

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



REPORT NUMBER: 01 of 2023/24

ISBN NUMBER: 978-1-991244-33-8

**INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT,
MALADMINISTRATION AND SUBSEQUENT VICTIMISATION OF MR MC MUFAMADI
BY THE FUNCTIONARIES OF THE DEPARTMENT OF MILITARY VETERANS FOR
REPORTING THE IRREGULAR APPOINTMENT OF THE DEPUTY DIRECTOR: RISK
MANAGEMENT**

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LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYM / ABBREVIATION	DESCRIPTION
Constitution	Constitution of the Republic of South Africa, 1996
DMV	Department of Military Veterans
DMV's Recruitment Policy	DMV's Human Resource Management's Recruitment and Selection policy, 2013/2014
E-mail	Electronic mail correspondence
Investigation Team	Public Protector's Investigation Team
PDA	Protected Disclosures Act, 2000
Amendment Act	Protected Disclosures Amendment Act, 2017
Public Protector Rules	Rules relating to investigations by the Public Protector and Matters Incidental Thereto, 2018, (as amended)
PSA	Public Servants Association
Public Protector Act	Public Protector Act, 1994
Public Protector	Public Protector South Africa
Regulations	Public Service Regulations, 2001

EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of 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, 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, maladministration and subsequent victimisation of Mr MC Mufamadi (the Complainant) by the functionaries of the Department of Military Veterans (DMV) for reporting irregularities in the appointment of Ms A Ntlabati (Ms Ntlabati) to the post of Deputy Director: Risk Management at the DMV.
- (iii) The complaint was lodged with the Public Protector by the Complainant on 26 November 2020.
- (iv) In the main, the Complainant alleged that he was subjected to occupational detriment as a result of a protected disclosure that he made to Mr Mgwebi, the Director General of the DMV, regarding the alleged irregular appointment of Ms Ntlabati to the post of Deputy Director: Risk Management, by the DMV.
- (v) Based on the analysis of the complaint, the following issues were considered and investigated:
 - (a) Whether the Complainant was subjected to occupational detriment as contemplated by the Protected Disclosures Act, 2000, as a result of a protected disclosure made to Mr Mgwebi regarding the alleged irregular appointment of Ms Ntlabati to the post of Deputy Director: Risk Management,

and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to abuse or unjustifiable exercise of power in terms of section 6(4)(a)(ii) of the Public Protector Act; and

- (b) Whether the functionaries of the DMV irregularly appointed Ms A Ntlabati to the position of Deputy Director: Risk Management, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4)(a) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.
- (vii) On 27 February 2023 a notice in terms of rule 41(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2020* (the Public Protector Rules), relating to issue (a) above was sent to the Complainant affording him an opportunity to provide representations to the Public Protector's intention to conclude the investigation. Rule 41(1) of the Public Protector Rules provides that when the Public Protector intends concluding a complaint by means of a Closing Report, the Complainant shall be informed in writing and be provided an opportunity to make representations regarding same.
- (viii) No response was received from the Complainant. The Complainant was called on 28 February 2023, 05 May 2023 and 23 May 2023, in all telephonic communications he acknowledged receipt of the notice in terms of rule 41(1) of the Public Protector Rules and indicated that he will send a formal written acknowledgement but failed to do so. Subsequently, no response was received from him regarding the notice in terms of Rule 41(1) of the Public Protector Rules.

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- (ix) On 04 May 2023 notices in terms of section 7(9)(a) of the Public Protector Act were issued to the DMV for the attention of the Deputy Director General, Ms Nontobeka Mafu (Ms Mafu); the Minister of Defence and Military Veterans, Ms Thandi Modise; the Complainant; Ms Ntlabati, and on 10 May 2023 to the acting Director General Mr Mosiwa Hlongwane (acting Director General) to provide them with an opportunity for a response on the likely adverse findings and proposed remedial action. Sections 7(9)(a) of the Public Protector Act provides that persons implicated in an investigation by the Public Protector, are to be allowed an opportunity to make representations regarding same.
- (x) An acknowledgment was received from Ms Ntlabati on 08 May 2023 and from the office of Ms Mafu and the office of the acting Director General on 10 May 2023. Through a telephonic consultation with the Public Protector Investigation Team (Investigation Team) on 05 May 2023, Mr Motumi, the Chief of Staff in the office of the Minister of Defence, indicated that he will acknowledge receipt, however he has not done so, despite a reminder being forwarded to him on 10 May 2023. Ms Ntlabati, through a telephonic consultation on 23 May 2023, advised that the acting Director General will respond on her behalf as she was appointed by the institution. On 24 May 2023, correspondence was received from the office of the acting Director General, advising that they do not have any inputs or amendments to the section 7(9)(a) notice of the Public Protector.
- (xi) Having regard to the evidence and regulatory framework determining the standard that the DMV should have complied with, the following findings are made:
- (a) **Whether the Complainant was subjected to occupational detriment as contemplated by the Protected Disclosures Act, 2000 as a result of a protected disclosure made to Mr Mgwebi regarding the alleged irregular appointment of Ms Ntlabati to a post of Deputy Director: Risk Management, and if so, whether such conduct was improper as**

envisaged in section 182(1)(a) of the Constitution and amounted to abuse or unjustifiable exercise of power in terms of section 6(4)(a)(ii) of the Public Protector Act.

- (aa) The Public Protector conducted a preliminary investigation into the matter in terms of section 7(1) of the Public Protector Act, with a view to determine the merits of the matter and the manner in which it should be dealt with. On analysis of the merits of the matter, it was subsequently established that it fell outside the jurisdiction of the Public Protector.
- (bb) On the strength of the evidence obtained during the preliminary investigation, it is evident that the Commission for Conciliation Mediation and Arbitration (CCMA), the relevant Labour Council if any and/or the Labour Court are best suited to deal with this matter, as it relates to an *unfair labour practice* dispute between the parties.
- (cc) In the circumstances, the Public Protector finds that the nature of the dispute between the Complainant and DMV regarding occupational detriment as a result of a disclosure made is one that may be appropriately ventilated through the systems and fora established in terms of the Labour Relation Act (LRA). In the circumstances, no determination could be made by the Public Protector in terms of section 182(1)(a) of the Constitution as well as in terms of section 6(4)(a)(ii) of the Public Protector Act.
- (b) **Whether the functionaries of the DMV irregularly appointed Ms A Ntlabati to the position of Deputy Director: Risk Management, and if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

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- (aa) The allegation that the functionaries of the DMV irregularly appointed Ms A Ntlabati to the position of Deputy Director: Risk Management, is substantiated.
- (bb) On the strength of the evidence, placed before the Public Protector, it is apparent that at the time of her appointment, Ms Ntlabati did not possess the relevant academic qualifications as required in the advertisement of the post for Deputy Director: Risk Management by DMV.
- (cc) It is further revealed by evidence that the selection criteria that appears in the minutes of the shortlisting proceedings, dated 28 November 2019, was later modified and is different from the advertisement and the selection criteria stated on the submission to obtain approval from Mr Mgwebi, dated 12 December 2019.
- (dd) Based on the above discrepancies, the Public Protector finds that the appointment of Ms Ntlabati to the post of Deputy Director: Risk Management was not in line with the requirements of the post as advertised, as well as the selection criteria, as stated in the minutes of the selection panel. As a result, the conduct of the functionaries of the DMV in the circumstances is not compatible with the standards and principles imposed by section 195 of the Constitution, which requires fairness, equality, transparency and merit within the public administration.
- (ee) The conduct of the functionaries of the DMV is also at variance with the provisions of Paragraph 4.3 of the DMV's Recruitment Policy, which requires that candidates who do not comply with the minimum advertised requirements must be eliminated during the shortlisting phase. Equally, the conduct of DMV is at odds with the provisions of Regulation 67(5) of the Public Service Regulations, 2016, which requires the selection committee to make a recommendation on the suitability of a candidate after considering only

information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination.

- (ff) In the circumstances, the conduct of the functionaries of the DMV in appointing Ms Ntlabati to the post of Deputy Director: Risk Management, amounts to improper conduct in terms of section 182(1) of the Constitution and maladministration as contemplated by section 6(4)(a)(i) of the Public Protector Act.
- (xii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, is the following:

The Minister of Defence and Military Veterans

- (a) Take cognisance of the report and ensure implementation of the remedial action.

The Acting Director-General of the DMV

- (a) Within **ninety (90) calendar days** from the date of the receipt of the final report, take action to address the irregular appointment of Ms Ntlabati in the post of the Deputy Director, Risk Manager, in conformity with:
- (i) Section 5(7)(a) of the Public Service Act, 1994, or
- (ii) Take any other steps provided for in section 158(1)(h) of the LRA;
- (b) Ensure that future appointments are made in compliance with the Public Service Act, Regulations and DMV's Human Resources Recruitment and Selection Policy.

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 section 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation to affected parties (including the Complainant) for such persons to note the outcome of the investigation and to implement the remedial action, where applicable. The report is submitted to:

1.2.1 Mr Mosiwa Hlongwane, Acting Director General of the DMV; and

1.2.2 Ms Thandi Modise, Minister of Defence and Military Veterans.

1.3 A copy of the report is also provided to Mr Mufamadi, the Complainant in this matter.

1.4 The report relates to a complaint regarding allegations that Mr Mufamadi was subjected to occupational detriment as a result of a protected disclosure that he made to the Acting Director General of the DMV, Mr Mgwebi (Mr Mgwebi) regarding the alleged irregular appointment of Ms Ntlabati to a post of Deputy Director: Risk Management; and that the DMV irregularly appointed Ms Ntlabati to the position of Deputy Director: Risk Management.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector by Mr Mufamadi (the Complainant), on 26 November 2020. The Complainant alleged that:

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- 2.1.1 On 26 November 2020, the Public Service Association (PSA) wrote a letter to Mr Mgwebi informing him of allegations of improper conduct and irregularities during the shortlisting phase in the appointment process for the post of Deputy Director: Risk Management;
- 2.1.2 It was alleged by the PSA that Ms Z Gcasamba (Ms Gcasamba), the Chief Audit Executive who was at the time on maternity leave, made herself available for the shortlisting process to “*smuggle the appointment*” of a particular candidate that did not meet the requirements of the advertisement to occupy the position in question;
- 2.1.3 During the time of recruitment for the post of Deputy Director: Risk Management, he (the Complainant) had delegated authority to occupy the position of Acting Chief Audit Executive;
- 2.1.4 On 13 October 2020, he “*blew the whistle*” by submitting a letter to Mr Mgwebi informing him of the alleged irregular appointment of Ms Ntlabati to the post of Deputy Director: Risk Management within DMV, as Ms Ntlabati did not meet the necessary academic qualifications for the position as stated in the advertisement;
- 2.1.5 He was subsequently subjected to an occupational detriment, abuse of power and victimisation by Ms Gcasamba for blowing the whistle and raising the issue of irregular appointment with Mr Mgwebi as the accounting officer of the DMV at that stage; and
- 2.1.6 On 30 October 2020, he was served with a notice of intention to take disciplinary action against him, on the basis of a letter he addressed to Mr Mgwebi. The notice of intention to take disciplinary action against him was issued by Ms

Gcasamba, who is alleged to have been involved in the irregular appointment of Ms Ntlabati.

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, 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 DMV is an organ of state and its conduct amounts to conduct in state affairs, as a result, the Public Protector is satisfied that the complaint falls within

her competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and sections 6(4) of the Public Protector Act.

4. ISSUES IDENTIFIED FOR INVESTIGATION

4.1 Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.1.1 Whether the Complainant was subjected to occupational detriment as contemplated by the Protected Disclosures Act, 2000, as a result of a protected disclosure made to Mr Mgwebi regarding the alleged irregular appointment of Ms Ntlabati to the post of Deputy Director: Risk Management, if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to abuse or unjustifiable exercise of power in terms of section 6(4)(a)(ii) of the Public Protector Act; and

4.1.2 Whether the DMV irregularly appointed Ms A Ntlabati to the position of Deputy Director: Risk Management, if so, whether such conduct was improper as envisaged in section 182(1)(a) of the Constitution and amounted to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

5. THE INVESTIGATION

5.1 The Investigation Process

5.1.1 The investigation included an exchange of documents between the Public Protector and DMV, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2 Methodology

5.2.1 The investigation was conducted in terms of section 182 of the Constitution and Sections 6 and 7 of the Public Protector Act.

5.2.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

5.3 Approach to the investigation

5.3.1 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, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?

5.3.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct was inconsistent with the applicable prescripts.

5.3.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the DMV.

5.3.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration.

5.4 **Key sources of information**

5.4.1 **Documents and correspondence**

5.4.1.1 Ms Ntlabati's application for employment, dated 05 September 2019;

5.4.1.2 Advert for the post of Deputy Director: Risk Management with Closing date: 06 September 2019;

5.4.1.3 Minutes of shortlisting, dated 28 November 2019;

5.4.1.4 Memorandum of request for approval of selection board, dated 03 December 2019;

5.4.1.5 Submission to approve the filling of the advertised post, dated 18 December 2019;

5.4.1.6 Appointment letter of Ms A Ntlabati, dated 18 December 2019;

5.4.1.7 Memo of acceptance of post and assumption of duty of Ms Ntlabathi, dated 14 January 2020;

5.4.1.8 E-mail request from Ms Gcasamba for a meeting with Mr Mufamadi to discuss his defence, dated 05 August 2020;

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- 5.4.1.9 Annual performance assessment of Mr Mufamadi, dated 15 September 2020;
 - 5.4.1.10 Letter from Complainant to the Acting Deputy Director General Mr Mgwebi, dated 13 October 2020;
 - 5.4.1.11 Notice by DMV to take disciplinary action against the Complainant, dated 30 October 2020;
 - 5.4.1.12 Grievance of victimisation raised by Mr Mufamadi, dated 06 November 2020;
 - 5.4.1.13 E- mail from Labour Relations to Mr Mufamadi, dated 06 November 2020;
 - 5.4.1.14 E-mail from Labour Relations to Mr Mufamadi, dated 24 November 2020;
 - 5.4.1.15 Complaint received by the Public Protector from the Complainant on 26 November 2020;
 - 5.4.1.16 Letter from Labour Relations to Mr Mgwebi, dated 30 November 2020;
 - 5.4.1.17 Notice of resolution of the grievance, dated 14 December 2020;
 - 5.4.1.18 E-mail response sent from Ms Gcasamba to Labour Relations, dated 15 December 2020;
 - 5.4.1.19 Allegations letter from the Public Protector to the DMV, dated 21 January 2021;
 - 5.4.1.20 Letter from the PSA to the Acting Director General Mr Mgwebi, dated 08 March 2021;
 - 5.4.1.21 E-mail from Labour Relations to Mr Mufamadi that his grievance is closed, dated 17 March 2021;
 - 5.4.1.22 Mr Mufamadi's grievance, dated 23 March 2021;

- 5.4.1.23 Notice of the disciplinary hearing sent to Mr Mufamadi, dated 30 April 2021;
- 5.4.1.24 E-mail correspondence between Labour Relations and Complainant, dated 30 April; 04 May; and 10 May 2021 respectively; and
- 5.4.1.25 Letter from Mr Mgwebi to the Public Protector, dated 27 May 2021.

5.4.2 Legislation and other prescripts

- 5.4.2.1 The Constitution of the Republic of South Africa, 1996;
- 5.4.2.2 Labour Relations Act, 1995 as amended;
- 5.4.2.3 The Protected Disclosures Act, 2000;
- 5.4.2.4 Public Service Act, 1994;
- 5.4.2.5 Process Guide for the implementation of recommendations to correct irregular appointments, Public Service Commission, March 2018;
- 5.4.2.6 Public Service Regulations, 2001; and
- 5.4.2.7 DMV's Recruitment Policy 2013/2014.

5.4.3 Case Law

- 5.4.3.1 *Kwadukuza Municipality v Rajamoney and Others* (D880/10) [2013] ZALCD 17 (13 June 2013);
- 5.4.3.2 *KwaZulu Department of Transport v Hoosen and Others* 2016 37 ILJ 156 (LC);

5.4.3.3 *Economic Freedom Fighters v The Speaker of the National Assembly and Others and Democratic Alliance v The Speaker of the National Assembly and Others* CCT 143/15 and CCT 171/15;

5.4.3.4 *CWU v Mobile Telephone Networks (Pty) LTD* [2003] BLLR 741 (LC); and

5.4.3.5 *Cawe and Others v Public Protector of the Republic of South Africa and Others* (66063/2018) [2021] ZAGPPHC 333 (28 May 2021).

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

5.4.4.1 On 27 February 2023, a notice in terms of rule 41(1) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2020* (the Public Protector Rules), was issued to the Complainant in respect of issue one (1) under investigation, affording him an opportunity to provide representations to the Public Protector's intention to conclude the matter.

5.4.5 Notice issued in terms of section 7(9)(a) of the Public Protector Act.

5.4.5.1 On 04 May 2023, a notice in terms of section 7(9)(a) of the Public Protector Act in respect of issue two (2) under investigation, was sent to Ms Thandi Modise, Minister of Defence and Military Veterans, the Acting Director General DMV, Mr Mosiwa Hlongwane, the Deputy Director General Ms Mafu, Ms Ntlabati and Mr Mufamadi to provide them with an opportunity for a response 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.

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 Complainant was subjected to occupational detriment as contemplated by the Protected Disclosures Act, 2000 as a result of a protected disclosure made to Mr Mgwebi regarding the alleged irregular appointment of Ms Ntlabati to the post of Deputy Director: Risk Management, if so, whether such conduct was improper as envisaged in section 182(1) of the Constitution and amounted to abuse or unjustifiable exercise of power in terms of section 6(4)(a)(ii) of the Public Protector Act

Common cause

6.1.1 The Complainant is employed by the DMV as the Deputy Director: Internal Audit and during the time of recruitment for the post of Deputy Director: Risk Management, the Complainant had delegated authority to act in the position of Acting Chief Audit Executive.

6.1.2 On 13 October 2020, the Complainant lodged a formal complaint with Mr Mgwebi through a letter regarding the conduct of Ms Gcasamba and her involvement in the alleged irregular appointment of the Deputy Director: Risk Management which post was advertised with reference number DMV03/08/2019.

6.1.3 On 30 October 2020, the Complainant was served with a notice of intention to take disciplinary action against him by Ms Gcasamba, relating to his alleged poor work performance, incapacity, gross insubordination, gross insolence and disrespectful conduct.

Issue in dispute

- 6.1.4 The issue for Public Protector's determination is whether the disciplinary action against the Complainant was in retaliation against his alleged protected disclosure to Mr Mgwebi, if so, whether such conduct amounts to improper conduct and abuse or unjustifiable exercise of power as contemplated in the Constitution and the Public Protector Act.

The Complainant's version

- 6.1.5 The Complainant submitted that he made a *Protected Disclosure* to Mr Mgwebi on 13 October 2020, regarding the alleged irregular appointment of Ms Ntlabati to the position of Deputy Director: Risk Management, as she did not meet the academic requirements for the position.
- 6.1.6 The Complainant indicated that instead of his *Protected Disclosure* being attended to on 30 October 2020, he was served with a notice of intention to take disciplinary action against him by Ms Gcasamba, relating to his alleged poor work performance, incapacity, gross insubordination, gross insolence and disrespectful conduct.
- 6.1.7 The Complainant alleged further that despite PSA sending correspondence to Mr Mgwebi as the Accounting Officer of DMV on 26 November 2020, regarding the allegations of impropriety during the shortlisting process, no action was taken.
- 6.1.8 On 26 November 2020, the Complainant approached the Public Protector and alleged that he made a protected disclosure on 13 October 2020, to Mr Mgwebi relating to the alleged irregular appointment of Ms Ntlabati to the position of Deputy Director: Risk Management. The Complainant also made another

protected disclosure to the Public Protector, relating to the same allegations of irregular appointment of Ms Ntlabati to the position of Deputy Director: Risk Management.

- 6.1.9 According to the Complainant, he was unfairly subjected to a disciplinary process by DMV after raising a complaint and/or blowing the whistle to Mr Mgwebi as the accounting officer of DMV.

DMV's Response

- 6.1.10 On 27 May 2021, Mr Mgwebi responded on behalf of DMV to the allegations raised by the Investigation Team and stated that:

6.1.10.1 The DMV supports the PDA which states that protected disclosures should be made in good faith and information and allegations be substantially true. In the case of *CWU v Mobile Telephone Networks (Pty) LTD [2003] BLLR 741 (LC)* ...the Court said that an employee who makes a disclosure in order to embarrass or harass an employer could not be a disclosure made in good faith. In short, a disclosure which is not based on fact cannot be protected by the Courts;

6.1.10.2 The Complainant is being charged with allegations of absenteeism, failure to fill leave forms, failure to attend important internal audit committee meetings and he is continuing with his gross unacceptable conduct;

6.1.10.3 His whistleblowing was not intended to be made in good faith but was to harass the DMV and to further use the Public Protector as a scapegoat from the disciplinary action taken against him. The misconduct portrayed by the Complainant is in no way linked to the complaints lodged; and

- 6.1.10.4 The protection provided by the PDA is intended to protect an employee from being harassed or victimized due to a whistleblowing event and this is not the case. The Public Protector cannot promote unacceptable behaviour in the workplace and allow the Complainant to hide behind the PDA.

Response to Rule 41(1) Notice

- 6.1.11 On 27 February 2023, a Notice in terms of rule 41(1) (the Notice) of the Public Protector Rules was issued to the Complainant. In essence, the findings of the Public Protector were that the complaint meets the definition requirements of an unfair labour practice as contemplated in section 186(2)(a) of the LRA, and the CCMA, Labour Council and/or Labour Court are best suited to deal with this matter, as it relates to an unfair labour practice disputes between the parties.
- 6.1.12 The Complainant was contacted telephonically on 28 February 2023, to confirm receipt of the Notice. Several telephonic attempts were also made to solicit a response to the Notice from the Complainant, including on 05 May 2023 and 23 May 2023, respectively, however, in all telephonic communication the Complainant merely acknowledged receipt of the Notice and indicated that he will send a formal written acknowledgement but failed to do so. The Complainant has not provided a response to the Notice at the time of finalisation of this report.

Applicable law

Protected Disclosures Act, 2000

- 6.1.13 According to section 1 of the definitions in the Protected Disclosure Act (the PDA), “*disclosure means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who*

has reason to believe that the information concerned shows or tends to show one or more of the following:

- (a) that a criminal offence has been committed, is being committed or is likely to be committed;*
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;*
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur;*
- (d) that the health or safety of an individual has been, is being or is likely to be endangered;*
- (e) that the environment has been, is being or is likely to be damaged;*
- (f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); or*
- (g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed.”*

6.1.14 Section 2 (1) of the PDA provides that “*The objects of this Act are —*

- (a) to protect an employee, whether in the private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;*
- (b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure;
and*
- (c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer”.*

- 6.1.15 Section 3 of the PDA provides that *“No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure.”*
- 6.1.16 According to Section 4(1) *“Any employee who has been subjected, is subject or may be subjected, to an occupational detriment in breach of section 3, may-*
- (a) approach any court having jurisdiction, including the Labour Court established by section 15 of the Labour Relations Act, 1995 (Act No. 66 of 1995), for appropriate relief; or*
- (b) pursue any other process allowed or prescribed by any law”.*

Protected Disclosures Amendment Act, 2017

- 6.1.17 Section 5 of the Amendment Act states that:
- “(1A) any worker who has been subjected, is subjected or maybe subjected, to an occupational detriment in breach of section 3, or anyone on behalf of a worker who is not able to act in his or her own name, may approach any court having jurisdiction for appropriate relief.¹*
- (1B) If the court or tribunal, including the Labour Court is satisfied that an employee or worker has been subjected to or will be subjected to an occupational detriment on account of a protected disclosure, it may make an appropriate order that is just and equitable in the circumstances, including—*
- (a) payment of compensation by the employer or client, as the case may be, to that employee or worker;*

¹ Our underlining.

(b) payment by the employer or client, as the case may be, of actual damages suffered by the employee or worker; or

(c) an order directing the employer or client, as the case may be, to take steps to remedy the occupational detriment”.

6.1.18 Section 4(1) of the Amendment Act provides that an employee who has been subjected to an occupational detriment by his or her employer on account of or partly on account of having made a protected disclosure, may approach a court having jurisdiction, including the Labour Court established by section 151 of the LRA for appropriate relief or pursue any other process allowed or prescribed by any other law.

Labour Relations Act, 1995

6.1.19 Section 186(2)(a) of the LRA provides that unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; unfair suspension of an employee or any other unfair disciplinary action short of dismissal of an employee; and an occupational detriment, (own emphasis) other than dismissal, in contravention of the Protected Disclosures Act, 2000, on account of the employee having made a protected disclosure defined in that Act.

6.1.20 Section 157 of the LRA indicates that the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of LRA or in terms of any other law are to be determined by the Labour Court.

6.1.21 The court in *Cawe and Others v Public Protector of the Republic of South Africa and Others*² stated the following:

“[31] In her letter dated 31 May 2018, the Public Protector requested the applicants to keep the disciplinary proceedings against the third respondent in abeyance for 7 days to give her time to investigate the third respondent’s complaint. The applicants’ submission is that they could not accede to this request because it was unlawful. When the third respondent lodged the said complaint with the Public Protector, he had already approached the Labour Court on the same allegations to uplift his suspension and to interdict the applicants from proceeding with the disciplinary inquiry. The application was struck from the roll for lack of urgency.

[32] In a letter dated 30 May 2018, the applicants informed the Public Protector at the onset of her investigation that the matter of protected disclosure as alleged by the third respondent was still pending on the merits before the Labour Court, and that the third respondent had not exhausted his legal remedies as provided for in section 6(3)(b). The applicants requested the Public Protector to not entertain the third respondent’s complaint in this regard but she refused to oblige, despite the pending court process.

[33] The Public Protector’s findings with regard to whether the applicants violated the provisions of the Act by refusing and/or frustrating and/or by failing to assist the Public Protector to investigate the protected disclosure lodged by the third respondent, and proceeding with a disciplinary inquiry against him despite having been notified of a complaint in terms of the Act, that was lodged with her against the applicants are detailed in her report. The Public Protector found that the applicants subjected the third

² (66063/2018) [2021] ZAGPPHC 333 (28 May 2021).

respondent to occupational detriment on account of having made a protected disclosure which was in violation of section 3 of the Act.

*[34] It is the applicants' submission that the Public Protector ought to have allowed the matter pending before the Labour Court to conclude instead of investigating the matter herself. The Labour Court had refused the third respondent's application to interdict the disciplinary proceedings but his application was *lis pendens* since the matter was still to be heard on the merits, and the application was not withdrawn.*

[35] The Act affords an employee the right to approach any court having jurisdiction, including the Labour Court for appropriate relief or to pursue any other process allowed or prescribed by any law. It does not provide for an employee to elect one forum over the other or both. Consequently, the applicants were within their rights to continue with the disciplinary proceedings against the third respondent, and the Public Protector's finding that the applicants should have halted same is in my view unlawful and ought to be set aside".

6.1.22 Furthermore, the court emphasized at paragraph 12 of the judgment that, the public sector employees aggrieved by dismissal or unfair labour practice, should ordinarily pursue the remedies available in section 191 and 193 of the LRA. The Court further held that if a cause of action meets the definitional requirements of unfair labour practice or unfair dismissal, the dictates of the constitutional and judicial policy mandate, the dispute be processed by the system established in the LRA for their resolution.

Analysis

6.1.23 According to the above provisions, the courts, including the Labour Court, are vested with the jurisdiction to entertain matters relating to alleged occupational

detriment cases as a result of a protected disclosure. In this case, the Complainant submitted that after he had made a protected disclosure to the employer, he was given a notice of intention to take disciplinary action against him, which he viewed as an *occupational detriment*. It follows, therefore, that the Complainant in challenging the lawfulness of the conduct of the DMV, had to take the *legal route* available to him in terms of section 4(1) of the Protected Disclosures Act and section 5 of the Protected Disclosures Amendment Act.

- 6.1.24 This occupational detriment alleged by the Complainant namely, unfair disciplinary action, falls within the definition of an *unfair labour practice* in terms of section 186(2) of the LRA. If the dispute of unfair labour practice still remains unresolved and if 30 days have expired after the matter was referred to the Conciliation Mediation and Arbitration (CCMA), then the Complainant's dispute must immediately be referred for arbitration. If after arbitration the matter remains unresolved, then the Complainant can apply to the Director of the CCMA to refer his dispute to the Labour Court as contemplated in terms of section 191(6)(b)(c) of the LRA.
- 6.1.25 It is apparent from the legislation discussed above, as well as the cited court decision, that the Complainant should refer his dispute relating to unfair labour practice to the CCMA or relevant Labour Council for adjudication as required by section 191(5A)(c) of the LRA. If the matter remains unresolved, the Complainant should refer the dispute to the Labour Court as required by section 191(6)(b) and (c) of the LRA.
- 6.1.26 The nature of the complaint meets the definition requirements of an *unfair labour practice* as contemplated in section 186(2)(a) of the LRA. As a result, the CCMA, the relevant Labour Council and the Labour Court have exclusive jurisdiction in respect of all matters that elsewhere in terms of LRA or in terms

of any other law are to be determined by the CCMA, Labour Council or Labour Court.

- 6.1.27 The LRA does not avail to the Complainant an opportunity to approach the Public Protector for relief with a complaint or dispute relating to unfair labour practice.

Conclusion

- 6.1.28 Based on the nature of the dispute between the Complainant and DMV, which relates to allegations of occupational detriment i.e. the disciplinary action, as a result of the Complainant having made a protected disclosure, it is concluded that the complaint does not fall within the jurisdiction of the Public Protector. As such, it cannot be successfully investigated within the mandate of the Public Protector. A complaint regarding occupational detriment should be appropriately ventilated through the systems and fora established in terms of the LRA.

- 6.2 Whether the functionaries of the DMV irregularly appointed Ms A Ntlabati to the position of Deputy Director: Risk Management, if so, whether such conduct was improper as envisaged in section 182(1) of the Constitution and amounted to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

Common cause

- 6.2.1 The DMV advertised the position of Deputy Director: Risk Management (Level 11) with reference number DMV03/08/2019 on the Department of Public Service Administration's (DPSA) website during August 2019 with the closing date of 06 September 2019, stating as following:

“Requirements: Three year tertiary qualification in Risk Management/Internal Auditing/Economics. Two (2) years supervisory experience. Two (2) years functional experience in Risk Management / Internal Audit services. Valid driver’s license.

Knowledge: Public Sector Risk Management framework, COSO Framework, King Report on Corporate Governance, Public Finance Management Act, Treasury Regulations, Protected Disclosure Act, Anti-fraud and corruption policies, Criminal and Commercial Law, Labour Relations, legislation, policies and procedures, Basic Conditions of Employment Act, Public Service Act.

Skills: Analytical, Strategic Management, Financial Management, Facilitation, Investigation, Interviewing, People Management, Computer Literacy, Time Management, Communication, Interpersonal, Presentation, Planning and organising.

Duties: Develop, implement and maintain an Enterprise Risk Management (ERM) framework and supporting policies. Develop and facilitate the implementation of a fraud prevention plan and anti-corruption strategy. Embed a risk management culture, risk awareness and anti-fraud awareness. Facilitate the compilation of Strategic and Operation Risk Registers. Assess and maintain the risk maturity profile of the Department. Develop and implement a business continuity policy for the Department. Facilitate the implementation of risk based combined assurance. Facilitate the functioning of the departmental Risk Management Forum. Properly and timeously communicate relevant information to equip the relevant stakeholders to identify, assess and respond to risks. Ensure submission of accurate and timeous risk management reports to all departmental management structures. Manage the resources within the Risk Management Unit”.

6.2.2 Ms Ntlabati was one of the applicants and she was shortlisted, interviewed and subsequently appointed to the position with effect from 01 March 2020.

6.2.3 It is not in dispute that Ms Gcasamba is the Chief Audit Executive at the DMV and was on maternity leave during the period when the interviews were conducted. Mr Mgwebi signed the approval for recruitment process for the post and further requested Ms Gcasamba to form part of the selection board.

Issue in dispute

6.2.4 The issue for the Public Protector's determination is whether Ms Ntlabati's appointment to the position of Deputy Director Risk Management by DMV was improper and/or irregular on the grounds that she did not meet the requirements for the post as advertised.

The Complainant's version

6.2.5 The Complainant's contention is that at the time of the recruitment and selection process, Ms Gcasamba was officially on maternity leave. She unlawfully returned to work, to unduly influence the recruitment process to appoint Ms Ntlabati, who is the current incumbent of the post in question. He further alleged that Ms Ntlabati did not meet the requirements of the advertised position.

DMV's Response

6.2.6 The Public Protector raised the allegations with the DMV on 21 January 2021. On 27 May 2021, Mr Mgwebi responded through a letter, on behalf of DMV to the allegations raised by the Public Protector and stated that:

- 6.2.6.1 The requirements of the post were a three year tertiary qualification in Risk Management/Internal Audit/Accounting/Economics and two (2) years functional experience in Risk Management/Internal Audit services. Three (3) selection board members Brigadier General Thembe, Acting Director Human Resources Management as a Chairperson and two other panellists (Ms Z Gcasamba and Mr Olivier) were appointed by the Accounting Officer for the purpose of recruitment and selection. Shortlisting was conducted on 22 and 26 November 2019.
- 6.2.6.2 Ms Ntlabati was one of the best candidates who was considered for shortlisting by the Panel, due to the fact that she had two honours degrees, namely Military Management and Psychology. She also had more than six (6) years' experience in the risk management environment. All shortlisted candidates had a variety of qualifications namely; risk management, auditing and accounting.
- 6.2.6.3 It was identified that in her Honours degree in Military Management, Ms Ntlabati majored in financial management at Honours level, which could be matched with the Accounting guideline on the advert. The requirements on the advert did not include '*must*' or '*equivalent*' in terms of the qualification required, however the Panel had to make a determination in terms of relevant qualification on the basis of shortlisting the best candidates for the job.
- 6.2.6.4 Ms Gcasamba, as a direct supervisor to the incumbent, was on maternity leave during the time of recruitment. She was requested by Mr Mgwebi to come back and finalise the recruitment process and she accepted. All candidates were interviewed and the selection board adhered to the relevant policy. Ms Ntlabati, on the basis of her performance during the interview, was the best candidate. She had been detached from the Department of Defence to perform the Deputy Director: Risk Management function in the DMV and was doing well. She

performed the function for a period of six (6) months before being appointed in the position.

- 6.2.6.5 The selection board also took into account her knowledge and experience in the field of Risk Management. The recommendations made by the selection board were based on the best suitable candidate for the position. The recommendations were approved by him (Mr Mgwebi) as he had vested powers to approve or disapprove the recommendation made by the Panel.

Documentation received from the DMV

- 6.2.7 On 27 May 2021, the DMV submitted to the Investigation Team supporting documentation showing the minutes of the shortlisting proceedings, signed on 28 November 2019. According to the minutes, the selection criteria and elimination factors identified for the post were as follows:

- (i) Z83 Form must be signed and dated;
- (ii) Three (3) year tertiary qualification in Risk Management / Internal Auditing;
- (iii) Two (2) years supervisory experience and two (2) years functional experience in Risk Management; and
- (iv) Knowledge of Public Sector Risk Management Framework.

- 6.2.8 The minutes indicate that five (5) candidates were shortlisted. All candidates, except for Ms Ntlabati, held tertiary qualifications in the fields of Risk Management/Internal Auditing /Accounting /Economics, as stated in the advertisement for the post and in the selection criteria. Ms Ntlabati was cited as having a Bachelor of Military Science Honours Degree.

- 6.2.9 Shortlisted candidates as per qualifications and experience are captured and illustrated in the table below:

NO.	Candidates	Highest Qualifications and Current Rank	Public Protector Analysis
1.	Candidate 1	Bachelor of Tech in Internal Auditing and Post Graduate Diploma in Internal Auditing – DD: Risk Management	Met the Requirements
2.	Candidate 2	Bachelor of Accounting (Accounting, Managerial Accounting and Finance) – Assistant Director: Risk Management	Met the Requirements
3.	Candidate 3	Bachelor of Commerce in Risk management – Deputy Director: Risk, Anti – Corruption and Integrity Management	Met the Requirements
4.	Ms A L Ntlabathi	Bachelor of Military Management – 10 Signal Unit Officer Commanding	Did not meet the requirements
5.	Candidate 4	Bachelor of Accounting Science – Assistant Director: Risk Management	Met the Requirements

6.2.10 According to the Shortlisting Memorandum signed by the Chairperson of the Selection Panel, General P Thembe on 28 November 2019, the shortlisting was held on 22 and 26 December 2019, respectively. (The dates of 22 and 26 December 2019 have since been rectified in a response to the Investigations Team, on 27 May 2021, to reflect that the correct dates of the shortlisting were 22 and 26 November 2019).

6.2.11 The shortlisting panel comprised of the following persons as reflected in the table below:

Name	Representing	Function
General P Tembe	Acting Director: HRM	Chairperson
Ms Z Gcasamba	Director: Internal Audit	Member
Mr JB Olivier	Deputy Director: HRA	Member
Mr CN Mailula	HR: Personnel Officer	Secretary

6.2.12 A memorandum from the shortlisting panel to Mr Mgwebi dated 12 December 2019, seeking approval for the filling of the advertised post of Deputy Director: Risk Management, listed the following terms:

- (a) Preference must be given to Military Veterans and their dependants;
- (b) Employment Equity must be taken into consideration;
- (c) Incumbent must have relevant qualifications in Finance and must be working within the finance field;
- (d) Knowledge of Public Sector Risk Management Framework; and
- (e) Two (2) years supervisory experience and two (2) years functional experience in Risk Management.

Response to section 7(9)(a) notice

6.2.13 On 04 May 2023, a notice in terms of section 7(9)(a) of the Public Protector Act was issued to the DMV. The findings as contained in the section 7(9) notice were that at the time of her appointment, Ms Ntlabati did not possess the relevant academic qualifications as required in the advertisement of the post for the Deputy Director: Risk Management.

6.2.14 A response email to the section 7(9)(a) notice dated 24 May 2023, was received from Ms Semakaleng Moatlhodi, the Director in the Office of the DG:

Department of Military Veterans, wherein she indicated the Acting DG wished to inform the Public Protector that the Department does not have inputs and or amendments to the preliminary report (*section 7(9) notice*).

Applicable law

The Constitution, 1996

6.2.15 Section 195(1) of the Constitution provides that public administration in every sphere of government must be underpinned by amongst others, the following democratic values and principles-

- “(a) A high standard of professional ethics must be promoted and maintained.*
- (b) Efficient, economic and effective use of resources must be promoted.*
- (c) Public administration must be development-oriented.*
- (d) Services must be provided impartially, fairly, equitably and without bias.*
- (e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) Public administration must be accountable.*
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on*

ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to —

(a) administration in every sphere of government;

(b) organs of state³ and

(c)..."

Public Service Act, 1994

6.2.16 Section 11(1) of the Public Service Act, 1994 states that:

"In the making of any appointment or the filling of any post in the public service due regard shall be had to equality and the other democratic values and principles in the Constitution.

(2) In the making of any appointment or the filling of any post in the public service-

(a) all persons who qualify for the appointment, transfer or promotion concerned shall be considered; and

(b) the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress 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 Our underlining.

(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”.

6.2.17 Section 5(7)(a) of the Public Service Act, 1994 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 error of fact or law or fraud and it is in the public interest to correct the action or omission.*” It further stipulates in subsection (b) that “*The relevant executive authority shall in the prescribed manner keep record of and report to the Minister any correction by a functionary of a department within the portfolio of that executive authority*”.

Guide to correct irregular appointments, Public Service Commission, June 2018 (Guide)

6.2.18 Paragraph 5.2 of the Guide states that an appointment is considered to be irregular, amongst others, if the inherent requirements were not reflected in the advertisement and/or the appointed employee did not meet the advertisement requirements of the post (e.g. educational qualifications, relevant work experience, etc.). Paragraph 5.2 of the Guide further indicates that people who are appointed without having met the minimum requirements of the post as advertised will be found to have been appointed irregularly.

Public Service Regulations, 2016 (Regulations)

6.2.19 Regulation 67(5) states that:

“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...”

The Recruitment and Selection Policy of the DMV 2013/2014 (the Policy)

6.2.20 The DMV’s Recruitment and Selection Policy (the Policy) Part 1 stipulates that:

“The DMV is therefore committed to a demand and needs driven and administratively sound recruitment practice and process and / or retention of employees where diversity in all its elements is used as a strength in order to derive maximum benefit from employees personal commitment, to meet the Department’s strategic and operational business imperatives”.

6.2.21 Part 2, Paragraph 4.3 of the Policy deals with shortlisting and states as follows:

“4.3.1 Candidates who do not comply with the minimum advertised requirements must be eliminated during the shortlisting phase with noting of reasons in a preliminary selection pool.

4.3.2 Reasons must be aligned with the inherent requirements of the advertised post, when screening applications. Elimination of candidates must be done in a justifiable manner.

4.3.3 All applications, CV’s, qualification certificates (and annexures to the CV) must be carefully scrutinised when shortlisting. Any information from other sources should be discounted as it may unfairly benefit or disadvantage an applicant in relation to the others”.

Kwadukuza Municipality v Rajamoney and Others

6.2.22 In the matter of *Kwadukuza Municipality v Rajamoney and Others*⁴, the court set out the following:

“For the requirements of an advertised post to be met therefore, cognisance must be taken of the objective of the policy to ensure that the candidate who best meets the selection criteria is appointed. The short listing of a candidate who least meets the set selection criteria will ordinarily fly on the clear face of the objective of the policy. Such short listing would then be arbitrary as contrary to the selection criteria. The applicant set out requirements to be met for the contested post. The fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach. It has to be borne in mind that there would be people who desired to apply for the contested post but did not submit their applications merely because they

⁴ (D880/10) [2013] ZALCD 17 (13 June 2013), paragraph 15.

did not meet the set requirements. It would also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements.”

KwaZulu Department of Transport v Hoosen and Others

- 6.2.23 In the case of *KwaZulu Department of Transport v Hoosen and Others*⁵, where the facts were very similar to the present case, the court held that the promotion of a candidate who did not meet the requirements of the advertised post amounted to an unfair labour practice. The court pointed out that the employee’s “*promotion was irregular by want of his meeting the minimum criterion for the position.*”
- 6.2.24 In this case, the court clearly discourages the shortlisting of candidates who least meet the requirements and selection criteria. The court in this case promotes the screening of all candidates against the set requirements in order to avoid arbitrariness in the recruitment and selection process. Any deviation from the advertised requirements of the position, would be tantamount to an unfair labour practice as was the decision in the case of case of *Transport v Hoosen and Others* 2016 37 ILJ 156 (LC).

Analysis

- 6.2.25 Upon analysis of the evidence, the following inconsistencies and contradictions were identified between the versions of the Complainant, the DMV and the documentary evidence submitted:
- (a) On one hand, the selection criteria which appear on the submission to obtain approval from Mr Mgwebi dated 12 December 2019, is not in line

⁵ 2016 37 ILJ 156 (LC), paragraph 23.

with the requirements stated in the advertisement as outlined above. On the other hand, the submission or request to obtain approval for filling the post provides that *preference must be given to Military Veterans and their dependants, Employment Equity must be taken into consideration, incumbent must have relevant qualifications in Finance and must be working within the Finance Field*, which is modified and phrased differently from the advertisement.

- (b) The minutes of the shortlisting proceedings dated 28 November 2019, to General Thembe, indicated that the elimination of other candidates was in line with the shortlisting criteria. However, the selection criteria that appears on the minutes of the shortlisting proceedings dated 28 November 2019, differ from the selection criteria on the submission to obtain approval from Mr Mgwebi, dated 12 December 2019. It appears unlikely that the inconsistencies could merely be described as error.
- (c) Another discrepancy and/or inconsistency is that the selection criteria during the shortlisting namely, *“Three (3) years tertiary qualification in Risk Management / Internal Auditing”*, was left out of the request when it was sent to Mr Mgwebi for approval and it was subsequently approved by the latter, without consideration of the advertisement as required by the applicable prescripts. The approval request indicated the shortlisting and selection criteria as the following *“Preference must be given to Military Veterans and their Dependants; Employment Equity must be taken consideration; Incumbent must have relevant qualifications in Finance and must be working within the Finance Field; Knowledge of Public Sector Risk Management Framework; and Two (2) years supervisory experience and Two (2) years functional experience in Risk Management.”*

- 6.2.26 The evidence demonstrates that at the time of her appointment, Ms Ntlabati did not possess the relevant academic qualifications as required in the advertisement of the post of a Deputy Director: Risk Management. She held a Bachelor's degree in Military Management and not in Risk Management or Auditing, as required by the advertisement.
- 6.2.27 It was further noted from the evidence that the selection criteria in the minutes of the shortlisting proceedings dated 28 November 2019, was later modified and is different from the advertisement and the selection criteria stated on the submission to obtain approval from Mr Mgwebi dated 12 December 2019.
- 6.2.28 The evidence shows that Ms Gcasamba was requested by Mr Mgwebi from maternity leave to form part of the recruitment process, as she was the head of the unit. However, no evidence of undue influence by Ms Gcasamba in the appointment of Ms Ntlabati was established.
- 6.2.29 In terms of the Regulations as cited above, the DMV's selection panel had to make recommendations based on the valid selection methods set out in the advertisement and selection criteria. The Regulations do not avail to the selection panel an opportunity to modify or reintroduce different selection methods at a later stage. This is intended to ensure a fair process, free from any bias or unfair discrimination is maintained throughout the recruitment and selection.
- 6.2.30 The selection committee needed to act in accordance with Regulation 67(5) by considering the valid criteria for selection based on the inherent requirements of the post. It was also the responsibility of the functionaries of the DMV to ensure that the Regulations, as cited above were adhered to.

Conclusion

- 6.2.31 On the strength of the evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it is concluded that Ms Ntlabati did not possess the relevant academic qualifications as required in the advertisement of the post of a Deputy Director Risk Management by DMV.
- 6.2.32 Based on the evidence in the possession of the Public Protector, it is evident that the selection criteria that appears on the minutes of the shortlisting proceedings dated 28 November 2019, were later modified and are different from the advertisement and the selection criteria on the submission to obtain approval from Mr Mgwebi, dated 12 December 2019.
- 6.2.33 As a result, the subsequent appointment of Ms Ntlabati to the post of Deputy Director Risk Management, was not in line with the requirements of the post advertisement and selection criteria appearing on the minutes of the selection panel. It was also at variance with the dictates of the applicable legal prescripts that regulate selection process as outlined in evidence above.

7. FINDINGS

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

- 7.1 Whether the Complainant was subjected to occupational detriment as contemplated by the Protected Disclosures Act, 2000 as a result of a protected disclosure made to Mr Mgwebi regarding the alleged irregular appointment of Ms Ntlabati to a post of Deputy Director: Risk Management,**

if so, whether such conduct was improper as envisaged in section 182(1) of the Constitution and amounted to abuse or unjustifiable exercise of power in terms of section 6(4)(a)(ii) of the Public Protector Act

- 7.1.1 The Public Protector conducted a preliminary investigation into the matter in terms of section 7(1) of the Public Protector Act, with a view to determine the merits of the matter and the manner in which it should be dealt with. On analysis of the merits of the matter, it was subsequently established that this complaint fell outside the jurisdiction of the Public Protector.
- 7.1.2 On the strength of the evidence obtained during the preliminary investigation, it is evident that the CCMA, the relevant Labour Council if any and/or the Labour Court are best suited to deal with this matter, as it relates to an unfair labour practice dispute between the parties.
- 7.1.3 In the circumstances, the Public Protector finds that the nature of the dispute between the Complainant and DMV regarding the occupational detriment allegedly suffered by the Complainant as a result of a disclosure made, is one that may be appropriately ventilated through the systems and fora established in terms of the LRA.
- 7.1.4 In the circumstances no determination is made by the Public Protector in terms of section 182(1)(a) of the Constitution as well as in terms of section 6(4)(a)(ii) of the Public Protector Act.
- 7.2 Whether the functionaries of the DMV irregularly appointed Ms A Ntlabati to the position of Deputy Director: Risk Management, if so, whether such conduct was improper as envisaged in section 182(1) of the Constitution and amounted to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

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- 7.2.1 The allegation that DMV irregularly appointed Ms A Ntlabati to the position of Deputy Director: Risk Management, is substantiated.
- 7.2.2 On the strength of the evidence before the Public Protector, it is apparent that at the time of her appointment, Ms Ntlabati did not possess the relevant academic qualifications as required in the advertisement of the Deputy Director: Risk Management by DMV post.
- 7.2.3 It is further revealed by evidence that the selection criteria that appears in the minutes of the shortlisting proceedings dated 28 November 2019, was later modified and is different from the advertisement and the selection criteria stated on the submission to obtain approval from Mr Mgwebi, dated 12 December 2019.
- 7.2.4 Based on the above discrepancies, the Public Protector finds that the appointment of Ms Ntlabati to the post of Deputy Director: Risk Management was not in line with the requirements of the post as advertised, as well as the selection criteria, as stated in the minutes of the selection panel. As a result, the conduct of the DMV in the circumstances is not compatible with the standards and principles imposed by section 195 of the Constitution, which requires fairness, equality, transparency and merit within the public administration.
- 7.2.5 The conduct of the functionaries of the DMV is also at variance with the provisions of Paragraph 4.3 of the DMV's Recruitment Policy, which requires that candidates who do not comply with the minimum advertised requirements must be eliminated during the shortlisting phase. Equally, the conduct of the functionaries of the DMV is at odds with the provisions of Regulation 67(5) of the Public Service Regulations, 2016, which requires the selection committee to make a recommendation on the suitability of a candidate after considering only

information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination.

- 7.2.6 In the circumstances, the conduct of the functionaries of the DMV in appointing Ms Ntlabati to the position of Deputy Director: Risk Management, amounts to improper conduct in terms of section 182(1) of the Constitution and maladministration as contemplated by 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 upon the conclusion of an investigation where adverse findings are made.
- 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 Having regard to the evidence, the regulatory framework determining the standard that the functionaries of the DMV should have complied with, the Public Protector takes the following remedial action in terms of section 182(1)(c) of the Constitution, 1996:

The Minister of Defence and Military Veterans

- 8.3.1 Take cognisance of the report and ensure implementation of the remedial action.

The office of the Director-General of the DMV

8.3.2 Within **ninety (90) calendar days** from date of the receipt of the final report, take action to address the irregular appointment of Ms Ntlabati in the post of the Deputy Director, Risk Manager, in conformity with:

(i) Section 5(7)(a) of the Public Service Act, 1994, or

(ii) Take any other steps provided for in section 158(1)(h) of the LRA;

8.3.3 Ensure that future appointments are made in compliance with the Public Service Act, Regulations and DMV's Human Resources Recruitment and Selection Policy.

9. MONITORING

9.1 The Acting Director General of Defence and Military Veteran, to report to the Public Protector on the implementation of the remedial action within one hundred and twenty days (120) days from the date of this report.



ADV KHOLEKA GCALEKA
ACTING PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA

DATE: 30 JUNE 2023

Assisted by: Mr Vusumuzi Xolani Dlamini
Acting Executive Manager: Investigations Branch