
PUBLIC PROTECTOR
SOUTH AFRICA

"Allegations of maladministration and improper conduct by the Chief Executive Officer of the Manufacturing Engineering Related Services Sector Education and Training Authority."

Report 7 of 2018/19
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REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT IN CONNECTION WITH THE AFFAIRS OF THE MANUFACTURING ENGINEERING RELATED SERVICES SECTOR EDUCATION AND TRAINING AUTHORITY ALLEGEDLY BY THE CHIEF EXECUTIVE OFFICER DR. RAYMOND ANDREW PATEL
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<td>CAS</td>
<td>Crime Administration System</td>
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<td>CCMA</td>
<td>Commission for Conciliation Mediation and Arbitration</td>
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<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>CFO</td>
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<td>DPCI</td>
<td>Directorate of Priority Crime Investigation</td>
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<td>EXCO</td>
<td>Executive Council</td>
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<td>HR Manager</td>
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<td>LRA</td>
<td>Labour Relations Act No. 66 of 1995</td>
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<td>merSETA</td>
<td>Manufacturing Engineering Related Services Sector Education and Training Authority</td>
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<td>PAJA</td>
<td>Promotion of Administrative Justice Act No. 3 2000</td>
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<td>PPA</td>
<td>Public Protector Act No. 23 of 1994</td>
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<td>PSC</td>
<td>Public Service Commission of South Africa</td>
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<tr>
<td>SAPS Act</td>
<td>South African Police Service Act No. 68 of 1995</td>
</tr>
<tr>
<td>SCM Policy</td>
<td>Supply Chain Management Policy</td>
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<tr>
<td><em>sic</em></td>
<td><em>Erat scriptum (meaning “thus it had been written”)</em></td>
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<td>SIU Act</td>
<td>Special Investigating Units and Special Tribunals Act 76 of 1996</td>
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<td>SIU</td>
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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 section 8(1) of the Public Protector Act, 1994.

(ii) The report relates to an investigation into the allegations of maladministration and improper conduct in connection with allegations of victimisation and subjection to occupational detriment of employees on account of them having made protected disclosures in connection with the irregular appointment of service providers and personnel, irregular disposal of the Manufacturing Engineering Related Services Sector Education and Training Authority's (merSETA) movable assets, irregular, fruitless and wasteful expenditure, as well as failure by the Chief Executive Officer of the merSETA, Dr. Raymond Andrew Patel (hereinafter referred to as the CEO), to institute disciplinary proceedings against an employee who is alleged to have contravened the merSETA’s Code of Conduct Policy.

(iii) The first Complainant is a 46 year old married male and a sole bread winner with 3 dependent children. One of the children has already completed her tertiary education, while the other is still in Primary School and the last one is in Pre-School.

(iv) The second Complainant is a 46 year old married male with 4 dependent children. One of the children is in a tertiary institution, while the rest are in Primary School.

(v) Both Complainants were employed by the merSETA in the positions of Procurement Managers: Supply Chain Management, until their dismissals for gross negligence pertinent to their positions. The Complainants submitted to the Public Protector that they have never been dismissed or subjected to a disciplinary enquiry by any of their previous employers.
(vi) The first complaint was received by the Public Protector as a referral from the Chairperson of the Public Service Commission (PSC), on 27 July 2011, as a result of a complaint lodged with the PSC by Mr. Bertram Baird (first Complainant) on 04 May 2011.

(vii) The second complaint was lodged by Mr. Takalani Desmond Murathi (second Complainant) with the Public Protector on 20 June 2014.

(viii) In the main, the first Complainant alleged that:

(a) He was victimised and subjected to occupational detriment and subsequently dismissed on account of him having made a protected disclosure to the former merSETA Chief Financial Officer (hereinafter referred to as the former CFO), Ms Beaula Dziruni, as well as to a member of the merSETA Board of Directors, Ms. Malebo Mogopodi (Ms. Mogopodi), relating to allegations of irregular appointment of service providers and personnel by the merSETA CEO; and

(b) The CEO failed to take action against an employee who is alleged to have attended an official meeting while under the influence of alcohol, as is required by the merSETA Code of Conduct Policy.

(ix) The second Complainant alleged that:

(a) He was victimised and subjected to occupational detriment and subsequently dismissed on account of having made a protected disclosure to the former merSETA CFO of the merSETA, Ms. Dziruni, in connection with what he considered to be maladministration and improper conduct in the procurement of services on behalf of the merSETA by the CEO; and
(b) He was also subjected to occupational detriment for his refusal to accede to CEO’s demand to accept a position of a Senior Manager: Monitoring, which was exclusively created with the intention of moving him from the position of a Manager: Supply Chain Management, as he was seen as an obstacle to the CEO’s manipulation of the supply chain management processes;

(c) In November 2012, the CEO improperly influenced the transfer of merSETA’s movable assets, in particular a vehicle with registration number TLF 123 GP, to his personal driver, Mr. Thomas Khoza, without following proper disposal processes and procedures, as is required by the provisions of the Public Finance Management Act 1 of 1999 (PFMA); and

(d) The CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure amounting to R80 000.00, by commissioning a disciplinary inquiry against him which yielded no results, contrary to the provisions of the PFMA of 1999.

(x) The merSETA did not dispute that it had embarked on a recruitment of personnel and procurement of services processes. Nonetheless, it contended that both processes were in accordance with legislation and prescripts which regulates recruitment and procurement of services in the public sector.

(xi) On analysis of the complaints, the following issues were identified and investigated:

(a) Whether the CEO subjected the Complainants to occupational detriment on account of them having made disclosures to a member of the merSETA Board of Directors and the former CFO respectively, and if so, whether his conduct constitute maladministration or improper conduct;
(b) Whether the CEO improperly influenced and authorised the appointment of certain service providers to render services at the merSETA contrary to the legislation and prescripts regulating procurement processes in the public sector, and if so, whether his conduct constitute maladministration or improper conduct;

(c) Whether the CEO improperly authorised the appointment of personnel in positions for which they allegedly possessed no relevant qualifications and/or experience, and if so, whether his conduct constitute maladministration or improper conduct;

(d) Whether the CEO improperly influenced the disposal of the merSETA's movable asset contrary to the legislation and prescripts regulating disposal of assets in the public sector, and if so, whether his conduct constitute maladministration or improper conduct;

(e) Whether the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary enquiry against the second Complainant, which did not yield results and was later aborted, and if so, whether his conduct constitute maladministration or improper conduct;

(f) Whether the CEO failed to institute disciplinary action against an employee (herein referred to as Mr. X to protect his identity and with a view to avert infringing on Mr. X's rights), who had contravened the merSETA Code of Conduct, and if so, whether his conduct constitute maladministration or improper conduct; and

(g) Whether the Complainants were improperly prejudiced by the CEO's conduct as envisaged in section 182(1)(a) of the Constitution of the Republic of South Africa Act 106 of 1996 (the Constitution) and section 6(4)(a)(v) of the Public Protector Act, 1994 (PPA).
(xii) Whereas the investigation encompassed the above-mentioned issues, I could not make a finding and take any appropriate remedial action regarding issue (b) above, as it came to my attention that same is a subject of an investigation currently conducted by Colonel Jack Shivuri of the South African Police Service (SAPS) Directorate of Priority Crime Investigation (DPCI), informally known as the HAWKS, under Brixton SAPS CAS Numbers 306/11/2017 and 307/11/2017 respectively.

(xiii) In the circumstances, I deferred the investigation of an issue referred to in paragraph (xi)(b) above, with a view to avert interfering with an investigation currently conducted by the DPCI as envisaged by section 17E (9)(b) of the SAPS Act 68 of 1995 (as amended), and with a view to avert duplication of work currently carried out by the DPCI.

(xiv) The investigation process was conducted through meetings and interviews with Complainants and relevant officials of the merSETA, as well as inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts.

(xv) Key laws and policies taken into account to determine if there had been maladministration by the CEO, the merSETA and prejudice to the Complainants were principally those imposing administrative standards that should have been complied with by the merSETA or its officials when procuring services from suppliers and dealing with disclosures made by the Complainants. Those are the following:

(a) Section 1 of the Protected Disclosures Act 26 of 2000 (PDA), which defines an occupational detriment in the working environment;
(b) Section 3 of the PDA, 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", was relied on to affirm the Complainants’ rights in that regard and to determine whether they were prejudiced by the conduct of the merSETA or its officials;

(c) Section 6 (1) (a) of the PDA, which provides that "any disclosure made in good faith and in accordance with any procedure prescribed, or influenced by the employee’s employer for reporting or otherwise remedying the impropriety concerned is a protected disclosure", was relied on to affirm whether the first Complainant endeavoured to report his concerns in a prescribed manner;

(d) Clause 7.1 of the Whistle-blowing Guidelines to the merSETA Fraud Prevention Policy and Plan, FIN-PL009 dated 1/07/ 2009, which provides steps to be followed when raising a concern within the merSETA, was relied on to affirm whether there existed a policy that provides for the procedure to be followed when merSETA employees report their concerns relating to maladministration within the institution;

(e) Section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA), were relied on to determine whether the CEO improperly failed to provide the Complainants with adequate notice and statement of the administrative action to be taken against them;

(f) Clause 6.1 and 7.1 of the merSETA Recruitment Policy HRM-PL-010 dated 1/09/2008, were relied on to determine the procedure to be conformed to when advertising vacant positions;
(g) Clause 10.1.5 of the merSETA Recruitment Policy, was relied on to determine the procedural requirements that needs to be fulfilled by candidates prior to shortlisting and subsequent appointment to a vacant position advertised;

(h) Clause 12.1(b) of the merSETA Code of Conduct, 2008, which provides that a merSETA employee shall act responsibly (during working hours) as far as the use of alcoholic beverages or any other substance with intoxicating effect is concerned; (unbecoming conduct outside of working hours is strongly discouraged and may lead to disciplinary action if it negatively reflects on the merSETA, e.g. drunkenness, public disorder;

(i) Clause 17.1 of the merSETA Code of Conduct, which provides that any violation of any part of the Code of Conduct, may be cause for appropriate disciplinary action in terms of the merSETA Disciplinary Procedure;

(j) Section 54(2)(d) of the Public Finance Management Act 1 of 1999 (PFMA) National Treasury: PFMA Regulation 16A7 1999, Preferential Procurement Policy Framework: Regulation 20.2.1 and clause 12 (a) of the merSETA Property and Equipment (Fixed Assets) Management Policy, 2008, were relied on to determine the procedure to be conformed to when disposing of movable and immovable assets;

(k) Section 57(c) of the PFMA, 1999 was relied on to determine the role, duties and responsibilities of an accounting officer in respect of the prevention of irregular, fruitless and wasteful expenditure in the public entity;

(l) Section 83(3) of the PFMA which provide that "an official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty".

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(m) Section 87(1)(3) of the PFMA, 1999 was relied on to determine which offences are committed by an official of a public entity, delegated in terms of section 56, in failing to exercise the power or duty so delegated;

(n) National Treasury Regulation 4.1.3, which provides that "if an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority and/or the Department of Public Service and Administration initiates appropriate disciplinary proceedings against the accounting officer".

(xvi) Having considered the evidence obtained during the investigation against the relevant regulatory framework, I make the following findings:

(a) Whether the CEO subjected the Complainants to occupational detriment on account of them having made disclosures to the former CFO, as well as to a member of the merSETA Board of Directors respectively, and if so, whether his conduct constitutes maladministration or improper conduct;

(aa) The allegation that the CEO subjected the Complainants to occupational detriment on account of them having made protected disclosures to the former merSETA CFO, as well as to a member of the merSETA Board of Directors is not substantiated.

(bb) In terms of section 3 of the PDA 2000, "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."

(cc) Section 6(1)(a) of the PDA, further provides that, "any disclosure made in good faith and in accordance with any procedure prescribed, or influenced by the employer’s employer for reporting or otherwise remediying the impropriety concerned, is a protected disclosure."

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(dd) The information received during the investigation indicates that, upon the realisation by the first Complainant that there existed a possibility of him being subjected to a disciplinary enquiry for misconduct in connection with theft of company property, failure to keep an updated record of company assets and gross negligence (subsequent to an internal audit conducted by the merSETA), he approached the former CFO, as well as a member of the merSETA Board of Directors to raise his concerns regarding what he had considered to be malpractice on the part of the CEO.

(ee) I have also established that the second Complainant’s alleged protected disclosure was not related to allegations of malpractice on the part of the CEO, likewise it was found that it was made after the fact and not in good faith.

(ff) The information received indicates that subsequent to the second Complainant being charged with misconduct in connection with his failure to acknowledge receipt of computers, computer consumables worth R1 million and ensuring their safekeeping, which exposed the organisation to an unfavourable audit outcome, he approached the former merSETA CFO, with a view to raise his concerns regarding what he had considered to be malpractice on the part of the CEO and also lodged a complaint with the Special Investigating Unit (SIU), alleging maladministration on the part of the CEO.

(gg) The principle of good faith was enunciated in CWU v Mobile Telephone Networks (Pty) Limited[1] where the Court held that the protection of whistleblowers is not unconditional, in that in order to be a protected disclosure the disclosure had to meet the requirements provided for in the Act.

(hh) The Court said that an employee who makes a disclosure in order to embarrass or harass an employer could not be a disclosure made in good faith.

[1] [2003] BLLR 741 (LC)
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(ii) Therefore, the alleged protected disclosures made by the Complainants were not made in good faith as envisaged in section 6(1)(a) of the PDA 2000, in that the sole purpose thereof, was to embarrass the employer subsequent to them being charged for gross negligence with a view to divert attention from their infractions.

(jj) In the circumstances, I am not making a finding nor taking remedial action with regard thereto.

(b) Whether the CEO improperly influenced and authorised the appointment of certain service providers to render services at the merSETA contrary to legislation and prescripts regulating procurement in the public sector, and if so, whether his conduct constitute maladministration or improper conduct;

(aa) I have established during the investigation that the issue regarding whether the CEO improperly influenced and authorised the appointment of certain service providers to render services at the merSETA, is a subject of an investigation currently conducted by Colonel, Jack Shivuri of the South African Police Service’s DPCI under Brixton SAPS CAS Numbers 306/11/2017 and 307/11/2017 respectively.

(bb) As a consequence thereof, I have deferred the investigation of the issue referred to above, with a view to avert interfering in an investigation currently conducted by the SAPS’ DPCI as envisaged by section 17E (9) (b) of the SAPS Act 68 of 1995 (as amended) and with a view to avert duplication of work currently carried out by the DPCI.

(cc) In the circumstances, I am not making a finding nor taking remedial action with regard thereto.
(c) Whether the CEO improperly influenced and authorised the appointment of personnel in positions for which they allegedly possessed no relevant qualifications or experience, which were not advertised and on his instruction, and if so, whether his conduct constitute maladministration or improper conduct;

(aa) The allegation that the CEO improperly authorised the appointment of personnel who allegedly possessed no relevant qualifications or experience in positions appointed into, which were not advertised and upon his instruction contrary proper recruitment processes is not substantiated.

Regarding the appointment of Mr. Owen Dudley Steyn (Mr. Steyn) to the position of Project Manager: New Venture Creations;

(i) The information and evidence received during the course of the investigation indicates that the General Manager: Projects, Mr. Derrick Peo, submitted a draft application for temporary/contract staff to the CEO requesting the approval for the appointment of a Project Manager: New Venture Creations on a fixed term contract.

(ii) The evidence and information in this regard further indicates that one of the requirements for appointment to the position of Project Manager: New Venture Creations was experience in the education field and training, which Mr. Steyn possessed at the time of application for the position.

(iii) In terms of clause 17.3.1 of the merSEITA Recruitment Policy of 2008 (Recruitment Policy), temporary appointments may be made on short notice to fill a vacancy for a few days, weeks or up to three months.
Additionally, clause 17.4.1 of the merSETA Recruitment Policy, provides that fixed term appointments of staff are obtained by the merSETA for a specific task or project and are placed on a time related fixed term contract.

Furthermore, clause 10.2.3 of the merSETA Recruitment Policy provides that the shortlist of external candidates would be based on applicants who meet the minimum requirements of the position and in line with the merSETA Employment Equity targets. Moreover in terms of clause 17.5.3 of the Recruitment Policy all temporary and fixed term contract positions must be approved by the CEO.

Therefore, the allegation that Mr. Steyn was appointed to a position of Project Manager despite that fact that he did not possess the required qualifications and/or experience has no merit and could not be substantiated by the evidence and information received and extensively analysed during the course of the investigation.

Regarding the appointment of Ms. Carmen Imelda Adams (Ms. Adams) to the position of Project Manager: Career Development;

The evidence and information received during the course of the investigation indicates that the merSETA advertised the position of a Project Manager: Career Development internally with a closing date for submission of applications set for 10 May 2010, on its website and notice boards to which Ms. Adams accordingly applied for.

The evidence and information received further indicates that on 17 December 2009, the General Manager: Projects, Mr. Derrick Peo, submitted a draft application for temporary/contract staff to the CEO requesting the approval for the appointment of a Project Manager on a fixed term contract.
(ix) According to a copy of the advertisement, for a candidate to qualify for appointment to the position, such an applicant must, amongst others, possess a post graduate qualification in related field, Project Management qualification was stated as beneficial and not a prerequisite, five years' working experience in the education and training field as well as experience in education and training with a focus on career advisory and development.

(x) The evidence and information received during the course of the investigation further indicates that Ms. Adams was, at the time of her application for the position referred to above, in possession of a Bachelor of Education (Honours) with a focus in education, training and development; experience in the education and training field and career development, as well 3 years' experience in project management as required in the advertisement.

(xi) In terms of clause 7.1 of the merSETA Recruitment Policy, it is normal practice for the merSETA to advertise a positions internally first. However in exceptional circumstances such as scarce skills positions, the merSETA would advertise same internally and externally simultaneously.

(xii) In terms of clause 17.3.1 of the merSETA Recruitment Policy of 2008 (Recruitment Policy), temporary appointments may be made on short notice to fill a vacancy for a few days, weeks or up to three months.

(xiii) Additionally, clause 17.4.1 of the Recruitment Policy, provides that fixed term appointments of staff are obtained by the merSETA for a specific task or project and are placed on a time related fixed term contract.
Furthermore, clause 10.2.3 of the merSETA Recruitment Policy provides that “the shortlist of external candidates would be based on applicants who meet the minimum requirements of the position and in line with the merSETA Employment Equity targets. Moreover in terms clause 17.5.3 of the merSETA Recruitment Policy all temporary and fixed term contract positions must be approved by the CEO.”

I have established that as a consequence of Ms. Adams possessing the minimum requirements for the advertised position, she was accordingly appointed to the position of a Project Manager: Career Development.

Therefore, the allegation that Ms. Adams was appointed to a position of Project Manager: Career Development, despite the fact that she did not possess the required qualifications and/or experience has no merit and could not be substantiated by the evidence and information received and extensively analysed during the course of the investigation.

Regarding the appointment of Mr. Bafana Petrus Motsepe (Mr. Motsepe) to the position of Administrator: Supply Chain Management;

The information received during the course of the investigation indicates that the position of Administrator: Supply Chain was advertised by the merSETA with the closing date set for 25 July 2012. Further that Mr. Motsepe applied for the position and was shortlisted for interviews which were held on 30 August 2012.

According to a copy of the advertisement one of the peremptory requirements for the position of an Administrator: Supply Chain Management was least five years’ experience in stock control/management, which Mr. Motsepe possessed from his employment as Inventory Controller at WorldNet Logistics from 2005 to 2008 and as a Bond Store Supervisor/Export Controller at WorldNet Logistics from 2008 to 2011.
(xix) In terms of clause 10.2.3 of the merSETA Recruitment Policy the shortlist of external candidates would be based on applicants who meet the minimum requirements of the position and in line with the merSETA Employment Equity targets.

(xx) I have established that as a consequence of Mr. Motsepe possessing the minimum requirements for the advertised position, he was accordingly appointed to the position of an Administrator: Supply Chain Management.

(xxi) Therefore, the allegation that Mr. Motsepe was appointed to a position of an Administrator: Supply Chain Management despite that fact that the position was not advertised has no merit and could not be substantiated by the evidence and information received and extensively analysed during the course of the investigation.

Regarding the appointment of Mr. Grant Victor Anthony (Mr. Anthony) to the position of Client Liaison Officer;

(xxii) A determination on whether Mr. Anthony was appointed to the position of a Client Liaison Officer in accordance with the provisions of the merSETA Recruitment Policy 2000, could not be made due to the unavailability of supporting documents.

(xxiii) While no evidence could be found substantiating that the CEO improperly influenced and authorised the appointment of personnel at the merSETA, it was noted from the copies of the advertisements which were inspected during the investigation that persons mentioned hereunder, were invited for interviews and subsequently appointed to positions on advertisements which were clearly marked "internal advertisement" and which did not make provision for the consideration of external candidates and therefore not eligible for invitation to the interviews:

(a) Mr Cameron Wesley Theron;
(b) Mr Fabian Brown;
(c) Ms Carmen Imelda Adams;

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(d) Mr Derrick Roy Peo;
(e) Ms Romiella Sarojini Pillay;
(f) Mr Bafana Petrus Motsepe;
(g) Ms Aretha Enthea Williams; and
(h) Ms Mufaro Flora Nkomo.

(xxiv) In the circumstances, I am not making a finding nor taking remedial action with regard thereto.

(d) Whether the CEO improperly influenced the disposal of the MerSETA’s movable asset contrary to the legislation and prescripts regulating disposal of assets in the public sector, and if so, whether his conduct constitute maladministration or improper conduct;

(aa) The allegation that the CEO improperly influenced the disposal of the merSETA’s movable asset, in particular a Toyota Corolla vehicle with registration number TLF 123 GP, contrary to the legislation and prescripts regulating disposal of assets in the public sector, is not substantiated.

(bb) The information obtained during the investigation indicates that the merSETA invited its officials with a B-Band salary level and below to submit bids for obsolete pool vehicles to be disposed of by the merSETA in accordance with the National Treasury: PFMA Regulation 16A7.1.

(cc) In terms of clause 16A7.1 of the National Treasury: PFMA Regulations of 2005, “disposal of movable assets must be at market-related value or by way of price quotations, competitive bids or auction, whichever is most advantageous to the state, unless determined otherwise by the relevant treasury.”
(dd) Therefore, the allegation that the CEO improperly influenced the disposal of the MerSETA's movable asset has no merits and could not be supported by the information and evidence received and extensively examined during the course of the investigation.

(ee) In the circumstances, I am not making a finding nor taking any remedial action with regard thereto.

(e) Whether the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary enquiry against the second Complainant, which did not yield results and was later aborted, and if so, whether his conduct constitute maladministration or improper conduct;

(aa) The allegation that the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary enquiry against the second Complainant, which did not yield results and was later aborted, is substantiated.

(bb) The evidence and information received during the course of the investigation from the merSETA indicates that the second Complainant was on 12 April 2013, served with a disciplinary charge form by the former merSETA CFO, Ms. Lindiwe Ndlela, for gross negligence which arose as a result of the following facts:

(i) failure to acknowledge receipt of computers, computer consumables and their safekeeping worth over R1 million by the second Complainant as a Financial Manager: Supply Chain; and

(ii) the lack of management of receipt of the assets and their safekeeping which exposed the organisation to a financial risk and unfavourable audit outcome.
(cc) According to the information received from the merSETA’s Human Resource Department and Tokiso Dispute Settlement (Pty) Limited (Tokiso), no evidence could be found that the disciplinary hearing with respect thereof was ever concluded due to the unavailability of a sanction and/or a report pertinent to the proceedings.

(dd) The copies of invoices submitted by Tokiso indicates that it (Tokiso) was paid an amount of R32, 490.00 for services rendered as per a table below:

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<th>No.</th>
<th>Invoice Number</th>
<th>Date</th>
<th>Description</th>
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<td>1.</td>
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<td>Panellist fee</td>
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<td>IN1693</td>
<td>30 April 2013</td>
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<td>3.</td>
<td>IN1950</td>
<td>28 June 2013</td>
<td>Panellist fee</td>
<td>R 6, 726.00</td>
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<td></td>
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<td></td>
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<td><strong>Total amount billed</strong></td>
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(ee) The CEO, in a meeting held with the investigation team of the Public Protector on 13 March 2018, further conceded that as the accounting officer of the merSETA, he should have taken reasonable steps to prevent the irregular, fruitless and wasteful expenditure by ensuring that the disciplinary proceedings instituted against the second Complainant is completed.

(ff) In terms of section 1 of the PFMA 1999, fruitless and wasteful expenditure means “expenditure which was made in vain and would have been aviced had reasonable care been exercised.”

(gg) Section 57(c) of the PFMA, 1999 provides that “an official in a public entity 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.”
(hh) Section 83(3) of the PFMA, 1999 provides that “an official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty.”

(ii) The information and evidence received during the course of the investigation indicates that the CEO, as the overall accounting officer of the merSETA, failed to ensure that disciplinary proceedings instituted against the second Complainant were completed.

(jj) It follows then that the CEO, as an official of a public entity to whom a power or duty was assigned in terms of section 56 of the PFMA 1999, was obliged to take effective and appropriate steps to prevent irregular expenditure and fruitless and wasteful expenditure within his area of responsibility as the CEO of the merSETA.

(kk) Therefore, in failing to ensure that disciplinary proceedings against the second Complainant was concluded, the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure.

(II) In the circumstances, I find that failure by the CEO to take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure constitutes maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act, 1994, an act of financial misconduct as envisaged in section 83 of the PFMA and improper conduct as envisaged by section 182(1) of the Constitution.
(f) Whether the CEO failed to institute disciplinary proceedings against an employee who contravened the merSETA Code of Conduct Policy, and if so, does his conduct constitute maladministration or improper conduct;

(aa) The allegation that the CEO failed to institute disciplinary proceedings against an employee (herein referred to as Mr. X to protect his identity and with a view to avert infringing on his rights) who contravened the merSETA's Code of Conduct is substantiated.

(bb) The CEO, in his response to my enquiries dated 19 July 2017, conceded that an employee of the merSETA indeed attended an official business meeting of the merSETA whilst under the influence of alcohol. The CEO further stated that there are also instances where the very purpose of discipline may be achieved other than by subjecting an employee to a disciplinary hearing and punishment.

(cc) Clause 1.3 of the merSETA Code of Conduct Policy, 2008 stipulates the purpose of the Code of Conduct and provides that "the primary purpose of the Code is a positive one, viz. to promote exemplary conduct. Notwithstanding this, if an employee contravenes any provision of this Code or fails to comply with any provision thereof the employee is guilty of misconduct and will be dealt with in accordance with this Code of Conduct agreement."

(dd) Clause 12.1 (b) of the Code of Conduct Policy provides that "a merSETA employee shall act responsibly (during working hours) as far as the use of alcoholic beverages or any other substance with intoxicating effect is concerned; (unbecoming conduct outside of working hours is strongly discouraged and may lead to disciplinary action if it negatively reflects on the merSETA, e.g. drunkenness, public disorder."
(ee) Clause 17.1 of the Code of Conduct provides that “any violation of any part of this code of conduct may be cause for appropriate disciplinary action in terms of the MerSETA Disciplinary Procedure.”

(ff) Clause 16.2 of the merSETA Disciplinary Code Policy (Disciplinary Code Policy), 2008 provides categories of alcohol and/or Drug offences and their sanctions. In terms of clause 16.2 of the Disciplinary Code Policy, a sanction for being under the influence whilst on the MerSETA’s premises is dismissal.

(gg) The merSETA Code of Conduct Policy acts as a guideline to employees as to what is expected of them from an ethical point of view, both in their individual conduct and in their relationships with others. Therefore Mr. X’s conduct in this regard was no exception.

(hh) Therefore, the CEO was obliged in terms of clause 17.1 of the Code of Conduct Policy, to institute disciplinary action against Mr. X and impose a sanction in accordance with clause 16.1 of the merSETA Disciplinary Code Policy irrespective of the circumstances that had arisen.

(iii) In the circumstances, I accordingly find that failure by CEO to institute disciplinary proceedings against Mr. X constitutes maladministration as envisaged in section 6 (4) (a) (i) of the Public Protector Act, 1994 and improper conduct as envisaged in section 182 (1) of the Constitution, 1996.
(g) Whether the Complainants were improperly prejudiced by the CEO's conduct as envisaged by section 6 (4) (a) (v) of the Public Protector Act, 1994.

(aa) As indicated herein above, the information received indicates that, upon the realisation by the first Complainant, that there existed a possibility for him to be charged for theft of company property, gross negligence and fraud, approached the former CFO, as well as a member of the merSETA Board of Directors with a view to disclose what he considered to be maladministration and improper conduct in the appointment of service providers and personnel allegedly by the CEO, in order to divert attention from his infractions.

(bb) Similarly, as indicated herein above, the information received indicates that subsequent to the second Complainant being charged with misconduct in connection with his failure to acknowledge receipt of computers, computer consumables worth R1 million and ensuring their safekeeping, which exposed the organisation to an unfavourable audit outcome, he approached the former merSETA CFO, with a view to raise his concerns regarding what he had considered to be malpractice on the part of the CEO and also lodged a complaint with the Special Investigating Unit (SIU), alleging maladministration on the part of the CEO.

(cc) According to the information received during the course of the investigation, the complainants' alleged protected disclosures in this regard, were made after the fact and although made substantially in accordance with the procedure prescribed by the employer, they were however, not made in good faith as envisaged by section 6(1)(a) of the PDA 2000.

(dd) The allegation that the CEO subjected the complainants to occupational detriment on account of them having protected disclosures has no merit and could not be supported by the evidence and information received during the course of the investigation.
Therefore, the CEO's conduct in this regard does not constitute prejudicial conduct to the Complainants and abuse of power as envisaged by section 6(4)(a)(ii) and (v) of the Public Protector Act, 1994.

I take the following remedial action in terms of section 182(1)(c) of the Constitution:

(a) The Minister of Higher Education and Training must:

(aa) Take cognisance of the findings regarding maladministration and improper conduct by the CEO, Dr Raymond Andrew Patel mentioned in the report.

(bb) Ensure that the Board considers the acts of maladministration, financial misconduct and improper conduct referred to in the report and take appropriate disciplinary action against the CEO, Dr. Raymond Andrew Patel in accordance with Treasury Regulation 4.1.3; and

(cc) Include in her oversight responsibilities with regard to merSETA, as a National State Entity, the monitoring of implementation of remedial action taken in pursuit of the findings in terms of the powers conferred under section 182(2)(c) of the Constitution.

(b) The merSETA Board of Directors must:

Take cognisance of the findings of maladministration and improper conduct by the CEO, Dr. Raymond Andrew Patel and ensure that such action is not repeated;

(aa) Take appropriate disciplinary action against the CEO, Dr. Raymond Andrew Patel, within 60 days of publication of this report, in accordance with Treasury Regulation 4.1.3, for maladministration, act of financial misconduct and improper conduct incurred;
(bb) The Board evaluate the effectiveness of merSETA's internal controls on Human Resource Management processes to identify deficiencies with a view to take corrective action to prevent a recurrence of the improprieties referred in the report.

(cc) Ensure that training is provided to merSETA staff, including those in authority, regarding a proper response to whistle-blowing and the protection of whistle-blowers to prevent the recurrence of the improprieties referred to in the report.

(c) The Chief Executive Officer must:

(aa) Take cognisance of the findings of maladministration and improper conduct identified in the report and ensure that such conduct is not repeated;

(bb) Ensure that that merSETA Recruitment Policy is amended to prescribe the process to be followed when a suitably competent candidate for position(s) advertised internally could not be identified.

(e) MONITORING

(aa) The Minister of Higher Education and Training and Accounting Authority must submit an implementation plan indicating how the remedial action referred to in paragraph (a) and (b) above will be implemented, within 30 days working days from date of the report.

(bb) The Chief Executive Officer must submit an implementation plan indicating how the remedial action referred to in paragraph (c) above will be implemented, within 30 days working days from date of the report.
(cc) All remedial actions taken by the Public Protector, in terms of the Public Protector’s powers under section 182(2)(c) of the Constitution, must be finalised within six months from date of the report.
REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT AT THE MANUFACTURING ENGINEERING RELATED SERVICES SECTOR EDUCATION AND TRAINING AUTHORITY ALLEGEDLY BY THE CHIEF EXECUTIVE OFFICER DR. RAYMOND ANDREW PATEL.

1. 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) and section 8 (1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8 (3) of the Public Protector Act to the following people to note the outcome of my investigation:

1.2.1. The Minister of Higher Education and Training, Honourable Ms. Naledi Grace Mandisa Pandor, MP;
1.2.2. The Interim Chairperson of merSETA’s Board of Directors, Mr. Xolani Tshayana;
1.2.3. The Chief Executive Officer of merSETA, Dr. Raymond Patel;
1.2.4. The Senior Manager; Supply Chain Management and Contracts Management of merSETA, Ms. Reshoketswe Mosuwe;
1.2.5. The Senior Manager, Human Resource Department of merSETA, Ms. Nolwazi Simelane;
1.2.6. The former Chief Financial Officer of merSETA, Ms. Beaula Dziruni; and
1.2.7. The merSETA’s Board Member, Ms. Malebo Mogopodi;

1.3. A copy of the report is also provided to Mr. Bertram Baird, the first Complainant, and Mr. Takalani Desmond Murathi, the second Complainant, to inform them about the outcome of my investigation.

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1.4. A section 7(9)(a) Notice issued in terms of the Public Protector Act, 1994 was previously provided to the Dr Patel, as the responding party, to enable him to respond to provisional findings on substantiated allegations. Furthermore, an invitation was extended to him with a view to afford him an opportunity to respond orally to the allegations and provide clarity on ambiguities identified in the written response received by the Public Protector on 22 February 2018.

1.5. The report relates to an investigation into the alleged maladministration and improper conduct relating to allegations of victimisation and subjection to occupational detriment to employees on account of them having made protected disclosures in connection with the irregular appointment of service providers and personnel, irregular disposal of the SETA’s movable assets, fruitless and wasteful expenditure, as well as failure by the Chief Executive Officer (CEO) of the Manufacturing Engineering Related Services Education and Training Authority (merSETA) to institute disciplinary proceedings against an official who have contravened the SETA’s Code of conduct.

2. THE COMPLAINTS

2.1 The first Complainant is a 46 year old married male and a sole bread winner with three (3) dependent children. One (1) of the children has already completed her tertiary education, while the other is still in Primary School and the last one is in Pre-School.

2.2 The second Complainant is a 46 year old married male with four (4) dependent children. One of the children is in a tertiary institution, while the rest are in Primary School.
2.3 Both Complainants were employed by the merSETA in the capacity of Procurement Managers: Supply Chain Management section until their subsequent dismissal by the latter. The Complainants had never been dismissed or subjected to a disciplinary enquiry by any of their previous employers.

2.4 In the main, the first Complainant alleged that:

2.4.1. He was victimised and subjected to occupational detriment and subsequently dismissed on account of having made a protected disclosure to the former merSETA CFO, Ms Beaula Dziruni as well as to a member of the merSETA Board of Directors, Ms. Malebo Mogopodi (Ms. Mogopodi), relating to allegations of irregular appointment of service providers and personnel by the CEO, Dr Raymond Patel; and

2.4.2. He also alleged that the CEO failed to take action against an employee who is alleged to have attended an official meeting while under the influence of alcohol as is required by the Code of Conduct.

2.5 The second Complainant alleged that:

2.5.1. He was improperly victimised and subjected to occupational detriment and subsequently dismissed on account of him having made a protected disclosure to the former merSETA CFO, Ms. Beaula Dziruni, in respect of what he considered to be maladministration in connection with the procurement of services on behalf of the merSETA by the CEO; and

2.5.2. For his refusal to accede to CEO’s demand to accept a position of a Senior Manager: Monitoring, which was exclusively created with the intention of moving him from the position of a Procurement Manager: Supply Chain Management, as he was seen as an obstacle to the CEO’s manipulation of the supply chain management processes.
2.5.3. In November 2012 the CEO influenced the disposal of the merSETA’s movable assets, in particular a vehicle, to his personal driver, Mr. Thomas Khoza, without following the proper disposal processes and procedures as required by the provisions of the Public Finance Management Act 1 of 1999 (PFMA); and

2.5.4. The CEO incurred irregular wasteful and fruitless expenditure to amounting to R80 000.00 by commissioning a disciplinary inquiry against the first Complainant for failing to receive consumables, which yielded no positive results contrary to the provisions of the PFMA, 1999.

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. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5. In the matter of the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”

3.6. In the above-mentioned Constitutional Court judgment, the Chief Justice further stated the following, when confirming the powers the Public Protector:

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

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

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution.
3.6.4 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);

3.6.5 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);

3.6.6 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);

3.6.7 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);

3.6.8 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));

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

3.6.10 “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));
3.7. The merSETA is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

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

4. THE INVESTIGATION

4.1. Methodology

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

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.1.3. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

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:

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

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4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on legislation, prescripts and policies regulating the protection of whistleblowers, recruitment of personnel and procurement by organs of state.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the merSETA or organ of state to prevent maladministration and prejudice.

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

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

4.3.1 Whether the CEO subjected the Complainants to occupational detriment and subsequently dismissed them on account of them having made protected disclosures to the former merSETA CFO as well as to a member of the merSETA Board of Directors respectively, and if so, whether his conduct constitutes maladministration or improper conduct;
4.3.2 Whether the CEO improperly influenced and authorised the appointment of certain service providers to render services at the merSETA contrary to the legislation and prescripts regulating procurement processes in the public sector, and if so, whether his conduct constitute maladministration or improper conduct;

4.3.3 Whether the CEO improperly authorised the appointment of personnel in positions for which they allegedly possessed no relevant qualifications or experience, which were not advertised and on his instruction, and if so, whether his conduct constitutes maladministration or improper conduct;

4.3.4 Whether the CEO improperly influenced the disposal of the merSETA's movable asset contrary to the legislation and prescripts regulating disposal of assets in the public sector, and if so, whether his conduct constitutes maladministration or improper conduct;

4.3.5 Whether the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary enquiry against the second Complainant, which did not yield results and was later aborted, and if so, whether his conduct constitutes maladministration or improper conduct;

4.3.6 Whether the CEO failed to institute disciplinary action against an employee who had contravened the merSETA Code of Conduct, and if so, whether his conduct constitutes maladministration or improper conduct; and

4.3.7 Whether the Complainants were improperly prejudiced by the CEO's conduct as envisaged in section 6(4)(a)(v) of the Public Protector Act, 1994.
4.4. Whereas the investigation encompassed the above-mentioned issues, findings I could not make findings in respect of issue 2 above, as a result that it came to my attention that same is a subject of an investigation currently conducted by Colonel, Jack Shivuri of the SAPS Directorate of Priority Crime Investigation (DPCI), informally known as the HAWKS, under Brixton SAPS CAS Numbers 306/11/2017 and 307/11/2017 respectively.

4.5. In the circumstances, I deferred the investigation of issue 2 referred to above, with a view to avert interfering with an investigation currently conducted by the DPCI as envisaged by section 17E (9) (b) of the SAPS Act 68 of 1995 (as amended), and with a view to avert duplication of work currently carried out by the DPCI.

4.6. The Key Sources of Information

4.6.1. Documents

4.6.1.1. A copy of Mr. Bertram Baird’s claim documents;
4.6.1.2. A copy of Mr. Bertram Baird’s affidavit dated 31 October 2011;
4.6.1.3. A copy of Mr. Takalani Desmond Murathi’s affidavit dated 24 March 2014;
4.6.1.4. A copy of a redeployment letter from Dr. Raymond Patel dated 13 January 2011 addressed to Mr. Bertram Baird;
4.6.1.5. A copy of a redeployment reminder letter from Dr. Raymond Patel dated 20 January 2011 addressed to Mr. Bertram Baird;
4.6.1.6. A copy of envisioned suspension letter from Dr. Raymond Patel dated 23 February 2011 addressed to Mr. Bertram Baird;
4.6.1.7. A copy of a disciplinary proceedings report compiled by Mr. Stephan Hardie from Tokiso Dispute Settlement (Pty) Limited dated 28 March 2011;
4.6.1.8. A copy of appeal documents by Mr. Bertram Baird dated 31 March 2011;
4.6.1.9. Copies of curriculum vitae of the following employees:
(a) Mr. Owen Dudley Steyn;
(b) Ms. Carmen Imelda Adams;
(c) Mr. Bafana Petrus Peo;
(d) Mr. Grant Anthony;
(e) Mr. Cameron Wesley Theron;
(f) Mr. Neil Lewis;
(g) Mr. Fabian Brown;
(h) Mr. Derrick Roy Peo;
(i) Ms. Romiella Sarojini Pillay;
(j) Ms. Aretha Enthea Williams; and
(k) Ms. Mufaro Flora Nkomo.

4.6.1.10. Copies of the following advertised positions:

(a) Project Manager: New Venture Creations;
(b) Project Manager: Career Development;
(c) Administrator: Supply Chain;
(d) Client Liaison;
(e) Call Centre Supervisor;
(f) Administrator Central Administration-Head Office;
(g) Administrator: Supply Chain;
(h) Human Resource Officer;
(i) Manager: Legal and Governance.

4.6.2. Interviews conducted

4.6.2.1. Meeting with Mr. Bertram Baird, the first Complainant, on 22 August 2016;
4.6.2.2. Meeting with Mr. Takalani Murathi, the second Complainant, on 18 September 2017;
4.6.2.3. Meeting with Ms. Malebo Mogopodi, merSETA Board Member on 24 April 2017;

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4.6.2.4. Meeting with Ms. Beaula Dziruni, merSETA former Chief Financial Officer on 15 May 2017;

4.6.2.5. Meeting with Ms. Nolwazi Simelane, merSETA Senior Manager: Human Resource Department on 24 April 2017;

4.6.2.6. Meeting with Ms. Reshoketswe Mosuwe, merSETA Senior Manager: SCM and Contracts Management on 24 April 2017;

4.6.2.7. Meeting with Mr. Rod Chammudzi, Managing Director of Motlhompegi Management Consultants and Projects on 18 October 2017; and

4.6.2.8. Meeting with the CEO of the merSETA, Dr. Raymond Andrew Patel on 13 March 2018.

4.6.3. **Correspondence sent and received**

4.6.3.1. A copy of a letter dated 10 November 2011 from the Public Protector addressed to Dr. Raymond Patel requesting documents pertinent to the investigation;

4.6.3.2. A copy of an email correspondence from Ms. Beaula Dziruni dated 25 June 2014 addressed to the Public Protector confirming her presence in a meeting wherein Mr. Bertram Baird was threatened with termination of employment by Dr. Raymond Patel;

4.6.3.3. A copy of letter from the Public Protector dated 31 May 2017 addressed to Dr. Raymond Patel requesting responses to allegations levelled against him by Mr. Bertram Baird;

4.6.3.4. A copy of a response letter from Dr. Raymond Patel dated 19 July 2017 addressed to the Public Protector responding to allegations made against him by Mr. Bertram Baird;
4.6.3.5. A copy of a letter from the Public Protector dated 10 August 2017 addressed to Ms. Dziruni requesting comments on the alleged victimisation of Mr. Bertram Baird;

4.6.3.6. A copy of an email response from Ms. Dziruni dated 16 August 2017 addressed to the Public Protector;

4.6.3.7. A copy of Dr. Patel’s response to a section 7(9)(a) Notice dated 22 February 2018;

4.6.4. Websites consulted/electronic sources

4.6.4.1. www.merseta.gov.za;
4.6.4.2. www.treasury.gov.za;
4.6.4.3. www.fsb.co.za;
4.6.4.4. www.saflii.co.za; and
4.6.4.5. www.cipc.co.za

4.6.5. Legislation and other prescripts

4.6.5.1. The Constitution of the Republic of South Africa, 1996;
4.6.5.2. The Public Protector Act No. 23 of 1994;
4.6.5.3. Protected Disclosures Act No.26 of 2000;
4.6.5.4. Public Finance Management Act No. 1 of 1999;
4.6.5.5. National Treasury: PFMA Regulations of March 2005;

4.6.6. Policies

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4.6.6.1.  merSETA Procurement Policy FIN-PL-010 of 1 September 2008;
4.6.6.2.  merSETA Procurement Procedure FIN-PR-002 of 15 February 2011;
4.6.6.3.  merSETA Recruitment Policy HRM-PL-010 of 1 September 2008;
4.6.6.4.  merSETA Code of Conduct Policy HRM-PL-014 of 1 September 2008;
4.6.6.5.  merSETA Property and Equipments (Fixed Assets) Management Policy and Procedure TFA-PL-002 of 1 September 2008;

4.6.7.  Case law

4.6.7.1.  Tshishonga v Minister of Justice and Constitutional Development and Another [2006] ZALC 104; [2007] 4 BLLR 327(LC); 2007 (4) SA 135 (LC) (26 December 2006);

4.6.7.2.  Commercial Workers Union v Mobile Telephone Networks (Pty) Limited [2003] 24 ILJ 1670 (LC);

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

5.1  Whether the CEO subjected the Complainants to occupational detriment and subsequently dismissed them on account of them having made disclosures to a Member of the Board and the former CFO respectively, and if so, whether his conduct constitutes maladministration or improper conduct;

Issues that are Common Cause

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5.1.1. It is not disputed that the Complainants were employed by the merSETA as a Procurement Managers and were subsequently dismissed from the employ of the merSETA for gross negligence on separate occasions.

**Issues in Dispute**

5.1.2. The issue for my determination was whether the CEO subjected the Complainants to occupational detriment by dismissing them from the employ of the merSETA on account of them having made protected disclosures to the former merSETA CFO, Ms Dziruni as well as to a member of the merSETA Board of Directors, Ms. Mogopodi respectively.

5.1.3. Regarding whether the CEO subjected the first Complainant to occupational detriment and subsequently dismissed him on account of him having made a protected disclosure to the former merSETA CFO as well as to a member of the merSETA Board of Directors and subsequently dismissed him as a consequence thereof:

5.1.3.1. The first Complainant alleged in November 2010, he made a protected disclosures to Ms. Beaula Dziruni and to Ms. Malebo Mogopodi in January 2011, in connection with what he considered to be maladministration and improper conduct relating to the appointment of service providers and personnel at the merSETA allegedly by the CEO.

5.1.3.2. He also alleged that once the CEO became aware of the protected disclosures he had made to Ms. Dziruni and Ms. Mogopodi, he was subjected to occupational detriment in that he was threatened with dismissal, thereafter unilaterally redeployed to a lesser position without consultation and eventually charged and dismissed from the employ of the merSETA by the CEO on unfounded allegations.
5.1.3.3. The first Complainant submitted to the Public Protector, a copy of the redeployment letter dated 13 January 2011, which provided no reasons for the redeployment and stated that:

"This serves to inform you that you are being redeployed with immediate effect to the Gauteng South Regional Office. Your job title will be Manager: Client Relations and you will report to the Senior Manager: Client Services.

Your terms and conditions of employment will remain the same." (sic)

5.1.3.4. The first Complainant also submitted a copy of a grievance letter dated 20 January 2011, which he lodged with his Manager, Ms. Dziruni as is required by the merSETA Grievance Policy, which indicates that he challenged his redeployment on the following basis:

(a) "That the re-deployment process was conducted without consultation with him and his immediate Manager and further that the CEO indicated that he did not have to provide reasons for his unilateral decision;

(b) That the redeployment amounted to a demotion in that, the new position was at a lower level; and

(c) The CEO's decision was informed by the fact that he had leaked the information to a journalist for his wrongdoing, which includes the allegation that his (CEO) wife was conducting business with the merSETA." (sic)

5.1.3.5. He further submitted, a copy of a letter which he received from the CEO, subsequent to him lodging a grievance with his Manager on 20 January 2011, regarding his redeployment which stated that:
"On 13 January 2011 you received a written instruction from my office that you are being re-deployed to the Gauteng South Regional Office with immediate effect. To date you have failed to comply with this instruction. This insubordinate behaviour constitutes unwillingness to follow an instruction and in contravention of the merSETA Policies and Code of Conduct.

This letter serves as a final instruction to immediately vacate your office and to take up your position as the new Gauteng South Client Relations Manager.

You are also expected to hand over your procurement duties to the incoming Procurement Manager. Failure to follow the abovementioned instructions will lead to the appropriate action being taken against you."

5.1.3.6. He also alleged that he was subjected to occupational detriment for his refusal to accept a position of Senior Manager. Monitoring, which was exclusively created with a view to move him from the position of Supply Chain Manager as he was seen as an obstacle to the CEO’s manipulation of the supply chain processes and for reporting allegations of fraud and corruption to the SIU.

5.1.3.7. On the other hand, the information received from Ms. Mogopodi and Ms. Dziruni, in separate meetings held with me on 15 May 2017, indicates that the first Complainant had indeed approached them (Messrs. Dziruni and Mogopodi) with a view to disclose his concerns relating to what he considered to be irregular appointment of personnel and service providers at the merSETA allegedly by the CEO.

5.1.3.8. With regard to whether the CEO threatened the first Complainant with dismissal, Ms. Dziruni stated that she cannot accurately recall whether the CEO threatened the first Complainant with dismissal, however, she stated that the CEO would at times make general comments which, when interpreted, would mean that should one do something not to his liking, such a person would accordingly be dealt with.
5.1.3.9. With regard to the redeployment of the first Complainant to the Gauteng South Regional office to assume a position of a Manager: Client Relations, Ms. Dziruni stated that the first Complainant had raised the matter with her and that she informed him that she was informed by the CEO and the Human Resource Manager, Ms. Ester Meyer of the redeployment.

5.1.3.10. She further stated that she was aware that the first Complainant had lodged a grievance in which he challenged his redeployment to the Gauteng South office with the Human Resource Department.

5.1.3.11. In a meeting with the investigation team of the Public Protector on 15 May 2017, Ms. Mogopodi confirmed that the first Complainant approached her with a view to disclose his concerns relating to what he considered to be the irregular appointment of personnel and service providers at the merSETA by the CEO, and advised him to reduce his concerns in writing so that they could be tabled in the Board of Directors’ meeting, which never happened.

5.1.3.12. The information received from the merSETA indicates that subsequent to the first Complainant’s allegations, the merSETA appointed Comperio Technology (Pty) Limited (Comperio) to conduct an investigation to establish the veracity of allegations and to obtain necessary evidence to prove or disprove the allegations, which was concluded in July 2011 and a report was submitted with regard thereof.

5.1.3.13. According to the report submitted by the merSETA, Comperio was mandated to investigate, among other, the following allegations:

(a) Whether the CEO improperly appointed members of his family, in particular his daughter Ms. G Patel;
(b) Whether the CEO improperly ensured that his wife's company (Institute for Management and Business in Southern Africa) was awarded contracts by the merSETA;

(c) Whether the CEO improperly victimised a Project Manager, Ms. Linda Nxumalo, which led to her resignation; and

Whether the CEO improperly influenced the procurement processes at the merSETA.

5.1.3.14. The report further indicates that Comperio, on numerous occasions, attempted to interview and solicit further information from the first Complainant as the source of the allegations but to no avail. Consequently the investigation was put on hold, however, in June 2011 the merSETA Board of Directors reconsidered its position and Comperio was advised to continue with the investigation.

5.1.3.15. According to the report, the following findings and conclusions were made by Comperio on completion of the investigation:

(a) Regarding whether the CEO improperly influenced the appointment of his daughter, Ms. G Patel, it was found that in December 2010 Ms G Patel participated in the merSETA's pilot project whereby volunteers, chosen by different merSETA staff members, were offered an insight into their chosen careers and they were not remunerated for their participation;

(b) Regarding whether the CEO improperly ensured that his wife's company, Institute for Management and Business in South Africa (IMBISA) was awarded contracts by the merSETA, it was found that IMBISA was a recipient of grant funding from the merSETA from the period 2007 until May 2010, which is prior to his wife's appointment as a director thereof and further that she was removed
as a director in terms of section 220 of the Companies Act 61 of 1973 on 21 May 2008;

(c) Regarding whether the CEO improperly victimised a Project Manager, Ms. Linda Nxumalo, which led to her resignation, no evidence could be found suggesting that the CEO had indeed victimised the employee referred to above which led to her resignation;

(d) Regarding whether the CEO improperly influenced the procurement processes at the merSETA, no evidence could be found suggesting that the CEO had indeed influenced the merSETA procurement processes.

5.1.3.16. On the other hand, the information received from Mr Fabian Brown indicates that subsequent to his appointment as the Information and Communication Technology (ICT) Manager, he requested the first Complainant on 17 December 2009, to hand-over 10 navigators (which by virtue of his appointment fell under his custody) donated by Vodacom SA Limited (Vodacom), consequent to an agreement reached with it wherein the 10 navigators would be exchanged to mobile handsets, which he failed to do.

5.1.3.17. The information further indicates that on 15 February 2011, Mr Fabian Brown sent an email to the first Complainant in which he stated that:

"We have checked all user files and could not find any records within the files to whom the navigators 588's were issued to.

During this exercise we could not locate who the below handsets were issued to. Can you please indicate to whom these devises where issued to or handover such devises to me if you still have it in your possession (sic):"
5.1.3.18. In response thereof, the first Complainant, in an email dated 17 February 2011 stated as follows:

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"As mentioned to Beaula, I do not have any records in my possession thus cannot add much value to your questions. What I can suggest is that a full audit be done since the period in question to date to ascertain if everything is accounted for. The scope should include everything received from Vodacom to date. The exercise should be done by an independent form of auditors so as to avoid any misrepresentation."(sic)

5.1.3.19. Mr Fabian Brown, in response to my enquiries stated, in an affidavit dated 26 March 2018, that subsequent to the first Complainant’s failure to hand-over the navigators and cellphones referred to above, he reported the matter to his manager, Ms Moketenyana Mayongo (Ms Mayongo), who requested him to conduct a full audit on all issued and received mobile devices by the merSETA from Vodacom.

5.1.3.20. Mr Brown further stated the outcome of the audit which was submitted to the merSETA Chief Operations Officer (COO), Mr Wayne Adams, revealed that 27 cellphones and 8 Garmin navigators could not be accounted for and that this fact was brought to the attention of the first Complainant for response.

5.1.3.21. The information received from the merSETA indicates that the first Complainant was consequently served with a disciplinary charge form advising him that he was charged with misconduct in connection with allegations of theft of company property, in particular the unaccounted 27 cell phones and 8 navigators, fraud and gross negligence.

5.1.3.22. According to a letter submitted by the merSETA dated 30 March 2011, the first Complainant attended a disciplinary hearing held on 11 March 2011 and 22 March 2011 respectively on charges of theft of company property, failure to keep an updated record of company property and gross negligence and was found guilty on all charges.

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5.1.3.23. Further that due to the seriousness of the offences, the chairperson of the disciplinary hearing recommended a summary dismissal which the employer accepted and thereby advised him that his contract of employment was therefore terminated with immediate effect from 30 March 2011.

5.1.3.24. According to the letter referred to above, the first Complainant was advised that he had the right to appeal his dismissal to the Commission for Conciliation Mediation and Arbitration (CCMA) within 30 days of receipt of the letter.

5.1.3.25. I have established during the course of the investigation that the first Complainant appealed his dismissal which was on 26 April 2011 dismissed by the chairperson of the appeal hearing, Mr M.I.E Ismail, as having no merit and as a consequence, the first Complainant was dismissed from the employ of the merSETA.

5.1.3.26. The information I have received from the merSETA and the first Complainant further indicates that the matter was subsequently referred to the CCMA for arbitration and it was set down for hearing on 08 August 2011, 12 September 2011, 13 October 2011 and 23 January 2012 respectively and remained part-heard and was eventually finalised on 06 March 2012 wherein the CCMA found that the first Complainant's dismissal was both substantively and procedurally fair.

5.1.3.27. The investigation of the matter further revealed that the first Complainant, subsequent to the CCMA ruling, lodged his complaints with the office of the Public Service Commission (PSC) on 04 May 2011(a month after his dismissal), which through its Chairperson, Ms Phelele Tengeni referred it to the Public Protector on 27 July 2011.

5.1.4. Regarding whether the CEO subjected the second Complainant to occupational detriment and subsequently dismissed him on account of him having made a protected disclosure to the former merSETA CFO, as well as to the Special Investigating Unit (SIU):

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5.1.4.1. The second Complainant alleged that he was subjected to occupational detriment and subsequently dismissed on account of him having made a protected disclosure to the former merSETA CFO, as well as to the SIU on 24 March 2014 relating to allegations of recruitment and procurement malpractice on the part of the CEO.

5.1.4.2. On the other hand, the former merSETA CFO, Ms. Dziruni confirmed in a meeting held on 15 May 2017 with the Public Protector that the second Complainant had indeed approached her to raise malpractice on the part of the CEO, nevertheless, his concerns related to the scoring of certain service providers by the certain members of Bid Evaluation Committee (BEC) and not in connection with allegations of maladministration and improper conduct on the part of the CEO.

5.1.4.3. The information I have received from the merSETA’s Human Resources Department indicates that the second Complainant was appointed by the merSETA in the capacity of Client Relations Manager for the Gauteng South office effective from on 01 July 2008 and later elevated to the position of Manager: Supply Chain Management on 13 January 2011 consequent to the suspension of Mr Bertram Baird.

5.1.4.4. The information also indicates that the second Complainant was on 10 March 2010, charged by the merSETA for being absent from work for a period of five days without submitting leave request for approval, as well as for his failure to submit a Projection Plan for 23 February 2010 and a weekly Chief Operations Officer (COO) Report for 26 February 2010. Further that he appealed the sanction of a final written notice on 24 March 2010 on the basis that the process was procedurally and substantively unfair which was dismissed.
5.1.4.5. According to the information received, the second Complainant, in the capacity of a Financial Manager: Supply Chain Management section, was further on 12 April 2013 charged for gross misconduct for his failure to acknowledge receipt and safekeeping of computers, computer consumables worth over R1 million, which exposed the organisation to financial risk and which had the potential of an unfavourable audit outcome.

5.1.4.6. I have also established during the course of the investigation that the disciplinary action instituted against the second Complainant, in connection with the above stated charge was never concluded and as a consequence thereof, he included same in his complaint lodged with SIU on 24 March 2014, alleging that the CEO failed to prevent irregular, fruitless and wasteful expenditure which is dealt with later in the report.

5.1.4.7. The information I have received from the merSETA, further shows that the second Complainant was on 20 January 2014, served with suspension notice on full pay pending an investigation into allegations of misconduct relating to the following:

(a) irregular disposal of the merSETA pool vehicle, in particular a Toyota Corolla with registration number SMN 219 GP;

(b) failure to ensure that tender specifications are complied with relating to tenders awarded to Tasma Construction (Tasma) and Methaga Investments CC (Methaga) which resulted in prejudice and unavoidable risk to the employer;

(c) utilisation of a service provider’s workers appointed by the merSETA to render services at its offices for performing private work at his residences situated in Cosmo City Randburg and in Venda;

(d) gross negligence in connection with the appointment of Methaga to provide gardening services at the merSETA premises;
(e) non-compliance to company procedures, tender requirements and contractual conditions.

5.1.4.8. The merSETA also submitted a report dated 14 April 2014 in connection with an investigation conducted by Nexus Forensic Services (Pty) Limited (Nexus), in which it was recommended that:

(a) The issue on the irregular disposal of the merSETA pool vehicle and the manipulation of the bidding process with regard thereto, must be referred to the South African Police Service (SAPS) for further investigation and a disciplinary action taken against the second Complainant for contravention of the merSETA Internal Disciplinary Code Policy;

(b) Disciplinary action be instituted against the second Complainant for contravention of PFMA: Treasury Regulations 16A.8.1, 16A.8.2, 16A.8.3 and clause 10.4.1 of the merSETA Code of Conduct;

(c) Disciplinary action be instituted against the second Complainant for contravention of section 57(a),(b), (c) and (e) of the PFMA 1999 and contravention of the merSETA Code of Conduct read with the merSETA Code of Ethics; and

(d) The CEO report the second Complainant’s conduct to Treasury in accordance with PFMA: Treasury Regulation 16A.9.1 (b) (i).

5.1.4.9. I further established that subsequent to receipt of the investigation report by the merSETA, the second Complainant was on 06 May 2014 served with a disciplinary charge form advising him of a charge of gross negligence preferred against him.
5.1.4.10. On 22 May 2015, subsequent to the disciplinary hearing held on 8 April 2015 to 15 April 2015 and 08 May 2015, the second Complainant was served with a dismissal letter indicating that his employment contract was terminated effective from 22 May 2015 subsequent to the chairperson of the disciplinary hearing finding him guilty of improper conduct in connection with the disposal of the merSETA pool vehicle, in particular a Toyota Corolla with registration number SMN 219 GP and recommended a summary dismissal which the employer accepted.

5.1.4.11. On 28 May 2015, the second Complainant lodged an appeal against his dismissal which was heard on 12 June 2015 on the basis that the process was not procedurally and substantively fair. On 18 June 2015, the chairperson of the appeal hearing, Ad. W.J Hutchinson dismissed the appeal and advised the second Complainant that he has a right to refer the alleged unfair dismissal to the CCMA within 30 days.

5.1.4.12. The second Complainant thereby, on 19 June 2015 referred the matter to the CCMA on the basis that his dismissal was not procedurally and substantively fair and argued that the chairperson failed to consider all the facts relevant to the issues and requested that he be re-instated to his position.

5.1.5. Dr. Patel contended in his response addressed to the Public Protector on 19 July 2017 that he did not victimise nor subject the Complainants to occupational detriment on account of them having made protected disclosures to the former CFO and a member of the merSETA Board of Directors. In his response he stated that:

"According to him, a protected disclosure is a disclosure of information by an employee who has reason to believe that the information so disclosed shows or tends to show, amongst others, that a criminal offence has been committed, is being committed or it is likely to be committed."
That the requirement that the employee “has reason to believe” requires that the employee must have objective facts on the basis of which the belief is held.

In the case of Messrs Baird and Murathi, both of them had no objective facts to hold the required belief and for this reason alone, they did not make protected disclosure as contemplated in the PDA. The allegations made by the Complainants were not made in good faith, but for their own personal gain.

A purported protected disclosure, which is not made in good faith does not qualify for protection under the PDA. The Complainants were not subjected to any occupational detriment. Further that conduct constitutes an occupational detriment if, amongst others, the employee is subjected to disciplinary action, or the employee is suspended, dismissed, demoted, harassed or intimidated or is otherwise adversely affected in respect of his or her employment on account of having made a protected disclosure.

According to him, it follows that in order to constitute an occupational detriment, there must be a close connection between the making of the disclosure and the conduct which is complained of. In this case, the two Complainants failed to establish a connection between each of the conduct complained of and the disclosures. This is due to the fact that there has never been such a connection.

The Complainants were subjected to a fair disciplinary hearing proceedings at which they were charged, prosecuted and found guilty after which they were dismissed. Further that both Complainants challenged their dismissals at the relevant Labour Dispute Resolution Institutions established in terms of the Labour Relations Act 55 of 1995 (LRA) and failed.
The fact that the Complainants did not succeed in challenging their dismissals at the relevant Labour Dispute Resolution Institutions is a clear indication that there is no merit in their allegations that they were subjected to victimisation and occupational detriment.”

5.1.6. In response to a section 7(9)(a) Notice with regard to the allegation that he subjected the Complainants to occupational detriment, Dr. Patel in paragraphs 2(2.1) to (2.6) stated as follows:

**Par. 2.1:** The re-deployment letter on which the Public Protector has based its finding that I subjected the first Complainant, Mr. Bertram Baird, to occupational detriment was issued to Mr. Baird on 13 January 2011.

**Par. 2.2:** On or about 17 January 2011 Mr. Baird obtained legal representation from Thabang Ntshebe Attorneys and referred the matter to the CCMA. I attach hereto as Annexure RP1 And RP2 the letter received from the attorneys for Mr. Baird as well as the referral to the CCMA respectively.

**Par. 2.3:** Mr. Baird then proceeded to lodge a formal grievance in terms of the merSETA Grievance Policy on 20 January 2011. A copy of the lodgement of grievance form is attached as Annexure RP3.

**Par. 2.4:** On 1 February 2011 the attorneys for the merSETA addressed a letter to Mr. Baird’s attorneys advising them that the merSETA was unable to process the internal grievance since Mr. Baird had already referred the matter to the CCMA.
As such, the matter at the CCMA proceeded and on 16 February 2011 an agreement was reached between the parties in terms of which Mr. Baird was reinstated to his position as Procurement Manager with immediate effect. He was further granted special leave with full pay until 23rd February 2011. The letter from the attorneys as Annexure RP4 and RP5. Mr. Baird later underwent a fair disciplinary process that found him guilty of theft which was the reason for his dismissal from the merSETA.

Par. 2.5: In light of the above, Mr. Baird utilised the legal avenues available to him at the time of his re-deployment. As a result thereof, he was reinstated into the position he held prior to my issuing him with the re-deployment letter. Therefore, the Protected Disclosures Act does not have application in this situation as Mr. Baird utilised the CCMA as well as legal representation to provide a defence to his re-deployment.

Par. 2.6: The maladministration on my part was corrected by the CCMA and the merSETA implemented the decision of the CCMA. The Public Protector is not in position to now impose that a further remedy must be granted to Mr. Baird as the matter is res judicata. He accepted the decision of the CCMA and abided by it as well. Any financial remedy that may be paid to Mr. Baird will result in fruitless and wasteful expenditure. "(sic)"

5.1.7. Dr Patel submitted a copy of an agreement concluded between the parties (the first Complainant and the merSETA) which indicates that on 16 February 2011, the parties resolved the dispute referred to the CCMA under Case No GAJB 1028/11 on the following basis:

(a) The employee is re-instated in his position as Procurement Manager with immediate effect;

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(b) The employee shall remain on a fully paid special leave and report for duty on 23 February 2011; and

(c) The legal representatives will meet before 23 February 2011 in an attempt to finally and fully resolve any matters that may affect the employment relationship.

5.1.8. In an interview held on 13 March 2018, with the investigation team, Dr Patel stated that he was not aware of any protected disclosures made by the first Complainant to anyone employed by the merSETA, that he only became aware of the alleged protected disclosure when a section 7(9)(a) Notice in terms of the Public Protector Act, 1994 was submitted to him for response and that the first Complainant was not dismissed for reasons related to the alleged disclosures.

5.1.9. He further indicated that in 2010, the first Complainant made allegations that he (CEO) had improperly influenced the appointment of his daughter to the merSETA. As a consequence, the merSETA commissioned an investigation which established that the allegation made by the first Complainant were unfounded.

5.1.10. Dr. Patel also stated that the gist of the allegation lodged by the first Complainant emanates from his dissatisfaction with a recommendation that he must dismissed from the employ of the merSETA following a disciplinary hearing conducted by Tokiso Dispute Settlement (Pty) Limited (Tokiso), which found him guilty on allegations of theft of company property, failure to keep an updated record of company assets and gross negligence.
5.1.11. In a meeting referred to above, Dr Patel also stated that, subsequent to the first Complainant’s comprehension that he was going to face a disciplinary hearing for allegations of theft, failure to keep an updated records of company assets and gross negligence, he (first Complainant) approached Ms. Dziruni and Ms. Mogopodi in December 2010 and January 2011 respectively, with a view to raise his concerns regarding to what he had considered to be malpractice on his part, with a view of diverting attention from his infractions.

5.1.12. Dr. Patel further stated that following the conclusion of a disciplinary enquiry, the first Complainant was found guilty for theft, failure to keep an updated record of company assets and gross negligence and as a consequence thereof a sanction of dismissal was recommended by the disciplinary hearing chairperson, Mr Stephen Hardie on 28 March 2011, which the employer accepted.

Application of the relevant law

5.1.13. The PDA 2000, imposes a duty in terms of section 3 on employers in the private and public sectors to provide protection against occupational detriment on employees who make a disclosures which are protected in terms of the Act and/or in accordance with the Act and procedures authorised by their employer.

5.1.14. Section 3 of the PDA further 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.”

5.1.15. Section 6 (1) (a) of the PDA provides that: “Any disclosure made in good faith and substantially in accordance with any procedure prescribed, or authorised by the employee’s employer for reporting or otherwise remedying the impropriety concerned, is a protected disclosure.

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5.1.16. Section 6 (2) of the PDA provides that: "An employee who, in accordance with a procedure authorised by his or her employer, makes a disclosure to a person other than his or her employer, is deemed, for the purposes of this Act, to be making the disclosure to his or her employer."

5.1.17. The merSETA Fraud Prevention Policy and Plan prescribes procedures and steps in which an employee of the MerSETA should follow when raising his/her concerns regarding malpractice within the MerSETA.

5.1.18. Clause 17 (17.1) of the merSETA Fraud Prevention Policy and Plan, 2008 that: "The following steps should be followed to raise a concern within the SETA:

**Step one:** If you have a concern about malpractice, we hope you will feel able to raise it first with the CFO. This may be done verbally or in writing.

**Step two:** If an employee is unable to raise the matter with the person referred to in step 1, for whatever reason, or s/he is involved, the matter may be raised with the CEO or any member of the Audit and Risk Committee.

**Step three:** If these channels have been followed and an employee still has concerns, or if the matter is so serious that an employee cannot discuss it with any of the above, the matter may be reported to: vuvuzela Hotline at 0800 36 36 36 or merSETA@thehotline.co.za

5.1.19. It then follows that if a disclosure is made to an employer in terms of section 6 of the PDA, 2000, a number of conditions must be satisfied before such a disclosure can qualify as a protected disclosure. One of the condition for a disclosure to be protected is that the employee making such a disclosure must make same in good faith and in accordance with the procedure prescribed by the employer. Furthermore, there ought to be some relationship between the disclosure and the detriment.
5.1.20. The evidence and information discussed above indicates that, although the first Complainant followed the correct procedure prescribed by the employer to raise his concerns regarding to what he had considered to be malpractice on the part of the CEO as envisaged by section 6(1)(a) of the PDA, 2000 read with clause 17 (17.1) of the merSETA Fraud Prevention and Policy 2008, the disclosures were not made in good faith and further that same was made after the fact.

5.1.21. Subsequent to the realisation that he was to be subjected to a disciplinary hearing for allegations theft, failure to keep updated records of company assets and gross negligence, which were successfully proven by the merSETA, the first Complainant approached Ms Dziruni as well as Ms Mogopodi with a view to raise allegations of malpractice on the part of the CEO in an attempt to divert attention from his infractions.

5.1.22. The evidence and information discussed above further indicates that the purported protected disclosure made by the second Complainant was not related to allegations of maladministration and improper conduct on the part of the CEO.

5.1.23. Furthermore, the evidence and information indicates that the second Complainant, subsequent to being charged for gross negligence relating to the disposal of the merSETA pool vehicle, approached the SIU on 24 March 2014 with a view to disclose malpractice on the part of the CEO and later on 20 June 2014 approached the Public Protector to lodge a complaint in connection with the same allegations.

5.1.24. Likewise, the evidence and information discussed above indicates that the second Complainant’s purported protected disclosure was not made in good faith and further that same was made after the fact.
5.1.25. The principle of good faith was enunciated in *Tshishonga v Minister of Justice and Constitutional Development* and another where it was held at paragraphs 203-205 that:

"An employee may reasonably believe in the truth of the disclosures and may gain nothing from making them, but his good faith or motive would be questionable if the information does not disclose an impropriety or if the disclosure is not aimed at remedying a wrong…

Good faith is a finding fact. The court has to consider all the evidence cumulatively to decide whether there is good faith or an ulterior motive, or, if there are mixed motives, what the dominant motive is.

A whistleblower is unlikely to have ‘warm feelings’ about the wrongdoing or person against whom disclosure is made. At the other extreme a whistleblower who is overwhelmed by ulterior motive, that is, a motive other than to prevent or stop wrongdoing, may claim the protection under the PDA. The requirement of good faith therefore invokes a proportionality test to determine the dominant motive."

5.1.26. In *Communication Workers Union v Mobile Telephone Networks (Pty) Limited* it was held that:

"However, as I have noted, the protection extended to employees by the PDA is no unconditional.

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2 [2006] ZALC 104; [2007] 4 BLLR 327(LC); 2007 (4) SA 135 (LC) (26 December 2006)
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The PDA sets the parameters of what constitutes a protected disclosure, as well as the manner of permissible disclosure by workers. The definition of ‘disclosure’ clearly contemplates that it is only the disclosure of information that either discloses or tends to disclose forms of criminal or other misconduct that is subject of protection under the PDA.

The disclosure must also be made in good faith. An employee who deliberately sets out to embarrass or harass an employer is not likely to satisfy the requirement of good faith.

... However, more extensive the rights established by the PDA might be in the employment context, I do not consider that it was intended to protect what amounts to mere rumours or conjecture."

5.1.27. The evidence and information received and analysed during the course of the investigation indicates that there exists no relationship between theComplainants’ dismissals and the alleged protected disclosures made to Messrs. Dziruni and Mogopodi.

5.1.28. It further does not indicate that the CEO’s conduct in respect thereof amounted to prejudicial conduct as envisaged in section 6(4)(a)(v) of the Public Protector Act, 1994 and improper conduct as envisaged in section 182(1) of the Constitution.

Conclusion

5.1.29. I am therefore, not making any finding nor taking any appropriate remedial action with regard thereto.
5.2 Regarding whether the CEO improperly influenced and authorised the appointment of certain service providers to render services at the merSETA contrary to the legislation and prescripts regulating procurement processes in the public sector;

**Issues that are Common Cause**

5.2.1. It is not disputed that the merSETA had embarked upon an exercise of procurement of services from the following service providers:

<table>
<thead>
<tr>
<th>No.</th>
<th>Service Provider</th>
<th>Services Rendered</th>
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<tbody>
<tr>
<td>1.</td>
<td>K Seven Investments (K7);</td>
<td>KwaZulu-Natal Regional office accommodation</td>
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<tr>
<td>2.</td>
<td>Mobile Satellite Technologies (Pty) Limited (MST)</td>
<td>Lease of an I-Lab bus</td>
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<td>3.</td>
<td>Self-Empowerment International (Pty) Limited (SEI)</td>
<td>HIV/AIDS workplace management programme</td>
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<td>4.</td>
<td>Giant Leap Workspace Specialists (Pty) Limited (Giant Leap)</td>
<td>Office demarcation</td>
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<tr>
<td>5.</td>
<td>P and D Building Contractors (P&amp;D)</td>
<td>Office refurbishment at the SETA’s Melville Office</td>
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<tr>
<td>6.</td>
<td>Apple Blossom Catering CC (Apple Blossom)</td>
<td>Canteen and catering services</td>
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<tr>
<td>7.</td>
<td>Mothomphegi Management Consultants and Projects CC (MMC&amp;P)</td>
<td>Sub-contracted to Qubelisa Empowerment Enterprise and Training (Pty) Limited</td>
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<tr>
<td>8.</td>
<td>Lesidi Consulting Projects</td>
<td>Bathroom refurbishment</td>
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<tr>
<td>9.</td>
<td>Landshark Agencies (Landshark)</td>
<td>Golf Day Management and facilitation</td>
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<td>11.</td>
<td>Redpeg (Pty) Limited (Redpeg)</td>
<td>HIV/AIDS workplace training</td>
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<tr>
<td>12.</td>
<td>Growth Laboratory (Pty) Limited (Growth Lab)</td>
<td>Analysis of Work Skill Plan and Annual Training Reports</td>
</tr>
<tr>
<td>13.</td>
<td>VKN Services (Pty) Limited (VKN)</td>
<td>Short-term insurance brokerage</td>
</tr>
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</table>

**Issues in Dispute**

5.2.2. The issue for my determination was whether service providers referred to in paragraph 5.2.1 above, were appointed contrary to legislation and prescripts regulating procurement processes in the public sector.

5.2.3. I have established from the investigation that the issue regarding whether the CEO improperly influenced and authorised the appointment of certain service providers to render services at the merSETA is a subject of an investigation currently conducted by Colonel Jack Shivuri of the South African Police Service’s (SAPS) DPCI under Brixton SAPS CAS Numbers 308/11/2017 and 307/11/2017 respectively.

5.2.4. As a consequence thereof, I deferred the investigation of the issue referred to above, with a view to avert interfering in an investigation currently conducted by the DPCI as envisaged by section 17E (9) (b) of the SAPS Act 68 of 1995 (as amended), and with a view to avert duplication of work currently carried out by the DPCI.

5.3 Whether the CEO improperly influenced and authorised the appointment of personnel who allegedly possessed no relevant qualifications or experience for positions appointed into, which were not advertised and on his instruction and contrary proper recruitment processes in accordance with the merSETA’s Recruitment Policy:
Issues that are Common Cause

5.3.1. It is not in disputed that between 2007 and 2012, the merSETA embarked on a recruitment process to fill vacant positions existing within the institution, which led to the appointment of the following personnel:

<table>
<thead>
<tr>
<th>No.</th>
<th>Full Names and Surname</th>
<th>Position appointed into</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Mr. Owen Dudley Steyn</td>
<td>Project Manager: New Venture Creations</td>
</tr>
<tr>
<td>2.</td>
<td>Ms. Carmen Imelda Adams</td>
<td>Project Manager: Career Development</td>
</tr>
<tr>
<td>3.</td>
<td>Mr. Bafana Petrus Motsepe</td>
<td>Administrator Supply Chain</td>
</tr>
<tr>
<td>4.</td>
<td>Mr. Grant Victor Anthony</td>
<td>Client Liaison Officer</td>
</tr>
</tbody>
</table>

Issues in Dispute

5.3.2. The issue for my determination was whether the CEO improperly influenced and authorised the appointment of:

(a) Mr. Owen Dudley Steyn (Mr. Steyn) in the position of a Project Manager: New Venture Creations, despite the fact that the position was not advertised and that Mr. Steyn did not possess the relevant qualifications and/or experience for the position referred to above;

(b) Ms. Carmen Imelda Adams (Ms. Adams in the position of Project Manager: Career Development despite the fact the position was not advertised and owing to the fact that Ms. Adams is a long-time friend of the CEO, as well as to the fact that Ms. Adams as related to the director of Growth Laboratories, and entity which provided service on behalf of the merSETA.

(c) Mr. Bafana Petrus Motsepe (Mr. Motsepe) in the position of Administrator: Supply Chain Management upon his (CEO’s) instruction; and
(d) Mr. Grant Victor Anthony (Mr. Anthony) in the position of Client Liaison Officer, in a manner that was inconsistent with the merSETA’s Recruitment Policy.

5.3.2.1. The appointment of Mr. Steyn in the position of Project Manager: New Venture Creations;

5.3.2.1.1. Regarding the appointment of Mr. Steyn, the first Complainant alleged that the CEO influenced and authorised the appointment of Mr. Steyn in the position of Project Manager: New Venture Creations, despite the fact that the position was not advertised and that Mr. Steyn did not possess the relevant qualifications and/or experience for the position appointed into.

5.3.2.1.2. The CEO denied in his response addressed to the Public Protector dated 19 July 2017, that he influenced and authorised the appointment of Mr. Steyn in the position of a Project Manager: New Venture Creations, as alleged by the first Complainant.

5.3.2.1.3. On the other hand and in response to my enquiries dated 8 November 2017, the former Human Resource Manager, Ms. Ester van der Linde (Ms. van der Linde), stated that she commenced employment with the merSETA in the position of Human Resources Manager on 19 May 2008 and that processes followed and any appointments made prior to 19 May 2008 will not be within her knowledge.

5.3.2.1.4. Ms. van der Linde stated that Mr. Steyn commenced his employment with the merSETA on 2 July 2008 as the New Venture Creation Project Manager. Further that at the time of his appointment, Mr. Steyn possessed the following qualifications:

(a) Diploma in Higher Education from the University of Western Cape obtained in 1983;

(b) Bachelor of Arts from the University of the Western Cape obtained on 17 February 1984; and
(c) Bachelor of Education from the Rand Afrikaans Universiteit obtained on 27 April 1990.

5.3.2.1.5. Ms. van der Linde also stated that Mr. Steyn, had been employed as a teacher since 1983 and thereafter a Deputy Principal from 1994 until his employment at the merSETA, therefore he possessed the requisite qualifications, competencies and skills required for the position that he was employed in.

5.3.2.1.6. The information I have received from Ms. Nolwazi Simelane, MerSETA’ Senior Manager: Human Resource Department, indicates that on 27 June 2008 the merSETA’s General Manager: Projects, Mr. Derrick Peo submitted a Draft Application for Temporary/contract staff requesting the CEO’s approval for the appointment of a Project Manager: New Venture Creations on a fixed term contract.

5.3.2.1.7. According to the draft application for temporary/contract staff referred to above, experience, skills and competencies required for appointment in the position of a Project Manager: New Venture Creations were as follows:

(a) Four year Bachelor of Commerce degree or three year degree and one year post graduate qualification in enterprise development;
(b) Five to ten years’ experience in the manufacturing and engineering environment, with experience of business ownership as an added advantage;
(c) Experience of working with government departments such as the Department of Public Works, Department of Public Enterprises and the Department of Trade and Industry; and
(d) Project Management or education and training skills and expertise.

5.3.2.1.8. According to Mr. Steyn’s curriculum vitae submitted by the MerSETA through Ms. Simelane (Senior Manager: Human Resource Department), Mr. Steyn, at the time of appointment possessed twenty five years’ experience in the education field.
5.3.2.2. The appointment of Ms. Adams as a Project Manager: Career Development:

5.3.2.2.1. Regarding the appointment of Ms. Adams, Mr. Baird alleged that the CEO influenced and authorised the appointment of Ms. Adams in the position of Project Manager: Career Development, despite the fact the position was not advertised and owing to the fact that Ms. Adam was a long-time friend of the CEO, as well as to the fact that Ms. Adams was related to the director of Growth Laboratory, an entity which provided services on behalf of the merSETA.

5.3.2.2.2. The CEO denied in his response dated 19 July 2017, that he influenced and authorised the appointment of Ms. Adams in the position of a Project Manager: Career Development, as alleged by the first Complainant.

5.3.2.2.3. As in the case of Mr. Steyn and in her response to my enquiries dated 8 November 2017, the former Human Resource Manager, Ms. van der Linde, stated that she commenced employment with the merSETA in the position of Human Resources Manager on 19 May 2008 and that processes followed and any appointments made prior to 19 May 2008 will not be within her knowledge.

5.3.2.2.4. Ms. van der Linde also stated that Ms. Adams commenced employment at the merSETA on the 1st of January 2010 on a fixed term contract until 31 March 2010, as a Project Manager.

5.3.2.2.5. She further stated that the position of Project Manager: Career Development was advertised with a closing date of 10 May 2010. Ms. Adams applied for the position, was shortlisted and interviewed. She was the top scoring candidate in the interviews and was subsequently appointed to the position.

5.3.2.2.6. Ms. van der Linde continued by stating that at the time of appointment Ms. Adams was in possession of the following qualifications:
(a) A Further Diploma in Education with the field of study being Educational Management obtained from the Rand Afrikaans Universiteit (now University of Johannesburg) on 23 April 2002; and

(b) A Bachelor of Education Honours with the field of study being Education, Training and Development obtained from the University of Johannesburg on 19 April 2005.

5.3.2.7. She further stated that Ms. Adams was employed as a teacher from 1989 until 2003, thereafter she was employed in the Further Education and Training sector from 2003 until 2010, and that at the time of appointment she was employed by Key ETD Projects as a Human Resource Director.

5.3.2.8. Ms. van der Linde also stated that Ms. Adams possessed the requisite qualifications, competencies and skills required for the position of Project Manager: Career Development and as a consequence thereof, she was accordingly appointed in the position.

5.3.2.9. According to a copy of the advertisement submitted by the merSETA through the Senior Manager: Human Resource Department, Ms. Nolwazi Simelane and analysed during the course of investigation confirmed that the position of Project Manager: Career Development was advertised internally by the merSETA with a closing date set for 10 May 2010.

5.3.2.10. According to a copy of the advertisement referred to above and inspected, the qualities, experience, knowledge and skills required for the position were as follows:

(a) Post graduate qualification in related field;
(b) Project Management qualification will be beneficial;
(c) Five years’ working experience in the education and training filed;
(d) Experience in education and training with a focus on career advisory and
development;
(e) Analytical thinking;
(f) Innovation;
(g) Organising and planning;
(h) Strategic analysis and problem solving skills;
(i) High level written and oral communication skills;
(j) Commercial awareness;
(k) Attention to detail; and
(l) Resilience

5.3.2.2.11. I have established from a copy of an interview schedule submitted during the
investigation that Ms. Adams was invited to an interview which was held on 17
June 2010. According to a copy of the score-sheet submitted by the merSETA
through Ms. Notwazi Simelane, Ms. Adams was scored as follows by a panel
consisting of Ms. Ester Meyer Mr. Christo Basson and Mr. Tom Mkhwanazi:

<table>
<thead>
<tr>
<th>Name of Candidate</th>
<th>Carmen Adams</th>
<th>Thabang Jase</th>
<th>Annamitah Phuti</th>
<th>Motseki Mokonyane</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ester Meyer</td>
<td>37</td>
<td>31</td>
<td>Absent</td>
<td>25</td>
</tr>
<tr>
<td>Christo Basson</td>
<td>43</td>
<td>35</td>
<td>Absent</td>
<td>19</td>
</tr>
<tr>
<td>Tom Mkhwanazi</td>
<td>40</td>
<td>32</td>
<td>Absent</td>
<td>34</td>
</tr>
<tr>
<td>Total per candidate</td>
<td>120</td>
<td>98</td>
<td></td>
<td>78</td>
</tr>
</tbody>
</table>

5.3.2.2.12. I also established from a copy of Ms. Adams’ curriculum vitae and copies of
qualifications that at the time of appointment, Ms. Adams was in possession of
the following qualifications:
(a) Further Diploma in Education (Educational Management) obtained from the Rand Afrikaanse Universiteit on 23 April 2002; and

(b) Bachelor of Education (Honours) specialising in Education, Training and Development obtained from the University of Johannesburg on 19 April 2005.

5.3.2.2.13. It was further established from Ms. Adams’ curriculum vitae, that she was employed as a:

(d) Teacher from 1989 to 2003;
(e) Consultant: Curriculum Development in the Further Education and Training sector from 2003 to 2010;
(f) Project Unit Manager at G’Lab from May 2006 to January 2009;
(g) Human Resource Director at Key ETD Projects from July 2009 until her appointment by the merSETA.

5.3.2.3. The appointment of Mr. Motsepe as an Administrator, Supply Chain Management:

5.3.2.3.1. Regarding the appointment of Mr. Motsepe, the first Complainant alleged that Mr. Motsepe was appointed in the position of an Administrator: Supply Chain Management on instruction of the CEO.

5.3.2.3.2. The CEO denied in his response addressed to the Public Protector dated 19 July 2017, that he instructed that Mr. Motsepe be appointed in the position of Administrator: Supply Chain Management, as alleged by the first Complainant.

5.3.2.3.3. As in the case of Mr. Steyn, Ms. Adams and in response to my enquiries dated 8 November 2017, the former Human Resource Manager, Ms. van der Linde, stated that she commenced employment with the merSETA in the position of Human Resources Manager on 19 May 2008 and that processes followed and any appointments made prior to 19 May 2008 will not be within her knowledge.

Report of the Public Protector

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5.3.2.3.4. Ms. van der Linde also stated that Mr. Motsepe commenced his employment with the merSETA as an Administrator: Supply chain Management on 5 September 2012.

5.3.2.3.5. She further stated that, the position of Administrator: Supply Chain was advertised by the merSETA with the closing date set for 25 July 2012. Further that Mr. Motsepe applied for the position and was shortlisted for interviews which were held on 30 August 2012.

5.3.2.3.6. Ms. van der Linde further stated that at the time of appointment by the merSETA, Mr. Motsepe was in possession of the following qualifications:

(a) Senior Certificate obtained on 1 January 1992; and
(b) Diploma in Warehouse Management obtained from Damelin Management College.

5.3.2.3.7. She further stated that prior to his appointment by the MerSETA, Mr. Motsepe was employed as:

(a) Storeman from 1995 to 1998;
(b) Warehouse supervisor at Bytes Technologies from 1998 to 2002;
(c) Storeman from 2002 to 2004 at Lipton Griffin International;
(d) Dealer Coordinator at Lipton Griffin International from 2004 to 2005;
(e) Inventory Controller at WorldNet Logistics from 2005 to 2008; and
(f) Bond Store Supervisor/Export Controller and SHE Officer at WorldNet Logistics from 2008 to 2011.
5.3.2.3.8. Ms. van der Linde also stated that Mr. Motsepe possessed the requisite qualifications, competencies and skills required for the position of Administrator: Supply Chain Management and as a consequence thereof, he was accordingly appointed in the position.

5.3.2.3.9. According to a copy of the advertisement submitted by Ms. Nolwazi Simelane, merSETA’s Senior Manager: Human Resource Department, during the investigation, it was established that the peremptory requirements for the position of an Administrator: Supply Chain Management were as follows:

(a) Matric /NQF level 4 qualification;
(b) Bachelor of Commerce/National Diploma in Finance, Accounting or Supply Chain Management/Public Administration or at least five years’ experience in stock control/management;
(c) Driver’s licence;
(d) The ability to keep all logs, account control books and other documentation and ensure that these are clean and orderly condition;
(e) Maintain the security of assets and confidential information;
(f) Understanding of relevant legislations context and purchasing;
(g) Knowledge of SETA industry will be advantage;
(h) High level of proficiency in Microsoft Office packages;
(i) Ability to work under pressure and meet deadlines, both independently and within a team;
(j) Attention to detail;
(k) Analysis and problem solving skills;
(l) Interpersonal sensitivity;
(m) Planning, organising and the ability to compile reports;
(n) High level of verbal and written communication skills; and
(o) Knowledge of administration processes and procedures and practices.
5.3.2.3.10. I have established from a copy of an interview schedule submitted during the investigation that Mr. Motsepe was invited to an interview which was held on 30 August 2010. According to a copy of interview score sheet submitted by Ms. Nolwazi Simelane, Mr. Motsepe was scored as follows, by a panel consisting of Mr. Joseph Peele, Mr. Takalani Murathi and Mr. Charles Kok:

<table>
<thead>
<tr>
<th>Name of Panel Member</th>
<th>Scores awarded to candidates (by name of candidate)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Machego</td>
</tr>
<tr>
<td></td>
<td>Ester Leshilo</td>
</tr>
<tr>
<td></td>
<td>Petrus Motsepe</td>
</tr>
<tr>
<td></td>
<td>Moosa Fraser</td>
</tr>
<tr>
<td>Joseph Peele</td>
<td>28</td>
</tr>
<tr>
<td>Takalani Murathi</td>
<td>27</td>
</tr>
<tr>
<td>Charles Kock</td>
<td>27</td>
</tr>
<tr>
<td>Total per candidate</td>
<td>82</td>
</tr>
<tr>
<td></td>
<td>31</td>
</tr>
<tr>
<td></td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>84</td>
</tr>
<tr>
<td></td>
<td>79</td>
</tr>
</tbody>
</table>

5.3.2.3.11. I also established from Mr. Motsepe’s curriculum vitae, that prior to his appointment by the merSETA, he was employed as:

(a) Storeman from 1995 to 1998;
(b) Warehouse supervisor at Bytes Technologies from 1998 to 2002;
(c) Storeman from 2002 to 2004 at Lipton Griffin International;
(d) Dealer Coordinator at Lipton Griffin International from 2004 to 2005;
(e) Inventory Controller at WorldNet Logistics from 2005 to 2008; and
(f) Bond Store Supervisor/Export Controller and SHE Officer at WorldNet Logistics from 2008 to 2011.
5.3.2.4. The appointment of Mr. Anthony as a Client Liaison Officer:

5.3.2.4.1. Regarding the appointment of Mr. Anthony, Mr. Baird alleged that Mr. Anthony was appointed in the position of Client Liaison Officer, in a manner that was inconsistent with the merSETA's Recruitment Policy.

5.3.2.4.2. Having received neither the requested documentation from the merSETA nor documents in support of the allegation from the first Complainant, I could not make a determination with regard to the appointment of Mr. Anthony in the position of Client Liaison Officer.

5.3.2.4.3. Nonetheless, according to a letter of appointment submitted by Ms. Nolwazi Simelane, I have established that Mr. Anthony was appointed to a position of a Client Liaison Officer in the Gauteng Regional Office on 18 May 2009 effective from 1 June 2009.

5.3.2.4.4. I further established from Mr. Anthony's curriculum vitae that he was in possession of a Matric Certificate, N1 and N2 in Electrical Engineering. Furthermore, it was established from Mr. Anthony's curriculum vitae that prior to his appointment by the merSETA, he held the following positions:

(a) Assistant to the Manager at Grand Personnel from May 2003 to January 2004, a Receiving Clerk (Perishables) at Spar North Rand from January 2004 to June 2004,
(b) Scheduler (Perishables) Spar North Rand from June 2004 to November 2004,
(c) Inventory Supervisor Spar North Rand from November 2004 to April 2007; and
(d) Client Services Administrator at MerSETA from 25 September 2007 until his dismissal by the latter on 14 September 2009.
Application of the relevant law

5.3.3. Clause 7.1 of the merSETA Recruitment Policy of 2008, provides that:

"It is normal practice for merSETA to advertise a position internally first. In exceptional circumstances such as scarce skills positions will be advertised internally and externally simultaneously."

5.3.4. Clause 10.2.3 of the merSETA Recruitment Policy provides that:

"The shortlist of external candidates would be based on applicants who meet the minimum requirements of the position and in line with the merSETA Employment Equity targets.

5.3.5. Clause 17.3.1 of the merSETA Recruitment Policy of 2008, provides that:

"Temporary appointments may be made on short notice to fill a vacancy for a few days, weeks or up to three months."

5.3.6. Clause 17.4.1 of the merSETA Recruitment Policy of 2008, provides that:

"Fixed term appointments of staff are obtained by the merSETA for a specific task or project and are placed on a time related fixed term contract"

5.3.7. Clause 17.5.3 of the merSETA Recruitment Policy of 2008, provides that:

"All temporary and fixed term contract positions must be approved by the CEO"
5.3.8. The evidence discussed above indicates that the merSETA, through the General Manager: Projects, requested the CEO to approve a request for the appointment of a Project Manager: New Venture Creations on a fixed term contract in accordance with clauses 17.3.1, 17.4.1 and 17.5.3 of the merSETA Recruitment Policy 2008.

5.3.9. The evidence further indicates that the merSETA advertised the positions of a Project Manager: Career Development and an Administrator: Supply Chain Management in accordance with the provisions of clauses 7.1 and 10.2.3 of the merSETA Recruitment Policy 2008.

5.3.10. A determination on whether Mr. Anthony was appointed in the position of a Client Liaison Officer in accordance with the provisions of the merSETA Recruitment Policy 2000, could not be made consequent to unavailability of supporting documents.

5.3.11. It then follows that Mr. Steyn was accordingly appointed in the in the position of Project Manager: New Venture Creations subsequent to him possessing extensive experience in the education field, which was one of the requirements set down in the advertisement.

5.3.12. It also follows that the position of a Project Manager: Career Development was internally advertised on the merSETA website and notice boards to which Ms. Adams accordingly applied for and as a result of her meeting the minimum requirements set out in the advertisement, was eventually shortlisted for interviews which were held on 17 June 2010.

5.3.13. Furthermore, consequent to Ms. Adams obtaining the highest scores in the interviews, she was accordingly appointed in the position referred to above.
5.3.14. It further follows that the position of an Administrator: Supply Chain Management was internally advertised on the merSETA website and notice boards to which Mr. Motsepe accordingly applied for and as a result of him meeting the minimum requirements set out in the advertisement, was eventually shortlisted for interviews which were held on 30 August 2012.

5.3.15. Furthermore, consequent to Mr. Motsepe obtaining the highest scores in the interviews, he was accordingly appointed in the position referred to above.

5.3.16. While no evidence could be found substantiating that the CEO improperly authorised the appointment of personnel, I noted from the copies of the advertisements which were inspected during the investigation, that persons mentioned hereunder, were invited for interviews and subsequently appointed to positions on advertisements which were clearly marked internal advertisement and which did not make provision for the consideration of external candidates and therefore not eligible for invitation to the interviews:

(a) Mr Cameron Wesley Theron;
(b) Mr Fabian Brown;
(c) Ms Carmen Imelda Adams;
(d) Mr Derrick Roy Peo;
(e) Ms Romiella Sarojini Pillay;
(f) Mr Bafana Petrus Motsepe;
(g) Ms Aretha Enthea Williams; and
(h) Ms Mufaro Flora Nkomo.

**Conclusion**

5.3.17. In the circumstances, I am not making a finding nor taking any remedial action with regard thereto.

Report of the Public Protector
5.4 Whether the CEO improperly facilitated the disposal of the merSETA’s movable asset contrary to legislation and prescripts regulating the disposal of assets in the public sector:

**Issues that are Common Cause**

5.4.1. It is not disputed that the merSETA, in November 2012, embarked on a process of disposal of obsolete movable assets, in particular pool vehicles, by way of an auction to the highest bidder.

5.4.2. It is also not disputed that officials or employees of the merSETA at B-Band salary level and below were invited by the merSETA’s Supply Chain Management department to submit bids for the vehicles to be disposed of through a competitive bidding process.

**Issues in Dispute**

5.4.3. The issue for my determination was whether the CEO improperly facilitated the transfer of one of the vehicles, in particular a Toyota Corolla vehicle with registration number TLF 123 GP to his driver, Mr. Thomas Khoza, contrary to legislation and prescripts regulating the disposal of assets in the public sector.

5.4.4. The second Complainant, in an affidavit submitted to the SIU when lodging his complaints against the CEO and subsequently submitted to the Public Protector stated that:

"As a Supply Chain Manager, part of my responsibilities include disposal of assets. I was instructed to dispose of merSETA pool vehicles by means of sale to the highest bidder to officials at and below the B-Band salary level. Although this was contrary to the PFMA and the merSETA Asset Management Policy."
I sold the cars over two rounds, firstly three cars were sold in November 2012 and the rest had to be sold in February 2013. The CEO called me and told me that I should exclude one vehicle, a Toyota Corolla with registration number TLF 123 GP on the list for the sale. The CFO also called me to emphasize the same point; I excluded the car on the list. After second round of sales, the CFO and CEO decided to conduct investigation on the sale of the vehicles before giving me the go ahead to transfer the vehicles to the buyers.

Officials who bought the cars were called and asked if they had bought the cars on behalf of some senior people or persons. Some were even put under duress and threatened with dismissal if they did not tell the truth. When I got these reports, I did not do anything as I had nothing to hide. They did find that one official, Ms. Gabi Kubheka had purchased a vehicle on behalf of Mr. Mthunzi Lubando for R40 000.00.

I expected some action to be taken as the management was so eager to deal with whoever would have done this. Instead, I was told to write a memo reporting the outcome of their investigation and requesting them to refund Mr. Lubando. A cheque was written out to Mr. Lubando and the car was awarded to the next highest bidder for a price of R35 000.00.

The Senior Accountant: reporting-Mr. Graham Carr told me that the CEO had paid an amount of R25 100.00 from his own account into the merSETA account with the reference number TLF 123 GP.

Mr. Petrus Motsepe told me that he was told by the CEO to transfer the car to Mr. Thomas Khoza, his driver, without going through the disposal process. I told the CFO this but she didn’t seem interested in the matter. She told me to “just leave it, you know the CEO.”(sic)
5.4.5. The second Complainant alleged that during the disposal of the merSETA’s obsolete pool vehicles, he was called in by the CEO and informed that he should exclude a Toyota Corolla with registration number TLF 123 GP from the list of vehicles to be disposed of.

5.4.6. The CEO denied in his response addressed to the Public Protector dated 19 July 2017, that he influenced the transfer of the merSETA vehicle to his personal driver.

5.4.7. On the other hand, in response to my enquiries of 24 October 2017, Mr. Thomas Khoza (the CEO personal driver) stated that during 2012, the merSETA disposed some of its vehicles through a competitive bidding process, in which he participated.

5.4.8. He also stated that he was interested in bidding for a vehicle with registration number TLF 123 GP, however, he was advised by the second Complainant that the vehicle would not be part of the vehicles to be disposed of as it was utilised for deliveries by the merSETA and that it would only be disposed when a new vehicle was procured.

5.4.9. Mr. Khoza further stated that subsequent to his further enquiries pertaining to the auctioning of the vehicle referred to above, he was advised by the second Complainant that the vehicle would be sold for an amount of R 21, 100.00. He also stated that he subsequently obtained the amount required to secure the sale of the vehicle from sources not divulged to the Public Protector.

5.4.10. Mr. Khoza further stated that as a result of the merSETA office closure for December holidays and owing to the fact that he would be travelling to the Mpumalanga Province, he requested Ms. Doreen Mbolda (the CEO’s Personal Assistant) to keep the money for safekeeping for fear that he might utilise it for the purpose not intended for, which was to purchase the vehicle disposed of by the merSETA.
5.4.11. He further stated that Ms. Doreen Mbobla (Ms. Mbobla), in return and in fearing that she might also utilise the money, gave the money to the CEO for safekeeping. Further that in January 2013, upon his return from Mpumalanga, he was informed by Ms. Mbobla that she asked the CEO to keep the money safe on her behalf.

5.4.12. He further stated that he then requested the CEO to transfer the money into the merSETA bank account on his behalf as payment for the vehicle and subsequent to the CEO transferring the money as requested, he took possession of the vehicle and had it registered under his name in March 2013.

5.4.13. On the other hand, Ms. Mbobla in her email response to my enquiries dated 20 October 2017, confirmed that Mr. Khoza had requested her to keep the money referred to above for safekeeping and stated that:

"Mr. Thomas Khoza gave me R20 000.00 cash in December 2012 for safe keeping, which he said was to purchase a vehicle from the merSETA auction. Due to me having to travel to the Eastern Cape during the holiday season, I requested Dr. Raymond Patel, as someone I could trust, to keep it safe. I informed Mr. Khoza that I had given his money to Dr. Patel for safe keeping." (sic)

Application of the law

5.4.14. Section 54 (2) (d) of the PFMA, 1999 provides that before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:

(d) acquisition or disposal of a significant asset;
5.4.15. The National Treasury: PFMA Regulations 2005, in section 16A7.1 further provides that the disposal of movable assets must be at market-related value or by way of price quotations, competitive bids or auction, whichever is most advantageous to the state, unless determined otherwise by the relevant treasury.

5.4.16. The Preferential Procurement Policy Framework Act Regulation 20.2.1 of 11 December 2011, provides that “in instances where assets are sold or leased by means of advertised competitive bids or written price quotations or by auctions the award must be made to the highest bidder.”

5.4.17. Clause 12 (a) of the merSETA Property and Equipment (Fixed Assets) Management Policy of 1 September 2008, provides that “assets previously acquired will eventually be disposed of as per the PPPFA and PFMA.”

5.4.18. The Policy further provides, in clause 12 (b) that, “all disposals must be approved by the Procurement Committee and reported to the CEO and EXCO, in line with the Procurement Policy authority matrix.”

5.4.19. The evidence and information discussed above indicates that the merSETA invited its officials at B-Band salary scale and below to submit bids for obsolete pool vehicles to be disposed of in accordance with the provisions of the PFMA 1999, PPPFA: Regulations, 2011 and the merSETA’s Property and Equipment (Fixed Assets) Management Policy, 2008.

5.4.20. The information also indicates that Mr. Khoza, as one of the merSETA’s employees at B-Band salary scale, participated in a competitive bidding process for an obsolete vehicles to be disposed of by the merSETA, which process was overseen by second Complainant, in particular a Toyota Corolla with registration number TLF 123 GP as required by the National Treasury Regulations read with the merSETA’s Property and Equipment (Fixed Assets) Management Policy.
5.4.21. It then follows that the disposal of movable assets in the public sector must be at market-related value or by way of price quotations, competitive bids or auction, whichever is most advantageous to the state.

5.4.22. The merSETA in the circumstances invited its officials at B-Band salary level and below to submit bids for obsolete vehicles to be disposed of as is required by the provisions of Treasury Regulation 16A7.1 read with the merSETA’s Property and Equipment (Fixed Assets) Management Policy.

5.4.23. Therefore, the allegation that the CEO improperly facilitated the disposal of the merSETA’s movable asset, in particular a Toyota Corolla vehicle with registration number TLF 123 GP contrary to legislation and precripts regulating the disposal of assets in the public sector has no merit and could not be supported by the evidence and information received and extensively examined during the course of the investigation.

Conclusion

5.4.24. In the circumstances, I am not making a finding nor taking any remedial action with regard thereto.

5.5 Whether the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary proceedings which yielded no results and which was later aborted;
Issues that are Common cause

5.5.1. It is not disputed that the second Complainant was subjected to a disciplinary enquiry for his failure to acknowledge receipt of Information Technology (IT) assets worth over R1 million which were delivered to the merSETA offices without his supervision as a Financial Manager: Supply Chain Management unit, which exposed the organisation to huge financial risk and an unfavourable audit outcome.

Issues in Dispute

5.5.2. The issue for my determination was whether the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary inquiry against the second Complainant which yielded no results and which was later aborted.

5.5.3. The second Complainant alleged that the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary enquiry against him for gross negligence at a cost of R 20, 000.00 per day, which did not yield results and which was later aborted.

5.5.4. The CEO denied in his response to the Public Protector dated 19 July 2017, that he had caused irregular, fruitless and wasteful expenditure in commissioning a disciplinary inquiry against the second Complainant, which yielded no results and later aborted.

5.5.5. The CEO also stated that merSETA is obligated to investigate allegations of wrongdoing submitted to it and cannot refrain from doing so simply because there is a fear that the Public Protector’s office might consider the action to constitute wasteful and fruitless expenditure.
5.5.6. The CEO further stated that disciplinary hearing proceedings are by their nature not always guaranteed to result in an employee being found guilty and when that happens, it does not necessarily mean wasteful and fruitless expenditure has been incurred.

5.5.7. Ms. Lindiwe Ndlela, in her response dated 6 March 2018 to my enquiries, stated that:

"This enquiry was never concluded due to Mr. Murathi’s and his representative’s own delaying tactics. He insisted to be represented by an external party which was not customary at the time and can’t actually remember now if it was policy issue) but was granted such a privilege. He was represented by a lady called Gracia (whose surname I do not remember from Nehawu.

The first day of the hearing conducted by with an independent Chairperson from Tokiso (cannot confirm date at this point). The next date of the hearing was set and agreed upon by all parties and the Chairperson also confirmed availability.

You are correct in stating that fruitless and wasteful expenditure was incurred for the second sitting as this did not take place and as stated in my previous response, the costs to Tokiso would be incurred if a Chairperson is booked and confirmed and cancellation happens at the last minute. The person who is responsible for fruitless and wasteful expenditure is Mr Murathi himself This, I also stated in my email to him when he indicated that the day before the set date that he was no longer available.

Mr Murathi informed us the day before the hearing that he can no longer attend as he was taking leave and taking his son to hospital for circumcision. I responded with a firm reprimand. Firstly because I had not approved any leave, and the policy required that such an approval should be sort days prior.
Secondly, I stated that circumcision is not an emergency procedure and that he must know about it for days as a booking would have been required. Lastly, I stated the financial to the entity should the enquiry not go ahead as sat down.

He was defiant and insubordinate and actually responded with rather disrespectful memo to me. This memo formed part of his and our evidence in the final enquiry that saw him fired. He cited victimization and went as far as questioning my competence/ I choice not to respond to the memo as I saw it as an intentional act to build up a case of constructive dismissal.

This was the only instance where fruitless and wasteful expenditure was incurred. Thereafter, it became increasingly difficult to find a date to continue with the enquiry as Mr Murathi’s representative was never available. This continued to drag on for months and essentially overlapped the final disciplinary hearing which led to his dismissal."(sic)

5.5.8. The merSETA on the other hand, through the Senior Manager: Human Resource Department, Ms. Nolwazi Simelane, submitted the second Complainant’s disciplinary file which indicates that, on 12 April 2013 he was served with a disciplinary charge form by the former CFO, Ms. Ndlela, for gross negligence which had arisen as a result of the following facts:

(a) failure to acknowledge receipt of computers, computer consumables and their safekeeping worth over R1 million by the second Complainant as a Financial Manager: Supply Chain; and

(b) the lack of management of receipt of the assets and their safekeeping which exposed the organisation to a financial risk and unfavourable audit outcome.
5.5.9. On the other hand and in his response to my enquiries dated 18 January 2018, the merSETA Human Resources Manager; Mr. Simon Mabusela, stated that:

"HR has gone through the personal file for the above mentioned ex-employee and could only find the charge sheet, notice to attend the hearing, the transcript of the said hearing conducted on 25 April and 08 May 2013. There is no indication of the case been finalised or such record is not in the file."

5.5.10. Furthermore, in response to the Public Protector’s enquiries dated 25 October 2017 and on behalf of Tokiso Dispute Settlement (Pty) Limited, Ms. Lungi Bhengu (Ms. Bhengu) stated that:

"According to our records it looks like this matter never concluded." (sic)

5.5.11. Ms. Bhengu submitted copies of invoices which indicates that the merSETA was billed as follows for services rendered:

<table>
<thead>
<tr>
<th>No.</th>
<th>Invoice Number</th>
<th>Date</th>
<th>Description</th>
<th>Amount (VAT Inclusive)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>IN1605</td>
<td>23 April 2013</td>
<td>Panellist fee</td>
<td>R 14,592.00</td>
</tr>
<tr>
<td>2.</td>
<td>IN1693</td>
<td>30 April 2013</td>
<td>Panellist fee</td>
<td>R 11,172.00</td>
</tr>
<tr>
<td>3.</td>
<td>IN1950</td>
<td>28 June 2013</td>
<td>Panellist fee</td>
<td>R 6,726.00</td>
</tr>
</tbody>
</table>

Total amount billed R 32,490.00

5.5.12. Dr. Patel in paragraphs 3(3.1) to (3.8) of his response to the section 7(9)(a) Notice stated as follows:
"Par. 3.1: The disciplinary process against Mr Murathi were commissioned by the then Chief Financial Officer ("CFO"), Ms Lindiwe Ndlela, due to Mr Murathi’s failure in the performance of his duties. Clause 12.5.7 of the Notice in terms of Section 7(9(a) issue to me states that the second complainant was served with a disciplinary charge from the former CFO for negligence. I did not play any role in the issuing of the disciplinary charge or in the commissioning of the disciplinary enquiry against Mr Murathi.

Par. 3.2: Section 1 of the Public Finance Management Act 1 of 1999 ("the PFMA") defines fruitless and wasteful expenditure as expenditure which is made in vain and would have been avoided had reasonable care been exercised. Instituting disciplinary proceedings against an employee who has committed an act of misconduct and failed in the performance of their duties should not be construed as an action that has been taken in vain.

The merSETA Disciplinary Code Policy states at Paragraph 5 that the essential features of the disciplinary procedure are that:

5.1.1. Discipline is essential for orderly conduct of any organisation;

5.1.2. All employees are subject to discipline and to disciplinary action if required; and

5.1.3. Taking disciplinary action is the responsibility of the employer and the ultimate authority remains with the employer."
Par. 3.3: I stand by my previous statement that the merSETA is obligated to investigate allegations of wrongdoing submitted to it and that it cannot refrain from doing so simply because of a fear that the office of the Public Protector may find such disciplinary action to constitute fruitless and wasteful expenditure. Furthermore, disciplinary proceedings are indeed not guaranteed, such costs would have still been incurred had the employee been found guilty of the charges.

Par. 3.4: Section 57(c) of the PFMA provides as follows:

"An official in a public entity must take effective and appropriate steps to prevent any fruitless and wasteful expenditure within that official's area of responsibility."

Section 38(1)(g) of the PFMA provides as follows:

"The accounting officer must on discovery of fruitless and wasteful expenditure, immediately report in writing, particulars of the expenditure to the relevant treasury."

Section 38(1)(h) of the PFMA provides as follows:

"The accounting officer must take effective and appropriate disciplinary steps against any official in the service of the department or constitutional institution who makes or permits fruitless and wasteful expenditure."

Par. 3.5: Notwithstanding paragraph 3.3 above, the PFMA in Section 57(c) places a duty on individual officials of public entities to take effective and appropriate steps to prevent fruitless and wasteful expenditure.

Section 38(1)(g) and (h) places the onus on me as the accounting officer, upon discovery of the fruitless and wasteful expenditure, to report the said expenditure to the National Treasury and to institute disciplinary proceedings against the official who incurred the fruitless and wasteful expenditure.

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Par. 3.6: It stands without question then that the responsible official whose area of responsibility within which the alleged fruitless and wasteful expenditure is said to have been incurred, is the former CFO of the merSETA. My duties as the accounting officer, now that I have been informed of the said fruitless and wasteful expenditure, would be to report the expenditure to National Treasury. Unfortunately, due to the fact that the former CFO has left the employ of the merSETA, I am unable to institute disciplinary proceedings against her.

Par. 3.7: In addition to the sentiments expressed above, in the Labour Court application brought by Mr Murathi against the former Minister of Higher Education, Dr Blade Nzimande, Ms Phindile Baleni, myself, the former CFO, and the former Senior Human Resources Manager, Ms Aretha Williams, under case J2076/14, Ms Ndlela in the Answering Affidavit she filed in response to Mr Murathi’s Founding Affidavit dealt with the issue of the disciplinary enquiry in question. In paragraph 211 of the Answering Affidavit Ms Ndlela states as follows:

2.1.1. In respect of the averment contained in paragraph 64(a), I deny that the process was abandoned midway without explanation. The charges in April 2013 were for gross negligence in an area of the applicant’s responsibility.

2.1.2. The hearing was not abandoned. It has just been concluded because of the applicant’s dilatory tactics and continuous unavailability of his union representative.

Par. 3.8: In light of the former CFO’s affidavit mentioned above, it is clear that Mr Murathi was in fact engaging in delay tactics with regard to this disciplinary enquiry and the failure of his union representative to appear at the hearings was the main cause for the non-conclusion of the process.
This allows me to draw the inference that it is in fact Mr Murathi who caused the fruitless and wasteful expenditure and not the former CFO of the merSETA. Mr Murathi and his union representative were not cooperative in the process which led to the process not being concluded prior to the final disciplinary charges being laid against him which eventually led to his dismissal."(sic)

In a meeting held on 13 March 2018 with the Public Protector, Dr. Patel stated that in terms of the merSETA delegation of authority, the overall financial accountability resided with the CEO and conceded that he fell short in ensuring that the disciplinary proceedings against the second Complainant was concluded, which caused the merSETA to incur to fruitless and wasteful expenditure by securing the presence of the presiding chairperson allocated to hear the matter and whose services were not utilised.

Application of the relevant law

5.5.13. In terms of section 1 of the Public Finance Management Act 1 of 1999 (PFMA), fruitless and wasteful expenditure means expenditure which was made in vain and would have been avoided had reasonable care been exercised.

5.5.14. Section 51 (1) (c) of the PFMA, 1999 provides that "an accounting authority for a public entity 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."

5.5.15. Section 51 (1) (e) (iii) of the PFMA, 1999 provides that "an accounting authority for a public entity must take effective and appropriate disciplinary steps against any employee of the public entity who make or permits an irregular expenditure or a fruitless and wasteful expenditure."
5.5.16. Section 57 (c) of the PFMA, 1999 provides that "an official in a public entity 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."

5.5.17. Section 83 (3) of the PFMA, 1999 provides that an official of a public entity to whom a power or duty is assigned in terms of section 56 commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty."

5.5.18. A charge of financial misconduct against an accounting officer or official referred to in section 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in section 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of section 85.

5.5.19. Treasury regulations 4.1.3 provides that "if an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority and/or the Department of Public Service and Administration initiates appropriate disciplinary proceedings against the accounting officer."

5.5.20. It then follows that it is the responsibility of the accounting authority of a public entity to ensure that the expenditure of the public entity is managed efficiently and effectively and that appropriate disciplinary steps are taken against whoever causes the public entity to incur fruitless and wasteful expenditure.
5.5.21. It also follows that the accounting officer of a public entity commits an act of financial misconduct by wilfully or negligently failing to comply with his or her general responsibilities, as well as specific responsibilities related to prevention of unauthorised, irregular or fruitless and wasteful expenditure.

5.5.22. While the CEO did not commission a disciplinary proceedings against the second Complainant, the information obtained indicates that he failed, in the capacity of the merSETA accounting officer, to prevent fruitless and wasteful expenditure, as well as to manage the merSETA’s expenditure by ensuring that the disciplinary proceedings against the second Complainant paid for by the merSETA is concluded, the fact which he conceded to.

5.5.23. Therefore, the CEO failed to prevent irregular, fruitless and wasteful expenditure as defined in section 1 of the PFMA, 1999.

Conclusion

5.5.24. In the circumstances, I find that the CEO’s conduct amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994, to act of financial misconduct as envisaged in section 83 (3) of the PFMA and improper conduct as envisaged in section 182 (1) of the Constitution.

5.6 Whether the CEO improperly failed to institute disciplinary action against an employee who contravened the merSETA’s Code of Conduct:

Issue that are Common Cause

5.6.1. It is not disputed that in March 2010, an official of the MerSETA (herein referred to as Mr. X to protect his identity and to avoid infringing on his rights) attended an official merSETA business meeting convened between the merSETA and Self-
Empowerment (Pty) Limited (SEI) at the merSETA Head Office whilst under the influence of alcohol.

**Issues in Dispute**

5.6.2. The issue for my determination was whether the CEO failed to institute disciplinary proceedings against Mr. X for contravening the merSETA Code of Conduct read with the merSETA Disciplinary Code Policy.

5.6.3. The first Complainant alleged that, in March 2010, Mr. X attended an official merSETA business meeting convened between the merSETA and SEI at the merSETA Head Office in Melville Johannesburg in connection with the HIV/AIDS Pilot tender, whilst under the influence of alcohol, which was direct contravention of the merSETA’s Code of Conduct Policy read with the merSETA Disciplinary Code Policy and no action was taken against him.

5.6.4. The CEO conceded in his response addressed to the Public Protector dated 19 July 2017, that Mr. X attended and official business meeting whilst under the influence of alcohol and stated that:

"It is correct that an employee attended an official function under the influence of alcohol."

5.6.5. The CEO also stated that there are various ways of disciplining an employee. There are also instances where the very purpose of discipline may be achieved other than by subjecting an employee to a disciplinary hearing and punishment.

5.6.6. The CEO further stated that an investigation on this issue revealed that the employee in question has had his confidential medical condition disclosed without his consent. This resulted in him resorting to drinking alcohol.

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5.6.7. The CEO also stated that that merSETA decided to assist Mr. X to obtain the necessary and relevant professional assistance as opposed to punishing him and that Mr. X did receive the necessary and relevant professional assistance as a result of which he overcome that which caused him to resort to alcohol.

5.6.8. The CEO further stated that had it not been for the merSETA’s intervention, this would not have been achieved and that merSETA in this regard, does not perceive the decision of not subjecting the employee to a disciplinary action as misconduct and maladministration on his part.

5.6.9. Dr. Patel, in his response to the section 7 (9)(a) Notice regarding the allegation that he failed to institute disciplinary action against an employee who contravened the merSETA’s Code of Conduct, stated in paragraphs 4 (4.1) to (4.4) that:

*Par. 4.1:* “As stated in my previous response on this issue, an investigation into the matter revealed that the employee’s confidential medical condition had been disclosed without his consent. This disclosure was made by Mr Bertram Baird. Mr Baird did not stop there in his attempts at embarrassing the said employee, he continued further into the year 2011 after his dismissal wherein he embarked on a large scale smear campaign of the merSETA, myself and other executive and senior managers at the merSETA. A copy of an email Mr Baird sent under the guise of someone else to merSETA staff is attached as RP6.

*Par. 4.2:* Clause 7.3 of the merSETA HIV and AIDS Policy provides as follows:

“If a situation arises where an employee is found to be HIV positive and where his performance is affected, it is management’s duty to ensure that they are not simply discharged. This would be unfair labour practice.”

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Par. 4.3: Clause 7.6 of the merSETA HIV and AIDS policy provides:

"Subsequent to informing the SETA about their HIV/AIDS status, the employee must be encouraged and supported by their line manager to participate in counselling services provided by the officially appointed Employee Wellness Providers."

Par. 4.5: It is therefore my duty as the employee's line manager in terms of the merSETA Policy to encourage the employee to participate in counselling services as his behaviour was not solely due to alcoholism but it was caused by the disclosure of his status to the merSETA staff without his consent. Proceeding with disciplinary process against this employee would have been tantamount to an unfair labour practice as prescribed by the policy."(sic)

5.6.10. In a meeting held on 13 March 2018, Dr. Raymond Patel stated that according to the merSETA Disciplinary Policy, the sanction for being under the influence during working hours is dismissal. In response to the allegation that Mr X attended an official merSETA business meeting while under the influence of alcohol, he stated that the matter was never reported to him.

5.6.11. The CEO, Dr Andrew Patel stated that on 18 July 2011, an email allegedly sent by the first Complainant to staff members surfaced in which the dignity and reputation of executive and senior managers, including the former CFO, Ms. Dziruni, Mr. Wayne Adams, Mr. Thomas Mkhwanazi and himself, were degraded and which further stated that Mr. X was HIV positive and the reason why the CEO did not dismiss him (Mr. X) was because he would commit suicide.

5.6.12. The CEO further stated that subsequent to the improper disclosure of Mr. X's status by the first Complainant, he (Mr. X) resorted not only to alcohol but to a combination of narcotic drugs and alcohol.
5.6.13. He further stated that on realising that Mr. X was dependent on substances impairing mental faculties on account of the improper disclosure of his medical status, he intervened by referring him to counselling in accordance with the merSETA HIV/AIDS Policy, in view of the fact that the dependence to narcotic drugs and alcohol emanated from the disclosure of his medical status perpetuated by the first Complainant and in the circumstances dismissing him would be unfair labour practice.

5.6.14. Dr. Patel further stated that he also referred Mr. X, as part of his management duty, to the drugs and alcohol rehabilitation programme on two occasions which failed and that on the third occasion he decided to institute his “disciplinary routine” and at that stage, Mr X took a decision to resign from his position at the merSETA, as a consequence the disciplinary proceeding could not proceed.

5.6.15. In responding to the question why a sanction contained in the merSETA Disciplinary Code Policy for being under the influence of alcohol during working hours was not imposed to Mr. X for his infraction, Dr Raymond Patel stated that they realised that their policies were in contestation with one another and had to make a judgement call on which policy takes preference.

5.6.16. He continued by stating that sanctions relevant to being under the influence during office hours contained in the merSETA Disciplinary Code Policy were not imposed against Mr. X consequent to considering his rights afforded in terms of the Constitution. Further that they have realised that the merSETA policies were in contestation with each other and as a consequence thereof, they considered the Bill of Rights as it superseded the policies.

Application of the relevant law

5.6.17. The issue relating to the conduct of the merSETA employees is regulated by the merSETA Code of Conduct Policy HRM-PL-014 and Disciplinary Code Policy HRM-004 of 1 September 2008 respectively.
5.6.18. Clause 1.3 of the merSETA Code of Conduct, 2008 provides that:

"The primary purpose of the Code is a positive one, viz. to promote exemplary conduct. Notwithstanding this, if an employee contravenes any provision of this Code or fails to comply with any provision thereof the employee guilty of misconduct will be dealt with in accordance with this Code of Conduct agreement"

5.6.19. Clause 12(12.1) (b) of the Code of Conduct provides that:

"A merSETA employee shall act responsibly (during working hours) as far as the use of alcoholic beverages or any other substance with intoxicating effect is concerned; (unbecoming conduct outside of working hours is strongly discouraged and may lead to disciplinary action if it negatively reflects on the merSETA, e.g. drunkenness, public disorder."

5.6.20. Clause 17.1 of the Code of Conduct provides that:

"Any violation of any part of this code of conduct may be cause for appropriate disciplinary action in terms of the merSETA Disciplinary Procedure."

5.6.21. Clause 2.1 of the merSETA Disciplinary Code Policy, 2008 provides that:

"The objective of this policy is to inform employees of the disciplinary action merSETA can take under certain circumstances and to provide guidelines in dealing with misconduct. The aim is to encourage good behaviour among employees that both promotes the organisations' standards and enable a safe work environment for all employees"
5.6.22. Clause 16.2 of the merSETA Disciplinary Code Policy, 2008 provides that:

"The merSETA Code of Conduct provides an extensive guideline for the expected behaviour of staff in the merSETA's employment. An employee's contract of employment also details what is expected from them in the employment relationship."

<table>
<thead>
<tr>
<th>CATEGORY OF OFFENCE</th>
<th>1ST OFFENCE</th>
<th>2ND OFFENCE</th>
<th>3RD OFFENCE</th>
<th>4TH OFFENCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALCOHOL AND/OR DRUG OFFENCES</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under the influence on the premises</td>
<td>Dismissal</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under the influence on the premises based on alcohol dependency</td>
<td>Written warning</td>
<td>Final written warning</td>
<td>Dismissal</td>
<td></td>
</tr>
<tr>
<td>Illegal possession of drugs/alcohol</td>
<td>Final written warning</td>
<td>Dismissal</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

5.6.23. The evidence discussed above indicates that Mr. X attended a merSETA's official business meeting whilst under the influence of alcohol in contravention of provisions of the MerSETA's Disciplinary Code Policy read with the MerSETA Code of Conduct Policy.

5.6.24. It then follows that any employee who fails to comply with any provision of the merSETA Code of Conduct is guilty of misconduct and that his/her conduct will be dealt with in accordance with the merSETA Code of Conduct Policy read with the merSETA Disciplinary Code Policy.
The CEO was therefore obligated to institute disciplinary proceedings against Mr. X for contravening both policies, as well as to impose a sanction relevant to the infraction referred to above in accordance with the merSETA Disciplinary Code Policy.

Conclusion

5.6.25. In the circumstances, I find that the CEO’s conduct in this regard amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act, 1994 and improper conduct as envisaged in section 182 (1) of the Constitution.

6 FINDINGS

6.1. On whether the CEO subjected the Complainants to occupational detriment on account of them having made protected disclosures to the former merSETA CFO as well as to a member of the merSETA Board of Directors respectively, and if so, whether his conduct constitute maladministration or improper conduct;

6.1.1. The allegation that the CEO subjected the Complainants to occupational detriment on account of them having made protected disclosures to the former merSETA CFO as well as to a member of the merSETA Board of Directors is not substantiated.

6.1.2. In terms of section 3 of the PDA 2000, “no employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.”

6.1.3. Section 6(1) (a) of the PDA, further provides that “any disclosure made in good faith and in accordance with any procedure prescribed, or influenced by the employee’s employer for reporting or otherwise remedying the impropriety concerned, is a protected disclosure.”

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6.1.4. The evidence and information I have received during the course of the investigation indicates that the first Complainant accordingly made a protected disclosure in accordance with the procedure prescribed by the employer envisaged by the provisions of section 6(1)(a) of the PDA 2000 read with the merSETA Fraud Prevention Policy and Plan of 2008.

6.1.5. The evidence and information further indicates that subsequent to the first Complainant’s realisation that he was going to be subjected to a disciplinary enquiry for misconduct in connection with theft of company property, failure to keep an updated record of company assets and gross negligence, approached the former merSETA CFO, Ms. Beaula Dziruni as well as a member of the merSETA Board of Directors to raise his concerns of malpractice on the part of the CEO.

6.1.6. I have also established that the second Complainant’s protected disclosure was not related to allegations of malpractice on the part of the CEO, likewise it was found that it was made after the fact and not in good faith.

6.1.7. The evidence and information I have received further indicates that subsequent to the second Complainant being charged with misconduct in connection with his failure to acknowledge receipt of computers, computer consumables worth R1 million and ensuring their safekeeping which exposed the organisation to an unfavourable audit outcome, he approached the former merSETA CFO, with a view to raise his concerns of malpractice and also lodged a complaint with the Special Investigating Unit (SIU) alleging maladministration on the part of the CEO.
6.1.8. The principle of good faith was enunciated in *CWU v Mobile Telephone Networks (Pty) Limited*\(^3\) where the Court held that the protection of whistleblowers is not unconditional, in that in order to be a protected disclosure the disclosure had to meet the requirements provided for in the Act. The Court said that an employee who makes a disclosure in order to embarrass or harass an employer could not be a disclosure made in good faith.

6.1.9. Therefore, the alleged protected disclosures made by the complainants were not made in good faith as envisaged in section 6 (1)(a) of the PDA 2000, in that the sole purpose thereof was to embarrass the employer subsequent to them being charged for gross negligence with a view to divert attention from their infractions.

6.1.10. In the circumstances, I am not making a finding nor taking remedial action with regard thereto.

6.2. On whether the CEO improperly influenced and authorised the appointment of certain service providers to render services at the merSETA contrary to legislation and prescripts regulating procurement processes in the public sector, and if so, whether his conduct constitute maladministration or improper conduct;

6.2.1. I have established during the course of the investigation that the issue regarding whether the CEO improperly influenced and authorised the appointment of certain service providers to render services at the merSETA, is a subject of an investigation currently conducted by Colonel Jack Shivuri of the South African Police Service’s DPCI under Brixton SAPS CAS Numbers 306/11/2017 and 307/11/2017 respectively.

\(^3\) [2003] BLLR 741 (LC)

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6.2.2. As a consequence thereof, I deferred the investigation of the issue referred to above, with a view to avert interfering in an investigation currently conducted by the SAPS' DPCI as envisaged by section 17E(9) (b) of the SAPS Act 68 of 1995 (as amended) and with a view to avert duplication of work currently carried out by the DPCI.

6.2.3. In the circumstances, I am not making a finding nor taking any remedial action with regard thereto.

6.3. On whether the CEO improperly influenced and authorised the appointment of personnel in positions for which they allegedly possessed no relevant qualifications or experience, which were not advertised and on his instruction, and if so, whether his conduct constitute maladministration or improper conduct;

6.3.1. The allegation that the CEO improperly authorised the appointment of personnel who allegedly possessed no relevant qualifications or experience in positions appointed into, which were not advertised and upon his instruction contrary proper recruitment processes is not substantiated.

Regarding the appointment of Mr. Owen Dudley Steyn (Mr. Steyn) to the position of Project Manager: New Venture Creations;

6.3.2. The information and evidence received during the course of the investigation indicates that the General Manager: Projects, Mr. Derrick Peo, submitted a draft application for temporary/contract staff to the CEO requesting the approval for the appointment of a Project Manager: New Venture Creations on a fixed term contract.
6.3.3. The evidence and information in this regard further indicates that one of the requirements for appointment to the position of Project Manager: New Venture Creations was experience in the education field and training, which Mr. Steyn possessed at the time of application for the position.

6.3.4. In terms of clause 17.3.1 of the merSETA Recruitment Policy of 2008 (Recruitment Policy), temporary appointments may be made on short notice to fill a vacancy for a few days, weeks or up to three months.

6.3.5. Additionally, clause 17.4.1 of the Recruitment Policy, provides that fixed term appointments of staff are obtained by the merSETA for a specific task or project and are placed on a time related fixed term contract.

6.3.6. Furthermore, clause 10.2.3 of the Recruitment Policy provides that the shortlist of external candidates would be based on applicants who meet the minimum requirements of the position and in line with the merSETA Employment Equity targets. Moreover in terms of clause 17.5.3 of the Recruitment Policy all temporary and fixed term contract positions must be approved by the CEO.

6.3.7. Therefore, the allegation that Mr. Steyn was appointed to a position of Project Manager despite that fact that he did not possess the required qualifications and/or experience has no merit and could not be substantiated by the evidence and information received and extensively analysed during the course of the investigation.

Regarding the appointment of Ms. Carmen Imelda Adams (Ms. Adams) to the position of Project Manager: Career Development;

6.3.8. The evidence and information received during the course of the investigation indicates that the merSETA advertised the position of a Project Manager: Career Development internally with a closing date for submission of applications set for 10 May 2010 on its website and notice boards to which Ms. Adams accordingly applied for.
6.3.9. The evidence and information received further indicates that on 17 December 2009, the General Manager: Projects, Mr. Derrick Peo, submitted a draft application for temporary/contract staff to the CEO requesting the approval for the appointment of a Project Manager on a fixed term contract.

6.3.10. According to a copy of the advertisement, for a candidate to qualify for appointment to the position, such an applicant must, amongst others, possess a Project Management qualification, five years' working experience in the education and training field and experience in education and training with a focus on career advisory and development.

6.3.11. The evidence and information I have received during the course of the investigation further indicates that Ms. Adams was, at the time of her application for the position referred to above, in possession of experience in the Education and training field and career development, as well in project management as required in the advertisement.

6.3.12. In terms of clause 7.1 of the Recruitment Policy, it is normal practice for the merSETA to advertise a positions internally first. However in exceptional circumstances such as scarce skills positions, the merSETA would advertise same internally and externally simultaneously.

6.3.13. In terms of clause 17.3.1 of the merSETA Recruitment Policy of 2008 (Recruitment Policy), temporary appointments may be made on short notice to fill a vacancy for a few days, weeks or up to three months.

6.3.14. Additionally, clause 17.4.1 of the Recruitment Policy, provides that fixed term appointments of staff are obtained by the merSETA for a specific task or project and are placed on a time related fixed term contract.
6.3.15. Furthermore, clause 10.2.3 of the Recruitment Policy provides that the shortlist of external candidates would be based on applicants who meet the minimum requirements of the position and in line with the merSETA Employment Equity targets. Moreover, in terms of clause 17.5.3 of the Recruitment Policy, all temporary and fixed term contract positions must be approved by the CEO.

6.3.16. I have established that as a consequence of Ms. Adams possessing the minimum requirements for the advertised position, she was accordingly appointed to the position of a Project Manager.

6.3.17. Therefore, the allegation that Ms. Adams was appointed to a position of Project Manager despite the fact that she did not possess the required qualifications and/or experience has no merit and could not be substantiated by the evidence and information received and extensively analysed during the course of the investigation.

Regarding the appointment of Mr. Bafana Petrus Motsepe (Mr. Motsepe) to the position of Administrator: Supply Chain Management;

6.3.18. The information I have received during the course of the investigation indicates that the position of Administrator: Supply Chain was advertised by the merSETA with the closing date set for 25 July 2012. Further that Mr. Motsepe applied for the position and was shortlisted for interviews which were held on 30 August 2012.

6.3.19. According to a copy of the advertisement, one of the pre-emptory requirements for the position of an Administrator: Supply Chain Management was least five years’ experience in stock control/management, which Mr. Motsepe possessed from his employment as Inventory Controller at WorldNet Logistics from 2005 to 2008 and as a Bond Store Supervisor/Export Controller at WorldNet Logistics from 2008 to 2011.
6.3.20. In terms of clause 10.2.3 of the Recruitment Policy the shortlist of external candidates would be based on applicants who meet the minimum requirements of the position and in line with the merSETA Employment Equity targets.

6.3.21. I also established that as a consequence of Mr. Motsepe possessing the minimum requirements for the advertised position, he was accordingly appointed to the position of an Administrator: Supply Chain Management.

6.3.22. Therefore, the allegation that Mr. Motsepe was appointed to a position of an Administrator: Supply Chain Management despite that fact that the position was not advertised has no merit and could not be substantiated by the evidence and information received and extensively analysed during the course of the investigation.

Regarding the appointment of Mr. Grant Victor Anthony (Mr. Anthony) to the position of Client Liaison Officer;

6.3.23. A determination on whether Mr. Anthony was appointed to the position of a Client Liaison Officer in accordance with the provisions of the merSETA Recruitment Policy 2000, could not be made due to the unavailability of supporting documents.

6.3.24. While no evidence could be found substantiating that the CEO improperly influenced and authorised the appointment of personnel, I noted from the copies of the advertisements which were inspected during the investigation, that persons mentioned hereunder, were invited for interviews and subsequently appointed to positions on advertisements which were clearly marked “internal advertisement” and which did not make provision for the consideration of external candidates and therefore not eligible for invitation to the interviews:

(a) Mr Cameron Wesley Theron;
(b) Mr Fabian Brown;
(c) Ms Carmen Imelda Adams;
(d) Mr Derrick Roy Peo;
(e) Ms Romiella Sarojini Pillay;
(f) Mr Bafana Petrus Motsepe;
(g) Ms Aretha Enthea Williams; and
(h) Ms Mufaro Flora Nkomo.

6.3.25. In the circumstances, I am not making a finding nor taking remedial action with regard thereto.

6.4. On whether the CEO improperly influenced the disposal of the merSETA’s movable asset contrary to the legislation and prescripts regulating disposal of assets in the public sector, and if so, whether his conduct constitute maladministration or improper conduct;

6.4.1. The allegation that the CEO improperly influenced the disposal of the MerSETA’s movable asset, in particular a Toyota Corolla vehicle with registration number TLF 123 GP, contrary to the legislation and prescripts regulating disposal of assets in the public sector, is not substantiated.

6.4.2. The information I have received during the investigation indicates that the merSETA invited its officials at B-Band salary level and below to submit bids for obsolete pool vehicles to be disposed of by the merSETA in accordance with the National Treasury: PFMA Regulation 16A7.1.

6.4.3. In terms of clause 16A7.1 of the National Treasury: PFMA Regulations of 2005, disposal of movable assets must be at market-related value or by way of price quotations, competitive bids or auction, whichever is most advantageous to the state, unless determined otherwise by the relevant treasury.
6.4.4. Therefore, the allegation that the CEO improperly influenced the disposal of the merSETA's movable asset has no merits and could not be supported by the information and evidence received and extensively examined during the course of the investigation.

6.4.5. In the circumstances, I am not making a finding nor taking remedial action with regard thereto.

6.5. On whether the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary enquiry against the second Complainant, which did not yield results and was later aborted, and if so, whether his conduct constitute maladministration or improper conduct;

3.5.1. The allegation that the CEO caused the merSETA to incur irregular, fruitless and wasteful expenditure by commissioning a disciplinary enquiry against the second Complainant, which did not yield results and was later aborted, is substantiated.

6.5.2. The evidence and information I have received during the course of the investigation from the merSETA indicates that the second Complainant was on 12 April 2013 served with a Disciplinary Charge by the former CFO, Ms. Lindiwe Ndlela, for gross negligence which arisen as a result of the following facts:

i. failure to acknowledge receipt of computers, computer consumables and their safekeeping worth over R1 million by the second Complainant as a Financial Manager: Supply Chain; and

ii. the lack of management of receipt of the assets and their safekeeping which exposed the organisation to a financial risk and unfavourable audit outcome.
6.5.3. According to the information I have received from the merSETA Human Resource Department and Tokiso Dispute Settlement (Pty) Limited (Tokiso), no evidence could be found that the disciplinary hearing with respect thereof was ever concluded due to the unavailability of a sanction and/or a report pertinent to the proceedings.

6.5.4. The copies of invoices submitted by Tokiso indicates that it was paid an amount of R32,490.00 for services rendered as per a table below:

<table>
<thead>
<tr>
<th>No.</th>
<th>Invoice Number</th>
<th>Date</th>
<th>Description</th>
<th>Amount (VAT Inclusive)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>IN1605</td>
<td>23 April 2013</td>
<td>Panellist fee</td>
<td>R 14,592.00</td>
</tr>
<tr>
<td>2.</td>
<td>IN1693</td>
<td>30 April 2013</td>
<td>Panellist fee</td>
<td>R 11,172.00</td>
</tr>
<tr>
<td>3.</td>
<td>IN1950</td>
<td>28 June 2013</td>
<td>Panellist fee</td>
<td>R 6,726.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>Total amount billed</strong> R 32,490.00</td>
</tr>
</tbody>
</table>

6.5.5. In terms of section 1 of the Public Finance Management Act 1 of 1999 (PFMA), fruitless and wasteful expenditure means expenditure which was made in vain and would have been avoided had reasonable care been exercised.

6.5.6. Section 57(c) of the PFMA, 1999 provides that an official in a public entity 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.

6.5.7. Section 33(1)(3) of the PFMA, 1999 provides that an official of a public entity to whom a power or duty is assigned in terms of section 55 commits an act of financial misconduct if that official willfully or negligently fails to exercise that power or perform that duty.
6.5.8. While the CEO did not commission a disciplinary proceedings against the second Complainant the information obtained indicates that he failed, in the capacity of the merSETA accounting officer, to prevent fruitless and wasteful expenditure as defined in section 1 of the PFMA, 1999 as well as to manage the merSETA’s expenditure by ensuring that the disciplinary proceedings against the second Complainant paid for by the merSETA is concluded, the fact which he conceded to.

6.5.9. It follows then that the CEO, as an official of a public entity to whom a power or duty was assigned in terms of section 56 of the PFMA 1999, was obliged to take effective and appropriate steps to prevent irregular expenditure and fruitless and wasteful expenditure within his area of responsibility as the CEO of the merSETA.

6.5.10. In the circumstances, I find that the CEO’s conduct in respect thereof constitutes maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act, 1994 and improper conduct as envisaged by section 182 (1) of the Constitution.

6.6. On whether the CEO failed to institute disciplinary proceedings against an employee who contravened the merSETA Code of Conduct Policy, and if so, does his conduct constitute maladministration or improper conduct;

6.6.1. The allegation that the CEO failed to institute disciplinary proceedings against an employee (herein referred to as Mr. X to protect his identity and with a view to avert infringing on his rights), who contravened the merSETA’s Code of Conduct is substantiated.

6.6.2. The CEO, in his response to my enquiries dated 19 July 2017, conceded that an employee of the merSETA indeed attended an official business meeting of the merSETA whilst under the influence of alcohol. The CEO further stated that there are also instances where the very purpose of discipline may be achieved other than by subjecting an employee to a disciplinary hearing and punishment.
6.6.3. Clause 1.3 of the merSETA Code of Conduct, 2008 stipulates the purpose of the Code of Conduct and provides that the primary purpose of the Code is a positive one, viz. to promote exemplary conduct.

Notwithstanding this, if an employee contravenes any provision of this Code or fails to comply with any provision thereof the employee guilty of misconduct will be dealt with in accordance with this Code of Conduct agreement.

6.6.4. Clause 12.1(b) of the Code of Conduct provides that a merSETA employee shall act responsibly (during working hours) as far as the use of alcoholic beverages or any other substance with intoxicating effect is concerned; (unbecoming conduct outside of working hours is strongly discouraged and may lead to disciplinary action if it negatively reflects on the merSETA, e.g. drunkenness, public disorder.

6.6.5. Clause 17.1 of the Code of Conduct provides that any violation of any part of this code of conduct may be cause for appropriate disciplinary action in terms of the merSETA Disciplinary Procedure.

6.6.6. Clause 16.2 of the merSETA Disciplinary Code Policy (Disciplinary Code Policy), 2008 provides categories of alcohol and/or drug offences and their sanctions. In terms of clause 16.2 of the merSETA Disciplinary Code Policy, a sanction for being under the influence whilst on the merSETA’s premises is dismissal.

6.6.7. The merSETA Code of Conduct acts as a guideline to employees as to what is expected of them from an ethical point of view, both in their individual conduct and in their relationships with others. Therefore Mr. X’s conduct in this regard is no exception.
6.6.8. The information I have received during the investigation indicates that Mr. X indeed attended a merSETA business meeting whilst under the influence of alcohol, a fact which the CEO conceded to in his response to the Public Protector’s enquiries of 19 July 2017.

6.6.9. Therefore, the CEO was obliged in terms of clause 17.1 of the merSETA Code of Conduct, to institute disciplinary action against Mr. X and impose a sanction relevant to the infraction in accordance with clause 16.2 of the merSETA Disciplinary Code Policy irrespective of the circumstances that had arisen.

6.6.10. In the circumstances, I accordingly find that failure by CEO to institute disciplinary proceedings against Mr. X constitutes maladministration as envisaged in section 6 (4)(a)(i) of the Public Protector Act, 1994 and improper conduct as envisaged in section 182(1) of the Constitution, 1996.

5.7. On whether the Complainants were improperly prejudiced by the CEO’s conduct as envisaged by section 6 (4) (a) (v) of the Public Protector Act, 1994.

6.7.1. As indicated herein above, the information received indicates that, upon the realisation by the first Complainant, that there existed a possibility for him to be charged for theft of company property, gross negligence and fraud, approached the former CFO, as well as a member of the merSETA Board of Directors with a view to disclose what he considered to be maladministration and improper conduct in the appointment of service providers and personnel allegedly by the CEO, in order to divert attention from his infractions.
6.7.2. Similarly, as indicated herein above, the information I have received, indicates that subsequent to the second Complainant being charged with misconduct in connection with his failure to acknowledge receipt of computers, computer consumables worth R1 million and ensuring their safekeeping, which exposed the organisation to an unfavourable audit outcome, he approached the former merSETA CFO, with a view to raise his concerns regarding what he had considered to be malpractice on the part of the CEO and also lodged a complaint with the Special Investigating Unit (SIU), alleging maladministration on the part of the CEO.

6.7.3. According to the information received during the course of the investigation, the complainants’ alleged protected disclosures in this regard, were made after the fact and although made substantially in accordance with the procedure prescribed by the employer, they were however, not made in good faith as envisaged by section 6(1)(a) of the PDA 2000.

6.7.4. Therefore, the allegation that the CEO subjected the complainants to occupational detriment on account of them having protected disclosures has no merit and could not be supported by the evidence and information received during the course of the investigation.

6.7.5. The allegation that the CEO subjected the complainants to occupational detriment on account of them having protected disclosures has no merit and could not be supported by the evidence and information received during the course of the investigation.

6.7.6. Therefore, the CEO’s conduct in this regard does not constitute prejudicial conduct to the Complainants and abuse of power as envisaged by section 6(4)(a)(ii) and (v) of the Public Protector Act, 1994.

6.7.7. In the circumstances, I am not making a finding nor taking remedial action with regard thereto.
7 REMEDIAL ACTION

7.1. I am taking the following remedial action, in terms of section 182(1)(c) of the Constitution:

7.1.1. The Minister of Higher Education and Training must:

7.1.1.1. Take cognisance of the findings regarding maladministration and improper conduct by the CEO, Dr Raymond Andrew Patel mentioned in the report.

7.1.1.2. Ensure that the Board considers the acts of maladministration, financial misconduct and improper conduct referred to in the report and take appropriate disciplinary action against the CEO, Dr. Raymond Andrew Patel in accordance with Treasury Regulation 4.1.3; and

7.1.1.3. Include in his/her oversight responsibilities with regard to merSETA, as a National State Entity, the monitoring of implementation of remedial action taken in pursuit of the findings in terms of the powers conferred under section 182(2) (c) of the Constitution.

7.1.2. The merSETA Board of Directors must:

7.1.2.1. Take cognisance of the findings of maladministration and improper conduct by the CEO, Dr. Raymond Andrew Patel and ensure that such action is not repeated;

7.1.2.2. Take appropriate disciplinary action against the CEO, Dr. Raymond Andrew Patel, within 60 days of publication of this report, in accordance with Treasury Regulation 4.1.3, for maladministration, act of financial misconduct and improper conduct incurred;

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7.1.2.3. The Board evaluate the effectiveness of merSETA's internal controls on Human Resource Management processes to identify deficiencies with a view to take corrective action to prevent a recurrence of the improprieties referred in the report.

7.1.2.4. Ensure that training is provided to merSETA staff, including those in authority, regarding a proper response to whistle-blowing and the protection of whistle-blowers to prevent the recurrence of the improprieties referred to in the report.

7.1.3. The Chief Executive Officer must:

7.1.3.1. Take cognisance of the findings of maladministration and improper conduct identified in the report and ensure that such conduct is not repeated;

7.1.3.2. Ensure that that merSETA Recruitment Policy is amended to prescribe the process to be followed when a suitably competent candidate for position(s) advertised internally could not be identified.

8. MONITORING

8.1. The Minister of Higher Education and Training and Accounting Authority must submit an implementation plan indicating how the remedial action referred to in paragraph (a) and (b) above will be implemented, within 30 days working days from date of the report.

8.2. The Chief Executive Officer must submit an implementation plan indicating how the remedial action referred to in paragraph (c) above will be implemented, within 30 days working days from date of the report.
8.3. All remedial actions taken by the Public Protector, in terms of the Public Protector's powers under section 182(2)(c) of the Constitution, must be finalised within six months from date of the report.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 12/06/2018

(Assisted by Good Governance and Integrity Branch)