

**CLOSING 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**



**REPORT NO. 35 OF 2023/24
ISBN NUMBER: 978-1-7764604-8-9**

**CLOSING REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF UNDUE
DELAY BY THE COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION TO FINALISE THE ADJUDICATION OF AN UNFAIR DISMISSAL
CASE OF SABC EMPLOYEES**

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LIST OF ACRONYMS/ABBREVIATIONS

ACRONYMS AND ABBREVIATIONS	DESCRIPTIONS
CCMA	Commission for Conciliation, Mediation and Arbitration
Complainant	Mr Tuwani Gumani
Council	the Bargaining Council with the jurisdiction over the parties to the dispute
Constitution	Constitution of the Republic of South Africa, 1996
ICTU	Information Communication Technology Union
SABC	South African Broadcasting Corporation
Investigating Team	Public Protector South Africa Investigating Team.
MWASA	Media Workers Union of South Africa
PAIA	The Promotion of Access to Information Act, 2000
Public Protector Act	Public Protector Act, 23 of 1994, as amended.
Public Protector Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018, as amended.
RSC	Regional Senior Commissioner
SC	Senior Commissioner

1. INTRODUCTION

- 1.1. This is a Closing Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution), section 8(1) of the Public Protector Act, 1994 (the Public Protector Act) and Rule 40(b) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018*, as amended (the Public Protector Rules) as promulgated in terms of section 7(11) of the Public Protector Act.
- 1.2. The report is submitted in terms of sections 8(1), read with section 8(3) of the Public Protector Act and Rule 40(b) of the Public Protector Rules, which empowers the Public Protector to make known the findings of an investigation, to affected parties, including the Complainant, for such persons to note the outcome of the investigation. The report is submitted to the following persons:
- 1.2.1 The CCMA Director: Professor Cameron Sello Morajane;
- 1.2.2 The Complainant.
- 1.3. The report relates to an investigation into allegations of undue delay by the CCMA to finalize the adjudication of the unfair dismissal case of the SABC employees under case no. GAJB8474-16.

2. THE COMPLAINT

- 2.1 The investigation originates from a complaint that was lodged with the Public Protector by Mr Tuwani Gumani (Complainant) on 23 February 2022.
- 2.2 In the main, the Complainant alleged that:

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- 2.2.1 In 2016, the SABC dismissed just under 200 employees alleging that they committed medical aid fraud;
- 2.2.2 The SABC deliberately transgressed constitutional and labour rights of the employees and colluded with Afrocentric Health Pty Ltd, Tokiso Dispute Settlement Pty Ltd, Puke Maserumule Attorneys, and the CCMA;
- 2.2.3 The case under CCMA Case number GAJB8474-16 has remained unresolved since 2016 despite all efforts on the part of the applicants (some have died in the process);
- 2.2.4 The CCMA is required by statute to complete its dispute resolution process within 74 calendar days. The stalling, delaying, and unprofessional activities suggest that the CCMA is compromised and is incapacitated to carry out its mandatory obligations as a result;
- 2.2.5 The conduct of the CCMA administration has bordered on corruption, maladministration, fruitless and wasteful expenditure and obstruction of justice. Statutory requests such as a subpoena and PAIA are simply ignored, neglected and undermined to protect compromised individuals including Director Mr Cameron Sello Morajane. A subpoena and subsequent application for the initiation of CCMA contempt proceedings have been frustrated through granted postponements and reshuffling of Commissioners themselves accused of conflict of interest; and
- 2.2.6 The entire CCMA as an institution is compromised and now crippled and disabled by what appears to be systemic incompetence, corruption, maladministration and criminality.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

“The Public Protector has the power, as regulated by national legislation –

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

3.3 Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.4 The CCMA is an organ of state in terms of section 239(b) of the Constitution and its conduct amounts to conduct in state affairs, and as a result, the Public Protector is satisfied that the complaint falls 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. ISSUE IDENTIFIED FOR INVESTIGATION

4.1 Based on the analysis of the complaint, the following issue was identified and investigated:

4.1.1 Whether there was undue delay by the CCMA to finalize the adjudication of the unfair dismissal case of the SABC employees under case no. GAJB8474-16, if so, whether such conduct constitutes improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994.

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 6 and 7 of the Public Protector Act.

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 determine:

5.2.2.1 What happened?

5.2.2.2 What should have happened?

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- 5.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?
- 5.2.2.4 In the event of maladministration or improper conduct what would it take to remedy the wrong?
- 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. Evidence is evaluated and a determination is made on what happened based on a balance of probabilities. In this particular case, the factual enquiry principally focused on whether 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 CCMA during the adjudication process of the matter.
- 5.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration.
- 5.3 **Key sources of information**
- 5.3.1 Complaint form to the Public Protector, dated 19 February 2022;
- 5.3.2 Email from the Complainant to the Public Protector, dated 07 April 2022;
- 5.3.3 Email to the Director of CCMA, Professor Cameron Sello Morajane (Professor Morajane), dated 19 April 2022;

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- 5.3.4 Letter from Professor Morajane to the Public Protector, dated 05 May 2022;
- 5.3.5 Notice in terms of Rule 41 (1) sent to the Complainant, dated 30 January 2023;
- 5.3.6 Numerous correspondence from the Complainant to different parties by email and copied to the Investigation Team. The emails are dated 23, 24 May 2022, 30 August 2021, 6, 8 13 and 21 June 2022 and 10, 19 July 2022 and 7, 11, 20, 22 and 29 August 2022 and 02 September 2022; and
- 5.3.7 Closing letter from the Public Protector to the Complainant, dated 28 February 2023.

5.3.8 Legislation and other prescripts

- 5.3.8.1 The Constitution of the Republic of South Africa, 1996;
- 5.3.8.2 The Public Protector Act, 1994; and
- 5.3.8.3 Labour Relations Act 66 of 1995 as amended.

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

- 6.1 Whether there is undue delay by the CCMA to finalize the adjudication of an unfair dismissal case of the SABC employees under case no. GAJB8474-16 and whether such conduct constitutes improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(5) of the Public Protector Act, 1994**

Common Cause

- 6.1.1 In 2016, the SABC dismissed just under 200 employees alleging that they committed medical aid fraud.
- 6.1.2 The affected employees lodged an unfair dismissal case with the CCMA under case number GAJB8474-16, which is still pending.

Issue in dispute

- 6.1.3 The issue for the Public Protector's determination is whether the functionaries of the CCMA acted in line with the relevant legal framework when dealing with the unfair dismissal case lodged on behalf of the SABC employees.

Complainant's version

- 6.1.4 The Complainant submitted that there has been undue delay by the CCMA to finalize the matter since 2016 despite all efforts on the part of the applicants.
- 6.1.5 The CCMA was supposed to have completed its dispute resolution process within 74 calendar days. The Complainant averred that applications submitted in accordance with the rules of CCMA remain unattended. A subpoena and subsequent application for the initiation of CCMA contempt proceedings have been frustrated through granted postponements and reshuffling of Commissioners themselves accused of conflict of interest.

Version of the CCMA

- 6.1.6 The Public Protector raised the allegations with the CCMA Director, Professor Cameron Sello Morajane through a letter dated 19 April 2022.

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- 6.1.7 In his response dated 5 May 2022, Professor Morajane provided the following information on the adjudication of the matters involving the Complainant since 2016 and stated, *inter alia*, that:
- 6.1.7.1 The alleged unfair dismissal dispute involving the Information Communication Technology Union (ICTU) obo Mapheto and 38 Others as represented by Mr Tuwani Gumani, a Union official (“the Applicant”) against SABC Ltd (“the Respondent”) was referred to the CCMA in terms of section 191 of the Labour Relations Act 66 of 1995 as amended, pertaining to misconduct. The matter was processed under CCMA case number GAJB8474/16;
- 6.1.7.2 The Complainant in this matter was initially the Media Workers Union of South Africa (MWASA) obo Mapheto and 38 Others, however, in light of the deregistration of MWASA as a trade union in terms of the Labour Relations Act, by the Department of Labour (Government Gazette No: 42622), the Applicant brought an application substituting MWASA for ICTU during the commencement of the arbitration proceedings;
- 6.1.7.3 The dispute was conciliated on 19 May 2016, at the CCMA Johannesburg Regional Office and remained unresolved. The said period was within the required 30 days. The dispute was then scheduled for arbitration on 22 September 2016. An application for postponement occasioned by the Applicant was received on 23 November 2016, which postponement was granted. The matter then continued in process on 6 December 2016, 6 February 2017 and 25 April 2017 respectively;
- 6.1.7.4 The matter was subsequently adjourned on 26 June 2017 and continued before Commissioner Larry Shear from 14 August 2017 until 19 November 2020;

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- 6.1.7.5 During the above-mentioned period, a number of rulings and directives were issued by Commissioner Shear pertaining to *inter alia* preliminary matters to be dealt with by the CCMA; pre-arbitration meetings held; an application of transfer of the matter to redline status brought by the Applicant, together with an application for the substitution of MWASA by ICTU. Additionally, in May 2020, the Applicant filed a notice of withdrawal of its case at the CCMA and then subsequently re-referred the matter;
- 6.1.7.6 Additionally, since the inception of this matter, it was postponed on approximately six (6) previous instances occasioned by either the Applicant or the Respondent, alternatively, by agreement between the parties;
- 6.1.7.7 On 03 December 2020, following the proceeding from 19 November 2020, Commissioner Shear issued a ruling in terms of which, the Applicant was to bring an appropriate application in writing and in terms of the CCMA Rules as well as the provisions of the Labour Relations Act in respect of documents required by the applicant from the CCMA. According to this ruling, the application was thus postponed sine die pending the conclusion of the said applications;
- 6.1.7.8 The arbitration continued before Commissioner Shear until 26 April 2021. At the arbitration on 26 April 2021, the Applicant then raised an objection in terms of Rule 25(2) and 25(6) of the CCMA Rules. This application was towards the Representative of the Respondent Mr Puke Maserumule. The objection was based on the fact that the Applicants lodged a complaint against Mr Maserumule with the Legal Practice Council of South Africa, which was still pending. The Applicant's argument was that given the complaint, Mr Maserumule was automatically disqualified from representing the Respondent;
- 6.1.7.9 The Applicant subsequently applied for rescission of a number of rulings made by Commissioner Shear. In terms of the rescission application, Commissioner Shear on 17 June 2021, issued a rescission ruling directing that should the

Applicant be dissatisfied with the rulings, he should bring an application to review the ruling at the Labour Court;

- 6.1.7.10 On 16 August 2021, the dispute was then set down before Commissioner Eleanor Hambidge for arbitration. At this hearing, the parties reached an agreement that the Applicant must submit its statement of case on 27 August 2021 and the Respondent will in turn submit its statement of response on 7 September 2021. This was done to expedite the matter;
- 6.1.7.11 At the hearing on 25 November 2021 and in its statement of case, the Applicant challenged the impartiality of Commissioner Hambidge and appeared to be asking for her recusal, without submitting a formal application for recusal even when they were directed by the Commissioner to do so;
- 6.1.7.12 On 7 January 2022, Commissioner Hambidge issued a ruling recusing herself from arbitrating this dispute even though the complaint lodged against her was about an unrelated case. The Commissioner recused herself to ensure that the Applicant's case was not decided by a Commissioner against whom a complaint was lodged;
- 6.1.7.13 The complaint lodged was internally investigated and the CCMA advised the Applicant to focus on the matter at hand as opposed to focusing on unrelated issues which in turn delayed the main matter;
- 6.1.7.14 The parties were then served with a notice of set down dated 12 January 2022, for a hearing on 2 and 3 February 2022, to be arbitrated by Senior Commissioner, Themba Zwane;
- 6.1.7.15 The Respondent had then objected to the appointment of Commissioner Zwane on the basis that his previous awards were a subject of review applications; and

6.1.7.16 The matter was subsequently set down on 24 March 2022 and continued before Commissioner Thee.

PAIA application brought by Complainant

6.1.7.17 Professor Morajane stated that in 2019, a complaint was received from the Media Workers Union of South Africa (MWASA). The complaint at the time was against Tokiso Dispute Settlement (Pty) Ltd (“Tokiso”).

6.1.7.18 The complaint arose directly from the alleged conduct of Tokiso, with respect to an agreement entered into between Tokiso and the Respondent, in 2016. In terms of the agreement, the Respondent contracted Tokiso to provide presiding officers to chair internal disciplinary inquiries convened in respect of alleged medical aid fraud by approximately 145 of the Respondent’s employees. The CCMA was compelled to investigate the complaint lodged by MWASA and specifically Tokiso’s accreditation status by the CCMA.

6.1.7.19 On or about March 2020, the CCMA was then requested by the Applicant to provide a copy of the investigation report.

6.1.7.20 As per the request, the CCMA provided the investigation report to the Applicant but omitted to provide annexures to the report, on the basis that the documents were obtained from the Respondent, Tokiso and MWASA. The CCMA placed on record that it was obliged to treat the documents obtained from the above-mentioned parties as confidential and that the information could not be shared with anyone else unless permission is obtained from the authors of these documents Tokiso, the Respondent and MWASA.

6.1.7.21 The Applicant was thus advised to obtain these documents from the above-mentioned role players. The CCMA directed that the subpoena requesting the provision of these documents from the CCMA Director be redirected to Tokiso, the Respondent and MWASA, who are the authors of the said documentation.

6.1.7.22 The CCMA did not ignore the subpoena but provided the Applicant with a copy of the investigation report as requested and advised the Applicant that the annexures to such report be redirected, for the reasons mentioned above.

Subpoena Application

6.1.7.23 Professor Morajane averred that on 10 December 2021, the Applicant lodged a complaint with the CCMA pertaining to Senior Commissioner Eleanor Hambidge (“SC Hambidge”) who was conducting arbitration proceedings in relation to the unfair dismissal dispute referred to the CCMA.

6.1.7.24 The Applicant alleged that SC Hambidge had improperly conducted herself in an arbitration matter heard under case number GAJB8474-16 between ICTU obo Jonas Mapheto and 38 others v SABC SOC Ltd. However, before the matter could conclude, SC Hambidge, on her own accord, recused herself as she held a view that she could no longer be able to conduct the arbitration without fear or favour.

6.1.7.25 Regional Senior Commissioner Renold Mokoena (“RSC Mokoena”) was appointed by the erstwhile Acting National Senior Commissioner Elias Hlongwane to investigate the allegations which were brought against SC Hambidge as per the complaint by the Applicant.

6.1.7.26 In his Investigation report dated 14 January 2022, RSC Mokoena essentially made a finding that SC Hambidge had complied with section 138 of the LRA including the Commissioner’s Code of Conduct; and that allegations in as far they relate to the complaint against SC Hambidge were cured by her recusal ruling.

6.1.7.27 It is understood that the CCMA, through the erstwhile Acting NSC Hlongwane, responded to the Applicant regarding the outcome of the investigation and

advised the Applicant that the complaint had been cured by the recusal of the SC Hambidge. Additionally, a copy of the investigation report per the subpoena served on the CCMA by the Applicant, was provided to the Applicant on 25 March 2022.

Documentary information obtained from the CCMA

- 6.1.8 The CCMA provided the Investigation Team with copies of applications for postponements occasioned by either the Applicant or the Respondent, alternatively, by agreement between the parties as follows:

Request for postponement dated 16 November 2016

- 6.1.8.1 On 23 November 2016, the CCMA received an application for postponement dated 16 November 2016 from SABC Ltd (Respondent) represented by Maserumula Attorneys for the arbitration set down on 06-9 December 2016.
- 6.1.8.2 The application further directed that the arbitration process be set down on such a date as the CCMA may determine.

Opposition of application for postponement, dated 23 November 2016

- 6.1.8.3 The Applicants, represented by MWASA filed an affidavit dated 23 November 2016, opposing the postponement of the hearing.

Decision of the CCMA, dated 02 December 2016

- 6.1.8.4 In the correspondence dated 02 December 2016, Mr Kaizer Makoela, the Acting Commissioner stated, *inter alia*, that:

“The above matter is scheduled for a hearing on 06-09 December 2015.

We are in receipt of the application for postponement and the opposing application.

The parties are reminded that the CCMA is mandated to resolve disputes expeditiously.

The Respondent's application indicated that they are not available on the 06th, 08th and 09th of December 2016, however, available on the 07th December 2016. I therefore direct that the arbitration will proceed on the 07th December 2016 at 09:00 AM to enable the Commissioner to give direction on how the matter will be determined".

...".

- 6.1.8.5 The application for postponement and the objection thereto were respectively lodged with CCMA in November 2016. Therefore, reference to a matter that was scheduled for a hearing on 06-09 December 2015 appears to be a typing error.

Request for postponement dated 20 April 2017

- 6.1.8.6 On 20 April 2017, the Respondent brought an application for postponement to have the matter set down for hearing on 25, 26 and 28 April 2017 proceed only on 25 April 2017.

Opposition to application for postponement, dated 21 April 2017

- 6.1.8.7 In an affidavit dated 21 April 2017, the Applicants lodged an opposition to the application for postponement was postponed.

Letter from Maserumule Attorneys dated 22 May 2017

- 6.1.8.8 The Respondent's Attorneys requested a postponement of the matter set down on 26 and 27 June 2017 to 17 – 21 July 2017.

Email from the Complainant, dated 24 May 2017

- 6.1.8.9 In an email dated 24 May 2017, the Complainant raised concern about the postponement of the matter.

Complainant's request for postponement, dated 26 June 2017

- 6.1.8.10 On 26 June 2017, the CCMA granted approval on the application for postponement by the Applicant. The Applicant requested a postponement in order to issue and serve a subpoena on Centani, a witness. The matter was scheduled for 14 to 18 August 2017.

Postponement Agreement, 04 August 2017

- 6.1.8.11 On 04 August 2017, the Applicant, represented by Mr Gumani and the Respondent represented by Maserumule Attorneys concluded a postponement agreement. In terms of the agreement, the parties agreed that the matter be postponed on 14 and 15 August 2017 which was set down on 14 – 18 August 2017. Postponement was granted for the first two days.
- 6.1.8.12 On 16 August 2017, Commissioner Shear directed the parties to report back to the Commission within 21 days on progress regarding ongoing settlement discussions. The matter was postponed sine die pending the submission of the report by the parties to the CCMA.

Postponement dated 21 February 2018

- 6.1.8.13 On 21 February 2018, Commissioner Thomas Nemushungwa ruled on a request for postponement of this matter that was scheduled for a hearing on

27 and 28 February 2018. The matter was postponed sine die as per the postponement agreement by the parties.

Postponement dated 08 May 2018

6.1.8.14 On 08 May 2018, the Respondent brought an application for postponement before the CCMA requesting postponement of this matter set down on 15 May 2018 and 16 May 2018 to only proceed on 16 May 2018.

Postponement dated 20 August 2018

6.1.8.15 In a handwritten ruling dated 20 August 2018, it is recorded that:

- (a) The parties are in agreement that the matter be postponed to a future date.
- (b) Should the Applicant not receive documents sought from the Respondent in terms of an email dated 27 June 2018, they shall bring formal application for discovery by no later than 27 August 2018.
- (c) The parties agreed further to hold a pre-arbitration meeting on 30 August 2018 at the offices of the Respondent's Attorneys.
- (d) The parties further agreed to sign and file the pre-arbitration minute by no later than 03 September 2018.

Postponement agreement 20 August 2020

6.1.8.16 On 20 August 2020, the parties concluded a postponement agreement postponing arbitration hearing set down for 24 August 2020 and 25 August 2020.

6.1.8.17 The agreement was signed on behalf of Senior Commissioner Nokanyo-Madyibi on 21 August 2020.

Additional correspondence from the Complainant

6.1.9 The Complainant continued to address several correspondences to different parties by email and copied the Investigation Team. The emails dated 30 August 2021, 23, 24 May 2022, 6, 8 13 and 21 June 2022 and 10, 19 July 2022 and 7, 11, 20, 22 and 29 August 2022 and 02 September 2022 addressed to different people.

6.1.10 In his emails, the Complainant raised additional issues and allegations, including that:

6.1.10.1 The CCMA failed to respond to written communications and it appeared that even the appointed Senior Commissioner Joseph Wilson Thee joined the sizeable list of CCMA Officials and Officers who abdicated, absconded or abandoned their obligations, duties and responsibilities;

6.1.10.2 A minimum of 4 Senior Commissioners either failed to arbitrate the dispute and/or none stayed the course to finish the case. This is despite a binding agreement entered into by the disputing parties to conduct the Arbitration of GAJB8474-16 through a Rule 19;

6.1.10.3 Failure by the Chairperson of the Governing Body to suspend the Director of the CCMA Mr Sello Cameron Morajane as a matter urgency;

6.1.10.4 Complaint against Case Management for having arbitrarily issued a set down notice scheduling the matter for 13th to 15th September 2022, without agreement by the parties.

6.1.10.5 Failure to make available access to copies of all recordings regarding GAJB8474-16 under the various Commissioners including HQ.

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

6.1.11 On 30 January 2023, a Notice was issued to the Complainant in terms of Rule 41(1) of the Public Protector of the *Rules relating to Investigations by the Public Protector and Matters Incidental Thereto*¹ as amended (the Public Protector Rules), with a view to affording him the opportunity to submit further representations.

6.1.12 Rule 41(1) provides that when the Public Protector intends concluding a complaint by means of a closing report provided for in Rule 40(b), the Complainant shall be informed in writing accordingly and be given an opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notification.

6.1.13 The Complainant responded through an email dated 06 February 2023, indicating his dissatisfaction with the outcome of the investigation. The Complainant provided more information in relation to the merit of the case is insufficient but did not respond to the findings contained in the Notice.

6.1.14 Furthermore, the Complainant raised the following new issues that he alleged the Public Protector failed to investigate:

6.1.14.1 There was collusion between the SABC, Afrocentric Health, Medscheme, Tokiso, CCMA and Mr Maserumule of Maserumule Attorneys which had the effect of corrupting the alternative Dispute Resolution System and the Public Protector.

¹ Published under GG 41903, 14 September 2018 and amended by GG 43758, 02 October 2020.

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- 6.1.14.2 The SABC, through Mr Maserumule, approached Tokiso Dispute Settlement Pty Ltd without a tender having been issued and requested Tokiso to enter into a services agreement contract whereby Tokiso would provide its panelists to act as chairpersons in disciplinary enquiries processes.
- 6.1.14.3 Among the Tokiso panelists were several CCMA Commissioners some of whom presided over this very case GAJB 8474-16. Reference being made to Commissioner Larry Shear and Eric Myhill. In this regard, the independence of Tokiso in its involvement in this collusion remained unresolved with SABC, Maserumule and Tokiso maintaining the storyline that Tokiso panelists were independent in their participation in the disciplinary processes. The list of CCMA Commissioners who participated in the Tokiso disciplinary process must be investigated by the Public Protector as that is a case of conflict of interest.
- 6.1.14.4 The Independence of Tokiso was not investigated. The Public Protector failed to establish whether Tokiso acted independently, if CCMA acted independently and if so, why the matter was not concluded within the timeframes of the CCMA rules and the provisions of the LRA.
- 6.1.14.5 The responses of the CCMA to the issue identified by the Public Protector are irrelevant and victim-blaming.
- 6.1.14.6 The Public Protector failed to also consider what the total cost and fiscal implications of the retention of case GAJB 8474-16 on the CCMA case roll.
- 6.1.14.7 The case under CCMA Case number GAJB8474-16 remains unresolved since 2016 and the CCMA failed to complete its dispute within 74 calendar days. The Public Protector failed to sufficiently investigate all the causes of delay.
- 6.1.14.8 The conduct of the CCMA administration has bordered on corruption, maladministration, fruitless and wasteful expenditure and obstruction of

justice. Statutory requests such as subpoena and PAIA are simply ignored to protect compromised individuals including Director Professor Sello Morajane.

- 6.1.14.9 The Public Protector failed to investigate whether there was a flow of money, benefit, favour or influence between SABC, Tokiso, CCMA Commissioners, CCMA Director, CCMA staff and Maserumule; and
- 6.1.14.10 There was failure by CCMA Director, Professor Morajane to comply with the subpoena to release full Tokiso Report and its annexures.

Application for internal review

- 6.1.15 On 07 March 2023, the Complainant lodged an application for an internal review of the Closing Report dated 01 March 2023, seeking to change the original decision or to send the matter back to the original or another investigation team for further investigation or a better explanation. In the application, the Complainant contended, amongst other things, that:
- 6.1.15.1 There is demonstrable collusion involving SABC, Afrocentric Group Tshwane Metropolitan Municipality, Medscheme, Maserumule Attorneys, Tokiso, CCMA and various Unions to assist SABC in reducing overheads by culling from among the staff compliment certain portion of disposable employees through a fake disciplinary process, using illegal means;
- 6.1.15.2 This collusion has led to the delay in the resolution of this simple dismissal matter because there are vested interests, which would suffer prejudice should this matter be resolved expeditiously as provided for by Section 138(1) of Labour Relation Act of 1995;²

² Section 138(1) of LRA stipulates that the Commissioner may conduct the arbitration in a manner that the Commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

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- 6.1.15.3 In fact there is an application to the CCMA for striking off this convenient case off the CCMA case roll;
- 6.1.15.4 There is a statutory standard in place, the time periods are defined in simple terms and are quantifiable. These standards must be complied with and be enforced, not bent, stretched, abused or explained away;
- 6.1.15.5 What the CCMA is doing constitutes unlawful conduct, maladministration or even corruption;
- 6.1.15.6 The PPSA could not have arrived at the conclusion it has reached, had simple due considerations of available facts been the order of investigation. Further that law, logic and relevant empirical evidence attest to the fact that there were and continue to be undue delays since April 2016. PPSA was to investigate the causes of this delay, beyond the prescribed time periods and limits;
- 6.1.15.7 PPSA cannot conclude that there was no delay whether due, undue or otherwise, when empirical facts point to a statutory 90 days dispute resolution prescription;
- 6.1.15.8 He never submitted any dispute withdrawal application in relation to this matter since its referral to the CCMA in 2016. This is a patent fabrication and untruth;
- 6.1.15.9 He never made any application calling for the recusal of Senior Commissioner Larry Shear. This is a clear untruth;
- 6.1.15.10 There was never any challenge to the impartiality of Senior Commissioner Eleanor Hambidge. This ruse was addressed during the subsequent arbitration meeting; and
- 6.1.15.11 The PPSA may not close this investigation without having confirmed the above assertions, which address the casual relationships that have resulted in the undue delay.

Status of the CCMA case

- 6.1.16 On 13 February 2023, the CCMA issued an arbitration ruling on the matter. On 26 April 2023, the Applicant filed an application for rescission of the arbitration award, which was successful.
- 6.1.17 On 26 June 2023, the CCMA received an application for motion to review the arbitration award. The application is pending at the Labour Court.

Applicable law

The Constitution of the Republic of South Africa, 1996

- 6.1.18 **The Constitution, 1996** [Act. No. 108 of 1996], which is the supreme law of the Republic and provides in section 2 that, *“The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”*.
- 6.1.19 Section 34 of the Constitution provides that:
- “Everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate another independent and impartial tribunal or forum.”*
- 6.1.20 Section 23(1) provides that everyone has the right to fair labour practice.
- 6.1.21 Section 195(1)(a) enjoins the CCMA to display high standard of professional ethics. In this regard the officials of the CCMA are required to comply with departmental policies and regulatory framework when discharging their duties.

The Labour Relations Act 66 of 1995 as amended

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- 6.1.22 The LRA gives effect to section 23 of the Constitution and seeks to provide simple procedure for the resolution of labour dispute through statutory conciliation, mediation and arbitration and through independent alternative dispute resolution services accredited for that purpose.
- 6.1.23 Section 112 provides that the Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person.
- 6.1.24 The functions of the CCMA are provided in terms of section 115 of the LRA. Section 115 (a) states that the attempt to resolve, through conciliation, any dispute referred to it in terms of this Act; (b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if-
- (i) this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or
 - (ii) all the parties to a dispute in respect of which the Labour Court has jurisdiction consent to arbitration under the auspices of the Commission.
- 6.1.25 In terms of section 191 (1)(a) of the Labour Relations Act 66 of 1995 provides *that If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within to:-*
- (i) *a council, if the parties to the dispute fall within the registered scope of that council; or*
 - (ii) *the Commission, if no council has jurisdiction.*
- 6.1.26 Section 191 (1)(b) provides that *a referral in terms of paragraph (a) must be made within:-*
- (i) *30 days of the date of a dismissal or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal;*

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence.

6.1.27 Section 191(5) of the LRA provides that *If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved:-*

(a) *the council or the Commission must arbitrate the dispute at the request of the employee if- (i) the employee has alleged that the reason for dismissal related to the employee's conduct or capacity...*

Rules for the conduct of proceedings before the CCMA

6.1.28 Rule 23 (2)(b) of the Rules for the conduct of proceedings before the CCMA provides that *the Commission must postpone an arbitration without the parties appearing if all the parties to the dispute agree in writing to the postponement; and the written agreement for the postponement is received by the Commission at least seven (7) days prior to the scheduled date of the arbitration.*

6.1.29 Rule 25(2) of the Rules provides that *“if the party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of this Rule, the commissioner must determine the issue”.*

6.1.30 Rule 25(6) of the CCMA Rules provides that *“If in any proceedings it becomes necessary to substitute a person for an existing party, any party to the proceedings may apply to the Commission for an order substituting that party*

for an existing party, and a commissioner may make such order or give appropriate directions as to the further procedure in the proceedings”.

Analysis of evidence

- 6.1.31 Section 23 of the Constitution outlines the rights of workers, including the right to fair labour practices. Section 34 of the Constitution emphasizes the importance of access to justice and ensures that individuals have the means to seek legal remedies and have their disputes resolved in a fair and transparent manner. Therefore, by approaching the CCMA, employees of the Respondent as represented by the Complainant in this matter were entitled to fair labour practices in line with the Constitution.
- 6.1.32 Section 191(1)(a) of LRA provides that if there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within to a Council, if the parties to the dispute fall within the registered scope of that Council; or the CCMA, if no council has jurisdiction.
- 6.1.33 In terms of Section 191(5)(a) of the LRA if a Council or a commissioner of CCMA has certified that the dispute remains unresolved, or if 30 days have expired since the Council or the CCMA received the referral and the dispute remains unresolved, the Council or the CCMA must arbitrate the dispute at the request of the employee. In this instance, the dispute was conciliated under CCMA case number GAJB 8474/16 on 19 May 2016 within the required 30 days as outlined by the LRA, but was unresolved. The matter was then scheduled for arbitration on 22 September 2016.
- 6.1.34 It is evident that in terms of Section 191 of the LRA, there are no quantifiable time frames within which an arbitration must be finalised by CCMA. Arbitration.

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- 6.1.35 In line with Rule 23(2)(b), the matter was postponed several times on application by either the Applicant or the Respondent; alternatively, by agreement between the parties.
- 6.1.36 The word *undue delay* is neither defined in the Public Protector Act nor in the Public Protector Rules. However, in the matter of *Gqwetha v Transkei Development Corporations Ltd and Others*³ the Supreme Court of Appeal (SCA) held that the approach in determining whether there has been undue delay entails a factual enquiry upon which all the relevant circumstances and factors including any explanation that is offered for the delay should be considered. In this instance, this would entail amongst other things considering the explanation given by CCMA for the cause of delay, the statutory time frames, whether the applicant is entirely blameless in the cause of delay, the potential to prejudice the affected parties, including whether the delay in all the circumstances can be condoned.
- 6.1.37 These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may either help to lay a foundation for finding that a delay was inordinate, unreasonable and undue or that there is a justification for the delay. A lapse of time in itself is not necessarily decisive, much will depend upon a balancing of all the relevant circumstances, notwithstanding the statutory imperative of the expeditious resolution of labour disputes envisaged by Section 138(1) of LRA.
- 6.1.38 The Public Protector evaluated documentary evidence supporting the various applications for postponement and recusal of the Commissioner(s) and their casual relationships to the ultimate cause of delay in this matter and the following was observed:

³ (242/2004) [2005] ZASCA 51; [2006] 3 All SA 245 (SCA); 2006 (2) SA 603 (SCA) (30 May 2005) at para 3, and 24.

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- 6.1.38.1 Various applications for postponement brought in terms of Rule 23 of the CCMA Rules⁴ were made particularly by the Respondent to the CCMA, advancing numerous reasons in support of the application(s). However, in some instances there was mutual agreement and the Applicant(s) duly signed⁵ in support of the postponement; and
- 6.1.38.2 Evidence before the Public Protector indicates that the Complainant raised concern regarding the delays in finalising the matter as evident in an email dated 24 May 2017,⁶ addressed to Ruth Mokgatle and others wherein he expressed a view that the interests of the Respondent/SABC were put before those of the Applicants in this matter. Further that, the Commissioners themselves have not been immune to the knowledge of the details of this case, simply because of the manner this entire case has been managed even the by CCMA.
- 6.1.39 In terms of the *Code of Good Conduct for Commissioners* (the Code), Commissioners are obliged to display complete neutrality and impartiality when complying with their duties and responsibilities. The purpose of the Code is to provide a framework for Commissioners in the pursuit of conduct that is beyond reproach and to ensure that the conduct of Commissioners prior to, during and after all CCMA processes is seen to be fair, impartial and independent.
- 6.1.40 The Public Protector noted that Commissioner SC Hambidge recused herself after an application that was lodged by the Complainant for her recusal as she held a view that she could no longer be able to conduct the arbitration without fear or favour. Regional Senior Commissioner Renold Mokoena, in his

4 CCMA Rule 23 regulates postponements and sub-rule 23(2) provides that where both parties to the dispute agree in writing to the postponement and the written agreement for the postponement is received by the Commission at least seven (7) days prior to the scheduled date of the arbitration, the CCMA must postpone the hearing.

5 Applicant signed on 20 August 2018 to agree to a postponement for example.

6 Sent at 06:02 PM from a Samsung device.

Investigation report dated 14 January 2022 essentially made a finding that SC Hambidge had complied with section 138 of the LRA including the Commissioner's Code of Conduct; and that any allegations in a matter in as far as they relate to the complaint against SC Hambidge have been cured by her recusal ruling.

6.1.41 Once the independence or partiality of a Commissioner is impugned as it appears to be the case herein it would not be unreasonable for the Commissioner to recuse himself or herself, as it happened in this matter to maintain the integrity of the proceedings.

6.1.42 The Public Protector takes note that the adjudication of the matter has been concluded by the CCMA as per the arbitration ruling 13 February 2023. On 26 April 2023, the Applicant filed an application for rescission of the arbitration award, which was successful. The Public Protector further takes note that the matter has been referred to the Labour Court.

Conclusion

6.1.43 The evidence at the Public Protector's disposal indicates that the CCMA was seized with the adjudication of the matter from 2016 until it was finalized in 2023, which is a period of almost six (6) years).

6.1.44 It is evident from the evidence that the delay is attributable to the litigation processes that ensued between the parties, including objections, interlocutory applications and requests for postponements which happened either at the instance of the Applicant or Respondent, or by mutual agreement between parties.

6.1.45 The Public Protector further draws the attention of the Complainant to the fact that the Labour Relation Act, 1995(Act No. 66 of 1995) does not provide for

the Public Protector to form part of the process of adjudication aimed at determining labour disputes. According to the Labour Relations Act, 1995 and subject to the Constitution, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the Act, or in terms of any other law, is to be determined by the Labour Court.

7. FINDINGS

Having regard to the evidence and the regulatory framework determining the standard that should have been complied with, the Public Protector makes the following findings:

7.1 **Whether there is whether there is undue delay by the CCMA to finalize adjudication of unfair dismissal case of the SABC employees under case no. GAJB8474-16 and whether such conduct constitutes improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act, 1994**

7.1.1 The allegation that there is undue delay by the CCMA to finalize adjudication of unfair dismissal case of the SABC employees under case no. GAJB8474-16, is unsubstantiated.

7.1.2 Whilst the Public Protector notes that it has taken approximately six (6) years for the CCMA to finalise the adjudication on the matter, however, after the evaluation of the evidence it is evident that the delay in finalising the matter was primarily caused by the litigation processes, which ensued between the parties, including objections, interlocutory applications and postponements which happened at the instance of either party.

7.1.3 Accordingly, the conduct of the CCMA does not constitute improper conduct as envisaged 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 The Public Protector considers this matter as finalised and cannot take it further.



ADV KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE:28 MARCH 2024

Assisted by: Ms Lesedi Sekele
Acting Executive Manager: Investigations