

# **MEGA IRREGULARITIES**

*Report on an investigation into allegations of maladministration and misuse of public funds pertaining to the affairs of the Mpumalanga Economic Growth Agency (MEGA)*

*Report No: 3 of 2016/17*



PUBLIC PROTECTOR  
SOUTH AFRICA

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## Executive Summary

- (i) *Mega Irregularities* ” is my report as the Public Protector which is issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act).
- (ii) The report communicates my intended findings and directives on remedial action following an investigation into allegations of maladministration against Mr. M.N. Mokoena, a former Member of the Executive Council (the former MEC) for the Mpumalanga Department of Economic Development, Environment and Tourism (the Department), regarding the irregular resignation of Ms. Rachel Kalidass, a former chairperson of the MEGA Board; his alleged unlawful dissolution of the Mpumalanga Economic Growth Agency Board (the MEGA Board); the alleged failure by the Department to make regular transfers of funds to the MEGA account; the alleged irregular appointment of Purple Fountain Properties 133 (Pty) Ltd (Purple Fountain Properties) to produce a film as well as the alleged irregular appointment of Desmond K. Golding (Pty) Ltd. (Khabran Investments) to conduct research for the Department. It is important to mention that all these allegations had to do with MEGA, which is a statutory agency and a product of the Mpumalanga Economic Growth Agency Act 1 of 2010. The individual (the Complainant) who lodged this complaint requested to remain anonymous.
- (iii) On analysis of the complaint, the following issues were considered and investigated:
  - a) Whether the resignation of Ms. Rachel Kalidass, a former chairperson of the Board, was irregular?

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(b) Whether the former MEC unlawfully dissolved the MEGA Board?

b) Whether the Department failed to make regular transfer of funds to the MEGA account?

(c) Whether the appointment of Purple Fountain Properties was irregular and, if so, was there any fruitless and wasteful expenditure which resulted there from?

(d) Whether the appointment of Khabran Investments was irregular and, if so, was there an irregular expenditure which resulted there from?

(iv) The investigation process included an analysis of applicable law and policies, memoranda, resolutions, audit reports and other financial documents, securing and analysing other relevant documents, including court judgments, and conducting interviews and meetings with the relevant officials and stakeholders named in the report.

(v) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

**(a) Whether the resignation of Ms. Rachel Kalidass, a former chairperson of the Board, was irregular?**

(aa) The allegation that the resignation of Ms. Rachel Kalidass, the former Board chairperson of MEGA, was irregular is substantiated.

(bb) The resignation of Ms Kalidass with immediate effect was not in compliance with the provisions of section 9(1) of the MEGA Act, in that she failed to give the required one month's notice to the former MEC and was supposed to inform the Executive Council and the Board of her intended resignation.

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(cc) Ms Rachel Kalidass' resignation was irregular in that she did not serve the stipulated written one month's notice as required by section 9(1) of the MEGA Act. Section 9(5) of the same Act further states that non-compliance by a Board Member with any provision of this Act constitutes improper conduct and as a result, I accordingly find that Rachel Kalidass violated the provisions of section 9(1) of the MEGA Act.

**(b) Whether the former MEC unlawfully dissolved the MEGA Board?**

- (aa) The allegation that the former MEC unlawfully dissolved the MEGA Board is substantiated.
- (bb) The allegation that the former MEC acted unlawfully when he dissolved the Board in the first instance has merit, in that he contravened section 9(4) of the MEGA Act by not affording the individual Board members the opportunity to state their individual cases and/or considering any representations they could have wished to make before he dissolved the Board. It was also noted that the North Gauteng High Court held that the former MEC's decision to terminate the Board was not within the confines of the MEGA Act. However, the MEC subsequently afforded the individual Board members an opportunity to state their representations before he dissolved the Board accordingly, for the second time.
- (cc) I therefore, find that the subsequent dissolution of the MEGA Board by the MEC was lawful and proper.

**(c) Whether the Department failed to make regular transfer of funds to the MEGA account**

(aa) The allegations that the Department failed to make regular transfer of funds to the MEGA account could not be substantiated.

(bb) Therefore, even though for several months in 2011 there was no transfer of funds to the MEGA account, I cannot find merit in the allegation that the Department “failed” to make regular payments to the MEGA account. In actual fact, the Department was not obliged to make such transfers but had a discretion to do so provided there was money appropriated by the Provincial Legislature in terms of section 20 of the MEGA Act. However, in this case there was no money appropriated since MEGA failed to submit the necessary information through the MEC for consideration by the Provincial Legislature.

**(d) Whether the appointment of Purple Fountain Properties was irregular and if so, was there any fruitless and wasteful expenditure which resulted thereon?**

(aa) The allegations that the appointment of Purple Fountain Properties was irregular, is substantiated.

(bb) In appointing Purple Fountain Properties, the Department was in violation of section 217 (1) of the Constitution and section 38 (1)(a)(iii) of the Public Finance Management Act No: 1 of 1999 . The appointment lacked transparency and competitiveness as no proper procurement procedures were followed.

(cc) The resultant payment of R2.5 million (Two million and five hundred thousand rand) amounted to a fruitless and wasteful expenditure because had the Department followed proper procurement processes and exercised reasonable care it would have avoided entering into the Memorandum of Understanding (MOU) and paying this amount.

(dd) The Department failed to provide any documentary evidence to suggest that the deviation for the tender had been recorded and approved by the Accounting Officer. As such the deviation was not justified and in

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contravention of Treasury Regulation 16A6.4. There is therefore, no record of any communication by the Department regarding the recording and approval by the accounting officer and accounting authority of the deviation from the normal prescribed bidding processes. The conduct of the Department is therefore in violation of provision 16A6.4 of the Treasury Regulation 16 of 2003.

- (ee) The Department, through its Accounting Officer and Accounting Authorities, unduly failed to report to the Provincial Treasury and the Auditor General within ten (10) working days for deviating from normal bidding processes as required by Treasury Regulations. The conduct of the Department is therefore in violation of paragraph 3.1 of the National Treasury Practice Note 6 of 2007/2008.
- (ff) The appointment of Purple Fountain Properties did not achieve the objects of MEGA because it is related to the production based on a story about "Solomon Mahlangu" contrary to section 3 of the MEGA Act which provides for housing development, enterprise and agricultural development and lastly the promotion of foreign trade and investment.
- (gg) Therefore the conduct of the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994.

**(e) Whether the appointment of Khabran Investments was irregular and if so, was there an irregular expenditure which resulted thereon?**

- (aa) The allegation that the appointment of Khabaran Investments was irregular is substantiated.

**(bb)** In appointing Khabran Investments, MEGA violated section 217 (1) of the Constitution and section 38(1)(a)(iii) of the PFMA read with section 23 (1) of the MEGA Act, in that the procurement was in violation of the principles of "*fairness, equity, transparency, competitiveness and cost-effectiveness*". The payment of R92 000.00 (Ninety two thousand rand) to Khabran Investments amounted to an irregular expenditure as it was not in accordance with a requirement of the section 217 (1) of the Constitution and section 38(1)(a)(iii) of the PFMA read with section 23 (1) of the MEGA Act.

(cc) MEGA failed to provide any documentary evidence to suggest that the deviation for the tender had been recorded and approved by the Accounting Officer. As such the deviation was not justified and in contravention of Treasury Regulation 16A6.4. The conduct of MEGA is therefore in violation of provision 16A6.4 of the Treasury Regulation 16 of 2003.

(dd) Therefore the whole arrangement between Khabran Investments and MEGA disregarded the law and undermined the spirit of and principles laid down in section 217 (1) of the Constitution read with section 23 (1) of MEGA Act as well as section 38 (1)(a)(iii) of PFMA .

(ee) The conduct of MEGA constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994.

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

**(a) Regarding whether the resignation of Ms. Rachel Kalidass, the former chairperson of the Board, was irregular and unlawful:**



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(aa) Since Ms Rachel Kalidass is no longer a member of the MEGA Board, no appropriate action can be taken against her by the MEC.

**(b) Regarding whether the former MEC's unlawful dissolved the Board:**

(aa) The MEC must ensure that he/she fully understands the provisions of the MEGA Act in relation to the removal of the members of the Board Of MEGA.

**(c) Regarding whether Department failed to make regular transfer of funds to the MEGA account:**

(aa) The MEGA Board should (if it needs funding from the state) duly submit information to the MEC for him/her to present before the Provincial Legislature which will decide to appropriate moneys after consideration of the said information as provided for in Section 20 of the MEGA Act.

(bb) The MEGA Board should not rely solely on the Department for funding. As section 21(1) and (3) of the MEGA Act stipulates, the Board must endeavour to make use of "fees and other monies received or raised" and to seek "donations, grants and bequests".

**(d) Regarding whether the appointment of Purple Fountain Properties was irregular and if so, was there any fruitless and wasteful expenditure which resulted there from:**

(aa) The HOD and the MEC must within 30 days from receiving this report, take appropriate steps to ensure that action is taken against all the officials who are responsible for the irregular appointment of Purple Fountain Properties for the production of Kalushi, "The Story of Solomon Mahlangu", which resulted in fruitless and wasteful expenditure.

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(aa) As an Accounting Officer, the HOD should recover monies paid out by the Department and MEGA as a result of an illicit contract between the Department and Purple Fountain Properties.

(bb) The Department should through the HOD ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.

**(e) Regarding whether the appointment of Khabran Investments was irregular and if so was there an irregular expenditure which resulted thereon**

(aa) The MEGA must defend the claim instituted against it by Khabran Investments and counterclaim and seek to recover the sum of R92 800 (ninety two thousand eight hundred rand) advanced to Khabran Investments.

(aa) The HOD and the MEC must also within 30 days from receiving this report, take appropriate steps to ensure that action is taken against all the officials who are responsible for the irregular appointment of Khabran Investments for conducting research and produce a report titled "*Research and Advisory Report, Provincial Growth and Development Path*", which resulted in irregular expenditure.

(bb) The Department should through the HOD ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND MISUSE OF PUBLIC FUNDS PERTAINING TO THE AFFAIRS OF THE MPUMALANGA ECONOMIC GROWTH AGENCY**

**1. INTRODUCTION**

- 1.1 *"Mpumalanga Blues"* is my report as the Public Protector which is issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to the following people:
- 1.2.1 Member of the Executive Council (MEC) for the Department of Economic Development, Environment and Tourism in the Mpumalanga Provincial Government, Sikhumbuzo Eric Kholwane, Mr (MPL);
- 1.2.2 The Head of Department for the Department of Economic Development, Environment and Tourism in the Mpumalanga Provincial Government, Mr Muzi W. Mkhize;
- 1.2.3 Chairperson of Mpumalanga Economic Growth Agency Board, Mr DN Mculu.
- 1.2.4 The Chief Executive Offer of Mpumalanga Economic Growth Agency, Mr XGS Sithole;
- 1.3 A copy of the report is also provided to the Complainant even though he/she chose to remain anonymous.

1.4 The report relates to an investigation into allegations of maladministration and misuse of public funds pertaining to the affairs of the Mpumalanga Economic Growth Agency (MEGA).

## **2. THE COMPLAINT**

2.1 The complaint was lodged on 12 August 2011 by the Complainant who chose to remain anonymous. The anonymous Complainant alleged the following,

2.1.1 Ms Rachel Kalidas was the former Chairperson of the Mpumalanga Economic Growth Agency Board (the MEGA Board). On 19 May 2011, whilst holding this position she resigned without following due course. The resignation of Ms Rachel Kalidass, was irregular and unlawful;

2.1.2 Upon the resignation of the former Chairperson, Ms Rachel Kalidas, the former MEC, Mr N.M Mokoena, unlawfully dissolved the MEGA Board. The dissolution of the MEGA Board by the former MEC was unlawful;

2.1.3 Failure by the Department to make regular transfers to the MEGA account;

2.1.4 The appointment of Purple Fountain Properties 133 (Pty) Ltd (Purple Fountain Properties) to produce a local film was irregular because it failed to follow the required tender procedures and therefore resulted in fruitless and wasteful expenditure; and

2.1.5 The appointment of Khabran Investments to conduct research for the Department was irregular because it failed to follow the required tender procedures and therefore resulted in irregular expenditure.

2.2 Due to the seriousness of these allegations and their implications on good governance, the Public Protector in terms of the powers vested in her decided to conduct an investigation, hence this report.

### **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 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; to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.
- 3.3 The Public Protector is further empowered by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.4 The Department of Economic Development, Environment and Tourism (the Department) is an organ of state and its conduct amounts to conduct in state affairs, thus the matter falls within the ambit of the Public Protector's mandate.
- 3.5 The Public Protector's jurisdiction to investigate was not disputed by any of the parties

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## **4. THE INVESTIGATION**

### **4.1 Methodology**

3.4.1 The rationale of this report is to identify possible maladministration by the Department, to determine if the Complainant was prejudiced, and to direct remedial action to remedy the identified maladministration, if any is found.

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

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

### **4.2 Approach to the investigation**

4.2.1 When the Public Protector conducts an investigation, she is given a mandate which requires her to conduct an enquiry on the merits of the complaint that transcends lawfulness and include considerations of equity, good administration and proper conduct.

4.2.2 As with every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.2.1 What happened?

4.2.2.2 What should have happened?

4.2.2.3 Is there a discrepancy between what happened and what should have happened and if there is a deviation does the deviation amount to improper conduct or maladministration; and

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- 4.2.2.4 In the event of improper conduct or maladministration what would it take to remedy the wrong or place the Complainant as close as possible to where he or she would have been but for the maladministration or improper conduct?
- 4.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation and making a determination based on a balance of probabilities. This includes: -
- a) verification of the facts by obtaining responses to the allegations as well as information and evidence on the events, conduct or decisions that led to the complaint; and
  - b) Establishing proof on a balance of probabilities, achieved through document and explanation requests, interviews or hearings, forensic investigation and expert opinions where appropriate.
- 4.2.4 The enquiry regarding what should have happened, focusses on the law or rules that regulate the standard that should have been met by the organ of state to prevent maladministration and prejudice.
- 4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for correcting maladministration and redressing its consequences. Where a Complainant suffered prejudice, the idea is to place him or her as close as possible to where they would have been, had the organ of state complied with the regulatory framework setting the applicable standards for good administration.

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### **4.3 Limitations to the investigation**

4.3.1 The subject matter of the investigation was confined to determine whether Ms. Rachel Kalidass' resignation as chairperson of the Board was irregular and unlawful; whether the former MEC, M.N. Mokoena, unlawfully dissolved the Board; whether the Department failed to make transfers into MEGA account; and whether the appointment of Purple Fountain Properties was irregular and amounted to a fruitless and wasteful expenditure; and whether the appointment of Khabran Investment was irregular and resulted in irregular expenditure.

4.3.2 A subpoena was issued in terms of section 7(5) of the Public Protector Act, calling upon the former MEC, M.N. Mokoena, to present himself to my offices. This was occasioned by what appeared to be a lack of cooperation on his part. Subsequent to the issuing of a subpoena against him, he was removed from his position and replaced by Ms. Y.N. Phosa and a fresh subpoena was issued against her. She was appointed as an MP in the National Assembly and was replaced by Mr S.E Kholwane (the current MEC).

### **4.4 On analysis of the complaint the following issues were considered and investigated;**

- (a) Whether the resignation of Ms. Rachel Kalidass, a former Chairperson of the Board, was irregular and unlawful?
- (b) Whether the former MEC unlawfully dissolved the MEGA Board?
- (c) Whether the Department failed to make regular transfer of funds to the MEGA account?



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- (d) Whether the appointment of Purple Fountain Properties was irregular and if so, was there any fruitless and wasteful expenditure which resulted there from?
  
  - (e) Whether the appointment of Khabran Investments was irregular and if so, was there an irregular expenditure which resulted there from?

## **4.5 Key sources of information**

### **4.5.1 Interviews conducted**

4.5.1.1 Several interviews were conducted with the Complainant on the following dates:

- (i) 24 July 2012
- (ii) 04 February 2013
- (iii) 12 February 2013
- (iv) 25 March 2013
- (v) 03 April 2013
- (vi) 06 April 2013
- (vii) 31 August 2013 and
- (viii) 22 October 2013.

4.5.1.2 Interviews were also held with the former MEC Y.N. Phosa, the Head of Department, Dr. Vusani Dlamini, and the Head of Legal Services, Mr. T.N. Fakude, were interviewed on two occasions.

- (i). The first interview took place at the Public Protector's Head Office in Pretoria on the 04 April 2013.
  
- (ii) The second interview took place on the 08 April 2013 at the Public Protector's Nelspruit offices in Mpumalanga.

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4.5.1.3 Follow up interviews with Mr. T.N. Fakude and Mr. Bheki Shabangu were also held.

4.5.1.4 The Public Protector also interviewed Ms. Thandi Mokwena who is the MEGA Legal Adviser.

#### **4.5.2 Correspondence**

4.5.2.1 Letter from Ms. F.T. Mashiane, addressed to Mr. M.N. Mokoena (the former MEC), dated 23 February 2011;

4.5.2.2 Electronic mail from Ms. Rachel Kalidass, dated 19 May 2011;

4.5.2.3 Letter from Mr. M.N. Mokoena, the former MEC, addressed to Mr. Z.E. Mncube, dated 19 May 2011;

4.5.2.4 Letter from Dr. V. Dlamini, addressed to Mr. R.S. Tshukudu, Acting Chief Executive Officer (acting CEO), dated 2 June 2011;

4.5.2.5 Letter from Kruger-Moeletsi (Attorneys for MEGA Board members), addressed to the chairperson of the MEGA, dated 15 June 2011;

4.5.2.6 Letter from Mr. M.N. Mokoena, former MEC, addressed to Mr. Z. E. Mncube (MEGA Board member), dated 17 June 2011;

4.5.2.7 Letter from Kruger-Moeletsi, addressed to the Deputy Chairperson of the MEGA Board, dated 20 June 2011;

4.5.2.8 Letter from Mr. M.N. Mokoena, addressed to Mr. Mncube, date 22 June 2011;

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- 4.5.2.9 Letter from Mr. M.N. Mokoena, addressed to Mr. Z.E. Mncube, dated 22 June 2011; and
- 4.5.2.10 Letter from Mr. M.N. Mokoena, addressed to Kruger-Moeletsi, dated 24 June 2011.
- 4.5.2.11 Electronic mail from Mrs P Morgan, Company Secretariat & Legal from MEGA, addressed to the Public Protector dated 12 July 2016;
- 4.5.2.12 Electronic mail from Mr T.N Fakude, Director Legal Services from the Department, addressed to the Public Protector dated 05 August 2016; and
- 4.5.2.13 Letter from the MEC, addressed to Ms R Kalidass, dated 20 October 2010.

#### **4.5.3 Memoranda**

- 4.5.3.1 Memorandum of Understanding between the Department and Purple Fountain Properties, dated 31 March 2011;
- 4.5.3.2 Internal Memorandum from Mr. R.S. Tshukudu (Acting CEO), addressed to Ms.Tshabangu, Acting Chief Financial Officer (Acting CFO), dated 2 June 2011; and
- 4.5.3.3 Internal Memorandum from Dr. V. Dlamini, addressed to Ms.Y.N. Phosa dated 7 May 2013.

#### **4.5.4 Internal Audit Report**

- 4.5.4.1 Internal Audit Report (unsigned), dated 20 June 2011.

#### **4.5.5 Payment Advice**

4.5.5.1 Payment Advice authorized by Mr. R.S. Tshukudu, dated 2 June 2011.

#### **4.5.6 Transfer of Funds Document**

4.5.6.1 Transfer of Funds Document addressed to Standard Bank's Annalie Sydney, co-signed by Anton Scheepers and Jerry Mahlangu (MEGA signatories), dated 3 June 2011.

#### **4.5.7 Invoice**

4.5.7.1 Invoice from Khabran Investments, dated 13 December 2010 and received by MEGA Finance Division on the 20 January 2011.

#### **4.5.8 Cheque Requisition**

4.5.8.1 Cheque Requisition in respect of Khabran Investments from the Mpumalanga Development Corporation dated 20 January 2011.

#### **4.5.9 Standard Bank's Final Audit Reports**

4.5.9.1 A Final Audit in respect of Khabran Investments from Standard Bank, dated 26 January 2011.

#### **4.5.10 High Court Judgments**

4.5.10.1 North Gauteng Judgment heard on the 8 June 2011; and

4.5.10.2 North Gauteng application heard on the 20 June 2011, with the Registrar's stamp of the 3 April 2013.

#### **4.5.11 Legislation and other prescripts**

- 4.5.11.1 The Constitution of the Republic of South Africa, 1996;
  - 4.5.11.2 The Public Protector Act 23 of 1994;
  - 4.5.11.3 The Mpumalanga Economic Growth Agency Act 1 of 2010;
  - 4.5.11.4 The Public Finance Management Act 1 of 1999 (PFMA);
  - 4.5.11.5 National Treasury Regulations and Framework issued in terms of the PFMA, 2005.
  - 4.5.11.6 National Treasury SCM Guidelines dated February 2004;
- National Treasury Practice Note 6 of 2007/2008.

## **5. THE ADMINISTRATIVE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH BY THE MEGA BOARD**

### **5.1 Introduction**

- 5.1.1 The Legal and regulatory framework determines what should have happened and are used as benchmarks for standards that should have been complied with by the state institution or public authority.
- 5.1.2 The considerations include the following Constitutional provisions, legislation and other prescripts, as well as sector and international good practice.

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**5.2 Whether the resignation of Ms. Rachel Kalidass, a former Chairperson of the MEGA Board, was irregular and unlawful**

**5.2.1 The Mpumalanga Economic Growth Agency Act 1 of 2010 (the MEGA Act).**

- 5.2.1.1 Section 9(1) of the MEGA Act is explicit with regard to the obligation of a Board Member when resigning as it states that *"A Member may at any time resign from the Board upon one month's written notice tendered to the Member of the Executive Council who shall forthwith inform the Executive Council and the Board accordingly."*
- 5.2.1.2 In terms of section 9(1) of the MEGA Act the Chairperson of MEGA as a member of the Board was therefore expected to tender a one month's written notice to the Member of the Executive Council and as such any failure to do so renders her resignation irregular.
- 5.2.1.3 The resignation of Ms. Kalidass, with immediate effect, was not in compliance with the provisions of section 9(1) of the Act, in that she failed to give the required one month's notice to the former MEC and was supposed to inform the Executive Council and the Board of her intended resignation. She instead sent an electronic mail dated 19 May 2011 and resigned with immediate effect and stated that she would give her reasons for resigning to the former MEC.
- 5.2.1.4 This section clearly requires a Board member to tender one month's written notice to the MEC. The operative phrase to have regard to in this regard is "upon one month's written notice", and clearly the legislature's intention was that the MEC must be given a notice of one month before a Board member could resign. The purpose of giving a one month's notice could be for the MEC to be able to deal with the resultant vacancy accordingly and to satisfy

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himself/herself that the Board was properly constituted and met the minimum required number of members.

The resignation of Ms Rachel Kalidass was not in accordance with the standard as outlined in section 9(1) of the MEGA Act.

### **5.3 Regarding whether the former MEC unlawfully dissolved the Board:**

#### **5.3.1 The Mpumalanga Economic Growth Agency Act 1 of 2010 (the MEGA Act).**

##### 5.3.1.1 Section 9(2) of the MEGA Act provides:

*"Notwithstanding the provisions of section 12, but subject to the provisions of subsection (3) of this section, the appointment of any Member may, before the expiration of a Member's term of office, be terminated by the Member of the Executive Council, in consultation with the Executive Council:*

- (i) on account of his or her improper conduct;*
- (ii) on account of unfitness for the functions of his or her office;*
- (iii) on the ground of a permanent infirmity of mind or body which renders him or her incapable of discharging the functions of his or her office or discharging them properly; or*
- (iv) that he or she is or has become disqualified in terms of section 8"*

##### 5.3.1.2 In terms of section 9(2)(a) of the Mega Act, the former MEC was allowed to terminate the appointment of the Board Members on account of a

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Board member's improper conduct provided that he or she consulted with the Executive Council first.

5.3.1.3 The reasons listed in the former MEC's letter dated 19 May 2011 amount to a ground for removal from the Board on account of improper conduct and thus justify the dissolution of the Board provided that he consulted with the Executive Council, which he stated, in the same letter, as having done

5.3.1.4 Section 9(4) of the MEGA Act provides:

*"The Member of the Executive Council may not terminate the appointment of a Member in terms of subsection (2) or (3) unless the Member of the Executive Council, after having afforded the relevant person an opportunity to state his or her case and having duly considered the matter, including any representations made, explanations given or evidence tendered by such person, is satisfied that the termination of his or her appointment is justified in the circumstances."*

5.3.1.5 In addition to the grounds of removal from the Board in section 9(2)(a), it is clear that section 9(4) the MEGA Act does not permit the MEC to remove members from the Board without affording each member the opportunity to state his/her case and the concomitant requirement that the MEC must apply his or her mind to the matter, taking into account the representations made, explanations given or evidence tendered. Clearly, the former MEC fell foul of section 9(4) in that he did not bother to give the individual remaining Board members the opportunity to make representations as required.

5.3.1.6 Section 9(5) clearly states that *"for the purposes of subsection (2)(a), non-compliance by a Member with any provision of this Act, inter alia, constitutes improper conduct"*. Therefore according to section 9(5), non-compliance with any provision in this Act by a Board Member constitutes



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improper conduct which is a ground for removal from office by the former MEC as provided for in section 9(2)(a).

5.3.1.7 In terms of section 9(5) of the MEGA Act any violation of the provisions of the MEGA Act amounts to an improper conduct. In his letter to the remaining Board members dated 19 May 2011, the former MEC stated as his reasons to dissolve the Board as being due to the Board's failure to satisfactorily discharge its responsibilities in terms of the MEGA Act including not complying with the PFMA or addressing some of the special concerns that he had raised to the Board.

5.3.2 The legal attack on the unlawfulness of the former MEC's actions of dissolving the Board is given credence to by the North Gauteng High Court judgment dated 8 June 2011 wherein the Court set aside the former MEC's decision to dissolve the Board. The Court held that the former MEC acted outside the confines of the MEGA Act when dissolving the Board and therefore had no authority to dismiss the remaining Board members en masse. The former MEC applied for an appeal but his application was dismissed by the Court in a judgment dated 20 June 2011.

5.3.3 Subsequent to the Court ruling, the former MEC corrected his error by serving each Board member with a notice of intention to dissolve the Board and providing them with an opportunity to respond in writing within 8 working days. It was only after the 8 working days had expired and no responses were received that the former MEC ultimately terminated their appointments and thereafter appointed a new Board.

5.3.4 In this regard he wrote a letter on the 22 June 2011 entitled "Notice of intention to terminate your membership in terms of section 9(2)(b) read with section 9(4) of the Mpumalanga Economic Growth Agency Act, 2010 (Act No.01 of 2010)

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to all the Board members individually stating inter alia, that “In view of the above, I hereby afford you an opportunity to state why your membership of the Board must not be terminated”. None of the Board members responded and new Board members were appointed and this was confirmed by Ms.Y.N Phosa during the interview in Nelspruit.

#### **5.4 Regarding whether the Department failed to make regular transfer of funds to the MEGA account:**

##### **5.4.1 The Mpumalanga Economic Growth Agency Act 1 of 2010 (the MEGA Act).**

###### 5.4.1.1 Section 20 of the MEGA Act provides that:

*“The Agency may be funded by the Government with such moneys as may be appropriated by the Provincial Legislature, after consideration of the information, duly submitted by the Agency to the Member of the Executive Council, before or on 30 September of every year in respect of the ensuing financial year, as contemplated in section 52 of the Public Finance Management Act, 1999.”*

5.4.1.2 The use of the words “may be funded” in section 20 of the MEGA Act means that the Department had a discretion to fund the MEGA with monies as appropriated by the Provisional Legislature after it (the Provisional Legislature) had considered information duly submitted to it by the former MEC, on or before 30 September prior to the ensuing financial year. The Public Protector did not obtain any evidence regarding whether or not the former MEC did submit such information to the Provisional Legislature. In any event, a strict interpretation of the discretionary language used on the issue of the Department funding the MEGA account reinforces the point that the Department was not obliged to make regular transfers to the MEGA

account. Even though there might have been an expectation on the part of MEGA to receive funds from the Department, and even if the Department could be said to have “failed” to make regular transfers as alleged, there was no obligation on it to make regular transfers to the MEGA account. Therefore, where there was no information submitted to the Provincial Legislature no monies would be made available to the Agency.

5.4.1.3 Section 21(1) of the MEGA Act further provides that :

*“For the purposes of achieving its objects, exercising its powers and performing its functions, the Agency shall utilize as its revenue:*

- (a) fees and other moneys received or raised by it under the provisions of the Act or any other law; ...*
- (b) any other money which may accrue or be appropriated to it, or which may be placed at its disposal from any other source whatsoever.”*

5.4.1.4 In terms of section 21(1)(i) of the MEGA Act, the MEGA could use any money that it received under the provisions of the MEGA Act or any other law. Subsection (ii) allows MEGA to also use any money that accrued or was appropriated to, or any money placed at its disposal from any source.

5.4.1.5 The MEGA acts as an intermediary in assisting, for example, farmers to access financial services from the MAFISA Fund. In terms of section 21(1) (i) and (ii) of the MEGA Act, the MEGA was permitted to use the money from the MAFISA fund that was received by it, appropriated to it and also at its disposal from another source to achieve its objects and carry out its powers and perform its functions. The MEGA was therefore entitled to use the MAFISA Fund “to cover its operational expenses” as was stated to have happened in the internal memorandum dated 7 May 2013 co-signed by Mr

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Fakude and Dr Dlamini as the operational expenses were linked to the MEGA's performing its duties of being an intermediary to the MAFISA FUND.

**5.5 Regarding whether the appointment of Purple Fountain Properties was irregular and if so, was there any fruitless and wasteful expenditure which resulted thereon**

**5.5.1 The Constitution of the Republic of South Africa 1996 (the Constitution).**

5.5.1.1 A lawful and accordingly proper procurement process is one that complies with section 217 (1) of the Constitution, which clearly states that "*When an organ of state in the national, provincial or local sphere of government, or any institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective*". This ensures that when the state spends public money for goods or services it does so in a manner that is able to have value for money spent. It further encourages equity amongst all the bidders which in essence prevents unfair procurement practices which unlawfully favour any individuals or groups.

5.5.1.2 In terms of section 217 (1) of the Constitution the contract of the services of Purple Fountain Properties should have been done inter alia, fairly, equitably, transparently, competitively and cost-effectively. Such processes must also comply with other applicable laws. Key amongst these laws are the Public Finance Management Act No. 1 of 1999 (PFMA), Treasury Regulations, related prescripts and internal institutional procurement policies. There is incontrovertible evidence that Purple Fountain Properties was appointed in circumstances where no due procurement process was followed.

- 5.5.1.3 It is evident that the Memorandum of Agreement entered into between the Department and Purple Fountain Properties was:
- 5.5.1.4 Not fair, in that Purple Fountain Properties was the only entity offered an opportunity to make presentation to produce a film and no other film-makers were afforded the same or similar opportunity.
- 5.5.1.5 Inequitable, in that it was not fair and impartial in so far as the other service providers in the film-making industry were denied an opportunity.
- 5.5.1.6 Not transparent, in that even MEGA, which was later made to pay (and let alone the public and other film-makers) knew nothing about the contract. They became aware when they were instructed by the Department to pay.
- 5.5.1.7 uncompetitive, and the price or value for money was an issue here, in that had the Department solicited other bids, it could have been in a position to benchmark and obtained the best price and maybe get better ideas as to which film project would be more suitable than the one they agree upon.
- 5.5.1.8 lacked cost effectiveness, and one must remember that although MEGA paid the sum of R2.5 million (two million five hundred thousand rand) for the making of the film, the Memorandum of Agreement, to which we referred to above, provided in clause 23:
- 5.5.1.9 *"The Government of Mpumalanga agrees and undertakes to make payment to Purple Fountain 133 (Pty) Ltd t/a Legends of Freedom a payment of the sum of R15 054 037.00 ..."*
- 5.5.1.10 Surely, there is nothing cost-effective in the Department agreeing to pay such an exorbitant amount for the making of a film, especially when there

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were more pressing issues such as housing that required government funding.

5.5.1.11 Clearly, the procurement of goods or services from Purple Fountain Properties was flawed from the supply chain management perspective for a number of reasons and these are:

5.5.1.12 Despite the value of the contract, the Department did not call for an open bidding process so as to make the whole transaction fair, cost-effective, competitive, and transparent.

5.5.1.13 There was no conscientious use of public property, i.e. state funds.

5.5.1.14 The Department failed to take effective and appropriate steps to prevent fruitless and wasteful expenditure, in that had it followed a proper bidding process it could have avoided the financial exposure to which it was ultimately subjected to.

5.5.1.15 There is no evidence to the effect that the accounting officer and the accounting authority deviated from the prescribed procurement procedures as allowed by provision 16A6.4 of the National Treasury Regulations 16 of 2003.

5.5.1.16 Furthermore, there is also no evidence to support that the deviation from the prescribed procurement procedures of goods and services was reported to the relevant treasury and to the Auditor-General, as required by National Treasury Practice Note 6 of 2007/2008.

5.5.1.17 Sections 3 and 4 of the MEGA Act were violated, in that it was not the intention of the Legislature to include the making of films as one of the objectives, nor to clothe the MEGA with the powers and duties of funding films.

5.5.1.18 The money paid to Purple Fountain Properties was not “utilized exclusively for the achievement of its objects and in accordance with provisions of this Act” (Section 22).

5.5.1.19 More specifically, in the Department entering into an agreement with Purple Fountains Properties without following the correct procurement procedures, the Department acted in contravention of its SCM demand management provision and section 38(1) (c) (ii) read with 51 (b) (ii) of the PFMA and the Treasury Regulations, which provides that an accounting authority of a public institution must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure.

## **5.5.2 The Public Finance Management Act 1 of 1999 (the PFMA).**

5.5.2.1 Chapter 1 of the PFMA defines “fruitless and wasteful expenditure” as:

*“Expenditure which was made in vain and would have been avoided had reasonable care been exercised”.*

5.5.2.2 Chapter 1 of the PFMA further requires that any public expenditure incurred by government must be exercised with reasonable care and that there must be value for money.

## **5.5.3 Treasury Regulations 16 of 2003.**

5.5.3.1 National Treasury Regulation 16A6.4 provides for situations where there could be deviations from normal bidding processes and emphasizes that such must be recorded and approved by the Accounting Officer or Accounting Authority.

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#### **5.5.4 National Treasury Practice Note 6 of 2007/2008 dated 18 April 2007.**

5.5.4.1 With effect from the date on which this practice note takes effect, accounting officers and accounting authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General, all cases where goods and services above the value of R 1 million (VAT included) were procured in terms of Treasury Regulation 16A6.4.

#### **5.5.5 National Treasury Supply Chain Management (SCM) Guidelines dated February 2004**

5.5.5.1 In February 2004, the National Treasury, issued a document entitled "Supply Chain Management: A Guide for Accounting Officers/Authorities" (National Treasury SCM Guidelines). The purpose of the National Treasury SCM Guidelines was to give guidance to accounting officers in fulfilling their roles within the SCM framework.

5.5.5.2 Paragraph 3 of the SCM Guide sets out guidelines in regard to demand Management and reads as follows:

*"Demand management*

##### *3.1 Introduction*

*3.1.1 Demand management is the first phase of SCM. The objective is to ensure that the resources required to fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs. As part of this element of SCM, a total needs assessment should be undertaken. This analysis should be included as part of the strategic planning process of the institution and hence will incorporate the future needs.*



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3.1.2 *It is vital for managers to understand and utilise sound techniques to assist them in their planning, implementation and control activities. As part of the strategic plan of the institution, resources required for the fulfilment of its obligations should be clearly analysed. This includes a detailed analysis of the goods, works and services required, such as how much can be accomplished, how quickly and with what materials, equipment, Etc."*

5.5.5.3 This document is applicable to all accounting officers and contains the following principles:

- a) The identification of a need is the initiating trigger to a procurement Process.
- b) The fulfilment of the need should form part of the strategic objectives of the department and a needs analysis should therefore be part of the strategic planning process.
- c) Sound techniques should be utilised in conducting the needs analysis.
- d) The need should be linked to the budget.

5.5.5.4 According to paragraph 1.3.2.2 of the SCM Guide Demand Management is the beginning of the supply chain where:

- *a needs assessment is done to ensure that goods or services are acquired in order to deliver the agreed service;*
- *specifications are precisely determined;*
- *requirements are linked to the budget; and*
- *the supplying industry has been analysed,*

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## 5.5.6 The Mpumalanga Economic Growth Agency Act 1 of 2010

### 5.5.6.1 Section 3 (1) of the MEGA Act provides:

*"The objects of the Agency are to provide funding in respect of property development including the granting of housing loans as well as in respect of approved enterprise and agricultural development focussing primarily on previously disadvantaged individuals within the Province, whilst focusing on project management, development and management of immovable property and to promote foreign trade and investment so as to ensure enterprise and agricultural development that will significantly contribute to economic growth and development within the Province, with specific emphasis on Black Economic Empowerment".*

### 5.5.6.2 In terms of section 3(1) the objects of the MEGA Act are to provide funding for property and agricultural development as well as foreign trade and investment. Any other activity except the one stated in the section cannot be accommodated.

### 5.5.6.3 Section 22 of the MEGA Act further provides:

*"The moneys appropriated by the Provincial Legislature to the Agency as contemplated in section 20, shall be utilized in accordance with such appropriation and all other income, property and profits of the Agency, shall be utilized exclusively for the objects and in accordance with the provisions of this Act".*

### 5.5.6.3 Therefore the monies that are appropriated by the Department cannot be used for anything else other than what it was appropriated or allocated for. Section 22 of the MEGA Act does not leave room for any form of discretion in the utilisation of such monies

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5.5.6.5 Section 23 (1) of the MEGA Act provides:

*"When procuring any supply or service, or hiring or letting anything or acquiring any right or acquiring or disposing of any asset for or on behalf of the Agency as contemplated in section 4, the Board shall ensure that such procurement is effected in accordance with, and duly complies with –*

*The regulations made or instructions issued by the National Treasury in respect of an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective as contemplated in section 76 (4) of the Public Finance Management Act, 1999".*

5.5.6.6 Section 23 (1) of the MEGA Act clearly provides a guideline that for any supply or service performed on behalf of MEGA, the Board must comply with a procurement and provisioning system that is fair, equitable, transparent, competitive and cost-effective.

5.5.6.7 The resultant payment of R2.5 million (Two million and five hundred thousand rand) amounted to a fruitless and wasteful expenditure because had the Department followed proper procurement processes and exercised reasonable care it would have avoided entering into the Memorandum of Understanding (MOU) and paying this amount.

**5.6 Regarding whether the appointment of Khabran Investments was irregular and if so, was there an irregular expenditure which resulted thereon;**

**5.6.1 Constitution of the Republic of South Africa 1996.**

5.6.1.1 Section 217(1) of the Constitution provides:

*"When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".*

5.6.1.2 In terms of section 217 (1) of the Constitution enjoins the Department to make sure that the procurement of services from Khabran Investments was in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Failure to do things accordingly renders the procurement of goods or services unlawful.

## **5.6.2 The Public Finance Management Act 1 of 1999**

5.6.2.1 Section 38 (1) (a) (iii) of the PFMA provides inter alia:

*"The accounting officer for a department, trading entity or constitutional institution:*

*(a) must ensure that that department, trading entity or constitutional institution has and maintains:*

*(iii) An appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective..."*

5.6.2.2 In terms of Section 38 (1) (a) (iii) of the PFMA the Department through its Accounting Officer is obliged to have and maintain a fair, equitable, transparent, competitive and cost-effective procurement and provisioning system.

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5.6.2.3 Section 38 (1) (c) provides:

*"The accounting officer of a department, trading entity or constitutional institution must take effective and appropriate steps to collect all money due to the department, trading entity or constitutional institution".*

5.6.2.4 Section 38 (1) (c) of the MEGA Act makes it obligatory for the Department to collect the money paid to Khabran Investments.

5.6.2.5 Chapter 1 of the PFMA defines 'irregular expenditure' to mean "*expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation*".

5.6.2.6 According to Chapter 1 the payment of R92 800 (ninety two thousand and eight hundred rand) to Khabran Investments was supposed to be in accordance with the PFMA as the applicable legislation. However, in this instance the payment was not in accordance with the requirement and thus renders the payment an irregular expenditure as it was in contravention of the PFMA and other applicable laws.

### **5.6.3 Treasury Regulations 16 of 2003**

5.6.3.1 Provision 16A6.4 clearly states that if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.

### **5.6.4 National Treasury SCM Guidelines dated February 2004**

5.6.4.1 Paragraphs 5.5.5 above should be referred to as it is also applicable here

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Section 217 (1) of the Constitution provides that organs of state (and this includes provincial departments and their subsidiary entities) must contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost effective this is also echoed in section 38 (a) (iii). Further, the procurement procedure, which is required in terms of section 23 of the MEGA Act, was also not followed as this section requires amongst others, a fair and transparent procurement process.

5.6.4.2 National Treasury Regulation 16A6.4 provides for situations where there could be deviations from normal bidding processes and emphasizes that such must be recorded and approved by both the accounting officer and the accounting authority. In the present matter, we could not find any justification for such a deviation and no record thereof. This, therefore, renders the whole procurement of Khabran Investments to be flawed and in violation of Treasury Regulation 16A6.4.

5.6.4.3 There is also no evidence to support that the deviation from the prescribed procurement procedures of goods and services were reported to the relevant treasury and to the Auditor-General, as required by National Treasury Practice Note 6 of 2007/2008.

5.6.4.4 More importantly, no demand management exercise preceded the engagement with Khabaran Investment as a result the Department acted in contravention of its SCM demand management provision and section 38(1) (c) (ii) read with 51 (b) (ii) of the PFMA and the Treasury Regulations, which provides that an accounting authority of a public institution must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure.

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## **6 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

### **6.1 Whether the resignation of Ms. Rachel Kalidass, a former Chairperson of the MEGA Board, was irregular and unlawful**

#### **6.1.1 The Complainant's submission**

6.1.1.1 The Complainant alleged that Ms Rachel Kalidass who was a former Chairperson of the MEGA Board, resigned without consulting the Board in the morning of 19 May 2011.

6.1.1.2 The former Chairperson did not follow the required legal procedures when tendering in her resignation and her conduct was therefore irregular and unlawful.

#### **6.1.2 Ms. Rachel Kalidass's response**

6.1.2.1 The Public Protector obtained a copy of a printed out electronic mail sent and submitted by Ms. Rachel Kalidass, dated 19 May 2011, addressed to the following persons: GJ Dladla, Dias, Ndoyo, Gaylene, Jerry Mafereka, Kgomo, and Thulani. The same electronic mail was also copied to the following persons: Thandi Mokwena, Sello Malomane, Portia Ngomane, and Anton Scheepers.

6.1.2.2 In the same electronic mail, Ms. Kalidass stated that the reasons for her resignation would be communicated to the former MEC. Her electronic mail read as follows:

*"Please be informed that I have resigned as the Chairperson of MEGA with immediate effect. The reason for my resignation shall be communicated to the Honourable MEC Mokoena in accordance with the provisions of the MEGA Act. The wrapping of the administrative issues*

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*shall be communicated to the Deputy Chairperson and the Acting Company Secretary."*

### **6.1.3 Department's submission**

- 6.1.3.1 In an electronic response received on 05 August 2016 from Mr T.N Fakude, Director of Legal Services at the Department, it was contended that the resignation of a Board Member is regulated by section 9(1) of the MEGA Act, 2010. This provision states that a member may at any time resign from the Board upon tendering in one month written notice to the MEC who shall inform the Executive Council and Board thereafter.
- 6.1.3.2 The appointment of Board Members does not require the signing of an employment contract as it is not regarded as employment. The Board Members are not employed but only appointed to serve for a specific period of time which does not exceed four years. This is in accordance with the terms and conditions which are determined and gazetted by the MEC.
- 6.1.3.3 MEGA's approved Annual Performance Plan, shareholder's compact and business plan are used as a measuring tool to assess whether the Board has performed. However, there was nothing that regulated the instance where the Board member has failed to serve the one month's notice.
- 6.1.3.4 The circumstances around the resignation of Ms Kalidass are that the MEC had requested the Board Members to tender their resignations in due to poor performance of their responsibilities as MEGA's Accounting Authority of which a number of Members had declined.

According to the appointment letter Ms Kalidass basically undertook to observe and comply with the principles and provisions of all legislation relevant to MEGA and to



observe and maintain the highest standard of integrity and probity in the execution of her responsibility.

#### 6.1.4 Independent evaluation

6.1.4.1 It was not disputed that Ms. Kalidass communicated her decision to resign as the chairperson of the Board with immediate effect in an electronic mail she sent on 19 May 2011. From the reading of her electronic mail, it is also common cause that Ms. Kalidass purported to be acting in terms of the MEGA Act, hence she made mention of it in her email.

6.1.4.2 What needs to be determined is whether Ms. Kalidass' actions in sending the above-cited electronic email may lead to the conclusion that she intended to resign without serving the required notice. It is clear from reading her electronic mail and evaluating it, that

- (i) Ms. Kalidass did tender her resignation, albeit irregularly in that she did not give a notice prior to resigning but only sent an electronic mail, after the fact, informing of her resignation;
- (ii) The resignation was with immediate effect which clearly shows that she did not intend to give the one month's notice required by the MEGA Act; and
- (iii) Based on Ms. Kalidass' intention to resign expressed in the electronic mail, *"the wrapping of the administrative issues"* that was to be communicated to the Deputy Chairperson and the Acting Company Secretary related to *"issues"* surrounding her resignation.

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## 6.2 Whether the former MEC unlawfully dissolved the MEGA Board?

### 6.2.1 The Complainant's submission

6.2.1.1 The Complainant alleged that the former MEC, N.M. Mokoena, unlawfully dissolved the MEGA Board. According to this complaint, the former Chairperson resigned on 19 May 2011 after she had consulted with the MEC followed an hour later with the MEC dissolving the Board.

6.2.1.2 On 19 May 2011, the former MEC wrote a letter to the remaining members of the Board informing them that the Board would be dissolved on 20 May 2011. In his letter he communicated his decision as follows:

*"THE DISSOLUTION OF THE BOARD OF THE MPUMALANGA ECONOMIC GROWTH AGENCY (MEGA)*

*In the process of my engagements with the Board of MEGA, I have come to the determination that:*

- 1) *The Board has failed to satisfactorily discharge its responsibilities as stated in section 4 of the Mpumalanga Economic Growth Agency Act, 2010 (Act No. 1 of 2010);*
- 2) *The Board has failed to satisfactorily discharge its corporate governance responsibilities as encapsulated in the MEGA and PFMA Acts as well as the King Code III;*
- 3) *The members of the Board have not discharged their fiduciary duties adequately; and*

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- 4) *The Board has failed to address specific areas of concern raised by myself on several occasions.*

*In view of the above and having afforded the Board an opportunity to state why it should not be dissolved, I was left with no other option but to conclude that dissolution of the Board is justified in the circumstances. I have therefore, in consultation with the Executive Council, come to the conclusion that dissolution of the Board is justified in the circumstances.*

*The decision will come into effect on the [sic] 20 May 2011, and I further wish to express my sincere appreciation to you for your willingness to serve on the Board and wish you the best in all your future endeavours."*

6.2.1.3 The decision by the MEC to dissolve the Board on 19 May 2011 was however, taken to Court by the Eight (08) members of the Board and MEGA. The matter was subsequently appealed by the MEC and the Premier of Mpumalanga Province (the Respondents) of which the Appeal Court on 20 June 2011 as per Justice De Vos found that the Respondent's decision to terminate the appointment of the members of the Board was not within the boundaries of section 9(2)(a) read with section 9(5) of the MEGA Act.

6.2.1.4 The Appeal Court further reviewed and set aside the former MEC's decision on the grounds that the Respondent abrogated their powers to dissolve the Board and that the decision to terminate the appointment of the Board was not within the confines of the Act as the prescribed procedure set out in section 9(4) of the MEGA Act was not complied with.

Subsequent to the court ruling and to be precise on 22 June 2011, the former MEC sought to correct his error by serving each member of the Board with an 8 days' notice of intention to dissolve the Board. In terms of his notice he

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afforded the members of the Board an opportunity to provide him with reasons why their individual memberships should not be terminated. After the expiry of the 8 day notice period and without a response from the members of the Board, the Board was deemed to be dissolved.

## **6.2.2 Independent evaluation**

6.2.2.1 An evaluation of the contents of the former MEC's letter dated 19 May 2011 and his related actions demonstrate that:

i. Instead of affording the Board members an opportunity to state the reasons why their individual memberships should not be terminated before removing them, he erroneously dissolved the Board. This is in contravention of section 9(4) of the MEGA Act which basically provides that a Board member's appointment cannot be terminated in terms of subsection (2) and (3) unless he/she is afforded an opportunity to state his/her case.

ii. Evidence that the former MEC erred is found in his letter referred to in 7.2.2 below and it reads *"I have therefore, in consultation with the Executive Council, come to the conclusion that the dissolution of the Board is justified in the circumstances"*. He treated the Board members as a group and not individually. When the appointments are made to the Board the members get appointed individually and similarly, when they are dismissed, the members are treated individually.

iii. Section 9 of the MEGA Act does not provide for the dismissal of the members of the Board en masse. Therefore, he clearly erred in dismissing the Board members en masse. What he was supposed to do which is already stated in (i) herein above, was to deal with them individually. This proposition is supported by section 9(4) of the MEGA Act which refers to termination of individual members after having afforded the relevant individual an opportunity to state his or her case.

6.2.2.2 In my understanding however, the decision by the former MEC to dissolve the Board was taken to Court for recourse and was also later appealed by the former MEC and the Mpumalanga Premier. A ruling was made in favour of the members of the Board stating that the former MEC's decision to terminate the appointment of the Board was not within the confines of the MEGA Act.

6.2.2.3 It is worth noting that on 22 June 2011, the former MEC sought to correct his error and served each member of the Board with a notice of intention to dissolve the Board. The members of the Board were given an opportunity to provide any reasons as to why the Board should not be dissolved and after the 8 day expiry period no responses had been received. The Board was subsequently dissolved.

### **6.3 Whether the Department failed to make regular transfer of funds to the MEGA account?**

#### **6.3.1 The Complainant's submission**

6.3.1.1 The Complainant alleged that there was a failure by the Department to make monthly transfer of funds to the MEGA account.

6.3.1.2 According to the Complainant, such failure resulted in MEGA not being able to meet its financial obligations, which included paying staff salaries. The lack of funds in the MEGA account led to the MEGA management using funds from another account (the MAFISA Fund account), which was a separate account to assist farmers. The MAFISA Fund is a government-supported financial scheme that assists farmers, fisheries, growers in agriculture and forestry. The fund is accessed through intermediaries like MEGA.

### **6.3.2 The Department's submission**

6.3.2.1 My investigation team obtained a copy of an Internal Memorandum dated 7 May 2013, from and co-signed by Mr. Fakude and Dr. Dlamini, and addressed to former MEC Ms YN Phosa. The Memorandum states that:

*"MEGA has confirmed that for several months in 2011, the MAFISA Fund was used to cover operational expenses due to cash flow constraints."*

6.3.2.2 For some months in 2011, there were no transfer of funds from the Department to the MEGA account and this evidence was obtained from one of the interviews conducted with Dr. V.Dlamini.

### **6.3.3 Independent Evaluation**

6.3.3.1 According to the internal memorandum referred to in paragraph 6.3.2.1 above, it is not disputed that the MAFISA Fund was not used for the purpose for which it was created but to pay for MEGA's operational expenses because there were cash flow constraints at MEGA.

6.3.3.2 In the memorandum referred to in the said paragraph and in referring to the Department's failure to make regular transfers to the MEGA account, the authors of the memorandum stated categorically that "the MAFISA Fund was used to cover operational expenses due to cash flow constraints". According to the letter this happened "for several months during 2011" and this clearly resulted from the Department's failure as discussed herein above. This memorandum was prepared following our meeting with the former MEC, Ms. Phosa and her senior staff.

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6.3.3.3 However, it is important to note that:

- i. The relevant section that deals with the funding of MEGA by the Department is couched in discretionary terms. It reads “The Agency may be funded by the Government with such monies as may be appropriated by the Provincial Legislature, after consideration of the information, duly submitted by the Agency to the Member of the Executive Council, on or before 30 September of every year in respect of the ensuing financial year, as contemplated in section 52 of the Public Finance Management Act, 1999; and
- ii. The South African Concise Oxford Dictionary describes the word “fail” to mean “be unsuccessful in an undertaking”.
- iii. It follows therefore from above that the Department was neither obliged to fund the MEGA nor did it fail to do so because it never made an undertaking to make funds available to MEGA and besides MEGA is under an obligation to initiate the process for funding by preparing the necessary information to be considered by the Provincial Legislature for appropriation of funds.

**6.4 Whether the appointment of Purple Fountain Properties was irregular and if so, was there any fruitless and wasteful expenditure which resulted there from.**

**6.4.1 The Complainant’s submission**

- 6.4.1.1 The Complainant alleged that the appointment of Purple Fountain Properties was irregular and amounted to fruitless and wasteful expenditure.

**6.4.2 The Department’s submission**

- 6.4.2.1 The Department conceded that at the beginning of 2011, Purple Fountain Properties made a presentation to the then HOD, Mr R.S Tshukudu for the production of a film entitled *"KALUSHI: The Story of Solomon Mahlangu"*.
- 6.4.2.2 Subsequent to the presentation the Department signed a Memorandum of Understanding with Purple Fountain Properties on the 31 March 2011. The Department was represented by Mr R.S Tshukudu and Purple Fountain Properties 133 (Pty) Ltd trading under the name of Legends of Freedom was represented by Mr Walter Mandla Dube.
- 6.4.2.3 Purple Fountain Properties was appointed to produce the film referred titled *"KALUSHI: The Story of Solomon Mahlangu"* and the contract value which was agreed upon was R15 054 037.00. A copy of the Memorandum of Understanding between the Department and Purple Fountain Properties was signed on 31 March 2011.
- 6.4.2.4 The Public Protector was provided with a copy of a report following a press briefing held at the Emnotweni arena in 2011 which was addressed by the then MEC, MN Mokoena. According to the same report Dr Dlamini confirmed the appointment and payment of money to Purple Fountain Properties and explained that they did not go out on tender because the proposal came directly from Purple Fountain Properties.
- 6.4.2.5 The Public Protector obtained a copy of a written confirmation of the appointment of Purple Fountain Properties to produce a film titled *"KHALUSHI: The Story of Solomon Mahlangu"*. The written confirmation is dated 7 May 2013, signed by Mr. Fakude, the Director: Legal Services, Dr. Dlamini, the former HOD, Mr Y.N. Mahlangu and the former MEC for the Department of Economic Development, Environment and Tourism, respectively.



- 6.4.2.6 The Public Protector was further provided with a copy of a letter dated 2 June 2011 which was addressed to Mr. Tshukudu from the office of the Head of Department, Dr. Dlamini. The letter confirmed *"... that Purple Fountain 133 (Pty) Ltd t/a Legends of Freedom has entered into a contractual agreement with the Department of Economic Development, Environment and Tourism for the full production of KALUSHI: The Story of Solomon Mahlangu ..."*
- 6.4.2.7 Dr Dlamini further stated in the abovementioned letter (2 June 2011) that *"We request that MEGA urgently make the payment in the sum of R2 500 000.00 to Purple Fountain Properties"*. During the investigation Dr Dlamini confirmed this payment and stated that it was part payment of the sum of R5 175 095.00 which remained due and owing to Purple Fountain Properties in terms of the production of the KALUSH film.
- 6.4.2.8 The Public Protector obtained a copy of a Memorandum dated 2 June 2011 from Mr. Tshukudu, then the Acting CEO of MEGA, to Ms. Tshabangu, Acting CFO, requesting her to *"release"* the sum of R2.5 million (two million five hundred thousand rand) from the MEGA account to Purple Fountain Properties.
- 6.4.2.9 The Public Protector also obtained a copy of a MEGA Payment Advice dated 2 June 2011, signed by Mr. Tshukudu authorising payment of R2.5 million (two million five hundred thousand rand), with Purple Fountain Properties as a payee.
- 6.4.2.10 In an electronic mail received from Mr T.N Fakude, Director Legal Services at the Department it was reported that the Board is independent entity from the Department but is still accountable to the MEC in terms of section 5 (2) of the MEGA Act, to ensure that the required performance is met and within the legal regulating framework.

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### **6.4.3 MEGA's submission**

6.4.3.1 On 11 July 2016, Mrs P Morgan, Company Secretariat & Legal at MEGA responded in an electronic mail to the Public Protector informing that the HOD has no authority to instruct the MEGA Board to pay a service provider.

6.4.3.2 Mrs P Morgan further stated that the Board is independent from the Department. The Board's independence is clearly provided for in the MEGA Act, the Companies Act, the PFMA and MEGA's delegations of Authority Framework.

### **6.4.4 Evidence obtain independently**

6.4.4.1 The Public Protector obtained a copy of a Transfer of Funds document from Standard Bank dated 3 June 2011, co-signed by Anton Scheepers and Mr. Tshukudu authorising Standard Bank, Nelspruit, to transfer the amount of R2.5 million (two million five hundred thousand rand) from the MEGA account to Purple Fountain Properties.

### **6.4.5 Independent evaluation**

6.4.5.1 In 2011 Purple Fountain Properties approached the Department and made a presentation for the production of a film titled "*KHALUSHI The Story of Solomon Mahlangu*". Subsequent to the presentation the Memorandum of Understanding (MOU) between the Department and Purple Fountain Properties was signed in terms of which Purple Fountain Properties would produce the film and be paid R15 054 037.00 million (fifteen million fifty four thousand and thirty seven rand).

6.4.5.2 From the evidence it is clear that Purple Fountain Properties' appointment was triggered by a project proposal and not necessarily by the needs of the Department. It is also clear that no process was followed to establish if any

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other entity offered similar services. More importantly, no demand management exercise preceded the engagement

- 6.4.5.3 According to the investigation the discussions about the funding of the film were strictly between the parties who signed it and MEGA was not informed. MEGA only became aware of the project when they were instructed by the former HOD, Dr V. Dlamini on 02 June 2011 to pay Purple Fountain Properties an amount of R2.5 million (Two Million and Five Hundred Thousand Rand).
- 6.4.5.4 There was no tender process followed in appointing them and no evidence was found to the contrary and in fact this was not disputed. In explaining the decision to not go out on tender Dr Dlamini is believed to have told the media that the reason for that was because it was “a proposal that came directly from Purple Fountain Properties”, so it means Purple Fountain Properties dictated to the Department which led the latter to disregard its own procurement processes.
- 6.4.5.5 According to the written confirmation dated 7 May 2013 as well as the letter from Dr. Dlamini to Mr. Tshukudu dated 2 June 2011, it is not disputed that Purple Fountain Properties was appointed to make and produce a film for the Department.
- 6.4.5.6 What needs to be determined is whether the appointment and payment of Purple Fountain Properties was irregular and amounted to a fruitless and wasteful expenditure.
- 6.4.5.7 It is without question that Mr. Tshukudu signed a MEGA Payment Advise on the same day (2 June 2011) authorising the payment of R2.5 million (two million five hundred and thousand rand) to Purple Fountain Properties.
- 6.4.5.8 It is also clear that Mr. Tshukudu, then the Acting CEO, requested Ms. Tshabangu, Acting CFO, to “*release*” R2.5 million (two million five hundred

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thousand rand) from the MEGA account to pay Purple Fountain Properties. This request was made in a Memorandum dated 2 June 2011, the same day on which the Payment Advice was signed. The reason for him to request that the payment be made was to honour the Department's legal obligation to Purple Fountain Properties in terms of the contract for the production of the film. This was confirmed by Dr Dlamini himself during the investigation.

6.4.5.9 The Department had a clear intention to transfer R2.5 million (two million five hundred and thousand rand) to Purple Fountain Properties, this can be derived from a Standard bank Audit Report with a stamp dated 2 June 2011, wherein it is stated that Purple Fountain Properties was the creditor.

6.4.5.10 It is further not disputed that the authorisation to transfer the requested amount to Purple Fountain Properties was given by Anton Scheepers and Mr. Tshukudu to Standard Bank, Nelspruit. This authorisation was given in a Transfer of Funds document dated 3 June 2011 and co-signed by Anton Scheepers and Mr. Tshukudu.

6.4.5.11 An amount of R2 500 000.00 (two million five hundred thousand rand) was paid from the coffers of MEGA towards fulfilling the obligations of the Department to Purple Fountain Properties.

**6.5 Whether the appointment of Khabran Investments was irregular and if so, was there an irregular expenditure which resulted there from?**

**6.5.1 The Complainant's submission**

6.5.1.1 The Complainant alleged that the appointment of Khabran Investment was irregular and therefore led to irregular expenditure.

**6.5.2 The Department's submission**

- 6.5.2.1 In the Department's submission it was reported that Khabran Investments was appointed through a verbal agreement to undertake work for the Mpumalanga Agricultural Development Corporation, namely, to conduct research and produce a report titled "Research and Advisory Report, Provincial Growth and Development Path."
- 6.5.2.2 Mr Fakude and Dr Dlamini in their letter dated 7 May 2013 to Mrs Y.N Phosa stated; "Regarding the payment to Khabran Investments, MEGA has confirmed that a part payment of R92 800 (ninety two thousand and eight hundred rand) was made to the service provider..." Besides this letter, the request for payment, invoice and final audit report all of which are already discussed above have a corroborative value to this conclusion.
- 6.5.2.3 In their submission it was further reported that Edward Nathan Sonnenbergs Attorneys acting on behalf of Khabran Investments issued a combined summons against MEGA for payment of R707 176.00 (seven hundred and seven thousand rands one hundred and seventy six rands) from MEGA. They claimed that "during or about November 2010 our client concluded an oral agreement with MEGA for the preparation of a comprehensive analysis of and comment on the draft Provincial Growth and Development Path ("the PGDP analysis"). They stated further that "subsequent to our client's preparation of the PGPD analysis, our client concluded a further oral agreement with MEGA on or about 29 December 2010 ("the agreement").

### **6.5.3 Evidence obtained independently**

- 6.5.3.1 In an interview held with Ms. Thandi Mokwena who is a legal adviser for the MEGA, she confirmed that there is a pending court action instituted by Khabran Investments for the payment of monies allegedly owed by MEGA. She stated that this emanated from an oral instruction from MEGA to

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Khabran Investments to conduct a research. MEGA is contesting the court action as the Board at the time never sanctioned the appointment for the research nor knew anything about it.

- 6.5.3.2 The Public Protector obtained a copy of an invoice, dated 13 December 2010, that was issued to MEGA from Khabran Investments. The invoice reference number is MEGA0030 and the amount stated on the invoice is R92 800.00 (ninety two thousand eight hundred rand). This invoice was stamped by the MEGA Finance Division. The invoice further has a handwritten note at the bottom which reads: *“Work completed and report received satisfactory”*.
- 6.5.3.3 The Public Protector obtained a copy of a “Goods Received Note” from the Mpumalanga Agricultural Development Corporation, dated 20 January 2011, with a description of work done, viz, “Research and Advisory Report, Provincial Growth and Development Path”. Khabran Investments was described in the note as the supplier. The note referred to herein has a cancellation line drawn across it.
- 6.5.3.4 The Public Protector obtained a copy of a cheque requisition from the Mpumalanga Agriculture Development Corporation, dated 20 January 2011, for the sum of R92 800.00 (ninety two thousand eight hundred rand), referenced MEGA0030. The cheque requisition had the same amount appearing on the Khabran Investment’s invoice of the 13 December 2010. The payment was in favour of “Mr Desmond K. Golding (Khabran Investments).The cheque requisition bore the same order number that was reflected in the Goods Received Note dated 20 January 2011, namely 8601.
- 6.5.3.5 The Public Protector further obtained a copy of the final audit report from Standard Bank of South Africa, dated 20 January 2011, which confirms

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the payment of the sum of R92 800.00 (ninety two thousand eight hundred rand.) In that report the MEGA is noted as a ‘Statement ref’ and Desmond K Golding as the “Account Name” which clearly means that the payment of the amount referred to herein was paid to Khabran Investments represented by Desmond K Golding whose name appears in the cheque requisition and invoice mentioned in 6.5.3.2 above.

#### **6.5.4 Independent Evaluation**

- 6.5.4.1 It is alleged that Khabran Investments was appointed to undertake work for the Mpumalanga Agricultural Development Corporation, namely, to conduct a research and produce a report titled “Research and Advisory Report, Provincial Growth and Development Path.”
- 6.5.4.2 Mr Fakude and Dr Dlamini in their letter dated 7 May 2013 to Mrs Y.N Phosa wherein state; “Regarding the payment to Khabran Investments, MEGA has confirmed that a part payment of R92 800 was made to the service provider...” Besides this letter, the request for payment, invoice and final audit report all of which are already discussed above have a corroborative value to this conclusion.
- 6.5.4.3 What is disputed, and the matter for determination, is whether the appointment and payment of Khabran Investments was irregular and amounted to an irregular expenditure.
- 6.5.4.4 It is Ms. Thandi Mokwena’s evidence that the MEGA Board at the relevant time disputed the appointment of Khabran and therefore MEGA’s indebtedness in that regard.
- 6.5.4.5 As pointed out above that Khabran Investments made a submission that it was appointed verbally. The legal prescripts including the Constitution and the PFMA which deal with the procurement processes do not provide for

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oral contracts and this is for a simple reason that such processes must be transparent. Therefore, the appointment of Khabran Investments lacked transparency, fairness and competitiveness amongst others and on those grounds alone it is irregular and unlawful.

- 6.5.4.6 It is clear and without dispute that Khabran Investments was appointed through a verbal agreement which in which the proposed project was accepted. Like in the former issue, it is also clear in this case that no process was followed to establish if any other entity offered similar services. More importantly, no demand management exercise preceded the engagement of the project.
- 6.5.4.7 According to the handwritten note reading: "*Work completed and report received satisfactory*" at the bottom of the invoice for the payment of R92 800.00 (ninety two thousand eight hundred rand), dated 13 December 2010, it appears that the report was compiled and delivered by Khabran Investments, although neither the Department nor MEGA furnish the Public Protector with the stated report.
- 6.5.4.8 It is also clear that on 20 January 2011, an order form/goods received note bearing the imprint of the Mpumalanga Agricultural Development Corporation, was generated. It would appear that it was related to the work done by Khabran Investments. Strangely, the same order form/ goods received note was cancelled by a line that runs across it.
- 6.5.4.9 It is not disputed that on the 20 January 2011, a payment of R92 800.00 (ninety two thousand eight hundred rand) was made to Khabran Investments. However, no evidence was obtained to show that there was a proper tender process followed in the appointment of Khabran Investments. Even MEGA has no records of the appointment.



6.5.4.10 Therefore, analysis of these individual facts combined provide incontrovertible evidence that Khabran Investments was appointed without regard to a transparent and open tender process and was therefore irregular.

6.6 In his response to my section 7(9) notice the MEC expressed his intention to ensure that all remedial measures by the Public Protector are implemented without fail.

## **7 FINDINGS:**

Having regard to the evidence, the regulatory framework determining the standard the Department should have complied with and the impact on the complainant, I am likely to make the following adverse findings: :

### **7.1 Whether the resignation of Ms. Rachel Kalidass, a former chairperson of the Board, was irregular and unlawful:**

7.1.1 The allegation that the resignation of Ms Rachel Kalidass, a former Chairperson of MEGA, was irregular and unlawful was found to be substantiated.

7.1.2 The resignation of Ms Kalidass, a former Board Chairperson, with immediate effect was not in compliance with the provisions of section 9(1) of the MEGA Act, in that she failed to give the required one month's notice to the former MEC and was supposed to inform the Executive Council and the Board of her intended resignation.

7.1.3 Ms Rachel Kalidass resigned irregularly in that she did not tender the stipulated written one month's notice to the former MEC as required by section 9(1) of the MEGA Act. Section 9(5) of the MEGA Act further states that non-compliance by a Board Member with any provision of this Act

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constitutes improper conduct and as a result, I accordingly find that Rachel Kalidass violated the provisions of section 9(1) of the MEGA Act.

## **7.2 Whether the MEC unlawfully dissolved the Board:**

7.2.1 The allegation that the former MEC unlawfully dissolved the MEGA Board was to be substantiated.

7.2.2 The allegation that the former MEC acted unlawfully when he dissolved the Board in the first instance has merit, in that he contravened section 9(4) of the MEGA Act by not affording the individual Board members the opportunity to state their individual cases and/or considering any representations they could have wished to make before he dissolved the Board. It was also noted that the North Gauteng High Court held that the former MEC's decision to terminate the Board was not within the confines of the MEGA Act. However, the MEC subsequently afforded the individual Board members an opportunity to state their representations before he dissolved the Board accordingly, for the second time.

7.2.3 I therefore, find that the subsequent dissolution of the MEGA Board by the MEC was lawful and proper.

## **7.3 Whether the Department failed to make regular transfer of funds to the MEGA account:**

7.3.1 The allegations that the Department failed to make regular transfer of funds to the MEGA account could not be substantiated.

7.3.2 Therefore, even though for several months in 2011 there was no transfer of funds to the MEGA account, I cannot find merit in the allegation that the Department "failed" to make regular payments to the MEGA account. In actual fact the Department was not obliged to make such transfers but had a

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discretion to do so provided there was money appropriated by the Provincial Legislature in terms of section 20 of the MEGA Act. However, in this case there was no money appropriated since MEGA failed to submit the necessary information through the MEC for consideration by the Provincial Legislature.

**7.4 Whether the appointment of Purple Fountain Properties was irregular and if so, was there any fruitless and wasteful expenditure which resulted there from:**

7.4.1 The allegation that the appointment of Purple Fountain Properties was irregular was found to be substantiated.

7.4.2 In appointing Purple Fountain Properties, the Department was in violation of section 217 (1) of the Constitution and section 38 (1)(a)(iii) of the PFMA. The appointment lacked transparency and competitiveness as no proper procurement procedures were followed.

7.4.3 In only negotiating with Purple Fountain Properties (Pty) Ltd the Department compromised an opportunity to ensure that the correct time, price and place for the received services was obtained and as a result proceeded beyond the demand management phase of the supply chain management process.

7.4.4 The resultant payment of R2.5 million (Two million and five hundred thousand rand) amounted to a fruitless and wasteful expenditure because had the Department followed proper procurement processes it would have avoided entering into the MOU and paying this amount.

7.4.5 The Department failed to provide any documentary evidence to suggest that the deviation for the tender had been recorded and approved by the Accounting Officer. As such the deviation was not justified and in contravention of Treasury Regulation 16A6.4. There is therefore, no record of

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any communication by the Department regarding the recording and approval by the accounting officer and accounting authority of the deviation from the normal prescribed bidding processes. The conduct of the Department is therefore in violation of provision 16A6.4 of the Treasury Regulation 16 of 2003.

- 7.4.6 The Department, through its Accounting Officer and Accounting Authorities, unduly failed to report to the Provincial Treasury and the Auditor General within ten (10) working days for a deviating from normal bidding processes as required by Treasury Regulations. The conduct of the Department is therefore in violation of paragraph 3.1 of the National Treasury Practice Note 6 of 2007/2008.
- 7.4.7 The appointment of Purple Fountain Properties did not achieve the objects of the MEGA because it was related to the production based on a story about "Solomon Mahlangu" contrary to section 3 of the MEGA Act which provides for housing development, enterprise and agricultural development and lastly the promotion of foreign trade and investment.
- 7.4.8 Therefore the conduct of the Department constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994.

**7.5 Whether the appointment of Khabaran Investments was irregular and if so, was there any irregular expenditure which resulted there from:**

7.5.1 The allegation that the appointment of Khabaran Investments was irregular was substantiated.

7.5.2 In entering into a verbal agreement with Khabaran Investment the Department had not considered other potential suppliers and failed to ensure

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that the most suitable price is received for the received services rendered and as a result proceeded beyond the demand management phase of the supply chain management process.

7.5.3 In appointing Khabran Investments, MEGA violated section 217 (1) of the Constitution and section 38(1)(a)(iii) of the PFMA read with section 23 (1) of the MEGA Act, in that the procurement was in violation of the principles of *"fairness, equity, transparency, competitiveness and cost-effectiveness"*. The payment of R92 000.00 (Ninety two thousand rand) to Khabran Investments amounted to an irregular expenditure as it was not in accordance with a requirement of the section 217 (1) of the Constitution and section 38(1)(a)(iii) of the PFMA read with section 23 (1) of the MEGA Act.

7.5.4 MEGA failed to provide any documentary evidence to suggest that the deviation for the tender had been recorded and approved by the Accounting Officer. As such the deviation was not justified and in contravention of Treasury Regulation 16A6.4. The conduct of MEGA is therefore in violation of provision 16A6.4 of the Treasury Regulation 16 of 2003.

7.5.5 Therefore the whole arrangement between Khabran Investments and MEGA disregarded the law and undermined the spirit of and principles laid down in section 217 (1) of the Constitution read with section 23 (1) of the MEGA Act as well as section 38 (1)(a)(iii) of the PFMA .

7.5.6 The conduct of MEGA constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994.

## **8 REMEDIAL ACTIONS**

The appropriate remedial actions I am taking in terms of section 182(1)(c) of the Constitution are as follows:

### **8.1 Regarding whether the resignation of Ms. Rachel Kalidass, the former chairperson of the Board, was irregular and unlawful:**


- i. Since Ms Rachel Kalidass is no longer a member of the MEGA Board, no appropriate action can be taken against her by the MEC.
  
- b. Regarding whether the former MEC's unlawful dissolved the Board:**
  - i. The MEC must ensure that he/she fully understands the provisions of the MEGA Act in relation to the removal of the members of the Board of MEGA.
  
- c. Regarding whether Department failed to make regular transfer of funds to the MEGA account:**
  - i. The MEGA Board should (if it needs funding from the state) duly submit information to the MEC for him/her to present before the Provincial Legislature which will decide to appropriate moneys after consideration of the said information as provided for in Section 20 of the MEGA Act.
  - ii. The MEGA Board should not rely solely on the Department for funding. As section 21(1) and (3) of the MEGA Act stipulates, the Board must endeavour to make use of "fees and other monies received or raised" and to seek "donations, grants and bequests".

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- d. **Regarding whether the appointment of Purple Fountain Properties was irregular and if so, was there any fruitless and wasteful expenditure which resulted there from:**
- i. The HOD and the MEC must within 30 days from receiving this report, take appropriate steps to ensure that action is taken against all the officials who are responsible for the irregular appointment of Purple Fountain Properties for the production of Kalushi, "The Story of Solomon Mahlangu", which resulted in fruitless and wasteful expenditure.
  - ii. As an Accounting Officer, the HOD should recover monies paid out by the Department and MEGA as a result of an illicit contract between the Department and Purple Fountain Properties.
  - iii. The Department should through the HOD ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.
- e. **Regarding whether the appointment of Khabran Investments was irregular and if so was there an irregular expenditure which resulted thereon**
- i. The MEGA must defend the claim instituted against it by Khabran Investments and counterclaim and seek to recover the sum of R92 800 (ninety two thousand eight hundred rand) advanced to Khabran Investments.
  - ii. The HOD and the MEC must also within 30 days from receiving this report, take appropriate steps to ensure that action is taken against all the officials who are responsible for the irregular appointment of Khabran Investments for conducting research and produce a report titled "*Research and Advisory Report, Provincial Growth and Development Path*", which resulted in irregular expenditure.

- iii. The Department should through the HOD ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.

## **9 MONITORING**

- 9.1 The MEC for Economic Development, Environment and Tourism must submit an action plan in respect of the implementation plan of the remedial action referred to in paragraph 9 above to the Public Protector within 30 days of the date of this report.
- 9.2 The MEC must ensure that when Board members resign in the future, they should comply with the provisions of section 9(1) of the MEGA Act by serving the required one (1) month's written notice.
- 9.3 The MEC must submit a report within 60 days, as of the date of the report, to the Public Protector on the progress made with implementation of the remedial action referred to in paragraph 9 above.



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**ADV T N MADONSELA  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA**

**DATE: 14 October 2016**





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Assisted by Mpumalanga Provincial Office of the Public Protector