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

PUBLIC PROTECTOR
SOUTH AFRICA

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT, CORRUPTION, CONFLICT OF INTEREST AND IRREGULAR APPOINTMENT OF AN EMPLOYEE BY THE FORMER CHIEF EXECUTIVE OFFICER (CEO) OF MEDIA INFORMATION AND COMMUNICATION TECHNOLOGY- SECTOR EDUCATION AND TRAINING AUTHORITY (MICT-SETA).

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EXECUTIVE SUMMARY

(i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), and published in terms of section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper conduct, corruption, conflict of interest and irregular appointment of an employee by the former CEO: Mr Oupa Mopaki (Mr Mopaki) of MICT-SETA.

(a) The investigation was conducted in terms of section 182(1) of the Constitution which gives me the power to investigate improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised.

(vi) Based on an analysis of the complaint, the following issues were considered and investigated:

(a) Whether Mr Mopaki is personally aligned or linked to any of the private companies that are contracted to the MICT-SETA and if so, whether this amounts to a conflict of interest;

(b) Whether the MICT-SETA and, in particular Mr Mopaki, irregularly appointed Ms Naledi Sibandze to the positions of Manager and Senior Manager: Corporate Services, which positions were never advertised as required by the MICT-SETA Recruitment and Selection Policy;

(c) Whether Mr Jabu Sibeko, the Senior Manager: Learning Programmes, and Mr Earnest Nemughavhini, the Manager: Learning Programmes, at the MICT-SETA, improperly aided Mr Mopaki to siphon off the MICT-SETA's funds to private companies linked to him; and

(d) Whether the conduct of Mr Mopaki resulted in prejudice to the MICT-SETA or to any other person in the circumstances.

(vii) The investigation process included an exchange of correspondence and analysis of all relevant documents and application of all relevant laws, policies and related prescripts and interviews were also conducted with the Complainants and relevant officials of the MICT-SETA.

(viii) Key laws and policies taken into account to determine if there had been improper conduct, corruption, conflict of interest and irregular appointment by the MICT-SETA and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the MICT-SETA. Those are the following:

(a) The relevant provisions of the Constitution of the Republic of South Africa, 1996 (the Constitution);

(b) The Public Protector Act, 23 of 1994 (the PPA);

(c) Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA)

(d) Public Finance Management Act 1 of 1999 (PFMA);

(e) The Code of Conduct of the MICT-SETA;

(f) The MICT-SETA's Constitution dated 24 March 2011;

(g) Related Party Disclosure Policy of the MICT-SETA signed and dated 18 September 2015;

(h) Principle 1 of King IV Code on Corporate Governance: 2016;

(i) The Recruitment and Selection Policy of MICT-SETA: POL-CORP-HR-07.

(ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings against the MICT-SETA:

(a) Whether Mr Mopaki is personally aligned or linked to any of the private companies that are contracted to the MICT-SETA and if so, whether this amounts to a conflict of interests.

(aa) The allegation that Mr Mopaki is personally aligned or linked to any of the identified private companies that are contracted to the MICT-SETA is substantiated.

(bb) Forensic evidence at my disposal from the computer/laptop drive of Mr Mopaki established on a balance of probability that Mr Mopaki had a business association and vested private interest at both Bandwith Technologies and Network Infraco which are owned by his nephew/Tebogo Mashigwane. Mr Mopaki exchanged various explicitly business related communication/emails and financial transactions with private companies contracted to the MICT-SETA which are owned by Tebogo Mashigwane.

(cc) On the other hand, Mr Mopaki signed and approved contracts/SLA between MICT-SETA and companies owned by his nephew/Tebogo Mashigwane without declaring same to the Board of MICT-SETA, thereby being caught in a conflict of interests.

(dd) *Prima facie* evidence from Mr Mopaki's official laptop indicated that Mr Mopaki was registered on the computer domain of both Bandwith Technologies and Network Infraco and engaged in business and financial related communications.

(ee) The evidence at my disposal confirmed that Mr Mopaki is an uncle of Mr Tebogo Mashigwane who is a director/owner of various companies that were contracted to MICT-SETA.

(ff) The conduct of Mr Mopaki constituted a conflict of interest as well as a breach of section 195 of the Constitution; committed an offence as contemplated by section 17(1) of the PRECCA; and further breached clauses 6.1 and 6.2 of the MICT-SETA's Related Party Disclosure Policy, clause 1 of the MICT-SETA's Code of Conduct and clause 12 of the MICT-SETA's SCM Policy as well as sections 50, 51 and 83 of the PFMA.

(gg) Accordingly, the conduct of Mr Mopaki amounts to improper conduct as contemplated by section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether MICT-SETA and, in particular Mr Mopaki, irregularly appointed Ms Naledi Sibandze to the positions of Manager and Senior Manager: Corporate Services, which positions were never advertised as required by SETA Recruitment and Selection Policy.

(aa) The allegation that Mr Mopaki irregularly appointed Ms Naledi Sibandze (Ms Sibandze) to the positions of a Manager and Senior Manager: Corporate Services, which positions were never advertised as required by MICT-SETA's Recruitment and Selection Policy, is substantiated.

(bb) The evidence in my possession indicates that the positions of Manager and Senior Manager Corporate Services were neither advertised nor were interviews

conducted in order to fill these posts. Ms Sibandze was improperly favoured/promoted/appointed to these two positions without Mr Mopaki following the MICT-SETA's Recruitment and Selection Policy. The evidence also indicates that Ms Sibandze was dishonest when she averred during an interview with my investigation team that she was promoted following job grading by 21st Century, when in fact that was not the case as shown by evidence in the body of this report.

(cc) This conduct by Mr Mopaki, was therefore in violation of clauses 5.1 and 6.3 of the MICT-SETA's Recruitment and Selection Policy and section 51(1)(b)(ii) of PFMA.

(dd) Accordingly, the conduct of the MICT-SETA, in particular Mr Mopaki, amounts to improper conduct as contemplated by section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(c) Regarding whether Mr Jabu Sibeko, the Senior Manager: Learning Programmes, and Mr Earnest Nemughavhini, the Manager: Learning Programmes, at the MICT-SETA, improperly aided Mr Mopaki to siphon off the MICT-SETA's funds to private companies linked to him.

(aa) The allegation that Mr Sibeko, the Senior Manager: Learning Programmes, and Mr Nemughavhini, the Manager: Learning Programmes, improperly aided Mr Mopaki in order to siphon off the MICT-SETA's funds to private companies linked to him, is not substantiated.

(bb) My investigation could not establish any impropriety or wrongdoing on the part of either Messrs. Sibeko or Nemughavhini. Similarly, the allegation was also not supported by any form of evidence submitted by the Complainant/s.

(cc) Accordingly, the conduct of the MICT-SETA, in particular Messrs Sibeko and Nemughavhini, does not amount to improper conduct as contemplated by section

182(1) of the Constitution or maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(d) Regarding whether the conduct of Mr Mopaki resulted in prejudice to the MICT-SETA or to any other person in the circumstances.

(aa) The allegation whether the conduct of Mr Mopaki resulted in prejudice to the MICT-SETA or any other person in the circumstances, is substantiated.

(bb) The MICT-SETA paid a combined amount of R14 614 000.00 following an irregular procurement process to Lylacorp, Network Infraco and Bandwith Technologies which companies are all linked to Mr Mopaki through his undeclared familial and business relationship with Mr Tebogo Mashigwane.

(cc) The MICT-SETA further paid a combined amount of R5 516 440.38 as a result of an irregular appointment of Ms Sibandze to both positions of Manager and Senior Manager: Corporate Services within the MICT-SETA. Equally, other people who qualified for these posts were unfairly denied an opportunity to apply for or compete for these posts since the positions were not advertised.

(dd) The cost incurred by the MICT-SETA in connection with payment to the above companies as well as the appointment/promotion of Ms Sibandze were irregular and in direct contravention of sections 50 and 51 of PFMA, and clause 6.3 of the MICT SETA's Recruitment and Selection Policy.

(ee) Accordingly, the conduct of the MICT-SETA, in particular Mr Mopaki, amounts to improper conduct as contemplated by section 182(1)(a) of the Constitution and resulted in prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.

(x) The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

The current CEO of MICT-SETA must take appropriate steps to ensure that:

(a) Within sixty (60) working days from the date of this report, disclose all irregular expenditure incurred by MICT-SETA to the National Treasury and to the Auditor General in connection with the irregular appointment of Ms Sibandze to both positions of Manager and Senior Manager: Corporate Services within the MICT-SETA.

(b) Within sixty (60) working days from the date of this report, disclose all irregular expenditure incurred by MICT-SETA to the National Treasury and to Auditor General in connection with the irregular procurement process to Lylacorp, Network Infraco and Bandwidth Technologies which companies are all linked to Mr Mopaki through his undeclared familial relationship with Mr Mashigwane.

(c) Within thirty (30) working days from the date of this report, all MICT-SETA officials who are involved in the Supply Chain Management, Recruitment and Selection processes including all the senior management, must attend a workshop on the Procurement Policy, Recruitment and Selection and related legal prescripts.

(d) The MICT-SETA must, within sixty (60) working days from the date of this report, develop a policy relating to the declaration of conflict of interest amongst all of its staff members for each financial year. The policy should, amongst others, address the manner in which the declaration must be processed and consequences for failure to disclose any conflict of interest.

(xi) The appropriate recommendation that I am making in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Head of the Directorate of Priority Crime Investigations (DPCI/Hawks) is as follows:

(e) Within thirty (30) working days from the date of this report, consider initiating an investigation into a link and possible money laundering offence(s) as defined in terms of the Prevention of Organised Crime Act 121 of 1998 between Mr Mopaki and the companies which are/were contracted to MICT-SETA and which are registered as Mr Mashigwane companies.

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1. INTRODUCTION

1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8 of the Public Protector Act to the following people to note the outcome of my investigation and implement remedial actions:

1.2.1 The Minister of Higher Education, Science and Technology, Dr B Nzimande;

1.2.2 The Director General of the Department of Higher Education, Science and Technology, Mr GF Qonde;

1.2.3 The Chairperson of the Media Information and Communication Technology-Sector Education and Training Authority (MICT-SETA) Board, Mr SJ Ngubane;

1.2.4 The current Chief Executive Officer of the MICT-SETA: Ms Charlton Philiso; and

2. THE COMPLAINT

2.1 The complaint was lodged with my office by an anonymous Complainant (the Complainant) on 27 September 2017.

2.2 The Complainant alleged, *inter alia*, that:

2.2.1 There was improper conduct, corruption, conflict of interest, irregular appointment of an employee by the former Chief Executive Officer (CEO) of the MICT-SETA, Mr Oupa Mopaki (Mr Mopaki), particularly with regard to his alleged conduct of constantly doing business with the MICT-SETA through various private companies that are aligned and linked to him;

2.2.2 Mr Mopaki has established an industry of companies that feed off the MICT-SETA's funds, *viz*:

2.2.2.1 Lylacorp;
2.2.2.2 Network Infraco;
2.2.2.3 Bandwidth Technologies;
2.2.2.4 SPL Communications;
2.2.2.5 Centretech; and
2.2.2.6 Transhub.

2.2.3 All of the above mentioned companies are aligned and linked to Mr Mopaki and the registered owners are fronting for Mr Mopaki. The above companies received a lot more learner allocation above all other companies and implemented mostly short period Skills Programmes only. They were also training providers and employers at the same time which is against the MICT-SETA policies.

2.2.4 Mr Mopaki and Ms Naledi Sibandze, the MICT-SETA's Senior Manager: Corporate Services, did not regularly report for work. In a month, they could be seen at the MICT-SETA offices twice or thrice. This went on for years. The reason for their absenteeism was a direct result of them running and managing these private companies while at the same time drawing salaries from the MICT-SETA. Ms Sibandze was assisting Mr Mopaki to manage these companies;

2.2.5 Ms Sibandze first joined the MICT-SETA to stand in for Ms Nomfundo Molefe, who was on maternity leave, but she later resigned to be a Director in most of the above listed companies linked to Mr Mopaki. The post which Ms Sibandze was occupying as the Senior Manager: Corporate Services was never advertised as required by the MICT-SETA Recruitment Policy. It was given to Ms Sibandze by Mr Mopaki;

2.2.6 Mr Jabu Sibeko, the MICT-SETA's Senior Manager: Learning Programmes, and Mr Earnest Nemughavhini, the MICT-SETA's Manager: Learning Programmes, were also Mr Mopaki's front runners who were masterminds behind the setting up and management of these companies internally. Mr Sibeko was never dismissed despite being found guilty of corruption through an investigation conducted by Segana Makhoba Charlton Philiso;

2.2.7 All the funds remaining on the budget of MICT-SETA at the end of each financial year were not returned to the National Treasury, but were transferred directly to the above companies. The rule that companies implementing programmes must first finalise those programmes before they are considered for additional funding, did not affect these companies; and

2.2.8 Mr Mopaki managed to buy property off-shore in Dubai as a result of all these dubious deals with the MICT-SETA.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides that: "*The Public Protector has the power as regulated by national legislation:*

(a) To investigate any conduct in state affairs, or in the public administration in any sphere of government , that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) To report on that conduct; and
(c) To take appropriate remedial action."

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

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

3.5 In *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11(5); 2016(5) BCLR 618 (CC); 2016(3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (Paragraph 65);

3.5.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the value underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (Paragraph 67);

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);

3.5.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);

3.5.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);

3.5.7 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence, (paragraph 71(a);

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d);

3.5.9 "*Appropriate*" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e); and

3.5.10 The remedial action taken by the Public Protector has a binding effect (para 76). The Constitutional Court further held that: "*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.*" (paragraph 73).

3.6 In *President of the Republic of South Africa v Office of the Public Protector and Others; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)*, the court held as follows, when confirming the powers of the Public Protector:-

3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (para 71);

3.6.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question (para 82);

3.6.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 – 102):-

a) Conduct an investigation;
b) Report on that conduct; and
c) To take remedial action.

3.6.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (para 104);

3.6.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105);

3.6.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector form taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (para 107 – 108);

3.6.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112);

3.7 The MICT-SETA is an organ of state and its conduct amounts to conduct in state affairs, as a result, the matter falls within the ambit of the Public Protector's mandate.

3.8 The jurisdiction of the Public Protector was not disputed by MICT-SETA in this matter.

3.9 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute '*special circumstances*', some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration ; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident (s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalance of the past. What constitute '*special circumstances'* depends on the merits of the each case.

3.10 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating the matter. Instead, it is mainly ***the interests of justice*** that dictate whether I should investigate the matter or not. It is axiomatic that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there is huge ***public interest*** in the public administration or in the governing of public affairs.

3.1 Procurement processes, allegations of corruption, conflict of interests and appointment of public officials to senior positions such as that one of the Senior Manager: Corporate Services at a public body like MICT-SETA would inordinately generate public interest and scrutiny. The community, other job applicants, other service providers and public servants themselves would be keen to know or

enquire into the just, fairness or transparency of the processes followed in dealing with such matters.

3.2 Realising the importance of promoting accountability, good governance, integrity and openness which lies at the core of our Constitution. Mindful of the need to strengthen constitutional democracy and driven by an inclination towards promoting basic values and principles governing public administration as envisaged both in section 181 and 195 of our Constitution apiece. Appreciating the importance of advancing the norms and values enshrined in the Constitution, I duly decided to exercise my discretion in favour of this complaint. For all these reasons I conclude that it is in the interest of justice to investigate and determine the merits of the complaint.

4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6 and 7 of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this case, the factual enquiry primarily focused on whether or not there is improper conduct, corruption, conflict of interests and irregular appointment by the MICT-SETA.

4.2.3 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the MICT-SETA to prevent improper conduct and/or maladministration as well as prejudice.

4.2.4 The enquiry regarding the remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration where possible and appropriate. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the MICT-SETA or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3 **On analysis of the complaint, the following issues were identified and investigated:**

4.3.1 Whether Mr Mopaki is personally aligned or linked to any of the private companies that are contracted to the MICT-SETA and if so, whether this amounts to a conflict of interest;

4.3.2 Whether the MICT-SETA and, in particular Mr Mopaki, irregularly appointed Ms Naledi Sibandze to the positions of Manager and Senior Manager: Corporate Services, which positions were never advertised as required by the SETA Recruitment and Selection Policy;

4.3.3 Whether Mr Jabu Sibeko, the Senior Manager: Learning Programmes, and Mr Earnest Nemughavhini, the Manager: Learning Programmes, at the MICT-SETA, improperly aided Mr Mopaki to siphon off the MICT-SETA's funds to private companies linked to him; and

4.3.4 Whether the conduct of Mr Mopaki resulted in prejudice to the MICT-SETA or to any other person in the circumstances.

4.4 The Key Sources of information

Documents

4.4.1 A completed complaint form from the Complainant, dated 22 June 2018;

4.4.2 A copy of the Announcement of the job Title Changes by the MICT-SETA, dated 14 August 2012;

4.4.3 A copy of a memorandum addressed to Mr Mopaki regarding the request for approval of the change of job titles and remuneration package adjustments, dated 4 July 2012;

4.4.4 A copy of a truck and trailer hire advertisement by Transhub Transport Solution, dated 25 February 2014;

4.4.5 A copy of an internal/external advertisement by the MICT-SETA for a competent Human Resources Manager on a fixed-term contract until 31 March 2016, dated 27 September 2012;

4.4.6 A copy of Ms Naledi Elizabeth Kgofelo's Curriculum Vitae (CV), relevant application documents and a contract for temporary employment, dated 22 June 2009;

4.4.7 A copy of a list of contracts of companies contracted to the MICT-SETA from 2015 to 2017;

4.4.8 A copy of the MICT-SETA's Recruitment and Selection Policy, dated 2 February 2009;

4.4.9 A copy of a Disclosure of Interest form completed by Mr Mopaki, dated 03 February 2017;

4.4.10 A copy of the MICT-SETA's Code of Conduct, dated 16 October 2017;

4.4.11 A copy of the MICT-SETA's Constitution, dated 24 March 2011;

4.4.12 A copy of an audit report for the financial year 31 March 2010 by the Auditor General South Africa;

4.4.13 A copy of a list of candidates who were interviewed on 22 May 2009 and 29 May 2009;

4.4.14 Copies of the approval of the inclusive flexible remuneration package for Ms. Sibandze, dated 17 August 2010;

4.4.15 A copies of MICT-SETA's Forensic Investigation into allegations of irregularities in awarding discretionary grants and the recruitment process, dated 19 March 2018 and 04 May 2018; and

4.4.16 Copies of affidavits, dated 03 June 2019 by Mr Mopaki in response to my section 7(9)(a) notice.

4.5 Correspondence with the MICT-SETA

4.5.1 Allegations letter, dated 12 October 2017addressed to the former Chairperson of the Board of MICT-SETA, Mr SJ Mjwara;

4.5.2 A letter, dated 12 October 2017addressed to the Complainant;

4.5.3 A letter, dated 31 October 2017 from Mr Mjwara;

4.5.4 A letter, dated 08 March 2018 to Mr Mjwara;

4.5.5 A letter, dated 08 March 2018 to Ms Dina Makhothong of the Companies and Intellectual Property Commission (CIPC);

4.5.6 A letter, dated 12 March 2018 from Adv. RW Voller, the CIPC's Acting Commissioner;

4.5.7 A letter, dated 26 June 2018 to the Acting Chief Executive Officer for MICT-SETA, Mr Cherlton Philiso;

4.5.8 A letter to Mr Mashingwane, dated 26 June 2018;

4.5.9 A letter, dated 29 June 2018 to the Business Manager of Business Accounts at Standard Bank, Ms Belinda Watermeyer;

4.5.10 A letter/subpoena, dated 29 June 2018 to the Chief Executive Officer at Vodacom Corporate Park Building, Mr Mohamed Azziz Joosub issued in terms of section 7(4) of the Public Protector Act;

4.5.11 A letter/subpoena, dated 29 June 2018 to Nicci Lopes of MTN SA Legal and Regulatory: Law Enforcement Liaison Department issued in terms of section 7(4) of the Public Protector Act;

4.5.12 A letter, dated 5 July 2018 to Mr Oupa Mopaki;

4.5.13 A letter, dated 2 October 2018 from Mmboneni (Nentswuni Attorneys and Associates on behalf of Mr Tebogo Mashigwane);

4.5.14 A letter, dated 16 November 2018 from Mr BT Mavuso Acting Director General of Home Affairs;

4.5.15 A letter, dated 24 May 2019 from Mr Jabu Sibeko and

4.5.16 An email, dated 3 June 2019 from Ike Motloung on behalf of Mr Oupa Mopaki: former CEO.

4.6 Legislation and other legal prescripts

4.6.1 The Constitution of the Republic of South Africa, 1996;

4.6.2 The Public Protector Act 23 of 1994;

4.6.3 The Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA);

4.6.4 The Public Finance Management Act 01 of 1999 (PFMA);

4.6.5 The Code of Conduct of the MICT-SETA;

4.6.6 The MICT-SETA's Constitution, dated 24 March 2011;

4.6.7 The Standard Constitution of SETA Regulations was published and signed off by Dr Bonginkosi Emmanuel Nzimande (MP), Minister of Higher Education and Training: Government Notice 369 in Government Gazette 35336, dated 11 May 2012. Commencement date: 11 May 2012.

4.6.8 Related Party Disclosure Policy of the MICT-SETA which is signed and dated 18 September 2015;

4.6.9 Principle 1 of King IV Code on Corporate Governance: 2016; and

4.6.10 The Recruitment and Selection Policy of MICT-SETA: POL-CORP-HR-07.

4.7 Case law/Touchstones

4.7.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);

4.7.2 *Public Protector v Mail and Guardian* 2011(4) SA 420 (SCA) and

4.7.3 *South African Broadcast Incorporation Limited v Mpofu and Another [2009] 4 ALL SA 169 (GSJ).*

4.7.4 *Gamede v Public Protector* (992646/2015)[2018] ZAGPPHC 865;2019(1) SA 491 (GP)(29 August 2018).

4.7.5 *Hlubi and Others v Universal Services and Access Agency of South Africa (**USAASA**) and Others (J 2951/2011) [2012] ZALCJHB 21 (24 February 2012)*

4.7.6 Gama v Transnet Limited and Others (09/38956) [2009] ZAGPJHC 75 (7 October 2009).

4.7.7 *Hitachi Report"* A Report of the Public Protector on an investigation into allegations of improper conduct in connection with the awarding of a contract: Report Number: 30 of 2008/2009.

4.7.8 To Be or Not To Be In Conflict" Report Number 9 of 2011/2012: A Report of the Public Protector.

4.7.7 *Hitachi Report"* A Report of the Public Protector on an investigation into allegations of improper conduct in connection with the awarding of a contract: Report Number: 30 of 2008/2009.

4.7.8 To Be or Not To Be In Conflict" Report Number 9 of 2011/2012: A Report of the Public Protector.

4.7.9 Inappropriate Moves" Report Number 13 of 2013/2014: A Report of the Public Protector.

4.8 Interviews/Meetings conducted

4.8.1 Several telephonic interviews with the Complainant from 10 October 2017 throughout the investigation;

4.8.2 Recorded audio interviews conducted with the MICT-SETA officials, Messrs Nemughavhini, Sibeko, Oupa Mopaki and Mashigwane. Audio recordings were made on 4 July 2018;

4.8.3 Recorded audio interviews conducted with Naledi Sibandze of MICT-SETA on 10 July 2018; and

4.8.4 Interviews conducted with the Complainant on 05 December 2018.

4.8.5 Meeting with the current chairperson of the Board of MICT-SETA: Mr S Ngubane on 16 October 2019.

4.9 Notices issued in terms of section 7(9)(a) of the Public Protector Act

4.9.1 A notice issued to Mr Mopaki on 27 May 2019;

4.9.2 A notice issued to Mr Mashigwane on 27 May 2019;

4.9.3 A notice issued to Ms Sibandze on 27 May 2019; and

4.9.4 A notice issued jointly to the current Chairperson of the Board of MICT-SETA: Mr S Ngubane and the current CEO of MICT-SETA: Ms C Philiso, on 27 May 2019.

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

5.1 Regarding whether Mr Mopaki is personally aligned or linked to any of the private companies that are contracted to the MICT-SETA and if so, whether this amounts to a conflict of interest.

Common cause issues

Lylacorp Company:

5.1.1 Lylacorp is a private company registered with the Companies and Intellectual Property Commission, Republic of South Africa (CIPC) on 9 December 2011 with a registration number 2011/14506/07. The only current active Director of Lylacorp is Mr Mashigwane.

5.1.2 The MICT-SETA is a statutory public body established in terms of the Skills Development Act[1] and required to implement the National Skills Development Objectives as agreed with the Department of Higher Education, Science and Technology (DHEST). In order to implement national skills development programmes, the MICT-SETA issues discretionary grant funding to qualifying employers and relevant levy paying training providers that offer skills programmes which fall within the mandate of MICT-SETA.

5.1.3 The following various Service Level Agreements (SLA) were entered into between the MICT-SETA and Lylacorp as illustrated in a table below:

[1] Act 97 of 1998.

Company	CONTRACT NO.	No. of Learners	Start Date	End Date	Amount Approved
Laylacorp	MICT/FET/PVT/Lship/2013/14/09/30/94A	100	15/10/13	14/10/14	R5 300 000.00
Laylacorp	MICT/FET/PVT/Lship/2013/14/09/30/94B	100	15/10/13	14/10/14	R5 300 000.00
Laylacorp	MICT/PVT/Skillsp/2013/14/03/07/110	100	15/01/14	15/04/14	R7 000 000.00
Laylacorp	MICT/PVT/Skillsp/2014/15/21/01/15143	200	16/03/15	16/07/15	R10 600 000.00
Laylacorp	MICT/PVT/Skillsp/2014/15/28/04/1654	200	25/03/15	25/07/15	R10 600 000.00
Laylacorp	MICT/PVT/Skillsp/2016/17/10/11/17297A	40	14/11/16	13/02//17	R1 680 000.00
Laylacorp	MICT/PVT/Skillsp/2016/17/10/11/17297B	40	14/11/16	13/02/17	R1 680 000.00
Laylacorp	MICT/PVT/Skillsp/2016/17/01/03/17395A	50	06/03/17	31/08/17	R2 475 000.00
Laylacorp	MICT/PVT/Skillsp/2016/17/01/03/17395B	50	06/03/17	31/08/17	R2 475 000.00
Laylacorp	MICT/PVT/Skillsp/2016/17/10/11/17297C	40	14/11/16	13/02/17	R1 680 000.00
Laylacorp	MICT/PVT/TVET/Intern/2016/17/10/03/17340A	50	17/03/17	05/12/18	R3 500 000.00
Laylacorp	MICT/PVT/TVET/Intern/2016/17/10/03/17340B	50	13/03/17	05/12/18	R3 500 000.00
Laylacorp	MICT/NPVT/TVET/Intern/2016/17/28/03/1740	40	28/03/17	27/06/18	R2 800 000.00
Total					**R58 590 000.00**

Network Infraco Company

5.1.4 Network Infraco is a private company registered with the CIPC on 5 December 2011, with a registration number 2011/141402/07. The only current active Director of Network Infraco is Mr Mashigwane.

5.1.5 The following various SLAs were entered into between the MICT-SETA and Network Infraco as illustrated in the table below:

Company	CONTRACT NO.	No. of Learners	Start Date	End Date	Amount Approved
Network Infraco	MICT/PVT/Skillsp/2014/15/30/03/15356A	150	30/03/15	30/07/15	R7 950 000.00
Network Infraco	MICT/PVT/Skillsp/2014/15/30/03/15356B	150	30/03/15	30/07/15	R7 950 000.00
Network Infraco	MICT/PVT/Skillsp/2014/15/28/04/1655	150	25/03/15	25/07/15	R7 950 000.00

Network Infraco	MICT/PVT/Skillsp/2014/15/28/04/1655B	50	25/03/15	25/07/15	R2 650 000.00
Network Infraco	MICT/PVT/Skillsp/2014/15/28/04/1657	120	25/03/15	25/07/15	R6 360 000.00
Network Infraco	MICT/PVT/Lship/2016/17/25/05/1780A	100	30/05/16	31/08/17	R5 300 000.00
Network Infraco	MICT/PVT/Lship/2016/17/25/05/1780B	100	30/05/16	31/08/17	R5 300 000.00
Network Infraco	MICT/PVT/Lship/2016/17/25/05/1780C	100	30/05/16	31/08/17	R5 300 000.00
Network Infraco	MICT/PVT/TVET/Intern/2016/17/10/03/17399	150	13/03/17	05/12/18	R10 500 000.00
Network Infraco	MICT/PVT/TVET/Intern/2016/17/28/03/17403	40	28/03/17	27/06/18	R2 800 000.00
Total					**R62 060 000.00**

Bandwith Technologies Company

5.1.6 Bandwith Technologies is a private company registered with the CIPC on 5 December 2011, with a registration number 2011/141358/07. The only current active Director of Bandwith Technologies is Mr Mashigwane.

5.1.7 The following various SLAs were entered into between the MICT-SETA and Bandwith Technologies as illustrated in the table below:

Company	CONTRACT NO.	No. of Learners	Start Date	End Date	Amount Approved
Bandwith	UIF/MICT/PVT/Lship/2014/15/18/08/444A	150	15/09/14	15/09/2015	R3 975 000.00
Bandwith	UIF/MICT/PVT/Lship/2014/15/18/08/444B	50	01/10/14	30/09/15	R1 325 000.00
Bandwith	UIF/MICT/PVT/Lship/2014/15/03/03/15141A	100	16/03/15	16/03/16	R5 300 000.00
Bandwith	MICT/PVT/Lship/2014/15/03/03/15141B	100	16/03/15	16/03/16	R5 300 000.00
Bandwith	MICT/PVT/Skillsp/2016/17/10/11/17296	120	14/11/16	13/02/17	R5 040 000.00
Bandwith	MICT/PVT/Skillsp/2016/17/17/02/17392	100	01/03/17	31/08/17	R4 550 000.00
Total					**R25 490 000.00**

SPL Communication Company

5.1.8 SPL Communication is a Close Corporation registered with the CIPC on 26 May 1998 with a registration number 1998/030011/23. The only current active Director of SPL Communication is Ms Shadi Patricia Laka.

5.1.9 The following various SLAs were entered into between the MICT-SETA and SPL Communication as illustrated in the table below:

Company	CONTRACT NO.	No. of Learners	Start Date	End Date	Amount Approved
SPL Communications	MICT/UIF/PVT/Lship/2013/14/01/10/95A	150	02/01/2014	31/12/14	R3 975 000.00
SPL Communications	MICT/UIF/PVT/Lship/2013/14/01/10/95B	100	02/01/2014	31/12/14	R2 650 000.00
SPL Communications	MICT/UIF/PVT/Lship/2013/14/01/10/95C	50	01/06/2014	31/05/15	R1 350 000.00
SPL Communications	MICT/PVT/Lship/2015/16/22/07/702	100	18/08/2016	18/10/16	R5 300 000.00
SPL Communications	MICT/PVT/Skillsp/2015/16/26/08/922	100	01/09/2015	31/03/16	R5 825 000.00
SPL Communications	MICT/PVT/Skillsp/2015/16/01/03/626	100	01/03/2016	30/09/16	R5 300 000.00
SPL Communications	MICT/PVT/Skillsp/2016/17/10/11/17295	100	11/14/2016	13/02/17	R4 200 000.00
SPL Communications	MICT/PVT/Skillsp/2016/17/1p;[7/02/17391	150	03/01/2017	31/08/17	R6 825 000.00
Total					**R34 075 000.00**

Centretech Broadcasting Company

5.1.10 Centretech Broadcasting is a Close Corporation registered with the CIPC on 19 April 2011 with a registration number 2011/059927/23. The only current active Director of Centretech Broadcasting is Mr Mihliketo Norman Maluleke.

5.1.11 The following various SLAs were entered into between the MICT-SETA and Centretech Broadcasting as illustrated in the table below:

Company	CONTRACT NO.	No. of Learners	Start Date	End Date	Amount Approved
Centretech	MICT/PVT/Lship/2014/15/03/09/430A	100	01/10/14	15/12/14	R6 500 000.00
Centretech	MICT/PVT/Lship/2014/15/03/09/430B	100	01/10/14	30/09/15	R5 300 000.00
Centretech	MICT/PVT/Lship/2014/15/03/09/430C	100	01/10/14	30/09/15	R5 300 000.00
Centretech	MICT/PVT/Lship/2014/15/03/03/15140A	150	16/03/15	16/07/15	R7 950 000.00
Centretech	MICT/PVT/Lship/2014/15/03/03/15140B	100	16/03/15	16/03/16	R5 300 000.00
Centretech	MICT/PVT/Skillsp/2015/16/23/02/621	150	01/03/16	30/09/16	R7 950 000.00
Centretech	MICT/PVT/Lship/2016/17/23/08/17216A	100	01/09/16	30/11/17	R5 300 000.00
Centretech	MICT/PVT/Intern/2016/17/23/08/17216B	100	01/09/16	30/11/17	R7 000 000.00
Centretech	MICT/PVT/Lship/2016/17/23/08/17216C	50	01/10/16	31/12/17	R2 650 000.00
Centretech	MICT/PVT/Lship/2016/17/23/08/17216D	50	01/10/16	31/12/17	R2 650 000.00
Total					**R35 425 000.00**

5.1.12 In almost all of the above contracts, Mr Mopaki, in his capacity as the CEO, signed the SLAs for and on behalf of the MICT SETA while on the other hand, the respective directors of the above private companies signed for and on behalf of their companies. Mr Sibeko also signed almost all the above SLAs as a witness.

5.1.13 Transhub has never been contracted with the MICT-SETA before. This information was confirmed by Mr Sibeko during an interview with my investigation team on 4 July 2018.

Issues in dispute

5.1.14 The Complainant contends that Mr Mopaki was linked to all of the above mentioned private companies that were contracted to the MICT-SETA. The Complainant further argued that the registered owners of these companies were just fronting for Mr Mopaki. The Complainant asserted that the companies were

all approved for funding by the MICT-SETA, yet they were run by Mr Mopaki and other board members which is against the policy of the MICT-SETA.

5.1.15 The Complainant also pointed out that Mr Mashigwane who is believed to be related to Mr Mopaki was fronting as the owner of Lylacorp, Network Infraco and BandwithTechnologies. Mr Mopaki was also alleged to be running SPL Communications by using Ms Shadi Patricia Laka.

5.1.16 According to the Complainant, Centretech was also run by the MICT-SETA board member, Mr Mihle Maluleke. However, Mr Sibeko denied this allegation and indicated that Mr Maluleke was neither a Board member nor an employee of the MICT-SETA during an interview with my investigation team on 4 July 2018. Ms Madimetja Tisana, the MICT-SETA's Secretary of the Board, also rebutted this allegation and asserted that Mr Maluleke was not a member of the Board.

5.1.17 It was further argued by the Complainant that Mr Mopaki was dishonest to the MICT-SETA in his declaration of conflict of interest form and failed to disclose or mention his familial links and other associations with these companies.

5.1.18 In a response letter dated 19 October 2017, Mr Mopaki, categorically denied doing business with the MICT-SETA or that he is linked to various companies contracted to it. He rebutted allegations that he has established an industry of companies that feed off the MICT-SETA's funds.

5.1.19 Similarly, in a Disclosure of Interest Form by Mr Mopaki, dated 13 February 2017 which was submitted to my office, he did not disclose any business or familial ties or other association with any of the companies contracted to the MICT-SETA.

5.1.20 In a meeting with my investigation team held on 4 July 2018, Mr Mopaki was asked if he was personally related to Mr Mashigwane as alleged by the Complainant. He could not answer this innocuous question and only undertook to respond in writing with the assistance of his legal representative. On 5 July 2018, a letter was subsequently sent by my investigation team to Mr Mopaki, requesting clarity about his alleged relationship and business association with Mr Mashigwane.

5.1.21 No response was received from Mr Mopaki despite him having acknowledged receipt of the letter and undertaken to reply by 25 July 2018. A courtesy reminder by way of an email was also sent to him on 30 July 2018 by my office, yet Mr Mopaki failed to reply.

5.1.22 Notwithstanding, the failure by Mr Mopaki to respond about his business or familial relationship with Mr Mashigwane, the latter has nonetheless responded to my investigation team through a letter dated 2 August 2018, from his legal representative, Nentswuni Attorneys. In the letter, Mr Mashigwane conceded that Mr Mopaki is his uncle and further indicated that it follows from this relationship that communication between him and Mr Mopaki exists.

5.1.23 My investigation team also conducted its own independent investigation of the alleged relationship between Mr Mopaki and Mr Mashigwane. The Department of Home Affairs (DHA) was consulted by my office to establish if there was any family ties between Mr Mopaki and Mr Mashigwane.

5.1.24 Mr BT Mavuso, the Acting Director General of the DHA confirmed, using identity numbers[2] in a letter dated 16 November 2018, that Ms Mirriam Mashigwane was born Mopaki and later married into the Mashigwane family. It was further

[2] Identity numbers of Mr. Oupa Mopaki, Mr. Tebogo Terence Mashigwane and Ms. Mirriam M Mashigwane were supplied to DHA by my team in order to establish existence or non-existence of any consanguinity amongst the three. Identity numbers are known to the Public Protector and shall not be published in this report for security reasons.

confirmed in the same letter that Ms Mirriam Mashigwane is the biological mother of Tebogo Terence Mashigwane. Both Ms Mirriam Mashigwane and Tebogo Terence Mashigwane are according to the DHA system, residing at the same address[3].

5.1.25 My office was also furnished with two forensic reports by the MICT-SETA during the course of this investigation which are dated 18 March 2018 and 4 May 2018 respectively[4]. These reports were compiled by Gobodo Forensic and Investigative Accounting (Pty) Ltd (GFIA). The scope of investigation of the GFIA covered similar issues lodged with my office.

5.1.26 The GFIA indicated in its reports that on 12 March 2018, it had taken possession of certain laptops including the one that had been issued to Mr Mopaki for imaging of their hard drives, recovery of deleted files, communication, etc.

5.1.27 According to the GFIA reports, forensic analysis and advanced auditing of Mr Mopaki's computer drive were conducted and the following, amongst others, was established by the GFIA[5]:

"Email message number 2216, which appears to be from Mr Mashigwane (tebogom@bwtek.co.za) to oupa@bwtek.co.za), dated 20 March 2014 at 10:22 AM, with the subject ***Water Bill.*** *The content of the email inter alia read as follows:*

"Kindly find attached water bill as requested".

5.1.28 The email appeared as follows from the hard drive imaging and reviewing:

[3] The physical address is known to the Public Protector and shall not be published in this report for security reasons.
[4] Final report and a supplementary report.
[5] GFIA Supplementary Report: MICT SETA Forensic Investigation into allegations of irregularities in awarding discretionary grants and Recruitment process, dated 04 May 2018, page 4.

"From: Tebogo Mashigwane<tebogom@bwtek.co.za<mailto:tebogom@bwtek.co.za
Date: 20 March 2014 10:32:05 AM SAST
To: <oupa@bwtek.co.za<mailto: oupa@bwtek.co.za
Subject: Water Bill

5.1.29 Upon perusal and inspection of the attached water bill referred to in the above email, which was also furnished to my team as an annexure to GFIA report , it was observed that the said water bill is a Rustenburg Local Municipality's monthly services statement for stand number.....[6] On the left top corner of the said municipal statement, it is clearly addressed to:

"Mr/s SN Mothokwa & and M Mopaki"

5.1.30 GFIA's forensic analysis and computer drive imaging further revealed the following:

"Email message number 2624 which appears to be from Mr Mopaki (oupa@networkinfraco.co.za) to Paul Botha (Paul@lytteltondolomite.co.za), dated from 26 June 2014 at 03:24 PM, with a subject heading "Invoice Information from Network Infraco".

5.1.31 Other email communication from Paul Botha:*Paul@lytteltondolomite*.co.za to Mr Mopaki: *oupa@networkinfraco.co.za)* dated 15 August 2014, *inter alia*, read as follows:

"Good day Oupa, How are you? I haven't heard from you again, when we can expect your truck to start with us".

[6] Physical address omitted for security reasons.

5.1.32 Mr Mopaki replied to the above email on 05 September 2014 at 02:44 PM using email address *oupa@networkinfraco.co.za* as follows:

"Good day Paul

Kindly receive the information below for invoicing purposes as per our discussion.

Kind Regards"

5.1.33 I have reviewed/inspected the attachment to the above email in connection with the truck as sent by Mr Mopaki to Mr Botha and observed that it was a Delivery Note including the details of the truck involved. The registration number of the truck involved was [redacted].[7] I have further profiled the truck involved on National Traffic Information System (ENatis) for ownership details and it came out as follows:

Make: Freightliner
Series: Argosy
Category: Heavy load vehicle (GVM-3500kg equip draw)
Owner status: Current
Owner name: Network Infraco (Pty) Ltd

5.1.34 The above clearly links Mr Mopaki to Network Infraco. It further confirms that Mr Mopaki is indeed aligned and associated with business activities of Network Infraco, which is owned by his nephew, Mr Mashigwane.

[7] Blacked out for security reasons.

5.1.35 An email message number 0001 which appears to be communication between Mr Mashigwane, Mr Henk and Mr Mopaki dated 20 September 2016 at 10:02 AM read as follows:

"Subject: Delanco Diamonds (Pty) Ltd //Network Infraco
From: Tebogo Mashigwane
Date: 20 September 2016 10:02: AM
To: henk@klaw.co.za
CC: brasygroup@gmail.com;Oupa Mopaki

"Good Morning Henk,
Kindly receive the attached ***proof of payment for the transactions that were to Delanco Diamonds.***
Kind Regards,
Tebogo

On 19 September 2016, at 21:59, Oupa Mopaki >oupa.mopaki@mict.org.za> wrote:
Good evening Henk,
There was no deal made with Barry, it is yet one of his delaying tactics.
Regards
Oupa
Sent from iPad".

5.1.36 Upon inspection of the attached proof of payment, referred to in the email above and which is provided as annexure C in the GFIA's forensic report, I observed that it was bank statements from Lylacorp Standard Bank Account number: 251 847217. Of relevance for the purposes of this matter, amongst many other transactions recorded in this bank statement is the following transaction:

Date	Batch Description	Account Number	Account Name	Statement Reference	Total Credit Amount
2015-12-01	Mining Operations	251 847217	Lylacorp (Pty) Ltd	Oupa	R150 000.00

5.1.37 The above highlighted financial transaction establishes that there existed a business/financial interest or association between Mr Mopaki and Lylacorp, which is owned by Mr Mashigwane.

5.1.38 During a meeting with my investigation team on 4 July 2018, Mr Mashigwane was requested to shed some light on these email addresses *oupa@bwtek.co.za* or *oupa@networkinfraco.co.za* with whom he had exchanged emails. He denied that it was Mr Mopaki and said that it was another "guy" by the name of Oupa who was working with him at Bandwith Technologies. According to Mr Mashigwane, this Oupa has since resigned and left Bandwith Technologies. However, it can be concluded that this was nothing more than a bare denial by Mr Mashigwane since these emails were extracted from Oupa Mopaki's official laptop which belonged to MICT-SETA.

5.1.39 On the other hand, Mr Mopaki has since failed to answer questions related to the allegations that he was registered on a computer domain of Network Infraco as *oupa@networkinfraco.co.za* as well as on a computer domain of Bandwith Technologies as *oupa@bwtek.co.za*. A letter dated 5 July 2018 from my office addressed to Mr Mopaki seeking clarity on this information has yet to be responded to, despite having acknowledged it and further undertook to respond by 25 July 2018.

Application of the relevant legal prescripts

5.1.40 Section 2 of the Constitution[8] provides that:

"This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled".

5.1.41 Section Section 195(1) of the Constitution provides, amongst others, that:

"Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a) A high standard of professional ethics must be promoted and maintained.
b) ...
c) ...
d) Services must be provided impartially, fairly, equitably and without bias.
e) ...
f) Public administration must be accountable
g) Transparency must be fostered
h) ..."

5.1.42 Section 195(2) of the Constitution provides that "*the above principles apply to-*

(a) Administration in every sphere of government;
(b) Organs of state; and
(c) Public enterprises."

[8] Constitution of the Republic of South Africa of 1996.

Status of MICT-SETA

5.1.43 It is necessary to establish the status of MICT-SETA in order to determine and establish how it's Board and Management function.

5.1.44 In terms of section 239 of the Constitution an *Organ of State* means:

(a) " any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution—

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution;

or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer."

5.1.45 The MICT-SETA is a statutory public body established in terms of section 9 of the Skills Development Act[9]. Similarly, the MICT-SETA is listed and identified as a national public entity under Schedule 3A of the PFMA.[10]

5.1.46 Section 10(1) of the Skills Development Act[11] set out the statutory Functions of SETA as including but not limited to the following:

"(1*) A SETA must, in accordance with any requirements that may be prescribed-*

(a) develop a sector skills plan within the framework of the national skills development strategy;

(b) implement its sector skills plan by-

(i) establishing learning programmes;

[9] Act 97 of 1998.
[10] Act 1 of 1999.
[11] Act 97 of 1998.

(ii) approving workplace skills plans and annual training reports;
(iii) allocating grants in the prescribed manner and in accordance with any prescribed standards and criteria to employers, education and skills development providers and workers; and
(iv) monitoring education and skills development provision in the sector;
(c) promote learning programmes by-
(i) identifying workplaces for practical work experience;
(ii) supporting the development of learning materials;
(iii) improving the facilitation of learning; and
(iv) assisting in the conclusion of agreements for learning programmes, to the extent that it is required"

5.1.47 The above legal prescripts confirm that the MICT-SETA is an organ of state and a public entity which discharges its functions in terms of the statute. By extension, MICT-SETA is therefore further bound by the Constitution and PFMA. The Constitution recognises the importance of good governance in section 195 which deals with basic values and principles governing public administration. In terms of this section, there must be a high standard of professional ethics which must be promoted and maintained. These principles apply to organs of state and public enterprises.

5.1.48 The officials of the MICT-SETA are therefore required to maintain a high standard of professional ethics, act impartially, without bias and transparently in the execution of his duties. In the instant case, Mr Mopaki, the CEO of MICT-SETA (as then he was) did not disclose his personal and familial relationship with Mr Mashigwane, who is contracted to the MICT-SETA through various companies. Evidence at my disposal established the existence of a familial and personal association between Mr Mopaki and Mr Mashigwane.

5.1.49 By failing to declare in his Disclosure of Interest Form that Mr Mashigwane is his nephew, Mr Mopaki did not promote or maintain a high standard of

professional ethics envisaged by the Constitution. Equally, his failure to disclose the family relationship between him and Mr Mashigwane defeats the principles and values of transparency, impartiality, fairness required by the Constitution.

5.1.50 Integrity is a key principle underpinning good corporate governance. Evidently, good corporate governance is based on a clear code of ethical behaviour and personal integrity exercised by the accounting officers, where communications are shared openly.

5.1.51 Section 49 of the PFMA provides, amongst others, that every public entity must have an authority which must be accountable for the purposes of the PFMA. MICT-SETA has a Board and therefore the Board is the MICT-SETA's Accounting Authority.[12]

5.1.52 The STANDARD CONSTITUTION OF SETA REGULATIONS was published[13] after being signed off by Dr Bonginkosi Emmanuel Nzimande (MP), Minister of Higher Education and Training, following a consultation with the National Skills Authority, in order to make regulations in terms of section 13(1) read with section 36(a) of the Skills Development Act, 1998 (Act No 97 of 1998).

5.1.53 Clause 8(3)(a) of the STANDARD CONSTITUTION OF SETA REGULATIONS provides for the Delegation of Functions by the Accounting Authority of SETA and stipulates the following:

(a) **The Accounting Authority may delegate any of its functions to -**

(i) The Executive Committee;

(ii) The Chief Executive Officer; or

[12] The role, functions and powers of the Board of MICT-SETA are clearly set out in Clause 8(1)(2) of its Constitution.

[13] Government Notice 369 in Government Gazette 35336, dated 11 May 2012. Commencement date: 11 May 2012.

(iii) To any other committee or chamber of the SETA.

5.1.54 It is also important to note that the Constitution of MICT-SETA has similar provisions which allows for delegation of powers and functions.

5.1.55 In Gama v Transnet Limited and Others[14], the court dismissed the challenge made against the Delegation of Authority against Transnet and held as follows at paragraph (47):

"A company can only perform acts through its duly authorised directors, managers and employees. This requires the appropriate delegation of powers, generally with suitable limitations. The source of these powers generally reside in the Board which in turn delegates to individual directors or executive management, with further powers of sub-delegation...."

5.1.56 In terms of Clause 12(1) of the MICT-SETA'S CONSTITUTION[15] (MICT-SETA Constitution), the Accounting Authority/Board must within six months of taking office recommend for appointment after following a transparent process three(3) qualified or experienced candidates in accounting, financial and senior management matters for appointment to the position of the CEO by the Minister after approval by Cabinet.

5.1.57 According to Clause 12(2) of the MICT-SETA Constitution the Duties of the CEO are to:

" (a) Implement the decisions of the Accounting Authority;
(b) Execute the strategic and management operations of the SETA;
(c) Attend the meetings of the Accounting Authority and the Executive Committee;

[14] (09/38956) [2009] ZAGPJHC 75 (7 October 2009).

[15] Dated 23 March 2011 and signed off by Chairperson of the Board: Mr Lesaiye Chiloane (as he was then)

(d) Promote strategic planning and policy development;

(e) Ensure strict and responsible control of the finances of the SETA, in compliance with the financial management requirements of the PFMA;

(f) Supervise and direct the other employees of the SETA; and

(g) From time to time perform such other functions as determined by the Accounting Authority or the Executive Committee".

5.1.58 Purposively viewed, it is clear from the above traversed judicial precedent, legal provisions of both the STANDARD CONSTITUTION OF SETA REGULATIONS and MICT-SETA's Constitution that the Board as the Accounting Authority of MICT-SETA appoints the CEO and further delegate to the CEO its functions and authority, who must ensure strict and responsible control of the finances of the MICT-SETA, in compliance with the financial management requirements of the PFMA. CEO is responsible for implementing all the decisions of the Board/Accounting Authority. In this instance, the CEO reports directly to, and is accountable to the Board for the performance and the day to day activities of MICT-SETA. In essence, the MICT-SETA is under the direction and control of the CEO appointed by the Board.

5.1.59 By both direction and delegation of the Board, the CEO manages all aspects of the organisation as Accounting Officer. Although there is no specific reference in any law which expressly provides that the CEO of MICT-SETA is its Accounting Officer, there is equally nothing in law which precludes the Board from delegating its authority to the CEO. CEOs typically oversee the entity's money, time and human resources and act as a liaison between the Board and staff. Simply put, the Board should govern and the CEO should manage subject to oversight by Board. The CEO is responsible for the overall success of a business entity or organisation and for making top-level managerial decisions. The CEO is the top operational decision-maker within the trading entity. There should not be any confusion between the role of a CEO and that of the Board.

The Board and its chairperson are not so directly involved in day-to-day business operations of the MICT-SETA, instead they leave the CEO with flexibility in running the MICT-SETA.

5.1.60 My team held a meeting and confirmed the above arrangements/status with the current chairperson of the Board of MICT-SETA: Mr Sihle Ngubane (Mr Ngubane) on 16 October 2019. During this meeting Mr Ngubane explained that the Board is not operational and only meets about four times a year. As a result, it is highly impossible for the Board to oversee the day to day business of the MICT-SETA. According to Mr Ngubane all MICT-SETA Boards (current and previous) used a document called "*Delegation of Authority*" [16](DoA) in terms of which the CEO is delegated with authority to run the MICT-SETA as an Accounting Officer responsible for all operational or administrative duties including ensuring compliance with PFMA.

5.1.61 Lastly, and taking into consideration the submission by Mr Ngubane, I further submit that it could never have been the intention of the legislature to allow for a situation where a public entity such as MICT-SETA to function without a CEO or other similar official responsible for the day to day operations.

5.1.62 It follows therefore that the CEO (Mr Mopaki as he was then) was fully delegated to ensure strict and responsible control of the finances of the MICT-SETA, in compliance with the financial management requirements of the PFMA. It stands to reason therefore that by extension the CEO of MICT-SETA constitute the Accounting Authority for the purposes section 49, 50, 51 and 83 of PFMA.[17]

[16] Refer to recorded audio at minute 34 to 39 (Meeting/interview with Mr Ngubane).
[17] Labour Court of South Africa held the same on a matter of "Hlubi and Others v Universal Services and Access Agency of South Africa (**USAASA**) and Others (J 2951/2011) [2012] ZALCJHB 21 (24 February 2012) at paragraph 21.

5.1.63 In what follows, I proceed to explore Mr Mopaki's financial obligations under PFMA as the CEO of MICT-SETA (as he was then).

5.1.64 In terms of section 50 of the PFMA, the accounting authority of a public entity has the following fiduciary duties to observe:

"(1) The accounting authority for a public entity must—

(a) .....

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

(c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

(2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not—

(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

(3) A member of an accounting authority must—

(a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant."

5.1.65 Section 51(1) of PFMA provides for general responsibilities of accounting authorities and states as follows—

"(1) An accounting authority for a public entity—
(a) must ensure that that public entity has and maintains—
(i) Effective, efficient and transparent systems of financial and risk management and internal control;

(ii) .....
(iii) An appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
(iv).....
(b) Must take effective and appropriate steps to—
(i).....
(ii) Prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity";

5.1.66 Section 83 of the PFMA stipulates that:

"(1) The accounting authority for a public entity commits an act of financial misconduct if that accounting authority willfully or negligently—
(a) fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55; or
(b) makes or permits an irregular expenditure or a fruitless and wasteful expenditure".

5.1.67 As indicated above, the Board/Accounting Authority of MICT-SETA appointed Mr Mopaki as the CEO responsible for the day to day business activities of MICT-SETA and reporting back directly to the Board. The authority delegated to the CEO by the Board is fully consonant with his duties as set out in Clause 12(2) of the MICT-SETA

Constitution and the powers of the Board under section 50, 51 and 83 of PFMA. As such, the above provisions of PFMA fully and squarely applied to Mr Mopaki on his capacity as CEO fully delegated with the functions of the Board/Accounting Authority.

5.1.68 Mr Mopaki was requested by the MICT-SETA, by way of a Disclosure of Interest Form[18] dated 20 February 2017, to declare any direct or indirect financial interest, whether personally or through a spouse, partner or associate which as an employee of MICT-SETA, he may have in any matter that may undermine objectivity of people making business decisions within MICT-SETA. A closer look at this form, shows that Mr Mopaki did not disclose his personal and family relationship with Mr Mashigwane, yet he signed his business contracts with MICT-SETA.

5.1.69 Evidence from Mr Mopaki's computer drive as outlined above from the GFIA report shows that Mr Mopaki had a business association with Bandwith Technologies and Network Infraco, which he never disclosed. Again, by signing off the SLA's of Mr Mashigwane's companies namely Lylacorp, Bandwith Technologies and Network Infraco, Mr Mopaki did not observe his fiduciary duties as contemplated above. As a result, there existed a conflict of interests when Mr Mopaki signed and approved his nephew's business contracts with MICT-SETA without declaring this family relationship.

5.1.70 Section 17(1) of the Prevention and Combating of Corrupt Activities Act (PRECCA) provides as follows:

"Any public officer who, subject to subsection (2) acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the

[18] This form is completed annually by all employees of MICT-SETA. The form is intended to disclose or declare any perceived, potential or actual conflict of interest that may undermine the objectivity of employees making business decisions for MICT-SETA. Public Protector is in possession this form which was signed by Mr Mopaki.

public body in which he or she is employed or which is made on account of that public body, is guilty of an offence."

5.1.71 Evidence from the computer/laptop drive of Mr Mopaki indicated that he had a vested private interest both at Bandwith Technologies and Network Infraco. Forensic investigation by the GFIA as outlined in its report on this matter, established that Mr Mopaki exchanged business related communication with private companies contracted to the MICT-SETA. The GFIA's report and its forensic evidence further revealed as inspected by myself that Mr Mopaki was registered on the computer domain of these two companies. Such conduct by Mr Mopaki was clearly at odds with the above provision of the PRECCA.

5.1.72 The Code of Conduct of the MICT-SETA (Code of Conduct), which was signed and approved on 16 October 2017 by Mr Mopaki in his capacity as the then CEO of MICT-SETA, provides the following as its purpose:

(i) The primary purpose of the Code of Conduct as stipulated in Clause 1 is to indicate the spirit in which employees should perform their duties and it is applicable to all MICT-SETA employees as confirmed by its scope of application in Clause 2 thereof.

(ii) Clause 6 of the Code of Conduct deals with Disclosures of Interests and states as follows:

"6.1.1 Do not bid for tender contracts if you are employed with SETA
6.1.2 Disclose your financial interests if you are in senior management, advisors or working in supply chain management or requested by management to do so.
6.1.3Withdraw from supply chain management process if you have an interest in the contract being awarded.
6.1.4...
6.1.5 ...

6.1.6…

6.1.7…

6.1.8 Nor should you divulge any information regarding the affairs of MICT-SETA to any unauthorised person which include: family, friends, stakeholders or service providers.

6.1.9…

6.1.10…

6.1.11Be true and faithful to MICT-SETA in all dealings and transactions relating to its activities and interests.

6.1.12 Declare any business, commercial and financial interests or activities undertaken for financial gain that may raise a potential conflict of interest".

5.1.73 The MICT-SETA's Constitution provides as follows with regard to Conflict of Interest in Clause 3(1) and (2):

(1) "Members of the Accounting Authority, the committees, the chambers and employees of SETA (and their immediate families) are prohibited from directly or indirectly associated with any business entities that provides goods or services to the SETA.

(2) Any person referred to in 3(1) found to have direct or indirect financial interest or any business interest in the SETA must be removed from the office he or she is occupying at SETA and such financial or business interests must be terminated by SETA."

5.1.74 Mr Mopaki is undeniably the CEO and an employee of MICT-SETA and further formed part of various Committees within SETA. The above Clause therefore applied to him and had a duty to uphold it, which as evidence showed, he failed to uphold.

5.1.75 Similarly, in terms of Clause 4.3 of the Related Party Disclosure Policy of the MICT-SETA which is signed and dated 18 September 2015, a "*close member of the family of an individual*" means family members who may be expected to influence or be influenced by that individual in their dealings with the entity. Clauses 6.1 and 6.2 of the Related Party Disclosure Policy provides that at every board meeting and at every management meeting a Declaration of Interest Form should be completed by each member.

5.1.76 In this instance, it would not be unreasonable to hold that Mr Mopaki and Mr Mashigwane are closely related, since Mr Mopaki is Mr Mashigwane's uncle. Mr Mopaki and Mr Mashigwane's mother are biological siblings. Mr Mopaki also did not uphold this policy as well.

5.1.77 Principle1 of King IV Code on Corporate Governance: 2016 provides for the following recommended practices for the governing body, accounting authorities or board members:

(a) Integrity

(i) Members of the governing body must act in good faith and in the interests of the organisation.

(ii) Members of the governing body should avoid conflict of interests. In cases where conflict of interest cannot be avoided, it should be disclosed to the governing body in full at the earliest opportunity and then be proactively managed by the governing body subject to legal provisions.

(iii) Members of the governing body should act ethically beyond mere legal compliance.

(iv) Members of the governing body should set the tone for an ethical organizational culture."

5.1.78 The above was also cited by the court in a matter of *South African Broadcast Incorporation Limited v Mpofu and Another* [2009] 4 ALL SA 169 (GSJ) at paragraph 29, in which a full bench approved certain basic principles of corporate governance relying, *inter alia,* on the King Report on Corporate Governance for South Africa. King IV Codes aspire to apply to all private and public organizations irrespective of their incorporation. Its aim is to broaden the acceptance of good corporate governance.

5.1.79 It follows therefore that Mr Mopaki, as the MICT-SETA's CEO, was expected by the MICT-SETA's Code of Conduct, Constitution, and Related Party Disclosure Policy and the King IV Code to declare his personal, familial and business association with Mr Mashigwane. It is required in terms of clause 6.3.3 of the Code of Conduct to over-declare rather than under declare. Mr Mopaki did not divulge his involvement with Bandwith Technologies, Network Infraco and his family relationship with Mr Mashigwane, notwithstanding the fact that most of these policies were signed off by him as the CEO. Although the legal status of King IV Code of Good Governance is voluntary, MICT-SETA has adopted it as one of the leading guide in its Disclosure of Interest Policy/Forms.

5.1.80 The MICT-SETA's Supply Chain Management (SCM) Policy dated 1 September 2016 has provisions in Clause 12 with similar terms as section 217 of the Constitution, highlighting the need for transparency, competitiveness, fairness, ethics and accountability. Clause 12.6 of the MICT-SETA's SCM Policy states that ignorance of this policy may not be used as an excuse for deviant behaviour. Failure to disclose the relationship by Mr Mopaki with Mr Mashigwane cannot be reconciled with the requirement of this clause.

THE PUBLIC PROTECTOR TOUCHSTONES:

5.1.81 The most relevant investigation reports dealing with conflict of interest are those on former Minister Valli Moosa commonly known as the "Hitachi" report; "To be or not to be in conflict" report and the IEC report titled, "Inappropriate Moves".

"Inappropriate Moves" Report Number 13 of 2013/2014

5.1.82 The conflict of interest concerned was whether or not a business partner in a different company than the one bidding presented a conflict of interest for the Chief Electoral Officer who was central to the bid process.

5.1.83 The finding was that it would have been prudent to disclose such a relationship despite the fact that it was not related to the bid in question so as to eliminate any suspicions of conflict of interest and that officials performing a public function should understand that things that can undermine objectivity transcend financial interests

***"To Be or Not To Be In Conflict"* Report Number 9 of 2011/2012**

5.1.84 The conflict of interest question was whether or not being a President of a powerful professional body presented a potential conflict of interest for a Director-General of the Department of Labour.

5.1.85 The finding was that there was a perceived conflict of interest that needed to be managed.

***"Hitachi Report"* A Report of the Public Protector on an investigation into allegations of improper conduct in connection with the awarding of a contract: Report Number: 30 of 2008/2009.**

5.1.86 The allegations of improper conduct related to a contract by a public entity that was awarded to a company in which a political party had an interest.

5.1.87 At the time of the awarding of the contract, the Chairperson of the Board of the public entity was also a member of the highest decision making body of the political party and as a result thereof, it was alleged that he had a conflict of interest.

5.1.88 The finding was that there was an unmanaged conflict of interest between the personal interest of the public official in the political party and his duty towards the public entity at the time when a resolution was taken to award the contract to the Hitachi Consortium, in which the political party had an interest.

"Lying and other forms of Dishonesty: The Ndaweni Mahlangu Report

5.1.89 In a report following allegations in the media to the effect that the former Premier of Mpumalanga Province said it was acceptable and normal for politicians to lie to members of the public.

5.1.90 The Public Protector found that the statement issued by the former Premier of Mpumalanga was unbecoming of a Member of an Executive Council. The statement was also found to have been inconsistent with the office of the Premier in that it compromised the credibility and integrity of that office and of government.

5.1.91 The finding was also that the former Premier's statement was in violation of the provisions of sections 136(2)(b) and 182(1)(a) of the Constitution read with section 6(4)(a)(ii) of the Public Protector Act.

5.1.92 The golden thread running across all the above touchstones and general principles, dealing with the question as to whether it is wrong to have a conflict

of interests, is indeed that public officials should where reasonably possible avoid conflicts between his/her personal interest and the public interest. However, where conflicts of interest cannot reasonably be avoided, an official has a responsibility to identify and declare same to his/her supervisor. In this case, Mr Mopaki did not declare anything to the Board of MICT-SETA, despite being the signatory approving most of the contracts/SLA for companies belonging to his nephew.

Response to the Notice in terms of section 7(9)(a) of the Public Protector Act, 1994

5.1.93 On 14 May 2019, I issued all implicated MICT-SETA's officials, including other parties with direct interest on this matter, with a notice in terms of section 7(9)(a) of the Public Protector Act, with the view to afford them an opportunity to respond to the allegations against them, particularly in relation to the role they played in this matter. Section 7(9)(a) of the Public Protector Act provides that: -

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

5.1.94 I now turn to consider the responses submitted regarding the section 7(9)(a) notices and further evaluate the responses.

5.1.95 A response was received by my office on 12 June 2019 on behalf of Messrs Mopaki and Mashigwane from Mr Ike Motloung of Maluleke Seriti Makume and Matlala Incorporated (MSMM).

5.1.96 Messrs Mopaki and Mashigwane argued that I misdirected myself on both facts and law in coming to my findings or conclusions. The dominant or the overarching theme of the argument advanced on behalf of Mr Mopaki was that I misunderstood the principle set by *Gamede*[19] decision with regard to access to information and documents in my possession. MSMM contended that *Gamede* is only applicable to the preliminary investigation stage.

5.1.97 It was further submitted by MSMM that when Mr Mopaki requested my office to provide him with certain documents related to this investigation, this matter was beyond preliminary investigation and that I had already served the Notice under reply. According to the submission by MSMM, at a Notice stage my investigation had already passed or progressed past the preliminary stage referred to in *Gamede*. As a result MSMM argued that *Gamede* decision should not have served as a basis or authority for my refusal to provide Mr Mopaki with information and documents he requested in order to enable him to reply or facilitate a response to my Notice.[20]

5.1.98 The above submission by MSMM is misplaced and stands to be rejected on the basis that at the Notice stage, my investigation is not yet final. In fact the investigation is still ongoing at this stage and my findings are only preliminary or provisional and subject to change or amendment. What is clear from both the tenor and the high water mark of the *Gamede* decision, was that there was no reviewable decision by my office at that stage of investigation which the applicant sought to set aside since the matter was still under investigation. Similarly, there is no reviewable decision at the Notice stage of my investigation to be set aside or substituted which would have ordinarily entitled Mr Mopaki to documents in my possession, *as of right*.

[19] *Gamede v Public Protector* (992646/2015)[2018] ZAGPPHC 865;2019(1) SA 491 (GP)(29 August 2018).
[20] On Tuesday, 04 June 2019 Mr Mopaki made an application to my office in order to discover certain documents in my possession which I declined in line with the *Gamede* decision.

5.1.99 Without arrogating to myself the *'blanket file privilege'* which I am by no means intending to do, Mr Mopaki did not establish any grounds to justify access to documents contained in my investigation file, for the purposes of responding to my notice. I still retain a discretion which I exercise judiciously to resist a request for access to any document in my investigation file on the grounds that such access is not justified for the purposes of enabling such other party to properly answer or respond to my ongoing investigation or notice.

5.1.100 Moreover, this matter was reported anonymously and to an extent, I had a reason to believe that there is a reasonable risk that access to documents in my investigation file would lead to the disclosure of the identity of the whistle blower which I have a duty to protect. Accordingly, I respectfully reject Mr Mopaki's argument.

5.1.101 In reply to my notice, it was further contended on behalf of Mr Mopaki that the Disclosure of Interests Form did not require him to declare a mere family relationship. It was submitted further that a mere fact that Mr Mopaki is Mr Mashigwane's uncle does not in any way constitute a conflict of interest. It was also submitted that my office failed to prove or demonstrate that Mr Mopaki had any financial interest or benefitted financially from any of the above companies.

5.1.102 I submit that this contention by Mr Mopaki cannot be accepted based on the evidence. A credit transfer of R150 000.00 from Lylacorp's Standard Bank account to Oupa adds to the weight of evidence which proves that Mr Mopaki had benefited from some of the companies contracted to the MICT-SETA. More so, balanced against the requirement in clause 6.3.3 of the Code of Conduct which demands for the employees of MICT-SETA to rather over-declare than under declare. It should be noted further that the issue under investigation was not sorely to focus on whether or not Mr Mopaki benefited financially from these companies, but whether he was linked to any of them.

Conclusion

5.1.103 Based on the evidence at my disposal, it is clear that Mr Mopaki was indeed not only related to Mr Mashigwane, but also that he was associated with Bandwith Technologies and Network Infraco. Evidence extrapolated above also indicates that Mr Mopaki failed to declare or disclose at any stage, his association with Mr Mashigwane, Bandwith Technologies and Network Infraco to the Board of MICT-SETA or on any other prescribed form.

5.1.104 Such an undisclosed relationship and association between Mr Mopaki and Mr Mashigwane created a direct or perceived conflict of interest. The totality of evidence at my disposal set out sufficient detail of the factual exposition which underpin my contention that there existed a strong and reasonable perception of conflict of interest on the part of Mr Mopaki in the circumstances.

5.1.105 Save for the companies that have been discussed in evidence herein, my office could not link Mr Mopaki to any other company that was contracted to the MICT-SETA.

5.2 Regarding whether the MICT-SETA and, in particular Mr Mopaki, irregularly appointed Ms Naledi Sibandze to positions of Manager and Senior Manager: Corporate Services which were never advertised as required by the MICT-SETA Recruitment and Selection Policy.

Common cause issues

5.2.1 Ms Sibandze first joined the MICT-SETA in June 2009 from Standard Bank after the MICT-SETA had advertised the position of SCM Officer as a temporary position for six (6) months. The MICT-SETA is no longer in possession of the particulars of this post advertisement and its requirements. Mr Tshegofatso

Magongwa, the MICT-SETA's Human Resources official confirmed during a meeting with my investigation team in December 2018 that they no longer have the particulars of this post advertisement and its requirements.

5.2.2 Ms Sibandze applied for the position of SCM Officer and was shortlisted and interviewed with other candidates.

5.2.3 According to the submission to my office on 8 March 2018 by Mr Mjwara, Ms Sibandze had the following academic qualifications at the time of her shortlisting for this post:

(a) A Senior Certificate;
(b) A Bachelor's degree in Production Management; and
(c) A National Diploma in Production Management.

5.2.4 The interview panel for the SCM Officer post comprised of the following officials:

No.	Panel Member
1.	Ms Janine Du Plessis
2.	Ms Victoria Ngoasheng
3.	Mr Jabu Sibeko
4.	Ms Babongile Mnyandu
5.	Mr Rudolph Coetzee

5.2.5 Ms Sibandze was the successful candidate and was subsequently appointed and offered the temporary position with a total package of R350 000.00 per annum.

5.2.6 On 2 June 2009, an appointment letter and the contract for Ms Sibandze for a six (6) months fixed term employment contract as an SCM Officer was signed by Mr Mopaki, together with that of the Human Resources Officer, Ms Victoria Ngoasheng, with the commencement date of 22 June 2009 to 30 December 2009.

5.2.7 Ms Sibandze was further issued with another letter of appointment signed by Mr Mopaki on 17 December 2009, prior to the expiry of her fixed term contract. In the letter, Mr Mopaki confirmed the permanent appointment of Ms Sibandze to the position of SCM Officer thereby converting Ms Sibandze's temporary contract of employment to permanent.

5.2.8 The commencement date to this permanent position was 5 January 2010 with a total salary package of R451 000.00. This post was not advertised and no interviews were conducted.

5.2.9 On 1 April 2011, Ms Sibandze was again promoted from the position of SCM Officer to Manager Corporate Services, on a salary of R580 000.00 per annum. The appointment letter was also signed by Mr Mopaki. The post was not advertised and no interviews were conducted.

5.2.10 In 2012, the MICT-SETA appointed 21st Century Pay Solutions Group (Pty) Ltd (21st Century), to conduct job evaluation and re-grading of some positions within the MICT-SETA. 21st Century subsequently issued a job evaluation report to the MICT-SETA in which certain positions were recommended for re-grading.

5.2.11 In terms of the report from 21st Century, the position of Ms Sibandze namely, Manager: Corporate Services, was not recommended for remuneration adjustment or change of the job title.

5.2.12 On 5 October 2012, Mr Mopaki signed and issued another letter to Ms Sibandze, titled *"CHANGE OF JOB TITLE (PROMOTION) WITH EFFECT FROM THE 05th OCTOBER 2012."* In this letter, Mr Mopaki expressed his pleasure at informing Ms Sibandze that her job title was changed from Manager: Corporate Services to Senior Manager Corporate Services.

5.2.13 The promotion and change of the job title of Ms Sibandze to a position of Senior Manager Corporate Services flowed from the recommendations of a memorandum that was drafted by Mr Joseph Shembe, the MICT-SETA's Specialist Human Resources and Industrial Relations Officer (Mr Shembe) on 5 October 2012. The same memorandum was approved by Mr Mopaki.

5.2.14 On 14 January 2019, Mr Magongwa submitted through an email, the following financial records of all the remuneration paid to Ms Sibandze following her appointment to a position of Manager and Senior Manager: Corporate Services at MICT-SETA:

MS ME SIBANDZE PAYMENT RECON

PERIOD ENDING	TOTAL
28/02/2013	R523 229.99
28/02/2014	R598 121.02
28/02/2015	R731 862.19
29/02/2016	R759 260.12
28/02/2017	R816 578.91
28/02/2018	R1 023 483.58
31/01/2019	R1 063 904.57
TOTAL	R5 516 440.38

Issues in dispute

5.2.15 The Complainant contends that Ms Sibandze was merely favoured by Mr Mopaki and was given the position of Senior Manager Corporate Services without it being advertised.

5.2.16 The Complainant further contends that the position of Manager: Corporate Services was not part of the positions that were recommended for upgrading in the job evaluation report by 21st Century.

5.2.17 During an interview with my investigation team on 12 December 2018, Mr Shembe indicated that he compiled a memorandum for the change of Ms Sibandze's job title under undue influence or duress from Mr Mopaki and Ms Sibandze herself. Mr Shembe confirmed that Ms Sibandze's position was not recommended for remuneration adjustment or change of the job title in the report from 21st Century.

5.2.18 Mr Shembe further informed my investigation team that Mr Mopaki threatened to charge him with insubordination and that he would be "*wiped out*" in order to exert pressure upon him to upgrade Ms Sibandze's position. According to Mr Shembe, he asked both Mr Mopaki and Ms Sibandze what is meant by being '*wiped out*' and Ms Sibandze allegedly said that they would kill him if he disclosed this information. Mr Shembe further indicated that indeed charges were subsequently orchestrated by the MICT-SETA in 2013 resulting in his dismissal which he is still challenging at the Labour Court at the time of issuing this report. The charge sheet drafted by MICT-SETA for Mr Shembe details, amongst others, dereliction of duty and gross insubordination.

5.2.19 The following extracts of emails were cited as part of forensic evidence in the GFIA report which I have discovered during my investigation of this matter:

"From: Joseph Shembe (mail to:joseph.shembe@isettseta.org.za)
Sent: 04 July 2012 03:09 PM
To: JC Nel; Gary Madden
Cc: Naledi Sibandze
Subject: FW: Re-Job Evaluation and Job Grading (Salary Benchmarking) of specified Job Titles
Importance: High

Good Afternoon Gary and JC

I refer to our telephonic conversation which we further requested you to execute the undermentioned instructions and specifically to upgrade the Manager; Corporate Services (Job Title) to a Senior Manager Corporate Services as per your Grade Correlation Schedule.

Furthermore, reconsider to re-grade the Job Title of Senior Managers from grade D to E, as these job roles are functioning at the Organizational Strategic Execution Level, the same as the intended upgrading of Senior Manager; Corporate Services as per Grade Correlation Schedule.

...

NB: Please send us a revised job Evaluation/Grading and Salary Benchmarking Report before 10:h00 tomorrow, as it should urgently serve in the Remuneration Committee of the Board.

Kind Regards"

5.2.20 A response email from 21st Century was sent to Mr Shembe on the same day and reads as follows:

"From: Gary Madden (mailto:gmadden@21century.co.za)
Sent: 04 July 2012 04:41 PM
To: Joseph Shembe; JC Nel
Cc: Naledi Sibandze
Subject: FW: Re-Job Evaluation and Job Grading (Salary Benchmarking) of specified Job titles
Dear Joseph

I have just spoken with JC and he is confident that the grades are right based on the current profiles. If the content of the profiles have changed we will be happy to re-evaluate the roles.
Due to the grades being correct the benchmarks will therefore remain valid.
Please note that the Corporate Services Manager has been benchmarked to DU benchmark (Correlated Paterson)
I have also attached the HR Manager benchmark as you requested.

Kind Regards
Gary Madden
Data Manager (21st Century Pay Solutions Group)"

5.2.21 After the above email from 21st Century, Ms Sibandze sent an email to Gary Madden at 21st Century on the same day at 05:46 PM. Ms Sibandze's email reads as follows:

"From: Naledi Sibandze
Sent: 04 July 2012 05:46 PM
To: gmadden@21century.co.za
Cc: JC Nel (jcnel@21century.co.za; Joseph Shembe
Subject: FW: Re-Job Evaluation and Job Grading (Salary Benchmarking) of specified Job Titles
Attachments: HR Manager 4 July 2012.xls

Dear Gary

Thank you for the information. The Corporate Services Manager manages the following divisions:

1. *Human Resources,*
2. *Finance*
3. *Internal Auditors,*

4. *Supply Chain Management,*
5. *Administration,*
6. *Facilities*

We have recommended that her position should be a Senior position as per her job profile. She is responsible for the development and execution of the organizational strategy, hence we've advised that she should be benchmarked to either an E lower E middle benchmark with all other Senior managers. The Human Resources manager reports to her as well.

Please make sure that you evaluate her job profile carefully and grade her job/position accordingly

Thanks and regards"

5.2.22 Mr Shembe further argued that although he was coerced to draft the memorandum to change Ms Sibandze's job title, such a memorandum did not serve before the MICT SETA's Finance and Remuneration Committee (FINREMCOM) of the board for its approval.

5.2.23 Mr Mopaki replied to this issue during a recorded interview with my investigation team on 4 July 2018 that the post of Senior Manager Corporate Services to which Ms Sibandze was appointed, was advertised. Mr Mopaki said that there was a panel appointed to conduct the interviews.

5.2.24 Contrary to Mr Mopaki's above contention, Ms Sibandze informed my investigation team during a recorded interview that there was no advertisement for the position of Senior Manager Corporate Services at the MICT SETA. Instead, she made it clear that she was promoted without any advertisement or

interviews, following a job-grading by 21st Century in 2012. However, 21st Century did not include her position in the list of posts identified to be upgraded.

5.2.25 In response to my Notice in relation to this issue, Mr Mopaki's argument sought to discredit Mr Shembe as a disgruntled and revenge-striven employee since his dismissal from the MICT-SETA. Mr Mopaki further warned me to treat Mr Shembe's evidence with extreme caution. According to Mr Mopaki, Mr Shembe has an axe to grind and a motive to lie.

5.2.26 While I remain receptive and open to this submission by Mr Mopaki, it is however completely off-the-tangent. The issue at point was whether or not the MICT-SETA followed its recruitment policies in promoting or appointing Ms Sibandze into the positions mentioned above. This submission by Mr Mopaki does not address the issue or rebut the evidence at my disposal.

Application of the relevant legal prescripts

5.2.27 As a preface to this, I find it both appropriate and compelling to pause here for a moment and underscore that, customarily *organs of state* operate within certain regulatory policy framework which guides their day to day procedural operations and administrative activities. Of particular note is that, although organisational or departmental policies such as Recruitment Policies and Supply Chain Management policies cannot be exalted to a strict legal code such as an Act of parliament or legislation, these policies are invariably crafted to mirror the objects of the main legislation. Policies are duly adopted by the organisation as a guiding document and a lodestar for a particular procedure and are normally binding on its employees. I am therefore highly inclined to apply and consider departmental/organisational policies during the course of my investigation to determine the extent to which policies have been complied with by public officials in execution of their official administrative duties.

5.2.28 The inclination to consider and apply policies in my investigation is informed in the main by section 6(4)(a) of the Public Protector Act[21] which stipulates inter alia:

"The Public Protector shall be competent:

(a) to investigate on his or her own initiative or on receipt of a complaint any alleged

i. maladministration in connection with the affairs of government at any level

ii. abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing public function;

iii. improper or dishonest act or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of Prevention and Combatting of Corrupt Activities Act, 2004, with respect to public money".

5.2.29 In my effort to discharge the above outlined mandate, it shall not make sense and further defy logic if I were to ignore policy framework which regulates the procedure of the day to day activities of the organs of state or public institutions. Operational Policies lies at the core of good governance and integrity, which my office seeks to promote and advance.

5.2.30 Most importantly, Section 51(1)(b)(ii) of PFMA states the following with regard to operational policies:

(1) "An accounting authority for a public entity—

(b) must take effective and appropriate steps to—

[21] Act 23 of 1994.

(ii) Prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, ***and expenditure not complying with the operational policies***[22] *of the public entity";*

5.2.31 The Recruitment and Selection Policy of MICT-SETA[23] was approved and came into effect on 2 February 2009. It was recommended by Mr Mopaki in his capacity as the CEO and was approved by Mr Andile Tlhoaele in his capacity as the Chairperson of the MICT-SETA's Executive Committee (Exco).

5.2.32 The purpose of the Recruitment and Selection Policy is to serve as a guideline to all managers based on fair human resources practices and procedures towards fulfilling the organization's and business units' established roles and responsibilities.

5.2.33 The scope of application of the Recruitment and Selection Policy shall apply in all procedures that need to be adhered to arising out of the need of filling an identified or existing vacancy within the MICT-SETA.

5.2.34 In terms of clause 5.1 of the Recruitment and Selection Policy, which regulates Recruitment Advertising, it is a prerequisite to advertise all funded and identified vacant posts so that they can be filled by suitable incumbents based on merit and potential requirement of the job profile and subsequent responsibilities.

5.2.35 Clause 6.3 defines Promotion as the progression from one position to another at a higher level or grade. Internal promotions at the discretion of the manager shall have to be motivated to the CEO through the Human Resources Manager. In line with the principle of competition, an employee may be promoted **only if**

[22] My emphasis.
[23] POL-CORP-HR-07.

he/she applies successfully for an identified vacant position at a higher level in competition with other external candidates.

5.2.36 The exposition of the evidence traversed above, revealed that the appointment/promotion of Ms Sibandze to both the positions of Manager and Senior Manager Corporate Services was not done in accordance with the dictates of the MICT SETA's Recruitment and Selection Policy.

5.2.37 There is no evidence that the positions of Manager and Senior Manager Corporate Services were ever advertised or interviews conducted in order to fill them by the MICT-SETA. Notwithstanding the advertisement being a prerequisite in order to fill vacant posts, the MICT-SETA and, in particular Mr Mopaki, appointed Ms Sibandze to these positions without advertising them and similarly without her applying for them.

Conclusion

5.2.38 I am persuaded to conclude therefore that, the service standards, processes and the guidelines as laid out or envisaged in the MICT-SETA's Recruitment and Selection Policy were not adhered to in the appointment of Ms Sibandze in the positions of Manager and Senior Manager: Corporate Services at MICT SETA, respectively.

5.3 Regarding whether Mr Jabu Sibeko, the Senior Manager: Learning Programmes, and Mr Earnest Nemughavhini, the Manager: Learning Programmes, at the MICT-SETA, improperly aided Mr Mopaki to siphon off the MICT-SETA's funds to private companies linked to him.

Common cause issues

5.3.1 Mr Nemughavhini is currently employed by the MICT SETA as Manager: Learning Programmes. On the other hand, Mr Sibeko was employed by the MICT SETA as the Senior Manager: Learning Programmes until he retired at the end of December 2018.

5.3.2 The duties of Mr Sibeko included monitoring the division responsible for implementation of learning programmes. He ensured the implementation of learning programmes, from the approval stage as the member of the Committee that allocates those programmes, deployed advisors/inspectors who regularly advise the Committee and made recommendations about appointed companies.

5.3.3 Mr Nemughavhini is responsible for managing the implementation of learning programmes by checking whether the companies that have been awarded discretionary grants by the MICT-SETA are operating in line with the SLAs. He reports directly to Mr Sibeko.

Issues in dispute

5.3.4 It was argued by the Complainant that both Messrs Sibeko and Nemughavhini are Mr Mopaki's front runners who are masterminds behind the setting up and management of private companies linked to Mr Mopaki within the MICT-SETA.

5.3.5 According to the Complainant, that is the reason Mr Sibeko was never dismissed despite being found guilty of corruption through a disciplinary enquiry instituted by the then MICT-SETA Acting Chief Executive Officer, Mr Charlton Philiso.

5.3.6 In response to the allegations of corruption, Mr Sibeko informed my investigation team during a recorded interview on 4 July 2018 that he was never charged,

investigated or found guilty by the MICT-SETA for any wrongdoing since he joined in 2003. Mr Sibeko emphatically dismissed this allegation[24].

5.3.7 Mr Sibeko's above denial is inconsistent with the documentary evidence obtained by my office on 13 December 2018 from the MICT-SETA's Human Resources Department. Mr Mugangwa provided my team with a copy of the Disciplinary Warning Form which indicates that Mr Sibeko was indeed warned for an offence of Repeated Dereliction of Duty by the MICT-SETA.

5.3.8 The Final Written Warning was issued by Mr Philiso on 24 March 2016 and it was also signed by Mr Sibeko. In light of the Final Written Warning extracted by HR from Mr Sibeko's file, the denial by Mr Sibeko of any knowledge of a disciplinary sanction was not truthful. Although such warning issued to Mr Sibeko by the MICT-SETA was in respect of Repeated Dereliction of Duty and not corruption as alleged by Complainant, it was untruthful of Mr Sibeko to hold that he was never charged for any wrongdoing by the MICT-SETA when in fact the opposite is true.

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

5.3.9 On 24 April 2019, Mr Sibeko responded to my Notice by a signed letter and clarified that he might have misunderstood the question from my investigation team. Mr Sibeko averred further that he thought the question from my team was whether or not he had been charged specifically with corruption during his stay at the MICT-SETA and not with any other wrong-doing. Although this question did not form the crux of the issue as formulated above, a response by Mr Sibeko on this question remained blurred and inconsistent with the question posed to him.

[24] Refer to an audio record at minute number 11-14 (of an interview between Mr Sibeko and my team).

5.3.10 Ultimately, both Messrs Sibeko and Nemughavhini denied ever being influenced by Mr Mopaki to wrongfully benefit any of the above private companies that are alleged to be aligned to Mr Mopaki. Mr Sibeko further indicated that he did not even know that Mr Mashigwane was a director in most of the companies contracted to the MICT-SETA until the matter was raised by my investigation team. However, Mr Sibeko conceded that Mr Mopaki made an exculpatory admission statement during a senior management meeting around September 2017 that Mr Mashigwane is his nephew following media reports and commencement of my investigation.

5.3.11 Several personal and telephonic interviews were conducted with the Complainant from between 2018 and January 2019. The Complainant was not able to submit to my office concrete evidence showing how Messrs Sibeko and Nemughavhini unlawfully assisted Mr Mopaki to siphon-off MICT-SETA's funds to private companies allegedly linked to him. My own independent investigation could not indicate how the Sibeko and Nemughavhini unlawfully assisted Mr Mopaki either. As an investigatory body, my office is an evidence-based institution and in the absence of any implicating or absolving evidence, I am not able to make a factual or legal conclusion on the matter.

Conclusion

5.3.12 The investigation of this issue did not establish any evidence of wrongdoing on the part of both Messrs Sibeko and Nemughavhini. This allegation was also not supported by any evidence from the Complainant.

5.4 Regarding whether the conduct of Mr Mopaki resulted into prejudice to the MICT-SETA or to any other person in the circumstances.

Common cause issues

5.4.1 Lylacorp, Network Infraco, Bandwith Technologies are all private companies that are registered with CIPC, all under the sole directorship of Mr Mashigwane.

5.4.2 These three (3) companies are contracted to and receive discretionary grants under various contracts from the MICT-SETA. Messrs Mopaki and Mashigwane signed the contracts involving these three (3) companies and the MICT-SETA.

5.4.3 According to the financial records received by my office from the MICT-SETA, the above companies have been paid as follows from 2014 to 2018:

(a) Lylacorp was paid **R58 590 000.00;**
(b) Network Infraco was paid **R62 060 000.00; and**
(c) Bandwith Technologies was paid **R25 490 000.00.**

5.4.4 Mr Mopaki is an uncle of Mr Mashigwane. In other words, Mr Mashigwane is the son of Mr Mopaki's sister. Mr Mopaki did not disclose his familial relationship with Mr Mashigwane in any of the Disclosure of Interests Form at the MICT-SETA.

5.4.5 On 1 April 2011, Mr Mopaki promoted Ms Sibandze from the MICT-SETA's SCM Officer to Manager: Corporate Services. This post was not advertised and no interviews were conducted in connection therewith.

5.4.6 On 5 October 2012, Mr Mopaki signed and approved a change in job title for Ms Sibandze from Manager: Corporate Services to Senior Manager Corporate Services, without any advertisement or interviews being conducted.

Issues in dispute

5.4.7 The crux of the contention by the Complainant, amongst others, was that Mr Mopaki has always been engaged in corruption, by re-directing the MICT-SETA funds to the above mentioned private companies, which are aligned to him.

5.4.8 Another contention put forward by the Complainant was that Ms Sibandze was just handed the position of a Senior Manager Corporate Services by Mr Mopaki as her favourite. The Complainant argued that this position was not filled in line with the MICT-SETA Recruitment and Selection Policy.

Application of the relevant legal prescripts

5.4.9 In terms of section 50 of the PFMA, the accounting authority of a public entity has the following fiduciary duties to observe:

"(1) The accounting authority for a public entity must—

act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity; on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the executive authority or that legislature; and seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

(3) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not—

(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

(4) A member of an accounting authority must—

(a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant."

5.4.10 Section 51(1)(b)(ii) of PFMA states inter alia:

"An accounting authority for a public entity—
must take effective and appropriate steps to—
(ii) Prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, ***and expenditure not complying with the operational policies***[25] *of the public entity";*

5.4.11 The above provisions regulate the legal obligations, financial and fiduciary duties of Accounting Authorities and the CEO where the latter is appointed and delegated with authority by the Board as an being responsible for day to day running of an organisation. Such provisions are unalterable and bound Mr

[25] Emphasis added.

Mopaki in his capacity as the former MICT-SETA's CEO as appointed by Accounting Authority/Board.

5.4.12 The evidence discussed in this report has established that Mr Mopaki is related to Mr Mashigwane. As a result, Mr Mopaki should have disclosed this relationship and his business interests at Bandwith Technologies and Network Infraco.

5.4.13 He should have recused himself from any procurement process, including the signing of SLA's involving Mr Mashigwane's companies while he had interests thereto. In fact, not only was there a lack of transparency and ethics on Mr Mopaki's part, but his relationship with Mr Mashigwane also placed him a situation where a conflict of interest arose or had the potential to arise.

5.4.14 At all material stages, Mr Mopaki did not disclose his interests, close family relations or withdraw from transacting with the above companies of Mr Mashigwane, which are evidently aligned to him. Failure to do so are in contravention of section 50 of the PFMA.

5.4.15 Section 51 of PFMA outlines the general responsibilities of accounting authorities as follows.—

"(1) An accounting authority for a public entity—
(a)must ensure that that public entity has and maintains—
(i)effective, efficient and transparent systems of financial and risk management and internal control;
(ii) system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77;
(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective".

5.4.16 In the circumstances, the procurement of Lylacorp, Network Infraco and Bandwith cannot be said to have been fair, transparent, equitable and competitive as envisaged in the subsection. This inference is to be drawn from the factual evidence which showed that these three (3) companies were inextricably aligned to Mr Mopaki. I am of the view that human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty and thus prejudicing those whom he is bound to serve.

5.4.17 There can be no rational basis for suggesting that a person who is an uncle to a service provider has no conflict and can deal with the matter utterly impartially without taking their own interest into account.

5.4.18 Section 1 of PFMA defines **"irregular expenditure"** as expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

5.4.19 Expenditure incurred in contravention of applicable policies[26] manifestly bears the same fate envisaged by section 1 of the PFMA. Policies mirror the main enabling legislation both in content and in substance. In determining and investigating allegations of maladministration, I duly consider and apply policies since officials or state functionaries should not be permitted to flout policies of their organisations at random choice.

5.4.20 Clause 6.3 of the Recruitment and Selection Policy of MICT SETA defines "*Promotion*" as the progression from one position to another at a higher level or grade. Internal promotions at the discretion of the manager shall have to be motivated to the CEO via Human Resources Manager. In line with the principle of competition, an employee may be promoted only if he/she applies

[26] See also Section 51(1)(b)(ii) of PFMA.

successfully for an identified vacant position at a higher level in competition with other external candidates.

5.4.21 The appointment/promotion of Ms Sibandze by Mr Mopaki to both the positions of Manager and Senior Manager Corporate Services were not done in accordance with the dictates of the Recruitment and Selection Policy of the MICT-SETA. Essentially, her appointment/promotion and procurement of the above three (3) companies were made in contravention of the section 51 of PFMA and MICT-SETA's Recruitment Policy as indicated in subsection. Inevitably, such conduct by Mr Mopaki resulted in irregular expenditure to the finances of MICT-SETA, as defined above.

Conclusion

5.4.22 Based on the evidence obtained during my investigation and the applicable legal prescripts quoted above, it can be concluded that the appointment of Ms Sibandze to both Manager and Senior Manager Corporate Services were not in compliance with the Recruitment and Selection Policy of MICT-SETA.

5.4.23 Equally, the procurement of Lylacorp, Network Infraco and Bandwith Technologies and the concomitant failure to disclose close family relationship between Mr Mopaki and Mashigwane were not compliant with the dictates of the PFMA which demands that accounting authority must prevent irregular expenditure, thereby causing financial prejudice to the MICT-SETA in a form of irregular expenditure.

6. FINDINGS

Having considered the evidence obtained during the investigation, and the regulatory framework, I make the following adverse findings:

6.1. Whether Mr Mopaki is personally aligned or linked to any of the private companies that are contracted to the MICT-SETA and if so, whether this amounts to a conflict of interests.

6.1.1 The allegation that Mr Mopaki is personally aligned or linked to any of the identified private companies that are contracted to the MICT-SETA is substantiated.

6.1.2 Forensic evidence at my disposal from the computer/laptop drive of Mr Mopaki established on a balance of probability that Mr Mopaki had a business association and vested private interest at both Bandwith Technologies and Network Infraco which are owned by his nephew/Tebogo Mashigwane. Mr Mopaki exchanged various explicitly business related communication/emails and financial transactions with private companies contracted to the MICT-SETA which are owned by Tebogo Mashigwane.

6.1.3 Mr Mopaki signed and approved contracts/SLA between MICT-SETA and companies owned by his nephew/Tebogo Mashigwane without declaring same to the Board of MICT-SETA, thereby being caught in a conflict of interests.

6.1.4 *Prima facie* evidence from Mr Mopaki's official laptop indicated that Mr Mopaki was registered on the computer domain of both Bandwith Technologies and Network Infraco and engaged in business and financial related communication.

6.1.5 The evidence at my disposal confirmed that Mr Mopaki is an uncle to Mr Tebogo Mashigwane who is a director/owner of various companies that were contracted to MICT-SETA.

6.1.6 The conduct of Mr Mopaki constituted a conflict of interest as well as a breach of section 195 of the Constitution, committed an offence as contemplated by

section 17(1) of the PRECCA, and further breached clauses 6.1 and 6.2 of the MICT-SETA's Related Party Disclosure Policy, clause 1 of the MICT-SETA's Code of Conduct and clause 12 of the MICT-SETA's SCM Policy as well as sections 50, 51 and 83 of the PFMA.

6.1.7 Accordingly, the conduct of the MICT-SETA, in particular Mr Mopaki, amounts to improper conduct as contemplated by section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether MICT-SETA and, in particular Mr Mopaki, irregularly appointed Ms Naledi Sibandze to positions of Manager and Senior Manager: Corporate Services which were never advertised as required by SETA Recruitment and Selection Policy.

6.2.1 The allegation that Mr Mopaki irregularly appointed Ms Naledi Sibandze (Ms Sibandze) to positions of a Manager and Senior Manager: Corporate Services, which were never advertised as required by MICT-SETA's Recruitment and Selection Policy is substantiated.

6.2.2 The evidence in my possession indicates that the positions of Manager and Senior Manager Corporate Services were never advertised nor interviews conducted in order to fill them. Ms Sibandze was improperly favoured/promoted/appointed to these two positions without following the MICT-SETA's Recruitment and Selection Policy by Mr Mopaki. The evidence also indicates that Ms Sibandze was dishonest when she averred during an interview with my investigation team that she was promoted following job grading by 21st Century, when it fact that was not the case as shown by evidence in the body of this report.

6.2.3 This conduct by Mr Mopaki, was therefore in violation of clauses 5.1 and 6.3 of the MICT-SETA's Recruitment and Selection Policy and section 51(1)(b)(ii) of PFMA.

6.2.4 Accordingly, the conduct of the MICT-SETA, in particular Mr Mopaki, amounts to improper conduct as contemplated by section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3 Regarding whether Mr Jabu Sibeko, the Senior Manager: Learning Programmes, and Mr Earnest Nemughavhini, the Manager: Learning Programmes, at the MICT-SETA, improperly aided Mr Mopaki to siphon off the MICT-SETA's funds to private companies linked to him.

6.3.1 The allegation that Mr Sibeko, the Senior Manager: Learning Programmes, and Mr Nemughavhini, the Manager: Learning Programmes, improperly aided Mr Mopaki in order to siphon off the MICT-SETA's funds to private companies linked to him is not substantiated.

6.3.2 My investigation could not establish any impropriety or wrongdoing on the part of both Messrs Sibeko and Nemughavhini. Similarly, the allegation was also not supported by any form of evidence from the Complainant/s.

6.3.3 Accordingly, the conduct of the MICT-SETA, in particular Messrs Sibeko and Nemughavhini, does not amount to improper conduct as contemplated by section 182(1) of the Constitution or maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.4 Regarding whether the conduct of Mr Mopaki resulted in prejudice to the MICT-SETA or to any other person in the circumstances.

6.4.1 The allegation whether the conduct of Mr Mopaki resulted in prejudice to the MICT-SETA or any other person in the circumstances is substantiated.

6.4.2 The MICT-SETA paid a combined amount of R14 614 000.00 following an irregular procurement process to Lylacorp, Network Infraco and Bandwith Technologies which are all linked to Mr Mopaki through his undeclared familial and business relationship with Mr Tebogo Mashigwane.

6.4.3 The MICT-SETA further paid a combined amount of R5 516 440.38 as a result of an irregular appointment of Ms Sibandze to both positions of Manager and Senior Manager: Corporate Services within the MICT-SETA. Equally, other people who qualified for these posts were unfairly denied an opportunity to apply or compete for the posts since the positions were not advertised, thereby being improperly prejudiced.

6.4.4 The cost incurred by the MICT-SETA in connection with the above companies and appointment/promotion of Ms Sibandze were irregular and in direct contravention of sections 50 and 51 of PFMA, and clause 6.3 of the MICT SETA's Recruitment and Selection Policy.

6.4.5 Accordingly, the conduct of the MICT-SETA, in particular Mr Mopaki, amounts to improper conduct as contemplated by section 182(1)(a) of the Constitution and resulted in prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.

7. REMEDIAL ACTION

The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

7.1.1 Within sixty (60) working days from the date of this report, disclose all irregular expenditure to the National Treasury and to Auditor General incurred by MICT-SETA in connection with the irregular appointment of Ms Sibandze to the position to both positions of Manager and Senior Manager: Corporate Services within the MICT-SETA.

7.1.2 Within sixty (60) working days from the date of this report, disclose all irregular expenditure to the National Treasury and to Auditor General incurred by MICT-SETA in connection with the irregular procurement process to Lylacorp, Network Infraco and Bandwidth Technologies which are all linked to Mr Mopaki through his undeclared familial relationship with Mr Mashigwane.

7.1.3 Within thirty (30) working days of the issue of this report, all MICT-SETA officials who are involved in the Supply Chain Management, Recruitment and Selection processes including all the senior management, attend a workshop on the Procurement Policy, Recruitment and Selection and related legal prescripts.

7.1.4 The MICT-SETA must, within sixty (60) working days from the date of this report, develop a policy relating to the declaration of conflict of interest amongst all of its staff members for each financial year. The policy should, amongst others, address the manner in which the declaration must be processed and consequences for failure to disclose conflict of interest.

The appropriate recommendation that I am making in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Head of the Directorate of Priority Crimes Investigations (DPCI/Hawks) is as follows:

7.1.5 Within thirty (30) working days from the date of this report, consider initiating an investigation into a link and possible money laundering offence(s) as defined in terms of the Prevention of Organised Crime Act 121 of 1998, between Mr Mopaki and the companies that are/were contracted to MICT-SETA which are registered under Mr Mashigwane.

8. MONITORING

8.1 The current CEO of MICT-SETA must, submit an Implementation Plan to my office within fifteen (15) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of **Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others[2016]ZACC 11**, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the current CEO of MICT-SETA, unless they obtain an *Interim Interdict* or *Court Order* directing otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 15/11/2019