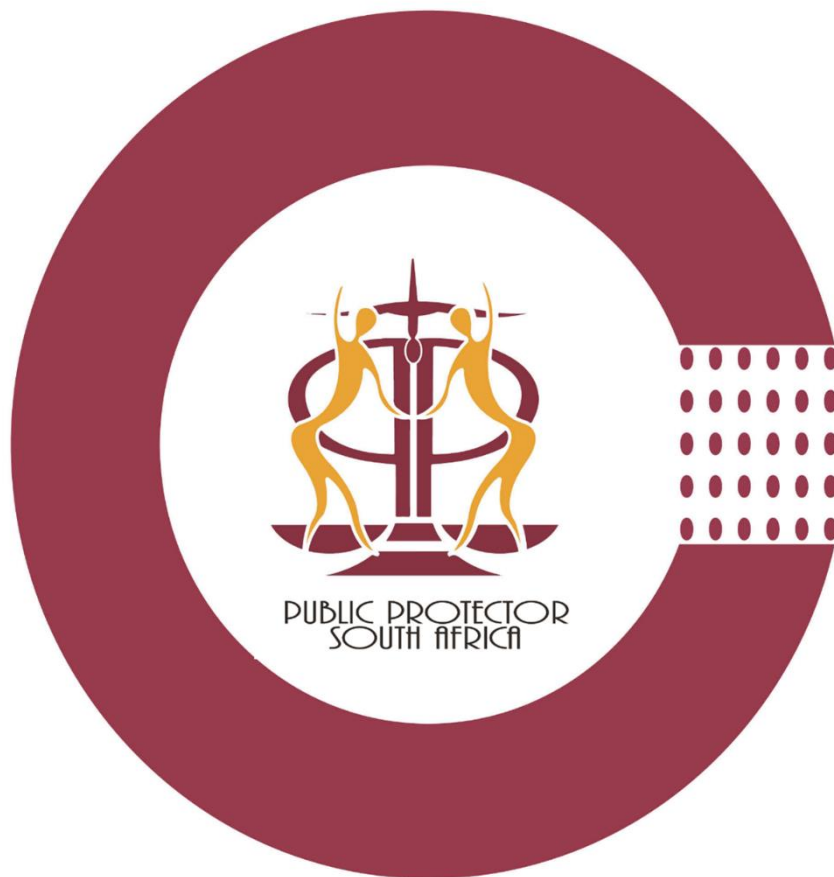


**REPORT IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE
REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC
PROTECTOR ACT, 1994**



REPORT NUMBER: 43 OF 2023/2024

ISBN NUMBER: 978-1-7764955-6-6

**INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT AND
FAILURE BY THE FUNCTIONARIES OF THE GAUTENG GAMBLING BOARD
(GGB) TO RESOLVE AN OBJECTION LODGED IN CONNECTION WITH THE
GRANTING OF A GAMBLING LICENSE TO 4RACING (PTY) LTD**

TABLE OF CONTENTS

ITEM	DESCRIPTION	PAGE NO
	LIST OF ACRONYMS AND ABBREVIATIONS	3
1.	INTRODUCTION	4
2.	THE COMPLAINT	5
3.	POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	6
4.	ISSUES IDENTIFIED FOR INVESTIGATION	7
5.	THE INVESTIGATION	8
6.	THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS	12
7.	FINDINGS	34

LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYM/ABBREVIATION	DESCRIPTION
4Racing	4Racing Proprietary Limited
ACEO	Acting Chief Executive Officer
Adv	Advocate
BBBEE	Broad-Based Black Economic Empowerment
CEO	Chief Executive Officer
Constitution	Constitution of the Republic of South Africa, 1996
COO	Chief Operations Officer
GGA	Gauteng Gambling Act, 1995
GGB	Gauteng Gambling Board
IFHA	International Federation of Horseracing Authorities
Investigation Team	Public Protector South Africa Investigating Team
MEC	Member of Executive Council
NHA	National Horseracing Authority
NPC	Non-Profit Company
PFMA	Public Finance Management Act, 1999
Phumelela	Phumelela Gaming and Leisure
PPA	Public Protector Act, 1994
RA	Racing Association
ROA	Racehorse Owners Association
SACC	South African Competition Commission
SAGA	South African Grooms Association
SC	Senior Counsel

1. INTRODUCTION

- 1.1 This is a Closing Report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution), and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act) and Rule 40(b) of the *Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018*¹ (Public Protector Rules) as promulgated under section 7(11) of the Public Protector Act.
- 1.2 The report relates to an investigation into allegations of irregular appointment of the former Chairperson of the Gauteng Gambling Board (GGB), Mr Mxolisi Zwane (Mr Zwane), as the Chairperson of the Board of Directors for 4Racing (Pty) Ltd (4Racing) and failure by the functionaries of the GGB to resolve an objection lodged in connection with the granting of a gambling license to 4Racing.
- 1.3 The report is submitted to the following persons in terms of sections 8(1) and 8(3) of the Public Protector Act:
- 1.3.1 Mr Simoto, the Chairperson of the South African Grooms Association (SAGA);
- 1.3.2 Ms Karabo Mbele, the GGB Chief Executive Officer; and
- 1.3.3 Mr Dalayan Moodley (Mr Moodley), the Complainant,

¹ Published under Government notice No 945, Government Gazette 41903 of 14 September 2018 and Amended in Government Notice No 1047, Government Gazette 43758 dated 2 October 2020.

2. THE COMPLAINT

2.1 The complaint was lodged with the Public Protector on 30 April 2021, by Mr Moodley who lodged the complaint on behalf of SAGA. He is also the legal representative of Mr Chophelikhaya Simoto (Mr Simoto), the Chairperson of SAGA.

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

2.2.1 4Racing is a South African horse racing operator that applied to the GGB for the transfer of a racing license from Phumelela Gaming and Leisure (Pty) Ltd (Phumelela) to 4Racing;

2.2.2 The functionaries of the GGB irregularly processed the license application for 4Racing and failed to respond to or resolve the objection raised by SAGA;

2.2.3 The objection was lodged by SAGA with the functionaries of GGB in February 2021 (exact date not specified);

2.2.4 There was no invitation issued by the functionaries of GGB for the application of the transfer of the aforesaid racing license and it was not gazetted in the Provincial Gazette as prescribed by the Gauteng Gambling Act, 1995 (GGA);

2.2.5 The former Chairperson of GGB, Mr Zwane, was appointed as the Chairperson of the Board of Directors for 4Racing with effect from 01 April 2021 after resigning from the GGB on 01 March 2021. Mr Zwane's appointment as the Chairperson of the Board of Directors for 4Racing was irregular, as it contravened the provisions of the GGA, which obligates him to apply for employment at a gambling company, only after a period of 12 months from date of resignation from the GGB;

- 2.2.6 Mrs Mapula Sambo (Mrs Sambo) is the wife of Mr Zwane and was appointed as a member of the Board of Directors for the Racing Association, now known as Racehorse Owners Association (ROA), on 18 May 2020, while Mr Zwane was the Chairperson of the GGB. Mrs Sambo was appointed to this position without the requisite colours. Colours are used to represent a horse's owner and to allow race commentators and spectators to easily differentiate between racehorses;
- 2.2.7 There was a contravention of the provisions of the GGA by Mr Zwane, functionaries of GGB and 4Racing, in relation to the transfer of the racing license from Phumelela to 4Racing in that the relevant provisions of the GGA were not followed in executing the transfer; and
- 2.2.8 4Racing neither declared their conflict of interest with Mrs Sambo and Mr Zwane to the functionaries of GGB nor did Mr Zwane declare his conflict of interest to the functionaries of GGB in processing the license applications of 4Racing.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that:

“The Public Protector has power as regulated by national legislation –

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

- 3.3 Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector's powers are regulated and amplified by the Public Protector Act, 1994 which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.
- 3.4 Section 6(5) of the Public Protector Act, 1994 (Public Protector Act) regulates the manner in which the powers conferred by section 182 of the Constitution may be exercised in respect of government at any level.
- 3.5 The GGB is an organ of state and a provincial public entity contemplated in section 1 of the Public Finance Management Act, 1999 (PFMA) and listed in Schedule 3 Part C of the PFMA. The conduct of its functionaries amounts to conduct in state affairs and as a result, the Public Protector is satisfied that the complaint falls within its competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and section 6(5)(a) of the Public Protector Act, 1994.

4. ISSUES IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:
- 4.1.1 Whether the functionaries of the Gauteng Gambling Board irregularly processed the license application for 4Racing and failed to respond to the objection raised by SAGA, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act, 1994; and
- 4.1.2 Whether Mr Zwane's appointment as the Chairperson of the Board of Directors for 4Racing constituted a conflict of interest on the part of the

Gauteng Gambling Board in contravention of the provisions of the Gauteng Gambling Act, if so, whether such appointment constitutes improper conduct in terms of section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act, 1994.

- 4.2 It should be noted that the Public Protector does not have jurisdiction to investigate the issue in respect of Mrs Sambo's appointment as a member of Board of Directors at the ROA. The ROA is a Non-Profit Organisation (NPO) and a private company. In terms of the Constitution of the Republic of South Africa, 1996 the Public Protector is only empowered to investigate conduct in state affairs.²

5. THE INVESTIGATION

5.1 Methodology

- 5.1.1 The investigation is conducted in accordance with section 182(1)(a) of the Constitution, read with sections 6 and 7 of the Public Protector Act.

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

5.2 Approach to the investigation

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

² Section 182(1) (a) of the Constitution provides that:

"The Public Protector has power as regulated by national legislation – 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..."

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

5.2.2.1 What happened?

5.2.2.2 What should have happened?

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

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

5.2.3 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. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct of the functionaries of the GGB contravened any legal prescripts, when processing the license application for 4Racing and appointing and/or registering Mr Zwane as the Chairperson of the Board of Directors for 4Racing.

5.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the functionaries of the GGB to prevent improper conduct in the matter.

5.3 **The Investigation Process**

5.3.1 The approach to the investigation included meetings, an exchange of documentation amongst the Public Protector, the Complainant, GGB and Mr Zwane.

5.4 Key sources of information

5.4.1 Correspondence exchanged

- 5.4.1.1 The original complaint received by the Public Protector from the Complainant on 30 April 2021;
- 5.4.1.2 Letter from the Public Protector to the Complainant, dated 28 July 2021;
- 5.4.1.3 Allegation letter from the Public Protector addressed to the former Acting Chief Executive Officer (ACEO) of the GGB, Mr Thiran Marimuthu (Mr Marimuthu), dated 30 July 2021;
- 5.4.1.4 Letter from Mr Charles Savage (Mr Savage), Director at 4Racing to Mr Ngubeni, the then Chief Executive Officer (CEO) of the GGB, dated 02 March 2021;
- 5.4.1.5 Letter from Mr Marimuthu to the Complainant, dated 11 November 2021;
- 5.4.1.6 Email from the Public Protector to Mr Zwane, dated 22 December 2023;
- 5.4.1.7 Affidavit deposed to by Mr Zwane, dated 23 January 2024;
- 5.4.1.8 Email from the Public Protector to the Complainant, dated 24 February 2024;
- 5.4.1.9 Email from the Public Protector to Mr Simoto, dated 24 February 2024;
and
- 5.4.1.10 Response letter to the Rule 41(1) Notice from Mr Simoto to the Public Protector, dated 03 March 2024.

5.4.2 Documents

- 5.4.2.1 Provincial Gazette Notice 32 of 2021 for the transfer of licenses, dated 13 January 2021;
- 5.4.2.2 Provincial Notice number 266 of 2021, dated 31 March 2021;
- 5.4.2.3 Legal opinion from Adv Vincent Maleka, Senior Council, dated 07 July 2021;
- 5.4.2.4 Minutes of GGB's virtual hearing held on 10 September 2021;
- 5.4.2.5 Copy of the license issued to 4Racing, signed on 01 December 2021;
- 5.4.2.6 Merger Clearance Certificate, dated 31 March 2021; and
- 5.4.2.7 Copy of the legal notice in the classified section of the Star Newspaper indicating that the public inspection was opened from 15 January 2021.

5.4.3 Meeting

- 5.4.3.1 Meeting held on 11 February 2022 facilitated by the Public Protector Investigation Team (Investigation Team), between the Complainant and functionaries of the GGB.

5.4.4 Legislation and other prescripts

- 5.5.4.1 Constitution of the Republic of South Africa, 1996 (the Constitution);
- 5.5.4.2 Gauteng Gambling Act, 1995; and
- 5.5.4.3 Competition Act, 1998.

5.4.5 **Rule 41(1) Notice issued**

5.4.5.1 On 24 February 2024 the Investigation Team issued a Rule 41(1) Notice to Mr Simoto and to Mr Moodley, respectively.

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

6.1 **Whether the functionaries of the Gauteng Gambling Board irregularly processed the license application for 4Racing and failed to respond to the objection raised by SAGA, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act, 1994**

Common cause

6.1.1 4Racing is a South African registered company, which is wholly controlled by the PHM Trust and its trustees are South African individuals.³

6.1.2 In April 2021, the former Gauteng Member of the Executive Council (MEC) for Economic Development, Environment, Agriculture and Rural Development, Mr Parks Tau, appointed Adv. F J Nalane, a Senior Council (SC) (Adv. Nalane) as an Administrator at the GGB in terms of the relevant provisions of the GGA. Adv Nalane was appointed to this position because the former Board was unable to reach a quorum due to a number of resignations during the 2021/2022 financial year. The GGB was without a Board and the Administrator assumed the responsibilities of the Board.⁴

³ Merger Clearance Certificate by Competition Commission South Africa dated 31 March 2021.

⁴ Available on <https://www.polity.org.za> Parks-Tau-appoints-administrator-at-Gauteng-Gambling-Board-to-ensure-Corporate-Governance accessed on date 07 April 2023.

6.1.3 An application for transfer of a racing license from Phumelela to 4 Racing was lodged with the GGB and was opened for public inspection from 15 January 2021.

Issue in dispute

6.1.4 The issue for the Public Protector's determination is whether the prescribed regulatory framework was followed in the processing of an application for transfer of a racing license by the GGB and a failure to resolve an objection raised by SAGA in connection with the transfer of a racing license application from Phumelela to 4Racing.

The Complainant's version

6.1.5 The Complainant contended that 4Racing applied for the transfer of a horse racing license from Phumelela in contravention of the GGA, in that there was no invitation for application or publication of notices informing interested stakeholders of the intended application to the GGB, and that the transfer of the license was not gazetted in the Provincial Gazette, as prescribed by section 19(1) of the GGA.

6.1.6 SAGA lodged an objection with the functionaries of the GGB against the processing of the application for a horse racing license by 4Racing in February 2021. In the objection, the following was raised:

6.1.6.1 There was a contravention of the GGA by Mr Zwane, functionaries of GGB and 4Racing, in relation to the transfer of the Phumelela horse racing license to 4Racing in that they did not follow the procedure stated in the GGA such as publication of the notice in the Provincial Gazette;

6.1.6.2 4Racing did not declare its conflict of interest with Mrs Sambo and Mr Zwane to the functionaries of GGB. Mr Zwane did not declare his conflict of interest to the functionaries of GGB when he processed the license application of 4Racing, in respect of the relationship between himself and Mrs Sambo as well as Mr Zwane's previous position at the GGB.

6.1.6.3 The functionaries of the GGB failed to respond to or resolve the objection lodged by SAGA.

GGB's Version

6.1.7 An allegations letter dated 30 July 2021, was sent by the Public Protector to the former Acting Chief Executive Officer (ACEO) of the GGB, Mr Marimuthu. A response was received on 01 September 2021, signed by Mr Marimuthu. In his response, he stated the following:

6.1.7.1 The application by 4Racing was not yet finalised and it was in the process of being investigated in line with the GGA. Section 20 of the GGA enjoins the applicant to publish notices in the provincial gazette and in a newspaper informing interested stakeholders of the intended application and, it also provides an opportunity to the said stakeholders to inspect the application and to submit written representations if they so wish;

6.1.7.2 Any written representations received are considered by the GGB and upon completion of the investigation, the Board convenes a public hearing of the application for a license;

6.1.7.3 Both the applicant and any person who made written representations and requested to make oral representations at the hearing, shall be afforded an opportunity to be heard, and their submissions will be considered when the Board makes its decision on the application; and

6.1.7.4 The functionaries of the GGB conducted a probity investigation of the application of the transfer of the license from Phumelela to 4Racing. The Complainant on behalf of SAGA and all persons who lodged written representations were invited by a General Notice 1021 of 2021 dated 03 September 2021 to a public hearing and afforded an opportunity to make oral representations in relation to the application for licenses before the Board, as is required by the GGA.

Meeting held on 11 February 2022

- 6.1.8 On 11 February 2022, the Investigation Team facilitated a meeting between the Complainant and the functionaries of the GGB. The GGB was represented by Mr Marimuthu, its Company Secretary, Mr Lucky Lukhwareni (Mr Lukhwareni) and the Chief Operations Officer (COO), Mr Lucky Letshwiti (Mr Letshwiti).
- 6.1.9 During the meeting, the Complainant reiterated the allegations as stated above and stressed the issue of non-transformation of the horse racing industry. In response, Mr Marimuthu stated that:
- 6.1.9.1 Phumelela traded as 4Racing after the merger even though the license was still in the name of Phumelela. Further, that it should be noted that the GGB is not a party to the merger and does not have a mandate to take a decision on mergers as it is the competency of South African Competition Commission (SACC); and
- 6.1.9.2 Phumelela did not relinquish or return its horse racing license to the functionaries of the GGB but received an application for a transfer of a horse racing license from Phumelela to 4Racing and not an application for a new horse racing license. The license was moving from one hand to another.

Documentary evidence received from the GGB

Merger Clearance Certificate

- 6.1.10 The Merger Clearance Certificate indicates that on 28 January 2021, the SACC received notice of an intermediate merger between Phumelela and 4Racing whereby 4Racing intended to acquire the business, assets and employees of the horseracing and associated betting businesses conducted by Phumelela who were under business rescue at the time;
- 6.1.11 Phumelela and 4Racing applied for a merger of their businesses, which was approved by Ms Tamara Paremoer (Ms Paremoer), Manager:

Mergers and Acquisitions at the SACC. The Merger Clearance Certificate is dated 31 March 2021;

- 6.1.12 The SACC found that the merger is unlikely to result in any substantial lessening or prevention of competition in any relevant market/s;
- 6.1.13 The SACC found that Phumelela, which controls the Target Firm pre-merger, was placed under business rescue on 08 May 2020. This precipitated the disposal of the Target Firm⁵ as contemplated in the merger;
- 6.1.14 To advance the public interest, the Merging Parties have made commitments to advance transformation in the horse racing industry, by way of a transformation initiative which will also aim to include workers of the Target Firm and horseracing industry workers such as grooms and stable hands; and
- 6.1.15 The Minister of Trade, Industry and Competition participated in the merger and proposed that the transformation initiative is included as a condition to the approval of the merger.

Provincial Gazette Notice 32 of 2021 for the transfer of licenses

- 6.1.16 Mr Marimuthu provided the Investigation Team with the Provincial Gazette, Notice 32 of 2021 dated 13 January 2021 (Provincial Gazette), which stated that:

“4Racing intends to submit an application to the Gauteng Gambling Board for the transfer of the race–meeting and totalisator license issued to Phumelela Gaming and Leisure Limited by the Gauteng Gambling Board in terms of Section 35 of the Gauteng Gambling Act, 1995.

⁵ Target Firm means horseracing, media production and distribution of horseracing product and betting business (and certain corresponding assets of Phumelela)

The application will be open for public inspection at the offices of the Board from 15 January 2021”.

Legal Notice

- 6.1.17 Mr Marimuthu also submitted a copy of a legal notice in the classified section of the Star Newspaper wherein an advertisement was placed regarding the intention of 4Racing to apply to the GGB for the transfer of the *race-meeting and totalisator license* issued to Phumelela by the functionaries of the GGB in terms of section 35 of the GGA, indicating that the public inspection was opened from 15 January 2021.

Letter responding to the objection

- 6.1.18 Mr Marimuthu submitted a copy of a letter dated 02 March 2021, which was signed by Mr Savage, Director at 4Racing and addressed to Mr Ngubeni, the then Chief Executive Officer (CEO) of the GGB. The letter replied to the objection lodged by the Complainant and disputed the objections raised by SAGA.

- 6.1.19 The letter stated, *inter alia*, that:

- 6.1.19.1 The allegation of Broad-Based Black Economic Empowerment (BBBEE) and transformation not forming part of 4Racing’s agenda is baseless for the following reasons:

- (a) 4Racing is a dormant company that was specifically established to acquire the business from Phumelela and has yet to commence trading;
- (b) 4Racing is committed to a minimum of 25% black economic empowerment shareholding; and
- (c) Until such time as the transaction is completed, 4Racing has no business or any assets and is unable to conclude any empowerment transaction or identify any empowerment partners.

- 6.1.20 There has been engagement with stakeholders in the industry regarding the acquisition of Phumelela horseracing and totalisator business;
- 6.1.21 Phumelela was currently in engagements discussing the transaction with the trade unions representing Phumelela employees as part of the merger notification process before the SACC;
- 6.1.22 The engagements were part of the preparation for the implementation of the transaction, which is subject to regulatory approval. 4Racing is currently engaging with the grooms in the relevant provinces. The process has been positive to date and the grooms have been both receptive and supportive of the transaction; and
- 6.1.23 4Racing will only be able to formally engage with stakeholders once it has received all of the requisite approvals from various authorities, including the Board and the Competition Authorities and once it is in possession of the business following implementation of the transaction.

Minutes of the GGB's virtual hearing held on 10 September 2021

- 6.1.24 A copy of the minutes of the GGB's virtual hearing held on 10 September 2021, indicated that SAGA participated in the public hearing held by the GGB and that the Complainant raised his objections (as highlighted above) on behalf of SAGA.
- 6.1.25 Mr Marimuthu stated that notwithstanding the fact that the GGB had a newly appointed Administrator and was without a Board at the time of the approval of the transfer of the horse racing license from Phumelela to 4Racing, functionaries of the GGB dealt with the objection of the Complainant;
- 6.1.26 During the meeting, the Complainant representing SAGA was provided with an opportunity to engage on the matter relating to the application. The Complainant contended that the application for 4Racing should be disqualified, due to the appointment of Mr Zwane and his conduct.

6.1.27 In response, Mr Marimuthu stated that anyone wishing to transfer a license may do so at any moment by applying to the license holder and receiving their consent. Ms Amy Jones, Director at Truter Jones Incorporated⁶ (Ms Jones) who represented 4Racing stated that Mr Zwane resigned as the Chairperson of the GGB and was appointed as Chairperson of 4Racing (non-executive director). Ms Jones indicated that she does not agree with the proposition by the Complainant that the application of a license transfer from Phumelela to 4Racing should be disqualified.

6.1.28 In closing the chairperson of the meeting, Adv Nalane, stated that the GGB as the regulator will look at the application in light of the submissions made by all the parties and feedback will be provided to the parties concerning the application.

Provincial Notice number 266 of 2021

6.1.29 Mr Marimuthu provided the Provincial Notice number 266 of 2021, which was signed by the former MEC for the Department of Economic Development, Environment, Agriculture and Rural Development in the Province of Gauteng, Mr Tau on 31 March 2021, appointing Adv. Nalane as the Administrator of the GGB.

6.1.30 According to the Provincial Notice, the Administrator, Adv. Nalane has all the powers and functions of the GGB as conferred and imposed by the GGA.

Legal Opinion dated 07 July 2021

6.1.31 Mr Marimuthu also submitted a legal opinion, which was sourced from Adv Vincent Maleka SC, on 07 July 2021, to the Public Protector. The legal opinion is titled “*Opinion on the powers of the Administrator under the Gauteng Gambling Act, 4 of 1995*”. The legal opinion states, *inter alia*, that:

⁶ Attorneys representing 4Racing.

- 6.1.31.1 The Administrator appointed by the responsible MEC has the power to lawfully consider, grant or refuse any application for amendment or transfer of a license issued by the GGB; and
- 6.1.31.2 The Administrator also has the power to consider, grant or refuse any application submitted to him for a consent to acquire or hold a controlling or prescribed financial interest in a licensee, in terms of section 38 of the GGA.

Letter dated 11 November 2021

6.1.32 In a letter, dated 11 November 2021, from Mr Marimuthu to the Complainant, it was stated that:

6.1.32.1 The Administrator has resolved to grant the application by 4Racing to take transfer of:

- (a) The Race Meeting License held by Phumelela at Turffontein Racecourse, No 14, Turf Club Street, Turffontein to 4 Racing (Pty) Ltd;
- (b) A Totalizator License held by Phumelela at Turffontein Racecourse, No 14, Turf Club Street, Turffontein to 4 Racing (Pty) Ltd;
- (c) A Bookmaker License from Phumelela at the Pavilion, Turffontein Racecourse, No 14, Turf Club Street, Turffontein; and
- (d) A Bookmaker License from Phumelela at the Buzz Shopping Centre, Witkoppen Road and Nerine Place, Fourways.

6.1.32.2 Approval of the above licenses was granted subject to the following:

- (a) The licensee shall, at all times, be at a minimum 26% black owned unless otherwise specified by the Board;
- (b) Mr Zwane shall be removed as a director of 4Racing owing to him being disqualified.

Copy of license issued to 4Racing

6.1.33 A copy of the license issued to 4Racing was signed on 01 December 2021. The license empowered 4Racing to conduct race meetings at Turffontein Racecourse situated at No 14 Turf Club Street, Turffontein, Johannesburg.

Affidavit from Mr Zwane

6.1.34 On 22 December 2023, Mr Zwane was requested by the Investigation Team to depose to an affidavit concerning this matter as the former Chairperson of the GGB. On 23 January 2024, an affidavit was received from Mr Zwane stating, *inter alia*, that:

6.1.34.1 He is an attorney and businessman practising under the name and style of Zwane Sambo Incorporated. He is a director of Zwane Sambo Inc;

6.1.34.2 He served as the Chairperson of the GGB from 2015 to 2021. He had not played any role when the process of the granting of license or approval of the transfer of the horse racing, gaming, and leisure license from Phumelela to 4Racing started or while he was still Chairperson of the GGB. His term at the GGB came to an end in March 2021 ;

6.1.34.3 The GGB gave approval of the racing, gaming and leisure license to 4Racing subject to a condition that he resigns as Chairperson of 4Racing. He accordingly resigned as Chairperson of the Board of Directors upon which 4Racing was granted the license approval; and

6.1.34.4 When the application by 4Racing was deliberated upon, he indicated that he was no longer the Chairperson of the GGB and did not form part of its Board since March 2021.

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

6.1.35 On 24 February 2024, a Notice in terms of Rule 41(1) was served on the Complainant to solicit his representations to the Public Protector's preliminary outcomes to the investigation. The Investigation Team did not receive any acknowledgement of receipt or a request for extension within the prescribed fourteen (14) day period.

Response to Rule 41(1) Notice by Mr Simoto

6.1.36 On 24 February 2024, the Investigation Team issued a Rule 41(1) Notice (the Notice), dated 23 February 2024 in terms of the Public Protector Rules to Mr Simoto and to Mr Moodley to inform them about the preliminary outcomes of the investigation and likely findings as well as to invite their comments.

6.1.37 On 03 March 2024, a response to the Notice was received from Mr Simoto and he indicated that he is unable to get hold of his legal representative, Mr Moodley, but resolved to respond to comply with the fourteen (14) days deadline set in the Notice. He stated, *inter alia*, that:

6.1.37.1 The investigation did not canvass all the issues that were raised in the complaint and that the evidence provided by SAGA during the investigation was not considered; and

6.1.37.2 The Notice did not state all the laws that ought to have been considered during the investigation such as "*why no mentioned about the fraud of the Trustees Letter of Authority that was done after the license was granted of which it was supposed to be done before the license being granted*"(sic).

Applicable Law

Constitution of the Republic of South Africa, 1996

6.1.38 Section 2 of the Constitution of the Republic of South Africa, 1996 provides that:

“The constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

6.1.39 Section 195(1) of the Constitution of the Republic of South Africa 1996 provides as follows:

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

- (a) A high standard of professional ethics must be promoted and maintained.*
- (b) ...;*
- (c) ...;*
- (d) ...;*
- (e) ...;*
- (f) Public administration must be accountable.*
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information”*

Gauteng Gambling Act, 1995

6.1.40 Gauteng Gambling Act makes it possible to control, restrict, and regulate gambling and betting.

6.1.41 Section 18C of the GGA prescribes as follows:

- (1) The responsible Member may, after consultation with the Executive Council, by notice in the Provincial Gazette, appoint an administrator*

to perform the functions and exercise the powers of the Board, either in whole or in part, excluding the granting and revocation of licenses, if the responsible member is of the opinion that-

- (a) the Board has failed to perform its functions, exercise its powers or comply with its strategic plan;*

6.1.42 Section 19 of the GGA prescribes the following;

- (1) No person shall make application for a license, and no such application shall be entertained, unless the application is lodged pursuant to and in accordance with a notice inviting applications which has been published by the board in the Provincial Gazette, ... -*

6.1.43 Section 20 of the GGA states that:

- “(1) The applicant shall, within seven days before lodgement of the application for a license, cause notice of the application to be published –*

- (a) in the Provincial Gazette in any official language; and*

- (b) in a newspaper circulating in the district in which the premises are situated to which such application relates in any official language in which such paper is published.*

- (2) A notice contemplated in sub-section(1) shall -*

- (a)*;

- (b) invite interested persons -*

- (i) to lodge their written representations in relation thereto with the chief executive officer within one month from the date specified in such notice; and...*”

6.1.44 Section 22 of the GGA states that:

- (1) *The applicant shall lodge his or her written response, if any, to any representations lodged in terms of section 20 with the chief executive officer within the period specified by the board, and ...*
- (2)

6.1.45 Section 30 of the GGA states the following:

- (1) *No application for a license shall be granted if the applicant, any person who has a controlling interest or a financial interest of five percent or more, or any lesser percentage as may be prescribed, in the applicant, or any manager of the business concerned -*
 - (a)
 - (b)
 - (c)
 - (d)
 - (e) *is a family member of a member of the board;*

6.1.46 Section 35 of the GGA states as follows:

- (1) *A person desiring to obtain transfer of a license may, with the consent of the holder of the license at any time make application for the transfer thereof to such applicant.*
- (2) ...;
- (3) *When the application has been granted the chief executive officer shall cause the name of the holder of the license to be changed on the license.*

- (4) *The board may, subject to such conditions as it shall determine, authorise an applicant contemplated in subsection (1) to conduct the business of the license holder pending the outcome of the applicant's application for the transfer of the license.*

Competition Act, 1998

6.1.47 In terms of section 4(1) of the Competition Act “*an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if:*

(a) *it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice or decision can prove that any pro-competitive, gain resulting from it outweighs that effect;*
or

(b) *it involves any of the following restrictive horizontal practices:*

(i) *directly or indirectly fixing a purchase or selling price or any other trading condition;*

(ii) *dividing markets by allocating customers, suppliers, territories or specific types of goods or services; or*

(iii) *collusive tendering...*”

Analysis

6.1.48 Section 195(1)(a)(f) and (g) of the Constitution places an obligation on the GGB as a public entity to ensure that the public administration is governed by democratic values and principles in the constitution, including the principle that Public administration must be accountable and that transparency must be fostered by providing the public with timely,

accessible and accurate information. The evidence at the Public Protector's disposal indicates that the GGB duly adhered to these constitutional imperatives in attending to the transfer of the license from Phumelela to 4Racing.

- 6.1.49 4Racing applied to the GGB for the transfer of a *race-meeting and totalisator license* issued to Phumelela in terms of section 35 of the GGA. Phumelela and 4Racing also applied for the merger of their businesses which was approved by the SACC in line with section 4 of the Competition Act. The SACC found that the merger is unlikely to result in any substantial lessening or prevention of competition in any relevant market/s.
- 6.1.50 The evidence before the Public Protector indicates that the GGB was not a party to the merger and does not have a mandate to take a decision on mergers as it is the competency of SACC.
- 6.1.51 Adv Nalane was appointed as the Administrator of the GGB, because the former Board was unable to reach a quorum due to a number of resignations. Subsequently, the remaining Board Members also resigned leaving the entity without a functioning Board. Section 18C(1) of GGA authorises functionaries of GGB, after consultation with the MEC, to appoint an Administrator to perform the functions and exercise the powers of the Board.
- 6.1.52 The Administrator has the power to lawfully consider, grant or refuse any application for amendment or transfer of a license issued by the GGB. In this regard, the Administrator granted the application by 4Racing.
- 6.1.53 Section 19(1) of GGA prescribes that a person can make an application if there was a notice in the Provincial Gazette inviting applications and the said application should be made in accordance with the notice. In this instance, Provincial Gazette Notice 32 of 2021, indicated that 4Racing intended to apply to the GGB for the transfer of the race-meeting and totalisator license issued to Phumelela.

- 6.1.54 Section 20(2)(b)(i) of the GGA enjoins the applicant to publish notices in the provincial gazette and a newspaper informing the interested stakeholders of the intended application and provides an opportunity to the said stakeholders to inspect the application and to submit written representations. The Complainant and all persons who lodged written representations were invited to a public hearing held on 10 September 2021 and afforded an opportunity to make oral representations in respect of the application before the Board.
- 6.1.55 In terms of section 22(1) of GGA, 4Racing must be afforded an opportunity by functionaries of the GGB, to respond to the representations made by the Complainant. The evidence at the Public Protector's disposal indicates that 4Racing responded to the objection lodged by the Complainant as per the letter dated 02 March 2021 from Mr Savage.
- 6.1.56 In his response to the Rule 41(1) Notice, Mr Simoto did not indicate or specify which applicable laws were omitted in the investigation and which aspect of the complaint, issues or evidence were not properly canvassed. No further representations were made by Mr Simoto to supplement or provide clarity regarding his response. No response was received from Mr Moodley despite the Notice being served on him. Mr Simoto indicated that he could not reach his legal representative.
- 6.1.57 As a result, no substantive amendments could be made to the preliminary findings following the issuance of the Rule 41(1) Notice and the response received from Mr Simoto.

Conclusion

- 6.1.58 Based on the evidence at the Public Protector's disposal it is concluded that GGB complied with the relevant provisions of the law when processing the transfer license application of 4Racing and when responding to the objection of SAGA.

- 6.1.59 The Provincial Gazette Notice 32 of 2021, dated 13 January 2021 indicated that 4Racing intends to apply to the GGB for the transfer of the race–meeting, and totalisator license issued by the functionaries of the GGB to Phumelela as prescribed by section 35 of the GGA. The application was open for public inspection at the offices of the Board from 15 January 2021.
- 6.1.60 The legal notice was published in the classified section of the Star Newspaper, wherein the intention of 4Racing to submit an application for the transfer of the race–meeting and totalisator license issued to Phumelela by the GGB as prescribed by section 35 of the GGA, was advertised.
- 6.1.61 The Complainant lodged an objection against the granting of the transfer of the license and 4Racing was afforded an opportunity to respond to the objection lodged by the Complainant.
- 6.1.62 Mr Zwane resigned as Chairperson of the GGB on 31 March 2021.
- 6.1.63 The functionaries of the GGB held a virtual hearing on 10 September 2021 where the Complainant participated by making a submission on behalf of SAGA. The transfer of the race–meeting and totalisator license issued to Phumelela was signed by Mr Marimuthu on 01 December 2021.
- 6.1.64 Accordingly, no evidence could be found to show that there was a contravention of any legal prescripts by the GGB in this matter.
- 6.2 Whether Mr Zwane’s appointment as the Chairperson of the Board of Directors for 4Racing constituted a conflict of interest on the part of the Gauteng Gambling Board in contravention of the provisions of the Gauteng Gambling Act, if so, whether such appointment constitutes improper conduct in terms of section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act, 1994**

Common cause

6.2.1 Mr Zwane was appointed as Chairperson of the GGB on 01 October 2015 and resigned as Chairperson of the GGB on 31 March 2021.

6.2.2 Mr Zwane was appointed as the chairperson of 4Racing with effect from 01 April 2021.

Issue in Dispute

6.2.3 The issue for the Public Protector's determination is whether the appointment of Mr Zwane created a conflict of interest and if so, whether the GGB failed to manage that conflict of interest emanating from the appointment of Mr Zwane as the Chairperson of the Board of Directors for 4Racing.

Complainant's version

6.2.4 The Complainant stated that on 31 March 2021, Mr Zwane resigned as the Chairperson of the Board of Directors of the GGB and accepted the offer to be the Chairperson for 4Racing on 01 April 2021.

6.2.5 According to the Complainant, Mr Zwane was then appointed as the Chairperson of 4Racing and accepted employment from the license holder within a year after resigning from GGB in contravention of the GGA.

GGB's version

6.2.6 In a response letter dated 01 September 2021, signed by Mr Marimuthu of GGB, he stated that in terms of the application submitted by the applicant, 4Racing, as well as media releases issued by 4Racing, Mr Zwane was appointed as the Chairperson for 4Racing with effect from 01 April 2021.

Meeting held on 11 February 2022

- 6.2.7 On 11 February 2022, the Investigation Team facilitated a meeting between the Complainant and the functionaries of GGB. The GGB was represented by Mr Marimuthu, Mr Lukhwareni and Mr Letshwiti.
- 6.2.8 During the meeting, the Complainant reiterated the allegations as stated above and stressed the issue of non-transformation of the horse racing industry. In response, Mr Marimuthu stated that:
- 6.2.8.1 Mr Zwane made an application (date of application not provided) to be registered by the GGB Board in terms of section 67(2) of the GGA. However, the application was declined by GGB in terms of section 13(1)(b); and
- 6.2.8.2 The allegations are baseless in that GGB cannot dictate who the license holder appoints as Chairperson of their Board, but such person will not be registered by the GGB if the application does not meet the requirements of section 67(2) of the GGA.

Documentary Evidence received from GGB

Letter dated 07 April 2021

- 6.2.9 Mr Marimuthu submitted a letter dated 07 April 2021, signed by Ms Jones addressed to Mr Simoto (SAGA) and the Complainant. Paragraph 4.2 of the letter states that Mr Zwane is not an employee of 4Racing but has been appointed as an independent Chairperson of the Board of Directors for 4Racing.
- 6.2.10 The letter further stated that Mr Zwane is no longer a “member” of the Board for 4Racing. Therefore, the allegations that Mr Zwane’s appointment as the Chairperson of the Board of Directors for 4Racing is contrary to the provisions of section 13 of the GGA and the implication that, in doing so, Mr Zwane has committed an offence as per section 13(3) of the GGA, are baseless.

- 6.2.11 Paragraph 4 subparagraph 4.3 of the letter states that at the time of Mr Zwane's appointment to the Board, 4Racing was not yet incorporated.

Letter dated 11 November 2021

- 6.2.12 Mr Marimuthu further submitted a letter dated 11 November 2021 addressed to SAGA for the attention of Mr Simoto. According to the letter, the Administrator resolved to grant the transfer of the license from Phumelela to 4Racing on condition that Mr Zwane shall be removed as a director owing to him being disqualified in terms of sections 13(1)(b) and 30(1)(f) of the GGA.

Applicable Law

Gauteng Gambling Act, 1995

- 6.2.13 Section 13 of the GGA states that:

“(1) No member of the board or of the staff of the board shall -

(a); or

(b) solicit or accept employment from the holder of, or applicant for, a license under this Act within one year after the termination of his or her term of office or service, as the case may be: Provided that a member of the staff of the board may solicit and accept such employment with the prior written approval of the board.

- 6.2.14 Section 67 of the GGA states that

(1) No person shall -

(a);

(b); or

(c) be engaged in any other prescribed occupation, unless such person is registered with the board.

- (2) *Any person desiring to be registered as contemplated in subsection(1) shall make application for such registration to the board.*
- (3) *A holder of a license shall not employ any person to perform any act or be engaged in any activity or occupation contemplated in subsection (1) unless such person is registered with the board as provided in subsection (1).*

Analysis

- 6.2.15 Section 13(1)(b) of GGA prohibits a member of the board or staff of the GGB to accept employment from the holder of or applicant for a license under the Act within one year after the termination of his or her term of office or service, as the case may be, unless that member of the staff of the board solicited and accepted such employment with the prior written approval of the board.
- 6.2.16 The evidence at the Public Protector's disposal indicates that Mr Zwane was appointed as chairperson of the Board of 4Racing within one year after resigning from the GGB as chairperson. However, the GGB cannot dictate who the license holder employs as Chairperson of the Board, but such person will not be registered by GGB if the application does not meet the requirements.
- 6.2.17 In terms of section 67(1) of GGA, Mr Zwane had to be registered with the GGB before he could assume his duties as the Chairperson of the Board of 4Racing as the license holder for horse racing, gaming leisure bookmaker, race meeting licenses and totalisator licenses.
- 6.2.18 The GGB's contention was that there could not have been a binding contract of employment until Mr Zwane was registered with the GGB and assumed his duties as the Chairperson of the Board of 4Racing.

6.2.19 The above submission by GGB is consistent with the requirements of section 67(1) of GGA, which requires prior registration with the GGB. In this regard, Mr Zwane's application to be registered with the GGB in terms section 67(2) of the GGA was declined based on him not meeting the requirements of section 13(1)(b) of the GGA.

Conclusion

6.2.20 Mr Zwane is not registered with the GGB and was disqualified in terms section 67(2) of the GGA. Mr Zwane resigned from the Board of 4Racing, in compliance with the GGB license conditions.

6.2.21 As a result, the Public Protector concludes that the appointment of Mr Zwane was not a perfected appointment, which gave rise to an employment envisaged by section 13(1)(b) of the GGA. The finalisation of Mr Zwane's appointment by 4Racing was not concluded as it was still subject to registration by the GGB in terms of section 67(2) of the GGA. The GGB found that Mr Zwane was not registrable and declined his application for registration in terms of section 13(1)(b) of the GGA.

6.2.22 Under these circumstances a conflict of interest was managed by the GGB when they declined Mr Zwane's application for registration with the GGB. As a result, there was no breach of section 13(1)(b) of the GGA by the GGB, because there were conditions attached to the appointment or employment of Mr Zwane that were not fulfilled. Mr Zwane did not qualify for registration with the GGB as required by section 67(2) of the GGA and the GGB did not approve his registration.

7. FINDINGS

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

7.1 Whether the functionaries of the Gauteng Gambling Board irregularly processed the license application for 4Racing and failed to respond to the objection raised by SAGA, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act, 1994

7.1.1 The allegation that the functionaries of the Gauteng Gambling Board irregularly processed the license application for 4Racing and failed to respond to the objection raised by SAGA, **is not substantiated.**

7.1.2 Provincial Notice 32 of 2021 was issued on 13 January 2021, indicating that 4Racing intends to apply to the GGB for the transfer of the race-meeting, and totalisator license from Phumelela to 4Racing as prescribed by section 35 of the GGA. The application was open for public inspection at the offices of the GGB from 15 January 2021.

7.1.3 The Complainant lodged an objection against the granting of the transfer of license and 4Racing was afforded an opportunity to respond to the objection lodged by the Complainant.

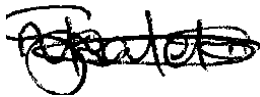
7.1.4 The functionaries of the GGB held a virtual hearing on 10 September 2021 wherein the Complainant participated by making a submission on behalf of SAGA. This meeting was attended by the functionaries of the GGB and the legal representative of SAGA where objections were heard and deliberations were held.

7.1.5 The transfer of the gambling license from Phumelela to 4Racing was approved by Adv. Nalane in November 2021 and the transfer of the race-meeting and totalisator license held by Phumelela was signed by Mr Marimuthu on 01 December 2021.

7.1.6 No evidence could be found by the Public Protector to indicate that Mr Zwane participated in the application process for the transfer of the race-meeting, and totalisator license from Phumelela to 4Racing.

- 7.1.7 Accordingly, the functionaries of the GGB did not contravene sections 18C(1), 19(1), 20(2)(b)(i), 22(1), and 30(1)(e), 35(1)(3)(4) of the Gauteng Gambling Act, 1995.
- 7.1.8 The conduct of functionaries of the GGB, in the circumstances does not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.
- 7.2 Whether Mr Zwane's appointment as the Chairperson of the Board of Directors for 4Racing constituted a conflict of interest on the part of the Gauteng Gambling Board in contravention of the provisions of the Gauteng Gambling Act, if so, whether such appointment constitutes improper conduct in terms of section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act, 1994**
- 7.2.1 The allegation whether Mr Zwane's appointment as the Chairperson of the Board of Directors for 4Racing constituted a conflict of interest on the part of the GGB in contravention of the provisions of the GGA, **is not substantiated.**
- 7.2.2 The evidence before the Public Protector indicates that Mr Zwane was appointed as Chairperson of the Board of the GGB on 01 October 2015 and resigned as Chairperson of the Board of the GGB on 31 March 2021.
- 7.2.3 Mr Zwane was appointed as the chairperson of 4Racing with effect from 01 April 2021. The appointment of Mr Zwane to 4Racing happened within one year after the termination of his term of office or service at the GGB, and the GGB did not give prior written approval of Mr Zwane's appointment by 4Racing.

- 7.2.4 Mr Marimuthu confirmed that the GGB cannot dictate who the license holder appoints as Chairperson of its Board, but such person will not be registered if the application does not meet the requirements of the GGA.
- 7.2.5 Mr Zwane made an application to be registered by the GGB, however, the application was declined in terms of section 67 of the GGA, thus managing the potential conflict of interest on the part of the GGB.
- 7.2.6 The evidence at the Public Protector's disposal of indicates that the GGB took the necessary caution upon receipt of Mr Zwane's application and disqualified him from being registered and duly avoided contravention of section 67 read with section 13(1)(b) of the GGA.
- 7.2.7 Accordingly, the conduct of the functionaries of the GGB does not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.



ADV. KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 28 MARCH 2024

Assisted by: Ms Nthoriseng Motsitsi
Executive Manager: PII Inland