

**REPORT OF THE PUBLIC PROTECTOR 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**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

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**INVESTIGATION INTO ALLEGATIONS OF VIOLATION OF THE EXECUTIVE ETHICS  
CODE PROMULGATED IN TERMS OF SECTION 2(1) OF THE EXECUTIVE  
MEMBERS' ETHICS ACT, 1998 BY THE MINISTER OF PUBLIC ENTERPRISES, MR  
PRAVIN GORDHAN WITH REGARD TO THE IRREGULAR APPOINTMENT OF MS  
BOROTHO AND THE APPOINTMENT OF ABACUS FINANCIAL CRIME ADVISORY  
TO INVESTIGATE PUBLIC SERVANTS SUSPECTED OF LEAKING INFORMATION  
ABOUT THE APPOINTMENT OF MS BOROTHO**

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**LIST OF ACRONYMS**

<b>Abacus</b>	Abacus Financial Crime Advisory FCA (Pty) Ltd
<b>B-BBEE Act</b>	Broad-Based Black Economic Empowerment Act No. 53 of 2003
<b>CIPC</b>	Companies and Intellectual Property Commission
<b>CODE</b>	Executive Ethics Code of 2000
<b>Complainant</b>	Mr Floyd Shivambu
<b>Constitution</b>	Constitution of the Republic of South Africa No. 108 of 1996
<b>DG</b>	Director-General
<b>DPE</b>	Department of Public Enterprises
<b>EFF</b>	Economic Freedom Fighters
<b>EMEA</b>	Executive Members Ethics Act No. 82 of 1998
<b>Minister</b>	Minister of Public Enterprises Mr Pravin Gordhan
<b>Ministerial Handbook</b>	Guide for Members of the Executive
<b>MPSA</b>	Minister of Public Service and Administration
<b>MTEF</b>	Medium-term Expenditure Framework
<b>PPPF Act</b>	Preferential Procurement Policy Framework Act No. 5 of 2000
<b>PSA</b>	Public Service Act No. 103 of 1994
<b>PSR</b>	Public Service Regulations, 2016
<b>Public Protector Act</b>	Public Protector Act, 23 of 1994, as amended
<b>Public Protector Rules</b>	Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018, as amended
<b>RFQ</b>	Request for Quotations
<b>SCM</b>	Supply Chain Management
<b>SMS</b>	Senior Management Service of the Public Service
<b>ToR</b>	Terms of Reference
<b>ZAR</b>	South African Rand

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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF VIOLATION OF THE EXECUTIVE ETHICS CODE PROMULGATED IN TERMS OF SECTION 2(1) OF THE EXECUTIVE MEMBERS' ETHICS ACT 1998 BY THE MINISTER OF PUBLIC ENTERPRISES, MR PRAVIN GORDHAN WITH REGARD TO THE IRREGULAR APPOINTMENT OF MS BOROTHO AND APPOINTMENT OF ABACUS FINANCIAL CRIME ADVISORY TO INVESTIGATE PUBLIC SERVANTS SUSPECTED OF LEAKING INFORMATION ABOUT THE APPOINTMENT OF MS BOROTHO.**

**1. INTRODUCTION**

- 1.1 This is a closing report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 [Act No. 23 of 1994] (Public Protector Act).
- 1.2 The report is submitted to His Excellency, President Matamela Cyril Ramaphosa (President Ramaphosa) in terms of section 3(2)(a) read with section 3(3) of the Executive Members' Ethics Act No. 82 of 1998 (EMEA).
- 1.3 The report is also submitted to the Chief Whip of the Economic Freedom Fighters (EFF), Mr Nyiko Floyd Shivambu, MP (the Complainant) in terms of section 8(1) read with section 8(3) of the Public Protector Act.
- 1.4 The report is also submitted to Minister Pravin Gordhan in terms of section 8(1) read with section 8(3) of the Public Protector Act.
- 1.5 The investigation relates to allegations that the Minister of Public Enterprises, Mr Pravin Gordhan, (hereinafter referred to as the Minister), irregularly appointed Ms Nthabiseng Borotho (Ms Borotho) as Chief of Staff in the Ministry of Public Enterprises, and in so doing, acted in violation of the Executive Ethics Code, 2000 (the Code) published by proclamation in the Government Gazette:

No 21399 Notice No 41 Regulation 6853 in terms of section 2(1) of the Executive Members' Ethics Act, 1998 (Executive Ethics Code).

## **2. THE COMPLAINT**

**2.1** The complaint was lodged with the Public Protector in terms of section 4 of the Executive Members' Ethics Act, 82 of 1998 (EMEA) by the Economic Freedom Fighters' (EFF) Member of Parliament, Mr Floyd Shivambu, (the Complainant) through an emailed letter, dated 24 November 2020.

**2.2** In his letter of complaint, the Complainant alleged that Ms Nthabiseng Borotho (Ms Borotho) was irregularly appointed as Chief of Staff in the Ministry of Public Enterprises by Mr Pravin Gordhan (the Minister), despite *prima facie* evidence that she does not possess the minimum requirements for the post. The Complainant requested the Public Protector to investigate the following:

**2.2.1** Whether the appointment of Ms Borotho was made in terms of section 9 of the Public Service Act No. 23 of 1994 and Regulation 66 of the Public Service Regulations, 2016, in particular:

**2.2.1.1** Was the selection committee appointed in terms of Section 67 of the Public Service Regulations of 2016;

**2.2.1.2** If yes, who were the people appointed to the selection committee, and who was the appointed chairman of the selection committee;

**2.2.1.3** When was the selection committee appointed and when did it make the recommendation;

**2.2.1.4** What were the valid methods, criteria or instruments used for selection; and

**2.2.1.5** Did she possess the minimum requirements for the position of Chief of Staff?

**2.2.2** Whether the Department of Public Enterprises followed proper procurement processes in the appointment of Abacus Financial Crime Advisory (Abacus) to

investigate public servants suspected of leaking information about the appointment of Ms Borotheo.

### **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 of the Republic of South Africa, 1996 (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 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** Section 4(1)(a) of the EMEA, provides *inter alia* that, the Public Protector *“...must investigate in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the President, a Member of the National Assembly or a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet member or Deputy Minister...”*

**3.5** In terms of section 3 of the EMEA, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member to the President.

**3.6** This complaint was lodged by a Member of the National Assembly against the Minister of Public Enterprises, Mr Pravin Gordhan, and therefore the complaint fell within the purview and jurisdiction of matters that should be investigated by the Public Protector in terms of the EMEA.

## **4 ISSUES IDENTIFIED FOR INVESTIGATION**

**4.1 Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:**

**4.1.1** Whether the Minister of Public Enterprises acted in a manner that is inconsistent with his position, in violation of clause 2.3(c) of the Code when he appointed Ms Borotho as Chief of Staff for the Ministry of Public Enterprises.

**4.1.2** Whether the Department of Public Enterprises followed proper procurement processes in the appointment of Abacus Financial Crime Advisory (Abacus) to investigate public servants suspected of leaking information about the appointment of Ms Borotho and if not, whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

## **5 THE INVESTIGATION**

**5.1 Methodology**

5.1.1 The investigation into the complaint is conducted in accordance with section 182(1) of the Constitution, read with sections 3 and 4 of the EMEA and section 7 of the Public Protector Act.

5.1.2 In terms of section 4(1)(a) of the EMEA, the Public Protector must investigate an alleged breach of the Executive Ethics Code on receipt of a complaint from the President, a Member of the National Assembly and a permanent delegate to the National Council of Provinces, if the complaint is against a Cabinet Member or Deputy Minister.

## **5.2 Approach to the investigation**

5.2.1 The approach to the investigation included analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2 The investigation was approached using an enquiry process that seeks to find out:

(a) What happened?

(b) What should have happened?

(c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Executive Ethics Code?

(d) In the event of a violation, what action should be taken?

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct of the Minister constitutes a violation of the Executive Ethics Code.



5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Minister to prevent a violation of the Constitution and/or the Executive Ethics Code.

### 5.3 The Investigation Process

5.3.1 The investigation included an exchange of correspondence with the Complainant, President Ramaphosa, the Minister of Public Enterprises, Minister Gordhan, the Director-General of the Department of Public Enterprises, Mr Kgathatso Tlhakudi and the then Chairperson of the Public Service Commission, Adv RK Sizani, in line with section 7(4)(b) of the Public Protector Act.

5.3.2 All relevant documents and correspondence were obtained and analysed and relevant laws, policies and related prescripts were considered and applied throughout the investigation.

5.3.3 In terms of section 3 of the EMEA, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member to the President.

5.3.4 A Notice in terms of Rule 41(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018 as amended*, promulgated under section 7(11) of the Public Protector Act was issued to the Complainant on 26 August 2022. No response was received from the Complainant. As a result, in line with Rule 41(2) of the Public Protector Rules, which provides that if the Complainant has not responded within the prescribed timeframe of fourteen (14) days, the Public Protector may proceed with the closing of the file.

## **5.4 Key Sources of Information**

### **5.4.1 Correspondence and documents**

- 5.4.1.1 Complaint letter from Mr NF Shivambu, MP dated 24 November 2020 via email;
- 5.4.1.2 Letter from the Public Protector to Mr NF Shivambu, MP, dated 25 November 2020;
- 5.4.1.3 Allegations letter in terms of PPSA Rule 24(1), dated 18 May 2021 to the Minister of Public Enterprises;
- 5.4.1.4 Response dated 30 June 2021 with annexures from Minister PJ Gordhan, Ministry of Public Enterprises;
- 5.4.1.5 Allegations letter to the then PSC Chairperson Adv AK Sizani, dated 26 May 2021;
- 5.4.1.6 Emails dated 02 June 2021 to and from the OPSC;
- 5.4.1.7 Letter dated 02 June 2021 to the CIPC in terms of section 7(4) of the PPA;
- 5.4.1.8 Response from CIPC Affidavit dated 08 June 2021 and CIPC completed forms;
- 5.4.1.9 Allegation letter to DPE dated 23 June 2021 sent via email on 24 June 2021;
- 5.4.1.10 Response from the DPE from DG Tlhakudi on 08 July 2021 with annexures;
- 5.4.1.11 The PSC report, dated April 2021 from the OPSC;
- 5.4.1.12 The DPE SCM Policy and National Treasury Practice Note Number SCM 4 of 2003; and
- 5.4.1.13 Subpoenas for financial records to major banks and response thereto.

### **5.5 Legislation and other prescripts**

- 5.5.1 The Constitution of the Republic of South Africa, 108 of 1996;
- 5.5.2 The Executive Members' Ethics Act, 82 of 1998;
- 5.5.3 The Executive Ethics Code, 2000 published by proclamation in Government; Gazette: No 21399 Notice No 41 Regulation 6853 in terms of section 2(1) of Executive Members' Ethics Act, 82 of 1998;
- 5.5.4 The Public Protector Act, 23 of 1994;

- 5.5.5 The Public Service Act, 103 of 1994;
- 5.5.6 The Public Service Regulations of 2016; and
- 5.5.7 The Guide for Members of the Executive approved by the President and became effective on 20 November 2019.

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

- 6.1 Whether the Minister of Public Enterprises acted in a manner that is inconsistent with his position, in violation of clause 2.3(c) of the Code when he appointed Ms Borotho as Chief of Staff for the Ministry of Public Enterprises.**

### Common cause issues

- 6.1.1 Ms Nthabiseng Borotho was appointed as Chief of Staff in the office of the Minister of Public Enterprises on 21 November 2019.
- 6.1.2 The appointment, as per the Appointment letter is linked to the Minister's term of office.

### Issues in dispute

- 6.1.3 The issue for determination by the Public Protector was whether the Minister irregularly appointed Ms Borotho to the position of Chief of Staff when she did not hold the minimum qualification required to be appointed for the position.

6.1.4 In addition, a determination has to be made whether Ms Borotho's appointment by the Ministry was in compliance with the applicable legal prescripts within the Public Service.

*Response from the Ministry*

6.1.5 In line with section 7(4)(b) of the Public Protector Act, an inquiry letter was sent to the Minister. In his response to the Public Protector dated 30 June 2021 he submitted that he communicated with the former Minister of Public Service and Administration (MPSA), Mr Senzo Mchunu on 29 July 2019 that he was about to appoint staff in his Office and that the appointments will be in terms of the Public Service Regulation (PSR), 2016.

6.1.6 He indicated that he would prefer to appoint one of his previous staff members, Ms Borotho, as Chief of Staff, even though she does not meet the minimum formal qualification requirement of having a tertiary degree, she was compliant with the other requirement in terms of possessing the required experience in addition to acting as Chief of Staff since 2018.

6.1.7 In the communication referred to above, the Minister further submitted that he requested the former MPSA, Mr Mchunu, to grant permission to deviate from the qualification requirement for the post of Chief of Staff as the appointment would provide continuity and enhance service delivery within his Office. The Minister submitted that the former MPSA, Mr Mchunu, requested him to provide justifiable circumstances for the consideration of the deviation.

6.1.8 In response to the request by the former MPSA, Mr Mchunu, the Minister submitted a further correspondence dated 03 September 2019, wherein he indicated that he considered the contents of the circular titled: *Directive on compulsory capacity development, mandatory training days and minimum entry*

*requirements for members of the Senior Management Service.* In addition, the Minister stated that he considered the PSR, 2016, specifically Regulation 66(2), read with Regulation 67(5)(b) to (d) which states that an executive authority, whilst considering the suitability of a candidate in filling a post in the Office of the Executive Authority, should consider the following:

- “(a) the inherent requirements of the post;*
- (b) the Department’s employment equity plan as contemplated in Regulation 27; and*
- (c) in respect of candidates applying for posts from salary level 9 and above-*
  - (i) the level of understanding of the relevant departmental mandates;*
  - (ii) the ability to identify problems and find innovative solutions; and*
  - (iii) the ability to work in a team”*

6.1.9 In a letter dated 26 September 2019 to the Minister, the former MPSA, Mr Mchunu, indicated that the request for a deviation finds expression in the directive for compulsory capacity development, mandatory training days and minimum entry requirements for members of the Senior Management Service (SMS).

6.1.10 The former MPSA, Mr Mchunu, further noted that the request for approval to deviate from the qualification requirements was as a result of Ms Borotho not meeting the inherent requirements of the post. However, he noted that the appointment is as a result of exceptional circumstances given the experience, understanding of the Ministerial Portfolio and networking skills of Ms Borotho.

6.1.11 In addition, he stated that due consideration has also been given to the financial implications of the decision being made. The former MPSA, Mr Mchunu, also noted that Ms Borotho has previous experience as an Administrative Secretary in the Minister’s office and has served previously as an acting Chief of Staff. He,

therefore, as the MPSA, granted the deviation for the appointment of Ms Borotho to the post of Chief of Staff.

- 6.1.12 According to the Minister, the acting Director-General of the Department of Public Enterprises, Mr K Tlhakudi, issued Ms Borotho with an appointment letter, dated 21 November 2019, which indicated that her contract of employment was approved for the period linked to the Minister's term of office, with effect from 01 October 2019.
- 6.1.13 The Minister submitted that the appointment of Ms Borotho was done in compliance with the Public Service Act and Regulations, and this was confirmed by the independent investigation conducted by the Public Service Commission (PSC) in its report issued in April 2021. The Public Protector's Investigation team also verified this information with the then Chairperson of the PSC, Adv Sizani, through an allegations letter sent to his office on 02 June 2021. The PSC provided a copy of its report that confirmed the regularity of Ms Borotho's appointment by Minister Gordhan.

*Application of the relevant legal prescripts*

**Constitution of the Republic of South Act, 1996**

- 6.1.14 Section 96 of the Constitution provides that:

*“(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.*

*(2) Members of the Cabinet and Deputy Ministers may not—*

*(a) ...;*

- (b) *act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or*
- (c) *.... ”*

6.1.15 The Minister is thus enjoined by the above provisions of the Constitution to ensure that his conduct is consistent with the position he occupies and that there is no conflict between his private interests and official duties and obligations.

**The EMEA and the Executive Ethics Code are national legislations based or referred to in section 96(1) of the Constitution.**

6.1.16 Section 2(1) of EMEA states the following:

*“The President must, after consultation with Parliament, by proclamation in the Gazette, publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and MECs must comply in performing their official responsibilities.”*

6.1.17 The general standards which the members of the Executives<sup>1</sup> must comply with are contained in clause 2.1 of the Executive Ethics Code which states that:

*“Members of the Executive must to the satisfaction of the President or the Premier, as the case may be-*

- (a) perform their duties and exercise their powers diligently and honestly;*
- (b) fulfil all the obligations imposed upon them by the Constitution and law;*
- (c) act in good faith and in the best interest of good governance;*

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<sup>1</sup> Member of the Executives' means a Cabinet member, a Deputy Minister or a Member of a Provincial Executive Committee, and 'member' and 'Executive' have corresponding meanings.

(d) *act in all respects in a manner that is consistent with the integrity of their office or the government.”*

6.1.18 Clause 2.2 provides that *“In deciding whether members of the Executive complied with the provisions of clause 2.1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government.”*

6.1.19 Clause 2.3 of the Executive Ethics Code provides the following:

*“Members of the Executive may not-*

(c) *act in a way that is inconsistent with their position;*

(d) *use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;*

(f) *expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests.”*

6.1.20 In the case of ***Public Protector and Others v President of the Republic of South Africa and Others (CCT 62/20) [2021] ZACC 19 (1 July 2021)*** (the *President case*). In para 11, the court denoted that:

*“Section 3 empowers the Public Protector to investigate any breach of the code. The scheme that emerges from the reading of this provision is that the Public Protector’s power to investigate is subject to a formal complaint. This suggests that the scope of an investigation is determined by the breach of the code contained in the complaint. It is important to note that section 3 does not authorise the Public Protector to investigate a violation of the Act itself but limits her authority to investigating a breach of the code.”*<sup>2</sup>

<sup>2</sup> Public Protector and Others v President of the Republic of South Africa and Others (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021)



- 6.1.21 The Court noted that the EMEA authorises the Public Protector to investigate alleged breaches of the Code only. Consequently, the Public Protector may undertake an investigation only after receipt of a complaint envisaged in section 4 of the EMEA. Section 4 of the EMEA mandates the Public Protector to investigate violations of the Executive Ethics Code only if there is a complaint by one of the persons listed therein.
- 6.1.22 The general standard imposed by paragraph 2.1(d) of the Code appears to extend the operations of section 96(2)(b) by requiring a Member to act in a manner that is consistent with the integrity of their office or the government.
- 6.1.23 The Constitution and the Code, therefore, require members of the Executive to conform to the prescribed ethical standards at all times.
- 6.1.24 **Section 9 of the Public Service Act** states that the Executive Authority may appoint any person in his or her department in accordance with the PSA and on such conditions as may be prescribed.
- 6.1.25 **Regulation 66(1)** states that an Executive Authority may only fill vacancies in the Office of an executive authority or a Deputy Minister by means of:

*“(a) an appointment in terms of section (9) of the Act for-*

*(i) the term of office of the incumbent executive authority or Deputy Minister which will terminate at the end of the first month after the month in which the terms of that executive authority or Deputy Minister terminates for any reason: or*

*(ii) a period not exceeding three years*

*(b) ....*

(2) *Subject to the appointment criteria in regulation 67(5)(b) to (d), an executive authority may fill a post in the Office of the executive authority or a Deputy Minister in that executive authority’s portfolio, in terms of subregulation(1) without complying with regulations 65(1); (3) and (4)."*

6.1.26 **Regulation 4** of the Public Service Regulation, 2016 (PSR) states that the Minister may—

*“(a) under justifiable circumstances, authorise a deviation from any regulation;  
and*

*(b) if necessary, authorise a deviation contemplated in paragraph (a) with retrospective effect for purposes of ensuring equality.”*

6.1.27 In terms of Chapter 3 paragraph 1(1.1) of the Guide for Members of the Executive (Ministerial Handbook)<sup>3</sup>, the salaries and allowances of Members and their staff and any expenses, which may be lawfully debited to the State, have to be paid from the Medium Term Expenditure Framework budget of the Department appearing first in the designations of Member’s portfolio.

6.1.28 Chapter 8 (1)(1.1.) of the Ministerial Handbook provides that, *“The following core staff may be utilised by Executing Authorities as a guideline for establishing Private Offices in support of Members:*

<b>MINISTERS/PREMIERS</b>	<b>DEPUTY MINISTERS/MEC</b>
Chief of Staff of the Ministry	Head
Administrative Secretary	
Media Liaison Officer	Media Liaison Officer Private Secretary/Appointments Secretary
Private Secretary/Appointments Secretary	
Assistant Appointments Secretary and Administrative Secretary	-

<sup>3</sup> Ministerial Handbook 7 February 2007

Parliamentary Officer	-
Secretary/Receptionist	Secretary/Receptionist
Registry Clerk	Registry Clerk
Aide or Driver/Messenger	Aide or Driver/Messenger
<b>TOTAL POSTS 10</b>	<b>TOTAL POSTS 6</b>

\*An additional post may be provided for Ministers whose portfolios relate to the activities of more than one executive institution/department (i.e. Portfolio)

*“Executing Authorities may utilise the above-mentioned guideline for the Private Offices of Members provided that staff be appointed either:*

- 1.1.1. *on a contract linked to the political term of office of the Executing Authority or Deputy Minister concerned, as well as the contracts envisaged in section 12A (3)(a) of the Public Service Act and conditions laid down by Cabinet; or*
- 1.1.2. *as full-time public servants, provided that they utilise the job evaluation system and ensure that there are sufficient funds available on the approved budget of the relevant Department for the creation of post(s).*
- 1.3 *The Executing Authority may second personnel from components within the Department. The advantage of secondment is that staff members could return to their original components on the approved establishment without any burden to the Department.*
- 1.4 *The core staff will be determined by the relevant Executing Authority, who may decide on the creation and grading of posts as identified in their structure, based on proven needs and provided that sufficient funds are available in terms of the medium-term expenditure framework (MTEF) of the relevant Department. Regulations B.2 and F.1 of Part III, Chapter 1 of the Public Service Regulations, 2001 are applicable.*

- 1.5 *The organisational structure of a private office in support of a Member shall be determined after consultation with the Minister for Public Service and Administration in terms of Public Service Regulations, 2001 B.2 (a) and B.2A”.*
- 6.1.29 In terms of the Ministerial Handbook, upon appointment, a Minister is entitled to appoint any person in his or her department and/or the office of the Deputy Minister in accordance with the legislative framework, policies and processes for recruitment, selection, appointment and development of employees with a view to ensuring that performance and quality of service is achieved.
- 6.1.30 The Complainant alleged that the Minister irregularly appointed Ms Borotho to the position of Chief of Staff without ensuring that she met all the minimum requirements for the post, placing his own interests first in securing the position for Ms Borotho, thus contravening the Executive Ethics Code.
- 6.1.31 Evidence submitted by the Minister and the DG: Kgathatso Tlhakudi revealed that the Minister sought approval from the former MPSA, Mr Mchunu, by way of a deviation for Ms Borotho’s lack of formal qualification for the post of Chief of Staff that is linked to the Minister’s term of office. The application for deviation was informed by Regulation 4 and subject to Regulation 67(5) of the PSR 2016. In addition, Regulation 66(2) as noted above empowers an Executive Authority to fill a post in his or her office without advertising the respective post.
- 6.1.32 Furthermore, the investigation revealed that Ms Borotho, as per the motivation by the Minister, acted as Chief of Staff in the Minister’s Office from March 2018. She, therefore, has the required experience and understanding of the Ministerial Portfolio and networking skills. In compliance with Regulation 66(2) and subject to appointment criteria in Regulation 67(5)(b) to (d), during the recruitment

process, due regard was also given to all the necessary information by the Selection Committee, to determine the suitability of the candidate.

- 6.1.33 The Minister also relied on the provisions of the Ministerial Handbook as indicated above when appointing Ms Borotho on a contract linked to the political term of office of the Minister.

### Conclusion

- 6.1.34 Based on the evidence canvassed above, there is no record in the Public Protector's possession that indicates that the Minister acted irregularly in submitting the recommendation and/or motivation for the deviation to former MPSA, Mr Mchunu, for approval as per Regulation 4 and subject to Regulation 67(5) in order to appoint Ms Borotho as Chief of Staff within his Office.

- 6.2 Regarding whether the Department of Public Enterprises followed proper procurement processes in the appointment of Abacus Financial Crime Advisory (Abacus) to investigate public servants suspected of leaking information about the appointment of Ms Borotho and if not, whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.**

### Common cause issues

- 6.2.1 The Department advertised, through Bid number DPE12/2018-19 a Request for Submission of Proposals (RFP) for bidders to be appointed on the Department's panel of Forensic Investigators for the period of three (3) years. The closing date for submission was 21 January 2019. Consequently, a number of service providers were appointed in terms of the above RFP and Abacus Crime

Advisory (Abacus) was one of the seven successful bidders who were appointed to the Department's panel of forensic investigators.

- 6.2.2 During July 2019, the Department indicated that there were leaks of confidential information of Ms Borotho's appointment and information that was of a personal nature. Abacus was then appointed by the Department on 15 October 2020 to conduct an investigation into the said leaks.

Issue in dispute

- 6.2.3 The issue for determination by the Public Protector was whether the appointment of Abacus was in line with public procurement policies and prescripts.

Response by the Department

- 6.2.4 The Public Protector sent an inquiry letter dated 18 May 2021 in line with section 7(4)(b) of the Public Protector Act to the Department. In its response on 30 June 2021 to the allegation of irregularity contained in the Public Protector's letter, the Department submitted that, in compliance with the Department's Supply Chain Management (SCM) Policy, a Request for Quotations sourced from the Department's panel of seven (7) forensic investigators, was issued with a closing date of 18 September 2020.
- 6.2.5 The Department stated that the Bid Pre-screening was done on 21 September 2020 with a representative from Internal Audit and that the Acting Director: SCM opened and received proposals to record the names of the RFQ respondent companies and the quoted amounts recorded for each. They further stated that the Committee verified all the information presented by SCM including captured prices and the B-BBEE statuses of the bidders.

6.2.6 They also stated that, as per the approval Memorandum dated 08 October 2020, three proposals had been received timeously and evaluated by the Special Committee on 28 September 2020. The Department alluded that the first stage of evaluation on functionality in compliance with the Preferential Procurement Policy Framework Regulation 5 of 2017 was finalised during the establishment of the panel of forensic investigators under Bid number DPE12/2018-19.

6.2.7 The Evaluation on price and B-BBEE status was done and the results are noted in the table below:

Name	Response	CSD status	Quoted price	Price points	BBBEE level	BBBEE points	Total points	Ranking	Comments
Abacus	yes	Positive	R281 168.00	80	1	20	100	1	Sworn affidavit expiring 2/7/21
Nexia	Yes	Positive	R399 389.25	46.36	Not complied	0	52.04	2	Copy of BBBEE certificate
Gobodo	Yes	Positive	R541 141.19	6.03	2	18	24.03	3	Sworn affidavit expiring 4/3/2021
Neo	No	n/a	n/a	n/a	n/a	n/a	n/a	n/a	No response
Ligwa	No	n/a	n/a	n/a	n/a	n/a	n/a	n/a	No response
Phandahanu	No	n/a	n/a	n/a	n/a	n/a	n/a	n/a	No response
Ernest & Young	No	n/a	n/a	n/a	n/a	n/a	n/a	n/a	No response

### Evaluation of evidence

6.2.8 Evidence evaluated by the Public Protector Investigation Team confirmed that Abacus was ranked number one (1) with Nexia following at number two (2) and Gobodo ranking at number three (3).

6.2.9 It was further established that the remainder of four (4) companies - Neo, Ligwa, Phandahanu and Ernest & Young - which are on the Department's panel of forensic investigators database did not submit their quotations. The quotation price submitted by Abacus was an amount of Two Hundred and Eighty-One Thousand, One Hundred and Sixty-Eight Rand only (R281 168,00) and it also received a scoring of 100 B-BBEE points, which is above the rest of the bidders. It was, therefore, ranked number one and thus the preferred service provider as it complied with the ToR. The Special Committee as per the Memorandum dated 08 October 2020 to the Director-General, Mr Kgathatso Tlhakudi requested approval to appoint Abacus to conduct a forensic investigation into a departmental information data leak of Ms Borocho's recruitment process.

*Application of the relevant legal prescripts*

6.2.10 **The Constitution of the Republic of South Africa, 1996** [Act No. 108 of 1996], Section 217 is the foundation on which all procurement practices within the public sector must be formulated and complied with. Section 217 provides that *"When an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective"*.

6.2.11 It is noted that the Constitution requires that all organs of state should comply with the principles of fairness, equity, transparency and competitiveness in the procurement of goods and services. In this instance the Department submitted that it has in place a procurement policy, therefore essentially complying with the Constitutional imperative.

6.2.12 **The Preferential Procurement Policy Framework Act 5 of 2000.** The Act was established to give effect to section 217(3) of the Constitution by providing a



framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution.

6.2.13 Section (2) of the **Preferential Procurement Policy Framework Act 5 of 2000** states that “*an organ of state must determine its preferential procurement policy and implement it within the following framework:*”

- (a) *A preference point system must be followed;*
- (b) (i) *for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;*
- (c) (ii) *for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;*
- (d) *any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;*
- (e) *the specific goals may include:*
  - (i) *contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;*

*(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;*

*(f) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;*

*(g) the contract must be awarded to the tenderer who scores the highest points, unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer; and*

*(h) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.*

*(2) Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance.”*

6.2.14 Evidence proves that the Department complied with the **Preferential Procurement Policy Framework and Regulations (PPPFR)**. It was noted that the thresholds for the 80/20 and the 90/10 preference point system have increased, such that a 20% preference points weighting would be applicable to the evaluation of procurement contracts with a Rand value equal to or above 30 000 and up to R50-million; and a 10% preference points weighting applicable to procurement contracts with a Rand value above 50-million.

6.2.15 **The Broad-Based Black Economic Empowerment Act, 2003**<sup>4</sup> (B-BBEE Act), which amongst others, seeks to establish a legislative framework for the

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<sup>4</sup> Act 53 of 2003.

promotion of black economic empowerment; to empower the Minister to issue codes of good practice.

6.2.16 Section 1 of the B-BBEE Act provides that, *“Unless the context indicates otherwise “black people” is a generic term which means Africans, Coloureds and Indians and “broad-based black economic empowerment” means “broad-based black economic empowerment” means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to-*

*(a) To increasing the number of black people that manage, own and control enterprises and productive assets;*

*(b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;*

*(c) human resource and skills development;*

*(d) achieving equitable representation in all occupational categories and levels in the workforce;*

*(e) preferential procurement; and*

*(f) investment in enterprises that are owned or managed by black people”.*

6.2.17 Section 2(a) of the B-BBEE Act provides that, *“The objectives of this Act are to facilitate broad-based black economic empowerment by promoting economic*

*transformation in order to enable meaningful participation of black people in the economy”.*

6.2.18 Section 9(1)(a) and (b) of the B-BBEE Act provides that, *“In order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment that may include-*

*(a) the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black empowerment entities;*

*(b) qualification criteria for preferential purposes for procurement and other economic activities”.*

6.2.19 The Department complied with section 217 of the Constitution in ensuring that the procurement and appointment of Abacus was in compliance with the Preferential Procurement Policy and the B-BBEE legislative framework as noted in the evaluation of an individual scoring of each company that had submitted their quotation as illustrated in evidence traversed above.

### Conclusion

6.2.20 The Director-General of the Department approved the recommendation for the appointment of Abacus as the preferred service provider and Abacus was accordingly appointed. In view of the foregoing, there is no evidence in the Public Protector's possession indicating that the Department failed to comply with its Preferential Procurement Policy and legal framework regulating procurement within the public service.

6.2.21 Based on the evidence submitted and analysed by the Public Protector's Investigation Team, the appointment of Abacus was in compliance with the

relevant procurement prescripts and processes, contrary to the allegations made by the Complainant.

- 6.2.22 There is no evidence to suggest or corroborate the allegation that the appointment of Ms Borocho by Minister Gordhan was irregular and therefore in violation of the Executive Ethics Code.

## 7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that the Minister should have complied with and the impact thereof on good administration and ethical conduct the following findings are made:

### 7.1 **Regarding whether the Minister of Public Enterprises acted in a manner that is inconsistent with his position, in violation of clause 2.3(c) of the Code when he appointed Ms Borocho as Chief of Staff for the Ministry of Public Enterprises.**

- 7.1.1 The allegation that the Minister acted in violation of the Executive Ethics Code when he appointed Ms Borocho as Chief of Staff is **not substantiated**.
- 7.1.2 The Minister appointed Ms Borocho to the position of Chief of Staff in his office in line with the requirements of Regulation 4, Regulation 66(2) and subject to Regulation 67(5) of the PSR.
- 7.1.3 Evidence at hand has confirmed that the Minister first sought approval in line with the PSR from the former MPSA, Mr Mchunu, by way of a deviation for Ms Borocho's lack of formal qualification for the post of Chief of Staff that is linked to the Minister's term of office.

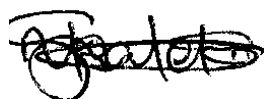
- 7.1.4 The Public Protector could not find evidence indicating that the Minister used his position or any information entrusted to him, to irregularly appoint Ms Borotho.
- 7.1.5 The Public Protector's Investigation Team could also not find evidence that suggests that the Minister acted in a way that is inconsistent with his position and/or exposed himself to a situation involving the risk of a conflict between his official responsibilities and his private interests.
- 7.1.6 The conduct of the Minister was therefore not inconsistent with section 96(2)(b) of the Constitution.
- 7.1.7 Consequently, the conduct of the Minister was not in breach of clause 2.3(c) of the Code.
- 7.2 Regarding whether the Department of Public Enterprises followed proper procurement processes in the appointment of Abacus Financial Crime Advisory (Abacus) to investigate public servants suspected of leaking information about the appointment of Ms Borotho and if not, whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.**
- 7.2.1 The allegation that the Department irregularly appointed Abacus to investigate public servants suspected of leaking information about the appointment of Ms Borotho is **not substantiated**.

- 7.2.2 In January 2019, Abacus responded to an advertisement Bid through number DPE12/2018-19, which was a Request for Submission of Proposals for bidders to be appointed to the Department's panel of forensic investigators for the period of three years.
- 7.2.3 On 18 September 2020, three proposals, including Abacus' had been received and were evaluated on functionality on 28 September 2020 in accordance with the Preferential Procurement Policy Framework Regulation 5 of 2017 by the Special Committee.
- 7.2.4 After the evaluation on price and B-BBEE was conducted, the results indicated that Abacus was ranked number one (1) in terms of price and BBEE points.
- 7.2.5 According to the information and evidence submitted and analysed, the appointment of Abacus was in compliance with the Constitution, Preferential Procurement Policy and BBEE legislative framework.
- 7.2.6 As a result the Department's conduct in this instance does not amount to improper conduct as contemplated in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

## **8. CONCLUSION**

- 8.1 Having regard to the evidence analysed, when applied to the facts and the regulatory framework determining the applicable standard that should have been complied with, the Public Protector is closing the investigation based on the findings in paragraph 7 above.

8.2 It is important to note that the complainant can ask for a review to a court of law if there is a belief that the decision by PPSA to close the file was wrong because it was based on irrelevant evidence or information, inaccurate facts, errors of the law and if there is new evidence which has the potential to yield a different result.



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**ADV KHOLEKA GCALEKA**  
**ACTING PUBLIC PROTECTOR OF**  
**THE REPUBLIC OF SOUTH AFRICA**  
**DATE: 30 SEPTEMBER 2022**

*Assisted by: Mr Rodney Mataboge*  
*Chief Investigator: Investigations Branch*