

**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(2A)(a) OF THE PUBLIC PROTECTOR ACT, 1994**



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION, NEPOTISM AND IRREGULAR EXPENDITURE AND
IRREGULAR APPOINTMENT BY THE SOUTH AFRICAN COUNCIL FOR
EDUCATORS**

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Executive Summary

- (i) This is my report issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (Constitution), and published in terms of section 8(2A)(a) of the Public Protector Act, 1994 (Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration, nepotism, irregular expenditure and the irregular appointment of Ms Lally Chauke (Muhlarhi) – (Ms Chauke) to the position of Human Resources Officer by the South African Council of Educators (SACE).
- (iii) The complaint was lodged with my office by an Anonymous Complainant (the Complainant) on 21 September 2015, alleging maladministration, nepotism and the irregular appointment of Ms Lally Chauke (Muhlarhi) to the position of Human Resources Officer by the South African Council of Educators.
- (iv) **In the main, the Complainant alleged *inter alia* that:**
 - (aa) The Manager of Finance Mr Morris Mapindani appointed himself to the position of Chief Financial Officer (CFO) of SACE without the relevant qualifications. No interviews were conducted for the position;
 - (bb) The position of Finance Manager was created to give Mr Cliff Ndwambi, who was the Finance Officer the position;
 - (cc) In 2009/2010 Ms Tshedi Dipholo from the South African Democratic Teacher`s Union (SADTU) was appointed as the Chief Operating Officer (COO) of SACE without qualifications;
 - (dd) Mr Themba Ndlovu, also from SADTU, was appointed to the position of Communications Manager of SACE without the necessary qualifications;

- (ee) The relative of the Chairperson of SACE was appointed as a Co-Ordinator Manager on a contract basis, with a large salary;
- (ff) Ms Lally Chauke was appointed as the Human Resources Officer without the necessary qualifications and she is a family friend of the CFO;
- (gg) Ms Ella Mokgalane was appointed into senior management without following proper recruitment processes;
- (hh) Ms L Mugondo was a supplier at SACE for IT (Ronewa IT) without any IT qualifications and he acted as the Corporate Manager in April and May prior to his appointment as IT person, without the relevant qualifications;
- (ii) The Province Co-Ordinator of Limpopo was appointed on contract basis but on a high salary and it is rumoured that she is related to Ms Ella Mokgalane;
- (jj) The Financial Manager was also an Accounting Officer at SACE;
- (kk) The CFO and Manager: Finance have power over contracts;
- (ll) The Personal Assistant (PA) of the CFO received an increase after only five (5) months of being appointed to the position;
- (mm) Mr Themba Ndlovu travelled to KwaZulu Natal every month for outreach, just to claim the subsistence and travel allowance;
- (nn) SACE hired a car for the Nigerian Council during their visit to South Africa in 2009 and the car was not returned immediately but it was used by the CFO to travel to Malamulele;

- (oo) The CEO has a connection with the Travel Agent of the company known as Sure Flywell Travel and that company has been used by SACE since SACE was established;
- (pp) The Supply Chain Manager, Ms Julia Britz is connected to the Boss Office company that rendered audit services to SACE;
- (qq) Performance bonuses were paid to the Senior Management (CEO, CFO and other Managers) from 2006 until 2010 without conducting a report regarding their work, until this was brought to a stop by the Union;
- (rr) During the period of 13 August 2012 to 01 September 2012, the home and car of the CEO were burnt and they appointed a security guard from Venture Security, a service provider of SACE to guard the CEO`s house. The invoices for the guard were paid for by SACE; and
- (ss) In 2010, because of the Soccer World Cup, a company (name not provided) donated two (2) Plasma Television sets to SACE but the televisions were stolen by the CFO on the day of delivery. The CFO then brought the televisions back only after the Union launched a grievance on 10 November 2010.
- (v) Upon conclusion of the preliminary investigation conducted in terms of section 7(1) of the Public Protector Act, only allegations in 2.2.6, 2.1.12 and 2.2.18 (in the main report) were supported by evidence.
- (vi) I subsequently issued supplementary section 7(9) Notices on 03 September 2019; 18 December 2019 and 21 February 2020 and also investigated the issue of whether the Complainant, SACE or any other person suffered prejudice in the circumstances:
- (vii) **On the analysis of the complaint, the following issues were identified and investigated:**

- (aa) Whether SACE failed to comply with the provisions of Human Resource Policy and Procedures by appointing Ms Lally Chauke (Muhlarhi) who did not possess the minimum qualifications required for the position of Human Resources Officer (HR Officer);
- (bb) Whether the Personal Administrator to the CEO improperly received an increase after five months of appointment; and
- (cc) Whether SACE incurred irregular expenditure by paying for security services rendered to the CEO of SACE at his private residence.
- (viii) The investigation process included an exchange of correspondence and analysis of all relevant documents and application of all relevant laws, policies and related prescripts and interviews were also conducted with the SACE the Complainant and South African Liberating Public Service Workers Union (SALIPSWU).
- (ix) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by SACE and improper prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by SACE. Those were the following:
 - (a) The relevant provisions of the Constitution of the Republic of South Africa, 1996 (the Constitution);
 - (b) The Public Protector Act, 23 of 1994 (the PPA);
 - (c) The Public Finance Management Act, 1 of 1999 (PFMA);
 - (d) SACE Human Resource Policy and Procedure Manual applicable between 2008 and 2010; (which makes reference to) :
 - (i) Guidelines on recruitment, selection and appointment;
 - (ii) Remuneration Policy;

- (iii) Personal loans and salary advances;
 - (iv) Policy and Implementation Guidelines on Performance Evaluation and Development system (PEDS); and
 - (v) Annual increments
- (x) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:
 - (a) Regarding whether SACE failed to comply with the provisions of Human Resource Policy and Procedures by appointing Ms Lally Chauke (Muhlarhi) who did not possess the qualifications required for the position of Human Resources Officer (HR officer):**
 - (aa) The allegation that the appointment of Ms Lally Chauke (Ms Chauke) to the position of HR officer was irregular, is substantiated.
 - (bb) Ms Chauke did not meet the academic minimum requirements for the position of HR officer as stated in the advertisement thereby failing to comply with the provisions of their Human Resource Policy and Procedures.
 - (cc) Evidence in my possession has revealed several procedural flaws in the recruitment and selection process which amounted in the main to a violation, subversion and flouting of the SACE's Human Resource Policy and Procedures which were committed when appointing Ms Chauke in that;
 - I. She did not meet the inherent requirements of the position she applied for. At the time of appointment, Ms Chauke did not possess the required and appropriate three (3) year degree in Human Resources for the position of Human Resource Officer.
 - II. The job advert required applicants to submit a copy of a three (3) year degree in Human Resources but instead Ms Chauke submitted a copy of her transcript of academic record which is not compliant with the job advert.

- III. She further submitted a copy of a training course in Human Resources (HR) which she attended for only five (5) days. The attendance of an HR course cannot be equated to the required three (3) year degree in Human Resource.
 - IV. The entire HR selection and interview panel failed to eliminate the CV of Ms Chauke from the selection process despite the fact that she did not satisfy all the requirements of an advert.
- (dd) Such a failure by the members of the selection/recruitment panel as mentioned above amounted to violation of clause 6.10 of the SACE`s Selection, Recruitment and Appointment Policy. Similarly, the CEO, as the Executive Authority of SACE, failed in his legal duty and obligation to satisfy himself that Ms Chauke is qualified to be appointed to the position of of Human Resource Officer before making the appointment. There is no evidence of any verification of such undertaken by the CEO.
- (ee) Accordingly, such a violation by the SACE`s HR selection and interview panel members and the conduct of the CEO, amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (b) Regarding whether the Personal Administrator to the CEO improperly received a salary increase after five (5) months of appointment:**
- (aa) The allegation that Ms Landsberg, the Personal Administrator (PA) to the CEO improperly received a salary increase after four (4) months of employment contrary to the provisions of the Remuneration Policy, is substantiated.
- (bb) In terms of SACE Remuneration Policy, an employee should have been in the employ of SACE, at least six (6) months before qualifying for annual cost of living increment.

- (cc) Ms Landsberg was appointed by SACE on 01 April 2002 and she irregularly received her annual salary increment in October 2002, backdated to July 2002. Therefore Ms Landsberg was only four (4) months in the employ of SACE when she received her annual salary increment, which is contrary to paragraph 20.2.1 of the SACE Remuneration Policy, which provides that employees should be in the employ of Council for at least 6 months before qualifying for an annual cost of living increment.
- (dd) There is no evidence that SACE took into account the fact that the annual increment was premature and motivated for increment of Ms Landsberg`s salary before the expiry of six (6) months based on the fact that she may have *“shown exceptional competence in the period following the annual increment date”* as required by their Remuneration Policy. Therefore SACE`s conduct amounts to irregular expenditure and contravention of sections 38 and 45 of the PFMA.
- (ee) Accordingly, SACE`s conduct amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (c) Regarding whether SACE incurred irregular expenditure by paying for security services rendered to the CEO of SACE at his private residence:**
- (aa) The allegation that SACE incurred irregular expenditure by paying for security services rendered to Mr Brijraj, the former (CEO) at his private residence is substantiated.
- (bb) Evidence in my possession has established that payment of R30 004.84 for salary deductions was recorded by SACE against Mr Brijraj on 02 February 2016 and 01 April 2016 respectively.
- (cc) The payment made to Venture Security on 11 February 2013 for the amount of R30 004.80 for the services provided to the CEO on invoices IN105785 and IN105777 were irregular since the services were provided to the CEO in his personal capacity. The Council only raised the CEO`s personal loan account in

2016 after a complaint was lodged with my office and almost four (4) years after the transaction.

(dd) Despite the loan repayment made by Mr Brijraj, the evidence indicates impropriety, wrongdoing and several procedural flaws in the manner in which the CEO of SACE authorised the use of services of Venture Security, a company appointed to render security services at SACE (guarding) at his private residence in that:

- I. The CEO authorised the security Company to render security at his private residence without approval of Council and SACE only became aware in 2016 and no action was taken against CEO for contravening the Loan Policy. SACE further effected payment for costs incurred at the CEO`s private residence and the CEO further allowed SACE to carry his personal costs of the security services rendered under SACE contract thereby resulting in SACE incurring irregular expenditure.
- II. The CEO did not apply for personal loan at SACE and he also did not satisfy the requirements of the Personal Loan Policy in that he did not apply for the loan and nor was it approved prior to utilizing the SACE security company for his private and personal use.
- III. The SACE Personal Loan Policy requires the loan to be paid off in monthly instalments for a period not exceeding 12 months. In this instance security services were rendered at CEO`s private residence in 2012 but the loan repayment was only raised against the CEO on 01 April 2016, four (4) years later.

(ee) The conduct of the CEO was in violation of section 195(1)(a);(h) and (i) of the Constitution, section 49, 50(1)(b),51(1)(b)(iii) and , 51(1)(e) (iii),57(b)(c) and (e), 83(c)(1)(b) of the PFMA; SACE Human Resource Policy and Procedure Manual and paragraph 101.1. of the Personal Loans and Advance Policy.

(ff) Accordingly, such a violation by SACE and in particular Mr Briraj, amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(xi) **The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:**

The Chairperson of SACE must take appropriate steps to ensure that:

- (a) Within sixty (60) days from date of this report, evaluate the adequacy and effectiveness of the SACE's internal controls on recruitment and selection and identify deficiencies with a view to take corrective action to prevent a recurrence of the improprieties referred to herein;
- (b) Within sixty (60) days from date of this report, regularise the appointment of Ms Chauke, alternatively identify a suitable position for which she is qualified and can be transferred to with full retention of her existing benefits, in accordance with the provisions of SACE's existing policies and the requirements of fair labour practices;¹
- (c) Within thirty (30) days from date of this report, arrange a workshop on the SACE Human Resource Policy and Procedure Manual (Procurement Policy and Recruitment and Selection Policy, Loans and Advances), to be attended by all SACE officials who are involved in the SCM process, to prevent a recurrence of the improprieties referred to in this report relating to the procurement and payment of security services rendered at the former CEO's private residence;
- (d) I have noted that the SACE Council has resolved to amend paragraph 20.2.1 of its Remuneration Policy, and therefore take no further remedial action in that regard.

¹ In *Khumalo v Member of the Executive Council for Education: Kwazulu-Natal* [CCT10/13 (2013) ZACC 49] Skweyiya J, in delivering the majority judgment held that a responsible state functionary is obliged to investigate and seek to rectify irregularities and unlawful conduct within an institution.

1. INTRODUCTION

- 1.1 This is my report as the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 This report is submitted in terms of section 8(1) of the Public Protector Act to the following:
 - 1.2.1. The Minister of Basic Education Ms Angie Motshekga;
 - 1.2.2. The Chairperson of SACE, Mr Mabutho Cele;
 - 1.2.3. The Chief Executive Officer of SACE, Mr Ella Mokgalane; and
- 1.3 A copy of the report is also submitted to the Complainant who requested that his or her identity be withheld to inform him or her of the outcome of the investigation.

2. THE COMPLAINT

- 2.1 The complaint was initially lodged with my office by an Anonymous Complainant on 21 September 2015. However with the passage of time, employees of SACE who are also members of a union named South African Liberating Public Service Workers Union (SALIPSU) made contact with the Public Protector in 2018 and claimed to be behind the complaint.
- 2.2 The Complainant alleged *inter alia* that:

- 2.2.1 The Manager of Finance Mr Morris Mapindani appointed himself to the position of Chief Financial Officer (CFO) of SACE without the relevant qualifications. No interviews were conducted for the position;
- 2.2.2 The position of Finance Manager was created to give Mr Cliff Ndwambi, who was the Finance Officer the position;
- 2.2.3 In 2009/2010 Ms Tshedi Dipholo from the South African Democratic Teacher's Union (SADTU) was appointed as the Chief Operating Officer (COO) of SACE without qualifications;
- 2.2.4 Mr Themba Ndlovu also from SADTU, was appointed to the position of Communications Manager of SACE without the necessary qualifications;
- 2.2.5 The relative of the Chairperson of SACE was appointed as a Co-Ordinator Manager on a contract basis, with a large salary;
- 2.2.6 Ms Lally Chauke was appointed as the Human Resources Officer without the necessary qualifications and she is a family friend of the CFO;
- 2.2.7 Ms Ella Mokgalane was appointed into senior management without following proper recruitment processes;
- 2.2.8 Ms L Mugondo was a supplier at SACE for IT (Ronewa IT) without any IT qualifications and he acted as the Corporate Manager in April and May prior to his appointment as IT person, without the relevant qualifications;
- 2.2.9 The Province Co-Ordinator of Limpopo was appointed on contract basis but on a high salary and it is rumoured that she is related to Ms Ella Mokgalane;
- 2.2.10 The Financial Manager was also an Accounting Officer at SACE;
- 2.2.11 The CFO and Manager: Finance have power over contracts;
- 2.2.12 The Personal Assistant (PA) of the CFO received an increase after only five (5) months of being appointed to the position;

- 2.2.13 Mr Themba Ndlovu travelled to KwaZulu Natal every month for outreach, just to claim the subsistence and travel allowance;
- 2.2.14 SACE hired a car for the Nigerian Council during their visit to South Africa in 2009 and the car was not returned immediately but it was used by the CFO to travel to Malamulele;
- 2.2.15 The CEO has a connection with the Travel Agent of the company known as Sure Flywell Travel and that company has been used by SACE since SACE started;
- 2.2.16 The Supply Chain Manager, Ms Julia Britz is connected to the Boss Office company that rendered audit services to SACE;
- 2.2.17 Performance bonuses were paid to the Senior Management (CEO, CFO and other Managers) from 2006 until 2010 without conducting a report regarding their work, until this was brought to a stop by the Union;
- 2.2.18 During the period of 13 August 2012 to 01 September 2012, the home and car of the CEO were burnt and they appointed a security guard from Venture Security, a service provider of SACE to guard the CEO's house. The invoices for the guard were paid for by SACE; and
- 2.2.19 In 2010, because of the Soccer World Cup, a Company (Name not provided) donated two (2) Plasma Television sets to SACE but the televisions were stolen by the CFO on the day of delivery. The CFO brought the televisions back only after the Union launched a grievance on 10 November 2010.

3 THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

- 3.2. Section 182(1) of the Constitution provides that: “*The Public Protector has the power as regulated by national legislation*
- (a) *To investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
 - (b) *to report on that conduct and;*
 - (c) *to take appropriate remedial action”.*
- 3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by 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 the power to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5. The Public Protector’s powers are further regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purpose of an investigation.
- 3.6. In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.² The Constitutional Court further held that: “*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness,*

² [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at paragraph [76].

appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

- 3.7. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.8. An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);
- 3.9. Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68).
- 3.10. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69).
- 3.11. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70).
- 3.12. The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71).

- 3.13. Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence, (paragraph 71(a)).
- 3.14. She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)).
- 3.15. “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
- 3.16. The remedial action taken by the Public Protector has a binding effect (para 76). The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences” (paragraph 73).
- 3.17. The SACE is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector’s mandate.
- 3.18. The jurisdiction of the Public Protector was not disputed by SACE in this matter.
- 3.19. Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able

to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.20. In terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints after two years of the date of an incident unless special circumstances exist. It is trite that I have to identify special circumstances using my discretion should I decide to entertain such a complaint. In this case, I submit that there is a huge public interest in the public administration or governing of public affairs. Appointment of public officials to positions would ordinarily generate huge public interest. The community, other applicants and public servants themselves would be keen to know or enquire into the fairness of the processes followed in filling of such key and strategic positions within public bodies.

4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1)(a), (b) and (c) of 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; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

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 Act gives the Public Protector the authority to resolve a matter without conducting an investigation

and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

- 4.1.3 Section 7(1)(b)(i) of the Public Protector Act provides that, the format and procedure to be followed in conducting an investigation shall be determined by the Public Protector with due regard to the circumstances of each case.
- 4.1.4 The approach to the investigation involved analysis of the relevant information and documentation and consideration and application of the relevant laws, regulatory framework and prescripts.
- 4.1.5 Relevant persons were communicated with telephonically, via email and through interviews.
- 4.1.6 Key sources of information were consulted, documentary evidence was gathered and interviews were conducted to help the Public Protector determine if there was maladministration and nepotism within SACE.

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 and/or improper conduct?
 - 4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said 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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.
- 4.2.3 The Supreme Court of Appeal³ (SCA) *made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.*
- 4.2.4 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the SACE to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and policies taken into account to determine if there had been improper conduct and irregular appointment of SACE's Ms Lally Chauke (Muhlarhi) to the position of Human Resources Officer, improper payment of salary increase to the Personal Administrator of the CEO after five months of appointment, irregular expenditure incurred by SACE for paying for security services rendered to the CEO of SACE at his private residence, were principally those imposing administrative standards that should have been complied with by the SACE or its officials.
- 4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct, corruption, conflict of interests and irregular appointment. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the SACE or organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.2.6 In the case of conduct failure, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

³ *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA),*

- 4.2.7 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.
- 4.2.8 Upon conclusion of the preliminary investigations, conducted in terms of section 7(1) of the Public Protector Act, allegations 2.2.6, 2.2.12 and 2.2.18 were supported by evidence.
- 4.2.9 I subsequently issued section 7(9) Notices on 03 September 2019, 18 December 2019, 21 February 2020 respectively and also investigated the issue of whether the Complainant, SACE or any other person suffered prejudice in the circumstances:

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

- 4.3.1 Whether SACE failed to comply with the provisions of Human Resource Policy and Procedures by appointing Ms Lally Chauke–Muhlarhi (Ms Chauke) who did not possess the qualifications required for the position of Human Resources Officer (HR officer);
- 4.3.2 Whether the Personal Administrator (PA) to the CEO improperly received a salary increase after five months of appointment; and
- 4.3.3 Whether SACE incurred irregular expenditure by paying for security services rendered to the CEO of SACE at his private residence.

4.4 THE KEY SOURCES OF INFORMATION

4.4.1 Correspondences between the Public Protector and SACE

- 4.4.1.1 A copy of the complainant's letter dated 21 September 2015;
- 4.4.1.2 A copy of the allegations letter to Chairperson of SACE dated 13 December 2016;

- 4.4.1.3 A copy of a letter received from SACE signed by Ms Veronica Hofmeester, the former Chairperson of SACE from SACE dated 30 January 2017;
- 4.4.1.4 A copy of a response to the allegations letter received from SACE signed by Ms Veronica Hofmeester, the former Chairperson of SACE dated 3 February 2017;
- 4.4.1.5 A copy of a letter signed by Ms ME Mokgalane, the Chief Executive Officer of SACE dated 20 March 2019 containing a copies of the of recruitment policy and guidelines, SACE financial statements, interview scoring cards for the HR Officer interviews, Ms Chauke`s CV and educational certificates;
- 4.4.1.6 A copy of the Human resource Policy and Procedures, with a covering letter signed Ms ME Mokgalane, the Chief Executive Officer of SACE dated 26 March 2019;
- 4.4.1.7 A copy of a response letter to the Section 7(9) notice signed by Mr Mabutho Cele, the Chairperson of SACE dated 19 September 2019;
- 4.4.1.8 A copy of a complainant`s Email/letter containing closing arguments dated 11 October 2019;
- 4.4.1.9 A copy of a letter dated 18 October 2019, from Ms ME Mokgalane, the CEO of SACE, titled SACE representations.
- 4.4.1.10 A copy of an Email/letter dated 04 December 2019, from Mpho Moloi of SACE to the Public Protector containing Ms Chauke and Landsberg`s offers of employment;
- 4.4.1.11 A copy of an Email dated 05 December 2019 from Mpho Moloi of SACE to the Public Protector advising of Mr Brijraj`s contact details;
- 4.4.1.12 A copy of an Email/letter dated 20 December 2019 from Mpho Moloi of SACE to the Public Protector;

- 4.4.1.13 A copy of an Email/letter dated 03 January 2020 from Mr Rej Brijraj, the former CEO of SACE to the Public Protector responding to the Section 7(9) notice;
- 4.4.1.14 A copy of an Email/letter dated 08 January 2020 from Mpho Moloi of SACE to the Public Protector regarding the supplementary notices;
- 4.4.1.15 A copy of an Email/letter dated 17 January 2020 from Mr Sibusiso Mchunu, the KZN Head Provincial of SACE to the Public Protector responding to the section 7(9) notice;
- 4.4.1.16 A copy of the response to the section 7(9) form Ms Lally Chauke dated 17 January 2020 responding to the section 7(9) notice;
- 4.4.1.17 A copy of an Email/letter dated 17 January 2020 from Mr Morris Mapindani, the CFO of SACE to the Public Protector;
- 4.4.1.18 A copy of an Email/letter dated 21 January 2020 from Mr Mabutho Cele, the Chairperson of SACE, responding to the supplementary Section 7(9) notice.
- 4.4.1.19 A copy of an Email/letter dated 03 March 2020 from Mr Mabutho Cele, the Chairperson of SACE, responding to the supplementary Section 7(9) notice.

4.4.2 Legislation and other legal prescripts

- 4.4.2.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
- 4.4.2.2 The Public Protector Act, 23 of 1994 (the PPA);
- 4.4.2.3 The Public Finance Management Act 01 of 1999 (PFMA);
- 4.4.2.4 SACE Human Resource Policy and Procedure Manual applicable between 2008 and 2010; which makes reference to :
 - I. Guidelines on recruitment, selection and appointment;

- II. Remuneration Policy;
- III. Personal loans and salary advances;
- IV. Policy and Implementation Guidelines on Performance Evaluation and Development system (PEDS);and
- V. Annual increments

4.4.3 **Case law**

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

4.4.3.2 *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA),*

4.4.4 **Notices issued in terms of section 7(9) of the Public Protector Act**

4.4.4.1 A notice was issued to Mr Mabutho Cele, the Chairperson of SACE, dated 03 September 2019;

4.4.4.2 A notice was issued to Ms Lally Chauke, the HR Office of SACE, dated 03 September 2019;

4.4.4.3 A notice was issued to Ms Ella Mokgalane, the CEO of SACE, dated 03 September 2019;

4.4.4.4 A notice was issued to Mr Rej Brijaj, the former CEO of SACE, dated 03 September 2019;

4.4.4.5 A notice was issued to Mr Sibusiso Mchunu, the KZN Head Provincial of SACE, dated 03 September 2019;

4.4.4.6 Supplementary notice was issued to the Mabutho Cele, the Chairperson of SACE, dated 18 December 2019;

- 4.4.4.7 Supplementary notice was issued to the Ella Mokgalane, the CEO of SACE, dated 18 December 2019;
- 4.4.4.8 Supplementary notice was issued to Mr Rej Brijraj, the former chief Executive Officer of SACE, dated 18 December 2019;
- 4.4.4.9 Supplementary notice was issued to the Ms Lally Chauke, the Human Resource Officer of SACE, dated 18 December 2019;
- 4.4.4.10 Supplementary notice was issued to the Mr Sibusiso Mchunu, the Head of Provincial KZN at SACE, dated 18 December 2019;
- 4.4.4.11 Supplementary notice was issued to the Mabutho Cele the Chairperson of SACE, 21 February 2020.

5 THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED DURING THE INVESTIGATION AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAWS AND PRESCRIPTS

5.1 Whether SACE failed to comply with the provisions of Human Resource Policy and Procedures by appointing Ms Lally Chauke (Muhlarhi) who did not possess the qualifications required for the position of Human Resources Officer (HR officer):

Common cause issues

- 5.1.1 SACE advertised the position of HR officer with a closing date of 10 July 2009. Ms Lally Chauke applied and was shortlisted. Among the documents required, applicants were asked to submit copies of academic qualifications.
- 5.1.2 She was interviewed together with two other candidates and she was recommended as the second candidate. The first candidate did not take up the position and it was then offered to Ms Chauke, who accepted.

Issues in dispute

- 5.1.3 The issue for my determination is whether Ms Lally Chauke possessed relevant qualifications to be appointed in the position of HR Officer as advertised. The Complainant alleged that SACE acted improperly by appointing her as she did not qualify for the position.
- 5.1.4 According to Ms Veronica Hofmeester, the former Chairperson of SACE, proper recruitment processes were followed in the appointment of Ms Chauke for the position of HR officer.
- 5.1.5 According to the advertisement the requirements for the position were:
- 5.1.5.1 *Computer Literacy;*
 - 5.1.5.2 *Good knowledge of MS Office*
 - 5.1.5.3 ***An appropriate three-year degree in Human Resources;***
 - 5.1.5.4 *Three years' relevant experience; and*
 - 5.1.5.5 *Good interpersonal relations and organisational skills”.*
- 5.1.6 The evidence received from SACE indicates that in applying for the position, Ms Chauke submitted a copy of a Senior Certificate (Std 10) dated 1 January 1989. She also submitted a copy of a Transcript of Academic Record issued on 09 March 2004, from the University of the North which showed marks attained in subjects including Public Administration, Political Science, Criminology, Xitsonga and Afrikaans. Under remarks, it was stated “*satisfied the requirements for the following degrees / diplomas: BA*”. It appears from the transcript that she studied for a BA qualification from 1992 to 1996.
- 5.1.7 In addition , she submitted copies of the following :
- 5.1.7.1 Certificate confirming completion of Training Course in Human Resource Planning during the period 24 October 2005 and 28 October 2005 (five days) at SAMDI;

- 5.1.7.2 Certificate of successful completion of a course on Public Financial Management for Non- Financial Managers attended from November to December 2018 offered by University of Pretoria jointly with PALAMA;
- 5.1.7.3 Skills Programme Certificate in End-User Technology from Damelin dated 18 November 2018; and
- 5.1.7.4 Diploma in Personal Computing for Windows 3.1 for Microsoft from Damelin.
- 5.1.7.5 According to SACE, Ms Chauke came second at the end of the interview and when the preferred candidate did not take up the position, a decision was taken to offer her the position having considered that she possessed the following:
 - 5.1.7.5.1 Computer Literacy;
 - 5.1.7.5.2 BA Degree;
 - 5.1.7.5.3 Human Resource Course;
 - 5.1.7.5.4 Twelve (12) years HR experience;
 - 5.1.7.5.5 Course in Public Finance Management.
- 5.1.8 The minimum requirement for the position of Human Resources Officer as stated in the advertisement was a BA degree *in Human Resource*. At the time of submitting the application, Ms Chauke did not possess the “appropriate three-year degree in Human Resources”. Although she appeared to have obtained a three year degree, it was a general BA qualification which did not focus on human resources. Further, the only human resources training she underwent was a five day course offered by SAMDI from 24 October 2005 to 28 October 2005.
- 5.1.9 It is noted that when she applied, she did not submit a copy of the actual BA qualification instead she submitted a copy of a transcript of academic record, contrary to what was stated as a requirement in the advertisement. From the documents submitted by SACE to the Public Protector in response to the

allegations, it does not appear that she ever submitted a copy of the qualification after her being appointed and even during this investigation.

- 5.1.10 The justification for the decision taken by the panel to shortlist Ms Chauke and to appoint her in the position when she clearly did not possess “*an appropriate three-year degree in Human Resources*”, has not been made clear by SACE.

Application of the relevant law

SACE Human Resource Policy and Procedure Manual

- 5.1.11 The Human Resources Manual serves to communicate, record and administer approved Human Resources related policies and procedure in the Council. It is applicable to all staff members and should there be sound reasons for a deviation from any of the procedures, such deviation from any of the procedures, such deviation may be approved at the sole discretion of the Council.

- 5.1.12 The Manual among others makes reference to:

- 5.1.13.1 Appointment and recruitment;
- 5.1.13.2 Personal Loans and Salary advances;
- 5.1.13.3 Performance Management; and
- 5.1.13.4 Annual Increments.

SACE Guidelines on Recruitment, Selection and Appointment:

- 5.1.13 According to the guideline, its objective is to set norms, measures and guidelines that will allow SACE to select the number and quality of employees with necessary competences, to satisfy the needs of the organisation.

5.1.14 Paragraph 3.1.2 states that the job specification is used as the main source document when compiling job advertisements. The advertisement must among others clearly set out the inherent job requirements to be built into the job specifications, the job title and job description, as well as whether any experience is required.

5.1.15 Regarding selection, paragraph 6.10 states that the Selection Committee shall make a recommendation on suitability of a candidate after considering among others, the training, skills, competence and knowledge necessary to meet the inherent post. The need for SACE to develop human resource and the Employment Equity Plan will also be taken into account.

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

5.1.17 On 03 September 2019 and 18 December 2019 respectively, I signed off and subsequently issued all implicated SACE officials including other parties with direct interest on this matter with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to afford them an opportunity to respond to the allegations against them, particularly in relation to the role they played in this matter. Section 7(9)(a) of the Public Protector Act provides that: -

“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

5.1.18 I now turn to consider the responses submitted regarding the section 7(9) notices. I have however, not dealt with each and every aspect raised in the responses but that should not be misconstrued as an admission of any kind of the averments contained therein.

- 5.1.19 A response was received by my office from Mr Rej Brijraj, Mr Sibusiso Mchunu, Ms Lally Chauke and Ms Mabutho Cele.
- 5.1.20 In a response received from Mr Rej Brijraj (Mr Brijraj) the former CEO of SACE on 03 January 2020, Mr Brijraj argued that he did not participate in the interviews and SACE Council and its Committees dealt with staff appointments during his tenure.
- 5.1.21 Mr Brijraj indicated that his job was to execute the resolutions approved by Council and as such he was duty bound to sign the appointment letters, thereby acknowledging signing Ms Chauke`s appointment letter. The argument put forward by Mr Brijraj that he never received any mandate from Council to investigate any irregularity regarding the Ms Chauke`s appointment but believes that the Council made the best appointment is irreverent and not moving the investigation forward.
- 5.1.22 Mr Brijraj further argued that he did not participate in the interviews and his duty as the CEO of SACE was only to execute the resolution of the Council. Before making an appointment Mr Brijraj has a duty to first satisfy himself that the recommended candidate by the panel (Ms Chauke) has fully satisfied the requirements of the advertised position. In this instance, Ms Chauke`s appointment was signed off by Mr Brijraj as the Accounting Officer of SACE and not by Council.
- 5.1.23 A response was received by my office from one of the Mr Sibusiso Mchunu (Mr Mchunu), the Provincial Head of SACE in KZN on 17 January 2020. In his response, Mr Mchunu argued that he served in the SACE Council as a representative from the National Teachers Union and as Council member, he served in the Committees and each Committee was required to report and/ recommend to the Council a way forward on certain issues. Mchunu reiterated that he has no memory of the issues he participated in, during his tenure as a Council member.
- 5.1.24 A response was received by my office from Ms Lally Chauke (Ms Chauke) on 17 January 2020. Ms Chauke argued that when she applied for the Human

Resource Officer post, she was qualifying in terms of the National Policy for the Implementation of Recognition of Prior Learning (RPL) as per Gazette 38075, hence she was shortlisted by SACE.

- 5.1.25 Ms Chauke further indicated that she is in possession of a matric certificate, a Bachelor's degree majoring in Public Administration and had experience in Human Resources. The advert for the Human Resource Officer required the incumbent to possess a BA Degree in Human Resource and in this instance, Ms Chauke only had a BA Degree and she conceded to that in her response.
- 5.1.26 I am not able to accept Ms Chauke contention that SACE shortlisted her as a result of Recognition of Prior Learning. The RPL was not a requirement in the job advert and there is no evidence to substantiate that the panel even considered RPL during the shortlisting and interview process.
- 5.1.27 A response was received by my office from Mr Mabutho Cele, the Chairperson of SACE, on 19 September 2019.
- 5.1.28 Mr Cele pointed out that the position of Human Resource Officer was advertised and Ms Chauke was appointed in 2009. Further, that the complaint was lodged with the Public Protector in 2015, six years (6) after the appointment of the HR Officer, which is contrary and way beyond the Rule 5(6) of the Rules Relating to the Investigations by the Public Protector and Matters Incidental thereto. He indicated that the lapse in time severely hampered SACE's ability to establish whether the selection panel deliberated on the adequacy of Ms Chauke's qualifications or whether there was justification to shortlist and appoint her to the position.
- 5.1.29 Mr Cele is of the view that there is no sufficient legal or factual basis for the Public Protector to conclude that Ms Chauke's appointment contravened the Guidelines on Recruitment, Selections and Appointment and therefore constituted improper conduct or maladministration.

- 5.1.30 He further argued that even though Ms Chauke did not possess the required qualification in Human Resources, she had extensive experience in HR matters as stated by the Public Protector. SACE pointed out that Ms Chauke has been in the position of HR Officer for over 10 years since her appointment in 2009.
- 5.1.31 I wish to point out that section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged with my office more than two years after the occurrence of the incident. It is of paramount importance that I have to identify special circumstances using my discretion should I decide to entertain such a complaint.
- 5.1.32 In this instance, I submit that there is a huge public interest in the public administration or governing of public affairs. Appointment of public officials would ordinarily generate huge public interest. The community, other applicants themselves would be keen to know or enquire into the fairness of the processes followed in filling of such key positions within public bodies.
- 5.1.33 Therefore the contention by SACE that there is no sufficient legal or factual basis for the Public Protector to conclude that Ms Chauke's appointment contravened the SACE Guidelines on Recruitment, Selections and Appointment and thereby constituting to improper conduct or maladministration stands to be rejected.
- 5.1.34 The fact that Ms Chauke has experience in HR matters does not necessary warrant the flouting of the SACE Guidelines on Recruitment, Selections and Appointment processes. Ms Chauke's experience cannot substitute the required qualifications for the post.
- 5.1.35 A response to my supplementary section 7(9) notice was received by my office from Mr Mabutho Cele on 21 January 2020.

5.1.36 In his response, Mr Cele conceded that Ms Chauke possessed a general BA Degree rather than a tertiary qualification in Human Resources. Mr Cele further reiterated the same issues he raised in the paragraphs above.

5.1.37 Other arguments raised in this response by Mr Cele, do not necessarily warrant regurgitation herein again, save to say that they do not move this issue forward and as a result stand to be rejected. However, this is not to say that due regard was not had to the comments and submissions raised therein but such comments or arguments cannot be regarded as superseding my preliminary findings. Instead, they remain unpersuasive in substance.

Conclusion

5.1.38 The appointment of Ms Lally Chauke as the Human Resource Officer was not in accordance with the provisions of SACE`s Recruitment Policy, as the candidate did not fulfil all the requirements for the position she was appointed in. While she possessed extensive experience in HR matters, her tertiary educational qualification was not in Human Resources but was general BA degree and not in accordance with the advertisement for the post.

5.1.39 Further, there is no indication that the Selection Panel deliberated on the adequacy of her qualifications or even waived the requirement.

5.2 Whether the Personal Administrator to the CEO improperly received a salary increase after five months of appointment;

Common Cause issues

5.2.1 Ms Landsberg, the Personal Assistant to the CEO, was appointed in 2002.

Issues in dispute

5.2.2 The issue for my determination was whether the Personal Administrator to the CEO improperly received an increase after five (5) months of

appointment, contrary to the SACE Recruitment Policy and/or Remuneration Policy.

- 5.2.3 The Complainant later submitted that Ms Landsberg was actually four (4) months in the employ of SACE when she received the annual salary increment as opposed to the five (5) months in complaint.
- 5.2.4 Payslips were received from SACE for Ms Landsberg for the period April 2002 when she started employment, to March 2003.
- 5.2.5 Ms Veronica Hofmeester, the former Chairperson of SACE, explained in a letter dated 30 January 2017, that Ms Landsberg received an increase in October 2002, backdated to July 2002 and this increase was a “general salary increase within SACE in 2002”.
- 5.2.6 At the start of employment Ms Landsberg earned a gross salary of around R 7 495.75 per month. At the end of July 2002 Ms Landsberg gross salary was still R 7 495.75 per month.
- 5.2.7 On 31 October 2002 her gross monthly salary was R9 733. 67.
- 5.2.8 In December Ms Landsberg received an annual bonus of R 4 636.75 and her gross monthly salary was R 12 691.98.
- 5.2.9 From January 2013 Ms Landsberg’s gross monthly salary was R 8, 055.23 per month.

Application of the relevant law

- 5.2.10 *Section 38 of PFMA which regulates the general responsibilities of accounting officers provides as follows—*

(1) The accounting officer for a department, trading entity or constitutional institution—

- (c) *must take effective and appropriate steps to—*
 - (i) ...
 - (ii) *prevent unauthorised, irregular and fruitless and wasteful expenditure and*
 - (g) *on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board.*
- (h) *must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—*
 - (i) *contravenes or fails to comply with a provision of this Act;*
 - (ii) *commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or*
 - (iii) *makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure.”*

5.2.11 Section 45 of PFMA which regulates the responsibilities of other officials provides as follows—

“An official in a department, trading entity or constitutional institution—

- (a) ...
- (b) ...
- (c) *must take effective and appropriate steps to prevent, within that official’s area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due”.*

5.2.12 The money paid towards Ms Landsberg’s annual increment when she did not qualify to receive it, as she was only four (4) months in the employ of SACE instead of six (6) months amounts to irregular expenditure by SACE as

defined above. By corollary to an infringement of section 38 and 45 of PFMA since these were done in contravention of applicable legal prescripts as explained in evidence above.

SACE Remuneration Policy

- 5.2.13 Paragraph 20.12 states that *“annual inflation related increments will be awarded to once per annum on 1 July. Employees should be in the employ of the Council for at least 6 months before qualifying for an annual cost of living increment”*.
- 5.2.14 However, paragraph 20.3 allows for extra ordinary salary increments in that Council may increase the salary of a specific employee or grant any other reward determined by the Council of such employee, if in the opinion of Council *“has been in the employ of Council for less than six months on the annual increment date, but has shown exceptional competence in the period following the annual increment date.”*
- 5.2.15 Ms Landsberg, the Personal Administrator to the CEO, who was appointed in 2002 received an increase after only four (4) months of being appointed contrary to the provisions of paragraph 20.2.1 of the Policy on Annual Increments. In terms of the Policy, an employee should have been in the employ of Council for at least 6 months before qualifying for an annual cost of living increment.
- 5.2.16 There is no evidence that SACE took into account the fact that the annual increment was premature and motivated for increment of her salary before the expiry of six (6) months based on the fact that she may have *“shown exceptional competence in the period following the annual increment date”*

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

- 5.2.17 A response was received by my office from Mr Mabutho Cele on 19 September 2019; 21 January 2020 and 03 March 2020 respectively.
- 5.2.18 Mr Cele argued that that Ms Landsberg received annual increment in 2002 (over 17 years ago) and over 13 years after her appointment and way beyond the period contemplated by Rule 5(6) of the Rules relating to the Investigations by the Public Protector and Matters Incidental thereto.
- 5.2.19 He argued that the lapse in time has severely hampered SACE's ability to establish the precise circumstances in which the annual increment was granted to Ms Landsberg. He submitted that there is no sufficient legal or factual basis for the Public Protector to conclude that the annual increment received by Ms Landsberg contravened SACE's Remuneration Policy and thereby resulting in improper conduct or maladministration
- 5.2.20 SACE noted that the implementation of paragraph 20.2.1 of the Remuneration Policy gives rise to the considerable complexity. In this regard, a person employed immediately following an annual increment would earn a higher salary than an employee on the same post level who was employed less than six months before the annual increment.
- 5.2.21 He emphasised that this would potentially result in an inherent unfairness and render SACE vulnerable to legal challenge on this ground.
- 5.2.22 He argued that SACE sought to understand the genesis of paragraph 20.2.1 of the Remuneration Policy from members of the Council at the time the Policy was adopted and understood that the intention (through the cross-reference to paragraph 19) was to preclude performance rewards during probation periods rather than to disqualify probationary employees from annual increments.

5.2.23 The Council resolved to amend paragraph 20.2.1 of the Remuneration Policy with effect from 08 November 2019 to indicate that annual inflation related salary increments would be awarded once per annum on 01 April, irrespective of service period.

5.2.24 He argued that there is no sufficient basis for the Public Protector to conclude that the annual increment received by Ms Landsberg contravened its Remuneration Policy and therefore constitutes improper conduct or maladministration. He further argued that Public Protector has no sufficient basis for a finding of irregular expenditure.

Conclusion

5.2.25 At the time when Ms Landsberg received an annual increment, she was in the employ of SACE for a period of four (4) months contrary to paragraph 20.2.1 of the SACE Remuneration Policy which provides that employees should be in the employ of the Council for at least 6 months before qualifying for an annual cost of living increment.

5.3 Whether SACE incurred irregular expenditure by paying for security services rendered to the CEO of SACE at his private residence:

Common Cause issues

5.3.1 In August 2012, the home and cars of the former CEO of SACE, Mr R Brijraj, were set alight and burned by unknown people.

5.3.2 Venture Security a company which provided security services at the premises of SACE at the time, placed a security guard at the house on the instruction of the former CEO.

Issues in dispute

- 5.3.3 The issue for my determination is whether SACE irregularly appointed Venture Security to guard the house of the CEO after a fire and whether the invoices for the security were issued to and paid for by SACE.
- 5.3.4 Information submitted by SACE revealed that an invoice (number IN105785), dated 31 August 2012 for a total amount of R15 859.68 was received by SACE from Venture Security. Details on this invoice indicate that the description of the services was for a security officer at the address of the private residence of the CEO, during the month of August 2012.
- 5.3.5 A second invoice (number IN105777), dated 30 September 2012 for a total amount of R14 145.12 was received by SACE from Venture Security. Details on this invoice indicate that the description of the services was for a security officer at the same address during the month of September 2012. The total of the two invoices for the private services provided by Venture Security to the CEO was R30, 004.80.
- 5.3.6 These invoices were paid together with an invoice with Reference number IN106090 on 11 February 2013. This payment is indicated as CASH on the Accounts Payable Transactions document obtained from SACE, Reference 168717249 and an amount of R31, 087.80.
- 5.3.7 The CEO of SACE, Ms Mokgalane in her response to the Public Protector Stated that *“SACE did not procure such a service from Venture Security. Mr Brijraj (former CEO) procured the services on his own as per attached declaration dated the 21st February 2017”*. She confirmed that the total amount was paid to Venture Security against the CEO’s staff loan account and repayment of the loan was made to SACE though salary deductions. She stated that CEO’s entire staff loan account was settled in full on 1 March 2017.

- 5.3.8 According to a copy extracted from SACE ledger account for the period April 2014 to April 2018, an amount of R30 000.00 was recorded against Mr Brijraj on 02 February 2016. Two separate amounts of R15 859.68 and R14 145.12 were recorded gain on 1 April 2016 for security expenses.
- 5.3.9 I was also provided with a copy of a letter which was written by the former CEO to the then Chairperson of the Council Ms Veronica Hofmeester dated 21 February 2017. In this letter titled “DECLARATION”, the former CEO made a “declaration regarding the circumstances pertaining to the burning of my house and cars in 2012”. He stated that at the time of the fire he had suspected arson due to mysterious calls and veiled threats regarding some SACE decisions.
- 5.3.10 He explained further that he and investigators suspected arson but they could not confirm. The matter was not reported to the police because there was no concrete evidence. He further stated that in desperation, he directed the SACE to assist to provide security for his safety until his home was renovated and he had assumed that it was in order for Council to protect him. In conclusion, he apologised for not bring the matter to Council structures as he was undergoing severe stress.

Application of the relevant law

The Constitution

- 5.3.11 Section 195(1) of the Constitution provides that:

“Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (h) Good human –resource management and career-development practices, to maximise human potential, must be cultivated;

- (i) Public Administration must be broadly represented of the South African people, with employment and personnel management practices base on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Public Finance Management Act

5.3.12 SACE is listed on schedule 3 of the PFMA as a public entity and is regulated by Chapter 6 of the PFMA.

5.3.13 Section 49 states that every public entity must have an authority which must be accountable for purposes of this Act. If the entity has a Board or other controlling body, that Board or controlling is the body is the accounting authority for that entity.

5.3.14 Section 50 of the PFMA provides that:

“(1) the accounting authority for a public entity must-

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity”.

5.3.15 Section 51(b)(ii) further provides that an accounting authority must take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure.

5.3.16 In terms of section 51(1)(e)(iii), the accounting authority must take effective and appropriate disciplinary steps against any employee who makes or permits an irregular or fruitless and wasteful expenditure.

5.3.17 Section 57 of the PFMA, provides that:

“An official in a public entity-

- (b) is responsible for the effective, efficient, economical and transparent use of financial and other resources with that official's area of responsibility.
- (c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;
- (e) is responsible for the management, including the safe-guarding, of the assets and the management of the liabilities within that official's area of responsibility."

5.3.18 Section 83 further provides that:

- "(1) The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently-
- (b) Makes or permits an irregular expenditure or a fruitless and wasteful expenditure.

Personal Loans and Advances

5.3.19 The issue of loans within SACE is regulated by Personal Loans Policy under paragraph 10.1. According to paragraph 10.1.1, the number of personal loans for employees is limited to one in a specific financial year. Such loans will be granted by Council in the following circumstance: Funeral costs of close relatives, emergency cases that cannot promptly be foreseen (Acts of God) and purchases of assets with a direct benefit to the Council.

5.3.20 The Policy further states that an application be completed for the loan and that an Acknowledgement of Debt be completed before approval of the loan. The loan must be repaid through monthly payments deducted from the employee's salary and that period of payment must not exceed 12 months.

5.3.21 The evidence gathered indicates that in 2012, the CEO of SACE utilized the services of a company appointed to render security services at the premises of SACE to provide security at his private residence without approval of the

Council. Further, the cost for the services was carried by SACE after submission of invoices for payment.

- 5.3.22 The CFO also failed to identify an irregular expenditure and merely authorised payment of the services rendered under these circumstances.
- 5.3.23 At no stage did the former CEO alert Council of the expenditure and even when Council became aware in 2017, no action was taken against him.
- 5.3.24 The former CEO of SACE decided to utilize the services of a security company appointed by SACE for personal reasons without involving and obtaining approval from Council. Further, the security company submitted invoices which were settled by SACE as part of services rendered under the contract, after authorization by the CFO.
- 5.3.25 Even though the CEO paid back the money to SACE as a loan, he did not apply for a loan in terms of the Policy at the time of the incident or soon thereafter. Further, although the fire took place in August 2012 and the services of the security guard were used in August and September 2012, the cost of the security was only raised against the CEO's staff loan account on 1 April 2016.
- 5.3.26 It appears that SACE paid invoices IN105785 and IN105777 and only recovered the funds from the CEO after the Union expressed dissatisfaction and lodged a complaint with the Public Protector.

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

- 5.3.27 A response was received by my office from Ms Mabutho Cele, the Chairperson of SACE on 19 September 2019 and 21 January 2020 respectively.
- 5.3.28 Mr Cele argued that the provision of security at the CEO's residence was on the former CEO's instruction and direction alone and without the knowledge or consent of Council. He indicated that upon receiving the allegations from the

Public Protector on 13 December 2016, SACE immediately took steps to investigate the allegations.

- 5.3.29 According to Mr Cele, the CEO resigned on 31 January 2017 and SACE raised costs of security against the CEO's staff loan effectively from 1 April 2016, several months prior to my notice on 13 December 2016. He further indicated that monthly loan repayments were made and the final loan balance was settled against the CEO's benefit entitlements when they became available on 31 May 2017 (after his retirement).
- 5.3.30 SACE contends that the costs of security at the CEO'S house have been fully recovered and in the circumstances there is no factual basis for the Public Protector to ascribe the conduct of the former CEO to the Council as the provision of security to his house was on his instruction and direction alone, without the knowledge of Council.
- 5.3.31 Mr Cele reiterated that Council took steps to investigate and recover the balance on the CEO`s loan amount from his benefit entitlements and as he had already resigned disciplinary steps could not be taken against him as they had no authority over him.
- 5.3.32 SACE submitted that the conduct of the CEO cannot be ascribed to Council. Further, there is no legal or factual basis for the Public Protector to conclude that the Council contravened the PFMA and any finding that the Council has contravened the PFMA would be irrational and unlawful. He advised the Council is compliant with its fiduciary and general responsibilities under the PFMA.
- 5.3.33 The argument advanced by SACE in this instance is unpersuasive and therefore stands to be rejected on the basis that it does not move this issue forward. SACE has fully recovered the balance on the CEO`s loan amount from his benefit entitlements but proper processes were not followed when the CEO utilized the SACE security for his personal use. SACE did not provide my office with the CEO`s loan application as required by the Loan and Advance Policy.

- 5.3.34 The provision of security at the CEO's house occurred in 2012 but the loan was only raised with the CEO in 2016, which is not in line with the staff loans Policy which the CEO never applied for. The CEO is appointed by the Chairperson, therefore one would reasonably have expected the Chairperson to be aware of all finances and expenditure that would have been incurred by SACE for all the financial years Mr Brijraj was the CEO.
- 5.3.35 A response was received by my office from Mr Rej Brijraj on 3 January 2020.
- 5.3.36 In his response to my notice, Mr Brijraj indicated that during 2012 and early 2013, series of events at his residence and at the office let him to believe that he was being intimidated due to the disciplinary work he was doing at SACE.
- 5.3.37 He further indicated that he requested the SACE to extend the provision of security services to his residence as he was of the view that as the CEO of SACE, Council had a duty to ensure his safety. He advised that he has decided to refund Council as a gesture of goodwill.
- 5.3.38 There is no evidence in my possession which indicate that Mr Brijraj requested Council to extend security services to his private residence. Mr Cele, the Chairperson of SACE conceded that Mr Brijraj acted on his own account without the knowledge of Council. Therefore the contention by Mr Brijraj that Council is duty bound to ensure his safety without even alerting them and obtaining their approval for the use of SACE security as his private residence is therefore rejected. As the CEO of SACE, Mr Brijraj is expected to manage all the expenditure at SACE in line with his duties and responsibility as the accounting authority.

Conclusion

- 5.3.39 A security company named Venture Security, a Service Provider of SACE was appointed to guard the CEO's house at the expense of SACE after his home and car were burned during the period of 13 August 2012 to 1 September 2012.

5.3.40 SACE staff loans Policy is very prescriptive with regards to the process that staff needs to follow in obtaining a loan advance from SACE and the repayment thereof. In this instance, there is no evidence that the former CEO obtained authority and approval from Council before utilization and deployment of SACE security to his private home.

6 FINDINGS

Having careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been complied with, I make the following adverse findings against the SACE:

6.1 Regarding whether SACE failed to comply with the provisions of Human Resource Policy and Procedures by appointing Ms Lally Chauke (Muhlarhi) who did not possess the qualifications required for the position of Human Resources Officer (HR officer):

6.1.1 The allegation that the appointment of Ms Lally Chauke (Ms Chauke) to the position of HR officer was irregular, is substantiated.

6.1.2 Ms Chauke did not meet the academic minimum requirements for the position of HR officer as stated in the advertisement thereby failing to comply with the provisions of their Human Resource Policy and Procedures.

6.1.3 Evidence in my possession has revealed several procedural flaws in the recruitment and selection process which amounted in the main to a violation, subversion and flouting of the SACE's Human Resource Policy and Procedures which were committed when appointing Ms Chauke in that;

- I. She did not meet the inherent requirements of the position she applied for. At the time of appointment, Ms Chauke did not possess the required and appropriate three (3) year degree in Human Resources for the position of Human Resource Officer.

- II. The job advert required applicants to submit a copy of a three (3) year degree in Human resources but instead Ms Chauke submitted a copy of her transcript of academic record which is not compliant with the job advert.
 - III. She further submitted a copy of a training course in Human resources (HR) which she attended for only five (5) days. The attendance of an HR course cannot be equated to the required three (3) year degree in Human Resource.
 - IV. The entire HR selection and interview panel failed to eliminate the CV of Ms Chauke from the selection process despite the fact that she did not satisfy all the requirements of an advert.
- 6.1.4 Such a failure by the members of the selection/recruitment panel as mentioned above amounted to violation of clause 6.10 of the SACE`s Selection, Recruitment and Appointment Policy. Similarly, the CEO, as the Executive Authority of SACE, failed in his legal duty and obligation to satisfy himself that Ms Chauke is qualified to be appointed to the position of of Human Resource Officer before making the appointment. There is no evidence of any verification of such undertaken by the CEO.
- 6.1.5 Accordingly, such a violation by the SACE`s HR selection and interview panel members and the conduct of the CEO, amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 6.2 Regarding whether the Personal Administrator to the CEO improperly received a salary increase after five months of appointment;**
- 6.2.1 The allegation that Ms Landsberg, the Personal Administrator (PA) to the CEO improperly received a salary increase after four (4) months of employment contrary to the provisions of the Remuneration Policy, is substantiated.

6.2.2 In terms of SACE Remuneration Policy, an employee should have been in the employ of SACE, at least six (6) months before qualifying for annual cost of living increment.

6.2.3 Ms Landsberg was appointed by SACE on 01 April 2002 and she irregularly received her annual salary increment in October 2002, backdated to July 2002. Therefore Ms Landsberg was only four (4) months in the employ of SACE when she received her annual salary increment, which is contrary to paragraph 20.2.1 of the SACE Remuneration Policy, which provides that employees should be in the employ of Council for at least 6 months before qualifying for an annual cost of living increment.

6.2.4 There is no evidence that SACE took into account the fact that the annual increment was premature and motivated for increment of Ms Landsberg's salary before the expiry of six (6) months based on the fact that she may have "*shown exceptional competence in the period following the annual increment date*" as required by their Remuneration policy. Therefore SACE's conduct amounts to irregular expenditure and contravention of section 38 and 45 of PFMA.

6.2.5 Accordingly, SACE's conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act

6.3 **Whether SACE incurred irregular expenditure by paying for security services rendered to the CEO of SACE at his private residence**

6.3.1 The allegation that SACE incurred irregular expenditure by paying for security services rendered to Mr Brijraj, the former (CEO) at his private residence is substantiated.

6.3.2 Evidence in my possession has established that payment of R 30.004.84 for salary deductions was recorded by SACE against Mr Brijraj on 02 February 2016 and 01 April 2016 respectively.

6.3.3 The payment made to Venture Security on 11 February 2013 for the amount of R30. 004.80 for the services provided to the CEO on invoices IN105785 and IN105777 were irregular since the services were provided to the CEO in his personal capacity. The Council only raised the CEO`s personal loan account in 2016 after a complaint was lodged with my office and almost four (4) years after the transaction.

6.3.4 Despite the loan repayment made by Mr Brijraj, the evidence indicates impropriety, wrongdoing and several procedural flaws in the manner in which the CEO of SACE authorised the use of services of Venture Security, a company appointed to render security services at SACE (guarding) at his private residence in that:

- I. The CEO authorised the security Company to render security at his private residence without approval of Council and SACE only became aware in 2016 and no action was taken against CEO for contravening the loan Policy. SACE further effected payment for costs incurred at the CEO`s his private residence and the CEO further allowed SACE to carry his personal costs of the security services rendered under SACE contract resulting in SACE incurring irregular expenditure.
- II. The CEO did not apply for personal loan at SACE and he also did not satisfy the requirements of the Personal Loan Policy in that he did not apply for the loan and nor was it approved prior to utilizing the SACE security company for his private and personal use.
- III. The SACE Personal Loan Policy requires the loan to be paid off in monthly instalments for a period not exceeding 12 months. In this instance security services were rendered at CEO`s private residence in 2012 but the loan repayment was only raised against the CEO on 01 April 2016, four (4) years later.

- 6.3.5 The conduct of the CEO was in violation of section 195(1)(a);(h) and (i) of the Constitution, section 49, 50(1)(b),51(1)(b)(iii) and, 51(1)(e)(iii),57(b)(c) and (e), 83(c)(1)(b) of the PFMA and SACE Human Resource Policy and Procedure Manual and paragraph 101.1. of the Personal Loans and Advance Policy.
- 6.3.6 Accordingly, such a violation by SACE and in particular Mr Brijral, amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7 REMEDIAL ACTION

The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

The Chairperson of SACE must must take appropriate steps to ensure that:

- (a) Within sixty (60) days from date of this report, evaluate the adequacy and effectiveness of the SACE's internal controls on recruitment and selection and identify deficiencies with a view to take corrective action to prevent a recurrence of the improprieties referred to herein;
- (b) Within sixty (60) days from date of this report, regularise the appointment of Ms Chauke, alternatively identify a suitable position for which she is qualified and can be transferred to with full retention of her existing benefits, in accordance with the provisions of SACE's existing policies and the requirements of fair labour practices;
- (c) Within thirty (30) days from date of this report, arrange a workshop on the SACE Human Resource Policy and Procedure Manual (Procurement Policy and Recruitment and Selection Policy, Loans and Advances), to be attended by all SACE officials who are involved in the SCM process, to prevent a recurrence of the improprieties referred to in this report relating to the procurement and payment of security services rendered at the former CEO's private residence;

- (d) I have noted that the SACE Council has resolved to amend paragraph 20.2.1 of its Remuneration Policy, and therefore take no further remedial action in that regard.

8 MONITORING

- 8.1 The Chairperson of SACE must submit an Implementation Plan to my office within 30 working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.
- 8.2 I wish to bring to your attention that in line with the Constitutional Court judgment in the matter of **Economic Freedom Fighters v Speaker of the National Assembly and other; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11**, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Chairperson of SACE, unless an *Interim Interdict* or *Court Order* directing otherwise is obtained.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 8/12/2020

Assisted by : Carina van Eeden, GGI