

**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**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY THE UNIVERSITY OF SOUTH AFRICA IN CONNECTION WITH THE IRREGULAR APPOINTMENT OF ITS EXECUTIVE DIRECTOR: LEGAL SERVICES, ADV MODIDIMA MANNYA**

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## **1. INTRODUCTION**

1.1. This is the Public Protector's Closing Report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act 23 of 1994] (the Public Protector Act).

1.2. The report is submitted in terms of section 8(3) of the Public Protector Act, 1994 to the following people:

1.2.1 Ms Puleng Lenka Bula, the Vice Chancellor of the University of South Africa; and

1.2.2 The two Complainants, who wished to remain anonymous.

1.3. The report relates to an investigation into allegations of improper conduct and maladministration by the University of South Africa (UNISA) in connection with the irregular appointment of its Executive Director: Legal Services, Adv Modidima Manny.

## **2. THE COMPLAINT**

2.1 The investigation emanates from two complaints received by the Public Protector.

2.1.1 The Public Protector received a complaint from a Whistle-blower on 21 August 2019, in which complaint it was alleged that: -

2.1.1.1 The UNISA advertised the position of Executive Director: Legal Services (Ref: ED: LS/RS&C/LS/GRM/2019) with a closing date of 22 March 2019;

- 2.1.1.2 All Executive Director positions at the UNISA require a Master's Degree but the appointee, Adv M Mannya, only possessed an LLB degree;
- 2.1.1.3 The UNISA changed the academic requirements for the post to ensure that Adv. Mannya is appointed to the position; and
- 2.1.1.4 Adv Mannya was appointed despite him having been previously dismissed by the Eastern Cape Department of Education and the KwaZulu-Natal Department of Agriculture and Environmental Affairs.
- 2.1.2 On 23 October 2019, the Public Protector received a second Anonymous complaint, in which complaint the following was alleged: -
  - 2.1.2.1 On 17 March 2019, the UNISA advertised the position of Executive Director: Legal Services. Adv. Modidima Mannya was subsequently appointed in the position. In the complaint, it was alleged that the appointment was irregular because: -
    - 2.1.2.1.1 The appointee did not meet the Employment Equity target because of the existence of a personal relationship between him and the Vice-Principal: Institutional Development, under which the Employment Equity Directorate resides;
    - 2.1.2.1.2 The appointee did not meet the selection criteria in that a Master's Degree was one of the minimum requirements for the position, but Adv. Mannya did not possess such. The post was advertised internally and externally, but the internal advert was changed and the Master's Degree requirement removed. The advert was not retracted;

- 2.1.2.1.3 The appointee was formerly employed as the Head of Department (HOD) of the KwaZulu-Natal Department of Agriculture and as the HOD of the Eastern Cape Department of Education. He was suspended and subsequently dismissed by both Departments and was unsuccessful in challenging these dismissals in court. The Complainant further alleged that the appointee failed to declare this during the interview; and
- 2.1.2.1.4 The required criminal checks in terms of the UNISA's Recruitment Policy were found to be inconclusive, but the appointee was not disqualified from the appointment.
- 2.1.2.2 The complaint further contended that, subsequently, two whistle-blowers raised the matter through UNISA's hotline, and UNISA's Internal Audit Unit was tasked to investigate the matter but the Chief Executive Officer (CEO) of UNISA, Mr Xola Lingane, unlawfully interfered with the investigation by discussing details of the case with the appointee outside of the investigation process.
- 2.1.2.3 In addition, that the Executive Director: Human Resources, also informed the appointee that the Investigating Officer from Internal Audit, Ms Estelle Gilberts, requested information and what the nature of the requested information was.
- 2.1.2.4 In this respect, it was alleged that the confidentiality and integrity of the Internal Audit investigation had been compromised.
- 2.3 Based on the analysis of the complaints and the allegations contained therein, the following issues were identified and investigated:**
- 2.3.1 Whether there were irregularities in the recruitment and selection process for the filling of the vacancy of Executive Director: Legal Services; and

2.3.2 Whether the Chief Executive Officer and the Executive Director: Human Resources of the UNISA improperly attempted to influence the outcome of the internal investigation report by the Internal Audit Unit into the alleged irregular appointment of the Executive Director: Legal Services.

### 3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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

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

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

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

(c) *to take appropriate remedial action.”*

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

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 The UNISA did not dispute the jurisdiction of the Public Protector to investigate the allegations.

#### **4. THE PRELIMINARY INVESTIGATION**

##### **4.1 Methodology and approach to the investigation**

4.1.1 The preliminary investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution), read with sections 6 and 7 of the Public Protector, 1994 (the Public Protector Act).

4.1.2 The preliminary investigation process included the consideration of the complaints lodged on 21 August 2019 and 23 October 2019, respectively, as well as an analysis of the information and evidence received during the course of the investigation from the UNISA.

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

##### **4.2 Approach to the investigation**

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

- 4.2.1.4 In the event of maladministration or improper conduct what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?
- 4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence is evaluated and a determination is made on what happened based on a balance of probabilities.
- 4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the UNISA and its functionaries to prevent maladministration and improper conduct.
- 4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.3 **The Key Sources of Information**
- 4.3.1 **Documents**
- 4.3.1.1 Complaint received from the Complainant on 21 August 2019;
- 4.3.1.2 Complaint received from the Complainant dated 23 October 2019;
- 4.3.1.3 Documents received from the UNISA on 10 October 2019;
- 4.3.1.4 Affidavit deposed to by Mr Xola Lingani, the Chief Audit Executive at the UNISA, dated 10 June 2021;

- 4.3.1.5 Affidavit deposed to by Prof Phasoane Mokgobu, the Vice-Principal: Institutional Development at the UNISA, dated 21 June 2021;
- 4.3.1.6 Affidavit deposed to by Mr Meshack Zwelibanzi Dlamini, the Executive Director: Human Resources at the UNISA, dated 21 June 2021;
- 4.3.1.7 Affidavit deposed to by Mr G R Masingi, Manager: Permanent Placements at the UNISA, dated 22 June 2021;
- 4.3.1.8 Statement deposed to by Ms A I Mavhungu, HR Practitioner: Permanent Placements at the UNISA, dated 22 June 2021; and
- 4.3.1.9 Forensic Investigation into the Recruitment and appointment process of the Executive Director: Legal Services, compiled by Nexus Forensic Services (Pty) Ltd, dated 19 May 2020.

#### **4.3.2 Correspondence Sent and Received**

- 4.3.2.1 Letter from the PPSA to the Principal and Vice-Chancellor of the UNISA, Prof Mandla Makhanya, dated 17 September 2019;
- 4.3.2.2 Subpoena from the PPSA to the Vice-Chancellor of the UNISA, Prof Puleng Lenka Bula, dated 28 June 2021;
- 4.3.2.3 Response received from the Vice-Chancellor of the UNISA, Prof Puleng Lenka Bula, dated 22 August 2021; and
- 4.3.2.4 Notice in terms of Rule 42(1) of the Public Protector Rules as promulgated under section 7(11) of the Public Protector Act, 1994, served on the Complainants and dated 15 October 2021.

#### **4.3.3 Legislation and other prescripts**

- 4.3.3.1 The Constitution of the Republic of South Africa, 1996;



- 4.3.3.2 The Public Protector Act, 1994 (Act 23 of 1994);
- 4.3.3.3 *Government Employees Medical Scheme & Others v Public Protector of the Republic of South Africa & Others* (1000/19) [2020] ZASCA 111 (29 September 2020); and
- 4.3.3.4 *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs* 2000 (2) SA 1 (CC).

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

5.1 **Regarding whether there were irregularities in the recruitment and selection process for the filling of the vacancy of Executive Director: Legal Services:**

Common cause issues

5.1.1 The UNISA advertised a post for the position of Executive Director: Legal Services (Ref: ED:LS/RS&C/LS/GRM/2019, hereinafter referred to as ED: Legal) with a closing date of 22 March 2019. According to the advert, the minimum qualification and experience criteria was: -

5.1.1.1 An LLB degree and admission as an Advocate;

5.1.1.2 Minimum of 10 years' experience in Legal Services, with at least 5 years in senior/legal management role; and

5.1.1.3 Right of appearance in the High Court.

5.1.2 The advert further stated that appointments will be made in accordance with UNISA's Employment Equity Plan and other applicable legislation.

5.1.3 Interviews with shortlisted candidates were held on 11 May 2019, and consequently, Adv Mannya was recommended for appointment. Adv Mannya was appointed to the position of ED: Legal at the UNISA on 01 August 2019.

Issues in dispute

5.1.4 The Complainants alleged that:

5.1.4.1 All Executive Director positions at the UNISA require a Master's Degree but the appointee, Adv M Mannya, only possesses an LLB degree;

5.1.4.2 The incumbent was formerly employed as the Head of Department (HOD) of the KwaZulu-Natal Department of Agriculture and as the HOD of the Eastern Cape Department of Education. He was suspended and subsequently dismissed by both Departments and was unsuccessful in challenging these dismissals in court. In addition, it was alleged that the appointee failed to declare this during the interview;

5.1.4.3 The incumbent did not meet the Employment Equity target, because of the existence of a personal relationship between him and the Vice - Principal: Institutional Development, under which the Employment Equity Directorate resides;

5.1.4.4 The required criminal checks in terms of the UNISA's Recruitment Policy were found to be inconclusive, but the appointee was not disqualified from the appointment.

5.1.5 From the documents submitted by the UNISA during the course of the investigation, it was established that the Job Description for the post, dated January 2019, stated that the minimum qualification criteria as an LLM Degree and admission as an Advocate, and a minimum of ten years' experience in Legal Services, with at least five years' experience at Senior Management level.

5.1.6 From the Minutes of the Job Evaluation Meeting which was held by the UNISA on 08 March 2019 and chaired by Prof S K Ndlovu, the Vice-Principal: Strategy, Risk and Advisory Services, the following discussions were minuted in relation to the position of Executive Director: Legal Services:

<b>2.4</b>	<p><b>Discussions</b></p> <p><b><u>1.Executive Director: Legal Services (P3)</u></b></p> <p><b><u>Technical Competences</u></b></p> <p>The following changes were made :</p> <ul style="list-style-type: none"><li>• second bullet was removed</li><li>• Sixth bullet was remove and replaced with HE related legislations</li></ul> <p><b><u>Requirements</u></b></p> <ul style="list-style-type: none"><li>• LLB and admission as an Advocate</li><li>• Right of Appearance in High Court</li><li>• Minimum of 10 years' experience in Legal Services, with at least 5 years in a Senior/Legal role</li></ul>
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5.1.7 The Selection Committee thereafter resolved that the Portfolio will engage Organisational Development Department regarding the change in the job descriptions.

5.1.8 In its response to the Public Protector dated 30 September 2019, the UNISA explained that: -

*“Prior to advertising a vacant post, a Job Advertisement Committee is constituted for the purposes of, amongst others, ensuring that the job description is reflective of the changed circumstances, appropriateness of the qualifications taking cognisance of changed circumstances and operational exigencies as well as the elimination of any artificial barriers to transformation as required by the Employment Equity Act of 1998, as amended.*

*In the case of the position of Executive Director: Legal Services, the Job Advertisement Committee convened on the 08 March 2019 for the purposes of reviewing the job description, the need to have an advocate with a right of appearance in court, especially the High Court. This position was informed by the not so good experience with previous incumbents who did not have the right of appearance resulting in the University having to rely on external resource for court appearance.*

*The previous incumbent was in this position for more than ten (10) years and did not have the right of appearance thereby resulting in the University incurring additional expenditure to procure the services of external resources in this regard. This state of affairs placed the University in a vulnerable position as evidenced by numerous instances where the basic legal matters were not managed appropriately. As part of this process, there was a need to strike a balance between academic qualifications and the requisite right of appearance. We were not looking for a typical academic but a competent legal practitioner hence the review of the qualification requirement by the Job Advertisement Committee. In this instance, the Advertisement Committee took a decision to alter the qualification requirement from LLM degree to LLB degree with the court appearance, admission as an Advocate of the High Court and practice registration as further requirements.”*

- 5.1.9 Following the decision to adopt the changed requirements, the vacant position was advertised in the media and the UNISA procured the services of a recruitment agency, Warrior Talent, to handle the applications. All the applications were received and processed by the recruitment agency.

5.1.10 From the **UNISA APPLICATION FOR A FIXED TERM CONTRACT HR-CA 001**, completed by Adv Manny's and dated 18 March 2019, the Public Protector was able to establish that Adv Manny possessed a B. Juris Degree obtained from the University of the North, as well as a LLB Degree, obtained from the University of Pretoria.

5.1.11 His relevant occupational experience was recorded on the same form as:

Employer	Position/duties/type of work	From		To	
MINISTRY OF SOCIAL DEVELOPMENT	LEGAL AND SPECIAL ADVISOR	1997		1998	
OFFICE OF THE PREMIER, GAUTENG	LEGAL AND SPECIAL ADVISOR	1998		1999	
DEPARTMENT OF AGRICULTURE AND ENVIRONMENTAL AFFAIRS, KZN	HEAD OF DEPARTMENT	2007	JUNE	2009	
DEPARTMENT OF EDUCATION, EASTERN CAPE	HEAD OF DEPARTMENT	2010	OCTOBER	2012	MA
SELF	PRACTICING ADVOCATE (breaks in between)	2005		2019	

5.1.12 Adv Manny further indicated on the application form, in response to a question about to what extent his qualifications and experience meet the requirements for the post, that:

*“HAVE EXTENSIVE MANAGEMENT EXPERIENCE-HELD VARIOUS SENIOR EXECUTIVE POSITIONS.*

*HAVE EXTENSIVE BUDGET AND FINANCIAL MANAGEMENT EXPERIENCE-HAVE BEEN ACCOUNTING OFFICER.*

*HAVE EXTENSIVE HUMAN RESOURCE AND PEOPLE MANAGEMENT HAVING BEEN RESPONSIBLE FOR PERFORMANCE MANAGEMENT AND REVIEW OF SENIOR MANAGERS (sic) REPORTING TO ME AND OVERALL RESPONSIBLE FOR DEPARTMENTAL PERFORMANCE MANAGEMENT.*

*EXTENSIVE LEGAL (sic) PRACTICE AND LEGAL ADVISORY EXPERIENCE HAVING BEEN IN PRACTICE FOR NOT LESS THAN 10 YEARS AND HAVING SERVED AS LEGAL ADVISOR TO A PREMIER AND MINISTER.*

*EXTENSIVE REPORTING EXPERIENCE BOTH AS HEAD OF DEPARTMENT AND ACCOUNTING OFFICER TO LEGISLATURES, THY (sic) EXECUTIVE AND AUDITOR-GENERAL.*

*HAVE EXTENSIVE LEGAL AND STATUTORY DRAFTING AND INTERPRETATION (sic) EXPERIENCE*

*HAVE EXTENSIVE INTERGOVERNMENTAL AND STAKEHOLDER EXPERIENCE HAVING WORKED IN A MULTI STAKEHOLDER ENVIRONMENT.*

*EXTENSIVE EXPERIENCE IN MANAGING LABOUR RELATIONS HAVING WORKED IN A HIGHLY UNIONISED ENVIRONMENT*

*[...]*

*EXTENSIVE DISPUTE RESOLUTION EXPERIENCE.*

*EXTENSIVE POLICY DEVELOPMENT EXPERIENCE*

*EXTENSIVE SYSTEMS DEVELOPMENT EXPERIENCE”*

5.1.13 In the same application form, Adv Mannyia provided the answer “No” to the questions about whether he had ever been found guilty of a criminal offence, whether there were any criminal, civil or disciplinary action pending against him and whether he had ever been found guilty of misconduct by a previous employer.

5.1.14 As part of the UNISA’s response to the Public Protector was a document dated 01 April 2019, signed by Adv Mannyia and entitled **Fact Sheet and Declarations by Adv Mannyia**, In the document Adv Mannyia declared the following: -

- “1. The candidate is a holder of an LLB Degree YES
2. The candidate is an admitted Advocate YES
3. The candidate has the right of admission to the High Court YES
4. [...]
5. The candidate has a minimum of 5 years senior legal leadership position experience YES
6. The candidate has a minimum of 10 years legal services experience in a large organization YES/NO

**NO IF GOVERNMENT IS NOT REGARDED AS A CORPORATION”**

5.1.15 In addition, Adv Mannyia declared that:

*“Is there any other information, which might have a negative impact on your appointment to this position (dismissed before, suspended, adverse media articles) that you would like to share with Unisa?”*

***If yes, please provide details:***

*I was previously susepended (sic) at the Head of Department. KZN Department of Agriculature (sic) and Environment. The matter was however settled in court following my approach to court which found the action against me unlawful. See attached Settlement Agreement.*

*In my position as Head of Department of Education, Eastern Cape, the Department received a significant adverse media reporting owing to issues which arose prior to my appointment. I have no record of any specific adverse media reports relating to me personally.*

*There was however extensive media reporting on my work which is freely accessible on the internet which I suggest be reviewed for own opinion.”*

- 5.1.16 It was further established that the report to Council, compiled by Dr P Mokgobu, the Vice-Principal: Institutional Development, entitled ***Selection Committee Report – Executive Director: Legal Services (P3), five (5) year fixed-term contract with benefits, Department Legal Services, Portfolio: Strategy, Risk & Advisory Services***, that Adv Manny was recommended for appointment, noting that: -

**“5. EVALUATION OF CANDIDATES**

<b>Name</b>	<b>Remarks/comments</b>
<b>Adv M Manny</b>	<i>The selection committee unanimously agreed that Adv Manny has the necessary skills, competencies and knowledge to fully execute the duties attached to this role. He has demonstrated extensive legal background and has worked in different institutions where he was able to turn around the legal department. Adv Manny was found suitable on all themes that were identified to check suitability of candidates for this role.</i>



## 6. CONCERNS

*During the interviews, the selection committee asked Adv Manny to declare any issues that he deems necessary for the University to know with respect to his profile and also his credibility. The candidate indicated that he was once suspended by the Premier in KwaZulu Natal and later resigned after a settlement was reached.*

*The Vice - Principal Institutional Development was also tasked by the HRCOC to further investigate the matter. The candidate was asked to submit an affidavit detailing what transpired. It was found that there was nothing untoward about his case with the KZN provincial government.*

*Considering the above the Management Committee is still of the view that the candidate should be recommended for appointment.”*

5.1.17 The same document highlighted that, in terms of the employment equity requirements for posts of Executive Director level, there was under presentation of Coloured and African females at Executive Director level. The shortlist of candidates who were invited for interviews for the position, consisted of three (3) African females and two (2) African males.

5.1.18 According to an affidavit submitted to the Public Protector by Prof Phasoane Mokgobu, the Vice-Principal: Institutional Development at the UNISA, dated 21 June 2021, Prof Mokgobu indicated that he was part of the selection committee which recommended Adv Manny for appointment. Regarding the non-adherence to the EE requirement, as well as his relationship with the incumbent, he stated that: -

*“My understanding was that on this level there is under representation of Coloured Females and African Females. It has always happened in the University that if the panel cannot find a suitable candidate within the preferred category the best candidate is recommended as long as it is within the EE definition of designated employee [...]. The appointee outperformed all candidates that were interviewed. He was found to possess all the necessary skills, competencies and knowledge and*

*presented the level of confidence that can manage the Department given the previous challenges faced by the University [...].”*

5.1.19 He further stated that: -

*“There is no relationship between the appointee and Vice - Principal: Institutional Development. The appointee was part of the group that was expelled with VP: ID from High school in 1985 for political activism as students. I met the appointee again in 1987 at varsity and we never interacted. Since then until 2019 when I saw his CV during the selection committee meeting around April 2019. The Employment Equity Directorates fell under the office of VC in the Change Management unit, now DLT. There has never been an interaction between myself and any of the EE unit representatives or employee regarding the appointment of the preferred candidate. All discussion took place openly during the selection committee meetings and the (sic) was a general consensus on all decisions taken by the committee.”*

5.1.20 In addition, Prof Mokgobu’s affidavit stated that the vetting report conducted by MIE only recorded that the incumbent had a road traffic offence committed around November 1993, and according to the SAPS Criminal Records Centre, a Clearance Report had been issued.

5.1.21 His contentions were confirmed in a second affidavit deposed to by Mr G R Masingi, the Manager: Permanent Placements at the UNISA, dated 22 June 2021.

5.1.22 In its formal response to enquiries from the Public Protector dated 30 September 2019, the former Principal and Vice Chancellor of the UNISA, Prof Mandla Makhanya, indicated that: -

*“It is our firm view that the appointment of Advocate Manny was not in conflict with any legal prescripts or our internal policies and practices. During his short stint with us, his contribution is being felt throughout the organisation. We strongly believe that we made the right appointment.”*

5.1.23 During the course of the investigation, it was further established that on 16 October 2019 and following a complaint from a whistle-blower, the UNISA appointed Nexus Forensic Services (Pty) Ltd to investigate, *inter alia*, whether:

5.1.23.1 Adv Mannyha failed to disclose that he was dismissed from his previous employment;

5.1.23.2 UNISA, in attending to the recruitment and appointment process did not take into consideration information which was readily available that Adv Mannyha was dismissed from his previous employment;

5.1.23.3 UNISA correctly communicated the minimum requirements for consideration for the vacant position in the job advertisement that was published;

5.1.23.4 Whether the University via the selection committee ignored the recommendations of the Employment Equity Officer in recommending the appointment of Adv Mannyha; and

5.1.23.5 The non-disclosure of a possible conflict of interest.

5.1.24 The investigation report, entitled ***Forensic Investigation into the Recruitment and appointment process of the Executive Director: Legal Services***, dated 19 May 2020, made the following findings: -

“6.1.3 *Based on the available evidence, we conclude that Adv Mannyha did disclose his suspension. We have no record that Adv Mannyha was in fact dismissed from his previous employment as a settlement agreement was reached.*

[...]

6.2.4 *Based on the evidence, we thus conclude that the Selection Committee deliberated on the issues stated by Adv Manny in his Fact sheet (based on the report submitted to us by Mokgobu) but still felt that there was nothing adverse that could result in the UNISA losing confidence in appointing Adv Manny. This is further reflected in the submission made to the Council.*

6.2.5 *We however, cannot with absolute certainty conclude that the Selection Committee was fully appraised of the specific details surrounding the suspension of Adv Manny as we have no record that UNISA actually made contact with the Department as part of the recruitment process.*

*[...]*

6.3.3 *We conclude that the minimum requirements were correctly communicated for the vacant post.*

*[...]*

6.4.2 *We could not find any prescript that compels the Selection Committee to execute nor implement the recommendations made by the Employment Equity Office, save for the fact that their recommendation should be considered.*

*[...]*

6.6.1 *Mokgobu did not declare his relationship with Adv Manny which made the appointment process to not be fair and transparent.*

6.6.2 *The non-disclosure of the above opens the University up to questions raised regarding the objectivity of the process and the biasness of the Committee members with the potential appointee.”*

5.1.25 The report made the following recommendations:

- 5.1.25.1 Consequence management should be instituted against Mr Mokgobu because of his failure to disclose his personal relationship with Adv Mannyana during the recruitment process;
- 5.1.25.2 UNISA to amend its policies with regard to the following:
- 5.1.25.2.1 The timeframes for advertising of positions as well as submission dates;
- 5.1.25.2.2 Clarity regarding the roles and responsibilities of the Advertisement / Shortlisting / Selection Committees (setting out clear mandates);
- 5.1.25.2.3 Clearly defined recruitment process in order to ensure transparency, fairness, objectivity and accountability in the process;
- 5.1.25.2.4 HR to upskill members selected on the Selection Committee in relation to recruitment processes to ensure compliance with processes and policies;
- 5.1.25.2.5 The role of the Employment Equity Office within the recruitment process should be further clarified, especially when recommendations between that office and that of the Selection Committee are conflicting.

Application of the relevant laws and prescripts

- 5.1.26 Section 7(1)(a) of the Public Protector Act, 1994, provides that:-

*“The Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with”.*

5.1.27 In *Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others*,<sup>1</sup> the Supreme Court of Appeal cautioned the Public Protector to not conduct parallel investigations into the same subject matters.

The conclusion that could be made based on the application of the law to the facts

5.1.28 The evidence received during the preliminary investigation indicates that, following the Complainants' allegations that the UNISA irregularly appointed Adv Manny as its Executive Director: Legal Services, the UNISA commissioned Nexus Forensic Services (Pty) Ltd to conduct an independent investigation with a view to investigate the allegations.

5.1.29 The evidence further revealed that the Nexus investigation only found evidence that Mr Mokgobu, the Vice-Principal: Institutional Development, failed to declare his relationship with Adv Manny during the recruitment process. As a result, the Nexus investigation recommended that the UNISA institute consequence management against Mr Mokgobu. In addition, the investigation report made recommendations to the UNISA to embark on a Policy review, with a view to improve fairness and transparency in its recruitment processes.

**5.2 Regarding whether the Chief Executive Officer and the Executive Director: Human Resources of the UNISA improperly attempted to influence the outcome of the internal investigation report by the Internal Audit Unit into the alleged irregular appointment of the Executive Director: Legal Services:**

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<sup>1</sup> (1000/2019; 31514/2018; 33401/2018) [2020] ZASCA 111 (29 September 2020).

Common cause issues

- 5.2.1 The Complainants contended that two whistle-blowers raised the allegations pertaining to the irregular appointment of Adv Manny through UNISA's hotline, and UNISA's Internal Audit Unit was tasked to investigate the matter but the Chief Executive Officer (CEO) of UNISA, Mr Xola Lingane, unlawfully interfered with the investigation by discussing details of the case with the appointee outside of the investigation process.
- 5.2.2 In addition, it was alleged that the Executive Director: Human Resources, also informed the appointee that the Investigating Officer from Internal Audit, Ms Estelle Gilberts, requested information and what the nature of the requested information was. In this regard, it was the Complainants' contention that the confidentiality and integrity of the Internal Audit investigation had been compromised.
- 5.2.3 During the course of the investigation and as part of the UNISA's response to the allegations, an affidavit deposed to by the Executive Director: Human Resources at the UNISA, Mr Meshack Zwelibanzi Dlamini, was submitted to the Public Protector. In his affidavit, he described as follows: -

*“Around April 2019, I was approached by Mr Masingi and Ms Azwi Mavhungu who made me aware that Ms Gilbert from Internal Audit had approached them for documents relating to the filling of the Executive Director: Legal Services position and this had been become (sic) a trend where no formal protocols relating to conducting investigations were being followed. They indicated that she had been doing this for some time and this had led to discomfort on their parts as to her motives.*

*In my view there was nothing wrong with auditing the appointment process where deemed appropriate and is this was a step that needed to form part of the governance process relating to appointments in the University, then we needed to formalise this and hence I contacted the Chief Audit Executive, Mr Xola Lingani in this regard. The latter requested that I leave the matter with him and he would attend to it internally in the Internal Audit Department.*

*During the latter part of 2019, I was advised by the then Principal and Vice-Chancellor – Prof MS Makhanya, that the Audit and Risk Committee had appointed an external company, Nexus, to conduct an investigation into the appointment of Adv Manny, and I was required to assist the investigators by ensuring the availability of everyone required for interviews and provision of pertinent documents. Indeed, I was contacted by the investigators and the necessary logistical arrangements were made enabling them to have access to whoever they wanted to interview.”*

5.2.4 Nexus Forensic Services (Pty) Ltd also proceeded to investigate the allegation that the Chief Audit Executive, who was a member of the selection committee, interfered with and tried to influence the internal investigation inquiry conducted by the investigation unit for which he was the line manager.

5.2.5 The investigation report, entitled ***Forensic Investigation into the Recruitment and appointment process of the Executive Director: Legal Services***, dated 19 May 2020, found that: -

*“6.5.1 There is no evidence which reveals that Lingani interfered or tried to influence the UNISA internal investigation.*

*6.5.2 It is clear that there was miscommunication between the investigator and Human Resources which led to Lingani providing the investigator with the requested documents.”*

Application of the relevant laws and prescripts

5.2.6 The legal framework outlined in paragraphs 5.1.26 and 5.1.27 apply *mutatis mutandis* to this issue.



The conclusion that could be made based on the application of the law to the facts

5.2.7 The evidence received during the preliminary investigation indicates that, following the Complainants' allegations that the UNISA irregularly appointed Adv Manny as its Executive Director: Legal Services, the UNISA commissioned Nexus Forensic Services (Pty) Ltd to conduct an independent investigation with a view to investigate the allegations.

5.2.8 The evidence further revealed that the Nexus investigation found no evidence of interference in the UNISA's internal investigation by the CEO of the UNISA, Mr Lingani.

## **6 REASONS FOR CLOSURE**

**Having regard to the evidence as well as the regulatory framework determining the standard that should have been complied with by the UNISA and any other persons that were involved in the appointment of Adv Manny as the Executive Director: Legal Services at the UNISA, the Public Protector is closing this investigation on the following basis:**

6.1 In terms of section 7(1)(a) of the Public Protector Act, the Public Protector had to determine on the basis of what was found from the preliminary investigation, how the matter should be dealt with.

6.2 The evidence received during the preliminary investigation indicates that, following the Complainants' allegations that the UNISA irregularly appointed Adv Manny as its Executive Director: Legal Services, the UNISA commissioned Nexus Forensic Services (Pty) Ltd to conduct an independent investigation with a view to investigate the allegations.

- 6.3 The evidence further revealed that the Nexus investigation only found evidence that Mr Mokgobu, the Vice-Principal: Institutional Development, failed to declare his relationship with Adv Manny during the recruitment process. As a result, the Nexus investigation recommended that the Unisa institute consequence management against Mr Mokgobu. In addition, the investigation report made recommendations to the Unisa to embark on a Policy review, with a view to improve fairness and transparency in its recruitment processes.
- 6.4 In addition, the evidence further revealed that the Nexus investigation found no evidence of interference in the Unisa's internal investigation by the CEO of the Unisa, Mr Lingani.
- 6.5 Consequently, the pursuance of the matter and remedial action that may be imposed should adverse findings be made from a further investigation will serve no judicious purpose on the basis that the issue has become moot consequent to the Unisa's action following the receipt of the Nexus Investigation Report.
- 6.6 The principle of mootness was echoed by the Constitutional Court in ***National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs***<sup>2</sup>:
- “A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law”*
7. On 18 October 2021, a Discretionary Notice was issued to you inviting you to submit representations on why the Public Protector should not proceed to close the investigation as prescribed in Rule 42(1) of the *Rules relating to Investigations and Matters Incidental Thereto* (GG 41903, 14 September 2018), which provides that *“when the Public Protector intends concluding a complaint by means of a closing report provided for in rule 41(b), the*

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<sup>2</sup> 2000 (2) SA 1 (CC) para 21 *op cit* fn 18.

*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 14 days of delivery of the notification.”*

8. In terms of Rule 42(2) the Public Protector may, if a Complainant has not responded within the prescribed timeframe of fourteen (14) days, proceed with the closing of the investigation. The Public Protector did not receive any response from you disputing the evidence and findings contained in the notice, and therefore, we have closed our file.
  
9. Kindly note that the Public Protector is now *functus officio* in the matter and cannot take the matter any further. Should any party wish to challenge this decision they are at liberty to approach a court of law and lodge an application for a judicial review of the matter.



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**ADV BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA  
DATE: 20/12/2021**