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

PUBLIC PROTECTOR
SOUTH AFRICA

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF VIOLATION OF THE EXECUTIVE ETHICS CODE BY MR JACOB MAMABOLO A MEMBER OF THE EXECUTIVE COUNCIL (MEC) IN HIS CAPACITY AS THE FORMER ACTING MEC RESPONSIBLE FOR HEALTH IN THE GAUTENG PROVINCE.

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Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 3(3) of the Executive Members` Ethics Act, 1998 (the Executive Members` Ethics Act) read with section 8 of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report relates to an investigation into allegations of a violation of the Executive Ethics Code against Mr Jacob Mamabolo (Mr Mamabolo) in his capacity as the former Acting MEC for Health in the Gauteng Province, in connection with his response to questions for oral reply during a sitting of the Gauteng Provincial Legislature (GPL) on 01 September 2020.

(iii) The complaint was lodged by Mr Itani Mukwevho (the Complainant), who is a Member of Provincial Legislature (MPL) on 28 September 2020. In his complaint Mr Mukwevho requested the Public Protector to investigate the conduct of Mr Mamabolo on misleading the GPL on the matter relating to forced and coerced sterilisation. Ms C Mabala (EFF) requested the MEC to respond to questions for oral reply in connection with the report released by the Commission for Gender Equality (CGE) in February 2020 regarding forced and/or coerced sterilisation on HIV/AIDS positive black women at certain public hospitals in Gauteng.

(iv) It is the Complainant's contention that Mr. Mamabolo deliberately misled the GPL in the aforesaid response and in doing so, he violated the Executive Ethics Code. According to the Complainant, Mr Mamabolo's inability to thoroughly investigate the questions submitted by Ms. Christine Mabala for which he was given ten (10) days in which to prepare, can be considered as grossly negligent and incompetent.

(v) On analysis of the complaint, the following issue was identified and investigated:

a) Whether the former Acting MEC for Health, Mr Jacob Mamabolo, wilfully misled the Gauteng Provincial Legislature in his response to the questions for oral reply posed by Ms Christine Mabala during a sitting of the Gauteng Provincial Legislature on 01 September 2020 and in doing so, violated the Executive Ethics Code.

(vi) The investigation was conducted in terms of section 182(1) of the Constitution, sections 6 and 7 of the Public Protector Act and in in terms of sections 3 and 4 of the Executive Members` Ethics Act. It included the exchange of correspondence and documentation between the Public Protector investigation team, the office of the Premier, the office of the MEC for Health, the Gauteng Department of Health, Chris Hani Baragwanath Academic Hospital, the Health Professionals Council of South Africa, the Health Ombud, the Chief Registrar of the High Court of South Africa, Gauteng Local Division and the Commission for Gender Equality and application of the relevant law and legal prescripts

(vii) Interviews were conducted with Dr William Edridge and Ms Bongisile Msibi.

(viii) The approach to the investigation included analysis of the relevant documentation, as well as consideration and application of the relevant laws, regulatory framework and prescripts.

(ix) Key laws taken into account to determine whether Mr Mamabolo acted in violation of the Executive Ethics Code were principally the Constitution, the Executive Members` Ethics Act and Executive Ethics Code in particular:

a) The general powers and responsibilities for MECs are set out in section 125(2) of **the Constitution** and it states that MECs exercise their executive authority through a wide range of responsibilities that include implementing national and provincial laws; developing and implementing provincial policy, and coordinating the functions of provincial administration and its departments.

b) In terms of section 132(1) of **the Constitution**, the Executive Council of a province consists of the Premier, as head of the Council and members appointed by the Premier from among the Members of the Provincial Legislature.

c) Section 133(2) of the Constitution states that Members of the Executive Council of a province are accountable collectively and individually to the Legislature for the exercise of their powers and the performance of their functions. They are required in terms of sub-section (3) to provide the legislature with full and regular reports concerning maters under their control.

d) Members of the Executive Council of a province are required to act in accordance with the Constitution[1] and the code of ethics prescribed by national legislation[2]

e) In terms of section 195(f) and (g) of the Constitution public administration must be accountable and transparency must be fostered by providing the public with timely, accessible and accurate information.

f) The primary objective of **the Executive Members' Ethics Act, 1998** is to provide for a Code of Ethics (the Code) governing the conduct of members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils.

g) Section 2 of the Act provides that the President must publish a Code of Ethics prescribing standards and rules aimed at promoting open, democratic and accountable government.

h) Section 3 of the Act provides that the Public Protector must investigate any alleged breach of the Code of Ethics on receipt of a complaint by ***inter alia***

[1] *133(3)(a) of the Constitution*
[2] *136(1), the Constitution*

a Member of the National Assembly or a permanent delegate to the National Council of Provinces.

i) Sub-sections 3(1) and (2) (a) provides that the Public Protector must submit a report of the alleged breach of a Code of Ethics within thirty (30) of receipt of the complaint to the President if the complaint is against a Cabinet Member, Premier or Deputy Minister.

j) However, section 3(3) provides that if the investigation has not yet been completed, the Public Protector must submit another report when the investigation has been completed.

k) Section 3(4) provides that when conducting an investigation in terms of this section, the Public Protector has all the powers vested in her in terms of the Public Protector Act.

l) Section 3(5)(a) of the Act provides that the President must within a reasonable time, but not later than 14 days after receiving a report from the Public Protector on an investigation into allegations of a violation of the Code by a Cabinet member, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.

m) The relevant provisions of **the Code** with which Members of the Executive must comply in performing their official responsibilities are paragraph 2.1 (a-d), paragraph 2.2, paragraph 2.3 (b),(c) and (e).

n) The HOD, as the accounting officer provides strategic leadership to the department in terms of **the PFMA** and directly accountable to the Member of the Executive Council.

o) The **Public Service Act, 1994** provide for the organisation and administration of the public service of the Republic. In terms of section

(3)(b) a Head of Department shall be responsible for the efficient management and administration of his or her department.

p) In terms of section 2(1)(a) and (b) of **the Sterilisation Act 44 of 1998**, no person is prohibited from having sterilisation performed on him or her if he or she is capable of consenting and 18 years of age or above.

q) Sub-section (2) of the Sterilisation Act states that a person capable of consenting may not be sterilized without his or her consent and in terms of subsection (3,) sterilisation may not be performed on a person who is under the age of 18 years except where failure to do so would jeopardize the person's life or seriously impair his or her physical health.

r) In terms of section 3(1) of the Sterilisation Act, sterilisation may be performed on any person who is incapable of consenting or incompetent to consent:

(a) Upon a request to the person in charge of a hospital and with the consent of a parent, spouse, guardian or curator;

(b) if a panel after considering all relevant information, including the fact that

(i) the person is 18 years of age, **unless the physical health of the person is threatened**; and

(ii) there is no other safe and effective method of contraception except sterilisation, concurs that sterilisation may be performed.

s) In terms of sub-section (2) of the Sterilisation Act, the person in charge of a hospital contemplated in subsection (1) must upon request, as prescribed for sterilisation, convene a panel which will consist of:

(i) a psychiatrist, or a medical practitioner if no psychiatrist is available;

(ii)a psychologist or a social worker; and

(iii) a nurse.

t) In terms of section 13(1) of **the National Archives and Record Service of South Africa Act, 1996** the National Archivist is charged with the proper management and care of public records in the custody of governmental bodies.

u) Furthermore, sub-section (2)(a) of the National Archives and Record Service of South Africa Act states that no public record under the control of a governmental body shall be transferred to an archives repository, destroyed, erased or otherwise disposed of without the written authorisation of the National Archivist.

v) The file containing the records of this procedure performed on Ms Msibi in 2005 was destroyed. This was confirmed by the hospital. No further details was provided in respect of the disposal of the aforesaid hospital records.

w) In terms of section 11(2) of the National Archives and Record Service of South Africa Act, public records identified in a disposal authority as having enduring value shall be transferred to an archives repository when they have been in existence for 20 year.

a) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, as well as the complaint received when weighed against the standard that was expected to be upheld by the MEC Mamabolo and/or any other official(s) of the Department, the Public Protector makes the following findings:

Regarding whether the former acting MEC for Health, Mr Jacob Mamabolo wilfully misled the Gauteng Provincial Legislature in his response to the questions for oral reply posed by Ms Christine Mabala during a sitting of

the Gauteng Provincial Legislature on 01 September 2020 and, if yes, whether he violated Executive Ethics Code:

(aa) The allegation that the former acting MEC for Health, Mr Jacob Mamabolo wilfully misled the Gauteng Provincial Legislature in his response to the questions for oral reply posed by Ms Christine Mabala during a sitting of the Gauteng Provincial Legislature on 1 September 2020, **is unsubstantiated**.

(bb) It is therefore established that, the former acting MEC did not intentionally/wilfully mislead the National Assembly and therefore did not breach paragraph 2.3 of the Executive Ethics Code published by proclamation in terms of section 2(1) of Executive Members' Ethics Act, 1998.

(cc) The former MEC Mamabolo, was responsible for the Gauteng Department of Health and had to account to the legislature in terms of the Constitution and provide accurate reports concerning matters under his control. The evidence indicate that the report presented by former acting Health MEC to the legislature in response to the questions posed by Ms Mabala from the EFF was inaccurate

(dd) Further, that the officials from the GDoH, responsible for the submission of inaccurate information to the HOD for the former acting MEC to account to the provincial legislature, violated section 195(1)(g) of the Constitution.

(ee) Lastly, the Public Protector is also inclined to conclude that the medical records of Ms Msibi have been destroyed without proper authority, contrary to the National Archives Act, 1996. In the National Archives and Record Service of South Africa Act, 1996, section 13(2)(a) states that no public record under the control of a governmental body shall be transferred to an archives repository,

destroyed, erased or otherwise disposed of without the written authorisation of the National Archivist.

(ff) Furthermore, that in terms of section 11(2), public records identified in a disposal authority as having enduring value shall be transferred to an archives repository when they have been in existence for 20 years.

(x) In light of the above findings, the Public Protector is taking the following appropriate remedial action, as contemplated in section 182(1)(c) of the Constitution:

The Premier of the Gauteng Province must:

a) When allocating responsibilities to MECs in terms of section 132(2) of the Constitution, remind MECs of their constitutional responsibilities and in particular the Executive Ethics Code.

b) Arrange a workshop to inform MECs on the provisions of the Executive Ethics Code to avoid violations of the Code. The Public Protector is willing to assist the Premier in this regard.

The HOD of the Department of Health must:

c) Within sixty (60) working days from the issuing of this report, consider taking appropriate action in terms of the Public Service Act against relevant official(s) of the Department of Health for providing inaccurate and misleading information to MEC Mamabolo for his response to the questions posed by Ms Mbala from the EFF to the Gauteng Provincial Legislature in line with section195(1)(g) of the Constitution

The CEO of Chris Hani Baragwanath Academic Hospital must:

d) Within sixty (60) working days from the issuing of this report, consider taking appropriate action in terms of the Public Service Act against the official(s)

responsible for medical record keeping at Chris Hani Baragwanath Academic Hospital and who authorised the destruction of Ms Msibi's hospital records which captured the events surrounding her subtotal hysterectomy performed on her in 2005 in contravention of the National Archives and Record Service of South Africa Act, 1996.

e) A meeting was held with the acting CEO of Chris Hani Baragwanath Hospital, Dr Mankhupane on 06 December 2021 to discuss the proposed remedial action in connection with record keeping contained in the section 7(9) notice sent to the CEO of Chris Hani Baragwanath Hospital.

f) The acting CEO of Chris Hani Baragwanath Hospital made the following undertakings:

"Chris Hani Baragwanath Academic Hospital has put up improved systems to archive files. Also that the files are archived soft through scanning and therefore stored electronically.

In terms of the team that handles Patient Affairs the current observation is that the supervisors who were managing at the time exited the system for one reason or the other.
The hospital has adopted that the patients documents be kept safe as hard copies as well as converting them into electronic copies. The documents shall not be tampered with for at least twenty three years minimum."

g) Furthermore, in accordance with the undertakings made by the acting CEO of Baragwanath Hospital, Dr Mankhupane, the CEO of Baragwanath Hospital must provide within sixty (60) working days of issuing this report, provide a report on progress made to electronically archive patient files .

(xi) Each remedial actions listed above are legally binding on the person directed to implement, unless it has been reviewed and set aside by the Court or an appropriate interim Court Order to stay the implementation of the remedial action is obtained within the prescribed period herein.

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1. INTRODUCTION

1.1. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 3(3) of the Executive Members' Ethics Act, 1998 (the Executive Members' Ethics Act) read with section 8 of the Public Protector Act, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 3(2)(b) of the Executive Members' Ethics Act to the Premier of the Gauteng Province Manemolla David Makhura (the Premier).

1.3. Copies of the report are also provided to the following individuals in terms of section 8(3) of the Public Protector Act, 1994:

1.3.1. Mr Jacob Mamabolo, MEC for Public Transport, Roads and Infrastructure; and

1.3.2. Mr Itani Edwin Mukwevho ("Mr Mukwevho"), Member of the Gauteng Provincial Legislature (MPL) and Member of the Economic Freedom Fighters (EFF).

1.4. The report relates to an investigation into allegations of a violation of the Executive Ethics Code against Mr Jacob Mamabolo (Mr Mamabolo) in his capacity as the former Acting MEC for Health in the Gauteng Province, in connection with his response to questions for oral reply during a sitting of the Gauteng Provincial Legislature (GPL) on 01 September 2020.

2. THE COMPLAINT

2.1. The complaint was lodged by Mr Mukwevho, MPL on 28 September 2020. In his complaint Mr Mukwevho alleged the following:

"I ask you to investigate the conduct of the Acting MEC Mr Jacob Mamabolo on misleading the GPL on the matter relating to forced and coerced sterilisation. An EFF Member of the Provincial Legislature (MPL), Ms Christine Mabala submitted the following questions for oral reply:

Ms C Mabala (EFF) to ask the Member of the Executive Council for Health:

With regard to the report released by the Commission for Gender Equality (CGE) in February regarding forced and/or coerced sterilisation on HIV/AIDS positive black women at certain public hospitals in Gauteng, and illegally limiting their reproductive choices, can the MEC respond to the following questions:

(i) Which other public hospitals in the province, except the once investigated by CGE, how many other has the department identified to have performed this illegal procedure on the vulnerable and unsuspecting black women since enactment of the Sterilization Act 44 of 1998;

(ii) How many women have since come forward to report cases of forced and/or coerced at Gauteng public health facilities after the release of this report by the CGE and how has the department responded to them;

(iii) How many health professionals and government officials from Gauteng health department had been implicated in these torturous and illegal medical procedure (in your response please confirm if the NDOH has contacted the province following the CGE recommendations that internal investigations be completed within three (3) months and whether the implicated health professionals were reported to both HPCSA and SANC for further action);

(iv) How many forced and/or coerced sterilisation litigation matters has the department had since 1998 (in your response indicate how many were settled out of court; the overall amounts of settlements; and the number of Non-Disclosure Agreements signed in relation to the out of court settlements) and

(v) *What action did the department take against health professionals and officials implicated in these litigation matters (the response must please indicate how the department plans to cover the costs of the resources to facilitate reversal of these torturous and illegal sterilisation, where possible?*

Acting MEC Mr. Jacob Mamabolo, replied as follows during the GPL sitting on the 1st September 2020 (transcript Annexure A):

MEC MAMABOLO: Thank you very much, Honorable Speaker. The reply to the questions (i), (ii) and (iii) is that none, there is no information about that or the information is zero. So, with respect to those facilities, there is no information that came forward.

With respect to (iv), there is no litigation matter [that] we have received. Number (v), there is no basis to take action against anyone, because there is no such information. Thank you very much."

Misleading answer in Reply 1(question ii):
Annexure B1 and B2 are two letters from the Gauteng Department of Health (DOH) to a complainant of forced sterilisation, Ms. Bongekile Msibi. Ms. Msibi is not one of the complainants' in the CGE Report on forced sterilisation. On request, we will make available additional names of women who independently lodged complainants with the Gauteng DOH in relation to the tortuous and criminal act of forced and coerced sterilisation. Proof is also available of their engagements with officials at the Gauteng DOH.

Misleading answer in Reply 2 (question iii):
Annexure 82 is a letter from the Gauteng DOH to Ms. Msibi dated 2 March 2020 which clearly indicates that the Gauteng DOH was aware that there were serious allegations against Dr. Edridge regarding his role in Ms. Msibi complaint of torture at the age of 17 at Chris Hani Baragwanath Hospital. More alarming is that the Gauteng DOH threatens a young black woman who is in pursuit of answers and justice as her body remains an unresolved crime scene. It is a legal requirement to report complaints of crime. The Gauteng DOH was also required to launch an immediate internal investigation and refer Dr. Edridge to the Health Professional Council South Africa (HPSCA). The Gauteng DOH did neither, instead, it resorted to threats and what appears to be a cover up of 'unofficial' criminal activities.

Misleading answer in Reply 3 (question iv):
Here is information of one of a number of cases - case number 19744/2012 High Court of South Africa, Gauteng Local Division, Johannesburg. The matter was settled out of Court in 2014. The young woman was forcefully sterilised in 2009, legal proceedings were instituted in 2012, the matter was finalised in 2014. On the 14th March 2014, the Gauteng MEC of Health was ordered to pay an amount of R470 800, within 30-days. The plaintiff was also awarded other costs including the costs of two expert witnesses for the plaintiff." (*sic*)

2.2. It is the Complainant's contention that Mr. Mamabolo willfully misled the GPL in the aforesaid response and in doing so, he violated the Executive Ethics Code. According to the Complainant, Mr Mamabolo's inability to thoroughly investigate the questions submitted by Ms. Christine Mabala for which he was given ten (10) days in which to prepare, can be considered as grossly negligent and incompetent.

2.3. Section 3(1) read with section 4(1)(b) of the Executive Members' Ethics Act provides that the Public Protector must investigate any alleged violation of the code of ethics, by a Member of the Executive Council (including the Premier) on receipt of a complaint by a member of the provincial legislature of a province.

3. THE ISSUE CONSIDERED AND INVESTIGATED

3.1. Based on the analysis of the complaint, and having taken into account the fact that Mr Mukwevho was also a Member of the Executive Council, the following issue has been identified to inform and focus the investigation:

3.1.1. Whether the former Acting MEC for Health, Mr Jacob Mamabolo, wilfully misled the Gauteng Provincial Legislature in his response to the questions for oral reply posed by Ms Christine Mabala during a sitting of the Gauteng Provincial Legislature on 01 September 2020, and if so, whether he violated the Executive Ethics Code.

4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

4.2. Section 182(1) of the Constitution provides that:

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

4.2.1. *(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;*

4.2.2. *(b) to report on that conduct; and*

4.2.3. *(c) to take appropriate remedial action.*

4.3. Section 182(2) of the Constitution, states that the Public Protector has the additional powers and functions prescribed by national legislation.

4.4. Section 4 of the EMEA provides that *"The Public Protector must investigate, in accordance with section 3, an alleged breach of the Code of Ethics on receipt of a complaint by the Premier or a member of the provincial legislature of a province, if the complaint is against an MEC of the province.*

4.5. In terms of section 3 of the Executive Members' Ethics Act, the Public Protector must submit a report on the alleged breach of the Executive Ethics Code by a Cabinet Member within 30 days of receipt of the complaint. If the Public Protector reports at the end of this period that the investigation has not yet been completed, she must submit another report when the investigation has been completed.

4.6. The Public Protector accordingly reported to the Premier of Gauteng Provincial Government on 04 December 2020, that her investigation of the complaint had not been completed and that she would submit the report when it is finalised.

4.7. In *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:-

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

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

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

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

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

4.7.6. The Public Protector's power to take appropriate remedial action is wide, but certainly not unfettered. What remedial action to take in a particular case, will

be informed by the subject-matter of the investigation and the type of findings made (para 71);

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

4.7.8. She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d); and

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

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

4.7.11. In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)*, the court held as follows, when confirming the powers of the Public Protector:-

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

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

4.7.11.3. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers;-

(a) Conduct an investigation;

(b) To take remedial action; and

(c) To take remedial action

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

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

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

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

4.7.12. The conduct of Mr Mamabolo falls within the mandate of the Public Protector as provided for by section 4(1)(b) of the Executive Members' Ethics Act.

5. THE INVESTIGATION

5.1. Methodology

5.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act read with sections 3 and 4 of the Executive Members' Ethics Act.

5.2. Approach to the investigation

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

5.2.2. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

5.2.2.1. What happened?

5.2.2.2. What should have happened?

5.2.2.3. Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Executive Ethics Code?

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

5.2.4. 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 former acting Health MEC, Mr Mamabolo constitutes a violation of the Executive Ethics Code.

5.2.5. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Mr Mamabolo in his capacity as acting MEC for Health.

5.3. **Key sources of information**

5.3.1. **Documents**

The relevant documents obtained and analyzed were primarily:

5.3.1.1. A copy of an affidavit deposed to by Mr Mamabolo, dated 01 January 2021;

5.3.1.2. A copy of an unsigned letter by Mr Mamabolo to the Gauteng Legislature duly initialed and dated 01 September 2020 with the heading, “Response to legislature question 5hl0118 tabled by member C Mabala from EFF”;

5.3.1.3. A copy of another letter by Mr Mamabolo to the Gauteng Legislature with heading, “Response to legislature question 5hl0118 tabled by member C Mabala from EFF”, dated 20 November 2020;

5.3.1.4. Copy of a letter to the Health Ombud, Prof Malegapuru Makgoba from Mr Mamabola requesting an investigation into the allegations made in the Commission for Gender Equality Investigation report on the forced sterilisation of women living with HIV/AIDS in South Africa, dated 20 November 2020;

5.3.1.5. A copy of Hansard Legis-15, dated Tuesday 01 September 2020;

5.3.1.6. A copy of an affidavit deposed to by Dr William Edridge, commissioned on 03 June 2021;

5.3.1.7. A copy of the MH's Redress minutes, dated 22 May 2017 of a meeting between Ms Msibi and Chris Hani Baragwanath Academic Hospital (CHBAH);

5.3.1.8. A copy of a letter to the Department of Obstetrics and Gynaecology at CHBAH from Dr Jeebodh regarding the Witness account of the redress for Ms Bongekile Msibi, dated 02 June 2021;

5.3.1.9. A copy of a, FORM:M/46 Obstetrics and Gynaecology Unit, 26 and 27 December 2005;

5.3.1.10. A copy of the list of doctors at CBAH on call in December 2005;

5.3.1.11. A copy of a letter to the acting MEC of Health, Mr J Mamabolo from the Secretary to the Legislature Mr Skosana, dated 05 October 2020;

5.3.1.12. A copy of a statement by Dr Edridge, dated 26 January 2021;

5.3.1.13. A copy of a letter to the acting HOD of the Gauteng Department of Health, Mr Malotana from the CEO of CHBAH, dated 07 October 2020;

5.3.1.14. A copy of a letter to Mr Victor Khanyile of the National Department of Health from the CEO of CHBAH, dated 16 September 2020;

5.3.1.15. Copy of the Commission for Gender Equality Investigation report on the forced sterilisation of women living with HIV/AIDS in South Africa, dated 24 February 2020

5.3.2. **Correspondence sent and received**

5.3.3. Letter to the Premier of Gauteng Province, Mr David Makhura from the Public Protector, dated 04 December 2020,

5.3.4. Letter to MEC of Transport, Gauteng Province, Mr Jacob Mamabolo, dated 04 December 2020,

5.3.5. Responses from MEC Mamabolo received on 29 January and 01 February 2021, respectively.

5.3.6. Subpoena issued to Dr William Edridge on 26 May 2021,

5.3.7. Subpoena hearing held on 04 June 2021,

5.3.8. Letter to Chief Registrar, High Court South Africa, Ms Roanne Brambaw, received on 27 May 2021,

5.3.9. Response from the Registrar by email on 09 June 2021,

5.3.10. Letter to the Health Ombud, Prof MW Makgoba, dated 25 May 2021,

5.3.11. Response received from the Health Ombud on 31 May 2021

5.3.12. A notice in terms of section 7(9) of the Public Protector Act, 1994 dated 17 November 2021 sent to Mr Mamabolo for response by 04 December 2021.

5.3.13. Response received from the MEC on 07 December 2021,

5.3.14. **Legislation and other prescripts**

5.3.14.1. The Constitution of the Republic of South Africa, 108 of 1996.

5.3.14.2. The Public Protector Act, 23 of 1994.

5.3.14.3. The Executive Members' Ethics Act, 82 of 1998.

5.3.14.4. The Executive Ethics Code published by proclamation in terms of section 2(1) of Executive Members' Ethics Act, 1998, Government Gazette: No 21399 Notice No 41 Regulation 6853, 2000,

5.3.14.5. Sterilisation Act [No. 44 of 1998],

5.3.14.6. National Archives and Record Service of South Africa Act (previously National Archives of South Africa) 43 of 1996

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. **Regarding whether the former acting MEC for Health, Mr Jacob Mamabolo, wilfully misled the Gauteng Provincial Legislature in his response to the questions for oral reply posed by Ms Christine Mabala during a sitting of the Gauteng Provincial Legislature on 01 September 2020, and if so, whether he violated the Executive Ethics Code.**

Common Cause Issues

6.1.1. Mr Jacob Mamabolo was elected to the Gauteng Provincial Legislature during the 2014 general elections and was appointed as MEC for Human Settlement and the Department of Cooperative Governance and Traditional Affairs (COGTA). He served in this position until his appointment as the MEC for Infrastructure Development in February 2016.

6.1.2. In 2019, Mr Mamabolo became the MEC for Roads and Transport and while in this portfolio, the Premier of Gauteng, Mr David Makhura, announced in July 2020 that the MEC for Health, Dr Masuku would be placed on leave following an investigation and that Mr Mamabolo would be the acting executive authority of the Department of Health. MEC Mamabolo served in this acting capacity as Health MEC until 02 December 2020.

6.1.3. On 02 December 2020, Dr Nomathemba Mokgethi was appointed as the MEC for Health in Gauteng.

Issues in dispute

6.1.4. It is the Complainant's contention that Mr. Mamabolo, during his tenure as acting MEC for Gauteng Health, wilfully misled the Gauteng Provincial Legislature (GPL) in his response to Ms. Christine Mabala's questions and in doing so, he violated the Executive Ethics Code. According to the Complainant, Mr Mamabolo's inability to thoroughly investigate the questions submitted by Ms. Christine Mabala for which he was given ten (10) days to prepare, can be considered as grossly negligent and incompetent.

6.1.5. The Complainant then requested the Public Protector to investigate whether the former acting MEC of Gauteng Health, Mr Mamabolo deliberately misled the GPL when responding to Ms Mabala's questions.

6.1.6. The Public Protector informed Mr Mamabolo of the allegations raised against him in a letter dated 04 December 2020. Mr Mamabolo responded on 29 January 2021.

6.1.7. A letter was also addressed to the Premier of the Gauteng Province, Mr Makhura, on 04 December 2020 in terms of section 3(2) and 3(3) of the Executive Members Ethics Act, 1998, informing him about the investigation.

6.1.8. Attached to the response of Mr Mamabolo to the letter of the Public Protector were replies to the questions for oral reply as published on the Internal Question Paper No. 4.HL024, dated 01 September 2020. The following question was presented by Ms Mabala to MEC Mamabolo, in his former capacity as acting MEC for Gauteng Department of Health for an oral reply:

"Ms C Mabala (EFF) to ask the Member of the Executive Council for Health:

With regard to the report released by the Commission for Gender Equality (CGE) in February regarding forced and/or coerced sterilisation on HIV/AIDS positive black women at certain public hospitals in Gauteng and illegally limiting their reproductive choices, can the MEC respond to the following questions:

Which other public hospitals in the province, except the once investigated by CGE, how many other has the department identified to have performed this illegal procedure on the vulnerable and unsuspecting black women since enactment of the Sterilisation Act 44 of 1998;

How many women have since come forward to report cases of forced and/or coerced at Gauteng public health facilities after the release of this report by the CGE and how has the department responded to them;

How many health professionals and government officials from Gauteng health department had been implicated in these torturous and illegal medical procedure (in your response please confirm if the NDOH has contacted the province following the CGE recommendations that internal investigations be completed within three (3) months, and whether the implicated health professionals were reported to both HPCSA and SANC for further action);

How many forced and/or coerced sterilisation litigation matters has the department had since 1998 (in your response indicate how many were settled out of court; the overall amounts of settlements; and the number of Non-Disclosure Agreements signed in relation to the out of court settlements) and

What action did the department take against health professionals and officials implicated in these litigation matters (the response must please indicate how the department plans to cover the costs of the resources to facilitate reversal of these torturous and illegal sterilisation, where possible?(sic)

Acting MEC Mr. Jacob Mamabolo, replied as follows during the GPL sitting on the 1st September 2020 (transcript Annexure A):

MEC MAMABOLO: Thank you very much, Honorable Speaker. The reply to the questions (i), (ii) and (iii) is that none, there is no information about that or the

information is zero. So, with respect to those facilities, there is no information that came forward.

With respect to (iv), there is no litigation matter [that] we have received. Number (v), there is no basis to take action against anyone, because there is no such information. Thank you very much."(sic)

6.1.9. Further to his response, Mr Mamabolo provided an affidavit he deposed to on 29 January 2021, in which he stated that there was no illegal procedures performed on vulnerable unsuspecting black women since the enactment of the Sterilization Act 33 of 1998. The MEC listed 34 hospitals in Gauteng and indicated that none confirmed any illegal sterilizations since the enactment of the Sterilization Act 33 of 1998.

6.1.10. Mr Mamabolo listed the following hospitals:

Name of Hospital	**Performed illegal Procedure on vulnerable unsuspecting black woman since enactment of the Sterilization Act 33 of 1998**
Charlotte Maxeke Hospital	None
Chris Hani Baragwanath Hospital	None
Steve Biko Academic Hospital	None
Dr George Mukhari Hospital	None
Tembisa Hospital	None
Kalafong Hospital	None
Helen Joseph Hospital	Not Applicable
Rahima Moosa Hospital	None
Edenvale Hospital	None
Pholosong Hospital	None
Sebokeng Hospital	None
Tambo Memorial Hospital	None
Mamelodi Hospital	None
Far East Rand Hospital	None

Leratong Hospital	None
Thelle Mogoerane Hospital	None
Dr Yusuf Dadoo Hospital	None
South Rand Hospital	None
Hiedelberg Hospital	None
Bertha Gxowa Hospital	None
Kopanong Hospital	None
Pretoria West Hospital	None
Jubilee Hospital	None
Odi Hospital	None
Carletonville Hospital	None
Bheki Mlangeni Hospital	None
Tshwane District Hospital	None
Bronkhorspruit Hospital	None
Sterkfontein Hospital	Not Applicable
Weskoppies Hospital	Not Applicable
Tshwane Rehab Hospital	Not Applicable
Tara Hospital	Not Applicable
Cullinan Hospital	Not Applicable
Sizwe Tropical Hospital	Not Applicable

6.1.11. Further, that none of the hospitals listed, reported any women coming forward to report cases of forced and/or coerced sterilization following the release of the CGE report.

6.1.12. Mr Mamabolo listed the following hospitals to substantiate his response:

Name of Hospital	Women that have come forward to report cases at Gauteng Health Facilities
Charlotte Maxeke Hospital	None
Chris Hani Baragwanath Hospital	None
Steve Biko Academic Hospital	None
Dr George Mukhari Hospital	None
Tembisa Hospital	None
Kalafong Hospital	None
Helen Joseph Hospital	Not Applicable
Rahima Moosa Hospital	None
Edenvale Hospital	None
Pholosong Hospital	None
Sebokeng Hospital	None
Tambo Memorial Hospital	None
Mamelodi Hospital	None
Far East Rand Hospital	None
Leratong Hospital	None
Thelle Mogoerane Hospital	None
Dr Yusuf Dadoo Hospital	None
South Rand Hospital	None
Hiedelberg Hospital	None
Bertha Gxowa Hospital	None
Kopanong Hospital	None
Pretoria West Hospital	None
Jubilee Hospital	None
Odi Hospital	None
Carletonville Hospital	None
Bheki Mlangeni Hospital	None
Tshwane District Hospital	None
Bronkhorspruit Hospital	None
Sterkfontein Hospital	Not Applicable
Weskoppies Hospital	Not Applicable
Tshwane Rehab Hospital	Not Applicable
Tara Hospital	Not Applicable
Cullinan Hospital	Not Applicable
Sizwe Tropical Hospital	Not Applicable

6.1.13. Mr Mamabolo further stated that, no health professional or government official, at any of the hospitals listed, were implicated in this illegal medical procedure.

6.1.14. Mr Mamabolo listed the following hospitals to substantiate his response:

Name of Hospital	How many health professional or government official implicated in this illegal medical procedure?
Charlotte Maxeke Hospital	None
Chris Hani Baragwanath Hospital	None
Steve Biko Academic Hospital	None
Dr George Mukhari Hospital	None
Tembisa Hospital	None
Kalafong Hospital	None
Helen Joseph Hospital	None
Rahima Moosa Hospital	None
Edenvale Hospital	None
Pholosong Hospital	None
Sebokeng Hospital	None
Tambo Memorial Hospital	None
Mamelodi Hospital	None
Far East Rand Hospital	None
Leratong Hospital	None
Thelle Mogoerane Hospital	None
Dr Yusuf Dadoo Hospital	None
South Rand Hospital	None
Hiedelberg Hospital	None
Bertha Gxowa Hospital	None
Kopanong Hospital	None
Pretoria West Hospital	None
Jubilee Hospital	None
Odi Hospital	None
Carltonville Hospital	None
Bheki Mlangeni Hospital	None
Tshwane District Hospital	None
Bronkhorspruit Hospital	None
Sterkfontein Hospital	Not Applicable
Weskoppies Hospital	Not Applicable
Tshwane Rehab Hospital	Not Applicable
Tara Hospital	Not Applicable
Cullinan Hospital	Not Applicable
Sizwe Tropical Hospital	Not Applicable

6.1.15. With regard to the question of how many forced and/or coerced sterilization litigation matters the department has had since 1998, the former MEC stated that the Department has requested a service provider (CAJV (Pty) Ltd) to obtain this particular information to enable the Department to report accurately. This information was supposedly due in September 2020.

6.1.16. In respect of the question of what action the Department had taken against Health Professionals and officials implicated in these litigation matters, the former MEC stated that the Labour Relations Unit of the Department should be able to respond as soon as the aforementioned service provider has obtained the required information.

6.1.17. In the response to the legislature question tabled by Ms Mabala MPL, MEC Mamabolo stated, *inter alia*, the following in a letter to Mr Skosana of the Gauteng Legislature, dated 20 November 2020, that:

6.1.18. He, in his capacity as acting MEC did not mislead the legislature as the information provided to the legislature was based on the information available at the time,

6.1.19. There was no evidence that Dr Edridge has performed any negligent or criminal acts in this regard, and

6.1.20. This matter was already at litigation stage when it was mediated, as summons were issued.

6.1.21. A Redress meeting was held with the Chris Hani Baragwanath Academic Hospital and Ms Msibi, which was attended by Dr William Edridge amongst others on 22 May 2017, arranged by the Gauteng Department of Health. In addition a Mediation Meeting was also held between the GDoH and Ms Msibi in February 2020, to address the complaint by Ms Msibi of a failure by the hospital to obtain proper consent when performing a subtotal hysterectomy on her.

6.1.22. The Public Protector is in possession of the investigation report on forced sterilisation of women living with HIV/AIDS in South Africa, issued by the Commission on Gender Equality on 24 February 2020, signed by Keketso Maema, the CEO of CGE. The report was received by the Public Protector from the Commission for Gender Equality (GCE) on 20 May 2021. The report was based on the complaint lodged with the CGE by two entities (Her Rights Initiative and the International Community of Women Living with HIV) against the National and Provincial Departments of Health. The two entities alleged that the sexual and reproductive rights of their clients were violated when their clients were subjected to forced and/or coerced sterilisation in public hospitals.

6.1.23. According to the report by the CGE, it inspected different hospitals in different Provinces at various times. The hospitals inspected in Gauteng were Tambo Memorial Hospital in Boksburg, Tembisa Hospital, Far East Rand Hospital in Springs, Edenvale Hospital and the Leratong Hospital in Johannesburg. The investigation by the Public Protector covered those hospitals in the Gauteng province that were not covered in the CGE report.

6.1.24. A subpoena was issued by the Public Protector to Dr William Edridge, FCOG (SA), MRCOG (UK), MBBChir (Cantab), the Head of Gynaecology at Chris Hani Baragwanath Hospital on 26 May 2021. During the subpoena hearing, Dr Edridge provided an affidavit dated 03 June 2021 he had deposed to in which he averred that Ms Msibi approached him and informed him that she gave birth to her daughter at the age of seventeen years at the Chris Hani Baragwanath Hospital on 26 December 2005. Her daughter was delivered through a caesarean section.

6.1.25. The Public Protector is in possession of a copy of the Night Manager's report i.e. Sister Ruth Diseko indicating that at 07:00 on 27 December 2005, Ms Msibi was:

6.1.25.1. Seventeen years of age;

6.1.25.2. Post-caesarean section after presenting with eclampsia[3] and following a failed vacuum attempt; and

6.1.25.3. Post-hysterectomy.

6.1.26. Dr Edridge presented a discharge summary, which recorded the following:

6.1.26.1. Ms Msibi was admitted to the Maternity High Care Unit on 26 December 2005;

6.1.26.2. She was thereafter transferred to the Maternity Theatre for a caesarean section on 26 December 2005;

6.1.26.3. The caesarean section was immediately followed by an emergency subtotal hysterectomy;

6.1.26.4. She was thereafter transferred to the Intensive Care Unit.

6.1.27. According to Dr Edridge, a hysterectomy is only performed as a last resort and only to save a life, especially in circumstances where there is severe haemorrhaging which cannot be stopped and is even more likely to be uncontrollable in eclampsia.

6.1.28. He explained the process of how a consent for a lifesaving procedure is legally and correctly acquired – firstly from the patient, if incapacitated or incapable, from a relative and if the relative cannot be reached, a senior doctor or administrator must give consent.

6.1.29. Dr Edridge contended that he had no recollection of the subtotal hysterectomy performed on Ms Msibi in 2005. In this regard, Dr Edridge provided a copy of the roster for on Duty Health Professionals in December 2005, which indicates

[3] **Eclampsia** is a rare but serious condition where high blood pressure results in seizures during pregnancy. Seizures are periods of disturbed brain activity that can cause episodes of staring, decreased alertness, and convulsions. Complications of eclampsia include the following: Permanent neurologic damage from recurrent seizures or intracranial bleeding.

that he was not on call when the procedure was performed. Below is copy of the roster:

'E

CHRIS HANI BARAGWANATH HOSPITAL

DEPARTMENT OF OBSTETRICS AND GYNAECOLOGY

DECEMBER 200

			DAILY DUTIES							AFTER HOURS	
DAY	DATE	UNI	LABOUR WARD	OBST THEATRE	A.N.C.	SPECIAL CLINICS	G.O.P.D.	GYNAE THEATRE	GYNAE F.U.C.	SENIOR 1	SENIOR 2
Thu	1	D	Schackis/Mfoba/Mankupane	Hamuy	Yasmeen/Gaffoor	Haematology: Edridge / Twins: Mapefane/Lekha	Hellman	Clark	Jh/Onc: Setzen	Clark	Hellman
Fri	2	A	Yasmeen/Clark/Gaffoor/Edridge	Mankupane	Galal	Epileptic: Mfoba	Setzen/Schackis	Mapefane	Lekha	Adam	Edridge
Sat	3	B								Galal/Naidoo	Lekha/Mfoba
Sun	4	C								Bareiro/Setzen	Naidoo/Hamuy
Mon	5	D	Mfoba/Schackis	Naidoo	Yasmeen/Clark/Edridge	Cardiac: Mapefane/Malebane / Rep Fail: M-Hosanee	Hamuy/Hellman	Gaffoor	Setzen/Mankupane	Mfoba	Nicolaou
Tue	6	A	Clark/Gaffoor	Schackis	Galal/Lekha	Diabetic: M-Hosanee	Setzen/Mankupane/Mfoba	Mapefane	Edridge/Yasmeen	Malebane	Setzen
Wed	7	B	Galal/Malebane/Lekha	Edridge	M-Hosanee/Hamuy		Yasmeen/Clark/Gaffoor	Naidoo	Hellman	Hamuy	M-Hosanee
Thu	8	C	Naidoo/M-Hosanee/Hamuy	Lekha	Schackis/Mfoba	Haematology: Gaffoor / Twins: Galal	Malebane/Mapefane	Mankupane	Mankupane	Mapefane	Mankupane
Fri	9	C								Mankupane	Mapefane
Sat	10	D								Mapefane	Mankupane
Sun	11	A								Mankupane	Mapefane
Mon	12	B	Lekha/Malebane/Galal	Edridge	Hellman	Cardiac: Mapefane / Rep Fail: M-Hosanee	Gaffoor/Yasmeen/Clark	No list	Mankupane/Schackis	Hull	Galal
Tue	13	C	Hellman/Buchmann (Ivf)	Galal	Schackis/Mankupane	Diabetic: M-Hosanee	Malebane/Lekha	No list	Edridge/Yasmeen/Clark/Gaffoor	M-Hosanee	Mankupane
Wed	14	D	Schackis/Mankupane	Hellman	Gaffoor/Yasmeen/Clark/Edridge		M-Hosanee	No list	Buchmann	Nicolaou	Jeebodh
Thu	15	A	Gaffoor/Yasmeen	Schackis	Mapefane/Lekha/Malebane	Haematology: Clark / Twins: Galal	Mankupane	No list	JH/Onc: Edridge	Bareiro	Schackis
Fri	16	B	Galal/Lekha	Clark	Hellman/M-Hosanee	Epileptic: Schackis	Yasmeen/Edridge/Gaffoor	No list	Mapefane/Malebane	Lekha	van Gelderen
Sat	17	C								Mapefane/Jeebodh	Hellman/Hull
Sun	18	D								Adam/Gaffoor	M-Hosanee/Galal
Mon	19	A								Hull/Yasmeen	Clark/Schackis
Tue	20	B	Malebane/Lekha	Gaffoor	Hellman	Diabetic: M-Hosanee	Clark	No list	Yasmeen/Edridge	Edridge	Malebane
Wed	21	C	M-Hosanee	Galal	Schackis/Mankupane		Mapefane/Galal/Lekha	No list	Hellman	Galal	Gaffoor
Thu	22	D	Schackis	M-Hosanee	Edridge/Clark/Gaffoor	Haematology: Yasmeen / Twins: Mapefane/Galal	Hellman	No list	JH/Onc: Mankupane	van Gelderen	Hull
Fri	23	A	Edridge/Clark/Yasmeen/Gaffoor	Mankupane	Galal/Malebane	Epileptic: Buchmann	Schackis	No list	Mapefane/Lekha	Hellman	Mapefane
Sat	24	B								Malebane/M-Hosanee	Hull/Yasmeen

OBSTETRIC UNITS

A: Schackis/Mfoba/Mankupane
B: Yasmeen/Gaffoor/Clark
C: Galal/Malebane/Lekha
D: Hamuy-Sosa/Mauthoor-Hosanee/Poovy Naidoo

Ward 57 — Shahid / Hull 01-31 / Mankupane 01-15 / Unit A Interns / MO's

Ward 62
Cub A (cardiac) + B + C — Unit C Interns / MO's / Registrars / Consultants
Cub D + E + Side Wards — Unit A Interns / MO's / Registrars / Consultants

6.1.30. Although the roster is not very eligible, however, in terms of the Night Manager's report, Ms Msibi was transferred to the Maternity Theatre for a caesarean section on 26 December 2005. The roster above indicates that Dr Edridge was on duty on 27 December 2005. The roster further indicates that Drs' Hull/Yasmeen and also Clark/Schackis were on duty on the day of the caesarean section on 26 December 2005

6.1.31. Dr Edridge further stated that he was aware of the fact that Ms Msibi instituted summons[4] against the Gauteng Provincial Department of Health under case number 26778/18 and that an attempt was made to settle the claim through mediation in 2020, but that he was not directly involved in the litigation process or the mediation.

6.1.32. An interview was conducted with Ms Msibi on 25 June 2021. She stated that she was sterilized without consent at Baragwanath Hospital on 26 December 2005. She stated further that following the birth of her daughter in 2005, she started taking contraceptive pills. In 2015, she was engaged to be married and had stopped taking contraceptives as she was hoping to expand her family. When she subsequently noticed that her menstrual periods had not returned and had difficulty conceiving, she sought medical advice and discovered that her uterus had been removed.

6.1.33. Further, that she was not aware of the fact that a subtotal hysterectomy, which she had not consented to, had been performed on her in 2005. Upon realising that her uterus had been removed without her knowledge or consent, she contacted the Hospital to request a copy of her patient file. She was advised that the records had been destroyed.

6.1.34. It was her contention that Dr Edridge was the doctor who performed the subtotal hysterectomy on her, but she had no evidence to substantiate this claim.

6.1.35. On 16 July 2021, the Public Protector received from the Complainant an affidavit deposed to by Ms Msibi on 25 June 2021, in which she alluded to the alleged illegal sterilisation.

6.1.36. Ms Msibi averred that after the alleged sterilisation a Redress Session was held with Dr Edridge, Matron Nomusa Ramela and Dr Jeebhad. In her affidavit she indicated that Dr Edridge was present on the date she was sterilized. She

[4] A summons is a document issued by a court, which begins the litigation process.

further indicated that all the parties present at the Redress Session acknowledged her complaint and undertook to schedule a psychological support session at a hospital closest to her, but this was apparently never done.

6.1.37. Furthermore, she advised that she reported her complaint to the MEC of Gauteng Health, but omitted to provide details of the identity of the MEC. Ms Msibi indicated that she submitted her complaint in 2017 and further indicated that there were twelve (12) other women who also reported cases of illegal sterilization in 2017. The investigation established that the MEC at the time was Dr Gwen Ramokgopa.

6.1.38. In his complaint, Mr Mukwevho indicated that "*Ms. Msibi is not one of the complainants in the CGE Report on forced sterilisation. On request, we will make available additional names of women who independently lodged complaints with the Gauteng DOH in relation to the tortuous and criminal act of forced and coerced sterilisation. Proof is also available of their engagements with officials at the Gauteng DOH".* The Public Protector team thereafter engaged Mr Mukwevho and the EFF on several occasions to provide the aforesaid information, but no responses were received in this regard.

6.1.39. The table below lists the patients, the hospitals and the alleged dates of sterilisation provided by Ms Msibi during the interview with the Public Protector investigation team on 16 July 2021:

Table 1

Patient	Date	Hospital
N. L Mdluli	Easter Monday 2010	OR Tambo Memorial Hospit
J Mdhluli	11 January 2011	Far East Rand Hospital
SA Zikali	23 January 2008	Germiston Hospital
Z Nkosi	14 January 2010	OR Tambo Memorial Hospit
LP Sibutha	09 July 2010	Far East Rand Hospital
KP Mpyana	23 July 2013	Mamelodi Hospital

6.1.40. The Public Protector is in possession of the affidavits of the aforementioned patients. The women indicated in their affidavits that they were not approached by the Commission for Gender Equality and therefore did not take part in the investigation that was conducted. They confirmed in their affidavits that they were sterilised without their consent. However, no medical records were provided by these Complainants and their affidavits were only deposed to in June 2021.

6.1.41. In her affidavit, Ms Mpyana indicated that she also, alongside Ms Msibi, lodged a complaint with the Gauteng Department of Health and had meetings with officials in this regard. This was confirmed by Ms Msibi during a consultation on 25 June 2021. However, no other evidence was provided in support of same.

6.1.42. The Complainant argued that the acting former MEC Mamabolo misled the GPL when he indicated that there are no litigation[5] matters against the Department. The Complainant provided the details of case number 19744/2012, *Sithole v MEC Health and Social Development and 3 others,* which was concluded in 2014.

6.1.43. In order to retrieve the aforesaid case file, a letter was written by the Public Protector Investigation team to the Chief Registrar of the High Court of South Africa, Gauteng Local Division, Ms Roanne Bramdaw on 25 May 2021. Ms Bramdaw responded as follows:

"We did not have any success in retrieving the 2012 file. We approached the Office of the State Attorney in an endeavour to access their file and were informed this morning that their file had been destroyed in line with their archiving prescripts which calls for destruction of files older than 5 years. In addition, I enquired as to the availability of audio for this matter on the court recording system. The control room advised that they cannot locate audio based on the case number or parties alone and will require hearing dates and

[5] The process of taking legal action.

the name of the presiding Judge or the court room number in order to proceed with a search for audio in this matter. If you have any such details on hand, it will be helpful to attempt retrieval of the audio recordings for the matter. Note, our current court recording (CRT) system is in use since 2016 and older audio are often unavailable at court level but we can request retrieval through the Department of Justice for matters on the previous (DCRS) system.

We located the 2018 file (Bongekile Msibi vs MEC for Health, but the file only contains one page, being the application for a case number. I contacted the Attorneys who had requested issuing in the matter (Tim Sukazi Inc. Attorneys). The attorneys advised that they no longer have a medical negligence department and that their files were assigned to several other firms. They undertook to provide me with the details of the firm to whom the matter was ceded. The file is not created on Case Lines at all and the case does not seem to have been enrolled at any stage."

6.1.44. In an article written by Ms Lindiwe Rosetta Khumalo, with the heading, *A critical analysis of a possibility of a class action or a public interest action on behalf of South African women living with HIV who have been sterilized without their informed consent*, dated February 2019, reference was made to *Sithole v MEC for Health and Social Development and 3 Others*. The article stated that, "*Besides the studies there has been one matter settled out of court involving an HIV positive woman who was sterilised during a caesarean section. There have not been any other cases brought before our courts concerning this issue".*[6]

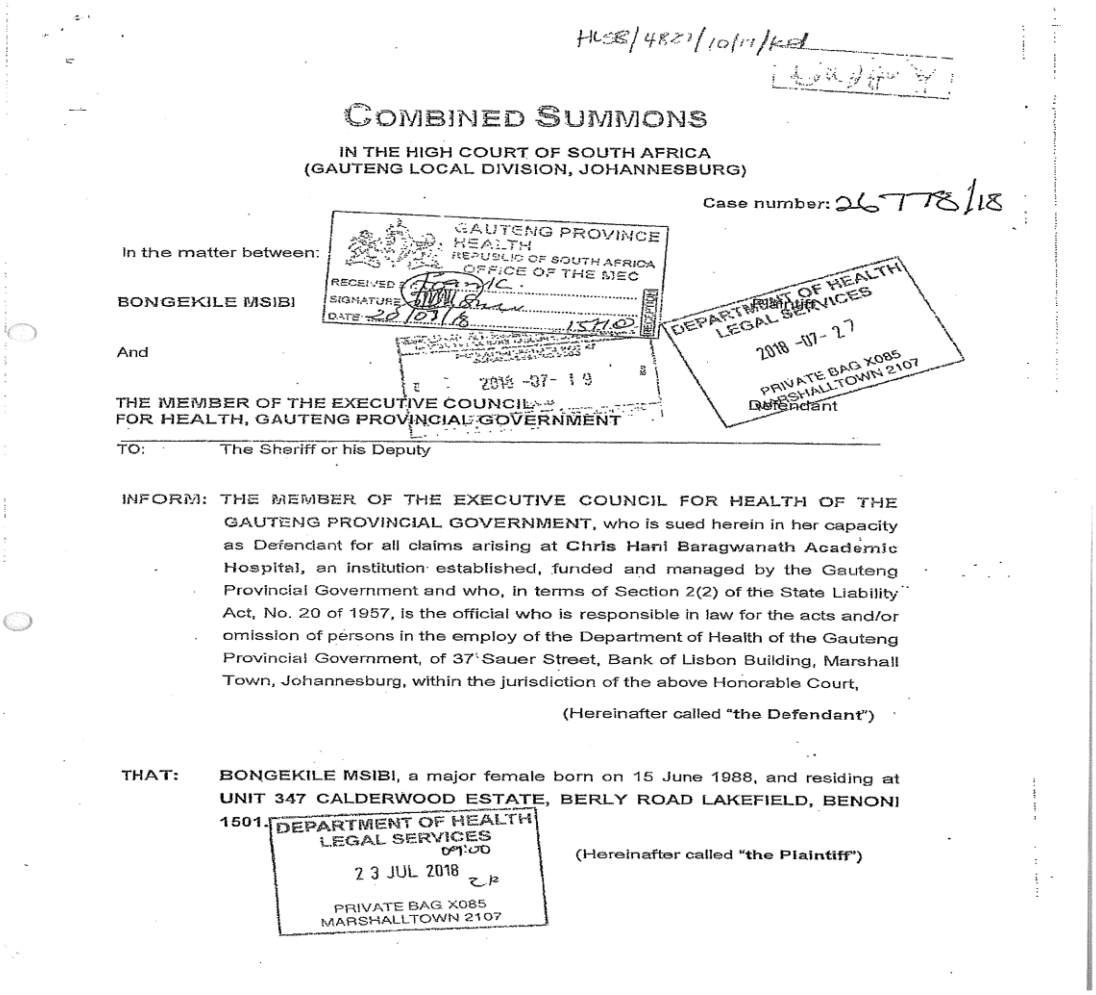
6.1.45. Contrary to the MEC's assertion that no health professional has been allegedly implicated in this illegal medical procedure, the Complainant made reference to Ms. Bongekile Msibi who was not one of the Complainants' in the CGE Report on forced sterilization, but was allegedly sterilized without her consent.

[6] *Page 150: A critical analysis of a possibility of a class action or a public interest action on behalf of South African women living with HIV who have been sterilized without their informed consent*

Further, that there were allegations against Dr. Edridge regarding his role in Ms. Msibi's forced or coerced sterilisation at the age of 17 at Chris Hani Baragwanath Hospital in 2015.

6.1.46. The Public Protector enquired from Ms Msibi in an email dated 10 August 2021 on whether she instituted summons against the Gauteng Department of Health. Ms Msibi affirmed and provided the contact details of Messrs. Tim Sukazi Inc. who acted on her behalf at the time.

6.1.47. Her current attorney of record, Messrs. BH Taula Attorneys provided copies of the summons and the notice of Intention to Defend on 12 August 2021. Table 1 below is an illustration of summons issued by Ms Msibi against the MEC of Gauteng Provincial Department of Health:



HCB/4821/10/11/KB

COMBINED SUMMONS

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case number: 26778/18

In the matter between:

GAUTENG PROVINCE HEALTH REPUBLIC OF SOUTH AFRICA OFFICE OF THE MEC RECEIVED SIGNATURE DATE 20/07/18 15:40

DEPARTMENT OF HEALTH LEGAL SERVICES 2018 -07- 27 PRIVATE BAG X085 MARSHALLTOWN 2107

2018 -07- 19

BONGEKILE MSIBI — Plaintiff

And

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT — Defendant

TO: The Sheriff or his Deputy

INFORM: THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT, who is sued herein in her capacity as Defendant for all claims arising at Chris Hani Baragwanath Academic Hospital, an institution established, funded and managed by the Gauteng Provincial Government and who, in terms of Section 2(2) of the State Liability Act, No. 20 of 1957, is the official who is responsible in law for the acts and/or omission of persons in the employ of the Department of Health of the Gauteng Provincial Government, of 37 Sauer Street, Bank of Lisbon Building, Marshall Town, Johannesburg, within the jurisdiction of the above Honorable Court,

(Hereinafter called "the Defendant")

THAT: BONGEKILE MSIBI, a major female born on 15 June 1988, and residing at UNIT 347 CALDERWOOD ESTATE, BERLY ROAD LAKEFIELD, BENONI 1501.

DEPARTMENT OF HEALTH LEGAL SERVICES 09:00 23 JUL 2018 PRIVATE BAG X085 MARSHALLTOWN 2107

(Hereinafter called "the Plaintiff")

6.1.48. Table 2 below is an illustration of the Notice of Intention to Defend from the State Attorney on behalf of the MEC of Health in Gauteng:

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

FIVE COPIES

CASE NO: 26778/2018

In the matter between:-

BONGEKILE MSIBI Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUCIL FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT Defendant

NOTICE OF INTENTION TO DEFEND

BE PLEASED TO TAKE NOTICE that the Defendant hereby gives notice of his intention to defend his actions and appoints the address set out hereunder or the service upon him of all process, notices and documents:-

DATED at JOHANNESBURG on this the 23rd day of AUGUST 2018.

THE STATE ATTORNEY
DEFENDANT'S ATTORNEY
10th Floor, North State Building
95 Albertina Sisulu, Cnr.Kruis Street
Private Bag X9, Docex 688
JOHANNESBURG, 2000
Refer To: (MRS) L. MAHLANGU/pm
Refer No: 7698/17/P42/pm
Tel No: (011) 330-7676
Fax No: (011) 333 9015 / 337 7180/2

6.1.49. In her question to MEC Mamabolo, during the sitting of the Legislature on 01 September 2020, Ms Mabala from the EFF enquired whether the alleged implicated health professionals were reported to both Health Professionals Council of South Africa (HPCSA) and South African Nursing Council **(**SANC) for further action and the MEC's reply was *'none'.* An enquiry was also made to Ms Caroline Mashego, the Administrator, Legal & Regulatory Affairs at the Health Professionals Council of South Africa (HPCSA), to establish whether an investigation was conducted and the outcome thereof, but no details could be provided by HPCSA in connection with a complaint lodged against Dr Edridge.

6.1.50. Mr Mamabolo stated that on 20 November 2020, he had sought guidance from the Health Ombud, Prof William Makgoba, in respect of a complaint regarding forced sterilisation of women in Gauteng.

6.1.51. The Public Protector Investigation team addressed a letter to the Health Ombud, Prof Makgoba on 25 May 2021, to enquire on the progress of this investigation. The Health Ombud responded on 31 May 2021 and conceded to receiving the referral of the complaint from Mr Mamabolo to investigate the allegations. Subsequent to receiving the complaint, Prof Makgoba engaged the former MEC Mamabolo telephonically on the matter and advised him that the complaint did not fall within the ambit of the Health Ombud's mandate.

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

6.1.52. A section 7(9) notice was sent to Mr Mamabolo in order to inform him of the preliminary findings in order to afford him the opportunity to respond to same.

6.1.53. Mr Mamabolo responded to the notice on 07 December 2021 and gave an overview of the Public Protector's section 7(9) notice, including the preliminary findings against him.

6.1.54. Mr Mamabolo responded as follows regarding the allegation of violating the Executive Code:

*"**WILFULLY MISLEADING***

I am advised that for a finding of wilfully misleading and for a member of the Executive to breach the Code, such a member must have given incorrect information with the intention to mislead the legislature. Incorrect information alone is not sufficient to constitute a violation of the Code. Such information must be accompanied by the member's intention to mislead.

I am further advised that the prohibition or the definition is a narrow one and that it is problematic to introduce other elements to the definition other than as defined by law.

The advice further received is that intention is usually defined as "(i) the direction of the will at causing a particular consequence, (ii) in the knowledge that it is wrongful.[7]"

Should this finding be an accurate finding on "wilful misleading" it means that the Public Protector ought to have established 2 elements in respect of the statement made at the 1 September 2020 sitting of the Gauteng Provincial Legislature:

The Public Protector ought to have established through her evidence that on 1 September 2020:

(i) I gave incorrect information to the Legislature and

(ii) with the intention to mislead the legislature.

[7] *Francois du Bois (eds) Wille's Principles of South African Law, 9th Ed,page 1129 with reference to Dantex Investments Holdings (Pty) Ltd v Brenner and Others NNO 1989 (1) SA 390 (A)*

Looking at the intention element - it means that I directed my will at causing a particular consequence, that is, misleading the Legislature (ii) in the knowledge that it is wrongful. This position is both incorrect and unsubstantiated

Looking at the questions which Ms C Mabala (EFF) the Member of the Executive Council for Health addressed to the MEC, the findings of the Public Protector on this is that I provided inaccurate information and that it is the view of the Public Protector that the information was readily available to me as the department was informed of these cases on different platforms.

The Public Protector has with respect misdirected herself in the determination of whether I wilfully misled the Legislature. The enquiry is not that of determining whether the information existed and was readily available to myself. It is whether I had knowledge of the information which the member of the legislature asked questions on, at the time of the oral reply. It is whether I gave an accurate account when I stated that there was no information that had come forward.

Importantly, it is my humble submission that it is not accurate to find that because the information exists, that I was aware of the information.

To prove the case of wilful misleading, the Public Protector has to show through the evidence she submits she gathered, that at the time of the oral response I had that information but intentionally decided to give incorrect information to the Legislature. The Public Protector has not done this.

Practically, this means the Public Protector had to produce evidence, which could have been in the form of correspondence from the department; any of my sources of information; my subordinates; proving that at the time of my response I had received this information and had acquainted myself with it and elected to respond differently from that which I knew to be accurate.

At the risk of stating the obvious, the Public Protector misdirected herself in that she applied the test of the information she herself found out about that is knowledge she acquired subsequent to her investigations of the matter, and not the information which I had at the time of the oral response.(sic)

PRELIMINARY FINDINGS - GROSSLY NEGLIGENT

According to the Complainant, Mr Mamabolo's inability to thoroughly investigate the questions submitted by Ms. Christine Mabala for which he was given ten (10) days to prepare , can be considered as grossly negligent and incompetent.

…the Public Protector is not at liberty to introduce the element of grossly negligent and incompetent to the meaning of wilfully misleading as referred to in the Code.

This is entirely at odds with the text of the Code. It also introduces an entirely different test.

It cannot be overlooked even in this case that this is not the enquiry the Public Protector is requested to get into in terms of the Code.

The Code is clear, and the questions by member of the legislature were very clear that he intends to lodge a case of "wilful misleading". It remains to be understood what the finding of grossly negligent and incompetent served to prove - for which allegations and for which provision of the code is it meant to be a finding?(sic)

VERIFICATION OF INFORMATION

The finding of the Public Protector assumes a position with respect to my state of mind (that I intended to mislead), when no such information was available to her. In fact it is very clear in the report that she does not even address this

element. How, then, can it be held that I gave incorrect information with intention to mislead.

Accordingly, both the findings of wilfully misleading and that of grossly negligent and incompetent ought not to be confirmed in the final report as there is no factual or rational basis for such findings. I referred the questions to the department for answers according to convention.The exchange between myself and the department establishes that I did undertake due diligence, in the context of my responsibilities before giving the oral answer to the Legislature.

Importantly, it is noteworthy that as referred to in the Public Protector's Section 7(9)(a) Notice, it is common cause that in 2019, I became the MEC for Roads and Transport and while in this portfolio, the Premier of Gauteng, Mr David Makhura, announced in July 2020 that the MEC for Health, Dr Masuku would be placed on leave following an investigation and that I would be the acting executive authority of the Department of Health. I served in this acting capacity as Health MEC until 02 December 2020. Accordingly, I spent a period of less than 5 months in this office. (sic)

EVENTS AFTER 1 SEPTEMBER 2020

On 5 October 2020, the Legislature Secretary forwarded some follow up questions in this matter to me for responding on 7 October 2020.

I did the best that I could to obtain the necessary information for the 1 September 2020 response. The quest for information did not cease after 1 September 2020, but as above-stated, even after this date I continued to search for the information.

This is glaringly not in harmony with the findings of an intention to mislead.

CONCLUSION

It is therefore my submission that I did everything in my power and according to convention to procure the information required to enable him to give an informed response to the legislature, which is not consistent with the allegations of intention to mislead.

The Public Protector's preliminary findings are not with respect substantiated and therefore ought not to be confirmed as final."(sic)

Application of the relevant legal prescripts

The Constitution of the Republic of South Africa, 1996

6.1.55. The Constitution of South Africa is the supreme law of the Republic and all other laws should conform to the constitution.

6.1.56. The general powers and responsibilities for MECs are set out in section 125(2) of **the Constitution** and it states that MECs exercise their executive authority through a wide range of responsibilities that include implementing national and provincial laws; developing and implementing provincial policy, and coordinating the functions of provincial administration and its departments.

6.1.57. In terms of section 132(1) of the Constitution, the Executive Council of a province consists of the Premier, as head of the Council and members appointed by the Premier from among the Members of the Provincial Legislature.

6.1.58. Section 133(2) of the Constitution states that Members of the Executive Council of a province are accountable collectively and individually to the Legislature for the exercise of their powers and the performance of their functions. They are required in terms of sub-section (3) to provide the legislature with full and regular reports concerning maters under their control.

6.1.59. Members of the Executive Council of a province are required to act in accordance with the Constitution[8] and the code of ethics prescribed by national legislation[9]

6.1.60. In terms of section 195(f) and (g) of the Constitution public administration must be accountable and transparency must be fostered by providing the public with timely, accessible and accurate information.

6.1.61. The primary objective of **the Executive Members' Ethics Act, 1998** is to provide for a Code of Ethics (the Code) governing the conduct of members of the Cabinet, Deputy Ministers and members of Provincial Executive Councils.

6.1.62. Section 2 of the Act provides that the President must publish a Code of Ethics prescribing standards and rules aimed at promoting open, democratic and accountable government.

6.1.63. Section 3 of the Act provides that the Public Protector must investigate any alleged breach of the Code of Ethics on receipt of a complaint by ***inter alia*** a Member of the National Assembly or a permanent delegate to the National Council of Provinces.

6.1.64. Sub-sections 3(1) and (2) (a) provides that the Public Protector must submit a report of the alleged breach of a Code of Ethics within thirty (30) of receipt of the complaint to the President if the complaint is against a Cabinet Member, Premier or Deputy Minister.

6.1.65. However, section 3(3) provides that if the investigation has not yet been completed, the Public Protector must submit another report when the investigation has been completed.

[8] *133(3)(a) of the Constitution*
[9] *136(1), the Constitution*

6.1.66. Section 3(4) provides that when conducting an investigation in terms of this section, the Public Protector has all the powers vested in her in terms of the Public Protector Act.

6.1.67. Section 3(5)(a) of the Act provides that the President must within a reasonable time, but not later than 14 days after receiving a report from the Public Protector on an investigation into allegations of a violation of the Code by a Cabinet member, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the National Assembly.

6.1.68. **The Executive Ethics Code published by proclamation in terms of section 2(1) of Executive Members' Ethics Act, 1998, Government Gazette: No 21399 Notice No 41 Regulation 6853, 2000** which Members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils must comply with in performing their official responsibilities.

6.1.69. In terms of paragraph 2.1 Members of the Executive must, to the satisfaction of the President or the Premier, as the case may be:

(a) perform their duties and exercise their powers diligently and honestly;

(b) fulfill all the obligations imposed upon them by the Constitution and law; and

(c) act in good faith and in the best interest of good governance; and

(d) act in all respects in a manner that is consistent with the integrity of their office or the government.

6.1.70. Clause 2.2 states that in deciding whether members of the Executive complied with the provisions of clause 2. 1, the President or Premier, as the case may be, must take into account the promotion of an open, democratic and accountable government.

6.1.71. In terms of paragraph 2.3(a) and (c), Members of the Executive may not wilfully mislead the legislature to which they are accountable or act in a way that is inconsistent with their position.

6.1.72. In terms of the above Executive Ethics Code published in the Government Gazette of 2000, the Executive Members such as MEC Mamabolo are precluded from wilfully misleading the Legislature to which they are accountable.

6.1.73. The HOD, as the accounting officer provides strategic leadership to the department in terms of **the PFMA** and directly accountable to the Member of the Executive Council.

6.1.74. The **Public Service Act, 1994** provide for the organisation and administration of the public service of the Republic. In terms of section (3)(b) a Head of Department shall be responsible for the efficient management and administration of his or her department.

6.1.75. The **Sterilisation Act [No. 44 of 1998],** provides for the right to sterilisation, the circumstances under which sterilisation may be performed and in particular on persons incapable of consenting or incompetent to consent.

6.1.76. By definition, in terms of section 1, ‘‘*sterilisation*’’ means a surgical procedure performed for the purpose of making the person on whom it is performed incapable of procreation, but does not include the removal of any gonad.

6.1.77. In terms of section 2(1)(a) and (b) of the Sterilisation Act 44 of 1998, no person is prohibited from having sterilisation performed on him or her if he or she is capable of consenting and 18 years of age or above.

6.1.78. Sub-section (2) of the Sterilisation Act states that a person capable of consenting may not be sterilized without his or her consent and in terms of

subsection (3,) sterilisation may not be performed on a person who is under the age of 18 years except where failure to do so would jeopardize the person's life or seriously impair his or her physical health.

6.1.79. In terms of section 3(1) of the Sterilisation Act, sterilisation may be performed on any person who is incapable of consenting or incompetent to consent:

(a) Upon a request to the person in charge of a hospital and with the consent of a parent, spouse, guardian or curator;

(b) if a panel after considering all relevant information, including the fact that:

(iv) the person is 18 years of age, **unless the physical health of the person is threatened**; and

(v) there is no other safe and effective method of contraception except sterilisation, concurs that sterilisation may be performed.

6.1.80. In terms of sub-section (2) of the Sterilisation Act, the person in charge of a hospital contemplated in subsection (1) must upon request, as prescribed for sterilisation, convene a panel which will consist of:

(vi) a psychiatrist, or a medical practitioner if no psychiatrist is available;

(vii) a psychologist or a social worker; and

(viii) a nurse.

6.1.81. This provision allows any person to have a sterilisation procedure to be performed on them on condition that they are *inter alia* over 18 years and capable of consenting to such, but in circumstances where failure to perform such a procedure may jeopardize a person's life or seriously impair their physical health, the procedure may be performed in terms of section 3(1) above.

6.1.82. The Public Protector is in possession of evidence that Ms Msibi was sterilized and at the time of sterilisation, she was 17 years of age and incapable of consenting to the procedure. Based on the evidence provided, Ms Msibi was also suffering from eclampsia associated with extreme high blood pressure and seizures, diminished consciousness and life threatening haemorrhage.

6.1.83. In the **National Archives and Record Service of South Africa Act (previously National Archives of South Africa) 43 of 1996,** section 13 of the act contains specific provisions for efficient records management in governmental bodies. It provides for the National Archivist to *inter alia* determine which record keeping systems should be used by governmental bodies and authorizes the disposal of public records or their transfer into archival custody.

6.1.84. In terms of section 13(1) of the National Archives and Record Service of South Africa Act, 1996 the National Archivist is charged with the proper management and care of public records in the custody of governmental bodies.

6.1.85. Furthermore, sub-section (2)(a) of the National Archives and Record Service of South Africa Act states that no public record under the control of a governmental body shall be transferred to an archives repository, destroyed, erased or otherwise disposed of without the written authorisation of the National Archivist.

6.1.86. The file containing the records of this procedure performed on Ms Msibi in 2005 was destroyed. This was confirmed by the hospital. No further details was provided in respect of the disposal of the aforesaid hospital records.

6.1.87. In terms of section 11(2) of the National Archives and Record Service of South Africa Act, public records identified in a disposal authority as having enduring value shall be transferred to an archives repository when they have been in existence for 20 year.

6.1.88. By definition in the act, "disposal authority" means a written authority issued in terms of section 13(2)(a) specifying records to be transferred into the custody of the National Archives or specifying records to be otherwise disposed of.

Case Law

Public Protector and Others v President of the Republic of South Africa and Others [2021] ZACC [19]

6.1.89. The Constitutional Court had to pronounce on *inter alia* the following issues that have arisen from that decision:

1. *Whether the Public Protector correctly found that the President had misled Parliament in breach of the Code;*
2. *Whether the President had a duty to disclose donations made to the CR17 campaign;*
3. *The Public Protector's competence to investigate the affairs of the CR17 campaign;*

6.1.90. The Executive Ethics Code was published by proclamation in terms of section 2(1) of Executive Members' Ethics Act, 1998, Government Gazette: No 21399 Notice No 41 Regulation 6853, 2000, which Members of the Cabinet, Deputy Ministers and Members of Provincial Executive Councils must comply with in performing their official responsibilities. In terms of paragraph 2.3, Members of the Executive may not wilfully mislead the legislature to which they are accountable or act in a way that is inconsistent with their position.

6.1.91. On the other hand, the Ministerial Handbook for Members of the Executive, Approved by Cabinet 7 February 2007: Executive Ethics Code, states in paragraph 2(3)(a), that Members of the Executive may not '*deliberately or inadvertently'* mislead the President, or the Premier or, as the case may be; the legislature.

6.1.92. Jafta J contended that the Public Protector's report reveals "…*that she seriously misconstrued the Code* and pronounced *inter alia* as follows:

"The Public Protector's report reveals that, on the facts placed before her, she accepted that the President did not wilfully mislead Parliament. This meant that he could not have violated the Code. The Public Protector then changed the wording of the Code to include "deliberate and inadvertent misleading" so as to match with the facts. Having effected the change in the Code, the Public Protector proceeded to conclude that the President had violated the Code. It is unacceptable that the Public Protector did what no law had authorised her to do.

The High Court's conclusion that the Public Protector's findings should be set aside on the material error of the law point alone, cannot be faulted."

6.1.93. In her rescission of judgement application to the Constitutional Court, the Public Protector stated in her founding affidavit *inter alia* that there are truly exceptional circumstances which warrants rescission of judgement. The argument raised is that the court reviewed and set aside her report on the basis of a patent error that the Public Protector changed the version of the Code. It is the Public Protector's contention that the court was unaware or did not pay heed in its own judgement in the *'Nkandla'* judgement which is '*dispositive'* on the issue of the applicable 2007 Executive Ethics Code.

6.1.94. Further, that the Honourable Court compounded to the error when it ruled, ostensibly unaware of the existence of the *2007 Code,* that the Public Protector '*dishonestly'* and '*incompetently'* changed the Code and added words to it.

6.1.95. The application for rescission of judgement is still pending before the Constitutional Court and up until the rescission of judgement is heard and pronounced upon, the Executive Ethics Code published by proclamation in Government Gazette, 2000 prevails, for the purposes of this investigation.

The Conclusions that could be made based on the application of the law to the facts

6.1.96. Based on the information and evidence obtained during the investigation and the application of the legal framework to the facts of the matter, it can be concluded that:

6.1.96.1. With regard to the question posed by Ms Mabala on "*Which other public hospitals in the province, except the once (sic) investigated by CGE, has the department identified to have performed this illegal procedure on the vulnerable and unsuspecting black women since enactment of the Sterilization Act 44 of 1998;* the former acting Health MEC responded inaccurately that there were none. It was established that the Baragwanath hospital where the procedure was performed on Ms. Bongekile Msibi, was not listed under hospitals investigated in the CGE Report.

6.1.96.2. It was further confirmed that Ms Msibi instituted litigation proceedings under case number 26778/18 against the MEC for Heath in Gauteng in 2018 and was represented by Tim Sukazi Incorporated Attorneys albeit the case does not seem to have been placed on the court roll at any stage. This was contrary to the assertion by the former acting MEC to the legislature that "…*there is no litigation matter [that] we have received"*

6.1.96.3. Contrary to the former acting Health MEC's assertion that there were no Health Professionals implicated, but Dr William Edridge was alleged to have been linked to the aforesaid case of Ms Msibi as a Health Professional for his alleged role in the emergency hysterectomy on Ms Msibi. However, the evidence in the possession of the Public Protector can neither confirm nor deny that this was in fact the case, as the records show that he was not on duty on the day in question.

6.1.96.4. There is no evidence to indicate that the GDoH took action to investigate any Health Professionals, like Dr Edridge who might possibly have been associated with the *forced and/or coerced sterilisation*.

6.1.96.5. GDoH was aware of the complaint laid by Ms Msibi, since Mediation was attempted by the GDoH in February 2020 to address the complaint by Ms Msibi of a failure by the hospital to obtain proper consent when performing a subtotal hysterectomy on her. It was also established that a Redress was held with the Chris Hani Baragwanath Academic Hospital and Ms Msibi, which was attended by Dr William Edridge amongst others on 22 May 2017. The Redress and the Mediation were clearly failed attempts to address the concerns of Ms Msibi, since Ms Msibi decided to continue with litigation against the GDoH.

6.1.96.6. In this regard, the acting MEC should have either been aware or ought reasonably to have been aware or at the very least taken reasonable steps to establish the correct factual position by virtue of his legal obligation to provide accurate information to the provincial legislature. This information was readily available.

6.1.96.7. Lastly, it was established that Ms Msibi was 17 years old when the procedure was performed on her in 2005 and that the file containing the records of this procedure was destroyed. It could therefore not be established whether consent to perform the procedure was properly sought or not, however, Ms Msibi maintains that such consent was neither sought nor obtained from her prior to the procedure. In fact, Ms Msibi has contended that she only discovered that such a procedure was performed on her almost ten (10) years when she wanted to expand her family.

7. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, as well as the complaint received when weighed against the standard that was expected to be upheld by the MEC Mamabolo

and/or any other official(s) of the Department, the Public Protector makes the following findings:

7.1. **Regarding whether the former acting MEC for Health, Mr Jacob Mamabolo wilfully misled the Gauteng Provincial Legislature in his response to the questions for oral reply posed by Ms Christine Mabala during a sitting of the Gauteng Provincial Legislature on 01 September 2020 and, if yes, whether he violated Executive Ethics Code:**

7.1.1. The allegation that the former acting MEC for Health, Mr Jacob Mamabolo wilfully misled the Gauteng Provincial Legislature in his response to the questions for oral reply posed by Ms Christine Mabala during a sitting of the Gauteng Provincial Legislature on 1 September 2020, **is unsubstantiated**.

7.1.2. It is therefore established that, the former acting MEC did not intentionally/wilfully mislead the National Assembly and therefore did not breach paragraph 2.3 of the Executive Ethics Code published by proclamation in terms of section 2(1) of Executive Members' Ethics Act, 1998.

7.1.3. The former MEC Mamabolo, was responsible for the Gauteng Department of Health and had to account to the legislature in terms of the Constitution and provide accurate reports concerning matters under his control. The evidence indicate that the report presented by former acting Health MEC to the legislature in response to the questions posed by Ms Mabala from the EFF was inaccurate

7.1.4. Further, that the officials from the GDoH, responsible for the submission of inaccurate information to the HOD for the former acting MEC to account to the provincial legislature, violated section 195(1)(g) of the Constitution.

7.1.5. Lastly, the Public Protector is also inclined to conclude that the medical records of Ms Msibi have been destroyed without proper authority, contrary to the National Archives Act, 1996. In the National Archives and Record Service of South Africa Act, 1996, section 13(2)(a) states that no public record under the

control of a governmental body shall be transferred to an archives repository, destroyed, erased or otherwise disposed of without the written authorisation of the National Archivist.

7.1.6. Furthermore, that in terms of section 11(2), public records identified in a disposal authority as having enduring value shall be transferred to an archives repository when they have been in existence for 20 years.

8. REMEDIAL ACTION

8.1. In light of the above findings, the Public Protector is taking the following appropriate remedial action, as contemplated in section 182(1)(c) of the Constitution:

The Premier of the Gauteng Province must:

8.2. When allocating responsibilities to MECs in terms of section 132(2) of the Constitution, remind MECs of their constitutional responsibilities and in particular the Executive Ethics Code.

8.3. Arrange a workshop to inform/train MECs on the provisions of the Executive Ethics Code to avoid violations of the Code. The Public Protector is willing to assist the Premier in this regard.

The HOD of the Department of Health must:

8.4. Within sixty (60) working days from the issuing of this report, take appropriate action in terms of the Public Service Act against relevant official(s) of the Department of Health for providing inaccurate and misleading information to MEC Mamabolo for his response to the questions posed by Ms Mbala from the EFF to the Gauteng Provincial Legislature in line with section195(1)(g) of the Constitution

The CEO of Chris Hani Baragwanath Academic Hospital must:

8.5. Within sixty (60) working days from the issuing of this report, take appropriate action in terms of the Public Service Act against the official(s) responsible for medical record keeping at Chris Hani Baragwanath Academic Hospital and who authorised the destruction of Ms Msibi's hospital records which captured the events surrounding her subtotal hysterectomy performed on her in 2005 in contravention of the National Archives and Record Service of South Africa Act, 1996.

8.6. A meeting was held with the acting CEO of Chris Hani Baragwanath Hospital, Dr Mankhupane on 06 December 2021 to discuss the proposed remedial action in connection with record keeping contained in the section 7(9) notice sent to the CEO of Chris Hani Baragwanath Hospital.

8.7. The acting CEO of Chris Hani Baragwanath Hospital made the following undertakings:

"Chris Hani Baragwanath Academic Hospital has put up improved systems to archive files. Also that the files are archived soft through scanning and therefore stored electronically.

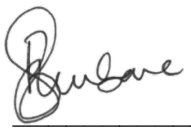
In terms of the team that handles Patient Affairs the current observation is that the supervisors who were managing at the time exited the system for one reason or the other.
The hospital has adopted that the patients documents be kept safe as hard copies as well as converting them into electronic copies. The documents shall not be tampered with for at least twenty three years minimum."

8.8. Furthermore, in accordance with the undertakings made by the acting CEO of Baragwanath Hospital, Dr Mankhupane, the CEO of Baragwanath Hospital must provide within sixty (60) working days of issuing this report, provide a report on progress made to electronically archive patient files.

8. **MONITORING**

8.5 The Director-General (DG) in the Office of the Premier must within ninety (90) working days provide the Public Protector with an action plan, indicating timelines, in respect of the above-mentioned remedial action.

8.6 All actions directed in this report as part of the remedial action taken by the Public Protector in terms of the Public Protector's powers under section 182(1)(c) of the Constitution must be finalised within six (6) months from date of the report.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 31/01/2022

Assisted by: Gauteng Provincial Office