
PUBLIC PROTECTOR
SOUTH AFRICA

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT, MALADMINISTRATION, AND IMPROPER APPLICATION OF THE PROTECTED DISCLOSURE ACT 23 OF 2000 AND VICTIMISATION OF AN EMPLOYEE BY NTP RADIOISOTOPES SOC LTD.
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"Whistle-blowers are not impiips, a derogatory term reserved for apartheid era police spies. Whistle-blowing is neither self-serving nor socially reprehensible. In recent times its pejorative connotation is increasingly replaced by openness and accountability. Employees who seek to correct wrongdoing, to report practices and products that may endanger society or resist instructions to perform illegal acts, render a valuable service to society and the employer.........

Employees have a responsibility to disclose criminal and other irregular conduct in the workplace. Public servants have an obligation to report fraud, corruption, nepotism, maladministration and other offences. A company can have a cause of action against its directors for failing in their duty to report wrongdoing"

Tshishonga V Minister of Justice And Constitutional Development And Another (JS898/04) [2006] ZALC 104; [2007] 4 BLLR 327 (LC)
Executive Summary

(i) This is my report issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act, 23 of 1994.

(ii) This report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into a complaint lodged by Mr Lionel Adendorf (the Complainant) on 24 November 2016. The Complainant was employed by the Nuclear Technology Product Radioisotopes SOC Ltd (NTP) as a Manager, Group Communications and Stakeholder Relations. He alleged that:

(a) Through an email dated 11 November 2016, he made a protected disclosure to the Group Executive: Global Markets, Mr Jongilizwe Mdekazi (Mr Mdekazi) about maladministration and tender irregularities during the procurement of Future of Fusion Project (Future of Fusion) and Vuma Media by NTP;

(b) In support thereof, on 15 November 2016, he sent a sworn statement to Mr Mdekazi and the Supply Chain Manager, Mr Benneth Machaba (Mr Machaba) about his protected disclosure;

(c) Consequently, disciplinary charges of gross insubordination and blatant refusal to obey direct lawful and reasonable instructions were preferred against him by the NTP on 17 November 2016 with a date of the hearing scheduled for 23 November 2016;

(d) He addressed a letter dated 18 November 2016 to the Senior Manager: Corporate Communication & Stakeholder Relations, Mr A van Haght (Mr van Haght), advising that the notice of disciplinary charges against him, are in contravention of the Protected Disclosure Act, 26 of 2000 (PDA);
(e) The NTP did not properly address his protected disclosure of alleged maladministration and tender irregularities in that during the disciplinary hearing of Mr van Hagt, he was not asked anything about the maladministration and tender irregularities relating to the procurement of Future of Fusion which he had disclosed to the NTP;

(f) He then referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) under case number: NWKD4618-16 (GATW) and NWRB4505. Subsequently, a settlement agreement was purportedly reached between him and the NTP on 26 January 2017;

(g) He thereafter addressed an email to Mr Mdekazi dated 2 March 2017 wherein he confirmed that he was neither questioned about Future of Fusion nor was he informed about the investigation against Mr van Hagt;

(h) On 9 March 2017, he wrote a letter to the Chairperson of the Board, Dr T N Magau (Dr Magau) and informed him that he was not questioned about Future of Fusion. He made further disclosures about other officials of the NTP;

(i) On 10 March 2017, the Head of Department, Human Resources, Mr WJ Oosthuizen (Mr Oosthuizen) informed him that they considered the allegations contained in the letter of ‘disclosure’ dated 9 March 2017, to amount to not more than false, spurious, unfounded, unsubstantiated and defamatory statements, which do not qualify as a protected disclosure, and that as a result thereof the NTP will be taking disciplinary action against him;

(j) Further that the NTP will not permit him to exploit the PDA so as to commit serious acts of misconduct and that he has been previously informed that such conduct will not be tolerated, a warning he obviously chose to ignore;
(k) Disciplinary charges relating to incompatibility, *gross insubordination* and *leaving the workplace without permission* were preferred against him on 23 March 2017 with a date of the hearing scheduled for 30 and 31 March 2017; and

(l) He served Mr Mdekazi with his resignation letter on 29 March 2017 wherein he mentioned that he could no longer tolerate the unbearable working conditions imposed upon him in the last six (6) months. Further thereto, that his resignation would take effect from 30 April 2017.

(iii) The Complainant also made a protected disclosure to me in terms of section 8(1)(a) of the PDA on 24 November 2016.

(iv) In the main, he alleged that he was subjected to occupational detriment following the protected disclosure that he lodged with NTP, this led to him resigning from his employment on 29 March 2017.

(v) **Based on an analysis of the allegations, the following issues were identified to inform and focus the investigation:**

(a) Whether the NTP improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosure Act, 2000, if so;

(b) Whether such improper conduct of the NTP contributed to the Complainant’s resignation from employment; and

(c) Whether due to these circumstances the Complainant was prejudiced by the improper conduct of the NTP as envisaged in section 6(4)(a)(v) of the Public Protector Act.
(vi) The investigation was conducted through correspondence, meetings and interviews with the Complainant and the NTP.

(vii) Key laws and policies taken into account to help me determine if there had been improper conduct by the NTP includes the Constitutional provisions, case law and PDA which makes provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers; to provide for the protection of employees who make a disclosure which is protected in terms of the PDA.

(viii) References were also made to principles developed in previous reports issued by the Public Protector dealing with similar investigations. Such principles are referred to as Touchstones¹.

(ix) On receipt of the complaint, I immediately approached the NTP on 24 May 2017, and informed them of the protected disclosure received and the need to ensure that the Complainant as a whistle-blower must not be subjected to occupational detriment. I further requested that they hold in abeyance the disciplinary enquiry which was already underway to allow the investigation to take its course and then if the outcome of the investigation was that the complaint was not a protected disclosure, they could proceed with the disciplinary enquiry as the allegation of subjection to occupational detriment would have been removed.

(x) The NTP did not accede to my request, instead, they proceeded with the disciplinary charges against the Complainant without affording me an opportunity to verify the allegations they were making against him.

¹Rocking the Boat Report number 4 of 2016/2017, They Called it Justice Report number 23 of 2012/13, USSASA Report number: 13 of 2018/19
(xi) In its response to my notice issued in terms of section 7(9)(a) of the Public Protector Act 23 of 1994 (Notice), the NTP challenged my jurisdiction and argued that I am neither a Labour Court nor a court as contemplated by section 4(2)(a) of the PDA, as such I did not have jurisdiction to deal with the matter.

(xii) Section 181 (1)(a) of the Constitution establishes the office of the Public Protector as an office intended to strengthen constitutional democracy in the Republic. In terms of Section 182 of the Constitution, the Public Protector has the power to:

(1) 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."

(xiii) Therefore, the Public Protector Act 23 of 1994 (PPA) significantly confers wide powers to me to investigate any alleged maladministration, abuse, improper conduct, act or omission arising within the public administration.

(xiv) In the case of Minister of Home Affairs and Another v Public Protector of the Republic of South Africa (308/2017) [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) (15 March 2018), the court held at paragraph 40 and 46 that:

"The Public Protector is not a court, does not exercise judicial power and cannot be equated with a court. Her role is completely different to that of a court and the jurisdictional arrangements of the courts are entirely irrelevant to a determination of the Public Protector's jurisdiction. It is necessary to look to s 182 of the
Constitution and the Public Protector Act to ascertain the bounds of the Public Protector’s jurisdiction. Neither excludes labour matters from her jurisdiction.

The only express exclusion of the Public Protector’s investigative jurisdiction is in relation to decisions of courts. For the rest, her jurisdiction is extremely wide and her mandate is clear: she must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance.”

(xv) My investigation is informed by virtue of the provisions of section 181(2) of the Constitution and the Public Protector Act. The Public Protector has jurisdiction in terms of the Constitution, to investigate any conduct in state affairs or in the public administration which is alleged or suspected to be improper or to result in impropriety or prejudice.

(xvi) Section 2 of the Constitution provides that: “the Constitution is the supreme law of the Republic; any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

(xvii) In light of the above, the NTP’s argument that the Public Protector lacks jurisdiction cannot be sustained.

(xviii) During the investigation process, I issued a Notice dated 20 August 2019 to afford the NTP an opportunity to respond to my provisional findings. However, the aforesaid Notice was inadvertently issued to South African Nuclear Energy Corporation (NECSA). Although the Notice was issued to NECSA, the NTP and its attorneys responded to me on 2 September 2019 and 4 September 2019 respectively.

(xix) On 18 September 2019, I properly served a Notice to Dr Magau and they were requested to respond within (ten) 10 working days.
Having considered the evidence uncovered during the investigation against the relevant regulatory framework, including the response to the section 7(9) Notice, I make the following findings:

(a) **Regarding whether the NTP improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosure Act 26 of 2000.**

(aa) The allegation that the NTP improperly handled a protected disclosure duly made by the Complainant in terms of the PDA, is substantiated.

(bb) The Complainant made a protected disclosure as defined in section 1 read with section 6 of the PDA on 11 November 2016 to Mr Mdekazi with a copy of a sworn statement sent via email on 15 November 2016 and on 9 March 2017, to Dr Magau.

(cc) The Complainant also made a protected disclosure to me in terms of section 8(1)(a) of the PDA read with section 182 (2) of the Constitution on 24 November 2016.

(dd) The disclosures made by the Complainant were in good faith as required by section 8(1)(a) and section 6(1) of the PDA.

(ee) A disciplinary hearing emanating from the Complainant’s disclosure on 11 November 2016 was held against Mr van Hagt. Subsequently, the outcome of the disciplinary hearing against Mr van Hagt dated 12 April 2017, confirmed the issues raised by the Complainant’s disclosure hence a written warning was issued against Mr van Hagt on 29 June 2017 in the outcome of the appeal.
(ff) The NTP preferred disciplinary charges against the Complainant on 17 November 2016, six (6) days after he lodged a disclosure, as such the NTP subjected the Complainant to occupational detriment and this was in violation of section 3 of the PDA, which required that the Complainant should not have been subjected to occupational detriment on account of having made a protected disclosure.

(gg) Further disciplinary charges were preferred against the Complainant on 23 March 2017 on account of having made a disclosure to Dr Magau on 9 March 2017, as such the NTP violated section 3 of the PDA.

(hh) By failing to handle a protected disclosure duly made by the Complainant in compliance with section 1 read with section 6 of the PDA, the NTP acted unlawfully and in violation of section 3 of the PDA.

(ii) Therefore, the conduct of the NTP in this regard amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether such improper conduct of the NTP contributed to the Complainant’s resignation from employment.

(aa) The allegation that the improper conduct of the NTP contributed to the Complainant’s resignation from employment, is substantiated.

(bb) The NTP issued disciplinary charges preferred against the Complainant on 17 November 2016, although the NTP had withdrawn the first disciplinary charges brought against the Complainant in a form of a settlement
agreement entered into between itself and the Complainant on 26 January 2017, the NTP never reinstated the charges.

(cc) Instead, on 23 March 2017 the NTP issued different disciplinary charges against the Complainant, with a date of hearing scheduled for 30 until 31 March 2017.

(dd) This is a clear indication that the NTP made the Complainant’s continued employment intolerable hence he succumbed to the pressure and tendered his resignation letter on 29 March 2017.

(ee) The conduct of the NTP of subjecting the Complainant to occupational detriment through the charges brought against him on 17 November 2016 and 23 March 2017, constitute maladministration and abuse of power as envisaged in section 6(4)(a)(i) of the Public Protector Act, as well as improper conduct as envisaged in section 182(1)(a) of the Constitution.

(c) Regarding whether due to these circumstances the Complainant was prejudiced by the improper conduct of the NTP as envisaged in section 6(4)(a)(v) of the Public Protector Act.

(aa) The allegation that the Complainant was improperly prejudiced by the conduct of the officials of the NTP, is substantiated.

(bb) By proceeding with the disciplinary hearing against the Complainant, the NTP exposed the Complainant to occupational detriment, which ostensibly led to the Complainant’s frustration, despair and psychological suffering, hence his resignation from work.
(cc) Due to the improper conduct of the NTP through its failure to comply with section 3 of the PDA, the Complainant unduly suffered immense financial, emotional and social prejudice mainly involving:

i. Loss of income during the unemployed period;
ii. Emotional pain and suffering endured by him and his family;
iii. Financial expenses relating to opposing the intended charges in the form of legal fees, transport communication and therapy fees;
iv. Apparent blacklisting as a whistle-blower who remains unemployed and facing a reality of exit papers that reflect resignation; and
v. Inconvenience to his family and security concerns relating to the disclosure that was handled by the NTP improperly.

(dd) NTP even when it finally instituted disciplinary proceedings against the subject of the Complainant’s disclosure, Mr Van Haght, it purportedly did so not because of the disclosure, but for completely different reasons. It did not want to lend credence to the Complainant’s protected disclosure and therefore did not observe the objectives and hallmarks of the PDA.

(ee) Therefore, the conduct of the NTP amounts to improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.

(xxii) The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

The Chairperson of the Board of Directors NTP Radioisotopes SOC Ltd to:

(a) Ensure that the following remedial actions are implemented:
(aa) The Complainant to be provided with a letter of apology within ten (10) working days of this report, for subjecting him to occupational detriment, which resulted in him resigning from employment;

(bb) The Complainant should be reinstated to his position within thirty (20) working days from the date of issuing of a letter of apology to him;

(cc) The Complainant should be paid full salary and benefits that would have been due to him had he not been dismissed, together with interest calculated at the applicable rate as prescribed by section 1(2) of the Prescribed Rate of Interest Act No. 55 of 1975 within thirty (30) days from date of issuing of this report;

(dd) The Complainant should be compensated for financial losses incurred by virtue of incidental expenses related to his dismissal within 60 days from date of issuing of this report and upon submission of proof thereof;

(ee) Ensure that he gets further therapeutic support if still required, for suffering the occupational detriment as a whistle-blower

(ff) Provide support to him and employees reporting under him through change management leadership intervention, and provide all team members with knowledge, values and skills to embrace whistle-blowing; and

(gg) Review and or develop, institutionalise and implement Standard Operating Procedures for handling whistle-blowers as provided for in the PDA.
(b) **The Managing Director of the NTP Radioisotopes SOC Ltd**

(aa) The Group Managing Director of NTP, Ms TNM Eboka to:

(bb) Ensure that disciplinary action is taken against the Mr WJ Oosthuizen, Head of Department, Human Resources, NTP for his violation of section 3 of the PDA in how he handled the Complainant’s protected disclosure.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT, MALADMINISTRATION, AND IMPROPER APPLICATION OF THE PROTECTED DISCLOSURE ACT, 2000 AND VICTIMISATION OF AN EMPLOYEE BY NTP RADIOISOTOPES SOC LTD

1. INTRODUCTION

1.1. This is my report 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, 23 of 1994 (Public Protector Act).

1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation:

1.2.1. The Chairperson of the Board, Dr NT Magau.

1.2.2. Group Managing Director of NTP, Ms TNM Eboka.

1.2.3. The Complainant: Mr Lionel Adendorf.

1.3. This report relates to my investigation into allegations of improper conduct, maladministration, and improper application of the Protected Disclosure Act, 2000 and victimisation of an employee by the Nuclear Technology Product Radioisotopes SOC Ltd (NTP).

2. THE COMPLAINT

2.1. The complaint was lodged with me on 24 November 2016 by Mr Lionel Adendorf (the Complainant) as a protected disclosure. The Complainant was employed by the Nuclear Technology Product Radioisotopes SOC Ltd (NTP) as a Manager,
Group Communications and Stakeholder Relations. The Complainant alleged that:

2.1.1. Through an email dated 11 November 2016, he made a protected disclosure to the Group Executive: Global Markets, Mr Jongilizwe Mdekazi (Mr Mdekazi) about maladministration and tender irregularities during the procurement of Future of Fusion Project (Future of Fusion) and Vuma Media by NTP;

2.1.2. In support thereof, on 15 November 2016, the Complainant sent a sworn statement to Mr Mdekazi and the Supply Chain Manager, Mr Benneth Machaba (Mr Machaba);

2.1.3. Instead of responding to his disclosure, disciplinary charges of gross insubordination and blatant refusal to obey direct lawful and reasonable instructions were brought against him by the NTP on 17 November 2016 with a date of the hearing scheduled for 23 November 2016;

2.1.4. He addressed a letter dated 18 November 2016 to the Senior Manager: Corporate Communication & Stakeholder Relations, Mr A van Haght (Mr van Haght), advising that the notice of disciplinary charges are in contravention of the Protected Disclosure Act, 26 of 2000 (PDA);

2.1.5. The NTP did not properly address his protected disclosure of alleged maladministration and tender irregularities in that during the disciplinary hearing of Mr van Haght, he was not asked about the maladministration and tender irregularities relating to the procurement of Future of Fusion which he had disclosed to the NTP about;

2.1.6. He referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) under case number: NWKD4618-16 (GATW) and
NWRB4505. Subsequently, a settlement agreement was reached between him and the NTP on 26 January 2017;

2.1.7. He addressed an email to Mr Mdekazi dated 2 March 2017 wherein he confirmed that he was neither questioned about Future of Fusion nor was he informed about the investigation against Mr van Haght;

2.1.8. On 9 March 2017, he wrote a letter to the Chairperson of the Board, Dr T N Magau (Dr Magau) and informed him that he was not questioned about Future of Fusion. He made further disclosures about other officials of the NTP;

2.1.9. On 10 March 2017, the Head of Department, Human Resources, Mr WJ Oosthuizen (Mr Oosthuizen) informed him that they considered the allegations contained in the letter of ‘disclosure’ dated 9 March 2017, to amount to not more than false, spurious, unfounded, unsubstantiated and defamatory statements, which do not qualify as a protected disclosure, and that as a result thereof the NTP will be taking disciplinary action against him;

2.1.10. Further that the NTP will not permit him to exploit the PDA so as to commit serious acts of misconduct and that he has been previously informed that such conduct will not be tolerated, a warning he obviously chose to ignore;

2.1.11. Disciplinary charges relating to incompatibility, gross insubordination and leaving the workplace without permission were preferred against him on 23 March 2017 with a date of the hearing scheduled for 30 and 31 March 2017; and

2.1.12. He served Mr Mdekazi with his resignation letter on 29 March 2017, wherein he mentioned that he could no longer tolerate the unbearable working conditions imposed upon him in the last six (6) months. Further thereto, his resignation would take effect from 30 April 2017.
2.2. The Complainant also made a protected disclosure to me in terms of section 8(1)(a) of the PDA on 24 November 2016.

2.3. In the main, the Complainant alleged that he was subjected to occupational detriment following the protected disclosure which led to him resigning from employment on 29 March 2017.

2.4. Based on analysis of the allegations, I identified the following issues to inform and focus this investigation:

2.4.1 Whether the NTP improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosure Act, 26 of 2000, if so;

2.4.2 Whether such improper conduct of the NTP contributed to the Complainant’s resignation from employment; and

2.4.3 Whether due to these circumstances the Complainant was prejudiced by the improper conduct of the NTP as envisaged in section 6(4)(a)(v) of the Public Protector Act.

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 mechanism.

3.5. In the constitutional court, 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), Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the Public Protector:

3.5. The remedial action taken by the Public Protector has a binding effect, "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences" (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*, Case no 91139/2016 (13 December 2017)[2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 all SA 800 GP; 2018 (5) BCLR 609 (GP) (13 December 2017), the court held as follows:

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. 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):

3.6.2.1. Conduct an investigation;
3.6.2.2. Report on that conduct; and
3.6.2.3. To take remedial action.
3.6.3. The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (para 104);

3.6.4. 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).

3.6.5. The fact that there are no firm findings on the wrong doing, 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); and

3.6.6. *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 NTP is an organ of state and their 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. However, the Public Protector’s powers and jurisdiction to investigate and take appropriate remedial action was disputed by the NTP. In its response letter dated 2 September 2019 to my Notice, the NTP submitted as follows:

3.8.1. That I did not have jurisdiction to deal with the matter;

3.8.2. That I am neither a Labour Court nor a court as contemplated by section 4(2)(a) of the PDA, as such I cannot order remedial action in the form of reinstatement, compensation, and the payment of damages as provided for by the LRA; and
3.8.3. That the proper remedy for the Complainant is to approach the Labour Court to challenge any alleged unfair dismissal, which includes one contemplated in section 186(e), read with section 187(1)(h) of the LRA.

3.9. My investigation is informed by the provisions of section 181(2) of the Constitution and the Public Protector Act. The Public Protector has jurisdiction in terms of the Constitution, to investigate any conduct in state affairs or in the public administration which is alleged or suspected to be improper or to result in impropriety or prejudice.

3.10. Beyond that, my office is one of the prescribed institutions to receive protected disclosures in terms of the section 8 of the PDA, thus serving as “safe harbour” for those wishing to make disclosures of suspected improprieties in the exercise of state power and control over public resources.

3.11. Section 2 of the Constitution provides that: “the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

3.12. In the case of Minister of Home Affairs and Another v Public Protector of the Republic of South Africa (308/2017) [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) (15 March 2018), the court held at paragraph 40 and 46 that:

"The Public Protector is not a court, does not exercise judicial power and cannot be equated with a court. Her role is completely different to that of a court and the jurisdictional arrangements of the courts are entirely irrelevant to a determination of the Public Protector's jurisdiction. It is necessary to look to s 182 of the
Constitution and the Public Protector Act to ascertain the bounds of the Public Protector’s jurisdiction. Neither excludes labour matters from her jurisdiction.

The only express exclusion of the Public Protector’s investigative jurisdiction is in relation to decisions of courts. For the rest, her jurisdiction is extremely wide and her mandate is clear: she must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance.”

3.13. In light of the above the NTP’s argument that the Public Protector lacks jurisdiction cannot be sustained.

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 alleged improper conduct or maladministration.

4.2. Approach to the investigation

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

4.2.1.1. What happened?
4.2.1.2. What should have happened?
4.2.1.3. Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?

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

4.2.1.5. 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 the roles played by the NTP when it subjected the Complainant to occupational detriment following the protected disclosure he made to the NTP, which resulted in the Complainant resigning from employment.

4.2.1.6. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the officials of the NTP.

4.2.1.7. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the Complainant has suffered prejudice, the idea is to place him as close as possible to where he would have been had the institution concerned complied with the regulatory framework setting the applicable standards for good administration.

4.3. **Notice issued in terms of section 7(9)(a) of the Public Protector Act, 1994:**

4.3.1. During the investigation process, I issued a Notice to the NTP on 20 August 2019 to afford it an opportunity to respond to my provisional findings. However, the aforesaid Notice was inadvertently sent to NECSA. Notwithstanding the fact that
the said Notice was sent to NECSA, the NTP responded to my Notice on 2 September 2019 and 4 September 2019, respectively.

4.3.2. In order to rectify the foregoing, I properly served a Notice to the Chairperson of the NTP, Dr Magau on 18 September 2019, wherein the NTP was requested to respond within (ten) 10 working days.

4.4. The Key Sources of information

4.4.1. Documents

4.4.1.1. A copy of a communiqué dated 3 November 2016, from the Complainant to NTP, Benneth Machaba, Charlene Nkosi, Arno Van Haght and Jongilizwe Mdekazi;

4.4.1.2. A copy of a communiqué dated 9 November 2016, from the Complainant to NTP, Benneth Machaba, Charlene Nkosi, Arno Van Haght and Jongilizwe Mdekazi;

4.4.1.3. A copy of an email dated 11 November 2016, from the Complainant to NTP, Jongilizwe Mdekazi;

4.4.1.4. A copy of an email with attached sworn statement dated 15 November 2016, from the Complainant to NTP, Jongilizwe Mdekazi and Benneth Machaba;

4.4.1.5. A copy of a Notice of a Disciplinary Enquiry dated 17 November 2016;

4.4.1.6. A copy of a letter dated 18 November 2016, from the Complainant to the NTP, Head Group Communication and Stakeholders Relations, Arno Van Haght;
4.4.1.7. A copy of an acknowledgement of response by NTP dated 18 November 2016 to the Complainant;

4.4.1.8. A copy of a letter dated 24 November 2016, from the Complainant to NTP, Jongilizwe Mdekazi;

4.4.1.9. A Public Protector complaint form with a stamp dated 24 November 2016;

4.4.1.10. A copy of a letter dated 15 December 2016 from NTP Group Executive Global Markets, J Mdekazi to the Complainant;

4.4.1.11. A copy of a Grievance dated 21 November 2016, from the Complainant to NTP;
4.4.1.12. A copy of a communiqué letter reporting the Grievance dated 21 November 2016, from the Complainant to NTP, W Oosthuizen;

4.4.1.13. A copy of a communiqué letter acknowledging receipt of the Grievance dated 21 November 2016, from NTP, Brenda Berries to the Complainant and Mr W Oosthuizen;


4.4.1.15. A copy of a settlement agreement of case number NWKD4618-16 dated 26 January 2017;

4.4.1.16. A copy of a communiqué dated 2 March 2017 from the Complainant to NTP, Mr J Mdekazi;

4.4.1.17. A copy of a communiqué letter dated 2 March 2017, from NTP, Gerhard Petrus Smith to the Complainant;
4.4.1.18. A copy of a letter dated 9 March 2017, from the Complainant to NTP Chairperson, Dr Namane Magau entitled “Protected disclosure: outcome of forensic investigation into possible irregularities and corruption with communication unit at NTP and disciplinary hearing of Arno Van Hagh”; 

4.4.1.19. Copies of the disciplinary hearing for Arno Van Hagh dated 1, 2, 10 March 2017; 

4.4.1.20. A copy of a letter dated 10 March 2017, from NTP, Head HR, WJ Oosthuizen to the Complainant; 

4.4.1.21. A copy of a response letter dated 10 March 2017, from the Complainant to the NTP, Head HR, WJ Oosthuizen; 

4.4.1.22. A copy of a notice to attend a hearing from the Human Relations Officer dated 23 March 2017, to the Complainant; 

4.4.1.23. Copies of the application for revision of the disciplinary action dated 27 March 2017; 

4.4.1.24. A copy of a letter of resignation dated 29 March 2017 from the Complainant to NTP, Mr J Mdekazi; 

4.4.1.25. A copy of a letter in response to the Complainant’s resignation dated 1 April 2017 to the Complainant from NTP, Head HR, W Oosthuizen; 

4.4.1.26. Copies of the Labour Court Case No JS 932/17 documents; 

4.4.1.27. Copies of the outcome of the disciplinary enquiry of Mr Arno Van Hagh dated 29 June 2017; and

4.5. Interviews and meetings conducted:

4.5.1. Interviews with the Complainant on 12 December 2016;

4.5.2. Interviews with the Complainant on 19 September 2019.

4.5.3. Meeting with NTP on 7 October 2019.

4.6. Correspondence sent and received

4.6.1. A letter dated 2 December 2016, from the Public Protector to Ms T Eboka (Ms Eboka);

4.6.2. A letter dated 5 December 2016, from Ms Eboka to the Public Protector;

4.6.3. A letter dated 20 December 2016, from the Chairperson of the NTP Board, Dr Magau;

4.6.4. A letter dated 29 March 2017, from the Public Protector to the Chairperson of the NTP Board NTP, Dr Magau.

4.6.5. A letter dated 15 May 2017 to Dr Magau to the Public Protector;

4.6.6. A letter dated 8 June 2017, from the Chairperson of the NTP Board, Dr Magau to the Public Protector;
4.7. A Response to the notice in terms of section 7(9)(a) of the Public Protector Act, 1994 from:

4.7.1. Response from NTP legal representative, Mr Puke Maserumule (Maserumule Attorneys) dated 2 September 2019;
4.7.2. Response from Mr O Modibela, NTP, Legal and Compliance, dated 4 September 2019.
4.7.3. Response from Maserumule Attorneys dated 22 October 2019.

4.8. Notice issued in terms of 7(9) of the Public Protector Act, 1994


4.9. Legislation and other prescripts.

4.9.1. The Constitution of the Republic of South Africa, 1996 (The Constitution);
4.9.2. The Public Protector Act, 23 of 1994 (PPA);
4.9.3. The Labour Relations Act, 66 of 1995 (LRA); and

4.10. Public Protector Touchstones

4.10.1. They Called it Justice Report number 23 of 2012/13;
4.10.2. Rocking the Boat Report number 4 of 2016/17; and
4.10.3. **USSASA Report number:** 13 of 2018/19

4.11. **Case law**

4.11.1. **President of the Republic of South Africa v Office of the Public Protector and Others,** Case no 91139/2016 (13 December 2017)[2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 all SA 800 GP; 2018 (5) BCLR 609 (GP) (13 December 2017);

4.11.2. **Minister of Home Affairs and Another v Public Protector of the Republic of South Africa** (308/2017) [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) (15 March 2018);

4.11.3. **Tshishonga v Minister of Justice & Constitutional Development** 2007 4 BLLR 327 (LC)

4.11.4. **Grieve v Denel** (2003) 24 ILJ 551 (LC);

4.11.5. **Independent Municipal & Allied Trade Union & another v City of Matlosana Local Municipality & another** (2014) 35 ILJ 2459 (LC.)

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

5.1. Regarding whether the NTP improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosure Act 26 of 2000.
Common cause

5.1.1. It is common cause that the Complainant made a protected disclosure on 11 November 2016 to Mr Mdekazi in terms of section 6 of the PDA. Subsequently, the NTP preferred charges against the Complainant on 17 November 2016 with a date of a disciplinary hearing scheduled for 23 November 2016.

5.1.2. The issue for my determination is whether or not the NTP improperly handled a protected disclosure duly made by the Complainant in terms of the PDA.

Issues in dispute

5.1.3. The Complainant informed me that six (6) days after he had submitted a protected disclosure through an email on 11 November 2016 to Mr Mdekazi and Mr Machaba. Mr Van Haght, the Complainant’s line manager, subjected him to occupational detriment when he served him with a notice of disciplinary charges brought against him on 17 November 2016, to appear before a disciplinary hearing which was scheduled for 23 November 2016.

5.1.4. In an email dated 15 November 2016, the Complainant submitted a sworn statement to Mr Mdekazi in support of his protected disclosure that he lodged on 11 November 2016.

5.1.5. The Complainant wrote a letter to Mr van Haght on 18 November 2016 informing him that he received a notice of disciplinary charges to appear before a disciplinary hearing and that the notice is in contravention of the PDA. The Complainant further advised that the notice be withdrawn by the end of business day.
5.1.6. In a letter to my office dated 8 June 2018, the NTP disputed that the protected disclosure from the Complainant was made to Mr Mdekazi on 14 November 2016 and argued that it was only sent to the NTP on 15 November 2016. On the same date of 15 November 2016, Mr Mdekazi acknowledged receipt of the disclosure.

5.1.7. In order to support its argument, the NTP provided me with evidence submitted in the form of emails between Mr Mdekazi and the Complainant dated 14 and 15 November 2016, respectively. In terms of these emails, the Complainant mentioned tender irregularities involving a company called Future of Fusion and irregular tender processes involving a company called Vuma and others. The emails further showed that the correspondence which was acknowledged on 15 November 2016 was a sworn statement from the Complainant.

5.1.8. The NTP disputed that the above-mentioned disclosure by the Complainant only addressed alleged irregularities in the tender process by Mr Van Haght, and did not make any mention of alleged “irregular and unprocedural appointment of Arno Van Haght and Gerhard Smith.”

5.1.9. In the same correspondence, the NTP disputed that the Complainant was charged for making a protected disclosure, but submitted that he was charged for alleged various acts of misconduct. Further that disciplinary charges were brought in the ordinary course of managing employees by Mr Van Haght, in his capacity as the Complainant’s line manager and were not discussed with senior management of the NTP beforehand.

5.1.10. Further to the above, the NTP submitted that when the Complainant first made his disclosures, it was not yet established that the disclosures were indeed protected as contemplated in the PDA. It is only after I launched this investigation that some of the allegations made by the Complainant fell within the ambit of the PDA.
5.1.11. On the same basis, the NTP disputed the Complainant’s letter dated 9 March 2017, addressed to Dr Magau in which the Complainant raised his concerns on how the matter relating to the investigation of the Future of Fusion project was dealt with, as well as the manner in which his disclosure that he had lodged on 11 November 2016 was handled by the NTP.

5.1.12. The Complainant further wanted to establish reasons for not being called to testify on 1 March 2017 during Mr Van Haght’s disciplinary hearing, in particular about providing evidence relating to the Future of Fusion project.

5.1.13. More importantly, the Complainant was concerned that there might have been possible elements of manipulation of Mr Van Haght’s disciplinary hearing processes in an attempt to exonerate him, because there were deliberate omissions of the most serious allegations contained in his sworn statements that he submitted on 15 November 2016 that was ignored by the investigators and the initiators of the disciplinary charges against Mr Van Haght.

5.1.14. In a letter dated 10 March 2017, provided to me by the Complainant as evidence, NTP responded to him that they considered the allegations contained in the letter of ‘disclosure’ dated 9 March 2017, to amount to not more than false, spurious, unfounded, unsubstantiated and defamatory statements which do not qualify as a protected disclosure, and that as a result thereof the NTP would be taking disciplinary action against him.

5.1.15. Further that the NTP would not permit the Complainant to exploit the PDA so as to commit serious acts of misconduct and that he has been previously informed that such conduct will not be tolerated, a warning he obviously chose to ignore.
Application of the relevant law

5.1.16. Section 23(1) of the Constitution of the Republic of South Africa 1996 (the Constitution) guarantees a fundamental right in respect of labour relations by providing that "everyone has the right to fair labour practices".

5.1.17. Section 185 of the Labour Relations Act 66 of 1995 (LRA) gives the effect to the right to fair labour practices in that employees have the right not to be unfairly dismissed or subjected to unfair labour practices.

5.1.18. Section 193(1)(a)(b) of the LRA provides for remedies when an employee is unfairly dismissed which include inter alia reinstatement, re-employment and compensation to be paid to the employee.

5.1.19. Section 193(2) of the LRA provides that when an employee wishes not to be reinstated or re-employed, or the circumstances surrounding the dismissal would make the continued employment relationship intolerable, or it is not reasonably practicable to reinstate or re-employ the employee or the reason for dismissal is that it is only procedurally unfair, compensation would be the most appropriate remedy.

5.1.20. The objectives of the PDA includes inter alia, to provide for the procedures and processes through which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employers or other employees in the employ of their employers, and to provide for the protection of employees who make a disclosure which is protected in terms of this Act.

5.1.21. Further thereto, the PDA was inter alia enacted to create a culture which will facilitate the disclosure of information by employees relating to criminal or other
irregular conduct in the workplace in a responsible manner by providing comprehensive statutory guidelines for the disclosure of such information and protection against any occupational detriment as a result of such disclosures.

5.1.22. For the Complainant’s conduct to be dealt with under the PDA and be considered worthy of the protection afforded to employees under the PDA, his act(s) which he alleges to constitute a protected disclosure, should comply with the definition of a protected disclosure under the PDA.

5.1.23. In terms of section 1 of the PDA "disclosure" means "any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of inter alia that a criminal offence has been committed, is being committed or is likely to be committed, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject, or that a miscarriage of justice has occurred, is occurring or is likely to occur". It is my conclusion that the conduct the Complainant disclosed falls under the definition of a protected disclosure as envisaged in section 1 of the PDA.

5.1.24. Section 2(1)(a) of the PDA provides for the protection of whistle-blowers in the private and public sector from being subjected to an occupational detriment on account of having made a protected disclosure and who disclose information regarding unlawful or irregular conduct by their employers or fellow employees.

5.1.25. Section 3 of the PDA provides that an ‘occupational detriment’ in relation to the working environment of an employee means being subjected to any disciplinary action, dismissed, suspended, demoted, harassed or intimidated.
5.1.26. Section 4(1)(b) of the PDA provides that "any employee who has been subjected, is subjected or may be subjected, to an occupational detriment in breach of section 3, may pursue any other process allowed or prescribed by any law".

5.1.27. In terms of section 4(3) of the PDA "any employee who has made a protected disclosure and who reasonably believes that he or she may be adversely affected on account of having made that disclosure, must, at his or her request and if reasonably possible or practicable, be transferred from the post or position occupied by him or her at the time of the disclosure to another post or position in the same division or another division of his or her employer or, where the person making the disclosure is employed by an organ of state, to another organ of state".

Application of the relevant case law

5.1.28. In the case of Tshishonga v Minister of Justice & Constitutional Development 2007 4 BLLR 327 (LC), it was stated that "Whistle-blowers are not impipis, a derogatory term reserved for apartheid era police spies. Whistle-blowing is neither self-serving nor socially reprehensible. In recent times its pejorative connotation is increasingly replaced by openness and accountability. Employees who seek to correct wrongdoing, to report practices that may endanger society or resist instructions to perform illegal acts, render a valuable service to society and the employer…

169 Employees have a responsibility to disclose criminal and other irregular conduct in the workplace, Public servants have an obligation to report fraud, corruption, nepotism, maladministration and other offences. A company can have a cause of action against its directors for failing in their duty to report wrongdoing".

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5.1.29. In the case of Grieve v Denel (2003) 24 ILJ 551 (LC) in which the Labour Court gave context to Section 3 of the Protected Disclosure Act, 2000: "No employee may be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure".

5.1.30. Similarly in Independent Municipal & Allied Trade Union & another v City of Matlosana Local Municipality & another (2014) 35 ILJ 2459 (LC), the Labour Court gave practical pointers to determine if there is a link between the occupational detriment (in this case disciplinary charges) and the disclosure namely:

- The timing of the institution of the charges or the occupational detriment;
- The reasons given by the employer;
- The nature of the disclosure; and
- The person responsible for taking the decision to institute the charges.

5.1.31. The evidence discussed above indicates that the NTP issued disciplinary charges against the Complainant dated 17 November 2016, six (6) days after the Complainant had lodged a protected disclosure on 11 November 2016.

**Conclusion:**

5.1.32. Based on the evidence at my disposal, it is clear that the Complainant made a disclosure to the NTP in terms of the section 1 of the PDA through an email dated 11 November 2016, followed by a sworn statement to Mr Mdekazi wherein he attested his protected disclosure made in terms of the aforesaid email.
5.1.33. It has been confirmed that on 18 November 2016, the Complainant wrote a letter to the NTP. However, the NTP continued and preferred charges against him based on the charge sheet issued on 17 November 2016. The Complainant approached the Commission for Conciliation Mediation and Arbitration (CCMA) to prevent the NTP from proceeding with the charges against him.

5.1.34. Whilst appearing at the CCMA, the NTP and the Complainant entered into a settlement agreement, wherein they agreed *inter alia* that the Complainant withdraws the dispute referred to the CCMA and the NTP would not proceed with the disciplinary proceedings against him relating to the disciplinary charges of gross insubordination, blatant refusal to obey direct lawful and reasonable instructions.

5.1.35. Following the settlement agreement entered into between the Complainant and the NTP at the CCMA, Mr Van Hagt was subjected to a disciplinary hearing by the NTP on 1 March 2017 regarding the allegations of tender irregularities. Subsequently, Mr Van Hagt was found guilty and as a result thereof, the NTP imposed substantial financial penalties as well as a final written warning against him.

5.1.36. At the disciplinary hearing, the Complainant appeared as a witness against Mr Van Hagt. However, the Complainant was not asked about any issue relating to Future of Fusion project, whereas the Complainant had made a protected disclosure in relation to such a project in his disclosure dated 11 November 2016.

5.1.37. From the evidence before me, the Complainant informed NTP through a letter dated 9 March 2017 that he was concerned that during Mr. Van Hagt’s disciplinary hearing, he was not asked about any issues relating to the Future of Fusion project, whereas such was raised in his protected disclosure dated 11 November 2016.
5.1.38. However, in a letter dated 10 March 2017, the NTP informed the Complainant that the allegations contained in the letter of 9 March 2017 are false, spurious, unfounded, unsubstantiated and defamatory statements and do not qualify as a protected disclosure thus dismissing his testimony. As a result of this, NTP would be taking disciplinary action against the Complainant.

5.1.39. I have also established that on 23 March 2017, the NTP preferred disciplinary charges against the Complainant, wherein he was charged with *inter alia* incompatibility, gross misconduct and leaving the workplace without permission. On 29 March 2017 the Complainant tendered a notice of resignation from employment to the NTP and his last date of employment was 30 April 2017.

5.1.40. It is therefore my conclusion that the NTP had a duty not to issue disciplinary charges dated 17 November 2016 and 23 March 2017, respectively, against the Complainant as directed by section 3 of the PDA, as he made a *protected disclosure* in good faith and therefore should not have been subjected to *occupational detriment*.

5.1.41. Therefore, the actions of the NTP amounts to improper conduct in state affairs as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

5.2. **Regarding whether such improper conduct of the NTP contributed to the Complainant’s resignation from employment.**

*Common cause:*

5.2.1. It is common cause that on 29 March 2017, the Complainant tendered his resignation from employment to the NTP.
5.2.2. The issue for my determination is whether or not conduct of the NTP contributed to the Complainant's resignation from employment.

*Issues in dispute*

5.2.3. The Complainant provided me with copies of the charge sheets relating to charges which were preferred against him on 17 November 2016 following a disclosure he made on 11 November 2016 as well as charges brought against him on 23 March 2017 following a letter he wrote to Dr Magau on 9 March 2017.

5.2.4. The NTP disputed that the charges preferred against the Complainant were as a result of the protected disclosure he had made in terms of the PDA.

5.2.5. It is further disputed by the NTP that the Complainant's resignation emanated from the disciplinary charges preferred against him on 17 November 2016 and on 23 March 2017.

5.2.6. On 26 March 2018, the Complainant made a protected disclosure to me relating to irregular appointments of Messrs Van Haght and Gerhard Smith.

5.2.7. The NTP brought charges against the Complainant on 17 November 2016 in a document entitled "Notice of Disciplinary Enquiry". In terms of this document, the Complainant was notified that the disciplinary enquiry against him would be held on 23 November 2016 at 9:00 am. The disciplinary charges which were preferred against him were the following:

5.2.7.1. *Gross insubordination; and*  
5.2.7.2. *Blatant refusal to obey direct lawful and reasonable instructions.*
5.2.8. The Complainant provided me with a copy of a letter dated 18 November 2016 that he had sent to the NTP, after he had received his notice of disciplinary hearing on 17 November 2016. In terms of this letter, the Complainant informed the NTP that it contravened the PDA on the basis that it served him with a notice of disciplinary enquiry after he had lodged a protected disclosure. As such, he is subjected to occupational detriment.

5.2.9. Subsequently, the NTP responded to the Complainant in a letter dated 18 November 2016. According to its response, the NTP confirmed to the Complainant that it would continue with a disciplinary hearing as set out in the notice of a disciplinary hearing dated 17 November 2016.

5.2.10. On 24 November 2016, the Complainant lodged a protected disclosure against the NTP with my office. The protected disclosure was in connection with allegations of contravention of the PDA, abuse of power, nepotism, procurement irregularities and maladministration by the NTP.

5.2.11. On 2 December 2016, I wrote a letter requesting that a disciplinary process against the Complainant be suspended. The NTP responded in a letter dated 5 December 2016 stating that the NTP was satisfied that the disciplinary enquiry against the Complainant is not related to the disclosure that he made, and that it had taken a decision to continue with the disciplinary enquiry against him.

5.2.12. I responded to the above-mentioned letter on 12 December 2016 requesting that the NTP provide me with disciplinary charges preferred against the Complainant so that I can make an informed decision. In a letter dated 20 December 2016, the NTP notified me of the management and Board of Directors (BoD) decision to suspend the disciplinary action instituted against the Complainant.
5.2.13. Furthermore, the NTP advised me that an independent forensic investigation was instituted into the allegations of improper conduct relating to procurement processes made by the Complainant in his disclosure to the NTP Management, and that I will be advised of the outcome of the forensic investigation in due course.

5.2.14. The Complainant also referred a dispute to the CCMA under case number: NWKD4618-16 (GATW) and NWRB4505. Subsequently, a settlement agreement was reached between the NTP and the Complainant on 26 January 2017. In terms of this settlement agreement, the NTP and the Complainant agreed as follows:

5.2.14.1. The Complainant withdraws the dispute referred to the CCMA; and

5.2.14.2. The NTP would not proceed with the disciplinary proceedings against the Complainant relating to the disciplinary charges of gross insubordination; and blatant refusal to obey direct lawful and reasonable instructions.

5.2.15. In a letter dated 15 May 2017, the NTP informed me that subsequent to its letter dated 20 December 2016 addressed to me, the NTP management did not proceed with the disciplinary enquiry against the Complainant and that decision was made in order to manage the incorrect perception that the disciplinary enquiry was as a result of the disclosure made by him.

5.2.16. In the above-stated correspondence the NTP informed me its management has instituted disciplinary action against Mr Van Haght in respect of some of the issues contained in the Complainant’s disclosure. Mr Van Haght was found guilty as charged, as a result the NTP imposed substantial financial penalties as well as a final written warning against him.
5.2.17. However not long after Mr van Haght’s disciplinary hearing, the NTP inexplicably further brought three (3) charges against the Complainant on 23 March 2017 with a date of the hearing scheduled for 30 and 31 March 2017 respectively. The charges were as follows:

5.2.17.1. Incompatibility:

“it was alleged that the Complainant is incompatible with the corporate culture and values of NTP, which are based on mutual respect and the maintenance of harmony at the workplace, with Mr Mdekazi, Mr Smith, Mr Eboka in that you have, without any just or reasonable cause, treated your managers and executives, the three included with unreasonable suspicion, questioned their integrity without justification and implied that they are corrupt or engage in corrupt activities when you had no evidence or credible evidence to support your belief or suspicions, and when you knew that your conduct had the effect of straining and destroying the trust and working relationship between you and your managers and executives”.

5.2.17.2. Gross misconduct:

“On 9 March 2017, you submitted a memorandum to the Chairperson of the board, Dr Magau, in which you made the following unfounded, false and defamatory statements about and concerning Mrs Eboka, Mr Mdekazi, Mr Smith and Gobodo Forensics:

a. Gobodo forensics ignored the allegations that you made concerning alleged improprieties in the Future of Fusion project during the investigation into the alleged protected disclosure that you had made in November 2016;
b. Mr Mdekazi acting alone or in concert with other unnamed persons, has manipulated the disciplinary hearing of the Complainant in order to get him off the hook in respect of the charges of his misconduct that he is facing or which he ought to be facing;

c. Mr Mdekazi deliberately and with intention to unlawfully favour Van Haght left out from the charges faced by Van Haght, a charge relating to the Future of Fusion project even when there was no evidence to support the charge;

d. Mr Smith was involved in unspecified unlawful and/or improper conduct in relation to the Future of Fusion project;

e. Mrs Eboka was involved in unspecified unlawful and/or improper conduct in relation to the Future of Fusion project;

f. Mr Mdekazi was involved in unspecified unlawful and/or improper conduct in relation to the Future of Fusion project;

g. Gobodo forensic, acting with unlawful and/or improper motives, and/or with intent to benefit Van Haght, did not thoroughly investigate the allegations of impropriety by Van Haght around the Future of Fusion project.”

5.2.17.3. Leaving the workplace without permission:

“On 10, 14, 16 and 17 March 2017, you left your workplace and the company premises early
a. Without having sought and obtained prior permission of your line manager; and

b. Without informing your line manager of the reasons for your leaving the workplace, including whether or not it is for business or personal reasons.”

5.2.18. On 29 March 2017 the Complainant tendered his resignation to NTP which was effective from 30 April 2017.

Application of the relevant law

5.2.19. Section 186(1)(e) of the LRA provides that “Dismissal” means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

Application of the relevant case law

5.2.20. In the case of Grieve v Denel (2003) 4 BLLR 366 (LC) (Grieve v Denel) an employee was suspended pending a disciplinary hearing after he had forwarded a report of alleged misconduct by a senior director at the division of Denel. The employee made an urgent application to court to stop the employer from instituting action against him on the grounds that he was protected in terms of the PDA. The court concluded that the disciplinary action constituted an occupational detriment and the employer was stopped from instituting disciplinary proceedings.

5.2.21. Similarly in CWU v Mobile Telephone Networks (Pty) Ltd (2003) BLLR 741 (LC) (CWU v Mobile Telephone Networks (Pty) Ltd) the court agreed with this judgement, however added that the protection under PDA is not unconditional.
5.2.22. The evidence before me and canvassed above, indicates that by instituting disciplinary charges against the Complainant on 17 November 2016 and 23 March 2017, respectively, after he made a protected disclosure on 11 November 2016, the NTP’s conduct made it quite difficult for the Complainant to continue with his employment and he tendered a resignation from employment on 29 March 2017 as a result thereof.

5.2.23. The NTP had issued a notice of disciplinary charges to the Complainant on 17 November 2016 and to which the Complainant responded through a letter dated 18 November 2016. This was six (6) days after the Complainant had lodged a protected disclosure to the NTP on 11 November 2016.

5.2.24. Subsequently, the NTP and the Complainant entered into a settlement agreement that the Complainant withdraws the dispute referred to the CCMA; and that the NTP would not proceed with the disciplinary proceedings against him relating to the disciplinary charges of gross insubordination; and blatant refusal to obey direct lawful and reasonable instructions.

5.2.25. As a result of the NTP’s conduct of instituting disciplinary charges against the Complainant, despite the fact that he had lodged a protected disclosure on 11 November 2016 as confirmed in Grieve v Denel case that the disciplinary action constituted an occupational detriment, the Complainant tendered a resignation from his employment on 29 March 2017.

5.2.26. The NTP made the Complainant’s conditions of employment unbearable hence he tendered his resignation from employment. The conduct of the NTP in this regard amounts to constructive dismissal as defined in section 186(e) of the LRA.
5.2.27. After the Complainant withdrew the dispute from the CCMA, following a settlement agreement entered into between him and the NTP, the NTP inexplicably issued another disciplinary charges against the Complainant on 23 March 2017.

5.2.28. This was after the NTP had issued a letter to the Complainant dated 10 March 2017 wherein it informed him that his ‘disclosure’ amounts to not more than false, spurious, unfounded, unsubstantiated and defamatory statement which do not qualify as a protected disclosure, and that as a result thereof the NTP will be taking disciplinary action against him.

Conclusion

5.2.29. The NTP had an obligation in terms of the law to ensure that whistle-blowers, like the Complainant, are protected from being subjected to occupational detriment, which the NTP clearly failed to do.

5.2.30. The NTP should have ensured that the Complainant did not suffer any occupational detriment as provided for by section 3 of the PDA which led to his resignation from employment on 29 March 2017, which is tantamount to constructive dismissal as defined by section 186(1)(e) of the LRA.

5.3. Regarding whether due to these circumstances the Complainant was prejudiced by the improper conduct of the NTP as envisaged in section 6(4)(a)(v) of the Public Protector Act.

Common cause

5.3.1. It is common cause that the Complainant was subjected to disciplinary charges preferred against him on 17 November 2016 and 23 March 2017 by the NTP, after he had made a protected disclosure on 11 November 2016, which resulted
in him suffering occupational detriment. This led to his resignation from his employment on 29 March 2017.

5.3.2. The issue for determination was whether or not the Complainant was prejudiced by the improper conduct of the NTP as envisaged in section 6(4)(a)(v) of the Public Protector Act.

*Issue in dispute*

5.3.3. Notwithstanding the argument advanced by the NTP that the Complainant had not made a protected disclosure as required by the PDA, a series of events point to a different course as far as his employment is concerned.

5.3.4. This consequently has led to an untenable situation for the Complainant which is attributable to him not being employed since 2017, thereby indisputably suffering serious financial loss and prejudice.

*Application of the relevant law*

5.3.5. In determining whether the Complainant was improperly prejudiced by the NTP's conduct, I took into account the Public Protector's touchstone in "*They Called it Justice*"², taking into account the positive response and compliance with remedial action by then Minister of Justice, Mr Jeff Radebe following the release of the report. I was further guided by court jurisprudence, particularly the guidelines provided by Davis AJA in the *Tshishonga* matter where Davis AJA said³, among others:

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² Report no 23 of 2012/13
³ *Tshishonga v Minister of Justice and Constitutional Development and Another (J5898/04) [2006] ZALC 104 [2007] 4 BLLR (LC); 2007 (4) SA 135 (LC) (26 December 2006) paragraph 285, 287, 289 and 290
(i) "All ‘developments’ up to and after the occupational detriment contribute ‘cumulatively’ towards the assessment of compensation.

(ii) Subjection to an occupational detriment for whistle-blowing is generally and on the facts of the present case in particular ‘a very serious form of discrimination’ and such ‘merits a very high award.

(iii) The fact that a whistle-blower takes risks when making disclosures is a factor that ‘must be acknowledged.

(iv) The manner in which a disclosure is made is also a relevant factor...”

5.3.6. In the circumstances the Complainant’s legal journey from the receipt of the disciplinary charges to the CCMA and Labour Court and related socio-legal costs, had to be taken into account. Key matters taken into account include:

5.3.6.1. Loss of remuneration;
5.3.6.2. Legal fees estimated;
5.3.6.3. Therapy fees;
5.3.6.4. Logistical costs of pursuing the case mainly transport, telephone and data; and
5.3.6.5. Emotional pain and suffering.

5.3.7. I have taken into account the psychological impact of this matter on the Complainant, because it is common that when a person loses something under similar circumstances, which was as a result of victimisation he inevitably got affected emotionally, spiritually and psychologically.
Conclusion

5.3.8. Based on the information traversed above which include legal prescripts and case law as well as continuous consultations with the Complainant, I have come to conclusion that the conduct of the NTP led to improper prejudice suffered as envisaged in section 6(4)(a)(v) of the Public Protector Act 23 of 1994.

5.4. Response from NTP Radioisotopes SOC Ltd dated 2 September 2019 in relation to my section 7(9) notice issued.

At paragraph 3 – 8 of the response

5.4.1. In its response to my section 7(9) Notice dated 20 August 2019, which was inadvertently issued to NECSA on 22 August 2019, the NTP’s legal representative, Puke Maserumule Attorneys INC (the Attorneys) in a letter dated 2 September 2019 submitted that I issued my Notice to NECSA and not the NTP. The NTP submitted further that my Notice refers to allegations of improper conduct by the NTP and not NECSA, as such my Notice should have been issued to the NTP and not NECSA. Therefore, my notice was not served properly to it.

5.4.2. The NTP referred me to Rule 24(2) of Public Protector Act No. 23 of 1994: Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018 (Public Protector Rules) which provides as follows:

“(4) The Public Protector shall address a request for information referred to in sub-rule (1) to-

(a) The executive authority of the state institution as defined in section 1 of the Public Finance Management Act, 1999 (Act No 1 of 1999);

(b) The head of the state institution; or
(c) A person, official or employee designated by the head of the state institution for the purpose of dealing with request for information from the Public Protector

5.4.3. I have considered the above submission made by the NTP and accept that my section 7(9) Notice dated 20 August 2019, to Dr Magau was inadvertently served at NECSA instead of NTP. However on 18 September 2019, I properly served the said Notice to Dr Magau, although NTP had already responded within the stipulated timeframe.

At paragraph 9 – 20 of the response

5.4.4. The NTP referred me to the following legislation:

5.4.4.1. Section 6(1) of the PPA provides that “Any matter in respect of which the Public Protector has jurisdiction may be reported to the Public Protector by any person-

(a) By means of a written or oral declaration under oath or after having made an affirmation, specifying-

(i) The nature of the matter in question;
(ii) The grounds on which he or she feels that an investigation is necessary;
(iii) All other relevant information known to him or her; or

(b) by such other means as the Public Protector may allow with a view to making his her office accessible to all persons”.

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5.4.4.2. Section 7(4)(a)(b) of the PPA provides that "For the purpose of conducting an investigation the Public Protector may direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any documents in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person. The Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspect of having information which has a bearing on a matter being or to be investigated".

5.4.4.3. Section 7(9) of the PPA provides as follows:

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

(b)(i) If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.

(ii) Such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determine by the Public Protector, who have appeared before the Public Protector in terms of this section".
5.4.5. The NTP went on and referred me to *Gamede v Public Protector* and submitted that it was erroneous and misconceived since the judgement referred to an instance where no preliminary findings had as yet been made by the Public Protector.

5.4.6. The NTP highlighted that I declined it an opportunity to engage me further when it requested to do so and that it is entitled to question witnesses who I interviewed during the investigation of this complaint.

5.4.7. The NTP highlighted further that I did not disclose documents I relied upon in arriving to my findings and that was prejudicial to the NTP.

5.4.8. The NTP provided that I must properly serve it with my section 7(9) Notice and provide it with evidentiary material I relied upon in arriving at my conclusions. Further that I must afford it with an opportunity to question witnesses who provided me with evidence, to enable it to respond to my Notice.

5.4.9. The NTP concluded that it is not required nor obliged to respond in writing to my Notice until I comply with the legislation and prescripts set out above.

5.4.10. I have considered the above submission made by the NTP in relation to its reference to section 6(1) of the PPA. However, I did not find any relevance on its reference to the aforesaid section. The reason being, I did receive a formal complaint from the Complainant dated 24 November 2016. The lodgement was completed through a document entitled “Public Protector Complaint Form” as required by section 6(1)(b) of the PPA.

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4 (2019) I SA 491 (GP)
5.4.11. I also did not find any relevance of the NTP’s referral to section 7(4)(a)(b) of the PPA. During the investigation of this complaint, the NTP was co-operative in that it provided me with information and evidence required in order to conclude my investigation. As such, it was not necessary to compel the NTP to appear before me in a Subpoena hearing session. The format and the procedure that I followed in the investigation of this complaint was determined by myself as empowered by section 7(b)(i) of the PPA.

5.4.12. The NTP’s referral to section 7(9)(a) of the PPA with regards to affording a person implicated in the matter being investigated an opportunity to respond is misconstrued. I properly served my Notice dated 20 August 2019 to Dr Magau on 18 September 2019 and afforded NTP an opportunity to respond to me accordingly, which they did.

5.4.13. Although my Notice dated 20 August 2019 was inadvertently issued to NECSA on 22 August 2019, the NTP responded comprehensively to me regardless, as I had already received a response from their Attorneys and the NTP in letters dated 2 September 2019 and 4 September 2019, respectively.

5.4.14. The NTP’s referral to section 7(9)(b)(i)(ii) of the PPA in connection with affording the implicated person an opportunity to question witnesses is without merit. The aforesaid section relates to instances wherein I had conducted a Subpoena hearing session during the investigation of a complaint.

5.4.15. However, at the time of the investigation of this complaint, I did not conduct any Subpoena hearing session against any person implicated in the investigation of this complaint, since it was not necessary to do so. The evidence that is in my possession was obtained from the NTP and the Complainant in a form of
documentary evidence and interviews conducted with the Complainant and the NTP.

5.5. **Response from NTP Radioisotopes SOC Ltd dated 4 September 2019 in relation to my section 7(9)(a) notice issued.**

At paragraph 1-5 of the response

5.5.1. The NTP referred me to its response dated 2 September 2019 and argued that in this letter, I did not respond to its aforesaid letter wherein it mentioned issues relating to procedural and substantive defects regarding *inter alia* the fact that I did not properly serve it with my Notice, I declined it an opportunity to engage me further and I did not disclose documents I relied upon in arriving to my findings.

5.5.2. The NTP’s submission concerning the fact that I did not properly serve it with my Notice is baseless. I properly served my Notice dated 20 August 2019 to Dr Magau on 18 September 2019 and afforded NTP an opportunity to respond to me accordingly. Despite the fact that my Notice dated 20 August 2019 was inadvertently issued to NECSA on 22 August 2019, their Attorneys responded to me comprehensively in a letter dated 2 September 2019.

5.5.3. The NTP’s submission that I declined it an opportunity to engage me further is also baseless. In an email dated 19 September 2019, I invited NTP to a meeting with me at any date suitable to it. On 7 October 2019, I held a meeting with NTP and offered it an opportunity to engage me further in relation to my Notice.

5.5.4. During the aforesaid meeting, NTP made an unusual request that they wanted to meet with the Complainant and also to have sight of the document on which his complaint was based.
5.5.5. Despite being offered an opportunity to do so, but through paying for the Complainant's travel and accommodation expenses as he lives in Cape Town, the NTP abandoned the plan through a letter sent to me on 22 October 2019.

At paragraph 6 - 29 of the response

5.5.6. The NTP argued that it does not make sense that in terms of my Notice, I mentioned that I exercised a discretion to investigate this complaint in relation to alleged procurement irregularities since they were reported within that period. Therefore, the NTP questioned the validity of the investigation, since the decision to investigate could not have been as a result of any exceptional circumstances as contemplated by section 6(9) of the PPA.

5.5.7. The NTP also argued further that I referred to competent alternative remedies available to the Complainant as considerations I took into account in deciding to investigate the complaint outside the period of two (2) years.

5.5.8. The NTP submitted that the assertion that I investigated the complaint in accordance with section 6(9) of the PPA is not consistent with the facts and the law. As such, my notice was irregular.

5.5.9. In the Notice issued to NTP dated 20 August 2019, reference was inadvertently to section 6(9) of the PPA as part of the standard narrative on my powers and jurisdiction in dealing with complaints lodged after the lapse of a two (2) year period, which in this instance was not applicable.

5.5.10. However, the confusion pertaining to the foregoing albeit immaterial to the course of the investigation, was cleared with both the NTP and their attorneys during a meeting with my investigation team on 7 October 2019.
5.5.11. My office received this complaint from the Complainant on 24 November 2016, therefore it was not necessary to consider special circumstances, since the complaint was reported within two (2) years from the occurrence of the incident.

5.5.12. I have therefore sufficiently addressed the NTP’s argument concerning the fact that the Complainant lodged this complaint with me within the two (2) years of the occurrence of the dispute, hence it was not necessary to exercise my discretion in this regard.

5.5.13. NTP further argued that the Complainant made two (2) protected disclosures to me. The Complainant lodged first disclosure on 24 November 2016 and the second one on 29 March 2017, the same date on which the Complainant tendered his resignation in writing to the NTP.

5.5.14. The NTP highlighted further that I informed it through a letter dated 29 March 2017 that the Complainant made a protected disclosure, which I was investigating. The NTP submitted its response to me on 8 June 2017. Between the period of 8 June 2017 and 22 August 2019, the NTP did not receive any communication from me.

5.5.15. The NTP highlighted further that from the Notice that I had issued to it, it appeared that the Complainant made two (2) protected disclosures to me, the first disclosure was on 24 November 2016 and second disclosure was on 29 March 2017, which was the same date on which the Complainant tendered his resignation in writing to the NTP, effective from 30 April 2017.

5.5.16. Following the Complainant’s resignation, he referred an alleged unfair dismissal dispute to the CCMA in terms of section 191 of the LRA. Subsequently, he referred the dispute to the Labour Court. On 19 March 2019, the Labour Court ruled that the dispute must in fact be dealt with by the CCMA. The Complainant
was afforded an opportunity to decide what further action he wished to take within thirty (30) days but the Complainant did not communicate, his decision to the NTP.

5.5.17. The NTP provided that it reasonably assume that I am in possession of the documents relating to this complaint, which included referral to the CCMA and Labour Court document since the Notice made reference to the aforesaid process. The NTP indicated that the proceedings were halted when the Complainant ran out of funds and was forced to remove the matter from the roll of the Labour Court.

5.5.18. The NTP provided further that the Complainant approached me after he resigned from employment in order to complain about constructive dismissal which occurred in March 2017. The Complainant never made a new disclosure.

5.5.19. The NTP’s argument that the Complainant lodged his first disclosure on 24 November 2016 is without merit. The Complainant lodged his first disclosure with NTP on 11 November 2016.

5.5.20. Herein below is a copy of an email that the Complainant sent to Mr Mdekazi on 11 November 2016 when he lodged his first disclosure:
Lionel Adendorf

From: Lionel Adendorf
Sent: Friday, 11 November 2016 12:15 PM
To: Jongilizwe Mdakazi
Subject: Potential irregularities in Tenders and RFQ's

Dear Jongi,

An impression is created by Arno that he is close to Mrs E, that he has her ear and that the same relationship he has with her, he also enjoys with GPS. It is for these reasons why I am a bit apprehensive and unsure if an internal enquiry would bear the required results.

Another suggestion I had was to approach the Chairperson of the NTP board directly, inform the Minister of Energy or shareholder about it or take the matter to the Hawks for investigation because I consider these matters as very serious.

But, because I am extremely concerned about the damage our reputation might suffer as a result, I hope that these matters can be resolved internally. I would however reserve my right to approach any of the institutions or people mentioned above if I am at any stage of the opinion that NTP is not treating this matter with the seriousness it deserves. But I wish to assure you that this would be the last of last resorts.

As you requested, here is the email containing the information that I am aware of or that I am involved in:

VUMA REPUTATION MANAGEMENT: As soon as I started at NTP in July 2016, my supervisor, Arno van Haght, would complain about how "useless" the Communications Team is and about the low quality of work and that they are the reason why the organisation is not known. With it, he also sang the praises of the companies/service providers he worked with while at Standard Bank and about his plans to have them all "on board" as part of "his team".

He then told me about a request for Quotation (RFQ) that we would issue for a communications company to supply a package of services and to make up for the lack that he identified in the unit. He mentioned the company, Vuma, and sang their praises and also told me more about its owner, Janine Hills and how "good" she was.

A meeting was then scheduled with representatives of Vuma and the two of us (date not sure of because I didn't diarise it but can be around the 15th of July). We met them at their offices and during the meeting he then informed the Vuma about the RFQ, he gave them some background about the nuclear medicines industry and the direction he thinks NTP should go. He also explained to them how RFQ's are assessed and he spoke about what happened during the assessment of the RFQ for TCD and mentioned an instance where Angola was not happy with the short synopsis of project leaders when the RFQ asked for CV's of those who would be involved in the project.
I was very uncomfortable in the meeting and with the discussion and what was happening but I must admit, I did not raise my discomfort with him in the meeting or when we met again at another appointment afterwards. Due to my discomfort with what was happening, I limited my input to my perceptions of NTP and my experiences in previous companies but did not consider myself qualified enough to speak on the technical aspects of the RFQ.

Soon thereafter the RFQ was out and it was, on his instruction, also sent to Vuma. Vuma was eventually the only one who applied and Supply Chain (SCM) was not satisfied with the outcome but decided to extend the closing date and this time also send it to other companies. I know that when Arno heard about the extension, he was very upset and complained to us that SCM does not know what they are doing, are delaying matters unnecessarily and that Vuma should instead be appointed.

I need to add that, before the selection and appointment of Vuma (unsure of date as this was also not diarised), Arno called for a “strategic session” with staff and all service providers, including TCD and Vuma. Without being asked, he explained confidently that he would “eventually” get Vuma on board and it is for that reason that why he was comfortable discussing NTP communications with them. To his credit though, he made it clear to all that they should not bill NTP for the time.

FUTURE OF FUSION: During the same time Arno informed me that Mrs E told him that she wanted a Women in Nuclear Conference before the end of the year and that we would have to work with NECSA that doesn’t have money.

He then also told me about the difficulties with SCM and that he has found a way how to avoid the many troubles we can encounter with SCM if we do it on our own.

He informed me that he spoke to “Damien” at ContactMedia and he gave them the idea and in exchange, they would sell the idea back to NTP who would then sponsor it.

He then arranged a meeting with ContactMedia for 11 August 2016 where they would present their plan and we would then help develop.

The meeting was also attended by Nikelwa Tengimfeme from NECSA and representatives of Women in Nuclear SA.

In subsequent meetings between Nikelwa and my colleague, Manubha Ramunnie, we agreed that the intellectual property of the event is a problem because it is an NTP idea that now no longer belongs to us. This means that in future we cannot hold an event like this as ContactMedia holds the intellectual property. We agreed that it should be cleared with Arno and agreed that Nikelwa would speak to him about this.

I’m not sure what happened.
COMMUNICATIONS TENDER: On Tuesday, 13 September, I saw in my diary that I had to attend a meeting at Lethabo Estate the next day. Included in the invitee list were representatives from Vuma Media, ContactMedia, Nechama Brodie and a few others (not sure at the moment which companies they represented).

At the meeting, Amo explained his idea of calling for a comprehensive communication tender that would include all the services some of them currently provide to NTP and he explained how it would impact on them. He urged them to organise themselves and prepare for it and even suggested that they for a consortium. They spoke about BBEEE and ways to get around it and what he would be looking for and the trouble he might have because NECSA would be involved but he gave the meeting that he would deal with it.

Due to the way the rushed way in which the meeting was organised, I had little time to enquire about it and found and was only introduced to the matter once I got there.

I found it curious that Manubha was not there but it was afterwards that I realised that Amo has a devious, possibly criminal, way of dealing with RFQ's and tenders and that this pose a threat to the company’s reputation.

Soon afterwards I met with Benneth and explained to him what happened and he assured me that he would look into it.

SOCIAL MEDIA RFQ: I was never in any meeting where the matter of a social media RFQ was discussed or where it was considered a necessity. I have seen draft documents on the matter where my name on it. After considering my involvement in a matter I had no knowledge of, I asked that my name be removed.

MY PERSONAL OBSERVATIONS: I am now convinced that Amo has his own reasons why he bad-mouths the division. This allows him to get away with issuing RFQ's and tenders. While there are many capable professionals and communication experts in the unit, they are not appreciated and their views and suggestions are not entertained.

I also know now why suggestions from within are not allowed, encouraged or dismissed at the point of suggestion. The reason, according to me, is because it might not always involve service providers and would render them redundant.

Thirdly, it is also now abundantly clear why there is so much interference, and no guidance, in the management of relationships between contract managers (assuming managers like Manubha and I) because Amo treat these suppliers as his special force.

Lastly, I have also concluded as to why the unit does nothing and why no projects are being done in the unit; because Amo wants to be personally involved in what service providers do and what the unit thinks is of no importance.

I am hoping that you would do what is required to save, protect and defend the integrity of our internal systems and the reputation of the company as I am unable to do it at this moment.

I am also more than willing to cooperate with any investigation.
5.5.21. As such, the NTP was aware of the Complainant's disclosure from 11 November 2016 as articulated in this aforesaid email.

5.5.22. The NTP's argument that it did not receive any communication from me between the period of 8 June 2017 and 22 August 2019 after it had responded to me in its letter dated 8 June 2017 is baseless. During this period, this matter was still under my consideration and I had not indicated to the NTP that it was finalised.

5.5.23. Notwithstanding the above, I am empowered to determine the format and the procedure in the investigation of this complaint which was consistent with section 7(b)(i) of the PPA.

5.5.24. The NTP's argument that the Complainant lodged a protected disclosure after he had resigned from his employment is also misconstrued and unfounded. The Complainant lodged his first disclosure on 11 November 2016 as it appears from an email mentioned above.

5.5.25. Although the NTP and the Complainant entered into a settlement agreement on 26 January 2017 following a referral of the dispute to the CCMA, the NTP preferred further charges against him on 23 March 2017.

5.5.26. The disclosure made by the Complainant to Dr Magau in a letter dated 9 March 2017, prompted further disciplinary charges of 23 March 2017. The initial disciplinary charges of the 17 November 2016 preferred against the Complainant emanated from the protected disclosure made by the Complainant on 11 November 2016. From the evidence above, it is apparent that the NTP's modus operandi was to subject the Complainant to disciplinary process in spite of the protected disclosure.

5.5.27. The Complainant subsequently resigned from employment on 29 March 2017. The reasons for the Complainant's resignation are concisely canvassed in his
letter of the resignation. Herein below is a copy of the Complainant’s resignation letter from employment that he submitted to Mr Mdekazi of the NTP on 29 March 2017.

Lionel R. Adendorf

Mr Jongilizwe Mdekazi
GE: Global Markets
NTP Radiosotopes
Elias Motsoaledi Street
PEINDABA

Per email: jongilizwe@ntp.co.za
wyne@ntp.co.za

Dear Mr Mdekazi,

RESIGNATION: MANAGER – GROUP MEDIA AND STAKEHOLDER RELATIONS

Herewith, against my will but because I can no longer tolerate the unbearable working conditions imposed upon me for the last six months and have no other choice, I wish to resign from my position as Manager: Group Media and Stakeholder Relations, last day being 30 April 2017.

I wish to state upfront that this resignation should not in any way or means be misconstrued as an attempt to avoid, dodge, prevent or frustrate the pending disciplinary hearing that you have instituted against me (nor is it hastened by it) even-though it is part of a range of contributing factors to this decision. I welcome it and hope that it can be concluded within this notice period.

In fairness, I wish to state that I will soon lodge a constructive dismissal case with the CCMA or would combine it with the one already lodged with them because I remain convinced that I still have a contribution to make to the company and would not otherwise have made the decision that you read of now.

Two weeks after I have started at NTP Radiosotopes, I have been exposed to, what I believe constituted potentially illegal and unlawful activities.

Unfortunately, this was not the only one but only the start.

Then, for three months, I have been subjected to unlawful and unreasonable instructions due to the above and have even lodged a protected disclosure to you about the incidences and further filed a grievance with HR but this remains unresolved.
Since then, I have noticed clear and blatant attempts to ostracize me, frustrate me and make my life, work and conditions at NTP Radioisotopes the most difficult. This campaign was successful. I therefore give in.

Despite attempts, now found to be superficial and done in bad faith, to ensure that my conditions and relations are restored to how and what it should be, it is now obvious and clear that NTP Radioisotopes had no real intention to respect agreements made and attempts, originally thought to be genuine, as means to restore my working conditions and relationship. A case in point is your disregard for the agreement reached at the CCMA in January this year.

When I complaint about victimization and harassment when I learnt that my movements are monitored, you dismissed it as a misunderstanding and I understood and agreed to it as such and even withdrew a CCMA complaint in this regard - all in good faith- but my original instincts were correct and following the charges, my suspicions were confirmed.

I have submitted two policies to you and till today, you have never even gave me feedback on it, read it or even considered it. Note, that these policies, done without an instruction from you but done because I considered it necessary for me to do my work.

More than a month ago, I submitted an application to you to do extra work. This application was done after a discussion with you and on agreement between us that I should apply but till this day, I have not received any feedback from you on this application.

Following a meeting with the GMD, I proposed to you a plan for April and, despite answering all your questions satisfactory, you continued to frustrate me (and even humiliate me) when you again denied me from doing my work and being of use to a company and contribute productively to the organisation.

As has been the norm for the last few months, I have received no instructions or work from you and am just left without any work or anything to do. This directly affected my reputation amongst my peers and my own self-worth.

In four months I have been subjected to two hearings and faced a set of probably more than ten charges all together, making it impossible for me to work, focus on work or given a chance to be productive.
I have lodged two protected disclosures internally (and following your non-action externally) but without any regard for the law or for any respect for allowable and standard international and corporate prescripts that regulate such, I was instead left vulnerable and subjected to abuse, victimisation and harassment. This forced me to conclude that such harassment is meted out as a desperate means to get rid of me.

It remains the most difficult decision of my entire professional career but, without any options or immediate prospects of employment, I found the conditions created at NTP intolerable and unbearable and can no longer endure it. I tried to have faith, be hopeful that things would change but am now convinced that you do not feel the same way. The letter received from Mr Oosthuizen two weeks ago, confirmed my resolve.

I will continue to cooperate with the investigation launched by the Public Protector and am certain that the outcome of her investigation would vindicate me and confirm all my suspicions. Furthermore, I also hope that she would investigate the conditions and reasons for this resignation and make a finding on it.

While it is not in my nature to walk away from something like this or leave something I feel so strongly about in the way I am, I unfortunately have no faith in NTP’s ability to mediate the above or allow for the above and am convinced that it is only an outside statutory body who can do justice to my hopes or my wishes.

I am sorry about all those colleagues who I am letting down by giving in, those who supported me and believed in me, those who encouraged me to persevere.

I trust that NTP would seriously reconsider its approach to protected disclosures, do whatever is necessary to protect and defend the company’s integrity and reputation but more importantly, that it would do more to protect those who bring irregularities to its attention and would engage on a rigorous campaign to rid the company of the perceived or real culture of corruption and maladministration that I have encountered in my first four months with the company.

As a father, citizen and leader, I have always fought against corruption, as I am convinced that it erodes the trust the public should have in particularly public institutions and companies like NTP Radioisotopes. Those who know me well, know about my objection and repulsion towards corruption and my commitment to the fight against it. For the sake of my children, the battle against corruption is a fight I am willing to die for or, in this instance, be unemployed for.

I remain convinced that NTP Radioisotopes have great potential and stand out amongst the best in the world and it is for this reason why I was (and remain) attracted to it but due to these difficulties outlined above, I am forced to take this drastic but necessary step.

Regards,

Lionel R. Adendorf
Date: Wednesday, March 29, 2017
5.5.28. Even though the Complainant had referred his complaint to the CCMA in terms of section 191 of the LRA and to the Labour Court, wherein the Labour Court ruled that the dispute must in fact be dealt with by the CCMA, the Complainant did not refer his complaint back to the CCMA since he was in financial dire straits and he was well aware that I had started to engage the NTP in relation to his complaint.

5.5.29. Since the Complainant did not refer his complaint back to the CCMA as ruled by the Labour Court, I am not precluded by section 182(3) of the Constitution to investigate this complaint since the CCMA did not reach finality in this matter after it was referred back by the Labour Court.

5.5.30. The only disclosure that the Complainant made to me in terms of section 8(1)(a) of the PDA was on 24 November 2016. On 29 March 2017, I received a copy of the Complainant’s letter of resignation and not a new disclosure.

At paragraph 30 – 47 of the response

5.5.31. The NTP referred me to my conclusions and findings outlined in my Notice issued to it and argued that the Complainant’s disclosure was not submitted to Mr van Haght who was the Complainant’s line manager. The NTP argued that the disclosure which the Complainant made on 11 November 2016 was not shared or discussed with Mr Van Haght at any time prior to 17 November 2016.

5.5.32. The NTP further maintained that the decision to institute disciplinary charges against the Complainant was made by Mr van Haght and not Mr Mdekazi and/or Mr Machaba, both of whom had no prior knowledge thereof. NTP reiterated that no other senior employee above Mr Van Haght was involved in the decision to discipline the Complainant.
5.5.33. The NTP maintained that the misconduct levelled by Mr van Haght against the Complainant related to the day to day operational matters which were in relation to allegations of refusal to obey lawful instructions. Backed up by emails and WhatsApp messages attached to the charge sheet. It further argued that it could not be in dispute that the Complainant refused to comply with instructions given by his line manager.

5.5.34. The NTP argued that for a disciplinary action to amount to occupational detriment, the employee must be disciplined on account or partly on account of having made a protected disclosure.

5.5.35. The NTP submitted a recent case of TSB Sugar RSA Ltd (Now RCL Sugar LTD) v Dorey⁵, that the LAC held as follows:

"[94] In terms of s 3 of the PDA, an employee may not be subjected to any occupational detriment by his or her employer on account, or partly on account, of having made a protected disclosure. The phrase 'on account of' means 'owing to', 'by reason of' or 'because of the fact that'. The phrase is used to introduce the reason or explanation for the occupational detriment. The word 'partly' means 'not completely', 'not solely', 'not entirely' or 'not fully'. A finding that an employee was subjected to an occupational detriment on account of having made a protected disclosure will be based on a conclusion that the sole or predominant reason or explanation for the occupational detriment was the protected disclosure; whereas a finding that an employee was subjected to an occupational detriment partly on account of having made a protected disclosure will be to the effect that the protected disclosure was one of more than reason for the occupational detriment".

⁵ (2019) 40 ILI 1224 (LAC)
5.5.36. The NTP mentioned that in the absence of any knowledge by Mr Van Haght that the Complainant made a disclosure, it would be improper to conclude that disciplinary action was initiated against the Complainant on account of or partly on account of him having made a protected disclosure.

5.5.37. The NTP further submitted that the disciplinary charges against the Complainant were withdrawn and never reinstated, although they were unrelated to the disclosure and could have been persisted with.

5.5.38. The NTP’s submission that Complainant’s disclosure was not submitted to Mr van Haght who was the Complainant’s manager and that the disclosure which the Complainant made on 11 November 2016 was not shared or discussed with Mr Van Haght at any time prior to 17 November 2016 is not true.

5.5.39. Mr van Haght was well aware about the Complainant’s disclosure from as early as 9 November 2016, after Mr van Haght had issued an instruction to the Complainant in a form of an email dated 3 November 2016. Herein below is an email dated 3 November 2016 which related to when Mr van Haght issued instruction to the Complainant:
Hi Helena,

TEAM:

This — as per Benneth’s advice — is so we can finalise the spec with procurement before it heads out to Necsa and government Tender publication site. We want this to go out in November. Hopefully for finalisation by end January with the service provider ready to go by 1 March for the latest!

Guys, Benneth has already reviewed this draft...in principle he is happy with body of the tender... although he has asked us to consider whether everything is properly included. He is reviewing the evaluation/scoring currently and will revert soon. He has also made suggestions about ensuring that we use the current tender “name” plus include “and related services” so that we are properly covered.

Lastly, please bear in mind that ultimately I am looking to procure the services of a single supplier for ALL these services for the following broad reasons:

1. In the changing world of integrated brand, marketing, communications and stakeholder relations it is all about the SINGLE, INTEGRATED BRAND NARRATIVE crafted and executed RELEVANTLY, CONSISTENTLY across every visual, experiential, spoken media, written media, and digital media platform — ultimately with objective of building brand affinity and loyalty to DRIVE SALES in EVERY territory in which we operate. The key here is SINGLE-MINDED AND INTEGRATED. In my over 22 years of doing this stuff, it is much harder to do it efficiently if you have multiple agencies with differing mandates, differing approaches; differing strengths and separate executional philosophies. It’s not impossible; and sometimes it is necessary...but it is NOT easy...and can prove more expensive and time consuming.

2. A Single Supplier certainly makes the administrative process from our side a WHOLE lot simpler.

3. It makes co-ordination of multiple facets of a campaign MUCH easier to manage, co-ordinate and report on: e.g. Just for a single event we may require nearly ALL of the services that are being listed...from photography, to catering, to branding, to media communications, and videography and staging and social media publishing and brochures, and a matching internal activation for staff linked to the event, etc. You do not want to have so many variable moving parts all needing to be on the same strategic and tactical page, needing massive project management in order to work well together to deliver a SINGLE project. (As you may or may not know — it is like herding cats with big egos! Nearly impossible.) We should also bear in mind that we may at times be delivering MORE than one project at a time in MULTIPLE locations.

4. Having said what I said in point 1-3, does not mean I am not willing to see the other side and the opposite advantages. I just want us to think VERY hard about how “fluid” the NTP context is; how constrained NTP tends to be “procedurally”; how nimble and agile we actually need to be; and how tricky it can be to create the necessary strategic alignment, management control, administrative efficiency, and tactical and executional co-ordination, and output reporting linked to reputational value AND demonstrable value-add toward the achievement of sales targets — even among OURSELVES — let alone multiple agencies.

So think on these things...in preparation for this technical spec meeting.

Thanks, again!

Cheers,

Arno
5.5.40. The Complainant responded to Mr van Hagt and included amongst others Mr Machaba and Mr Mdekazi wherein the Complainant highlighted his intentions to lodge a disclosure. Herein below emails relating to a response from the Complainant to Mr van Hagt’s instruction.

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**Lionel Adendorf**

From: Lionel Adendorf
Sent: Wednesday, 09 November 2016 9:40 AM
To: Arno Van Hagt; Jongilizwe Mdekazi
Cc: Benneth Machaba; Charlene Nikos
Subject: RE: RE: BRMC&S Tender Spec Meeting

Amo,

I would respectfully ask to be excused from this process.

I am conflicted following a meeting I attended with service providers where this matter was discussed.

I have obtained legal opinion on my involvement in the matter and was advised to rather excuse myself from it due to the conflict.

Hope you would understand.

Regards,

Lionel

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**Lionel Adendorf**

From: Lionel Adendorf
Sent: Wednesday, 09 November 2016 11:23 AM
To: Benneth Machaba
Cc: Charlene Nikos; Arno Van Hagt; Jongilizwe Mdekazi
Subject: RE: RE: BRMC&S Tender Spec Meeting

Benneth,

Due to the nature and seriousness of this matter, I would rather submit a sworn affidavit in this regard.

Hope you understand,

Lionel

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From: Benneth Machaba
Sent: Wednesday, 09 November 2016 10:01 AM
To: Lionel Adendorf <lionel@ntp.co.za>
Cc: Charlene Nikos <Charlene@ntp.co.za>; Arno Van Hagt <ArnoVH@ntp.co.za>; Jongilizwe Mdekazi <Jongilizwe@ntp.co.za>
Subject: RE: RE: BRMC&S Tender Spec Meeting

Dear Lionel,

With reference to your mail below, can you please elaborate further on this matter so that I can also be in the picture.

I will appreciate your cooperation.

Regards

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5.5.41. In an email dated 10 November 2016, Mr Mdekazi responded to the Complainant and confirmed that the issues raised in the Complainant’s email dated 9 November 2016 required an official investigation. Herein below is a copy of an email from Mr Mdekazi:
5.5.42. Subsequently, the Complainant lodged a protected disclosure of 11 November 2016 to Mr Mdekazi, which was followed by an email dated 15 November 2016 wherein the Complainant attached a copy of a sworn affidavit relating to the details of his disclosure.

5.5.43. The fact that Mr van Haght, as the Senior Manager, Corporate Communication and Stakeholder Relations and a line manager to the Complainant, as well as Mr Mdekazi as the Group Executive Global Markets and a line manager of Mr van Haght were informed in an email dated 3 November 2016 and 9 November 2016, is evident that the Executive Managers of the NTP responsible for taking disciplinary action against the Complainant, were well aware of the charges instituted against him.

5.5.44. A similar scenario was This was highlighted in the case of Independent Municipal & Allied Trade Union & another v City of Matlosana Local Municipality & another (2014) 35 ILJ 2459 (LC) that the link between the occupational detriment and the disclosure is determined by the timing of the institution of the
charges or the occupational detriment, the reasons given by the employer, the nature of the disclosure and the person responsible for taking the decision to institute the charges.

5.5.45. I did not investigate the issues that were before the CCMA which led to the settlement agreement entered into between the parties since they were dealt with by it.

5.5.46. Although the NTP had withdrawn the first disciplinary charges brought against the Complainant in a form of a settlement agreement dated 26 January 2017 the NTP never reinstated the charges. However, the NTP issued different disciplinary charges against the Complainant on 23 March 2017, with a date of hearing scheduled for 30 until 31 March 2017 respectively.

At paragraph 48- 56 of the response

5.5.47. The NTP mentioned that following the appointment of an independent forensic firm to investigate the allegations made by the Complainant against Mr van Haght, it found that at least two of the allegations against Van Haght, had merit and that disciplinary action was warranted. However, there was insufficient evidence to support the allegations of irregularities surrounding the Future of Fusion Project.

5.5.48. It mentioned that charges of misconduct were then levelled against van Haght, based on the findings and recommendations in the forensic report. It further submitted that the Complainant was called as a witness to testify. However, no sufficient evidence was found to warrant charges against van Haght with regard to the Future of Fusion Project. As such there were no recommendations to institute disciplinary action against him in this regard. The Complainant could not be asked to testify about the Future of Fusion Project as it was not before the Chairperson.
5.5.49. Further, that Mr van Haght was found guilty on all four (4) charges and the Chairperson recommended his dismissal in an outcome dated 4 April 2017 and he then proceeded to appeal against the findings as well as the sanction of dismissal.

5.5.50. The NTP submitted that it appointed an independent Chairperson (Motshegare Attorneys Inc) to consider and preside over the appeal. However, the Chairperson misconstrued what the appeal process entailed by purporting to review the outcome of the disciplinary hearing, instead of considering the grounds of appeal and determining whether or not the findings made by the disciplinary Chairperson and recommendations should stand or be overturned.

5.5.51. Due to the above, the NTP appointed another Chairperson (TGR Attorneys) who in an outcome dated 29 June 2017, overturned one finding of guilt and confirmed a sanction of a written warning against Mr van Haght.

5.5.52. I have noted that the NTP conducted a disciplinary hearing against Mr van Haght and this hearing emanated from the Complainant’s protected disclosure. The outcome of an appeal against Mr van Haght dated 29 June 2017 confirmed some of the issues raised by the Complainant in his disclosure. Consequently, Mr van Haght issued disciplinary charges against the Complainant and subjected him to occupational detriment. As such, it is apparent that the Complainant lodged a disclosure in good faith.

At paragraph 57 - 65 of the response

5.5.53. The NTP conceded that the Complainant wrote a letter to it dated 9 March 2017, however this was even before the outcome of the disciplinary hearing chaired by Ms Gungubele was submitted.
5.5.54. It argued in this regard that contrary to what may be understood in reading paragraph 12.1.36 of the Notice, the Complainant did not just complain about not being asked to testify about the Future of Fusion Project, he in fact went on to make serious and unsubstantiated allegations against various executives of NTP and Gobodo Forensics, accusing them without any factual basis, of manipulating the disciplinary hearing to get Van Hagt off the hook.

5.5.55. Further, that the Complainant provided no evidence of how this was done or could possibly have been done, given that either Mr GP Smith (Mr Smith) not Ms Eboka, the Executives named by the Complainant, had been involved in the disciplinary hearing of Mr van Hagt, which was run by Mdekazi.

5.5.56. Furthermore, he implied without any evidence that Mr Smith and Ms Eboka were somehow involved in irregular and unlawful conduct in relation to the Future of Fusion Project. The NTP stated that it is clear by now that a disclosure is protected only if it is made in good faith. It then argued that there was nothing remotely resembling good faith in the letter written by the Complainant on 9 March 2017.

5.5.57. The NTP argued that contrary to the Complainant's unfounded allegations that Mr van Hagt was found guilty of all charges, even in the absence of any charges relating to the Future of Fusion Project and that it was only due to the appeal that Van Hagt was not dismissed, not because of any intervention by any of the Executives.

5.5.58. The NTP submitted that if the Complainant was acting in good faith, he should have waited for the outcome of the disciplinary hearing, which only became available on 12 April 2017, before making wild and unsubstantiated claims contained in his letter dated 9 March 2017.
5.5.59. The NTP further argued that the Complainant had already made a disclosure regarding the Future of Fusion Project, which had been investigated and found not to be supported by available evidence. The Complainant should instead have alleged that the disciplinary process had been manipulated.

5.5.60. The NTP mentioned that the reason the Complainant was issued with a notice to attend a disciplinary hearing was not on account of or partly on account of having made protected disclosure, but because he had made wild and unsubstantiated allegations against the two Executives, which disclosure was not in good faith and therefore did not constitute protected disclosure as defined in the PDA.

5.5.61. The NTP submitted that the finding in paragraph 12.1.38 of the Notice are not supported by the facts or the law.

5.5.62. It is disingenuous of the NTP to argue that the Complainant’s disclosure sent to the BoD of the NTP on 9 March 2017 was not made in good faith, whereas a disciplinary hearing was held against Mr van Haght regarding his disclosure that he had lodged which resulted in a written warning issued against him. The disciplinary charges against Mr van Haght emanated from the disclosure that was lodged by the Complainant.

5.5.63. It is unfair and without merit that the Complainant should have awaited the outcome of the disciplinary hearing against Mr van Haght, which became available on 12 April 2017, before he could make a “wild and unsubstantiated claim” as referred to by the NTP.

5.5.64. I could not find any provision in the PDA which appears to suggest that disclosure is prohibited in circumstances where there is ensuing disciplinary hearing or investigation by the employer. On the contrary, the Complainant
believed that there could have been an attempt to ignore some of the issues that were included in his disclosure.

5.5.65. In John v Afrox Oxygen Limited (JA90/15) [2018] ZALAC 4;[2018] 5 BLLR 476 (LAC); (2018) 39 ILJ 1278 (LAC) (29 January 2018), the court held a view that "...for the disclosures made by the appellant to qualify as protected disclosure as stated earlier, the appellant had to have reason to believe that the information she disclosed, at the very least, tended to show that an impropriety has, is being, or may be committed, or that the respondent has, is failing, or may in the future fail to comply with its legal obligation. Furthermore, that the appellant acted in good faith when she made the disclosures and in doing so followed procedures either prescribed or authorised by the employer".

5.5.66. It should be noted that I did not investigate the allegations contained in the protected disclosure made by the Complainant against Mr van Haght, since NTP conducted such which resulted in a disciplinary hearing against Mr van Haght and issued an outcome on 12 April 2017. However I considered the outcome of a written warning issued against Mr Van Haght, which is an indication that the disclosure made by the Complainant was lodged in good faith and had merit.

At paragraph 66-76 of the response

5.5.67. NTP argued that the charges laid against the Complainant issued on 23 March 2017 were not on account of or partly on account of a disclosure made on 11 November 2016. The Complainant was charged because on 9 March 2017, he made spurious allegations against various executives and Gobodo Forensic which were not made in good faith.
5.5.68. In its submission NTP refuted that the Complainant’s resignation on 29 March 2017 was because NTP made continued employment intolerable in that the Complainant served a month’s notice following his resignation.

5.5.69. It indicated in its argument that an employee who alleges that a resignation amounts to constructive dismissal bears the onus of proving that the employer made continued employment intolerable.

5.5.70. It stated that NTP has not been provided with any of the documents relied upon by me, including such statements as the Complainant has made, as a result it is impossible to determine how I reached the determination that the Complainant discharged that onus which rest on him.

5.5.71. Further that the procedure adopted by me is such that the onus to prove that there was a dismissal has now been shifted to NTP, contrary to the requirements of section 192(1) of the LRA, which provides as follows:

"In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal."

5.5.72. In its submission it stated that in any event, it is not competent of me to make a finding concerning an alleged automatically unfair dismissal as a finding requires that evidence first be led under oath, the claimant be subjected to cross-examination and the employer be afforded an opportunity to tender evidence to show that if there is a dismissal, such dismissal is not unfair. This procedure has not been followed. Instead, a finding has been made without the claims of the Complainant being tested.
5.5.73. It mentioned that it simply cannot be that an employee who resigns from his/her employment can avoid having his/her credibility tested by abandoning processes that he/she has already initiated in terms of the LRA and seek relief from my office in the manner that the Complainant has done.

5.5.74. The NTP conceded that the disciplinary charges made against the Complainant were directly linked to the disclosure he made on 9 March 2017. Despite the NTP's submission that the afore-mentioned disclosure was not made in good faith, the NTP could not provide evidence supporting its assertion.

5.5.75. As already alluded to above, the Complainant held a reasonable belief that the disclosure concerned shows that a person has failed, is failing or likely to fail to comply with any legal obligation to which that person is subject.

5.5.76. The NTP's response to the Complainant's disclosure of 9 March 2017 through a letter dated 10 March 2017 stating that it will continue with a disciplinary hearing against him, and subsequent issuing of the disciplinary charges against the Complainant on 23 March 2017, is an indication that the NTP made the Complainant's continued employment intolerable hence he succumbed to pressure and tendered his resignation letter.

At paragraph 77- 88 of the response

5.5.77. The NTP went on and referred me to my findings arguing that I could not find any evidence to allow me to arrive at a different finding.
At paragraph 89-98 of the response

5.5.78. The NTP challenged my jurisdiction and argued that I am neither a Labour Court nor a court as contemplated by section 4(2)(a) of the PDA, as such I did not have jurisdiction to deal with this matter.

5.5.79. The issues relating to my jurisdiction in the investigation of this complaint have already been sufficiently dealt with in a paragraph entitled powers and jurisdiction of the Public Protector and need not be rehashed here.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I hereby make the following findings:

6.1. Regarding whether the NTP improperly handled a protected disclosure duly made by the Complainant in terms of the Protected Disclosure Act 26 of 2000.

6.1.1. The allegation that the NTP improperly handled a protected disclosure duly made by the Complainant in terms of the PDA, is substantiated.

6.1.2. The Complainant made a protected disclosure as defined in section 1 read with section 6 of the PDA on 11 November 2016 to Mr Mdekazi with a copy of a sworn statement sent via email on 15 November 2016 and on 9 March 2017, to Dr Magau.

6.1.3. The Complainant also made a protected disclosure to me in terms of section 8(1)(a) of the PDA read with section 182 (2) of the Constitution on 24 November 2016.
6.1.4. The disclosures made by the Complainant were in good faith as required by section 8(1)(a) and section 6(1) of the PDA.

6.1.5. A disciplinary hearing emanating from the Complainant’s disclosure on 11 November 2016 was held against Mr van Haght. Subsequently, the outcome of the disciplinary hearing against Mr van Haght dated 12 April 2017, confirmed the issues raised by the Complainant’s disclosure hence a written warning was issued against Mr van Haght on 29 June 2017 in the outcome of the appeal.

6.1.6. The NTP preferred disciplinary charges against the Complainant on 17 November 2016, six (6) days after he lodged a disclosure, as such the NTP subjected the Complainant to occupational detriment and this was in violation of section 3 of the PDA, which required that the Complainant should not have been subjected to occupational detriment on account of having made a protected disclosure.

6.1.7. Further disciplinary charges were preferred against the Complainant on 23 March 2017 on account of having made a disclosure to Dr Magau on 9 March 2017, as such the NTP violated section 3 of the PDA.

6.1.8. By failing to handle a protected disclosure duly made by the Complainant in compliance with section 1 read with section 6 of the PDA, the NTP acted unlawfully and in violation of section 3 of the PDA.

6.1.9. Therefore, the conduct of the NTP in this regard amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2. Regarding whether such improper conduct of the NTP contributed to the Complainant's resignation from employment.
6.2.1. The allegation that the improper conduct of the NTP contributed to the Complainant’s resignation from employment, is substantiated.

6.2.2. The NTP issued disciplinary charges preferred against the Complainant on 17 November 2016, although the NTP had withdrawn the first disciplinary charges brought against the Complainant in a form of a settlement agreement entered into between itself and the Complainant on 26 January 2017, the NTP never reinstated the charges.

6.2.3. Instead, on 23 March 2017 the NTP issued different disciplinary charges against the Complainant, with a date of hearing scheduled for 30 until 31 March 2017.

6.2.4. This is a clear indication that the NTP made the Complainant’s continued employment intolerable hence he succumbed to the pressure and tendered his resignation letter on 29 March 2017.

6.2.5. The conduct of the NTP of subjecting the Complainant to occupational detriment through the charges brought against him on 17 November 2016 and 23 March 2017, constitute maladministration and abuse of power as envisaged in section 6(4)(a)(i) of the Public Protector Act, as well as improper conduct as envisaged in section 182(1)(a) of the Constitution.

6.3. Regarding whether due to these circumstances the Complainant was prejudiced by the improper conduct of the NTP as envisaged in section 6(4)(a)(v) of the Public Protector Act.

6.3.1. The allegation that the Complainant was improperly prejudiced by the conduct of the officials of the NTP, is substantiated.
6.3.2. By proceeding with the disciplinary hearing against the Complainant the NTP exposed the Complainant to occupational detriment, which ostensibly led to the Complainant’s frustration, despair and psychological suffering, hence his resignation from work.

6.3.3. Due to the improper conduct of the NTP through its failure to comply with section 3 of the PDA, the Complainant unduly suffered immense financial, emotional and social prejudice mainly involving:

6.3.3.1. Loss of income during the unemployed period;
6.3.3.2. Emotional pain and suffering endured by him and his family;
6.3.3.3. Financial expenses relating to opposing the intended charges in the form of legal fees, transport communication and therapy fees;
6.3.3.4. Apparent blacklisting as a whistle-blower who remains unemployed and facing a reality of exit papers that reflect resignation; and
6.3.3.5. Inconvenience to his family and security concerns relating to the disclosure that was handled by the NTP improperly.

6.3.4. NTP even when it finally instituted disciplinary proceedings against the subject of the Complainant’s disclosure, Mr Van Haght, it purportedly did so not because of the disclosure but for completely different reasons. It did not want to lend credence to the Complainant’s protected disclosure and therefore did not observe the objectives and hallmarks of the PDA.

6.3.5. Therefore, the conduct of the NTP amounts to improper prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.
7. REMEDIAL ACTION

The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

7.1. The Chairperson of the Board of Directors NTP Radiosotopes SOC Ltd to:

7.1.1. Ensure that the following remedial actions are implemented:

7.1.1.1. The Complainant to be provided with a letter of apology within ten (10) working days of issuing of this report for subjecting him to occupational detriment, which resulted in him resigning from employment;

7.1.1.2. The Complainant should be reinstated to his position within thirty (20) working days from the date of issuing of a letter of apology to him;

7.1.1.3. The Complainant should be paid full salary and benefits that would have been due to him had he not been dismissed, together with interest calculated at the applicable rate as prescribed by section 1(2) of the Prescribed Rate of Interest Act No. 55 of 1975 within thirty (30) days from date of issuing of this report;

7.1.1.4. The Complainant is compensated for financial losses incurred by virtue of incidental expenses related to his dismissal within 60 days from date of issuing of this report and upon submission of proof thereof;

7.1.1.5. Ensure that he gets further therapeutic support if still required, for suffering the occupational detriment as a whistle-blower
7.1.1.6. Provide support to him and employees reporting under him through change management leadership intervention and provides all team members with knowledge, values and skills to embrace whistle-blowing; and

7.1.1.7. Review and or develop, institutionalise and implement Standard Operating Procedures for handling whistle-blowers as provided for in the PDA.

7.2. The Managing Director of the NTP Radioisotopes SOC Ltd

7.2.1. The Group Managing Director of NTP, Ms TNM Eboka to:

7.2.2.1 Ensure that disciplinary action is taken against the Mr WJ Oosthuizen, Head of Department, Human Resources, NTP for his violation of section 3 of the PDA in how he handled the Complainant’s protected disclosure.

8. MONITORING

8.1. The Chairperson of the Board of NTP to submit an action plan, within thirty (30) working days of issuing this Report, indicating how the remedial actions mentioned in paragraph 7.1 and 7.2 of this Report will be implemented.

8.2. The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within a period of six (6) months of the issuing in my Report.

ADV. BUSIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 26 / 12 / 2019