

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



**PUBLIC PROTECTOR
SOUTH AFRICA**

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**INVESTIGATION INTO ALLEGATIONS OF IRREGULARITIES BY THE
FUNCTIONARIES OF THE GAUTENG PROVINCIAL DEPARTMENT OF HEALTH
IN THE APPOINTMENT OF THE LATE DR ASHLEY MTHUNZI AS THE CHIEF
EXECUTIVE OFFICER AT TEMBISA TERTIARY HOSPITAL**

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LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS AND ABBREVIATIONS	DESCRIPTIONS
Constitution	Constitution of the Republic of South Africa, 1996
CEO	Chief Executive Officer
CV	Curriculum Vitae
DA	Democratic Alliance
DD	Deputy Director
GDoH	Gauteng Provincial Department of Health
HoD	Head of Department
HR	Human Resources
HRM	Human Resources Management
Investigation Team	Public Protector Investigation Team
MEC	Member of the Executive Council
MPL	Member of Provincial Legislature
Panel	Recruitment and Selection Committee
Public Protector	Public Protector of the Republic of South Africa
Public Protector Act	Public Protector Act, 1994
Public Protector Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018 (as amended)
PSA	Public Service Act, 1994
PFMA	Public Finance Management Act, 1999
Policy	Recruitment and Selection Policy, 2017

SMS	Senior Management Service
Tembisa Hospital	Tembisa Tertiary Hospital

EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), which empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act, 1994 (Public Protector Act), which provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her.
- (ii) The report relates to an investigation into allegations of irregularities by the functionaries of the Gauteng Provincial Department of Health (GDoH) in the appointment of the now late Dr Ashley Mthunzi (Dr Mthunzi) as the Chief Executive Officer (CEO) at Tembisa Tertiary Hospital (Tembisa Hospital).
- (iii) The investigation originates from a complaint was lodged with the Public Protector on 29 September 2022 by Mr JD Bloom (Complainant), a Member of the Gauteng Provincial Legislature, representing the Democratic Alliance (DA), in connection with allegations of irregularities by the functionaries of the GDoH in the appointment of Dr Mthunzi (who is now deceased) as the CEO of Tembisa Hospital.
- (iv) The Complainant alleged *inter alia* that:
 - (a) Dr Mthunzi was appointed as the CEO of Tembisa Hospital in mid-2021 after acting in the role since April 2021;
 - (b) On 15 September 2021, the acting Head of the GDoH, Dr Sibongile Zungu (Dr Zungu), approved the recommendations that Dr Mthunzi should be disciplined for contravening the GDoH's Recruitment and Selection Policy and that the GDoH's Labour Relations Directorate was supposed to implement the said recommendations; and

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- (c) Dr Mthunzi was facing a disciplinary action when he was at Pholosong Hospital and it was wrong that this information of his pending disciplinary case was not made known to the Recruitment and Selection Committee (Panel) that eventually appointed him as the CEO of Tembisa Hospital. Dr Mthunzi also failed to disclose that there were pending disciplinary charges against him when he was being considered for the Tembisa Hospital CEO position.
- (v) Based on the analysis of the complaint, the following issue was considered and investigated:
- (a) Whether there were irregularities by the functionaries of the Gauteng Department of Health during the recruitment and selection of Dr Ashley Mthunzi as the CEO of Tembisa Hospital, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(4) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.
- (vii) Notices in terms of section 7(9)(a) of the Public Protector Act (the Notice/s) were issued to the following implicated and/or affected parties to provide them with an opportunity to respond to the proposed provisional findings and remedial action on 04 June 2024:
- (a) Dr Nomathemba Mokgethi (Dr Mokgethi) the former Gauteng MEC of Health;
- (b) Mr Arnold Malotana (Mr Malotana), the Head of the Department,

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- (c) Dr Freddy Kgongwana (Dr Kgongwana), acting Deputy Director General Hospital Services;
 - (d) Ms Nomsa Mmope (Ms Mmope), the former acting Chief of Operations;
 - (e) Dr Mthabo P Mathebula (Dr Mathebula), the Chief Executive Officer Steve Biko Academic Hospital;
 - (f) Mr Lucky Motsogi (Mr Motsogi), Director Human Resources Administration;
 - (g) Mr Solly Cave (Mr Cave) the former Acting Deputy Director General HRMD & Corporate Service;
 - (h) The Complainant.
- (viii) Written responses to the Notices were received from:
- (a) Dr Mokgethi on 06 June 2024;
 - (b) Dr Kgongwana on 22 June 2024;
 - (c) Dr Mathebula on 25 June 2024;
 - (d) Ms Mmope on 25 June 2024;
 - (e) Mr Malotana on 26 June 2024; and
 - (f) Mr Motsogi on 27 June 2024.
- (ix) The responses and information/evidence submitted in response to the section 7(9) Notice were duly considered by the Public Protector.
- (x) There were no responses to the section 7(9) notice from Mr Cave who is no longer an employee of the GDoH although numerous follow-up emails were sent to his private email address.
- (xi) Having regard to the evidence and regulatory framework determining the standard that the GDoH should have complied with, the following findings are made:

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- (a) **Whether there were irregularities by the functionaries of the Gauteng Department of Health during the recruitment and selection process of Dr Ashley Mthunzi as the CEO of Tembisa Hospital, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**
- (aa) The allegation that there were irregularities by the functionaries of the GDoH during the recruitment and selection process of Dr Ashley Mthunzi as the CEO of Tembisa Hospital, **is substantiated.**
- (bb) The functionaries of the GDoH did not adequately conduct pre-employment screening before the appointment of Dr Mthunzi. They did not conduct all the requisite personnel suitability checks, such as the verification of financial stability, citizenship/identity screening, criminal record and personal security. The verification of Dr Mthunzi's citizenship and existence of pending disciplinary proceedings, could have been confirmed by the functionaries directly with the candidate and with his current employer (the same department), respectively.
- (cc) The Shortlisting and Interview Panel that conducted Dr Mthunzi's interview, did not properly ventilate the issue relating to the discrepancies in his Z83 form. Dr Mthunzi made material inaccuracies in his Z83 application form which should have prompted the functionaries of the GDoH to probe this information and determine its effect on the suitability of Dr Mthunzi for the post. This was contrary to the provisions of Paragraph 8.3 of the SMS Handbook.

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- (dd) Mr Malotana's recommendations to Dr Mokgethi, contained material omissions and were not a true reflection of Dr Mthunzi's candidacy.
- (ee) Considering the above material irregularities and/or non-compliance by the functionaries of the GDoH, the Public Protector finds that their conduct is not consistent with the standard contemplated in Paragraph 1, 6.5 and 7.3 of the GDoH Policy, Paragraph 8.3, 8.6.1 and 8.6.3(d) of the SMS Handbook.
- (ff) Accordingly, the conduct of the functionaries of the GDoH amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.
- (xii) The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, are the following:
- (a) The Member of the Executive Council for Health**
- (aa) Take cognisance of the report and ensure implementation of the remedial action in terms of section 133 of the Constitution.
- (b) The Head of Department: GDoH**
- (aa) Within **one hundred and twenty (120) calendar days** from the date of the final report, take effective and appropriate steps and embark on a procurement process to appoint a service provider to conduct Personnel Suitability Checks to all SMS personnel including non-SMS personnel in Supply Chain Management in line with Regulation 57(1)(c) Public Service Regulations and Paragraph 6.5 of the GDoH Recruitment and Selection Policy.

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 This report is submitted in terms of section 8(1) read with section 8(3) of the Public Protector Act, which empower the Public Protector to make known the findings of an investigation, to affected parties, for such persons to note the outcome of the investigation and to implement the remedial action, where applicable:
- 1.2.1 Mr Malotana, the Head of the Department;
 - 1.2.2 Dr Mokgethi, the former MEC of Gauteng Department of Health;
 - 1.2.3 Dr Kgongwana, the former acting Deputy Director General Hospital Services;
 - 1.2.4 Ms Mmope, the former acting Chief of Operations;
 - 1.2.5 Dr Mathebula, the former Chief Executive Officer: Steve Biko Academic Hospital;
 - 1.2.6 Mr Motsogi, the Director Human Resources Administration;
 - 1.2.7 Mr Cave, the former acting Deputy Director General HRMD & Corporate Service; and
 - 1.2.8 The Complainant.
- 1.3. The report relates to an investigation into allegations of irregularities by the functionaries of the Gauteng Provincial Department of Health in the appointment of the now late Dr Mthunzi the CEO at Tembisa Hospital.

2. THE COMPLAINT

- 2.1. The complaint was lodged with the Public Protector on 29 September 2022 by Mr JD Bloom (Complainant), a Member of the Gauteng Provincial Legislature, representing the Democratic Alliance (DA), in connection with allegations of irregularities by the functionaries of the GDoH in the appointment of Dr Mthunzi (who is now deceased) as the CEO of Tembisa Hospital.
- 2.2. In essence the Complainant alleged *inter alia*, that:
- 2.2.1. Dr Mthunzi was appointed as the CEO of Tembisa Hospital in mid-2021 after acting in the role since April 2021;
- 2.2.2. On 15 September 2021, the acting Head of the GDoH, Dr Sibongile Zungu (Dr Zungu), approved the recommendations that Dr Mthunzi should be disciplined for contravening the GDoH's Recruitment and Selection Policy and that the GDoH's Labour Relations Directorate was meant to implement the said recommendations; and
- 2.2.3. Dr Mthunzi was facing a disciplinary action when he was at Pholosong Hospital and it was wrong that this information of his pending disciplinary case was not made known to the Recruitment and Selection Committee (Panel) that eventually appointed him as the CEO of Tembisa Hospital. Dr Mthunzi also failed to disclose that there were pending disciplinary charges against him when he was being considered for the Tembisa Hospital CEO position.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2. Section 182(1) of the Constitution provides that:

“The Public Protector has 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 the additional powers and functions prescribed by national legislation. The Public Protector’s powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.

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

4. ISSUE IDENTIFIED FOR INVESTIGATION

4.1. On analysis of the complaint, the following issue was identified to inform and focus the investigation:

4.1.1. Whether there were irregularities by the functionaries of the Gauteng Department of Health during the recruitment and selection of Dr Ashley Mthunzi as the CEO of Tembisa Hospital, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

5. THE INVESTIGATION

5.1. Methodology

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

5.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine the format and procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

5.2. Approach to the investigation

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

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

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration, abuse of power or other improper conduct?
- (d) In the event of a violation, what action should be taken?

5.2.3. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence is evaluated and a determination is made on what happened based on a balance of probabilities. In this case, the factual enquiry principally focused on the process followed by the functionaries of the GDoH in the appointment of Dr Mthunzi.

5.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the functionaries of the GDoH in the appointment of Dr Mthunzi as the CEO at Tembisa Hospital.

5.2.5. The inquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration.

5.3. The Investigation Process

5.3.1. The investigation process commenced with correspondence to Dr Nolutshungu the former Head of the Department on 12 October 2021, wherein she was informed of the investigation as well as the information required from her.

5.4. Key sources of information

5.4.1. Correspondence sent and received

- 5.4.1.1. Complaint letter from Mr JD Bloom: Member of Gauteng Provincial Legislature, dated 29 September 2022;
- 5.4.1.2. Allegations letter from the Public Protector to Dr Nolutshungu, dated 12 October 2022;
- 5.4.1.3. Email from the Public Protector to Dr Mthunzi, enquiring about the discrepancies in his Z83 application form and whether he made disclosures in respect of his alleged pending disciplinary matter, dated 6 January 2023;
- 5.4.1.4. Email from the Public Protector to Mr Motsogi enquiring about the contact details of the panel members and Dr Mthunzi interview recording, dated 09 January 2023;
- 5.4.1.5. Response letter from Dr Nolutshungu to the Public Protector dated 24 November 2022 and 24 January 2023;
- 5.4.1.6. Email from the Public Protector to Mr Motsogi enquiring about the discrepancies in Dr Mthunzi's Z83 application form and whether he made disclosures in respect of his alleged pending disciplinary matter, dated 09 January 2023;
- 5.4.1.7. Email from the Public Protector to Dr Mathebula enquiring about the discrepancies in Dr Mthunzi's Z83 application form and whether he made disclosures in respect of his alleged pending disciplinary matter, dated 21 April 2023;

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- 5.4.1.8. Email from the Public Protector to Dr Kgongwana enquiring about the discrepancies in Dr Mthunzi's Z83 application form and whether he made disclosures in respect of his alleged pending disciplinary matter, dated 21 April 2023;
 - 5.4.1.9. Email from the Public Protector to Mr Cave enquiring about the discrepancies in Dr Mthunzi's Z83 application form and whether he made disclosures in respect of his alleged pending disciplinary matter, dated 21 April 2023;
 - 5.4.1.10. Email response to the Public Protector's e-mail dated 21 April 2023 from Dr Mathebula to the Public Protector dated 21 April 2023;
 - 5.4.1.11. Email response to the Public Protector's e-mail dated 21 April 2023 from Dr Kgongwana to the Public Protector dated 23 April 2023;
 - 5.4.1.12. Email response to the Public Protector's e-mail dated 21 April 2023 from Mr Cave to the Public Protector dated 03 May 2023;
 - 5.4.1.13. Email response to the Public Protector's e-mail dated 21 April 2023 from Dr Mthunzi to the Public Protector dated 17 May 2023;
 - 5.4.1.14. A response letter from Mr Malotana to the Public Protector clarifying the discrepancies in the Z83 application form of Dr Mthunzi dated 12 June 2023;
 - 5.4.1.15. Letter from the Public Protector to Mr Makhode the Director General (DG) of Department of Home Affairs requesting assistance regarding the citizenship of Dr Mthunzi, dated 25 July 2023; and
 - 5.4.1.16. Response letter from Mr Makhode to the Public Protector regarding the citizenship of Dr Mthunzi dated 13 September 2023.

5.4.2. Documents received

- 5.4.2.1. GDoH Recruitment and Selection Policy dated 10 May 2017;
- 5.4.2.2. Appointment letter of Dr Mthunzi as acting CEO of Tembisa dated 22 April 2021;
- 5.4.2.3. Acceptance of the acting CEO position letter from Dr Mthunzi dated 22 April 2021;
- 5.4.2.4. Z83 application form of Dr Mthunzi dated 13 April 2021;
- 5.4.2.5. Request to schedule shortlisting and Interview process for the post of CEO Tembisa Hospital Memorandum addressed to Dr NE Mokgethi approved on 01 May 2021;
- 5.4.2.6. Reference Checks for Dr Mthunzi dated 17 May 2021;
- 5.4.2.7. Filing of the CEO post at Tembisa Memorandum addressed to Dr NE Mokgethi approved 01 July 2021;
- 5.4.2.8. Appointment letter for the post of CEO addressed to Dr Mthunzi dated 01 July 2021;
- 5.4.2.9. Acceptance of the CEO position letter from Dr Mthunzi dated 08 July 2021;
- 5.4.2.10. Pholosong Investigation report dated 15 September 2021; and
- 5.4.2.11. GDoH Media Statement on the appointment of Dr Mthunzi dated 21 September 2022.

5.4.3. Meetings held

5.4.3.1. Meeting held between the Public Protector Investigation Team (Investigation Team) and Dr Mthunzi on 09 June 2023; and

5.4.3.2. Meeting held between the Investigation Team and Mr Errol Ogle, the Chief Director: HR; Mr Lucky Motsogi, the Director: HR and Ms Lebogang Sebokolodi, the HR Practitioner, who are the functionaries of the GDoH on 13 November 2023,

5.4.4. Legal Framework

5.4.4.1. Constitution of the Republic of South Africa, 1996;

5.4.4.2. Public Service Act, 1994;

5.4.4.3. Public Protector Act, 1994;

5.4.4.4. Labour Relations Act, 1995;

5.4.4.5. Senior Management Service Public Service Handbook 2003;

5.4.4.6. Public Administration Management Act, 2014;

5.4.4.7. Public Service Regulations, 2016;

5.4.4.8. Recruitment & Selection Policy of the GDoH, 2017; and

5.4.4.9. Employment Circular 44 of 2020.

5.4.5. Case Law

5.4.5.1. *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017); and

5.4.5.2. *Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) (18 December 2013).

5.4.6. Notices issued in terms of section 7(9)(a) of the Public Protector Act

5.4.6.1. On 04 June 2024, Notices in terms of section 7(9)(a) of the Public Protector Act (the Notice/s) were sent via email to the following implicated and/or affected parties to provide them with an opportunity to respond to the proposed provisional findings:

- (a) Dr Mokgethi;
- (b) Mr Malotana;
- (c) Dr Kgongwana;
- (d) Ms Mmope;
- (e) Dr Mathebula;
- (f) Mr Motsogi;
- (g) Mr Cave; and
- (h) The Complainant.

5.4.6.2. Section 7(9)(a) of the Public Protector Act provides that persons implicated or affected in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding same.

5.4.6.3. Responses to the section 7(9)(a) notice were received from the following parties:

- (a) Dr Mokgethi on 06 June 2024;
- (b) Dr Kgongwana on 22 June 2024;
- (c) Dr Mathebula on 25 June 2024;
- (d) Ms Mmope on 25 June 2024;
- (e) Mr Malotana on 26 June 2024; and
- (f) Mr Motsogi on 27 June 2024.

5.4.6.4. There were no responses to the section 7(9) notice from Mr Cave who is no longer an employee of the GDoH although numerous follow-up emails were sent to his private email address.

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

6.1 Whether there were irregularities by the functionaries of the Gauteng Department of Health during the recruitment and selection of Dr Ashley Mthunzi as the CEO of Tembisa Hospital, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act

Common cause

6.1.1. Dr Mthunzi was appointed as the acting CEO at Tembisa Hospital with effect from 22 April 2021. He was subsequently appointed as the CEO of Tembisa Hospital from 01 July 2021.

Issue in dispute

6.1.2. The issue for the Public Protector's determination is whether the functionaries of the GDoH conducted the necessary vetting in the appointment of Dr Mthunzi; if there were any pending disciplinary proceedings against him and whether Dr Mthunzi failed to disclose same.

The Complainant's version

- 6.1.3. Dr Mthunzi was appointed as the CEO of Tembisa Hospital in mid-2021 after acting in the role since April 2021;
- 6.1.4. Dr Mthunzi was facing a disciplinary hearing when he was at Pholosong Hospital in Tsakane and it was wrong that information about his pending disciplinary case was not made known to the panel that eventually made the appointment.
- 6.1.5. Dr Mthunzi also failed to disclose that there were pending disciplinary charges against him when he was being considered for the Tembisa Hospital CEO position; and
- 6.1.6. On 15 September 2021, Dr Zungu approved the recommendations that Dr Mthunzi should be disciplined for contravening the GDoH's Recruitment and Selection Policy and that the GDoH's Labour Relations Directorate was supposed to implement the recommendations of the disciplinary hearing.

The GDoH's version

- 6.1.7. An allegation letter dated 12 October 2022, was sent to Dr Nomonde Nolutshungu (Dr Nolutshungu), the then Head of the GDoH. A response dated 24 November 2022, was received from Dr Nolutshungu, indicating that:
- 6.1.7.1. It is correct that Dr Mthunzi was appointed the Acting CEO of Tembisa on 22 April 2021. It is also correct that Dr Mthunzi was appointed as the CEO at Tembisa Hospital with effect from 01 July 2021;
- 6.1.7.2. The matter was not brought to the attention of the Labour Relations Directorate, it was managed in the office of Mr S Cave, the then acting

DDG: Corporate Services. As a result, labour will not have knowledge of the process;

- 6.1.7.3. The CEO post at Tembisa Hospital was advertised in the *Sunday Times* Newspaper on 11 April 2021 with the closing date of 23 April 2021. Twenty-seven (27) applications were received through the Gauteng Provincial Government (GPG) e-recruitment system (professional job centre);
- 6.1.7.4. A request to commence with the shortlisting and interviews for the post was approved by the Executive Authority, the former Member of the Executive Council (MEC) for Health, Dr Mokgethi, on 01 May 2021;
- 6.1.7.5. The selection committee(panel) members were approved and appointed on 01 May 2021. Shortlisting for the post was conducted on 05 May 2021. Three (03) applicants were shortlisted. Interviews for the post were conducted on 12 May 2021;
- 6.1.7.6. The following selection committee (panel) members conducted the shortlisting and interview process:
- (a) Ms M Mmope;
 - (b) Dr F Kgongwane;
 - (c) Dr M Mathebula; and
 - (d) Mr S Cave.
- 6.1.7.7. The selection committee was supported by the following:
- (a) Mr L Motsogi, the Director: Human Resources Management;
 - (b) Ms P Mgojo, the Employment Equity Representative; and
 - (c) Mr A Mahlangu, the Personnel Practitioner.

- 6.1.7.8. The selection committee met in the morning of the day to craft the shortlisting criteria in accordance with the requirements of the post as advertised.
- 6.1.7.9. Three (03) applicants were shortlisted, namely:
- (a) Dr Mthunzi;
 - (b) Dr Tryphena Nontobeko Socikwa (Dr Socikwa); and
 - (c) Mr Ananias Thizwilondi Magadze (Mr Magadze).
- 6.1.7.10. The interview process for the post was conducted on 12 May 2021 and included a compulsory practical exercise for the Senior Management Service (SMS) members.
- 6.1.7.11. Towards the end of the interviews, the candidates were also asked Human Resources quality assurance questions, which included, *inter alia*, the following:
- “... As part of the HR selection process, the department is mandated to conduct vetting of candidates’ prior to appointment-vetting includes criminal check, financial suitability, qualification check, ID, and citizenship verification – Therefore, do you have any objection if the department conducts vetting on you?”*
- Do you have any information to declare to the panel in terms of the following: Criminal offence, investigation on a misconduct, Insolvency, precautionary suspension and dismissal.”*
- 6.1.7.12. After subjecting all the candidates to the same interview process and deliberation on the performance of the candidates, the panel unanimously recommended Dr Mthunzi as the preferred candidate for the post;

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- 6.1.7.13. The Human Resources Practitioner compiled a submission for the approval of the recommended candidate for the post of CEO at Tembisa Hospital and reference checks were conducted and were positive;
- 6.1.7.14. Dr Mthunzi was subjected to the Department of Public Service and Administration's compulsory SMS competency assessment, on 03 June 2021;
- 6.1.7.15. The submission was approved by the Executive Authority, the former MEC for Health: Dr Mokgethi on 01 July 2021;
- 6.1.7.16. An offer/appointment letter was drafted and signed by Dr Mokgethi and Dr Mthunzi, who accepted the offer to the post of CEO of Tembisa Hospital, with effect from 01 July 2021; and
- 6.1.7.17. There was no improper conduct on the appointment of Dr Mthunzi as CEO of Tembisa Hospital.
- 6.1.8. Dr Nolutshungu submitted to the Investigation Team copies of documentation pertaining to the appointment of Dr Mthunzi, which included the following:

Advertisement for the position of Tembisa Hospital CEO

- 6.1.8.1. The advertisement for the position of CEO (5 Year Fixed Term Contract Appointment Based on Performance) was published on 11 April 2021 in the *Sunday Times* Newspaper, with a closing date of 23 April 2021.

6.1.8.2. The requirements were indicated as follows:

“Application must be done on the E-Recruitment portal://profession/jobcenter.gpg.gov.za. No e-mailed, faxed, hand delivered or posted applications will be accepted. A fully completed Z83 form and recently updated Curriculum Vitae, copies of qualifications, registration certificate with the relevant profession’s body, identity document and drivers’ licence must be attached. Non-RSA Citizens/Permanent Resident Permit Holders must attach a copy of their Permanent Residence Permits to their applications. Should you be in possession of a foreign qualification, it must be accompanied by an evaluation certificate from the South African Qualification Authority (SAQA). A mandatory pre-entry certificate obtained by registering on the following link: <https://www.thensg.gov.za/training-course/sms-pre-entry-programme> is mandatory when applying for SMS positions in the Public Service. Applicants who do not comply with the above-mentioned requirements, as well as applications received late, will not be considered. Correspondence will be limited to short-listed candidates only...”

Application for Employment Form (Z83)

6.1.8.3. According to the employment form (Z83), its purpose is to assist a government department in selecting a person for an advertised post.

6.1.8.4. The Z83 form for Dr Mthunzi dated 13 April 2021, indicates that he is not a South African citizen and he further marked “Yes” where he was asked whether he had any pending disciplinary case.

Interview Questions for the Post of Chief Executive Officer: Tembisa Tertiary Hospital

- 6.1.8.5. The document titled “*Interview Questions for the Post of Chief Executive Officer: Tembisa Tertiary Hospital*” which was signed by all panel members on 12 May 2021, indicates that when answering the question whether he had anything to declare to the panel regarding any criminal offence, investigation on a misconduct, insolvency, precautionary suspension and dismissal, Dr Mthunzi answered with a “No”.

Appointment letter, dated 01 July 2021

- 6.1.8.6. On 01 July 2021, Dr Mokgethi signed the appointment letter for the post of CEO at Tembisa Hospital on a five (05) year performance-based contract. Dr Mthunzi accepted the offer on 08 July 2021.
- 6.1.8.7. Paragraph 9 of the appointment letter provides that misrepresentation, or omission to mention previous offences casts doubt to an applicant’s integrity, honesty and security competence. However, disclosure of previous offences will be treated on merit according to the guidelines from Vetting Norms, Criminal Procedure Act and Departmental Disciplinary procedures.

Further written response from Dr Nolutshungu

- 6.1.9. On 09 January 2023, the Investigation Team sent an email to Dr Nolutshungu requesting the voice recording of the interviews as well as the contact numbers of the panel members.
- 6.1.10. In the response dated 23 January 2023, Dr Nolutshungu indicated that no recording was done during the interview proceedings.

- 6.1.11. She also provided the Investigation Team with the names and contact details of the panel members namely; Dr Mathebula, Dr Kgongwana, Ms Mmope, Mr Cave and Mr Motsogi.

Communication between the Investigation Team and Panel Members

- 6.1.12. On 21 April 2023, the Investigation Team sent letters of enquiry to all panel members regarding the discrepancies in Dr Mthunzi's Z83 form and whether he made disclosures in respect of his alleged pending disciplinary matter.

Dr Mathebula's version

- 6.1.12 In her response dated 21 April 2023, Dr Mathebula stated that:
- 6.1.12.1 She could not recall much on the circumstances surrounding the recruitment of Dr Mthunzi because he was already in the system. As a panel, they did not scrutinise his application;
- 6.1.12.2 She could also not remember whether Dr Mthunzi was asked to explain the disparities between his response to the question during the interview and the Z83 declaration;
- 6.1.12.3 The Z83 form was scrutinised during the shortlisting and based on its contents, the decision on whether to shortlist or not is made and because of the COVID-19 restrictions, the shortlisting was conducted online. It is possible that although that was done with the utmost diligence by going through the application, one would have missed the declaration of an outstanding misconduct part and continued to miss it even during the interview. As a mitigation step, specific pointed questions get to be asked to ascertain that nothing was missed. This afforded the applicant an opportunity to declare as well as to explain further;

- 6.1.12.4 Dr Mthunzi must have been asked that question and he informed the panel that there were no outstanding disciplinary cases, hence the panel's marking and recommendation; and
- 6.1.12.5 Another possibility is that because of the lengthy time that it takes for the whole recruitment process to be finalised, by the time an applicant was interviewed, the misconduct cases or anything else were no longer outstanding, meaning that in future, the lesson is that the question must be whether the applicant has ever been previously disciplined for a misconduct or not.

Dr Kgongwana's version

- 6.1.13 On 23 April 2023, Dr Kgongwana made a submission to the Investigation Team stating as follows:
- 6.1.13.1 He was a member of the panel that recommended Dr Mthunzi to the post of CEO of Tembisa Hospital;
- 6.1.13.2 Although he could not remember exactly what happened that day, the response received from Dr Mthunzi during the interview regarding any disciplinary process against him, was a "No". There were no disciplinary processes active at the time of the interview against Dr Mthunzi;
- 6.1.13.3 As he was the Acting DDG: Hospital Services at the time, he was the supervisor of Dr Mthunzi as the CEO of Tembisa Hospital and there was never any information or activities relating to disciplinary activities against him brought to his attention;
- 6.1.13.4 He was made aware about the disciplinary activities and allegations during the "Skinny Jeans Procurement Saga" at Tembisa Hospital. He neither had access to documents nor details/information around the disciplinary

process against Dr Mthunzi and believed that the Labour Relations and Human Resources Units would be the custodians of the documents around the disciplinary activities/application forms/shortlisting/interview of Dr Mthunzi; and

- 6.1.13.5 The time lapse was a challenge to him, however, he could not remember any discussions by the panel about the disclosure in the Z83 form and any disciplinary activities against Dr Mthunzi during the interview.

Mr Cave's response

- 6.1.14 On 03 May 2023 Mr Cave submitted his response to the Investigation Team indicating as follows:

6.1.14.1 The quality assurance questions, as the standard practice, were asked by the Human Resources at the end of the panel questions. Due diligence by the panel was thoroughly conducted; and

6.1.14.2 If the Z83 form, which he was shown indicates a "Yes" and the response to the Human Resources quality assurance question is a "No" then the response to the quality assurance question was misleading.

Response from Mr L A Malotana, the current HoD of GDoH

- 6.1.15 Mr Malotana submitted another GDoH response letter dated 12 June 2023, to the Investigation Team and indicated, *inter alia*, that:

6.1.15.1 The panel did not interrogate the response of Dr Mthunzi when he responded "No" to the question about him having a disciplinary action against him and only relied on his answer.

Dr Mthunzi's version

- 6.1.16 On 06 January 2023, the Investigation Team sent an email to Dr Mthunzi, requesting a response from him regarding the issues raised in the complaint.
- 6.1.17 He responded on 17 May 2023 and stated that:
- 6.1.17.1 The media statement issued by the GDoH on 21 September 2022, clears the allegation that he was irregularly appointed;
- 6.1.17.2 There was no pending disciplinary case prior to his appointment at Tembisa Hospital. There was no charge that was issued against his name before his appointment at Tembisa Hospital;
- 6.1.17.3 There was no sanction issued against him prior to his appointment at Tembisa Hospital. He could not recall any manager discussing these allegations with him and highlighting that he was under investigation;
- 6.1.17.4 He did not mislead the panel and there was no disciplinary action pending at the time of his appointment at Tembisa Hospital. He followed all processes when applying for the post of CEO at Tembisa Hospital and if there was a pending investigation directed to his omission, he would have known and declared accordingly;
- 6.1.17.5 He would not have acted as the CEO for a duration of three (03) months before his actual appointment. The recommendations (that he be disciplined) were signed by Dr Zungu on 15 September 2021; and
- 6.1.17.6 The recommendations were not forwarded to him, instead he received these recommendations from a colleague at Pholosong Hospital. He maintained that there was no pending charge sheet, no pending disciplinary

action at the time of his appointment at Tembisa Hospital or prior thereto relating to the allegations.

Interview with Dr Mthunzi

- 6.1.18 The Investigation team interviewed Dr Mthunzi on 09 June 2023 regarding his appointment and he stated that:
- 6.1.18.1 He joined Pholosong Hospital as the Acting CEO in mid-2018 until he was formally appointed. He was then asked to act at Tembisa Hospital in April 2021 and the post of the CEO of Tembisa Hospital was advertised in May 2021. He applied and was appointed;
- 6.1.18.2 The investigation at Pholosong Hospital was about the Human Resources process in recruitment and selection and not about him as the CEO;
- 6.1.18.3 The investigator of the Pholosong Hospital matter agreed in an interview he held with her on 04 February 2021, that she was not investigating him, but the process that was taken to appoint contract workers. He never heard from the investigator after the interview;
- 6.1.18.4 He was asked by Dr Mokgethi to act at Tembisa Hospital in April 2021 and received a letter from her to act. The position of CEO was advertised around May 2021 after he had acted for two (02) months, and he went through the process of recruitment and selection;
- 6.1.18.5 He applied and was invited for an interview on or around 12 May 2021. He did not disclose any case pending against him because he did not know or have knowledge that he was being investigated;
- 6.1.18.6 Whilst he was being interviewed for the Tembisa Hospital CEO post on 12 May 2021, he believed that the investigation was not finalised as he never met with the investigator again. The investigator indicated to him that they

wanted to check the process of HR. It was not a misconduct because he did not even receive an allegation letter or letter of misconduct;

- 6.1.18.7 During the interview for CEO of Tembisa Hospital on the section of HR Quality Assurance questions, the panel informed him that the GDoH is mandated to conduct vetting which includes qualification check, citizenship verification, criminal check, financial suitability check and ID verification;
- 6.1.18.8 He was asked if he had any objection, and his reply was that he did not have. He was also asked to declare in terms of the following: criminal offence, investigation on misconduct, solvency, precautionary suspension and dismissal. He indicated “No” to the above;
- 6.1.18.9 If a person is being investigated for misconduct, he/she must be informed in writing or information must be disseminated to the person. On 12 May 2021, the day of his interview, he never had a report on investigation or information that he was being investigated;
- 6.1.18.10 Dr Kgongwana and Mr Motsogi were in a better position to inform the panel if there was a disciplinary process against him at the time of the interview, but they did not. They were part of the interview panel and never informed him that there was a disciplinary matter pending against him;
- 6.1.18.11 On 15 September 2021, he received recommendations from his colleague at Pholosong Hospital, signed by Dr Zungu, indicating that he must get a final written warning;
- 6.1.18.12 On 21 September 2022, the GDoH released a statement on queries raised by the Complainant. The Legislature’s response on 21 June 2022, indicated that the investigator did not follow due process and that he was not facing disciplinary action; and

6.1.18.13 He made an error on his Z83 when he indicated “Yes” on the question that read as follows: “Do you have any disciplinary process against you”. He also made another error when he was asked if he is a South African Citizen on the Z83 form by indicating “No”.

6.1.18.14 *Documentary evidence received from Dr Mthunzi*

Investigation Report dated 15 September 2021

- (a) Dr Mthunzi provided the Investigation Team with a report titled: “*Investigation report on allegations of employer failing to follow recruitment and selection Policy by Pholosong Hospital Management*”.
- (b) The report makes findings and recommendations regarding allegations of failure by Pholosong Hospital Management to follow their Recruitment and Selection policy in the appointment of three (03) Food Service Aids without advertising the posts.
- (c) One of the recommendations of the report was that Dr Mthunzi be progressively disciplined (Final written warning) for recommending that the three (03) employees should be appointed permanently when the posts were advertised as contracts.
- (d) The report was prepared by Ms Mpho Ramudzuli (Ms Ramudzuli), the Labour Relations Officer of the GDoH, recommended for approval by Mr Cave on 08 September 2021 and approved by Dr Zungu on 15 September 2021.

Media Statement of the GDoH

- 6.1.19 In a media statement of the GDoH, dated 21 September 2022 titled “*Gauteng Health Dismisses sensational allegations made by Mr Jack Bloom related to the appointment of Tembisa CEO*”, it is stated that:
- 6.1.19.1 The GDoH would like to dismiss the deliberate distortion of facts by the Member of the Provincial Legislature, Mr Jack Bloom, on circumstances regarding the appointment of Dr Mthunzi;
- 6.1.19.2 Mr Bloom in his recent statement stated that the GDoH falsely denied that Dr Mthunzi was appointed whilst facing disciplinary charges and that he was subsequently given a final written warning;
- 6.1.19.3 The GDoH would like to categorially state that at the time of his appointment, Dr Mthunzi was not facing any disciplinary charge or action;
- 6.1.19.4 Dr Mthunzi was not given any final written warning and there was no disciplinary process against him as alleged by Mr Bloom;
- 6.1.19.5 On 15 September 2021, the then acting Head of the GDoH signed a report prepared by an internal investigator recommending that Dr Mthunzi and other officials should be given a final written warning(s) without applying the *audi alteram partem rule* (which is the principle of hearing the other side in any matter);
- 6.1.19.6 Following the commitment made by the MEC for Health when responding to the recent Legislature question, the matter was further investigated, the GDoH wishes to emphasise the following factors:
- (a) The investigator acted *ultra vires* in that they investigated and pronounced on a sanction without following due process;

- (b) The Legislature's responses by the MEC on 20 June 2022, was correct that Dr Mthunzi was not found guilty of any previous misconduct charges; and
- (c) At the time of responding to the Legislature's question on 20 June 2022, the Accounting Officer and Head of Hospital Service were not aware of the report in question.
- (d) The GDoH dismisses any assertion that the appointment of Dr Mthunzi was "dodgy" and wishes to state on record that his appointment followed an open and transparent recruitment and selection process.

Telephonic interview with Ms Ramudzuli, Labour Relations Officer of the GDoH

- 6.1.20 On 06 December 2023, after numerous requests by the Investigation Team to meet with Ms Ramudzuli regarding the investigation she conducted, she indicated that she was uncomfortable answering the questions about the investigation and the report, as the GDoH had already issued a media statement distancing itself from the report.

Interviews with officials of the GDoH

- 6.1.21 On 13 November 2023, the Investigation Team had a meeting with Mr Errol Ogle, the Chief Director: HR; Mr Lucky Motsogi, the Director: HR and Ms Lebogang Sebokolodi, the HR Practitioner, who are the functionaries of the GDoH. The purpose of the meeting was to verify whether pre-employment screening was done by the shortlisting panel, interviewing panel and HR regarding the appointment of Dr Mthunzi.

- 6.1.22 The functionaries of the GDoH responded as follows:

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- 6.1.22.1 The only vetting that was done was the qualifications checks, reference checks on 17 May 2021 and they also provided evidence that these checks were done;
- 6.1.22.2 They did not conduct financial stability check, citizenship/identity screening and criminal records checks as the GDoH does not have a service provider to do such checks because of budgetary constraints and it was during the COVID-19 pandemic restrictions;
- 6.1.22.3 They have a huge backlog regarding conducting personnel suitability checks as required by Paragraph 7.3 of the GDoH HR Policy on Recruitment and Selection; and
- 6.1.22.4 Regarding the discrepancies in the Z83 form, they confirmed that this is an important document that cannot be overlooked as it assists the GDoH in selecting a person for an advertised position.

Response from Mr LT Makhode, the Department of Home Affairs Director General

- 6.1.23 On 25 July 2023, the Investigation Team requested verification of Dr Mthunzi's citizenship from Mr LT Makhode, the Director General of the Department Home Affairs. On 13 September 2023, Mr Makhode responded confirming that according to the Home Affairs records, Dr Mthunzi is a South African citizen.

Response to the section 7(9) notice by the former MEC of Health, Dr Mokgethi

- 6.1.24 On 04 June 2024, a Notice in terms of section 7(9) was sent *via* email to Dr Mokgethi. The Public Protector received a response, dated 06 June 2024 from her wherein she stated *inter alia* the following:

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- 6.1.25.1. She is no longer with the GDoH and this caused her limitation in accessing the file on the appointment of the late Dr Ashley Mthunzi and some documents that she might need to refer to, in her response;
 - 6.1.25.2. During her tenure as the MEC of Health and in one of the extended Management Committee meetings, the issue of vetting was discussed including financial suitability, qualifications and criminal record. This discussion was prompted by a finding on the internal control deficiencies by the Auditor General on the GDoH that all senior management positions were filled without vetting prior to her arrival in the GDoH. The management then resolved that all SMS personnel vetting including non-SMS personnel in Supply Chain Management must be done through the departmental Risk Management Office;
 - 6.1.25.3. Feedback was received afterwards informing her that the GDoH was unable to appoint an external service provider to do some of the quality assurance checks for the GDoH and were relying on the vetting process by the State Security Agency (SSA) who also cited capacity challenges and a huge backlog;
 - 6.1.25.4. In addition, GDoH Human resources indicated that the GDoH amended the appointment letters with the insertion of a clause to make provision for all SMS who had not been subjected to suitability checks and security vetting to understand that should they receive negative reports their appointments will be terminated. However, Labour relations processes will be followed according to the recruitment policy of the department; and
 - 6.1.25.5. Regarding the issue of the appointment of the late Dr Ashley Mthunzi whilst facing disciplinary action, she stated that the only time she learned about it was when the question was posed by Hon Bloom in the Gauteng Provincial Legislature (GPL) and the GDoH responded.

6.1.25.6. The process of appointment for SMS members required that, the Accounting Officer or Head of the Department make recommendations to appoint or not to appoint to the Executive Authority. During that time, she was not made aware of any pending disciplinary or charge against the late Dr Ashley Mthunzi.

Response to the notice in terms of section 7(9) by Dr Kgongwana

6.1.25 On 04 June 2024, a notice in terms of section 7(9) was sent *via* email to Dr Kgongwana. The Public Protector received his response, dated 22 June 2024, wherein he stated *inter alia* the following:

6.1.26.1. He was never made aware nor informed about any disciplinary activities by the GDoH against the late Dr Mthunzi. No details nor information were shared with him from anybody regarding the matter of the alleged disciplinary actions.

6.1.26.2. He was never informed and had no knowledge/awareness of any prior disciplinary activities against Dr Mthunzi prior to him moving from CEO of Pholosong Hospital to Acting CEO of Tembisa Hospital, and subsequently to being appointed as the CEO of the Tembisa Hospital.

6.1.26.3. No disciplinary actions were disclosed to him, even during the work-related interactions with Dr Mthunzi as his supervisor.

6.1.26.4. Even when he got to learn about the alleged disciplinary actions against the Dr Mthunzi after the "*Skinny Jeans Saga*" at Tembisa Hospital, no details were made available to him. The Public Protector's section 7(9) report provided him with the actual details of what was happening then, around the allegations and disciplinary activities against the late Dr Mthunzi;

6.1.26.5. In conclusion, he was never informed nor made aware of any allegations or disciplinary actions against the late Dr Mthunzi. The "*Skinny Jeans Saga*"

provided a learning to him about the existence of such disciplinary activities against the CEO of Tembisa Hospital. Furthermore, no details of the allegations were made available to the Office of the ADDG Hospital Services; and

- 6.1.26.6. He does not have the information regarding the reasons as to why the vetting, criminal records and citizens checks were not done by GDoH.

Response to the notice in terms of section 7(9) by Dr Mathebula

- 6.1.26 On 04 June 2024, a notice in terms of section 7(9) was sent *via* email to Dr Mathebula. The Public Protector received her response, dated 26 June 2024, wherein she stated *inter alia* the following:

- 6.1.27.1. Her participation in the recruitment of Dr Mthunzi was only regarding shortlisting and interviewing as a panellist, the initial steps of the recruitment process. Vetting processes and reference checking and competency testing were the responsibility of GDoH's Human Resource, and they were conducted for recommended candidates only. She therefore is not able to explain why the suitability checks were not conducted;

Response to the notice in terms of section 7(9) by Mr Malotana

- 6.1.27 On 04 June 2024, a notice in terms of section 7(9) was sent *via* email to Mr Malotana. The Public Protector received his response, dated 26 June 2024, wherein he stated *inter alia* the following:

- 6.1.28.1. The GDoH acknowledges the remedial action proposed on paragraph 8.6 of the section 7(9) notice which states:

“Within ninety (90) calendar days from the date of the final report, take effective and appropriate corrective action against the shortlisting and

interview panel, who are still in the employ of the GDoH for the irregularities identified in this Notice in connection with the appointment of Dr Mthunzi, in line with section 15 (6) (a) of the PAMA”.

- 6.1.28.2. He wished to bring to the attention of the Public Protector that the following officials who constituted the Selection Committee are no longer in the employ of the GDoH: Dr Mathebula, Dr Kgongwana, Ms Mmope and Mr Cave.
- 6.1.28.3. He also acknowledged the non-compliance with Public Service Regulations on conducting suitability checks for all staff. A budget has been approved to address this challenge. The procurement process has commenced to appoint a service provider to conduct Personnel Suitability Checks as there is no capable staff to perform this responsibility.

Response to the notice in terms of section 7(9) by Mr Motsogi

- 6.1.28 On 04 June 2024, a notice in terms of section 7(9) was sent *via* email to Mr Motsogi. The Public Protector received his response, dated 27 June 2024, wherein he stated that he aligns himself with the response provided by the GDoH.

Applicable law

Public Service Act (PSA), 1994

- 6.1.29 Section 9 of the PSA dealing with Appointments in Public Service provides that, an Executive Authority may appoint any person in his or her department in accordance with this Act and in such manner and on such conditions as may be prescribed.

Public Service Regulations, 2016

- 6.1.30 Regulation 57(1)(c) provides that an Executive Authority shall subject an employee or a candidate for employment to personnel suitability checks as directed by the Minister;
- 6.1.31 Regulation 67(9) provides that before making a decision on an appointment or the filling of a post, an Executive Authority shall:

“satisfy herself or himself that the candidate qualifies in all respects for the post and that his or her claims in his or her application for the post have been verified as directed by the Minister;”.

Employment Circular 44 of 2020

- 6.1.32 On 12 November 2020, the Director General of the Department of Public Service and Administration, Ms Yoliswa Makhasi, approved a Circular 44 of 2020 titled, *“WITHDRAWAL OF OLD PRESCRIBED APPLICATION FOR EMPLOYMENT FORM Z83 AND IMPLEMENTATION OF AMENDED Z83 AS PER GOVERNMENT GAZETTE NUMBER 43872”*
- 6.1.33 Paragraph 3 of the circular provides for the new Z83 form. It indicates that any applicant who submits the application form on or after 01 January 2021 shall do it on the prescribed new Z83 form. The Z83 form states that its purpose is to assist a government department in selecting a suitable person for an advertised post.
- 6.1.34 The Departments are advised to take note that all fields of the new Z83 form are compulsory, and the signature of the applicant is mandatory. Departments must take the necessary steps and appropriate means to

comply with this requirement. Furthermore, the Z83 must be completed in full and signed in order for an applicant to be considered.

Senior Management Service–Public Service Handbook 2003 (SMS Handbook)

6.1.35 Paragraph 8.3 of the SMS Handbook, dealing with Screening, provides that:

“

- (1) *After the closing date, the application documents should be screened to determine whether applicants comply with the basic criteria laid down in the advertisement. When in doubt, additional information should be requested. The thoroughness with which this phase is conducted determines the success of the selection activities to follow. During this phase candidates who do not comply with the minimum advertised requirements may be eliminated with noting of reasons, resulting in a preliminary selection pool.”*

6.1.36 Paragraph 8.5(1) deals with the role of the selection committee and provides that a selection committee is to:

“

- (a) *establish the suitability of a candidate who complies with the job requirements;*
- (b) *determine the relative suitability of the various candidates as objectively as possible;*
- (c) *render justifiable and valid advice to the final decision maker; and*
- (d) *formulate and record the reasons for specific recommendations”.*

6.1.37 Paragraph 8.6(1) provides that the next stage in the selection process is the interview and that during the interview, the selection committee is granted an opportunity to probe into the applicant’s background, experience and interests

- 6.1.38 Paragraph 8.6.3(d) provides that the interviewing panel must study the information that appears on the candidate's application form and CV.

The GDoH Recruitment and Selection Policy approved by the Acting Head of Health dated 10 May 2017 (Policy)

- 6.1.39 Paragraph 1 provides that this is a Policy on Recruitment and Selection of employees and filling of vacant posts in the GDoH and it ensures that there is a fair, consistent, transparent and efficient way of attracting, selecting and appointing the necessary talented employees to enhance performance and effective service delivery.

- 6.1.40 Paragraph 6.5 of the Policy provides as follows:

“All new appointees or transferees will be subjected to a personnel suitability checking process as an inherent requirement of all posts.”

- 6.1.41 Paragraph 7.3 of the Policy deals with recruitment and selection implementation process in the GDoH and provides as follows:

“Personnel Suitability Checks (PSC) – Vetting

Vetting includes processes such as qualifications check, reference check, financial stability check, citizenship/identity screening and criminal records checks (personal security check)”

- 6.1.42 Paragraph 7.7.6(b) of the Policy, dealing with Appointment/Post Promotion, provides that no official may assume duty unless an application form for employment (Z83) accompanies the approval when it is forwarded to Human Resources.

Public Administration Management Act, 2014 (PAMA)

- 6.1.43 Section 15 (6)(a) of the Public Administration Management Act provides that notwithstanding subsection (5)(b), every institution has the responsibility to ensure that it deals with matters relating to misconduct without undue delay.

Analysis

- 6.1.44 Evidence at the Public Protector's disposal indicates that the GDoH appointed Dr Mthunzi as the CEO of Tembisa Hospital with effect from 01 July 2021. Upon analysis of the evidence, it was observed that in the Z83 form which was signed by Dr Mthunzi wherein he stated that he was not a South African citizen and further responded positively to the question of whether he had a pending disciplinary enquiry.
- 6.1.45 Furthermore, the advert indicates that the post of CEO at Tembisa Hospital required that *"Non-RSA Citizens/Permanent Resident Permit Holders must attach a copy of their Permanent Residence Permits to their applications"*.
- 6.1.46 There is no evidence to show that the functionalities enquired from Dr Mthunzi about the declarations that may have affected his suitability for the post during the recruitment and selection process.
- 6.1.47 In terms of Paragraph 6.5 of the GDoH's Policy, the functionalities of GDoH are obligated to subject all new appointees to a personnel suitability checking process as an inherent requirement of all posts.
- 6.1.48 In terms of Paragraph 8.3 of the SMS Handbook, the functionalities of the GDoH had an obligation to ensure that after the closing date, applications are screened to determine whether applicants comply with the basic criteria laid down in the advertisement. Furthermore, the selection committee was

required to study the information that appears on the candidates' application form and CV as provided in Paragraph 8.6.3(d) of the SMS Handbook.

- 6.1.49 The evidence before the Public Protector indicates that the functionaries of the GDoH did not adequately conduct pre-employment screening before the appointment of Dr Mthunzi. This is confirmed by the functionaries in their responses to the notice in terms of section 7(9), in which they stated that they did not conduct all the requisite personnel suitability checks, such as the verification of financial stability, citizenship/identity screening, criminal record and personal security, due to capacity constraints and the absence of a service provider.
- 6.1.50 The Public Protector rejects the assertion by the GDoH that they could not conduct screening due to the absence of a service provider however, the verification of citizenship and existence of pending disciplinary proceedings, could have been confirmed by the functionaries directly with the candidate and with his current employer (the same department), respectively.
- 6.1.51 Regarding the interview of Dr Mthunzi, Dr Mathebula stated that she could not remember much about the interview process, however she recalls that as a panel, they did not scrutinise Dr Mthunzi's application because he was already in the system. She cannot recall if Dr Mthunzi was asked about the disparities on his Z83 form.
- 6.1.52 Although Dr Kgongwana stated that he could not remember what happened that day, strangely, he only remembers that Dr Mthunzi's response to the question during the interview, regarding pending disciplinary action was "No". The Public Protector views Dr Kgongwana's version as less probable than that of Dr Mathebula. Considering the totality of the responses by the various panel members, it is unlikely that only one panel member has a

clear recollection of Dr Mthunzi's response to that particular question, while he could not remember anything else.

- 6.1.53 The Public Service Regulation 57(1)(c) also places a duty on the Executive Authority to subject an employee or a candidate for employment to personnel suitability checks as directed by the Minister. Furthermore, Regulation 67(9) enjoins the Executive Authority to satisfy herself/ himself that the candidate qualifies in all respects for the post and that his/her claims in his or her application for the post have been verified before he/she makes an appointment. The Public Protector notes that Dr Mokgethi, who was the Executive Authority at the time approved the submission for Dr Mthunzi's appointment on 01 July 2021.
- 6.1.54 The evidence before the Public Protector indicates that Dr Mokgethi as the Executive Authority of the GDoH approved the appointment of Dr Mthunzi on 01 July 2021. The evidence further indicates that the approval was based on a recommendation in the same memo from Mr Malotana, however the memo was silent on the discrepancies in the Z83 form.
- 6.1.55 In this instance Mr Malotana as the recommender, and the functionaries ought to have disclosed the discrepancies identified in Dr Mthunzi's Z83 form and interview.
- 6.1.56 Accordingly, Dr Mokgethi cannot absorb liability for the appointment despite her approval of the appointment because such approval was based on a recommendation which did not fully disclose the facts surrounding the recruitment process.
- 6.1.57 In his response to the notice in terms of section 7(9), Dr Mthunzi indicated that he was unaware of an investigation that was proceeding against him, however, he was only aware of an investigation relating to the alleged

irregular recruitment and selection process of three (03) Food Service Aids while he was the CEO of Pholosong Hospital.

- 6.1.58 The Public Protector has considered the reasons provided by Dr Mthunzi pertaining to why he indicated conflicting versions on his Z83 form, and later on during the process of his recruitment.
- 6.1.59 It is important to emphasise at this point that the Public Protector's investigation did not seek to make a determination on the legitimacy of the disciplinary process against Dr Mthunzi, nor does it seek to make a determination as to whether Dr Mthunzi deliberately sought to misrepresent himself or mislead the panel.
- 6.1.60 The investigation focused on the irregularities in the appointment of Dr Mthunzi's.

Conclusion

- 6.1.61 Based on the evidence at the disposal of the Public Protector and the application of the law thereto, there is reasonable cause to conclude:
- 6.1.61.1 The functionaries of the GDoH, did not fully discharge their requisite duties and governance obligations insofar as personnel suitability checks and verification of the information indicated in Dr Mthunzi's Z83 form.
- 6.1.62 Considering the above administrative deficiencies and/or non-compliance by the functionaries of the GDoH, it may be concluded that these conduct lapses are not consistent with the standard contemplated in the GDoH Recruitment and Selection Policy, Public Service Regulations, and the SMS Handbook.
- 6.1.63 The Interview Panel that conducted Dr Mthunzi's interview, did not properly ventilate the issue relating to the discrepancies in his Z83 form.

- 6.1.64 Mr Malotana's recommendations to Dr Mokgethi, contained material omissions and were not a true reflection of Dr Mthunzi's candidacy.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard that the GDoH should have complied with, the Public Protector makes the following adverse findings against the GDoH:

7.1. **Whether there were irregularities by the functionaries of the Gauteng Department of Health during the recruitment and selection process of Dr Ashley Mthunzi as the CEO of Tembisa Hospital, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(4)(a)(i) of the Public Protector Act**

7.1.1 The allegation that there were irregularities by the functionaries of the GDoH during the recruitment and selection process of Dr Ashley Mthunzi as the CEO of Tembisa Hospital, **is substantiated**.

7.1.2 The functionaries of the GDoH did not adequately conduct pre-employment screening before the appointment of Dr Mthunzi. They did not conduct all the requisite personnel suitability checks, such as the verification of financial stability, citizenship/identity screening, criminal record and personal security. The verification of Dr Mthunzi's citizenship and existence of pending disciplinary proceedings, could have been confirmed by the functionaries directly with the candidate and with his current employer (the same department), respectively.

7.1.3 The Shortlisting and Interview Panel that conducted Dr Mthunzi's interview, did not properly ventilate the issue relating to the discrepancies in his Z83 form. Dr Mthunzi made material inaccuracies in his Z83 application form

which should have prompted the functionaries of the GDoH to probe this information and determine its effect on the suitability of Dr Mthunzi for the post. This was contrary to the provisions of Paragraph 8.3 of the SMS Handbook.

7.1.4 Mr Malotana's recommendations to Dr Mokgethi, contained material omissions and were not a true reflection of Dr Mthunzi's candidacy.

7.1.5 Considering the above material irregularities and/or non-compliance by the functionaries of the GDoH, the Public Protector finds that their conduct is not consistent with the standard contemplated in Paragraph 1, 6.5 and 7.3 of the GDoH Policy, Paragraph 8.3, 8.6.1 and 8.6.3(d) of the SMS Handbook.

7.1.6 Accordingly, the conduct of the functionaries of the GDoH amounts to improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(4)(a)(i) of the Public Protector Act.

8. REMEDIAL ACTION

8.1. The Public Protector is empowered in terms of section 182(1)(c) of the Constitution to take appropriate remedial action with a view of redressing the conduct referred to in this notice upon conclusion of an investigation where adverse findings are made.

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

- 8.3. The Public Protector has taken cognisance that Dr Mokgethi who was the MEC and the final approver for the appointment of Dr Mthunzi as the CEO of Tembisa Hospital is no longer in the of the GDoH.
- 8.4. Further cognisance is taken of the fact that the Selection Committee members for the appointment of Dr Mthunzi as the CEO of Tembisa Hospital are no longer in the employ of the GDoH which include Dr M Mathebula, Dr F Kgongwana, Ms N Mmope and Mr S Cave.
- 8.5. The appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, are the following:

The Member of the Executive Council for Health

- 8.6. Take cognisance of the report and ensure implementation of the remedial action in terms of section 133 of the Constitution.


The Head of Department: GDoH

- 8.7. Within **one hundred and twenty (120) calendar days** from the date of the final report, take effective and appropriate steps and embark on a procurement process to appoint a service provider to conduct Personnel Suitability Checks to all SMS personnel including non-SMS personnel in Supply Chain Management in line with Regulation 57(1)(c) Public Service Regulations and Paragraph 6.5 of the GDoH Recruitment and Selection Policy.

9. MONITORING

- 9.1 The Head of the Department to submit an action plan to the Public Protector within **ninety (90) calendar days** from the date of this report on the implementation of the remedial action referred to in paragraph 8 above.

- 9.2 The submission of the implementation plan and the implementation of the remedial action shall, in the absence of a court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.
- 9.3 In line with the Constitutional Court Judgement in the matter of *Economic Freedom Fighters*, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial action prescribed in this Report are legally binding on the GDoH unless there is an Interim Interdict or Court Order directing otherwise.



ADV. KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 30 JUNE 2024

Assisted by: Ms Ponatshego Mogaladi
Executive Manager: Investigations