

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)
OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NUMBER: 13 OF 2024/2025

ISBN NUMBER: 978-1-0672527-0-0

**INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND
MALADMINISTRATION RELATING TO THE IRREGULAR APPOINTMENT OF MR
HASTING FARRINGTON NEL AS PROJECT MANAGER: KEY INFRASTRUCTURE
PROJECTS BY THE FUNCTIONARIES OF THE DEPARTMENT OF TRANSPORT,
SAFETY AND LIAISON IN THE NORTHERN CAPE**

TABLE OF CONTENTS		
ITEM	DESCRIPTION	PAGE
	LIST OF ACRONYMS AND ABBREVIATIONS	3
	EXECUTIVE SUMMARY	4
1.	INTRODUCTION	9
2.	THE COMPLAINT	10
3.	POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	11
4.	THE ISSUES IDENTIFIED FOR INVESTIGATION	12
5.	THE INVESTIGATION	13
6.	THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS	17
7.	FINDINGS	51
8.	REMEDIAL ACTION	53
9.	MONITORING	54

LIST OF ACRONYMS/ABBREVIATIONS

ACRONYMS AND ABBREVIATIONS	DESCRIPTIONS
Constitution	Constitution of the Republic of South Africa, 1996
CV	Curriculum Vitae
Department	Department of Transport, Safety and Liaison
DPSA	Department of Public Service and Administration
HoD	Head of Department
LGSETA	Local Government Sector Education Training Authority
MEC	Member of Executive Council
NEHAWU	National Education Health & Allied Workers Union
PFMA	Public Finance Management Act, 1999
PSA	Public Servants Association of South Africa
PSA	Public Service Act, 1994
PSR	Public Service Regulations, 2016
Public Protector	Public Protector of the Republic of South Africa
Public Protector Act	Public Protector Act, 1994

Executive Summary

- (i) This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice, and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations of improper conduct and maladministration relating to the irregular appointment of Mr Hasting Farrington Nel (Mr Nel) as a Project Manager: Key Infrastructure Projects (Project Manager) by the functionaries of the Department of Transport, Safety and Liaison (the Department) on a one-year employment contract.
- (iii) The investigation originates from a complaint lodged by the Economic Freedom Fighters (the Complainant) at the Northern Cape Provincial Office of the Public Protector, in Kimberley on 04 December 2020.
- (iv) In the main, the Complainant alleged that:
 - (a) In November 2018, the Department advertised the position of Project Manager: Key Infrastructure Projects with Ref S4.1/11/11, with a closing date of 23 November 2018.
 - (b) The requirements for the post were as follows:
 - (aa) A Bachelor's Degree in Civil Engineering, a related field in Project Management supplemented by seven (07) or more years of experience in

Project Implementation, and a related Master's degree will be an added advantage.

- (bb) Professional Engineer or certified Project Manager; and
- (cc) Certification in Project Management (CPM) or an equivalent project management credential.
- (c) The appointed candidate did not have the required qualifications and relevant experience for the post as indicated in the advertisement.
- (d) There was extreme pressure to shortlist and appoint Mr Nel, who is *“the Premier’s best childhood friend and business associate”*; and
- (e) The appointed candidate was the only person that was interviewed for the post. However, the erstwhile Head of the Department (HoD) of the Northern Cape Department of Transport, Safety and Liaison (the Department), Mr Moeketsi Piet Dichaba (Mr Dichaba), and the erstwhile Member of the Executive Council of Transport, Safety and Liaison (MEC), Ms Nontobeko E Vilakazi (Ms Vilakazi) proceeded with the appointment of Mr Nel against the advice from the Senior Legal Administration Officer not to appoint him since he was the only person interviewed for the post.
- (v) In essence, the Complainant alleged that the appointment of Mr Nel as Project Manager by the Department was not in accordance with the laws and prescripts regulating the appointment of public servants.
- (vi) Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:
 - (a) Whether Ms Vilakazi, the erstwhile MEC of the Northern Cape Transport, Safety and Liaison and its functionaries, appointed Mr Hasting Farrington Nel

as Project Manager: Key Infrastructure Projects without following the prescribed recruitment process, 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.

- (vii) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the Department, an analysis of the relevant documents and information obtained during the investigation, and a consideration and application of the relevant laws and prescripts.
- (viii) On 08 August 2024, a notice in terms of section 7(9)(a) of the Public Protector Act (the Notice) was issued to the Premier of the Northern Cape, the HoD, and other functionaries of the Department to provide an opportunity for responses on the likely adverse findings and proposed remedial action. Section 7(9)(a) of the Public Protector Act provides that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations regarding same.
- (ix) Having regard to the evidence and regulatory framework determining the standard that the Department should have complied with, the following findings are made:
- (a) **Whether Ms Vilakazi, the erstwhile MEC of the Northern Cape Transport, Safety and Liaison and its functionaries, appointed Mr Hasting Farrington Nel as Project Manager: Key Infrastructure Projects without following the prescribed recruitment process, 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**

- (aa) The allegation that the appointment of Mr Nel as Project Manager: Key Infrastructure Project by the MEC and the functionaries of the Northern Cape Department of Transport, Safety, and Liaison without following the prescribed recruitment process, **is substantiated**.
- (bb) The shortlisting, interviewing, recommendation, and appointment of Mr Nel who did not meet the minimum requirements as set out in the advertisement was irregular. In terms of the criteria set out in the advert, Mr Nel did not qualify and ought not have been shortlisted and appointed.
- (cc) There is no record confirming that the shortlisted candidates were approved by the executive authority or delegated authority, as required by the RSP.
- (dd) The selection panel chaired by Mr Wolfe was not constituted in accordance with regulation 67(1)(a) of the PSR, 2016, which requires the Chairperson to hold a position above the advertised post.
- (ee) Ms Vilakazi's reliance on Mr Dichaba to facilitate the administrative process and recommend the appointment of Mr Nel, is contrary to the provisions in Regulation 57(3)(a) of the PSR, 2016 and Paragraph H(ii)(a) and (b) of the RSP which placed an obligation on her as the executive authority, before deciding on an appointment of a person additional to the establishment, to satisfy herself that the person she intended to appoint qualifies in all respects for the position, the contents of his application for the post have been verified and to record the verification in writing.
- (ff) The Public Protector could not establish any evidence confirming that Dr Saul pressured the functionaries of the Department to appoint Mr Nel. The Public Protector found that the recruitment process in question was initiated during the tenure of Ms Lucas as Premier, in 2018, prior to Dr Saul's appointment.

- (gg) The conduct of all the functionaries of the Department involved in this recruitment process was in contravention of the PSA, PSR, and the RSP. The conduct of Ms Vilakazi did not comply with the provisions of section 195(1) of the Constitution and section 11(1) of the PSA. The conduct is not consistent with the democratic values and principles governing good public administration as enshrined in the Constitution.
- (hh) The conduct of the Departmental functionaries accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (ix) The appropriate remedial action the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

Premier of the Northern Cape

- (aa) Take cognizance of the report and take appropriate action against Ms Vilakazi for her role in the irregular appointment of Mr Nel as the Project Manager: Key Infrastructure Projects, in terms of section 132(2) of the Constitution.

The Member of the Executive Council for COGHSTA, Roads and Transport

- (bb) Take cognisance of the findings and remedial actions contained in this report.

The Head of the Department

- (cc) Within **thirty (30) calendar days** from the date of this report, take corrective action against Ms Lekwene, the then Acting HR Manager involved in the

irregular appointment of Mr Nel, in terms of the disciplinary procedures of the Department in line with section 16A(2)(a) of the PSA.

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 to the following persons in terms of sections 8(1) read with section 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation, to affected parties, for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:

1.2.1. Dr Zamani Saul, the Premier of the Northern Cape Province;

1.2.2. Ms Nontobeko Vilakazi, a Member of the Executive Council responsible for Social Development;

1.2.3. Mr Bentley Vass, a Member of the Executive Council responsible for Cooperative Governance, Human Settlements, Traditional Affairs (COGHSTA), Transport and Safety;

1.2.4. Mr Rodney Pieterse, the Head of the Northern Cape Department of Transport, Safety and Liaison;

1.2.5. Ms Lekwene, the then Acting HR Manager;

1.2.6. Mr LEL Wolfe, the Director: Transport Regulations;

1.2.7. Ms G Parker, the Technical Specialist: Ministry;

- 1.2.8. Mr EC Apie, the former Acting Chief Financial Officer; and
 - 1.2.9. Mr Harrington Nel, (the Project Manager: Key Infrastructure Projects).
 - 1.2.10. The Economic Freedom Fighters (the Complainant).
- 1.3. The report relates to an investigation into allegations of improper conduct and maladministration relating to the irregular appointment of Mr Hasting Farrington Nel (Mr Nel) as a Project Manager: Key Infrastructure Projects (Project Manager) by the functionaries of the Department of Transport, Safety and Liaison (the Department) on a one-year employment contract.

2. THE COMPLAINT

- 2.1. The investigation originates from a complaint lodged on 04 December 2020 with the Northern Cape Provincial Office of the Public Protector (the Public Protector) by the Economic Freedom Fighters (the Complainant).
- 2.2. In the main, the Complainant alleged that:
- 2.2.1. In November 2018, the Department advertised the position of Project Manager: Key Infrastructure Projects with Ref S4.1/11/11, with a closing date of 23 November 2018;
 - 2.2.2. The requirements for the post were as follows:
 - 2.2.2.1. A Bachelor's Degree in Civil Engineering, a related field in Project Management supplemented by seven (07) or more years of experience in Project Implementation and a related Master's degree will be an added advantage;

-
- 2.2.2.2. Professional Engineer or certified Project Manager; and
- 2.2.2.3. Certification in Project Management (CPM) or an equivalent project management credential.
- 2.2.3. The appointed candidate did not have the required qualifications and relevant experience for the post as indicated in the advertisement;
- 2.2.4. There was extreme pressure to shortlist and appoint Mr Nel, who is *“the Premier’s best childhood friend and business associate”*; and
- 2.2.5. The appointed candidate was the only person that was interviewed for the post. However, the erstwhile Head of the Department (HoD) of the Northern Cape Department of Transport, Safety and Liaison (the Department), Mr Moeketsi Dichaba (Mr Dichaba), and the erstwhile Member of the Executive Council of Transport, Safety and Liaison (MEC), Ms N E Vilakazi (Ms Vilakazi) proceeded with the appointment of Mr Nel against the advice from the Senior Legal Administration Officer not to appoint him since he was the only person interviewed for the post.
- 2.3. In essence, the Complainant alleged that the appointment of Mr Nel as Project Manager by the Department was not in accordance with the laws and prescripts regulating the appointment of public servants.

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

3.4. The Department of Transport, Safety and Liaison is an organ of state as contemplated in section 239 of the Constitution, and the conduct of its functionaries amounts to conduct in state affairs. As a result, the Public Protector is satisfied that the complaint falls within its competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and section 6(4) of the Public Protector Act. Furthermore, the jurisdiction of the Public Protector was not disputed in this regard.

4. THE ISSUE IDENTIFIED FOR INVESTIGATION

4.1. Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

- 4.1.1. Whether Ms Vilakazi, the erstwhile MEC of the Northern Cape Transport, Safety and Liaison and its functionaries, appointed Mr Hasting Farrington Nel as Project Manager: Key Infrastructure Projects, without following the prescribed recruitment process, 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 is conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act.

- 5.1.2. Section 7(1)(b) of the Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

5.2. Approach to the investigation

- 5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework, and prescripts.

- 5.2.2 The investigation was approached using an enquiry process that seeks to determine:

- 5.2.2.1. What happened?

- 5.2.2.2. What should have happened?

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

5.2.2.4. In the event of a violation, what action should be taken?

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence is evaluated and a determination is made on a balance of probabilities. In this case, the factual enquiry principally focused on whether Ms Vilakazi, the erstwhile MEC and the functionaries of the Department appointed Mr Hasting Farrington Nel as Project Manager: Key Infrastructure Projects without following the prescribed recruitment process.

5.2.4 The enquiry regarding what should have happened focuses on the law or rules that regulate the standard that should have been met by the erstwhile MEC and the functionaries of the Department in the execution of their duties relating to the subject of the complaint.

5.3 The Key Sources of Information

5.3.1 Documents and correspondence

5.3.1.1 Advertisement of Project Manager: Key Infrastructure Projects post, undated;

5.3.1.2 Mr Nel's blank Senior Certificate, undated;

5.3.1.3 Internal memorandum on the request for approval of a contract appointment of Project Manager: for Key Transport Infrastructure Projects: Department of Transport, Safety and Liaison, for one (01) year, dated 11 June 2018;

-
- 5.3.1.4 *Screening Matrix/Long list of applicants* titled “*Department of Transport, Safety, and Liaison Post: Project Manager: Key Infrastructure Projects Directorate: Office of the Head of Department Ref no: S4.1/11/11*”, undated;
- 5.3.1.5 Memorandum for the filling of the advertised vacant post of Project Manager: Key Infrastructure Projects, 2019, dated 11 December 2019;
- 5.3.1.6 Appointment letter from Mr MP Dichaba to Mr HF Nel, dated 19 December 2019;
- 5.3.1.7 Employment Agreement between the Department represented by Mr Dichaba and Mr Nel, dated 20 December 2019;
- 5.3.1.8 Letter from the Head of Examination to Mr Nel, relating to calculation of Mr Nel’s Senior Certificate Aggregate symbols, dated 08 December 2022;
- 5.3.1.9 Letter from the erstwhile MEC of the Northern Cape Department of Transport, Safety and Liaison: Ms Vilakazi to the Investigation Team responding to the allegations, dated 18 March 2024;
- 5.3.1.10 Email from the Senior Legal Administration Officer, Mr Caleb Manapele Modisa to the Public Protector, relating to the complaint, dated 14 March 2024;
- 5.3.1.11 Letter from the Investigation Team to Dr Saul, the Premier, relating to the complaint, dated 16 July 2024;
- 5.3.1.12 Letter from the Public Protector to Mr Nel, informing him about the complaint, dated 17 July 2024; and
- 5.3.1.13 Email from Mr Nel to the Public Protector, responding to the allegations letter, dated 02 August 2024.
- 5.3.2 **Legislation and Policies**

-
- 5.3.2.1 The Constitution of the Republic of South Africa, 1996;
- 5.3.2.2 The Public Service Act, 1994 (as amended);
- 5.3.2.3 The Public Service Regulations, 2016; and
- 5.3.2.4 The Northern Cape Provincial Administration Recruitment and Selection Policy, 2018.
- 5.3.3 **Case Law**
- 5.3.3.1 *Khumalo and Another v Member of the Executive Council for Education¹, KwaZulu-Natal 2014 (5) SA-579 (CC).*
- 5.3.3.2 *Hunter v Financial Sector Conduct Authority and Others 2018 ZACC 31²*
- 5.3.4 **Notices issued in terms of section 7(9)(a) of the Public Protector Act**
- 5.3.4.1 Section 7(9)(a) of the Public Protector Act, provides that persons implicated in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding same.
- 5.3.4.2 On 08 August 2024, Section 7(9)(a) notices were served on the following persons to afford them an opportunity to make representations regarding the likely findings and remedial action:
- (a) Dr Saul, the Premier of the Northern Cape Province;
 - (b) Ms Vilakazi, the MEC of Social Development;

¹ (CCT 10/13) [2013] ZACC 49, at par 61 and 62

² 2018 ZACC 31

-
- (c) Mr Vass, the MEC of Cooperative Governance, Human Settlement and Traditional Affairs;
 - (d) Mr Pieterse, the Head of the Northern Cape Department of Transport, Safety and Liaison;
 - (e) Ms Lekwene, the then Acting HR Manager;
 - (f) Mr Apie, the former Acting Chief Financial Officer;
 - (g) Mr Nel, Project Manager: Key Infrastructure Projects; and
 - (h) The Economic Freedom Fighters, the Complainant.

5.3.4.3 Responses were received only from Mr Pieterse on 23 August 2024, Mr Apie on 27 August 2024 and Ms Lekwene on 30 August 2024, respectively.

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

6.1. Whether Ms Vilakazi, the erstwhile MEC of the Northern Cape Transport, Safety and Liaison and its functionaries, appointed Mr Hasting Farrington Nel as Project Manager: Key Infrastructure Projects without following the prescribed recruitment process, 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 In November 2018, the Department advertised the post of Project Manager: Key Infrastructure Projects Level 13, in the local newspaper in the Northern Cape with a closing date of 23 November 2018.

- 6.1.2 Mr Nel was appointed by the Department as Project Manager: Key Infrastructure Projects from 01 January 2020 to 31 December 2020.

Issue in dispute

- 6.1.3 The issue for the Public Protector's determination is whether Mr Nel possessed the requisite qualifications and experience when he was appointed to the post of Project Manager: Key Infrastructure Projects and whether an appropriate recruitment process was followed.

The Complainant's version

- 6.1.4 The Complainant contended that the appointment of Mr Nel by the Department as Project Manager: Key Infrastructure Projects was improper as it was not made in accordance with the laws and prescripts regulating the appointment of public servants, in that Mr Nel did not possess the requisite qualifications and relevant experience for the post as indicated in the advertisement.
- 6.1.5 There was pressure to shortlist and appoint Mr Nel, who is "*the Premier's best childhood friend and business associate*". Further, the appointed candidate was the only person who was interviewed for the post, contrary to the advice of Mr Modisa, the Senior Legal Administration Officer.

Response from Mr Dichaba, the erstwhile HoD of the Northern Cape Department of Transport, Safety and Liaison

- 6.1.6 On 10 December 2020, the Public Protector raised the allegations with Mr Dichaba, the erstwhile HoD, requesting a response and supporting evidence.

6.1.7 On 18 January 2021, Mr Dichaba provided the Investigation Team with the following documents:

Internal memorandum on the request for approval of a contract appointment of Project Manager: for Key Transport Infrastructure Projects: Department of Transport, Safety and Liaison, for one (1) year

6.1.7.1 A copy of a document titled “*Request for approval of contract appointment of one (01) Project Manager; for Key Transport Infrastructure Projects: Department of Transport, Safety, and Liaison memorandum*” (Contract appointment approval memorandum), dated 11 June 2018 from Mr Dichaba addressed to Ms Sylvia Lucas (Ms Lucas), the erstwhile Premier of the Northern Cape. The memorandum was approved by Ms Lucas on 15 October 2018 and included the following:

- (a) Mr Dichaba commented on the submission and indicated that the post did not exist on the approved organizational structure of the Department. The post would be additional to the establishment and sufficient funds were available for the filling of the contract appointment; and
- (b) Mr E Crouch (Mr Crouch), the Senior Manager: Corporate Services also commented and indicated that the post did not appear on the organogram of the Department.

Advertisement of the post

6.1.7.2 A copy of the advertisement dated November 2018, titled “*Project Manager: Key Infrastructure Projects with Ref S4.1/11/11*”, advertised in the local newspaper circulating in the Northern Cape with a closing date of 23 November 2018. The minimum qualification requirements were a Bachelor’s Degree in Civil Engineering, a related field in Project Management

supplemented by seven (07) or more years of experience in Project Implementation and a related Master's degree would be an added advantage, Professional Engineer or certified Project Manager. Certification in Project Management (CPM) or equivalent project management credentials is preferred.

Screening Matrix/Long list of applicants

6.1.7.3 An undated and unsigned document titled “*Department of Transport, Safety, and Liaison Post: Project Manager: Key Infrastructure Projects Directorate: Office of the Head of Department, Ref no: S4.1/11/11*” indicating the following:

NO	SURNAME & INITIALS	QUALIFICATIONS	EMPLOYER	POSITION	LOCALITY	RELEVANT EXPERIENCE	COMMENTS
1	Mr S	Master in Business Administration BSC in Civil Engineering and BSC	IGS Consulting Engineers	Senior Civil Engineer	Swaziland	2 years' experience as Concrete Site Agent at Inyatsi Construction 3 years' experience as Construction Engineer at Kings Office 1 year experience as Project Manager at Makole Property Developments 3 years' experience as Senior Civil Engineer at IGS	Z83 application form not attached identity Document not attached National Senior Certificate not attached
2	Mr B	National Senior Certificate	Construction Worker	Road net Construction Company	Richmond	Construction Worker at Road Net till date	No relevant documents attached

3	Mr L	National Senior Certificate Bachelor of Business administration	Northern Cape Department of Education	EPWP	Kimberley	1 year experience as EPWP at Dept. of Education	No relevant documents attached
4	Mr N	National Senior Certificate Primary Teachers Diploma	Unemployed	Unemployed	Kimberley	3 years' experience as Hospital Manager at Dept. of Health 7 years' experience as Community Liaison Officer at Pixley Ka Seme District Municipality 5 years' experience as Municipal Manager at Siyancuma Municipality	No relevant qualification attached
5	Ms M	BTECH: Project Management BTECH in Public Management	Unemployed	Unemployed	Kimberley	7 years' experience as Senior Training Officer at Office of the Premier 3 years' experience as Chief Training Officer at Office of the Premier 7 years' experience as Secretary/ Administrative Officer at Office of the Premier	National Senior Certificate not attached
6	Mr T	Master of Science in Civil Engineering	SAES Consulting Engineers	Technical Manager and Principal Engineer	Not stated	6 years' experience as Project Engineering Manager 2010 to date still employed at SAES Consulting Engineers as Technical Manager and Principal Engineer	National Senior Certificate not attached

Memorandum for the filling of the advertised vacant post of Project Manager: Key Infrastructure Projects, 2019

6.1.7.4 A document titled the “*Submission Memorandum for the filling of the advertised vacant post of Project Manager: Key Infrastructure Projects*” (*Filling of vacant post memo*), dated 11 December 2019, from Mr Dichaba addressed to Ms Vilakazi indicated that the post was advertised in the local and national media and the Department of Public Service and Administration (DPSA) Circular, as per Regulation 65 of the Public Service Regulations, 2016 (PSR) in November 2018, with a closing date of 23 November 2018.

6.1.7.5 The memorandum stated, *inter alia*, that:

(a) Five (05) candidates were shortlisted from a total of six (06) applications received and were invited for interviews as indicated below:

No	Candidate	Qualification	Experience
1.	Mr HF Nel	A National Certificate Programs in Public Administration.	Municipal Manager of Siyancuma Municipality from December 2012 to June 2017. Liaison Officer at Pixley Ka Seme District Municipality from June 2005 to November 2012. Hospital Manager of the Calvinia and Kuruman Hospitals, Northern Cape from February 2002 to May 2005.
		A National Diploma in Project Management.	
		A Diploma in Project Management obtained from Damelin (date obtained unspecified).	

		<p>A National Certificate in Municipal Financial Management NQF Level 6 obtained from the Local Government Sector Education Training Authority (LGSETA) in 2014.</p> <p>A National Diploma obtained from Phatsimang Teachers Training College.</p> <p>A Primary Teachers' Diploma obtained in 1997.</p> <p>A Certificate in Housing Policy Development and Management Programme obtained from the University of the Witwatersrand in 2000.</p> <p>Blank Senior Certificate with no details of Mr Nel issued by the Republic of Transkei.</p>	
2.	Mr L	<p>National Senior Certificate.</p> <p>Bachelor of Business Administration.</p>	1 year experience as EPWP at the Department of Education.
3.	Mr T	Master of Science in Civil Engineering.	6 years' experience as Project Engineering Manager from 2010 to date. Employed at SAES Consulting Engineers as Technical Manager and Principal Engineer.
4.	Mr B	National Senior Certificate.	Construction Worker at Road Net until to date.
5.	Ms M	BTECH: Project Management.	7 years' experience as Senior Training Officer at Office of the Premier, 3 years' experience as Chief Training Officer at the Office of the Premier, and 7 years' experience as

			Secretary/Administrative Officer at the Office of the Premier.
--	--	--	--

6.1.7.6 The memorandum further indicated that all candidates were informed of the interview proceedings timeously and were further contacted again on the day of the interview in the presence of all the panel members but only one (01) candidate attended the interview. The reasons indicated for non-attendance by the candidates were as follows:

- (a) Mr L declined the invitation to the interview telephonically;
- (b) Mr T declined the invitation to the interview telephonically, stating that he was in Pretoria and therefore unavailable;
- (c) Mr B declined the invitation to the interview telephonically stating that he was in Richmond and therefore unavailable; and
- (d) Ms M formally declined the invitation to the interview via SMS stating that she would be out of the country and therefore unavailable.

6.1.7.7 The memorandum reflected that the interview Panel members for the post of Project Manager: Key Infrastructure Projects were the following:

- (a) Mr LEL Wolfe, Director (Chairperson);
- (b) Ms G Parker, Director;
- (c) Ms CN Jonkers, Director;
- (d) Ms A Demas, HR Officer; and
- (e) Mr B Marekwa, Technical Advisor.

6.1.7.8 According to the memorandum, labour representatives, Mr N Masimini (Mr Masimini), of the Public Service Association (PSA) and Ms K Gwele (Ms Gwele) of the National Education Health & Allied Workers Union (NEHAWU), were invited to observe the interview proceedings, however, both representatives raised their concerns about not being part of the shortlisting process, as well as their disapproval of receiving invitations to the interviews on short notice.

6.1.7.9 The Labour representatives indicated that they would lodge a dispute under “Section 17” and the issues raised would be further discussed with the HoD as well as their concerns about the criteria used for shortlisting.

6.1.7.10 In terms of the memorandum, the Interview panel recommended that Ms Vilakazi approve the appointment of Mr Nel as the Project Manager: Key Infrastructure Projects on a contract basis for twelve (12) months, with effect from 01 January 2020.

6.1.7.11 The memorandum, further indicated that Mr Modisa, did not recommend the appointment of Mr Nel and stated the following:

“I vehemently oppose and object the recommendation. This is a Senior Position and for the Department to only interview one candidate is gross. The whole process is flawed. NB-Please re-advertise” (sic)

6.1.7.12 It was noted in the memorandum that, Mr Dichaba recommended the appointment of Mr Nel and stated that:

“The post was advertised and only 6 candidates applied. The post is a 12 months contract. Therefore, an advertisement will not get many candidates because of job security. Therefore, the appointment is recommended”.

6.1.7.13 The memorandum for the appointment of Mr Nel was approved by Ms Vilakazi, on 17 December 2019.

Interview score sheets of Mr Nel

6.1.7.14 During the Investigation, the Investigation Team was provided with score sheets from only two (02) members of the interview panel i.e. Ms Parker and Mr Wolfe. According to the interview score sheets, the two (02) panelists scored Mr Nel as follows:

	Ms Parker	Mr Wolfe
Project Management	5	4
Stakeholder Management	4	5
Financial Management	3	4
Coordination of approval processes	3	4
Management and interpretation of contracts	4	4

Response from the erstwhile MEC of the Northern Cape Department of Transport, Safety and Liaison: Ms Vilakazi

6.1.8 The Public Protector issued an allegations letter dated 04 March 2024, to the erstwhile MEC of the Northern Cape Department of Transport, Safety and Liaison, Ms Vilakazi.

6.1.9 Ms Vilakazi responded to the Investigation Team through a letter dated 18 March 2024, and stated, *inter alia*, that:

-
- 6.1.9.1 The vacancy of Project Manager: Key Transport Infrastructure Projects post was advertised, and the entire submission was submitted to her for the final decision;
- 6.1.9.2 The HoD, Mr Dichaba recommended the appointment of Mr Nel, as indicated in the submission. She was not part of the technical administrative process and would also not interfere in the process. She would allow the administration, led by the HoD, to ensure that all the required administrative and regulatory prescripts are adhered to;
- 6.1.9.3 She was satisfied, upon receipt of the submission from Mr Dichaba, that Mr Nel qualified in all respects as indicated in the submission;
- 6.1.9.4 The following officials served as the selection and interview committee:
- (a) Mr Wolfe, (Chairperson);
 - (b) Ms Parker, (Technical Specialist, Ministry);
 - (c) Ms Jonkers, (Director, Civilian Secretariat); and
 - (d) Mr Marekwa and Ms Demas (Resource scribe and Technical Advisor).
- 6.1.9.5 The appointment of the selection and interview committee was done by the HoD, Mr Dichaba; and
- 6.1.9.6 All other candidates that were shortlisted for the interviews were contacted telephonically and they declined the invitation, and this was highlighted on the score sheets of the individual panel members.

*Response received from Mr Modisa, the Senior Legal Administration Officer:
Department of Transport, Safety and Liaison*

6.1.10 In an email dated 03 March 2024, the Public Protector raised the allegations with the Senior Legal Administration Officer, Mr Caleb Manapele Modisa (Mr Modisa). He responded through an email dated 14 March 2024, wherein he indicated, *inter alia*, as follows:

6.1.10.1 He would request the relevant information from the HR Unit and seek the intervention of the then HR Manager, Ms Lekwene, then revert to the Investigation Team as soon as possible; and

6.1.10.2 Despite numerous reminders by the Investigation Team to Mr Modisa in emails dated 13 April 2024, 02 May 2024, and 20 May 2024 respectively, and his undertaking to respond on 26 April 2024, no response was received.

Meeting held with the Senior Legal Administration Officer, Mr Modisa, and the Assistant Director: Corporate Services, Ms Kebuileng Lekwene

6.1.11 On 09 July 2024, the Investigation Team held a meeting with Mr Modisa and Ms Kebuileng Lekwene (Ms Lekwene), the Assistant Director: Corporate Services.

6.1.12 During the meeting, Ms Lekwene stated that she was the Acting Human Resources Manager at the time when Mr Nel was appointed to the post of Project Manager: for Key Transport Infrastructure Projects. She also stated, *inter alia*, as follows:

6.1.12.1 She telephonically contacted all five (05) shortlisted candidates and informed them about the date of the interviews;

6.1.12.2 All the candidates except Ms M confirmed their availability to attend the interviews;

- 6.1.12.3 All the candidates were contacted again on the day of the interview. Mr L and Mr B did not answer their phones; and
- 6.1.12.4 Only Mr T answered his phone and informed her that he was already in Kimberley for the interviews. However, he was contacted by someone from the Department who informed him that they had earmarked someone for the position, and he was upset that he had already travelled to Kimberley to attend the interview.
- 6.1.13 Mr Modisa stated that his decision to oppose the appointment of Mr Nel was informed by the fact that Mr Nel was the only candidate interviewed on the day for a senior position. Further, he was informed by Ms Lekwene that the other candidates were contacted by an official(s) of the Department and were informed that the Department had already earmarked someone (Mr Nel) for the same position. Ms Lekwene confirmed same.

Response from Mr Nel

- 6.1.14 The Public Protector issued an allegation letter dated 17 July 2024, to Mr Nel. He responded through a telephonic consultation with the Investigation Team on 17 July 2024 indicating that he would respond to the allegations in writing and would also provide a copy of his Senior Certificate.
- 6.1.15 Mr Nel responded to the allegations through an email dated 02 August 2024, and stated, *inter alia*, that:

"I categorically deny the allegations made against me in the complaint. I was appointed to the position of Project Manager: Key Infrastructure Projects on the basis of my response to an advert that required what I believe I indeed qualified for and had years of experience in.

Qualifications and Experience

I hold a National diploma in project management which I am of the view the advert required and I had over 20 years of experience in managing projects and project implementation, these include my days works at the then Department of Housing and local Government where I was responsible for both housing and CMIP projects, later worked at the Department of Health where I oversaw the successful building of the Abraham Essau Hospital this included the commissioning of the hospital, in Local Government I was the project Manager of a number of projects within the Pixley ka Seme District municipality including the application and establishment of a Human Settlements department that went on to implement the multi Million Rand project of Ouboks. This is the experience I believed was referred to in the Advert.

I am confident that my qualifications and experience make me well-suited to the role of Project Manager.

Interview Process

I was interviewed for the position by a panel of the Department that I never lobbied nor interacted with before the interviews. I believe that the interview process was fair and impartial, and that I was selected on merit.

Additional Information

As to the other allegations of friendship and undue pressure applied on officials I do believe is totally unfounded and driven by political jealousy which I believe one should not give any dignity to with a response.

I further need to state it for the record that the premier is indeed my leader my Comrade for years and that was never a secret, and has never requested Him to fight any of my personal battles let alone compromise himself for me.

I trust that this information is sufficient to address your concerns.

Matric Certificate

I passed my matric in 1989 in Ngangelizwe Senior Secondary School in Umtata (former Transkei) the Certificate's ink or print faded over the years and that resulted in the department of Transport requesting me to get confirmation of the Results which lead to me requesting the Department to issue me with a statement confirming my results. Which is what has been issued to you". (sic)

Response from Dr Saul

- 6.1.16 In a letter dated 17 July 2024, the Public Protector raised the allegations with Dr Saul, however, no response was received from him.

Response from the Northern Cape Economic Development Agency (NCEDA)

- 6.1.17 On 29 July 2024, the Public Protector requested a copy of Mr Nel's Senior Certificate from Mr Hendrik Louw (Mr Louw), the Chief Executive Officer of the Northern Cape Economic Development Agency (NCEDA). Mr Nel is currently employed by NCEDA.
- 6.1.18 On the same date, Mr Louw furnished the Investigation Team with a copy of the letter from the Northern Cape Department of Education signed by the Head

of the Examinations to Mr Nel, dated 08 December 2022, titled: '*Calculation of Aggregate: Senior Certificate*'. According to the Remarks section of the letter, the Head of Examinations stated the following:

- 6.1.18.1 Mr Nel passed the Senior Certificate examination with exemption;
 - 6.1.18.2 The application was received on 05 December 2022; and
 - 6.1.18.3 The certified statement would be issued within three (03) months.
- 6.1.19 On 30 July 2024, the Investigation Team in an email to NCEDA requested a copy of Mr Nel's Senior Certificate obtained from the Republic of Transkei. In response to the request, Mr Louw stated that NCEDA does not have the certificate from the Department of Education, Transkei on file.

Independently sourced information

- 6.1.20 According to the PB Verify Credit Bureau System dated 07 April 2020, Masiqhame Trading 737 Close Corporation (CC) with a registration number B2006/045724/23, registration date of 27 March 2006, Mr Nel and Dr Zamani Saul (Dr Saul), the Premier are listed as amongst four (04) others, as active directors. According to the business status, by April 2020, the CC was under the Annual Return (AR) Deregistration Process.
- 6.1.21 A further search of the CC on 16 July 2024, revealed that the CC is still active and in business, Mr Nel and Dr Saul are amongst the four (04) listed directors.

Response to the notice in terms of section 7(9)(a) of the Public Protector Act

- 6.1.22 On 08 August 2024 the Public Protector issued a notice in terms of section 7(9)(a) of the Public Protector Act (the Notice) to the functionaries of the

Department, Ms Vilakazi, the MEC of Social Development, Mr Vass, the MEC of COGHSTA affording them an opportunity to make representations regarding the intended findings and remedial action of the Public Protector.

Response from the HoD, Department of Transport, Safety and Liaison

6.1.23 Mr Pieterse, the Head of Department responded to the Notice in a letter dated 23 August 2024. In his response he acknowledged receipt of the findings, and the remedial action recommended by the Public Protector. He further stated, *inter alia*, that:

6.1.23.1 The Department would implement the recommendations of the Public Protector in terms of the Collective Agreement (PSCBC Resolution 1 of 2003) to remedy the conduct of the implicated officials;

6.1.23.2 Mr Wolfe, Ms Jonkers and Ms Parker are no longer employed by the Department. Mr Wolfe has retired, Ms Jonkers passed away and Ms Parker's fixed term contract with the Department expired on 31 July 2024; and

6.1.23.3 The MEC would inform the Premier of the steps to be taken against Ms Vilakazi, the erstwhile MEC, as stipulated in the findings and remedial action of the Public Protector.

Response from Mr Apie: Acting Chief Financial Officer

6.1.24 Mr Apie responded to the Notice in a letter dated 27 August 2024 and stated, *inter alia*, that:

6.1.24.1 He made a request though the Promotion of Access to Information Act, 2000 (PAIA) to the Department of Transport for a copy of the submission which implicated him. He still awaits a response and in the absence of same, his response would not be supported by documentation;

- 6.1.24.2 He was not part of the interviewing panel;
- 6.1.24.3 His involvement was limited to the confirmation of funds, as is the practise with all submissions that have financial implications;
- 6.1.24.4 He did not have any delegation/authority in terms of the appointment of personnel, either with the process or the actual appointment;
- 6.1.24.5 His signature was appended, before that of the Department's Legal Officer: Mr. Modisa, hence he was never privy to his comments. Even if he was privy to Mr Modisa's comments, he would still not have any delegations/authority to institute corrective action;
- 6.1.24.6 His signature was after the signatures of the co-ordinators of the recruitment process, Director: Corporate Services, who did not express any comments on the submission;
- 6.1.24.7 He was of the view that there is nothing in this matter, that would require the Head of the Department to institute corrective action against him; and
- 6.1.24.8 The Public Protector is requested to amend its report which recommends that corrective action be instituted against him.

Response from Ms Lekwene

- 6.1.25 Ms Lekwene responded to the Notice in a letter dated 30 August 2024 and stated, *inter alia*, that:
 - 6.1.25.1 The report of the Public Protector confirmed what she did regarding the task and the responsibility given to the Human Resource Administration which she represented;

-
- 6.1.25.2 After she completed her given responsibility, it then became the responsibility of the Interviewing Panel to decide whether it continued or discontinued with the process;
- 6.1.25.3 It was not her responsibility to decide upon any decision around the subject at hand because she was not an appointed member of the Interviewing Panel. She was providing administrative support;
- 6.1.25.4 Her responsibility was to call the candidates which she did, and she allowed the relevant Committee to decide because she was not an appointed member of the Panel. She did not attend any meeting(s) of the Interview Panel;
- 6.1.25.5 She does not take decisions at the Department except providing administrative support where necessary;
- 6.1.25.6 As an Assistant Director in Corporate Services, she has never been given powers to take decisions. In this case, she was never requested to provide advise;
- 6.1.25.7 Her concern in the remedial action is the exclusion of the Accounting Officer who recommended the submission of the Interviewing Panel to the Executive Authority;
- 6.1.25.8 She was ethical and provided an honest report back to the Interview Panel relating to the non-availability of the four candidates. There was no improper conduct on her relating to any role she performed during the recruitment and selection process in this matter;
- 6.1.25.9 The post was advertised nationally but failed to attract a number of interested persons because it was a twelve (12) month contract hence only six (06) applications were received by the Department; and

6.1.25.10 The irregularity of that arose from interviewing one candidate, however, it was the role and responsibility of the Interviewing Panel to have arrived at that decision and her view was never sought.

Applicable Law

The Constitution of the Republic of South Africa, 1996 (the Constitution)

6.1.26 Section 132(2) of the Constitution provides that *“the Premier of a Province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them”*.

6.1.27 Section 195(1) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution including, *inter alia*, the following principles:

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

(f) *Public administration must be accountable.*

(g) *Transparency must be fostered.*

The Public Service Act, 1994 (as amended)

Appointments and filling of posts –

6.1.28 Section 11 of the Public Service Act (PSA) provides as follows:

(1) *“In making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.*

-
- (2) *In the making of any appointment in terms of section 9 in the public service –*
- (a) *all persons who applied and qualify for the appointment concerned shall be considered; and*
- (b) *the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act 55 of 1998), the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.*
- (3) *Notwithstanding the provisions of subsection (2), the relevant executing authority may, subject to the prescribed conditions, approve the appointment, transfer or promotion of persons to promote the basic values and principles referred to in section 195(1) of the Constitution”.*

6.1.29 Section 5(7)(a) of the PSA states that a functionary shall correct any action or omission purportedly made in terms of this Act by that functionary if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission.

6.1.30 Section 16A(2)(a) of the PSA states that “*the Head of a Department shall immediately take appropriate disciplinary steps against an employee of the Department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder*”.

The Public Service Regulations, 2016

- 6.1.31 Regulation 57(2)(a)(b) and (c) of the Public Service Regulations (PSR) provide that, *“an executive authority may, unless otherwise authorized by the Act, within the available budget and at a salary level linked to a grade determined through job evaluation or as determined in an OSD, employ persons additional to the establishment, where —*
- (a) the incumbent of a post is expected to be absent for such a period that his or her duties cannot be performed by other employees;*
 - (b) a temporary increase in work occurs or it is necessary for any other reason to temporarily increase the staff of the department;*
 - (c) an employee’s post has been abolished and he or she cannot be transferred into another post; or*
 - (d) an employee is part of a development programme as contemplated in regulation 58”.*
- 6.1.32 Regulation 57(3) of the PSR provides that *“before making a decision on an appointment of a person additional to the establishment, an executive authority shall —*
- (a) satisfy himself or herself that the person qualifies in all respects for the position and that his or her claims in his or her application for the position have been verified; and*
 - (b) record that verification in writing”.*
- 6.1.33 Regulation 67 of the PSR provides that *“an executive authority shall appoint a selection committee to make a recommendation on the appointment to a post. The selection committee shall consist of at least three members who are employees of a grade equal to or higher than the grade of the post to be filled*

or suitable persons from outside the public service. It provides specifically in regulation 67 that ...

- (1)(a) *the chairperson of the selection committee, who shall be an employee, shall be of a grade higher than the post to be filled...*

- (5) *The selection committee shall make a recommendation on the suitability of a candidate after considering only –*
 - (a) *information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;*
 - (b) *the inherent requirements of the post;*
 - (c) *the department's employment equity plan as contemplated in regulation 27;...*

- (7) *If the selection committee is unable to recommend a suitable person for appointment from those who applied in terms of sub regulation (5), the executive authority may, after that selection process has been completed, approve the head-hunting of one or more persons with the requisite competencies and subject such person or persons to the same selection process as those who applied.*

- (8) *If an executive authority does not approve a recommendation of a selection committee, he or she shall record the reasons for his or her decision in writing.*

- (9) *Before making a decision on an appointment or the filling of a post, an executive authority shall –*
 - (a) *satisfy herself or himself that the candidate qualifies in all respects for the post and that his or her claims in his or her application for the post have been verified as directed by the Minister; and*

(b) record that verification in writing”.

The Northern Cape Provincial Administration Recruitment and Selection Policy, 2018

- 6.1.34 In terms of paragraph 7(b) of the *Northern Cape Provincial Administration Recruitment and Selection Policy* (RSP), one of the objectives of the Policy, is to ensure that recruitment and selection is done in a fair, efficient, effective, transparent, and equitable manner.
- 6.1.35 According to paragraph 9A of the RSP, departments must ensure that all funded vacant posts that have been subjected to job evaluation (permanent, fixed term contract) are so advertised as to reach, as efficiently and effectively as possible, the entire pool of potential applicants, especially historically disadvantaged persons, and persons with a disability. A funded vacant post shall be advertised within six (6) months after becoming vacant and be filled within twelve (12) months.
- 6.1.36 Paragraph 9C(i) and (iii) of the RSP provides that the re-advertisement of a vacancy should be done for good reasons, these include:
- (i) No suitable candidate could be found, this is subject to a fair process of selection having been applied.
 - (iii) A long delay in finalizing the selection process due to various unforeseen Departmental circumstances, resulting in candidates no longer being available.
- 6.1.37 Paragraph 9E(a) of the RSP relating to the screening of candidates, states as follows:

-
- (i) *After the closing date, the application documents should be screened to determine whether applicants comply with the basic criteria laid down in the advertisement. During this phase candidates who do not comply with the minimum advertised requirements may be eliminated with noting of reasons, resulting in a preliminary selection pool.*
- (ii) *In case of a negative screening outcome, the Security Management or relevant Unit must advise the Executive Authority/Delegated official on the implications of a negative result, and it will be the discretion of the Executive Authority/Delegated official to effect appointment or decide not to appoint such a candidate with a negative record”.*

6.1.38 Paragraph 9E(b) of the RSP which relates to shortlisting provides as follows:

- (i) *All shortlisted candidates shall be subjected to a pre-employment screening process, which shall include the following:*
- (d) *qualification/study verification; and*
- (ii) *.....*
- (iii) *The short-listing process should be compiled on the basis of a uniform methodology and strong emphasis should be placed on the information supplied in a candidate's Curriculum Vitae (CV) and in the application form, as measured against the advertised requirements. Any information from other sources should not be considered as it may unfairly benefit or disadvantage an applicant in relation to the others....*
- (vi) ***The executive authority/delegated official must approve the short-listed candidates.*** (Own emphasis)

- 6.1.39 According to Paragraph 9E(c)(i) of the RSP, the interview panel shall comprise of the same panel appointed by the Executive Authority/delegated official that conducted the shortlisting.
- 6.1.40 Paragraph 9H(ii)(a) and (b) of the RSP provides that, before deciding on an appointment of a person additional to the establishment, an executive authority must satisfy himself or herself that the person qualifies in all respects for the position and that his or her claims in his or her application are verified and record that verification is in writing.
- 6.1.41 Paragraph 13 of the RSP indicates that it is the responsibility of each Head of Department to ensure that this policy is carefully followed within their respective Departments.

Case law

- 6.1.42 The appointment of candidates without appropriate qualifications was dealt with by the court in the matter of *Khumalo and Another v Member of the Executive Council for Education*³, *Kwazulu-Natal 2014 (5) SA-579 (CC)* the court held, *inter alia*, that:
- 6.1.42.1 The rule of law is a founding value of our constitutional democracy and that it is the duty of the Courts to insist that the State, in all its dealings, operates within the confines of the law and in so doing, remains accountable to those on whose behalf it exercises power. It was held that:

“[t]he supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, we are thus required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights”.

³ (CCT 10/13) [2013] ZACC 49, at par 61 and 62

6.1.42.2 Reference was also made to section 195 of the Constitution which compelled the MEC, in the public interest, to avoid and eliminate illegalities in public administration and the fact that the MEC was not only entitled but also duty-bound to set aside irregular administrative acts. It was held that:

“[35] Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues...”

[62] Section 11 of the PSA must be read in the context of the state’s obligations under section 195(1)(i) of the Constitution and the right to fair labour practices under section 23 of the Constitution. Section 195(1)(i) stresses the importance of ensuring that appointment processes in the public sector are based on ability, objectivity, and fairness. Fairness in employment practices and labour relations requires the state to be even-handed and transparent not only to those whom it employs but also to those who may wish to apply for employment at a state institution.

It would not be fair if the state were to employ persons who do not meet the very requirements that the state itself sets. It is neither fair nor in compliance with the dictates of transparency and accountability for the state to mislead applicants and the public about the criteria it intends to use to fill a post. The formulation and application of requirements for a particular post is a minimum prerequisite for ensuring the objectivity of the appointment process. Persons who do not meet the requirements for a post in the public sector ought not to be appointed.

[63] *However, the fairness of the decision will typically be weighted heavily on the process and justification of the decision-makers. This would be in line with the interpretation offered by the MEC of section 11(3) to require justifications to be given for departing from the requirements. Section 11(3) allowed for the approval by an executing authority of a promotion to promote the basic values and principles in section 195(1) of the Constitution. The values in section 195(1) may, therefore, call for the approval of a person whose appointment would, for example, promote a more efficient, economic and effective use of resources; maximise the human-resource potential in the institution; or provide for greater representativeness. The rationality of an approval of this nature would largely depend on the reasons of the executing authority”.*

6.1.43 In *Hunter v Financial Sector Conduct Authority and Others*⁴ the Constitutional Court held that the principles highlighted in the *Khumalo* case correctly and logically implies that there is a legal duty to investigate potential, as yet unproven, unlawful conduct. In short, whenever the attention of a responsible functionary is drawn to a potential irregularity, they have a duty to launch a proportionate investigation into it.

Analysis

6.1.44 The evidence before the Public Protector indicates that the Department advertised the post of Project Manager: Key Transport Infrastructure Projects, with a closing date of 23 November 2018. According to the undated long list, six applications were received by the Department. It is evident from the long list that none of the applicants complied with the basic criteria of the advertisement, as supporting documents were not attached. In respect of Mr

⁴ 2018 ZACC 31

Nel, the long list also indicates that he did not attach relevant qualifications to his application.

- 6.1.45 The Department had a concomitant responsibility to make a determination on how to proceed in light of the non-compliance of all applicants with the basic criteria in terms of paragraph 9E(a)(i) of the RSP which provides that following the screening candidates who do not comply with the minimum advertised requirements may be eliminated with noting of reasons. There is no evidence to support how the Department elected to proceed to shortlist five candidates and eliminate one from the shortlist, taking cognizance of the overall non-compliance.
- 6.1.46 Furthermore, no evidence was provided to the Public Protector, such as the minutes of the shortlisting committee reflecting, how the shortlisting process was undertaken, or that approval of the shortlisted candidates by the executive authority was obtained. This casts doubt as to whether shortlisting took place in accordance with paragraph 9E(b)(vi) of the RSP which provides that the executive authority/delegated official must approve the shortlisted candidates.
- 6.1.47 The evidence before the Public Protector indicates that the Chairperson of the Interviewing Panel, Mr Wolfe was a director in the department, which is the same level as the post to be filled by the candidate they were interviewing, contrary to the provision of Paragraph 9E(iii) of the RSP which requires that the panel must be chaired by an employee of a grading higher than the post to be filled. In the circumstances, the panel was not properly constituted in accordance with clause 67(1)(a) of the PSR.
- 6.1.48 The evidence further indicates that only Mr Nel was interviewed for the post on the basis that other candidates declined the invitation to the interviews as submitted by Ms Lekwene. She further advised that she called all the candidates on the day of the interview, two of the candidates did not answer

and another indicated that he had lost interest in the position as he was informed by someone purporting to be from the Department, that a particular person had already been earmarked for the position. The conduct of the interviewing panel in proceeding to interview only Mr Nel, was in conflict with the objectives of paragraph 7(b) of the RSP, which provides that recruitment and selection must be done in a fair, efficient, effective, transparent, and equitable manner.

- 6.1.49 Evidence reveals that Mr Crouch and the interview panel members namely, Mr Wolfe, Ms Parker, Ms Jonkers, and Mr Apie recommended the appointment of Mr Nel to Ms Vilakazi. It is evident in the submission that Mr Modisa objected to the appointment of Mr Nel and implored the Department to readvertise on the basis that it was a senior position and to interview one candidate rendered the whole process flawed.
- 6.1.50 Nevertheless, Mr Dichaba proceeded to recommend the appointment of Mr Nel with effect from 01 January 2020, stating that a re-advertisement would not attract other candidates due to a lack of job security. Having considered the submission in its totality, including Mr Modisa's input on the flawed process, Ms Vilakazi approved the appointment of Mr Nel on 17 December 2019.
- 6.1.51 Regulation 67(5) of the PSR, 2016 places an obligation on the selection committee to only make a recommendation on the suitability of a candidate after considering information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination as well as the inherent requirements of the post.
- 6.1.52 Ms Vilakazi's submission to the Investigation Team that she placed reliance on Mr Dichaba to facilitate the administrative process and recommend the appointment of Mr Nel, is contrary to the provisions in Regulation 57(3)(a) of

the PSR, 2016 and Paragraph H(ii)(a) and (b) of the RSP which placed an obligation on her as the executive authority, before deciding on an appointment of a person additional to the establishment, to satisfy herself that the person she intended to appoint qualifies in all respects for the position, the contents of his application for the post have been verified and to record the verification in writing.

- 6.1.53 Ms Vilakazi further stated that upon receipt of the submission from Mr Dichaba, she was satisfied that Mr Nel qualified in all respects “*as indicated in the submission*”. However, upon perusal of the appointment memorandum, the Public Protector notes that no reference was made to Mr Nel’s qualifications or the fact that he qualified for the post. Furthermore, the submission does not reflect an evaluation of the candidates’ suitability, therefore Ms Vilakazi’s submission to the Public Protector is not supported by evidence.
- 6.1.54 Ms Vilakazi approved the recommendation without reservation, despite the obligations placed on her by section 195 to investigate and, if need be, to correct any unlawfulness when she was enlightened of a potential irregularity. The duty is premised on the principles of accountability and transparency in sections 195(1)(f) and (g) of the Constitution which enjoins public administration to maintain a high standard of professional ethics.
- 6.1.55 This was echoed in the matter of Hunter, where the Constitutional Court highlighted the principles in the Khumalo case that there is a legal duty to investigate potential, yet unproven, unlawful conduct, specifically in instances where the attention of a responsible functionary is drawn to a potential irregularity, they have a duty to launch a proportionate investigation into it.
- 6.1.56 The Public Protector notes with concern Ms Vilakazi’s contention that she was not part of the technical administrative process and would also not interfere in same is contradictory to the obligations placed on her in terms of section 195

of the Constitution, which requires her as the executive authority to correct and redress any irregularity in the public administration within her oversight.

- 6.1.57 Section 16A(2)(a) of the PSA, places an obligation on the Head of a Department to immediately take appropriate disciplinary steps against an employee of the Department who does not comply with a provision of the PSA, or a regulation, determination, or directive made.
- 6.1.58 In this instance, the Human Resources functionaries, the shortlisting and interviewing panel, Mr Dichaba and Ms Vilakazi had an obligation to ensure that they comply with the Public Service prescripts and the departmental policy in the recruitment process that resulted in the appointment of Mr Nel, who did not meet the inherent requirements of the post.
- 6.1.59 The evidence before the Public Protector reflects that it took the department over a year from the date when the post was advertised to effect the appointment. According to paragraph 9A of the RSP, departments must ensure that a funded vacant post shall be advertised within six (06) months after becoming vacant and be filled within twelve (12) months. In this instance, it took the department longer than the prescribed period to fill the post.
- 6.1.60 Regarding the allegation that there was extreme pressure to shortlist and appoint Mr Nel, as he was the Premier's best childhood friend and business associate, the evidence at the Public Protector's disposal indicates that as at 16 July 2024 Mr Nel, Mr Pieterse and Dr Saul were in a business relationship. According to the evidence before the Public Protector, on 15 October 2018 the former Premier, Ms Lucas approved the request for the filling of the post for Project Manager: Key Infrastructure Projects additional to the establishment. The post was advertised in November 2018 prior to the appointment of Dr Saul as Premier of the Northern Cape Province, on 22 May 2019. Therefore, the recruitment process had already commenced at the time Dr Saul assumed office.

- 6.1.61 The Public Protector acknowledges that the private interest of an official assumes a public dimension only if and when it impinges on or is perceived to impinge on some action or decision the official must take in the course of duty. If this occurs, the official becomes 'conflicted' and must promptly consider the proper ethical path to take in the particular case.
- 6.1.62 In this case, Dr Saul was not a decision-maker or even remotely involved in the selection and recruitment process and there is no basis to conclude that any perceived or actual conflict arose out of the business relationship.
- 6.1.63 The Public Protector notes from the response of Mr Pieterse to the Notice that he accepted the findings and recommendations and indicated that Mr Wolfe, Ms Jonkers and Ms Parker were no longer in the employ of the Department. Furthermore, he committed to taking the necessary corrective action in line with the Collective Agreement.
- 6.1.64 In his response to the Notice, Mr Apie contended that he was not involved in the recruitment process save to confirm the availability of funds in line with his responsibilities as the Acting CFO. At the time he appended his signature to the recommendation for appointment, the co-ordinators of the recruitment process i.e. the Directors: Corporate Services, Transport Regulations and Civilian Secretariat who had recommended the appointment of Mr Nel did not make any comments that would have alerted him to any possible irregularities. He was not privy to the reservations expressed by Mr Modisa in the appointment submission, as they were only made after he had signed. In the circumstances, the Public Protector could not find any evidence to suggest that his involvement related to more than the confirmation of available funds, within the purview of his responsibilities.
- 6.1.65 The Public Protector notes from the response of Ms Lekwene that despite her averment that her responsibility was only limited to providing administrative

support she had an obligation in her capacity as the Acting HR Manager and custodian of the recruitment process to advise the interview panel that due to the unavailability of the four candidates, an irregularity would arise from continuing to interview only one candidate.

- 6.1.66 The conduct of the Interview panel to interview only one candidate who did not qualify for the post was in conflict with the objectives set out in paragraph 7b of the RSP which seek to ensure that recruitment and selection is done in a fair, efficient, effective, transparent, and equitable manner.
- 6.1.67 The Public Protector further notes with concern the submission by Mr Modisa and Ms Lekwene in the meeting with the Investigation Team that one candidate who was already in Kimberley for the interviews alleged to have been contacted by an official from the Department advising that someone was already earmarked for the position, resulting in the candidate withdrawing from the interviews. The decision by the Interview panel to proceed with interviews under such circumstances was in contravention section 195(1)(a) of the Constitution which enjoins functionaries of the state to promote and maintain a high standard of professional ethics.

Conclusion

- 6.1.68 Having considered the evidence before the Public Protector and the legal prescripts applicable thereto, it is concluded that the appointment of Mr Nel by the Department was irregular in that the recruitment process was flawed. None of the candidates complied with the basic criteria for the advertised post, however, the Department proceeded with the shortlisting and interview of Mr Nel even though he did not meet the inherent minimum requirements for the post as outlined in the advertisement. In addition, the interviewing panel was not properly constituted as the Chairperson was on the same grade as the post to be filled, contrary to the PSR, 2016 which require that he should be of a

grade higher than the post to be filled. Furthermore, only one person was interviewed.

7. FINDINGS

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

7.1.1 Whether Ms Vilakazi, the erstwhile MEC of the Northern Cape Transport, Safety and Liaison and its functionaries, appointed Mr Hasting Farrington Nel as Project Manager: Key Infrastructure Projects without following the prescribed recruitment process, 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

7.1.1.1 The allegation that the appointment of Mr Nel as Project Manager: Key Infrastructure Project by the MEC and the functionaries of the Northern Cape Department of Transport, Safety, and Liaison without following the prescribed recruitment process, **is substantiated**.

7.1.1.2 The shortlisting, interviewing, recommendation, and appointment of Mr Nel who did not meet the minimum requirements as set out in the advertisement was irregular. In terms of the criteria set out in the advert, Mr Nel did not qualify and ought not have been shortlisted and appointed.

7.1.1.3 There is no record confirming that the shortlisted candidates were approved by the executive authority or delegated authority, as required by the RSP.

-
- 7.1.1.4 The selection panel chaired by Mr Wolfe was not constituted in accordance with regulation 67(1)(a) of the PSR, 2016, which requires the Chairperson to hold a position above the advertised post.
- 7.1.1.5 Ms Vilakazi's reliance on Mr Dichaba to facilitate the administrative process and recommend the appointment of Mr Nel, is contrary to the provisions in Regulation 57(3)(a) of the PSR, 2016 and Paragraph H(ii)(a) and (b) of the RSP which placed an obligation on her as the executive authority, before deciding on an appointment of a person additional to the establishment, to satisfy herself that the person she intended to appoint qualifies in all respects for the position, the contents of his application for the post have been verified and to record the verification in writing.
- 7.1.1.6 The Public Protector could not establish any evidence confirming that Dr Saul pressured the functionaries of the Department to appoint Mr Nel. The Public Protector found that the recruitment process in question was initiated during the tenure of Ms Lucas as Premier, in 2018, prior to Dr Saul's appointment.
- 7.1.1.7 The conduct of all the functionaries of the Department involved in this recruitment process was in contravention of the PSA, PSR, and the RSP. The conduct of Ms Vilakazi did not comply with the provisions of section 195(1) of the Constitution and section 11(1) of the PSA. The conduct is not consistent with the democratic values and principles governing good public administration as enshrined in the Constitution.
- 7.1.1.8 The conduct of the Departmental functionaries accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

8. REMEDIAL ACTION

- 8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this report.
- 8.2 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*, the Constitutional Court per Mogoeng, CJ held that the remedial action taken by the Public Protector has a binding effect.
- 8.3 Although the Public Protector made adverse findings against Mr Dichaba, Mr Wolf, Ms Jonkers and Ms Parker, any remedial action that the Public Protector might have taken against them, would serve no judicious purpose as Mr Dichaba and Mr Wolfe have retired, Ms Jonkers is deceased, and Ms Parker is no longer in the employ of the Department.
- 8.4 Having regard to the evidence, the regulatory framework determining the standard that the Department should have complied with, the Public Protector is taking the following remedial action in terms of section 182(1)(c) of the Constitution:

Premier of the Northern Cape

- 8.4.1 Take cognizance of the report and take appropriate action against Ms Vilakazi for her role in the irregular appointment of Mr Nel as the Project Manager: Key Infrastructure Projects, in terms of section 132(2) of the Constitution.

The Member of the Executive Council for COGHSTA, Roads and Transport

8.4.2 Take cognisance of the findings and remedial actions contained in this report.

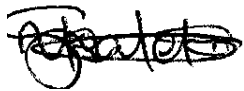
The Head of the Department

8.4.3 Within **thirty (30) calendar days** from the date of this report, take corrective action against Ms Lekwene, the then Acting HR Manager involved in the irregular appointment of Mr Nel, in terms of the disciplinary procedures of the Department in line with section 16A(2)(a) of the PSA.

9. MONITORING

9.1 The Head of Department to submit an action plan to the Public Protector **within thirty (30) calendar days** from the date of this report on the implementation of the remedial action referred to in paragraph 8 above.

9.2 The submission of the implementation plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 30 SEPTEMBER 2024

Assisted by: Mr Mlungisi Khanya
Northern Cape Provincial Representative