

**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**



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**INVESTIGATION INTO ALLEGATIONS OF VICTIMISATION, IRREGULAR
APPOINTMENT AND UNFAIR DISMISSAL OF MR ZPM BOSHIELO BY AIR
TRAFFIC AND NAVIGATION SERVICES**



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LIST OF ABBREVIATIONS AND ACRONYMS

ATNS	Air Traffic and Navigation Services
Constitution	Constitution of the Republic of South Africa, 1996
E-mail	Electronic mail correspondence
CCMA	Commission for Conciliation, Mediation and Arbitration
CEO	Chief Executive Officer
Investigation Team	Public Protector's Investigation Team
IT	Information Technology
LRA	Labour Relations Act, 1995 as amended
PFMA	Public Finance Management Act, 1999
Public Protector Rules	Rules relating to investigations by the Public Protector and Matters Incidental Thereto, 2018, (as amended)
Public Protector Act	Public Protector Act, 1994
Public Protector	Public Protector South Africa
UNISA	University of South Africa



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(1) read with section 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation, to affected parties for such persons to note the outcome of the investigation:
 - 1.2.1 Ms N Mdawe, CEO ATNS;
 - 1.2.2 Adv. Z Majavu, Chairperson of the Board; and
 - 1.2.3 Mr Boshielo who lodged the complaint.
- 1.3. The report relates to an investigation into allegations of victimisation, irregular appointment and the unfair dismissal against the Air Traffic and Navigation Services (ATNS) involving the Complainant.

2. THE COMPLAINT

- 2.1 The complaint was lodged with the Public Protector by Mr ZPM Boshielo (the Complainant) on 23 October 2020. The Complainant, in the main alleged that:
 - 2.1.1 He is a former employee of ATNS and the position he occupied was Chief Technology Officer. In 2018, after applying for the position of Chief Executive Officer (CEO), he was victimised by the ATNS.
 - 2.1.2 He lodged a grievance with the Board of ATNS (the Board) against the former CEO, the late Mr Mthiyane (Mr Mthiyane) on 10 July 2018 and 27 July 2018, alleging that Mr Mthiyane victimised and harassed him by



shouting at him and using defamatory language during meetings. The Board neither investigated the matter nor provided him with an outcome of the grievance that he lodged.

2.1.3 The ATNS maliciously charged him for an Information Technology (IT) related matter accusing him of unlawfully using another employee's login details to access the computer (system). He was suspended on 28 August 2018 and thereafter allegedly unfairly dismissed on 20 May 2019.

2.1.4 There were three (3) irregular appointments at ATNS in 2018. The positions were never advertised and no interview process was followed for the appointment of:

2.1.4.1 Mr Thomas Kgokolo as CEO;

2.1.4.2 Ms Thandeka Mdebuka as Executive Legal; and

2.1.4.3 Mr Mbongeleni Maqashelana as Chief Risk Executive.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The investigation was conducted in terms of section 182(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution), which gives the Public Protector the powers to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, 1994 (Public Protector Act), which regulates the manner in which the powers conferred by section 182 of the Constitution may be exercised in respect of government at any level.

3.2 Section 6(9) of the Public Protector Act, 1994 provides that, *“Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not*



be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned”.

3.3 Since the incident or matter concerned occurred more than two years prior to the reporting of the matter to the Public Protector, she has exercised her discretion in terms of section 6(9) of the Act to entertain the complaint based on the following special circumstances¹ as envisaged in Rule 10(1) of the Rules –

- (a) The Complainant provided *sufficient and compelling information* relating to the alleged failure of ATNS to embark on proper recruitment processes when making appointments. He provided the Investigation Team with copies of his grievances lodged, details of the affected positions and the names of the affected officials.
- (b) The nature of the complaint and grievance reveals the *possibility of un-remedied prejudice or injustice*, which may result from failure to follow due processes by ATNS relating to recruitment, labour relations practices and internal grievance processes.
- (c) The complainant provided a *reasonable explanation for the delay in reporting the matter to the Public Protector* since he had been engaged in efforts to obtain legal assistance to no avail, as he is not in a position to raise funds to pay attorneys.

3.4 The ATNS is a public entity, and its conduct amounts to conduct in state affairs, as a result, the Public Protector is satisfied that the complaint falls

¹ In *Gordhan v Public Protector and Others* [2019] JOL 45246 (GP) and *Gordhan and Others v Public Protector and Others* (36099/2098) [2020] ZAGPPHC 777 (17 December 2020), the Supreme Court of Appeal (the SCA) and the High Court in Pretoria respectively, held that, it is only where special circumstances exist, that complaints that are older than two years can be entertained, and that, the particulars of the special circumstances must be succinctly set out.



within her competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and section 6(5) of the Public Protector Act.

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 Board unduly delayed or failed to deal with the grievance of victimisation lodged by the Complainant against the former CEO, Mr Mthiyane, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and undue delay in terms of section 6(5)(b) of the Public Protector Act;

4.1.2 Whether the Complainant was subjected to victimisation which ultimately led to his dismissal from ATNS as a result of the grievance he lodged with Board against Mr Mthiyane, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and abuse of power in terms of section 6(5)(b) of the Public Protector Act;

4.1.3 Whether there were irregularities in the appointment of Mr Thomas Kgokolo as the CEO of ATNS, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act; and

4.1.4 Whether there were irregularities in the appointment of Ms Thandeka Mdebuka as the Executive Legal and Mr Mbongeleni Maqashelana as Chief Risk Executive, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.



4.2 The Public Protector has concluded the investigation and based on the information and evidence obtained during the course thereof, the Public Protector is now in a position to make findings.

5. THE INVESTIGATION

5.1 Methodology

5.1.1 The investigation is conducted in terms of sections 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

5.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

5.2 Approach to the investigation

5.2.1 The approach to the investigation included the exchange of documents, 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 determine:

- (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 maladministration, abuse of power or other improper conduct?
- (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. The factual enquiry principally focused on whether or not the alleged conduct was inconsistent with the applicable prescripts.

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 ATNS in the recruitment, selection and subsequent appointment processes.

5.3 **The Investigation Process**

5.3.1 The investigation process commenced with correspondence to ATNS dated 07 March 2022, wherein the institution was informed of the investigation, the legislation in terms of which the investigation was conducted, as well what information is required and the format thereof.

5.3.2 The format and the procedure followed in conducting the investigation included:

- (a) Communications by telephone and email;
- (b) Meetings with affected parties or persons reasonably believed to have information relevant to the investigation; and
- (c) Obtaining records or documents relevant to the investigation which were in the possession of or under control of ATNS;

5.4 **Key sources of information**

5.4.1 **Documents and e-mail correspondence sent and received:**

5.4.1.1 Complaint form received from Complainant on 23 October 2020;

5.4.1.2 Referral of dispute to CCMA received from Complainant on 02 December 2021;



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- 5.4.1.3 Internal appeal outcome received from Complainant on 02 December 2021;
 - 5.4.1.4 Application for condonation at the CCMA received from Complainant on 02 December 2021;
 - 5.4.1.5 Condonation ruling from the CCMA received from the Complainant on 02 December 2021;
 - 5.4.1.6 E-mail received by the Investigation Team from Complainant containing utterances made by Mr Mthiyane, dated 02 December 2021;
 - 5.4.1.7 E-mail from Investigation Team to the Complainant confirming the issues to be investigated, dated 21 February 2022;
 - 5.4.1.8 Response from ATNS dated 22 March 2022;
 - 5.4.1.9 E-mail from Executive Manager, Ms P Mogaladi to Complainant informing him of issues to be investigated, dated 25 May 2022 ;
 - 5.4.1.10 Letter received from Complainant relating to Mr Sangweni acting as interim CEO dated 26 May 2022;
 - 5.4.1.11 Grievance procedure of ATNS-2018, Grievance 1 and Grievance 2 received from Complainant on 21 August 2022;
 - 5.4.1.12 ATNS Code of Conduct, 2017, received from Complainant on 22 August 2022; and
 - 5.4.1.13 Response received from ATNS CEO Ms M Mdawe dated 21 December 2022.

5.4.2 **Legislation and other prescripts**

- 5.4.2.1 The Constitution of the Republic of South Africa, 1996;
- 5.4.2.2 Labour Relations Act, 1995 as amended;
- 5.4.2.3 ATNS Recruitment Policy, 07 September 2018;
- 5.4.2.4 ATNS Grievance Procedure, 07 September 2018; and
- 5.4.2.5 Public Finance Management Act, 1999.



5.4.3 **Case Law**

5.4.3.1 Gordhan v Public Protector and Others [2019] JOL 45246 (GP) and Gordhan and Others v Public Protector and Others (36099/2098) [2020] ZAGPPHC 777 (17 December 2020);

5.4.3.2 Hendricks v Overstrand Municipality & Another CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) (25 September 2014);

5.4.3.3 Economic Freedom Fighters v The Speaker of the National Assembly and Others and Democratic Alliance v The Speaker of the National Assembly and Others CCT 143/15 and CCT 171/15; and

5.4.3.4 National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs 2000 (2) SA 1 (CC).

5.4.4 **Notice issued in terms of Rule 41(1) of the Public Protector Rules**

5.4.4.1 On 20 February 2023, a notice in terms of Rule 41(1) of the Public Protector Rules was issued to the Complainant to provide him with an opportunity to respond to the Public Protector's intention to conclude the investigation.

5.4.4.2 A response dated 06 March 2023 was received from the Complainant. The response and information/ evidence submitted in response to the notice in terms of Rule 41(1) of the Public Protector Rules, were duly considered by the Public Protector.



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

6.1 Whether the Board unduly delayed or failed to deal with the grievance of victimisation lodged by the Complainant against the former CEO, the late Mr Mthiyane, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(b) of the Public Protector Act

Common cause

6.1.1 The Complainant was employed at ATNS as a Chief Technology Officer, in 2018. He lodged a grievance of victimisation to the Board against Mr Mthiyane.

Issue in dispute

6.1.2 The issue for the Public Protector's determination is whether the grievances raised by the Complainant to the Board against Mr Mthiyane were appropriately dealt with by the Board.

Complainant's version

6.1.3 The Complainant alleged that he was victimised shortly after he applied for the position of CEO at ATNS in 2018. He alleged that the victimisation was in the form of Mr Mthiyane shouting, harassing and using defamatory language towards him during meetings.

6.1.4 According to the Complainant, in one of the meetings, Mr Mthiyane went as far as to tell him that he is going to get rid of all those people who disagree



with him. However, the Complainant indicated that he can no longer recall the date of this meeting.

- 6.1.5 The Complainant stated that as a result of this, he lodged a grievance on 10 July 2018 and 27 July 2018 with the Board, who did not investigate his complaint or provide him with a response thereto.

Response from ATNS

- 6.1.6 In correspondence dated 07 March 2022, the Public Protector raised the allegations as set out by the Complainant with the then CEO of ATNS, Mr Dumisani Sangweni (Mr Sangweni) and with the then Chairperson of the Board, Mr S Thobela (Mr Thobela).

- 6.1.7 On 22 March 2022, Mr Thobela, sent a response to the Public Protector on behalf of the ATNS addressing all issues as set out in the allegations letter and stated that:

- 6.1.7.1 The ATNS Grievance Procedure under the heading “*Settlement of Grievances – Individual Employees*”, provides that an employee, in the first instance, must raise the grievance with his immediate manager to try and resolve the grievance. Therefore, the Board decided that Mr Mthiyane, as the Complainant’s immediate manager be given an opportunity to resolve the issues with the Complainant.

- 6.1.7.2 The Board has not been able to ascertain whether following its decision at the time to allow the Complainant, Mr Mthiyane and Mr Sangweni an opportunity to attempt an informal resolution of the issues amongst themselves, such issues were ultimately resolved.

- 6.1.7.3 By September 2018, when Mr Mthiyane vacated his role as CEO and left the employ of ATNS, no further formal grievance procedure had been



commenced by either the Complainant or Mr Sangweni. Mr Mthiyane no longer had any involvement with the ATNS, and no further action was taken by the Board concerning the grievances lodged.

6.1.7.4 The ATNS has no record of the Complainant escalating his grievance following his initial submission, as he was entitled to escalate the grievance to a formal stage 1 (one) process, or stages two (2) or three (3), had he remained unsatisfied.

6.1.7.5 The ATNS's Grievance Procedure makes a specific provision that should the dispute remain unresolved, on finalisation of the stage three (3) grievance procedure, the Complainant would have been entitled to refer the dispute to external dispute resolution, but there is no record that the Complainant ever referred the dispute to external dispute resolution forum. Since this was not done, ATNS accepted that the Complainant's grievances, as they existed at the time, were either resolved or became of no consequence due to Mr Mthiyane having left ATNS.

Applicable Legal Prescripts

The Constitution of the Republic of South Africa, 1996

6.1.8 Section 195 of the Constitution provides that public administration in every sphere of government must be underpinned by amongst others, the following the democratic values and principles-

(1) *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

(a) *A high standard of professional ethics must be promoted and maintained.*



- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) *Public administration must be accountable;*
- (g) *...; and*
- (h) *Good human resource management and career development practices, to maximise human potential, must be cultivated.*

(2) *The above principles apply to —*

- (a) *administration in every sphere of government;*
- (b) *organs of state; and*
- (c) *public enterprises.*

6.1.9 The conduct of ATNS as an organ of state should measure up to the policy and legislative prescripts that concern good public administration. These requirements must also be understood together with the basic values governing public administration as provided in section 195(1) of the Constitution.

Labour Relations Act, 1995 (LRA)

6.1.10 Section 186(2)(a) of the Labour Relations Act² (LRA) provides that unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; unfair suspension of an employee or any other unfair disciplinary action short of dismissal of an employee; and an occupational detriment, other than dismissal, in contravention of the

² Act 66 of 1995, as amended.



Protected Disclosures Act 2000, on account of the employee having made a protected disclosure defined in the Act.

- 6.1.11 The allegations of victimisation and harassment raised by the Complainant to the Public Protector emanate from an employer and an employee relationship, relating to unfair conduct, which falls within the definition of an unfair labour practice as set out in the LRA.
- 6.1.12 Section 191(5A)(c) of the LRA provides that despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved, if the dispute concerns any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.
- 6.1.13 Section 191(6)(b)(c) of the LRA provides that despite subsection 5(a) or (5A), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering amongst other things, reasons for dismissal, whether there are questions of law raised by the dispute and the complexity of the dispute.
- 6.1.14 The provisions of the LRA cited above indicate established mechanisms for resolution of unfair labour practices or dismissal, which are to be dealt with through the Commission for Conciliation, Mediation and Arbitration (CCMA). If unresolved it can thereafter on application be referred to the Labour Court.

ATNS HC Policy – 05/2016 – Grievance Procedure

- 6.1.15 Section 10(d) Settlement of grievances – individual employees, states that:
- “i. If any employee wishes to raise a matter he is directly concerned, other than a matter that has been dealt with under the Company’s Disciplinary Code and matter that had been the subject to collective*



bargaining, he will in the first instance discuss it with his immediate manager to try and resolve the grievance.

ii. Only a matter which cannot be settled in this manner will be considered to be a grievance which will be dealt with in accordance with the following procedure:

2.1. Stage 1

2.1.1 An employee who wishes to record a grievance must raise this matter with his manager who will do his best to resolve the grievance. This aggrieved employee may discuss the matter with an official of the Employee Relations Department who will assist the employee in explaining the procedure that must be followed.

2.1.2 If the employee is still not satisfied with the outcome of the grievance, then the employee may within three (3) working days lodge the grievance with the next higher-level manager. A Grievance Form must be completed and a copy of it must also be handed to the Employee Relations Department.

2.2 Stage 2

2.2.1 The next higher-level manager may upon receipt of the grievance, arrange a meeting within three (3) working days in order to try and solve the grievance.

2.2.2 If the employee is still not satisfied with the outcome of the grievance, the employee may within the three (3) working days lodge the grievance in writing with the appropriate next higher-level manager.



2.3 Stage 3

2.3.1 *The next higher-level manager may upon receipt of the grievance, arrange a meeting within three (3) working days to consider the matter. The Employee Relations Department will (if the employee so wishes) note the substance of the grievance and indicate the resolved and unresolved aspects.*

2.3.2 *The decision of this next higher-level manager will be final and if the employee is still not satisfied he must thereafter pursue the matter in accordance with existing procedures for the resolution of disputes including external dispute resolution.*

2.3.3 *In the absence of the applicable manager due to operation requirements, the three-day timeline may be extended.”*

6.1.16 The Complainant’s dispute is regulated by the policy of the ATNS’s Grievance Procedure. This provides that the grievance be dealt with in stages if it is not resolved with the immediate manager. The evidence presented by the ATNS shows that the Complainant did not initiate stage 1 of the grievance procedure according to which he had to “*raise this matter with his manager who had to do his best to resolve the grievance. Further, had the matter not been resolved he was entitled to escalate the matter to next level higher managers in terms of stage 2 and 3*”.

Case Law

6.1.17 The court in *Hendricks v Overstrand Municipality & Another*³ stated the following in paragraph 12:

³ (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) (25 September 2014) at para 12.



“These dicta of the Constitutional Court support the general proposition that public sector employees aggrieved by dismissal or unfair labour practices (unfair conduct relating to promotion, demotion, training, the provision of benefits and disciplinary action short of dismissal) should ordinarily pursue the remedies available in section 191 and 193 of the LRA, as mandated and circumscribed by section 23 of the Constitution. The court made no explicit finding in either case in relation to section 158(1)(h) of the LRA.”

- 6.1.18 As indicated above, the court held that the public sector employees aggrieved by dismissal or unfair labour practice, should ordinarily pursue the remedies available in section 191 and 193 of the LRA. The Court emphasized further that if a cause of action meets the definitional requirements of unfair labour practice or unfair dismissal, the dictates of the constitutional and judicial policy mandate that the dispute be processed by the system established by the LRA for their resolution.⁴

Response to a notice issued in terms of Rule 41(1) of the Public Protector Rules

- 6.1.19 A notice in terms of Rule 41(1) of the Public Protector Rules, dated 20 February 2023 was issued to the Complainant. The Complainant responded to notice on 6 March 2023, 7 March 2023 and 8 March 2023, respectively.

- 6.1.20 In respect of this issue, the Complainant responded as follows:

- 6.1.19.1 The approach to the Public Protector’s investigation focused on the Complainant, whilst Mr Sangweni also lodged a grievance and he was not interviewed by the Public Protector during this investigation.

⁴ *Hendricks v Overstrand Municipality and Another* (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) (25 September 2014) at para 30.



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- 6.1.19.2 The grievance did not follow the stages provided for in ATNS Grievance Policy and cannot be regarded as resolved. The Acting HR Executive had a mandate to deal with the grievance and report back to the Board, but failed to do so, resulting in undue delay. All internal grievance procedures were not exhausted.
- 6.1.19.3 The Chairperson of the Board failed to ascertain from the HR executive the outcome of the informal resolution of issues between the Complainant, Mr Sangweni and Mr Mthiyane. The Chairperson of the Board conceded that he did nothing and this was accepted by the Public Protector, who consequently failed to hold him accountable.
- 6.1.19.4 He rejects the version of ATNS that the matter was either resolved or became of no consequence due to Mr Mthiyane leaving the ATNS. Further investigation needs to be conducted by the Public Protector to find out why the Board chose to do nothing, and did not close the grievance from their side which amounts to maladministration.
- 6.1.19.5 The Public Protector incorrectly applied the law to the facts of this case, and has jurisdiction over labour related matters.
- 6.1.19.6 Incorrect averment by the Public Protector that Mr Mthiyane and the Complainant were employed at ATNS between September 2018 and May 2019, as Mr Mthiyane left the ATNS in September 2018 and the Complainant was on suspension from September 2018.

Analysis of evidence

- 6.1.21 Based on the evidence placed before the Public Protector, it is apparent that the Complainant never exhausted all internal grievance procedures set out in ATNS' Grievance Procedure, in order to resolve his complaint against Mr Mthiyane.



- 6.1.22 The Public Protector noted that during the period September 2018 and May 2019, both the Complainant and Mr Mthiyane were not present at the offices of ATNS. However, from 10 July 2018 when the Complainant first raised his grievance, to September 2018 when Mr Mthiyane left the employ of ATNS, there were options available to the Complainant to escalate his grievance in terms of the Grievance Policy for a dispute resolution.
- 6.1.23 The focus of the Public Protector's investigation was the grievances raised by the Complainant, against the former CEO Mr Mthiyane. In this regard, there was no evidence found or presented by the Complainant to indicate that he exhausted all his internal remedies and/or escalated his grievance as per the ATNS Grievance Policy.
- 6.1.24 The responsibility to escalate the grievance to Stage 2, Stage 3 and the utilisation of external dispute resolution mechanisms lies with the Complainant. It is also submitted that as a public sector employee aggrieved by unfair labour practice, the Complainant had further remedies available to him, as prescribed in section 191 of the LRA, which he could have embarked upon, should he continued to be aggrieved by any unfair labour practice at the hands of ATNS.

Conclusion

- 6.1.25 It is concluded based on the strength of the legislation and the case law cited above, that the Complainant should have referred his dispute relating to unfair labour practice and the subsequent unfair dismissal to the CCMA for adjudication as required by section 191(5A) of the LRA.
- 6.1.26 If the matter remains unresolved, the Complainant should refer the dispute to the Labour Court as required by section 191(6) of the LRA.
- 6.1.27 The Complainant's response to the notice issued in terms of Rule 41(1) of the Public Protector Rules, has been adequately considered, however the



Public Protector has not been persuaded to amend the findings and determinations made in the interim report on this issue.

6.2 Whether the Complainant was subjected to victimisation, which ultimately led to his dismissal from the ATNS, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(b) of the Public Protector Act

Common cause

6.2.1 The Complainant was charged by ATNS for an IT related matter, in that he unlawfully used another employee's login details. He was subsequently suspended and following the conclusion of a disciplinary process, he was dismissed from ATNS on 20 May 2019.

Issue in dispute

6.2.2 The issue for the Public Protector's determination is whether ATNS subjected the Complainant to victimisation resulting in his dismissal.

Complainant's version

6.2.3 According to the Complainant, he was victimised after he applied for the position of CEO at ATNS in 2018. He alleged that Mr Mthiyane shouted at and harassed him. He further stated that Mr Mthiyane used defamatory language towards him during meetings.



Response from ATNS

- 6.2.4 On 22 March 2022 Mr Thobela responded to the allegations in respect of this issue as contained in the letter dated 07 March 2022, from the Public Protector to ATNS, and stated that:
- 6.2.4.1 The Complainant was charged on 28 August 2018 and subsequently found guilty in an internal disciplinary hearing, for serious offences of misconduct, relating to:
- (a) Committing a serious breach of ATNS' policies and failing to act in the best interests of his employer. He acted without authority when he unlawfully and without cause attempted to access another employee's Microsoft Outlook email account.
 - (b) Misconduct in the form of intimidation of another ATNS employee, when he intimidated the employee in a circumstance where the employee had escalated a complaint against him. The Complainant threatened the employee from persisting with the complaint by suggesting that the complaint would have the effect of limiting his career prospects at ATNS.
- 6.2.4.2 Following an internal disciplinary hearing, chaired by Mr Peter Mosebo, a Director at Werksmans Attorneys, the Complainant was found guilty of the charges against him. Due to the seriousness of the charges, his breach of duty of good faith, and the damage that his actions had on the trust relationship with ATNS, the recommended sanction by the chairman of the internal disciplinary hearing, was that of summary dismissal. Following an assessment of the internal disciplinary chairman's findings and recommended sanction, ATNS dismissed the Complainant on 20 May 2019.



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- 6.2.4.3 The Complainant then lodged an appeal against his dismissal. Due to the fact that the internal appeal was chaired by an external and independent chairman, it was resolved that in the interests of fairness, the Complainant's appeal hearing, would similarly be overseen by an external chairperson. Mr Tuekla Ningiza of Ningiza Horner Inc. Attorneys was appointed by ATNS to hear the appeal.
- 6.2.4.4 During the appeal, the Complainant was represented by both an Attorney and Advocate, and enjoyed his right to legal representation during this process.
- 6.2.4.5 On 27 September 2019, the chairperson of the hearing found no cause to set aside the guilty verdict of the internal disciplinary chairman and endorsed that the result of dismissal, given the seriousness of the charges, was justifiable.
- 6.2.4.6 Following the dismissal of the Complainant's appeal, he then referred an unfair dismissal dispute to the CCMA. On 28 February 2020, the CCMA dismissed the Complainant's referral and ruled that the Complainant had failed to demonstrate any reasonable prospects of success concerning his referral of an unfair dismissal dispute.

Applicable Legal Prescripts

Labour Relations Act, 1995

- 6.2.5 Section 186(2)(a) of the LRA provides that unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; unfair suspension of an employee or any other



unfair disciplinary action short of dismissal of an employee; and an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 2000, on account of the employee having made a protected disclosure defined in that Act.

6.2.6 Section 191(5A)(c) of the LRA provides that despite any other provision in the Act, the council or Commission must commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns any other dispute contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.

6.2.7 Section 191(6)(b)(c) of the LRA provides that despite subsection 5(a) or (5A), the director must refer the dispute to the Labour Court, if the director decides, on application by any party to the dispute, that to be appropriate after considering amongst other things, reasons for dismissal, whether there are questions of law raised by the dispute and the complexity of the dispute.

Case Law

6.2.8 The court in *Hendricks v Overstrand Municipality & Another*⁵ stated the following in paragraph 12:

“These dicta of the Constitutional Court support the general proposition that public sector employees aggrieved by dismissal or unfair labour practices (unfair conduct relating to promotion, demotion, training, the provision of benefits and disciplinary action short of dismissal) should ordinarily pursue the remedies available in section 191 and 193 of the LRA, as mandated and

⁵ (CA24/2013) [2014] ZALAC 49; [2014] 12 BLLR 1170 (LAC); (2015) 36 ILJ 163 (LAC) (25 September 2014) at para 12.



circumscribed by section 23 of the Constitution. The court made no explicit finding in either case in relation to section 158(1)(h) of the LRA.”

Response to a notice issued in terms of Rule 41(1) of the Public Protector Rules

6.2.9 The Complainant responded as follows In respect of this issue:

6.2.9.1 He disputes that the IT related charges against him were a serious breach of ATNS Policy as he reported suspicious entry on his outlook login window to his employer. He stated that the matter was reported to the HAWKS who found no wrongdoing on his part. He disputes that he intimidated an employee which was part of the charges brought against him and the employer lied about this charge. He referred to an e-mail from the Chairperson of the hearing, Mr Masebo who mentions that he was not found guilty on a misconduct that involves dishonesty.

6.2.9.2 The Public Protector made the incorrect conclusion that his victimisation was not linked to his dismissal, even though it was proven that he did not intimidate an employee and ATNS proceeded to dismiss him, as a way of getting rid of him. He contended that his referral to the CCMA was made during the 30 day period after dismissal and the incorrect judgment of the CCMA was accepted by the Public Protector. He further submitted that it was not necessary for him to lodge a condonation application in this regard.

Analysis of evidence

6.2.10 The evidence before the Public Protector, indicates that the Complainant was charged on 28 August 2018 and subsequently found guilty and dismissed following an internal disciplinary hearing for offences of misconduct, which were not related to the alleged victimisation by Mr Mthiyane.



- 6.2.11 It was further noted by the Public Protector that after his dismissal, the Complainant lodged an appeal against his dismissal and also submitted further supplementary grounds for appeal. The chairperson who presided over the appeal, found no cause to set aside the guilty verdict and confirmed the dismissal. The Complainant referred a dispute of unfair dismissal to the CCMA but was unsuccessful.
- 6.2.12 The CCMA in their analysis of evidence indicated that *“section 191(1)(b)(i) of the LRA requires that a dispute about the fairness of a dismissal be referred to the Commission or a relevant bargaining council within 30 days of a dismissal. Section 191(2) allows an employee to refer a dispute to the Commission or council after the 30 day period has expired provided the employee shows good cause.”*
- 6.2.13 The CCMA also ruled that the Complainant failed to demonstrate that he had any reasonable prospect of success with his claim. Furthermore, that he also failed to show good cause for condonation and referral. In this regard, the Public Protector is in possession of copy of the Complainant’s application for condonation at the CCMA, dated 15 October 2019 and the CCMA’s condonation ruling dated 28 February 2020, wherein it was concluded that a degree of lateness was excessive.
- 6.2.14 The evidence further indicates that the Complainant was unsuccessful with three separate and independent adjudicators, in an attempt to vitiate the charges against him and his sanction of dismissal.

Conclusion

- 6.2.15 Based on the evidence at the disposal of the Public Protector, it is concluded that the Complainant’s dismissal was not related to any victimisation that he alleged against Mr Mthiyane. The charges preferred against the Complainant were specific in nature and related to him unlawfully using



another employee's login details, resulting in his suspension. He was subsequently dismissed, following the conclusion of a formal disciplinary process. He duly exercised his right of appeal against his dismissal and was unsuccessful.

6.2.16 Based on the nature of the dispute, it is further concluded that this is a labour related matter. Disputes about the unfairness of labour related issues such as unfair labour practices and dismissals, should be resolved through a system or mechanisms established in terms of sections 191 and 193 of the LRA. The Public Protector is not an appropriate body to adjudicate and offer remedies for such disputes.

6.2.17 The Complainant's response to the notice issued in terms of Rule 41(1) of the Public Protector Rules, has been adequately considered, however the Public Protector has not been persuaded to amend the findings and determinations made in the interim report on this issue.

6.3 Whether there were irregularities in the appointment of Mr Thomas Kgokolo as CEO of ATNS, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

Common cause

6.3.1 During 2018, the former Minister of Transport Mr Joe Maswanganyi, following a three (3) month extension of Mr Mthiyane's contract as the CEO, elected not to renew his contract of employment.

6.3.2 Mr Thomas Kgokolo was appointed by the Board as CEO, on an interim basis for the period 01 October 2019 to 31 March 2020, after which Mr



Sangweni was delegated as CEO for the period 01 April 2020 to 31 March 2022. These interim appointments took place while the recruitment process for the appointment of a permanent CEO was being finalised.

Issue in dispute

- 6.3.3 The issue for Public Protector's determination is whether the appointment of Mr Kgokolo as the CEO was undertaken in compliance with the applicable prescripts.

Complainant's version

- 6.3.4 The Complainant alleged that ATNS did not follow any recruitment process or advertise the position of CEO, but appointed Mr Kgokolo as the CEO of ATNS.

Response from ATNS

- 6.3.5 Regarding the appointment of Mr Kgokolo as the CEO on 22 March 2022, Mr Thobela responded as follows:
- 6.3.5.1 As a result of the position of the CEO being vacant, Mr Kgokolo was appointed by the Board on an interim basis for the period 01 October 2019 to 31 March 2020, whilst the Board initiated the process of recruitment of the new CEO.
- 6.3.5.2 At that time, Mr Kgokolo was an independent non-executive director and a member of the Audit and Risk Committee of the Board.



6.3.5.3 Mr Kgokolo is a Chartered Accountant and holds an MBA degree from the Gordon Institute of Business Sciences, B Compt Honours and B Com Degree in Accounting Sciences from the University of South Africa (UNISA) and University of Pretoria, respectively.

6.3.5.4 After six (6) months, Mr Sangweni was then appointed as the Delegated CEO, following a consultation with the Minister of Transport for the period 01 April 2020 to 31 March 2022. The Board then finalised the recruitment process and Ms N Mdawe (Ms Mdawe) was appointed as the CEO from 01 April 2022.

Documentary Evidence received from ATNS

6.3.6 The minutes of the Special Board Meeting on 26 September 2018, indicate that the *“Chair then made a special recommendation to the Board, that the interim CEO be appointed for a period of 6 months whilst the recruitment process is restarted and finalised. The Chair recommended the appointment of current Board member, Mr T Kgokolo as Interim CEO.”*

Applicable Legal Prescripts

The Public Finance Management Act, 1999 (PFMA)

6.3.7 Section 49 of the PFMA states that:

- (1) Every public entity must have an accounting authority which must be accountable for the purposes of this Act.
- (2) If the public entity - (a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity;



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- 6.3.8 Section 56(1) of the PFMA states that the accounting authority for a public entity may—
- a) in writing delegate any of the powers entrusted or delegated to the Accounting Authority in terms of this Act, to an official in that public entity; or
 - b) instruct an official in that public entity to perform any of the duties assigned to the accounting authority in terms of this Act.
- (2) A delegation or instruction to an official in terms of subsection (1)—
- a) is subject to any limitations and conditions the accounting authority may impose;
 - b) may either be to a specific individual or to the holder of a specific post in the relevant public entity.

Response to a notice issued in terms of Rule 41(1) of the Public Protector Rules

- 6.3.9 In respect of this issue, the Complainant responded as follows:
- 6.3.9.1 He stated that he accepts that the Board has the purview to make acting appointments, however, he requested that the investigation should focus on why Mr Kgokolo was appointed as the acting CEO and not Mr Sangweni. He submitted that in June 2018, a decision was taken by the Board that Mr Sangweni should act, however, Mr Kgokolo was appointed to act and thereafter Mr Sangweni was appointed a year later. He contended that this amounts to maladministration, as there was no ratification from the Board for this decision.



Analysis of evidence

- 6.3.10 The PFMA and other prescripts empower the Board as the Accounting Authority of ATNS to make acting appointments, as it did when appointing Kgokolo to act as CEO. This appointment was confirmed by the Board resolution as evident in the minutes of a Special Board Meeting on 26 September 2018.
- 6.3.11 In the circumstances, it would not be prudent for the Public Protector to question the Board's prerogative or individual candidate's identity. The investigation of the Public Protector focuses on the fairness of processes to determine whether any maladministration or improper conduct occurred in line with its mandate.

Conclusion

- 6.3.12 The evidence obtained by the Public Protector during the investigation do not support the allegation that Mr Kgokolo was permanently appointed without ATNS following proper processes. Evidence in possession of the Public Protector indicate that Mr Kgokolo was only appointed on an interim basis as the CEO in accordance with the PFMA, whilst the recruitment process to appoint a permanent CEO was underway.
- 6.3.13 The Complainant's response to the notice issued in terms of Rule 41(1) of the Public Protector Rules, has been adequately considered, however the Public Protector has not been persuaded to amend the findings and determinations made in the interim report on this issue.



6.4 Whether there were irregularities in the appointment of Ms Thandeka Mdebuka as the Executive Legal and Mr Mbongeleni Maqashelana as Chief Risk Executive, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5) of the Public Protector Act

Common cause issues

6.4.1 Ms Thandeka Mdebuka (Mdebuka) was appointed by ATNS as the Executive Legal from 01 April 2018.

6.4.2 Mr Mbongeleni Maqashelana (Mr Maqashelana) was appointed by ATNS as Chief Risk Executive from 01 July 2018.

Issues in dispute

6.4.3 The issue for Public Protector's determination is whether the appointments by ATNS of Ms Mdebuka as the Executive Legal and Mr Maqashelana as Chief Risk Executive followed the correct procedure in line with the Recruitment Policy of ATNS.

Complainant's version

6.4.4 The Complainant alleged that there were irregular appointments at ATNS in 2018. The positions were never advertised and no interview process was followed for the appointment of Ms Thandeka Mdebuka as Executive Legal and Mr Mbongeleni Maqashelana as Chief Risk Executive.



Response from ATNS

- 6.4.5 On 22 March 2022, Mr Thobela responded as follows in respect of this issue:
- 6.4.5.1 He stated that the Board of ATNS recognised and accepted that the previous Board, which Mr Mthiyane was a member of by virtue of him being a Chief Executive Officer, had failed to follow the approved recruitment procedures adopted by ATNS. Mr Thobela submitted that the Public Protector should differentiate between the improper actions of the previous Board, and those remedial actions implemented by the new Board.
- 6.4.5.2 Mr Thobela further stated that on 25 August 2020, and in an endeavour to manage Mr Mthiyane's irregular appointment process, Mr Sangweni (in the capacity of a Delegated Chief Executive Officer of ATNS), submitted a memorandum to the Human Resource Committee, recommending that the Committee recommend to the Board that the appointments of Legal Counsel and Chief Risk Executive be ratified.
- 6.4.5.3 Mr Thobela further stated that, this was proposed on the basis that Management of ATNS had been satisfied with their performance in their respective roles and would monitor their performance through the Human Capital performance management system to determine whether they were in fact competent for their respective roles.
- 6.4.5.4 It was submitted by Mr Thobela that the performance of the incumbent Legal Executive and Chief Risk Executive, for the financial period preceding the submission by Mr Sangweni on 25 August 2020, was assessed and found to be satisfactory. He stated that on 18 September 2020, the Board ratified the initial irregular appointment of Legal Executive and the Chief Risk Executive. He clarified further that Mr Sangweni continued to monitor their



respective performance, as he does with all of the employees, and would take necessary action should the circumstances dictate.

6.4.5.5 It was also contended by Mr Thobela that having regard that Mr Mthiyane is deceased, the Board could not take any action against him for the irregular appointments during his tenure. It was submitted by Mr Thobela that the Board was satisfied that Ms Mdebuka as Legal Executive Counsel of ATNS and Mr Maqashelana as Chief Risk Executive, had the requisite skills and experience and were performing admirably in their respective roles.

6.4.5.6 It was also conceded by Mr Thobela that the ATN-33 Internal Audit report dated November 2019, indicated that the allegations relating to the irregular appointment of Legal Executive Counsel and Chief Risk Executive were substantiated. However, he submitted that there were no recommendations made in the audit report. He further stated that the Internal Audit Report made the following observations and conclusions:

- (a) For both positions no recruitment process was followed, therefore, there were no recruitment files to review whether the recruitment process was in line with ATNS' Recruitment Policy.
- (b) Actions that needed to be implemented prior to the finalisation of these appointments were not completed. The Board minutes do not grant approval for appointment as permanent staff.
- (c) Upon request for the Board Resolutions to make these permanent appointments, it was revealed by the Acting Company Secretary, Ms Ayanda Manqele that there was no resolution to do so from the Board.

6.4.6 On 30 November 2022, the Public Protector sent correspondences to the current ATNS CEO, Ms Mdawe and Mr Thobela, requesting clarity on the process followed by the Board in ratifying the positions in question. This



resulted in a meeting that took place on 19 December 2022, between the Investigation Team and Ms Mdawe. Ms Mdawe subsequently sent a formal response dated 21 December 2022, to the Public Protector stating that:

- 6.4.6.1 The organisation is implementing a Future Fit Workforce Programme, which aims to unlock one of the key drivers for the organisations Strategy 2025 implementation being the required skills, culture and appropriate organisational design that supports intended outcomes.
- 6.4.6.2 The Board of Directors approved the Tier 1 – Executive Level structure on the 19th of September 2022. A number of Executive positions have been significantly impacted by the organisation re-design. Changes include an impact on the existing role profile, merging of two or more positions into one, or the creation of a new role. The resourcing of the newly approved structure, will follow a defined placement approach, whereas all positions with changes of more than thirty percent, will be advertised and recruited for.
- 6.4.6.3 Amongst the positions significantly impacted, are the roles which Ms Mdebuka and Mr Maqashelana occupy. These two executives will be subjected to a recruitment process, including psychometric assessments to determine their suitability as per the redesigned organisational structure. The process being followed above, indicate the organisation’s commitment to ensuring that the recruitment process and all other governance processes are followed in a consistent and fair manner. This demonstrates ATNS’s intention to ensure that any irregularities of previous appointments are corrected.

Applicable Legal Prescripts

- 6.4.7 ATNS’ Recruitment Policy regulates at section 2 recruitment process as follows:



“2.1 Filling of Posts

2.1.1 The filling of every vacancy and new position arising out of established posts will be initiated by a line manager in the form of an ATNS'er requisition form.

2.1.2 All posts which must be recruited for must have been clarified in terms of a job description which has been graded in terms of the ATNS approved grading system.

2.1.3 ATNS is an equal opportunity employer that strives to achieve a diverse work force broadly representative of our people. Positions will therefore be filled in a manner which is focused on the achievement of the company Employment Equity and resultant departmental employment equity targets.

2.1.4 Individuals will only be appointed to positions based on:

- i. Merit/Potential*
- ii. Job Output*
- iii. Relevant skills*
- iv. Educational qualification*
- v. Employment Equity Status*
- vi. Assessment and validation (as required)*

2.2 Advertisements

2.2.1 All vacancies within ATNS will be clearly advertised by Human Capital, when the Company is ready to fill them. Such advertisement will state the necessary criteria and where possible, these will be indicated in terms of required job outputs.”



Response to a notice issued in terms of Rule 41(1) of the Public Protector Rules

6.4.8 In response to this issue, the Complainant stated that:

6.4.8.1 It is incorrect to accept that since ATNS is implementing a restructuring process, it is the solution to ratify irregular appointments, as these employees will be advantaged when roles are identified.

Analysis of evidence

6.4.9 ATNS Recruitment Policy sets out the process to be followed when posts are to be filled. The ATNS through their internal audit report and the response of Ms Mdawe to the Public Protector, confirmed that the appointments for the positions of Legal Executive Counsel and Chief Risk Executive by the previous Board, were irregular.

6.4.10 The Public Protector further notes that whilst the Board acknowledged that the previous Board, which Mr Mthiyane was a member of by virtue of him being a Chief Executive Officer, had failed to follow the approved recruitment procedures adopted by ATNS. However, the Board ratified the initial irregular appointment of Legal Executive and the Chief Risk Executive.

6.4.11 Furthermore, that the ATNS has taken measures, including implementing a new organogram for ATNS, which directly affects the two posts of Legal Executive Counsel and Chief Risk Executive. These incumbents will be subjected to the recruitment process when applying for new posts, with a view of mitigating any further advantage that they may directly derive as a result of their irregular appointments. These changes were also adopted to rectify all other irregular appointments made by the previous administration of ATNS.



Conclusion

- 6.4.12 Based on the submissions made by ATNS, it is concluded that the appointments of Ms Mdebuka as the Executive Legal and Mr Maqashelana as Chief Risk Executive were found to be irregular in terms of ATNS's Internal Audit Report and were not done in accordance with the HC POLICY 21/2012 – ATNS Recruitment Policy. However, the Public Protector concludes that ATNS has regularised the irregular appointments of the two incumbents. Therefore, the Public Protector has found no meritorious grounds to make any adverse conclusions on the conduct of ATNS, noting that the Board has taken adequate measures to prevent the recurrence of such maladministration, in future.
- 6.4.13 The Complainant's response to the notice issued in terms of Rule 41(1) of the Public Protector Rules, has been adequately considered, however the Public Protector has not been persuaded to amend the findings and determinations made in the interim report on this issue.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that ATNS should have complied with and the impact thereof on good administration, the Public Protector makes the following findings against the ATNS:

- 7.1 Whether the Board of the ATNS unduly delayed or failed to deal with the grievance of victimisation lodged by the Complainant against the former CEO, the late Thabani Mthiyane, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and undue delay in terms of section 6(5)(b) of the Public Protector Act**



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- 7.1.1 The allegation that Board unduly delayed or failed to deal with the grievance of victimisation lodged by the Complainant against the former CEO, Mr Mthiyane, is not substantiated.
- 7.1.2 On the strength of the evidence before the Public Protector, it is evident that the Complainant did not exhaust all internal grievance procedures and/or external dispute resolution processes as set out in ATNS' Grievance Procedure in order to resolve his complaint of victimisation and/or unfair labour practice by Mr Mthiyane.
- 7.1.3 The Labour Court is the appropriate forum for issues related to unfair labour practices, as provided for by section 157(1) and 157(2)(a) of the LRA. The same was emphasized in *Hendricks v Overstrand Municipality & Another* where the court held that disputes relating to unfair labour practice should be processed by the system established by the LRA for their resolution.
- 7.1.4 In this regard, the Complainant's remedy is to refer his dispute relating to unfair labour practice and the subsequent unfair dismissal to the CCMA for adjudication as required by 191(5A) of the LRA and/or if the dispute remains unresolved, to refer it to the Labour Court as required by section 191(6)(b)(c) of the LRA.
- 7.1.5 In the circumstances, the Public Protector could not find that the conduct of ATNS amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and undue delay in terms of section 6(5)(b) of the Public Protector Act.
- 7.2 Whether the Complainant was subjected to victimisation which ultimately led to his dismissal from ATNS and if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and abuse of power in terms of section 6(5)(b) of the Public Protector Act**



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- 7.2.1 The Public Protector is unable to conclude and make a determination on the allegation that the Complainant was subjected to victimisation which ultimately led to his dismissal from ATNS.
- 7.2.2 The Public Protector, being subject to the Constitution and the law, is obliged to heed to the directive of the Court that the fora established by the LRA to deal with issues of this nature, should be burdened with any further determination of this matter.
- 7.2.3 It is clear from evidence obtained that the Complainant's disciplinary action was related to him having been found guilty of using another employee's login details. He was subsequently dismissed following the completion of a formal disciplinary process, and was also unsuccessful when he appealed his dismissal.
- 7.2.4 In the circumstances, the Public Protector finds that the nature of the dispute between the Complainant and ATNS regarding unfair dismissal is one that may be appropriately ventilated through the systems and fora established in terms of the LRA.
- 7.2.5 Accordingly, no determination could be made by the Public Protector in terms of section 182(1)(a) of the Constitution and abuse of power in terms of section 6(5)(b) of the Public Protector Act.
- 7.3 Whether there were irregularities in the appointment of Mr Thomas Kgokolo as CEO of the ATNS, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act**
- 7.3.1 The allegation that there were irregularities in the appointment of Mr Kgokolo as the CEO of ATNS, is not substantiated.



- 7.3.2 On the strength of the evidence before the Public Protector, it is apparent that Mr Kgokolo was not permanently employed but rather appointed on an interim basis with the approval of the Board, whilst the recruitment process was underway to appoint the CEO.
- 7.3.3 Evidence further revealed that the acting appointment of Mr Kgokolo as the Interim CEO, was done in terms of the applicable legal prescripts as noted from the minutes of the Special Board Meeting on 26 September 2018, which indicate that the Chair made a special recommendation to the Board, that the interim CEO be appointed for a period of 6 months whilst the recruitment process is restarted and finalised.
- 7.3.4 In the circumstances, the appointment of Mr Kgokolo as CEO of the ATNS does not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.
- 7.4 Whether there were irregularities in the appointment of Ms Thandeka Mdebuka as the Executive Legal and Mr Mbongeleni Maqashelana as Chief Risk Executive, if so, whether such conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act**
- 7.4.1 The allegation that the appointments of Ms Mdebuka as the Executive Legal and Mr Maqashelana as Chief Risk Executive were irregular, is substantiated.
- 7.4.2 Based on the evidence before the Public Protector, it was noted that according to the ATNS's Internal Audit Report, these two appointments were found to be irregular and not in line with the ATNS Recruitment Policy.



- 7.4.3 However, Ms Mdawe, who is the current CEO of ATNS confirmed to the Investigation Team that there is a new approved organogram for ATNS and a redesign which directly affects the posts of Legal Executive Counsel and Chief Risk Executive, wherein the incumbents will be subjected to the recruitment process when applying for new posts in order to rectify and correct all irregular appointments by the previous administration of ATNS.
- 7.4.4 In the light of the corrective action being taken by ATNS as shown above, the Public Protector is of the view that, where the state institution has already taken action or implements remedial action based on its own internal practice and prescripts, within its sphere of administration, it should be allowed an opportunity and the space to correct the improper conduct and fully address the maladministration concerned.
- 7.4.5 The constitutional principle of separation of powers was reiterated in *Economic Freedom Fighters v The Speaker of the National Assembly and Others and Democratic Alliance v The Speaker of the National Assembly and Others*⁶ where the court held the following:
- “The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principles of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another...”*
- 7.4.6 Given the above, it is submitted that where the state functionary, as the ATNS has already done in this matter, takes action to remedy irregular appointments and maladministration within the sphere of its administration, it would not be prudent for the Public Protector to interfere with the process

⁶ CCT 143/15 and CCT 171/15 at para 91.



concerned, unless the maladministration, through an act of commission or omission manifests and persists.

7.4.7 Further the pursuance of the matter and/or imposing any remedial action will serve no judicious purpose on the basis that the issue has become moot⁷ consequent to ATNS's implementation of remedial action based on its own internal practice and prescripts. In this regard, the remedial action that may be taken by the Public Protector will have no practical effect or result.

8. CONCLUSION

8.1 The Public Protector considers this matter as finalised and cannot take it further. Should any party wish to challenge this decision, they are at liberty to explore legal remedies at their disposal.

ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR
OF THE REPUBLIC OF SOUTH AFRICA
DATE: 31 MARCH 2023

Assisted by: *Mr Vusumuzi Xolani Dlamini*
Acting Executive Manager: Investigations Branch

⁷ The principle of mootness was echoed by the Constitutional Court in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 21.