

**CLOSING 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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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER  
CONDUCT BY THE UNIVERSITY OF PRETORIA TO EXCLUDE MS TK CHIMBWANDA  
DURING THE SELECTION PROCESS FOR A BACHELOR OF SOCIAL SCIENCE  
HONOURS PROGRAMME IN PSYCHOLOGY**

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## **1. INTRODUCTION**

- 1.1. This is the closing report of the Public Protector in terms of Section 182 (1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and Section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. This report relates to allegations of improper conduct by the University of Pretoria (the University), by excluding Ms T K Chimbwanda (the Complainant) with Student Number 15303986 during the selection process for a Bachelor of Social Science Honours programme in Psychology for 2019 academic year.

## **2. THE COMPLAINT**

- 2.1. On 15 February 2019, the Public Protector received a complaint from the Complainant on the following allegations:
- 2.1.1 That during 2018, she received a letter from the University dated 19 November 2018 advising her that her application for admission to the Bachelor of Social Science Honours Psychology programme for 2019 was successful. Subsequent to that, on 05 January 2019, she paid a total amount of R5000-00 (Five Thousand Rand) into the University's bank account towards her tuition fees.
- 2.1.2 The Complainant further alleged that she was later informed by the University that her application was not accepted for her to continue with the above mentioned programme.



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

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

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

*“The Public Protector has power as regulated by national legislation:*

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

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

3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate Alternative Dispute Resolution (ADR) mechanisms.

3.5. In the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016, the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:

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- 3.5.1 The remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, and 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” (para 73);
- 3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
- 3.5.3 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 (para 67);
- 3.5.4 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 (para 68);
- 3.5.5 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 (para 69);
- 3.5.6 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 (para 70);

- 3.5.7 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 (para 71);
- 3.5.8 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 (para 71(c));
- 3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));
- 3.5.10 “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 (para 71(e));
- 3.6. In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747 (13 December 2017); 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the Court held as follows, when confirming the powers of the Public protector:
- 3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (para 79);
- 3.6.2 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted

on them under the constitution where that is required to remedy the harm in question (para 82);

3.6.3 The Public Protector, in appropriate circumstances, has the power to direct the President to appoint a Commission of Inquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (para 85 and 152);

3.6.4 There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);

3.6.5 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 and 101):

- (a) Conduct an investigation;
- (b) Report on that conduct; and
- (c) To take remedial action.

3.6.6 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

3.6.7 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105).

3.6.8 The fact that there are no firm findings on the wrongdoing, this does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (para 107 and 108);

3.6.9 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action ( para 112);

3.7 The University is an organ of state and its conduct amounts to conduct in state affairs, as a result the complaint falls within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

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

## **4. THE INVESTIGATION**

### **4.1. Methodology**

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

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

4.1.3. This complaint was classified as an Administrative Justice and Service Delivery complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act.

### **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:

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- 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 improper conduct and/or maladministration?
  - d) In the event of improper conduct and/or maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where she would have been had the improper conduct and/or maladministration not taken place?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the University improperly excluded the Complainant during the selection process for a Bachelor of Social Science Honours programme in Psychology and whether such conduct caused prejudice to the Complainant as envisaged in section 6(4)(a)(v) of the Public Protector Act.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the University or an organ of state to prevent maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the improper conduct and/or maladministration. Where the Complainant has suffered prejudice, the idea is to place her as close as possible to where she would have been had the University or organ of state complied with the regulatory framework setting the applicable standards for good administration.

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**4.3. On analysis of the complaint, the following issue was considered and investigated:**

4.3.1. Whether the University improperly excluded the Complainant during the selection process for a Bachelor of Social Science Honours programme in Psychology for 2019 academic year?

**4.4. The Key Sources of Information:**

**4.4.1. Documentation and correspondence sent and received:-**

4.4.1.1. Copy of a letter from the University of Pretoria to the Complainant dated 19 November 2018;

4.4.1.2. Proof of payment from ABSA dated 11 February 2019;

4.4.1.3. Letter from the University of Pretoria to PPSA dated 26 March 2019;

4.4.1.4. Copy of the University of Pretoria Under and Postgraduate Programmes: Department of Psychology;

4.4.1.5. Email correspondence from PPSA to the University requesting further information dated 9 April 2019;

4.4.1.6. Letter from the University to PPSA with supporting documents dated 30 April 2019;

4.4.1.7. Discretionary Notice to the Complainant dated 2 March 2020;

4.4.1.8. Letter from PPSA to the University dated 17 March 2020; and

4.4.1.9. Letter from the University to PPSA dated 30 April 2020.

#### **4.4.3 Legislation and other prescripts**

4.4.3.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);

4.4.3.2 Public Protector Act, 23 of 1994 (Public Protector Act); and

4.4.3.3 University of Pretoria Year Book, 2018.

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

#### **5.1 Regarding whether the University improperly excluded the Complainant during the selection process for a Bachelor of Social Science Honours programme in Psychology for 2019 academic year:**

##### *Common cause facts*

5.1.1 It is common cause that the Complainant applied to the University / Department of Psychology in order to be admitted into a Bachelor of Social Science Honours programme in Psychology for 2019 academic year.

5.1.2 It is also not in dispute that the University issued the Complainant with a letter dated November 2018, conditionally accepting her into the programme subject to the final selection process by the Department of Psychology.

5.1.3 On 5 January 2019, the Complainant paid an amount of R5000-00 (Five Thousand Rand) into the University's bank account.

5.1.4 During the final stage of the selection process, the Complainant was not accepted into the programme.

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*Issues in dispute*

- 5.1.5 The issue for determination is whether the University improperly excluded the Complainant during the selection process for a Bachelor of Social Science Honours programme in Psychology for 2019 academic year.
- 5.1.6 The Complainant alleged that during 2018, she received a letter from the University dated 19 November 2018 advising her that her application for admission to the Bachelor of Social Science Honours Psychology programme for 2019 was successful. Subsequent to that, on 05 January 2019, she paid a total amount of R5000-00 (Five Thousand Rand) into the University's bank account towards her tuition fees.
- 5.1.7 The Complainant was later informed by the University that her application was not accepted.
- 5.1.8 The University through a correspondence dated 26 March 2019, from the Head of the Department of Psychology in the Faculty of Humanities, Professor Tharina Guse, submitted that a total of 800 applications were received from the students who were interested to study for a Bachelor of Social Science Honours programme in Psychology for the year 2019.
- 5.1.9 In terms of the numbers that were to be admitted, the University confirmed that only 60 students were to be registered for the 2019 academic year.
- 5.1.10 As stipulated on the Faculty Brochure, the minimum requirement for admission to the programme is 70%.
- 5.1.11 Due to a high number of applications received by the University for the programme, the University decided to implement further selection processes as follows:

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- 5.1.11.1 Phase 1: Conditional selection based on available 3<sup>rd</sup> year marks when the selection process closed in September 2018. All the applicants were ranked based on these marks and the top 111 students were conditionally selected, pending final marks and space in the programme.
- 5.1.11.2 Phase 2: Final selection in January 2019. The 111 students' final marks for the second semester of Psychology 3<sup>rd</sup> year were captured to calculate a final average. Students were again ranked based on these marks and the top 55 students were finally admitted.
- 5.1.11.3 The cut-off average mark was 81% after ranking from highest marks downwards.
- 5.1.12 It was further confirmed by the University that not only did they take the academic marks into consideration for ranking students, but race, gender and disability were considered in order for the University to meet its transformation targets.
- 5.1.13 The University further confirmed that the Complainant was conditionally accepted in November 2018 after phase 1 of the selection process, pending her final marks and space in the programme. Hence the Complainant was issued with a letter dated 19 November 2018.
- 5.1.14 In phase 2 of the selection process, the Complainant's average marks were 77%, which was below the cut-off average marks of 81%.
- 5.1.15 Due to the fact that the Complainant had already paid an amount of R5000-00, the University indicated that the payment of the said amount was not based on any invoice, as a result it was fully refundable.
- 5.1.16 On 9 April 2019, a follow up enquiry was sent to the University requesting further information.

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- 5.1.17 On 30 April 2019, the University submitted a copy of the Faculty Policy / Yearbook of the Faculty of Humanities as well as the Selection Criteria documents.
- 5.1.18 These documents clearly states the admission requirements for Bachelor of Social Science Honours programme in Psychology, the selection criteria and the panel of people who are members of the selection committee.
- 5.1.19 The selection panel consisted of:-
- 5.1.19.1 The Head of the Department of Psychology;
  - 5.1.19.2 The Coordinator: Programme Manager;
  - 5.1.19.3 Lecturers involved in training in the respective modules; and
  - 5.1.19.4 Ad-hoc members, who may be co-opted by the Committee.
- 5.1.20 The University also alluded that during 2019 academic year, there were four (4) vacant posts within the Department of Psychology and that has also placed enormous pressure on the Department to present the course, as students are required to conduct a comprehensive research project under the practical supervision of the lectures. As a result, the Department targeted a class size of 55 - 60 students.
- 5.1.21 Further, in determining the number of students to be admitted to the programme, the University also took into account the 2017-2021 Strategic Goals and Principles, as another guideline for the selection process as follows:-
- 5.1.21.1 The percentage of black students relative to the total students cohort's Performance Indicator;
  - 5.1.21.2 The enhancement of access, equity, social justice, diversity and inclusive culture;
  - 5.1.21.3 The provision of educational opportunities to students from diverse communities

and negating the regressive effects of poor socio-economic backgrounds;

5.1.21.4 The advancement of transformation and development imperatives of the post-apartheid dispensation; and

5.1.21.5 The elimination of differential student success rates based on race and gender.

5.1.22 The demographics for the selected and accepted students were as follows:

5.1.22.1 African: 24 selected and 24 accepted.

5.1.22.2 White: 23 Selected and 21 accepted.

5.1.22.3 Coloured: 5 Selected and 4 accepted.

5.1.22.4 Indian: 7 Selected and 6 accepted.

5.1.23 The University advised that the Complainant can apply again in order to be admitted to the programme during 2020 academic year.

5.1.24 On 17 March 2020, further enquiry was made with the University and on 30 April 2020, a report was received from the University summarised as follows:

5.1.24.1 That the University's current strategic transformation initiatives is to select 60% black students from the designated groups and 40% white students;

5.1.24.2 The University confirmed that all the vacant posts that existed within the Department of Psychology were filled in during 2020 academic year.

5.1.24.3 It was also brought to the attention of the Public Protector that the Complainant had an opportunity to apply again for admission into the programme during 2020 academic year, however, she did not apply.

5.1.25 On 19 June 2020, a Discretionary Notice was sent to the Complainant, detailing the outcome of the Public Protector’s investigation and also affording her ten (10) days to respond to the Discretionary Notice. No response was received from the Complainant in this regard.

*Application of the relevant law & evaluation of evidence*

5.1.26 Section 195 (1) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including, *inter alia*, the promotion and maintenance of a high standard of professional ethics and ensuring that public “services are provided impartially, fairly, equitably and without bias”, as per section 195(1)(a) and (d).

5.1.26.1 According to section 195(1)(a) and (d), the University has an obligation to ensure that its administration is conducted in a manner that is impartial, fair, equitable without prejudicing any party.

5.1.27 A copy of the Faculty Policy / Yearbook of the Faculty of Humanities as well as the selection criteria documents states the admission requirements for Bachelor of Social Science Honours programme in Psychology as follows:

5.1.27.1 *“A relevant bachelor’s degree recognised by the Senate of the University of Pretoria with a minimum of six semester modules in psychology of which at least two semester modules must have been obtained at third year level.*

5.1.27.2 *An average of 70% is required for psychology modules.*

5.1.27.3 *Research modules (RES 210, 320 or equivalent) should have been included in the undergraduate degree.*

5.1.27.4 *Additional research modules may be required, if deemed necessary by the head of department”.*

5.1.28 In terms of the Selection Criteria Document dated May 2013, signed by Professor David Maree, the following information is stipulated:

5.1.28.1 Members of the officials who constitute the Selection Committee; and

5.1.28.2 The selection criteria and the selection process into the programme.

5.1.29 Upon analysis of the response and supporting documents from the Complainant and the University, it is noted that in terms of a letter dated 19 November 2018, the Complainant was conditionally accepted into the programme subject to the final selection process by the University (Department of Psychology). Accordingly, the admission was at that time not final.

5.1.30 Due to the fact that the Complainant had paid an amount of R5000-00 into the University bank account, the University confirmed that the said payment was not based on any invoice and as a result, it was fully refundable.

5.1.31 The University did comply with the applicable Policy when selecting and accepting the 55 students into the programme.

5.1.32 Below is a breakdown of students who met the final qualifying requirements or criteria of 70%, but were still not accepted into the programme:

<b>African</b>	<b>White</b>	<b>Indian</b>	<b>Coloured</b>
80% x4	85% x4	81% x1	72% x1
78% x1	84% x3	80% x1	
77% x1 (Complainant)	83% x2	78% x1	
76% x3	82% x1	72% x1	

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75% x3	81% x2		
73% x1	79% x1		
70% x1	78% x3		

5.1.33 As stated above, the cut off for the selection of students was 81%. Further, there were 19 (nineteen) students who obtained the final scores between 70% and 85%. Had the Department followed the cut-off of 70% as stipulated in the Faculty Policy and Brochure, the class size of 55 – 60 students would have exceeded the Department's capacity. As a result, the Department selected as close to 55 as possible in order to ensure that the class size does not exceed the required number.

#### *Conclusion*

5.1.34 It can therefore be concluded that the University did comply with the Constitution and in particular, section 195 (1)(a) and (d) in that the selection process was conducted in a fair and transparent manner without any bias.

5.1.35 Further, the selection process and the criteria used by the University has always been there, dating back to 2013.

## **6. FINDINGS**

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

**6.1 Regarding whether the University improperly excluded the Complainant during the selection process for a Bachelor of Social Science Honours programme in Psychology for 2019 academic year:**

- 6.1.1 The allegation that the University improperly excluded the Complainant during the selection process for a Bachelor of Social Science Honours programme in Psychology for 2019 academic year is not substantiated.
- 6.1.2 Based on the applicable evidence, the University did not improperly exclude the Complainant's name during the selection process for a Bachelor of Social Science Honours programme in Psychology. During the first phase of the selection process, the Complainant was conditionally accepted subject to the final selection process. The Complainant was excluded during the second phase of the selection process, whereby the cut off average mark was 81% for the top 55 students and her average mark was 77%, which was below the cut-off average marks. Accordingly, the selection process was conducted by the University in line with the applicable Policy as well as the selection criteria that was applicable during 2018 / 2019 academic years.
- 6.1.3 The conduct of the University in this regard does not constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

## **7. REASON FOR CLOSURE**

- 7.1 In conclusion, with specific reference to the matter that was under investigation as per this report, the Public Protector could not make any findings against the University based on all the allegations raised by the Complainant. In light of the above, the Public Protector is now taking a decision to close this matter.

7.2 Kindly note that the Public Protector is now *functus officio* in the matter and cannot take the matter any further. Should any party wish to challenge this decision he/she is at liberty to approach a court of law and lodge an application for a judicial review of the matter.



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**ADV KHOLEKA GCALEKA**  
**ACTING PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**

**DATE:** 31 March 2021

*Assisted by Ms Amukelani Sombhani, Senior Investigator: Investigations Branch*



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