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INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT BY THE FUNCTIONARIES OF THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY, RELATING TO THE FRAUDULENT CREATION OF AND/OR PRODUCTION OF COUNCIL RESOLUTIONS PURPORTING TO BE THE OUTCOME OF A COUNCIL MEETING HELD ON 28 JANUARY 2010 AND THE IRREGULAR PURSUIT OF DISCIPLINARY ACTION AGAINST MR TEMBA XAKAZA

Ekurhuleni
METROPOLITAN MUNICIPALITY

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LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS / ABBREVIATIONS	DESCRIPTIONS
AGSA	Auditor-General South Africa
CEO	Chief Executive Officer
City of Ekurhuleni	City of Ekurhuleni Metropolitan Municipality
Constitution	Constitution of the Republic of South Africa, 1996
LAC	Labour Appeal Court
LRA	Labour Relations Act, 1995
MFMA	Local Government: Municipal Finance Management Act, 2003
MPAC	Municipal Public Account Committee
MSA	Local Government: Municipal System Act, 2000
PAIA	Promotion of Access to Information Act, 2000
Public Protector	Public Protector South Africa
Public Protector Act	Public Protector Act, 1994
Public Protector Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018, as amended and promulgated under section 7(11) of the Public Protector Act, 1994
SALGBC	South African Local Government Bargaining Council

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The Report is submitted in terms of sections 8(1), read with section 8(3) of the Public Protector Act and Rule 40(b) of *Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018¹, as amended* (the Public Protector Rules), which empowers the Public Protector to make known the findings of an investigation, to affected parties, including the Complainant, for such persons to note the outcome of the investigation.
- 1.3 The report is provided to the following persons:
- 1.3.1 Mr Temba Xakaza (the Complainant); and
- 1.3.2 Mr Kagiso Michael Lerutla, the City Manager of the City of Ekurhuleni Metropolitan Municipality.
- 1.4 The report relates to an investigation into allegations of maladministration and improper conduct by the functionaries of the City of Ekurhuleni Metropolitan Municipality (City of Ekurhuleni), relating to the fraudulent creation of and/or production of Council resolutions purporting to be the outcome of a Council meeting held on 28 January 2010 and the irregular pursuit of disciplinary action against Mr Temba Xakaza.

¹ 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.

2. THE COMPLAINT

1.5 The investigation originates from a complaint lodged with the Public Protector on 09 January 2013, by Mr Temba Xakaza (the Complainant). On 25 January 2013, the Complainant submitted on the Public Protector's complaint form² information supplementing his original complain.

1.6 In essence, the Complainant alleged that:

2.1.1. He was suspended and disciplined based entirely on a document that was communicated to his trade union as a Council Resolution of a meeting held on 28 January 2010;

2.1.2. He has secured the correct minutes and written confirmation that the City of Ekurhuleni is yet to give effect to the aforesaid Resolution;

2.1.3. Funds were expended to appoint attorneys in order to implement a fraudulently created document purporting to be the Resolution of the City of Ekurhuleni's meeting, held on 28 January 2013;

2.1.4. Whereas it was unclear whether the expenditure that followed this fraudulently created decision was deliberate or an unintended consequence, it was clear that the person who financially benefited from this fraudulent act, took the opportunity to secure income instead of reporting the corrupt activities related thereto; and

2.1.5. He further alleged that the document which contained the fraudulent decision appeared to have been faxed on 01 November 2010, from the Alberton Customer Centre, from either the 10th or the 11th floor. The

² The complaint form was dated 08 October 2012.

official of the City of Ekurhuleni, who took vigorous posture to get rid of the Complainant at all costs, was Mr Tinus van Staden (Mr van Staden).

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution), to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

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

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

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 functionaries of the City of Ekurhuleni Metropolitan Municipality fraudulently created and/or produced a Council Resolution purporting to be the outcome of the Council meeting held on 28 January 2010 and irregularly pursued disciplinary action against Mr Temba Xakaza, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and

4.1.2. Whether the functionaries of the City of Ekurhuleni improperly directed the municipality's funds in pursuit of an irregular initiation of disciplinary action against Mr Temba Xakaza, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

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 Section 7(1) of 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 approach to the investigation included the sourcing of information and documents from the Complainant and the City of Ekurhuleni, analysing documents, and an examination of regulatory instruments, including constitutional provisions, legislation, regulations and relevant court decisions.

5.2.1.1. The investigation was approached using an enquiry process that seeks to determine:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

5.2.1.2. In the event of improper conduct or maladministration, what would it take to remedy the wrong or to place the Complainant as close as possible to where he would have been, but for the maladministration or improper conduct.

5.2.1.3. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence is evaluated and a determination is made on what happened based on a balance of probabilities. In this case, the factual enquiry principally focused on whether the functionaries of the City of Ekurhuleni Metropolitan Municipality fraudulently created a Council Resolution purporting to be the outcome of the Council meeting held on 28 January 2010, which

formed the basis of the disciplinary action against the Complainant and whether the City of Ekurhuleni improperly directed the municipality's funds to implement the alleged fraudulent decision and/or improperly implemented the Resolution of Council, which consequently led to the Complainant's dismissal.

- 5.2.1.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Municipality in order to prevent improper conduct or maladministration.

5.3 Key sources of information

5.3.1 Correspondence exchanged

- 5.3.1.1 Allegations letter from the Public Protector to the City of Ekurhuleni, dated 07 March 2014;
- 5.3.1.2 Email correspondence from Mr Khomotso Fambe (Mr Fambe), Legal Advisor at the City of Ekurhuleni, responding to the Complainant's allegations, dated 16 April 2014;
- 5.3.1.3 Email correspondence from the Public Protector Investigation Team (Investigation Team) to Ms Caroline Mphage (Ms Mphage), dated 17 October 2014;
- 5.3.1.4 Statement from Ms Mphage to the Investigation Team, dated 03 November 2014, confirming that the Complainant was handed several documents by Mr Zebediela;
- 5.3.1.5 Letter from the Investigation Team to the Complainant, dated 24 June 2016, advising him that the Public Protector intended to close the matter

based on the conclusion that there was no material difference between the two versions of the minutes in dispute.

- 5.3.1.6 Email from the Complainant, dated 04 July 2016 stating, *inter alia*, that after careful consideration he has decided not to challenge the Public Protector's report to close the matter, but maintained that the minutes were fraudulently produced thus introducing new issues for further consideration and undertook to submit further information.
- 5.3.1.7 Email from Adv Arius Dathi to the Complainant, dated 20 July 2016 advising him to deliver the documents at any time, nothing was forthcoming, resulting in the closure of the file.
- 5.3.1.8 Email from the Complainant to the Investigation Team, dated 21 June 2021 restating his complaint, *inter alia*, that minutes were produced unlawfully for ulterior purpose of removing him from the office.
- 5.3.1.9 Email from the Complainant to the Investigation Team, dated 05 August 2022;
- 5.3.1.10 Email from the Complainant to the Investigation Team, dated 30 June 2023, reiterating that his complaint deals with the exercise of Municipal authority, which exercise always require an empowering delegated authority that has been adopted into effect by the Municipal Council;
- 5.3.1.11 Letter from Public Protector to Dr Mashazi, dated 07 September 2023, requesting further clarity on the basis for the disciplinary action against the Complainant;
- 5.3.1.12 Letter from Mr Jack Zebediela (Mr Zebediela), dated 30 October 2023 responding to the issues raised by the Public Protector regarding the disciplinary action taken against the Complainant;

- 5.3.1.13 Email from the Complainant to the Investigation Team, dated 04 December 2023, addressing the procedural issues which he contends were contrary to the provisions of the Disciplinary Code;
- 5.3.1.14 Email from the Complainant to the Investigation Team, dated 13 December 2023 reiterating, *inter alia*, that his complaint is about unlawful exercise of administrative action by the City of Ekurhuleni;
- 5.3.1.15 Letter to Dr Imogen Mashazi, the then City Manager: City of Ekurhuleni, dated 23 April 2024, requesting the municipality to address the Complainant's allegations regarding procedural deficiencies in the context of the Disciplinary Code; and
- 5.3.1.16 Letter from Adv Kemi Behari (Adv Behari), Head of Corporate Legal Services Department, to the Public Protector, dated 16 May 2024.

5.4 Documents received

- 5.4.1 Undated Extract titled: "*Findings: Mpac Report on Allegations against Themba of Irregularities and Misconduct: City Development (Alberon CC)*";
- 5.4.2 MPAC agenda and extract of minutes, dated 19 January 2010;
- 5.4.3 Minutes of the First Ordinary Council Meeting, dated 28 January 2010;
- 5.4.4 Amended minutes of the Second Ordinary Council, dated 25 February 2010;
- 5.4.5 Copy of Mr Andile Sihlahla's answering affidavit, dated 07 June 2011;
- 5.4.6 Complaint form, dated 09 January 2013;

5.4.7 Complaint form, dated 25 January 2013;

5.4.8 Affidavit of Mr Terrence Pharo (Mr Pharo), Executive Manager: Committee Services, dated 26 August 2015.

5.5 Interviews

5.5.1 Interview were held with the following persons:

5.5.1.1 Mr Pharo on 26 March 2015;

5.5.1.2 Ms Busi Hlongwane (Ms Hlongwane), the City of Ekurhuleni's Records Manager on 26 March 2015;

5.5.1.3 Mr JH Hough (Mr Hough), Legal and Administrative Department, on 26 March 2015; and

5.5.1.4 Mr van Staden, Area Manager: Department of City Planning on 17 July 2015.

5.6 Regulatory Framework

5.6.1 Constitution of the Republic of South Africa, 1996;

5.6.2 Labour Relations Act, 1995, as amended;

5.6.3 Public Protector Act, 1994;

5.6.4 Local Government: Municipal System Act, 2000; and

5.6.5 Local Government: Municipal Finance Management Act, 2003.

5.7 Case Law

- 5.7.1 *Motor Industry Staff Association v Macun NO and Others* (2016) 37 ILJ 625 (SCA);
- 5.7.2 *Gcaba v Minister for Safety and Security and Other* 2010 (1) SA 238 (CC);
- 5.7.3 *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC);
- 5.7.4 *Baloyi v Public Protector and Others* [2020] ZACC 27;
- 5.7.5 *Hendricks v Overstrand Municipality & Another* (2015) 36 ILJ 163 (LAC);
- 5.7.6 *EC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*, 2014 (3) SA 481 (CC); and
- 5.7.7 *TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal and Others* [2022] JOL 52532 (SCA).

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

- 5.8.1 On 09 July 2024, a Notice in terms of Rule 41(1) of the Public Protector Rules (Notice) was issued to the Complainant to afford him an opportunity to respond thereto.
- 5.8.2 The Complainant responded to the Notice through an email, dated 20 August 2024.

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

6.1 Whether the functionaries of the City of Ekurhuleni Metropolitan Municipality fraudulently created or produced a Council Resolution purporting to be the outcome of the Council meeting held on 28 January 2010 and irregularly pursued disciplinary action against Mr Temba Xakaza, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act

Common cause

6.1.1 On 28 January 2010, the City of Ekurhuleni Council held its first ordinary meeting of the year and resolved, *inter alia*, to:

- (a) Note the MPAC report.
- (b) Mandate the City Manager to institute disciplinary action against implicated officials.
- (c) Investigate blacklisting of companies mentioned in the report.
- (d) Submit the MPAC investigation to the Commercial Crime Unit.
- (e) Inform the Auditor-General.

6.1.2 Based on these resolutions, the complainant was subjected to disciplinary action and ultimately dismissed on 18 January 2013.

Issue in dispute

- 6.1.3 The issue for the Public Protector's determination is whether the functionaries of the City of Ekurhuleni created or produced a fraudulent Council Resolution, which formed the basis to pursue disciplinary action against the Complainant.

Complainant's version

- 6.1.4 The Complainant alleges that his suspension, in February 2010 and subsequent disciplinary action were based on a fraudulently created municipal document. He contends that:
- 6.1.4.1 The impugned document, dated 28 January 2010, purported to be Council minutes containing resolutions of the Municipal Public Accounts Committee (MPAC), but it was never properly adopted or recorded by Council;
- 6.1.4.2 Based on this fraudulent document, attorneys were appointed, expenses incurred, and disciplinary action (including his suspension with full salary and benefits) was pursued against him;
- 6.1.4.3 He obtained confirmation through a PAIA application (21 November 2011) that no such Council resolution existed; only MPAC minutes from 19 January 2010 could be traced;
- 6.1.4.4 Despite reporting the fraudulent document to the City Manager, no corrective action was taken, as the matter was delegated to implicated managers;

- 6.1.4.5 He suspects the document originated from a fax at the Alberton Customer Centre (1 or 11 November 2010) and alleges that Thinus van Staden was driving efforts to remove him;
- 6.1.4.6 The fraudulent creation and use of the document, according to him, amounts to non-compliance with section 59 of the Municipal Systems Act, 2000;
- 6.1.4.7 The impugned minutes contained serious resolutions, including mandating the City Manager to institute disciplinary action, suspend officials, blacklist companies, report matters to the SIU, and inform the Auditor-General; and
- 6.1.4.8 The impugned document was later produced against him by the City's attorneys during his disciplinary hearing.

6.1.5 **FINALISATION OF THE MATTER BY ADVOCATE JENO SINGH**

- 6.1.5.1 The complaint was registered under file reference number 7/2-000663/13 and was allocated to Advocate Jeno Singh (Adv Singh): a Senior Investigator.
- 6.1.5.2 Adv Singh issued a Rule 11(1)(a) and (b)(i) closing letter dated 23 September 2023, to the Complainant, informing him that the Public Protector is unable to investigate his complaint.
- 6.1.5.3 Rule 11(1)(a)(b)(i) of the Public Protector Rules provides that the Public Protector shall, if he or she refuses to investigate a complaint in terms of section 6(3) of the Act, in writing inform the complainant of the decision and the grounds on which the decision is based; including the situation

where the Public Protector has decided that a matter falls outside his or her mandate and remit;

6.1.5.4 The closing letter stated *inter alia*, that:

- (a) The Public Protector South Africa is unable to put a stop to the disciplinary proceedings;
- (b) The hearing did not rely on the minutes alone and there was other evidence that was led;
- (c) If you believed that the process was flawed your defence attorney could have raised this at the hearing; and
- (d) The other options that were available to you were that you could review the decision of the Presiding Officer, appeal the matter or approach the CCMA or Labour Court.

6.1.5.5 The closing letter also recorded that Adv Singh enquired whether the complainant registered a criminal case to report the allegations that fraudulent documents were used against the Complainant. It is indicated that the Complainant stated that the Public Protector should register the case.

6.1.5.6 The Complainant was informed that if a crime has been committed against him, the responsibility and onus is on him to register the case.

6.1.5.7 The Complainant was then informed that a meeting will be arranged between him and Advocate Elsabe de Waal (Adv. De Waal) in order to discuss the complaint because he was of the opinion that the office does not really understand the issues in his complaint.

- 6.1.5.8 The letter referred to an email from the Complainant, dated 14 February 2013, which was largely quoted verbatim and would not be quoted here again. However, paragraph 4.1 of the letter recorded the following from the aforesaid email:
- “The issue that I brought to the Public Protector is relatively easy. I will reiterate it again. The creation of a resolution fraudulently and contrary to the Municipal Systems Act, 2000. The use of state funds to give effect to action which the fraudulent document (herein contemplated on paragraph).” (sic)*
- 6.1.5.9 In the letter, Adv Singh recorded that he was arranging a meeting with Adv de Waal, because the Complainant misquoted him or did not understand what was discussed during the meeting held on 13 February 2013.
- 6.1.5.10 Paragraph 7 of the closing letter indicates that on 18 February 2013, at 19:49, an email was received from the Complainant advising the Investigation Team to suspend all activities because the matter has been referred to higher management.
- 6.1.5.11 The Complainant was informed that the Public Protector could not assist him further and the matter was considered finalised.

Further consideration of the Complaint

- 6.1.6. After discussion with the Public Protector’s management, the matter was re-allocated to Adv Arius Dathi (Adv Dathi) for further investigation.
- 6.1.7. In a letter dated 24 June 2016, the Complainant was advised that the Public Protector intended to close the matter based on the conclusion

that there was no material difference between the two versions of the minutes in dispute.

- 6.1.8. In an email dated 04 July 2016, the Complainant stated, *inter alia*, that after careful consideration he has decided not to challenge the Public Protector's report, being the report prepared Adv Dathi, as a factual finding but maintained that the minutes were fraudulently produced thus introducing new issues for further consideration.
- 6.1.9. The Complainant asserted that the Public Protector must test and declare the document upon which corrective action has been taken against him as fraudulent and given that the fraudulent creation of the document is a criminal offence, parties that are responsible should be prosecuted.
- 6.1.10. The Complainant undertook to provide new further documentation to substantiate his argument, however, despite Adv Dathi's email dated 20 July 2016, advising him to deliver the documents at any time, nothing was forthcoming, resulting in the closure of the file.

Email from the Complainant to Mr Sello Mothupi, dated 21 June 2021

- 6.1.7 The Complainant, through an email addressed to Mr Sello Mothupi, dated 21 June 2021, reiterated his complaint and further submitted that:
- 6.1.7.1 The minutes were produced unlawfully for an ulterior purpose of removing him from the office "by any means necessary;"
- 6.1.7.2 The origins of the impugned minutes were connected to Mr van Staden or Cllr Neil Diamond (Mr Diamond). The official appointed to respond to PAIA applications could not find the minutes and there was no other

official that could source the record of the minutes since February 2010, including the investigation by the Public Protector; and

- 6.1.7.3 At least one incorrect fact reflected in the minutes i.e. the item number A-MPAC (01-2010). The item number for the meeting does not exist in the records of the Municipality. There was no evidence to suggest that the "error" was limited to this input. But assuming the error, as it were to be assumed to be one, is limited to this one "error", the instructions of the MPAC committee are clear insofar as who is the person whom it has delegated to act in this regard. The minutes are expressly clear insofar as their confirmation that this action is a NON-DELEGATED matter. To this end, the instructions were specifically to no other official, but the City Manager.

Email from the Complainant to Public Protector, dated 05 August 2022

- 6.1.8 In the document transmitted via an email, dated 05 August 2022, the Complainant submitted that:
- 6.1.8.1 The complaint deals with the exercise of Municipal authority, which exercise always require an empowering delegated authority that has been adopted into effect by the Municipal Council. The system of delegation of authority was transgressed;
- 6.1.8.2 Between 2007 and 2008, the City of Ekurhuleni instituted an investigation against him in terms of the South African Local Government Bargaining Council (SALGBC) Disciplinary Procedure Collective Agreement, 2007. However, the disciplinary action was not concluded and the former Chief Audit Executive, Mr H Chiloane (Mr Chiloane), and other officials made a secret agreement to suspend the disciplinary action without the requisite authority to do so in terms of the systems of delegations. Secondly, the

suspension of the disciplinary action was inconsistent with the Disciplinary Code, 2007;

- 6.1.8.3 The investigation conducted against him in terms of the Audit Charter was at odds with the Disciplinary Code. Even if it were accepted that the investigation was lawful, the failure to give him a right of reply by the City of Ekurhuleni and MPAC before making its recommendation to Council, was a violation of his rights;
- 6.1.8.4 The Disciplinary Code, 2009 was approved on 24 June 2009 and ended the application of the previous Code. However, old matters could still be processed in terms of the Disciplinary Code, 2007, within a specific period;
- 6.1.8.5 Neither the 2007 nor the 2009 Disciplinary Code allowed for the participation of the MPAC and Council in matters concerned with the application of disciplinary codes. Notwithstanding, the MPAC meeting held on 19 January 2010, recommended dismissal of implicated officials with immediate effect;
- 6.1.8.6 In 2010, he was suspended by the then Deputy City Manager, Mr John Liebbrandt, (Mr Liebbrandt) and Mr van Staden and he was subjected to disciplinary action based on a document purporting to be a Council resolution, taken during a Council meeting held on 28 January 2010;
- 6.1.8.7 On or about 04 February 2010, Mr Liebbrandt established a pre-suspension hearing, wherein he alleged that the Council resolved that he should be suspended. This was a misrepresentation of the Council resolution contained in the five (05) resolutions minutes, because the said document did not make mention of suspension;

- 6.1.8.8 The disciplinary action against him was wholly or in part based on the impugned seven (07) resolutions that specifically enjoined the then City Manager to consider taking disciplinary action against him;
- 6.1.8.9 The resolutions were adopted as non-delegated resolutions which means that only the former City Manager could execute. However, the former City Manager was not involved in his disciplinary action nor did those who were involved produce the requisite delegation;
- 6.1.8.10 Even if the disciplinary action against him was based on the Disciplinary Code, 2009, only the City Manager or his authorised representative/nominee would have been required to act. However, in this case, Mr Liebbrandt was the one who acted against him without the necessary delegation to do so;
- 6.1.8.11 The City Manager is the custodian of the Municipal System of delegation and there was no evidence that Mr Liebbrandt and/or Mr van Staden had the requisite delegated authority to suspend and subsequently pursue disciplinary action against him;
- 6.1.8.12 The records he obtained from the City of Ekurhuleni through the PAIA application, do not support the allegation that the seven (07) resolutions or alleged draft resolutions were amended and adopted as five (05) resolutions during the Second Ordinary Council Meeting held on 25 February 2010;
- 6.1.8.13 The recordings at his disposal do not have the Council's discussion about seven (07) resolutions and the amendment thereof to five (05) resolutions, as alleged by Mr Pharo in his evidence to the Public Protector; and

6.1.8.14 Mr Pharo's evidence was that the five (05) resolutions furnished to Mr Fambe, were true and correct and yet seven (07) resolutions instead of five (05) resolutions were presented as a record of Council by the prosecutor, Mr Zebediela, during the disciplinary hearing on or about 30 April 2010.

Email from the Complainant to the Public Protector, dated 30 June 2023

6.1.9 The Complainant, through an email dated 30 June 2023, indicated that the relief he sought was to set aside the legal effect of the unlawful act. The objective of the relief sought is to restore the parties to their pre-act position as if the unlawful act had never taken place. This involves the reversal of any actions or transactions resulting from the application of the unlawful act, inclusive of the following:

6.1.9.1 Declaration of the officials' decision to assume authority exclusively vested in the then City Manager, as invalid. This encompasses declaring the termination of the Complainant's employment contract as invalid;

6.1.9.2 Declaration of the officials' decision to act inconsistently with the resolutions of the Council, which were adopted on 28 January 2010, as invalid;

6.1.9.3 Recovery of resources, including financial resources, used for payments for the use of external legal services;

6.1.9.4 The reinstatement of his benefits such as the basic salary, pension contributions, housing subsidy, car allowance, etc; and

6.1.9.5 Payment of constitutional damages envisaged in the Bill of Rights, i.e. human dignity and administrative action.

Email from Complainant to the Public Protector, dated 04 December 2023

- 6.1.10 In his email dated 04 December 2023, the Complainant reiterated the following:
- 6.1.15.1 The application of any disciplinary Code Collective Agreement should be preceded and supported by a delegated authority that has been adopted into effect in accordance with section 59 of the MSA. Mr Zebediela was fully aware of this requirement, thus the delivery of the impugned minutes;
- 6.1.15.2 The exercise of authority is limited to Council approved processes, i.e. application of the Disciplinary Code approved in 2007 or 2009 or the steps adopted into effect on 28 January 2010; and
- 6.1.15.3 The steps/actions/processes highlighted below demonstrated that the officials involved were not applying the Disciplinary Code, 2009:
- (a) The accusation was received in 2007, ahead of the adoption of the Disciplinary Code Collective Agreement approved in 2009. The accusations would have been received in terms of the existing Disciplinary Code, 2007;
 - (b) The decision to investigate the accusation was not effected in terms of the Disciplinary Code, 2009. This would have been undertaken in terms of the existing Disciplinary Code, 2007;
 - (c) The investigation was undertaken between 2007 and December 2009. This would have been undertaken in terms of the existing Disciplinary Code Collective, 2007 or as it has been established, the Audit Charter;

- (d) The outcome of the investigation was undertaken in terms of the Audit Charter and presented before the MPAC and Council instead of the City Manager or his nominee;
- (e) The seriousness of the charges to warrant disciplinary action was determined and adopted by the Council, not the City Manager or his nominee;
- (f) Prima facie, to charge was determined by the Council and not the City Manager or his nominee;
- (g) The decision to establish the Disciplinary Tribunal instead of a Departmental enquiry was not made by the City Manager nor his nominee.

Email from the Complainant to the Investigation Team, dated 13 December 2023

6.1.16 The Complainant, through an email dated 13 December 2023, clarified the nature of his complaint and stated as follows:

“My complaint is related to the unlawful exercise of administrative action. In the context of this complaint, administrative action refers to the exercise of the Ekurhuleni Metro Municipality (“EMM”) authority in a manner that violates the foundational requirement to act consistently with EMM’s resolutions (including those adopted on January 28, 2010) and the further requirement to comply with the conditions of the Constitution of the South African Republic, legislation of the Republic including case law, Basic Conditions of Employment Act, Promotion of Administrative Justice Act, Municipal Systems Act, 2000, Municipal Finance

Management Act, etc., particularly concerning the disciplining of staff, including myself.

The failure to implement Council-approved processes and/or act consistently with resolutions of the EMM, including those adopted on January 28, 2010, as well as the laws of the Republic, including case law and the constitution, renders any outcome thereof invalid in law. The EMM Council has further enacted a resolution whose effect declares that any authority whose actions are inconsistent with the Council-approved processes and/or act consistently with resolutions of the EMM, including those adopted on January 28, 2010, and the laws of the Republic, including case law and the constitution, renders any outcome thereof invalid in law.

Based on the above facts, I believe there is ample evidence and supporting resolutions of the EMM compelling officials of the EMM to take action in a specific manner regarding the termination of the contract in question and to pursue action against persons, including service providers, who acted inconsistently with the systems of delegated authorities, Council-approved processes, and/or acted consistently with resolutions of the EMM, including those adopted on January 28, 2010, and the laws of the Republic, including case law and the constitution, rendering any outcome thereof invalid in law". (sic)

6.1.17 In the email, the Complainant further submitted that:

16.1.17.1 An employer-employee agreement contract is not governed exclusively by the LRA. The LRA does not deprive the parties to the agreement of their common law and constitutional rights. The contract is subject to common law, statutory and constitutional scrutiny;

- 16.1.17.2 There is a clear distinction between a dismissal in terms of the LRA, a breach of contract in terms of common law, invalid and unlawful administrative action in breach of the provisions of the conditions of the PAJA, MSA, and resolutions of the City of Ekurhuleni;
- 16.1.17.3 Administrative action can be in the form of giving effect to a termination of contract and termination of contracts includes contracts of employment;
- 16.1.17.4 Impugned minutes are not records, resolutions and/or delegated authorities of Council. The use of the impugned minutes constitutes an unlawful and/or invalid act. Any outcome of the use thereof will always be invalid in law. During the disciplinary process, the prosecutor presented, used and defended the use of the impugned minutes, which subsequently led to the termination of his employment contract;
- 16.1.17.5 Acting inconsistent with the resolutions of the Council insofar as the implementation of either the 2007 or 2009 Disciplinary Codes renders the outcome of such an implementation invalid. The prosecutor caused an implementation of the disciplinary code collective agreements in a manner that is inconsistent with the agreements and therefore council-approved processes; and
- 16.1.17.6 Acting inconsistent with the instructions of Council will undoubtedly render any outcome of such action as invalid and unlawful. Mr Liebbrandt reiterated the point that only the former City Manager could act in respect of the matter hence he, as the Deputy City Manager, couldn't sign the letter of suspension. By assuming authority vested on the former City Manager, the officials acted invalidly and unlawful.

Response from Mr Khomotso Fambe, Legal Advisor, City of Ekurhuleni

- 6.1.18 The Public Protector, issued a notice in terms of Rule 23(1) of the Public Protector Rules dated 07 March 2014, raising the allegation with the City of Ekurhuleni and solicited a response.
- 6.1.19 In an email dated 16 April 2014, Mr Fambe responded and focused on the disciplinary action taken against the Complainant stating, *inter alia*, that:
- 6.1.19.1 The Complainant lodged an urgent application to the Labour Court under Case no J1844/10, interdicting and restraining the City of Ekurhuleni from proceeding with the disciplinary action against him. The application was dismissed by the Court;
- 6.1.19.2 The Complainant again lodged an application to the Labour Court under Case no JS281/11, interdicting the City of Ekurhuleni from proceeding with the disciplinary action him. The application also failed. He was charged in terms of the Disciplinary Code;
- 6.1.19.3 The MPAC report is not relevant to the disciplinary hearing of the Complainant. According to paragraph 4.1.2 of the City of Ekurhuleni's answering affidavit, none of the other officials, who were interviewed by the PASCO Risk Management (Pty) Ltd (PASCO) investigator, were disciplined for making disclosures to the investigators. The reason was that the City of Ekurhuleni lacked any motivation to discipline individuals who supplied information to the PASCO investigators;
- 6.1.19.4 In paragraph 15.5.7 to 15.5.9 of his founding affidavit under case JS281/11, the Complainant made submissions about the MPAC report, which the court did not take into consideration, hence the court ruled against him;

- 6.1.19.5 Paragraph 77.2 of the City of Ekurhuleni's answering affidavit states that the applicant was suspended in terms of clause 13 of the Disciplinary Code. Further thereto, paragraph 78.1 of the affidavit states that the MPAC Report was irrelevant to disciplinary hearing; and
- 6.1.19.6 The Complainant was within his right to approach the Bargaining Council for assistance if he was not satisfied with the outcome of the hearing.

Answering Affidavit of Mr Andile Sihlahla in case number JS281, dated 07 June 2011

- 6.1.20 On 22 April 2014, Mr Fambe, on behalf of the City of Ekurhuleni, submitted supporting documents, including documents relating to litigation between the Complainant and the City of Ekurhuleni under Case No. JS281.
- 6.1.21 The City of Ekurhuleni's answering affidavit in Case No. JS281 was deposed to by Mr Sihlahla, who addresses some of the issues relating to the minutes. The said affidavit recorded amongst others that:

78.2 "The inferences which the applicant seeks to draw from the minutes are, with respect, absurd. It is apparent from these scurrilous allegations that the relationship of trust has broken down irretrievably between the applicant and the first respondent.

78.3 There were not, as suggested by the applicant, two meetings with two separate agendas. There was one meeting of the council, one being an in-committee session and the other being an ordinary meeting.

78.4 *In general, all in-committee meetings are held after the ordinary business of council is attended to.*

78.5 *If one has regard to page 314 will be noted that the council went into committee from 16h10 to 17h30 for consideration of a tabled item which was specifically referred to council in-committee”.*

Minutes of the Ordinary Council Meeting, held on 28 January 2010

- 6.1.22 The Public Protector through a letter dated 15 September 2021, requested the City of Ekurhuleni to provide, *inter alia*, copies of the full record of the First Ordinary Council meeting held on 28 January 2010, a full record of the Second Ordinary Council meeting of 25 February 2010 and the minutes of the Council meeting that was held on 28 January 2010.
- 6.1.23 In an email to the Investigating Team dated 22 September 2021, from the Senior Legal Adviser: Municipal Courts, By-Law Enforcement and Compliance Corporate Legal Services, Ms Makoma Mkhize, (Ms Mkhize), provided the documents as requested.
- 6.1.24 The City of Ekurhuleni submitted a full copy of the minutes of the First Ordinary Council Meeting for 2010 held on Thursday, 28 January 2010 at 14:00, at the Council Chamber in Germiston. The minutes of the First Ordinary Council Meeting consisted of about forty-five (45) pages and recorded amongst other things, those in attendance.
- 6.1.25 It was also recorded in the minutes of the First Ordinary Council Meeting that the Council went into Committee from 16:10 to 17:30 for consideration of a tabled item referred to *Council -In Committee*.

Amended minutes of the Second Ordinary Council Meeting, dated 25 February 2010

- 6.1.26 A copy of the amended minutes was also availed to the Investigating Team by the City of Ekurhuleni, which contained five (05) resolutions as already highlighted above.
- 6.1.27 The City of Ekurhuleni submitted that the amended minutes were approved during the meeting of the Second Ordinary Council Meeting for 2010 held on Thursday, 25 February 2010, at 14:00, at the Council Chamber in Germiston. The minutes recorded, *inter alia*, that:
- 6.1.28 A corrected version of the resolution in respect of Item A-MPAC (01-2010) contained on page 9 of the minutes was tabled; and
- 6.1.29 It was resolved that the In-Committee Minutes of the First Ordinary Council Meeting as proposed by Clr KJ Noonan and seconded by Clr QB Duba be confirmed.

Undated Report from the City of Ekurhuleni

- 6.1.30 The City of Ekurhuleni also availed to the Investigating Team a copy of a document titled: "FINDINGS: MPAC REPORT ON ALLEGATIONS AGAINST THEMBA OF IRREGULARITIES AND MISCONDUCT: CITY DEVELOPMNET (ALBERON CCC)", wherein it is recorded, *inter alia*, that:
- 6.1.30.1 Paragraph 10 under the heading: "Powers and Functions of the Committee", of the Terms of Reference, the MPAC is empowered to make recommendations to Council for corrective, remedial and/or disciplinary purposes that may be sanctioned in terms of the MFMA

regarding the mismanagement of funds, unauthorised, irregular, fruitless and wasteful expenditure; and

- 6.1.30.2 The MPAC at its meeting held on 19 January 2010, considered the report and recommended that the officials involved be dismissed with immediate effect.

Interview held by the Investigating Team with Mr Jack Zebediela on 17 October 2014

- 6.1.31 The Investigating Team interviewed Mr Zebediela on 17 October 2014. During the interview, Mr Zebediela admitted that he handed the Complainant the impugned minutes. Mr Zebediela also submitted that the disciplinary proceedings were preferred against the Complainant and others in terms of SALGBC Disciplinary Code and in line with the resolutions of the MPAC.

Report from Mr Zebediela handed to the Investigating Team, dated 03 December 2014

- 6.1.32 On 03 December 2014, the Investigating Team received a report prepared by Mr Zebediela, from Mr Fambe, which recorded, *inter alia*, that:

- 6.1.32.1 It would appear, that on 28 January 2010, the chairperson of MPAC presented various reports on irregularities within the City of Ekurhuleni which, resolved to institute disciplinary proceedings. The disciplinary proceedings were initiated at the stage when MPAC resolved to institute disciplinary proceedings against the Complainant and others;

- 6.1.32.2 On or about 08 April 2010 and following the above Council resolution, a disciplinary process against the Complainant was instituted in terms of the Disciplinary Code. A presiding officer, Mr Darian Nolan (Mr Nolan), and prosecutor, Mr Zebediela, were appointed and the matter was scheduled to commence on 30 April 2010 at 09:00 in Benoni;
- 6.1.32.3 Numerous documents were furnished to the Complainant and his representative during the various disciplinary hearing sittings. It is difficult to specifically point out which documents were furnished as volumes running into hundreds of pages and files were requested and produced. Other documents were refused and the MPAC report as well as the Resolution of 28 January 2010;
- 6.1.32.4 He recalls that an argument might have been raised by the Complainant that the minutes are fraudulent as a submission, which was to go to the credibility of the evidence led by the employer. The view was challenged and opposed and to his recollection, it failed; and
- 6.1.32.5 In the end, the Complainant's contention that he was charged in a manner which is irregular and fraudulent was successfully opposed and dismissed by the chairperson of the disciplinary hearing.

Evidence of Ms Caroline Mphage

- 6.1.33 In an email dated 17 October 2014, the Investigating Team requested Ms Caroline Mphage (Ms Mphage) to make a statement regarding the minutes that were allegedly handed to the Complainant. In her submission to the Investigating Team, dated 03 November 2014, Ms Mphage indicated the following:

- 6.1.33.1 She was a shop steward and represented Mr Xakaza in a number of matters starting from the “*Pre-suspension hearing, the unfair suspension at conciliation and arbitration including part of the disciplinary hearing...*”;
- 6.1.33.2 She further assisted Mr Xakaza in preparation of his Labour Court papers as he did not have access to the requisite finances at the time; and
- 6.1.33.3 She was present when the impugned minutes were handed to the Complainant. At no stage did the City of Ekurhuleni through its representative, Mr Zebediela, deny that such minutes were handed to the Complainant. However, when Mr Hough from the Corporate, Legal and Administration Department was requested to provide minutes and the agenda of the MPAC meeting of 28 January 2010, he reported that there was no such minute’s reflecting what was contained in the impugned minutes.

Interview with the Area Manager: Department of City Planning, Mr van Staden, by the Investigating Team, held on 17 July 2015

- 6.1.34 On 17 July 2015, the Investigating Team interviewed Mr van Staden, based in the Alberton Office. He admitted that he received documents relating to the Complainant’s disciplinary proceedings from Mr Diamond, which he faxed to Mr Zebediela.

Interview with the erstwhile Executive Manager: Committee Services, Mr Terrence Pharo, by the Investigating Team, held on 26 March 2015

- 6.1.35 The Investigation Team visited the office of the City of Ekurhuleni on 26 March 2015 and interviewed the Executive Manager: Committee Services, Mr Pharo, based at the Germiston Office. He explained that:

- 6.1.35.1 The impugned minutes were the initial draft that was circulated to members for approval and adoption by Council on 25 February 2010. During the 25 February 2010 Council meeting, the impugned minutes were adopted as amended. In this regard, the impugned resolutions were subsequently adopted as the amended minutes; and
- 6.1.35.2 Draft minutes are always circulated to Council members for adoption during the next meeting. Once adopted, the minutes are sent to the archive room for filing.
- 6.1.36 Upon visiting the archive room, the Investigating Team found that the impugned minutes were in the archives and not the amended minutes. Mr Pharo admitted that this was a misfiling because the amended minutes should have been archived.
- 6.1.37 He further confirmed that the amended minutes were only archived in his computer and not in the archive room as it was supposed to. He undertook to rectify the misfiling at the archive room and future filing of documents at the archive room.

Affidavit of Mr Terrance Pharo, dated 26 August 2015

- 6.1.38 Mr Pharo confirmed the fact that the amended minutes were only archived in his computer and not in the archive room in an affidavit dated 26 August 2015, wherein he added that the amended minutes were archived in their computer system, which had a security feature and saved on Adobe Reader to prevent any changes to the minutes.
- 6.1.39 Mr Pharo further provided the following explanation regarding the minutes:
- 6.1.39.1 Regarding Council minutes, dated 28 January 2010: The reason why “None” is indicated on Page 13 of the index under “L: Municipal Public

Accounts Committee”, is the fact that no MPAC items were included in the Open Council Agenda for consideration as the MPAC item in question was tabled and presented by the Chairperson of MPAC in the In-Committee meeting of Council;

- 6.1.39.2 It should further be noted that the MPAC item that was presented by the Chairperson was not circulated to any one present in the meeting and the Chairperson of MPAC, who presented the item in Council on the day, was the only attendee with a copy of the item (this can be verified from the recording of the meeting procedures of the day);
- 6.1.39.3 Regarding the impugned minutes (In-Committee Council minutes, dated 28 January 2010, containing seven (07) resolutions): The impugned minutes were circulated with the Council Agenda for the meeting that was held on 25 February 2010, for confirmation at the mentioned meeting. An amendment to the resolution contained in the In-Committee Minutes was tabled at the Council meeting and was accepted by Council, hence the final version of the In-Committee minutes, that was confirmed, contained only five (05) resolutions;
- 6.1.39.4 It can be verified from the recording of the Council meeting dated 28 January 2010, that the Council agreed that the resolution in respect of the MPAC item should be crafted by the Secretariat on the basis of the presentation made by the Chairperson of MPAC and should an amendment/correction of the minutes be required, it would be done at the next Council meeting when the minutes will be submitted for confirmation; and
- 6.1.39.5 Regarding the amendment page that was tabled at the Council meeting held on 25 February 2010, he indicated that it was mentioned in the said

meeting that the said page was the corrected version of the resolution and not an amendment of the resolutions.

Interview with the City of Ekurhuleni's Records Manager, Ms Busi Hlongwane, by the Investigating Team, held on 26 March 2015

- 6.1.40 On 26 March 2015, the Investigating Team interviewed the City of Ekurhuleni's Records Manager, Ms Hlongwane. During the interview, she explained that their task was to file or archive documents as received. She explained that all minutes are ordinary archived upon receipt and subsequently bonded in a journal for record keeping.

Interview between the Investigating Team and Mr JH Hough, the Corporate, Legal and Administration Department

- 6.1.41 During the visit to the City of Ekurhuleni's office on 26 March 2015, the Investigating Team requested Mr Hough for an explanation regarding the office's response to the Complainant's PAIA application. He confirmed that at the time of the request, they could not trace a copy of the minutes of the Council-in-Committee meeting, dated 28 January 2010.
- 6.1.42 He indicated that when the request for information was made to the relevant Department, the information was not submitted to his Department and hence the response that was furnished to the Complainant. He could not remember, due to passage of time, the steps taken in trying to retrieve the information requested by the Complainant.
- 6.1.43 Mr Hough further confirmed that the City of Ekurhuleni has since improved the system in respect to PAIA applications in that all information including emails are currently kept in one file and archived accordingly. He indicated that when the request for the information was made to the

relevant Department, not all the information was submitted to him and hence the response that was furnished to the Complainant.

The recording of the City of Ekurhuleni First Ordinary Meeting for 2010 held on 28 January 2010

- 6.1.44 The Public Protector, through a letter dated 15 September 2021, further requested the City of Ekurhuleni to avail recordings of the meetings in question, which recordings were received on 09 December 2021.
- 6.1.45 In terms of the recordings, the then Speaker of the City of Ekurhuleni, Cllr N P Kumalo (the Speaker), before the report of MPAC was presented, excused the members of the public from the meeting except the officials of the Auditor-General South Africa (AGSA), who were allowed to attend the In-Committee Meeting. She also indicated that there was no item specified but Councillors will discuss the matter after the presentation of the report. She then called on the then Chairperson of the MPAC (MPAC Chairperson), Cllr P D Mkhonza (Mr Mkhonza).
- 6.1.46 The MPAC Chairperson reported amongst others, the following:
- 6.1.46.1 The reason for not circulating the item beforehand was due to the sensitivity of the matter under discussion, involving senior officials of the Municipality. The item was not circulated nor was the report divulged to the Councillors before the meeting; and
- 6.1.46.2 In the meeting of MPAC held on 19 January 2010, it was recommended that, in line with the conditions of employment, the Complainant be dismissed with immediate effect and a criminal case be opened against him.

- 6.1.47 Council was accorded an opportunity to deliberate on the MPAC Chairperson's report and recommendations. The Speaker summarised the recommendations of Council after deliberations by the Councillors as follows:
- 6.1.47.1 Council notes and accepts the report presented by the Chairperson of MPAC;
 - 6.1.47.2 To allow the City Manager to deal with the implicated officials in accordance with the applicable labour relations prescripts;
 - 6.1.47.3 Urgent suspension without pay of the officials implicated in the report;
 - 6.1.47.4 The companies and individuals involved be blacklisted;
 - 6.1.47.5 Individual companies be referred to the Special Investigating Unit and/or Specialised Commercial Unit; and
 - 6.1.47.6 The AGSA be informed of the contents of the report.
- 6.1.48 There was a suggestion that the Council withdrew the recommendation that specifically state that the implicated officials should be suspended without pay; and
- 6.1.49 Council noted there were suggested amendments to the recommendations by different Councillors, however, it was resolved that there was general consensus to the recommendations listed above and should there be any amendments to the exact wording, same would be confirmed in the next Council meeting.

Further response from Mr Zebediela to the Investigating Team

- 6.1.50 Through a letter dated 07 September 2023, Dr Mashazi, the thwnCity Manager, was requested to provide further clarity to the processes leading up to the initiation of the disciplinary process against the Complainant.
- 6.1.51 In a response dated 30 October 2023, Mr Zebediela reiterated that the disciplinary action against the Complainant was done in terms of the applicable disciplinary code.

Response from the Head of Corporate Legal Services Department, Adv Kemi Behari

- 6.1.52 Through a letter dated 23 April 2024, the Public Protector requested Dr Mashazi to respond to the Complainant's allegations that the disciplinary action taken against him was at variance with the applicable framework.
- 6.1.53 In a letter dated 16 May 2024, Adv Behari stated, *inter alia*, that:
- 6.1.53.1 Mr Pharo confirmed the existence of two sets of minutes. The impugned minutes are a record of the MPAC, which were tabled by the Chairperson of the In-Committee meeting of Council of 28 January 2010. The In-Committee meeting of the Council amended or corrected the impugned seven (07) resolutions into five (05) resolutions. Both resolutions were circulated in the Council agenda of 25 February 2010;
- 6.1.53.2 The issue of the authority to institute disciplinary proceedings has been responded to and remains the same. The response was that the disciplinary hearing was conducted in terms of the Disciplinary Code. Challenge to the authority to discipline was adjudicated upon by the SALGBC and Labour Court;

- 6.1.53.3 The court would have found in the Complainant's favour had the functionaries of the City of Ekurhuleni transgressed the applicable framework. The officials who were directly involved are no longer in the employ of the municipality. Further thereto, the Complainant did not suffer any injustice as the matter was also adjudicated by the court; and
- 6.1.53.4 The City of Ekurhuleni Municipal Integrity Framework was approved by Council in October 2017. However, the MSA contains Schedule 2: Code of Conduct for Municipal Staff Members, which is binding to all employees. The City of Ekurhuleni could have applied the provisions of the Code of Conduct for Municipal Staff to address any form of misrepresentation by employees in the period 2010 to 2011.

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

- 6.1.54 In his email dated 20 August 2024, the Complainant responded to the Notice and submitted the following:
- 6.1.54.1 His complaint focuses solely on the exercise of the City of Ekurhuleni's authority, particularly the consequences arising from the application of what the Public Protector's office has recognised as the recommendations of the MPAC meeting held on 19 January 2010, rather than the resolutions and delegated authorities adopted by the Municipal Council on 28 January 2010;
- 6.1.54.2 The Investigation Team has persistently mischaracterised the complaint, presenting it as one centred on suspensions and other matters, rather than accurately reflecting its focus on the exercise of the Council's

Resolutions and delegated authorities from 28 January 2010 and/or the application of the Disciplinary Codes of 2007 and 2009;

- 6.1.54.3 Although Dr Mashazi stated that she lacks personal knowledge of the facts surrounding the delivery of the 07 MPAC recommendations to the Council meeting scheduled for 28 January 2020, it is important to note that Mr Zebediela, testified under oath that the application of the Disciplinary Code collective agreement of 2009 was preceded by the Council's adoption of resolutions and established delegated authorities on 28 January 2010;
- 6.1.54.4 Mr Zebediela distributed and presented the 07 MPAC recommendations to the Council meeting scheduled for 28 January 2010. Mr Zebediela's submission that he distributed and implemented the 05 resolutions and delegated authorities adopted by the Council on 28 January 2010, is incorrect.
- 6.1.54.5 The second part of his complaint addresses whether officials acted consistently with the Council's instructions adopted on 28 January 2010. He has reiterated that the 05 resolutions, delegated authorities and the 07 MPAC resolutions adopted at the MPAC meeting held on 19 January 2010, clearly instruct officials to treat the matter as a non-delegated authority, with full delegation vested in the former City Manager, Mr Ngema.
- 6.1.54.6 Only the City Manager had the delegated authority to implement the 05 Council Resolutions or the 07 MPAC recommendations. He also presented the Investigation Team with resolutions confirming the following:
- (a) Any authority exercised inconsistently with the Council resolutions and delegated authorities is invalid;

- (b) Any authority exercised in violation of the laws of the Republic, such as the MSA, particularly in applying the 07 MPAC recommendations adopted on 19 January 2010, instead of the 05 resolutions and delegated authority adopted on 28 January 2010, is invalid;
 - (c) If any official or service provider acting on behalf of the City of Ekurhuleni exercises authority in violation of the laws of the Republic or the system of delegated authority, they would be subject to the Anti-Corruption Strategy, Disciplinary Code, among others.
- 6.1.54.7 Whether applying the 05 resolutions adopted on 28 January 2010 or the 07 recommendations adopted on 19 January 2010, the officials were obligated to wait for the City Manager to act on the Council Resolutions rather than assume authority vested exclusively in the City Manager;
- 6.1.54.8 Mr Zebediela and other officials repeatedly stated that Mr Ngema played no role in the decision to apply the 2009 Disciplinary Code. The Investigation Team is yet to address this issue despite his repeated attempts to include it in the definition of his complaint. Additionally, the facts and legal arguments he presented in this regard have been excluded and omitted in various reports historically produced concerning the subject of the complaint;
- 6.1.54.9 It is important to emphasise that neither the City Manager, officials, nor the service provider oppose the assertion that the exercise of Council's authority in breach of the System of Delegated Authorities, including resolutions, constitutes an invalid act and misconduct and could be grounds for civil action against the service provider to recover losses. However, there is a refusal from the Investigation Team to acknowledge

the misuse of the City of Ekurhuleni's authority through proximity to power;

- 6.1.54.10 He has noted the attempt to create the impression that the application of the Disciplinary Code does not require prior exercise of delegated authority vested in the City Manager, or sub-delegated authority authorized by the City Manager. This is despite the existence of delegated authority specifically governing the application of the Disciplinary Code within the City of Ekurhuleni's system of delegated authorities at the time Mr Zebediela distributed the 07 MPAC recommendations of the 19 January 2010 meeting, for the Council meeting scheduled for 28 January 2010.
- 6.1.54.11 This suggestion lacks logic as the 07 recommendations distributed by Mr Zebediela fail to demonstrate the existence of authority to act, as the officials did, including the decision to apply the 2009 Disciplinary Code to accusations dating back to 2007. No such authority exists. No disciplinary code or collective agreements can ever be applied retrospectively, nor can any valid authority empower such actions;
- 6.1.54.12 Dr Mashazi recently published her sub-delegated authorities for applying the Disciplinary Code Collective Agreement to specific positions within the municipality in accordance with its system of delegated authority and the MSA. However, Dr Mashazi's sub-delegated authority for the various decisions related to the application of the Disciplinary Code of 2007 and/or 2009, is irrelevant to this complaint;
- 6.1.54.13 What is critical is Dr Mashazi's response regarding the consequences of applying the 07 MPAC recommendations from 19 January 2010 to the Council meeting scheduled for 28 January 2010, rather than enforcing the resolutions and delegated authorities adopted by the Council on 28 January 2010. Dr Mashazi regrettably submitted that the 07 MPAC

recommendations and the 05 Council Resolutions and delegations have the same effect.

6.1.54.14 This response did not factor the following points that should be considered:

- (a) Typically, recommendations from a committee like MPAC are advisory in nature and do not have binding legal force until they are adopted or ratified by Council;
- (b) On the other hand, a resolution adopted by the Municipal Council is a formal decision that is binding. Once a resolution is passed, it represents the will of the Council and must be implemented as directed. A resolution has legal force and often mandates specific actions to be taken or policies to be implemented; and
- (c) When the Council adopts resolutions that include delegations of authority, it grants specific powers to individuals or bodies (e.g. a City Manager or a committee) to act on behalf of the Council. This delegation creates a legal obligation on the delegate to exercise the authority within the bounds of the resolution. This is distinct from mere recommendations, which do not confer any decision-making power unless adopted by the Council.

6.1.54.15 Dr Mashazi's response may reflect a misunderstanding of the legal and practical distinctions between resolutions and recommendations. While the outcomes desired by the recommendations and resolutions might align, the process by which they achieve these outcomes differs significantly in terms of legal enforceability and authority;

6.1.54.16 Relevant case law that can be cited to support the principle that recommendations remain non-binding until formally adopted is *Matatiele*

*Municipality v President of the Republic of South Africa*³. In this case, the Constitutional Court emphasized the importance of the proper legal processes in municipal decision-making;

6.1.54.17 The Courts have held that recommendations are not legally binding unless adopted through a formal resolution. For example, in *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd*⁴, the Supreme Court of Appeal discussed the binding nature of council resolutions versus non-binding recommendations;

6.1.54.18 The MSA and the MFMA provide the legislative framework for municipal governance, emphasising the distinct roles and legal consequences of recommendations versus resolutions;

6.1.54.19 The complaint had been mischaracterized by the Investigation Team as an unfair labour practice or unfair dismissal issue, rather than as a concern over the application of the Council's resolutions and delegated authorities;

6.1.54.20 His complaint is predicated on the misuse of state authority, lack of accountability, and the improper exercise of the Council's authority, particularly in relation to the Anti-Corruption Strategy and breaches of the system of delegated authorities of the City of Ekurhuleni. However, the Investigation Team has systematically isolated key facts and mischaracterised his complaint as a matter that reside under the auspices of the LRA, focusing on unfair labour practices. This misrepresentation has resulted in the refusal to record his complaint in its intended context;

³ 2007 (6) SA 477 (CC).

⁴ [2007] ZASCA 161.

- 6.1.54.21 The Investigation Team confusingly argue that the constitution prevents the Public Protector from intervening due to a court case, suggesting that the court's decision includes rulings from the Disciplinary Tribunal and CCMA or Bargaining Council. This is despite his complaint not being related to these bodies, but rather to the application of the 07 recommendations;
- 6.1.54.22 It seems likely that Mr Zebediela was acting on his own authority or under instructions from an official who lacked the proper authority, which explains the difficulty in recalling or naming the official that gave him instructions on the matter.

Applicable law

The Constitution of the Republic of South Africa, 1996

- 6.1.55 Section 23 of the Constitution provides that everyone has the right to fair labour practices.
- 6.1.56 Section 160 of the Constitution provides that:
- “(1) A Municipal Council—*
- (a) makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality;*
- (7) A Municipal Council must conduct its business in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted.*

- (8) *Members of a Municipal Council are entitled to participate in its proceedings and those of its committees in a manner that—*
- (a) *allows parties and interests reflected within the Council to be fairly represented;*
 - (b) *is consistent with democracy; and*
 - (c) *may be regulated by national legislation”.*

6.1.57 Section 181(2) stipulates that the Chapter 9 institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

Public Protector Act, 1994

6.1.58 Section 6(3) empowers the Public to refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter did not take all reasonable steps to exhaust his or her legal remedies in connection with such matter.

Labour Relations Act, 1995, as amended

6.1.59 The LRA gives effect to section 23 of the Constitution and seeks to provide simple 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.

6.1.60 Section 157 of the LRA provides for the jurisdiction of the Labour Court as follows:

- “(1) 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 elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.*
- (1) 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 of the Republic of South Africa, 1996, and arising from—*
- (a) employment and from labour relations;*
 - (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer”.*

6.1.61 Section 158(1) of the LRA provides that the Labour Court may—

- “(a) make any appropriate order, including—*
- (i) ...;*
 - (ii) ...;*
 - (iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;*
 - (iv) a declaratory order;*
 - (v) an award of compensation in any circumstance contemplated in this Act;*
 - (vi) an award of damages in any circumstances contemplated in this Act; and*
 - (vii) ...;*

- (a) *review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law”.*

6.1.62 Section 158(1B) of the LRA stipulates that:

“The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined”.

Local Government: Municipal System Act, 2000

6.1.63 Section 20 of the MSA provides that:

“Meetings of a municipal council and those of its committees are open to the public, including the media, and the council or such committee may not exclude the public, including the media, from a meeting, except when—

- (a) *it is reasonable to do so having regard to the nature of the business being transacted; and*
- (b) *a by-law or a resolution of the council specifying the circumstances in which the council or such committee may close a meeting and which complies with paragraph (a), authorises the council or such committee to close the meeting to the public”.*

6.1.64 Section 59 of the MSA provides that:

- (1) *A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may—*
 - (a) *delegate appropriate powers, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members;*
 - (b) *instruct any such political structure, political office bearer, councillor, or staff member to perform any of the municipality's duties; and*
 - (c) *withdraw any delegation or instruction.*

- (2) *A delegation or instruction in terms of subsection (1)—*
 - (a) *must not conflict with the Constitution, this Act or the Municipal Structures Act;*
 - (b) *must be in writing;*
 - (c) *is subject to any limitations, conditions and directions the municipal council may impose;*
 - (d) *may include the power to subdelegate a delegated power;*

- (e) *does not divest the council of the responsibility concerning the exercise of the power or the performance of the duty; and*
- (f) *must be reviewed when a new council is elected or, if it is a district council, elected and appointed”.*

6.1.65 Section 62 of the MSA deals with appeals and stipulates that:

“A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or subdelegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision”.

6.1.66 **STANDING RULES AND ORDERS FOR THE MEETINGS OF THE COUNCIL AND ITS COMMITTEES (SRO).**

6.1.67 Paragraph 22 provides that:

“22.1 Minutes of the proceedings of every meeting of the council and committee, shall be electronically or otherwise recorded and be kept for that purpose by the Director: Corporate Services. The Municipal Manager shall be responsible for the correctness of the same, and the minutes of every meeting shall be confirmed at the next ordinary meeting.

22.2 Minutes of the proceedings of every meeting of the council or a committee shall be word processed or typed and printed, and shall if confirmed, be signed at the next ensuing ordinary meeting by the chairperson. Minutes shall be bound and kept secure.

22.3 *The Municipal Manager must ensure that the minutes reflect the names of the members that attended the meeting, those that are absent and those that have been granted leave of absence”.*

Case Law

6.1.68 In *Motor Industry Staff Association v Macun NO and Others*,⁵ the Court stated:

*“Section 157(2) of the LRA was enacted to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. **The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. Forum shopping is to be discouraged. When the Constitution prescribes legislation in promotion of specific constitutional values and objectives then, in general terms, that legislation is the point of entry rather than the constitutional provision itself.** (emphasis added)*

6.1.69 In the case of *Gcaba v Minister for Safety and Security and Other*⁶, the Constitutional Court interpreted section 157(1) as follows:

“Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. That

⁵ (2016) 37 ILJ 625 (SCA) at para 20.

⁶ 2010 (1) SA 238 (CC) at para 70.

includes, amongst other things, reviews of the decisions of the CCMA under section 145”.

6.1.70 The Constitutional Court held further that:

“Section 157(2) confirms that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in chapter 2 of the Constitution and arising from employment and labour relations, any dispute over the constitutionality of any executive or administrative act or conduct by the state in its capacity as employer and the application of any law for the administration of which the minister is responsible. The purpose of this provision is to extend the jurisdiction of the Labour Court to disputes concerning the alleged violation of any right entrenched in the Bill of Rights which arise from employment and labour relations, rather than to restrict or extend the jurisdiction of the High Court. In doing so, s 157(2) has brought employment and labour relations disputes that arise from the violation of any right in the Bill of Rights within the reach of the Labour Court. This power of the Labour Court is essential to its role as a specialist court that is charged with the responsibility to develop a coherent and evolving employment and labour relations jurisprudence. Section 157(2) enhances the ability of the Labour Court to perform such a role”. (emphasis added)

6.1.71 In the case of *Chirwa v Transnet Ltd and Others*⁷ (*Chirwa*), Skweyiya J denoted that:

“It is my view that the existence of a purpose-built employment framework in the form of the LRA and associated legislation infers that labour

⁷ 2008 (4) SA 367 (CC) at para 41.

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”.

6.1.72 In this case, the Constitutional Court held that ***‘It could not have been the intention of the legislature to allow an employee to raise what is essentially a labour dispute under the LRA as a constitutional issue under the provisions of s 157(2). To hold otherwise would frustrate the primary objects of the LRA and permit an astute litigant to bypass the dispute resolution provisions of the LRA. This would inevitably give rise to forum shopping simply because it is convenient to do so or as the applicant alleges, convenient in this case “for practical considerations”.***⁸(emphasis added)

6.1.73 In *Baloyi v Public Protector and Others*⁹ (Baloyi case), Theron J denoted that:

“While accepting that section 157(1) does not confer exclusive jurisdiction on the Labour Court in every employment-related matter, this Court, in Chirwa, made it clear that the Labour Court and other specialist tribunals created under the LRA are uniquely qualified to handle labour-related disputes: The purpose of labour law as embodied in the LRA is to provide a comprehensive system of dispute resolutions mechanisms, forums and remedies that are tailored to deal with all aspects of employment. It was

⁸ At para 124.

⁹ [2020] ZACC 27 at para 30.

envisaged as a one-stop shop for all labour related disputes. The LRA provides for matters such as discrimination in the workplace as well as procedural fairness; with the view that even if a labour dispute implicates other rights, a litigant will be able to approach the LRA structures to resolve the disputes”.

- 6.1.74 In a Labour Court Case no: J 3521/18, between *Poya v Railway Safety Regulator and others* (Poya), the Applicant sought an order to interdict the Respondents from proceeding with the disciplinary proceedings, to set aside the delegation of the Minister dated 26 June 2018, as it is unlawful and to declare that all steps taken subsequent to 27 November 2017, *inter alia*, to charge the Applicant with misconduct and notifying him to attend a disciplinary enquiry are invalid, null and void.¹⁰
- 6.1.75 At paragraph 14, the Labour Court indicated that, the gist of the Applicant’s case is that section 9(4) of the National Railway Safety Regulator Act, 2002 (RSR Act), states that only the Minister may discharge the Chief Executive Officer(CEO) from office for misconduct and it was patently unfair for him to be subjected to a hearing by a functionary that is his peer and not the Minister, who should choose the forum at which the Applicant would be required to answer to in his disciplinary enquiry.
- 6.1.76 The Court stated that, “*The Respondents’ submitted that the **Applicant’s contention requires the Court to interpret the RSR Act and to make a finding on the lawfulness or otherwise of the decisions by the RSR and the Minister and this Court has no jurisdiction nor power to interpret the RSR Act for purposes of determining the powers or competence of the Minister under that legislation.**”¹¹ (emphasis added)*

¹⁰ At para 13.

¹¹ At para 17.

- 6.1.77 The Court held that, *“The jurisdictional challenge is without merit and has to fail for the following reasons: Firstly, section 157(2) of the LRA gives the Labour Court jurisdiction 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 and any dispute over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct by the State in its capacity as an employer**”*.¹² (emphasis added)
- 6.1.78 The Labour Appeal Court (LAC) in *Hendricks v Overstrand Municipality & Another*¹³ reasoned that, *“There is strictly speaking no need to classify the decision as administrative action in terms of PAJA before a review will be competent under section 158(1)(h). The provision does not say that the Labour Court may review decisions of the State acting as employer on the grounds of review applicable to administrative action under PAJA. The Labour Court may do so on any ground “permissible in law.”*¹⁴
- 6.1.79 The LAC at paragraph 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. 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”*.

¹² At para 18.

¹³ 2015) 36 ILJ 163 (LAC).

¹⁴ At para 21.

- 6.1.80 *In Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁵(Oudekraal) the Supreme Court of Appeal (SCA), held that Administrator’s approval is set aside by a court in proceedings for judicial review if it exists in fact and it has legal consequences that cannot simply be overlooked (at paragraph 26).
- 6.1.81 *In EC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* (Kirkland) the Constitutional Court explained that the essential basis of the Oudekraal principle is that an ‘invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process’ (at para 101).
- 6.1.82 In *TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal and Others*¹⁶(TMT Services) the SCA unequivocally held that the court, in terms of section 6 of PAJA, is vested with powers to judicially review an administrative action.
- 6.1.83 The SCA also denoted that a ‘court’ is identified in sections 6 and 8 of PAJA as the institution that has the power to review administrative action and to grant remedies when administrative action has been found to be irregular.¹⁷
- 6.1.84 The SCA further stated that section 8 of PAJA deals with remedies that may be awarded when administrative action is reviewed and found to be either unlawful, unreasonable or procedurally unfair. Section 8(1) specifically empowers the court to grant any order that is just and

¹⁵ 2004 (6) SA 222 (SCA).

¹⁶ [2022] JOL 52532 (SCA).

¹⁷ At para 12.

equitable', including mandatory and prohibitory interdicts, the setting aside of administrative action, declarators and, in exceptional circumstances, substituting or varying administrative action and even directing the payment of compensation.¹⁸

6.1.85 *In Government Employees Medical Scheme and Others v The Public Protector of the Republic of South Africa and Others*¹⁹ (GEMS), the court remarked that:

*“According to the high court, unlike other medical schemes, GEMS, may be investigated by the Public Protector. In that it has been singled out by the high court. Thus, solely in respect of GEMS, and not any other medical scheme, aggrieved members may lodge a complaint with the Public Protector, **thereby rendering nugatory the complaints procedure prescribed by the MSA.** It will be recalled that in this case, Mr Ngwato had yet a further appeal in terms of the MSA. He eschewed that in favour of a complaint to the Public Protector. The high court gave no attention to the fact that Mr Ngwato had failed to exhaust his internal remedies. Nor did it consider when precisely an aggrieved member may have recourse to the office of the Public Protector.*

It is thus unclear from the high court’s judgment, whether, as occurred here, an aggrieved member may in addition to a complaint to the Public Protector also avail him - or her - self of the complaints procedures envisaged in the MSA. Were that to be the case, it could lead to parallel investigation processes, with the potentiality for conflicting decisions. This clearly could not have been the intention of the legislature in enacting Chapter 10 of the MSA”. (emphasis added)

¹⁸ At para 11.

¹⁹ (1000/2019 and 31514/2018 and 33401/2018) [2020] ZASCA 111 (29 September 2020), para 25.

Analysis

- 6.1.86 The evidence in the Public Protector's possession reveals that on 09 January 2013, the Complainant reported that the City of Ekurhuleni, during the disciplinary process against the Complainant, produced and relied on a document which purported to be a resolution of a Council meeting of 28 January 2010.
- 6.1.87 At the time of the complaint, the Complainant had already challenged the initiation of his disciplinary action at the Labour Court but was not successful. He also challenged the authenticity of the impugned minutes and was unsuccessful.
- 6.1.88 From the outset, the complaint was dismissed as a labour issue, particularly given the fact that the disciplinary processes had not been concluded at the time. It was also determined that section 23(1) of the Constitution accords everyone a right to fair labour practices which have been amplified in the LRA.
- 6.1.89 The Complainant approached the Public Protector following the disciplinary process that was undertaken against him. The Complainant questioned whether some of the processes and documents produced and relied upon were proper and authentic. He asserted that the disciplinary action was predicated on the documents that were fraudulently created.
- 6.1.90 The Complainant sought a parallel investigation which would determine the authenticity of the documents relied upon in the disciplinary process and/or for the Public Protector to make a declaration regarding whether the process undertaken was compliant with the regulatory framework and the authenticity of the impugned minutes. Upon a proper analysis of the original complaint, it became clear that an investigation of the issues

raised by the Complainant had the potential to undermine the ongoing disciplinary processes and the authority of the SALGBC.

- 6.1.91 Section 34 of the Constitution provides that everyone has the right to have any dispute resolved by application of law by any impartial tribunal or forum. In this instance, the disciplinary process against the Complainant was undertaken under the auspices of SALGBC in line with section 28(1) of the LRA, which empowers bargaining councils to prevent and resolve labour disputes.
- 6.1.92 The Complainant's contract with the City of Ekurhuleni was subsequently terminated on 18 January 2013, following the outcome of his disciplinary hearing. This meant that the provisions of the LRA were triggered, including section 157(1)(h) of the LRA, which provides that the Labour Court can review any decision taken or any act performed by the state in its capacity as an employer.
- 6.1.93 Notwithstanding the above, the Complainant insisted on characterising the complaint outside the LRA framework, but based on the further discussion below, the Public Protector considered the legal framework in order to address the said complaint.

The Jurisdiction of the Labour Court over employment issues as defined in the LRA

- 6.1.94 It is common cause that the Complainant was subjected to a disciplinary process and that his contract of employment was subsequently terminated on 18 January 2013.

- 6.1.95 In his submission dated 04 December 2023, the Complainant contended that his complaint was centred around the legal capacity of the functionaries of the City of Ekurhuleni to act on its behalf as opposed to the application of a specific Disciplinary Code within the scope of the delegated authority. He reiterated that the functionaries of the City of Ekurhuleni failed to show that they had legal authority to act on behalf of the City in terms of the system of delegation of authority or impugned minutes or the correct resolutions of Council.
- 6.1.96 The Complainant raised the issue of delegation of authority indicating that the functionaries that acted against him during the disciplinary process did not have the requisite delegation. Therefore, their conduct should be declared invalid.
- 6.1.97 It is the Public Protector's view that the issue of whether or not the functionaries of the City of Ekurhuleni had capacity to act as they did, or acted in compliance with the system of delegations or Council resolutions arose out of an employment relationship the Complainant had with the City. There can be no argument that the question whether the functionaries of the City of Ekurhuleni correctly implemented the Council Resolutions and/or in accordance with the prevailing delegation intrinsically arose in the context of the Complainant's disciplinary action. This is also buttressed by the remedies which he sought from the Public Protector which includes, reinstatement into his position.
- 6.1.98 The Complainant also characterised his complaint as one involving a breach of employment contract and/or the lawfulness of administrative action taken against him. He further explained that the termination of his contract of employment was preceded by unlawful administration actions, violation of his constitutional rights, etc. In his email dated 13 December 2023, the Complainant sought to characterise his complaint as relating to the unlawful exercise of administrative action.

- 6.1.99 He specifically argued that the LRA does not deprive parties to the employment contract of their common law and constitutional rights. Notwithstanding, the court in the *Hendricks case* expressed that it is unnecessary to declare certain action as administrative action before subjecting it to a review in terms of section 157 of the LRA.
- 6.1.100 From the above submission, it is evident that the lawfulness of the action taken against the Complainant by the City of Ekurhuleni occurred under the confines of the employment relationship that existed between the parties.
- 6.1.101 The Public Protector is subject to the Constitution and the law as espoused in section 181(2) of the Constitution. The jurisprudence articulated in the Constitutional Court cases of *Gcaba* and *Chirwa* is that the Labour Court, in terms of section 157(1) of the LRA, has exclusive jurisdiction over any matter that the LRA prescribes should be determined by it. It is trite that dismissals of employees as traversed in chapter VIII of the LRA constitute one of the matters referred to in the aforementioned section.
- 6.1.102 Where one seeks to depart from relying on the LRA in dealing with employment related disputes, the High Court has concurrent jurisdiction to determine certain disputes. It should be noted that in this context, the Public Protector is not placed in the equal standing with that of the Labour Court or the High Court. This is true because the Public Protector does not have inherent jurisdiction to make declaratory orders or interpret statutes or deal with the interpretation of contractual terms and conditions where there are contractual disputes.

- 6.1.103 In the *Baloyi* case the Constitutional Court²⁰ held that contractual rights exist independently of the LRA. As the SCA has on numerous occasions emphasised, section 23 of the Constitution does not deprive employees of the common law right to enforce the terms of a fixed-term contract of employment and the LRA, in turn, does not confine employees to the remedies for “unfair dismissal” provided for in the Act. Chapter VIII of the LRA is “not exhaustive of the rights and remedies that accrue to an employee upon termination of a contract of employment”.
- 6.1.104 In the *Poya* case, the respondent sought to exclude the jurisdiction of the Labour Court on the basis that the Applicant wanted the Court to interpret the RSR Act and to make a finding on the lawfulness or otherwise of the decisions by the RSR. The Labour Court, citing the decision of *Gcaba*, confirmed that it had jurisdiction in terms of section 157(2) of the LRA to deal with the issue.
- 6.1.105 In this case, the Public Protector initially dismissed the Complainant’s matter as his complaint was considered to be a labour matter, which should have been dealt with through the labour processes and forums that are purpose-built for such matters. The Complainant is opposed to the Public Protector’s characterisation of the matter as labour related. It is this contrasting characterisation of the matter, which also accounts for the delay in finalising the matter.
- 6.1.106 The Constitutional Court confirmed that the Labour Court has concurrent jurisdiction with the High Court in relation to alleged or threatened violations of fundamental rights entrenched in Chapter 2 of the Constitution and arising from employment and labour relations, or any dispute over the constitutionality of any executive or administrative act or conduct by the State in its capacity as employer.

²⁰ In para 46.

- 6.1.107 In the *Chirwa case*, the Constitutional Court cautioned against allowing an employee to raise what is quintessentially a labour dispute as a constitutional matter contemplated by section 157(2) of the LRA.
- 6.1.108 In the *Motor Industry Staff Association case*, the Supreme Court of Appeal (SCA) held that the Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining.
- 6.1.109 It is evident from the remedies sought by the Complainant that he would be able to claim those in the circumstances where the outcome of the disciplinary action taken against him has been challenged and set aside. Instead of challenging the said outcome, the Complainant seeks to enjoin the Public Protector to, *inter alia*, make declarations on the validity of the impugned minutes. In other words, whether the said minutes constituted a true record of the Council meeting that took place on 28 January 2010.
- 6.1.110 The Complainant further sought the Public Protector to declare that the functionaries of the City of Ekurhuleni acted inconsistent with the Council's Resolution and/or the delegation of the Municipality in that those who were involved in his disciplinary action did not have the requisite authority.
- 6.1.111 The Complainant's request was made in the context wherein he had already challenged the authenticity of the impugned minutes during his disciplinary process, inclusive of his challenge to the disciplinary action under case no: JS281/11, which the Labour Court dismissed. Furthermore, Mr Nolan, in delivering the outcome of the Disciplinary Tribunal, also remarked that "...*there is neither basis nor merit for Mr.*

Xakaza’s challenge on the authority of the City Manager or any other person for that matter or indeed the validity of the constitution of the disciplinary hearing.”

- 6.1.112 Having regard to the Complainant’s submissions, it is evident that he seeks to reverse the outcome of his disciplinary process by challenging the processes that preceded it. This, he seeks to do by questioning the authenticity of the impugned minutes, whether the functionaries of the City of Ekurhuleni had the requisite authority to act against him and/or whether in acting against him, they correctly applied the Disciplinary Code.
- 6.1.113 Section 158(1)(a) and (h) empowers the Labour Court to grant declaratory orders sought by the Complainant and can review any decision taken or any act performed by the City of Ekurhuleni in its capacity as employer. The alleged unlawful administrative actions of the functionaries of the City of Ekurhuleni falls squarely within the ambit of the LRA processes.
- 6.1.114 To enjoin the Public Protector to decide on the issues that have already found expression in other legally constituted structures such as the SALGBC, would undermine the Rule of Law. The consequences of declaring certain actions, that preceded the disciplinary action, has the potential of circumventing the disciplinary process undertaken under the auspices of the SALGBC and the LRA.
- 6.1.115 In the *GEMS* case, the High Court warned against allowing Complainants to lodge complaints with the Public Protector instead of following certain established prescribed procedure/s to deal with complaints. Further thereto, section 6(3) of the Public Protector Act, clearly allows the Public Protector to reject a matter on the basis that the Complainant prejudiced,

has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.

Unlawful administrative action

- 6.1.116 In response to the Rule 41(1) Notice dated 20 August 2024, the Complainant again contended that his complaint was solely focused on whether the functionaries of the City of Ekurhuleni's had authority and/or acted consistently with the authority they purported to have. He argued that Mr Ngema, as the then City Manager, would have been the only official with the delegated authority in the City to action the non-delegated resolution to discipline him, but this did not happen.
- 6.1.117 The Complainant further criticized any other basis, including the reliance on the impugned resolutions, as the basis for his disciplinary action. All the Complainant's arguments premised on the lawfulness or the validity of actions of the functionaries of the City of Ekurhuleni, which invariably led to the initiation of the disciplinary action against him.
- 6.1.118 To the extent that the Complainant wishes to challenge the validity of administrative actions taken by the functionaries of the City of Ekurhuleni or its representatives, the current jurisprudence requires that he challenges this in a court of law. This is based on the *Oudekraal* principle as confirmed by the Constitutional Court in *Kirland*, which states that invalid administration action remains valid until set aside by a competent court.
- 6.1.119 It is manifest that the validity of administrative action can be challenged by invoking the provisions of PAJA. This process would also enable the Complainant to obtain the remedies which he seeks that cannot be granted by the Public Protector. In *TMS Services* the court expounded

that section 8(1) of PAJA empowers the court to grant any order that is just and equitable, including the setting aside of administrative action, declarators and in exceptional circumstances, substituting or varying administrative action and even directing the payment of compensation.

Further consideration of section 6(9) of the Public Protector Act

- 6.1.120 The Public Protector can refuse to investigate a matter on the basis of section 6(9) of the Public Protector Act. In other words, the refusal can happen where an incident, as defined in the said paragraph, occurred more than two (02) years before the matter was reported to the Public Protector.
- 6.1.121 The Complainant's complaint invoked the question whether the incident(s) complained of occurred more than two (02) years before they were reported to the Public Protector and whether the Public Protector should have first exercised her discretion to investigate as contemplated in section 6(9) of the Public Protector Act.
- 6.1.122 It is evident that the decision to suspend and initiate disciplinary action against the Complainant occurred in 2010. This would include all issues relating to whether the functionaries of the City of Ekurhuleni had authority or capacity to act as they did and the handing over of the impugned minutes by Mr Zebediela, which occurred more than two (02) years before the matter was reported to the Public Protector. Furthermore, this could also include the alleged fraudulent creation of the impugned minutes, given that these minutes constituted some of the source documents during the disciplinary process.
- 6.1.123 Put differently, the unlawful exercise of an administrative action, as contended by the Complainant, commenced with the decision to suspend

followed by the institution of a disciplinary action against him, which all occurred in the first half of 2010, which is two (02) years before the matter was reported to the Public Protector.

6.1.124 Considering that the administrative action that gave rise to this complaint, in earnest, started in early 2010, the incident complained of occurred more than two (02) years before it was reported to the Public Protector. In this instance, there were no special circumstances that were identified in favour of investigating the issues as required in terms of section 6(9) of the Public Protector Act.

6.1.125 Part of the reason was that the manner in which the complaint was phrased which excluded some of the incidents that the Complainant subsequently brought to the fore. This would include the processes that were followed by PASCO investigators and with the suspension of the Complainant and the decisions of the MPAC. It is now settled law that the exercise of the discretion in terms of section 6(9) of the Public Protector Act should happen at the commencement of the investigation as contemplated in the *Gordhan case*.

6.1.126 Lastly, the Complainant's response to the Rule 41(1) Notice was fully considered, however, it must be noted that the Complainant repeated the same submissions that he made prior the Notice.

Conclusion

6.1.127 The Labour Court or the High Court as contemplated in section 157(2) of the LRA has jurisdiction to determine whether the documents used by the functionaries of the City of Ekurhuleni during the disciplinary action against the Complainant were authentic or had legal force. This section does not extend the same powers to the Public Protector.

- 6.1.128 Section 158(1)(h) of the LRA empowers the Labour Court to review any decision taken or any act performed by the City of Ekurhuleni in its capacity as employer, which would include the question whether the impugned minutes were the official record of the Municipality and/or whether it was lawful for the functionaries of the City of Ekurhuleni to pursue disciplinary action against the Complainant based on the said document.
- 6.1.129 Given that the Complainant was subjected to the SALGBC disciplinary processes and challenged the initiation of the disciplinary action at the Labour Court, the Public Protector does not have jurisdiction to determine whether the functionaries of the City of Ekurhuleni fraudulently created the impugned minutes and/or irregularly initiated the Complainant's disciplinary action as this should have been challenged through the LRA processes.
- 6.1.130 It is evident further from the information canvassed above that the matters which were presented in different ways by the Complainant, relates to incidents that occurred in 2010, which are more than two (02) years before a complaint was reported and registered with the Public Protector on 09 January 2013 and 10 January 2013, respectively.
- 6.2 Whether the City of Ekurhuleni improperly directed the municipality's funds to implement the alleged fraudulent decision and/or improperly implemented the Resolution of Council, which consequently led to the Complainant's dismissal, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**
- Common cause*

- 6.2.1 The Complainant was subjected to disciplinary action and was subsequently dismissed from the City of Ekurhuleni on 18 January 2013.

Issue in dispute

- 6.2.2 The issue for determination by the Public Protector is whether the Municipality acted appropriately and within the bounds of the law in directing and utilising public funds to initiate and pursue the disciplinary process against the Complainant.

The Complainant's version

- 6.2.3 The Complainant, in his complaint to the Public Protector dated 09 January 2013 wrote, *inter alia*, that:

- 6.2.3.1 He was suspended in February 2009 and has remained on suspension since then. He alleged that the suspension and ensuing disciplinary process were based solely on a document presented to the union as a municipal decision dated 28 January 2009. He further indicated that attorneys were appointed and funds allocated on this basis, while his full salary and benefits continued to be paid.

Email from the Complainant to the Investigating Team, dated 04 October 2013

- 6.2.4 In an email dated 04 October 2013, to the Investigating Team, the Complainant wrote, amongst others, that:

- 6.2.4.1 The minutes were unlawfully created and falsely presented as a decision of the City of Ekurhuleni, constituting fraud and a breach of the Municipal Systems Act, 2000, which carries criminal penalties. He further claimed

that, based on this document, financial commitments were made, including the appointment of a presiding officer, prosecutor, and attorneys to represent the Municipality in related disputes. According to the Complainant, these attorneys benefitted despite being aware of the irregularities.

Email from the Complainant to Mr Mothupi, dated 15 November 2020

6.2.5 In his email addressed to the Investigation Team dated 15 November 2020, the Complainant sought to extend the scope of the investigation by requesting that the Public Protector investigate whether the actions of the City of Ekurhuleni were consistent with the resolution of Council.

6.2.6 The Complainant submitted that Council directly enjoined the City Manager to act, something he did not do. This was because the pre-suspension hearing itself was actioned by Mr Liebbrandt. Oral submissions were made to Mr Liebbrandt who, thereafter, presented a draft suspension letter to the then City Manager, who signed the suspension letter.

Copy of the outcome of the disciplinary hearing, dated 18 January 2013

6.2.7 The Complainant also submitted a copy of the outcome of the disciplinary hearing dated 18 January 2013. In paragraph 03 of the outcome of the disciplinary hearing, the Presiding Officer, Mr Nolan, wrote that:

“In respect to these ‘preliminary issues’ these issues had already been dealt with in this hearing and these ‘preliminary issues’ have already been dismissed and ruled upon. Further the issue of the authority of the Municipal Property Accounts Committee (MPAC) charging Mr Xakaza was also canvassed and dealt with”. (sic)

6.2.8 In paragraphs 04, 05 and 06 of the outcome of the disciplinary hearing, Mr Nolan further stated that:

“I pause to also point that the Labour Court also dismissed an application by the employee in terms of which I was cited in my capacity as the Presiding Officer in which issues along similar lines as the ‘preliminary issues’, were also relied upon by the employee [Complainant].

Taking into account that I have already dismissed the ‘preliminary issues’, I briefly restate with regard to the charges, the position I held was that in terms of the delegated authorities, which is publicly accessible document, the Municipal Manager has several persons to act in his stead in effecting discipline. I am satisfied that the deputy City Manager is included upon this duly authorised group and as such I am convinced on the balance of probabilities that the persons who instructed the disciplinary hearing against Mr Xakaza were duly authorised to do thereto and the disciplinary tribunal was properly constituted.

As an aside, I further am respectfully of the view that even if Mr Xakaza’s contentions relating to the authority of the deputy City Manager were true, which I am wholly convinced is not the case, and in that event it would be a simple matter of the City Manager ratifying the actions of the deputy Manager retrospectively. Under these circumstances and taking into account that Mr. Xakaza attempted to interdict this disciplinary tribunal before the Labour Court and was unsuccessful, I am wholly convinced, as I was previously in this hearing that there is neither basis nor merit for Mr. Xakaza’s challenge on the authority of the City Manager or any other person for that matter or indeed the validity of the constitution of the disciplinary hearing.”

Response from Mr Khomotso Fambe

6.2.9 The Public Protector, through a letter dated 07 March 2014, raised the matter with the City of Ekurhuleni. Through an email dated 16 April 2014, Mr Fambe submitted that the disciplinary action was instituted in line with the Disciplinary Code.

Labour Court judgment, case number JS281/11, dated 21 February 2013

6.2.10 Mr Fambe also availed a copy of the Labour Court judgment in case no: JS281/11 dated 21 February 2013, wherein the Complainant sought a final order that he had suffered occupational detriment at the hands of the City of Ekurhuleni in terms of the Protected Disclosure Act, 2000 (PDA). The Complainant in his founding affidavit fully canvassed the issue of fraudulent minutes and the process that ensued thereafter. He enjoined the Court to arrive at the conclusion that he did suffer occupational detriment in that, amongst other things, he was subjected to disciplinary action instituted against him in 2010.

6.2.11 In his founding affidavit, the Complainant challenged the disciplinary process followed by the Municipality and/or the circumstances that gave rise to him being subjected to a disciplinary action.

6.2.12 In paragraph 71 of the Court judgement, Boqwana AJ held that:

“I therefore find that the applicant has not been able to show that he suffered an occupational detriment warranting protection in terms of the PDA”.

Applicable law

The Constitution of the Republic of South Africa Act, 1996

6.2.13 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**”.*
[emphasis added].

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

6.2.15 Section 182(3) prohibits the Public Protector to investigate court decisions.

Public Protector Act, 1994

6.2.16 Section 6(6) of the Public Protector Act provides that: *“Nothing in subsection (4) and (5) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law”.*

The South African Local Government Bargaining Council: Disciplinary Procedure Collective Agreement dated 24 June 2009

6.2.23 Paragraph 6 of the Disciplinary Code provides for the Disciplinary Tribunal wherein a suitably qualified person is appointed to serve as the Presiding Officer and/or as the Prosecutor.

6.2.24 Paragraph 9.4 of the Disciplinary Code provides that, *“The determination of the Disciplinary Tribunal shall be final and binding on the employer save that the employee may lodge an appeal thereto”.*

6.2.25 Paragraph 14 of the Disciplinary Code deals with the appeal processes.

Case Law

6.2.26 The case law discussed under issue one (01) also finds application herein and will not be repeated.

Analysis

6.2.27 It is manifest that the City of Ekurhuleni expended funds in the appointment of the Presiding Officer and the Prosecutor, who undertook disciplinary processes on behalf of the Municipality.

6.2.28 It is common cause that the Complainant was subsequently dismissed following the outcome of the Disciplinary Tribunal on 18 January 2013.

6.2.29 It is further common cause that paragraph 9.4 of the Disciplinary Code provides that the determination of the Disciplinary Tribunal shall be final and binding on the employer save that the employee may lodge an appeal thereto. There is no evidence that the Complainant pursued an appeal in line with the aforementioned paragraph as he elected to take a different cause of action.

6.2.30 On the contrary, the Complainant raised the matter with the Public Protector and argued that the City of Ekurhuleni unlawfully expended funds in pursuit of his disciplinary hearing. He based his assertions on, *inter alia*, the issue of delegation of authority, which the Complainant did raise during the disciplinary hearing, which issues were considered and dismissed by Mr Nolan.

- 6.2.31 It should be noted that the Complainant also challenged the City's processes at the Labour Court under case no: JS281/11. However, it was noted that the Labour Court's pronouncement was mainly to the effect that the Complainant failed to prove that he was subjected to an occupational detriment. Section 6(6) of the Public Protector Act prevents the Public Protector to investigate the performance of judicial functions by any Court of Law.
- 6.2.32 Based on the issues canvassed under issue one (01), it is submitted that the issue whether the City of Ekurhuleni improperly directed the Municipality's funds in pursuit of the disciplinary action against the Complainant can only be answered once a determination on the lawfulness of the disciplinary action against the Complainant has been properly reviewed in terms of section 158(1)(h) of the LRA.
- 6.2.33 Furthermore, the Constitutional Court in the *Chirwa* and *Gcaba cases* affirmed the authority and jurisdiction of the Labour Court in determining employment and labour disputes and any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer as contemplated in section 157(2) of the LRA.
- 6.2.34 There is nothing in the language of section 157(1) and (2) of the LRA that accords the Public Protector with the same jurisdiction given to Labour Court and the High Court, especially in the circumstances where such a matter has already been subjected to the LRA processes.

Conclusion

- 6.2.35 The evidence reveals that the Complainant challenged the City of Ekurhuleni for initiating disciplinary processes against him at the Labour

Court under case no: JS281/11. The Public Protector, in terms of section 182(3) of the Constitution read with section 6(6) of the Public Protector Act, is proscribed from investigating court decisions and the performance of judicial functions by any Court of Law.

6.2.36 The Constitution and the Constitutional Court recognises the tribunals and the purpose-built structures that deal with labour issues, to which the Complainant was subjected to.

6.2.37 Furthermore, this issue is intrinsically intertwined with the determination of the first issue and requires a determination of whether the functionaries of the City of Ekurhuleni transgressed applicable prescripts when pursuing disciplinary processes against the Complainant.

6.2.38 The Public Protector is unable to make a determination whether the City of Ekurhuleni irregularly expended funds to initiate a disciplinary action against the Complainant, when there has not been a successful review of same in terms of section 158(1)(h) of the LRA.

7. FINDINGS

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

7.1 Whether the functionaries of the City of Ekurhuleni Metropolitan Municipality fraudulently created or produced a Council Resolution purporting to be the outcome of the Council meeting held on 28 January 2010 and irregularly pursued disciplinary action against Mr Temba Xakaza, if so, whether such conduct is improper as

envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act

- 7.1.1 The Labour Court or the High Court, as contemplated in section 157(2) of the LRA, has jurisdiction to make a determination on whether the documents used by the functionaries of the City of Ekurhuleni during the disciplinary action against the Complainant, including the impugned minutes, were authentic and/or had legal force.
- 7.1.2 Section 158(1)(h) of the LRA empowers the Labour Court to review any decision taken or any act performed by the City of Ekurhuleni in its capacity as employer, which would include the question whether the impugned minutes were the official record of the Municipality and/or whether the functionaries of the City of Ekurhuleni who pursued disciplinary action against the Complainant had the necessary delegation to do so.
- 7.1.3 It is further noted that the Public Protector's jurisdiction is excluded on the basis that the complaint relates to incidents that occurred more than two (02) years before they were reported to the Public Protector and that no special circumstances were established, from the outset, to justify the investigation of the matter in line with section 6(9) of the Public Protector Act.
- 7.1.4 The Complainant's insistence in having this matter to be adjudicated by the Public Protector, is inconsistent with the jurisprudence. The alleged invalid administrative action taken by the functionaries of the City of Ekurhuleni remains valid until set aside by a competent court as espoused by the court in the *Oudekraal case*.

7.1.5 Therefore, the Public Protector does not have jurisdiction to determine whether the functionaries of the City of Ekurhuleni unlawfully exercised an administrative action or fraudulently created and/or produced a Council Resolution, purporting to be the outcome of the Council meeting held on 28 January 2010, which formed the basis of the Complainant's disciplinary action.

7.2 Whether the functionaries of the City of Ekurhuleni improperly directed the municipality's funds in pursuit of an irregular initiation of disciplinary action against Mr Temba Xakaza, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act

7.2.1 The Public Protector observed that the City of Ekurhuleni expended funds in pursuit of a disciplinary action that was undertaken against the Complainant and concluded on 18 January 2013.

7.2.2 From the evidence canvassed above, this issue is intrinsically intertwined with the determination of the first issue and essentially a determination of whether the disciplinary processes undertaken by the City of Ekurhuleni against the Complainant were in accordance with applicable prescripts. In this regard, a determination of this issue is not mutually exclusive from the first issue.

7.2.3 Therefore, the Public Protector cannot make a determination whether the City of Ekurhuleni improperly expended funds in order to implement the alleged fraudulent decision and/or improperly implemented the resolution of Council, which consequently led to the Complainant's dismissal, when there has not been a successful review of same in terms of section 158(1)(h) of the LRA.

8. CONCLUSION

- 8.1. In light of the foregoing, the Public Protector is not issuing a formal report with remedial action as contemplated in section 182(1)(c) of the Constitution.
- 8.2. The Public Protector considers this matter as finalised and cannot take it further. Should any party be dissatisfied with this decision, they are at liberty to explore legal remedies at their disposal.



ADV KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 31 DECEMBER 2025

Assisted by: Adv Deon Barnard
Executive Manager PII Coastal: