

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**

“Allegations of improper conduct and maladministration by Metrorail: Western Cape relating to the appointment of staff”

REPORT NUMBER: 37 of 2021/22

ISBN NUMBER: 978-1-77634-705-6

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY METRORAIL: WESTERN CAPE RELATING TO THE APPOINTMENT OF STAFF

INDEX

| | |
|--|-----------|
| Executive Summary | 3 |
| 1. INTRODUCTION | 11 |
| 2. THE COMPLAINT | 11 |
| 3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR | 13 |
| 4. THE INVESTIGATION | 17 |
| 5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS | 24 |
| 6. FINDINGS | 41 |
| 7. REMEDIAL ACTION | 44 |
| 8. MONITORING | 45 |

Executive Summary

- (i) This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- (ii) The report communicates the findings of the Public Protector and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into a complaint into allegations of improper conduct and maladministration by Metrorail: Western Cape (Metrorail), a Division of the Passenger Rail Agency of South Africa (PRASA)) relating to the appointment of staff.
- (iii) The complaint was lodged anonymously with the Public Protector on 30 January 2013 and in the main related to the alleged abuse of Metrorail fleet vehicles and the irregular appointment of staff by Metrorail. The incidents referred to by the Complainants occurred during the period Mr Mthura Swartz (Mr Swartz) was the Regional Manager of Metrorail.
- (iv) From the information provided by the Complainants and obtained from the initial enquiries made, it was established that some of the allegations or were unsubstantiated or without merit. It also transpired that Metrorail had already taken disciplinary and corrective action in respect of several of the incidents complained of.
- (v) It was, therefore, decided to focus the investigation on the following allegations made in the complaints that were lodged and the information obtained, namely:
 - (a) The alleged improper appointment of Dr B V Msengana (Dr Msengana), Mr M Fritz (Mr Fritz) and Mr T Xola (Mr Xola) as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013.
 - (b) The alleged improper appointment of Ms Jam-Jam by Metrorail as Transformation Manager on 1 April 2014.

- (c) The alleged improper appointment of Mr Lumkile Mzukwa (Mr Mzukwa) as Area Manager Customer Services and subsequently as Customer Services Manager in 2013.
 - (d) The alleged improper appointment of Ms Luyanda Matomane (Ms Matomane), Mr Mzukwa, Ms Emmarentia Fielding (Ms Fielding) and Mr Mbulelo Ngxonono (Mr Ngxonono) by Metrorail in various acting positions.
 - (e) The alleged improper appointment of Mr Themba Jack (Mr Jack) as Senior Manager: Human Resources by PRASA in 2012.
- (vi) In essence, the Complainants alleged that Metrorail and/or PRASA's conduct, as described above, was improper and amounted to maladministration.
- (vii) Based on the analysis of the complaint, the following issues were identified for investigation:
- (a) Whether the appointments of Dr Msengana, Mr Fritz and Mr Xola as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013, were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, and if yes, whether Metrorail's conduct was improper and constitutes maladministration.
 - (b) Whether the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.
 - (c) Whether the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

- (d) Whether the appointments of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono by Metrorail to act in various positions for periods longer than prescribed, were not in accordance with the relevant laws and prescripts regulating acting appointments of staff by Metrorail, and if yes whether Metrorail's conduct was improper and constitutes maladministration.
- (e) Whether the appointment of Mr T Jack as the Senior Manager: Human Resources by PRASA in 2012 was not in accordance with the relevant laws and prescripts regulating the selection and recruitment of staff by PRASA and if yes, whether PRASA's conduct was improper and constitutes maladministration.
- (viii) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included the exchange of correspondence with PRASA, Metrorail and the Complainants, the evaluation and consideration of the documents submitted and obtained, and consideration and application of the relevant laws and legal prescripts.
- (ix) The Acting Regional Manager of Metrorail: Western Cape and the Group Chief Executive Officer (GCEO) of PRASA and the persons implicated or that could be affected by the evidence obtained during the investigation were afforded an opportunity to respond thereto, in terms of section 7(9) of the Public Protector Act. The responses received were considered during the investigation
- (x) Having considered the evidence and information obtained during the investigation, the Public Protector makes the following findings:
 - (a) Regarding whether the appointments of Dr Msengana, Mr Fritz and Mr Xola as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013, were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, and if yes, whether Metrorail's conduct was improper and constitutes maladministration.**

(aa) The allegation that the appointments of Dr Msengana, Mr Fritz and Mr Xola as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013 were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, is substantiated.

(bb) Their appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of PRASA's Recruitment and Selection Policy as it did not comply with the minimum requirements for the position, as determined and advertised by Metrorail.

(cc) Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

(b) Regarding whether the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

(aa) The allegation that the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the laws and prescripts regulating the recruitment and selection of staff by Metrorail, is substantiated.

(bb) Her appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy, as it did not comply with the minimum requirements for the position as determined and advertised by Metrorail.

(cc) Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

(c) Regarding whether the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

(aa) The allegation that the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, is substantiated.

(bb) His appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy as Mr Mzukwa did not comply with the minimum requirements for the position, as determined and advertised by Metrorail.

(cc) Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

(d) Regarding whether the appointments of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono by Metrorail to act in various positions for periods longer than prescribed, were not in accordance with the relevant laws and prescripts regulating acting appointments of staff by Metrorail, and if yes

whether Metrorail's conduct was improper and constitutes maladministration.

- (aa) The allegation that the appointment of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono by Metrorail, in acting positions for periods longer than prescribed, was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, is substantiated.
 - (bb) Their appointment contravened the provisions of section 195(1)(i) of the Constitution and paragraph 9.1.2.8 of PRASA's Remuneration Policy the appointments as it exceeded the prescribed requisite three (3) month period.
 - (cc) Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.
- (e) Regarding whether the appointment of Mr T Jack as the Senior Manager: Human Resources by PRASA in 2012 was not in accordance with the relevant laws and prescripts regulating the selection and recruitment of staff by PRASA and if yes, whether PRASA's conduct was improper and constitutes maladministration.**
- (aa) The allegation that the appointment of Mr Jack as the Senior Manager: Human Resources in 2012 by PRASA was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by PRASA, is substantiated.
 - (bb) His appointment contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy

as it did not comply with the minimum requirements for the position as determined and advertised by Metrorail and/or PRASA.

(cc) PRASA's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

(xi) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution is the following:

(a) The GCEO of PRASA to:

(aa) To approach a court to review the appointment of Mr Jack and for a just and equitable order when considering the consequences thereof. In this regard, it should be noted that the Constitutional Court held in *In Khumalo and Another V Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49*; that appointments made irregularly are not automatically *null and void* because the appointed candidate has labour rights. . It was further held in this case that only a court can grant a "*just and equitable*" order in terms of section 172(1)(b) of the Constitution, when considering the consequences of declaring a decision unlawful.

(bb) Take appropriate action based on the engagement with the National Treasury and PRASA's internal auditors to declare the salary paid to Mr Jack as irregular expenditure. Note is also taken that PRASA has also advised the Public Protector that there is a process underway to deal with the matter including the remedial action as per the National Treasury processes.

(b) The Regional Manager of Metrorail: Western Cape to:

(aa) To approach a court to review the appointments of Ms Jam-Jam and Mr Mzukwa and for a just and equitable order when considering the consequences thereof.

- (bb) Take appropriate action based on the engagement with the National Treasury and PRASA's internal auditors to declare the salaries paid to Ms Jam-Jam and Mr Mzukwa as irregular expenditure.

- (cc) Take disciplinary action against the relevant senior managers responsible for the recruitment, selection and appointment of Dr Msengana, Mr Xola, Mr Fritz, Ms Jam-Jam and Mr Mzukwa in terms of the Recruitment and Selection Policy, and the acting appointments of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono in terms of the Remuneration Policy.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT AND MALADMINISTRATION BY METRORAIL: WESTERN CAPE RELATING TO THE APPOINTMENT OF STAFF

1. INTRODUCTION

- 1.1 This is a report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of sections 8(1) and section 8(3) of the Public Protector Act to the following persons, to inform them of the outcome of the investigation by the Public Protector and the remedial action taken:
 - 1.2.1 Mr Zolani Kgosie Matthews, the Group Chief Executive Officer (GCEO) of the Passenger Rail Agency of South Africa (PRASA);
 - 1.2.2 Mr Ranti A Mahlabana, the Acting Executive: Human Capital Management of PRASA Rail Operations; and
 - 1.2.3 Mr Richard Walker, the Regional Manager of Metrorail (a division of PRASA): Western Cape.
- 1.3 Copies of the report are also provided to the complainants, who preferred to remain anonymous.

2. THE COMPLAINT

- 2.1 The complaint was lodged anonymously with the Western Cape Provincial Office of the Public Protector South Africa in Cape Town, on 30 January 2013 and in the main related to the alleged abuse of Metrorail fleet vehicles and the irregular appointment of staff by Metrorail. The incidents referred to by the Complainants occurred during the period that Mr Mthura Swartz (Mr Swartz) was the Regional Manager of Metrorail.

- 2.2 From the initial enquiries made during the investigation, it was established that some of the allegations lacked sufficient information or were without merit. It also transpired that Metrorail had already taken disciplinary and corrective action in respect of several of the complaints lodged.
- 2.3 This included disciplinary action taken in 2014 against Ms Cecelia Jam-Jam (Ms Jam-Jam) and Mr Bulelani Ngxukumeshe (Mr Ngxukumeshe) for using a Metrorail vehicle and petrol card for personal purposes. They were given a 12 month written warning and the amounts of the expenditure recovered from their salaries. The Fleet Coordinator that gave them permission to use the vehicle was also charged and dismissed.
- 2.4 Disciplinary action was also taken against Mr Swartz, who was charged with misconduct, found guilty on all charges and dismissed in 2018. One of the charges related to his improper interference with the recruitment process relating to the appointment of Mr Ngxukumeshe and Mr Tshazi as Segment Security Commanders in June 2013.
- 2.5 The allegations regarding the irregular appointments of the following Metrorail employees were not substantiated by the complaints and the facts obtained during the initial enquiries and therefore did not form part of the investigation:
- 2.5.1 Mr Thabiso Molise;
 - 2.5.2 Ms Linda Malotana;
 - 2.5.3 Mr Eric Mangxoyi;
 - 2.5.4 Mr Masivelane Monzi;
 - 2.5.5 Mr Zolisa Magwaca; and
 - 2.5.6 Ms Faith Mhlonyelwa.
- 2.6 The allegation that five security learnership positions were filled by candidates who all attended the same church as the former regional manager, which was apparently perceived to be nepotistic and unfair, was also not substantiated. It was therefore decided to focus the investigation on the following substantive allegations made by the Complainants and the information obtained in respect thereof:

- 2.6.1 The appointments of Dr B V Msengana (Dr Msengana), Mr M Fritz (Mr Fritz) and Mr T Xola (Mr Xola) as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013 were improper, as Dr Msengana was past the prescribed retirement age and the appointees did not qualify for the position.
- 2.6.2 Ms Cecilia Jam Jam was appointed by Metrorail as Transformation Manager on 1 April 2014, even though she did not meet the minimum requirements for the position.
- 2.6.3 Metrorail appointed Mr Lumkile Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 despite him not meeting the minimum requirements for the positions.
- 2.6.4 The appointment of Ms Luyanda Matomane (Ms Matomane), Mr Mzukwa , Ms Emmarentia Fielding (Ms Fielding) and Mr Mbulelo Ngxonono (Mr Ngxonono) by Metrorail in various acting positions, for periods longer than the three (3) months prescribed by the relevant PRASA Policy.
- 2.6.5 The appointment of Mr Themba Jack (Mr Jack) as Senior Manager: Human Resources by PRASA in 2012 although he lacked the relevant experience.
- 2.7 In essence, the Complainants alleged that the conduct of Metrorail and/or PRASA was improper and amounted to maladministration.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

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

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

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

3.5 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that:

“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”²

3.6 In the above-mentioned constitutional matter, Mogoeng CJ, stated the following, when confirming the powers of the Public Protector:

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

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

² *Supra* at para [73].

- 3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the *Constitution* cannot properly be upheld or enhanced (paragraph 67);
- 3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);
- 3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69);
- 3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70);
- 3.6.6 The Public Protector's power to take remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71);
- 3.6.7 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a));

- 3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- 3.6.9 “*Appropriate*” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
- 3.7 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others, Case No 91139/2016 (13 December 2017)*, the Court held as follows when confirming the powers of the Public Protector:
- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71);
- 3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question. (paragraph 82);
- 3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101):
- 3.7.3.1 Conduct an investigation;
- 3.7.3.2 Report on that conduct; and
- 3.7.3.3 To take remedial action.
- 3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (paragraph 104);
- 3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (paragraph 105);

- 3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute *prima facie* findings that point to serious misconduct (paragraphs 107 and 108); and
- 3.7.7 *Prima facie* evidence which points to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112).
- 3.8 PRASA was established by the Legal Succession to the South African Transport Services Amendment Act 38 of 2008. It is a Public Entity listed in Schedule 3 to the Public Finance Management Act, 1999 (PFMA). Metrorail is a division of PRASA. Their conduct amounts to conduct in state affairs. As a result the matter falls squarely within the ambit of the Public Protector's mandate.
- 3.9 The jurisdiction of the Public Protector in this matter, was not disputed by either Metrorail or PRASA.

4. THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

- 4.2.1 The investigation was approached using an enquiry process that seeks to find out:
- 4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of improper conduct and/or maladministration, what would it take to remedy the wrong and what action should be taken?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this case the factual enquiry principally focussed on whether or not the appointments made by Metrorail and/or PRASA as referred to in 2.8 above in accordance with the laws and other prescripts regulating the appointment of staff.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by Metrorail and/or PRASA to prevent improper conduct and/or maladministration.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration, where possible and appropriate.

4.3 On analysis of the complaint, the following issues were identified for investigation:

4.3.1 Whether the appointments of Dr Msengana, Mr Fritz and Mr Xola as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013, were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

4.3.2 Whether the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

- 4.3.3 Whether the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.
- 4.3.4 Whether the appointments of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono by Metrorail to act in various positions for periods longer than prescribed, were not in accordance with the relevant laws and prescripts regulating acting appointments of staff by Metrorail, and if yes whether Metrorail's conduct was improper and constitutes maladministration.
- 4.3.5 Whether the appointment of Mr T Jack as the Senior Manager: Human Resources by PRASA in 2012 was not in accordance with the relevant laws and prescripts regulating the selection and recruitment of staff by PRASA and if yes, whether PRASA's conduct was improper and constitutes maladministration.

4.4 The Key Sources of information

4.4.1 Documents:

- 4.4.1.1 The complaint submitted by the Complainants on 30 January 2013 to the Public Protector, and supporting documents attached thereto.
- 4.4.1.2 A Copy of the Metrorail internal investigation report relating to the abuse of fleet vehicles, dated 30 August 2013.
- 4.4.1.3 Copies of the outcomes of the Metrorail disciplinary hearings of Ms Jam-Jam and Mr Ngxukumeshe, dated 19 January 2014.
- 4.4.1.4 A copy of statement of Mr T Tsui, former Feet Coordinator, made during his disciplinary hearing.

- 4.4.1.5 A copy of internal advertisement for position of presiding officers, dated 1 March 2013.
- 4.4.1.6 A copy of Curriculum Vitae of Dr Msengana, Mr Xola and Mr Fritz.
- 4.4.1.7 Copies of the shortlist memorandum, the Selection Committee Report and appointments letters for the presiding officer posts.
- 4.4.1.8 Affidavit of Ms C Dire of Metrorail, regarding the appointment of the presiding officers, copies of memorandum from Ms Dire to Mr Swartz regarding the alleged irregular appointment of the presiding officers and office administrator, and copies of the notes of the interview with Dr Msengana, dated 19 September 2016.
- 4.4.1.9 Copies of vacancy requisition form and internal advertisement for the post of Transformation Manager; the internal application of Ms Jam-Jam, the Selection Committee Report dated 28 November 2013 and letter of appointment of Ms Jam-Jam, dated 19 March 2014.
- 4.4.1.10 Copy of and internal advertisements for the posts Area Manager: Customer Services and Customer Services Manager, copies of the internal applications of Mr Mzukwa, copy of his Curriculum Vitae, copies of the records of the Selection Committee, shortlisting and interview processes, and letters of appointment to Mr Mzukwa.
- 4.4.1.11 Copy of Curriculum Vitae of Mr T Jack and the internal advertisement for the post of Senior Manager: Human Resources, and an affidavit of Mr Schrikker of Metrorail, dated 4 August 2015.
- 4.4.1.12 Copies of acting appointment application forms, dated 17 December 2014, 4 March 2014, 30 August 2013 and 4 June 2012 for Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono.
- 4.4.1.13 Copy of internal advertisement for the Segment Security Commander posts; Curriculum Vitae and internal applications of Mr Ngxukumesha and Mr Tshazi, letters of appointment of Mr Ngxukumeshe and Mr Tshazi, affidavit of Ms BN Ngalwa of Metrorail,

dated 23 July 2015, affidavit of Ms M Mojela dated 23 July 2015 and an affidavit of Mr Q Fourie of Metrorail, dated 24 July 2015.

4.4.1.14 Copy of Metrorail Report to the GCEO of PRASA on an investigation in allegations of irregularities in the Western Cape, regarding the management of disciplinary matters, dated 24 April 2017.

4.4.1.15 CCMA Arbitration Award in the matter between Mr M Ngxonono and PRASA, dated 10 April 2017.

4.4.1.16 Report on investigation in allegations of irregularities in the Western Cape, regarding the management of disciplinary matters, dated 24 April 2017; CCMA Arbitration Award in the matter between Mr M Ngxonono and PRASA, dated 10 April 2017.

4.4.2 Correspondence (including e-mail) between the PPSA and:

4.4.2.1 The Complainants, dated 28 May 2013, 4 October 2013 and 7 October 2013.

4.4.2.2 Metrorail and PRASA, dated 13 November 2013, 27 November 2013, 9 April 2014, 13 April 2015, 10 May 2014, 3 June 2014, 7 November 2014, 4 December 2014, 9 May 2015, 13 May 2015, 19 October 2015, 26 October 2015, 17 November 2015, 14 November 2017, 13 December 2017, 20 December 2018.

4.4.2.3 Mr T Tsui, former Fleet Coordinator of Metrorail, dated 19 January 2014.

4.4.2.4 Dr B Msengana, dated 23 June 2015, and supporting documents.

4.4.2.5 Mr R Mahlabana, Acting HR Executive of PRASA Rail, dated 27 August 2021.

4.4.3 Meetings

4.4.3.1 Meeting with Complainants on 17 July 2013 and 30 January 2018,

4.4.3.2 Meeting with Mr Swartz on 29 May 2014.

4.4.4 Interviews held with Metrorail employees on:

4.4.4.1 21 September 2015, 22 September 2015, 25 September 2015, 15-18 February 2016.

4.4.5 Legislation and other prescripts:

4.4.5.1 The Constitution of the Republic of South Africa, 1996.

4.4.5.2 The Public Protector Act 23 of 1994.

4.4.5.3 The Public Finance Management Act 1 of 1999. (PFMA)

4.4.5.4 The *Irregular Expenditure Framework: PFMA Compliant Institutions* document issued by the National Treasury in terms of National Treasury Instruction no 1 of 2018/2019. (Irregular Expenditure Framework document).

4.4.5.5 Metrorail Recruitment and Selection Policy of 1 December 2008. (Recruitment and Selection policy).

4.4.5.6 Metrorail Remuneration Policy and Philosophy, approved on 20 February 2010. (Remuneration policy).

4.4.6 Jurisprudence considered:

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

4.4.6.2 *President of the Republic of South Africa vs Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017).*

4.4.6.3 *Sedibeng District Municipality v South African Local Governing Bargaining Council and Others (JR 1559/09) [2012] ZALCJHB 45 (31 May 2012).*

- 4.4.6.4 *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others [2011] ZALAC 16; JA 56/06 (3 August 2011).*
- 4.4.6.5 Adonis, T. 2015. The employment recruitment and promotion process: legal regulation and practice. University of Cape Town.
- 4.4.6.6 *Rex v Zackey 1945 AD 505 at 513; Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398; Ex parte Neethling & others 1951 (4) SA 331 (A) at 335D; Benson v SA Mutual Life Assurance Society 1986 (1) SA 776 (A) at 781J and 783C; Shepstone H & Wylie & other v Geyser NO 1998 (3) SA 1036 (SCA) at 1045A).*
- 4.4.6.7 *Letsogo v Department of Economy and Enterprise Development and Others (JR350/16) [2018] ZALCJHB 48; (2018) 39 ILJ 851 (LC) (9 January 2018).*
- 4.4.6.8 *Khumalo and Another v Member of the Executive Council for Education: Kwa Zulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013)*

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

- 4.4.7.1 On 2 November 2020 a Notice was issued in terms of section 7(9)(a) of the Public Protector Act to the Acting Regional Manager of Metrorail, Mr Raymond Maseko, affording him an opportunity to respond to the evidence obtained during the investigation. He responded on 17 November 2020.
- 4.4.7.2 Copies of the Notice issued in terms of section 7(9) of the Public Protector Act on 2 November 2021 were also sent to Dr Msengana, Mr Fritz, Mr Xola, Ms Jam-Jam, Mr Mzukwa, Ms Matomane, Ms Fielding and Mr Ngxonono, affording them an opportunity to respond to the allegations in which they were mentioned or implicated. No response was received from them.

4.4.7.3 On 22 April 2021, a Notice was issued in terms of section 7(9) of the Public Protector Act the GCEO of PRASA in connection with the appointment of Mr Jack. A copy of the section 7(9) Notice was also sent to Mr Jack, affording him an opportunity to respond to the contents thereof.

4.4.7.4 A response was received from Mr Ranti A Mahlabana, the Acting Executive: Human Capital Management of PRSAS Rail Operations, dated 17 June 2021. No response was received from Mr Jack.

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

5.1 Regarding whether the appointments of Dr Msengana, Mr Fritz and Mr Xola as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013, were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

Common cause or undisputed facts

5.1.1 It is common cause that the vacancy for Presiding Officers was advertised by Metrorail on 1 January 2013. The minimum requirements stated in the advertisement were an LLB or B. Proc Degree, legal practice experience, extensive work knowledge of South African Labour Laws, conciliation and arbitration skills and legal drafting experience.

5.1.2 Interviews were conducted on 22 February 2013.

5.1.3 Copies of the CVs of the three successful candidates show that none of them had a legal qualification or practical legal experience at the time.

5.1.4 Dr Msengana had a B.Sc degree, a M.Sc. degree and a PhD. The subject of his doctoral thesis was titled: "*Black Immigrants in the British Labour Market*". There is no indication

in his CV that was submitted with his application that he had any legal practice experience or extensive work knowledge of South African Labour Laws, as required by the advertisement. He did not have the required legal qualification.

5.1.5 Mr Xola had a Certificate in Forensic Examination and a Diploma in Human Resources Management and Training. He did not have the required legal qualification.

5.1.6 Mr Fritz had a Certificate in Negotiations and Mediations and attended the Program in Public Service at the University of Pretoria, which consisted of Human Resources: Presiding Officers, Management, Reporting Skills, Service Delivery. He also had a Certificate in Forensic Investigations, which included, *inter alia*, Labour Law. He also did three day short courses in Labour Relations, Disciplinary Hearings, Presiding Officer, and Initiation Officer. Mr Fritz did not possess the required legal qualification or extensive work knowledge of South African Labour Laws, as required by the advertisement.

5.1.7 The Metrorail Selection Committee conducted interviews with the applicants on 22 February 2013 and Dr Msengana, Mr Xola and Mr Fritz were recommended for appointment.

5.1.8 On 1 March 2013 Mr T Jack, the Senior Manager; Human Resources of Metrorail informed Dr Msengana, Mr Xola and Mr Fritz of their appointment as Presiding Officers for a period of two years.

Issues in dispute

5.1.9 In his written response to the complaints, dated 27 November 2017, Mr Swartz, the former Regional Manager of Metrorail denied the allegations of impropriety and stated that all applicants were subjected to the same recruitment and selection process.

5.1.10 Ms Catherine Dire, the former Recruitment and Selection Manager at Metrorail, stated during the investigation that she lodged a written complaint with the former Regional Manager, Mr Swartz on 15 May 2013 in connection with the advertisement of the positions of Presiding Officer and the appointments that were made.

- 5.1.11 According to Ms Dire, the three candidates did not meet the minimum requirements and the positions were not provided for in the Metrorail personnel structure.
- 5.1.12 No action was taken in response to her complaint and she received no response from Mr Swartz.
- 5.1.13 On 13 April 2015, Mr R Walker, the Regional Manager of Metrorail: Western Cape, advised that Dr Msengana was dismissed for misconduct on 5 September 2014; Mr M Fritz' employment contract was terminated by the former Regional Manager after which an unfair dismissal claim was granted in favour of the employee and Mr Xola resigned and left the Metrorail on 31 December 2014.
- 5.1.14 In his response to the Notice issued by the Public Protector in terms of section 7(9) of the Public Protector Act, dated 17 November 2020, Mr Raymond Maseko, the Acting Regional Manager of Metrorail: Western Cape, did not dispute the evidence obtained during the investigation and stated that Metrorail would accept any adverse findings made by the Public Protector in this regard and reasonable remedial action to be taken.

Application of the relevant legal framework

- 5.1.15 Section 195(1)(i) of the Constitution stipulates that *"Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness..."*.
- 5.1.16 The recruitment and selection of all employees of PRASA, its Divisions (such as Metrorail) and Subsidiaries are regulated by PRASA's Recruitment and Selection Policy made by virtue of the provisions of the Legal Succession of the South African Transport Services Act, 1989 (as amended).
- 5.1.17 Paragraph 3 of the Recruitment and Selection Policy provides that its purpose is, *inter alia* to attract the best quality skills in a cost effective manner and that all recruitment and selection practices should be consistent, equitable, transparent and in line with the requirements of procedural and substantive fairness.

- 5.1.18 The advertising standards for all vacant positions are referred to in paragraph 12 of the Recruitment and Selection Policy. It provides that all advertisements must include, *inter alia*:
- 5.1.18.1 The inherent requirements of the job; and
- 5.1.18.2 Skills, knowledge and attributes required for the job.
- 5.1.19 Paragraph 14 of the Recruitment and Selection Policy provides that the candidates shortlisted should be restricted to those who show in their applications that they clearly meet the minimum requirements, which are:
- 5.1.19.1 *“All the skills, knowledge competencies and abilities identified in the job/role description that the potential candidate must possess at the time of hire, or which the candidate would be able to acquire in a reasonable time.*
- 5.1.19.2 *All the qualifying criteria for the position.”*
- 5.1.20 The line manager and the Human Resources Department must, in terms of paragraph 14.3, take into account formal qualifications, prior and relevant experience, or the capacity to acquire the necessary skills and competencies within reasonable time.
- 5.1.21 Paragraph 19 of the Recruitment and Selection Policy provides that the selection decision should be taken based on the assessment of the candidates in the context of PRASA’s organizational requirements and with reference to PRASA’s employment equity targets.
- 5.1.22 Once the selection of the successful candidates is made, the Human Resources Department will send an offer letter to the successful candidates signed by a General Manager or Higher and will confirm the acceptance of the offer in writing from the successful candidates.

- 5.1.23 The Recruitment and Selection Policy does not provide for a maximum age for the appointment of employees.
- 5.1.24 The Labour Appeal Court³ held that where an advertised requirement is inherent to the operation of the job then the employer is by no means allowed to deviate from the advertisement. Adonis (2015)⁴ explains that the fundamental reason why an employer should not ignore a minimum requirement is that there could be others who would have applied for the post had they known that a stated minimum requirement was in fact flexible. The procedurally fair response is for the employer to withdraw the advertisement and to re-advertise the post with that minimum requirement withdrawn or stated as simply a desirable attribute.
- 5.1.25 In terms of the test thus developed by our courts, an employer's exercise of a discretion in respect of the appointment of employees can only be interfered with if it is demonstrated that the discretion was exercised capriciously, or for insubstantial reasons, or based upon any wrong principle or in a biased manner.⁵ Changing or disregarding the requirements as set out in the advertisement without authority or a legal basis, would mean that the employer failed to apply his/ her mind, and was arbitrary, capricious, unfair or failed to comply with applicable procedural requirements, and therefore unlawful.⁶
- 5.1.26 According to the *Factsheet on Irregular Appointments in the Public Service*, issued by the Public Service Commission (PSC) in February 2016, in "*human resource practice*" irregular appointment denotes a wrongful act occurring during the recruitment selection process, due to non-compliance with applicable legislation, regulations and policy frameworks.

³ In the matters of *Sedibeng District Municipality v South African Local Governing Bargaining Council and Others* (JR 1559/09) [2012] ZALCJHB 45 (31 May 2012); *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others* *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2011] ZALAC 16; JA 56/06 (3 August 2011)

⁴ Adonis, T. 2015. The employment recruitment and promotion process: legal regulation and practice. University of Cape Town.
⁵ Refer to *Rex v Zackey* 1945 AD 505 at 513; *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398; *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335D; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781J and 783C; *Shepstone H & Wylie & other v Geyser* NO 1998 (3) SA 1036 (SCA) at 1045A."31

⁶ *Letsogo v Department of Economy and Enterprise Development and Others* (JR350/16) [2018] ZALCJHB 48; (2018) 39 ILJ 851 (LC) (9 January 2018)

5.1.27 Section 1 of the Public Finance Management Act, 1 of 1999 (PFMA) provides that “*irregular expenditure*” means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation. Furthermore, as confirmed in paragraph 5 of the ‘*Irregular Expenditure Framework: PFMA Compliant Institutions*’ document the transgression of the internal policies of a public entity can amount to irregular expenditure, as contemplated by section 1 of the PFMA.

5.1.28 The PSC therefore indicates in its ‘*Factsheet on Irregular Appointments in the Public Service*’ that, “*In terms of the PFMA, an irregular appointment could be classified under irregular and wasteful expenditure; as there could be financial implications to correct an act that ought to have not taken place.*”

Conclusion

5.1.29 Dr Msengana, Mr Xola and Mr Fritz did not meet the minimum requirements for the position of Presiding Officer as determined and advertised by Metrorail.

5.1.30 Their appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy. It was therefore improper and constitutes maladministration.

5.1.31 The remuneration paid to them also possibly amounted to irregular expenditure, as contemplated by section 1 of the PFMA.

5.2 Regarding whether the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail’s conduct was improper and constitutes maladministration.

Common cause or undisputed facts

- 5.2.1 It is not in dispute that the position of Transformation Manager was internally advertised by Metrorail on 12 November 2013. The position was located in the Regional Manager's Office. The minimum requirements for the position included a 3 year legal or human resources degree or diploma, 3 years' experience in *dealing with labour stakeholders; EE and Diversity Management experience with proven experience in coordinating labour in these topics.*
- 5.2.2 Ms Jam-Jam applied for the position. According to her CV, her highest qualification was a Certificate in Office Administration and Computer Training. She also did not have the requisite experience as indicated in the advertisement.
- 5.2.3 The Selection Committee Report indicates that the panel members were Mr L Weideman and Mr T Jack. There were only two candidates and Ms Jam-Jam scored the highest. The letter of appointment, dated 19 March 2014 was issued and was effective 1 April 2014.

Issues in dispute

- 5.2.4 In terms of the records provided by Metrorail during the investigation, only two candidates were shortlisted for the position of Transformation Manager, one of whom was Ms Jam-Jam. According to their applications, both did not meet the minimum requirements of the position, as advertised by Metrorail.
- 5.2.5 In his response to the Notice issued by the Public Protector in terms of section 7(9) of the Public Protector Act, dated 17 November 2020, Mr Raymond Maseko, the Acting Regional Manager of Metrorail: Western Cape, did not dispute the evidence obtained during the investigation he stated that Metrorail would accept any adverse findings made by the Public Protector in this regard and reasonable remedial action to be taken.

Application of the relevant legal framework

5.2.6 The relevant laws and prescripts referred to in paragraphs 5.1.15 to 5.1.28 above, also apply *mutatis mutandis* to this issue.

Conclusion

5.2.7 Ms Jam-Jam did not meet the minimum requirements for the position of Transformation Manager.

5.2.8 Her appointment was not in accordance with section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy.

5.2.9 The remuneration paid to her also possibly amounted to irregular expenditure, as contemplated by section 1 the PFMA.

5.3 Regarding whether the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

Common cause or undisputed facts

5.3.1 It is not in dispute that the position of Area Manager: Customer Services (salary group 106) was advertised by Metrorail in November 2011. The minimum requirements stated by the advertisement included a three year "*business related degree/diploma*" and at least three years supervisory experience.

5.3.2 It is also common cause that Metrorail advertised the position of Customer Services Manager (salary group 109) in August 2013. The minimum requirements stated in the advertisement for the position of Customer Services Manager included a B Com or

equivalent degree, 3 (three) to 4 (four) years management experience, preferably in a service and logistics environment and 5 (five) years customer service experience.

5.3.3 Mr Mzukwa applied for both posts, respectively.

5.3.4 Mr Mzukwa was shortlisted and interviews were conducted for the position of Area Manager: Customer Services by the Selection Committee on 15 March 2013. Mr Mzukwa was recommended for appointment. Mr Mzukwa was informed of his appointment as Area Manager: Customer Services with effect from 1 April 2013 by Mr Swartz on 10 April 2013.

5.3.5 The Selection Committee conducted interviews for the position of Customer Services Manager on 2 September 2013 and according to the records provided by Metrorail, Mr Mzukwa scored the highest of the six shortlisted candidates. Mr Mzukwa was informed of his appointment by Metrorail as Customer Services Manager, on 4 September 2013.

Issues in dispute

5.3.6 According to his Curriculum Vitae submitted with both the applications, Mr Mzukwa had a Bachelor's Degree in Social Science, and there was no indication in his CV that he possessed any of the relevant supervisory experience.

5.3.7 In his response to the Notice issued by the Public Protector in terms of section 7(9) of the Public Protector Act, dated 17 November 2020, Mr Raymond Maseko, the Acting Regional Manager of Metrorail: Western Cape, did not dispute the evidence obtained during the investigation. He stated that Metrorail would accept any adverse findings made by the Public Protector in this regard and reasonable remedial action to be taken.

Application of the relevant legal framework

5.3.8 The relevant laws and prescripts referred to in paragraphs 5.1.15 to 5.1.28 above, also apply *mutatis mutandis* to this issue.

Conclusion

- 5.3.9 Mr Mzukwa did not meet the minimum requirements for the positions of Area Manager: Customer Services and Customer Services Manager. He did not possess the requisite qualifications and experience.
- 5.3.10 Mr Mzukwa's appointment was not in accordance with section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy.
- 5.3.11 The remuneration paid to him in respect of both positions could possibly amount to irregular expenditure, as contemplated by section 1 of the PFMA.
- 5.4 Regarding whether the appointments of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono by Metrorail to act in various positions for periods longer than prescribed, were not in accordance with the relevant laws and prescripts regulating acting appointments of staff by Metrorail, and if yes whether Metrorail's conduct was improper and constitutes maladministration.**

Common cause or undisputed facts

- 5.4.1 It is not in dispute that Ms Matomane assumed her first acting position, as Acting Senior Office Administration Assistant, with effect from 1 February 2013.
- 5.4.2 In his response to the complaints, the former Regional Manager, Mr Swartz, stated that Ms Matomane was appointed to act and perform the additional duties of the Marketing and Communication Officer from 1 March 2013, which position was vacant.
- 5.4.3 According to the records provided by Metrorail, Ms Matomane was recalled from the Marketing Department to the Office of the Regional Manager (Mr Swartz) with effect from 1 March 2013 and appointed as acting in the position of Office Manager.

5.4.4 Later, Ms Matomane was appointed as Communication and Marketing Officer with effect from 1 June 2013 by Mr Swartz

5.4.5 The Acting/Responsibility Allowance application forms obtained from Metrorail indicate that Ms Matomane was paid an allowance for acting as the Office Manager in the Office of the Regional Manager for the following periods:

5.4.5.1 1 March 2013 to 30 June 2013;

5.4.5.2 30 June 2013 to 31 August 2013;

5.4.5.3 1 September 2013 to 30 November 2013;

5.4.5.4 1 December 2014 to 28 February 2014; and

5.4.5.5 1 March 2014 to 31 May 2014.

5.4.6 In his response to the complaints during the investigation, Mr Walker confirmed on 4 December 2014 that acting/responsibility allowances were paid to Ms Matomane for the periods that she acted. He conceded that she acted for periods exceeding three months. He further stated that:

“Our acting policy allows for the extension of the acting period beyond 3 (three) months provided that permission and/or authorization is sought from the Regional Manager. We could not find any documentation which indicates to us that approval for the extension of the acting period was sought.”

5.4.7 In addition, it is also not disputed that Ms Fielding held the position of Senior Ticket Sales Official and acted as Area Manager, from 1 April 2013 until 31 August 2013. Ms Fielding was paid an acting allowance from April 2013 to September 2013. Mr Walker confirmed in his response to the complaints, dated 14 December 2014, that Ms Fielding acted for a period exceeding the three months as stipulated by the Policy. He also confirmed that no supporting documentation for the approval of the acting period and/or the extension thereof could be found by Metrorail. These acting periods were approved retrospectively on a monthly basis.

- 5.4.8 Furthermore, it is also not in dispute that Mr Mzukwa acted as Customer Services Manager from 1 February 2013 until he was appointed in the position with effect from 1 September 2013. During this time he held the position of Area Manager as from 1 April 2013. In his written response of 29 May 2014, Mr Walker conceded that Mr Mzukwa was paid an acting/responsibility allowance for the period that he acted in the higher grade.
- 5.4.9 It is also common cause that Metrorail appointed Mr Mbulelo Ngxonono (Mr Ngxonono) as Management Accountant in October 2012. He was subsequently appointed as acting Senior Finance Manager from January 2013 until August 2013 and acting Senior Customer Service Manager from May 2013 until May/June 2014 and was paid an acting/responsibility allowance accordingly. In his response dated 4 December 2014, Mr Walker confirmed that Mr Ngxonono acted in two positions as indicated above. He stated that no records could be found indicating the reasons why he acted in both positions.

Issues in dispute

- 5.4.10 Mr Swartz on 27 November 2013 reported to the Public Protector that an acting position is for a period of 3 months, but can be renewed, and that a further renewal can only be approved by the Regional Manager. This was done in these cases as the employees were awarded for their performance. Mr Swartz confirmed that Mr Ngxonono was acting in two positions, but maintained that there was no breach of PRASA policy, and that he only received one acting allowance.
- 5.4.11 The response received from Mr R Walker on 4 December 2014, confirmed that Mr Ngxonono acted in two positions, however there are no documents and reasons provided for Mr Ngxonono to act in both positions. Mr Walker stated further that no consideration was given to Employment Equity or Succession Planning.
- 5.4.12 It can be concluded that Mr Ngxonono was appointed as acting Senior Finance Manager for 8 consecutive months, from January 2013 until he was appointed as Senior Finance Manager (level 106) from 1 October 2013.

5.4.13 In his response to the Notice issued by the Public Protector in terms of section 7(9) of the Public Protector Act, dated 17 November 2020, Mr Raymond Maseko, the Acting Regional Manager of Metrorail: Western Cape, did not dispute the evidence obtained during the investigation, He stated that Metrorail would accept any adverse findings made by the Public Protector in this regard and reasonable remedial action to be taken.

Application of the relevant legal framework

5.4.14 The acting of Metrorail employees at a higher level is regulated by PRASA's Remuneration Policy and Philosophy (Remuneration Policy).

5.4.15 Paragraph 9.1.2.8 of the Remuneration Policy provides that:

"It is deemed to be acting if an employee is not acting at their level, i.e. if level (sic) is B1 then the employee should act at B2 and higher."

5.4.16 It further provides that no employee will be allowed to act for more than three (3) consecutive months, and no provision is made for the extension of the period of three months in the Remuneration Policy.

5.4.17 Section 1 of the PFMA provides that "*irregular expenditure*" means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation. The *Irregular Expenditure Framework: PFMA Compliant Institutions* document confirms in paragraph 5 thereof that the transgression of the internal policies of a public entity can amount to irregular expenditure as contemplated by section 1 of the PFMA.

Conclusion

5.4.18 Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono were appointed by Metrorail in acting positions in 2013 and 2014 and paid acting allowances for periods exceeding three months.

- 5.4.19 The acting appointments were in violation of Paragraph 9.1.2.8 of the Remuneration Policy.
- 5.4.20 The acting allowances paid by Metrorail to these employees, for the periods exceeding three months, could possibly also have resulted in irregular expenditure, as contemplated in section 1 of the PFMA.
- 5.5 Regarding whether the appointment of Mr T Jack as the Senior Manager: Human Resources by PRASA in 2012 was not in accordance with the relevant laws and prescripts regulating the selection and recruitment of staff by PRASA and if yes, whether PRASA's conduct was improper and constitutes maladministration.**

Common Cause issues or undisputed facts

- 5.5.1 The vacancy for Senior Manager: Human Resources was advertised by Metrorail in 2012. The minimum requirements stated in the advertisement were a Bachelor's degree in Human Resources, 5 years' experience in a Human Resources environment, 5 years management experience, 3 years at a Human Resources strategic level and a driver's licence.
- 5.5.2 According to the documents received from PRASA during the investigation on 21 December 2018, six candidates were shortlisted for the position, including Mr Jack. Interviews were conducted on 19 July 2012. Two applicants withdrew before the interviews were conducted.
- 5.5.3 The '*Declaration of Interest*' form of Ms TA Mokhobo (Executive Manager: HRM), dated 19 July 2012, indicates that the Selection Panel (the Panel) conducted interviews with the remaining 4 (four) candidates. The Panel comprised of Ms TA Mokhobo, Adv. D Le Roux (Senior Manager: Training and Development and Performance Management), Mr M Swartz (former Regional Manager: Metrorail WC) and Mr E Chinnappen (Senior Manager: Metrorail WC). On their respective '*Declaration of Interest*' forms, Mr Swartz

declared that he was acquainted with Mr Jack and Mr Chinnappen declared that he was acquainted with Mr Jack and another candidate.

5.5.4 On 19 July 2012 the Panel recommended Mr Jack for appointment in the position, and on 2 August 2012 Mr Jack was issued with a letter of appointment, signed by Mr M Mofi, the former Chief Executive Officer of PRASA Rail.

5.5.5 A copy of Mr Jack's Curriculum Vitae, received from PRASA, shows that he did not have the required Bachelor's degree in Human Resources, but a Bachelor's degree in Political Science (Local Government and Public Policy Analysis) and a post graduate diploma in Management. In addition, he had the following work experience at the time:

5.5.5.1 From 2009 until 2012 he was self-employed as a senior consultant in Planning and Performance Management and Corporate Governance, and provided services, included Human Resources Management and the formulation of Human Resources policies, to local government.

5.5.5.2 From May 2005 to 2009 he was employed by the City of Cape Town, mainly in the Performance Management Department.

5.5.5.3 From September 2002 until April 2005 he was the Regional Manager: Human Resources at Liberty Life, and

5.5.5.4 From July 2001 until August 2002 he was the Head of Planning and Performance Management at Statistics SA.

Issues in dispute

5.5.6 In his response to the complaint, dated 27 November 2017, the former Regional Manager, Mr Swartz disputed the allegations that the recruitment, selection and appointment of Mr Jack was irregular or improper.

5.5.7 According to Mr Swartz, the recruitment, interview and appointment process was done at the PRASA Head Office, and that the Panel found Mr Jack to be competent to perform

the functions as he had the prerequisite skills to hold it on merit. Mr Swartz maintained that Mr Jack had extensive experience in Human Resources.

- 5.5.8 Mr R A Mahlabana the Acting Executive: Human Capital Management: PRASA Rail Operation responded to the Notice issued by the Public Protector in terms of section 7(9) of the Public Protector Act in connection with the appointment of Mr Jack, on 19 June 2021. He stated *inter alia* that:

“Having considered the recruitment file on the appointment of Mr Themba Jack (the employee) indeed, PRASA wishes to confirm that the employee did not meet the minimum advertised qualification and experience requirements.

The shortlisting process was conducted by the then Regional Manager. Mr M Swartz under the guidance of the then Executive: Human Capital Management, Mr A Mokhobo.

It has been established that then Executive: Human Capital Management gave approval to include the employee on the shortlist despite the fact that the employee did not meet the advertised minimum requirements.

PRASA has also confirmed that indeed, the employee had previously worked with other two panel members (Mr M Swartz and Mr E Chinnapenn) at the City of Cape Town offices.

All interview panel members bar Adv Des Le Roux have left the employ of PRASA for various reasons.

The business however, wishes to confirm that the employee functioned effectively and efficiently in the role of Senior Manager: Human Capital Management Western Cape until he was transferred into another portfolio in the Region.”

- 5.5.9 Further, that consequence management will be effected in respect of the remaining panel member regarding the recruitment of Mr Jack.

- 5.5.10 Mr Mahlabana stated that based on the fact that the employee performed in this role effectively and efficiently, PRASA is of the view that that the expenditure should not be regarded as irregular, but that it will engage with the Auditor-General South Africa to gain their input on the matter.
- 5.5.11 Mr Mahlabana also indicated that PRASA's internal Employee Relations Department has confirmed that it will not be "*legally practical based on the Labour Relations Act to withdraw the offer of employment with the employee*". Mr Jack was subsequent to his appointment transferred to head up the Region's Business Performance Department in 2014. Further, that PRASA will obtain an external legal opinion on whether Mr Jack's appointment could be reviewed, reversed or confirmed.
- 5.5.12 It was further stated that PRASA will engage with the Auditor-General South Africa regarding whether the irregular appointment of Mr Jack by PRASA resulted in PRASA incurring irregular expenditure as defined in terms of section 1 of the PFMA, and if so, how such irregularity may be remedied.

Application of the relevant legal framework

- 5.5.13 The relevant laws and prescripts referred to in paragraphs 5.1.15 to 5.1.28 also apply *mutatis mutandis* to this issue.

Conclusion

- 5.5.14 The evidence obtained during the investigation shows Mr Jack did not have the requisite Bachelor's degree in Human Resources. Mr Jack did not meet the minimum requirements for the position of Senior Manager: Human Resources, as determined and advertised by PRASA at the time.
- 5.5.15 Accordingly, the appointment of Mr Jack was in contravention of the section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy, and as no

legal basis was provided for the employer to disregard or deviate from the requirements, the appointment was irregular.

5.5.16 The appointment of Mr Jack could possibly also have resulted in irregular expenditure, as contemplated in section 1 of the PFMA.

6. FINDINGS

6.1 Regarding whether the appointments of Dr Msengana, Mr Fritz and Mr Xola as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013, were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

6.1.1 The allegation that the appointments of Dr Msengana, Mr Fritz and Mr Xola as Presiding Officers for disciplinary hearings by Metrorail on 1 March 2013 were not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, is substantiated.

6.1.2 Their appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy as it did not comply with the minimum requirements for the position, as determined and advertised by Metrorail.

6.1.3 Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

6.2 Regarding whether the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.

- 6.2.1 The allegation that the appointment of Ms Jam-Jam as Transformation Manager on 1 April 2014 by Metrorail was in not in accordance with the laws and prescripts regulating the recruitment and selection of of staff by Metrorail, is substantiated.
- 6.2.2 Her appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy, as it did not comply with the minimum requirements for the position as determined and advertised by Metrorail.
- 6.2.3 Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.
- 6.3 Regarding whether the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail and if yes, whether Metrorail's conduct was improper and constitutes maladministration.**
- 6.3.1 The allegation that the appointment of Mr Mzukwa as Area Manager Customer Services and subsequently as Customer Services Manager in 2013 by Metrorail was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, is substantiated.
- 6.3.2 His appointment by Metrorail contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy as Mr Mzukwa did not comply with the minimum requirements for the position, as determined and advertised by Metrorail.
- 6.3.3 Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

6.4 Regarding whether the appointments of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono by Metrorail to act in various positions for periods longer than prescribed, were not in accordance with the relevant laws and prescripts regulating acting appointments of staff by Metrorail, and if yes whether Metrorail's conduct was improper and constitutes maladministration.

6.4.1 The allegation that the appointment of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono by Metrorail, in acting positions for periods longer than prescribed, was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by Metrorail, is substantiated.

6.4.2 Their appointment contravened the provisions of section 195(1)(i) of the Constitution and paragraph 9.1.2.8 of the Remuneration Policy the appointments exceeded the prescribed requisite three (3) month period.

6.4.3 Metrorail's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

6.5 Regarding whether the appointment of Mr T Jack as the Senior Manager: Human Resources by PRASA in 2012 was not in accordance with the relevant laws and prescripts regulating the selection and recruitment of staff by PRASA and if yes, whether PRASA's conduct was improper and constitutes maladministration.

6.5.1 The allegation that the appointment of Mr Jack as the Senior Manager: Human Resources in 2012 by PRASA was not in accordance with the relevant laws and prescripts regulating the recruitment and selection of staff by PRASA, is substantiated.

6.5.2 His appointment contravened the provisions of section 195(1)(i) of the Constitution and paragraph 14 of the Recruitment and Selection Policy as it did not comply with the minimum requirements for the position as determined and advertised by Metrorail and/or PRASA.

6.5.3 PRASA's conduct accordingly constitutes improper conduct as envisaged in terms of section 182(1) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that the Public Protector is taking in terms of section 182(1) (c) of the Constitution is the following:

7.1.1 The GCEO of PRASA to:

7.1.1.1 To approach a court to review the appointment of Mr Jack and for a just and equitable order when considering the consequences thereof. In this regard, it should be noted that the Constitutional Court held in *In Khumalo and Another V Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49*; that appointments made irregularly are not automatically *null and void* because the appointed candidate has labour rights. . It was further held in this case that only a court can grant a "*just and equitable*" order in terms of section 172(1)(b) of the Constitution, when considering the consequences of declaring a decision unlawful.

7.1.1.2 Take appropriate action based on engagement with the National Treasury and PRASA's internal auditors to declare the salary paid to Mr Jack as irregular expenditure. Note is also taken that PRASA has also advised the Public Protector that there is a process underway to deal with the matter including the remedial action as per the National Treasury processes.⁷

7.1.2 The Regional Manager of Metrorail: Western Cape to:

7.1.2.1 To approach a court to review the appointments of Ms Jam-Jam and Mr Mzukwa and for a just and equitable order when considering the consequences thereof.

⁷ *Supra*

7.1.2.2 Take appropriate action based on the engagement with the National Treasury and PRASA's internal auditors to declare the salaries paid to Ms Jam-Jam and Mr Mzukwa as irregular expenditure.

7.1.2.3 Take disciplinary action against the relevant senior managers responsible for the recruitment, selection and appointment of Dr Msengana, Mr Xola, Mr Fritz, Ms Jam-Jam and Mr Mzukwa in terms of the Recruitment and Selection Policy, and the acting appointments of Ms Matomane, Mr Mzukwa, Ms Fielding and Mr Ngxonono in terms of the Remuneration Policy.

8. MONITORING

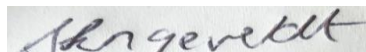
8.1.1 The GCEO of PRASA and the Regional Manager of Metrorail: Western Cape to submit an implementation plan to the Public Protector within 30 days from the date of this report on the implementation of the remedial action taken in paragraph 7.1 above.

8.1.2 The submission of the implementation plans and the implementation of the remedial action taken shall in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF
THE REPUBLIC OF SOUTH AFRICA
DATE: 08/10/2021

Assisted by: Ms Shireen Lengeveldt



Senior Investigator: Western Cape Provincial Office