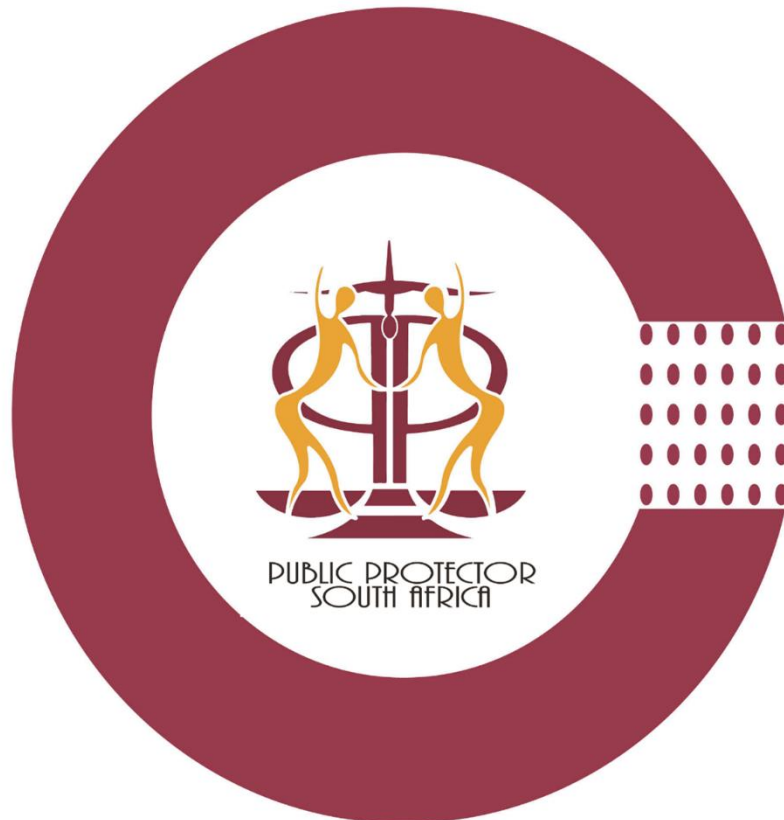


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE  
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF  
THE PUBLIC PROTECTOR ACT, 1994**



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**REPORT NUMBER: 31 of 2023/2024**

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**INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER  
CONDUCT RELATING TO THE APPOINTMENT OF CHILD AND YOUTH CARE  
WORKERS AND CHILD AND YOUTH CARE TEAM LEADERS AT THE POLOKWANE  
WELFARE COMPLEX AND MAVAMBE SECURE CARE CENTRE**

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## LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS / ABBREVIATIONS	DESCRIPTION
<b>Adv</b>	Advocate
<b>Care Workers</b>	Child and Youth Care Workers
<b>Constitution</b>	Constitution of the Republic of South Africa, 1996
<b>Department</b>	Limpopo Department of Social Development
<b>EPWP</b>	Expanded Public Works Programme
<b>HWSETA</b>	Health and Welfare Sector Education and Training Authority
<b>LRA</b>	Labour Relations Act, 1995
<b>MSCC</b>	Mavambe Secure Care Centre
<b>NEHAWU</b>	National Education, Health, and Allied Workers Union
<b>NQF</b>	National Qualifications Framework
<b>OSD</b>	Occupation Specific Dispensation
<b>PSA</b>	Public Service Act, 1994
<b>PSCBC</b>	Public Service Co-ordinating Bargaining Council
<b>Public Protector</b>	Public Protector of the Republic of South Africa
<b>Public Protector Act</b>	Public Protector Act, 1994
<b>PWC</b>	Polokwane Welfare Complex
<b>RSP</b>	Recruitment and Selection Policy
<b>SACSSP</b>	South African Council for Social Service Professions
<b>SAQA</b>	South African Qualifications Authority
<b>SDP</b>	Skills Development Provider
<b>SMS</b>	Senior Management Service
<b>Team Leaders</b>	Child and Youth Care Team Leaders

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## EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution, which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations of maladministration and improper conduct relating to the shortlisting, interviewing and appointment of certain candidates to positions of Child and Youth Care Workers (Care Workers) and Child and Youth Care Team Leaders (Team Leaders) at the Polokwane Welfare Complex (PWC) and the Mavambe Secure Care Centre (MSCC), during the period of March to October 2020, by officials of the Limpopo Department of Social Development (the Department).
- (iii) The investigation originates from a complaint lodged by an anonymous person (the Complainant) with the Limpopo Office of the Public Protector on 05 March 2021.
- (iv) In essence, the Complainant alleged that:
  - (a) The Department advertised various posts, including ninety-eight (98) posts for Care Workers and nine (09) posts for Team Leaders, in the Departmental Circular No. 43 of 2019 (the Circular), dated 13 December 2019;
  - (b) The posts of the Care Workers were allocated as follows: sixty-two (62) posts for the PWC and thirty six (36) posts for MSCC;

- 
- (c) There was a lack of transparency in the recruitment processes in that some candidates or applicants were preferred over others and were appointed to the positions of Care Worker without them meeting the minimum requirements as set out in the advertisement. In this regard, she provided details of candidates who did not meet the minimum requirements of the advertised post on the following basis:
- (aa) One (01) candidate was appointed to the position of Care Worker without having a Grade 12 certificate;
- (bb) Six (06) other candidates had Grade 12 certificates only, but did not have the relevant certificate and experience for the position of Care Worker;
- (cc) Five (05) candidates were appointed to the positions of Team Leader, while they only had Grade 12 certificates, but did not have the basic qualification in Child Care as required in the advert; and
- (dd) Former BOSASA employees who applied for the Care Worker post, who are in possession of Care Worker certificates, only attended a one-week training course offered and coordinated by BOSASA to enable them to obtain the said certificate. None of the recipients of the certificate underwent any competency examinations.
- (v) Based on the analysis of the complaint, the following issues were considered and investigated:
- (a) Whether the functionaries of the Department irregularly appointed certain candidates to posts of Care Worker at both PWC and MSCC without them meeting the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act; and
- (b) Whether the functionaries of the Department irregularly appointed certain candidates to posts of Team Leader at both PWC and MSCC without them meeting

the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act.

- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.
- (vii) On 08 November 2023, a notice in terms of section 7(9)(a) of the Public Protector Act was issued to the following persons to provide them with an opportunity to respond on the likely adverse findings and proposed remedial action. Section 7(9) of the Public Protector Act provides that persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations regarding same:
- (a) The Premier of Limpopo Province, Mr C S Mathabatha;
  - (b) The Member of the Executive Council (MEC) for the Department of Social Development, Ms N Ndalane;
  - (c) The Head of Department of Social Development, Mr J M Mahopo;
  - (d) The Human Resources Deputy Director, Mr M J Sekgobela;
  - (e) The recruitment panel members:
    - (aa) Mr P W Cholo;
    - (bb) Ms L D Khwinana;
    - (cc) Mr E M Monyamane;
    - (dd) Mr M S Mothapo;
    - (ee) Ms M S Mothapo;
    - (ff) Mr N G Shikwambani;
  - (f) All implicated candidates; and
  - (g) The anonymous Complainant;

- 
- (viii) Responses to the notice were received from the following persons:
- (a) Mr Mahopo
  - (b) Mr M J Sekgobela;
  - (c) Mr N G Shikwambani;
  - (d) Ms L D Khwinana;
  - (e) Mr M S Mothapo;
  - (f) The Complainant;
  - (g) Mr E;
  - (h) Ms M;
  - (i) Ms T;
  - (j) Mr Z;
  - (k) Mr HH;
  - (l) Mr A.
- (ix) No other responses were received from other parties who were also issued with the section 7(9)(a) notice.
- (x) Having regard to the evidence and regulatory framework determining the standard that the Department should have complied with, the following findings are made:
- (a) **Whether the functionaries of the Department irregularly appointed certain candidates to posts of Care Worker at both PWC and MSCC without them meeting the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act**
- (aa) The allegation that the functionaries of the Department irregularly appointed certain candidates to the posts of Care Worker at both PWC and MSCC without them meeting the minimum requirements as set out in the advertisement, is substantiated.

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- (bb) The eighteen (18) candidates who were appointed, did not meet the minimum requirements for the post as outlined in the advertisement and should not have been shortlisted.
- (cc) The relaxation of the post requirements by the shortlisting panel during the shortlisting process was in contravention of clause 3.4.2 of the RSP which states that relaxation of post requirements is not allowed during the shortlisting process.
- (dd) The shortlisting, interviewing, recommendation, and appointment of all the candidates who did not meet the qualification requirements as set out in the advertisement were irregular.
- (ee) The conduct of the functionaries involved in these processes was in violation of section 195(1) of the Constitution and in contravention of section 11(1) of the PSA. The conduct of the functionaries of the Department is not consistent with the democratic values and principles governing good public administration as enshrined in the Constitution. In addition, the conduct of the shortlisting panel was in contravention of clauses 5.3.2.1; 5.3.2.3 and 5.3.2.4 of the RSP. Further, the conduct of the interview panel was in contravention of clause 5.3.3.1 of the RSP.
- (ff) Accordingly, the conduct of the functionaries of the Department constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (b) Whether the functionaries of the Department irregularly appointed certain candidates to posts of Team Leader at both PWC and MSCC without them meeting the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act**
- (aa) The allegation that the functionaries of the Department irregularly appointed certain candidates to the posts of Team Leaders at both the PWC and the MSCC without



them meeting the minimum requirements as set out in the advertisement, is substantiated.

- (bb) The evidence at the Public Protector's disposal indicates that nine (09) candidates who were appointed to the post of Team Leader did not have the minimum of seven (07) years appropriate post qualification experience in Child and Youth Care work as stated in the advertisement.
- (cc) The relaxation of the post requirements by the shortlisting panel during the shortlisting process was in contravention of clause 3.4.2 of the RSP, which provides that relaxation of post requirements is not allowed during the shortlisting process.
- (dd) The shortlisting, interviewing, recommendation, and appointment of all the candidates who did not meet the qualification requirements as set out in the advertisement were irregular.
- (ee) The conduct of the functionaries involved in the recruitment process was in violation of section 195(1) of the Constitution and in contravention of section 11(1) of the PSA. The conduct is not consistent with the democratic values and principles governing good public administration as enshrined in the Constitution. In addition, the conduct of the shortlisting panel was in contravention of clauses 5.3.2.1; 5.3.2.3 and 5.3.2.4 of the RSP. Further, the conduct of the interview panel was in contravention of clause 5.3.3.1 of the RSP.
- (ff) The conduct of the functionaries of the Department accordingly constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (xi) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, is the following:

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### **The Head of Department**

- (a) In accordance with the provisions of section 158(1)(h) of the LRA, within a period of **one hundred and twenty (120) calendar days**, from date of receipt of this report, take the necessary steps for the judicial review of the irregular appointments of the eighteen (18) candidates appointed to the posts of Care Workers and nine (09) candidates appointed to the posts of Team Leader.
- (b) Within **one hundred and twenty (120) calendar days** from the date of receipt of this report take appropriate steps in line with the provisions of section 16A(2)(a) of the PSA against members of the shortlisting and interviewing panels.
- (c) Within **hundred and twenty (120) calendar days** of receipt of this report, take appropriate steps, in line with the provisions of section 16A(2)(a) of the PSA and the Disciplinary Code and Procedures for the Public Service, against the Deputy Director of Human Resources, Mr Sekgobela for misguiding the interview panel in contravention of the provisions of clause 5.1.2.6 of the RSP, resulting in the irregular addition of Mr A to the list of candidates to be interviewed for the position of Care Worker.

### **The Member of the Executive Council for Social Development, Limpopo**

- (d) Take cognisance of the findings and remedial action contained in this report.

### **The Premier of the Limpopo Provincial Government**

- (e) Within **one hundred and twenty (120) calendar** days from the date of receipt of this report, take appropriate steps against the Mr Mahopo for not exercising proper oversight and adherence to provisions of the PSA over the recruitment process of Care Workers and Team Leaders, in accordance with the provisions of section 16A(1)(a) of the PSA and Chapter 7 of the Senior Management

Handbook<sup>1</sup>.

## 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 section 8(1) read with section 8(3) of the Public Protector Act, which empowers the Public Protector to make known the findings of an investigation, to affected parties (including the Complainant) for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:
- 1.2.1 Mr Chupu Stanley Mathabatha, the Premier of the Limpopo Province;
  - 1.2.2 Ms N Ndalane, MEC for the Department of Social Development, Limpopo Province;
  - 1.2.3 Mr JM Mahopo, Head of Department (HoD), Limpopo Department of Social Development;
  - 1.2.4 Mr JM Sekgobela, Deputy Director Human Resource Management (HRM), Limpopo Department of Social Development;
  - 1.2.5 Recruitment panel members:
    - 1.2.5.1 Mr P W Cholo;
    - 1.2.5.2 Mr D L Khwinana;
    - 1.2.5.3 Mr M E Monyamane;
    - 1.2.5.4 Mr M S Mothapo;
    - 1.2.5.5 Ms M S Mothapo;
    - 1.2.5.6 Mr N G Shwikwambani;
  - 1.2.6 All implicated candidates; and
  - 1.2.7 The Anonymous Complainant;

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<sup>1</sup> 2003 Edition.

1.3 The report relates to an investigation into allegations of maladministration and improper conduct relating to the shortlisting, interviewing and appointment of certain candidates to positions of Child and Youth Care Workers (Care Workers) and Child and Youth Care Team Leaders (Team Leaders) at the Polokwane Welfare Complex (PWC) and the Mavambe Secure Care Centre (MSCC), during the period of March to October 2020, by officials of the Limpopo Department of Social Development (the Department).

## 2. THE COMPLAINT

2.1 The investigation originates from a complaint lodged by an anonymous person (the Complainant) with the Limpopo Provincial Office of the Public Protector on 05 March 2021.

2.2 The Complainant, in the main, alleged that:

2.2.1 The Department advertised various posts, including ninety-eight (98) posts for Care Workers and nine (09) posts for Team Leaders, in the Departmental Circular No. 43 of 2019 (the Circular), dated 13 December 2019;

2.2.2 The posts of the Care Workers were allocated as follows: sixty-two (62) posts for the Polokwane Welfare Complex (PWC) and thirty six (36) posts for Mavambe Secure Care Centre (MSCC);

2.2.3 There was a lack of transparency in the recruitment processes in that some candidates or applicants were preferred over others and were appointed to the positions of Care Worker without meeting the minimum requirements as set out in the advertisement. In this regard, the Complainant provided details of candidates who did not meet the minimum requirements of the advertised post on the following basis:

2.2.3.1 One (01) candidate was appointed to the position of Care Worker without having a Grade 12 certificate;

- 2.2.3.2 Six (06) other candidates had Grade 12 certificates only but did not have the relevant certificate and experience for the position of Care Worker;
- 2.2.3.3 Five (05) candidates were appointed to the positions of Team Leader, while they only had Grade 12 certificates, but did not have the basic qualification in Child Care as required in the advert; and
- 2.2.4 Former BOSASA employees who applied for the Care Worker post, who are in possession of Care Worker certificates, only attended a one-week training course offered and coordinated by BOSASA to enable them to obtain the said certificate. None of the recipients of the certificate underwent any competency examinations.

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

3.1 The Public Protector is an independent constitutional institution established in terms of 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 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) of the Constitution directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which

states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in state affairs.

- 3.4 The Department is an organ of the state in terms of section 239 of the Constitution and its conduct amounts to conduct in state affairs, as a result, the Public Protector is satisfied that the complaint falls within its competency to conduct an investigation as envisaged in section 182(1)(a) of the Constitution and section 6(4) of the Public Protector Act.

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

- 4.1 Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.1.1 Whether the functionaries of the Department irregularly appointed certain candidates to posts of Care Worker at both PWC and MSCC without them meeting the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act; and

4.1.2 Whether the functionaries of the Department irregularly appointed certain candidates to posts of Team Leader at both PWC and MSCC without them meeting the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act.

#### **5. THE INVESTIGATION**

##### **5.1 Methodology**

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

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

## 5.2 Approach to the investigation

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

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

(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 maladministration, abuse of power or other improper conduct?

(d) In the event of a violation, what action should be taken?

5.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the alleged conduct was inconsistent with the applicable prescripts.

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- 5.2.4 The enquiry regarding what should have happened, focuses on the law and rules that regulate the standards that should have been met by the Department and its employees.
- 5.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration; what it would take to remedy the wrong or, where appropriate, to place the Complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration.

### **5.3 The Investigation Process**

- 5.3.1 A preliminary investigation was conducted in terms of section 7(1) of the Act to determine the merits of the complaint, allegation or information, and the manner in which the matter should be dealt with, including whether or not a “full scale” investigation was justified.
- 5.3.2 The investigation process commenced with correspondence to Mr Mahopo on 23 March 2021, wherein the Department was informed of the investigation, the legislation in terms of which the investigation was conducted, as well as what information was required.
- 5.3.3 The format and the procedure followed in conducting the investigation included:
- 5.3.3.1 Communication by telephone, letter exchanges and email correspondence with the Department;
- 5.3.3.2 Interviews held with affected parties or persons reasonably believed to have information relevant to the investigation, such as the shortlisting and interview panel members, other functionaries of the Department, the Complainant and some of the appointed candidates; and



- 5.3.3.3 Records or documents obtained relevant to the investigation, which were in the possession or under the control of the Department.

## 5.4 Key sources of information

- 5.4.1 Letters, e-mail correspondence, documents, and interviews

### Letters and Emails

- 5.4.1.1 The complaint, dated 05 March 2021;
- 5.4.1.2 Public Protector letter to Mr Mahopo, dated 23 March 2021;
- 5.4.1.3 Letter from Mr Mahopo to the Public Protector, dated 29 April 2021;
- 5.4.1.4 Email from Mr Mahopo to the Public Protector, dated 17 June 2021;
- 5.4.1.5 Email from the Public Protector to Mr Mahopo, dated 21 June 2021;
- 5.4.1.6 Email from Mr Mahopo to the Public Protector, dated 21 June 2021;
- 5.4.1.7 Email from the Public Protector to Mr Mahopo, dated 19 January 2022;
- 5.4.1.8 Email from Public Protector to Ms Elaine Brass (Ms Brass), the Chief Executive Officer (CEO) of Health and Welfare Sectoral Educational Training Authority (HWSETA), dated 07 April 2022;
- 5.4.1.9 Email from the Mr Eugene Du Plooy, the Specialist-Professional Bodies: Registration and Recognition, South African Qualifications Authority (SAQA) to the Public Protector, dated 12 April 2022;
- 5.4.1.10 Letter from Public Protector to Ms Brass, dated 20 May 2022;
- 5.4.1.11 Response from Ms Brass to the Public Protector, dated 07 June 2022;
- 5.4.1.12 Response from Mr Mahopo to the Public Protector, undated;
- 5.4.1.13 Email from Mr Sekgobela to the Public Protector, dated 19 July 2023;
- 5.4.1.14 Responses to the section 7(9) notice were received by the Public Protector from:
- (a) Mr Mahopo on 21 November 2023;
  - (b) Mr Sekgobela on 23 November 2023;
  - (c) The Complainant on 13 November 2023;
  - (d) Ms Khwinana on 13 November 2023;

- (e) Mr Mothapo on 10 November 2023;
- (f) Mr Shikwambani on 10 November 2023;
- (g) Ms M on 15 November 2023;
- (h) Mr E on 11 November 2023;
- (i) Ms T on 13 November 2023;
- (j) Mr Z on 14 November 2023; and
- (k) Mr A on 24 November 2023.

### **Documents**

- 5.4.1.15 Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) Resolution 1 of 2009;
- 5.4.1.16 Department of Social Development Recruitment and Selection Policy 2011;
- 5.4.1.17 Departmental Circular 43 of 13 December 2019;
- 5.4.1.18 Desktop printout of National Qualification Framework from the Department (undated);
- 5.4.1.19 Minutes of the shortlisting panel, dated 24 March 2020;
- 5.4.1.20 Memorandum for Approval of Shortlists and Proceeding with Interviews dated 18 June 2020;
- 5.4.1.21 Request for replacement of Panel Members for Secure Care posts, dated 29 June 2020;
- 5.4.1.22 Recommendations with score sheets by the Panel Members for posts of Care Workers, dated 06 August 2020;
- 5.4.1.23 Recommendations with score sheets by the Panel Members for posts Care Workers for PWC, dated 07 August 2020;
- 5.4.1.24 Request for approval of thirty-six (36) Child & Care Workers, dated 31 August 2020; and
- 5.4.1.25 Request for approval for appointment of nine (9) Child & Youth Care Workers Team Leaders, dated 30 September 2020;

### **Interviews**

5.4.1.26 Interviews with shortlisting and interview panel members held on 29 June 2021;  
and

5.4.1.27 Interview with Mr A held on 28 July 2022.

#### 5.4.2 **Legislation and other prescripts**

5.4.2.1 The Constitution of the Republic of South Africa, 1996;

5.4.2.2 The Public Protector Act, 1994;

5.4.2.3 The Public Service Act, 1994;

5.4.2.4 The Labour Relations Act, 1995;

5.4.2.5 The Public Service Handbook, Senior Management Services, 2003;

5.4.2.6 Limpopo Department of Social Development Recruitment and Selection Policy, 2011; and

5.4.2.7 Guide on Managing Discipline in the Public Service, 2021.

#### 5.4.3 **Case Law**

5.4.3.1 Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76]; and

5.4.3.2 Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC).

#### 5.4.4 **Notice issued in terms of section 7(9)(a) of the Public Protector Act**

5.4.4.1 On 08 November 2023, a notice in terms of section 7(9)(a) of the Public Protector Act was issued to various persons referred to in paragraph 1.2 above, to provide them with an opportunity to respond to the likely adverse findings and proposed remedial action. Section 7(9)(a) and (b) of the Public Protector Act provide that

persons implicated in an investigation by the Public Protector, are to be allowed the opportunity to make representations regarding same.

5.4.4.2 Responses to the notice were received from the persons indicated in paragraph 5.4.1.14 *supra*.

5.4.4.3 No other responses were received on the notices served. No party requested an extension in terms of Rule 23(3) of *the Rules relating to investigations by the Public Protector and matters incidental thereto, 2020* (the Public Protector Rules, as amended). The responses and information/evidence submitted in response to the notice, were duly considered by the Public Protector in relation to the substance of any allegations against the parties concerned or the grounds for adverse comments or findings against or remedial action involving them.

## **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 functionaries of the Department irregularly appointed certain candidates to posts of Care Worker at both PWC and MSCC without them meeting the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act**

### *Common cause*

6.1.1. The Department advertised sixty-two (62) Care Worker posts for PWC and thirty-six (36) Care Worker posts for MSCC, in Departmental Circular No. 43 of 2019 with reference no. DSD/2019/62, dated 12 December 2019. The closing date for the submission of applications was 03 January 2020.

### *Issue in dispute*

- 6.1.2. The issue for the Public Protector's determination is whether the recruitment of candidates for the positions of Care Worker at both PWC and MSCC was undertaken in accordance with the prescripts and approved procedures governing recruitment in the Department.

*The Complainant's version*

- 6.1.3. The Complainant alleged that the process followed for the recruitment of candidates for the posts of Care Workers was not transparent, as some candidates were appointed without meeting the minimum requirements for the said position.
- 6.1.4. Furthermore, certain former BOSASA employees who are in possession of a Care Worker certificate, only attended a one-week training course offered and coordinated by BOSASA, to enable them to obtain the said certificate. None of those recipients of the certificate underwent any competency examinations.

*Evidence obtained from the Department on the recruitment process*

- 6.1.5. On 23 March 2021, the Public Protector raised the allegations with Mr Mahopo and further requested documents relating to the recruitment process followed.
- 6.1.6. On 29 April 2021, in his response to the allegations letter, Mr Mahopo only provided the following documents without providing a narrative:

*Advertisement for the post, dated 12 December 2019*

- 6.1.6.1 A copy of the advertisement dated 12 December 2019, indicating the minimum qualification requirements for the post of Care Worker as an appropriate recognised National Qualifications Framework (NQF) level 4 (Grade 12) or relevant qualification, basic qualification in Childcare, knowledge and understanding of the legislative framework governing the secure care centres, good communication skills and good interpersonal relationships. The advert further indicated that

applications should be submitted on a Z83 form and must be accompanied by a comprehensive CV and certified copies of the required qualifications.

#### *Curricula Vitae*

- 6.1.6.2 The Investigation Team was furnished with copies of ninety-eight (98) curricula vitae (CVs) of candidates who were appointed to Care Worker posts at both PWC and MSCC.

#### *Recruitment Registers*

- 6.1.6.3 The recruitment registers for Care Worker posts dated 03 January 2020 indicate that two thousand four hundred and seventy (2470) applications for the PWC and one thousand one hundred and ninety (1190) applications for the MSCC, were received by the Department.

#### *Memorandum on the shortlisting and Interviewing panel, dated 20 February 2020*

- 6.1.6.4 In a memorandum dated 20 February 2020 from the Member of the Executive Council (MEC) for Social Development, Ms CN Rakgoale, approved the members of the shortlisting and interview panels for both Care Workers and Team Leaders.
- 6.1.6.5 According to the memorandum for the approval of the Panel for Shortlisting of Posts, the members of the shortlisting and interviewing panel for the posts of Care Worker were the following:

#### *Shortlisting Panel*

- a) Mr E M Monyamane;
- b) Mr N G Shikwambani;

- c) Ms D L Khwinana; and
- d) Mr M S Mothapo.

*Interview Panel*

- a) Mr E M Monyamane;
- b) Mr M S Mothapo;
- c) Ms M S Mothapo; and
- d) Mr P W Cholo.

*Minutes of the shortlisting panel, dated 24 March 2020*

6.1.6.6 The Minutes of the shortlisting panel dated 24 March 2020 reflect that the shortlisting for the posts of Care Workers for PWC and MSCC took place over the period 18 to 24 March 2020. The minutes further indicate that the panel agreed on the shortlisting criteria for the Care Worker posts as follows:

- (a) Due to the volume of application[s] received, the panel agreed to start with the appropriate recognized NQF level 4 qualification or equivalent (Grade 12);
- (b) Locality within Capricorn/Vhembe District;
- (c) Applicants who are working as contract workers within both Secure Care Centres and meet criteria (a) will qualify automatically; and
- (d) Persons with disabilities who meet criteria (a) will also qualify automatically.

*Internal memorandum on the approval to proceed with interviews, dated 18 June 2020*

6.1.7. On 19 July 2023, the Investigation Team telephonically requested the Department to provide the Memorandum for the *Request for Approval to Proceed with Interviews for the posts of Team Leader and Care Worker*.

6.1.8. On the same day, Mr Sekgobela emailed a memorandum dated 18 June 2020 titled *“Request for Approval to Proceed with Interviews for the Posts of Social Work*

*Supervisor, Social Worker, Child and Youth Care Supervisor, Child and Youth Care Team Leader, Child and Youth Care Worker, Social Auxiliary Worker, Staff Nurse and Occupational Therapist*”, which indicated the names of functionaries who conducted the shortlisting for both posts of Care Worker and Team Leader.

- 6.1.9. The memorandum further contains a list of one hundred and thirty (130) applicants who were shortlisted for interviews for the posts of Care Worker at PWC and a list of seventy-seven (77) applicants who were shortlisted for interviews for the posts of Care Worker at MSCC.

*Internal Memorandum on appointments at PWC, dated 03 September 2020*

- 6.1.10. In the memorandum titled *“Request for approval for appointment of sixty-two (62) child and youth care workers for Polokwane Welfare Complex”*, which was signed by Mr Mahopo on 03 September 2020, Mr Sekgobela, who was the Deputy Director: Human Resources, stated the following:

- (a) Two (02) candidates, Mr A and Ms B were initially not shortlisted. Both candidates lodged formal complaints relating to their exclusion from the interview shortlist upon establishing that they were not shortlisted;
- (b) The interview panel took a decision that Ms B qualified according to the shortlisting criteria as she was *“employed by Expanded Public Works Programme (EPWP) and placed at Polokwane Welfare Complex as a Child and Youth Care Worker”*. Based on this, she was then added to the interview shortlist;
- (c) Mr A was on contract with the Department of Social Development as a Care Worker at the time when he applied for the post of Care Worker, but he did not hold a Grade 12 certificate. At the time when he lodged his complaint with Mr Mahopo, he argued that Mr A’s Care Worker certificate was equivalent to Grade 12. The panel took a decision to interview him, pending an investigation into his complaint by the Human Resource Division.



*Internal Memorandum on appointments at MSCC, dated 03 September 2020*

6.1.11. The memorandum approved by Mr Mahopo, on 03 September 2020 titled “*Request for approval for appointment of thirty-six (36) Child and Youth Care Workers for Mavambe Secure Care Centre*” reflects the following:

- (a) Two (02) other candidates, Mr C and Mr D, who were on contract with the Department and placed at MSCC as Care Workers, were “*erroneously*” not shortlisted and they complained “*informally*” against their exclusion; and
- (b) The panel resolved to look at their applications and checked if they met the criteria. The panel unanimously agreed to shortlist them as they met the shortlisting criteria.

*Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) Resolution, 2009*

6.1.12. A copy of the PHSDSBC Resolution, 01 of 2009, was also furnished to the Investigation Team. The Resolution indicated that the qualification requirement for the post of Care Worker was Grade 12.

*Appointment Letters*

6.1.13. The Investigation Team was furnished with copies of ninety-eight (98) appointment letters for the candidates appointed to the Care Worker posts at both PWC and MSCC.

*Interview with members of the interview and shortlisting panels*

- 6.1.14. On 29 June 2021, the Investigation Team conducted an interview with members of both the interview and shortlisting panels to seek clarity regarding, amongst others, the following issues:
- 6.1.14.1 Relaxation of the qualification requirements and amendment of the shortlisting criteria as reported in the minutes of the shortlisting panel; and
- 6.1.14.2 The interview of Mr A, who was not initially shortlisted and did not have a Grade 12 qualification.
- 6.1.15. The following functionaries were interviewed regarding their role in the shortlisting and interview processes:

*Interview with Mr Monyamane*

- 6.1.15.1 Mr Monyamane, the Chairperson of the Shortlisting and the Interview panels stated that all the shortlisted candidates met the minimum requirements, except for one candidate, Mr A, who did not have a Grade 12 certificate. He confirmed that the panel agreed to relax and amend the requirements of the post, as reflected in the minutes of the shortlisting process, due to the volume of applications received.
- 6.1.15.2 He indicated that the issue of Mr A not having a Grade 12 qualification was referred to the Deputy Director of Human Resources, Mr Sekgobela, for advice. Mr A was, at the time, attached to the PWC on a contractual basis and he only had a Child and Youth Care Worker certificate.
- 6.1.15.3 He further indicated that Mr Sekgobela conducted an investigation after the complaint by Mr A was referred to him by the interview panel and from his investigation, he indicated to the panel verbally that *“the desktop findings regarding the candidate’s qualification were that he had an Occupational Certificate in Child and Youth Care Work which was registered on National Qualification Framework*

(NQF) and was pitched at level 4". Mr Sekgobela regarded it as equivalent to NQF credits of Grade 12, which is also pitched at level 4 on the NQF.

- 6.1.15.4 Mr Monyamane indicated that, after the interviews were held and before the appointments were made, Mr Sekgobela advised the interview panel that Mr A's certificate in Child and Youth Care Work was equivalent to Grade 12, at NQF Level 4.

*Interview with Mr Mothapo*

- 6.1.15.5 Mr Mothapo confirmed that he was a member of both the shortlisting and interview panels. He further stated that Mr A lodged a complaint about not being shortlisted and the panel decided to shortlist and interview him, pending an investigation by the Human Resources unit.

- 6.1.15.6 He confirmed that he shared the same view as Mr Monyamane regarding the advice given by Mr Sekgobela on the equivalence of the Child and Youth Care Worker qualification to Grade 12 and the fact that Mr A met the second criterion for shortlisting.

*Interview with Ms Mothapo*

- 6.1.15.7 Ms Mothapo stated that she was a member of the Interview panel only and that Mr A was interviewed, even though he was not shortlisted.

- 6.1.15.8 She further stated that the interview panel awaited advice from the HR unit on whether his basic qualification in Child Care was equivalent to a Grade 12 (NQF Level 4).

*Interview with Ms Khwinana*

- 6.1.15.9 Ms Khwinana confirmed that she was a member of the shortlisting and the interview panel. She stated that she was not present when the shortlisting panel took the

decision to relax and amend the post requirements, but when she returned to the meeting, she was briefed about the decision and she agreed with the decision taken. She further confirmed that Mr A approached the interview panel on the day of the interviews to complain that he was not shortlisted and the interview panel then decided that Mr A should be interviewed, pending an investigation by the HR unit.

*Interview of Mr Shikwambani*

- 6.1.15.10 Mr Shikwambani confirmed that he was a member of the shortlisting panel and that Mr A was not shortlisted because he did not have a Grade 12 qualification;
- 6.1.15.11 He further confirmed that the shortlisting panel did not request the approval from the Head of the Department to relax the job requirements for the post of Care Worker.

*Interview with Mr A*

- 6.1.15.12 Information obtained from Mr Mahopo during the course of the investigation indicated that candidates shortlisted for the Care Worker posts for PWC were interviewed over the period of 06 to 08 July 2020. However, during a telephone interview between the Investigation Team and Mr A on 28 July 2022, he indicated that he was only interviewed on 10 July 2020.

*Submission from Mr Sekgobela, Deputy Director Human Resources*

- 6.1.16. On 19 January 2022, the Investigation Team sent an email to Mr Sekgobela in order to request his report on the investigation he conducted regarding the qualifications of Mr A's Child and Youth Care Worker certificate. On 26 January 2022, Mr Sekgobela responded through an unsigned and undated letter stating that Mr A has an Occupational Certificate in Child and Youth Care Work, which is registered at NQF level 4 and equivalent to the NQF credits of Grade 12, as per the guideline on NQF.

- 6.1.17. On 12 July 2023, the Investigation Team made a further enquiry with Mr Sekgobela relating to whether there was any basis upon which the interview panel relied on when considering the complaints lodged by Mr A, Ms B, Mr C and Mr D and adding them to the interview lists.
- 6.1.18. Mr Sekgobela responded by letter attached to an email dated 18 July 2023 and indicated that there is no legislation that empowered the panel to add Mr A, Ms B, Mr C and Mr D and, that the panel members used their own discretion as the affected candidates were internal staff within the institution as Care Workers on a contract basis.

*Independently sourced information*

- 6.1.19. On 19 May 2022, the Investigation Team perused the South African Council for Social Service Professions (SACSSP) website register to establish whether Mr A was registered. It was established that Mr A registered with the SACSSP as a Care Worker in April 2015.
- 6.1.20. On 15 August 2022, the Investigation Team conducted further desktop research regarding the difference between or the equivalence of a Grade 12 certificate and a certificate in Child and Youth Care Work. The research by the Investigation Team showed that the difference between the two qualifications (Grade 12 and Occupational Certificate in Child and Youth Care Work) is that they are not regulated by the same regulatory council. A Grade 12 qualification is regulated by the Council for Quality Assurance in General and Further Education and Training Qualification (also known as UMALUSI), whereas the Care Worker certificate falls under the Occupational Qualifications sub-Framework and is regulated by the HWSETA.
- 6.1.21. The Child and Youth Care Workers, upon attainment of their Child Care certificates from HWSETA, register with the SACSSP, a statutory body which validates the

authenticity of their qualification with the relevant authority (HWSETA) before such registration is effected.<sup>2</sup>

*Submission from the South African Qualifications Authority (SAQA)*

- 6.1.22. On 07 April 2022, the Investigation Team made a written enquiry with SAQA to verify the equivalence of the Care Worker certificate to a Grade 12 certificate.
- 6.1.23. In an email response from Mr Du Plooy, the Specialist-Professional Bodies: Registration and Recognition, dated 12 April 2022, stated that although qualifications may be registered at the same NQF level or higher, they may not be equivalent due to the unique nature and complexity of the qualifications. The two (02) qualifications have different purposes, entry requirements and exit level outcomes. Therefore, the Care Worker qualification cannot be equated to the National Senior Certificate.

*Submission received from Health and Welfare Sectoral Educational Training Authority (HWSETA)*

- 6.1.24. On 31 May 2022, the Investigation Team conducted a verification of the Child & Youth Care Work certificates awarded to former BOSASA Care Worker employees by way of an enquiry letter to the HWSETA. A copy of the Child & Youth Care Work certificate of Mr A was attached to the enquiry letter as a specimen of the certificate to be verified.
- 6.1.25. On 07 June 2022, Ms Brass, the CEO of HWSETA, responded through a letter by stating that Mr A was not linked to any qualification on the HWSETA system, and it was therefore unlikely that the certificate was issued by the HWSETA.

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<sup>2</sup> <https://regqs.saqa.org.za/viewQualification.php?id=49647> and <https://regqs.saqa.org.za/viewQualification.php?id=60209>.

- 6.1.26. Ms Brass further stated that it was also found that the Skills Development Provider (SDP) who provided the training to the said employees, was not accredited for the Child and Youth Care Worker qualification but was accredited for only two (02) qualifications by the HWSETA, *i.e.* Ancillary Health Care and Community Health Care qualifications.
- 6.1.27. Ms Brass concluded that the attached certificate of Mr A, which reflected the Child and Youth Care Worker qualification, could not have been issued by HWSETA because the SDP was not accredited for the qualification and therefore the learner could not be linked to the non-approved qualification.
- 6.1.28. On 19 June 2023, the Investigation Team made a further enquiry by way of a letter to the HWSETA, requesting verification of educational qualifications achieved at the HWSETA in respect of Care Workers qualification by the applicants to the Care Worker post.
- 6.1.29. Mr Thabang Nkadimeng (Mr Nkadimeng), the Legal Officer of HWSETA responded through a letter on 20 June 2023. He confirmed that only two (02) of the names submitted, *i.e.*, Mr G and Ms U had completed the qualification in Care Work and certificates of achievement had been issued to them.
- 6.1.30. On 30 October 2023, the Investigation Team enquired from Mr Nkadimeng, regarding the date of issuance of the Child and Youth Care Work Certificates to Mr G and Ms U. On the same date, Mr Nkadimeng indicated that Ms U was issued with the Certificate on 26 November 2019 and Mr G on 17 February 2020.

#### **Responses to the section 7(9)(a) notice**

- 6.1.31 The Public Protector received responses to the Notice in terms of section 7(9)(a) of the Public Protector Act on 08 November 2023.

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*Response from Mr Mahopo*

- 6.1.32 In his response on behalf of the Department, dated 21 November 2023, Mr Mahopo stated that:
- 6.1.32.1 The Department took note of the preliminary remedial action proposed by the Public Protector and the time frames thereof. The Department was committed to implementing the recommendations once the final investigation report was issued by the Public Protector office;
- 6.1.32.2 The Department shall correct the irregular appointments as follows:
- (a) By promptly engaging the appointed employees for mutual agreement and if the person found to be irregularly appointed agrees to resign, then the irregularity would have been resolved;
  - (b) The Department will approach the Labour Court to set aside such a decision in terms of section 158(1)(h) of the Labour Relations Act which provides that the Labour Court *may "... review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law"*;
  - (c) The Department will, without delay as required by the Public Protector and subject to applicable case law, make an application to the Labour Court to declare the appointments null and void;
  - (d) The Department shall consider referring the matter to the Office of the State Attorney, as regulated by the State Attorney's Act, 1957;
  - (e) The Department shall further institute disciplinary action against all officials identified in the report for non-compliance with the regulatory framework applicable to the appointment of staff as prescribed in the Public Service Act, 1994, any relevant legislation applicable to the Department, Public Service Regulations and Departmental policy; and



- (f) The Department shall further thereto take disciplinary action against Mr Sekgobela for non-compliance with the regulatory framework applicable to the appointment of staff as prescribed in the Public Service Act, 1994, any relevant legislation applicable to a Department, Public Service Regulations for misrepresentation, gross dishonesty and contravening departmental policy.

*Response from Mr Sekgobela*

- 6.1.33 Mr Sekgobela responded on 23 November 2023, as follows:
- 6.1.33.1 He disputes that the Memorandum titled “*Request for Approval for Appointment of Sixty-Two (62) Child and Youth Care Workers for Polokwane Welfare Complex*” was generated by him or that he was the author thereof;
- 6.1.33.2 He further disputes that the Memorandum titled “*Request for Approval for Appointment of Thirty-six (36) Child and Youth Care Workers for Mavambe Secure Care Centre*” was approved by him or that he was the author thereof;
- 6.1.33.3 He was not part of the selection team either as a panel member or Human Resource Representative and the advice to relax the requirement was not provided by him to the selection team. The advice to add Mr A, Ms B, Mr C and Mr D to the interview list was not provided by him as he was not a member of the panel or HR Representative of both the shortlisting and interview selection team;
- 6.1.33.4 He only provided advice regarding the qualification of Mr A after the interviews were concluded and the status quo of Mr A’s qualification as per his response in his email to the Public Protector on 26 January 2022 still stood. The response stated that Mr A had an Occupational Certificate in Child and Youth Care Work, which was registered at NQF level 4 and equivalent to the NQF credits of Grade 12, as per the guideline on NQF; and

6.1.33.5 With regard to the addition of candidates to the interview list after same had been approved by the approving authority, his interpretation of clause 5.3.3.1 of the RSP was that it does not preclude the panel from correcting any errors or omissions on their part and thereafter notifying the approving authority about the corrections.

*Response from the Complainant*

6.1.34 The Complainant responded to the Notice on 13 November 2023 and stated that:

6.1.34.1 When she approached the Public Protector as a Complainant in March 2021, the reason was not only to ask the Office to unearth the rot that poisoned the recruitment and selection process, but also to seek redress or relief at a personal level. The proposed remedial action as contained in the notice was silent about her redress.

*Response from Mr Mothapo*

6.1.35 In his response to the Notice dated 10 November 2023, Mr Mothapo stated that:

6.1.35.1 He noted the proposed remedial action “*with a heavy heart*” considering that all the processes that they followed as members of the shortlisting and interview panels were guided by HR advice where the panels were not sure of the process.

*Response from Mr Shikwambani*

6.1.36 Mr Shikwambani responded to the Notice on 10 November 2023 and stated as follows:

6.1.36.1 He was a member of the shortlisting panel. The panel did not shortlist Mr A as he did not meet the first minimum requirement which was Grade 12. He was not involved in the processes where the irregularities were alleged to have occurred and therefore, he cannot be held accountable.

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*Response from Ms M*

6.1.37 Ms M stated in her response to the Notice dated 15 November 2023 as follows:

6.1.37.1 She registered with the Council (South African Council for Social Services Professions) upon her appointment as a Care Worker.

*Response from Ms T*

6.1.38 In the response to the Notice dated 13 November 2023, Ms T stated that:

6.1.38.1 According to her, the advertisement for the post of Care Worker required an appropriate recognised NQF level 4 (Grade 12) and therefore she met the requirement.

*Response from Mr A*

6.1.39 Mr A stated in his response to the Notice dated 24 November 2023, that:

6.1.39.1 He complied with the minimum requirements of the advertised post as he was in possession of an NQF Level 4 qualification. HWSETA confirmed his qualification for Child and Youth Care Work.

*Applicable law*

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

6.1.40 Section 195(1) of the Constitution provides, amongst other things, that “*Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

- (a) *A high standard of professional ethics must be promoted and maintained;*
- (b) ...
- (c) ...

- (d) *Services must be provided impartially, fairly, equitably and without bias;*
- (e) ...
- (f) *Public administration must be accountable;*
- (g) *Transparency must be fostered...;*
- (h) *Good human-resource management and career-development practices, to maximise human potential, must be cultivated.”*

### **Public Service Act, 1994 (as amended) (the PSA)**

- 6.1.41 Section 11(1) of the PSA states that in the making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.
- 6.1.42 Section 11(2)(a) of the PSA provides that *“in the making of any appointment or the filling of any post in the public service, all persons who qualify for the appointment, transfer or promotion concerned shall be considered”*.
- 6.1.43 Section 16A(2)(a) of the PSA states that *“the Head of a Department shall immediately take appropriate disciplinary steps against an employee of the Department who does not comply with a provision of this Act, or a regulation, determination or directive made thereunder”*.
- 6.1.44 Section 5(7)(a) of the PSA states that a functionary shall correct any action or omission purportedly made in terms of this Act by that functionary if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission.

### **Labour Relations Act, 1995 (LRA)**

- 6.1.45 Section 158(1)(h) of the LRA states that the Labour Court may review any decision taken or any act performed by the state in its capacity as employer, on such grounds as are permissible in law.

- 6.1.46 The Code of Good Practice contained in Schedule 8 of the LRA applies to the employer and all employees falling within the registered scope of the Public Service Co-ordinating Bargaining Council (PSCBC).

**Limpopo Department of Social Development Recruitment and Selection Policy, 2011 (RSP)**

- 6.1.47 In its foreword, the RSP states that recruiting and selecting the right people is of paramount importance to the continued success of the Department. The RSP sets out how to ensure, as far as possible, that the best people are recruited on merit and that the recruitment process is free from bias and discrimination.
- 6.1.48 The RSP Foreword further states that the policy sets out a procedure to enable the Department to monitor staff recruitment and to provide information to enable appropriate committees to monitor recruitment activity within the Department.
- 6.1.49 Clause 3.1.1 of the RSP states that recruitment and selection practices must be fair, just and equitable and the most suitable candidates must be selected for appointment according to their competencies.
- 6.1.50 Clause 3.1.3.3. of the RSP states that it is the responsibility of each head of division/district manager to ensure that this policy is carefully followed and that all heads of divisions/district managers should make members of their staff aware of the obligation to familiarise themselves with and follow this policy.
- 6.1.51 Clause 3.4.2 of the RSP provides that relaxation of post requirements is not allowed during the shortlisting process.
- 6.1.52 Clause 5.1.2.6 of the RSP provides that the role of the Human Resource Management Division shall be to provide secretarial and advisory services during the selection process.

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- 6.1.53 Clause 5.2.1.3 of the RSP provides that the contents of the advertisement ultimately represent the selection criteria applicable to the filling of the post.
- 6.1.54 Clause 5.2.2 of the RSP provides for “*Relaxation of educational qualifications appointment requirements*”. Clause 5.2.2.6 states that the submission must be made to the HoD for approval of the relaxation of the educational qualification requirements.
- 6.1.55 Clause 5.3.2 of the RSP provides for “*Requirements for short-listing*”. It states, amongst others, the following:
- 6.1.55.1 Clause 5.3.2.1 states that a candidate shall at least meet the minimum appointment requirements for the advertised post in respect of qualifications and competencies in order to be short-listed;
- 6.1.55.2 Clause 5.3.2.3 provides that the short-listing criteria must be in line with the job content and appointment requirements as well as advertised requirements so that applicants short-listed are clear on the criteria that apply in a consistent manner;
- 6.1.55.3 Clause 5.3.2.4 states that candidates who do not meet the minimum requirements of the advertised posts shall be excluded from short-listing;
- 6.1.55.4 Clause 5.3.2.5 states that for the reason that the elimination of candidates has an important impact on the rights and expectations of applicants, it shall be done in a justifiable manner and for the fact that the elimination may be challenged, it is important that reasons for such elimination be documented and put on record;
- 6.1.55.5 Clause 5.3.2.6 provides that the shortlisting of candidates shall be based on the information provided in the application form and the curriculum vitae, which is relevant to the requirements of the advertised post;

- 6.1.55.6 Clause 5.3.2.7 provides that the qualifications and competencies of a candidate to be short-listed must be relevant in terms of the advertised post. What is considered relevant is what has been specified in the advertisement; and
- 6.1.55.7 Clause 5.3.3.1 states that the approving authority may not, when approving the shortlisted candidates, include candidates not shortlisted by the panel in the shortlisting.

#### *Case law*

- 6.1.56 The appointment of candidates without appropriate qualifications was dealt with by the court *in the matter of Khumalo and Another v Member of the Executive Council for Education KwaZulu-Natal*<sup>3</sup>, the court held, *inter alia*, that:

“(61) Section 11(2) of the Public Service Act does not state explicitly that only those who meet the requirements may be appointed. However, section 11(2)(a) does create an entitlement for those who apply and qualify for a position to be considered. The purpose of section 11(2) is to ensure that applicants are considered on their merits and on the basis of equality and objectivity. It follows, as a corollary to these express terms, that those who do not apply or do not qualify are not entitled to be considered.

(62) Section 11(2) must be read in the context of the state’s obligations under section 195(1)(i) of the Constitution and the right to fair labour practices under section 23 of the Constitution. Section 195(1)(i) stresses the importance of ensuring that appointment processes in the public sector are based on ability, objectivity and fairness. Fairness in employment practices and labour relations requires the state to be even-handed and transparent not only to those whom it employs, but so too to those who may wish to apply for employment at a state institution. It would not be fair if the state were to employ persons who do not meet

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<sup>3</sup> Khumalo and Another v Member of the Executive Council for Education KwaZulu-Natal [2013] ZACC 49 (18 December 2013)

*the very requirements that the state itself sets. It is neither fair nor in compliance with the dictates of transparency and accountability for the state to mislead applicants and the public about the criteria it intends to use to fill a post. The formulation and application of requirements for a particular post is a minimum prerequisite for ensuring the objectivity of the appointment process. Persons who do not meet the requirements for a post in the public sector ought not to be appointed”.*

- 6.1.57. The court further held that public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to “*respect, protect, promote and fulfil the rights in the Bill of Rights*”. As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration<sup>4</sup>.

#### *Analysis*

- 6.1.58. The evidence at the Public Protector’s disposal indicates that Mr A was not on the list of shortlisted candidates, however, he was interviewed and appointed, despite him not having a Matric Certificate, as specified in the advertisement.
- 6.1.59. Seventeen (17) candidates were shortlisted, interviewed and appointed to the post of Care Worker at both PWC and MSCC, despite their applications showing that they did not have a basic qualification in Child Care, which was one of the requirements for the post.
- 6.1.60. The constitutional principles outlined in section 195(1) of the Constitution enjoined the Department to maintain a high standard of professional ethics and to cultivate sound human resource management when it recruited and appointed candidates

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<sup>4</sup> At Par. 36



for the advertised posts. In the matter of *Khumalo and Another v Member of the Executive Council for Education*, the court emphasised the obligation of functionaries of the state to ensure that appointments in state institutions are based on ability, objectivity, and fairness.

- 6.1.61. Furthermore, section 11(1) of the PSA, enjoins the Department to have due regard to the principle of equality and other democratic values and principles enshrined in the Constitution. In this instance, Mr Mahopo, as the Accounting Officer and other functionaries responsible for the recruitment and selection process, were expected to ensure that due processes, applicable laws and policy directions that regulate the appointment of suitable candidates were rigorously followed in the appointment of Care Workers.
- 6.1.62. The amendment of the shortlisting criteria by the panel during the shortlisting process had the effect of including candidates who in fact did not qualify to be shortlisted in terms of the criteria as set out in the advertisement, contrary to the provisions of section 11(2)(a) of the PSA, which requires that all persons who apply and qualify for a position shall be considered in the making of any appointment or the filling of any post in the public service.
- 6.1.63. The Foreword of the RSP sets the tone for the application of the policy in the recruitment process. It states that *“the RSP sets out how to ensure ... that the best people are recruited on merit and the recruitment process is free from bias and discrimination”*. The provisions of clause 3.1.1 echo the sentiments stated in the Foreword in so far as fairness and justice are encouraged in the recruitment and selection practices.
- 6.1.64. According to the provisions of clause 3.1.3.3, Mr Mahopo bears the responsibility to ensure that this policy is carefully followed and he was thus expected to make the functionaries involved in the recruitment process aware of the obligation to familiarise themselves with and follow the policy.

- 6.1.65. Clause 3.4.2 of the RSP stipulates that relaxation of post requirements is not allowed during the shortlisting process. However, the shortlisting panel took a decision to relax the requirements of the posts as set out in the advertisement during the shortlisting process. The panel took a decision to consider only *“appropriate recognised NQF level 4 qualification or equivalent (Grade 12)”* instead of *“an appropriate recognised NQF level 4 (Grade 12) or relevant qualification and Basic qualification in Child Care”* as prescribed in the advertisement. The panel proceeded with the shortlisting based on the relaxed qualification requirements, which is against the provisions of clause 3.4.2 of the RSP.
- 6.1.66. The advice provided to the interview panel by Mr Sekgobela relating to the complaint lodged by Mr A, was in accordance with the execution of his role in the selection process as provided for in clause 5.1.2.6 of the RSP. However, his advice was incorrect and misdirected the interview panel. As the Manager: Human Resources, he had a responsibility to ensure that the advice provided to the panel was correct since he did not undertake any process of verifying the equivalence of the certificate of Mr A against any standard.
- 6.1.67. The evidence at the Public Protector’s disposal, namely the submission received from SAQA on the equivalence of the Grade 12 qualification and the Care Worker qualification, established that the Care Worker certificate is not equivalent to Grade 12. Therefore, the contention by Mr A and Mr Sekgobela that Mr A’s Care Worker certificate is equivalent to Grade 12 cannot be sustained.
- 6.1.68. The selection criteria used by the shortlisting panel deviated from the requirements as set out in the advertisement. The shortlisting panel disregarded the requirement for a basic qualification in Child Care. The conduct of the functionaries of the Department in this regard did not comply with the provisions of clause 5.2.1.3 of the RSP, which states that the contents of the advertisement ultimately represent the selection criteria applicable to the filling of the post.
- 6.1.69. Further evidence in the possession of the Public Protector revealed that approval for relaxation of the requirements was not sought from the HoD. This was in

contravention of clause 5.2.2 of the RSP which allows for the relaxation of educational qualification requirements only at the advertisement stage of the recruitment process and only under certain conditions, including obtaining the approval of the HoD in terms of clause 5.2.2.6.

- 6.1.70. The provisions of clause 5.3.2 of the RSP place an emphasis on candidates meeting the minimum requirements as set out in the advertisement. Clause 5.3.2.1 states that a candidate shall at least meet the minimum appointment requirements for the advertised post in respect of qualifications and competencies to be shortlisted. The minimum requirements for the post of Care Worker with respect of qualifications were Grade 12 and a basic qualification in Child Care.
- 6.1.71. Evidence in the possession of the Public Protector indicates however, that appointments were made where some of the candidates did not meet the minimum requirements as set out in the advertisement. In this case, the amended shortlisting criteria deviated from the advertised requirements and were not in line with the provisions of clause 5.3.2.3 which require that the short-listing criteria must be in line with the job content and appointment requirements.
- 6.1.72. According to clause 5.3.3.1, the approving authority may not, when approving the shortlisted candidates, include candidates not shortlisted by the panel in the shortlisting. The interview panel, despite not having the authority to vary the approved list of shortlisted candidates, took a decision to include Mr A, Ms B, Mr C and Mr D in the interview shortlist for the Care Worker posts at PWC and MSCC respectively, after the candidates had complained that they were not shortlisted by the shortlisting panel. The candidates were interviewed and eventually appointed to the posts of Care Worker at PWC and MSCC. Furthermore, Mr Sekgobela conceded that the panel had no legal basis to add the above candidates to the interview list.
- 6.1.73. Mr G indicated in his application and CV that he was studying towards a Further Education and Training Certificate (FETC) Child and Youth Care Worker Certificate (awaiting the results). Ms U indicated in her application that her FETC Child and

Youth Care Work qualification was still in progress. Therefore, at the time of shortlisting, the two (02) candidates did not qualify to be shortlisted. Clause 5.3.2.6 provides that the shortlisting of candidates shall be based on the information provided in the application form and the CV, which is relevant to the requirement of the advertised post. The Public Protector takes note that Mr G and Ms U indicated in their applications that they were studying towards their Child and Youth Care Work qualifications, however, at the time of closure of the applications they had not completed their studies.

- 6.1.74. Furthermore, the responsibilities of the Department are outlined in section 5(7)(a) of the PSA, which enjoins the functionaries of the Department to correct any action or omission made in terms of the Act, in circumstances where such action or omission was based on an error of fact or law or was based on fraud and if such correction of such action or omission is in the public interest. Accordingly, it is incumbent on the Department, in line with the dictates of the aforementioned section, to take active steps to address the irregularities committed during the recruitment process as held by the court in the Khumalo case.
- 6.1.75 Following service of the section 7(9)(a) notice to all affected parties, responses were received and considered from the parties who elected to submit further representations prior to the finalisation of the matter. Upon analysis of the submissions to the Public Protector from the implicated candidates and the Complainant, their responses did not have any effect on the intended findings and remedial action.
- 6.1.76 In addition, the Complainant sought to extend the scope of the investigation regarding the alleged failure by the MEC and Premier to intervene in her matter and raised issues of personal redress. The allegations relating to the MEC and Premier were not investigated as they did not emanate from the complaint. The Public Protector is not empowered to take the kind of remedial action requested by the Complainant in as far as the personal redress claimed. Lastly, the Public Protector takes note that the HoD undertook to implement the remedial action as contained in the notice.

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*Conclusion*

6.1.77. Based on the evidence before the Public Protector, it is evident that the eighteen (18) candidates who were appointed, did not meet the minimum requirements for the post as outlined in the advertisement and should not have been shortlisted. The conduct of the functionaries of the Department in this regard was in conflict with the relevant legal and policy prescripts regulating the recruitment and selection process in the Department.

**6.2 Whether the functionaries of the Department irregularly appointed certain candidates to posts of Team Leader at both PWC and MSCC without them meeting the minimum requirements for the post as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act**

*Common Cause*

6.2.1 The Department advertised nine (09) Child & Youth Care Team Leaders (Team Leaders) posts for PWC and three (03) Team Leaders posts for MSCC respectively, through the Departmental Circular No. 43 of 2019 with reference DSD/2019/62, dated 13 December 2019.

*Issue in dispute*

6.2.2 The issue for the Public Protector's determination is whether the recruitment of candidates for the positions of Team Leader at both PWC and MSCC was undertaken in accordance with the prescripts and approved procedures governing recruitment in the Department.

*The Complainant's version*

6.2.3 The Complainant argued that five (05) candidates were appointed to the posts of Team Leader whilst they only held a Grade 12 qualification.

*Evidence received from the Department*

6.2.4 On 23 March 2021, the Public Protector wrote an enquiry letter to the Department raising the allegations, soliciting its response, and supporting evidence.

6.2.5 On 29 April 2021, in his response to the allegations letter, Mr Mahopo only provided the following documents, without providing a narrative:

*Advertisement, dated 12 December 2019*

6.2.5.1 A copy of the advertisement dated 12 December 2019, indicating that the minimum qualification requirements for the posts of Team Leader were an appropriate recognised NQF level 4 (Grade 12) or relevant qualification, basic qualification in Child Care, a minimum of seven (07) years appropriate experience in child and youth care work after obtaining the required qualification, knowledge and understanding of the legislative framework governing the secure care centres, good communication skills and good interpersonal relationships.

*Curricula Vitae*

6.2.5.2 The Department provided copies of twelve (12) CVs of candidates who were appointed to the post of Team Leader.

*Copies of the applications of all shortlisted candidates*

6.2.5.3 The Mr Mahopo also provided the Investigation Team with copies of the applications of all shortlisted candidates. From the applications, the following was deduced:

NO.	CANDIDATE	QUALIFICATIONS	POST QUALIFICATION EXPERIENCE IN CHILD AND YOUTH CARE WORK
1	Ms AA	Grade 12; Bachelor of Arts Degree in Youth Development,	BA Degree obtained: 2012 Certificate obtained: 2017

NO.	CANDIDATE	QUALIFICATIONS	POST QUALIFICATION EXPERIENCE IN CHILD AND YOUTH CARE WORK
		Certificate in Child and Youth Care Work	Seven (07) years experience
2	Mr BB	Grade 12; Basic qualification in Child Care; Certificate in Child and Youth Care Work	Basic Qualification obtained: 2001 Certificate obtained: 2014 Eighteen (18) years experience
3	Ms V	Grade 12; Registration Certificate with South African Council for Social Service Professions as Child and Youth Care Worker; Certificate of Competency: Introduction to Child and Youth Care Work;	Certificate obtained: 2017  Two (02) years experience
4	Mr W	Grade 12; Registration Certificate with South African Council for Social Service Professions as Child and Youth Care Worker; Child and Youth Care Worker Competency Certificate by HWSETA;	Certificate obtained: 2015  Four (04) years experience
5	Mr X	Grade 12; Registration Certificate with South African Council for Social Service Professions as Child and Youth Care Worker; Child and Youth Care Worker Competency Certificate by HWSETA;	Certificate obtained: 2014  Five (05) years experience
6	Mr Y	Grade 12; Certificate of Competency: Introduction to Child and Youth Care Work from BOSASA and Watson Corporate Academy; Registration Certificate with South African Council for Social Service	Certificate obtained: 2017 Two (02) years experience

NO.	CANDIDATE	QUALIFICATIONS	POST QUALIFICATION EXPERIENCE IN CHILD AND YOUTH CARE WORK
		Professions as Child and Youth Care Worker;	
7	Mr Z	Grade 12; Certificate of Competency: Introduction to Child and Youth Care Work from BOSASA and Watson Corporate Academy; Registration Certificate with South African Council for Social Service Professions as Child and Youth Care Worker.	Certificate obtained: 2017  Two (02) years experience
8	Mr GG	Grade 12; Certificate in Child and Youth Care Work from BOSASA and Watson Corporate Academy	Certificate obtained: 2018 Two (02) years' experience
9	Mr HH	Grade 12; Certificate of achievement in Child and Youth Care Work from HWSETA	Certificate obtained: 2014 Five (05) years' experience
10	Mr JJ	Grade 12; Certificate of achievement in Child and Youth Care Work from HWSETA	Certificate obtained: 2015 Four (04) years' experience
11	Mr KK	Grade 12; Certificate in Social Auxiliary Work; Certificate of achievement in Child and Youth Care Work from HWSETA.	Obtained 2008  Obtained 2017  Eleven (11) years' experience
12	Mr MM	Grade 12; Bachelor of Arts, Youth in Development, University of Venda;	Obtained 2014



NO.	CANDIDATE	QUALIFICATIONS	POST QUALIFICATION EXPERIENCE IN CHILD AND YOUTH CARE WORK
		Certificate of achievement in Child and Youth Care Work from HWSETA	Obtained 2017  Five (05) years' experience

*Recruitment Registers, dated 03 January 2020*

- 6.2.5.4 The recruitment registers for the Team Leader post, dated 03 January 2020 indicate that two hundred and seventy-five (275) applications for the PWC and three hundred and sixty-five (365) applications for the MSCC were received by the Department.

*Memorandum approving the shortlisting and interviewing panel, dated 20 February 2020*

- 6.2.5.5 According to the memorandum dated 20 February 2020, from the MEC for Social Development, Ms CN Rakgoale, approving the members of the shortlisting and interview panels for both Care Workers and Team Leaders, the members of the shortlisting and interview panels for the posts of Care Worker were:

Shortlisting Panel

- (a) Mr EM Monyamane;
- (b) Mr NG Shikwambani;
- (c) Ms DL Khwinana; and
- (d) Mr MS Mothapo.

Interview Panel

- (a) Mr EM Monyamane;
- (b) Mr MS Mothapo;

- (c) Ms MS Mothapo; and
- (d) Mr PW Cholo.

*Minutes of the shortlisting panel, dated 24 March 2020*

6.2.5.6 The Minutes of the shortlisting panel dated 24 March 2020, reflect that the position of Team Leader for PWC and MSCC took place over the period 18 to 24 March 2020. The minutes further indicate that the panel agreed on the shortlisting criteria for the Team Leader positions as follows:

a. **“1st Criteria:** *Due to the volume of application[s] received, the panel agreed to start with appropriate recognized NQF level 4 qualification or equivalent (Grade 12)” and a minimum of seven (07) years appropriate experience;*

b. **2nd Criteria:** *Locality within Capricorn/Vhembe District;*

c. *Applicants who are working as contract workers within both Secure Care Centres and meet criteria 1 will qualify automatically; and*

d. *Persons with disabilities who meet criteria 1 will also qualify automatically”.*

*Memorandum on approval to proceed with interviews, dated 18 June 2020*

6.2.6 On 19 July 2023, the Investigation Team telephonically requested the Department to provide a copy of the Memorandum for the Request for Approval to Proceed with Interviews for the posts of Team Leader and Care Worker.

6.2.7 On the same day, Mr Sekgobela emailed a memorandum dated 18 June 2020 titled *“Request for Approval to Proceed with Interviews for the Posts of Social Work Supervisor, Social Worker, Child and Youth Care Supervisor, Child and Youth Care Team Leader, Child and Youth Care Worker, Social Auxiliary Worker, Staff Nurse and Occupational Therapist”* dated 18 June 2020, which indicated the names of

functionaries who conducted the shortlisting for both posts of Care Worker and Team Leader.

- 6.2.8 The memorandum further contained a list of thirty-four (34) applicants who were shortlisted for interviews for the post of Team Leader at PWC and a list of twenty-two (22) applicants who were shortlisted for interviews for the post of Team Leader at MSCC.

*Memorandum on the approval of appointments, dated 03 September 2020*

- 6.2.9 The memorandum titled “*Request for approval for appointment of nine (09) Team Leaders for Polokwane Welfare Complex and three (03) Team Leaders for Mavambe Secure Care Centre*”, which was signed by Mr Mahopo on 03 September 2020, indicates that:
- 6.2.9.1 Thirty four (34) candidates were shortlisted for the Team Leader post at the PWC centre and twenty one (21) candidates at the MSCC;
- 6.2.9.2 One (01) candidate, herein referred to as Ms AA, complained to the interview panel that she was not shortlisted for the post at MSCC but was only shortlisted at PWC. The panel agreed to include her on the interview list for MSCC as well;
- 6.2.9.3 Two (02) candidates herein referred to as Mr BB and Ms CC, who were employed on contract by the Department and placed at MSCC and PWC respectively, lodged formal complaints because they were not shortlisted. Mr BB was on contract as a Team Leader and Ms CC was on contract as a Care Worker. After reconsidering their applications, the interview panel unanimously agreed to shortlist them as they met the shortlisting criteria;
- 6.2.9.4 All the shortlisted candidates except one (01), including Mr BB and Ms CC were interviewed for the posts of Team Leader for both secure care centres;

- 6.2.9.5 The panel recommended nine (09) candidates for appointment to the post of Team Leader at the PWC and three (03) candidates at MSCC;
- 6.2.9.6 Ms AA was recommended for appointment at PWC and also recommended as a replacement at MSCC should any of the candidates recommended for appointment at the latter centre decline the position;
- 6.2.9.7 Mr BB was recommended for appointment at MSCC while Ms CC was not recommended anywhere; and
- 6.2.9.8 Mr Mahopo approved the recommendations on 03 September 2020.

*Appointment Letters*

- 6.2.10 Copies of twelve (12) appointment letters for successful candidates appointed to the position of Team Leader were also provided to the Investigation Team.

*Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) Resolution, 2009*

- 6.2.11 A copy of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) Resolution 01 of 2009 indicated that the qualification requirement for the post of Team Leader was Grade 12. The Resolution further indicated that a minimum of seven (07) years' experience in Child and Youth Care Work after obtaining the required qualification was also required.

*Additional information received from Mr Mahopo*

- 6.2.12 Mr Mahopo provided the Investigation Team with additional information on the recruitment process followed for the post of Team Leader. He stated that:
- 6.2.12.1 Thirty-four (34) applicants were shortlisted for the nine (09) posts of Team Leader at PWC;

- 6.2.12.2 The candidates who were appointed scored between eighty-two (82) and ninety seven (97) points in the interviews; and
- 6.2.12.3 All appointed candidates met the minimum requirements for the post. The post of Team Leader was an Occupation Specific Dispensation (OSD) post and the requirements were contained in the PHSDSBC Resolution 01 of 2009. According to the PHSDSBC Resolution, the requirements for the post of Team Leader were a Grade 12 qualification and a minimum of seven (07) years appropriate experience in child and youth care work, after obtaining the required qualification.

*Responses to the section 7(9)(a) Notice*

- 6.2.13 Notices in terms of section 7(9)(a) of the Public Protector Act were sent to various persons on 08 November 2023. The responses from paragraph 6.1.31 above also apply in this instance and will not be repeated. However, Mr Z responded to the issue relating to the Team Leader post as follows:

*Response from Mr Z*

- 6.2.14 Mr Z acknowledged receipt of the notice and responded as follows:
- 6.2.14.1 According to his understanding, the advertised posts of Child and Youth Care Team Leader Ref No DSD/2019/62 stated that a candidate must have an appropriate recognised NQF Level 04 (Grade 12), which he has, including other qualifications relevant to the post. He has more than eight (08) years of work experience, therefore, he met the requirements.

*Applicable law*

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

- 6.2.15 The provisions of section 195(1) of the Constitution, as discussed above, are applicable to this issue.

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### **Public Service Act, 1994 (as amended) (PSA)**

- 6.2.16 The provisions of sections 5(7)(a), 11(1) and 11(2)(a) of the PSA, as discussed above, are also applicable.
- 6.2.17 Section 16A(1)(a) of the PSA provides that an executive authority shall immediately take appropriate disciplinary steps against a head of department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder.

### **Public Service Handbook: Senior Management Services, 2003**

- 6.2.18 Chapter 7 of the Public Service Handbook on Senior Management Service provides for the procedures that must be applied in cases of misconduct by members of the Senior Management Services (SMS).

### **Guide on Managing Discipline in the Public Service, March 2021**

- 6.2.19 The Guide provides for procedures to deal with taking disciplinary action against officials employed in terms of the PSA.

### **Labour Relations Act, 1995 (LRA)**

- 6.2.20 Section 158(1)(h) of the LRA states that the Labour Court may review any decision taken or any act performed by the state in its capacity as employer, on such grounds as are permissible in law.
- 6.2.21 The Code of Good Practice contained in Schedule 8 of the LRA applies to the employer and all employees falling within the registered scope of the Public Service Co-ordinating Bargaining Council (PSCBC).

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## Recruitment and Selection Policy (RSP), 2011

- 6.2.22 In its foreword, the RSP states as follows: *“Recruiting and selecting the right people is of paramount importance to the continued success of the department. The Recruitment and Selection Policy sets out how to ensure, as far as possible, that the best people are recruited on merit and that the recruitment process is free from bias and discrimination”*.
- 6.2.23 The Foreword further states that *“the policy sets out a procedure to enable the Department to monitor staff recruitment and to provide information to enable appropriate committees to monitor recruitment activity within the Department”*.
- 6.2.24 In addition, the provisions of the RSP as discussed above are *mutatis mutandis* applicable to this issue.

### *Analysis*

- 6.2.25 The evidence at the Public Protector’s disposal indicates that the Complainant met the minimum requirements for the post as she possessed a Grade 12 certificate, Bachelor of Arts degree in Youth Development and had seven (07) years relevant working experience. Her shortlisting and invitation to the interview were carried out in accordance with the law and applicable prescripts.
- 6.2.26 The functionaries of the Department were required to ensure that the recruitment process followed in the appointment of candidates to the post of Team Leader was free from bias, unfair discrimination and that candidates were appointed on merit, in accordance with fair criteria, as per legislative requirements as well as internal policies and procedures. Their conduct must also comply with the values and principles of fair and accountable public administration as encapsulated in section 195 of the Constitution, which prescribes the maintenance and promotion of a high standard of professional ethics.

- 6.2.27 The amendment of the shortlisting criteria by the panel during the shortlisting process had the effect of including candidates who in fact did not qualify to be shortlisted in terms of the criteria as set out in the advertisement. This conduct was in conflict with the RSP and the principles set out in the aforementioned Constitutional provision.
- 6.2.28 In line with the provisions of section 11(2)(a) of the PSA, Mr Mahopo as the Accounting Officer, was expected to ensure that due processes, applicable laws and policy directives that regulate the appointment of suitable candidates were rigorously followed. The appointment of applicants who did not meet the minimum requirements of the post as advertised was in contravention of section 11(2)(a) of the PSA, which requires that all persons who qualify for appointment shall be considered in the making of any appointment or the filling of any post in the public service.
- 6.2.29 The minimum requirements for the post of Team Leader were Grade 12, a basic qualification in Child Care and seven (07) years experience in Child and Youth Care work after obtaining the required qualification. The evidence in the Public Protector's possession indicates, however, that appointments were made where the candidates did not meet the minimum requirements as set out in the advertisement.
- 6.2.30 The conduct of the functionaries of the Department in this regard, was contrary to the provisions of clause 5.3.2 of the RSP, which places an emphasis on candidates meeting the minimum requirements as set out in the advertisement. It was further in conflict with clause 5.3.2.1, which states that a candidate shall at least meet the minimum appointment requirements for the advertised post in respect of qualifications and competencies in order to be shortlisted.
- 6.2.31 In this instance, the amended shortlisting criteria deviated from the advertised requirements. This was not in line with the provisions of clause 5.3.2.3, which required that the short-listing criteria must be in line with the job content and



appointment requirements as well as advertised requirements so that applicants short-listed are clear on the criteria that apply in a consistent manner.

- 6.2.32 The panel shortlisted candidates based on the amended criteria which deviated from the post requirements as set out in the advertisement. The deviation was not done at the advertisement stage of the recruitment process, which was in contravention of clause 3.4.2 of the RSP.
- 6.2.33 The Public Protector has observed from the evidence obtained that the selection criteria used by the shortlisting panel deviated from the requirements as set out in the advertisement. The shortlisting panel did away with the requirement for a basic qualification in Child Care. The conduct of the functionaries of the Department in this regard did not comply with the provisions of clause 5.2.1.3 of the RSP, which states that the contents of the advertisement ultimately represent the selection criteria applicable to the filling of the post.
- 6.2.34 It was further established from the evidence that the Interview Panel, despite not having the authority to add candidates after approval of shortlisted candidates, took a decision to add Ms AA, Mr BB and Ms CC to the interview shortlist for the Team Leader posts at PWC and MSCC respectively. This transpired after the candidates had complained that they were not shortlisted by the shortlisting panel. The candidates were interviewed and eventually Ms AA and Mr BB were appointed to the posts of Team Leader at PWC.
- 6.2.35 The conduct of the functionaries of the Department in this regard, was contrary to the prescripts of clause 5.3.3.1, which provides that the approving authority may not, when approving the shortlisted candidates, include candidates not shortlisted by the panel in the shortlisting. In this regard, it was conceded by Mr Sekgobela that the panel had no legal basis to add Mr AA, Mr BB and Ms CC to the interview list.
- 6.2.36 The evidence in the Public Protector's possession confirms that all the twelve (12) candidates appointed to the posts of Team Leader had a basic qualification in Child

Care, contrary to the allegation by the Complainant that five (05) candidates did not have a basic qualification in Child Care.

6.2.37 In his response to the section 7(9) notice, Mr Z contended that he had the necessary qualifications as stipulated in the advert together with 08 years relevant experience. However, the Public Protector noted that his interpretation is incorrect in that the requirements for the post of Team Leader were an appropriate recognised NQF level 4 (Grade 12), a basic qualification in Child Care and seven years' relevant experience after obtaining the required qualification. Mr Z did not have a minimum of seven (07) years' appropriate experience in Child and Youth Care work, but only four years' experience after obtaining the required qualification. He obtained the required qualification in 2015 and applied for the post on 24 December 2019.(Own emphasis)

6.2.38 The evidence at the Public Protector's disposal reveals that nine (09) of the appointed candidates did not have the minimum of seven (07) years appropriate experience in Child and Youth Care work after obtaining the required qualification as stated in the advertisement. They are Ms V, Mr W, Mr X, Mr Y, Mr Z, Mr GG, Mr HH, Mr JJ, and Mr MM.

### *Conclusion*

6.2.39 It is concluded that nine (09) out of the twelve (12) candidates, who were appointed, did not meet the minimum requirements for the post as outlined in the advertisement. The nine (09) candidates did not have the minimum of seven (07) years appropriate experience in Child and Youth Care work after obtaining the required qualification as stated in the advertisement.

## **7. FINDINGS**

Having regard to the evidence, the regulatory framework determining the standard the Department should have complied with and the impact thereof on good

administration, the Public Protector is making the following adverse findings against the Department:

- 7.1 Whether the functionaries of the Department irregularly appointed certain candidates to posts of Care Worker at both PWC and MSCC without them meeting the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act**
- 7.1.1 The allegation that the functionaries of the Department irregularly appointed certain candidates to the posts of Care Worker at both PWC and MSCC without them meeting the minimum requirements as set out in the advertisement, is substantiated.
- 7.1.2 The eighteen (18) candidates who were appointed, did not meet the minimum requirements for the post as outlined in the advertisement and should not have been shortlisted.
- 7.1.3 The relaxation of the post requirements by the shortlisting panel during the shortlisting process was in contravention of clause 3.4.2 of the RSP which states that relaxation of post requirements is not allowed during the shortlisting process.
- 7.1.4 The shortlisting, interviewing, recommendation, and appointment of all the candidates who did not meet the qualification requirements as set out in the advertisement were irregular.
- 7.1.5 The conduct of the functionaries involved in these processes was in violation of section 195(1) of the Constitution and in contravention of section 11(1) of the PSA. The conduct of the functionaries of the Department is not consistent with the democratic values and principles governing good public administration as enshrined in the Constitution. In addition, the conduct of the shortlisting panel was

in contravention of clauses 5.3.2.1; 5.3.2.3 and 5.3.2.4 of the RSP. Further, the conduct of the interview panel was in contravention of clause 5.3.3.1 of the RSP.

7.1.6 Accordingly, the conduct of the functionaries of the Department constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

**7.2 Whether the functionaries of the Department irregularly appointed certain candidates to posts of Team Leader at both PWC and MSCC without them meeting the minimum requirements for the posts as set out in the advertisement, if so, whether such conduct is improper as envisaged by section 182(1)(a) of the Constitution and amounts to maladministration as envisaged by section 6(4)(a)(i) of the Public Protector Act**

7.2.1 The allegation that the functionaries of the Department irregularly appointed certain candidates to the posts of Team Leaders at both the PWC and the MSCC without them meeting the minimum requirements as set out in the advertisement, is substantiated.

7.2.2 The evidence at the Public Protector's disposal indicates that nine (09) candidates who were appointed to the post of Team Leader did not have the minimum of seven (07) years appropriate post qualification experience in Child and Youth Care work as stated in the advertisement.

7.2.3 The relaxation of the post requirements by the shortlisting panel during the shortlisting process was in contravention of clause 3.4.2 of the RSP, which provides that relaxation of post requirements is not allowed during the shortlisting process.

7.2.4 The shortlisting, interviewing, recommendation, and appointment of all the candidates who did not meet the qualification requirements as set out in the advertisement was irregular.

- 7.2.5 The conduct of the functionaries involved in the recruitment process was in violation of section 195(1) of the Constitution and in contravention of section 11(1) of the PSA. The conduct is not consistent with the democratic values and principles governing good public administration as enshrined in the Constitution. In addition, the conduct of the shortlisting panel was in contravention of clauses 5.3.2.1; 5.3.2.3 and 5.3.2.4 of the RSP. Further, the conduct of the interview panel was in contravention of clause 5.3.3.1 of the RSP.
- 7.2.6 The conduct of the functionaries of the Department accordingly constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

## 8. REMEDIAL ACTION

- 8.1 The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this report upon the conclusion of an investigation where adverse findings are made.
- 8.2 In the matter of *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.
- 8.3 Having regard to the evidence, the regulatory framework determining the standard the functionaries of the Department should have complied with, the Public Protector takes the following remedial action in terms of section 182(1)(c) of the Constitution:

### The Head of Department

- 8.3.1 In accordance with the provisions of section 158(1)(h) of the LRA, **within a period of one hundred and twenty (120) calendar days**, from the date of receipt of this

report, take the necessary steps for the judicial review of the irregular appointments of the eighteen (18) candidates appointed to the posts of Care Workers and nine (09) candidates appointed to the posts of Team Leader.

8.3.2 **Within one hundred and twenty (120) calendar days** from the date of receipt of this report take appropriate steps in line with the provisions of section 16A(2)(a) of the PSA against members of the shortlisting and interviewing panels.

8.3.3 **Within hundred and twenty (120) calendar days** of receipt of this report take appropriate steps, in line with the provisions of section 16A(2)(a) of the PSA and the Disciplinary Code and Procedures for the Public Service, against the Deputy Director of Human Resource, Mr Sekgobela, for misguiding the interview panel in contravention of the provisions of clause 5.1.2.6 of the RSP, resulting in the irregular addition of Mr A to the list of candidates to be interviewed for the position of Care Worker.

#### **The Member of the Executive Council for Social Development, Limpopo**

8.3.4 Take cognizance of the findings and remedial action contained in this report.

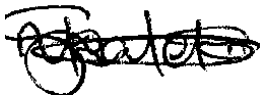
#### **The Premier of the Limpopo Provincial Government**

8.3.5 **Within one hundred and twenty (120) calendar days** from the date of receipt of this report, take appropriate steps against Mr Mahopo for not exercising proper oversight and adherence to provisions of the PSA over the recruitment process of Care Workers and Team Leaders, in accordance with the provisions of section 16A(1)(a) of the PSA and Chapter 7 of the Senior Management Handbook.

## **9. MONITORING**

9.1 The Head of Department to submit an action plan to the Public Protector within thirty (30) calendar days from the date of this report on the implementation of the remedial action referred to in paragraph 8 above.

- 9.2 The submission of the implementation plan and the implementation of the remedial action 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.
- 9.3 In line with the Constitutional Court Judgement in the matter of *Economic Freedom Fighters*, and in order to ensure the effectiveness of the Public Protector, the remedial action prescribed in this Report is legally binding on the Municipality unless there is an Interim Interdict or Court Order directing otherwise.



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**ADV KHOLEKA GCALEKA**  
**PUBLIC PROTECTOR**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE: 29 DECEMBER 2023**

*Assisted by: Ms Nthoriseng Motsitsi*

*Executive Manager: PII Inland*