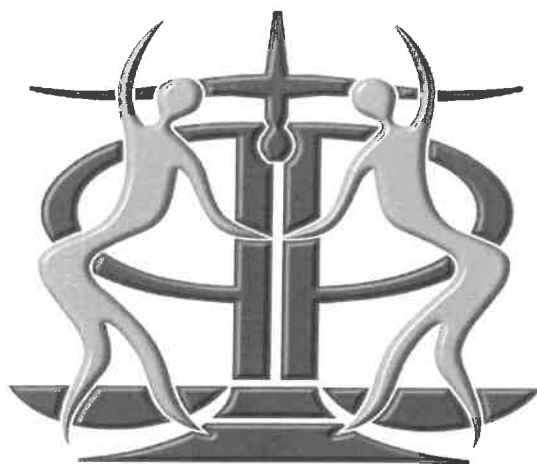


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND
SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO. 41 OF 2019/20

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF PROCUREMENT
IRREGULARITIES, IRREGULAR APPOINTMENT AND MALADMINISTRATION
RELATING TO THE APPOINTMENT OF MS TH BOTHA AS DEPUTY DIRECTOR:
NATIONAL SPECIALISED INVESTIGATION TEAM BY INDEPENDENT POLICE
INVESTIGATIVE DIRECTORATE**

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EXECUTIVE SUMMARY

- (i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), and published in terms of section 8(2A)(a) of the Public Protector Act, 1994 (Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of procurement irregularities, irregular appointment and maladministration relating to the appointment of Ms TH Botha (Ms Botha) as the Deputy Director: National Specialised Investigation Team by the Independent Police Investigative Directorate (IPID).
- (iii) The complaint was lodged with my office on 22 June 2018 by Mr Cedrick Mthokozisi Nkabinde (Complainant) alleging an irregular appointment and maladministration surrounding the appointment of Ms Botha as a Deputy Director: National Specialised Investigation Team (NSIT) by the IPID.
- (iv) **In the main, the Complainant alleged, *inter alia*, that:**
 - (aa) In early 2017, the former Deputy Director of NSIT, Ms Emily Motsogi, left the IPID and her post became vacant. On 21 April 2017, the vacant post was advertised with **REF NO.Q9/2017/25** and the closing date was 05 May 2017. The Complainant applied for this post as he qualified for it;
 - (bb) After seven (7) days, the same post was re-advertised on 28 April 2017 with **REF NO.QA/2017/29** and with a closing date of 12 May 2017. There was an adjustment on the requirements for the post. Some of the requirements were removed or relaxed to suit a specific individual, namely Ms TH Botha, and other requirements

were added such as 10 years' experience as an Investigation Analyst. The first post with **REF NO.Q9/2017/25** was never withdrawn. The Complainant alleged that he never applied for the second advertised post as he had already applied as per the initial advertisement;

- (cc) He started to make enquiries on 04 July 2017 with the IPID's Human Resources (HR) about the selection and filling of this post and was told that the post was put on hold until the Programme Manager of Investigations addressed certain issues about it. On 01 October 2017, Ms Botha was appointed to the post, **REF NO.QA/2017/29**, as the Deputy Director: NSIT. On 06 October 2017, the Complainant made another follow up with HR, but did not get any satisfactory answer with regard to the processes followed in the filling of the vacant position. Instead, the Complainant was told by Mrs N Netsianda, the IPID's Chief Director Corporate Services that the post in which Ms Botha was appointed is the same post that was vacated by Ms Motsogi;
- (dd) Complainant further submitted that in 2015, he was a member of the recruitment panel at IPID KwaZulu Natal where the same Ms Botha applied for a position of a Principal Investigator. According to the Complainant, he had sight of Ms Botha's Curriculum Vitae (CV) and noticed that she was an Administrative Clerk at the South African Police Service (SAPS);
- (ee) Ms Botha was appointed at the SAPS on 21 February 1994 as an Administrative Clerk and for her entire career in the SAPS, she remained an Administrative Clerk until she resigned on 21 February 2016. According to her SAP 96 (SAPS career profile), she never attended any Data Analyst Course within the SAPS. The CV also did not reflect her duties as a Data Analyst or an Investigator;

- (ff) The post in which Ms Botha was to appointed by the IPID is, in terms of the Department of Public Service and Administration (DPSA), an NQF level 6 post and its minimum requirement is a National Diploma or equivalent qualification. According to the Complainant, Ms Botha only has a matric and did not have a Diploma hence she still did not qualify for the post even though the requirements were relaxed and altered to suit her;
- (gg) Ms Botha is expected to supervise and give guidance to Investigators, including Senior and Principal Investigators. Ms Botha cannot be expected to perform that duty when she has never been an Investigator before;
- (hh) The IPID changed and manipulated the requirements of the post of a Deputy Director: NSIT in order to suit Ms Botha without any job evaluation process being conducted by a job analyst as required by the policies. As a result, the Complainant and other qualifying candidates were disadvantaged and prejudiced by this maladministration and nepotism;
- (ii) The IPID's Labour Relations Desk/Division referred the grievance to the Office of the Presidency for further investigation since the allegations involved senior officials within the IPID. According to the Complainant, Advocate Moloko in the Office of the Presidency investigated the matter and tabled a report to the former Executive Director of IPID, Mr Robert McBride, a while ago. The report by Advocate Moloko had adverse findings implicating IPID senior officials in wrongdoing in connection with the appointment of Ms Botha. However, Mr McBride held onto the report and failed to implement its recommendations which entailed taking disciplinary steps against the IPID senior officials involved in this appointment;

- (jj) In essence, the IPID improperly followed procurement processes when it appointed Fidelity Security Services (Pty) Ltd (Fidelity) to provide the services of an Investigative Analyst for the interpretation of cellular and other data in criminal investigations;
- (kk) The IPID improperly appointed Ms Botha as a Deputy Director: NSIT without following proper recruitment processes; and
- (ll) The IPID improperly suspended the Complainant in retaliation against his protected disclosure regarding alleged unethical conduct by Mr McBride and regarding the grievance against alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the Protected Disclosures Act, 2000.
- (v) The investigation was conducted in terms of section 182(1)(a) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.
- (vi) **On analysis of the complaint, the following issues were identified and investigated:**
 - (a) Whether the IPID improperly followed procurement processes when it appointed Fidelity Security Services (Pty) Ltd (Fidelity) to provide the services of an Investigative Analyst for the interpretation of cellular and other data in criminal investigations;

- (b) Whether the IPID improperly appointed Ms TH Botha as a Deputy Director: NSIT without following proper recruitment processes;
- (c) Whether the IPID improperly suspended the Complainant in retaliation against his protected disclosure regarding alleged unethical conduct by Mr McBride and regarding the grievance against alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the Protected Disclosures Act¹ and
- (d) Whether the Complainant, IPID or any other person suffered prejudice as a result of the alleged improper appointment of Ms TH Botha in the circumstances.
- (vii) The investigation process included an exchange of correspondence and analysis of all relevant documents and application of all relevant laws, policies and related prescripts and interviews were also conducted with the Complainant and relevant officials of the IPID.
- (viii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the IPID and improper prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the IPID. Those were the following:
 - (a) The relevant provisions of the Constitution;
 - (b) The Public Protector Act 103 of 1994;
 - (c) The Independent Police Investigative Directorate Act 1 of 2011;
 - (d) The IPID Supply Chain Management Policy of Independent Police Investigative Directorate signed off on 2015/05/05 (IPID SCM Policy);
 - (e) The IPID Recruitment and Selection Policy (Recruitment and Selection Policy);

¹ Act No. 26 of 2000.

- (f) The Public Finance Management Act 1 of 1999 (PFMA);
 - (g) The National Treasury Regulations of March 2005;
 - (h) The National Treasury Instruction 3 of 2016/2017;
 - (i) The Public Service Act, 1994 (PSA) and its Regulations (PSA Regulations);
 - (j) The Protected Disclosures Act 26 of 2000 (PDA);
 - (k) The Promotion of Administrative Justice Act, 3 of 2000 (PAJA).
- (ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:
- (a) **Regarding whether the IPID improperly followed procurement processes when it appointed Fidelity Security Services (Pty) Ltd (Fidelity) to provide the services of an Investigative Analyst for the interpretation of cellular and other data in criminal investigations:**
 - (aa) The allegation that the IPID failed to follow proper procurement processes when it appointed Fidelity Security to provide the services of an Investigative Analyst for the interpretation of cellular phone and other data in criminal investigations is substantiated.
 - (bb) Evidence in my possession has revealed several procedural flaws which amounted, in the main, to a violation and flouting of the IPID SCM Policy committed at various stages of the procurement of Fidelity by the IPID such as:
 - (a) The omission or non-involvement of the office of the CFO in the procurement of Fidelity. The CFO's name and place of her signature in the deviation memorandum was scratched or cancelled out by a pen. As a result there was no confirmation as to whether this expenditure/purchase or procurement was in accordance with the

- vote of the main financial division within the IPID namely, its Finance Office as required by regulatory legal framework;
- (b) The SLA between Fidelity and the IPID was not signed by Mr McBride as required by the IPID SCM Policy in order for it to be regarded as enforceable. The SLA was only signed by Fidelity;
 - (c) The extension/expansion or variation of the SLA between the IPID and Fidelity exceeded a threshold of fifteen (15) percent of the original contract value and it was not considered by BSC, BEC and BAC as required by the IPID SCM Policy; nor was it signed by Mr McBride or at least his nominated delegate;
 - (d) The SLA between the IPID and Fidelity was not forwarded to the IPID's SCM by Chief Director Legal Services: Ms Moroasui to be maintained and managed there as required by IPID SCM Policy;
 - (e) The Fidelity's consultant, Ms Botha, started working at the IPID on 09 January 2017 thereby gaining access to state official documents/dockets and files while there was no valid or a duly signed contract between the IPID and Fidelity in place;
 - (f) The payment to Fidelity of a total amount of **R513 000.00** which was in excess of Procurement Threshold Values, and not considered by BSC, BEC or BAC (excluding travel and accommodation costs) was made by the IPID without the existence of a valid or a duly signed contract in place; and
 - (g) The expenditure incurred on travel and accommodation of Ms Botha was not on the approved submission/quotation nor approved separately. This, in essence, understated the actual contract amount which carried hidden costs to the IPID expenditure. The travel and accommodation costs of Ms Botha should have been

included as part of the SLA, but it was not factored in, which was the deliberate attempt not to follow the procurement process by advertising this service.

- (cc) Such conduct by the IPID officials namely, Ms Moroasui and Mr McBride violated sections 195(1)(a);(b);(d) and (g) and 217(1) of the Constitution, sections 38(1)(c) and (g) and 39 of the PFMA, National Treasury Regulation 8.2, National Treasury Regulation 9, sections 7(1)(b) and 31(1)(a)(i) of IPID Act, Clauses 19(d), 22(a) and 9.2(C) of the IPID SCM Policy when procuring the services of Fidelity.
- (dd) Accordingly, such a violation by the IPID amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (b) **Regarding whether the IPID improperly appointed Ms TH Botha as a Deputy Director: NSIT without following proper recruitment processes:**
 - (aa) The allegation that IPID improperly appointed Ms TH Botha as a Deputy Director: NSIT without following proper recruitment processes is substantiated.
 - (bb) As a result of Chief Director National Head of Investigation: Mr Sesoko's undue influence, interference with the IPID's HR, unlawful persistence or unauthorised deviation which he made in his own handwriting, as well Ms Netsianda's inaction or supine attitude in the face of such gross irregularity as the overall Head of Corporate Services within the IPID, a newly created post namely, **ref number Q9/2017/29** was not subjected to the necessary job evaluation process before it was advertised thereby violating Public Service Regulations 4(a) and (b) and 40(b) and (d) governing the administration of Public Service.

- (cc) Ubiquitous evidence in my possession revealed that the entire selection/recruitment panel, namely Mr Sesoko, Ms Motlhale, Mr Khuba and Mr De Bruin failed to exclude the CV of Ms Botha during the selection process despite the fact that it did not have the necessary information such as her position/job title or rank from her previous employer/SAPS and experience which would have assisted them in making an informed decision. Submission received by my office from the SAPS stated that Ms Botha had always been employed by SAPS as an Administrative Clerk. Same was admitted by Ms Botha herself during an interview with my investigation team.
- (dd) Based on the above, the members of the selection/recruitment panel violated clause 10.5.7 of the IPID Recruitment Policy, section 11(2)(a) and (b) of the PSA. Similarly, there is no indication that the Head of Corporate Services; Ms Netsianda satisfied herself that due processes have been followed to determine that Ms Botha met all the requirements for the advertised position. This information could have been presented to Mr McBride before this appointment is finalised.
- (ee) IPID referred the Complainant's grievance in relation to this issue to the Presidency for further investigation. Advocate Moloko in the Presidency undertook this investigation and tabled a report with adverse findings against certain IPID officials that were involved in this recruitment. Mr McBride did not implement the recommendations as made in this report by Advocate Moloko.
- (ff) Accordingly, such a violation by the IPID selection/recruitment panel members amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (c) **Regarding whether the IPID improperly suspended the Complainant in retaliation against his Protected Disclosure regarding an alleged unethical**

conduct by Mr McBride and regarding the grievance against alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the Protected Disclosures Act:

- (aa) The allegation that the IPID improperly suspended the Complainant in retaliation against his protected disclosure regarding an alleged unethical conduct by Mr McBride and the grievance against alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the PDA is substantiated.
- (bb) The Complainant was subjected to a disciplinary hearing/occupational detriment by the IPID and charged for reasons that were patently or causally related to his making of a protected disclosure as defined, thereby improperly prejudicing him as he had to later resign by concluding a Settlement Agreement with the IPID.
- (cc) *Prima facie*, I am satisfied that the evidence at my disposal established a link between the charges which have been brought against the Complainant and the fact that he made a protected disclosure.
- (dd) By subjecting the Complainant to apparently unsubstantiated charges or occupational detriment following the fact that he had blown the whistle on improper administrative activities taking place within the IPID, Mr Sesoko, violated section 3 of the PDA, section 186(2)(d) of LRA and 23(1) of the Constitution when he instructed Ms Maharaj: the Provincial Head of the IPID in KwaZulu Natal, who was not even the line manager of the Complainant at the time of alleged misconduct, to suspend and charge him.

- (ee) Accordingly, such conduct by Mr Sesoko amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (d) **Regarding whether the Complainant, IPID or any other person suffered prejudice as a result of the alleged improper appointment of Ms TH Botha in the circumstances:**
 - (aa) The allegation regarding whether the Complainant, IPID or any other person suffered prejudice in the circumstances is substantiated.
 - (bb) The Complainant suffered prejudice in a form of occupational detriment, however such was immediately addressed by the Settlement Agreement which he subsequently signed with the IPID in the presence of his legal representative.
 - (cc) The IPID also suffered financial prejudice or loss by advertising a post of Deputy Director with REF NO.Q9/2017/25 at a costs of **R34 900.83** which was never filled, officially withdrawn or cancelled. This conduct amounted to fruitless and wasteful expenditure as well as violation of sections 38 of the PFMA by Mr McBride as accounting officer and section 45 of PFMA by Ms Netsianda as the Head of Corporate Services within the IPID under whose watch this financial irregularity happened.
 - (dd) The IPID advertised another post of Deputy Director: NSIT with REF NO.QA/2017/29, at a costs of **R34 900.83** without it being subjected to the necessary job evaluation as required by Public Service Regulation.
 - (ee) This post was newly created position as shown in evidence. Failure to subject this post to the necessary job evaluation process was apparently attributable Mr

Sesoko's undue influence, unlawful persistence or unauthorised deviation in his own handwriting, as well as Ms Netsianda's inaction or supine attitude as the overall head of Corporate Services at the IPID. Such advertisement amounted to irregular and unauthorised expenditure as defined and thereby in violation of section 45 of the PFMA by Mr Sesoko and Ms Netsianda respectively.

- (ff) The expenditure of **R102 123.15** was incurred on travel and accommodation for Ms Botha, however it was not in the approved submission/memorandum nor approved separately. This, in essence, understated the actual contract amount of **R171 000.00** which was paid by the IPID to Fidelity for the services of Ms Botha. The travel and accommodation costs of Ms Botha should have been included as part of the SLA. Clearly, such conduct amounted to unauthorised and irregular expenditure as defined and prohibited in sections 38 and 45 of PFMA.
- (gg) The IPID appointed Ms Botha as Deputy Director: NSIT on 03 August 2017 on a salary notch of **R657 558.00** per annum for a post REF NO.QA/2017/29 that never existed before or subjected to job evaluation as required by regulations governing Public Service. Since the date of her appointment, Ms Botha has received a salary from the IPID in excess of **R1 174 873.56**. Continuous payment of such salary to Ms Botha amounts to a cumulative and progressive irregular expenditure as well as violation of section 38 of the PFMA by Mr McBride and section 45 of the PFMA by Mr Sesoko and Ms Netsianda.
- (x) The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

The (Acting) Executive Director of the IPID must take appropriate steps to ensure that:

- (aa) Within thirty (30) working days from the date of this report takes disciplinary steps against all IPID officials who were responsible for violation of the Constitution, IPID Act, PDA Act, IPID Recruitment and Selection Policy, IPID SCM Policy, PSA Regulations which resulted in the irregular appointment of Ms Botha, irregular procurement of Fidelity's services, irregular, fruitless and wasteful expenditure and improper prejudice to the Complainant;
- (bb) Investigate and recover any irregular, unauthorised, fruitless and wasteful expenditure incurred by the IPID, from any person who is liable in law, in accordance with the process prescribed by the National Treasury;
- (cc) Within sixty (60) working days of the issue of this report; all IPID's officials who are involved in the SCM process, including all the senior management, attend a workshop on the Recruitment and Selection procedures and processes.
- (dd) Within sixty (60) working days from the date of this report, present this report and the investigation report compiled by Advocate Moloko to the Minister of Police for a decision to address the irregular appointment of Ms Botha and other findings contained in the Presidency report.
- (ee) Within sixty (60) working days from the date of this report, disclose the unauthorised, irregular as well as fruitless and wasteful expenditure to the National Treasury.
- (ff) Directs the CFO to amend the closing balance of the current financial statements to include the unauthorised, irregular as well as fruitless and wasteful expenditure in the 2019/2020 financial statements.
- (gg) Within sixty (60) working days from the date of this report, he initiates a judicial review process as prescribed in terms of sections 6 and 7 of the PAJA to set aside

the appointment of Ms Botha on the basis that she was irregularly appointed on the newly created post that neither existed before within the IPID structure nor subjected to a job evaluation process as required in terms of PSA Regulations;

- (hh) Within sixty (60) working days from the date of this report, the IPID develops a policy relating to the proper handling of protected disclosures/whistle-blowing lodged by its internal staff members. The policy should, amongst other things, address the manner in which such disclosures should be processed without victimising, disclosing the identity of the whistle-blower or subject him/her to occupational detriment.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF PROCUREMENT IRREGULARITIES, IRREGULAR APPOINTMENT AND MALADMINISTRATION RELATING TO THE APPOINTMENT OF MS TH BOTHA AS DEPUTY DIRECTOR: NATIONAL SPECIALISED INVESTIGATION TEAM BY INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE

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 published in terms of section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).
- 1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of the investigation and implementation of the remedial action:
- 1.2.1 The Minister of Police, Mr Bheki Cele;
- 1.2.2 The Acting Executive Director for the Independent Police Investigative Directorate, Mr VO Senna and
- 1.2 A copy of the report is also provided to Mr Cedrick Mthokozisi Nkabinde who is the complainant, to inform him about the outcome of the investigation.
- 1.3 The report relates to an investigation into allegations of procurement irregularities, irregular appointment and maladministration relating to the appointment of Ms TH Botha (Ms Botha) as the Deputy Director: National Specialised Investigation Team (NSIT) by the Independent Police Investigative Directorate (IPID).

2. THE COMPLAINT

2.1 The complaint was lodged with my office on 22 June 2018 by Mr Nkabinde (Complainant).

2.2 The Complainant alleged, *inter alia*, that:

2.2.1 In early 2017, the former Deputy Director of NSIT, Ms Emily Motsogi, left the IPID and her post became vacant on 21 April 2017. The vacant post was advertised with **REF NO.Q9/2017/25** and the closing date was 05 May 2017. The Complainant applied for this post as he qualified for it;

2.2.2 After seven (7) days, the same post was re-advertised on 28 April 2017 with **REF NO.QA/2017/29** and with a closing date of 12 May 2017. There was an adjustment on the requirements for the post. Some of the requirements were removed or relaxed to suit Ms Botha, and other requirements were added such as ten (10) years' experience as an Investigation Analyst. The first post with **REF NO.Q9/2017/25** was never withdrawn. The Complainant alleged that he never applied for the second advertised post as he had already applied as per the initial advertisement;

2.2.3 He started to make enquiries on 04 July 2017 with the IPID's Human Resources (HR) about the selection and filling of this post and was told that the post was put on hold until the Programme Manager of Investigations addressed certain issues about it. On 01 October 2017, Ms Botha was appointed to the post with **REF NO.QA/2017/29**, as the Deputy Director: NSIT. On 06 October 2017, the Complainant made another follow up with HR, but did not get any satisfactory answer with regard to the processes followed in the filling of the vacant position. Instead, the Complainant was told by Ms N Netsianda, the IPID's Chief Director

Corporate Services that the post in which Ms Botha was appointed was the same post that was vacated by Ms Motsogi;

2.2.4 He further submitted that in 2015, he was a member of the recruitment panel at IPID KwaZulu Natal where the same Ms Botha applied for a position of a Principal Investigator. According to the Complainant, he had sight of Ms Botha's Curriculum Vitae (CV) and noticed that she was an Administrative Clerk in the South African Police Service (SAPS);

2.2.5 Ms Botha was appointed at the SAPS on 21 February 1994 as an Administrative Clerk and for her entire career in the SAPS, she remained an Administrative Clerk until she resigned on 21 February 2016. According to her SAP 96 (SAPS career profile), she never attended any Data Analyst Course within the SAPS. The CV also did not reflect her duties as a Data Analyst or an Investigator;

2.2.6 The post in which Ms Botha was appointed to by the IPID was at the time, in terms of the Department of Public Service and Administration (DPSA), an NQF level 6 post and its minimum requirement was a National Diploma or equivalent qualification. According to the Complainant, Ms Botha only had a matric and did not have a Diploma when she was appointed, hence she still did not qualify for the post even though the requirements were relaxed and altered to suit her;

2.2.7 Ms Botha was expected to supervise and give guidance to Investigators, including Senior and Principal Investigators. Ms Botha could not be expected to perform that duty when she has never been an Investigator before;

2.2.8 The IPID changed and manipulated the requirements of the post of a Deputy Director: NSIT in order to suit Ms Botha without any job evaluation process being conducted by a job analyst as required by the relevant policies. As a result, the

Complainant and other qualifying candidates were disadvantaged and prejudiced by this maladministration and nepotism; and

2.2.9 The IPID's Labour Relations Desk/Division referred the grievance to the Office of the Presidency for further investigation since the allegations involved senior officials within the IPID. According to the Complainant, Advocate Moloko, in the Presidency, investigated the matter and tabled a report to the IPID's former Executive Director, Mr Robert McBride, a while ago. The report by Advocate Moloko had adverse findings implicating IPID's senior officials in wrongdoing in connection with the appointment of Ms Botha. However, Mr McBride held onto the report and failed to implement its recommendations which entailed taking disciplinary steps against the IPID's senior officials involved in this appointment.

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 the power as regulated by national legislation:*

(a) To investigate any conduct in state affairs, or in the Public Administration in any sphere of government , that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) To report on that conduct; and

(c) To take appropriate remedial action."

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

- 3.4 The Public Protector's powers are further regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purpose of an investigation.
- 3.5 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.² The Constitutional Court further held that: *"When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."*
- 3.6 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.7 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (paragraph 67);
- 3.8 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-

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

reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68).

- 3.9 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (paragraph 69).
- 3.10 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (paragraph 70).
- 3.11 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (paragraph 71).
- 3.12 Implicit in the words "*take action*" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "*action*" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence, (paragraph 71(a)).
- 3.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)).

- 3.14 “*Appropriate*” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (paragraph 71(e)).
- 3.15 The remedial action taken by the Public Protector has a binding effect (para 76). The Constitutional Court further held that: “*When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences*” (paragraph 73).
- 3.16 The IPID is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector’s mandate.
- 3.17 The jurisdiction of the Public Protector was not disputed by the IPID in this matter.

4 THE INVESTIGATION

4.1 Methodology

- 4.1.1 The investigation was conducted in terms of section 182(1)(a), (b) and (c) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter without conducting an investigation and resolve a complaint through alternative dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

4.2.3 The Supreme Court of Appeal³ (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

³ *Public Protector versus Mail and Guardian*, 2011(4) SA 420 (SCA),
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- 4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and prejudice.
- 4.2.5 In this particular case, the factual enquiry primarily focused on whether or not the IPID improperly followed procurement processes when it appointed Fidelity Security Services (Pty) Ltd (Fidelity) to provide the services of an Investigative Analyst for the interpretation of cellular and other data in criminal investigations;
- 4.2.6 Whether or not the IPID improperly appointed Ms Botha as a Deputy Director: NSIT without following proper recruitment processes; and
- 4.2.7 Whether or not the IPID improperly suspended the Complainant in retaliation against his protected disclosure regarding the alleged unethical conduct by Mr McBride and regarding the grievance against the alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the Protected Disclosures Act, 2000 (PDA).
- 4.2.8 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the IPID to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and policies taken into account to determine if there had been maladministration by the IPID and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the IPID or its officials when:
- (a) Appointing Fidelity to provide the services of an Investigative Analyst for the interpretation of cellular and other data in criminal investigations,

(b) Appointing Ms Botha as the Deputy Director: NSIT; and

(c) Suspending and charging the Complainant in retaliation against his protected disclosure regarding alleged unethical conduct by Mr McBride and regarding the grievance against alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the PDA.

4.2.9 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had a department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.2.10 In the case of conduct failure as was the case in this matter, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

4.2.11 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

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

4.3.1 Whether the IPID improperly followed procurement processes when it appointed Fidelity Security Services (Pty) Ltd (Fidelity) to provide the services of an Investigative Analyst for the interpretation of cellular and other data in criminal investigations;

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- 4.3.2 Whether the IPID improperly appointed Ms TH Botha as a Deputy Director: NSIT without following proper recruitment processes;
- 4.3.3 Whether the IPID improperly suspended the Complainant in retaliation against his protected disclosure regarding the alleged unethical conduct by Mr McBride and regarding the grievance against the alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the Protected Disclosures Act, 2000 and
- 4.3.4 Whether the Complainant, IPID or any other person suffered prejudice as a result of the alleged improper appointment of Ms TH Botha in the circumstances.

4.4 The Key Sources of information

4.4.1 Documents

- 4.4.1.1 A completed complaint's form from the Complainant on 22 June 2018;
- 4.4.1.2 A copy of the advertisement for the Deputy Director: NSIT, dated 24 April 2017;
- 4.4.1.3 A copy of an internal memorandum regarding placements of adverts with the Department of Public service and Administration, dated 28 April 2017;
- 4.4.1.4 A copy of a memorandum directed to Minister of Police regarding request for approval of grading new posts in the organisational structure of the IPID, dated 03 June 2014;
- 4.4.1.5 A copy of application for interdepartmental transfer to the SAPS of Ms Motsogi, dated 22 March 2017;
- 4.4.1.6 A copy of an internal memorandum regarding approval of interdepartmental transfer of Messrs TS Kgomo, RE Force and MJ Mosimanegape and recommendation for the release of Ms Mokgotsi, dated 31 March 2017;

- 4.4.1.7 A copy of an internal memorandum regarding a request to fill vacant positions under program 2, dated 31 March 2017;
- 4.4.1.8 A copy of an internal memorandum regarding placements of adverts with Department of Public Service and Administration, dated 18 April 2017;
- 4.4.1.9 A copy of employment contract between Ms T Botha and Fidelity, dated January 2016;
- 4.4.1.10 A copy of shortlisted candidates for filling of the post of Deputy Director: NSIT;
- 4.4.1.11 A copy of internal memorandum regarding filling of post of the Deputy Director: NSIT, dated 26 July 2017;
- 4.4.1.12 A copy of a letter from Fidelity confirming Ms Botha's employment and agreed salary, dated 29 January 2016;
- 4.4.1.13 A copy of an internal memorandum regarding agreement between the IPID and Fidelity, dated 26 April 2017;
- 4.4.1.14 A copy of a Service Level Agreement (SLA) entered into between Fidelity and the IPID, dated 06 June 2017;
- 4.4.1.15 A copy of an addendum to the SLA between the IPID and Fidelity, dated 7 June 2017;
- 4.4.1.16 A copy of a letter terminating the SLA between Fidelity and IPID, dated 04 August 2017;
- 4.4.1.17 Copies of the WhatsApp chat messages of the IPID: NSIT Task Team;
- 4.4.1.18 A copy of affidavit of Ms SB Phalatsi regarding the recruitment process for the placement of the advertisement with the Department of Public Service and Administration, dated 15 October 2018;
- 4.4.1.19 A copy of affidavit of Ms Botha regarding her service at the SAPS and Fidelity, dated May 2018;
- 4.4.1.20 A copy of the letter to Ms Botha regarding an appointment to the IPID, dated 03 August 2017;
- 4.4.1.21 A copy of a certificate of acceptance by Ms Botha of appointment at the IPID, dated 10 August 2017;

- 4.4.1.22 A copy of an affidavit of Ms M Moroasui regarding the SLA between the IPID and Fidelity, its purpose and the amount paid to Fidelity by the IPID, dated 14 November 2018;
- 4.4.1.23 A copy of an internal memorandum regarding the resettlement expenses of Ms Botha, dated 16 January 2018;
- 4.4.1.24 Copies of invoices reflecting the payment of accommodation of Ms Botha by the IPID;
- 4.4.1.25 Copies of invoices reflecting proof of payments to Fidelity for services rendered;
- 4.4.1.26 A copy of an internal memorandum regarding the emergency procurement of services of a cellphone interpretation specialist, dated 20 December 2016; and
- 4.4.1.28 Copies of responses by the IPID officials to notices issued in terms of section 7(9)(a) of the Public Protector Act dated 12 and 14 June 2019.

4.4.2 Correspondence/Letters received

- 4.4.2.1 Letters from the Executive Director of IPID, Mr McBride dated 10 July 2018, 06 August 2018, 25 September 2018, 26 September 2018, 10 October 2018, 15 October 2018, 18 October 2018, 18 November 2018, 14 December 2018, 14 January 2019, 15 January 2019, 21 January 2019, 28 January 2019, and 22 March 2019;
- 4.4.2.2 A letter from the Deputy-Director for Department of Public Service and Administration, Professor Richard Levin, dated 21 September 2018;
- 4.4.2.3 A letter from Head of Personnel Management, Lieutenant General L Ntshiea dated 23 October 2018;
- 4.4.2.4 A letter from Deputy National Commissioner of SAPS, B Mgwenya, dated 13 August 2018;
- 4.4.2.5 A letter from the Chief Executive Officer (CEO), Mr J Samuels, of South African Qualifications Authority, dated 08 October 2018 and 11 October 2018;

4.4.2.6 A letter from The Group CEO of Fidelity, Mr F Bartmann, dated 12 October 2018, 23 October 2018, and 22 March 2019; and

4.4.2.7 A letter from the Chief Financial Officer (CFO) of Johannesburg City Parks (former CFO of IPID/Ms L Ngcongo), dated 10 December 2018.

4.4.3 Recorded interviews/meetings conducted

4.4.3.1 A meeting with Messrs McBride and Moses Dlamini of the IPID on 19 September 2018;

4.4.3.2 A meeting with Mr J Baloyi and Ms S Phalatsi of the IPID, held on 09 October 2018;

4.4.3.3 A meeting with Ms B Motlhale of the IPID, held on 10 October 2018;

4.4.3.4 A meeting with Mr DW De Bruin of the IPID, held on 11 October 2018;

4.4.3.5 A meeting with Ms Netsianda and Mr M Sesoko of the IPID, held on 23 October 2018;

4.4.3.6 A meeting with Mr Sibanyoni of the Department of Rural Development and Land Reform held on 25 October 2018;

4.4.3.7 A meeting with Mr M Gqalane, Ms M Moroasui and Mr VO Senna of the IPID, held on 21 November 2018;

4.4.3.8 A meeting with Mr I Khuba of the IPID on 11 October 2018;

4.4.3.9 A meeting with Ms Botha on 11 October 2018;

4.4.3.10 A meeting with Ms P Hlalele of the IPID's HR on 24 October 2018;

4.4.3.11 A meeting with Mrs L Ngcongo of Johannesburg City Parks, held on 13 December 2018 and

4.4.3.12 Numerous telephonic interviews with the Complainant in connection with this matter.

4.4.4 Case Law

- 4.4.4.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);
- 4.4.4.2 *President of the Republic of South Africa v Office of the Public Protector and Others*, Case no 91139/2016 [2017] ZAGPPHC 747;
- 4.4.4.3 *Public Protector v Mail and Guardian*, 2011(4) SA 420 (SCA);
- 4.4.4.4 *Affordable Medicines Trust & Others v Minister of Health & Others* 2005 (6) BCLR 529 (CC);
- 4.4.4.5 *Prinsloo v Van Der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).
- 4.4.4.6 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC);
- 4.4.4.7 *Rail Commuters Action Group v Transnet Ltd Metrorail* 2005 (2) SA 359 (CC);
- 4.4.4.8 *City of Johannesburg Metropolitan Municipality vs Blue Moonlight Properties (PTY) LTD* Case CCT 37/11[2011] ZACC;
- 4.4.4.9 *Khumalo and Another v MEC of Education KZN* (CCT 10/13) ZACC 49, 2014(3) BCLR 333(CC);
- 4.4.4.10 *Home Affairs v The Public Protector* (308/2017) [2018] ZASCA 15 (15 March 2018 and
- 4.4.4.11 *Grieve v Denel* [2003] 4 BLLR366 (LC) / *Grieve v Denel* (2003) 24 ILJ 551 (LC).

4.4.5 Legislation and other prescripts

- 4.4.5.1 The Constitution of the Republic of South Africa, 1996;
- 4.4.5.2 The Public Finance Management Act 1 of 1999 (PFMA);
- 4.4.5.3 The Public Protector Act 23 of 1994;

- 4.4.5.4 The Independent Police Investigative Directorate Act 1 of 2011 (IPID Act);
- 4.4.5.8 The Labour Relations Act 66 of 1995 (LRA);
- 4.4.5.9 Supply Chain Management Policy of Independent Police Investigative Directorate (IPID SCM Policy);
- 4.4.5.10 Recruitment and Selection Policy of Independent Police Investigative Directorate (IPID Recruitment and Selection Policy);
- 4.4.5.11 National Treasury Regulations of March 2005;
- 4.4.5.12 National Treasury Instruction 3 of 2016/2017;
- 4.4.5.13 The Public Service Act, 1994 (PSA) and its Regulations (PSA Regulations);
- 4.4.5.14 The Protected Disclosures Act 26 of 2000; and
- 4.4.5.15 The Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

4.4.6 Books

- 4.4.6.1 Bressler MS 2014 on page 2 *Building the winning organisation through high-impact hiring*.

4.4.7 Responses to the notice in terms of section 7(9) of the Public Protector Act from:

- 4.4.7.1 Mr Jac Marais of Adams and Adams Attorneys on behalf of Mr McBride, Mr Sesoko, Mr Khuba, Ms Netsianda, Ms Moroasui, Ms Motlhale, Ms Botha and Mr de Bruin on 12 June 2019;
- 4.4.7.2 Ms P Maharaj, the Provincial Head of IPID in KwaZulu Natal on 14 June 2019; and
- 4.4.7.3 Mr VO Senna, Acting Executive Director of IPID on 27 June 2019.

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

5.1 Regarding whether the IPID improperly followed procurement processes when it appointed Fidelity Security Services (Pty) Ltd (Fidelity) to provide the services of an Investigative Analyst for the interpretation of cellular telephone and other data in criminal investigations:

Common cause issues

- 5.1.1 Mr Francois Bartmann, the Fidelity's Regional Executive and Mr McBride, met during December 2016⁴ and subsequent thereto, negotiations for the services of a cellphone data specialist ensued. The meeting referred to herein was confirmed in a letter dated 23 October 2018 from Fidelity to my investigation team, signed off by Mr Bartmann.
- 5.1.2 On 20 December 2016, Mr De Bruin, the Deputy Director of Investigation and Information Management at the IPID, addressed a memorandum to Mr McBride. The purpose of the memorandum was to request approval for the procurement and deviation from the normal procurement process with the view to obtain the services of a cellular telephone data specialist or analyst.
- 5.1.3 According to the motivation by Mr De Bruin, the lives of IPID investigators were at risk as they were being threatened and receiving threatening messages (SMSes)⁵. It was further motivated that due to the urgency or emergency of the

⁴ The exact day and place of this meeting in December could not be ascertained. However, Mr Francois Bartmann, Mr McBride and Ms TH Botha were all at liberty to confirm that the meeting to negotiate the services of a cellphone data analyst did take place in December 2016 between Mr McBride and Mr Bartmann.

⁵ Such threats were reported as per Silverton CAS 450/11/2016.

situation, the normal procurement process would not be followed. Instead, a deviation as provided for in Treasury Regulation 16A6.4 was contemplated in this memorandum by Mr De Bruin.

- 5.1.4 A quotation from Fidelity was annexed to the memorandum with an amount of **R57 000.00**. It was recommended by Mr De Bruin that the services of the cellphone data interpretation specialist shall be for an estimated period of three months with a total expenditure of **R171 000.00**. The same memorandum was signed and approved by Mr McBride on 20 December 2016.
- 5.1.5 Ms Botha started to report for work at the IPID Head Office⁶ on 09 January 2017 as a consultant/cellphone data analyst, with Fidelity being the service provider.
- 5.1.6 On 17 May 2017, the IPID made payment to Fidelity of an amount of **R171 000.00** in respect of the period of 01 January to 31 March 2017, leaving a balance for the period from April to 30 June 2017 as per purchase order number OR-024791 for the additional work rendered for contract extension/addendum.
- 5.1.7 On 20 February 2019, Mr McBride further approved the payment of additional work by Fidelity for an amount of **R342 000.00** which emanated from the variation/extension of the original SLA between the IPID and Fidelity. This amount was for services that Fidelity continued to render between April 2017 and September 2017.

Issues in dispute

- 5.1.8 The Complainant vehemently disputed that he was one of the investigators in the Task Team who received death threats on his cellphone relating to an investigation against the former National Commissioner of the SAPS, General

⁶ No. 114 Madiba Street City Forum Building, Pretoria central.

Khomotso Phahlane. According to the Complainant, only Mr Mandla Mahlangu, who is an IPID Investigator, received a threatening SMS and not any other IPID official. The Complainant further indicated that he heard that Mr Paul O'Sullivan who is not an IPID Investigator also received the same threat.

- 5.1.9 Both Messrs De Bruin and McBride did not mention the names of other IPID investigators in their respective submissions who had received the death threats except Mr Mandla Mahlangu, although such threats were the main basis of an application for deviation from normal procurement process. However, on 12 June 2019, when responding to my section 7(9)(a) notice, my office was furnished with an explanation that Mr McBride too, was also threatened and received threatening messages.
- 5.1.10 Although Mr Bartmann confirmed to my investigation team in his letter dated 23 October 2018, that he met with Mr McBride in December 2016 and negotiated for the services of a cellphone data specialist, it remains unknown who from the IPID Supply Chain Management (SCM) or Legal personnel accompanied Mr McBride to this particular meeting which, as said by Mr Bartmann, resulted in the procurement of Fidelity.
- 5.1.11 Similarly, it is not explained by the IPID how a price quotation from Fidelity received by the IPID for the services of an Investigative Analyst, is dated 09 December 2016, which was way before the memorandum requesting for deviation was prepared on 20 December 2016. This raises a concern as to how a quotation for the services may precede a memorandum for deviation from the normal procurement processes.
- 5.1.12 A memorandum of request for deviation from normal procurement processes in order to obtain the services of a cellphone data specialist from Fidelity by Mr De

Bruin did not have the signature of the Chief Financial Officer (CFO), Ms Lindokuhle Nonjabulo Ngcongco, indicating the availability of funds. Without involving the CFO, Mr McBride approved the deviation memorandum on 20 December 2016. The name of the Ms Ngcongco was scratched out with a pen just above Mr McBride's approval signature.

5.1.13 In terms of a letter dated 28 January 2019 from the IPID, Mr McBride contended that Ms Ngcongco was off-sick and therefore not available. However, a medical certificate⁷ provided by Ms Ngcongco upon her return clearly indicated that she was only off-sick from 21 to 22 December 2016. Furthermore, according to the PERSAL system⁸, Ms Ngcongco was confirmed as being off-sick only from 21 to 22 December 2016.

5.1.14 On 13 December 2018, my investigation team interviewed Ms Ngcongco on the matter. Unfortunately, she could not recall whether she was at work or not on 20 December 2016, but said that the computer system should be able to guide my office⁹. She further indicated that there would be somebody acting in her absence and her Personal Assistant communicated the name of the acting person to the staff if she was not at work. The **medical report and the Persal system** did not provide or stipulate that Ms Ngcongco was off-sick on 20 December 2016.

5.1.15 As a result of the omission of CFO or her acting delegate in this process, no indication or undertaking was therefore given by the CFO's office whether the funds were available for this procurement and whether the deviation was in line with the IPD's SCM policies.

⁷ Dated 21 December 2016 as a date of consultation with NHC Medical and Dental Centre.

⁸ As per copy of a PERSAL computer screen shot dated 22 January 2019.

⁹ Refer to recorded audio at minute 28-30:00 (Interview with Ms Ngcongco).

5.1.16 On 09 January 2017, when Ms Botha first reported for duty at the IPID as a consultant from Fidelity, there was no contract or written legal instrument between the IPID and Fidelity. It is unclear who advised Ms Botha to report for duty at IPID.

5.1.17 Notwithstanding the absence or lack of a contract between the IPID and Fidelity, Ms Botha commenced her consultancy duties at the IPID and reported directly to the Chief Director: Investigation and Information Management, Mr Mathews Sesoko.

5.1.18 On 26 April 2017, the Chief Director: Legal Services, Ms Marianne Moroasui, addressed a memorandum to Mr McBride, in which she recommended that Mr McBride signs and approve the Agreement between Fidelity and IPID for the provision of the services of an Investigative Analyst namely, Ms Botha. It appears from Ms Moroasui's memorandum that an Agreement and its Addendum were also attached for Mr McBride to initial and sign at appropriate pages.

5.1.19 The same memorandum was supported by Mr Sesoko by appending his signature on 26 April 2017 and later signed/approved by Mr McBride on 08 May 2017. Above his signature, Mr McBride made the following handwritten proviso:

"My understanding: The service was initially procured on an emergency basis. Lives were at stake. Work not yet completed. Ascertain whether it is feasible to permanently employ specialist for IPID. The skill is a scarce, rare skill."

5.1.20 According to Ms Moroasui, she drafted the SLA between the IPID and Fidelity in April 2017 and submitted it to Mr McBride for approval and that he subsequently signed it. The signed SLA was returned to Ms Moroasui who handed it over to Fidelity for them to sign and return it for her records and archiving. At a later

stage when Ms Moroasui followed up with Fidelity, it dawned that Fidelity had lost/misplaced the original SLA that she had allegedly sent to them¹⁰. Ms Moroasui then re-sent another SLA to Fidelity which they signed on 06 June 2017 in Durban and subsequently returned it to her. Similarly, the addendum to the SLA was also signed by Fidelity on 06 June 2017.

- 5.1.21 In terms of Clause 2 of the SLA, it stated that the Agreement shall be deemed to have commenced on 09 December 2016, which was the date when the services commenced. It was further indicated that the services shall automatically lapse on 31 March 2017, unless extended by agreement of the parties. In terms of Clause 2 of the Addendum to the SLA, it was stated that the Addendum shall be deemed to have commenced on 31 March 2017 and would automatically terminate on 30 June 2017.
- 5.1.22 However, both the SLA and its Addendum allegedly sent by Ms Moroasui to Fidelity were not signed by Mr McBride as the IPID's accounting officer at any stage of the subsistence of the Agreement between the two parties. Only the signature of Fidelity representative appears on the SLA and its Addendum. The signature of the IPID's accounting officer or his delegate was an absolute requirement to give rise to a valid contract. Absence of the signature of IPID's accounting officer or his authorised delegate summarily resulted in the invalidity of the contract.
- 5.1.23 On 21 November 2018, my investigating team asked Ms Moroasui the reasons why the SLA and its Addendum were not signed by Mr McBride. She admitted during the interview that she sent the original SLA to Fidelity, the first original copy that was supposedly signed by Mr McBride, without making a copy for

¹⁰ This explanation is contained in an affidavit by Ms Moroasui, dated 14 November 2018 which was submitted to my office.

herself. Ms Moroasui further informed my investigation team that it was an oversight on her part not to make a copy for herself. Ms Moroasui also indicated that because she had no Personal Assistant in her office at the time, she could not make a copy of the SLA before sending the original to Fidelity.

5.1.24 Similarly, when asked to explain why the second copy of the SLA was also not taken to Mr McBride as the IPID's accounting officer for signature before or after it was sent to Fidelity in Durban, Ms Moroasui pleaded the same oversight and lack of administrative support and Personal Assistant in her office at the time. The same bald assertion and excuse was advanced by Ms Moroasui in her affidavit in which she emphasised in paragraph 9 thereof, that during the said period, she was functioning without administrative support, hence the SLA ended up not being submitted to Mr McBride for his signature.

5.1.25 The glaring discrepancy with regard to the different dates of commencement of the SLA between the IPID and Fidelity and the day Ms Botha reported for duty as a consultant at the IPID namely, 09 December 2016 and 09 January 2017, was also put across to Ms Moroasui to explain, but she could not provide clarity on the above discrepancy. Instead, she conceded to the discrepancy and resorted to speculation, saying that perhaps Ms Botha was already working on the IPID data off-site in December 2016 and only came to report at the IPID premises in January 2017. It therefore remains unclear why the SLA stated that the services of the specialist should commence on 09 December 2016 when in fact ubiquitous evidence showed that Ms Botha started to report at the IPID on 09 January 2017.

5.1.26 Upon being asked whether or not she handed over a copy of the SLA and the compliance certificate to the SCM as dictated to by the IPID's SCM Policy, Ms Moroasui gave a stock and curt response and she said "*I don't know*" whether

the SLA was forwarded to the SCM or not. She again cited capacity constraints as a reasons for her failure to forward a copy of SLA to the SCM as required by the SCM policy.

- 5.1.27 In conclusion, the overall amount of money paid by the IPID to Fidelity for the entire period of the SLA/contract including its variation or extension stood at the total of **R513 000.00** which is above the IPID's procurement threshold value for goods or services that may be sourced without inviting competitive bids.

Application of the relevant legal prescripts

- 5.1.28 In the seminal case of **Public Protector v Mail and Guardian Ltd (422/10) (2011) ZASCA 108 (1June 2011)**, the court held that the Public Protector is not a passive adjudicator between the citizens and the state, relying only upon evidence which is placed before her by the parties. The Supreme Court of Appeal (SCA) held further that the Public Protector should not be bound or be limited to the issues raised for consideration and determination by the parties but should, investigate further and discover the truth and also inspire confidence that the truth has been discovered.
- 5.1.29 The court further made it clear that the mandate of the Public Protector is an investigatory one, requiring pro-action in appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an enquiry, and on no more than '*information that has come to his or her knowledge*' of maladministration, malfeasance or impropriety in public life. The court emphasised that the Public Protector has a pro-active function. He or she is expected not to sit back and wait for proof where there are allegations of malfeasance but is enjoined to actively discover the truth.

5.1.30 Informed by the above judicial precedent, my office discovered during a series of investigative interviews conducted with the IPID officials between October and December 2018 that Ms Botha first came to IPID as a consultant from Fidelity Security before being appointed as a permanent IPID employee. This was an independent discovery by my office. It was not raised by the Complainant in his original complaint which he filed with my office. As an investigatory and oversight body, I could not turn a blind eye to this discovery, but I immediately extended the scope of my investigation to cover this issue as well.

5.1.31 I have deliberately decided to cite the above case law and further laid this short background in order to address or dispel any misguided notion or contention that I have unduly extended the scope of this investigation without just cause.

5.1.32 The principle of legality in South African law is enshrined in section 2 of the Constitution, which provides that:

"This 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."

5.1.33 The constitutional principle of legality requires that a decision maker exercises the power conferred upon her/him lawfully, rationally and in good faith.

5.1.34 In ***Affordable Medicines Trust & Others v Minister of Health & Others***¹¹ the Constitutional Court held that:

"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The

¹¹ 2005 (6) BCLR 529 (CC) [paras 49, 75 and 77].

doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power. [...] The exercise of such power must be rationally related to the purpose for which the power was given."

- 5.1.35 It follows therefore, in the circumstances that the Constitution required of all the IPID officials to exercise their power/duties within the regulatory framework governing the procurement processes and appointment of staff when handling this matter. No function or power that is not conferred or authorised by applicable law should have been arbitrarily entertained during this process.
- 5.1.36 Section 206(6) of the Constitution provides for the establishment of an independent police complaints body by national legislation. In order to give effect to this constitutional injunction, Parliament established the IPID to ensure independent oversight of the SAPS and Municipal Police Services.
- 5.1.37 The IPID is one such organ of state established by national legislation, in terms of section 3(1) of the IPID Act, and it is structured at national level, with provincial offices across nine provinces. The IPID must exercise its functions in accordance with the IPID Act and any other relevant law.
- 5.1.38 In terms of section 239 of the Constitution an **'organ of state'** means—
- “(a) *any department of state or administration in the national, provincial or local sphere of government; or*
- (b) *any other functionary or institution—*

- (i) *exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
- (ii) *exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”*

5.1.39 Section 217(1) of the Constitution regulates procurement in the Public Service and it provides that:

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

5.1.40 In light of section 239 of the Constitution as outlined above, it is common cause that the IPID is indeed an organ of state. Ordinarily, as an organ of state, it was expected of the IPID to contract for services in a fair, equitable, transparent, competitive and cost effective manner as per section 217 of the Constitution.

5.1.41 An unsigned SLA purported to be a contract between the IPID and Fidelity cannot be said to have been cost effective as envisaged by the above constitutional injunction since it carried other hidden costs such accommodation and travel expenses that were borne by the IPID for the services of Ms Botha. Travel and accommodation costs for Ms Botha were not part of the first memorandum drafted by Mr De Bruin nor approved separately at any later stage.

5.1.42 Section 195(1) of the Constitution provides, amongst others, that:

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

- (a) A high standard of professional ethics must be promoted and maintained;*
- (b) ...;*
- (c) Services must be provided impartially, fairly, equitably and without bias;*
- (d) ...;*
- (e) Public administration must be accountable; and*
- (f) Transparency must be fostered."*

5.1.43 It is axiomatic that IPID employees are public servants who were expected to maintain a high standard of professional ethics, foster transparency and to be accountable and impartial when procuring the services of Fidelity Security.

5.1.44 The motivation memorandum for deviation by Mr De Bruin did not indicate emergency or impractical circumstances or reasons that sought to justify a disregard of the procurement procedure laid down by section 217 of the Constitution. The fact that Ms Botha reported to the IPID in January 2017 shows that such procurement was not an emergency. Also the nature of services which Ms Botha was contracted to render to the IPID was interpretation of cellular data and not provision of security services or protection to the threatened Investigators' lives.

5.1.45 Section 7(1) of the IPID Act provides that:

"The Executive Director is the accounting officer of the Directorate and must ensure that-

- (a)...;*
- (b) the financial affairs of the Directorate comply with the Public Finance Management Act (PFMA)."*

5.1.46 Section 31(1) of IPID Act provides that:

“The Executive Director-

- (a) must, subject to the Public Finance Management Act*
- (i) be charged with the responsibility of accounting for money received or paid out for or on account of the office of the Directorate;*
- (ii) cause the necessary accounting and other related records to be kept.”*

5.1.47 Mr McBride, the former IPID’s Executive Director since 03 March 2014, was also its accounting officer charged with the duty to ensure that the financial affairs of IPID were consistent with the spirit of the PFMA.

5.1.48 Section 3(1)(a) of the PFMA provides that the Act applies to departments and IPID is one such government department contemplated herein.

5.1.49 Section 38(1)(a) of the PFMA provides that the accounting officer for a department, constitutional institution or trading entity must have and maintain effective, efficient and transparent systems of financial and risk management and internal control. The IPID developed and adopted its SCM Policy¹² as a guideline to its management and staff about procurement of goods and services. Standards, norms or guidelines for procurement are spelt out in this policy for all the IPID officials.

5.1.50 Section 38(1)(c) of the PFMA states that the accounting officer for an institution must prevent unauthorised, irregular, fruitless and wasteful expenditure or losses resulting from criminal conduct. It was expected therefore of Mr McBride to put measures in place to prevent such expenditure or losses.

¹² IPID SCM Policy signed off by the then Acting Executive Director: Mr I Kgamanyane on 2015/05/05.

5.1.51 Regulation 9 which deals with unauthorised, irregular, fruitless and wasteful expenditure of the National Treasury Regulations of March 2005 [Sections 38(1)(g) and 76(2)(e) of the PFMA] (National Treasury Regulations) issued in terms of PFMA provides that:

“9.1.1 The accounting officer of an institution must exercise all reasonable care to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure, and must for this purpose implement effective, efficient and transparent processes of financial and risk management.

9.1.2 When an official of an institution discovers unauthorised, irregular or fruitless and wasteful expenditure, that official must immediately report such expenditure to the accounting officer. In the case of a department, such expenditure must also be reported in the monthly report, as required by section 40(4)(b) of the Act. Irregular expenditure incurred by a department in contravention of tender procedures must also be brought to the notice of the relevant tender board or procurement authority, whichever applicable.”

5.1.52 Section 1 of the PFMA defines an irregular expenditure as follows:

“Expenditure other than unauthorized expenditure that is incurred in contravention of or that is not in accordance with a requirement of any applicable legislation...”

5.1.53 Clause 5 of the IPID SCM Policy provides that this policy applies to all the IPID officials and shall be applied to all activities or tasks related to procurement process.

5.1.54 Clause 19(d) of the IPID SCM Policy states as follows:

*"All emergency purchases will be approved by the Executive **through CFO**".*
(Our emphasis)

5.1.55 The word "**through**" as used in the above context should have been literally interpreted to mean the following:

"By means of, by the hand of, by way of, using, using the help of, all the way, by way of, via"¹³

5.1.56 Clause 19(d) of the IPID SCM Policy is, therefore, in my view, unambiguous and can only be understood within its literal context and be duly accorded its grammatical meaning. Nothing appears to be vague in its wording and it carries no other connotations to the contrary. I am roundly satisfied about the balance between its grammatical and overall contextual meaning as applied in the above Clause. In the circumstances, it simply means that *"All emergency purchases will be approved by the Executive Director through CFO or by the hand of CFO, via CFO, by means of CFO, using the help of CFO". In this case, IPID accounting officer did not approve this procurement through the CFO nor her delegate, thereby violating this Clause.* (own emphasis)

5.1.57 Regulation 8.2, which deals with approval of expenditure [Section 38(1)(f) and 76(4)(b) of the PFMA] of the National Treasury Regulations, provides as follows:

¹³ Online Legal Dictionary: Burton's Legal Thesaurus, 4E. Copyright © 2007 by William C. Burton.
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“An official of an institution may not spend or commit public money except with the approval (either in writing or by duly authorised electronic means) of the accounting officer or a properly delegated or authorised officer.

Before approving expenditure or incurring a commitment to spend, the delegated or authorised official must ensure compliance with any limitations or conditions attached to the delegation or authorisation.”

- 5.1.58 It is further clear from the above Regulation that while the accounting officer has power to approve expenditure, he or she must still ensure compliance with any limitations or conditions attached to such authority. Simply put, his/her authority is subject to compliance with certain conditions namely, Clause 19(d) of the IPID SCM Policy. Such authority cannot therefore be exercised arbitrarily.
- 5.1.59 It being so or it being the case, I am persuaded to hold that involving or consulting the CFO in the emergency procurement as required by Clause 19(d) of IPID SCM Policy was one such fundamental pre-condition by which the accounting officer of IPID had to comply with in this case. As evidence had it, Mr McBride did not comply with this pre-condition/limitation in exercising his authority to approve expenditure. Moreover, IPID did not furnish my office with any evidence or document officially revoking the role or delegation of the CFO in the procurement process. Lack of the signature of the CFO on the memorandum for procurement of Fidelity raises a reasonable suspicion that there was an intention on the part of Mr McBride not comply with IPID SCM policy procedures.
- 5.1.60 Section 39(1)(a) and (b) of the PFMA regulates the Accounting officers' responsibilities relating to budgetary control and provides, inter alia, that:

“The accounting officer for a department is responsible for ensuring that expenditure of that department is in accordance with the vote of the department and the main divisions within the vote and effective and appropriate steps are taken to prevent unauthorised expenditure.”

- 5.1.61 Evidence at my disposal laid bare the fact that the CFO or at least her acting delegate was not involved in this emergency procurement. As a result, this expenditure was not confirmed by the office of the CFO as being in accordance with the vote of the financial division of IPID. Mr McBride approved the emergency procurement without involving the CFO or her delegate. The place where the signature of the CFO was supposed to be appended was scratched out with a pen.
- 5.1.62 The lack of the of the CFO's involvement or signature , was therefore in contravention of Clause 19(d) of the IPID SCM, Regulation 8.2 of Treasury Regulation which deals with approval of expenditure as well section 39(1)(a) and (b) of PFMA. By contravening or violating these regulatory legal prescripts which was requirement in the circumstances, the IPID invariably rendered this whole procurement irregular as defined in the PFMA.
- 5.1.63 It follows therefore that a violation of the principle of legality is also in direct conflict with the Constitution which requires officials in the public administration to act within the confines of its provisions, statutes and other applicable legal prescripts. Such conduct failure by the IPID cannot also be reconciled with the standard envisaged and expected in terms of section 195 of the Constitution and under section 7(1) of the IPID Act 1, as already shown above.
- 5.1.64 Clause 22(a) of the IPID SCM Policy stipulates, amongst others, that:

*“No contract will be regarded as enforceable until both parties have negotiated, finalised and **officially signed**. All procurement must be concluded at the Head Office and **signed off by the Executive Director**.” (Our emphasis)*

5.1.65 In this case, Mr McBride as the Executive Director of IPID did not sign the contract or SLA between IPID and Fidelity. A payment of R171 000.00, excluding travel and accommodation costs, was effected by the IPID to Fidelity on 17 May 2017 for the services of Ms Botha, despite the fact that the SLA between the two parties was not signed off by Mr McBride as expressly required by the IPID SCM Policy. Such conduct failure would be in violation of Clause 22(a) of the IPID SCM Policy as stipulated above as well as the principle of legality demanded by the Constitution within the state affairs.

5.1.66 During an interview with my investigation team when Ms Moroasui was asked to explain her failure as the IPID’s Head of Legal Services to have the SLA/contract signed by both parties as required by Clause 22(a) of the IPID SCM Policy, she argued that the contract was deemed valid because of the intention of both parties, notwithstanding the absence of the signature of Mr McBride¹⁴.

5.1.67 I am of the view that if a particular position is regulated by a legal statute as is clearly the case in this instance, such a statute has to prevail, take precedence and serve as a guideline. Personal opinions, however honestly and sincerely held, should not override what regulatory framework dictates.

5.1.68 Accordingly, I am unable to accept the extrinsic argument or contention advanced by Ms Moroasui since such would be outside the dictates of the regulatory policy framework. Ms Moroasui cannot unilaterally depart from the

¹⁴ Refer to an audio record at minute 58:12 (Interview with Ms Moroasui).

SCM Policy and seek to dispute a position that is regulated by a clear written legal instrument, as such will fly against the spirit of the principle of legality enshrined in the Constitution and amount to challenging or attacking the very same written policy of the IPID.

- 5.1.69 Besides the implausible contention, Ms Moroasui spoke “*in the vaguest terms*” about her reasons for failing to ensure that that SLA/contract between the IPID and Fidelity was signed by the IPID’s accounting officer as required by policy. Save to plead lack of a Personal Assistant in her office, Ms Moroasui did not set out supporting facts to illustrate why the SLA/contract could not be signed. The Constitutional Court¹⁵ adopted a context-sensitive, reasonableness standard for such defence of *resource constraint*. The Court enquired whether the functionary in an effort to discharge her/his official obligations had shown that she/he had taken all reasonable measures within her/his available resources and the Court held that:

“An organ of State will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of State will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to

¹⁵ *Rail Commuters Action Group v Transnet Ltd Metrorail 2005 (2) SA 359 (CC)* at paragraph 88. See also *City of Johannesburg Metropolitan Municipality vs Blue Moonlight Properties (PTY) LTD Case CCT 37/11 [2011] ZACC* at paragraph 68- 72.

determine what are reasonable and appropriate measures in the overall context of their activities. "

5.1.70 In the circumstances, the exercise of taking an SLA/contract to the office of Mr McBride for signature as required by procurement policy would not have necessarily required a Personal Assistant to do, neither would it have caused any significant strain on Ms Moroasui if she did so herself. I am, therefore, unable to accept this explanation as a *bona fide* impediment on Ms Moroasui's ability to execute her legal duty/obligation.

5.1.71 An expenditure of this nature would become '*irregular*' as it would be incurred in contravention of applicable legislation and it would also be unauthorised if the CFO and Mr McBride were not involved in the procurement process. Crucial documents such as a deviation memorandum and the SLA were not signed by CFO and by Accounting Officer at any stage.

5.1.72 The Treasury Regulation 16A6.4 which deals with the Procurement of Goods and Services provides as follows:

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

5.1.73 The reasons advanced by Mr De Bruin in support of his memorandum for deviation from normal procurement process appears to have been sensationalised in the sense that it talks about investigators lives being at risk whereas only one investigator, Mr Mahlangu received the threatening SMS. The

memorandum for deviation by Mr De Bruin did not disclose the names of investigators or even the actual nature of threats made against such investigators.

- 5.1.74 It is only Mr McBride who later mentioned Mr Mahlangu after my office requested this clarity as per a letter dated 28 January 2019 received from the IPID. Mr McBride further furnished the actual threatening SMS which in part read as follows:

"Hallo Chief. This is a warning to u. we are aware that u working for a big foreign spy Paull Sallivan who is funded by his masters. this man is in cahoot with Robert.

...

Unfortunately you became part of them. U must stop now. we know where u stay and ur family. Paul is stupid old man. His days are numbered. We r on his heels. U must either chose to die with him. We r watching u boy.we r about to finish Paul. we have everything on him from his family in uk. he is a foreigner.'[sic]

- 5.1.75 A proper and closer look at the above message shows that, although Mr Mahlangu was also threatened, the main target was Mr Paul O'Sullivan. It remains unknown as to how Mr Paul O'Sullivan who is not an IPID employee links up with threats related to an official investigation conducted by the IPID as an institution of the state.

- 5.1.76 Reasonably analysed, the motivation memorandum for deviation by Mr De Bruin did not indicate emergency or impractical circumstances that sought to prohibit the invitation of tenders for open competitive bidding as required by Regulation 16A6.4 of National Treasury and to justify a disregard of the procurement procedure laid down by section 217 of the Constitution. There is also no evidence

showing that the IPID had at some stage reported the said threat to the State Security Agency (SSA) in order to conduct threat and risk assessment in respect of Mr Mandla Mahlangu as it was allegedly done for Mr McBride.

5.1.77 Moreover, the nature of services for which Ms Botha was sought for by the IPID never entailed a provision of security or protection to IPID investigators whose lives were threatened. Ms Botha worked as a specialist cellular telephone data analyst in order to assist the IPID with its investigation and she never rendered protection services to the IPID Investigators. It is also worth noting that interpretation/analysis of cellphone data is not the competency or core business of Fidelity. Fidelity is a security and protection solutions service provider.

5.1.78 The request for deviation from normal procurement process was approved as an emergency on 20 December 2017 for the services of a data analyst. However, the service was only rendered on 09 January 2018, which is the date Ms Botha first reported at IPID premises in Pretoria. This further lends credence to an impression that there was no need to contravene the SCM policy in procuring these services.

5.1.79 Clause 8 of National Treasury Instruction 3 of 2016/2017- (Preventing and Combating Abuse in the Supply Chain Management System) which deals with deviation from normal bidding process provides that:

“8.1 The Accounting Officer/Accounting Authority must only deviate from inviting competitive bids in cases of emergency and sole supplier.

8.2 An emergency procurement may occur when there is a serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls an agency to action and there is insufficient time to invite competitive bids.

8.3 ...

8.4 ...

8.5 *Any other deviation will be allowed in exceptional cases subject to the written approval from the relevant treasury."*

5.1.80 Clause 9 of National Treasury Instruction 3 of 2016/2017- (Preventing and Combating Abuse in the Supply Chain Management System) which deals with expansion or variation of orders provides, amongst others, that:

"9.1 The Accounting Officer/Accounting Authority must ensure that contracts are not varied by more than 15% for all goods and services of the original contract value.

9.2 Any deviation in excess of the prescribed thresholds will only be allowed in exceptional cases subject to prior written approval from the relevant treasury."

5.1.81 Clause 9(E) of the IPID SCM Policy deals with Acquisition Management and Deviations and provides, *inter alia*, as follows:

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

5.1.82 Clause 19 of the IPID SCM Policy stipulates the following:

(a) "Urgent cases are cases where rapid supply is of critical importance and the invitation of competitive bids is either not possible or impractical. (However, a lack of proper planning should not be constituted as an urgent case)

- (b) Emergency situation are situations where immediate action is necessary in order to avoid a dangerous or risky situation or misery,*
- (c) The reasons for the urgent/emergency and for dispensing of competitive bids should be clearly recorded and approved by accounting officer or his/her delegate and*
- (d) All emergency purchases will be approved by Executive Director through CFO.”*

5.1.83 Evidently, the IPID appears to have based its deviation from the above provisions in order to procure the services of Fidelity. This can be observed from the deviation memorandum from Mr De Bruin to Mr McBride. However, a procurement process and, in particular, a deviation, as was the case herein, carried financial implications to the IPID, yet a CFO or his/her delegate was not involved in this process as required by Clause 19(d) of the IPID SCM Policy. It cannot, therefore, be said that this deviation complied with IPID SCM Policy, particularly 19(d).

5.1.84 An addendum to the SLA also purported to extend the contract between the IPID and Fidelity by another six (6) months, which is more than hundred percent of the original contract value. Such conduct was in direct violation of clauses 9.1 and 9.2 of National Treasury Instruction 3 of 2016/2017-(Preventing and Combating Abuse in the Supply Chain Management System) which deals with expansion or variation of orders, since the extension/expansion of the SLA was neither signed by Mr McBride nor reported to Treasury.

5.1.85 Clause 9.2 of the IPID SCM Policy regulates the procurement threshold value and states, *inter alia*, that:

“(C) All purchases equal to and above R500 000 must be considered by the Bid Specification Committee (BSC), Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC).”

5.1.86 Following the variation or extension of SLA/contract by IPID, an additional amount of R342 000.00 was further paid to Fidelity by the IPID as approved by Mr McBride on 20 February 2019¹⁶. This variation should have been pre-approved by National Treasury since it exceeded 15 percent of the original SLA/contract.

5.1.87 At the end, the overall amount of money paid by IPID to Fidelity Security for the entire period of the SLA/contract including variation or extension stood at the total of **R513 000.00**, which is above the IPID’s procurement threshold value for goods or services that may be sourced without inviting competitive bids, thereby contravening Clause 9.2 (C) of the IPID SCM Policy. This procurement went above the R500.000.00 threshold as a result of variations. The IPID could not furnish my office with proof that this procurement was considered by its Bid Specification Committee, Bid Evaluation Committee and Bid Adjudication Committee as demanded by the IPID SCM Policy since it was above threshold of R500 000.00.

5.1.88 *Prinsloo v Van Der Linde and Another*¹⁷ is instructive in this instance where the Court held as follows:

“The constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no

¹⁶ Refer to Page 6 paragraph 21 of the response letter submitted to my office by IPID officials on 12 June 2019.

¹⁷ *Prinsloo v Van Der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state.”

- 5.1.89 Over and above, clause 7 of the IPID SCM Policy, which deals with the Responsibilities of Officials, stipulates, *inter alia*, as follows:

“The Executive Director has charged all IPID officials with the responsibility to ensure that the SCM policy is implemented and adhered to at all time.

IPID officials shall take appropriate steps to prevent any irregular, fruitless and wasteful expenditure in their areas of responsibility in line with PFMA and this policy.”

- 5.1.90 It is clear from the above clause that compliance with the IPID SCM Policy was not optional or discretionary, but had to be adhered to at all times, when engaging in various stages of procurement.

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

- 5.1.91 On 14 May 2019, I signed off and subsequently issued to all implicated IPID officials, including other parties with direct interest on this matter, with a notice in terms of section 7(9)(a) of the Public Protector Act, (notice/s) with a view to afford them an opportunity to respond to the allegations against them, particularly in relation to the role they played in this matter. Section 7(9)(a) of the Public Protector Act provides that:

“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding

pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

- 5.1.92 In what follows, I will proceed to consider the responses submitted regarding the section 7(9) notices. I have, however, not dealt with each and every aspect raised in the responses, but that should not be misconstrued as an admission of any kind of the averments contained therein.
- 5.1.93 A written response accompanied by annexures was received by my office on 12 June 2019 on behalf of Mr McBride, Mr Sesoko, Mr Khuba, Ms Netsianda, Ms Moroasui, Ms Motlhale, Ms Botha and Mr De Bruin from Mr Jac Marais of Adams and Adams Attorneys (Adams and Adams).
- 5.1.94 Adams and Adams argued on behalf of the said IPID officials that there was nothing sinister about the CFO not signing the emergency procurement memorandum. It was further submitted in this response that the CFO was aware of this emergency procurement and had already instructed the head of the SCM to assist Mr Sesoko with the procurement through an email dated 14 December 2016 sent at 10:12am to Ms Zuziwe Cele and it read as follows:

“Good Day Ms Cele

Kindly assist as discussed in the previous meeting with Programme 2. You can liaise with Mr Sesoko or Mr de Bruin for clarity.

Regards

Mrs LN Ngcongco

Chief Financial Officer”

- 5.1.95 Reasonably assessed and objectively analysed, the tenor of this email cannot be equated to an approval or confirmation of funds by the CFO neither does it tie in as endorsement of the procurement by the CFO.
- 5.1.96 As such, the argument advanced by the IPID officials in this instance is unpersuasive and therefore stands to be rejected on the basis that it does not move this issue forward. Relying heavily on *Fedsure*,¹⁸ I further submit that an organ of state like the IPID is not authorised to take action not prohibited by law; it is prohibited from taking action not so authorised. I hold along those basis, that this procurement was not authorised or seconded by the CFO or at least a delegate from her office as required by the relevant legal prescripts.
- 5.1.97 Similarly, the actual SLA/contracts between the IPID and Fidelity were also not signed by Mr McBride as required by relevant policies.
- 5.1.98 In the same response dated 12 June 2019 submitted to my office, the IPID's officials further raised concerns of *perceived conflict of interests* on the part of my investigation team member, Mr VX Dlamini (Mr Dlamini) who was part of this investigation. This has been constantly accentuated as another high water mark or dominant theme of IPID official's dispute. It was argued by IPID officials that Mr Dlamini should have recused himself from this investigation on the basis of alleged friendship with Complainant as the two once worked together at IPID KZN Provincial Office between 2011 and 2012.

¹⁸ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 55-6 (*Fedsure*).

5.1.99 I formally requested from Mr Dlamini a written clarity on his perceived relationship/friendship with the Complainant and he duly responded as per a memorandum dated 20 November 2018¹⁹. Upon perusing same, I noted that Mr Dlamini was by no means a friend of the Complainant as alleged by the IPID's officials, save to indicate that the Complainant was his former colleague whom he has never met in person since 2012. On the other hand, the IPID never backed up such claims of friendship with evidence or any form of proof.

5.1.100 As a result, I could not find any reason to remove Mr Dlamini from participating in this investigation on the mere basis of conjectural claims of friendship with Complainant. After all, Mr Dlamini was not an allocated or dedicated investigator of this matter, he only assisted mainly during the interviews. Also of noteworthy, is that my reports undergo a rigorous quality assurance process under various committees in order to detect and address any mischief or bias that might have overshadowed the investigation stage. As a result, there is no possibility that Mr Dlamini could have unduly influenced the outcome of this investigation. I view such argument as nothing more than an unjustifiable attempt to dictate the composition of my investigation team.

Conclusion

5.1.101 Based on the exposition of pervasive evidence and legal prescripts traversed above, it can be concluded that the IPID officials did not comply with the relevant legal prescripts when procuring the services of Fidelity.

5.2 Regarding whether the IPID improperly appointed Ms TH Botha as a Deputy Director: NSIT without following proper recruitment processes:

¹⁹ Submitted to myself by Gauteng Provincial Representative.

Common cause issues

- 5.2.1 In 2017, Ms Motsogi, left the IPID and her post became vacant.
- 5.2.2 On 21 April 2017, the vacant post was advertised by IPID on the website of the Department of Public Service and Administration (DPSA) with REF **NO.Q9/2017/25** and with salary level **R657 558 per annum**. The closing date for this advertisement was 05 May 2017. The Complainant applied for this post.
- 5.2.3 The advertisement had the following requirements:

“Deputy Director NSIT

Relevant NQF 6 undergraduate or equivalent qualification in law or law enforcement as recognised by SAQA;

A minimum of four (4) years’ experience in the Criminal Justice System is required of which at least three (3) years should have been in a supervisory position;

Criminal investigation experience relating to specialized investigations (corruption, racketeering and money laundering, surveillance and covert information gathering, forensic investigations, cybercrime investigations, witness protections) will serve as an added advantage;

Experience and training in Special weapons and tactics will be a strong recommendation;

Thorough knowledge and understanding of criminal law and Criminal procedure Act and other applicable legislation, knowledge of human rights and governments broad transformation objectives and initiatives are essential; Project Management and knowledge of investigative system and procedures, valid driver’s licence is essential, ability to work under pressure;

Should have undergone firearm competency training and should be willing to carry an official firearm if needed/required/requested;
Should be available on short notice to perform duties, should be willing to travel on short notice;
Sound knowledge in compliance practices and prescripts
Strong supervisory responsibilities and duties;
Familiarity with criminal investigation processes.”

5.2.4 On 28 April 2017, another Deputy Director: NSIT post was advertised by IPID with **REF NO.QA/2017/29** and with salary level **R612 822.00 per annum**. The closing date for this post was 12 May 2017. The Complainant did not apply for this post.

5.2.5 The advertisement had the following requirements:

“Deputy Director NSIT

Relevant Bachelor’s Degree or equivalent qualification in law or law enforcement as recognised by SAQA;

A minimum of four (4) years’ experience in the Criminal Justice System is required and or 10 years’ experience as an Investigation Analyst;

Criminal investigation experience relating to specialized investigations (corruption, racketeering and money laundering, surveillance and covert information gathering, forensic investigations, cybercrime investigations, witness protections) will serve as an added advantage;

Experience and training in Special weapons and tactics will be a strong recommendation;

Thorough knowledge and understanding of criminal law and Criminal procedure Act and other applicable legislation, knowledge of human rights and governments broad transformation objectives and initiatives are essential;

*Project Management and knowledge of investigative system and procedures;
Experience in specialized analytical investigation, specialized cellphone data analysis and skills transfer abilities;
Good presentation, written and verbal communication skills, valid driver's licence is essential, ability to work under pressure;
Should have undergone firearm competency training and should be willing to carry an official firearm if needed/required/requested;
Should be available on short notice to perform duties, should be willing to travel on short notice;
Sound knowledge in compliance practices and prescripts."*

5.2.6 On 08 June 2017, the shortlisting was conducted in relation to the Deputy Director post with **Reference number Q9/2017/29**. The members of the shortlisting panel were constituted as follows:

- (a) Mr M Sesoko (Chairperson);
- (b) Ms B Motlhale;
- (c) Mr D De Bruin; and
- (d) Ms NJL Hlongwane (Human Resources Advisor).

5.2.7 The following people were shortlisted from a total of 163 applications received and subsequently attended interviews:

Candidate	Experience	Qualification
Ms TH Botha	20 years relevant experience	Matric
Ms K Magonono;	11 years relevant experience	Matric and National Diploma in Human Resources and higher certificate in Anti-Corruption and Commercial Crimes Investigation.

Mr TC Bopape;	Extensive Experience	Matric and B-Tech in Policing.
Mr Phatang	10 years' relevant experience	Matric and 1 year Diploma in Criminal Justice and Forensic Investigation and National Certificate in Information Technology.

5.2.8 On 03 July 2017, the interviews were held for Deputy Director's post with **Reference number Q9/2017/29**. During the interviews, Mr Khuba was brought in to replace Mr Sesoko and Ms B Motlhale became the chairperson of the interviews.

5.2.9 There was no shortlisting or interviews for the Deputy Director's post with **Reference number Q9/2017/25** and it was neither withdrawn nor was the public notified of its withdrawal/cancellation as initially advertised.

5.2.10 Ms Botha was appointed as the Deputy Director: NSIT on 3 August 2017 as per a letter signed off by Mr McBride with a salary notch of R657 558.00.

5.2.11 Ms Botha only had a Matric certificate as the highest qualification obtained through Intec Private College in 1995 at the time of her application for the post.

5.2.12 On 12 October 2017, the Complainant lodged an internal grievance with the IPID complaining about the appointment of Ms Botha. The IPID's Labour Relations unit referred his grievance to the Presidency whereat the matter was investigated by Advocate Moloko.

5.2.13 Advocate Moloko investigated the complaint and tabled a report on 07 May 2018 with adverse findings to Mr McBride immediately after completing his investigation.

5.2.14 The findings of in the report by Advocate Moloko highlighted a number of administrative irregularities and further implicated several IPID senior officials in

the appointment of Ms Botha. Advocate Moloko recommended, amongst others, that the IPID's Head should take disciplinary steps against specified senior officials within the IPID that were responsible for irregularities in the appointment of Ms Botha.

Issues in dispute

5.2.15 The Complainant asserted strongly that Ms Botha did not qualify for the position of Deputy Director: NSIT at the time of her appointment. According to the Complainant, in terms of the general practice at the IPID, a Deputy Director is an NQF level 6 post which requires a minimum academic requirement of a National Diploma or equivalent qualification.

5.2.16 The Complainant further contended that Ms Botha had a matric certificate only and did not have a Diploma or an NQF6 qualification at the time of application of the post. He further reported that in 2015, he was part of a recruitment/selection panel member at the IPID KwaZulu Natal where Ms Botha applied for a position of a Principal Investigator. According the Complainant, he had sight of Ms Botha's CV and noticed that she was an Administrative Clerk in the SAPS. As a result, the Complainant further argued that Ms Botha still did not qualify for the post of a Deputy Director, even though academic requirements were relaxed and altered to suit her since she was an administrative clerk in the SAPS.

5.2.17 The Complainant also alleged that the IPID changed and manipulated the requirements of the post in order to suit Ms Botha without any job evaluation process being conducted, thereby unfairly prejudicing him and other potential candidates who applied.

5.2.18 Mr McBride responded to the above dispute/allegations as per a letter dated 20 July 2018 and indicated that the Complainant was a suspended IPID official who was subject to an investigation into allegations of misconduct and/or criminal activity.

5.2.19 In relation to the report of Advocate Moloko, Mr McBride indicated that he had given the implicated officials an opportunity to make their representations in response thereto in order to enable himself to apply his mind to the matter in line with the *Audi Alteram Partem Rule*. Mr McBride further pointed out that he received submissions from his officials and applied his mind to the matter, however there were gross contradictions between Advocate Moloko's report and the representations made by implicated officials.

5.2.20 In a response signed on 9 November 2018, Mr McBride stated that he applied his mind to Advocate Moloko's report and to all the submissions made by the Senior Managers. After applying his mind, Mr McBride decided not to accept the recommendations of Adv Moloko for the following reasons:

- (a) He noted that the basis for taking disciplinary action against Mr Sesoko and Mrs Netsianda was a meeting which is alleged to have taken place between the two officials and the Director of HRM, Ms Phalatsi;
- (b) The meeting referred to in the report is disputed by Mr Sesoko and Mrs Netsianda, whilst Ms Phalatsi reiterated her position to the effect that the meeting took place in her response;
- (c) This created a dilemma as to which version to accept; and

(d) With regard to Mr Khuba, Advocate Moloko also recommended that a disciplinary action be taken against him as a panel member, but Mr Khuba was never given an opportunity to provide his version.

5.2.21 According to Mr McBride, as a result of the contradictions mentioned above, he directed the IPID's Labour Relations component to appoint a new, competent and impartial investigator to reinvestigate the matter. According to Mr McBride, an investigator was appointed in this regard, however, no investigation outcome had been tabled by IPID at the time of this report, neither were the recommendations of Advocate Moloko implemented by Mr McBride.

5.2.22 In relation to the two posts advertised within a space of seven (7) days, Mr McBride replied in a letter dated 20 July 2018 as follows:

Post Reference number Q9/2017/25:

5.2.23 The above post was advertised by the IPID on 21 April 2017 and the advertisement appeared on the website of the Department of Public Service and Administration. According to Mr McBride's response, this post was to be vacated by Mr Baloyi who had applied for a transfer to the SAPS with effect from 1 May 2017. Mr McBride stated that in order to avoid a capacity gap, they advertised the above position immediately. He further highlighted that on 1 May 2017, Mr Baloyi had unfortunately not been allocated the position at Directorate for Priority Crime Investigation (DPCI/SAPS) as he had expected. Mr Baloyi was still occupying the position and this was the reason the above advertised position was not filled.

5.2.24 On 9 October 2018, my investigation team held an interview with Ms Phalatsi, who contradicted Mr McBride and indicated that the advertisement was in connection with the post vacated by Ms Motsogi²⁰.

5.2.25 When Ms Phalatsi was alerted about the contradiction between her version and the submission by Mr McBride, she declined to comment on the account of Mr McBride and maintained that this post was vacated by Ms Motsogi and not Mr Baloyi as submitted by Mr McBride.

5.2.26 Ms Phalatsi further confirmed that the application for transfer of Mr Baloyi was not yet approved or signed by Mr McBride as was evident from the application letter itself dated 19 April 2017. As a result, Ms Phalatsi asserted that it could not be said that the post was vacant as the post became vacant only when the incumbent had been accepted by another department and taken out of the system by the HR unit. In the case of Mr Baloyi's application, there was no confirmation of acceptance by the SAPS and the IPID's HR was not involved in facilitating his application for transfer. Ms Phalatsi denied ever signing any application for transfer by Mr Baloyi.

5.2.27 Similarly, on 23 October 2018, Mr Sesoko also confirmed to my investigation team, during an interview, that the post was vacated by Ms Motsogi. He, as the immediate head of the IPID's NSIT and the National Head of Investigation was quite adamant on this point, thereby also contradicting the submission made by Mr McBride.

5.2.28 My investigation team also held an interview with Mr Baloyi on 9 October 2018 regarding his application for transfer to the SAPS. He made it categorically clear that his application was not approved by Mr McBride and the application was never submitted to the SAPS at all. He further pointed out that he was taken by surprise

²⁰ Refer to audio recording minutes at 18:45 and at 22-24:00.

when he heard through the grapevine that his post had been advertised while he was still at the IPID with no approval of his transfer by Mr McBride.

5.2.29 In light of the submissions by Messrs Baloyi and Sesoko and Ms Phalatsi, it is not clear why the IPID would rush to advertise the post of Mr Baloyi as an effort to avoid a capacity gap, but fail to advertise the post which had long been vacated by Ms Motsogi who was already out of the system. Mr Baloyi was still at the IPID and had only made an application which Mr McBride never approved, yet his post was advertised prematurely or hastily.

Post Reference number Q9/2017/29:

5.2.30 With reference to this particular post, Mr McBride did not provide my office with a response or clarity as to who vacated this post. He also did not furnish my office with the job evaluation report for this post despite being requested to do so by my investigation team. However, Ms Phalatsi and Messrs Sesoko and Baloyi indicated that the post was a new one due to the drastic change of inherent the job requirements of a post of Deputy Director: NSIT.

5.2.31 Ms Phalatsi informed my investigation team during an interview that she advised Mr Sesoko, as the manager responsible for the post, that a change of job requirements had rendered the post new altogether and therefore needed to be subjected to a process of job evaluation as required by the Public Service Regulations. She further submitted that Mr Sesoko became very persistent and demanded that the advertisement of the post must be placed due to the urgent need to fill the post notwithstanding the reasons/advice given by Ms Phalatsi. According to Ms Phalatsi, she then called the former IPID's Deputy Director: HR, Mr Vincent Sibanyoni, to also assist in explaining to Mr Sesoko the pressing need for evaluating the post.

5.2.32 Realising that Mr Sesoko was adamant and unrelenting, Ms Phalatsi pointed out that she escalated the issue to Ms Netsianda because she felt Mr Sesoko, as a Chief Director, was coercing her to place the advertisement without heeding her advice of the job evaluation process. Ms Phalatsi reported that she asked Ms Netsianda to intervene since Mr Sesoko was not willing to take advice. Ms Netsianda simply responded by saying Mr Sesoko was the manager responsible for the programme and understands his service delivery needs and therefore Mr Sesoko must give direction.

5.2.33 Ms Phalatsi then asked Ms Netsianda if she was going to sign the placement of a post advertisement or reduce such direction in writing, as Ms Phalatsi was not comfortable signing for the post. Ms Netsianda refused and said Mr Sesoko would sign as this was his post. This stance by Ms Netsianda appeared to evince or manifest an attitude of approval or complicity. My office was never favoured with anything to show any form of intervention by Ms Netsianda as the IPID's Head of Corporate Services. It was then that Mr Sesoko made the following handwritten proviso/entry on the post draft document on 24 May 2017:

"Due to service delivery requirements for a data analyst I deviate from the original advert. This is a strategic decision by the programme to avoid paying service providers for the services."

5.2.34 Thereafter, while all of them, Mr Sesoko and Ms Netsianda, were still in Ms Phalatsi's office, Ms Phalatsi called the IPID's HR practitioner, Ms Portia Hlalele and reminded her about this post which was supposed to be advertised, but due to job evaluation challenges was placed on hold. Ms Hlalele agreed that she remembered the post. She then told Ms Hlalele in front of Ms Netsianda and Mr Sesoko that the two Chief Directors indicated that they would be deviating from the requirements of the position and that the HR must secure the space for the

advertisement. Ms Hlalele then left the office to email the advertisement to the DPSA to advertise.

5.2.35 During an interview with my investigation team on 23 October 2018, Ms Netsianda was also requested to clarify her intervention or role in the matter. The nub of her response was that she was perched at a strategic level and did not deal with the day to day operational issues. She further denied a meeting between herself, Ms Phalatsi and Mr Sesoko in relation to this issue. When probed further, Ms Netsianda diverted attention from the issue at hand by unjustifiably accusing my investigation team member of pointing fingers or intimidating her. She further accused the team of being in possession of a document that was not provided by the IPID. To this end, it is worthwhile to note that our investigation/interview process as an organisation modelled on an institution of ombudsman is not accusatorial. Our processes are inquisitorial in nature and only intended to elicit information related to the investigation.

5.2.36 My investigation team further interviewed Ms Hlalele on 29 October 2018. She confirmed that Ms Phalatsi called her to her office on 24 April 2017 at about 16:30 to 17:00 afternoon wherein there was Mr Sesoko, Ms Netsianda and Ms Phalatsi. According to Ms Hlalele, Ms Phalatsi then told her in the presence of Mr Sesoko and Ms Netsianda that she must send a draft advertisement of the post to the DPSA which she did. She also confirmed that Mr Sesoko personally signed the advertisement to take responsibility in Ms Phalatsi's office by writing that he deviated from the HR process²¹. Ms Hlalele further indicated that she was not comfortable advertising this post, but was given instructions to do so by Ms Phalatsi.

²¹ Refer to 18-22 minutes of the audio record.

5.2.37 On 25 October 2018, my investigation team further held an interview with Mr Vincent Sibanyoni (Mr Sibanyoni), Deputy Director of Human Resources within IPID at the time, whose duty was to evaluate new posts, amongst other things. Mr Sibanyoni confirmed that this post came to his desk and he realised that the job requirements were drastically changed namely, academic requirement of a Bachelor's degree were dispensed with by an alternative of a ten (10) years' experience as an analyst. Upon realising that the job requirements for this post were changed, Mr Sibanyoni advised Ms Phalatsi of the need to subject the post to a process of job evaluation. Upon being presented by my investigation team with a handwritten proviso that was made by Mr Sesoko whereby the latter resolved to deviate as explained above, Mr Sibanyoni contended that it was wrong of Mr Sesoko to have done that since Mr Sesoko was not clothed with powers to approve changes of the post inherent requirements. According to Mr Sibanyoni, the handwritten proviso/entry by Mr Sesoko appeared to be an instruction to those it was intended for.

5.2.38 As a result of Mr Sesoko's persistent demand and insistence whereby he even committed himself and put it in writing as explained above, and also as a result of Ms Netsianda's supine attitude towards Mr Sesoko's conduct, the post was advertised without being evaluated. The IPID and particularly its head Mr McBride, could not therefore provide a record of the job evaluation which was supposed to be conducted on the post of Deputy Director: NSIT with **ref number Q9/2017/29**.

5.2.39 In terms of the IPID's first HR's screening report of all applications received for this post, dated 8 June 2017 which was submitted to my office, it was indicated that Ms Botha (who was captured as application number 159) did not meet the required qualifications. Despite this red flag at the screening phase by the HR, the shortlisting panel ignored it and went on to hand-pick and shortlisted her.

5.2.40 Upon being asked by my investigation team the reason why the shortlisting panel disregarded the HR's applications screening report pertaining to the disqualification of Ms Botha, Mr Sesoko, as the chairperson of the panel, indicated that these screening reports by the HR were often inaccurate and the panel did not rely on it, hence the panel overruled the HR's decision to disqualify Ms Botha²².

5.2.41 With regard to the criteria followed to shortlist and further interview Ms Botha for this post, all the panel members as mentioned above could not point out on Ms Botha's CV the position/job title, including the period of time held by Ms Botha in the SAPS. Instead, all the panel members purported to justify their decision to shortlist and interview Ms Botha by relying on other extrinsic documents annexed to her CV such as letters of commendation/appreciation from prosecutors and judges, notwithstanding the fact that Ms Botha's previous position was not reflected on her CV or on either of those letters.

5.2.42 Mr Khuba, the interview panel member, did in fact concede during an interview with my investigation team on 23 October 2018, that he did not look at the CV of Ms Botha or compare it with the job advertisement²³ and further tendered an untenable argument that sought to row an interview as not being part of selection during a recruitment process.

5.2.43 Page four (4) of Ms Botha's CV, the same one she submitted when applying for this position, which is in my possession, was drafted as follows under **Work History**:

"Employment Period: February 1994 –present

Company Name: South African Police Service (SAPS)

²² Refer to recorded audio at minute 1:51 to 1:54 (interview with Mr Sesoko).

²³ Refer to a recorded audio at minute 15: 21 (interview with Mr Khuba).

Current Position: *Directorate Priority Crimes Investigation,
Pietermaritzburg: January 2011-present*

Reason for Leaving: *I would like to explore new opportunities where I would
be able to utilize my skills and expertise, contributing
to combating crime and corruption”.*

5.2.44 Furthermore, Ms Botha's CV did not disclose the years of experience as an Investigative Analyst. Equally, the IPID panel members failed to explain how they determined her years of experience as an Analyst which was required by the advertisement. Conversely, and directly against the contention by the IPID panel members, Ms Botha when being interviewed by my team about her CV, she admitted that the *Directorate for Priority Crimes Investigation* was not a position and that with hindsight she presumed that she should have written that her position was a civilian and Chief Administrative Clerk in the SAPS²⁴.

5.2.45 In pursuit of what position Ms Botha held in the SAPS, my investigation team further engaged and subsequently received a written submission from the SAPS National Office signed off by Deputy National Commissioner, BC Mgwenya, dated 13 August 2018. According to this submission from the SAPS, Ms Botha's SAP 96 document (SAPS career profile document) does not disclose that she attended any Data Analyst Course within the SAPS nor does it reflect her duties as that one of a data analyst or an investigator. The submission from the SAPS further clarified that Ms Botha was appointed at the SAPS on 21 February 1994 as an Administrative Clerk and for her entire career in the SAPS she remained an Administrative Clerk until she resigned in on 21 September 2016 as a Chief Administrative Clerk.

²⁴ Refer to audio record at 1:48 (interview with Ms Botha).

5.2.46 In light of the submission by Ms Botha's previous employer, it is apparent that Ms Botha was employed in an administrative capacity until she resigned. It is also worth noting that none of the commendation letters (from prosecutors and judges) for Ms Botha that are in my possession indicated the position held by her in the SAPS. It is, therefore, not clear how the panel members of IPID determined the position Ms Botha held and the periods of time spent in each position. Commendation letters from prosecutors and judges only expressed appreciation for the assistance rendered by Ms Botha in analysing telephone calls, however none of the letters disclose Ms Botha's official position or job title in the SAPS.

5.2.47 In her own words, Ms Botha indicated during an interview with my investigation team on 11 October 2018 that although she was doing investigation analytical work, she was not appointed as such and her job title remained that one of the Administrative Clerk within the SAPS until she resigned²⁵. She also indicated that she applied to be converted from being an Administrative Clerk to investigation analyst within the SAPS, but without any success.

5.2.48 It was only at Fidelity that she was officially appointed as its National Investigative Analyst on **1 March 2016** as per a letter from Fidelity dated 29 January 2016 signed off by J Coetzee, Fidelity's Regional HRM Manager KZN office. This could, therefore, mean Ms Botha neither had ten (10) years as Investigation Analyst nor four (4) years' experience in Criminal Justice as required by post advertisement when she was appointed in **3 August 2017**.

Application of the relevant legal prescripts

The Constitution

²⁵ Refer to recorded audio at 1:18-20.

5.2.49 Section 33 of the Constitution provides that:

- (1) *“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
- (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”*

5.2.50 Section 3(1) of the Promotion Administrative Justice Act (PAJA) stipulates that:

“Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.”

5.2.51 In this instance, there is no evidence showing that the first post advertised on 21 April 2017 (**Deputy Director: NSIT ref number Q9/2017/25**) which the Complainant applied for, was ever withdrawn or officially cancelled at some later stage. Instead, the Complainant was told conflicting reasons regarding the delay in filling this post. Firstly, he was informed by the HR that the post was put on hold by the programme manager responsible for the vacancy and subsequent to that, the Complainant was told by Ms Netsianda that the post had been filled by Ms Botha.

5.2.52 In light of the sharp contradictory reasons given to the Complainant by the HR and those given by Ms Netsianda, it is clear that there were various stark contradictions amongst IPID senior officials on these posts. Their versions were inconsistent and fraught with contradiction, lack of transparency, accountability, and honesty when it came to explaining whether post **ref number Q9/2017/25** and post **ref number Q9/2017/29** was one post or different posts. However, evidence at my disposal later revealed that this was the same post, vacated by Ms Motsogi, which was

advertised under different reference numbers, with the inherent job requirements on the second advertisement being varied/lowered or changed. This inference is reliably drawn from the fact that Mr Baloyi never left the employ of the IPID and therefore his post never became vacant.

5.2.53 As a result of the administrative irregularities surrounding the advertisement of one post twice, without officially withdrawing the first post and the whimsical changing of job requirements, the IPID's administrative action in the circumstances cannot be said to have been lawful, reasonable and procedurally fair as required by the Constitution. By corollary, the administrative action by the IPID adversely affected the rights or legitimate expectations of the Complainant and other applicants who applied for **ref number Q9/2017/25**. There can be no gainsaying fact that this post was not filled or withdrawn by the IPID at least up to this day and opaque reasons were given to the Complainant for the non-filling of this post. The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law²⁶.

5.2.54 Another notable administrative discrepancy was that Ms Botha applied for a post **ref number Q9/2017/29** which was advertised at salary notch **R612 882.00**, but she was appointed at a higher salary notch **R657 558.00** compared to the advertisement. This cannot be reconciled with the Constitutional requirement of lawfulness, reasonableness and procedural fairness for any administrative action. It is highly unfair, irregular and lacks transparency to advertise a post at specific salary notch and later appoint at a higher salary notch, as this has a prejudicial effect on other candidates who might have been interested on the post, but due to misleading salary notch did not apply.

²⁶ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 1999 (4) SA 788 (T) at paragraph 20.

5.2.55 If regard is had to the nature and subject matter of the power exercised by the IPID's officials in the circumstances, it would not be wrong to characterise the IPID's actions as administrative action within the meaning of section 33 of the Constitution. It was, however, the exercise of public power which had to be carried out lawfully and consistently within the provisions of the Constitution in so far as they may be applicable to the exercise of such power.

5.2.56 The *Prinsloo v Van Der Linde and Another*²⁷ case is instructive in instance where the Court held as follows:

"The constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state".

5.2.57 Section 14 of the Public Service Act²⁸ as amended (PSA) which deals with transfers within public service provides as follows:

(1) Subject to subsections (2), (3) and (4), any employee of a department may be transferred-

(a) within the department, by its executive authority;

(b) to another department by the executive authorities of the two relevant departments.

²⁷ *Prinsloo v Van Der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

²⁸ Act 103 of 1994. Public Service Act has been applied only to the extent that it is not inconsistent with any provisions of IPID Act.

(2) Such transfer shall be made in such manner and on such conditions as may be prescribed.

(3) An employee may be transferred under subsection (1) only if-

(a) the employee requests the transfer or consents to the transfer; or

(b) in the absence of such request or consent, after due consideration of any representations by the employee, the transfer is in the public interest.

(4) Before employees may be transferred in terms of subsection (3) (b) as a result of a determination regarding an allocation, abolition or transfer of a function, contemplated in section 3 (4) (b) or (c) or 3A (b), consultation shall take place in the applicable bargaining council established in terms of the Labour Relations Act for the public service as a whole or for a particular sector in the public service.”

5.2.58 The transfer of Mr Baloyi was patently subject to the approval by both the IPID's Accounting Authority and SAPS. Evidence as discussed above has shown that Mr Baloyi's transfer had not been approved by the IPID's Executive Director and had also not been submitted to the SAPS. In the absence of such approval, no transfer could have taken place. This proves that the post of Mr Baloyi was never vacant to warrant advertisement by the IPID. Its purported advertisement was, therefore, at odds with the above guidelines of section 14 of PSA. As a matter of fact, Mr Baloyi is currently still within the employ of the IPID.

5.2.59 Section 11 of the PSA states the following:

“Appointments and filling of posts

- (1) *In the making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.*
- (2) *In the making of any appointment or the filling of any post in the public service—*
 - (a) *all persons who qualify for the appointment, transfer or promotion concerned shall be considered; and*
 - (b) *the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.*
- (3) *Notwithstanding the provisions of subsection (2), the relevant executing authority may, subject to the prescribed conditions, approve the appointment, transfer or promotion of persons to promote the basic values and principles referred to in section 195(1) of the Constitution."*

5.2.60 Section 11 of the PSA must be read in the context of the state's obligations under section 195(1)(i) of the Constitution and the right to fair labour practices under section 23 of the Constitution. Section 195(1)(i) stresses the importance of ensuring that appointment processes in the public sector are based on ability, objectivity and fairness. Fairness in employment practices and labour relations requires the state to be even-handed and transparent not only to those whom it employs, but so too to those who may wish to apply for employment at a state institution. It would not be fair if the state were to employ persons who do not meet the very requirements that the state itself sets. It is neither fair nor in compliance with the dictates of transparency and accountability for the state to mislead applicants and the public about the criteria it intends to use to fill a post. The

formulation and application of requirements for a particular post is a minimum prerequisite for ensuring the objectivity of the appointment process. Persons who do not meet the requirements for a post in the public sector ought not to be appointed.²⁹ Ms Botha's CV and SAP 96 did not reflect any specialised training as a Notebook/Cellphone analyst, neither did the IPID provide such qualifications or certificates to my office.

5.2.61 Regulation 40 the Public Service Regulations³⁰ (PSR) provides as follows:

"Before creating a post for any new job, or filling any vacancy, an executive authority shall—

(a) ...

*(b) in the case of a new job, **evaluate the job in terms of the job evaluation and job grading system (own emphasis)** referred to in regulation 41(1), except in the case of jobs determined in terms of an OSD, or jobs graded by the Minister in terms of regulation 41(2)(d), in which case the grade indicated in the OSD or as determined by the Minister shall be utilised;*

(c) ...

(d) ensure that sufficient budgeted funds, including funds for the remaining period of the medium-term expenditure framework, are available for filling the post."

5.2.62 Regulation 41 of the PSR which deals with job evaluation and job grading systems provides as follows:

(1) The Minister shall determine—

²⁹ *Khumalo and Another vs MEC for Education KZN* (CCT 10/13) ZACC 49, 2014(3) BCLR 333(CC) at paragraph 62.

³⁰ Public Service Regulation of July 2016.

- (a) a job evaluation and job grading system or systems that shall be utilised in the public service to ensure work of equal value is remunerated equally; and*
- (c) a range of job weights derived from the system or systems for each salary level in a salary scale.*

(2) The Minister may—

- (a) issue directives on the application of a job evaluation or job grading system or systems;*
 - (b) review the application of job evaluation in the public service;*
 - (c) determine a job or category of jobs that an executive authority must evaluate; and*
 - (d) issue directives that direct the evaluation and grading of any job or category of jobs.*
- (3) An executive authority may evaluate or re-evaluate any job in his or her department, except—*
- (a) jobs evaluated and graded by the Minister in terms of subregulation (2)(d); or*
 - (b) jobs determined in terms of an OSD.”*

5.2.63 Ms Phalatsi stated, during her interview on 9 October 2018, that she informed Mr Sesoko and Ms Netsianda that fundamental changes that were made in terms of the job requirements to post advertisement **reference number Q9/2017/29** constituted a new post altogether. As a result, this post needed to be subjected to a job evaluation process as required by the above regulation, hence Ms Phalatsi did not secure a space for the advertisement on the DPSA’s website. However, Mr Sesoko was persistent that the advertisement should be published. On the hand, Ms Netsianda as the overall Head of Corporate Services did not take any action to ensure compliance with the above PSRs.

5.2.64 Regulation 4 of PSR provides as follows:

The Minister may—

- (a) under justifiable circumstances, authorise a deviation from any regulation;*
- and*
- (b) if necessary, authorise a deviation contemplated in paragraph (a) with retrospective effect for purposes of ensuring equality.*

5.2.65 In terms of Regulation 4, only the Minister may authorise a deviation from any regulation of PSA. Therefore, Mr Sesoko had no authority to order a deviation from the PSR.

5.2.66 Clearly, the only ineluctable conclusion to be drawn from the handwritten entry by Mr Sesoko was, by all accounts, meant to circumvent or bypass any due process that had to be followed before a new post could be advertised, thereby disregarding the advice by Ms Phalatsi. By so doing, Mr Sesoko acted *ultra-vires* and further usurped the powers of the IPID's Executive Authority and the Minister of Public Service and Administration who are vested with powers to initiate and approve new jobs following an evaluation and grading process alluded to in Regulations 40 and 41 of PSR.

5.2.67 It also dawns from the corroborating evidence of Ms Hlalele that Ms Netsianda to whom Ms Phalatsi reported that she was also equally aware that a new post was being advertised without subjecting it to the job evaluation process as required by regulations. In an interview with my investigation team, Ms Netsianda distanced herself from the HR's day to day activities. On the other hand, Mr Sesoko maintained that although he made the above entry, he was not stopping HR from following their own processes. However, Mr Sesoko could not explain what he meant by *deviation* in his entry or the purpose of the whole handwritten proviso.

5.2.68 Ms Phalatsi indicated that she felt compelled to direct Ms Hlalele to advertise the post when the two Chief Directors above agreed with each other, despite her advice to subject the post to job evaluation.

5.2.69 Clause 10.5.7 of the IPID Recruitment and Selection Policy³¹ (Recruitment Policy) which regulates shortlisting process provides as follows:

“To ensure consistent understanding of a detailed CV with work experience, CV should clearly indicate the Employer, Position held, clear starting dates, where as a minimum the month and year should be indicated, duties performed and clear termination dates where again as a minimum, the month and year should be indicated. Should CV’s not meet with this criteria then such applicants should be eliminated.”

5.2.70 Ms Botha’s CV did not disclose the position held at DPCI/SAPS neither did it indicate relevant experience in a particular post. Moreover, according to the SAP 96 document received from SAPS by my office, Ms Botha was employed as an Administrative Clerk until her resignation. It is therefore unexplained how the panel determined the post she held and experience as an analyst since such was not defined in the CV and commendation letters from prosecutors and judges.

5.2.71 The Recruitment Policy directs that **a CV that does not disclose a position should be eliminated**. By failing to eliminate such a CV the IPID’s recruitment and selection panel would be in contravention of clause 10.5.7 of the Recruitment Policy.

5.2.72 Clause 10.5.8 of the Recruitment Policy provides as follows:

³¹ Dated 01 April 2015 and signed off by Mr I Kganyane.

“The HR representative is also responsible to go through all applications reviewed during the shortlisting process, to ensure that no mistakes were made during shortlisting process and if mistakes are detected, they should be brought to the attention of the Chairperson.”

5.2.73 It appears from the first screening of the long list of all one hundred and sixty three (163) applicants, that Ms Hlongwane made it clear in the screening report that Ms Botha did not meet the qualifications of the post. Nonetheless, the shortlisting panel and, in particular Mr Sesoko, ignored this report and went on to shortlist, interview and recommended Ms Botha for appointment.

5.2.74 Clause 10.6 of the Recruitment Policy provides as follows:

“After the panel has shortlisted, the chairperson will inform the Directorate HRM or the Division Corporate Services of the date, time and venue of the interview and HRM will invite shortlisted candidates. Prior to the invitation of the candidates for the interviews, the Directorate: HRM or Division: Corporate Services shall ensure that all shortlisted candidates meet the requirements of the advertised post. In the event that any of the shortlisted candidates does not meet the inherent requirements of the posts, such a shortlist shall be referred back to the panel.”

5.2.75 The evidence at my disposal does not indicate that HR or Corporate Services reviewed the applications after the shortlisting by the panel except the screening report which shows that Ms Botha’s application was regarded as not meeting the qualification criteria. During the interview with my investigation team, Mr Sesoko pointed out that as the selection panel, they did not rely on the HR’s report because it was often inaccurate.

5.2.76 Section 57(3) of PSR that deals with general conditions for appointment stipulates as follows:

“An executive authority shall, before making a decision on an appointment of a person additional to the establishment—

(a) satisfy himself or herself that the person qualifies in all respects for the position and that his or her claims in his or her application for the position have been verified; and

(b) record that verification in writing”.

5.2.77 In terms of the above prescript, Mr McBride also had a legal duty to satisfy himself that Ms Botha qualified for the position she applied for. In the circumstances, there is no indication that he satisfied himself with the suitability of Ms Botha. There is no evidence of any verification of such undertaken by Mr McBride which is in violation of section 57(3) of PSA.

5.2.78 Section 6(1) and (2) of PAJA provides for a Judicial Review of Administrative Action as follows:

“(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –

(i) ...

(ii)...

or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

- (e) the action was taken –*
 - (i) for a reason not authorised by the empowering provision;*
 - (ii) for an ulterior purpose or motive;*
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;*
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;*
 - (v) in bad faith; or*
 - (vi) arbitrarily or capriciously;*
- (f) the action itself –*
 - (i) contravenes a law or is not authorised by the empowering provision; or*
 - (ii) is not rationally connected to –*
 - (aa) the purpose for which it was taken;*
 - (bb) the purpose of the empowering provision;*
 - (cc) the information before the administrator; or*
 - (dd) the reasons given for it by the administrator;*
 - (g) the action concerned consists of a failure to take a decision;*
 - (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
 - (i) the action is otherwise unconstitutional or unlawful”.*

5.2.79 Section 7(1) of PAJA provides for a Judicial Review of Administrative Action as follows:

“Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-”

5.2.80 Section 158(1)(h) of the Labour Relations Act which regulates the powers of the Labour Court provides as follows:

“The Labour Court may- review any decision taken or any act performed by the State in its capacity as employer, on such grounds that are permissible in law”.

5.2.81 In the *Khumalo and Another vs MEC of Education KZN*³² case, the court outlined the process to be followed when a responsible functionary is embarking on a process of remedying an administrative irregularity. It is obvious from the evidence available at my disposal that Ms Botha’s appointment was replete with a number of reviewable irregularities and similarly the executive authority of IPID may have to embark on either a judicial review or approach the Labour Court to cure the defects that occurred during the appointment of Ms Botha within the stipulated time frame namely, 180 days of being aware of such irregularities.

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

5.2.82 A response was received by my office on the 12 June 2019 on behalf of Mr McBride, Mr Sesoko, Mr Khuba, Ms Netsianda, Ms Moroasui, Ms Motlhale, Ms Botha and Mr de Bruin from Mr Jac Marais of Adams and Adams Attorneys.

5.2.83 In response to this issue, the IPID officials sought to argue that Public Service Commission (PSC) investigated allegations by the Complainant and found no merit in them. The response further raises concerns about the basis on which my office considered it necessary to reinvestigate complaints that have already been subject

³² (CCT 10/13) ZACC 49, 2014(3) BCLR 333(CC)

of the PSC's investigation. IPID officials further attached a letter dated 24 October 2018, signed by RK Sizani: Chairperson of PSC indicating that allegations lodged anonymously against IPID were not substantiated.

5.2.84 To this end, I wish to point out that the Complainant indicated to my team³³ that he has never lodged any complaint with the PSC and has no knowledge of any whatsoever. Besides, my office had no scope or terms of reference of the PSC's investigation neither do I know about the approach followed by PSC in their processes, nature of evidence considered and upon which their findings were based. Without expressing a view of my own on the investigation of PSC (an independent body on its own), I duly assert/reiterate my jurisdiction and mandate over allegations of impropriety and maladministration within the public service and in this case against the IPID³⁴.

5.2.85 In essence and the nub of response by IPID officials on this issue seek to contend that my proposed findings were flawed and not supported by documents or evidence. However, and in sharp contrast to their dispute, the IPID's officials accept that **no Job Evaluation**³⁵ was conducted for the **post ref Q9/2017/29** on which Ms Botha was appointed to.

5.2.86 Notably, this irregularity namely, failing to subject a newly created post to a process of job evaluation as conceded by the IPID's officials themselves ranks amongst my primary adverse finding on this issue. Of relevance here, is that such a failure, literally rendered the appointment of Ms Botha irregular on its own, as she had to

³³ As per telephonic interview held on 04 July 2019.

³⁴ Refer to Section 182 of the Constitution and Section 6(4) of the Public Protector Act which both detail my mandate that I assert and execute without fear, favour or prejudice.

³⁵ Page 19 at paragraph 27.4 of the IPID response to the Notice in terms of section 7(9) of the Public Protector Act dated 12 June 2019.

be subsequently appointed on the post that never existed nor evaluated or approved by the relevant authority.

5.2.87 The job weight of Ms Botha's position has not been systematically determined and its responsibilities have not been evaluated to determine if Ms Botha not only qualifies to be appointed but if its grading is correct, a process which should have been done before the position was advertised.

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

Conclusion

5.2.89 Having considered the conspectus of evidence as a mosaic of pieces of proof on its entirety/totality, the only inescapable conclusion to be drawn on a balance of probability is that the IPID did not comply with the relevant legal prescripts during the recruitment and appointment of Ms Botha.

5.3 Regarding whether the IPID improperly suspended the Complainant in retaliation against his protected disclosure regarding alleged unethical conduct by Mr McBride and regarding the grievance against alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the Protected Disclosures Act:

Common cause issues

- 5.3.1 On 03 August 2017, Ms Botha was appointed by the IPID as the Deputy Director: NSIT as per a letter signed off by Mr McBride with a salary notch of R657 558.00, following the advertisement of **post ref number Q9/2017/29**.
- 5.3.2 On 12 October 2017, the Complainant lodged an internal grievance within IPID in order to have this complaint investigated and resolved. The IPID Labour Relations then referred the grievance to the Presidency for further handling. The Presidency investigated this matter and subsequently tabled a report written by Advocate Moloko³⁶, implicating certain senior IPID officials in wrongdoing relating to the advertisement of this as a new post without subjecting it to job evaluation and administrative irregularities surrounding the process of appointment of Ms Botha.
- 5.3.3 Over and above this matter, on 28 April 2018 the Complainant also lodged another complaint of unethical conduct as a whistle-blower to the Minister of the Police who then forwarded the same complaint to the Parliamentary Portfolio Committee on Police. On this particular complaint, the Complainant detailed a number of allegations of improper conduct by Mr McBride.

Issues in dispute

- 5.3.4 The Complainant contended that Mr McBride failed, without just cause, to implement the report of Advocate Moloko, hence the internal complaint resolution mechanism system proved to be a futile exercise for him. As a result, the Complainant lodged this complaint with my office on 22 June 2018.

³⁶ This report is dated 07 May 2018.

5.3.5 It was also submitted by the Complainant, as his additional argument, that the protected disclosure he made to the Minister of Police was leaked and it went viral on mainstream as well as social media.

5.3.6 The Complainant argued that once his protected disclosure report came to the attention of Mr McBride, he was immediately removed from the IPID Task Team in Pretoria, transferred back to the IPID's KwaZulu Natal Provincial office and subsequently placed on suspension by Ms Parbathie Maharaj³⁷. According to the Complainant, fabricated charges related to his act of whistleblowing were then concocted against him by the IPID through Ms Maharaj while he remained on suspension. The charges at the time of the Complainant's suspension were the following³⁸:

- (a) Leakage of information to external people and media;
- (b) Compromising investigations conducted by the IPID;
- (c) Bringing the name of the IPID, its Executive Director and other senior managers into disrepute and prejudicing the administration, discipline or efficiency of the department of the state and
- (d) Prejudicing the administration, discipline or efficiency of a department, office or institution of the state.

5.3.7 He further asserted that he viewed the charges against him as no less than an act of victimisation and occupational detriment since he lodged complaints of unethical conduct against Mr McBride and maladministration against the IPID senior managers. He further notified my office and sought my intervention that the IPID

³⁷ Ms Parbathie Maharaj is the IPID's Provincial Head in KZN.

³⁸ As contained in the Suspension Letter dated 04 June 2018, signed off by Ms Maharaj and acknowledged by complainant's attorney: Donovan Naidoo and Associates.

charged him solely for making a protected disclosure thereby subjecting him to occupational detriment.

5.3.8 The Complainant also furnished my office with a letter dated 06 June 2018 which was signed off by the Minister Cele. This letter was addressed to Mr McBride wherein Minister Cele informed Mr McBride that he received a complaint of unethical conduct and that he has decided that this matter be independently investigated. In the same letter, Minister Cele further urged Mr McBride to reverse any decision or imminent decision taken against the Complainant, including his suspension.

5.3.9 Notwithstanding the above call or request from the Minister Cele, the IPID allegedly continued with the disciplinary action against the Complainant.

5.3.10 I also wrote a letter to Mr McBride requesting him to hold any disciplinary proceedings against the Complainant in abeyance until my office finalises the investigation in the complaint relating to occupational detriment. However, on the same day of my letter to Mr McBride, the Complainant tendered his resignation from the employ of the IPID and withdrew the complaint relating to the occupational detriment, as per the Settlement Agreement between him and the IPID. Accordingly, my office closed and ceased the investigation relating to occupational detriment. However, my office continued with the investigation relating to the alleged irregular appointment of Ms Botha and procurement of Fidelity.

5.3.11 During a telephonic interview with my investigation team on 12 March 2019, the Complainant indicated that he was forced to resign or terminate his employment with the IPID and that the resignation was not free or voluntary since Mr McBride kept on saying that my office should not be involved during the settlement negotiations when the Complainant requested that my office facilitates the

settlement negotiations. The Complainant further argued that the IPID drafted the Settlement Agreement on their own and subsequently presented it to him and his legal representative to sign on the day.

5.3.12 According to the Complainant, he also requested that the Settlement Agreement be amended to indicate that Mr McBride should at least approve his lateral transfer to SAPS on the same or equivalent salary level he held at the IPID, so that he could not find himself unemployed after signing the Settlement Agreement, but Mr McBride refused and said: *“sign or face the disciplinary action and be dismissed”*. The Complainant submitted further that his legal representative held a brief caucus with Mr McBride in an attempt to amend the Settlement Agreement to cater for his transfer to SAPS, but such attempt was fruitless.

5.3.13 The Complainant further averred that at the end and out of frustration, fear of a dismissal record under his name and bearing in mind his financial predicament, he realised that he could not afford to continue paying the costs of his legal representative beyond that day, decided to sign the Settlement Agreement as was presented to him by the IPID. He vehemently contended that with the benefit of hindsight, his resignation was nothing short of a *constructive dismissal* and it was never a free and voluntary one, in the circumstances.

5.3.14 The presence of Mr McBride, as an Executive Authority, as well as other IPID’s senior officials during the settlement agreement negotiations with the Complainant was not explained. The Complainant, as the IPID’s junior employee, was faced with an executive authority and senior managers during bargaining and his bargaining power/position was likely to be weakened and his powers of resistance were most probably rendered pliable by their presence. Similarly, my letter to Mr McBride requesting that the disciplinary hearing against the Complainant be placed on hold until I finalise the complaint relating to occupational detriment was ignored.

5.3.15 The IPID did not respond to all of the above disputes, save to indicate that the report tabled by Advocate Moloko was not implemented due to certain contradistinctions contained therein and that the Complainant was on suspension and facing disciplinary action as well as possible criminal charges.

5.3.16 The IPID has also advised my office of the Complainant's resignation and its accompanying Settlement Agreement which was attached to their letter to my office dated 01 October 2018. The terms of the said Settlement Agreement between the IPID and Complainant were captured as follows:

***"INDEPENDENT POLICE INVESTIGATION DIRECTORATE
INTERNAL DISCIPLINARY HEARING
(HELD AT JOHANNESBURG)***

In the matter between:

INDEPENDENT POLICE INVESTIGATION DIRECTORATE (Employer)

And

CEDRICK MTHOKOZISI NKABINDE (Employee)

WHEREAS the employer has suspended the employee and instituted disciplinary action against him

Now therefore the parties agree as follows:

- (a) *The employee hereby resigns with immediate effect and the employer accepts his resignation. His last day of service will be today. The employee will be entitled to his remuneration up to date of this agreement and any accrued statutory payments due as of today. The resignation and its acceptance is by mutual agreement and does not constitute a dismissal, including a constructive dismissal.*
- (b) *The employer agrees not to continue with the disciplinary process.*
- (c) *The employee agrees that he shall not interfere with, hamper or frustrate any IPID investigations.*
- (d) *The employee forthwith hereby withdraws all of his complaints and any statements related to those complaints (including any complaints under the Labour Relations Act, 66 of 1995, as amended and the Protected Disclosures Act, and in terms of the Public Protector's Act). Without limiting the generality of the foregoing, the employee hereby withdraws his complaints to the Public Protector, any complaints to any Ministers, Parliament and any of his referrals against the employer whilst in the employ of the employer to any forum, including any bargaining council, including but not limited to his suspension and/or the institution of disciplinary proceedings against him, including his application in terms of section 142 of the Labour Relations Act 66 of 1995, as amended and undertakes to inform the said by no later than 21 September 2018 and furnish proof to the employer thereof by 21 September. If the employee fail to do so, the employer shall have the right to inform the said forums of this agreement.*
- (e) *This agreement is in full and final settlement of all claims which the employee has against the employer and any official or employee of the employer, whether such claims arise in common law, contract or statute, including arising out of his employment with the employer.*

The parties have entered into this agreement freely and voluntarily and with the benefit of independent legal advice.”

5.3.17 Pursuant to this Settlement Agreement and upon hearing the Complainant being interviewed on Talk Radio 702 on 20 September 2018 about his resignation from the IPID, my investigation team contacted the Complainant in order to get clarity around his resignation and the terms of this Settlement Agreement. The Complainant disputed and further rejected out of hand any notion that he has withdrawn this matter relating to the irregular appointment of Ms Botha and complaint relating to unethical conduct by Mr McBride made to the Minister of Police.

5.3.18 Based on the subsequent dispute as made by the Complainant both to my office and on radio and bearing in mind the interest of the community in the administration of public affairs as well as the serious reservations I had about the withdrawal of a complaints of maladministration and impropriety over which I have a statutory mandate³⁹ to investigate and report on, I made a resolve to continue with this investigation, despite the existence of the above Settlement Agreement.

Application of the relevant legal prescripts

5.3.19 Section 23(1) of the Constitution stipulates that:

“Everyone has the right to fair labour practices”

5.3.20 Section 186 of the Labour Relations Act No 66 of 1995 provides as follows:

³⁹ Section 6(4)(a)(i) of the Public Protector Act.

“(2) Unfair labour practice means any unfair act or omission that arises between an employer and an employee involving:

(a)...

(b) ...

(c) ...

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.”

5.3.21 In the matter between the Minister of ***Home Affairs v The Public Protector***⁴⁰ my mandate to investigate labour issues was challenged by the Department of *Home Affairs (DHA)* and the DHA argued that the complaint in question at the time related to unfair labour practice, and as such the complainant had to seek his remedy in the Labour Relations Act 66 of 1995 and that the Labour Court has exclusive jurisdiction in labour matters and thereby sought to oust Public Protector’s jurisdiction over labour matters, disputes or complaints.

5.3.22 The Court after hearing the matter held that there is no merit in this argument and subsequently bellowed, inter alia, that:

“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 jurisdiction⁴¹”.

⁴⁰ (308/2017) [2018] ZASCA 15 (15 March 2018)

⁴¹ (308/2017) [2018] ZASCA 15 (15 March 2018) at paragraph 44-46.

5.3.23 Since the investigation of this matter automatically invades on an unfair labour practice, I now deliberately opt to cite the above instructive case to accentuate my jurisdiction to probe or enquire into labour related issues. Section 182 of the Constitution makes it clear that I have the mandate to investigate *any* conduct in state affairs. The only express exclusion is the investigative jurisdiction in relation to decisions of courts. For the rest, my jurisdiction is extremely wide and my mandate is clear: I must seek out and effect the rectification of maladministration, through directing appropriate remedial steps so as to ensure good governance.

5.3.24 In terms of section 1 of the PDA **"Protected Disclosure"** means:

"A Disclosure made to:

- (a) a legal adviser in accordance with section 5;*
- (b) an employer in accordance with section 6;*
- (c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;*
- (d) a person or body in accordance with section 8; or*
- (e) any other person or body in accordance with section 9, but does not include a disclosure-*
 - (i) in respect of which the employee concerned commits an offence by making that disclosure; or*
 - (ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5."*

5.3.25 **"Occupational Detriment"** as defined in section 1 of PDA in relation to the working environment of an employee, means:

- “(a) being subjected to any disciplinary action;*
- (b) being dismissed, suspended, demoted, harassed or intimidated;*
- (c) being transferred against his or her will;*
- (d) being refused transfer or promotion;*
- (e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;*
- (f) being refused a reference, or being provided with an adverse reference, from his or her employer;*
- (g) being denied appointment to any employment, profession or office;*
- (h) being threatened with any of the actions referred to paragraphs (a) to (g) above; or*
- (i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.”*

5.3.26 The PDA provides for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful and irregular conduct of their employers or other employees in the employ of their employers and to provide for protection of employees who make a disclosure which is protected in terms of this Act.

5.3.27 For the Complainant’s conduct to be dealt with and be considered worthy of the protection afforded to employees under the PDA, it must comply with the definition of a protected disclosure under the PDA.

5.3.28 In ***Grieve v Denel* [2003] 4 BLLR366 (LC) / *Grieve v Denel* (2003) 24 ILJ 551 (LC)**, the Labour Court was called upon to pronounce on the provisions of the PDA in the case of *Grieve v Denel* [2003] 4 BLLR366 (LC). In this case the employee, who was employed as a Safety and Security Manager at a division of Denel was suspended with a view towards conducting a disciplinary hearing against him. This

was after he had forwarded a report of alleged misconduct by a senior director in his division. The employee had been a spokesperson for a group within the division which had compiled information relating to improper management and misconduct by their general manager. This information had then been handed to the employee's immediate superior who forwarded it to the board of directors. The idea behind the information gathering had been to try and have the general manager removed from his position. Disciplinary proceedings were then instituted against the employee.

5.3.29 Before his disciplinary hearing, the employee made an urgent application to the Court to stop the employer from subjecting him to the disciplinary action. The employee brought the case on the grounds that he was entitled to protection in terms of the PDA.

5.3.30 The Court considered the PDA, analysing the provisions relating to protected disclosures as well as occupational detriment. The Court concluded that the disciplinary hearing was disciplinary action as contemplated by the Act and therefore constituted an occupational detriment. It accordingly stopped the employer from instituting disciplinary proceedings.

5.3.31 There can be no gainsaying fact that the Complainant made a protected disclosure to Minister Cele, and subsequently, the Complainant was subjected to a disciplinary action by the IPID for charges related to his act of whistleblowing. He further approached my office and sought my intervention under PDA. It is submitted therefore that the Complainant's case is essentially analogous with *Grieve v Denel* case. It is also my observation that there was a causal link between the protected disclosure/complaint and the occupational detriment or the disciplinary hearing that the Complainant was subsequently subjected to by IPID.

5.3.32 Looking closely at the timing/date of the institution of the charges⁴² and the composite nature of these charges, there is a reasonable apprehension to establish a causal connection between the charges and the occupational detriment which is prohibited in terms of the PDA. The Complainant made his protected disclosure to Minister Cele as per a letter dated 28 April 2018 and in May 2018 he was suspended and subsequently charged. The actual protected disclosure made by the Complainant to Minister Cele can be briefly summarised as follows:

“PURPOSE

The unethical conduct of IPID’s Executive Director, Mr Robert McBride which has the consequence of bringing the Directorate into disrepute.

BACKGROUND

It was in 2016, shortly after the Executive Director, Mr Robert McBride returned suspension and established a Task Team at National Office to which the Complainant was also deployed to. The Task Team was to investigate corruption allegations levelled against former Acting National Commissioner of the SAPS, Lt General K Phahlane, which was internally referred to as PHAHLANE TASK TEAM.

The Task Team was reporting directly to Mr McBride as well as Mr M Sesoko, Mr Innocent Khuba. The scope work of the Phahlane Task Team became wider and covered all other high profile matters.

⁴² As contained in a letter of suspension dated 25 May 2018 addressed to Complainant by the IPID.

There is a number of on-going unethical conduct committed by Phahlane Task Team which amongst others included the following:

- (i) Allowing a private person namely, Mr Paul O'Sullivan to spearhead IPID investigations together with his assistant Ms Sarah Jane Trent as well as representative from Afriforum. For example, Mr McBride gave instructions that all official information MUST be given to Mr Paul O' Sullivan. IPID would apply for cellphone and banking records of Lt General Phahlane and it would be given to Mr Paul O'Sullivan for analysis. Mr Paul O'Sullivan would be allowed to access and use IPID letter head and further draft statements for witnesses.*
- (ii) Conducting investigations through the media in order to deliberately tarnish the images of specific individuals. For example, it was a known fact that Mr McBride also wanted to become the National Commissioner and he was telling some members of the task team that he was being considered for that position. There was a meeting that took place at Mr Paul O'Sullivan's house, the former house of the well-known Radovan Krejcir whereby Mr Paul O'Sullivan was chairing this meeting. Amongst other people who were present were Mr McBride, Mr Mandlakayise Mahlangu of IPID, Mr Cedrick Nkabinde (Complainant) Sarah Jane Trent (Paul's assistant), a white lady called Candice (Crime Intelligence), Mr Shadrack Sibiya (Former Head of Gauteng Hawks), two white males (representatives from Afriforum and Democratic Alliance/DA), a white lady (journalist) and one black male who was busy preparing fire for the braai.*

The main purpose of the said meeting was to plot how to bring down Lt General Phahlane to ensure that he was not confirmed as National

Commissioner. Afriforum representative guaranteed that the funds were available to carry out this mission and Mr Paul O'Sullivan was responsible for spying on Lt General Phahlane and to find anything that can be used to bring him down. The meeting further sought to plot how to usurp power of the entire Security Cluster such as National Prosecuting Authority (NPA), Crime Intelligence, South African Security Agency (SSA), and Directorate of Priority Crime Investigation (DPCI). Specific individuals were identified from these departments and Mr McBride gave assurance that IPID will go after them and Paul O' Sullivan will spy on all of them. It was emphasised that this was a secret meeting and if anyone asked about it, it should be referred to as book launch.

IPID subsequently hired a so called data analyst, Ms Botha who was working very closely with Mr Paul O'Sullivan and Sarah Jane Trent and they would exchange official information and compare their analysis together.

At one stage a search warrant was going to be executed at Lt General Phahlane's house and pre-planning between IPID and media was done before execution of same search warrant. The plan was to keep the media posted. The media was communicating directly with other members of the task team and for official comments they would quote the IPID spokesperson. On arrival at Lt General Phahlane's house, the media was already there as pre-planned. This would happen under the direction of Mr McBride, Mr Sesoko and Mr Khuba who was the project manager.

- (iii) *Allowing the obtaining of evidence unlawfully.*

- (iv) *Abuse of authority by targeting specific individuals without any valid complaint for ulterior motives. For example, the National Commissioner was appointed and Mr McBride was not happy about the appointment of General Khehla Sitole. He made it clear that General Sitole must be pushed out and be targeted. The strategy was to spy on General Sitole in order to damage his image. Mr McBride came up with an information that General Sitole and other Generals were part of the meeting which took place shortly before the African National Congress (ANC) National Conference in one of the hotels whereby Crime Intelligence money was going to be used to buy votes at the ANC National Conference.*
- (v) *Unlawfully giving instructions not to investigate a specific case for personal gain. For example, Mr McBride gave instruction that the investigation against Major General Dladla (Former Head of Presidential Protection Services) must be stopped. Several meetings were held between Mr McBride and Dladla whereby Dladla was given the assurance that the investigation against him would be stopped and in return Dladla would speak to the former President to appoint Mr McBride as the National Commissioner.*
- (vi) *Misrepresentation and abuse of authority to have members of the DPCI seconded full time in the IPID task team for ulterior motives.*
- (vii) *Unlawful monitoring and Interception of cellular communications and unlawful transmission of same”.*

5.3.33 Section 3 of PDA provides that:

"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."

5.3.34 It follows therefore that the IPID's conduct in the circumstances infringed on section 3 of the PDA as cited above. However, the Complainant signed a Settlement Agreement with the IPID as a remedy to the provisions of section 3 of PDA which was in full and final settlement of all the claims arising therefrom. The Complainant was legally represented during the signing of this Settlement Agreement and as such I am not inclined to enquire into its validity.

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

5.3.35 A response to this issue was received by my office as per letter dated 14 June 2019 from the IPID's Provincial Head in KwaZulu Natal, Ms P Maharaj, who was also served with the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act. She indicated, amongst others, the following in her response:

"On Friday 25 May 2018, I received a telephonic call from National Head Investigations; Mr M Sesoko instructing me to serve suspension papers on the above named which he also said must be signed by me. All such documents were prepared by National IPID office and emailed to me and my Deputy Provincial Head. I then enquired why I should sign it as Mr Nkabinde did not report under my command and was performing duties at National IPID offices under the command of Mr Sesoko. He informed me that Mr C Nkabinde was transferred back to my office and therefore, I should sign it in my capacity as Provincial Head as that is the post designation of the office I hold."

5.3.36 In support of her response, Ms Maharaj furnished my office with the actual copies of a Suspension Letter and the Charge Sheet for the Complainant. Ms Maharaj further provided my office with a copy of another email which was received by her from Mr Sesoko on 30 May 2018 at 02:17 pm, with the subject matter titled "*Letter Nkabinde*", in which Mr Sesoko said:

"Please find the attached letter to the attorney, please sign and send the email to the attorney. Please also make sure that both Nkabinde and the attorney are properly served today without fail and it is acknowledged".

5.3.37 Upon scrutinising the copies of the emails from Mr Sesoko, Letter of Intention to Suspend, Suspension Letter itself and Charge Sheet for the Complainant, I observed that all documents were prepared on the letter head of IPID Head Office namely, *City Forum Building, 114 Madiba Street Pretoria*. I also observed an incontrovertible and clear email communication trail in which the same documents were sent by Mr Sesoko to Ms Maharaj at KZN IPID Provincial Office.

5.3.38 In light of the above extrapolated evidence, I am therefore inclined to accept the version of Ms Maharaj as being more probable in the circumstances. Ms Maharaj indicated in her response to my office that she was merely instructed by Mr Sesoko to sign the Complainant's disciplinary documents and had no knowledge of what the Complainant was being charged for since he was performing duties at the IPID's Head office during the commission of the alleged misconduct.

5.3.39 In response to this issue, the IPID's officials as per their response from Adams and Adams Attorneys dated 12 June 2019, in the main, disputed that the Complainant's complaint to Minister Cele was not a protected disclosure since it was not made in

good faith⁴³. They strongly argued that the Complainant and other members of IPID, in particular Mr Mandla Mahlangu, had been promised a promotion in the SAPS Crime Intelligence if they agreed to give false statement implicating Mr McBride and other senior IPID managers involved in the investigation of General Phahlane. In support of this assertion, the IPID's officials furnished my office with a number of annexures including affidavits made under oath by members of IPID NSIT Task Team.

5.3.40 Upon analysing those affidavits, ⁴⁴ I could not find any concrete evidence which directly proves that the Complainant had been promised or offered a promotion or post in the SAPS as alleged. In fact, it is only Mr Mandla Mahlangu who made a *hear-say statement and a bald assertion* which is not supported by empirical evidence, claiming that the Complainant informed him that he was approached by SAPS to implicate IPID senior officials in exchange for promotion in the SAPS.

5.3.41 My investigation team interviewed the Complainant over the phone on 5 July 2019 about the above allegations. The Complainant rejected allegations that he was ever approached by SAPS as alleged and contended that the IPID started targeting him as early as when he lodged the internal grievance of irregular appointment of Ms Botha which later went to the Presidency. He submitted that if he had committed any crime or leaked confidential information relating to the IPID's official investigation, he should at least have been criminally charged by now, something which has never happened up to this day.

5.3.42 I have further analysed a *'transcribed recording'*⁴⁵ purported to be an interview between Mr Mandla Mahlangu and Brigadier Tlou Kgomo of SAPS Crime

⁴³ Protected Disclosure is a legally defined concept under PDA while 'Good Faith' is a fact-based concept/inquiry that is not defined under PDA.

⁴⁴ Affidavits supplied by IPID officials as part of their response to my notice.

⁴⁵ Annexure in support of Mandla Mahlangu's affidavit which was submitted to my office by IPID.

Intelligence. Besides the whole of this recording being incoherent and inaudible, and marked as such by the transcriber, nowhere in this conversation is the Complainant offered a position in the SAPS by Brigadier Tlou Kgomo. After all, the conversation in this transcribed record is between Mr Mahlangu and Brigadier Tlou Kgomo and does not disclose at any stage proof of the Complainant being offered a position in the SAPS.

5.3.43 Furthermore, the allegations made by the Complainant which were investigated by my office and by Advocate Moloko the Presidency have been found to be substantially true or substantiated as shown in evidence. As explained, I could not find any bad faith or incontrovertible evidence which seem to point out that the Complainant's disclosure was false or simply made for the purposes of personal gain, or reward. An affidavit by Mr Mandla Mahlangu as said, was based on speculative hearsay and not on anything tangible/concrete. As matter of fact, Complainant is still at home and remains unemployed, with no offer of promotion or senior post from SAPS as alleged.

5.3.44 It is worth noting that investigations conducted by my office are evidence-based. In the absence of any tangible evidence seeking to prove that the Complainant was indeed offered a promotion in the SAPS or driven by malice or bad faith, I am inclined to reject such allegations as being unsubstantiated and implausible in the circumstances.

Conclusion

5.3.45 Based on the strength of the evidence discussed above, I am persuaded to conclude that the IPID violated the PDA in the circumstances by subjecting the Complainant to a disciplinary hearing and proffering charges against him that are casually related to his making of a protected disclosure as defined above.

5.3.46 At a *prima facie* level I can also conclude that the evidence at my disposal has established a causal link between the charges which have been brought against the Complainant and the fact that he made disclosures. However, the Complainant resigned following a Settlement Agreement which he signed with and IPID.

5.4 Regarding whether the Complainant, IPID or any other person suffered prejudice as a result of the alleged improper appointment of Ms TH Botha in the circumstances:

Common cause issues

- 5.4.1 On 21 April 2017, the IPID advertised on the website of the Department of Public Service and Administration (by enlisting the services of Basadzi Personnel and Media) a post of Deputy Director with **REF NO.Q9/2017/25** at a costs of **R34 900.83** which post was never filled, officially withdrawn or cancelled. Clearly such conduct amounted to fruitless and wasteful expenditure as defined above and by corollary to contravention sections 38 and 45 of the PFMA.
- 5.4.2 On 28 April 2017, the IPID advertised on a website of the Department of Public Service and Administration (by enlisting the services of Basadzi Personnel and Media) another post of a Deputy Director: NSIT with **REF NO.QA/2017/29** at a costs of **R34 900.83** which post never existed before or subjected to the necessary job evaluation as required by the Public Service Regulation. Clearly such conduct amounted to irregular expenditure as defined above and by corollary to infringement sections 38 and 45 of the PFMA.
- 5.4.3 On 17 May 2017, the IPID made payment to Fidelity of an amount of **R171 000.00** (excluding hotel and travel expenses) for the services of Ms Botha to Fidelity in

respect of the period of 01 January to 31 March 2017, leaving a balance for a period April to 30 June 2017 as per purchase order number OR-024791, without the existence of a contract between the IPID and Fidelity.

5.4.4 A further amount of **R102 123.15** was spent by the IPID on accommodation and travel costs: Tourvest Travel Services (flights) for Ms Botha.⁴⁶

5.4.5 On 20 February 2019, Mr McBride further approved the payment of additional work by Fidelity for an amount of **R342 000.00** which emanated from the variation/extension of the original SLA between IPID and Fidelity Security. This amount was for services that Fidelity continued to render between April 2017 and September 2017.

5.4.6 The overall amount of money paid by IPID to Fidelity for the entire period of the SLA/contract for the services of investigation analyst/Ms Botha, including its variation or extension stands at a total of **R513 000.00**.

5.4.7 On 23 June 2019, the Complainant furnished my office through an email with an invoice dated 20 September 2018 from Lister & Company Incorporated/Attorneys indicating an amount of **R43 701.88** as the total legal costs he incurred while defending himself against the IPID disciplinary charges.

5.4.8 On 19 September 2018, the Complainant resigned from the employ of the IPID as per the Settlement Agreement⁴⁷ concluded between him and the IPID.

Issues in dispute

⁴⁶ As per letter and annexure B submitted by IPID to my office on 28 March 2019.

⁴⁷ Ibid.

5.4.9 According to the Complainant, he is still at home and remains unemployed as a result of being subjected to occupational detriment. The Complainant further argued that the situation has been exacerbated by the fact that since he resigned on 19 September 2018, the IPID never bothered to process or transmit his pension documents to Government Employees Pension Fund (GEPF) and only did so on January 2019.

5.4.10 He argued that as a result of this delay by the IPID, the GEPF only released his pension benefits in February 2019 after he had struggled to send his kids to school, defaulted on his home loan and fell sick due to depression emanating from this case. He further underlined that he is a breadwinner with five kids to support and that this situation/unemployment is affecting his family.

5.4.11 The IPID appointed Ms Botha as Deputy Director of NSIT on 03 August 2017 as per a letter signed off by Mr McBride with a salary notch of **R657 558.00** per annum, for post **REF NO.QA/2017/29** that never existed before or subjected to a job evaluation process as required by regulations governing Public Service. To date, the total costs of the salary paid to Ms Botha by the IPID is an estimated and a cumulative amount to **R1 174 873.56** inclusive of basic salary, employer's contribution to pension, cellphone claims, removal of furniture, subsistence and travel claims, salary adjustments and service bonus.

Application of the relevant legal prescripts

5.4.12 In terms section 1 of the PFMA "**fruitless and wasteful expenditure**" means expenditure which was made in vain and would have been avoided had reasonable care been exercised;

5.4.13 In terms section 1 of the PFMA “**irregular expenditure**” means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

5.4.14 Section 38 of PFMA which regulates the general responsibilities of accounting officers provides as follows—

“

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

(c) must take effective and appropriate steps to—

(i) ...

*(ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and
(g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board.*

(h) must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—

(i) contravenes or fails to comply with a provision of this Act;

(ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution;

or

(iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure.”

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

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

(a) ...

(b) ...

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

5.4.16 All the expenses incurred as a result of advertising a post without first subjecting it to job evaluation as required by the Public Service Regulation, paying the service provider namely, Fidelity, without a valid and binding contract signed by the IPID’s Accounting Officer, advertising a post on the website without filling it; paying accommodation and travel costs of Ms Botha without prior approval of the quotation and contract by the CFO and Accounting Officer, paying a salary to Ms Botha from the date of her irregular appointment all amount to irregular, unauthorised, wasteful and fruitless expenditure as defined above and by corollary to an infringement of sections 38 of PFMA by Mr McBride and 45 of PFMA by other IPID officials as mentioned in evidence. All the above listed processes were done in contravention of applicable legal prescripts as explained in evidence.

5.4.17 The term *“irregular appointment”* is utilised to describe a wrongful action that has taken place during the process of Recruitment and Selection which is in contravention with legislation, regulations and other subordinate prescripts. Simply put, irregular appointments entail transgression of the requirements of applicable legislative and policy frameworks in the appointment process.

5.4.18 The Recruitment and Selection process has a couple of steps that need to be followed which are guided by legislation, regulations and other frameworks. Failure to comply with the recruitment and selection requirements stipulated in these frameworks would result in an irregular appointment. Any expenditure incurred on an irregular appointment would therefore be an irregular expenditure regardless of how suitable, how good the service/job rendered by the person appointed.

5.4.19 A wrong recruit might have a negative impact in the organisation, hence it is crucial for management to apply its mind when appointing. A *“bad hiring decisions could not only negatively affect a company financially, but could also harm employee morale and result to time loss due to grievance, disputes and litigation processes”*⁴⁸.

Conclusion

5.4.20 Based on the evidence above, and on a balance of probability it can be concluded that the Complainant suffered improper prejudice in the circumstances by being subjected to occupational detriment for making a protected disclosure against IPID and lodging a grievance of an irregular appointment of Ms Botha. However, the prejudice related to occupational detriment suffered by the Complainant in this instance was remedied by the Settlement Agreement which clearly states that *“This agreement is in full and final settlement of all claims which the employee has against the employer.”*

5.4.21 Similarly, there is a well-grounded apprehension that the IPID itself suffered improper financial prejudice by incurring irregular, unauthorised and wasteful expenditure, thereby being in violating the Constitution, PFMA, IPID SCM Policy

⁴⁸ Bressler MS 2014 at page 2 *Building the winning organisation through high-impact hiring*.
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and Recruitment Policy due to certain payments made in connection with the irregular appointment of Ms Botha and irregular procurement of Fidelity Security services.

5.4.22 It is also not unfair to conclude that other job applicants who applied for a post of Deputy Director: NSIT and other service providers who could have rendered similar services as Fidelity Security were improperly prejudiced under the circumstances. Most suitable applicants for the post occupied by Ms Botha were unfairly prejudiced after being eliminated during the selection process in favour of Ms Botha who did not meet the minimum requirements for this position.

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

5.4.23 On 27 June 2019, Mr Senna responded to my notice by way of a short and simple email and it read as follows in verbatim:

"Good Morning Mr Dlamini

It was brought to my attention that officials implicated in the report have responded. I would like to put it on record that the response by the officials was in their own individual capacity as implicated officials and not on behalf of the IPID. The position of IPID can only be articulated by the Accounting Officer i.e. myself.

*The response should therefore not to be taken as the official response and position of the IPID but rather of the individuals concerned
Regards"*

5.4.24 The above response is self-explanatory and does not warrant any rejoinder from my office. No response was received from Minister Cele, however, his office was issued with the notice for his noting as the Minister responsible for the portfolio under which the IPID reports.

6. FINDINGS

Having carefully examined the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been complied with, I make the following adverse findings against the IPID:

6.1 **Regarding whether the IPID improperly followed procurement processes when it appointed Fidelity Security Services (Pty) Ltd (Fidelity) to provide the services of an Investigative Analyst for the interpretation of cellular and other data in criminal investigations:**

6.1.1 The allegation that the IPID failed to follow proper procurement processes when it appointed Fidelity Security to provide the services of an Investigative Analyst for the interpretation of cellular phone and other data in criminal investigations is substantiated.

6.1.2 Evidence in my possession has revealed several procedural flaws which amounted, in the main, to a violation and flouting of the IPID SCM Policy committed at various stages of the procurement of Fidelity by the IPID such as:

- (a) The omission or non-involvement of the office of the CFO in the procurement of Fidelity. The CFO's name and place of her signature in the deviation memorandum was scratched or cancelled out by a pen. As a result there was

no confirmation as to whether this expenditure/purchase or procurement was in accordance with the vote of the main financial division within the IPID namely, its Finance Office as required by regulatory legal framework;

- (b) The SLA between Fidelity and the IPID was not signed by Mr McBride as required by the IPID SCM Policy in order for it to be regarded as enforceable. The SLA was only signed by Fidelity;
- (c) The extension/expansion or variation of the SLA between the IPID and Fidelity exceeded a threshold of fifteen (15) percent of the original contract value and it was not considered by BSC, BEC and BAC as required by the IPID SCM Policy; nor was it signed by Mr McBride or at least his nominated delegate;
- (d) The SLA between the IPID and Fidelity was not forwarded to the IPID's SCM by Chief Director Legal Services: Ms Moroasui to be maintained and managed there as required by IPID SCM Policy;
- (e) The Fidelity's consultant, Ms Botha, started working at the IPID on 09 January 2017 thereby gaining access to state official documents/dockets and files while there was no valid or a duly signed contract between the IPID and Fidelity in place;
- (f) The payment to Fidelity of a total amount of **R513 000.00** which was in excess of Procurement Threshold Values, and not considered by BSC, BEC or BAC (excluding travel and accommodation costs) was made by the IPID without the existence of a valid or a duly signed contract in place; and
- (g) The expenditure incurred on travel and accommodation of Ms Botha was not on the approved submission/quotation nor approved separately. This, in essence, understated the actual contract amount which carried hidden costs to the IPID

expenditure. The travel and accommodation costs of Ms Botha should have been included as part of the SLA, but it was not factored in, which was the deliberate attempt not to follow the procurement process by advertising this service.

6.1.3 Such conduct by the IPID officials namely, Ms Moroasui and Mr McBride violated sections 195(1)(a);(b);(d) and (g) and 217(1) of the Constitution, sections 38(1)(c) and (g) and 39 of the PFMA, National Treasury Regulation 8.2, National Treasury Regulation 9, sections 7(1)(b) and 31(1)(a)(i) of IPID Act, Clauses 19(d), 22(a) and 9.2(C) of the IPID SCM Policy when procuring the services of Fidelity.

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

6.2 Regarding whether the IPID improperly appointed Ms TH Botha as a Deputy Director: NSIT without following proper recruitment processes:

6.2.1 The allegation that IPID improperly appointed Ms TH Botha as a Deputy Director: NSIT without following proper recruitment processes is substantiated.

6.2.2 As a result of Chief Director National Head of Investigation: Mr Sesoko's undue influence, interference with the IPID's HR, unlawful persistence or unauthorised deviation which he made in his own handwriting, as well Ms Netsianda's inaction or supine attitude in the face of such gross irregularity as the overall Head of Corporate Services within the IPID, a newly created post namely, **ref number Q9/2017/29** was not subjected to the necessary job evaluation process before it was advertised thereby violating Public Service Regulations 4(a) and (b) and 40(b) and (d) governing the administration of Public Service.

- 6.2.3 Ubiquitous evidence in my possession revealed that the entire selection/recruitment panel, namely Mr Sesoko, Ms Motlhale, Mr Khuba and Mr De Bruin failed to exclude the CV of Ms Botha during the selection process despite the fact that it did not have the necessary information such as her position/job title or rank from her previous employer/ SAPS and experience which would have assisted them in making an informed decision. Submission received by my office from the SAPS stated that Ms Botha had always been employed by SAPS as an Administrative Clerk. Same was admitted by Ms Botha herself during an interview with my investigation team.
- 6.2.4 Based on the above, the members of the selection/recruitment panel violated clause 10.5.7 of the IPID Recruitment Policy, section 11(2)(a) and (b) of the PSA. Similarly, there is no indication that the Head of Corporate Services; Ms Netsianda satisfied herself that due processes have been followed to determine that Ms Botha met all the requirements for the advertised position. This information could have been presented to Mr McBride before this appointment is finalised.
- 6.2.5 IPID referred the Complainant's grievance in relation to this issue to the Office of the Presidency for investigation. Advocate Moloko from the Office of the Presidency undertook this investigation and tabled a report with adverse findings against certain IPID officials that were involved in this recruitment. Mr McBride did not implement the recommendations as made in this report by Advocate Moloko.
- 6.2.6 Accordingly, such a violation by the IPID selection/recruitment panel members amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3 Regarding whether the IPID improperly suspended the Complainant in retaliation against his Protected Disclosure regarding an alleged unethical conduct by Mr McBride and regarding the grievance against alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the Protected Disclosures Act:

- 6.3.1 The allegation that the IPID improperly suspended the Complainant in retaliation against his protected disclosure regarding an alleged unethical conduct by Mr McBride and the grievance against alleged irregular appointment of Ms Botha, thereby amounting to an occupational detriment as envisaged in the PDA is substantiated.
- 6.3.2 The Complainant was subjected to a disciplinary hearing/occupational detriment by the IPID and charged for reasons that were patently or causally related to his making of a protected disclosure as defined, thereby improperly prejudicing him as he had to later resign by concluding a Settlement Agreement with the IPID.
- 6.3.3 *Prima facie*, I am satisfied that the evidence at my disposal established a link between the charges which have been brought against the Complainant and the fact that he made a protected disclosure.
- 6.3.4 By subjecting the Complainant to apparently unsubstantiated charges or occupational detriment following the fact that he had blown the whistle on improper administrative activities taking place within the IPID, Mr Sesoko, violated section 3 of the PDA, section 186(2)(d) of LRA and 23(1) of the Constitution when he instructed Ms Maharaj: the Provincial Head of the IPID in KwaZulu Natal, who was not even the line manager of the Complainant at the time of alleged misconduct, to suspend and charge him.

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

6.4 Regarding whether the Complainant, IPID or any other person suffered prejudice as a result of the alleged improper appointment of Ms TH Botha in the circumstances:

6.4.1 The allegation regarding whether the Complainant, IPID or any other person suffered prejudice in the circumstances is substantiated.

6.4.2 The Complainant suffered prejudice in a form of occupational detriment, however such was immediately addressed by the Settlement Agreement which he subsequently signed with the IPID in the presence of his legal representative.

6.4.3 The IPID also suffered financial prejudice or loss by advertising a post of Deputy Director with REF NO.Q9/2017/25 at a costs of **R34 900.83** which was never filled, officially withdrawn or cancelled. This conduct amounted to fruitless and wasteful expenditure as well as violation of sections 38 of the PFMA by Mr McBride as accounting officer and section 45 of PFMA by Ms Netsianda as the Head of Corporate Services within the IPID under whose watch this financial irregularity happened.

6.4.4 The IPID advertised another post of Deputy Director: NSIT with REF NO.QA/2017/29, at a costs of **R34 900.83** without it being subjected to the necessary job evaluation as required by Public Service Regulation.

6.4.5 This post was newly created position as shown in evidence. Failure to subject this post to the necessary job evaluation process was apparently attributable Mr

Sesoko's undue influence, unlawful persistence or unauthorised deviation in his own handwriting, as well as Ms Netsianda's inaction or supine attitude as the overall head of Corporate Services at the IPID. Such advertisement amounted to irregular and unauthorised expenditure as defined and thereby in violation of section 45 of the PFMA by Mr Sesoko and Ms Netsianda respectively.

6.4.6 The expenditure of **R102 123.15** was incurred the travel and accommodation for Ms Botha, however it was not in the approved submission/memorandum nor approved separately. This, in essence, understated the actual contract amount of **R171 000.00** which was paid by the IPID to Fidelity for the services of Ms Botha. The travel and accommodation costs of Ms Botha should have been included as part of the SLA. Clearly, such conduct amounted to unauthorised and irregular expenditure as defined and prohibited in sections 38 and 45 of PFMA.

6.4.7 The IPID appointed Ms Botha as Deputy Director: NSIT on 03 August 2017 on a salary notch of **R657 558.00** per annum for a post REF NO.QA/2017/29 that never existed before or subjected to job evaluation as required by regulations governing Public Service. Since the date of her appointment, Ms Botha has received a salary from the IPID in excess of **R1 174 873.56**. Continuous payment of such salary to Ms Botha amounts to a cumulative and progressive irregular expenditure as well as violation of section 38 of the PFMA by Mr McBride and section 45 of the PFMA by Mr Sesoko and Ms Netsianda.

7. REMEDIAL ACTION

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

The (Acting) Executive Director of the IPID must take appropriate steps to ensure that:

- 7.1.1 Within thirty (30) working days from the date of this report takes disciplinary steps against all IPID officials who were responsible for violation of the Constitution, IPID Act, PDA Act, IPID Recruitment and Selection Policy, IPID SCM Policy, PSA Regulations which resulted in the irregular appointment of Ms Botha, irregular procurement of Fidelity's services, irregular, fruitless and wasteful expenditure and improper prejudice to the Complainant;
- 7.1.2 Investigate and recover any irregular, unauthorised, fruitless and wasteful expenditure incurred by the IPID, from any person who is liable in law, in accordance with the process prescribed by the National Treasury;
- 7.1.3 Within sixty (60) working days of the issue of this report; all IPID's officials who are involved in the SCM process, including all the senior management, attend a workshop on the Recruitment and Selection procedures and processes.
- 7.1.4 Within sixty (60) working days from the date of this report, present this report and the investigation report compiled by Advocate Moloko to the Minister of Police for a decision to address the irregular appointment of Ms Botha and other findings contained in the Presidency report.
- 7.1.5 Within sixty (60) working days from the date of this report, disclose the unauthorised, irregular as well as fruitless and wasteful expenditure to the National Treasury.
- 7.1.6 Directs the CFO to amend the closing balance of the current financial statements to include the unauthorised, irregular as well as fruitless and wasteful expenditure in the 2019/2020 financial statements.

- 7.1.7 Within sixty (60) working days from the date of this report, he initiates a judicial review process as prescribed in terms of sections 6 and 7 of the PAJA to set aside the appointment of Ms Botha on the basis that she was irregularly appointed on the newly created post that neither existed before within the IPID structure nor subjected to a job evaluation process as required in terms of PSA Regulations;
- 7.1.8 Within sixty (60) working days from the date of this report, the IPID develops a policy relating to the proper handling of protected disclosures/whistle-blowing lodged by its internal staff members. The policy should, amongst other things, address the manner in which such disclosures should be processed without victimising, disclosing the identity of the whistle-blower or subject him/her to occupational detriment.

8. MONITORING

- 8.1 The IPID's Executive Director must submit an Implementation Plan to my office within thirty (30) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

- 8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and other; Democratic Alliance v Speaker of the national Assembly and others*** [2016] ZACC 11; 2016 (3) SA 580 (CC), and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Head of the Department of IPID, unless an *Interim Interdict* or *Court Order* directing otherwise is obtained.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 16/09/2019

