# 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 No 23 1994

PUBLIC PROTECTOR
SOUTH AFRICA

**ISBN 978-1-928366-15-7**

**REPORT No. 15 of 2016/2017**

*Allegations of abuse of office and violation of EMEA by a Member of the Executive Council of the Limpopo Provincial Government*

**INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND CONTRAVENTION OF THE EXECUTIVE MEMBERS ETHICS ACT NO. 82 OF 1998 BY A MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF TRANSPORT, SAFETY AND LIAISON, LIMPOPO, THE HON. MS MAPULA MOKABA-PHUKWANA (MPL)**

## INDEX

## Executive Summary

(i) This is the 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), sections 3(2)(a) and 3(3) of the Executive Members' Ethics Act, 1998 (EMEA) and section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act).

(ii) The report communicates the Public Protector's findings and the appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of abuse of office and violation of the Executive Members' Ethics Act, 1998 (EMEA) by the Member of the Executive Council of the Limpopo Department of Transport, Safety and Liaison (Department), the Honourable Mapula Mokaba-Phukwana, Member of the Limpopo Provincial Legislature (MPL).

(iii) The investigation followed a complaint lodged with the Public Protector's Limpopo Provincial Office by the Honourable Joseph Buthane, the Economic Freedom Fighters (EFF) Limpopo Provincial Secretary and Member of the Limpopo Provincial Legislature on 15 July 2015 in terms of section 4(1) of the EMEA against the MEC Mapula Mokaba-Phukwana.

(iv) The Complainant alleged that MEC Mokaba-Phukwana contravened the Executive Ethics Code by acting in a manner that is inconsistent with her position when:

(a) She irregularly awarded a contract for forensic investigation services to MPA Investigators, a service provider, who was in actual fact a debt collector and not forensic investigators. It is alleged that the appointment was made through a letter dated 16 September 2014, without following procurement procedures, Public Finance Management Act No. 29 of 1999 (PFMA) and Treasury Regulations. It is alleged that this was irregular as the MEC Mokaba-Phukwana is not the Accounting Officer of the Department.

(b) She suspended half of the Executive Management Team of the Department and when questioned on their suspension, she allegedly responded by indicating that she was dealing with EFF corruption in the Department of Transport, Safety and Liaison.

(v) The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action, section 3 of the EMEA and section 6(4) of the Public Protector Act that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(vi) The merits of the complaint relating to the suspension of the Executive Management Team of the Department by the MEC Mokaba-Phukwana, where her response to the suspensions was allegedly to deal with EFF corruption in the Department were not investigated, as they relate to labour laws handled in a different forum. It should be noted that disciplinary proceedings were in progress during the investigation.

(vii) MEC Mokaba-Phukwana was cooperative from the commencement of the investigation. Despite her busy schedule, she always availed herself to the Public Protector's Investigators. Her failure to remember the identity of the officials from the Office of the Premier who advised her before taking the final decision to appoint a service provider in her Department to conduct forensic investigation, contributed to the delay in the finalisation of the Public Protector's investigation.

(viii) Mrs Mpho Pearl Johan Antonio (Mrs Antonio) who was the sole Director of MPA Investigation Team and an employee of the South African Police Service (SAPS), when the Company was first appointed to render forensic investigation services to the Department and was not cooperative during the investigation. During the investigation it was also discovered that Mrs Mpho Pearl Johan Antonio (Mrs Antonio) engaged herself in the performance of extra remunerative work outside her employment as a public servant in the SAPS.

(ix) While MEC Mokaba-Phukwana did not dispute that she awarded the contract for forensic investigation within her Department to MPA Investigation Team, she indicated that she was acting in line with the Treasury Regulations dealing with Departments', Trading Entities, Constitutional Institutions and Public Entities section 4.1.3 read with Treasury Regulation 16A6.4 and that National Treasury Regulation 4.1.3 provides that *"If an accounting office is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority initiates an investigation into the matter and if the investigation are confirmed, holds a disciplinary hearing in accordance with the prescripts applicable agreements applicable in the public service"*.

(x) Based on an analysis of the complaint, the following issues were identified to inform and focus the investigation:

1. Whether MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team to conduct forensic investigations without proper legal authority;

2. Whether MEC Mokaba-Phukwana irregularly awarded a contract to MPA Investigation Team to conduct forensic investigation without following proper procurement processes;

3. Whether Ms Hanli du Plessis, the Head of the Department of Transport, improperly regularised the contract irregularly awarded to MPA Investigation Team to conduct forensic investigation services in the Department;

4. Whether Mrs M P J Antonio, MPA Investigation Team's sole Director improperly entered into a contract with the Department of Transport, Safety and Liaison and engaged herself in the performance of extra remunerative work outside her employment as a public servant;

5. Whether MEC Mokaba-Phukwana irregularly awarded a contract to an entity whose sole proprietor did not have the necessary qualification to do the job; and

6. Whether the conduct of MEC Mokaba-Phukwana was inconsistent with the Executive Ethics Code.

(xi) The investigation process included an analysis of applicable laws and policies and related prescripts, exchange of correspondence, securing and analysing relevant documents and conducting interviews and/or meetings with MEC Mokaba-Phukwana, Mr H Matanga, the then Manager in the MEC's Office, Ms H du Plessis, Head of Department of Transport, Mr G Pratt, Head of Department of the Limpopo Provincial Treasury, Adv Rammutla, Legal Advisor in the Office of the Premier, Ms S V Masekela, Senior State Law Advisor at the Office of the Premier, Mr M E Phophi, General Manager: Labour Relations, Employee Health and Wellness in the Office of the Premier, Mr Thabo "Gab" Mokhine, Mr Martins Santana Antonio; Mrs Mpho Pearl Johan Antonio, the former Director of MPA Investigation Team.

(xii) Upon completion of the investigation, notices issued in terms of section 7(9) of the Public Protector Act were addressed to the MEC Mokaba-Phukwana, the Head of the Department of Transport, Ms H du Plessis, Mr. & Mrs M P J Antonio: current and the former Director of MPA Investigation Team.

(xiii) In arriving at the findings, the Public Protector was guided by the standard approach adopted by the office, which simply asks: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

(xiv) As it is customary, the "what happened" inquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. The question regarding what should have happened on the other hand relates to the standard that the conduct in question should have complied with. In determining such standard the Public Protector was guided,

as it is customary, by the Constitution, national legislation and applicable policies and prescripts.

(xv) Key laws and related prescripts considered to help the Public Protector to determine if there was maladministration by the MEC Mokaba-Phukwana in the awarding of a contract for forensic investigation services to MPA Investigation Team by the Department and the assessment of her conduct thereof are as follows:

(a) Sections 36 and 38 of the Public Finance Management (PFMA) Act No.1 of 1999 to determine authority and accountability in procurement of services and financial management in government departments and Treasury Regulations;

(b) Sections 8 and 9 of the Public Service Administration Management Act 11 of 2014 regulating business relationship between the State and State employees and financial disclosure by government employees to State ;

(c) Section 30 of the Public Service Administration Act No. 38 of 1994 to look at the authorisation for Mrs Antonio to engage in remunerative work outside her employment to determine commitment to her employer being the SAPS and compliance thereof.

(d) Paragraph 2.3(b) of the Executive Ethics Code, 2000, which provides that "*Members may not act in a way that is inconsistent with their position*".

(xvi) Whereas, the report should have been submitted to the Premier within 30 days as envisaged in the EMEA, the investigation was delayed by failure of the MEC Mokaba-Phukwana to remember the identity of some of the officials who participated in the process of the appointment of MPA Investigation

Team and non-cooperation of Mrs Mpho Pearl Johan Antonio, the then sole Director of MPA Investigation Team, a company awarded the contract to conduct forensic investigation services to the Department of Transport.

(xvii) Having considered the evidence uncovered during the investigation against the applicable laws and related prescripts, the Public Protector makes the following findings:

1. **Regarding whether MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team to conduct forensic investigations without proper legal authority:**

   (a) The allegation that MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team to conduct forensic investigation without proper legal authority has been proven;

   (b) MEC Mokaba-Phukwana did not have the legal authority to award a contract to MPA Investigation Team to conduct forensic investigations since that authority exclusively vests with the HOD of the Department as the accounting officer in terms of section 38 of the PFMA;

   (c) MEC Mokaba-Phukwana's conduct in this regard was in violation of sections 38(1)(a)(iii) and 38(1)(b) of the PFMA and section 1(c) of the Constitution; and

   (d) Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994.

2. **Regarding whether MEC Mokaba-Phukwana irregularly awarded a contract to MPA Investigation Team to conduct forensic investigations without following proper procurement processes:**

(a) The allegation that MEC Mokaba-Phukwana irregularly awarded a contract to MPA Investigation Team to conduct forensic investigation without following proper procurement processes has been proven;

(b) MEC Mokaba-Phukwana conceded that she appointed MPA Investigation Team to render investigation services to her Department without following the legal prescripts regulating procurement in the process causing her Department to incur irregular expenditure;

(c) MEC Mokaba-Phukwana's conduct was in violation of section 217(1) of the Constitution, section 38(1)(a)(iii) of the PFMA and Regulation 16A3.2 of the National Treasury Regulations;

(d) MEC Mokaba-Phukwana's conduct could also not be justified in terms of Regulation 16A6.4 as she did not have the legal authority to appoint MPA Investigation Team; and

(e) Her conduct in the circumstances constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994.

3. **Regarding whether Ms Hanli du Plessis, the Head of the Department of Transport, improperly regularised the contract irregularly awarded to MPA Investigation Team to conduct forensic investigations services in the Department:**

(a) The allegation that Ms du Plessis as the Head of Department of the Limpopo Department of Transport improperly regularised the contract irregularly awarded to MPA Investigation Team to conduct forensic investigation services in her Department has been proven;

(b) Ms du Plessis re-appointed MPA Investigation Team on 02 March 2015 on the basis of a verbal instruction or directive issued by MEC Mokaba-Phukwana apparently at a meeting held on 24 February 2015 at the Legislature in Lebowakgomo;

(c) Ms du Plessis purportedly re-appointed MPA Investigation Team in terms of Regulation 16A6.4 of the National Treasury Regulations circumventing compliance with the provisions of section 64(1), (2) and (3) of the PFMA which regulates the manner in which executive directives having financial implications have to be dealt with;

(d) Ms du Plessis' re-appointment of MPA Investigation Team in terms of Regulation 16A6.4 of the National Treasury Regulations was dishonest and was embarked upon with an ulterior motive to achieve a predetermined outcome in the process causing the Department to incur irregular expenditure;

(e) It is clear from the evidence that Ms du Plessis was subjected to undue pressure from MEC Mokaba-Phukwana to re-appoint MPA Investigation Team even though she is reluctant to say it in the open;

(f) Ms du Plessis' conduct in this regard was in violation of section 195(1)(a) of the Constitution which requires a high standard of professional ethics on her part; and

(g) Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994.

4. **Regarding whether Mrs M P J Antonio, MPA Investigation Team's sole Director improperly entered into a contract with the Department of Transport, Safety and Liaison and engaged herself in the performance of extra remunerative work outside her employment as a public servant:**

(a) The allegation that Mrs M P J Antonio, MPA Investigation Team's Sole Director improperly entered into a contract with the Limpopo Department of Transport and engaged herself in the performance of extra remunerative work outside her employment as a Public Servant could not be proven;

(b) The Public Protector could not find any evidence to prove that Mrs Antonio had personally and improperly entered into a contract with the Limpopo Department of Transport and engaged herself in the performance of extra remunerative work outside her employment

as a Public Servant. Instead the evidence revealed that it was actually her husband who entered into a contract with the Limpopo Department of Transport to provide forensic investigation services on behalf of MPA Investigation Team;

(c) However, by virtue of being a sole director of a company which earned remuneration by providing services to a government department whilst employed as a Public Servant herself, Mrs Antonio violated section 30(1) of the Public Service Act, 1994;

(d) Similarly by virtue of being a director in a company that conducted business with the state, Mrs Antonio violated section 8(2)(b) of the Public Service Management Act No. 11 of 2015; and

(e) Mrs Antonio's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution.

**5. Regarding whether MEC Mokaba-Phukwana irregularly awarded a contract to an entity whose sole proprietor did not have the necessary qualifications to do the job:**

(a) The allegation that MEC Mokaba-Phukwana awarded a contract to MPA Investigation Team, whose sole proprietor did not have the necessary investigation qualifications to render forensic investigation services to the Department could not be proven; and

(b) In the absence of a competitive bidding process where specifications regarding the requisite qualifications to be awarded the contract are determined upfront before the awarding of the

contract is considered, the Public Protector is unable to make a determination whether the sole proprietor of MPA Investigation Team had the necessary qualifications to do the job.

6. **Regarding whether the conduct of MEC Mokaba-Phukwana was inconsistent with the Executive Ethics Code and Executive Members' Ethics Act:**

   (a) The allegation that the conduct of MEC Mokaba-Phukwana was inconsistent with the Executive Ethics Code and Executive Members' Ethics Act has been proven;

   (b) MEC Mokaba-Phukwana appointed MPA Investigation Team to render forensic investigation services in her Department without the necessary legal authority and without following the relevant legal prescripts regulating procurement, causing her Department to incur irregular expenditure in the process;

   (c) MEC Mokaba-Phukwana's conduct in the circumstances was in violation of paragraph 2.1 and 2.3(c) of the Executive Ethics Code;

   (d) Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994.

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

1. **The Premier:**

(a) The Premier of the Limpopo Provincial Government must consider taking appropriate disciplinary action against MEC Mokaba-Phukwana with regard to her conduct as outlined in the findings;

(b) The Premier of the Limpopo Provincial Government must in consultation with the National/Provincial Treasury determine the exact amount of the irregular expenditure incurred by the Department of Transport as a result of MEC Mokaba-Phukwana's conduct and recover such irregular expenditure from her; and

(c) The Premier of the Limpopo Provincial Government must take appropriate steps to ensure that all members of the Executive Council of Limpopo Provincial Government are made aware of the contents of this report and are sensitised about compliance with the provisions the Executive Members' Ethics Act and the Executive Ethics Code, within 30 days from the date of this report.

2. **The MEC for Transport (current):**

(a) The current MEC for Transport must consider taking appropriate disciplinary action against Ms Hanli du Plessis with regard to her conduct as outlined in the findings; and

(b) The current MEC for Transport must in consultation with the National/Provincial Treasury determine the exact amount of the irregular expenditure incurred by the Department of Transport as

a result of Ms Hanli du Plessis' conduct and recover such irregular expenditure from her;

3. **Speaker of the Limpopo Provincial Legislature:**

   (a) The Speaker of the Limpopo Provincial Legislature must take appropriate steps to ensure that this report is tabled in the Limpopo Provincial Legislature within 30 days from the date of this report.

4. **The National Commissioner of the South African Police Service:**

   (a) The National Commissioner of the South African Police Service must take appropriate disciplinary action against Mrs Antonio within 60 days from the date of this report.

5. **Minister of Finance:**

   (a) The Minister of Finance to take steps to ensure that the Chief Procurement Officer sensitise all the Members of the Executive Council of Limpopo about compliance with Treasury Regulations and procurement processes in public service within 30 days from the date of this report;

**INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND CONTRAVENTION OF THE EXECUTIVE MEMBERS ETHICS ACT NO. 82 OF , 1998 BY A MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF TRANSPORT, SAFETY AND LIAISON, LIMPOPO, THE HON. MS MAPULA MOKABA-PHUKWANA, MPL**

## 1. INTRODUCTION

### 1.1 Overview

1.1.1 This is the report of the Public Protector issued in terms of section 182(1) (b) of the Constitution, 1996 (the Constitution) and section 8(1) and (3) of the Public Protector Act No. 23 of 1994 (the Public Protector Act).

1.1.2 The report is submitted in terms of section 3(3) of the Executive Members' Ethics Act No.82 of 1998 (EMEA) to:

1.1.2.1 Honourable S T Mathabatha, Premier of Limpopo Provincial Government;

1.1.3 Copies of the Report are provided to the following individuals in terms of section 8(1) of the Public Protector Act:

1.1.3.1 The National Commissioner; South African Police Service (SAPS);

1.1.3.2 Honourable P Boshielo, Speaker of the Limpopo Provincial Legislature;

1.1.4 Further copies of the report have been made available in terms of section 8(3) of the Public Protector Act to the following:

1.1.4.1 Mrs Mpho Pearl Johan Antonio, the former sole Director of MPA Investigation Team;

1.1.4.2 Ms Hanli du Plessis, HOD, Limpopo Department of Transport.

1.1.5 A copy of the report is also provided to Honourable J Buthane (Complainant).

1.1.6 The report relates to an investigation into allegations of maladministration and contravention of the Executive Members Ethics Act No. 82 of 1998 by a Member of the Executive Council of the Limpopo Department of Transport, Safety and Liaison, the Hon. Ms Mapula Mokaba-Phukwana, MPL.

## 1.2 Background

1.2.1 Prior to the May 2014 elections, in Limpopo Province, the Department of Roads and Transport and the Department of Safety and Liaison were two separate Departments with separate heads of Departments and Members of the Executive Council (MEC).

1.2.2 After the May 2014 elections, a Department named Department of Transport, Safety and Liaison was established and Premier S T Mathabatha appointed Honourable Mapula Mokaba-Phukwana as a Member of the Executive Council (MEC) responsible for the Department. During the investigation, there were no changes to the administrative structure. There was a Head of the Department of Safety and Liaison and a Head of the Department of Transport being Ms

Johanna Jacoba du Plessis according to her identity document, but known as Ms Hanli du Plessis in the Department's records.

1.2.3 While still new in the Department, MEC Mokaba-Phukwana was confronted with allegations of corruption, maladministration and mismanagement of funds, which were raised against the officials including the Head of the Department, Ms Hanli du Plessis in the former Department of Transport.

1.2.4 MEC Mokaba-Phukwana noticed that there were a lot of uncertainties relating to positions of staff members in the newly formed Department of Transport, Safety and Liaison, especially from staff members in the former Department of Transport.

1.2.5 Due to the above allegations, the MEC Mokaba-Phukwana approached the Head of Department, Ms du Plessis for more information on the allegations however, she could not assist her.

1.2.6 MEC Mokaba-Phukwana was frustrated by the allegations and she resolved that an investigation needed to be conducted to root out corruption and maladministration in that part of the Department (the former Department of Transport).

1.2.7 She then decided to approach the Premier for guidance and met the Premier on a date of which could not be confirmed.

1.2.8 After sharing her frustrations with the Premier, he referred her to the legal team in his Office, which is led by Advocate Christopher Rammutla whom she never met during 2014.

1.2.9 Unfortunately Advocate Rammutla was not available on that day and she met Mr Mpfariseni Erasmus Phophi, General Manager, Labour Relations, Employee Health and Wellness and other officials whom the MEC Mokaba-Phukwana could not remember.

1.2.10 Mr Phophi confirmed to MEC Mokaba-Phukwana that she could appoint a service provider to conduct a forensic investigation in her Department, as the Head of the then Department of Transport Ms du Plessis was implicated in the allegations.

1.2.11 MEC Mokaba-Phukwana, appointed MPA Investigation Team to conduct an investigation in the former Department of Transport on 16 September 2014 due to the allegations of maladministration, corruption and mismanagement of funds which were raised.

1.2.12 On 03 December 2014, the Managing Director of MPA Investigation Team, Mr Santana Martin Antonio informed the Head of the Department of Transport, Ms du Plessis of the appointment. After discussing the matter with the MEC Mokaba-Phukwana, Ms du Plessis authorised MPA Investigation Team to conduct an investigation in the Department through a letter dated 03 December 2014.

1.2.13 Ms du Plessis informed the Chief Procurement Officer, Mr Kenneth Brown through a letter dated 04 February 2015 of the irregular appointment of MP.A Investigation Team and requested the Chief Procurement Officer to advise her, as MEC Mokaba-Phukwana had requested her to formalise the said appointment and to draft a service level agreement.

1.2.14 The Chief Procurement Officer through a letter dated 04 February 2015 directed the Head of the Limpopo Provincial Treasury, Mr G Pratt to *"ensure that the irregular appointment of MPA is terminated with immediate effect and that a full assessment of the work done by MPA is done to establish if the department received value for money"*. The Chief Procurement Officer copied Ms du Plessis, MEC Mokaba-Phukwana, the then MEC of the Provincial Treasury, Hon Mr K A Phala, the Premier, Hon Mr S Mathabatha and the then Minister of Finance Hon Mr N Nene the abovementioned letter.

1.2.15 Through a letter dated 09 February 2015, the Head of the Limpopo Provincial Treasury, after his Department studied the documents informed Ms du Plessis and recommended to her that she should terminate MPA Investigation Team's contract with her Department with immediate effect, that the Department should demand the return of all documents in the possession of MPA Investigation Team and that no payment should be made to MPA Investigation Team, as it would constitute irregular expenditure.

1.2.16 In a letter dated 11 February 2015, Ms du Plessis informed Mr Pratt that when she briefed MEC Mokaba-Phukwana about the Limpopo Provincial Treasury's recommendation, the MEC responded that the recommendations of the Head of the Limpopo Provincial Treasury had no bearing on the appointment of MPA Investigation Team, as the letter of advice received was addressed to Ms du Plessis and not to her. She further advised Ms du Plessis to inform Mr Pratt that he could communicate with her through the Member of the Executive Council of the Limpopo Provincial Treasury, Mr Phala.

## 2. THE COMPLAINT

2.1 Mr Joseph Buthane, MPL of the Economic Freedom Fighters lodged a complaint on 15 July 2015, in terms of section 4(1) of the Executive Members Ethics Act, 1998 through the Public Protector's Limpopo Provincial Office. The key allegations in the complaint were that:

2.1.1 The Member of the Executive Council (MEC) responsible for Transport, Safety and Liaison, Limpopo Provincial Legislature, MEC Mapula Mokaba-Phukwana, Member of the Provincial Legislature contravened the Executive Ethics Code by acting in a manner that is inconsistent with her position when:

2.1.1.1 She awarded a contract for forensic investigation services to MP.A Investigators, who were allegedly not forensic investigators but debt collectors through a letter dated 16 September 2014 despite having no authority to do so in terms of the Public Finance Management Act, 1999 and Treasury Regulations, as she was not the Accounting Officer of the Department; and

2.1.1.2 She suspended half of the Executive Management Team of her Department and when questioned on their suspension, she allegedly responded by indicating that she was dealing with EFF corruption in the Department of Transport, Safety and Liaison.

## 3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides:

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

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

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

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

3.5 Sections 3(1) and 4(1)(b) of the Executive Members' Ethics Act provide that the Public Protector must investigate any alleged violation of the Executive Ethics Code on receipt of a complaint by a Member of the Provincial Legislature against a Member of the Executive Council.

3.6 When investigating an alleged violation of the Executive Ethics Code, the Public Protector, by virtue of section 3(4) of this Act, have all the powers vested in the Public Protector in terms of the Public Protector Act. Section 4(3) of the Executive Members' Ethics Act further states that nothing in this Act may prevent the Public Protector from investigating any complaint by a member of the public in accordance with the Public Protector Act.

3.7 The complaint lodged against MEC Mokaba-Phukwana relates to allegations of improper conduct in state affairs and unethical conduct by MEC Mokaba-Phukwana, and accordingly falls within the ambit of the Public Protector.

3.8 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

## 4. THE INVESTIGATION

### 4.1 Methodology

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

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

maladministration. Section 6 of the Public Protector gives the Public Protector the authority to investigate and report her findings regarding any complaint lodged.

4.1.3 Section 3 (1) of the Executive Members' Ethics Act gives the Public Protector the power to investigate any alleged violation of the code of ethics on receipt of a complaint to the President if the complaint is against a Cabinet member, Premier or Deputy Minister and to Premier of the Province concerned, if the complaint is against an MEC.

**4.2 Approach to the investigation**

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation, through correspondence, interviews, meetings and

documents. In this particular case, the factual enquiry principally focused on whether or not MEC Mokaba-Phukwana acted in the manner alleged by the Complainant. The principal source of evidence included institutional documents consisting of correspondence. Further information was requested from the Complainant through a discretionary letter. Evidence was evaluated and a determination was made on what happened based on a balance of probabilities.

4.2.3 The enquiry regarding what should have happened, focused on the law or rules that regulate the ethical standard that should have been met or complied with by MEC Mokaba-Phukwana as regulated by the Executive Ethics Code and other regulatory frameworks, applicable ethical standards, to prevent the improper conduct or violation of the Executive Ethics Code. In this case, key reliance was placed on the Executive Ethics Code, in addition to the Executive Members' Ethics Act and the Constitution.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing injustice or prejudice suffered or damage caused as a consequence of improper conduct involving maladministration, unethical conduct or any other impropriety. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the MEC Mokaba-Phukwana or organ of state complied with the regulatory framework setting the applicable standards for proper conduct or good administration. The same is done where the wrongful conduct negatively affects the general populace. However, in appropriate circumstances, the remedial or corrective action primarily seeks to prevent a recurrence.

4.2.5 The substantive scope focused on compliance with the law and regulations relating to the propriety of the conduct of MEC Mokaba-Phukwana regarding

the allegations of failure to discharge an ethical obligation when she appointed MPA Investigation Team to render forensic investigation services to the Department of Transport.

**4.3 On analysis of the complaint, the following issues were considered and investigated:**

**4.3.1 Whether MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team to conduct forensic investigation without proper legal authority;**

**4.3.2 Whether MEC Mokaba-Phukwana irregularly awarded a contract to MPA Investigation Team to conduct forensic investigation without following proper procurement processes;**

**4.3.3 Whether Ms Hanli du Plessis, the Head of the Department of Transport, improperly regularised the contract irregularly awarded to MPA Investigation Team to conduct forensic investigation services in the Department;**

**4.3.4 Whether Mrs M P J Antonio, MPA Investigation Team's sole Director improperly entered into a contract with the Department of Transport, Safety and Liaison and engaged herself in the performance of extra remunerative work outside her employment as a Public Servant;**

**4.3.5 Whether MEC Mokaba-Phukwana irregularly awarded a contract to an entity whose sole proprietor did not have the necessary qualification to do the job; and**

4.3.6 Whether the conduct of MEC Mokaba-Phukwana was inconsistent with the Executive Ethics Code.

## 4.4 The key sources of information

### 4.4.1 Documents

4.4.1.1 Certificate with registration number 2013/061214/07 issued by the Companies and Intellectual Commission issued on 11 April 2015;

4.4.1.2 Mr Martins Santana Antonio's Debt Collector's certificate issued by Council for Debt Collectors dated 02 April 2015;

4.4.1.3 Appointment letter of MPA Investigation Team dated 14 September 2014;

4.4.1.4 Letter from the Hon Mokaba-Phukwana to the Premier dated 21 January 2015 with the heading *"APPOINTMENT TO CONDUCT INVESTIGATION IN THE DEPARTMENT OF TRANSPORT"*;

4.4.1.5 Letter from the Hon Mokaba-Phukwana to the Limpopo Provincial Treasury dated 21 January 2015 with the heading *"APPOINTMENT TO CONDUCT INVESTIGATION IN THE DEPARTMENT OF TRANSPORT"*;

4.4.1.6 Letter from the MEC Mokaba-Phukwana to Office of the Auditor General dated 21 January 2015 with the heading *"APPOINTMENT TO CONDUCT INVESTIGATION IN THE DEPARTMENT OF TRANSPORT"*;

4.4.1.7 Letter from the National Chief Procurement Officer Mr Kenneth Brown with the heading "*APPOINTMENT OF A SPECIAL INVESTIGATOR TO INVESTIGATE CERTAIN IRREGULARITIES IN THE DEPARTMENT OF TRANSPORT, SAFETY, SECURITY AND LIAISON*" addressed to the HOD of the Limpopo Provincial Treasury Mr G Pratt dated 04 February 2015, copied to the HOD of Transport Ms H du Plessis, MEC of Transport MEC Mokaba-Phukwana, MEC of Finance Hon A K Phala, Premier S Mathabatha and Minister of Finance Hon N Nene.

**4.4.2 Correspondences sent and received**

4.4.2.1 Letter sent to the Chief Procurement Officer, Mr. K Brown dated 30 July 2015;

4.4.2.2 Email to the National Treasury dated 13 August 2015;

4.4.2.3 Email from the National Treasury dated 19 August 2015;

4.4.2.4 Letter sent to the Honourable, MEC M Mokaba-Phukwana dated 28 August 2015;

4.4.2.5 Letter sent to the Honourable, Premier S Mathabatha dated 28 August 2015;

4.4.2.6 Letter sent to the Head of Department of Transport dated 04 September 2015;

4.4.2.7 Letter sent to the Head of the Limpopo Provincial Treasury dated 04 September 2015;

4.4.2.8 Letter received from the Head of Department of Transport, Safety and Liaison dated 08 September 2015;

4.4.2.9 Letter sent to the Head of Department of Transport, Safety and Liaison dated 09 September 2015;

4.4.2.10 Letter received from the Honourable, MEC M Mokaba-Phukwana dated 19 September 2015;

4.4.2.11 Letter sent to the Head of the Limpopo Provincial Treasury dated 21 September 2015;

4.4.2.12 Letter sent to the Honourable MEC M Mokaba-Phukwana dated 22 September 2015;

4.4.2.13 Email sent to the Honourable MEC M Mokaba-Phukwana's office dated 13 October 2015;

4.4.2.14 Email received from the Honourable MEC M Mokaba-Phukwana's office dated 13 October 2015;

4.4.2.15 Email sent to the Legal Advisor in the Office of the Premier, Advocate C Rammutla dated 14 October 2015;

4.4.2.16 Email received from the Legal Advisor in the Office of the Premier, Advocate C Rammutla dated 15 October 2015;

4.4.2.17 Email sent to the Legal Advisor in the Office of the Premier, Advocate C Rammutla dated 15 October 2015;

4.4.2.18 Email received from the Professional Assistant to the General Manager, Legal Services, Office of the Premier dated 21 October 2015;

4.4.2.19 Email sent to the Legal Advisor in the Office of the Premier, Advocate C Rammutla dated 26 October 2015;

4.4.2.20 Email received from the Honourable MEC M Mokaba-Phukwana's office dated 27 October 2015;

4.4.2.21 Email sent to the General Manager: Labour Relations, Employee Health and Wellness in the Office of the Premier, Mr M E Phophi dated 27 October 2015;

4.4.2.22 Letter sent to the Director/CEO of HJN Training dated 03 December 2015;

4.4.2.23 Email Sent to the Department of Home Affairs dated 03 December 2015;

4.4.2.24 Email received from the Department of Home Affairs dated 03 December 2015;

4.4.2.25 Email received from HJN Training dated 04 December 2015;

4.4.2.26 Email sent to the Director of MPA Investigation Team dated 05 January 2016;

4.4.2.27 Email received from the Director of MPA Investigation Team dated 06 January 2016;

4.4.2.28 Email sent to the Director of MPA Investigation Team dated 11 January 2016;

4.4.2.29 Email received from the Director of MPA Investigation Team dated 11 January 2016;

4.4.2.30 Email sent to the Director of MPA Investigation Team dated 12 January 2016;

4.4.2.31 Letter sent to the SAPS Acting National Commissioner dated 12 January 2016;

4.4.2.32 Letter received from the SAPS Divisional Commissioner, Human Resource Management dated 16 January 2016;

4.4.2.33 Letter sent to the Director of MPA Investigation Team dated 19 January 2016; and

4.4.2.34 Letter received from the SAPS Divisional Commissioner, Human Resource Management dated 26 January 2016.

### 4.4.3 Interviews

Interviews (including telephonic interviews) were conducted with:

4.4.3.1 Honourable MEC M Mokaba-Phukwana, MP on 13 October 2015 and 04 November 2015;

4.4.3.2 Ms H du Plessis, Head of Department of Transport on 08 September 2015;

4.4.3.3 Mr G Pratt, Head of the Limpopo Provincial Treasury on 15 September 2015;

4.4.3.4 Advocate P C Rammutla, Legal Advisor in the Office of the Premier on 21 October 2015;

4.4.3.5 Ms S V Masekela, Senior State Law Advisor, Office of the Premier on 22 October 2015;

4.4.3.6 Mr M E Phophi, General Manager: Labour Relations, Employee Health and Wellness in the Office of the Premier on 28 October 2015;

4.4.3.7 Mr Thabo "Gab" Mokhine on 28 October 2015;

4.4.3.8 Mr M S Antonio on 08 November 2015;

4.4.3.9 Mr M H Matanga, the former Manager in the MEC's Office on 18 November 2015; and

4.4.3.10 Mrs M P J Antonio, the former Director of MPA Investigation Team 04 January 2015.

**4.4.4 Legislation and other prescripts relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:**

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

4.4.4.2 The Public Protector Act No.23 of 1994;

4.4.4.3 The Executive Members' Ethics Act No.82 of 1998;

4.4.4.4 The Executive Ethics Code, 2000;

4.4.4.5 The Public Finance Management Act No. 1 of 1999;

4.4.4.6 The Treasury Regulations issued in terms of the Public Finance Management Act No. 1 of 1999 (PFMA);

4.4.4.7 Public Service Act No. 103 of 1994;

4.4.4.8 Public Administration Management Act No.11 of 2014;

4.4.4.9 Department of Roads and Transport Procurement Policy Version 2.

4.4.4.10 *MEC for Health, EC v Kirland Inv (Pty) Ltd t/a Eye & Lazer Institute* 2014(3) SA 481(CC)

## 5 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

**5.1 Whether MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team to conduct forensic investigation without proper legal authority:**

5.1.1 It is common cause that MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team for forensic investigation services in the Department without proper legal authority.

5.1.2 In her response dated 11 July 2016 to the Public Protector's section 7(9) notice, MEC Mokaba-Phukwana conceded that as a result of an administrative error she made the appointment. She however argued that she was entitled to make the appointment as no one could properly appoint other than herself since the HOD and the procurement officials were all suspected to be involved in the alleged rampant corruption taking place in the Department. The MEC further argued that it would not have been fair for the people who are likely to be implicated to participate in the appointment of those tasked with the duty of investigation and that it would not have been appropriate were any of the procurement officials to do so.

5.1.3 Despite the MEC's argument that whereas she is not generally authorised to award contracts, she may do so under certain circumstances, she could however not refer to any legal prescript which provided her with the authority to make such an appointment even under the circumstances in which she sought to justify the appointment.

5.1.4 In the circumstances the MEC's argument in this regard does not take the matter any further. It is also puzzling that the same HOD who could not be

trusted with the process of appointing the service provider to conduct forensic investigation by virtue of being suspected of involvement in the alleged rampant corruption in the Department was the same person who wrote to the Provincial Treasury seeking approval for the re-appointment of MPA Investigation Team.

**5.2 Whether MEC Mokaba-Phukwana irregularly awarded a contract to MPA Investigation Team to conduct forensic investigation without following proper procurement processes:**

5.2.1 MEC Mokaba-Phukwana admitted in her response to the Public Protector's section 7(9) notice that "*It is common cause that the MEC awarded this contract and that by so doing bypassed the procurement regulations*". Whereas the MEC indicated an appreciation of the relevant legal prescripts regulating procurement in her response to the Public Protector's section 7(9) notice, she argued that following those prescripts would not have resulted in a fair, equitable, competitive and transparent outcome even though it might be cost effective as required by section 217(1) of the Constitution and section 38(a)(iii) of the PFMA.

5.2.2 The MEC further submitted that the appointment was extremely urgent and needed to be done in a clandestine fashion as not to alert the culprits and that this coupled with the fact that she was keen to eliminate corruption as a matter of urgency for the smooth running of the Department led her to believe that she was acting correctly by bypassing those prescripts.

5.2.3 As to whether the MEC could deviate from the relevant legal prescripts regulating procurement by virtue of emergency as contended will be determined once the applicable legal prescripts are applied to the evidence

established under the administrative standards that should have been complied with by the MEC and the Department.

5.2.4 Regarding the allegation that MPA Investigation Team was highly paid for work that they did not have the competency and that payments were being made even after Treasury had directed that the services of the company be terminated, the MEC in her response to the Public Protector's section 7(9) notice argued that there was no money paid to anybody prior to regularisation and that she failed to understand why payments made after the contract was regularised could be attributed to her.

5.2.5 It is noted that the MEC's response in this regard contradicts the submission made by Ms H Du Plessis, HOD in her response to the Public Protector's section 7(9) notice. In her response to the Public Protector's section 7(9) notice, Ms Du Plessis conceded that the Provincial Treasury advised her to pay 60% of the invoice which was submitted by MPA Investigation Team for the work that they did during the period of the irregular appointment made by the MEC (i.e. the period between September 2014 and February 2015).

5.2.6 She further conceded that the amount of R484 296.00 was paid which is equal to the 60% payment as recommended by Provincial Treasury. The Public Protector is in possession of a copy of an invoice which indicates that the amount of R484 296.00 is 60% of that invoice with a total amount of R807 160.00 which was received by the MEC on 6 March 2015.

5.2.7 Therefore it is disingenuous for the MEC to argue that no payment was made after she made an irregular appointment whereas the evidence provided by Ms Du Plessis proves the contrary. Ms Du Plessis was adamant that those payments were done as advised by the Provincial Treasury.

5.2.8 It is further noted that contrary to the MEC's argument that according to procurement policies of the government once an irregular contract has been regularised, all payments made before and after the process cannot be said to be irregular anymore. The argument by the MEC in this regard seems to suggest that the appointment of MPA Investigation Team was regularised whereas Ms Du Plessis indicated in her response to the Public Protector's section 7(9) notice that the initial irregular appointment was terminated by the MEC per letter dated 26 February 2015 after the advice received from the Chief Procurement Officer in that regard.

5.2.9 Therefore the MEC's argument in this regard is misconstrued since payments made in terms of an irregular appointment which was terminated remains an irregular expenditure by virtue of being an expenditure incurred in contravention of the Treasury Regulations relating to procurement of goods and services issued in terms of the PFMA.

**5.3 Whether Ms Hanli du Plessis, the Head of the Department of Transport, improperly regularised the contract irregularly awarded to MPA Investigation Team to conduct forensic investigation services in the Department:**

*The initial appointment of MPA Investigation Team*

5.3.1 With regard to the initial appointment of MPA Investigation Team, it is noted that in paragraph 5 of her affidavit deposed to on 6 August 2015 and submitted to the Public Protector, Ms du Plessis indicated that upon her request following an instruction from the MEC, a letter was drafted by Mr J R Bilankulu: Senior Manager Legal Services and signed by her on 3 December 2014 which was

issued to Mr Antonio of MPA Investigation Team. The Public Protector is in possession of the copy of the said letter.

5.3.2 The letter grants Mr Antonio the authority to conduct investigations in the Limpopo Provincial Department of Transport. It is now common cause that this appointment was made without following the relevant legal procurement prescripts. Ms du Plessis further indicated in her affidavit that upon her return from annual leave in January 2015, she as the Accounting Officer questioned the procurement process for the services of MPA Investigation Team with the MEC.

5.3.3 She further indicated that the MEC responded in writing that the appointment was made by her as the Executive Authority of the Department. She submitted a copy of a letter dated 5 January 2015 to the Public Protector which confirms that the MEC admitted that the internal investigations conducted by the MPA Investigation Team was commissioned and sanctioned by her.

5.3.4 It should be noted that whereas the MEC in her response to the Public Protector's section 7(9) notice seems to suggest that the appointment of MPA Investigation Team was regularised, Ms Du Plessis indicated in her response to the Public Protector's section 7(9) notice that the initial irregular appointment was terminated by the MEC per letter dated 26 February 2015 after the advice received from the Chief Procurement Officer in that regard. The Public Protector is in possession of a copy of said letter submitted by Ms Du Plessis as evidence of termination of the appointment.

5.3.5 The evidence of letter addressed by Ms Du Plessis to the Chief Procurement Officer at the National Treasury dated 4 February 2015, indicates that Ms Du Plessis sought advice on the process to be followed to formalise or regularise

the appointment of MPA Investigation Team after being requested to do so by MEC Mokaba-Phukwana. In her affidavit deposed to on 6 August 2015, Ms du Plessis indicated that the MEC verbally requested her on 27 January 2015 to formalise the appointment of MPA Investigation Team.

5.3.6 The Public Protector is also in possession of the evidence of a letter from Mr Kenneth Brown, Chief Procurement Officer at National Treasury dated 4 February 2015 addressed to Mr G Pratt, Head of Department of Limpopo Provincial Treasury responding to Ms Du Plessis' letter referred to above. In the said letter the Chief Procurement Officer directs the Provincial Treasury to ensure that the irregular appointment of MPA Investigation Team is terminated with immediate effect, and that the full assessment of the work done by MPA Investigation Team is done to establish if the Department received value for money.

*The re-appointment of MPA Investigation Team*

5.3.7 The evidence of the National Treasury: Forensic Investigation Report on the Investigation Conducted into Allegations of Irregularities in the Appointment of Service Provider by Limpopo Department of Transport for Specialised Investigation Services dated 22 August 2016 (National Treasury: Forensic Investigation Report), indicates that on 27 February 2015, MEC Mokaba-Phukwana wrote a letter to Ms du Plessis requesting her to appoint the forensic investigator as a matter of urgency.[1] The National Treasury: Forensic Investigation Report further indicates that during an interview with Ms du Plessis on 28 June 2016, she stated that at a meeting held at the legislature

1 National Treasury: Forensic Investigation Report at page 46.

in Lebowakgomo, MEC Mokaba-Phukwana verbally instructed her to re-appoint MPA Investigation Team.

5.3.8 It is noted that the National Treasury: Forensic Investigation Report further recorded that on 15 July 2016, the National Treasury Investigation Team sent an e-mail to Ms du Plessis requesting clarity on the exact date on which the meeting at which the MEC made such a verbal instruction took place and Ms du Plessis indicated that she could not recall but thought it was somewhere between 24 and 26 February 2015. It is noted that in her subsequent affidavit dated 20 January 2017, which was submitted to the Public Protector to clarify the issue regarding the alleged verbal instruction by the MEC, Ms du Plessis confirmed that the meeting took place on 24 February 2015.

5.3.9 She indicated that during that meeting the MEC was convinced that her appointment of MPA Investigation Team was in fact irregular and had to be terminated as per National Treasury instruction. Ms du Plessis further indicated that the MEC agreed to terminate on condition that as Accounting Officer and in terms of the correct legal prescript she then appoint the Company hence the use of Regulation 16A6.4 of the National Treasury Regulations. (Own emphasis).

5.3.10 Ms Du Plessis conceded that the subsequent appointment of MPA Investigation Team was done by her as HOD on 02 March 2015 in line with Regulation 16A.6.4 of the National Treasury Regulations.

5.3.11 It is disconcerting that by Ms du Plessis' own account of the events in her subsequent affidavit, *"the MEC agreed to terminate on condition that as the Accounting Officer and in terms of the correct legal prescript she then appoint the Company. Hence the use of paragraph 16A6.4."* The condition attached

seems to suggest that there was undue pressure exerted on the Accounting Officer to appoint *"the Company"*. It is also noted that in an e–mail addressed to the Public Protector dated 25 January 2017, Ms du Plessis indicated that the issue whether she was coerced is moot as it would be the word of the MEC against hers and that would serve no purpose.

5.3.12 A perusal of a copy of the letter purported to be dated 27 February 2015 and its contents, which MEC Mokaba-Phukwana purportedly wrote to Ms du Plessis requesting her to appoint the forensic investigator as a matter of urgency indicates that when the letter was written no investigation had taken place. This conclusion is drawn from the fact that the letter states that:

*"....To continue with our endeavour to serve the public and deliver equitable service to the citizens of South Africa and Limpopo in particular an urgent intervention is required before we experience another protracted service delivery protests. It is thus imperative that as the Accounting Officer you consider the appointment of a forensic investigator as a matter of urgency to ascertain the authenticity of these widespread allegations against the department.*

*Should you need more information or my assistance in this regard, to [sic] do not hesitate to consult with me at any moment."* (Own emphasis)

5.3.13 The Public Protector is of a considered view that contrary to what is recorded on the findings of the National Treasury Investigation Team the letter referred to above could not have been written on 27 February 2015. This view is further reinforced by the fact that after 26 February 2015 when the initial appointment was terminated by the MEC, in her response to the Public Protector's section 7(9) notice Ms du Plessis indicated that:

*"Due to the fact that MPA Investigation Team has covered most of the areas of investigations and that they now have traces of other areas that still have to be investigated, it is necessary and in the best interest of the Department to continue involving MPA Investigation Team to finalize the investigations and the disciplinary hearings. It is for this reason that the Department proceeded to appoint MPA Investigation Team in line with specific terms of reference and a duly signed contract to continue with the investigations and assist the Department with evidence in the disciplinary hearings."*

**5.3.14** It then follows that at the time the initial appointment was terminated on 26 February 2015, the *"authenticity of these widespread allegations against the department"* had already been ascertained around 27 February 2015.

**5.3.15** Therefore on a balance of probabilities the letter purported to have been written on 27 February 2015 contradicts the state of affairs that prevailed at the material time. The letter could have only been written before the initial appointment was made.

**5.3.16** It is disconcerting that Ms du Plessis disclosed to the National Treasury Investigation Team that she was verbally instructed by MEC Mokaba-Phukwana to re-appoint MPA Investigation Team but failed to disclose such information to the Public Protector Investigation Team. Such information is crucial to the Public Protector's investigation because it has legal implications in as far the issue of alleged irregular re-appointment of MPA Investigation Team by Ms du Plessis is concerned.

**5.3.17** The National Treasury: Forensic Investigation Report also reveals that its investigation team was not provided with any evidence that Ms du Plessis

requested the MEC to put the verbal instruction in writing as required by section 64(1) of the PFMA or informed her in writing of the likelihood that the directive may result in unauthorised expenditure as required by section 64(2) of the PFMA. The National Treasury: Forensic Investigation Report further reveals that the National Treasury Investigation team was not provided with any evidence that the implementation of the verbal directive was reported to the National Treasury, Auditor-General and Limpopo Provincial Treasury as required by section 64(3) of the PFMA.

5.3.18 The only logical inference that can be drawn from Ms du Plessis' conduct is that when faced with an instruction to make an otherwise irregular appointment, she resorted to the provisions of Regulation 16A6.4 of the National Treasury Regulations to regularise it.

5.3.19 The evidence as outlined above indicates that Ms du Plessis did not voluntarily embark on a process to make the appointment in terms Regulation 16A6.4 of the National Treasury Regulations as she alleged but was forced to do so by the circumstances in which she found herself. It is worth noting that the MEC in her response to the Public Protector's section 7(9) notice indicated that no one could properly appoint other than herself since the HOD and the procurement officials were all suspected to be involved in the alleged rampant corruption taking place in her Department.

5.3.20 It is perplexing that the HOD could then have voluntarily made the appointment when she herself and the procurement officials were all suspected of being involved in the alleged rampant corruption taking place in the Department.

5.3.21 Ms du Plessis' justification of the appointment in terms of Regulation 16A6.4 of the National Treasury Regulations was just a *fait accompli* intended to achieve an otherwise irregular outcome or objective.

**5.4 Whether Mrs M P J Antonio, MPA Investigation Team's sole Director improperly entered into a contract with the Department of Transport, Safety and Liaison and engaged in the performance of extra remunerative work outside her employment as a Public Servant:**

5.4.1 Mrs Antonio's information was received by the Public Protector's investigators through her employer and her company's registration records.

5.4.2 The investigation established that Mrs Mpho Pearl Johan Antonio, is an Administration Clerk of the SAPS, attached to Detective Services Division at the National Office, Pretoria. Ms Antonio's husband, Mr Martin Antonio confirmed in his response to the Public Protector's section 7(9) notice on behalf his wife that Mrs Antonio is indeed employed by the South African Police Service.

5.4.3 The investigation revealed that Mrs Antonio was the sole Director of MPA Investigation Team from 11 April 2013 when the Company was first registered to 31 December 2015 when she resigned. Mr Antonio also confirmed in his response to the Public Protector's section 7(9) notice that his wife was the sole director of MPA Investigation Team when the entity was registered. However, Mr Antonio submitted that the position changed during the latter part of 2015 when he became the sole director without providing any specific date as to when the position changed. Mr Antonio further submitted that for all ends and purposes Mrs Antonio had ceded all her powers to him and that he received remuneration in the form of monthly salary as an employee of the entity.

5.4.5 An examination of a copy of the MEC's letter of appointment addressed to MPA Investigators dated 16 September 2014 indicates that the acceptance of the appointment on the same date was signed for by Mr Antonio. It is further noted that the signature on the acceptance of appointment resembles the signature on Mr Antonio's response to the Public Protector's section 7(9) notice. Therefore this evidence gives credence to Mr Antonio's submission that Mrs Antonio had ceded all her powers to him and that he received remuneration in the form of monthly salary as an employee of the entity.

5.4.6 The signature of Mr Antonio in acceptance of the MEC's appointment also indicates that he was the person who had dealings with the MEC. It is also noted that upon the subsequent appointment of MPA Investigation Team by Ms du Plessis on 2 March 2015, Mr Antonio signed the Contract and Service Level Agreement.

5.4.7 Despite the SAPS' letter dated 26 January 2016 advising that Mrs Antonio did not obtain permission to perform remunerative work outside her employment from her employer, the Public Protector could not find any other evidence to prove that Mrs Antonio had personally and improperly entered into a contract with the Department of Transport, Safety and Liaison and engaged in the performance of extra remunerative work outside her employment as a Public Servant.

5.4.8 However, the evidence of Ms du Plessis in response to the Public Protector's section 7(9) notice in which she indicated that for the period between September 2014 and February 2015, MPA Investigation Team was paid an amount of R484 296.00. The amount of R484 296.00 which was remuneration

for services rendered can be attributed to Mrs Antonio by virtue of the fact that she was the sole director of MPA Investigation Team at the time.

5.4.8 Furthermore the SAPS' letter dated 26 January 2016 advising that Mrs Antonio did not obtain permission to perform remunerative work outside her employment from her employer is sufficient prove that she did not declare her financial interest in MPA Investigation Team to her employer at the time when she was the sole director of the entity.

5.4.9 However, it is common cause that Mrs Antonio was a director of a private company conducting business with the state from 11 April 2013 when the Company was first registered to 31 December 2015. It is noted that when MPA Investigation Team was appointed by the MEC on 16 September 2014 and when it was re-appointed by Ms du Plessis on 2 March 2015, Mrs Antonio was still the sole director of MPA Investigation Team and therefore had not yet ceded her powers as alleged by Mr Antonio.

**5.5 Regarding whether MEC Mokaba-Phukwana irregularly awarded a contract to an entity whose sole proprietor did not have the necessary qualification to do the job.**

5.5.1 The investigation revealed that the documents which were submitted to the Department when the contract was awarded to MPA Investigation Team to render forensic investigation services to the Department are the registration certificate of MPA Investigation Team issued by the Companies and Intellectual Property Commission with registration number 2013/061214/07 and Mr Antonio's Debt Collection Certificate number 0053097/111, issued by Council for Debt Collection on 02 April 2014 with an expiry date 02 April 2015.

5.5.2 The investigation also revealed that Mr Antonio attended a 5 day forensic investigation course from 14 to 18 September 2015 with HJN Training, after the contract was awarded during 16 September 2014.

5.5.3 In his response to the Public Protector's section 7(9) notice, Mr Antonio submitted that he has extensive investigative experience since 2003. He further submitted that he is registered as a security service provider since August 2006 and that in terms of converting his training to NQF with the South African Qualifications Authority, he was only required to finalise the training in five days instead of one year as a direct result of his experience.

**5.6 Regarding whether the conduct of MEC Mokaba-Phukwana was inconsistent with the Executive Ethics Code and Executive Members Ethics Act.**

5.6.1 The evidence discussed above revealed that MEC Mokaba-Phukwana appointed MPA Investigation Team to conduct forensic investigation in the Department, without the necessary legal authority and without following the legal prescripts regulating procurement.

5.6.2 It is not disputed that MEC Mokaba-Phukwana's conduct subsequently led to the Department incurring an irregular expenditure amounting R484 296.00. This amount is equivalent to 60% of the contractual amount, which the Department paid upon being advised by the Provincial Treasury to do so.

5.6.3 The only issue that remains to be determined is whether MEC Mokaba-Phukwana's conduct as alluded to above, was in accordance with the Executive Members Ethics Act and the Code.

## 6. THE ADMINISTRATIVE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH BY MEC MOKABA-PHUKWANA AND HER DEPARTMENT

**6.1 Whether MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team to conduct forensic investigation without proper legal authority:**

6.1.1 MEC Mokaba-Phukwana conceded that she appointed MPA Investigation Team to render investigation services to her Department without proper legal authority, as no one could properly appoint other than herself since the HOD and the procurement officials were all suspected of being involved in the alleged rampant corruption taking place in her Department. Despite the MEC's contention that she may do so under certain circumstances, she could however not refer to any legal prescript which provided her with the authority to make such an appointment even under the circumstances in which she sought to justify the appointment.

6.1.2 The issue to be adjudicated is whether or not MEC Mokaba-Phukwana had the authority to discharge such a duty and whether or not her conduct in that regard was in violation of the applicable legal prescripts that govern procurement in the public administration and the law.

6.1.3 In terms of section 38 of the Public Finance Management Act No. 1 of 1999 (PFMA), the responsibility for the procurement and provisioning of goods and services in government departments is exclusively vested in the accounting officers. Section 38(1)(a)(iii) of the PFMA enjoins the accounting officer of a department to ensure that the department has and maintains an appropriate

procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

6.1.4 Section 38(1)(b) of the PFMA further emphasises that the accounting officer of a department is responsible for the effective, efficient, economical and transparent use of the resources of the department.

6.1.5 It is noted that section 38 does not make provision for any delegation of the responsibilities provided therein. It also does not provide for any exceptions or circumstances under which such responsibilities may be executed by anybody else except the accounting officer.

6.1.6 Therefore the MEC's argument that no one could properly appoint other than herself since the HOD and the procurement officials were all suspected to be involved in the alleged rampant corruption taking place in the Department is misconstrued and amounts to abuse of public authority.

6.1.7 Similarly in *MEC for Health, EC* v *Kirland* (Pty) t/a Eye & Laser Institute[2] the court took a dim view of the conduct of an MEC who sought to intrude in the powers vested in a person properly authorised (i.e. the superintendent-general) to make a decision regarding the approval of an application to erect private hospitals. The court was of the view that the MEC had no business in the reconsideration and approval of *Kirland's* application because the power was reposed in the superintendent-general.[3]

6.1.8 Similarly as it is the case in the issue under discussion, the court was further of the view that the MEC's conduct illustrates a complete disregard for the

2 2014 (3) SA 481 (CC).
3 *Supra* at para [42].

relevant legal prescripts, and an abuse of public authority, to facilitate a desired outcome. The court further held the view that the conduct is incompatible with the principles and values enshrined in the Constitution.[4]

6.1.9 It then follows that MEC Mokaba-Phukwana violated the principle of legality and the rule of law as enshrined in section 1(c) of the Constitution of the Republic of South Africa, 1996 by exercising a power which was not conferred upon her by law.

6.1.10 According to Snyman the principle of legality *is "a mechanism to ensure that the state, its organs and its officials do not consider themselves to be above the law in the exercise of their functions but remain subject to it."*[5] In *Fedsure Life Assurance Ltd* v *Greater Johannesburg Metropolitan Council*[6] the Constitutional Court held that "*Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law*".

6.1.11 In this case MEC Mokaba-Phukwana exercised a power that was exclusively conferred upon the HOD as the accounting officer in violation of section 38 of the PFMA.

---

4 *Supra* at para [43].
5 Snyman C R *Criminal Law* (2008) at page 36.
6 1999 (1) SA 374 (CC) at para [58].

**6.2 Whether MEC Mokaba-Phukwana irregularly awarded a contract to MPA Investigation Team to conduct forensic investigation without following proper procurement processes:**

6.2.1 MEC Mokaba-Phukwana conceded that she appointed MPA Investigation Team to render investigation services to her Department without following procurement regulations.

6.2.2 Section 217(1) of the Constitution provides that:

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

6.2.3 Section 38(1)(a)(iii) of the PFMA provides that the accounting officer of a department must ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. Similarly Regulation 16A3.2(a) of the National Treasury Regulations issued in terms of the PFMA provides that a supply chain management system must be fair, equitable, transparent, competitive and cost effective.

6.2.4 MEC Mokaba-Phukwana violated section 217(1) of the Constitution, section 38(1)(a)(iii) of the PFMA and Regulation 16A3.2(a) of the National Treasury Regulations issued in terms of the PFMA by appointing MPA Investigation Team to render investigation services to her Department without following a system which is fair, equitable, transparent, competitive and cost effective.

6.2.5 In her response to the Public Protector's section 7(9) notice, she contended that following the procedures provided for in the Treasury Regulations would not have resulted in a fair, equitable, competitive and transparent outcome, even though it might be cost effective. She further contended that it would not have been *"fair"* for the people who are likely to be implicated to participate in the appointment of those tasked with the duty of investigation. The MEC's contention in this regard is misconstrued since the requirement of fairness in this regard does not apply to the scenario she sought to depict but it rather applies to the potential service providers to be appointed.

6.2.6 Therefore the only issue that remains to be determined is whether assuming that she had the authority to make such an appointment, was she justified to do so without following procurement regulations on the basis of an emergency as alleged.

6.2.7 The Regulation 16A6.4 of the National Treasury Regulations provides that:

*"If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."* (Own emphasis)

6.2.8 In terms of Regulation 16A6.4 as alluded to above, deviation from following the applicable legal prescripts is only permissible if it is impractical to invite competitive bids. The MEC has failed to demonstrate how it would have been impractical to invite competitive bids even if she did not involve the people allegedly implicated. If the matter was so urgent as she alleged nothing

stopped her from reporting it to the relevant law enforcement agencies in order to preserve whatever evidence of corruption which needed to be uncovered.

6.2.9 In the circumstances MEC Mokaba-Phukwana also failed to comply with Regulation 16A6.4 of the National Treasury Regulations.

**6.3 Whether Ms Hanli du Plessis, the Head of the Department of Transport, improperly regularised the contract irregularly awarded to MPA Investigation Team to conduct forensic investigation services in the Department:**

6.3.1 It has been established in the evidence obtained that the initial appointment of MPA Investigation Team was terminated by the MEC per letter dated 26 February 2015 after the advice received from the Chief Procurement Officer in that regard.

6.3.2 It has also been established in the evidence that the allegation that Ms du Plessis improperly regularised or formalised the contract irregularly awarded to MPA Investigation Team is substantiated.

6.3.3 It has further been established that Ms du Plessis was given a verbal instruction by MEC Mokaba-Phukwana to re-appoint MPA Investigation Team. She accordingly re-appointed MPA Investigation Team on 02 March 2015.

6.3.4 It has also been further established that Ms du Plessis failed to comply with sections 64(1), (2) and (3) of the PFMA with regard to the verbal instruction she received from MEC Mokaba-Phukwana to re-appoint MPA Investigation Team. Section 64 of the PFMA provides as follows:

*"Executive directives having financial implications –*

*(1) Any directive by an executive authority of a department to the accounting officer of the department having financial implications for the department must be in writing.*

*(2) If implementation of the directive is likely to result in unauthorised expenditure, the accounting officer will be responsible for any resulting unauthorised expenditure unless the accounting officer has informed the executive authority in writing of the likelihood of that unauthorised expenditure.*

*(3) Any decision of the executive authority to proceed with the implementation of the directive, and the reasons for the decision, must be in writing, and the accounting officer must promptly file a copy of this document with the National Treasury and the Auditor-General and if a provincial department is involved, also with the relevant provincial treasury.*

**6.3.5 It has been established in the evidence of the National Treasury: Forensic Investigation Report that Ms du Plessis failed to request MEC Mokaba-Phukwana to put her verbal instruction in writing. It has also been established that the letter purportedly written by MEC Mokaba-Phukwana on 27 February 2015 requesting Ms du Plessis to consider the appointment of a forensic investigator as a matter of urgency could not have been written on that date since its contents are at odds with the state of affairs at that time.**

**6.3.6 Similarly it has also been established that in relation to the re-appointment of MPA Investigation Team, Ms du Plessis failed to inform MEC Mokaba-Phukwana in writing of the likelihood that her verbal instruction may result in unauthorised expenditure and she also failed to report the implementation of**

the verbal instruction to the National Treasury, Auditor-General and Limpopo Provincial Treasury.

6.3.3 Therefore the only issue that remains to be determined is whether or not the subsequent appointment of MPA Investigation Team by Ms Hanli Du Plessis in terms of Regulation 16A6.4 of the National Treasury Regulations was improper.

6.3.4 The Regulation 16A6.4 of the National Treasury Regulations provides that:

*"If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."* (own emphasis)

6.3.5 In the circumstances what the Public Protector had to determine in the main was whether it was impractical for Ms Du Plessis to invite competitive bids at the time she re-appointed MPA Investigation Team and whether the reasons for deviation in that regard were recorded and approved accordingly.

6.3.6 The Public Protector is in possession of the evidence of a copy of a letter dated 04 March 2015 addressed by Ms Du Plessis to the Provincial Treasury in which she reported the reasons justifying her appointment of MPA Investigation Team to conduct further investigations into the allegations of irregularities, maladministration together with fraud and corruption in her Department.

6.3.7 It is noted that the reasons contained therein are captured as follows:

*"Due to the fact that MPA Investigation Team has covered most of the areas of investigations and that they now have traces of other areas that still have to be investigated, it is necessary and in the best interest of the Department to continue involving MPA Investigation Team to finalize the investigations and the disciplinary hearings.*

*It is for this reason that the Department proceeded to appoint MPA Investigation Team in line with specific terms of reference and duly signed contract to continue with investigations and assist the Department with evidence in the disciplinary hearings."*

6.3.8 The Public Protector has noted that although the re-appointment of MPA Investigation Team by Ms du Plessis *prima facie* (on the face of it) seems to be in accordance with Regulation 16A6.4 of the National Treasury Regulations, Ms du Plessis resorted to that provision with an ulterior motive to achieve a predetermined outcome.

6.3.9 The conduct of Ms du Plessis in the circumstances borders on dishonesty and was in violation of section 195(1)(a) of the Constitution. Section 195(1)(a) provides that:

*"Public administration must be governed by the democratic values and principles enshrined in the Constitution including that a high standard of professional ethics must be promoted and maintained."*

6.3.10 In the circumstances the Public Protector is not persuaded that Ms du Plessis re-appointed MPA Investigation Team in terms of Regulation 16A6.4 of the National Treasury Regulations out of her own volition.

**6.4 Whether Mrs M P J Antonio, MPA Investigation Team's sole Director improperly entered into a contract with the Department of Transport, Safety and Liaison and engaged herself in the performance of extra remunerative work outside her employment as a Public Servant:**

6.4.1 Section 30(1) of the Public Service Act, 1994 provides that:

*"No employee shall perform or engage himself or herself to perform remunerative work outside of his or her employment in the relevant department, except with the written permission of the executive authority of the department."*

6.4.2 The Public Protector could not find any evidence to prove that Mrs Antonio had personally and improperly entered into a contract with the Department of Transport, Safety and Liaison and engaged herself in the performance of extra remunerative work outside her employment as a Public Servant. However, by virtue of the fact that a company in which she was a sole director was paid an amount of R484 296.00 as remuneration for services rendered at the time when she was the sole director, such remuneration can be attributed to her.

6.4.3 Therefore by virtue of being a sole director of a company which earned remuneration by providing services to a government department whilst a public servant herself, Mrs Antonio violated section 30(1) of the Public Service Act, 1994.

6.4.4 Similarly by being a sole director in a company that conducted business with the state, Mrs Antonio violated section 8(2)(b) of the Public Service Management Act No. 11 of 2014, which provides that an employee may not

be a director of a public or private company conducting business with the State.

**6.5 Regarding whether MEC Mokaba-Phukwana irregularly awarded a contract to an entity whose sole proprietor did not have the necessary qualification to do the job.**

6.5.1 Forensic investigation is a specialised skill which is associated with qualifications, experience and expertise of which evidence was not submitted to the Department when the appointment was made.

6.5.2 However, in the absence of a competitive bidding process where specifications regarding the requisite qualifications to be awarded the contract are determined upfront before the awarding of a contract is considered, the Public Protector is unable to make a determination whether the sole proprietor of MPA Investigation Team had the necessary qualifications to do the job or not.

6.5.3 The issue is further compounded by the fact that MPA Investigation Team was re-appointed by Ms du Plessis which is an indication that the Department was happy with the services rendered by it despite the allegation that its sole proprietor did not have the necessary qualification to do the job.

**6.6 Regarding whether the conduct of MEC Mokaba-Phukwana was inconsistent with the Executive Ethics Code and Executive Members' Ethics Act.**

6.6.1 It has been established that MEC Mokaba-Phukwana appointed MPA Investigation Team to conduct a forensic investigation in the Department,

without the necessary legal authority and without following the relevant legal prescripts regulating procurement, causing the Department to incur an irregular expenditure of R484 296.00 in the process.

6.6.2 The conduct of the members of the executive council is regulated by section 2(2) of the Executive Members Ethics Act No. 82 of 1998 read with the Executive Ethics Code. The Executive Ethics Code provides for both positive and negative obligations.

6.6.3 Paragraph 2.1 of the Executive Ethics Code provides that:

"*Members of the Executive must to the satisfaction of the President or the Premier, as the case may be*

*(a) perform their duties and exercise their powers diligently and honestly;*
*(b) fulfil all the obligations imposed upon them by the Constitution and law;*
*(c) act in good faith and in the best interest of good governance; and*
*(d) act in all respects in a manner that is consistent with the integrity of their office or the government.*

6.6.4 On the other hand paragraph 2.3(c) of the Executive Ethics Code provides that *"Members of the Executive may not act in a way that is inconsistent with their position."*

6.6.5 The conduct of MEC Mokaba-Phukwana in appointing MPA Investigation Team to conduct forensic investigation in the Department, without the necessary legal authority and without following the relevant legal prescripts regulating procurement, causing the Department to incur an irregular

expenditure of R484 296.00 in the process was in violation of paragraph 2.1 and 2.3(c) of the Executive Ethics Code.

## 7. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

**7.1 Regarding whether MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team to conduct a forensic investigation without proper legal authority:**

7.1.1 The allegation that MEC Mokaba-Phukwana improperly awarded a contract to MPA Investigation Team to conduct a forensic investigation without proper legal authority has been proven;

7.1.2 MEC Mokaba-Phukwana did not have the legal authority to award a contract to MPA Investigation Team to conduct forensic investigation since that authority exclusively vests with the HOD of the Department as the accounting officer in terms of section 38 of the PFMA;

7.1.3 MEC Mokaba-Phukwana's conduct in this regard was in violation of sections 38(1)(a)(iii) and 38(1)(b) of the PFMA and section 1(c) of the Constitution; and

7.1.4 Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994.

**7.2 Regarding whether MEC Mokaba-Phukwana irregularly awarded a contract to MPA Investigation Team to conduct a forensic investigation without following proper procurement processes:**

7.2.1 The allegation that MEC Mokaba-Phukwana irregularly awarded a contract to MPA Investigation Team to conduct a forensic investigation without following proper procurement processes has been proven;

7.2.2 MEC Mokaba-Phukwana conceded that she appointed MPA Investigation Team to render investigation services to her Department without following the legal prescripts regulating procurement in the process causing her Department to incur irregular expenditure;

7.2.3 MEC Mokaba-Phukwana's conduct was in violation of section 217(1) of the Constitution, section 38(1)(a)(iii) of the PFMA and Regulation 16A3.2 of the National Treasury Regulations;

7.2.4 MEC Mokaba-Phukwana's conduct could also not be justified in terms of Regulation 16A6.4 as she did not have the legal authority to appoint MPA Investigation Team; and

7.2.5 Her conduct in the circumstances constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994.

**7.3 Regarding whether Ms Hanli du Plessis, the Head of the Department of Transport, improperly regularised the contract irregularly awarded to MPA Investigation Team to conduct forensic investigation services in the Department:**

7.3.1 The allegation that Ms du Plessis as the Head of Department of the Limpopo Department of Transport improperly regularised the contract irregularly awarded to MPA Investigation Team to conduct forensic investigation services in her Department has been proven;

7.3.2 Ms du Plessis re-appointed MPA Investigation Team on 02 March 2015 on the basis of a verbal instruction or directive issued by MEC Mokaba-Phukwana apparently at a meeting held on 24 February 2015 at the Legislature in Lebowakgomo;

7.3.3 Ms du Plessis purportedly re-appointed MPA Investigation Team in terms of Regulation 16A6.4 of the National Treasury Regulations circumventing compliance with the provisions of section 64(1), (2) and (3) of the PFMA which regulates the manner in which executive directives having financial implications have to be dealt with;

7.3.4 Ms du Plessis' re-appointment of MPA Investigation Team in terms of Regulation 16A6.4 of the National Treasury Regulations was dishonest and was embarked upon with an ulterior motive to achieve a predetermined outcome in the process causing the Department to incur irregular expenditure;

7.3.5 It is clear from the evidence that Ms du Plessis was subjected to undue pressure from MEC Mokaba-Phukwana to re-appoint MPA Investigation Team even though she is reluctant to say it in the open;

7.3.6 Ms du Plessis' conduct in this regard was in violation of section 195(1)(a) of the Constitution which requires a high standard of professional ethics on her part; and

7.3.7 Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(l) of the Public Protector Act 23 of 1994.

**7.4 Regarding whether Mrs M P J Antonio, MPA Investigation Team's sole Director improperly entered into a contract with the Department of Transport, Safety and Liaison and engaged herself in the performance of extra remunerative work outside her employment as a Public Servant:**

7.4.1 The allegation that Mrs M P J Antonio, MPA Investigation Team's Sole Director improperly entered into a contract with the Limpopo Department of Transport and engaged in the performance of extra remunerative work outside her employment as a Public Servant could not be proven;

7.4.2 The Public Protector could not find any evidence to prove that Mrs Antonio had personally and improperly entered into a contract with the Limpopo Department of Transport and engaged in the performance of extra remunerative work outside her employment as a Public Servant. Instead the evidence revealed that it was actually her husband who entered into a contract with the Limpopo Department of Transport to provide forensic investigation services on behalf of MPA Investigation Team;

7.4.3 However, by virtue of being a sole director of a company which earned remuneration by providing services to a government department whilst

employed as a Public Servant herself, Mrs Antonio violated section 30(1) of the Public Service Act, 1994;

7.4.4 Similarly by virtue of being a director in a company that conducted business with the state, Mrs Antonio violated section 8(2)(b) of the Public Service Management Act No. 11 of 2015; and

7.4.5 Mrs Antonio's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution.

**7.5 Regarding whether MEC Mokaba-Phukwana irregularly awarded a contract to an entity whose sole proprietor did not have the necessary qualification to do the job:**

7.5.1 The allegation that MEC Mokaba-Phukwana awarded a contract to MPA Investigation Team, whose sole proprietor did not have the necessary investigation qualifications to render forensic investigation services to the Department could not be proven; and

7.5.2 In the absence of a competitive bidding process where specifications regarding the requisite qualifications to be awarded the contract are determined upfront before the awarding of the contract is considered, the Public Protector is unable to make a determination whether the sole proprietor of MPA Investigation Team had the necessary qualifications to do the job or not.

**7.6 Regarding whether the conduct of MEC Mokaba-Phukwana was inconsistent with the Executive Ethics Code and Executive Members' Ethics Act:**

7.6.1 The allegation that the conduct of MEC Mokaba-Phukwana was inconsistent with the Executive Ethics Code and Executive Members' Ethics Act has been proven;

7.6.2 MEC Mokaba-Phukwana appointed MPA Investigation Team to render forensic investigation services in her Department without the necessary legal authority and without following the relevant legal prescripts regulating procurement, causing her Department to incur irregular expenditure in the process;

7.6.3 MEC Mokaba-Phukwana's conduct in the circumstances was in violation of paragraph 2.1 and 2.3(c) of the Executive Ethics Code;

7.6.4 Such conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994.

## 8. REMEDIAL ACTION

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

**8.1 The Premier:**

**8.1.1 The Premier of the Limpopo Provincial Government must consider taking appropriate disciplinary action against MEC Mokaba-Phukwana with regard to her conduct as outlined in the findings;**

**8.1.2 The Premier of the Limpopo Provincial Government must in consultation with the National/Provincial Treasury determine the exact amount of the irregular expenditure incurred by the Department of Transport as a result of MEC Mokaba-Phukwana's conduct and recover such irregular expenditure from her; and**

**8.1.3 The Premier of the Limpopo Provincial Government must take appropriate steps to ensure that all members of the Executive Council of Limpopo Provincial Government are made aware of the contents of this report and are sensitised about compliance with the provisions the Executive Members' Ethics Act and the Executive Ethics Code, within 30 days from the date of this report.**

**8.2 The MEC for Transport (current):**

**8.2.1 The current MEC for Transport must consider taking appropriate disciplinary action against Ms Hanli du Plessis with regard to her conduct as outlined in the findings; and**

**8.2.2 The current MEC for Transport must in consultation with the National/Provincial Treasury determine the exact amount of the irregular**

expenditure incurred by the Department of Transport as a result of Ms Hanli du Plessis' conduct and recover such irregular expenditure from her;

**8.3 Speaker of the Limpopo Provincial Legislature:**

8.3.1 The Speaker of the Limpopo Provincial Legislature must take appropriate steps to ensure that this report is tabled in the Limpopo Provincial Legislature within 30 days from the date of this report.

**8.4 The National Commissioner of the South African Police Service:**

8.4.1 The National Commissioner of the South African Police Service must take appropriate disciplinary action against Mrs Antonio within 60 days from the date of this report.

**8.5 Minister of Finance:**

8.5.1 The Minister of Finance to take steps to ensure that the Chief Procurement Officer sensitise all the Members of the Executive Council of Limpopo about compliance with Treasury Regulations and procurement processes in public service within 30 days from the date of this report;

**9. MONITORING**

9.1 The Premier of the Limpopo Provincial Government must submit an implementation plan to the Public Protector within 30 days of receipt of this report on how the remedial action outlined under paragraph 8.1 will be implemented.

9.2 The current MEC for Transport must submit an implementation plan to the Public Protector within 30 days of receipt of this report on how the remedial action outlined under paragraph 8.2 will be implemented.

9.3 The Speaker of the Limpopo Provincial Legislature must submit an implementation plan to the Public Protector within 30 days of receipt of this report on how the remedial action outlined under paragraph 8.3 will be implemented.

9.4 The National Commissioner of the South African Police Service must submit an implementation plan to the Public Protector within 30 days of receipt of this report on how the remedial action outlined under paragraph 8.4 will be implemented.

9.5 The Minister of Finance must submit an implementation plan to the Public Protector within 30 days of receipt of this report on how the remedial action outlined under paragraph 8.5 will be implemented.

**ADV. BUSISIWE MKHWEBANE**
**PUBLIC PROTECTOR OF THE**
**REPUBLIC OF SOUTH AFRICA**

**DATE:** 3/02/2017

**Assisted by: Limpopo Provincial Office**