregard the recommendation of the USAASA Board of Directors in connection with the outcome of the impugned Disciplinary Enquiry held against the CEO of USAASA until the finalization of my investigation into the complaints referred to in this report for investigation.

(b) The USAASA Board of Directors to take urgent steps to;

(1) Lift the suspension of the CEO within seven (7) days of the publication of this report;

(2) Develop a policy on handling of Protected Disclosures by the entity as contemplated in section 2(a) of the Act;

(3) Ensure that there is no employee of the Agency who is victimized or subjected to occupational detriment for having reported allegations of corruption or lodged a complaint in terms of the Protected Disclosures Act;

(4) Extend an apology to the complainant for the irrational and inappropriate manner in which it handled his complaints against the Board within fifteen (15) days of the publication of this report; and;

(5) Provide adequate support to the complainant and his subordinates and encourage disclosure of incidents of malfeasance within the Agency and provide appropriate change management leadership intervention that incorporates gender mainstreaming and provide the Agency staff with knowledge, values and skills to manage diversity and embrace whistle-blowing.
(c) The Chief Executive Officer of USAASA to take urgent steps to:

1. Consider the reports of the Auditor-General and the National Treasury with regard to the appointment and remuneration of the Company Secretary with a view to advising the Board of the financial and related implications thereof to enable them to remedy such an appointment and recover from the Individual Board Members any amounts that may have spent to date which would have constituted irregular expenditure as a result of the Board’s actions and refusal to heed advice from the CEO, Auditor General and the National Treasury;

2. Calculate the expenditure incurred by USAASA in respect of legal costs associated with the labour dispute with the CEO and costs incurred by the entity in holding the Disciplinary Enquiry against the CEO effective from the date the Public Protector informed the Board of the existence of a Protected Disclosure lodged with her and recover such expenditure from the individual members of the USAASA Board of Directors under the Chairmanship of Mr Mawethu Cawe;

3. Ensure that there is no employee of the Agency who is victimized or subjected to occupational detriment for having reported allegations of corruption or lodged a complaint in terms of the Protected Disclosures Act. And;

4. Develop, institutionalize and implement a policy on handling of protected disclosures and standard operating procedures on the protection of whistle-blowers as well as ensure adherence to those procedures by all staff members of the Agency.
INTRODUCTION

1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) read with section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

1.2 The report is submitted in terms of section 8 of the Public Protector Act to:

1.2.1 The Minister of Telecommunications and Postal Services, the Hon. Dr. Siyabonga Cwele, MP;

1.2.2 The Minister of Public Service and Administration, the Hon. Ms Ayanda Dlodlo, MP;

1.2.3 The Minister of Finance, the Hon Mr Nhlanhla Nene, MP;

1.2.4 The Director; School of Government; and

1.2.5 The USAASA Board of Directors.

1.3 Copies of the report are also circulated to:

1.3.1 The President of the Republic of South Africa, H E President Matamela Cyril Ramaphosa;
1.3.2 The Speaker of the National Assembly, the Hon. Ms Baleka Mbete, MP

1.3.3 The Chairperson of the National Council of Provinces, Ms Thandie Modise, MP

1.3.4 The Auditor General of South Africa, Mr Kimi Makwetu;

1.3.5 The Complainant (Whistle-blower)

1.4 The report relates to an Own Initiative investigation into the improper conduct of the USAASA Board of Directors in connection with the Public Protector’s investigation of a complaint lodged with her to investigate allegations in terms of the provisions of the Protected Disclosures Act, 2000.

2. THE COMPLAINT

2.1 On 15 May 2018, I received a complaint lodged in terms of the Protected Disclosures Act, 2000 against the Board of Directors of the Universal Service and Access Agency of South Africa (USAASA). The complaint was lodged by the Chief Executive Officer (CEO) of the Agency, Mr Lumko Mtmende (the complainant) In his complaint Mr Mtmende alleged *inter alia* that;

2.1.1 The USAASA Board of Directors irregularly appointed a Company Secretary, Ms Selloane Motloung at a salary amounting to R1.3000.000.00 per annum which was above the advertised salary scale and above salary level 13 in the public service resulting in the entity incurring irregular expenditure as the amount was not budgeted for;
2.1.2. According to the enabling legislation of the entity in particular section 83(4) of the Electronic Communications Act 36 of 2005, it is the responsibility of the CEO to employ staff for the entity including senior management and such other persons as may be necessary to assist him or her with the performance of the functions of the Agency. Therefore, according to Mr Mtimde, the Board of Directors had no legal authority to appoint the Company Secretary and as such acted *ultra vires*; and;

2.1.3. On behalf of USAASA and in his official capacity as the CEO of the Agency, he is involved and actually, central in a protracted litigation that is before the Gauteng High Court in connection with the irregularities in the manufacturing, production and distribution of Set Top Boxes for the Broadcasting Digital Migration and the Board is not supportive of the CEO in the matter despite claims amounting in excess of R250 000.000 against the State.

2.2 Further thereto, Mr Mtimde provided me with screenshots of further complaints against the Board which he believes were questionable Board decisions that were tantamount to compromising the fiduciary duties of the Board towards USAASA as well as good corporate governance. These were the following;

2.2.1. Altering the panel recommendation to the Accounting Officer regarding salary on the appointment of a Company Secretary in contravention of Section 83(5) and 83(12) of the ECA;

2.2.2. In Contravention of Section 83(5) of the ECA, through resolving (against the panel and CEO decision), to include a non-recommended second candidate for appointment as Executive Manager (Operations), in the event of the preferred candidate not accepting;
2.2.3. Rescinding the power of the CEO/Accounting officer to appoint staff in terms of Section 83(5) of the ECA;

2.2.4. Rescinding the role of the Accounting Officer/CEO as a Director in terms of Section 82B (4) of the ECA;

2.2.5. Attempting to suspend the CEO without the referral or recommending to the Minister in terms of Section 82A (1) of the ECA;

2.2.6. Appointing a service provider to investigate the CEO in violation of the SCM Policy (Chairperson imposing which service provider to be appointed, no appointment letter, no scope, no SLA);

2.2.7. Instructing the CEO to deduct money from 8 employees’ salaries in contravention of the Basic Conditions of Employment Act;

2.2.8. Instructing the CEO to remove Senior Managers from the union citing the recognition agreement;

2.2.9. The CEO’s performance assessment was done by Board members who only joined the Agency in December / January 2017 for the period 2016/17;

2.2.10. Board members rated the CEO with no regard to the signed performance agreement, KPI’s and portfolio of evidence;

2.2.11. Board members imposed ratings against the CEO with no engagement against the recommendations of the REM&HR Board Committee;
2.2.12. The Chairperson of the Board instructed lawyers to write a dismissal letter to the former Company Secretary in contravention of ECA, USSASA Policy and related regulations;

2.2.13. The Chairperson called a service provider to produce a report on the outcome of an investigation against some Board members;

2.2.14. The Board and its Chairperson acted in a manner that borders on being operational and interfering with management responsibilities; and

2.2.15. The Board incurred expenditure on travelling abroad. Such expenditure was initiated and approved by the Chairperson despite exceeding budgetary threshold and the CEO and the CFO warned the Board against such conduct.

2.3 As a result of the above issues raised by Mr Mtimde, he believes and is of the view that the USAASA Board of Directors abused their powers, have subjected him to occupational detriment and victimization as they instituted a Disciplinary Enquiry against him ostensibly based on trumped up charges in particular after his disclosures to the Auditor General, National Treasury and the Public Protector.

2.4 He thus requested that I investigate the complaints including, whether the Board Members of USAASA are fit and proper persons to be members of a Board of an organ of state.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

3.2 Section 182(1) of the Constitution provides that;

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

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

(b) **To report** on that conduct; and

(c) **To take appropriate remedial action.**"

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

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.5 The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
3.6 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC) and (5) *BCLR* 618, the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect [at para 76].

3.7 The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences".

3.8 In the above-mentioned matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others*, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

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

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

3.8.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
3.8.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69);

3.8.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);

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

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

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

3.8.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e)).
3.9 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), the Court held as follows:

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

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

3.9.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101):

3.9.3.1 Conduct an investigation;
3.9.3.2 Report on that conduct; and
3.9.3.3 To take appropriate remedial action.

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

3.9.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (paragraph 105).
3.9.6 The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108).

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

3.10 In the matter of the Section 182(2) of the Constitution directs that the Public Protector has the additional powers and functions prescribed by national legislation.

3.11 The complaint and the allegations against the USAASA Board of Directors referred to in this report, were correctly lodged in accordance with the applicable legislation and prescripts governing the functioning of the Public Protector and accordingly fall within the Public Protector's broader remit on investigating improper conduct in terms of section 182 of the Constitution and alleged maladministration and improper conduct under sections 6(4) and (5) of the Public Protector Act.

3.12 The Public Protector's power and jurisdiction to investigate the complaint and take appropriate remedial action was disputed by the USAASA Board of Directors who also requested that I refuse to accept the complaint and investigate the allegations made by Mr Mtimde based on an averment that the matter is pending before the Labour Court and that the issues raised by the complainant are not new as he raised them previously with the Minister of Telecommunications and Postal Services, Dr. Siyabonga Cwele, the National Treasury and the Auditor-General (AG).
3.13 The averments by the Board that the matter is still pending before the Labour Court were verified with the complainant who confirmed that indeed he took the matter of his Disciplinary Enquiry and the fact that he believed he was being subjected to occupational detriment to the Labour Court on an urgent basis and the Court dismissed the urgency part and thus struck the matter off the roll.

3.14 He stated that he did not re-enrol the matter due to lack of funding, so currently, he does not intend pursuing the matter with the Labour Court as he has now referred it to the Public Protector as provided for in the PDA.

4. **THE INVESTIGATION**

4.1 **Methodology**

4.1.1 The investigation was conducted in terms of section 182(1)(a) of the Constitution read with section 6(5)(a) of the Public Protector Act.

4.1.2 Section 6 of the Public Protector Act bestows upon the Public Protector, the authority to investigate and report her findings regarding any complaint lodged in particular, the manner in which the power conferred by section 182 of the Constitution may be exercised in investigating conduct in state affairs.

4.1.3 Section 6(1)(a) of the Public Protector Act provides that, "Any matter in respect of which the Public Protector has jurisdiction may be reported to the Public Protector by means of a written or oral declaration under oath or after having made an affirmation specifying-

   (i) The nature of the matter in question;
   (ii) The grounds on which he or she feels that an investigation is necessary;
4.1.4 In terms of section 7(1)(a) of the Public Protector Act, the Public Protector has the power to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.

4.1.5 Section 7(1)(b)(i) of the Public Protector Act, confers on the Public Protector, the sole discretion to determine the format and the procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

4.1.6 Section 8(1)(a) of the Protected Disclosures Act 26 of 2000 provides that, "Any disclosure made in good faith to the Public Protector … in respect of which the employee concerned reasonably believes that

(i) the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and

(ii) the information disclosed, and any allegation contained in it, are substantially true, is a protected disclosure".

4.1.7 Section 8(2) provides that, "A person or body referred to in, or prescribed in terms of, subsection 1 who is of the opinion that the matter would be more appropriately dealt with by another person or referred to in, or prescribed in terms of, that subsection, must render such assistance to the employee or worker as is necessary to enable that employee or worker to comply with this section"
4.2 **Approach to the investigation**

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?

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

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation.

4.2.3 Evidence was evaluated and a determination made on what happened based on a balance of probabilities. In this particular case, the factual enquiry focused on whether and to what extent the relevant organs of state fulfilled their responsibilities.

4.2.4 In the *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA)*, the Supreme Court of Appeal (SCA) made it clear that it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.
4.2.5 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and prejudice. In this case, key reliance was placed on the legislation, prescripts and policies regulating procurement by organs of state.

4.2.6 The enquiry regarding remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct.

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

4.3 Based on the analysis and assessment of the conduct of the USAASA Board of Directors and the information that came to the attention of the Public Protector, the following issue was identified to inform and focus the investigation:

4.3.1 Whether the USAASA Board of Directors violated the provisions of the Protected Disclosures Act, 2000 by refusing and/or frustrating and/or failure to assist the Public Protector to investigate Protected Disclosures lodged by its CEO, Mr Lumko Mtimde and proceeding with a Disciplinary Enquiry against him despite having been notified of a complaint in terms of the PDA that was lodged with the Public Protector against the Board.

4.4 Key Sources of information

4.4.1 Complainant’s correspondence to the Minister of Telecommunications and Postal Services dated 11 May 2018
4.4.2 Correspondence from the Minister of Telecommunications and Postal Services addressed to the Chairperson of the Board of USAASA, Mr Mawethu Cawe dated 7 March 2018;

4.4.3 Report from the National Treasury’s Acting Accountant-General titled "Appointment of Company Secretary" addressed to the Chief Financial Officer of USAASA dated 7 December 2017;

4.4.4 Complainant’s grievance against the USAASA Board dated 6 February 2018;

4.4.5 Notice of Intention to suspend addressed to the complainant by the USAASA Board Chairperson, Mr Mawethu Cawe dated 23 February 2018

4.4.6 Complainant’s representations to the USAASA Board in connection with the intention to suspend;

4.4.7 Correspondence from USAASA Board Chairperson, Mr Mawethu Cawe dated 16 April 2018 in connection with the complainant’s suspension

4.4.8 Disciplinary charges against the complainant dated and signed for on 12 April 2018

4.4.9 Copies of the Labour Court application filed by the complainant

4.4.10 The Auditor General’s report addressed to the complainant in connection with the possible irregularities regarding the appointment of USAASA Company Secretary dated 28 February 2018

4.4.11 Letter to the National Treasury’s Accountant General from the USAASA Chief Financial Officer, Mr Mahomed Chowan dated 17 November 2017;

4.4.12 Information and documentation obtained from the complainant outlining questionable USAASA Board decisions;

4.4.13 Submission addressed to the complainant from the Acting Executive Manager responsible for Corporate Services, Mr Willie Olivier signed on 24 October 2017 which is in connection with the appointment of the Company Secretary

4.4.14 USAASA Audit and Risk Committee report on Broadband Project at OR Tambo municipality which was rolled out by Brightwave Technologies (PTY)LTD dated 11 February 2018; and
4.4.15 All the documentation exchanged between the Public Protector and USAASA Board from the date of the complaint to 31 May 2018

4.5 Meetings and Interviews conducted

Consultations and Telephonic interviews were held with;

4.5.1 The complainant, the Chairperson of the Board and some senior staff members of USAASA

4.6 Correspondence exchanged between the Public Protector and;

4.6.1 The complainant dated 15 May 2018

4.6.2 The USAASA Board of Directors from 24 – 31 May 2018

4.7 Legislation and other prescripts

Acts

4.7.2 The Public Protector Act, No. 23 of 1994;
4.7.3 Protected Disclosures Act, No. 26 of 2000 ;
4.7.4 The Public Finance Management Act, No. 1 of 1999;
4.7.5 Promotion of Administrative Justice Act, No. 3 of 2000;
4.7.6 The Preferential Procurement Policy Framework Act, No 5 of 2000; and
4.7.8 The Electronic Communications Act No. 36 of 2005
4.8 Regulations

4.8.1 National Treasury Regulations issued in terms of PFMA, 2005.

4.9 Policies

4.9.1 The USAASA Disciplinary Code and Procedure adopted on 31 March 2014
4.9.2 The USAASA Delegation of Authority Framework adopted on 11 September 2015
4.9.3 The USAASA Recruitment and Selection Policy adopted on 14 June 2013

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

5.1. Regarding whether the USAASA Board of Directors violated the provisions of the Protected Disclosures Act, 2000 by refusing and/or frustrating and/or failure to assist the Public Protector to investigate Protected Disclosures lodged by its CEO, Mr Lumko Mtimde and proceeding with a Disciplinary Enquiry against him despite having been notified of a complaint in terms of the PDA that was lodged with the Public Protector against the Board.

The issues that are Common Cause

It is not disputed that;
REPORT ON AN OWN INITIATIVE INVESTIGATION INTO THE CONDUCT OF USAASA BOARD OF DIRECTORS IN CONNECTION WITH A COMPLAINT LODGED WITH THE PUBLIC PROTECTOR IN TERMS OF THE PROVISIONS OF THE PROTECTED DISCLOSURES ACT, 2000 AGAINST THE BOARD OF DIRECTORS OF THE UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA (USAASA)

5.1.1 The USAASA Board were within their rights to proceed with the holding of the disciplinary enquiry against any of their employees as and when they are of the view that a misconduct has been committed and/or take disciplinary steps against its employees;

5.1.2 On 15 May 2018 Mr Lumko Mtimde submitted a complaint with the Public Protector for an investigation in terms of the Protected Disclosures Act, 2000 against the Board of Directors of USAASA.

5.1.3 The USAASA Board of Directors were advised by the Public Protector of the complaint lodged by Mr Mtimde on 24 May 2018.

5.1.4 The Public Protector requested USAASA Board to hold in abeyance the disciplinary enquiry for a period of seven (7) days to allow her to apply her mind to the matter and consider the issues raised by the Board in their letter of 30 May 2018 as well as to;

5.1.4.1. Conduct a preliminary investigation for the purposes of determining the merits of the complaint, allegations and/or information and the manner in which the matter should be dealt with; and;

5.1.4.2. To determine the format and the procedure to be followed in conducting any investigation with due regard to the circumstances of each complaint.

**Issues in dispute**

The issue for determination by the Public Protector taking into account the purpose of the PDA, which is to protect whistle-blowers who disclose information regarding unlawful or irregular conduct by their employers are;
5.1.5 Whether on becoming aware that a Protected Disclosure had been lodged with the Public Protector in terms of the PDA, the Board should have held the disciplinary enquiry in abeyance pending the determination by the Public Protector of the Protected Disclosure, the findings thereof and the appropriate remedial action that would have been taken by the Public Protector;

5.1.6 Whether in the spirit of cooperative governance as well as constitutionally binding support for the work of the Chapter 9 Institutions, the USAASA Board of Directors should have proceeded with the Disciplinary Enquiry against Mr Mtimde despite a request by the Public Protector for the Board to postpone the hearing for a period of seven (7) days to allow her to apply her mind on the matter and consider the issues raised by the Board on reasons why they could not postpone the hearing; and

5.1.7 Whether it is correct, in terms of the PDA for an Employer, on becoming aware of the existence of a Protected Disclosure, to ignore such existence and if such conduct by employers is to be allowed, will it not defeat the very purpose of the PDA and the promotion of whistle-blowing to combat corruption?

5.1.8 Subsequent to the receipt of the complaint, I communicated with the USAASA Board of Directors on 24 May 2018 and notified them of the receipt of the protected disclosure. In this regard, I corresponded with the Board and informed them that I would be investigating complaints lodged by the CEO of the Agency against the Board in connection with allegations of maladministration, corruption, improper conduct and abuse of power. In my correspondence I stated that the information disclosed by Mr Mtimde related to;

"...

2.1 The irregular appointment and remuneration of the Company Secretary by the Board of USAASA in violation of the provisions of the Companies Act, USAASA Staffing Policy, the Electronic
Communications Act, the Public Finance Management Act as well as other relevant legislations and prescripts regulating the appointment and a remuneration of a Company Secretary and in this instance, specifically for USAASA; and:

2.2 The ostensible corrupt and undue interference by the Board of USAASA in attempts by the CEO to legally set aside the continuation with the unlawful and irregular process embarked upon regarding the Broadcasting Digital Migration in particular the production and manufacturing of Set Top Boxes, a matter which is of National importance resulting in the Board of Directors unconscionably suspending the CEO from duty."

3. In this regard, section 8(1) of the Protected Disclosures Act, 2000 provides that, "Any disclosure made in good faith to the Public Protector in respect of which the employee concerned reasonably believes that the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned and the information disclosed and any allegation contained in it are substantially true is a protected disclosure"

4. I have therefore accepted the complaints and the information disclosed as a "Protected Disclosure". Therefore, in compliance with the provisions of section 2(1)(a) of the Act, you are directed to ensure that the said employee is not subjected to any occupational detriment as a result of having lodged the complaints and provided the information and evidential material that they disclosed to the Public Protector."
In my letter, I also informed the Board that I was made aware that the complainant also raised the same and/or similar allegations with the Minister of Telecommunications and Postal Services, the Hon. Dr Siyabonga Cwele, MP who in return corresponded with USAASA Board on 7 March 2018, the National Treasury and the Auditor-General who all could for one reason or another not been able to decisively resolve the matter. I also advised them that I would be approaching these functionaries directly and a formal report on the outcome of the investigation would be provided to the Board as soon as possible.

On 30 May 2018, my team received an e-mail correspondence from Mr Mtimde in which he was responding to USAASA's legal representatives Messrs. Leepile Attorneys who informed him of the instructions from the USAASA Board of Directors to proceed with the Disciplinary Enquiry on 31 May 2018 and 1 June 2018 respectively. In this regard Leepile Attorneys wrote to Mr Mtimde as follows;

"...Please note that we have obtained instructions from client to proceed with the hearing tomorrow, the 31 May 2018 and on the 01 June 2018."

Mr Mtimde responded on the same date and wrote:

"...I am sure you are aware of the Public Protector process, which you confirmed in earlier communication. Notwithstanding, the PP investigation, you are also aware of my health conditions, as you again confirmed receipt. For ease of reference, I attach the certificate again.

I am instructed by my Dr not to engage on work exacerbating my stress leading to my health problems. Whilst I am out of ICU and ward, I am on serious medication and do activities that do not stress me."
Beside the above, and just for record, I still have not even received the requested documents from USAASA."

5.1.12 He attached to this e-mail a medical certificate booking him off from 25 May 2018 to 8 June 2018 for recovery.

5.1.13 On receipt of this e-mail, an advice was sought on appropriate action to take in view of the fact that the Board disregarded the notice regarding the existence of a protected disclosure. On the same date, I received a letter from the USAASA Board Chairperson, Mr Mawethu Cawe responding to my notice dated 24 May 2018. In his correspondence Mr Cawe informed me about the complainant's attempts at interdicting the Disciplinary Enquiry at the Labour Court and informed me that the enquiry would proceed on 31 May 2018 and 1 June 2018. He requested that I refuse to entertain the complaint thus exercising my discretion in terms of the provisions of section 6(3)(b) of the Public Protector Act. In this regard, Mr Cawe wrote and stated that;

"...

2. Mr Mtimde has already attempted to interdict the disciplinary inquiry at the Labour Court and his application was dismissed for lack of urgency. The disciplinary inquiry has commenced and the first witness has already testified and concluded her testimony. Mr Mtimde participated in that disciplinary inquiry and cross-examined the first witness.

When the disciplinary inquiry was to proceed to the next day, Mr Mtimde said he was hospitalized thus unable to attend. The disciplinary inquiry was postponed to accommodate him so that he could recover. On the next occasion, Mr Mtimde still did not attend stating that he was still ill.
The disciplinary inquiry was again postponed. The disciplinary inquiry will now proceed on the 31 May and the 01 June 2018.

It was surprising that Mr Mtimde has now lodged a complaint with your office relating to the same disciplinary inquiry which is under way.

3. Mr Mtimde has not exhausted his legal remedies as provided for in section 6(3)(b) of the Public Protector Act 23 of 1994 ("PP Act"). Mr Mtimde application at the Labour Court is still pending on the merits and he has not withdrawn that application. The Board has since obtained legal opinion from Senior Counsel that it is undesirable for the Public Protector to investigate allegations in respect of a disciplinary hearing which is incomplete and a Court application which is pending.

We request the Public Protector to refuse to entertain this complaint by exercising your discretion in terms of section 6(3)(b) of the PP Act.

Further, section 6(6) of the PP Act, precludes the Public Protector from investigating performance of judicial functions by any Court of law. Given that Mr Mtimde’s application is pending before Court is a matter which still await the decision of the Court.

In any event, the provision of section 13 of the PP Act make it clear that the provision of the Public Protector Act do not affect any investigation that is performed under any other law.
Currently, the disciplinary inquiry is proceeding in terms of the labour laws of the Republic and the Electronic Communications Act which is not affected by your investigation.

The undesirability of this is that there will be parallel investigations one by yourself and the other through the disciplinary processes when the investigation conducted by your office is not against Mtimde and would thus not be able to pronounce on whether or not Mr Mtimde is guilty or innocent of the misconduct charges levelled against him. Only the chairperson of the disciplinary inquiry can make such a pronouncement...

5.1.14 Attached to Mr Cawe’s letter was a copy of a notice of disciplinary hearing addressed to the complainant as well as a charge sheet containing six (6) charges as well as four (4) additional charges that were levelled against the complainant. Subsequently, on 31 May 2018, I issued an instruction to one of my team members for the Board to provide me with a copy of the Legal Opinion that the Board relied to and requested the Chairperson of the Board to postpone the hearing for seven (7) days to allow me to consider all the issues that they were raising in their correspondence dated 30 May 2018.

5.1.15 I received the legal opinion which was prepared on 28 May 2018 by Adv. W R Mokhari SC of the Duma Nokwe Group of Advocates in Sandton, Johannesburg. According to the opinion, its purpose was to advise whether the Minister had authority to stop the enquiry and whether the Public Protector’s intention to conduct the investigation could suspend the disciplinary inquiry.
5.1.16 Adv. Mokhari opined that;

"4. The answer to the two questions lies in the constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") and the Public protector Act 23 of 1994 ("the PP Act") read with the relevant case law.

Economic Freedom Fighters and others intervening vs The President of the Republic of South Africa and Others, the Constitutional Court has had occasion to clarify the powers of the Public Protector and that judgement is binding on all and sundry. Importantly, the Constitutional Court noted that the powers of the Public Protector are constrained by law. Whether or not the Public Protector’s actions are administrative or not it matters not. What matters is that the Public Protector by virtue of his or her office, exercise public power and performs a public function, hence his or her findings and remedial action are subject to judicial scrutiny by way of judicial review.

5. Section 181 (1)(a) of the Constitution establishes the office of the Public Protector as an office intended to strengthen constitutional democracy in the Republic. In terms of Section 182 of the Constitution, the Public Protector has the power to:

“(1) The Public Protector has the power, as regulated by national legislation;

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

(c) to take appropriate remedial action."

6. The national legislation referred to in section 182(1) is the PP Act. The Public Protector's investigative powers are founded in section 6(4) of the PP Act. Importantly, the Public Protector investigates complaints on his or her own initiative or on receipt of a complaint relating to maladministration, abuse or unjustified exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function, as well as improper or dishonest act or omission among others.

7. In terms of section 6(1) (b) of the PP Act, the Public Protector may mediate, conciliate or negotiate with the parties to the dispute, or may advise where necessary, a complainant regarding appropriate remedies or any other means expedient in the circumstances. The Public Protector's additional powers are set out in section 6(5).

The PP Act significantly confers wide powers to the Public Protector to investigate any alleged maladministration, abuse, improper conduct, act or omission arising within the public administration. USAASA is an organ of state contemplated in section 239 of the Constitution and the PFMA, thus empowering the Public Protector to investigate maladministration and other related affairs within USAASA when a complaint is lodged. The constraint to the Public Protector's powers is in section 6(6) of the PP Act which precludes the Public Protector from investigating performance of judicial functions by a Court OF LAW.
This in my view would include Court judgments and pending matters before Court.

Further, section 6(3) of the PP Act confers to the Public Protector a discretion to refuse to entertain a complaint where the complainant is in the employ of the State and he or she has not exhausted legal remedies connected to the matter.

8. In this matter, Mtimde has not yet exhausted legal remedies connected to his matter, and the disciplinary inquiry is incomplete. His application at the Labour Court to interdict the inquiry and lift his suspension was dismissed by the Court for lack of urgency, and the merits of his dispute are still pending before the Labour Court. He has not withdrawn that application.

The involvement of the Public Protector at this stage is undesirable because it creates the potential of conflicting decisions. Importantly, even if the Public Protector were to investigate, she would not investigate the conduct of Mtimde nor pronounce on his guilt or innocence to the misconduct charges levelled against him. Only the chairperson of the inquiry would in terms of the Labour law be the competent person to make such pronouncement.

The Public Protector is not investigating Mtimde but the Board. The investigation by the Public Protector does not stop the inquiry. The inquiry would still continue and make its findings. The Minister has no authority to halt the inquiry nor to request that the inquiry be stopped or suspended.
The Minister's request that the inquiry be suspended due to the Public Protector's investigation is without legal foundation. It may also be construed as interference by the executive in the administration affairs or operational matter of USAASA.

The Minister as the executive plays an oversight role and not an operational. The Public Protector's investigation does not suspend the inquiry. It is legally permissible as it was found in the EFF matter by the Constitutional Court that more than one institution may investigate the same matter and the mere fact that the Public Protector is investigating does not preclude other institution from investigating.

This much occurred in the well-known investigation by the Public Protector into the upgrades to the private residence of the former President of the Republic, Honourable Zuma in Nkandla.

The Public Protector investigated the matter whilst at the same time a ministerial task team was also investigating and subsequently the Special Investigation Unit ("SIU") was also investigating.

As long as it is understood that each of the institutions investigating possess specified powers which do not intrude into the other powers, there is nothing which precludes parallel investigations. Whilst the Public Protector may exercise a discretion to investigate notwithstanding the pending disciplinary inquiry and pending Court application at the Labour Court, the inquiry should proceed.
9. **The Board should address a letter to the Public Protector about the undesirability of investigating which pending before Court and before the disciplinary committee but should the Public Protector decide to continue to investigate notwithstanding that she has been alerted of these difficulties, the Board should nevertheless cooperate with that investigation by providing whatever information the Public Protector needs whilst at the same time the board exercising its prerogative to ensure that the CEO ("Mtimde") faces disciplinary charges and that the inquiry proceed to finality**

5.1.17 Adv. Mokhari concluded his opinion by stating *inter alia* that

"..."

10.4 **The Investigation by the Public Protector on the strength of the complaint lodged by Mtimde with the office of the Public Protector does not suspend the inquiry...**"

5.1.18 In a covering e-mail dated 31 May 2018, attaching the legal opinion, the Company Secretary, Ms Selloane Motloung (whose appointment to the position is also the subject of the (complaint) investigation) wrote:

"*We* have received your email and also received the legal advice on it. The disciplinary hearing was already a subject of an interdict application at the labour court which was dismissed. This disciplinary enquiry has therefore been sanctioned by the court. **We see no reason why it should be postponed.**

USSASA is incurring legal costs each time the DC is postponed and the further postponement will not be legally and financially sustainable. The legal opinion is attached. As a result **we are unable to accede to your request.**" (emphasis added)
On the same day, my office responded to Ms Motloung and stated the following:

"Thank you for your correspondence. I also wish to confirm that same has been referred to the PP for response.

Needless to say I know of no law that precludes the PP from investigating a matter that pre-dates a disciplinary enquiry or the fact that there is a labour court action which is still pending on merits. I am also worried about a risk of misreading the Constitution and the Public Protector Act to the exclusion of the mandate conferred on the PP by the PDA.

The last time I checked, there was only one Public Protector in this country which is Adv. Busisiwe Mkhwebane whom the PP Act bestows a discretion to decide on how to conduct an investigation depending on the circumstances of each case. According to our records the cause of action in this matter arose was back in about October // November 2017.

I am not too sure about the wisdom of communicating with you at this stage as you appear to be the subject of the very investigation. Neither am I sure of a statement that the court has sanctioned a disciplinary enquiry. I will nevertheless revert to the Board with a word from the PP."

On 31 May 2018, I also received a letter from the Chairperson of the USAASA Board, Mr Mawethu Cawe which in effect was requesting that I remove one of my senior members of the Investigation team.
In his correspondence Mr Cawe wrote:

"1. We refer to the email addressed to the Board by Mr. Abongile Madiba from your office dated 30 May 2018 who has described himself as a Chief Investigator.

2. We attach for your convenience and consideration a copy of his email which is self-explanatory. We therefore, submit that the content of his email and the tone thereof, are improper and unbecoming of an officer in the office of the Public Protector which is constitutionally to be enjoined with impartiality and act with integrity at all times as provided for in the constitution.

3. It is evident from the conduct of Mr. Madiba that he has taken personal interest in the matter of USAASA and its CEO (Mr. Lumko Mtimde) and as such has evidently lost his impartiality and objectivity in the matter as provided for in the Constitution and the Public Protector’s Act.

4. Besides, it is without doubt that Mr. Madiba has no understanding whatsoever of the powers of the Public Protector. As provided for in the legal opinion attached to the email dated 31 May 2018, the Public Protector does not have any power whatsoever to instruct an organ of state to halt a disciplinary hearing, particularly in this case where the court has already implicitly sanctioned it."
5. In view of the above and the conduct of Mr. Madiba we request that he be removed from the investigation of the matter forthwith. Should we fail to get a confirmation from yourself by 1st June 2018 close of business, that he has been removed, an application will be brought to court without further notice where a punitive cost order will be sought against yourself and Mr. Madiba personally?"

5.1.22 I was made to believe by the complainant that the Disciplinary Action against him was concluded in his absence and that a recommendation for his dismissal forwarded to the Minister of Telecommunication and Postal Service, the Hon, Dr Siyabonga Cwele, MP who has not to date confirmed the dismissal and/or who neither approved nor declined the recommendation. It was further brought to my attention by the complainant that the Board was seeking a legal opinion with a view to stopping his emoluments.

5.1.23 On 15 June 2018, I issued the Board of Directors of USAASA with notices in terms of section 7(9) of the Public Protector Act 1994 with a request that they respond to the notices by 22 June 2018. Section 7(9) provides that, "If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith in any manner that may be expedient under the circumstance (my emphasis)"
On 21 June 2018, I received correspondence from the Board Chairperson, Mr Mawethu Cawe dated 20 June 2018. In his correspondence Mr Cawe did not even attempt to address or respond to the contents of the section 7(9) notice instead he was of the view that I lack appreciation of the powers of the Public Protector, that, I had erred in my interpretation of the law and that I was irrational. Other than that, Mr Cawe and his Board appeared to be obsessed with the removal of one of my senior staffers, Mr Madiba from the investigation.

What Mr Cawe and his Board appear to have missed is that, as the Public Protector, I take independent decisions and I am impartial in the exercise of this function without any influence from Mr Madiba or any other person for that matter.

In his correspondence, Mr Cawe wrote as follows;

"1. I refer to your detailed letter dated 15 June 2018. I was surprised that you have elected not to react to the email dated 1st June 2018 in which through the letter emailed by the Company Secretary I requested you to remove Mr Madiba from the investigation because of his conduct explained in the said letter nor did you have the courtesy to respond to the email from the Company Secretary.

I was further alarmed to read in your letter of 15 June, the last paragraph thereof that Mr Madiba is the contact person. This means that you have refused to remove him as as investigation (sic) in this matter despite his conduct yet you have failed to advance reasons as to why you have decided that he should conduct the investigation despite his conduct."
2. I wish to reiterate the Board's position that it objects to Mr Madiba's involvement in the investigation because of his prejudicial conduct, lack of objectivity and a conduct unbecoming of the officer of the Public Protector's office. The Board has reason to believe that it will not receive a fair and impartial investigation because of the pre-conceived views held by yourself and Mr Madiba about the Board.

3. This has left the Board with no any other option but to approach the Court for appropriate relief but not limited to the removal of Mr Madiba in the investigation, and the setting aside of your investigation as procedurally unfair and tainted with illegality and irrationality. The preliminary views you have expressed in your letter are indicative of lack of appreciation of the powers of the Public Protector, material errors of law and irrationality.

4. As a result, USAASA and the Board will be approaching Court in due course. Your office will be served with papers and we will be asking for costs against yourself and Madiba personally.

5.1.27 Subsequent to the Board's intimidation about taking me to Court, on 10 July 2018 I received a High Court Application wherein I was cited as the 1st Respondent with Mr Madiba cited as the 2nd Respondent under case number 48250/18. The Chairperson of the USAASA Board of Directors deposed the Founding Affidavit in the matter. In the Application, a Declaratory Order was sought by the applicants in the following terms;

"...

1.1. The first respondent's refusal to remove the second respondent from the investigation initiated by the first respondent against the applicant is unlawful;
1.2. The investigation conducted by the first respondent against the applicant is unlawful;

1.3. The first respondent is directed to conduct the investigation impartially and do so de novo;

1.4. The first respondent is directed to remove the second respondent from the investigation forthwith;

1.5. The first and second respondents are ordered to pay the costs of the application personally and on the scale of attorney and own client, the one paying the other to be absolved.

1.6. Further and/or alternative relief.”

5.1.28 I do not intend dealing with the matter in this report as it is pending in court and will be ventilated in that forum. Needless to say, judging by the prayers for the issuing of a Declaratory Order, the USAASA Board of Directors appear to have missed the point. In my correspondence to the Board of 15 June 2018, I informed them in paragraph 4 of the letter that,

“I am still in the early stages of the investigation and based on the information and evidence obtained so far as well as the conduct of the Board in not cooperating with the investigation, despite notification,...” Therefore prayer number 1.5 of the applicants for a declaration that the Court directs that I conduct the investigation impartially and do so de novo is misplaced as an investigation on the complaints lodged has not been completed.
5.1.29 With respect, this conduct by the Board of USAASA of engaging in vexatious and frivolous litigation using public funds is a serious cause for concern. They seem to be intent on getting rid of the complainant to an extent that they do not listen to cogent advices from institutions such as the AG and the National Treasury who are custodians of good governance, especially with regard to the public funds and in the process engages in irregular, fruitless and wasteful expenditure of those public funds.

5.1.30 In support of his complaint lodged in terms of the Protected Disclosures Act, the complainant submitted various documents relating to the allegations of an irregular appointment of the Company Secretary as well as the issues relating to the rolling out of the Set Top Boxes.

5.1.31 I must state that, I have not been afforded an opportunity to ventilate these allegations as the USAASA Board refused to hold in abeyance, the conducting of the disciplinary enquiry against the complainant so as to allow me to apply my mind to the complaint as well as the issues raised by the Board as reasons why they were of the view that the disciplinary enquiry should continue despite a protected disclosure filed with the Public Protector.

5.1.32 The information and evidence submitted by the complainant in support of his complaint lodged in terms of the Protected Disclosures Act 2000 is as follows:

5.1.33 Amongst the documents submitted by the complainant for investigation was a job advertisement for the position of a Company Secretary for USAASA under reference number 2017/06/06. According to the advertisement, the position was to be remunerated at a salary scale of R898 743.00 to R1 058 691.00 cost to company per annum. The closing date for the advertisement was 7 July 2017.
REPORT ON AN OWN INITIATIVE INVESTIGATION INTO THE CONDUCT OF USAASA BOARD OF DIRECTORS IN CONNECTION WITH A COMPLAINT LODGED WITH THE PUBLIC PROTECTOR IN TERMS OF THE PROVISIONS OF THE PROTECTED DISCLOSURES ACT, 2000 AGAINST THE BOARD OF DIRECTORS OF THE UNIVERSAL SERVICE AND ACCESS AGENCY OF SOUTH AFRICA (USAASA)

5.1.34 On 29 September 2017, the USAASA Board of Directors took a resolution appointing Ms Selloane Motloung in the position of a Company Secretary of the entity. Despite the fact that the position was advertised at a salary range of R898 743.00 to R1 058 691.00 cost to company per annum, the Board appointed Ms Motloung at R1 300,000.00 per annum.

5.1.35 On 7 November 2017, the complainant, Mr Lumko Mtimde, in his official capacity as the CEO of USAASA signed a letter of appointment addressed to Ms Selloane Julia Motloung. In offering Ms Motloung the position, Mr Mtimde wrote under the heading, “LETTER OF APPOINTMENT”

“We have pleasure in confirming your employment to the position of Company Secretary on a permanent basis with an annual remuneration of R1 300,000.00 00 (one Million Three Hundred Thousand) (cost to company) per annum with effect from date of assumption of duty. However the appointment will be subject to vetting verification”

5.1.36 On 24 October 2017, USAASA's Acting Executive Manager responsible for Corporate Services who also serves as a Senior Manager responsible for Legal Services, Mr Willem Olivier penned a submission addressed to the CEO (complainant), Mr Lumko Mtimde under the subject, “Appointment of Company Secretary.” The purpose of the submission was to apprise the CEO of possible irregularities in the remuneration approved by the Board in filling the vacancy of Company Secretary.

5.1.37 As a background, Mr Olivier stated in his submission that, on 29 September 2017, the Board approved the appointment of Selloane Motloung in the capacity of Company Secretary on a salary of R1 300 000.00.
5.1.38 He further stated that on the same day, he received a telephone call from the CEO informing him about the Board Resolution and that on 18 October 2017, he was copied on an e-mail from the CEO addressed to the Internal Audit Department for purposes of verifying whether such an appointment would not result in an Audit Finding by the Auditor-General.

5.1.39 As a consequence thereof and in his official capacity as the Acting Executive Manager responsible for Corporate Services and Senior Manager responsible for Legal Services, he felt it necessary to apprise the CEO of his views and opinion regarding the issue of remuneration of the Company Secretary.

5.1.40 He further stated in his submission that a Company Secretary is on the same level of employment as a Senior Manager which is a salary level 13 in terms of public service or government salary scales. According to Mr Olivier, the salary band for a level 13 appointment, at the time, was R948 174.00 to R1 116 918.00 inclusive of the cost of living adjustment effective from 1 April 2017.

5.1.41 He stated that in 2008, the USAASA Board resolved to adopt the Public Service salary structure and therefore, it is the structure that is utilized annually to budget for USAASA and when the position was advertised, it was advertised on the said salary band.

According to Mr Olivier, “The salary resolved by the Board to be paid to the successful candidate therefore falls outside the provided structure for a level 13 appointment. The salary resolved by the Board to be paid to the successful candidate further (sic) is provided for on a level 14, Executive Manager, appointment. Further appointments of Executive Manager (level 14) are made on contract basis not exceeding 5 years.
The Company Secretary as a level 13 employee, is a permanent employee and not on contract term. This may lead to an adverse audit finding."

5.1.42 Mr Olivier concluded his background to the submission by stating that, "The position of Company Secretary was advertised as a level 13 (Senior Manager) position with a salary band of between (R898 743.00 to R1 058 691.00) (This was the salary that was budgeted for according to the CFO"

5.1.43 According to Mr Olivier, the appointment of the Company Secretary at a salary of R1 300 000.00 was in violation of the recruitment policy of USAASA, unbudgeted for and therefore, unlawful.

5.1.44 Mr Olivier concluded his submission by stating that the appointment of the Company Secretary on a salary notch above the agreed upon salary level 13 was in contravention of the USAASA Recruitment and Selection Policy as well as the USAASA Delegation of Authority Framework thus constituting an irregular expenditure as envisaged in section 51(1)(b)(ii) of the Public Finance Management Act, 1999 and in his opinion such an appointment would result in an Audit Opinion from the Auditor-General.

5.1.45 Mr Olivier signed the submission on 24 October 2017 and the CEO, Mr Mtimde on the same day with an inscription in which he lamented to the Board of USAASA and said, "I appeal to the Board to review in light of the SIU, salary desperations, ECA, USAASA Policy & need to avoid audit finding compromising labour relations & non-compliance with PFMA" On his part, the Chief Financial Officer, Mr Mahomed Chowan also signed on the same day and in the part BUDGET AVAILABLE / BUDGET NOT AVAILABLE, he circled BUDGET NOT AVAILABLE.
Correspondence from the USAASA CFO addressed to the Accountant-General of the National Treasury

5.1.46 On 17 November 2017, the CFO of USAASA, Mr Mahomed Chowan addressed a memorandum to the Accountant-General of the National Treasury. The purpose of the memorandum was to seek advice from the National Treasury on the appointment of the Company Secretary at USAASA.

5.1.47 In his memorandum, the CFO, provided a background on how the Company Secretary at USAASA was appointed and at what salary range as compared to the level of employment that would have been expected in terms of the advertisement for the position as well as in terms of USAASA policies.

5.1.48 He thus provided legal, policy, regulatory and financial implications for the appointment and concluded his memorandum by stating that the appointment may constitute an irregular expenditure as envisaged in section 51(1)(b)(ii) of the PFMA which provides for the prevention of irregular expenditure, fruitless and wasteful expenditure, loses arising from criminal conduct as well as expenditure not complying with the operational policies of the public entity.

5.1.49 In conclusion, Mr Chowan stated that he was reporting the matter to the National Treasury and thus seeking their advice on the matter. On 7 December 2017 the Acting Accountant-General at the National Treasury, Ms Zanele Mxunyelwa responded to Mr Chowan’s request for advice under the subject, “APPOINTMENT OF THE COMPANY SECRETARY” and said:
2. As defined in section 1 of the Public Finance Management Act (PFMA, Act 1 of 1999), irregular expenditure means ‘expenditure, other than unauthorized expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including –

(a) this Act; or

(b) the state Tender Board Act, 1968 (Act No. 86 of 1968), or any regulations made in terms of that Act; or

(c) any provincial legislation providing for procurement procedures in that provincial government.’

3. The definition of irregular expenditure is further expanded in the National Treasury Guideline on Irregular Expenditure which states that for the purposes of determining whether irregular expenditure has been incurred, there must first be a transgression of a provision contained in (a) the PFMA, (b) the Treasury Regulations, (c) a National Treasury Instruction issued in terms of section 76 of the PFMA, (d) a Provincial Treasury Instruction issued in terms of section 18(2) (a) of the PFMA and (e) any other applicable legislation.

4. The phrase “any other applicable legislation” as indicated in paragraph 3 refers to the legislation framework that applies to the USAASA and where a transaction, event or condition linked to that specific legislation was transgressed and such a transgression has financial implications.

5. Furthermore, for an entity to incur irregular expenditure the transgression must have a financial implication. In essence this means that if a law is contravened, such a contravention must be linked to a financial transaction, condition or event, i.e. funds must have been committed or spent.
6. It is understood from a review of your letter and section 83 (5) of the Electronic Communications Act, 2005 (Act No, 2005 – “the ECA”) that the power to appoint staff at the USAASA, including the Company Secretary, vests in the Chief Executive Officer (CEO).

The Board plays no role in the appointment of staff, except for the appointment of the CEO (refer to section 82 A of the ECA which enables the Board to appoint the CEO with the approval of the Minister responsible for Communications).

7. The approval of the Company Secretary’s appointment by the Board is in contravention of section 83 (5) of the ECA and may be viewed as irregular expenditure in terms of the PFMA.

8. In terms of increasing the salary grade of the Company Secretary to that of an Executive Manager, on a permanent basis, such an amendment to a salary grade of an employee does not necessarily translate to the employee occupying the position in that grade.

9. Section 83 of the ECA enables the CEO to determine different periods and conditions for members of the staff of the USAASA. If an employee is appointed permanently in a position which the law requires it to be filled on a contract period as determined by the CEO in terms of the ECA, then the appointment is in contravention of the ECA and must be corrected. Continuous occupation of the position beyond the period determined would be unlawful, and therefore rendering the related expenditure irregular.”
On the same day (17 November 2017) a similar letter was written by the CFO to the Auditor-General reporting and seeking advice on what appeared to be an irregularity in the appointment and remuneration of the Company Secretary. On 28 February 2018 the AG responded to the CEO of USAASA and said;

"Question 1: Was the Board within its power to pass a resolution and to subsequently instruct the CEO to formalize the appointment of the CS on a salary that is above DPSA salary scale? Did the Board overstep their mandate?"

In terms of section 83 (1) of the ECA, once the Board has been appointed by the Minister, the entity would then be under direction and control of the CEO appointed by the Board. Section 83(2) (b) states that the CEO is subject to the direction and oversight of the board in the performance of all financial and administrative functions as well as other work as may arise from the performance of the Agency's functions under this Act. Furthermore, section 83(4) of the ECA states that the CEO must employ a staff, including senior management and such other persons as may be necessary to assist him or her with the performance of the functions of the Agency.

The board is the accounting authority for the public entity, USAASA (section 49 of the PFMA). Section 50 of the PFMA sets out the accounting authorities fiduciary duties which section 51 sets out the responsibilities of the accounting authority. Section 56 (2)(c) of the PFMA further states that a delegation or instruction to an official in terms of section 56 (1) of the same does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.
Section 56 (3) of PFMA also give an accounting authority power to confirm, vary or revoke any decision taken by an official as a result of a delegation or instruction in terms of subsection (1).

The above sections of the PFMA therefore confirms the Board's power to revoke any decision or recommendation made by management, should the Board be of the view that such is in the best interest of the entity.

Section 51 (1) (b) states: "an accounting authority for a public entity – must take effective and appropriate steps to – prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity". (My emphasis)

The Recruitment & Selection (R&S) policy makes reference at 17.1 as follows: "if an employee cannot be recruited at the salary level indicated by the job weight (my emphasis) the CEO may approve a personal notch. The board acted within its power and directed the CEO to approve the higher remuneration of R1.3 million, however the employee was prepared to accept the offer at the remuneration that was advertised. (See extract below of minutes of board meeting dated 29 September 2017).

"The CEO indicated that the matter was raised with the candidate, and it was confirmed that she was willing to accept the salary as advertised and the CEO was of the view that the candidate should be offered what was advertised. The board was of the view that in order to retain the candidate, she should be offered a higher salary".
The issue of retention does not arise in our view since we have a candidate who was willing to accept the offer. What this means is that the candidate was prepare to accept the lower remuneration as offered HOWEVER the board decided to offer her more. In my view 17.1 of the R&S policy is therefore not applicable since it makes reference to circumstances where "the employee cannot be recruited at the salary level indicated by the job weight".

It is our view that the R&S Policy of USAASA was not complied with by the board or overlooked by the board and they did in fact, directly or indirectly authorize an expenditure not complying with the operation policy (Recruitment and Selection Policy) of USAASA.

Therefore, although the board did not overstep its mandate, it acted in contravention of section 51(1) (b) in instructing the CEO to approve expenditure that is not in line with the operational policies of USAASA. Although Section 56 of the PFMA confirms the Board’s power to revoke decisions made by management in line with the delegation or instruction in terms of subsection 1,

it is however our view that the power to revoke a decision of the CEO by the board does not change the facts stated above with regards to Section 51 of the PFMA. For the reasons stated above, we conclude that the board resolution was in contravention of the recruitment and selection policy.

**Question 2: Does the appointment of the Company Secretary at a salary notch above level 13 notch renders the salary thereon as irregular expenditure?**

The National Treasury Updated guideline on Irregular Expenditure paragraph 8 states the following:
For the purposes of determining whether irregular expenditure has been incurred, there must first be a transgression of a provision contained in:-

(a) The PFMA
(b) The Treasury Regulations;
(c) A National Treasury Instruction, issued in terms of section 76 of the PFMA;
(d) A Provincial Treasury Instruction issued in terms of section 18(2)(a) of the PFMA; or
(e) Any other applicable legislation

PFMA 51(1)(b)(ii) states the following:

"An accounting authority for a public entity must take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with operational policies of the public entity. The recruitment and selection policy for the Universal Service and Access Agency of South Africa (USAASA) states the following:

"17 Appointment of candidates on remuneration above the minimum notch of the salary range entry (personal notch) 17.1 if there is a need to recruit a competent employee with rare, critical or exception expertise and skills and such an employee cannot be recruited at the salary level indicated by the job weight, the CEO may authorize the granting of a salary above the minimum notch of the salary level as indicated by the job weight. This will depend on the circumstances of the candidate and the availability of fund"."
The policy states that candidates can be offered remuneration above the minimum salary range. The minutes of the special board meeting held on 29th of September in the agenda item 6.2.1 indicates that the candidate being recruited was willing to accept the salary level that was advertised. Therefore the amount above the advertised salary level is in transgression with the operation policies of the entity, which resulted in non-compliance with PFMA 51(1)(b)(ii). The transgression is non-compliance with legislation but does not constitute irregular expenditure.

PFMA 53(4) states the following:

"The accounting authority for such a public entity is responsible for ensuring that expenditure of that public entity is in accordance with the approved budget". The legislation is referring to the overall budget of the entity. The employee cost expenditure does not necessarily affect the overall budget of the entity. Therefore there is no non-compliance with PFMA 53(4).

In conclusion, the appointment of the company secretary at a salary notch above level 13 it its non-compliance with PFMA 51(1)(b)(ii) as it is not in compliance with the HR operational policies and does not constitute irregular expenditure.

Question 3: Is there a conflict between the Public Finance Management Act and the Electronic Communication Act with regards to the powers of the Board and that of the CEO, especially as far as the appointment of staff is concerned?

Section 56 (2) of the PFMA is clear with regards to where accountability rests, irrespective of a delegation by the board, in this case.
A board may delegates a function of the board to its CEO, for example and it may revoke a decision taken by the CEO as a result of the delegation of its authority to the CEO (See Section 56(3)).

ITO the ECA, the USAASA board directs and controls the CEO: “subject to the direction and control of the board”. Being subject to the direction and control is equivalent to taking instructions from that person or authority. It cannot be interpreted to mean anything to the contrary.

In this instances, the daily operations of USAASA remain in the hands of the CEO and the overall oversight and control rests with the board, who may direct the CEO to retract what he has put in place and implement something else which the board deems to be in the best interests of USAASA.

Any delegations by a board will be captured in a delegation document which must comply with the act of a delegation and the specific around the ambit of the delegation.

The appointment of staff by USAASA is not specifically dealt with the ECA but the general principles which regulate the decision making is not restricted to any type of decision and we hold the view that recruitment decision making, is definitely under the umbrella in both acts.

I therefore hold the view that there is no conflict between the PFMA and ECA with regards to powers of the board (USAASA).”
5.1.51 Amongst others, the other complaint lodged by Mr Mtimde against the USAASA Board relates to the long and protracted dispute concerning the Digital Migration from Analogue to Digital in particular allegations of corrupt and irregular interference by the Board of Directors in the procurement and selection of service providers to manufacture and distribute Set Top Boxes for that purpose.

5.1.52 In this regard, on 13 March 2018, the North Gauteng Division of the High Court sitting in Pretoria under case number 55207/07 in a matter between USAASA and 28 others made the following Order:

1. It is ordered that the procurement process followed in order to constitute the panel of service providers, as referred to hereinafter, is unlawful and in breach of the provisions of section 217 of the Constitution of the Republic of South Africa, 1996, the provisions of the preferential Procurement Policy Framework Act, 5 of 2000 and the Public Finance Management Act, 1 of 1999; is granted;

2. The decision to constitute the panel of service providers under the following bid numbers is hereby reviewed and set aside (granted):
   2.1 USAASA/DTT/07/2014–15;
   2.2 USAASA/DTH/08/2014-15;
   2.3 USAASA/DTT/09/2014-15; and
   2.4 USAASA/DTH/010/2014-15;

3. The constitution of the panel under the above bid numbers, whereby first to Twenty-Ninth respondents were listed as service providers in respect of the aforesaid bids is here by reviewed and set aside;
4. The conclusion of all and any Supply and Delivery Agreements concluded with First, second, Third, Fourth, Fifth and Sixth Respondents are hereby reviewed and set aside;

5. It is declared that the conclusion of the Supply and Delivery Agreements with the aforesaid First to Sixth Respondents is null and void;

6. It is declared that the Decision to place any purchase order with any of the aforementioned First to Sixth Respondents in pursuance of the Supply and Delivery Agreements is reviewed and set aside;

7. Prayers 7 - 12 are postponed sine die;

8. No order as to costs.

5.1.53 The Complainant therefore felt, as a result of the above issues and other complaints which are referred to in this report, which he exposed and reported to the Minister, the National Treasury and the Auditor General, the USAASA Board was abusing its powers, victimizing him and thus subjecting him to occupational detriment by deciding to initially suspend and haul him before a disciplinary enquiry so as to hide the irregular appointment and remuneration of the company secretary as well as the procurement for the appointment, manufacturing and distribution of Set Top Boxes in respect of the Digital Migration for the country to translate from monologue to digital.
Application of the relevant law

The Constitution, 1996

5.1.54 The Constitution is the supreme law of the Republic and all other laws should conform to the Constitution. In the event of a conflict between the Constitution and any other law, the Constitution supersedes and shall remain supreme.

Therefore, any other law that is contrary to the provisions of the Constitution shall be invalid.

5.1.55 Section 23(1) of the Constitution of the Republic of South Africa 1996 guarantees a fundamental right in respect of labour relations by providing that “everyone has the right to fair labour practices”. Therefore the complainant in this matter was entitled to be subjected to fair labour practices by his Employer, USAASA.

5.1.56 Section 181 (1) of the Constitution provides that the Public Protector is one of the Chapter 9 Institutions created or established to strengthen constitutional democracy in the Republic. Section 181(3) of the Constitution provides that, other organs of state through legislative and other measures must assist and protect these Institutions to ensure the independence, impartiality, dignity and effectiveness.

5.1.57 Chapter 9 Institutions are therefore created to assist government in governance and not usurp the powers bestowed upon other organs of state in terms of the law but to ensure that such powers are exercised in accordance with the law and rationally.

5.1.58 By informing the Board of an existence of a Protected Disclosure, the Public Protector was not trying to usurp the powers of the Board but to assist them.
5.1.59 Section 181(3) of the Constitution provides that other organs of state through legislative and other measures must assist and protect these Institutions to ensure the independence, impartiality, dignity and effectiveness.

5.1.60 Therefore Chapter 9 Institutions are created to assist government in governance and not usurp the powers bestowed upon the state organs in terms of the law but to ensure that such powers are exercised in accordance with the law and rationally.

5.1.61 Section 181(4) provides that no person or organ of state may interfere with the functioning of these Institutions (Chapter 9 Institutions). With respect, the conduct of the Board in requesting the Public Protector not to accept the complaint is tantamount to interference with the functioning of the Public Protector.

The relevant provision of the Constitution that relates to the issue of accountability in the public administration is section 195(1), which provides that, the public administration must be governed by the democratic values and principles enshrined in the Constitution, including a high standard of professional ethics which must be promoted and maintained; efficient, economic and effective use of resources which must be promoted as well as a public administration which must be accountable.

5.1.62 Chapter 3 of the Constitution provides for a cooperative government of the Republic and states in section 40(2) that, "All spheres of government must observe and adhere to the principles in this Chapter and must Conduct their activities within the parameters that the chapter provides"
Section 41(1) provides that all spheres of government and all organs of state within each sphere must respect the constitutional status, institutions, powers and functions of government in the other spheres and *inter alia* co-operate with one another in mutual trust and good faith by assisting and supporting one another.

**The Public Protector Act 23 of 1994**

The Act seeks to provide for matters incidental to the Office of the Public Protector as contemplated in the Constitution, 1996 and to provide for matters connected therewith. It is the sole prerogative of the Public Protector to decide on how a format of an investigation. On receipt of the Protected Disclosure, the Public Protector took an independent decision to investigate the matter.

Section 6 of the Public Protector Act regulates reporting of matters to the Public Protector as well as the additional powers of the Public Protector and provides that any matter in respect of which the Public Protector has jurisdiction may be reported to the Public Protector by any person.

Sub-section (iv) provides that the Public Protector shall, be competent—

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

(i) maladministration in connection with the affairs of government at any level;
(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

In his complaint, the complainant stated that the USAASA Board were abusing their powers which according to him constituted improper conduct and thus required appropriate relief.
5.1.68 Section 7(b)(i) of the Public Protector Act provides that the format and procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.

5.1.69 I received the complaint on 15 May 2018 and on 24 May 2018, I notified USAASA of the receipt of the complaint with a warning for the Agency to ensure that the complainant was not subjected to any occupational detriment as a result of having lodged the complaints and disclosed the information to the Public Protector.

5.1.70 In response thereto, the USAASA Board of Directors informed me that there was a disciplinary enquiry that was already underway and thus refused to postpone it pending the outcome of the investigation thus disregarding my request to postpone the hearing for seven (7) days so as to allow me to apply my mind on the matter as well as some of the issues that they raised in their correspondence to me.

The Labour Relations Act 66 of 1995

5.1.71 The Labour Relations Act 66 of 1995 (hereinafter "the LRA") gives effect to the right to fair labour practices in that employees have the right not to be unfairly dismissed or subjected to unfair labour practices. According to the complainant, there is no decision of a court that the Public Protector is investigating. He confirmed having referred the matter to the Labour Court but he was not successful as it was struck from the roll for lack of urgency. Thereafter and on advice from his legal team, he did not re-enroll the matter for hearing of the second part of the application which dealt with the merits and has no intentions of re-enrolling the matter.
5.1.72 The purpose of the Act is to provide for the procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers and to provide for the protection of employees who make a disclosure which is protected in terms of this Act.

5.1.73 Further thereto the Act was *inter alia* enacted to create a culture which will facilitate the disclosure of information by employees relating to criminal or other irregular conduct in the workplace in a responsible manner by providing a comprehensive statutory guidelines for the disclosure of such information and protection against any reprisals as a result of such disclosures.

5.1.74 **Occupational detriment** in relation to the working environment of an employee means being subjected to any disciplinary action, dismissed, suspended, demoted, harassed or intimidated. Section 2(1)(a) of the Act provides that the objects of the Act are to protect an employee whether in the private or public sector, from being subjected to an occupational detriment on account of having made a protected disclosure.

5.1.75 Section 3B of the Protected Disclosure Amendment Act 2017 provides that, any person or body to whom a protected disclosure has been made in terms of sections 6, 7 or 8, respectively, must, subject to subsection (3), and/or as soon as reasonably possible, but in any event within 21 days after the protected disclosure has been made:
5.1.76 Section (2) (a) provides that every employer must

(i) authorise appropriate internal procedures for receiving and dealing with information about improprieties; and

(ii) take reasonable steps to bring the internal procedures to the attention of every employee and worker.

5.1.77 Section 8(1)(a) provides that any disclosure made in good faith to the Public Protector in respect of which the employee concerned reasonably believes that the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and the information disclosed, and any allegation contained in it, are substantially true, is a "protected disclosure".

5.1.78 Employers have a duty to inform an employee or worker of the steps taken once a disclosure has been made. In this respect, employers are required to, as soon as reasonably possible, but within a period of 21 days after receiving the protected disclosure, decide whether to investigate the matter or refer the disclosure to another person or body (if that disclosure could be investigated or dealt with more appropriately by that other person or body).

5.1.79 The employer is also required to acknowledge receipt of the disclosure in writing by informing the employee or worker of its decision to investigate the matter or to refer it to another person or body. Should an employer be unable to make a decision within this time period, the employer will be required to inform the employee or worker, in writing, that it is unable to do so and, thereafter, advise the employee or worker on a regular basis (at intervals of not more than two months at a time) that the decision is still pending.
5.1.80 In such instance, the employer is required to advise the employee or worker of its decision on whether to investigate the matter as soon as reasonably possible but within a period of six months after the protected disclosure has been made.

5.1.81 Employers are also required to authorise appropriate internal procedures for receiving and dealing with information about improprieties and take reasonable steps to bring the internal procedures to the attention of every employee and worker. Therefore, employers need to ensure that they have measures in place to deal with employee disclosures. These procedures should be set out in a company policy which should be made available to all of its employees.

5.1.82 Section 4(1)(b) of the PDA provides that,

"Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may pursue any other process allowed or prescribed by any law".

5.1.83 In terms of section 4(3) of the PDA, "any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state".

5.1.84 On receipt of the complaint, it was assessed to determine whether the allegations warrant an investigation as well as whether the matter falls within the remit of the Public Protector.
Based on the complaint as well as the supporting documentation and the evidential material provided by the complainant I decided that the disclosure is a "Protected Disclosure".

**The Electronic Communications Act No. 36 of 2005 (ECA)**

The purpose of the Act is to promote convergence in the Broadcasting signal distribution and telecommunications sectors and to provide the legal framework for convergence of these sectors as well as making new provision for the regulation of electronic communications services, network and broadcasting services.

The Act also seeks to provide for the granting of new licenses and new social obligations as well as control radio frequency spectrum and continued existence of the Universal Service Agency and the Universal Service Fund.

Section 80 of the ECA regulates the continued existence of Universal Service Agency and provides that:

1. Despite the repeal of the Telecommunications Act by this Act, the Universal Service Agency established in terms of section 58 (1) of the Telecommunications Act continues to exist as a juristic person in terms of this Act and will henceforth be called the Universal Service and Access Agency of South Africa.

2. The Minister may, by notice in the Gazette, appoint a board of up to seven members to provide oversight of and guidance to the Agency.

3. A board appointed by the Minister in terms of section 58 (2) of the Telecommunications Act is considered to have been appointed in terms of this Act.
(4) The Agency is subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999).

5.1.89 Section 81 of the ECA regulates the functions of Board and provides that:

(1) The Agency's board must exercise the powers conferred, and perform the duties imposed, upon it in accordance with any policy direction issued by the Minister.
(2) The board must:

(a) represent the Agency before the Minister and the Authority;
(b) oversee the functions of the Agency;
(c) prepare and update a strategic plan for the Agency at least once every three years to be used by the Agency in exercising its powers and carrying out its functions;
(d) approve the annual report referred to in section 86 prior to submission to the Minister;
(e) approve the statement of estimated income and expenditures and any adjusted statements referred to in section 84 prior to submission to the Minister;
(f) approve the Chief Executive Officer's (CEO's) recommendations referred to in section 83 (3) (b);
(g) oversee the accounts of the Agency referred to in sections 84, 85 and 91; and
(h) take such other decisions as may be requested by the CEO of the Agency in terms of this Chapter.

5.1.90 Section 83 of the ECA which regulates the CEO and staff of the Agency provides that:

The Agency is under the direction and control of the CEO.
(1) . . . .

(2) Without derogating from his or her general powers, duties and functions as set forth in this section, the CEO must:

(a) approve of expenditures from the universal service and access fund;
(b) conduct competitive tenders in terms of section 90 and make recommendations to the board.

(3) . . . .

(4) The CEO must employ a staff, including senior management and such other persons as may be necessary to assist him or her with the performance of the functions of the Agency.

(5) The staff of the Agency is accountable to and must enter into a performance agreement with the CEO.

(6) The CEO must manage and direct the activities of the Agency.

(7) The CEO must, in the selection of the staff of the Agency:

(a) promote the empowerment of historically disadvantaged persons, including women, the youth and persons with disabilities; and

(b) subject to paragraph (a), apply equal opportunity employment practices.

(8) The staff of the Agency must be appointed on the grounds of their qualifications, expertise or experience in the fields, when viewed collectively, of development planning, community development, social sciences, economics, electronic communications and publicity.

(9) A person may not be appointed or continue in office as a member of the staff of the Agency if he or she becomes unfit to hold the office or becomes incapacitated.
(11) The members of the staff of the Agency hold office on such conditions as to remuneration and otherwise as the CEO may determine with the concurrence of the Minister and the Minister of Finance.

(12) Different periods and conditions may be determined under subsection (12) in respect of different members of the staff of the Agency."

USAASA's Recruitment and Selection Policy

5.1.91 The policy was adopted on 14 June 2013 and its purpose is to ensure transparent and fair processes with regard to the employment procedures and practices as well as create an appropriate framework to recruit, appoint and retain employees.

5.1.92 Paragraph 17 of the policy regulates the appointment of candidates on remuneration above the minimum notch of the salary range entry or what is called (personal notch)

5.1.93 Sub-paragraph 17.1 of the policy provides that in the event that there is a need to recruit a candidate with a rare, critical or exceptional expertise and skills and such an employee cannot be recruited at the salary level indicated by the job weight, the CEO may authorize granting of a salary above the minimum notch of the salary level as indicated by the job weight. This will depend on the circumstances of the candidate and the availability of the funds.

5.1.94 Based on the above legal framework as well as information and evidence provided by the complainant it appears that the responsibility of appointing a Company Secretary for USAASA vests with the CEO. However this information has not been tested.
5.1.95 The PFMA is the main legal instrument that regulates financial management and procurement in the public service. Its objectives are to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments.

5.1.96 USASSA is a Public Entity established in accordance with the provisions of Schedule 3A to the PFMA that falls under the auspices of the Department of Telecommunications and Postal Services.

5.1.97 Section 1 of the PFMA defines irregular expenditure as an expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with the requirements of inter alia, any applicable legislation including the PFMA itself.

5.1.98 Section 49 of the PFMA regulates the authority and accountability of Accounting Authorities and provides that if a public entity has a Board of Directors, the Board is the Accounting Authority of that entity.

5.1.99 Section 50 of the PFMA provides for the fiduciary duties of accounting authorities and provides that:

"(1) The accounting authority for a public entity must—

(a). exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;"
(b). act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

(c). on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and

(d). seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

(2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not—

(a). act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

(b). use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

Section 51 of the PFMA provides for the general responsibilities of accounting authorities and provides that;

(1) An accounting authority for a public entity:

(a). must ensure that that public entity has and maintains—
(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;

(iv) a system for properly evaluating all major capital projects prior to a final decision on the project;

(b). must take effective and appropriate steps to—

(i) collect all revenue due to the public entity concerned; and

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and

(iii) manage available working capital efficiently and economically;

(c). is responsible for the management, including the safe-guarding, of the assets and for the management of the revenue, expenditure and liabilities of the public entity;

(d). must comply with any tax, levy, duty, pension and audit commitments as required by legislation;

(e). must take effective and appropriate disciplinary steps against any employee of the public entity who—
(i) contravenes or fails to comply with a provision of this Act;
(ii) commits an act which undermines the financial management and internal control system of the public entity; or
(iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure;
(f). is responsible for the submission by the public entity of all reports, returns, notices and other information to Parliament or the relevant provincial legislature and to the relevant executive authority or treasury, as may be required by this Act;
(g). must promptly inform the National Treasury on any new entity which that public entity intends to establish or in the establishment of which it takes the initiative, and allow the National Treasury a reasonable time to submit its decision prior to formal establishment; and
(h). must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity."

5.1.101 Section 53(4) of the PFMA provides that an Accounting Authority of a public entity is responsible for ensuring that expenditure of the public entity is in accordance with the approved budget.

5.1.102 Section 56 of the PFMA provides the accounting authorities with powers and duties to delegate to officials of the entity, powers entrusted to the accounting authorities subject to any limitations and conditions that they may impose. However, this does not divest the accounting authority of the responsibility concerning the exercise of the delegated power or the performance of the assigned duty.
Section 57 of the Act entrusts other officials of the entity with responsibilities and provides that an official of a public entity;

"(a). must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;

(b). is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility;

(c). must take effective and appropriate steps to prevent, within that official’s area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d). must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and

(e). is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official’s area of responsibility."

The National Treasury guidelines on irregular expenditure

The definition of irregular expenditure is further expanded in the National Treasury Guidelines on Irregular Expenditure. Paragraph 8 thereon states that for the purposes of determining whether irregular expenditure has been incurred, there must first be a transgression of a provision contained in:
(a) The PFMA;
(b) The Treasury Regulations;
(c) A National Treasury Instruction, issued in terms of section 76 of the PFMA;
(d) A Provincial Treasury Instruction issued in terms of section 18(2)(a) of the PFMA; or
(e) Any other applicable legislation

5.1.105 Paragraph 20 of the guidelines provide that, in terms of section 53(4) of the PFMA, the accounting authority of a national or provincial public entity listed in the Schedule 3A and 3C to the PFMA is responsible for ensuring that expenditure of that public entity is in accordance with the approved budget of the institution.

5.1.106 According to paragraph 21 of the guidelines, if a public entity referred to in paragraph 20 above incurred expenditure that contravenes the provision of section 53(4) of the PFMA, it must be indicated that such a public entity has spent not in accordance with it approved budget and the non-compliance linked to the transaction, condition or event that lead to such a spending must be recognised as irregular expenditure. In this case, the amount to be disclosed as irregular expenditure will be the excess amount over the approved budget.

5.1.107 Paragraph 22 of the Guideline on Irregular Expenditure provides that based on the aforementioned, it is clear that even though public entities listed in schedules 3A to the PFMA will not incur unauthorised expenditure when they overspend on their respective budgets, such an overspending must be recognised as irregular expenditure in the notes to the financial statements.
Conclusion

5.1.108 Considering the allegations of irregularity in the appointment of the Company Secretary as well as allegations in the procurement of service providers who would be responsible for the Digital Migration in particular the manufacturing and distribution of Set Top Boxes for that purpose and based on the requirements as set out in the legal framework above, the Board should have considered it appropriate that I investigate the allegations prior to taking and/or continuing with the disciplinary steps against the complainant.

5.1.109 Despite the National Treasury and the AG finding that, there were irregularities in the appointment of the Company Secretary, the Board continued with the appointment and ignored the advice of these institutions. Similarly, when I requested to be afforded seven days to look into the matter and that they postpone the disciplinary enquiry for those days, the Board refused.

5.1.110 Therefore, based on the evidence and information referred to above which could not be tested due to the Board's refusal to hold disciplinary processes in abeyance, I could not determine the veracity of the allegations. I could therefore not exercise my discretion on how to handle the matter especially in so far as whether the complainant was indeed subjected to occupational detriment or victimization.

5.1.111 Under the circumstances, it was desirable for the Board to cooperate with me and allow the investigation to continue.
In the memorandum dated 24 October 2017 the CEO made his concerns regarding the irregularities concerning the appointment of the company secretary and even appealed to the Board that they should review this decision taking into account the investigations of misappropriation of public which are conducted by the SIU, salary desperations affecting the entity, ECA, USAASA Policy & need to avoid audit finding compromising labour relations & non-compliance with PFMA”. On his part, the Chief Financial Officer, Mr Mahomed Chowan also signed on the same day and in the part BUDGET AVAILABLE / BUDGET NOT AVAILABLE, he circled BUDGET NOT AVAILABLE. Despite the forewarnings, the Board was obstinate, with respect, a conduct that is highly irresponsible.

The PDA provides protection to whistleblowers in the private and public sector who disclose information regarding unlawful or irregular conduct by their employers or fellow employees. If employers are allowed to dismiss employees, after having made protected disclosure, the very purpose and objective of the Protected Disclosure Act will be futile.

The Public Protector, as one of the entity listed in section 8 of the PDA, has an obligation to ensure that whistleblowers, like complainant, are protected from being subjected to occupational detriment.

The Public Protector can only ensure the achievement of the above-mentioned objectives of the PDA through the protection and assistance from the Board, as envisaged in section 181(3) of the constitution.
6 FINDINGS

I make the following findings;

6.1. Regarding whether the USAASA Board of Directors violated the provisions of the Protected Disclosures Act, 2000 by refusing and/or frustrating and/or failure to assist the Public Protector to investigate Protected Disclosures lodged by its CEO, Mr Lumko Mtimde and proceeding with a Disciplinary Enquiry against him despite having been notified of a complaint in terms of the PDA that was lodged with the Public Protector against the Board.

6.1.1. The averment that the USAASA Board of Directors violated the provisions of the Protected Disclosures Act, 2000 in proceeding with a Disciplinary Enquiry against the CEO, Mr Lumko Mtimde despite having been notified of the existence of a Protected Disclosure reported for investigation by the Public Protector who requested the Board to hold the process in abeyance pending the investigation of the complaint lodged in terms of the Protected Disclosures Act is substantiated.

6.1.2. Indeed, the complainant had made a protected disclosure to the Minister, National Treasury and the Auditor General;

6.1.3. The disclosure was made in good faith, as both the National Treasury and the Auditor General advised against the conduct of USAASA Board

6.1.4. The complainant was subjected to occupational detriment by USAASA Board on account of having made a protected disclosure.
6.1.5. The Protected Disclosures Act provides for the protection of an employee from being subjected to an occupational detriment on account of having made a protected disclosure. Section 8 of the Protected Disclosures Act is very clear that a disclosure made to the Public Protector in good faith is a Protected Disclosure and she therefore had to investigate it and make a determination. It was not for the USAASA Board to advise the Public Protector against investigating the matter.

6.1.6. The USAASA Board was within its rights to take disciplinary steps against any of its employees in the exercise of its functions provided that such action does not amount to victimization or subjection to occupational detriment. However, it is unfortunate that the Board refused to postpone the Disciplinary Enquiry on notification of the existence of a complaint in terms of the Protected Disclosures Act lodged with the Public Protector.

6.1.7. The conduct of the USAASA Board was in violation section 3 of the Protected Disclosures Act, which 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, but also section 181(3) of the constitution which placed an obligation on the USAASA Board to assist and protect the Office of the Public Protector to ensure its effectiveness.

6.1.8. By proceeding with the disciplinary hearing, in total disregard of the protected disclosure under investigation, the USAASA Board did not only render the Office of the Public Protector ineffective, but the objectives of the PDA, as the Public Protector was unable to ensure proper protection of the employee from being subjected to occupational detriment. The Protected Disclosure Act is not intended to correct or reverse occupational detriment, but its objectives is to prevent an employee to be subjected to such occupational detriment.
6.1.9. In the spirit of cooperative governance, it would have been prudent and desirable for the Board to put the disciplinary process on hold to allow the investigation by the Public Protector to continue, in particular considering the reports of the Auditor General (AG) and National Treasury as well as advices from Minister Siyabonga Cwele. This would have allowed the Board an opportunity to negate the allegations levelled against them. The Board did not even afford the Public Protector a request to postpone for seven (7) days to enable her to make a determination on the matter.

6.1.10. Based on the information and documents submitted by the complainant, in particular, the allegations of the appointment of the company secretary and the issue surrounding the manufacturing and distribution of set top boxes, it was desirable that the complaints against the Board be investigated and for them to be afforded an opportunity to respond to the allegations and perhaps give reasons for their actions.

6.1.11. The Protected Disclosures Act makes provision for procedures in terms of which employees in both the public and the private sector who disclosed information of unlawful or corrupt conduct by their employers or fellow employees, are protected from occupational detriment. Considering the purpose of the Protected Disclosures Act, which is to protect employees from occupational detriment, the Board's conduct for failure to halt the alleged occupational detriment against the complainant was in violation of the Protected Disclosures Act and section 181(3) of the Constitution, which compels the Board to assist the Public Protector to ensure its effectiveness.

6.1.12. Accordingly, the conduct of USAASA Board, especially that of the Chairperson, Mr Cawe constitutes an improper conduct as envisaged in section 182(1) of the Constitution, maladministration and undue delay as envisaged in section 6(5)(a) of the Public Protector Act.
7 REMEDIAL ACTION

The appropriate remedial actions to be taken in pursuit of the provisions of section 182(1)(c) of the Constitution are the following:

7.1. The Minister of Telecommunications and Postal Services;

7.1.1. To take decisive, and appropriate action against all the Members of the USAASA Board of Directors under the Chairmanship of Mr Mawethu Cawe for the violation of the Protected Disclosures Act, after having been notified of the existence of a complaint lodged in terms of the Act and the defiance of the Public Protector referred to in this report, which defiance is in violation of section 181(3) of the Constitution, 1996 as well as failure to heed the advices provided to them by the National Treasury and the Auditor-General in connection with the unnecessary, reckless and unconscionable use of public funds in the remuneration of the Company Secretary on a salary scale exceeding the advertised remuneration package.

7.1.2. Ensure that the legal costs incurred by USAASA after they were made aware of the existence of a Protected Disclosure lodged with the Public Protector as well as costs incurred for the Disciplinary Enquiry be recovered from the Individual members of the USAASA Board of Directors under the Chairmanship of Mr Mawethu Cawe.

7.1.3. Consider whether under the circumstances dealt with in this report, it would not be appropriate and justifiable to seek a declaration for the entire USAASA Board of Directors under the Chairmanship of Mr Mawethu Cawe to be declared as Delinquent Directors for the irregular, unnecessary, reckless and unconscionable expenditure of public funds allocated to USAASA on legal costs; and;
7.1.4. In consultation with the Director: National School of Government as well as the Department of Public Service and Administration, to conduct in-depth training for all newly appointed Board Members of entities that fall under his authority on the Protected Disclosures Act, in particular its purpose, effect and meaning to employers prior to taking office; and;

7.1.5. Disregard the recommendation of the USAASA Board of Directors in connection with the outcome of the impugned Disciplinary Enquiry held against the CEO of USAASA until the finalization of my investigation into the complaints referred to in this report for investigation.

7.2. The USAASA Board of Directors to take urgent steps to;

7.2.1. Lift the suspension of the CEO within seven (7) days of the publication of this report;

7.2.2. Develop a policy on handling of Protected Disclosures by the entity as contemplated in section 2(a) of the Act;

7.2.3. Ensure that there is no employee of the Agency who is victimized or subjected to occupational detriment for having reported allegations of corruption or lodged a complaint in terms of the Protected Disclosures Act;

7.2.4. Extend an apology to the complainant for the irrational and inappropriate manner in which it handled his complaints against the Board within fifteen (15) days of the publication of this report; and;

7.2.5. Provide adequate support to the complainant and his subordinates and encourage disclosure of incidents of malfeasance within the Agency and provide appropriate change management leadership intervention that incorporates gender mainstreaming and provide the Agency staff with knowledge, values and skills to manage diversity and embrace whistle-blowing.
7.3. The Chief Executive Officer of USAASA to take urgent steps to;

7.3.1. Consider the reports of the Auditor-General and the National Treasury with regard to the appointment and remuneration of the Company Secretary with a view to advising the Board of the financial and related implications thereof to enable them to remedy such an appointment and recover from the Individual Board Members any amounts that may have spent to date which would have constituted irregular expenditure as a result of the Board’s actions and refusal to heed advice from the CEO, Auditor General and the National Treasury;

7.3.2. Calculate the expenditure incurred by USAASA in respect of legal costs associated with the labour dispute with the CEO and costs incurred by the entity in holding the Disciplinary Enquiry against the CEO effective from the date the Public Protector informed the Board of the existence of a Protected Disclosure lodged with her and recover such expenditure from the individual members of the USAASA Board of Directors under the Chairmanship of Mr Mawethu Cawe;

7.3.3. Ensure that there is no employee of the Agency who is victimized or subjected to occupational detriment for having reported allegations of corruption or lodged a complaint in terms of the Protected Disclosures Act. And;

7.3.4. Develop, institutionalize and implement a policy on handling of protected disclosures and standard operating procedures on the protection of whistle-blowers as well as ensure adherence to those procedures by all staff members of the Agency.
8 MONITORING

8.1 The Minister of Telecommunications and Postal Services must report to the Public Protector on the progress made with the remedial action taken in paragraph 7 above within 30 days from the date of this report;

8.2 The USAASA Board must report to the Public Protector on the progress made with the implementation of the remedial action taken in paragraph 7 within 30 days from the date of this report; and

8.3 The USAASA CEO must report to the Public Protector on the progress made with the implementation of the remedial action taken in paragraph 7 within 30 days from the date of this report.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28/08/2018
Assisted by the Branch: Good Governance and Integrity