

**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, ABUSE OF POWER AND MALADMINISTRATION BY THE OFFICIALS
OF THE GAUTENG ENTERPRISE PROPELLER, THE FORMER ACTING CHIEF
EXECUTIVE OFFICER, MS LEAH MANENZHE, AND THE GAUTENG
ENTERPRISE PROPELLER BOARD OF DIRECTORS**

TABLE OF CONTENTS

LIST OF ACRONYMS	3
1. INTRODUCTION	4
2. THE COMPLAINT.....	5
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR.....	7
4. ISSUES IDENTIFIED FOR INVESTIGATION.....	7
5. THE INVESTIGATION	8
6. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.....	14
7. FINDINGS.....	50
8. CONCLUSION	52

LIST OF ACRONYMS

ACRONYMS	DESCRIPTIONS
ACEO	Acting Chief Executive Officer
ADDG	Acting Deputy Director-General
CCMA	Commission for Conciliation, Mediation and Arbitration
Complainant	Mr Mthabisi Moyo
Constitution	Constitution of the Republic of South Africa, 1996
CEO	Chief Executive Officer
Department	Gauteng Department of Economic Development
ENS	Edward Nathan and Sonnenberg Incorporated
GEP	Gauteng Enterprise Propeller
GEP Board	GEP Board of Directors
HOD	Head of Department
Investigation Team	Public Protector South Africa Investigation Team
LRA	Labour Relations Act, 66 of 1995, as amended
MEC	Member of the Executive Council
Mkhabela Inc.	Mkhabela Incorporated
NEHAWU	National Education Health & Allied Workers Union
PDA	Protected Disclosures Act, 26 of 2000, as amended
PFMA	Public Finance Management Act, 1 of 1999, as amended
Portfolio Committee	Portfolio Committee on Economic Development, Environment, Agriculture and Rural Development
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
PSA	Public Servants Association of South Africa
TER	Township Economy Revitalisation
TMR	Transformation Modernisation and Re-Industrialisation
TSS	Transversal Shared Services

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT, ABUSE OF POWER AND MALADMINISTRATION BY THE OFFICIALS OF THE GAUTENG ENTERPRISE PROPELLER, THE FORMER ACTING CHIEF EXECUTIVE OFFICER, MS LEAH MANENZHE, AND THE GAUTENG ENTERPRISE PROPELLER BOARD OF DIRECTORS

1. INTRODUCTION

- 1.1 This is a closing 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 empowers the Public Protector to make known the findings of an investigation to affected parties (including the Complainant) or such persons to note the outcome of the investigation where applicable:
- 1.2.1 The Complainant, Mr Mthabisi Moyo; and
- 1.2.2 The Chief Executive officer of the Gauteng Enterprise Propeller (GEP), Mr Saki Zamxaka.
- 1.3 The report relates to an investigation into allegations of improper conduct, abuse of power and maladministration by the officials of the GEP, the former acting Chief Executive Officer (ACEO), Ms Leah Manenzhe (Ms Manenzhe), and the GEP Board of Directors (GEP Board).

2. THE COMPLAINT

2.1 The investigation originates from a complaint lodged with the Public Protector by Mr Mthabisi Moyo (Complainant) through an email dated 01 October 2019, which complaint was registered on 03 October 2019. In essence, the Complainant alleged that:

2.1.1 During his tenure as the Secretary General of the GEP Branch: Public Servants Association of South Africa (PSA), he raised a number of allegations relating to malfeasance, maladministration and corruption at the GEP;

2.1.2 The aforesaid issues were raised internally with the GEP Board, and also with the former Member of the Executive Council (MEC) for Economic Development, Environmental, Agriculture and Rural Development, Mr Lebogang Maile (Mr Maile), and the Portfolio Committee on Economic Development, Environment, Agriculture and Rural Development (Portfolio Committee);

2.1.3 On 01 May 2017, he raised the issues with the Portfolio Committee and it was resolved that the matter will be investigated and a report will be given to the PSA;

2.1.4 The then acting Deputy Director-General (ADDG): Business Regulation and Governance of the Gauteng Department of Economic Development (Department), Ms Joy Letlonkane (Ms Letlonkane), through a letter dated 13 September 2017, advised Ms Manenzhe that an external service provider, Mkhabela Incorporated (Mkhabela Inc.), was appointed to conduct a forensic investigation at the GEP;

2.1.5 In the aforementioned letter, Ms Letlonkane also advised that the forensic investigation by Mkhabela Inc. will focus on the allegations of misconduct,

maladministration and corruption by the GEP's officials, Ms Manenzhe and the GEP Board. The investigation was expected to be finalised by 15 October 2017;

- 2.1.6 On 15 September 2017, he gave evidence to Mkhabela Inc. that he unreliably learnt that the investigation report contained damning findings against implicated parties, however, the report was never given to the PSA, publicised or implemented;
- 2.1.7 It was the commitment to his duties as the Secretary General of the GEP Branch of the PSA that led him to be at odds with Ms Manenzhe and the GEP Board;
- 2.1.8 He was unilaterally transferred from one department to another, which decision was rescinded by the Commission for Conciliation, Mediation and Arbitration (CCMA). His unfair suspension was reversed before frivolous charges were brought against him emanating from having blown the whistle on the malfeasances within the GEP;
- 2.1.9 On 11 July 2017, he was suspended and charged soon after concluding a settlement agreement on the aforementioned unilateral transfer;
- 2.1.10 Between July and August 2017, an internal disciplinary hearing with the recommendation of dismissal was held. The Complainant was charged with four (4) counts, namely, non-compliance with policies and procedures, gross dishonesty, fraud and gross negligence; and
- 2.1.11 He was subsequently dismissed from the GEP on 08 September 2017. He referred his dismissal to the CCMA but he lost the case because none of his witnesses appeared on the date of the hearing. The two (2) key witnesses from management allegedly refused to testify because of the prevailing culture of victimisation.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The investigation was conducted in terms of section 182(1) 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(5) of the Public Protector Act 23, of 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 The GEP is a schedule 3C entity¹ in terms of the Public Finance Management Act, 1 of 1999 (PFMA). Therefore the GEP is an organ of state 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. 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 Complainant was subjected to victimisation and/or occupational detriment as a result of reporting issues of corruption and maladministration to the Public Protector and other structures and if so, whether such conduct constitutes improper conduct 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, 1994; and

¹ Gauteng Provincial Public Entity

4.1.2 Whether the Gauteng Department of Economic Development and/or the Gauteng Enterprise Propeller failed to release and/or implement the recommendation of the Mkhabela Forensic Report, and 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(5)(a) of the Public Protector Act, 1994.

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 issue a report on this matter.

5. THE INVESTIGATION

5.1 Methodology

5.1.1 The investigation was conducted in terms of section 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 how to resolve a dispute of alleged improper conduct or maladministration.

5.2 Approach to the investigation

5.2.1 The process involved sourcing information and documents from the Complainant and the GEP, analysing documents, and examination of regulatory instruments, including constitutional provisions, legislation, regulations and relevant court decisions.

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

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to 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. In this particular case, 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 GEP.

5.3 The Investigation Process

5.3.1 A preliminary investigation was conducted in terms of section 7(1) of the Public Protector Act, which sought to determine the merits of the complaint, allegation or information, and the manner in which the matter should be dealt with, including whether or not a “full scale” investigation was justified.

5.3.2 During the preliminary investigation it was established that the initial complaint was registered on 25 July 2017 under reference number 7/2-009252/17 and investigated by the Gauteng Provincial office of the Public Protector. Amongst other things, that investigation was closed on the basis that:

- (a) The Department, through a letter from Ms Letlonkane, had confirmed that the Portfolio Committee reported allegations to Mr Maile;

- (b) Consequently, Mr Maile had decided to institute a forensic investigation into the issues that were raised by the PSA; and
- (c) The investigation by Mkhabela Inc. was at an initial stage and was expected to be finalised on 30 October 2017.

5.3.3 During the meeting held between the Public Protector Investigation Team (Investigation Team) and the Complainant on 21 November 2019, the latter was advised that the Public Protector cannot overturn the CCMA's arbitration award. The Complainant cited health issues, financial challenges and more as the reasons for not taking the matter to the Labour Court. He further indicated that he failed to secure Legal Aid support when he sought assistance to deal with the civil claims instituted by Ms Manenzhe. The Investigation Team indicated that it would be a challenge to overturn the CCMA verdict and enquired why he had not appealed to the Labour Court. It was resolved that the investigation would focus on the maladministration at the GEP by tracing what transpired with the Mkhabela Forensic Report.

5.3.4 Despite the foregoing, the Complainant always brought back the issue of victimisation and/or occupational detriment. The Complainant had advised that he had appealed his unfair dismissal at the CCMA, which appeal was dismissed. In this regard, the Complainant was advised to refer the decision of the CCMA to the Labour Court, in line with the provisions of the Labour Relations Act, 66 of 1995 as amended (LRA).

5.3.5 The investigation process commenced with correspondence to the GEP on 29 April 2020 wherein the institution was informed of the investigation, the legislation in terms of which the investigation was conducted, as well as information required and the format thereof.

5.3.6 The method followed in conducting the investigation included:

- (a) Communication by telephone, letters and emails;
- (b) Meetings with affected parties or persons reasonably believed to have information relevant to the investigation;
- (c) Obtaining records or documents relevant to the investigation which were in the possession or under control of a state institution; and
- (d) Issuing of a subpoena directing the GEP to provide the requested information in terms of sections 7(4)(a) and (5) of the Public Protector Act.

5.4 Key sources of information

5.4.1 Documents and e-mail correspondence

- 5.4.1.1 Complaint letter from Mr Moyo, dated 15 May 2019;
- 5.4.1.2 Chronology of events document from the Complainant, dated 22 November 2019;
- 5.4.1.3 Supplementary chronology of events document from the Complainant, dated 11 December 2019;
- 5.4.1.4 Copy of the joint dossier from PSA & NEHAWU to GEP Board, dated 12 January 2017;
- 5.4.1.5 Copy of a follow-up letter from Mr Moyo to the Chairperson of the GEP Board, dated 22 March 2017;
- 5.4.1.6 Copy of response from the Chairperson of GEP Board to the PSA regarding Mr Moyo's Grievance, dated March 2017;
- 5.4.1.7 Copy of a letter from the PSA to the Chairperson of the Portfolio Committee, Mr Errol Magerman, requesting the Portfolio Committee's intervention dated 01 May 2017;
- 5.4.1.8 Copy of the email and Discussion Notes in Preparation for a meeting with Mr Maile from Mr Moyo to the Chairperson of the Portfolio Committee, dated 09 May 2017;

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- 5.4.1.9 Follow up letter from the PSA to the Chairperson of the Portfolio Committee, dated 28 June 2017;
 - 5.4.1.10 Follow up letter from the PSA to the Chairperson of the Portfolio Committee dated 07 July 2017;
 - 5.4.1.11 Copy of the CCMA Settlement Agreement on unilateral transfer, dated 19 July 2017;
 - 5.4.1.12 Copy of a letter from the GEP Human Resources Manager, Ms M Tema to Mr Moyo, dated 02 August 2017;
 - 5.4.1.13 Copy of a letter from the Department by Ms Letlonkane to Ms Manenzhe, dated 13 September 2017;
 - 5.4.1.14 Letter from the Investigation Team to Mr Moholwa, dated 29 April 2020;
 - 5.4.1.15 Subpoena from the Investigation Team to Mr Moholwa, dated 10 October 2020;
 - 5.4.1.16 Copy of the GEP report on the implementation of the Mkhabela Forensic Investigation Report, dated 02 March 2021;
 - 5.4.1.17 Copy of a Settlement Agreement between shop stewards and the GEP, dated 14 February 2021;
 - 5.4.1.18 Copy of an appointment of General Manager: Corporate Support and Administration, dated 06 July 2020;
 - 5.4.1.19 Copy of instructions to recoup funds re: Sakhile Ezweni & Nhlanhla Bakeries to Strauss Daly Inc. Attorney, dated 11 March 2021;
 - 5.4.1.20 Copy of the offer of employment to the new CEO of the GEP, Mr Sakhumzi Zamxaka, dated 08 April 2021;
 - 5.4.1.21 Copy of instructions to ENS Africa for the GEP Amahlo Project Vuthela matter Forensic Investigations, dated 30 July 2020;
 - 5.4.1.22 Copy of an email from Mr Moyo to the Investigation Team, dated 17 March 2021;
 - 5.4.1.23 Copy of an invitation letter from Mkhabela Inc. to the Complainant, dated 14 September 2017;
 - 5.4.1.24 Copy of the CCMA Arbitration Award on the dismissal of the Complainant, dated 23 July 2018; and
 - 5.4.1.25 Copy of the Mkhabela Forensic Report, dated November 2017.

5.4.2 Legislation and other prescripts

- 5.4.2.1 The Constitution of the Republic of South Africa, 1996 (Constitution);
- 5.4.2.2 The Labour Relations Act, 66 of 1995 (LRA); and
- 5.4.2.3 The Protected Disclosures Act, 26 of 2000, as amended (PDA).

5.4.3 Case Law

- 5.4.3.1 *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC);
- 5.4.3.2 *Gcaba v Minister for Safety and Security and Others* (CCT64/08) [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ;
- 5.4.3.3 *Hendricks v Overstrand Municipality & Another* (2015) 36 ILJ 163 (LAC);
and
- 5.4.3.4 *Du Plessis v Public Protector and Others* (C 272 of 2019) [2019] ZALCCT 15 (12 December 2019).

5.4.4 Notice issued in terms of Rule 41(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018²* as amended (Public Protector Rules)

- 5.4.4.1 On 18 August 2022, a notice in terms of Rule 41(1) of the Public Protector Rules was issued to the Complainant to provide him with an opportunity for further submission in relation to the proposed closure of the investigation. Rule 41(1) of the Public Protector Rules 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.

² Published under Government notice No 945, Government Gazette 41903 of 14 September 2018 and Amended in Government Notice No 1047, Government Gazette 43758 dated 2 October 2020.

5.4.4.2 A response from the Complainant was received on 01 September 2022. The response and information/evidence submitted in response to the Notice were duly considered by the Public Protector in relation to the substance of the allegations made by the Complainant.

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 Regarding whether the Complainant was subjected to victimisation and/or occupational detriment as a result of reporting issues of corruption and maladministration to the Public Protector and other structures and if so, whether such conduct constitutes improper conduct 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, 1994.

Common cause issue

6.1.1 The Complainant was in the employ of the GEP from June 2009 wherein he worked in the GEP's Human Resource Department before he was promoted to the position of Assistant Manager: Key Accounts. His employment contract with the GEP was terminated on 08 September 2017.

Issue in dispute

6.1.2 The issue for the Public Protector's determination was whether or not the issue of the Complainant's victimisation and/or occupational detriment should be adjudicated upon, given that the CCMA had issued an arbitration award on the Complainant's dismissal by the GEP.

Complainant's version

- 6.1.3 In his email to the Public Protector dated 03 September 2019, the Complainant contended that he had an unparalleled commitment to the public service values and issues of good governance and administration. It was the commitment to his duties as the Secretary General of the GEP Branch of the PSA that led him to be at odds with Ms Manenzhe and the GEP Board.
- 6.1.4 The Complainant submitted that he and six (6) other shop stewards who initially complained to the Public Protector in July 2017, and thus instrumental in blowing the whistle on corruption and maladministration at the GEP, were dismissed through trumped-up charges to ensure that there was no resistance to the ongoing malfeasances within the organisation.
- 6.1.5 He alleged that he was subjected to financial ruin when defending himself at the CCMA. He was subjected to workplace harassment or occupational detriment prior to his suspension, which he had challenged at the CMMA - only for the GEP to concede at the conciliation stage.
- 6.1.6 The Complainant presented the following chronology of events as he recalled them:
- 6.1.6.1 On 12 January 2017, he, in his capacity as the Secretary General of the GEP Branch of the PSA and Mr Nkadimeng Ledwaba on behalf of the National Education Health & Allied Workers Union (NEHAWU), co-authored a dossier to the former Chairperson of the GEP Board, Ms L Magagane (Ms Magagane) containing various allegations against the GEP Management. He also wrote a follow-up letter dated 22 March 2017 to Ms Magagane in this regard.

6.1.6.2 The above-mentioned dossier was titled “*Request for Urgent GEP Board Intervention into the Current Mis-State of Affairs Led by the GEP Executive Management*” and addressed the following topics:

- (a) Contravention of section 84 of the LRA dealing with consultation;
- (b) Movement of employees across Units and departments without consultation;
- (c) Lack of feedback on the Transversal Shared Services (TSS);
- (d) Job profiling and grading;
- (e) Consultation on criteria for merit increases or the payment of discretionary bonuses;
- (f) Rock bottom staff morale and perpetuation of self-centred and dysfunctional leadership;
- (g) Maladministration practices;
- (h) Selective application of policies; and
- (i) Urgent finalisation of all suspension /special leave cases.

6.1.6.3 In January 2017, he was also transferred from his unit and instructed to report to the office of the Chief Operations Officer without consultation.

6.1.6.4 In February 2017, he laid a grievance regarding his unilateral transfer against Ms Manenzhe in line with the GEP Grievance Policy and Procedures, which the GEP Board ignored.

6.1.6.5 However in March 2017, the GEP Board responded indicating that it was seeking legal advice as Ms Manenzhe was the last line of accountability when it pertains to the GEP administration. In the undated letter to the PSA’s Ms Yolanda Ralawa, Ms L Magagane wrote amongst other things that:

“...as you are well aware, the grievance procedure of the Gauteng Enterprise Propeller (“GEP”) does not provide for a procedure for dealing

with grievances brought against the ACEO. Further and as can be gleaned thereon, the ACEO is the final adjudicator in terms thereof. In addition, the said procedure does not specifically and unequivocally confer any powers on the Board to deal with grievances let alone grievances brought against the ACEO.”

- 6.1.6.6 On 01 May 2017, the Complainant co-authored³ a dossier to the Portfolio Committee on the Economic Development, Environment and Rural Development, Mr Errol Magerman (Mr Magerman), raising issues of corruption and administrative malpractices at the GEP. He also sent follow-up letters to Mr Magerman, dated 28 June 2017 and 07 July 2017 respectively.
- 6.1.6.7 On 09 May 2017, following a commitment by the Chairperson of the Portfolio Committee to set up a meeting with Mr Maile, the Complainant sent agenda items, including the discussion on the replacement of Ms Manenzhe.
- 6.1.6.8 On 21 June 2017, the Complainant referred the grievance against Ms Manenzhe for unfair labour practice to the CCMA. In June 2017, the mass meeting took a resolution to pursue a strike action on conditions of work, which application was successfully granted by the CCMA. On 22 June 2017, the Complainant and Mr Mpumelelo Ndebele (Mr Ndebele) who had been recommended by the PSA to replace Ms Manenzhe, were unfairly suspended.
- 6.1.6.9 On 23 June 2017 and subsequent to the aforesaid suspensions, the employees of the GEP affiliated to the PSA engaged in the so-called “walk” to the offices of Ms Manenzhe and the then acting General Manager: Corporate Support and Administration, Ms Catherine Mamabolo (Ms

³ Together with the Chairperson of GEP PSA, Ms. Phumlile Tshiredo and Deputy Chairperson of GEP PSA, Mr. Obed Hutamo.

Mamabolo). The memorandum was signed by Ms Phumlile Tshiredo, Mr Obed Hutamo, Mr Raymond Mojela, Mr Kgotso Modika, Ms Sylvia Naidoo, Mr Luphiwo Mgudlwa and Ms Delsy Dlodlu, most of whom were PSA shop stewards. The memorandum was served on Ms Mamabolo who was found in the corridors of the GEP offices, but Ms Manenzhe was not in her office on the day and the memorandum was handed to her Personal Assistant, Ms Mellissa Pillay. Amongst other things, the memorandum demanded that Ms Manenzhe rescind the suspension of the Complainant and two other members.

6.1.6.10 On 29 June 2017, a letter raising allegations of corruption at the GEP by the PSA was sent to the Premier of the Gauteng Province, Mr David Makhura.

6.1.6.11 During the hearing held at the CCMA on 11 July 2017, a settlement agreement was reached regarding the Complainant's unilateral transfer to another department by Ms Manenzhe. The settlement agreement under case reference number GAJB 13240 dated 19 July 2019 recorded that:

"The parties agree to settle the dispute relating to "Unilateral changes to the terms and conditions of the employment" as follows:

(a) To formalise the current placement of the applicant [PSA on half of Mthabisi Moyo] in the division of Revenue Generation and Stakeholder Management by no later than 19 July 2017." (sic)

6.1.6.12 On 11 July 2017, the Complainant was served with a second suspension letter dated 10 July 2017 soon after the settlement agreement was reached on the unilateral transfer matter. He was also served with the charge sheet containing three (3) charges of *"non-compliance with policies/procedures"*, *"gross dishonesty"* and *"fraud."*

6.1.6.13 The Complainant was suspended from duty through a letter dated 17 July 2017 from Ms Manenzhe which amongst others read that:

“I refer to my precautionary suspension letter dated 22 June 2017. Following the charge sheet served on you on 11 July 2017, I have decided to suspend you with full pay, effective from 17 July 2017.”

6.1.6.14 On 18 July 2017, GEP employees embarked on a protected strike whilst the Complainant was serving his suspension, however, the GEP applied the “no work no pay” principle on him and other suspended employees. Around June or July 2017, Mr Maile agreed to the appointment of forensic investigators to investigate the issues raised against the GEP Management and the GEP Board.

6.1.6.15 In a letter dated 02 August 2017 from the GEP Human Resources Manager, Ms Tema, to the Complainant titled “*Alleged Unfair Suspension Dispute Under Case Number GAJB13933/17*”, she referred to the conciliation proceedings at the CCMA on 27 July 2017. She also wrote that:

“We confirm that we informed you of the withdrawal of your suspension effective, Thursday, 27 July 2017.

We confirm that, notwithstanding the express withdrawal of the suspension, you requested a postponement of the proceedings in the dispute you have referred to the CCMA. We further confirm that the dispute is set down for arbitration on 30 August 2017.”

6.1.6.16 Through a letter dated 07 August 2017, Ms Manenzhe informed the Complainant about the additional charge of “*gross negligence*”. During the same month, the GEP successfully argued that the CCMA did not have jurisdiction to rule on the fairness or unfairness of his suspension.

- 6.1.6.17 Between July and August 2017, an internal hearing with the recommendation of dismissal was held. The Complainant was charged with four (4) counts, namely, non-compliance with policies and procedures, gross dishonesty, fraud and gross negligence.
- 6.1.6.18 On 15 September 2017, the Complainant gave evidence to the Mkhabela Inc. forensic investigators on charges levelled against him and allegations by the PSA against Ms Manenzhe and the GEP Board.
- 6.1.6.19 The Complainant was subsequently dismissed from the GEP. He then referred his dismissal to the CCMA but he lost the case because none of his witnesses appeared on the date of the hearing. The two (2) key witnesses from management allegedly refused to testify because of the prevailing culture of victimisation.
- 6.1.6.20 The Complainant further submitted that he received summons from the GEP claiming millions of Rands against him and other two (2) employees. However, the claim for damages was dropped due to a lack of evidence.
- 6.1.7 Through an email dated 22 February 2022 from the Complainant, the Investigation Team obtained a copy of the CCMA's arbitration award dated 23 July 2018 (the Award), under case number GAJB21230-17. The following details, amongst others, were recorded in the Award:
- 6.1.7.1 The case was set down for hearing on 23 April 2018, 21 and 22 June 2018 and finally on 02 July 2018. The issue to be decided was whether the dismissal of the applicant [Complainant] by the GEP was substantively unfair;
- 6.1.7.2 The complainant was dismissed on 08 September 2017. He appealed his dismissal internally, but his appeal was dismissed on 29 September 2017. The complainant referred an unfair dismissal to the CCMA on 04 October

2017. The matter was referred to arbitration on 13 November 2017, after conciliation failed;

6.1.7.3 The charges against the Complainant were recorded as follows:

Charge 1

Non-Compliance with policies/procedures

“On or about 18 May 2017 you issued an invoice to the Services SETA on the letterhead of the GEP under Contract Number 201617 SSETA 010787 in the amount of R207 900-00 without following the GEP Policy of issuing invoices and obtaining authorisation from the Finance Department.”

Charge 2

Gross Dishonesty

“On or about 18 May 2017 you issued an invoice to Service SETA on the letterhead of GEP under Contract Number 201617 SSETA 010787 in the amount of R207 900-00 which is not part of your (sic) job description and had no permission to do so.”

Charge 3

Fraud

“On or about 18 May 2017 you issued an invoice to Services Seta on the letterhead of GEP under Contract Number 201617 SSETA 010787 in the amount of R207 900-00 which is not part of your job description and had no permission to do so.”

Charge 4

Gross Negligence

“On or about 17 February 2017 you signed and/or concluded a workplace experience for National Diplomas in various fields with the interns in terms of the learner Employment Contracts. Employment Contracts related to Contract Number 201617sseta010787 concluded between GEP and

Service Seta. You therefore committed a misconduct of gross negligence for the following reasons:

- *You acted outside your mandate in that you signed the workplace experience without authorisation from mandated official;*
- *You failed to notify the mandated official about the signed workplace experience duties of the interns, fully aware that only authorised official from the GEP Human Resources and mandated official are allowed to signed workplace experience duties of interns;*
- *You misrepresented information to the interns that you had authority to discuss their duties and obligations in terms of the workplace experience, whereas you do not have such authority;*
- *You failed to verify with relevant authorised officials at GEP whether GEP has a capacity to carry out those interns workplace experience.*
- *(Sic)You above mentioned conduct had a potential to expose GEP to loss, risks and litigation.”*

6.1.7.4 Charges 1 and 2 related to the same incident, namely the generation of two hundred and seven thousand, nine hundred Rand (R207 900,00) by the complainant. The complainant was not found guilty of fraud at the disciplinary hearing;

6.1.7.5 The CCMA found the dismissal of the Complainant to be fair and his appeal was dismissed through an arbitration award dated 23 July 2018;

6.1.7.6 The generation of the invoice in the manner in which it had happened amounted to serious misconduct and the applicant was guilty thereof. Further that the complainant could no longer be trusted. The complainant was guilty on the fourth charge but this would not by itself warrant the applicant's dismissal; and

6.1.7.7 Paragraph 50 of the Award recorded the outcome or award as “*The dismissal of the applicant was fair.*”

- 6.1.8 The Complainant contended that in the internal disciplinary hearing, he was representing himself and when he raised the issues of unfair suspension, the GEP's legal representatives and Chairperson indicated those were not the issues under consideration. The same happened at the CCMA, despite having legal assistance, the matter of victimisation was not dealt with at length with focus on the invoice allegations.
- 6.1.9 During the meeting between the Investigating Team and the Complainant on 21 November 2019, the Complainant was advised that this issue would not be pursued as the matter had been adjudicated upon by the CCMA and as such, the Public Protector could not overturn its ruling.
- 6.1.10 It was also noted that the Complainant had lodged a complaint with the Gauteng Provincial Office of the Public Protector on 25 July 2017. The Complainant had already been suspended on 11 July 2017.
- 6.1.11 In his email dated 17 March 2021 addressed to the Investigating Team, the Complainant reiterated that he challenged his dismissal at the CCMA and lost. He submitted that he lost the case because his witnesses were scared to testify on his behalf having seen others who sided with him being suspended and dismissed on spurious charges.
- 6.1.12 In the aforesaid email, the Complainant indicated that the request he had made was for the Public Protector to overturn the CCMA's ruling should it be determined that he was victimised. He had also approached Legal Aid South Africa for assistance to appeal the CCMA's ruling but could not get the assistance and did not have the financial resources to pursue the matter at the Labour Court.

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

- 6.1.13 The Complainant, through an email dated 01 September 2022 to the Investigation Team, submitted that he understood the legalities leading to the advice that the Labour Court is the appropriate forum to deal with the issue of victimisation. Notwithstanding, the Complainant was of the view that the Public Protector would pronounce on the matter.
- 6.1.14 He further submitted that his disclosure to the Public Protector should pass the good faith test despite having reported the matter after the disciplinary processes had been initiated against him. This is due to the fact that he had already made similar disclosures to the GEP Board and the Portfolio Committee and was subjected to various forms of victimisation/harassment as a result thereof.
- 6.1.15 In his further submission dated 06 September 2022, the Complainant indicated that *“The Public Protector is requested not to close this complaint and to consider the recommendations made including further engagement with myself and implicated officials central to the victimisation allegations.”*

Application of the relevant law

The Constitution

- 6.1.16 Section 34 of the Constitution provides that:

*“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and **impartial tribunal or forum.**”*[Added emphasis].

6.1.17 Section 23(1) of the Constitution provides that everyone has the right to fair labour practice.

6.1.18 These provisions guarantee a right to have a dispute being resolved through an independent and impartial tribunal and for anyone not to be subjected to unfair labour processes. The Complainant's grievance against Ms Manenzhe was escalated to the CCMA on 21 June 2017. The Complainant's dismissal was referred to the CCMA and adjudicated upon on 23 July 2018.

The Labour Relation Act

6.1.19 The LRA gives effect to section 23 of the Constitution and seeks to provide procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the CCMA is established), and through independent alternative dispute resolution services accredited for that purpose.

6.1.20 Section 141(1) of the LRA provides that if a dispute remains unresolved after conciliation, the Commission must arbitrate the dispute if a party to the dispute would otherwise be entitled to refer the dispute to the Labour Court for adjudication and, instead, all the parties agree in writing to arbitration under the auspices of the Commission.

6.1.21 Section 145 of the LRA stipulates that:

- (1) *“Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award—*
- (a) *within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2*

of the Prevention and Combating of Corrupt Activities Act, 2004; or [S 145(1)(a) subs by s 36 of Act 12 of 2004.]

(b) if the alleged defect involves an offence referred to in paragraph (a), within six weeks of the date that the applicant discovers such offence.”

6.1.22 The above provision provides for the review of the arbitration awards made under the auspices of the CCMA.

6.1.23 Section 157(1) of the LRA provides that subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that in terms of this Act or in terms of any other law, are to be determined by the Labour Court.

6.1.24 Section 157(2)(a) of the LRA provides that the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution and arising from employment and labour relations.

6.1.25 Section 158(h) provides that the Labour Court can “*review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law.*”

6.1.26 Section 186 of the LRA provides for the definitions of unfair dismissals and unfair labour practice and stipulates *inter alia* that:

(2) “Unfair labour practice” means an unfair act or omission that arises between an employer and an employee involving—

(a) ...;

(b) ...;

(c) ...; and

(d) *an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.”*

6.1.27 Section 187 of the LRA specially provides that:

(1) *“A dismissal is **automatically unfair** if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is-*

(h) *a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.” [Added emphasis]*

6.1.28 Section 191(13) of the LRA stipulates that:

“(a) An employee may refer a dispute concerning an alleged unfair labour practice to the Labour Court for adjudication if the employee has alleged that the employee has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.”

6.1.29 It should be noted that in case of alleged automatic unfair dismissal, an employee is enjoined to refer such to the Labour Court for adjudication as required in terms of section 191(5)(b)(i) of the LRA.

Protected Disclosure Act

6.1.30 Section 4 provides that:

(1) *“Any employee who has been subjected, is subjected or may be subjected, to an occupational detriment in breach of section 3, or*

anyone acting on behalf of an employee who is not able to act in his or her own name, may—

- (a) approach **any court having jurisdiction, including the Labour Court established by section 151 of the Labour Relations Act, 1995 (Act No. 66 of 1995), for appropriate relief; or***
- (b) pursue any other process allowed or prescribed by any law.*
[Added emphasis]

6.1.31 The above provision implies that an employee who is subjected to an occupational detriment is required to approach the Labour Court for appropriate relief.

6.1.32 Section 8 of the PDA provides that:

“(1) Any disclosure made in good faith to—

- (a) the Public Protector;*
- (b) ...*

in respect of which the employee or worker concerned reasonably believes that—

- (i) the relevant impropriety falls within any description of matters which, in the ordinary course are dealt with by the person or body concerned; and*
- (ii) the information disclosed, and any allegation contained in it, are substantially true,*

is a protected disclosure.”

6.1.33 The Public Protector is one of the institutions that can receive disclosures made in good faith. The Complainant first made the disclosure to the Public Protector in August 2017.

GEP: Disciplinary Code and Procedure of 26 January 2016 (Disciplinary Code)

- 6.1.34 Paragraph 12.1 provides that “*Should an employee appeal against the finding of the disciplinary hearing, such appeal must be lodged with the Human Resources Manager within three(3) days of receipt of written notification of the findings and sanction of the disciplinary hearing.*”
- 6.1.35 Paragraph 12.6 reads that “*If there is no satisfaction on the part of the employee thereafter, the employee may refer the dispute to the CCMA within thirty (30) calendar days after being notified of the decision.*”
- 6.1.36 The Disciplinary Code enjoins an employee to refer a dispute to the CCMA in an instance where he is unsatisfied with the findings of the disciplinary hearing. The Complainant referred the unfair dismissal dispute to the CCMA on 04 October 2017.

Case Law

- 6.1.37 In ***Chirwa v Transnet Limited and Others [2007] ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC)*** at para 41 Skweyiya J stated that:
- “The existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour processes and forums should take precedence over non-purpose-built processes and forums in situations involving employment-related matters. At the least, litigation in terms of the LRA should be seen as the more appropriate route to pursue. Where an alternative cause of action can be sustained in matters arising out of an employment relationship, in which the employee alleges unfair dismissal or an unfair labour practice by the employer, it is in the first instance through the mechanisms established by the LRA that the employee should pursue her or his claims.”*

- 6.1.38 The Constitutional Court stated in ***Gcaba v Minister for Safety and Security and Others (CCT64/08) [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC); (2010) 31 ILJ***, para 29 “...Labour issues are to be dealt with in the specialised fora and pursued through the purpose-built mechanisms established by the LRA. The purpose of the LRA is to create a system under which all labour disputes can be resolved. This is also implied by the provisions of section 210 of the LRA, as well as in the purposes of the CCMA, and the concomitant specialist labour tribunals...”
- 6.1.39 The court in ***Hendricks v Overstrand Municipality & Another (2015) 36 ILJ 163 (LAC)*** at para 27 denoted that:
- “The underlying guiding rationale of the ratio decidendi in *Gcaba* and *Chirwa* is that once a set of carefully-crafted rules and structures has been created for the effective and speedy resolution of disputes and protection of rights in a particular area of law, it is preferable to use that particular system.⁴ In other words, and in practical terms, remedies for unfair dismissal and unfair labour practices contained in the LRA should be used by aggrieved employees rather than seeking review under PAJA.”
- 6.1.40 The Labour Court in ***Du Plessis v Public Protector and Others (C 272 of 2019) [2019] ZALCCT 15 (12 December 2019)*** dealt with the application to review a decision by the Public Protector to decline to investigate complaint by Mr Du Plessis (the applicant) against the CCMA Commissioner. The Labour Court held that it had no jurisdiction to review and set aside the decision of the Public Protector complained of by the applicant.
- 6.1.41 Snyman AJ also remarked that “*The Public Protector in any event cannot become involved in the decision making by functionaries tasked to fulfil*

⁴ *Gcaba* at para 56.

dispute resolution functions under the LRA. The oversight of those decisions resort exclusively under the jurisdiction of the Labour Court⁵.”

- 6.1.42 It was noted that the Complainant, in his capacity as the Secretary General of the GEP Branch of the PSA raised several issues with different structures including, the GEP Board, the Portfolio Committee, the offices of the MEC and the Premier.
- 6.1.43 The evidence before the Public Protector revealed that the issues of unilateral transfer and suspension of the Complainant were appropriately referred to the CCMA. The unilateral transfer was resolved through a settlement agreement concluded at the CCMA on 19 July 2017 whereas the suspension was resolved after the GEP withdrew the suspension. The CCMA ruled that it could not arbitrate on the matter because the GEP had lifted the suspension before the matter was heard.
- 6.1.44 The Complainant first reported a complaint with the Gauteng Provincial office of the Public Protector on 25 July 2017. This was after he was already suspended and charged with, amongst other things, non-compliance with policies and procedures, gross dishonesty and fraud. Therefore, the disciplinary process initiated against him was not associated with the lodging of the complaint with the Public Protector.
- 6.1.45 Although the Complainant contended that the issue of victimisation and/or occupational detriment was not dealt with at length at the CCMA, there was no evidence to suggest that he pursued his remedies as envisaged in section 4 of the PDA.
- 6.1.46 Moreover, his dismissal was not presented as an automatic unfair dismissal as contemplated in section 187(1)(h) of the LRA, in that he did not

⁵ At para 44

demonstrate that the charges that he was facing arose because he made a protected disclosure.

6.1.47 The Complainant referred his case of unfair dismissal to the CCMA on 04 October 2017, which was not upheld. It should be noted that the said referral was consistent with section 34 of the Constitution, the Disciplinary Code, the LRA and the Constitutional Court's judgement highlighted above.

6.1.48 In his submission to the Public Protector, the Complainant implored the Public Protector to overturn the ruling of the CCMA. The Complainant also appeared to suggest that the Public Protector can make a determination on whether or not the conduct of the GEP constituted victimisation and/or occupational detriment as envisaged in section 4(1) of the PDA. However, section 4(1) of the PDA enjoins the affected party to approach the courts for relief.

6.1.49 Equally, section 191(13) of the LRA enjoins an employee to approach the Labour Court for adjudication where there are allegations that the employee has been subjected to an occupational detriment in violation of section 3 of the PDA.

Conclusion

6.1.50 The Complainant referred his unfair dismissal matter to the CCMA on 04 October 2017 in line with section 34 of the Constitution, section 141 of the LRA and the Disciplinary Code. The CCMA subsequently issued an arbitration award on 23 July 2018, dismissing his referral.

6.1.51 The Complainant was not satisfied with the outcome of the CCMA's arbitration and was therefore enjoined to refer the matter to the Labour Court as required by section 145 of the LRA. The provisions of section 145

of the LRA, do not empower the Public Protector to review or overturn the arbitration award of the CCMA.

6.1.52 In terms of section 4(1) of the PDA, read with sections 187(1)(h) and 191(13) of the LRA, the Labour Court is the competent authority to grant relief in connection with occupational detriment resulting from a protected disclosure and make a determination whether a resulting dismissal constitutes an automatic unfair dismissal.

6.2 Regarding whether the Gauteng Department of Economic Development and/or Gauteng Enterprise Propeller failed to release and/or implement the recommendation of the Mkhabela Forensic Report, and 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(5)(b) of the Public Protector Act, 1994:

Common cause issues

6.2.1 The Department appointed Mkhabela Inc. to investigate several allegations of maladministration and corruption levelled against the GEP, which included *inter alia*, the following:

6.2.1.1 Alleged contravention of the LRA by imposing a non-consulted structure;

6.2.1.2 Alleged untimely termination of contracts, prolonged special leaves granted to employees, and abuse of recruitment processes/secondment practices; and

6.2.1.3 Alleged irregularities relating to Casa Mia (Pty) Ltd (Casa Mia), Sula Smart Supply Services (Pty) Ltd (Sula Smart), Amahlo Consulting, Sketa Trade and Investments (Pty) Ltd (Sketa), Sakhile Ezweni Trading and Projects

(Pty) Ltd (Sakhile Ezweni Bakery) Nhlanhla Trading and Projects (Pty) Ltd (Nhlanhla Bakery), U-Musk and Car Wash Programme (U-Musk).

6.2.2 The Portfolio Committee responded to the PSA's plea for an investigation into the affairs of the GEP and requested Mr Maile to engage the PSA for a possible solution. This resulted in the approval and appointment of Mkhabela Inc. to conduct a forensic investigation into the affairs of the GEP. The Mkhabela Inc. investigated and issued a forensic investigation report dated November 2017.

Issue in dispute

6.2.3 The issue for Public Protector's determination was whether the Department and/or the GEP failed to implement the Mkhabela Forensic Report or failed to avail a copy of the report to the PSA.

Complainant's version

6.2.4 The Complainant contended that the investigation by the Mkhabela Inc. related to the following:

6.2.4.1 That there has been a deliberate flouting of the GEP Recruitment Policy to favour few individuals. For instance, the position of the CEO was reserved for their favoured candidate;

6.2.4.2 That there was abuse of the Transformation Modernisation and Re-industrialisation (TMR) and Township Economy Revitalisation (TER) projects for self-enrichment by Ms Manenzhe. For instance, Sakhile Ezweni Bakery and Nhlanhla Bakery deals were approved through grant funding of one million and five hundred thousand Rand (R1.5m) each, on provision that they incubate township-based small bakeries. The Casmia project was approved for grant funding of two million and seven hundred thousand Rand

(R2.7m). However, Ms Manenzhe was seeking more funds for a non-operational company; and

6.2.4.3 That there was misappropriation of public funds to cover up maladministration and victimisation of employees.

6.2.5 The Complainant was invited through a letter dated 14 September 2017 from Mkhabela Inc. to give evidence. The said letter read *inter alia* that:

“We confirm as telephonically discussed that we have been appointed by the Gauteng Department for Economic Development (GDED) to assist it in conducting a forensic investigation into the Gauteng Enterprise Propeller.

The objective is to assist the Department in finding a solution to the challenges experienced at the (GEP). You have been identified as a person who can provide us with information that can assist us in our effort to guide the (GDED) in the resolution of the said challenges.”

6.2.6 The Complainant submitted that on 15 September 2017, he gave evidence on the charges levelled against him and on issues pertaining to the abuse of power by Ms Manenzhe and the GEP Board. However, two (2) years later, as of 2019, the Mkhabela Forensic Investigation had been completed but had not been shared with the stakeholders.

6.2.7 In his complaint to the Public Protector, the Complainant raised, amongst other things the following issues concerning the Mkhabela Forensic Investigation:

6.2.7.1 What were the outcomes of the Mkhabela Forensic Investigation?

6.2.7.2 Was the Mkhabela Forensic Report circulated amongst the interested stakeholders?

6.2.7.3 Were the recommendations of the Mkhabela Forensic Report implemented?

6.2.8 The Complainant contended that the reason the report had been swept under the carpet was because it contained damning findings against Ms Manenzhe. He wanted the report to be made available to him, the PSA and the GEP employees as the interested parties.

6.2.9 In a letter dated 13 September 2017 to Ms Manenzhe, Ms Letlonkane wrote, *inter alia*, that:

“Kindly be reminded that the legislative framework to support a forensic investigation is outlined in the legislation such as the Public Finance Management act, 1999 (Act 1 of 1999), the Prevention and Combatting of Corrupt Activities Act, 2004 (Act 12 of 2004 and the Protected Disclosure Act, 2000 (Act 26 of 2000).

*Against this background, **the Shareholder has appointed an external service provider to conduct a forensic investigation at GEP. The forensic investigation will focus on the claims and allegations of misconduct, maladministration and corruption by officials at the Gauteng Enterprise Propeller (GEP), as well as the allegations levelled against the Acting CEO and the Board.***

The service provider appointed is Mkhabela Incorporated, who will be represented by Mr. Ernest Nekhavhambe.

It is envisaged that the forensic investigation will be concluded by 15th October 2017.”

6.2.10 On 13 September 2017, the GEP addressed a letter to all employees informing them about the commencement of the forensic investigation by Mkhabela Inc.

Response by the GEP

6.2.11 In a letter dated 20 September 2021 submitted to the Public Protector through email correspondence, the General Manager of Risk and Audit (GEP): Mr Lamlani Dube (Mr Dube) reported that the investigation by Mkhabela Inc. was a result of a complaint addressed to the GEP Board and Company Secretary on 12 January 2017 by the PSA.

6.2.12 The PSA's complaint raised about nine (9) main allegations relating to abuse of labour relations processes, consultations on changes in the organisational structure, use of the transversal shared services, job profiling and grading, non-payment of performance bonuses, poor staff morale and dysfunctional leadership, maladministration practices and selective application of policies, suspension of employees. The allegations of maladministration and corruption were made against the GEP's Executive Management, the GEP Board and the MEC.

6.2.13 Mr Dube stated that "*after receipt of the report by Adv Holl⁶ on November 2017, only the verbal version of the report not a physical copy or electronic copy, was tabled to Board on the 08 February 2018 by Adv Holl with an undertaking that a physical copy or electronic copy will be circulated to the Board for its perusal to affirm the position that there was no substance to the allegations*".

⁶ Advocate Pieter Holl was the Deputy Director General: Governance and Regulations and a GEP Shareholder (Department of Economic Development) representative in GEP Board as a Board member, leading the briefing on behalf of the Shareholder.

- 6.2.14 The Public Protector is in possession of a task register submitted by Mr Dube emanating from the minutes of the GEP Board meeting wherein item 08/02/2018 4.0 stated that *“Mr Holl must immediately circulate the forensic report to the Board members and the Portfolio Committee, Economic Development as the circulation was overdue, set up a meeting with Mr Maile in the next 2 weeks (28 February 2018) for the Board delegation to present recommendations to Mr Maile and attend the proposed special Board Meeting, to review the Mkhabela Investigation report, scheduled for 27 February 2018. However the said Board meeting did not take place because Mkhabela Investigation report was not circulated.”*
- 6.2.15 Mr Dube stated that Mr Maile expressed his displeasure during a Board meeting held on 22 November 2018 and argued that the GEP Board required the actual copy of the Mkhabela Forensic Report. However, Messrs. Maile and Holl and the former HOD, Ms Phindile Mbanjwa (Ms Mbanjwa) left the Department around May 2019, before the requisite report could be submit.
- 6.2.16 Mr Dube also stated that the Mkhabela Investigation Report was then relayed to the GEP Board by Ms Mbanjwa and Mr Ramokgopa around 05 August 2019. The report had substantive findings and recommendations contrary to the views shared with the GEP Board by both Adv Holl and Mr Maile.
- 6.2.17 The Public Protector, through a letter dated 29 April 2020, requested the former ACEO of the GEP, Mr Motlatjo Moholwa (Mr Moholwa), to avail a copy of the Mkhabela Forensic Report. On 07 October 2020, the Public Protector issued Mr Moholwa with a subpoena in terms of sections 7(4)(a) and (5) of the Public Protector Act. The requested copy of the Mkhabela Forensic Report was subsequently delivered to the Public Protector on 21 October 2020.

- 6.2.18 The copy of the Mkhabela Investigation Report availed to the Public Protector bore a receipt stamp of the office of the HOD, with a date of 23 July 2019.
- 6.2.19 Following receipt of the Mkhabela Forensic Report on 21 October 2020, the Investigation Team met with Mr Moholwa on 23 February 2021 to discuss whether the recommendations made in the report had been implemented.
- 6.2.20 On 05 March 2021, Mr Moholwa provided the Investigation Team with a document containing the GEP Board's response (signed by the Chairperson of the GEP Board, Ms Lebogang Mphahlela), in respect of the recommendations of the Mkhabela Forensic Report.
- 6.2.21 The aforesaid document contained a summary of activities in a table which appears hereunder:

Matters	Recommendations	Progress	Action Plan	Time Lines
LRA CONTRAVENTION AND STAFF ISSUES	GEP Management to put systems in place to speedily finalise pending disciplinary hearings against suspended employees including PSA Shop stewards.	Reinstated	N/A	February 2020
	Appointment of CEO GEP be finalised.	Position vacant	The Board has initiated the recruitment process in consultation with the Shareholder.	March 2021
	Appointment of GM: Corporate Support and Administration be finalised.	Position filled	N/A	December 2018
	GEP Management considers re-engaging with PSA on the new structure in line with Sections 84 and 85 of LRA.	PSA and Management were reengaged and the organisational	PSA will be re-engaged in the reconfiguration Process	April 2022

<p>TER & TMR PROJECT IRREGULARITIES</p>	<p>Sakhile Ezweni Bakery:</p> <ul style="list-style-type: none"> • Obtain a detailed disbursement schedule from Sakhile Ezweni in relation to the R1,5M grant for the incubation programme; • Recover the grant from Sakhile Ezweni should they fail to demonstrate that the funds were utilised for the purposes they were intended for; • Conduct proper due diligence to ensure that applicants meet all requirements and criteria set out in the incubation policy prior to approving grants; • Conduct post investment monitoring to ensure that the client adheres to the terms of the agreement. 	<p>structure was subsequently approved.</p> <p>Handed over to GEP panel of attorneys for recovery.</p>	<p>including the proposed structure.</p> <p>Recovery in progress, due diligence and post investment monitoring are being strengthened.</p>	<p>N/A</p>
	<p>Nhlanhla Bakery:</p> <ul style="list-style-type: none"> • Recover R1,5M from Nhlanhla Bakery for breach of contract; • Prior to approving grants, conduct proper due diligence to ensure that applicants meet the criteria set out in the Incubation Policy; 	<p>Handed over to GEP panel of attorneys for recovery.</p>	<p>Recovery and investigation in progress, due diligence and post investment monitoring are being strengthened.</p>	<p>N/A</p>

	<ul style="list-style-type: none"> • Conduct post investment monitoring to ensure that the client adheres to the terms of the agreement; • Conduct further investigations including consultations with Makasana to identify GEP officials involved in forging Mdluli's signature on the agreement as well as the amendment of Nhlanhla. 			
	<p>Bakery's invoice</p> <ul style="list-style-type: none"> • Conduct computer imaging and analysis on the computers of the officials that were involved in the processing of the grant. 			
	<p>Casa Mia:</p> <ul style="list-style-type: none"> • GEP Management consider facilitating further discussions between Casa Mia and the relevant departments including Social Development and Health to source business for the company. 	<p>The business is no longer operational.</p>	<p>N/A</p>	<p>N/A</p>
	<p>Sketa:</p> <ul style="list-style-type: none"> • GEP Management considers instituting legal action against Sketa to recover the balance owed to GEP; loan granted to Sketa amounted to R6 326 126-14. 	<ul style="list-style-type: none"> • Attorneys instituted civil action as well as criminal action against the sole director of Sketa, Mr. Richard Ndlovu. • Handed over to GEP panel of attorneys for investigation. 	<p>Recovery and investigation in progress.</p>	<p>Recovery in progress. Investigation report is expected to be issued in March 2021.</p>

	<p>Amahlo Consulting (Project Vuthela):</p> <ul style="list-style-type: none"> • GEP should establish whether there was value for money, • Confirm whether the trainees received stipend as per the requirements; • Whether the individuals were in fact trained and whether there were any job placements for the trainees. 	<ul style="list-style-type: none"> • Handed over to GEP panel of attorneys for investigation 	<p>Investigation in progress.</p>	<p>Investigation report is expected to be issued in March 2021⁷.</p>
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6.2.22 The GEP Board also reported that it had taken the following decisions:

- (1) *“To separate Audit, Risk and Governance Committee (ARGC) of the Board into Audit Committee (AC) and Risk and Governance Committee (RGC) - The Risk and Governance Committee will be focusing on risk management and governance systems within the Agency to ensure compliance with all applicable legislation and treasury regulations, most of which are responsible for these matters. We believe that this will reduce resource leakages and enhance organizational efficiency and performance by ensuring that the Entity’s limited resources are fully deployed on its mandate, the provision of Financial and Business Development Support interventions to SMMEs in the Province (**October 2020**).*
- (2) *The Audit Committee of the Board will be engaging with Management on Supply Chain, Contract Management and ICT matters to deal with risks and associated compliance matters (**February 2021**).*
- (3) *The revision of the Credit Policy to ensure that the right SMMEs are supported as effectively as possible (**March 2021**).*

⁷ Investigation by ENS was finalised.

(4) *We will develop an action plan to ensure or improve the following:*

- *GEP is Fit-For-Purpose (December 2021),*
- *Filling of all key Management and Finance positions (April 2021),*
- *Compliance Regime (March 2021),*
- *Business Process Re-engineering (June 2021)*
- *Partnerships and Leveraging of Resources from the Private Sector (June 2021), and*
- *Organizational Performance (April 2021).”*

6.2.23 In respect of the labour relations issues, the GEP and the PSA entered into a settlement agreement on 14 February 2020 regarding the dismissal of the PSA shop stewards (Mr Obed Hutamo, Mr Kgotso Modika, Ms Delsy Dlodlu and Ms Phumlile Tshiredo) after an internal disciplinary enquiry was concluded on or about September 2018.

6.2.24 The paragraphs of the settlement agreement recorded amongst other things the following:

1.1.3 *“Dispute means the unfair dismissal dispute between the Employee and Employer referred to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) on 08 October 2018.*

3.2 *“The parties [Employer and Employees] have, through negotiations, resolved their differences and mutually agree to settle amicably the dispute between them, without admitting or denying the factual allegations made by the Parties, nor admitting any liability by both Parties, in respect of the dispute.*

4.1 *The employer shall reinstate the employees to their employment, alternatively to a position equivalent to that which was previously occupied or any other position suitable, upon signing this agreement.*

4.2 The Employer will be issued with a final written warning for the misconduct which will remain active for a period of six (6) months.

7.1 On confirmation of receipt of payment by the Employee and signing of the settlement agreement, Employee through PSA shall withdraw the claim before the CCMA, it being agreed that no Party shall be liable to the other for any costs incurred by such withdrawal.”

6.2.25 The GEP also provided a copy of the letter dated 30 July 2020 addressed to ENS Africa where Mr Moholwa appointed ENS Africa to assist the GEP with “*the forensic investigation and corporate governance issues on GEP/Amahlo/Project Vuthela/TVET College.*”

6.2.26 The Harris Nupen Molebatsi Incorporated (HNM) Report⁸ recorded that the investigation into Amahlo was duly conducted by ENS and agreed with the recommendations that disciplinary action should be taken against the implicated officials.

6.2.27 Regarding the appointment of the GM: Corporate Support, the GEP advised that Mr Ntambudzeni Vincent Mulaudzi, was appointed to the position from 03 December 2018.

6.2.28 Through an email dated 21 April 2021 to the Investigation Team, Mr Moholwa further reported as follows:

6.2.28.1 In respect of the vacant position of the CEO, MEC: EDEARD, Mr Franklyn Parks Tau, MPL entered into an employment contract with Mr Sakhumuzi Zamxaka on 08 April 2021; and

⁸ Harris Nupen Molebatsi Incorporated (HNM) submitted to the GEP a preliminary report dated 15 February 2022 to the GEP on the review of the recommendations contained in the Mkhabela Forensic Report.

- 6.2.28.2 In respect of Sakhile Ezweni Bakery and Nhlanhla Bakery, Strauss Daly Incorporated Attorneys was appointed to attend to the recovery of funds against the aforesaid entities through a letter dated 11 March 2021 from the GEP's Manager: Legal Services, Ms Tihalefang Matlhare.
- 6.2.29 In her email dated 20 September 2022 to the Investigation Team, the Acting General Manager of Risk and Audit (GEP): Ms Sibusisiwe Ntuli (Ms Ntuli) advised that the implementation of the Mkhabela Forensic Report recommendations *"is currently at 87% (13 out of 15 recommendations have been fully implemented). 13 % (2 out of 15 are partially implemented which in the main relate to recovery of funds from TMR deals (U-Mask and Sketa)."*
- 6.2.30 The GEP contracted Harris Nupen Molebatsi Incorporated (HNM) to review and implement such recommendation by instituting legal and/or disciplinary proceedings and/or take appropriate remedial action. The HNM subsequently issued a preliminary review report dated 15 February 2022 (HNM Report). The HNM Report recorded amongst others as follows:

Issue	Mkhabela Recommendation	Action taken /Remedial action
Sakhile Ezweni Bakery	Confirmed	<ul style="list-style-type: none"> • Letter of demand was issued on 08 February 2022. • Incubation policy Reviewed
Sula Smart	Confirmed	<ul style="list-style-type: none"> • Letter of demand for R 9 599 100.00 was issued.
Casa Mia	Confirmed	<ul style="list-style-type: none"> • Letter of demand was issued to Casa Mia.
Sketa	Confirmed	<ul style="list-style-type: none"> • Civil and criminal proceedings instituted against the Director of Sketa, Mr Richard Ndlovu.
U-Mask	Confirmed	<ul style="list-style-type: none"> • U-Mask was ordered to pay R1 700 000.00, of which R7 50 has been

		paid in a lump sum, the remainder in instalments.
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- 6.2.31 Regarding the recovery of fruitless expenditure, the Mkhabela Forensic Report found that the allegations that the suspensions of the GEP officials were unfair could not be proven, thus there was no basis to claim fruitless and wasteful expenditure.
- 6.2.32 In paragraph 8.5 of the HNM Report, it is recorded that *“In the light of HNM’s findings above, as well as the fact that the CCMA found in favour of GEP when these suspensions were referred to it, HNM is of the view that, in the absence of evidence to the contrary, it cannot be found that the suspension of these Shop Stewards was unfair and, as such, no claim for “fruitless and wasteful” expenditure is worth pursuing. There also seems to be no evidence, in this case, to indicate that the prolonged suspensions of these employees was as the result of any act or omission on the part of Manenzhe and HNM therefore cannot find a basis upon which to hold Manenzhe liable for the prolonged suspension of these employees.”*
- 6.2.33 Regarding the LRA contraventions, the HNM Report has recommended further review of the recruitment and selection policy and leave policy.

Application of the relevant law

The Constitution

- 6.2.34 Section 195 provides that:
- (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) *Efficient, economic and effective use of resources must be promoted.*
-”

6.2.35 Section 195(2) also provides that the principles contained in subsection (1) are also applicable to public enterprises, which includes the GEP.

The Labour Relations Act

6.2.36 Section 16 provides of the LRA that:

- (1) *“For the purpose of this section, “representative trade union” means a registered trade union, or two or more registered acting jointly, that had as members the majority of the employees employed by an employer in a workplace.*
- (2) *Subject to subsection (5), an employer must disclose to a trade union representative all relevant information that will allow the trade union representative to perform effectively the functions referred to in section 14(4).*
- (3) *Subject to subsection (5), whenever an employer is consulting or bargaining with a representative trade union, the employer must disclose to the representative trade union all relevant information that will allow the representative trade union to engage effectively in consultation or collective bargaining.*
- (4) *The employer must notify the trade union representative or the representative trade union in writing if any information disclosed in terms of subsection (2) or (3) is confidential.*
- (5) *As employer is not required to disclose information—*
 - (a) *that is legally privileged;*

- (b) *that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;*
- (c) *that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or that is private personal information relating to an employee, unless that employee consents to the disclosure of that information;*
- (6) *If there is a dispute about what information is required to be disclosed in terms of this section, any party to the dispute may refer the dispute in writing to the Commission.”*

6.2.37 The above provisions require the trade union to refer a matter to the CCMA in instances where there is a failure on the part of the employer to provide the information requested.

6.2.38 It was observed that the Department had expended financial resources to appoint a service provider to conduct a forensic investigation into the affairs of the GEP. Mkhabela Inc. duly conducted the investigation and issued a report dated November 2017.

6.2.39 There was no evidence showing an undertaking that the Mkhabela Forensic Report would be handed over to the employees as contended by the Complainant.

6.2.40 There was also no evidence that the Complainant and/or the PSA as the representative trade union attempted to access the report as contemplated in section 16 of the LRA.

6.2.41 The evidence at the Public Protector’s disposal revealed that the Department, as the shareholder who sanctioned the forensic investigation, received the Mkhabela Forensic Report on 23 July 2019, but the GEP had

already commenced implementing the recommendations contained in the report.

Conclusion

- 6.2.42 For the purposes of not duplicating effort and to promote the efficient, economic and effective use of resources as envisaged in section 195 of the Constitution, it was determined that it would be prudent not to conduct another investigation on the same matters that were addressed in the Mkhabela Forensic Report and the recommendations contained in the report were implemented by the GEP thus defeating the need for additional measures to be taken by the Public Protector.
- 6.2.43 The forensic investigation conducted by Mkhabela Inc. was sanctioned by the Department.
- 6.2.44 It was observed that the Mkhabela Forensic Report was handed over to the Department on 23 July 2019. However, there was no evidence that the Department was required to hand over the Mkhabela Forensic Report to the employees, including the Complainant.
- 6.2.45 Notwithstanding the aforesaid, the Public Protector noted that the recommendations of the Mkhabela Forensic Report have been implemented.
- 6.2.46 Furthermore, having regard to the evidence referred to in this report, it is undesirable and imprudent for the Public Protector to interfere with the administrative activities of the GEP. As an independent institution, it had a duty to decide on the process to be followed in realising its objectives as set out in its area of accountability, which according to evidence referred to in this report, it executed rationally and lawfully.

7. FINDINGS

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

7.1 **Regarding whether the Complainant was subjected to victimisation and/or occupational detriment as a result of reporting issues of corruption and maladministration to the Public Protector and other structures and if so, whether such conduct constitutes improper conduct 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, 1994.**

7.1.1. The Complainant was subjected to a disciplinary hearing which resulted in his dismissal on 08 September 2017. He subsequently referred his dismissal to the CCMA on 04 October 2017. In its Award dated 23 July 2018, the CCMA considered the dismissal of the Complainant by the GEP to be fair and dismissed the referral.

7.1.2. The Labour Court is the competent authority to review the CCMA's arbitration awards as contemplated in section 145 of the LRA.

7.1.3. The Complainant did not plead victimisation and/or occupational detriment during his disciplinary or arbitration case at the CCMA where he had the opportunity and appropriate forum to do so, in accordance with the provisions of the PDA and the LRA.

7.1.4. Further thereto, in terms of section 4(1) of the PDA read with sections 187(1)(h) and 191(13) of the LRA, the Labour Court is the competent authority to determine whether the Complainant, on the account of having made a protected disclosure, was subjected to an occupational detriment by the employer in contravention of section 3 of the PDA.

7.1.5. Therefore the Public Protector considers it imprudent to make a determination on whether or not the Complainant was subjected to victimisation and/or occupational detriment resulting in his dismissal.

7.2 Regarding whether the Gauteng Department of Economic Development and/or Gauteng Enterprise Propeller failed to release and/or implement the recommendation of the Mkhabela Forensic Report, and 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(5)(b) of the Public Protector Act, 1994

7.2.1 The allegation that the Department and/or the GEP failed to release and/or implement the recommendation of the Mkhabela Inc. Forensic Report is **unsubstantiated**.

7.2.2 The Mkhabela Forensic Report dated November 2017 was belatedly availed to the Department on 23 July 2019. However, the GEP had already started implementing its recommendations as early as 2018.

7.2.3 The Public Protector has noted that the GEP also contracted the HNM to review and implement the recommendations of the Mkhabela Forensic Report.

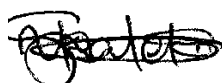
7.2.4 The Public Protector found that the GEP was implementing the recommendation of the Mkhabela Forensic Report dated November 2017.

7.2.5 There was no evidence that the GEP and/or the Department was required to release the Mkhabela Forensic Report to the PSA. Further thereto, there was no evidence that the PSA sought access to the Mkhabela Forensic Report as contemplated in section 16 of the LRA.

7.2.6 The conduct of the GEP, therefore, does not constitute improper conduct in terms of section 182(1) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.

8. CONCLUSION

8.1 The Public Protector considers this matter as finalised 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.



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

Assisted by: Mr Rodney Mataboge
Chief Investigator: Investigation Branch