

**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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**INVESTIGATION INTO ALLEGED MALADMINISTRATION, FRAUD, CORRUPTION,  
MISMANAGEMENT AND ABUSE OF DEPARTMENTAL FUNDS BY THE OFFICE OF  
THE CHIEF JUSTICE**

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|                      |   |
|----------------------|---|
| ACFO                 | Acting Chief Financial Officer                              |
| ADG                  | Acting Director General                                     |
| AGSA                 | Auditor General of South Africa                             |
| B-BBEE               | Broad Based Black Economic Empowerment                      |
| CFO                  | Chief Financial Officer                                     |
| CIPC                 | Companies and Intellectual Properties Commission            |
| Constitution         | The Constitution of the Republic of South Africa, 1996      |
| CSD                  | Central Supplier Database                                   |
| DD                   | Deputy Director   |
| DDG                  | Deputy Director-General                                     |
| DG                   | Director-General  |
| DOJ&CD               | Department of Justice and Constitutional Development        |
| DS&T                 | Department of Science and Technology                        |
| Email                | Electronic mail correspondence                              |
| JP                   | Judge President   |
| NDPP                 | National Director of Public Prosecutions                    |
| NPA                  | National Prosecuting Authority                              |
| NT                   | National Treasury   |
| OCJ                  | Office of the Chief Justice                                 |
| OSD                  | Occupation Specific Dispensation                            |
| PFMA                 | Public Finance Management Act, 1999 [Act No. 1 of 1999]     |
| PFMA                 | Public Financial Management Act No.1 of 1999                |
| PPPFA                | Preferential Procurement Policy Framework Act No. 5 of 2000 |
| PPSA                 | Public Protector South Africa                               |
| PSA                  | Public Service Act, 1994 [Act No. 103 of 1994]              |
| PSR                  | Public Service Regulations (PSR), 2016                      |
| Public Protector Act | Public Protector Act No. 23 of 1994                         |
| SAQA                 | South African Qualifications Authority                      |
| SCM Policy           | Supply Chain Management Policy, 2015                        |
| SG                   | Secretary General   |
| The SLA              | Service Level Agreement                                     |

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## INVESTIGATION INTO ALLEGED MALADMINISTRATION, FRAUD, CORRUPTION, MISMANAGEMENT AND ABUSE OF DEPARTMENTAL FUNDS BY THE OFFICE OF THE CHIEF JUSTICE

### 1. INTRODUCTION

- 1.1. This is a closing report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] (the Public Protector Act).
- 1.2. The report relates to an investigation conducted following a complaint lodged with the Public Protector by an anonymous complainant (the Complainant) into allegations of fraud, corruption, mismanagement and abuse of funds allocated to the Office of the Chief Justice. The allegations of fraud are attributed to, amongst other issues, irregular procurement and appointments of senior management within the Office of the Chief Justice (OCJ).
- 1.3. Copies of the closing report are to be provided to the anonymous Complainant (the Complainant) and Ms Memme Sejosengwe the Secretary General of OCJ in terms of section 8(3) of the Public Protector Act, 1994.

### 2. THE COMPLAINT

- 2.1 The complaint to the Public Protector was lodged anonymously through a letter dated 28 October 2019 and subsequent personal submission of supporting documents on 28 October 2019.
- 2.2 In essence, the Complainant alleged *inter alia* that:

#### **Recruitment irregularities**

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- 2.2.1 The appointment of the Chief Financial Officer, Mr Cassie Coetzer was irregular in that the post was not advertised and it is further alleged that Mr Coetzer is not competent to perform his duties in that since his appointment, the OCJ has since incurred fruitless and wasteful expenditure.
- 2.2.2 The Complainant further alleged that Mr Nathi Mncube's appointment to the post of Chief Director: Court Administration, is also suspicious. It is alleged that his appointment did not follow proper recruitment processes such as shortlisting and interview, and that he is not qualified to hold the position he occupies. Furthermore, that Mr Nathi was appointed at an incorrect salary level 16 which is at the level of a Deputy Minister and that this was never corrected.
- 2.2.3 Furthermore, that the Chief of Staff, Mr Sello Chiloane is earning a salary which is seven (7) salary notches above the entry level for his position, which puts him on the salary level of a Minister while occupying the post of a Chief Director.
- 2.2.4 In addition, the anonymous Complainant alleged that the Director: Internal Audit, Mr Ranako Mabunda is earning a Chief Director's salary despite being appointed at the level of a Director, which is way above his pay grade even though he is not qualified to be an Auditor.

### **Procurement irregularities**

- 2.2.5 According to the anonymous Complainant, Indaba Travel Agency (Travel Agency), has been the travel agency for the OCJ for over a period of 20 years, after being the travel agency for the Constitutional Court prior to the current seven (7) years period they have now been with the OCJ.

- 2.2.6 The anonymous Complainant further alleged that the company's B-BBEE status is suspicious as their black female partner from Durban is basically a silent partner and not a full owner in the company.
- 2.2.7 In addition, she alleged that there is also fraud taking place over the travel bookings for hotel accommodation, air travel, vehicle hire and subsistence and travel allowance claims, as there is often double billing and/or inflating of the invoices by the Travel Agency.
- 2.2.8 The anonymous Complainant also alleged that the foregoing which is tantamount to fraud and therefore ostensibly criminal conduct, is alleged to have resulted in the loss of substantial amounts of money by the OCJ, whilst it has unjustly enriched the travel agent at the expense of the taxpayers.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

- 3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that:

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

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

- 
- 3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.
- 3.4 Section 6(5) of the Public Protector Act, provides that the Public Protector shall be competent to investigate,
- (a) *“maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the **Public Finance Management Act, 1999 (Act No. 1 of 1999)**[ PFMA];*
  - (b) ***abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);***
  - (c) *improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or*
  - (d) *act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.”*
- 3.5 The investigation into allegations of fraud, corruption, mismanagement and abuse of funds allocated to the Office of the Chief Justice is conducted in terms of section 6 and 7 of the Public Protector and has been finalised.

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- 3.6 Section 7(4)(b) of the Public Protector Act provides that the Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information on a matter being or to be investigated.
- 3.7 The Public Protector may exercise a discretion, in terms of section 6(9) of the Public Protector Act, to entertain matters which arose more than two (2) years from the date of occurrence of the incident. In deciding the “**special circumstances**” that may be taken into account in exercising such discretion favourably in accepting complaints, consideration is given to the nature of the complaint and the seriousness of the allegations; whether the outcome of the investigation into the complaint can rectify systemic problems in state administration; whether the matter can be successfully investigated, with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether refusal to investigate the matter perpetuates the violation of section 195 of Constitution and whether the remedial action will redress the imbalances of the past. What constitutes “**special circumstances**” will depend on the merits of each case.
- 3.8 Where, in a statute, it is directed that a fixed rule shall be departed from, only under exceptional circumstances as is the case with section 6(9) of the Public Protector Act, effect should be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.
- 3.9 In the context of section 6(9) of the Public Protector Act, the Public Protector will need to be satisfied that the circumstances are truly exceptional before entertaining a matter not reported within two years from the date of occurrence



of the incident. This section is intended to enable the Public Protector to deal with a situation where otherwise injustice might result. It is not merely to indulge Complainants who lodged complaints outside the prescribed time frames.

- 3.10 Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a wild discretion, rather the existence of special circumstances is a matter of factual enquiry<sup>1</sup> which must be decided accordingly.
- 3.11 What is ordinarily contemplated by the words ‘*exceptional circumstances*’ is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare or different. To be exceptional, the circumstances concerned must arise out of, or be incidental to the particular case.<sup>2</sup>
- 3.12 Against that background, it is apposite to deal briefly with the complaint wherein the Complainant alleges that the SG did not act in the best interest of the OCJ in allowing alleged financial misconduct attributed to irregular recruitment and procurement processes within the institution.
- 3.13 To this it is submitted that in the exercise of the discretion vested in the Public Protector by section 6(9) of the Public Protector Act is none other than the overall interests of justice which will be the final determinative feature.
- 3.14 It is further submitted that this case truly raises a substantial point of great public importance involving serious allegations regarding the misuse of public funds, which affect the fiscus, and thus, a huge risk of a decimation thereof if not investigated, grave injustice may result.

<sup>1</sup> *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) paras 75-77.

<sup>2</sup> *Avnit v First Rand Bank Ltd* (20233/14) [2014] ZASCA 132 (23 September 2014) at paragraph 5.

See also *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and another* 2002 (6) SA 150 (C).

- 3.15 The investigation required an exploration of the conduct of the senior executives of the OCJ and the former Chief Justice, stemming as far back as 2015, to determine if their conduct was improper. The Public Protector accordingly decided to exercise her discretion in favour of this complaint. Alive to all these reasons, it is concluded that it is in the interests of justice to investigate and determine the merits or demerits thereof.
- 3.16 In the case between *South African Bureau of Standards v The Public Protector*<sup>3</sup>, the North Gauteng High Court held that, *as with most claims and complaints, there is for good reason, time-frames within which such must be instituted or laid. In this instance, the Public Protector Act has set a time-limit of 2 years. Entertaining a complaint which is older than 2 years certainly calls for exceptional circumstances. The underlying reason for time-frames is the trite maxim; justice delayed is justice denied. Underpinning this principle is the prejudice parties suffered when time has lapsed. To mention, but a few; no finality of a matter, evidence lost, memories failing and legislation and policies evolving.*
- 3.17 Similarly, in the case between *Gordhan v Public Protector and Others*<sup>4</sup> the North Gauteng High Court held that, *“in view of the provisions of section 6(9) and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this complaint”.*
- 3.18 The closing report deals with the alleged irregular appointments of senior staff, fraud, corruption, mismanagement and abuse of funds allocated to the Office of the Chief Justice (OCJ) made by the anonymous Complainant.

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<sup>3</sup> [2019] ZAGPPHC 101.

<sup>4</sup> [2019] JOL 45246 (GP).

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#### **4. ISSUES IDENTIFIED FOR INVESTIGATION**

- 4.1 Based on the assessment and analysis of the complaint, the following issues were identified to inform and focus the investigation:
- 4.1.1 Whether the OCJ followed proper recruitment processes in the appointment of the Chief Financial Officer, Mr Cassie Coetzer, and if not, whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;
- 4.1.2 Whether the OCJ followed proper recruitment processes in the appointment of Mr Nathi Mncube to the post of Chief Director: Court Administration at salary level 16, and if not, whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;
- 4.1.3 Whether the OCJ remunerated Chief of Staff, Mr Sello Chiloane at a higher salary notch than what his position qualified them for, and if so, whether this resulted in financial misconduct, which amounted to fruitless and wasteful expenditure;
- 4.1.4 Whether the OCJ remunerated the Director: Internal Audit, Mr Ranako Mabunda at a higher salary notch than what his position qualified him for, and if so, whether this resulted in financial misconduct in terms of section 81 of PFMA;
- 4.1.5 Whether the OCJ followed proper procurement processes in the appointment of service providers, in particular Indaba Travel Agency (Travel Agency), after being the travel agency for the Constitutional Court over a period of 20 years prior to the current seven (7) years of the OCJ, and if not, whether this amounted to improper

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

4.1.6 Whether the Travel Agency Company's B-BBEE status is suspicious as their black female partner from Durban is basically a silent partner and not a full owner in the company; and

4.1.7 Whether the OCJ improperly processed Subsistence and Travel Allowance payments for its employees, and if so, whether this amounted to financial misconduct in terms of section 81 of the PFMA.

## **5. THE INVESTIGATION**

### **5.1 The investigation process**

5.1.1 The Public Protector conducted a preliminary investigation into the matter in terms of section 7(1) of the Public Protector Act, 1994, to determine the merits of the complaint and also to determine how the matter concerned should be dealt with.

5.1.2 The investigation process included correspondence and the exchange of documentation as well as meetings between the Public Protector and the OCJ, through the Secretary General (SG), Ms Memme Sejosengwe (Ms. Sejosengwe).

### **5.2 Approach to the investigation**

5.2.2 The approach to the investigation included analysis of all relevant documents and correspondence were also obtained and analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the investigation.

- 5.2.3 The investigation was approached using an enquiry process that seeks to find out:
- (a) What happened?
  - (b) What should have happened?
  - (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to a violation of the Executive Ethics Code?
  - (d) 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 there is merit to the alleged recruitment, procurement and financial irregularities within the OCJ.
- 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 the OCJ to prevent violation of the applicable legal prescripts.

### 5.3 The Investigation Process

- 5.3.2 In line with section 7(4)(b) of the Public Protector Act, 1994, and the principles enunciated in the matters between the *Public Protector v Mail and Guardian*<sup>5</sup>, as well as *Mdwaba Mthunzi v Nonxuba Zuko*<sup>6</sup>, on 15 November 2019, a letter in terms of the section supra was issued to the Secretary General of the OCJ, Ms Mmeme Sejosengwe requesting her to submit a detailed response to the

<sup>5</sup> (422/10 [2011] ZASCA 108 (1 June 2011))

<sup>6</sup> [2018] ZAGPJHC 44 (9 March 2018)

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allegations made by the Complainant, as well as documents and/or information relevant to the matter under investigation by the Public Protector.

- 5.3.3 Ms Sejosengwe submitted a response to the Notice in terms of section 7(4)(b) of the Act on 23 December 2019, as well as a copies of the supporting documents as listed in the letter to the OCJ dated 15 November 2019.
- 5.3.4 On 04 February 2020, a consultative meeting was held between the Public Protector and the SG of OCJ, Ms Sejosengwe, wherein the latter took the Public Protector and the investigation team through the OCJ's response and supporting documents.
- 5.3.5 On 24 February 2020, as resolved in the above meeting of, the OCJ through the SG responded to the section 7(4)(b) Notice and submitted more documentation relevant to the issues under investigation.
- 5.3.6 All relevant documents and correspondence were obtained and analysed and relevant laws, policies and related prescripts were considered and applied throughout the investigation.
- 5.3.7 Consequently, on 08 June 2022, a Notice in terms of Rule 41(1) of the Public Protector Rules, 2018, as amended, was issued to the anonymous Complainant.
- 5.3.8 Notwithstanding the above, the Complainant failed to submit representation to the Discretionary Notice issued in terms of terms of rule 42(1) of the Public Protector Rules within the prescribed timeframe.

## 5.4 The Key Sources of Information

### 5.4.1 Documents

- 5.4.1.1 A copy of the Complainant's complaint document dated 28 October 2019;

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- 5.4.1.2 Copies of letters addressed to the OCJ, National Treasury, Auditor-General of South Africa and the Minister of DoJCD on various dates in 2019;
  - 5.4.1.3 A copy of OCJ's approved Organisational Structure;
  - 5.4.1.4 A copy of OCJ's approved Salary Structure;
  - 5.4.1.5 Copies of Recruitment documents in respect of Mr CN Coetzer;
  - 5.4.1.6 Copies of Recruitment documents relating to Mr NV Mncube;
  - 5.4.1.7 Copies of Recruitment documents relating to Mr SS Chiloane;
  - 5.4.1.8 Copies Recruitment documents in respect of RE Mabunda;
  - 5.4.1.9 Copies of Bid/procurement documents in relation to Indaba Travel Agency contract award;
  - 5.4.1.10 A copy of DPSA Circular 19 of 2019;
  - 5.4.1.11 A copy of a Directive on the Implementation of Competency-Based Assessments for Public Service SMS Members;
  - 5.4.1.12 Copies of various certificates by the Registrar of Companies and CCs on 22 November 2019 in respect Indaba Global Travel Agency;
  - 5.4.1.13 A copy of amended founding statement by CIPRO dated 24 May 2012;
  - 5.4.1.14 A copy of OCJ's SCM Policy; and
  - 5.4.1.15 Copies of the OCJ's Auditor General's Annual reports for 2016/17; 20017/18 and 2018/19.

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#### 5.4.2 **Correspondence Sent and Received**

- 5.4.2.1 A copy of a the Public Protector’s letter issued in terms of section 7(4)(b) of the Public Protector Act, 1994 dated 15 November 2019, addressed to the OCJ’s Secretary General, Ms Memme Sejosengwe;
- 5.4.2.2 A copy of a letter dated 23 December 2019 from Ms Sejosengwe addressed to the Public Protector in a response to the Notice in terms of section 7(4)(b) of the Act, 1994 on 15 November 2019;
- 5.4.2.3 A copy of the Public Protector’s second letter issued in terms of section 7(4)(b) of the Act from the Public Protector Act dated 4 February 2020, addressed to the Ms Sejosengwe;
- 5.4.2.4 A copy of a letter dated 24 February 2020 from Ms Sejosengwe addressed to the Public Protector in response to the letter issued on 4 February 2020 in terms of section 7(4)(b) of the Public Protector Act, 1994;
- 5.4.2.5 A copy of a Notice in terms of Rule 41(1) of the the Public Protector Rules dated 08 June 2022 addressed to the Complainant affording him the opportunity to make representations in connection with the intended closure of the file due to the unsubstantiated issues.

#### 5.4.3 **Legislation and other prescripts**

- 5.4.3.1 The Constitution of the Republic of South Africa, 1996;
- 5.4.3.2 The Public Protector Act No. 23 of 1994;
- 5.4.3.3 The Public Financial Management Act No.1 of 1999;



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- 5.4.3.4 The Public Service Act, 1994 [Act No. 103 of 1994];
- 5.4.3.5 The Broad-Based Black Economic Empowerment Amendment Act 46 of 2013;
- 5.4.3.6 The Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
- 5.4.3.7 The Public Service Regulations (PSR), 2016;
- 5.4.3.8 The National Treasury Regulations;
- 5.4.3.9 The National Treasury Practice Note 4, section 2 of 2003;
- 5.4.3.10 The Office of the Chief Justice Supply Chain Management Policy, 2015.
- 5.4.4 **Websites**
- 5.4.4.1 [www.publicprotector.org](http://www.publicprotector.org);
- 5.4.4.2 [www.ocj.gov.za](http://www.ocj.gov.za);
- 5.4.4.3 [www.agsa.org.za](http://www.agsa.org.za);
- 5.4.4.4 [www.cipc.gov.za](http://www.cipc.gov.za);
- 5.4.5 **Case Law**
- 5.4.5.1 *Public Protector v Mail and Guardian (422/10 [2011] ZASCA 108 (1 June 2011))*;
- 5.4.5.2 *Mdwaba Mthunzi v Nonxuba Zuko [2018] ZAGPJHC 44 (9 March 2018)*;
- 5.4.5.3 *South African Bureau of Standards v The Public Protector 34290/15A [2019] ZAGPPHC 101 (27 March 2019)*;

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- 5.4.5.4 *Gordhan v Public Protector and Others [2020] ZAGPPHC 777 (17 December 2020);*
- 5.4.5.5 *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) (18 December 2013);*
- 5.4.5.6 *S v Tshotshoza and Others (18/2009) [2009] ZAGPPHC 172; 2010 (2) SACR 274 (GNP) (17 April 2009).*

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

- 6.1 Whether the OCJ followed proper recruitment process in the appointment of Mr Cassie Coetzer, the Chief Financial Officer, and if not, whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.**

### Common cause

- 6.1.1 Mr Cassie Coetzer was appointed to the position of the Chief Financial Officer by the OCJ on 01 November 2017.

### Issues in dispute

- 6.1.2 The issue to be determined is whether the said appointment was in line with the recruitment prescripts and procedures.

- 6.1.3 On 23 December 2019, the Secretary General (SG), Ms Memme Sejosengwe (Ms. Sejosengwe) submitted a detailed response and documentation in refuting the anonymous Complainant's allegations.
- 6.1.4 According to the SG, the post of Chief Financial Officer (CFO) was advertised with a closing date of 19 June 2017 as per the requirements stipulated in section 65(5) of the Public Service Regulations, 2016. Mr CN Coetzer applied for the position and was the successful candidate. He accepted the offer to be appointed as CFO with effect from 01 November 2017. A competitive recruitment process was followed leading to the appointment of Mr Coetzer.
- 6.1.5 According to the recruitment record provided by the OCJ in respect of the CFO's post which included advertisement for the post, shortlisting record, interview panel members, scoring sheet reflected below, as per the requirements stipulated in Regulation 65(5) of the Public Service Regulations, 2016, the post was advertised on 5 June 2017 as per Reference 2017/14/OCJ with a closing date of 9 June 2017, which was extended to a closing date of 19 June 2017. A total of 69 applications were received and 9 candidates were shortlisted, with eight being interviewed for consideration to be appointed to the post.
- 6.1.6 The following nine (9) candidates were shortlisted and invited for interviews which were held on 14 August 2017:

| <b>Name</b>          | <b>Race and Gender</b> | <b>Weighted Total</b> |
|----------------------|------------------------|-----------------------|
| Mr Cassie Coetzer    | White Male             | 68.4                  |
| Mr David Mathunjwa   | African Male           | 56.6                  |
| Ms Pauline Mojaki    | African Female         | 55.2                  |
| Mr Victor Senna      | African Male           | 53.0                  |
| Mr Mphiwe Makhathini | African Male           | 47.9                  |

|                         |                |           |
|-------------------------|----------------|-----------|
| Mr Lefoka Motlhabedi    | African Male   | 35.6      |
| Ms Sarika Lakraj-Naidoo | Indian Female  | 31.8      |
| Ms Mogadima Masia       | African Female | 22.4      |
| Ms B Rutgers            | White Female   | DN Attend |

6.1.7 Mr Coetzer was recommended by the panel and approved on 16 October 2017 by the SG for appointment to the position of the CFO at salary level 14, notch R1 327 962 00, whilst Mr Mathunjwa was recommended and approved as the second best candidate should Mr Coetzer decline the appointment.

6.1.8 The Panel consisted of the following officials:

| Name                   | Rank                                  | Capacity                 | Level |
|------------------------|---------------------------------------|--------------------------|-------|
| Dr G Moshoeu           | DDG: Corporate Services               | Chairperson              | 15    |
| Judge President Mlambo | JP Gauteng Division of the High Court | Panel Member             | 16    |
| Ms L Rossouw           | CFO: DOJ&CD                           | Panel Member             | 15    |
| Ms N Mokoena           | DDG: DS&T                             | Panel Member             | 15    |
| Ms S Gideon            | DD: HRP                               | Secretary/Representative | 11    |

6.1.9 The SG indicated that Mr Coetzer reported directly to her since his appointment as the CFO and his performance is said to be satisfactory as per the performance management system applicable in the OCJ.

6.1.10 Regarding the allegation that since Mr Coetzer's appointment, the OCJ has incurred fruitless and wasteful expenditure, the SG averred that as Accounting Officer, she reported on a regular basis to the Minister of Justice and Correctional Services, National Treasury and OCJ Audit and Risk Committee about all the relevant and prescribed aspects of the finances of the department.

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- 6.1.11 In addition, she also referred the Public Protector to the Auditor General's (AGSA) reports for the past two financial years as reflected in the Annual Reports of the OCJ, which are public documents that clearly set out the OCJ's healthy position in relation to financial management.
- 6.1.12 In support and confirmation of the foregoing, the investigation team independently obtained and considered the Auditor General's Annual reports for the 2016/17, 2017/2018 and 2019/20 financial years preceding the allegation of fruitless and wasteful expenditure and no findings were made against the OCJ.
- 6.1.13 The Notes to the Annual Financial Statements for 2016/17 reflected under paragraph 24.1 on Reconciliation of Fruitless and Wasteful Expenditure relating to the current year that it was 20 (R'000), which was 18 for cancelled flights due to cancelled meeting- matter has been reported and investigated, awaiting condonation. 1 relates to no show - matter reported and condoned, Head of unit to request official to pay. 1 relates to overdue account-Awaiting condonation as matter has been resolved and paid.
- 6.1.14 The Notes to the Annual Financial Statements for 2017/18 reflected under paragraph 25.1 on Reconciliation of Fruitless and Wasteful Expenditure relating to the current year that it was 12 (R'000) which was for no show (Accommodation and car hire) – matter has been investigated and condoned, recovery recommended.
- 6.1.15 The Notes to the Annual Financial Statements for 2018/19 reflected under par 25.1 on Reconciliation of Fruitless and Wasteful Expenditure relating to the current year that it was negative (zero).

Applicable law

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## Public Service Regulations (PSR), 2016

- 6.1.16 Regulation 65(5) provides for the process to be followed when advertising outside the department. The department shall also advertise in the public service vacancy circular issued by the Department of Public Service and Administration. It provides as follows:

*“(6) An advertisement for a post shall not unfairly discriminate against or prohibit any suitably qualified person or employee from applying;*

....

*(7) A funded vacant post shall be advertised within six months after becoming vacant and be filled within twelve months after becoming vacant.”*

....

## Public Financial Management Act No.1 of 1999

- 6.1.17 The purpose of the Act is to regulate financial management in the national and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively, to provide for the responsibilities of persons entrusted with financial management in those governments, and to provide for matters connected therewith.
- 6.1.18 OCJ is a national department and is therefore required to comply with the provisions of the PFMA.
- 6.1.19 Section 1 of the PFMA defines irregular expenditure as:

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*“...expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including (a) this Act...”*

- 6.1.20 Section 38(1)(b) provides that, *“The accounting officer of a department, trading entity or constitutional institution is responsible for effective, efficient, economic and transparent use of the resources of the department, trading entity or constitutional institution”*.
- 6.1.21 Section 38(1)(c)(ii) provides that, *“The accounting officer of a department, trading entity or constitutional institution must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct”*.
- 6.1.22 Section 38(1)(k) provides that, *“The accounting officer of a department, trading entity or constitutional institution must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person”*.
- 6.1.23 Section 57 of the Act entrusts other officials of the entity with responsibilities and provides that an official of a public entity:
- (a) “must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;*
  - (b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility;*

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- (c) *must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*
- (d) *must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and*
- (e) *is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility."*

6.1.24 Following analysis of the documentary evidence adduced above, relating to when the post became vacant and the steps taken by the OCJ to advertise, shortlist, interview and appoint a suitable candidate, when weighed against the applicable legal prescripts it was found to be well in conformity with the above applicable legislative imperatives.

6.1.25 The recruitment process undertaken by the OCJ to effect Mr Coetzer's appointment to the CFO's position was therefore in line with Regulation 65(5) of the Public Service Regulations, 2016 as highlighted above.

### Conclusion

6.1.26 Having regard to the investigation conducted in the matter and the evidence adduced, it can be confirmed that the appointment of Mr Coetzer was through a competitive process, in line with the Public Service Regulations as there was advertising, shortlisting, interviews of candidates prior to the recommendation for his appointment by the OCJ.



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- 6.1.27 Proof in a form of all the recruitment documents, commencing with internal memoranda, circular, copy of advertisement, shortlisting matrix and the interview panel's names, their scoring on how the candidates performed as well as the recommendation for the best candidate's appointment.
- 6.1.28 It may thus be concluded that there was no financial misconduct with regard to the recruitment of Mr Coetzer by the OCJ as it was conducted in line with legislation and all other prescripts regulating such process. Furthermore, evidence adduced confirms that the OCJ continues to ensure that internal controls are in place as part of its risk management responsibilities. The financial state of the OCJ does not fall and fit into the definition of financial misconduct as provided for in the PFMA.
- 6.1.29 The AGSA's reports for the 2016/17, 2017/2018 and 2019/20 financial years were also sourced and analysed by the investigation team, and no anomalies and irregularities were picked up and flagged by the AGSA to suggest any financial misconduct on the part of OCJ.
- 6.2 **Whether the OCJ did not follow proper recruitment process in the appointment of Mr Nathi Mncube to the post of Chief Director: Court Administration at a salary level 16, and if so, whether this amounted to maladministration and improper conduct.**

Common cause issues

- 6.2.1 Mr Nathi Mncube was appointed to the position of the Chief Director: Court Administration by OCJ in 2015.

Issues in dispute

- 6.2.2 The issue to be determined is whether Mr Ncube's appointment was irregular, and whether he was appointed at an incorrect salary level 16 which is at the level of a Deputy Minister instead of an appropriate salary level of a Chief Director.

Responses received from OCJ

- 6.2.3 On 23 December 2019, the SG submitted a detailed response and documentation in refuting the anonymous Complainant's allegations.
- 6.2.4 The SG indicated that upon compiling this response to the allegations about this employee, she was advised (to her surprise) that documentation relating to the recruitment process for the post of Chief Director: Court Administration, as well as Mr Mncube's subsequent departmental transfer, are missing from the records of the Human Resources and Development Unit.
- 6.2.5 The SG said that she caused an inquiry to be undertaken in an effort to ascertain what happened to the missing documents, which regrettably did not yield any positive results, but that she would further pursue this matter. In view thereof, the OCJ has had to rely mostly on memory in reconstructing the sequence of events regarding the recruitment process and the departmental transfer of Mr Mncube, which is outlined below:
- 6.2.5.1 The post of Chief Director: Court Administration became vacant on 01 July 2014, following the resignation of the incumbent. The post was advertised as per Reference 2014/60/OCJ with a closing date of 15 August 2014. As no suitable candidates could be identified, the post was re-advertised as per Reference 2014/70/OCJ with a closing date of 19 November 2014. Again, no possible candidates could be identified following the re-advertisement.

6.2.5.2 According to both advertisements, the salary scale for the post was R988 152 00 – R1 181 469 00.

6.2.6 However, in the second advisement the number of key performance areas (KPA's) had been increased to fourteen (14) as against the eight (8) in the initial advertisement. The following new KPA's were added:

- (1) Manage the provision of administrative support for the Superior Courts including support to the Judges Presidents to exercise their legal mandate;
- (2) Oversee the delivery of support functions provided by OCJ Provincial Service Centers including the supervision of Supreme Courts Operations;
- (3) Provide institutional secretariat services and stakeholder relations management;
- (4) Provide advice and manage the transition relating to the recent transfer of Superior Courts functions from the Department of Justice and Constitutional Development to the Office of the Chief Justice;
- (5) Guide the development of court modernization initiatives aimed at enhancing courts efficiency; and
- (6) Enhance the information management capabilities for the entire court system and administration.

6.2.7 In paragraph 4.3 of the SG's response, she stated that during the time of the two above-mentioned advertisements, in consultation with the Judiciary, the scope of responsibilities of the Chief Director: Court Administration, consequently expanded extensively, based on the following:

- a) *The impact of the operationalisation of the Superior Courts Act;*

- b) *The imminent transfer of the administrative responsibilities of the Superior Courts from the DoJ&CD to the OCJ (approved by Cabinet in September 2014);*
- c) *Expansion of functional scope and span of control due to transfer above entailed inter alia, transfer of 8 (eight) Director: Court Operations (and court staff) that will directly report to the Chief Director: Court Administration; including the establishing of direct reporting lines for two additional Directors: Constitutional Court and Director: Supreme Court of Appeal to the Chief Director: Court Administration;*
- d) *Establishment of OCJ Provincial Service Delivery Centers for each High Court Division;*
- e) *Reconfigure a Directorate for a Judicial Case Flow Management System for Courts in line with the 17<sup>th</sup> Constitution Amendment Act and the Superior Courts Act and the revamping of workflow processes for quasi-judicial functions;*
- f) *Re-alignments of Court Managers' roles and their reporting functions in line with the Superior Courts Act;*
- g) *Establish a national Directorate: Court Performance to support the Judiciary with statistics/court information management for their accountability;*
- h) *The integration of the responsibilities of the Chief Director: Court Administration and that of the Spokesperson for the Judiciary, the latter post which was previously occupied by a Chief Director (instead of a separate Spokesperson at the level of Chief Director).*

6.2.8 Due to the non-response to the advertisements by any potential candidates, a process of engaging potential candidates with the required experience within the justice system was embarked on, with a view to a possible transfer to the OCJ. During these engagements, Mr Nathi Mncube, then an employee of the National Prosecuting Authority (NPA) was identified as a suitable candidate for the position of Chief Director: Court Administration, as he was legally qualified,

had knowledge and experience in court operations, case management, prosecution, legal services and project management. In addition, he was responsible for stakeholder relations management, media relations and being the Spokesperson for the NPA located in the office of the National Director of Public Prosecutions (NDPP). As alluded to in paragraph 4.3 (above) of the SG's response, one of the critical skills sought by the OCJ as identified by the Judiciary, was a need for a Spokesperson.

- 6.2.9 Consequently, in line with section 14(1) read with section 14(2) of the PSA, the possibility of a departmental transfer was in principle engaged on and agreed to between the SG of the OCJ, Ms Sejosengwe and the NDPP, Mr Mxolisi Nxasana. Thereafter, the OCJ and the NPA engaged with Mr Mncube on the possible departmental transfer.
- 6.2.10 In this regard correspondence was exchanged between Mr Mxolisi Nxasana, the NDPP and the SG of the OCJ through a letter dated 15 December 2014 requesting for Mr Mncube's transfer from the NDPP to the OCJ with effect from 1 January 2015.
- 6.2.11 At that stage, Mr Mncube was on salary package R990 156.00 per annum on the Occupation Specific Dispensation (OSD). In order to attract Mr Mncube as a part of a head hunting process by the OCJ, and taking into account the dual and expanded responsibilities as outlined in paragraph 4.3 alluded to above, he was required to perform, the OCJ offered him a salary package of R1 201 713 per annum as member of the Senior Management Service (SMS). Mr Mncube agreed to the departmental transfer, accepted the salary offer and assumed duty in the OCJ on 19 January 2015.
- 6.2.12 Mr Mncube joined the OCJ in January 2015 already in possession of a Bachelor of Law degree with 19 years' experience within the justice system.

Applicable law

**Public Service Act, 1994 [Act No. 103 of 1994]**

6.2.13 In terms of section 14(1) Subject to the provisions of this Act, every officer or employee may, when the public interest so requires, be transferred from the post or position occupied by him or her to any other post or position in the same or any other department, irrespective of whether such a post or position is in another division, or is of a lower or higher grade, or is within or outside the Republic.

6.2.14 Furthermore, in terms section 14 (2) of the PSA (a) “ *The transfer of an officer or employee from one post or position to another post or position may, subject to paragraphs (b), (c) and (d) of this subsection and subsection (3) (d), be made on the authority of the person having the power to transfer,*

*(b) In the case of a transfer from one department to another department the approval of the persons who in respect of each of those departments have the power to transfer, shall first be obtained.”*

*“(1) Employees shall be paid the salaries and allowances in accordance with the salary scale and salary level determined by the Minister in terms of section 3 (5).*

*(2) An executive authority may, only if it is allowed by regulation and to the extent prescribed-*

*(a) grant employees or classes of employees of the relevant department on appointment or transfer salaries higher than the*

*minimum amounts of the appropriate salary levels of the applicable salary scales;*

- (b) grant employees or classes of employees of the relevant department special advancement in salaries within the salary level of the salary scale applicable to them; and*
- (c) grant and employee of the relevant department special advancement in salary within the salary level of the salary scale applicable to him or her or grant him or her a salary in accordance with a higher salary level or any other reward, if he or she has exceptional ability or special qualifications or has rendered meritorious service and it is in the public interest.”*

6.2.15 Section 37 of the PSA:

*“(1) Employees shall be paid the salaries and allowances in accordance with the salary scale and salary level determined by the Minister in terms of section 3 (5).*

*(2) An executive authority may, only if it is allowed by regulation and to the extent prescribed-*

- (a) grant employees or classes of employees of the relevant department on appointment or transfer salaries higher than the minimum amounts of the appropriate salary levels of the applicable salary scales;*
- (b) grant employees or classes of employees of the relevant department special advancement in salaries within the salary level of the salary scale applicable to them; and*

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*(d) grant an employee of the relevant department special advancement in salary within the salary level of the salary scale applicable to him or her or grant him or her a salary in accordance with a higher salary level or any other reward, if he or she has exceptional ability or special qualifications or has rendered meritorious service and it is in the public interest.”*

6.2.16 Upon analysis of the documentary evidence adduced above, relating to when the post first became vacant and the steps taken by the OCJ to engage with the NDPP in an endeavour to find a suitable candidate, which was followed by external advertisement to attract a wide pool of candidates from which they would select, before finally resorting to internal process of requesting or head hunting for transfer of a suitable candidate from the NPA, all these were found to be well in conformity with the above applicable legislative imperatives as highlighted above, namely sections 14(1) and 14(2) of the PSA.

6.2.17 According to the power or duty being delegated by the Minister to the Secretary General in terms of the Public Service Act, relating to human resources in the Public Service, the SG has been delegated to effect approvals, including the powers referred to in section 37, up to and including level 14.

6.2.18 Therefore, the recruitment process undertaken by the OCJ to effect Mr Mncube’s transfer to the Chief Director: Court Administration’s position was therefore in line with the relevant legal prescripts as highlighted above.

### Conclusion

6.2.19 The SG of the OCJ as the Accounting officer (with delegated power of appointment, promotion or transfer conferred to him or her by the DoJ&CD



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- Minister). The SG requested for the transfer of Mr. Mncube to the OCJ from the NPA.
- 6.2.20 This was subsequent to the external advertisement process of engaging potential candidates with the required experience within the justice system was embarked on, with a view to a possible transfer to the OCJ.
- 6.2.21 Mr Nathi Mncube, was then identified as a suitable candidate for the position of Chief Director: Court Administration, as he was legally qualified, had knowledge and experience in court operations, case management, prosecution, legal services and project management. In addition, he was responsible for stakeholder relations management, media relations and being the Spokesperson for the NPA located in the office of the NDPP.
- 6.2.22 Mr Mncube was also imbued with one of the critical skills sought by the OCJ as identified by the Judiciary, that of a Spokesperson.
- 6.2.23 The Parties, the SG of the OCJ and the NDPP then agreed on a possibility of a departmental transfer of Mr Mncube, which he was then engaged on resulting into the subsequent departmental transfer.
- 6.2.24 The transfer of Mr Mncube from the NPA to the OCJ was the result of negotiations and agreement between the parties referred to above represented by Mr Nxasana and Ms Sejosengwe and Mr. Mncube on 15 December 2014
- 6.2.25 Having regard to the investigation conducted in the matter, the evidence and information obtained therewith, it may be safely concluded that the transfer of Mr Mncube from the NPA to the OCJ was conducted in line sections 37, 14(1) read with section 14(2) of the Public Service Act and all other prescripts

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regulating the transfer of personnel in the public service applicable to the OCJ and the NPA.

- 6.2.26 Albeit a transfer, it can be confirmed from the evidence adduced that the appointment of Mr Mncube was done through a competitive recruitment process, as he was not the only candidate who would have been considered for appointment by the OCJ, had there been other candidates who responded to the two (2) advertisements for the post. This then led to negotiation process between the NPA and OCJ, and the consequent transfer of Mr Mncube to the OCJ.
- 6.2.27 Mr Mncube's remuneration was also in line with the Occupation Specific Dispensation (OSD) which relate to one's years of experience and critical skills which he possessed and was motivated for in the correspondence exchanged between the OCJ and the NPA.
- 6.2.28 It was also based on the increased scope of work attributable to the increase in the number of KPAs as acknowledged in the letter of appointment by the SG that there were improved conditions to Mr Mncube's salary package.
- 6.3 **Whether the OCJ remunerated Chief of Staff, Mr Sello Chiloane at a higher salary notches than what his position qualified them for, and if so, whether this resulted in financial misconduct, which amounted to fruitless and wasteful expenditure.**

Common cause

- 6.3.1 Mr Chiloane was appointed to the position of Chief of Staff.

Issues in dispute

- 6.3.2 The issue to be determined is whether Mr Chiloane is being remunerated at a higher salary than what his position qualifies him for, i.e. earning a salary of a Minister while occupying a Chief Director position.

Response received from OCJ

- 6.3.3 According to the response received from the SG, the OCJ refuted the allegations made by the anonymous Complainant, and provided supporting documentation in that regard.
- 6.3.4 The SG stated that Mr Sello Chiloane (Mr Chiloane) was initially seconded from the Department of Justice and Constitutional Development (DoJ&CD) to the OCJ on 01 March 2010, was later appointed as Acting Chief Director: Judicial Policy and Research with effect from 02 April 2013, and was subsequently departmentally transferred from the DoJ&CD to the OCJ with effect from 13 July 2016.
- 6.3.5 According to her, at the time of his departmental transfer, Mr Chiloane was on salary package R1 192 059 on the Occupation Specific Dispensation (OSD). *(The salary package of R1 174 446 per annum in the memorandum which is included in the attached supporting documents, should be disregarded as it was erroneously stated. This amount is lower than what Mr Chiloane earned at that time).*
- 6.3.6 However, as a means of retaining his critical skills within the OCJ as envisaged by Regulation 44(1) to (4) of the PSR, 2016, it was approved by the SG that Mr Chiloane be remunerated on salary package of R1 246 515 per annum.
- 6.3.7 Financial Implications on Mr Chiloane's remuneration:

| <b>Current Notch</b> | <b>Proposed Notch</b> | <b>Difference</b> | <b>% Increase</b> |
|----------------------|-----------------------|-------------------|-------------------|
| <b>R 1 174 446</b>   | <b>R 1 246 515</b>    | <b>R72 069</b>    | <b>6.1%</b>       |

6.3.8 Furthermore, that on 23 May 2017, Mr Chiloane was transferred to the Private Office of Chief Justice to fulfil the responsibilities as Chief of Staff. This position made Mr Chiloane entitled to a non-pensionable allowance of R6760 per month and a once-off clothing allowance of R6360 applicable to certain officials in Private Offices. Mr Chiloane did not receive an increase salary package as a result of this internal transfer in the OCJ.

6.3.9 The SG further submitted documentation on which the OCJ based their rebuttal of the allegations, which are the OCJ's Remuneration Policy, the salary progression in respect of the Mr Chiloane.

6.3.10 Mr Chiloane was required to perform the following functions:

| <b>Original Functions</b>   | <b>Additional Functions</b>                          |
|-----------------------------|--|
| Regulatory compliance       | Speed writing  |
| Research and Legal Services | Judicial Support                                     |
| Judiciary Policy            | Research support on international judicial relations |

Applicable law

**Public Service Act, 1994 [Act No. 103 of 1994]**

6.3.11 In terms of section 14(1), *“Subject to the provisions of this Act, every officer or employee may, when the public interest so requires, be transferred from the post or position occupied by him or her to any other post or position in the same or any other department, irrespective of whether such a post or position*

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*is in another division, or is of a lower or higher grade, or is within or outside the Republic.”*

6.3.12 Furthermore, in terms section 14(2) of the PSA:

*“(a) The transfer of an officer or employee from one post or position to another post or position may, subject to paragraphs (b), (c) and (d) of this subsection and subsection (3) (d), be made on the authority of the person having the power to transfer,*

*(b) In the case of a transfer from one department to another department the approval of the persons who in respect of each of those departments have the power to transfer, shall first be obtained.”*

6.3.13 Section 37 of the PSA:

*“(1) Employees shall be paid the salaries and allowances in accordance with the salary scale and salary level determined by the Minister in terms of section 3 (5).*

*(2) An executive authority may, only if it is allowed by regulation and to the extent prescribed-*

*(a) grant employees or classes of employees of the relevant department on appointment or transfer salaries higher than the minimum amounts of the appropriate salary levels of the applicable salary scales;*

*(b) grant employees or classes of employees of the relevant department special advancement in salaries within the salary level of the salary scale applicable to them; and*

(c) *grant and employee of the relevant department special advancement in salary within the salary level of the salary scale applicable to him or her or grant him or her a salary in accordance with a higher salary level or any other reward, if he or she has exceptional ability or special qualifications or has rendered meritorious service and it is in the public interest.”*

6.3.14 According to the power or duty being delegated by the Minister to the Secretary General, in terms of the Public Service Act, relating to human resources in the Public Service, the SG has been delegated to effect approvals, including the powers referred to in section 37, up to and including level 14.

**Public Financial Management Act No.1 of 1999 {PFMA}**

6.3.15 The purpose of the Act is to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively, to provide for the responsibilities of persons entrusted with financial management in those governments, and to provide for matters connected therewith.

6.3.16 OCJ is a national department and is therefore required to comply with the provisions of the PFMA.

6.3.17 Section 1 of the PFMA defines irregular expenditure as:

*“...expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including (a) this Act...”*

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- 6.3.18 Section 38(1)(b) provides that, *“The accounting officer of a department, trading entity or constitutional institution is responsible for effective, efficient, economic and transparent use of the resources of the department, trading entity or constitutional institution”*.
- 6.3.19 Section 38(1)(c)(ii) provides that, *“The accounting officer of a department, trading entity or constitutional institution must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct”*.
- 6.3.20 Section 38(1)(k) provides that, *“The accounting officer of a department, trading entity or constitutional institution must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person”*.
- 6.3.21 Section 57 of the Act entrusts other officials of the entity with responsibilities and provides that an official of a public entity:
- (f) *“must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;*
  - (g) *is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility;*
  - (h) *must take effective and appropriate steps to prevent, within that official’s area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*

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- (i) *must comply with the provisions of this Act to the extent applicable to that and*
- (j) *is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility."*

6.3.22 Taking into account the steps taken by the OCJ to bring about the transfer of Mr Chiloane from the DoJ&CD where he was initially employed, which was based on the reasons they advanced in their submission for his internal transfer, it is clear that his secondment was effected in conformity applicable legislative imperatives as highlighted above, namely section 15(2)(a) and (b) of the PSA as well as Regulation 62 of the PSR. These also included Regulation 44(1) to (4) of the PSR, 2016 as the basis or motivation provided for his remuneration in order to attract and retain him for his much sought-after skills in line with the OCJ's Remuneration Policy.

6.3.23 The recruitment process undertaken by the OCJ to effect Mr Chiloane's secondment to the position of Chief of Staff: Private Office of the Chief Justice was therefore in line with the relevant legal prescripts as highlighted above.

### Conclusion

6.3.24 Having regard to the investigation conducted in the matter, the evidence and information obtained therewith, it may be concluded that the transfer as well as remuneration of Mr Chiloane from the DoJ&CD to the OCJ was conducted in line with legislation and all other prescripts regulating the secondment and/or transfer of personnel in the public service applicable to the OCJ and the DoJ&CD.



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- 6.3.25 In conclusion, the SG indicated that other than these allowances, Mr Chiloane's salary progression was just like all those of other employees, in line with the OCJ's Remuneration Policy.
- 6.3.26 It may thus be concluded that there was no financial misconduct with regard to the appointment and remuneration of Mr Chiloane by the OCJ as it was conducted in line with legislation and all other prescripts regulating such process. Furthermore, the salary package which was offered to Mr Chiloane, having been detailed and motivated for in line with their Remuneration Policy, does not fall and fit into the definition of financial misconduct as provided for in the PFMA.
- 6.3.27 Analysis of the evidence adduced, the purported benefit to be derived by Mr Chiloane from his transfer to the OCJ, it only made an annual difference of R72 069 00, which was a 6.1 % salary adjustment.
- 6.3.28 Furthermore, evidence provided also confirmed that the OCJ continues to ensure that internal controls are in place as part of its risk management responsibilities.
- 6.3.29 The AGSA's Annual reports were also sourced and analysed by the investigation team, and no anomalies and irregularities were picked up and flagged by the Auditor General to suggest any financial misconduct on the part of OCJ in relation to this matter.
- 6.4 Whether the OCJ remunerated the Director: Internal Audit, Mr Ranako Mabunda at a higher salary notch than what his position qualified him for, and if so, whether this resulted in financial misconduct in terms of section 81 of PFMA.**

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Common cause issues

- 6.4.1 Mr Mabunda was appointed by OCJ as Chief Director: Internal Audit on 1 July 2019.

Issues in dispute

- 6.4.2 The issue to be determined is whether Mr Mabunda is being remunerated at a higher salary level than what his position qualifies him for.

Complainant's version

- 6.4.3 The Complainant alleged that the OCJ is remunerating the Director: Internal Audit Mr Ranako Mabunda at a Chief Director's salary despite being appointed at the level of a Director, which is way above his pay grade whilst he is not qualified to be an Auditor.

OCJ's Response

- 6.4.4 The OCJ, through the SG submitted a response to the allegations first denying the allegations and stated as follows:
- 6.4.4.1 That the post of Chief Director: Internal Audit in the OCJ was advertised as per Reference number 2019/416/OCJ with a closing date of 01 March 2019 as per the requirements stipulated in section 65(5) of the Public Service Regulations, 2016. Mr RE Mabunda applied for the position and he was the successful candidate. He accepted the offer of employment as the Chief Director: Internal Audit with effect from 01 July 2019;

- 6.4.4.2 As Chief Director: Internal Audit, Mr Mabunda is remunerated at a salary package of one million, two hundred fifty one thousand, one hundred eighty three rand (R 1 251 183) per annum, which is the commencing salary package of a Chief Director;
- 6.4.4.3 Further that Mr Mabunda is in possession for a BCom Degree which is equivalent to NQF Level 7 as recognized by the South African Qualifications Authority (SAQA). In addition, he is a member of the Institute of Internal Auditors of South Africa (professional body for auditors) and continues to be professionally certified accordingly. He therefore met the minimum qualification requirements for entry into level 14 of the Senior Management Service (SMS);
- 6.4.5 Also that prior to Mr Mabunda's appointment as Chief Director: Internal Audit, he was appointed from 01 June 2014 until 30 June 2019 as a Director: Internal Audit in the OCJ on a salary package of one million, one hundred and five thousand, six hundred and forty one rand (R1 105 641) per annum which is within the salary band of a Director. Mr Mabunda had been appointed in the OCJ from 2011 as Deputy Director: Risk Management.
- 6.4.6 The SG further submitted documentation on which the OCJ based their rebuttal of the allegations made which are the OCJ's Remuneration Policy, recruitment records and the salary progression in respect of Mr Mabunda.
- 6.4.7 According to the advertisement for the post, the requirements and KRAs were as follows:

| REQUIREMENTS | KEY RESPONSIBILITY AREAS |
|--------------|--------------------------|
|--------------|--------------------------|

|  |  |
|--|--|
| <ul style="list-style-type: none"> <li>▪ An undergraduate qualification (NQF Level 7) as recognized by SAQA;</li> <li>▪ (BComm Accounting/internal Auditing/Auditing) or equivalent, or studies towards a postgraduate qualification (NQF Level 8);</li> <li>▪ Studies towards attaining a professional certification in CIA;</li> <li>▪ Registered with professional bodies for example the Institute of Internal Audit;</li> <li>▪ 5-10 years' experience in an auditing environment; and</li> <li>▪ A valid drivers' license</li> </ul> | <ul style="list-style-type: none"> <li>▪ Develop and oversee the implementation of the Internal Audit strategy and performance plans;</li> <li>▪ Develop the Audit policies and operating frameworks;</li> <li>▪ Manage the provision of Internal Audit (IT, Performance, Governance, Compliance, Financial Audits) and Forensic Investigation services;</li> <li>▪ Provide technical advisory and secretariat support services to the Audit and Risk Committee; and</li> <li>▪ Facilitate and providing risk assessment and advice</li> </ul> |
|--|--|

6.4.8 According to the recruitment records provided by the OCJ in respect of the Chief Director: Internal Audit's post, it was advertised with a closing date of 11 January 2019 and re-advertised in the Sunday Times with a closing date of 01 March 2019. A total of 66 applications were received and out of fifteen (15) considered by the panel, four (4) candidates were shortlisted, interviewed and considered for appointment to the post.

6.4.9 The Interview Panel consisted of the following officials:

| Name | Rank | Capacity | Level |
|------|------|----------|-------|
|------|------|----------|-------|

|                    |   |                   |    |
|--------------------|---|-------------------|----|
| Ms Thulani Manzini | DDG: Corporate Services   | Chairperson       | 15 |
| Adv Willy Huma     | Chairperson of the Audit and Risk Committee (ARC)               | Panel Member      | 16 |
| Ms Pulane Mkhize   | Acting Chief Director: Internal Audit Support National Treasury | Panel Member      | 15 |
| Mr Jakes Jacobs    | Chief Director : Office of the SG of OCJ                        | Panel Member      | 15 |
| Mr Elias Moeng     | Chief Director: HRM&D   | HR Representative | 14 |

6.4.10 The following 4 candidates were shortlisted, invited for interviews which were held on 29 March 2019:

| Name          | Race and Gender | Weighted Total |
|---------------|-----------------|----------------|
| Mr RE Mabunda | African Male    | 86             |
| Mr JJ Appel   | White Male      | 64             |
| Ms ME Mmola   | African Female  | 66             |
| Mr G Labane   | African Male    | 70             |

6.4.10.1 After the interviews, the two best candidates, namely; Messrs Mabunda and Labane, underwent external competency assessments. Mr Mabunda was recommended by the panel and approved on 19 June 2019 by the Secretary General of OCJ for appointment to the position of the Chief Director: Internal Audit at salary level 14, notch one million, one hundred eighty nine thousand, three hundred thirty eight rand (R1 189 338,00) whilst Mr Labane was recommended and approved as the second best candidate should Mr Mabunda decline the appointment.

6.4.11 In addition, it was noted by the Public Protector's investigating team that, Mr. Mabunda had relevant qualifications attained from the following institutions:

| Qualification                | Institution                                     | Year Obtained     |
|------------------------------|---|-------------------|
| B Com Accounting             | University of South Africa                      | 3 May 2008        |
| Certificate : Internal Audit | The Institute of Internal Auditors South Africa | 22 September 2009 |
| Certificate: Internal Audit  | The Institute of Internal Auditors South Africa | 14 January 2009   |

#### 6.4.12 Financial Implications in Mr Mabunda's remuneration:

| Salary Notch Advertised  | Appointment Notch | Alleged paid Notch | Difference |
|--------------------------|-------------------|--------------------|------------|
| R 1 189 338 – R1 422 012 | R 1 189 338       | R 1 251 183        | R61 845    |

#### Applicable law

#### **Public Service Regulations (PSR), 2016**

6.4.13 Regulation 65(5) provides for the process to be followed when advertising outside the department. The department shall also advertise in the public service vacancy circular issued by the Department of Public Service and Administration. It provides as follows:

*“(6) An advertisement for a post shall not unfairly discriminate against or prohibit any suitably qualified person or employee from applying;*

....

(7) *A funded vacant post shall be advertised within six months after becoming vacant and be filled within twelve months after becoming vacant.*”

....

6.4.14 In terms of Regulation 43 of the Public Service Regulations:

“(2) *An executive authority shall—*

*(a) determine the grade of a post to correspond with—*

*(i) the evaluation of the job by the Minister in terms of regulation 41(2)(d) on a date determined by the Minister;*

*(ii) jobs determined in terms of regulation 42; or*

*(iii) if the job was not so evaluated or determined by the Minister, the evaluation of the job by the executive authority in terms of regulation 41(3); and (b) set the commencing salary of an employee on the minimum notch of the salary level attached to the relevant grade, unless a higher salary is awarded in terms of regulation 44.*

(3) *An executive authority shall set the salary of a permanent or temporary employee employed in a part-time capacity proportional to the salary of an equally graded full-time employee.*

(4) *If an executive authority intends to evaluate jobs or implement job evaluation results that will affect the grade of an occupation or the salary level within an occupation where such occupation is utilised by*

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*more than one department then he or she shall do so in consultation with the Minister and the Minister of Finance.”*

### **Public Financial Management Act No.1 of 1999**

- 6.4.15 The purpose of the Act is to regulate financial management in the national and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively, to provide for the responsibilities of persons entrusted with financial management in those governments, and to provide for matters connected therewith.
- 6.4.16 The OCJ is proclaimed as a national department in Gazette No. 335500 on 23 August 2010, by the President of the Republic of South Africa and is thus required to comply with the provisions of the PFMA.
- 6.4.17 Section 1 of the PFMA defines irregular expenditure as:  
*“...expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including (a) this Act...”*
- 6.4.18 Section 1 defined fruitless and wasteful expenditure as *“expenditure which was made in vain and would have been avoided had reasonable care been exercised.”*
- 6.4.19 Section 38(1)(b) provides that, *“The accounting officer of a department, trading entity or constitutional institution is responsible for effective, efficient, economic and transparent use of the resources of the department, trading entity or constitutional institution”*.



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- 6.4.20 Section 38(1)(c)(ii) provides that, *“The accounting officer of a department, trading entity or constitutional institution must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct”*.
- 6.4.21 Section 38(1)(k) provides that, *“The accounting officer of a department, trading entity or constitutional institution must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person”*.
- 6.4.22 Section 57 of the Act entrusts other officials of the entity with responsibilities and provides that an official of a public entity:
- (k) “must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;*
  - (l) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility;*
  - (m) must take effective and appropriate steps to prevent, within that official’s area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*
  - (n) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56;*  
*and*

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*(o) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility."*

6.4.23 Section 81 provides that an "Accounting Officer for a department commits an act of financial misconduct if that Accounting Officer wilfully or negligently –

2.2.8.1 *fails to comply with a requirement of section 38, 39, 40, 41 or 42; or*

2.2.8.2 *makes or permits an unauthorised expenditure, an irregular expenditure or a fruitless or wasteful expenditure."*

6.4.24 Following analysis of the documentary evidence adduced above, relating to when the post became vacant and the steps taken by the OCJ to advertise, shortlist, interview and appoint a suitable candidate, when weighed against the applicable legal prescripts it was found to be well in conformity with the above applicable legislative imperatives.

6.4.25 The recruitment process undertaken by the OCJ to effect Mr Mabunda's appointment to the position of Chief Director: Internal Audit was therefore in line with Regulation 65(5) of the Public Service Regulations, 2016 as canvassed above.

### Conclusion

6.4.26 Having regard to the investigation conducted in the matter, the evidence and information obtained therewith, it may be concluded that the appointment and remuneration of Mr Mabunda by the OCJ was conducted in line with legislation and all other prescripts regulating appointments in the public service applicable to the OCJ as canvassed above.

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- 6.4.27 The allegation that Mr Mabunda was paid at a higher salary level than what he was appointed in, was found to be untrue as the evidence indicates that Mr Mabunda's remuneration was within the level 14 salary range, as no evidence of financial misconduct could be found.
- 6.4.28 In addition, the Complainant alleged that Mr Mabunda did not possess the requisite qualifications for the post he was appointed to. However, evidence adduced by the investigation team as canvassed above in a form of his CV and qualification certificates, does not support the allegation made.
- 6.4.29 The AGSA's Annual reports for the 2016/17, 2017/2018 and 2019/20 financial years were also sourced and analysed by the Investigation Team, and no anomalies and/or irregularities were identified to suggest any financial misconduct on the part of the OCJ.
- 6.5 Whether the OCJ did not follow proper procurement processes in the appointment of Indaba Travel Agency (Travel Agency), and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.**

Common cause

- 6.5.1 Indaba Travel Agency was appointed as the preferred service provider by the OCJ to provide travel services.

Issues in dispute

- 6.5.2 The issue to be determined is whether the travel agency's appointment was in compliance with procurement process and procedures.

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Response from OCJ

6.5.3 The OCJ through the SG, submitted a response on 23 December 2019 in which it denied the existence of any impropriety in the appointment of Indaba Travel Agency by the OCJ.

6.5.4 In the response, the SG asserted as follows:

*“The tender process was concluded in compliance with the relevant prescripts. The awarding thereof was audited by the Auditor General South Africa during the 2018/19 financial year and it was found to be in compliance with the prescripts.”*

6.5.5 In support of their response, the OCJ enclosed the requested documents relating to the travel agency tender processes, and asserted that it was concluded in compliance with the relevant prescripts, including the OCJ’s Supply Chain Management Policy of 2015/2016, developed in terms of the PFMA, Treasury Regulations, PPPFA, SCM Guidelines to AOs and BEE.

6.5.6 According to the SG, the appointment of Indaba Travel was in line with the OCJ’s Procurement Plan for the 2018/19 Financial Year, which was approved on 26 March 2018, confirming the need for the service.

6.5.7 The procurement process commenced with the appointment of the Bid Committees by the SG as per memorandum dated 21 May 2018, titled: *“Request for OCJBAC to appoint the Bid Specification Committee and the Bid Evaluation Committee for the appointment of a service provider to provide travel, accommodation, and conference facilities to the OCJ for a period of thirty six months.”*

6.5.8 Consequently, about sixteen (16) members, eight (8) BSC and eight (8) BEC were issued with appointment letters by the SG for their acceptance and involvement in the procurement process.

6.5.9 The Bid Specifications Committee consisted of the following officials:

| No | Name           | Position   | Role        |
|----|----------------|--|-------------|
| 1  | Mr J Jacobs    | Chief Director: Special Projects Office of the Secretary General | Chairperson |
| 2  | Ms S Nakool    | Director: Court Administration                                   | Member      |
| 3  | Ms J Ngobeni   | Court Manager: Pretoria High Court                               | Member      |
| 4  | Ms J Mashologu | Court Manager: Land Claims Court                                 | Member      |
| 5  | Ms P Mogale    | Deputy Director: Executive Support SAJEI                         | Member      |
| 6  | Ms L Sithole   | Deputy Director: Supply Chain Management                         | Member      |
| 7  | Ms N Ntimane   | Deputy Director: Demand Management                               | Secretariat |
| 8  | Mr B Mankwane  | Assistant Manager: Demand Management                             | Secretariat |

6.5.10 The Bid Evaluation Committee consisted of the following officials:

| No | Name             | Position   | Role        |
|----|------------------|--|-------------|
| 1  | Mr R Mabunda     | Chief Director: Special Projects Office of the Secretary General | Chairperson |
| 2  | Ms B Motene      | Director: Court Administration                                   | Member      |
| 3  | Mr N Phakola     | Court Manager: Pretoria High Court                               | Member      |
| 4  | Ms Y van Niekerk | Court Manager: Land Claims Court                                 | Member      |
| 5  | Ms P Morapedi    | Deputy Director: Executive Support SAJEI                         | Member      |
| 6  | Ms T Mashifane   | Deputy Director: Supply Chain Management                         | Member      |
| 7  | Ms N Ntimane     | Deputy Director: Demand Management                               | Secretariat |
| 8  | Mr B Mankwane    | Assistant Manager: Demand Management                             | Secretariat |

- 6.5.11 Subsequently, the OCJ advertised the bid under Tender number OCJ2018/02 with a briefing session scheduled for 21 September 2018 and a closing date of 05 October 2018 at 11h00, with a Bid validity period of 120 days.
- 6.5.12 The bid was also advertised in the Government Tender Bulletin on 07 September 2018 with a validity period of 120 days, copy of which was made available to the investigation team as part of the evidence which set out the evaluation criteria as Price=90 and Preference points=10.
- 6.5.13 As part of the ToR the BSC resolved to maintain the 90/10 preferential point system because it was of the opinion that the overall cost of the travel services will exceed fifty million rand (R50 million) in thirty six (36) months as per the Implementation Guide.
- 6.5.14 According to the SG, proper procurement process was followed by the OCJ during the bid advertisement, bid evaluation and the eventual appointment of the successful bidder out of the fifteen (15) bid documents received, namely:

| No | NAME OF TENDERER   |
|----|--|
| 1  | Be-Sure Travel and Tourism (PTY) Ltd                     |
| 2  | Rennies Travel (PTY) Ltd                                 |
| 3  | Morereshi General Trading                                |
| 4  | Munlin Travel  |
| 5  | House of Travel (PTY) Ltd                                |
| 6  | Daba Daba Global Travel T/A Indaba Global Travel         |
| 7  | Hamba Umhlaba (PTY) Ltd SARS PIN                         |
| 8  | Khuseleka Travel   |
| 9  | Travel with Flair (PTY) Ltd                              |
| 10 | Tourvest Holdings 9PTY) Ltd T/A Tourvest Travel Services |
| 11 | Gemini Moon Trading (PTY) Ltd T/A XL Nexus Travel        |
| 12 | Connex Travel T/A SCD Travel                             |

|    |  |
|----|--|
| 13 | Atlantis Corporate Travel(PTY) Ltd                                 |
| 14 | Hamba Nathi Travel (PTY) Ltd                                       |
| 15 | Foundation for Professional Development (PTY) Ltd 2 TCC's Attached |

6.5.15 OCJ received responses from fifteen (15) bidders and six (6) of which were responsive based on the pre-qualification functionality points of (seventy) 70 and price preference points of 90/10.

6.5.16 During the evaluation, the following two (2) bidders failed to attain a minimum of seventy (70) points on functionality and were therefore disqualified:

| No | Name of Bidders              | Functionality |
|----|------------------------------|---------------|
| 1  | Morereshi General Trading    | 27.44         |
| 2  | Hamba Nathi Travel (PTY) Ltd | 31.64         |

6.5.17 Four (4) bidders qualified for further evaluation based on price and B-BBEE, having scored a minimum of seventy (70) points on functionality. The following bidders proceeded to the next stage for price and B-BBEE evaluation:

| No | Name of Bidders                            | Functionality |
|----|--|---------------|
| 1  | Travel with Flair                          | 71.56         |
| 2  | Tourvest Holdings (PTY) Ltd T/A Tourvest   | 70.72         |
| 3  | Gemini Moon Trading (PTY) Ltd T/A XL Nexus | 74.32         |
| 4  | Daba Daba Global Travel T/A Indaba Global  | 76.12         |

6.5.18 In the end, the overall scores for the final four (4) bidders were as follows:

| No | Name of Bidders | Bid Price | Price Points | Preference Points | Total Points | Ranking |
|----|-----------------|-----------|--------------|-------------------|--------------|---------|
|    |                 |           |              |                   |              |         |

|   |  |                   |       |    |        |   |
|---|--|-------------------|-------|----|--------|---|
| 1 | Daba Daba Global<br>T/A Indaba Global<br>Travel      | R<br>2,533,764.83 | 90.00 | 10 | 100.00 | 1 |
| 2 | Gemini Moon<br>Trading (PTY) Ltd<br>T/A Nexus Travel | R<br>2,721,584.86 | 83.33 | 9  | 92.33  | 2 |
| 3 | Travel with Flair                                    | R<br>3,162,597.83 | 67.66 | 10 | 77.66  | 3 |
| 4 | Tourvest Holdings<br>(PTY) Ltd                       | R<br>3,831,524.61 | 43.90 | 9  | 52.90  | 4 |

- 6.5.19 Consequently, the BEC recommended the appointment of Daba Daba Global Travel T/A Indaba Global Travel as the preferred service provider for travel, accommodation and conference facilities for the OCJ, for a period of thirty (36) months, with effect from 01 February 2019 to 31 January 2022. This was based on the company's lowest price and the highest B-BBEE points obtained.
- 6.5.20 The foregoing culminated into an appointment letter being sent to Indaba Global Travel signed by the SG on 30 November 2018, followed by the signing of a Service Level Agreement (SLA) between Indaba Global Travel, represented by its CEO, Mr J Stander and the OCJ, represented by the CFO, Mr C Coetzer, on 19 March 2019.
- 6.5.21 The SLA covered the scope of services to be provided by the service provider and the terms and conditions attached to the contract, which include termination of contract for default, breach by any of the parties and dispute resolution process should there be any need for that, during the existence of the travel agency contract.



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- 6.5.22 According to the SG, the awarding of the travel agency contract was above board and even when it was audited by the Auditor General during the 2019/20 financial year, it was found to be in compliance with the relevant prescripts.
- 6.5.23 The investigation team considered all the minutes of the Bid Committees referred to above, to reflect and make a determination on what was deliberated upon by the members prior to the recommendation and appointment of the preferred service provider.
- 6.5.24 The Investigation Team also considered a document titled “*Tender Final Scoring Model*” which reflected the scoring model applicable to the bid, as 90/10 whilst also showing value of lowest acceptable tender price of R2 533 764.83, by Indaba Global Travel. It had been signed by the BAC members on 5 November 2018.
- 6.5.25 The Investigation Team was provided with, and analysed a Desktop Evaluation Technical Scorecard and Compliance checklist which was for completion by all the bidders.
- 6.5.26 As part of independent evidence, the Investigation Team has since obtained the CSD Compliance History report which covers the period prior to the appointment of Indaba Travel in order to verify and confirm its tax compliance status at the time of the award of the tender.
- 6.5.27 According to the report, the service provider was only non-compliant during March 2018, subsequent to which, it then became compliant, even at the time of the award on 30 November 2018, their tax affairs were in order.

*Applicable law*

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

6.5.28 The OCJ is a national department and is subject to section 217 of the Constitution and, like all other departments, is required to discharge all of its duties and functions in accordance with the law. The OCJ's conduct should measure up to the policy and legislative prescripts that concern the procurement of goods and services in public institutions.

6.5.29 These requirements must also be understood together with the basic values governing public administration in section 195(1) of the Constitution. Section 217 of the Constitution lays down minimum requirements for a valid procurement process and provides that:

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

6.5.30 The OCJ must therefore comply with section 217 of the Constitution.

### **Public Financial Management Act No.1 of 1999**

6.5.31 The purpose of the Act is to regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively, to provide for the responsibilities of persons entrusted with financial management in those departments, and to provide for matters connected therewith.

6.5.32 The OCJ is a national department and is therefore required to comply with the provisions of the PFMA.

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6.5.33 Section 1 of the PFMA defines irregular expenditure as:

*“...expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including (a) this Act...”*

6.5.34 Section 38(1)(b) provides that, *“The accounting officer of a department, trading entity or constitutional institution is responsible for effective, efficient, economic and transparent use of the resources of the department, trading entity or constitutional institution”*.

6.5.35 Section 38(1)(c)(ii) provides that, *“The accounting officer of a department, trading entity or constitutional institution must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct”*.

6.5.36 Section 38(1)(k) provides that, *“The accounting officer of a department, trading entity or constitutional institution must enforce compliance with any prescribed conditions if the department, trading entity or constitutional institution gives financial assistance to any entity or person”*.

6.5.37 Section 57 of the Act entrusts other officials of the entity with responsibilities and provides that an official of a public entity:

*(p) “must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;*

*(q) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility;*

- 
- (r) *must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;*
- (s) *must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and*
- (t) *is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility."*

#### **National Treasury Regulations, 2005**

6.5.38 Regulation 16A3.2 provides that:

*"16A 3.2 A supply chain management system referred to in paragraph 16A.3.1 must –*

- (a) *be fair, equitable, transparent, competitive and cost effective;*
- (b) *be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*
- (c) *be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*
- (d) *provide for at least the following: –*
- (i) *demand management;*

- (ii) *acquisition management;*
- (iii) *logistics management;*
- (iv) *disposal management;*
- (v) *risk management; and*
- (vi) *regular assessment of supply chain performance.”*

6.5.39 The National Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A6.1 which reads as follows:

*16A6.1 “Procurement of goods and services either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury”.*

6.5.40 The principle of fairness, equitability, transparency, competitiveness and cost effectiveness was enunciated in the matter between ***Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency***<sup>7</sup> where the Court held as per Justice Froneman on 29 November 2013 that, *“It is because procurement so palpably implicates socio-economic rights that the public has an interest in it being conducted in a fair, equitable, transparent, competitive and cost-effective manner”.*

### Conclusion

6.5.41 Having regard to the investigation conducted in the matter, the comprehensive evidence and information obtained, it is concluded that there were no

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<sup>7</sup> (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC).

irregularities with regard to the procurement and appointment of the Indaba Travel Agency by the OCJ, as it was conducted in line with legislation and all other prescripts regulating procurement. Evidence adduced also confirms that the OCJ ensures that internal controls are in place as part of its risk management responsibilities.

6.5.42 The OCJ's Annual AGSA reports for the 2016/17, 2017/2018 and 2019/20 financial years were also sourced independently by the investigation team and analysed, and no anomalies and irregularities were established by the Auditor General to suggest any financial misconduct on the part of the OCJ.

**6.6 Whether the Indaba Travel Agency Company's B-BBEE status is suspicious as their black female partner from Durban is basically a silent partner and not a full owner in the company.**

Common cause issues

6.6.1 The Indaba Travel Agency was appointed as the preferred service provider by the OCJ as their travel agency.

Issues in dispute

6.6.2 The issue to be determined is whether the travel company's B-BBEE status and ownership were compliant with the relevant legislative requirements.

Complainant's version

6.6.3 The Complainant alleged that the Indaba Travel Agency Company's B-BBEE status is suspicious as their black female partner from Durban is basically a silent partner and not a full owner in the company.

Response from OCJ

- 6.6.4 The OCJ through the SG, submitted responses on 23 December 2019 and 24 February 2020, respectively, in which they deny the allegation and in support of the response, provided the company's bid submission to which a B-BBEE certificate that was submitted by Indaba Global Travel was attached.
- 6.6.5 Through a subsequent letter dated 3 February 2022, the CIPC was requested to provide details pertaining to the directorship of Indaba Global Travel, in order to verify and confirm their B-BBEE status.
- 6.6.6 The CIPC and the Central Supplier Database records showed that the previous and/or current ownership and/or directorship of the company was as follows:

| <b>Service Provider</b> | <b>Director Name</b>     | <b>Gender</b> | <b>Race</b> | <b>Contrib. (R)</b> | <b>Interest (%)</b> |
|-------------------------|--------------------------|---------------|-------------|---------------------|---------------------|
| Indaba Global Travel    | Indira Kalichiran        | Female        | African     | 50.00               | 50.00               |
|                         | Makhosana<br>Gugu Ngcobo | Female        | African     | 50.00               | 50.00               |

- 6.6.7 This was also confirmed by the investigation team through analysis of the records provided by the OCJ which pertain to the responses received from the service providers when they submitted their bids in response to the OCJ's Invitation to tender for the travel agency services.

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Applicable law

**Broad-Based Black Economic Empowerment Amendment Act 46 of 2013**

- 6.6.8 The Broad-Based Black Economic Empowerment Act, 2003 [Act No. 53 of 2003] (as amended) (B-BBEE Act), which amongst others, seeks to establish a legislative framework for the promotion of black economic empowerment; to empower the Minister to issue codes of good practice.
- 6.6.9 Section 1 of the B-BBEE Act provides that, *“Unless the context indicates otherwise “black people” is a generic term which means Africans, Coloureds and Indians and “broad-based black economic empowerment” means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not limited to-*
- (a) Increasing the number of black people that manage, own and control enterprises and productive assets;*
  - (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;*
  - (c) human resource and skills development;*
  - (d) achieving equitable representation in all occupational categories and levels in the workforce;*
  - (e) preferential procurement; and*



(f) *investment in enterprises that are owned or managed by black people”.*

6.6.10 Section 2(a) of the B-BBEE Act provides that, *“The objectives of this Act are to facilitate broad-based black economic empowerment by promoting economic transformation in order to enable meaningful participation of black people in the economy”.*

6.6.11 Section 9(1)(a) and (b) of the B-BBEE Act provides that, *“In order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment that may include-*

*(a) the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black empowerment entities;*

*(b) qualification criteria for preferential purposes for procurement and other economic activities”.*

### **Office of the Chief Justice Supply Chain Management Policy, 2015**

6.6.12 The purpose of this policy is to ensure that the OCJ implements the Supply Chain Management System and Procedures developed in terms of the PFMA, Treasury Regulations, Preferential Procurement Policy Framework Act (PPPFA), Supply Chain Management Guidelines to AOs and the Black Economic Empowerment (BEE). This Policy applies when the Department procures goods and services and when disposing goods that are no longer needed.

- 6.6.13 The SCM Policy came into effect on 1 April 2015, and was developed to ensure the OCJ's internal control systems for compliance with the laws and regulations, in particular pertaining to procurement processes.

Conclusion

- 6.6.14 The OCJ is a national department and is subject to the above provisions of the B-BBEE Act and like all other departments, is required to discharge all of its duties and functions in accordance with the tenets thereof.
- 6.6.15 From the evidence received from the OCJ as well the investigation team's independent research, it was confirmed through the CIPC inquiry that the company's B-BBEE status is compliant, contrary to the Complainant's allegation of the company fronting. The company's status was also confirmed at B-BBEE Certificate Level 1 as 100% female black-owned.
- 6.6.16 The Indaba Travel Agency therefore complied with the B-BBEE legislative framework as noted in the final evaluation of individual scoring of each of the 4 service providers that submitted their quotations.
- 6.6.17 The OCJ also complied with the B-BBEE legislative framework as noted in the evidence adduced in their award of the contract to Indaba Travel Agency, whilst the company's B-BBEE status was found to be above board, as they were the only company which obtained the highest B-BBEE points.
- 6.7 **Whether the OCJ improperly processed Subsistence and Travel Allowance payments for its employees, and if so, whether this amounted to financial misconduct in terms of section 81 of the PFMA.**

- 6.7.1 The anonymous Complainant did not provide sufficient information to formulate an allegation in this regard and the matter could therefore not be adjudicated upon.

## 7. FINDINGS

Having regard to the evidence as well as the regulatory framework determining the standard that should have been complied with by the OCJ and/or any other persons that were involved in the matters under investigation, the following findings are likely to be made:

### 7.1 **Whether the OCJ followed proper recruitment process in the appointment of Mr Cassie Coetzer, the Chief Financial Officer, and if not, whether this amounted to improper conduct as contemplated in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.**

- 7.1.1 The allegation that Mr Coetzer's appointment as the Chief Financial Officer by the OCJ did not follow proper recruitment processes, is **not substantiated**.
- 7.1.2 The appointment was preceded by a recruitment process which included advertisement, shortlisting, interviews as per the requirements stipulated in Regulation 65(5) of the Public Service Regulations, 2016.
- 7.1.3 From the evidence provided and analysed, Mr Cassie Coetzer applied for the position and following a competitive recruitment process, he was appointed by the OCJ to the CFO's position as the successful candidate on 1 November 2017.

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7.1.4 The conduct of the OCJ in this regard, does not constitute maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

**7.2 Whether the OCJ did not follow proper recruitment processes in the appointment of Mr Nathi Mncube to the post of Chief Director: Court Administration at a salary level 16, and if so, whether this amounted to maladministration and improper conduct.**

7.2.1 The allegation that the appointment of Mr Mncube by the OCJ, as the Chief Director: Court Administration did not follow proper recruitment process is **not substantiated**.

7.2.2 Mr. Mncube's appointment was the result of a transfer from the NPA to the OCJ, and was conducted in accordance with applicable legislation and other prescripts regulating the transfer of personnel in the public service, in particular sections 14(1) and 14(2) of the PSA.

7.2.3 The possibility of a departmental transfer was in principle engaged on and agreed to between the SG of the OCJ, Ms Memme Sejosengwe and the NDPP, Mr Mxolisi Nxasana. Thereafter, the OCJ and the NPA engaged with Mr Mncube on the possible departmental transfer, to which he agreed.

7.2.4 Mr Mncube was already in possession of a Bachelor of Law degree with 19 years' experience within the justice system when he joined the OCJ through a transfer from the NDPP with effect from 1 January 2015 on a salary notch R1 201 713, per annum as a member of the Senior Management Service (SMS). This was based on the agreement between the NDPP and the SG of the OCJ.

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- 7.2.5 According to the power or duty being delegated by the Minister to the Secretary General in terms of the Public Service Act, relating to human resources in the Public Service, the SG has been delegated to effect approvals, including the powers referred to in section 37, up to and including level 14.
- 7.2.6 Evidence adduced by the investigation team therefore confirms that Mr Mncube's transfer to the position of Chief Director: Court Administration including his remuneration, was in line with the relevant recruitment legislative prescripts.
- 7.2.7 The conduct of the OCJ in this regard, does not constitute maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
- 7.3 Whether the OCJ remunerated Chief of Staff, Mr Sello Chiloane at a higher salary notches than what his position qualified them for, and if so, whether this resulted in financial misconduct in terms of section 81 of the PFMA.**
- 7.3.1 The allegation that the Chief of Staff, Mr Chiloane is remunerated by the OCJ at a higher salary notch than what he qualified for, thus leading to financial misconduct is **not substantiated**.
- 7.3.2 Mr Chiloane's appointment was a result of a transfer from the Department of Justice and Correctional Services to the OCJ, and was conducted in accordance with applicable legislation and other prescripts regulating the transfer of personnel in the public service, in particular sections 14(1) and 14(2) of the PSA.
- 7.3.3 According to the power or duty being delegated by the Minister to the Secretary General in terms of the Public Service Act, relating to human resources in the Public Service, the SG has been delegated to effect approvals, including the powers referred to in section 37, up to and including level 14.

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7.3.4 Mr Chiloane's remuneration was based on salary package R1 192 059 per the Occupation Specific Dispensation (OSD).

7.3.5 As a means of trying to retain his critical skills within the OCJ, as envisaged by Regulation 44(1) to (4) of the PSR, 2016, it was approved that Mr Chiloane be remunerated on a salary package of R1 246 515 per annum, intended for the purpose of retaining his critical and scarce skills.

7.3.6 The investigation team has confirmed from the evidence received and analysed that Mr Chiloane's transfer to the position of Chief of Staff: including his remuneration, was in line with the relevant legislative prescripts.

7.3.7 The conduct of the OCJ in this regard, does not constitute maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

**7.4 Whether the OCJ remunerated the Director: Internal Audit, Mr Ranako Mabunda at a higher salary notch than what his position qualified him for, and if so, whether this resulted in financial misconduct in terms of section 81 of PFMA.**

7.4.1 The allegation that the OCJ remunerated Mr Mabunda, the Director: Internal Audit more than what his position qualified him for, leading to financial misconduct, is **not substantiated**.

7.4.2 Mr Mabunda's appointment was preceded by a recruitment process which included advertisement on 1 March 2019, shortlisting, interviews as per the requirements stipulated in regulations 65(5) of the Public Service Regulations. 2016.

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- 7.4.3 As Chief Director: Internal Audit, Mr Mabunda met the minimum qualification requirement for entry into level 14 of the Senior Management Service (SMS) which is remunerated at salary package R1 189 338 per annum and is the commencing salary package for a Chief Director.
- 7.4.4 Furthermore, Mr Mabunda was found to be in possession of the requisite qualifications for the post he was appointed to.
- 7.4.5 The conduct of the OCJ does not constitute maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
- 7.5 Whether the OCJ did not follow proper procurement processes in the appointment of Indaba Travel Agency (Travel Agency), and if so, whether such conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**
- 7.5.1 The allegation that the OCJ did not follow proper procurement procedures in the appointment of Indaba Travel Agency is **not substantiated**.
- 7.5.2 From the evidence received relating to the appointment of Indaba Travel Agency, it can be confirmed that it was concluded in compliance with the relevant procurement prescripts.
- 7.5.3 From the evidence considered, the awarding of a contract to Indaba Travel Agency was also audited by the Auditor General during the 2018/19 financial year, and was found to be in compliance with the applicable prescripts.

7.5.4 The conduct of the OCJ does not constitute maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

**7.6 Whether the Indaba Travel Agency Company's B-BBEE status is suspicious as their black female partner from Durban is basically a silent partner and not a full owner in the company.**

7.6.1 The allegation that Indaba Global Travel Agency's B-BBEE status is suspicious as their black female partner from Durban is basically a silent partner, and not a full owner of the company, is **not substantiated**.

7.6.2 From the evidence provided and independently sourced, the B-BBEE status of Indaba Travel Agency was verifiable and confirmed to be compliant with the relevant B-BBEE legislative framework.

7.6.3 The conduct of the OCJ in this regard, does not constitute maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

**7.7 Whether the OCJ improperly processed Subsistence and Travel Allowance payments for its employees, and if so, whether this amounted to financial misconduct in terms of section 81 of the PFMA.**

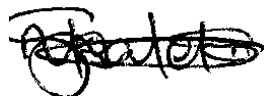
7.7.1 The anonymous Complainant did not provide sufficient information to formulate an allegation in this regard and the matter could therefore not be adjudicated upon.



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## 8. CONCLUSION

8.1 The Public Protector considers this matter as finalised and cannot take the matter any further. Should any party wish to challenge this decision they are at liberty to explore legal remedies at their disposal.



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**ADV KHOLEKA GCALEKA**  
**ACTING PUBLIC PROTECTOR OF**  
**THE REPUBLIC OF SOUTH AFRICA**  
**DATE: 30 SEPTEMBER 2022**

*Assisted by Ms P. Mogaladi*

*Executive Manager: Investigations Branch*