

**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**

***“Allegations of maladministration in the matter between Mr TR Nkosi and the
Mpumalanga Provincial Legislature”***

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR
APPOINTMENT OF THE SENIOR MANAGER: COMMUNICATIONS BY THE
MPUMALANGA PROVINCIAL LEGISLATURE**

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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, and published in terms section 8(1) of the Public Protector Act, 1994(the Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration and the irregular appointment of Ms ZS Memela (Ms Memela) to a position of Senior Manager: Communications by the Mpumalanga Provincial Legislature (the Legislature).
- (iii) The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- (iv) On 19 December 2016, I received a complaint from Mr T.R. Nkosi (the Complainant) who was a former employee of the Legislature and a candidate for the position of Senior Manager: Communications, with a request that I should intervene and investigate what he perceived as maladministration relating to the irregular appointment of Ms Memela to the position of Senior Manager: Communications by the Legislature.
- (v) On analysis of the complaint, the following issues were identified and investigated:
 - (a) Whether the Mpumalanga Provincial Legislature improperly appointed Ms ZS Memela to the position of Senior Manager: Communications; and
 - (b) Whether the Complainant and other candidates were prejudiced by the conduct of the Mpumalanga Provincial Legislature for loss of an employment opportunity under the circumstances.

- (vi) The investigation process included an exchange of correspondence as well as meetings and interviews conducted with relevant officials of the Mpumalanga Provincial Legislature, as well as an analysis of relevant documents and the application of all relevant laws, policies and related prescripts.
- (vii) Key laws and policies taken into account to determine if there had been maladministration and/or improper conduct by the Mpumalanga Provincial Legislature were principally those imposing administrative standards and procedures that should have been complied with when the Mpumalanga Provincial Legislature appointed Ms ZC Memela to the position of Senior Manager: Communications.
- (viii) Having regard to the evidence, the regulatory framework determining the standard the Mpumalanga Provincial Legislature should have complied with and the impact on the Complainant, I therefore make the following findings:
 - (a) **Regarding whether the Mpumalanga Provincial Legislature irregularly appointed Ms ZS Memela to the position of Senior Manager: Communications**
 - (aa) The allegation that the Mpumalanga Provincial Legislature irregularly appointed Ms ZS Memela to the position of Senior Manager: Communications in 2011, is substantiated.
 - (bb) The conduct of the Legislature in appointing Ms Z.C. Memela, who only obtained the third position during the interviews, is improper. The argument forwarded by the Legislature that the decision to appoint her was taken on gender imbalance principles, cannot be accepted, as the Legislature should then have appointed Ms Julies, another female candidate, who performed better than Ms Memela in the interview.
 - (cc) Therefore, the conduct of the Legislature was neither transparent, fair nor without bias and thus in violation of section 195(1) of the Constitution and

section 20 of the Mpumalanga Provincial Legislature Service and Administration Act.

- (dd) The argument around the introduction of the principle of geographical representation was also unfairly applied, as it did not comply with the affirmative action considerations mentioned in paragraph 7.1 of the Recruitment policy. Paragraph 4 of the Recruitment policy of the Legislature states that fairness is a guiding principle in the implementation of the policy. The appointment of Ms ZS Memela being the third highest candidate was not done on the principle of equality and fairness. Therefore, the conduct of the Legislature is in contravention of paragraphs 4 and 7 of the policy.
- (b) Regarding whether the Complainant and other candidates were prejudiced by the conduct of the Mpumalanga Provincial Legislature under the circumstances.**
 - (aa) The allegation that the conduct of the Legislature prejudiced the Complainant and other candidates for loss of an employment opportunity, is substantiated.
 - (bb) The Mpumalanga Provincial Legislature contravened section 7 of its Recruitment policy by appointing Ms ZC Memela to the position of Senior Manager: Communications, citing reasons of addressing gender imbalances and geographical representation. However, from the results of the interview panel it appears that another female candidate, Ms Julies, would then have been a more suitable candidate for appointment.
 - (cc) The conduct of the Legislature in irregularly appointing Ms Memela resulted in not only the Complainant suffering prejudice for loss of an employment opportunity to work for the Legislature as Senior Manager: Communications, but Ms Julies as well.

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

(a) The Secretary of the Mpumalanga Legislature, Mr L Mwali, must:

- (aa) Within sixty (60) working days from the date of the issuing of this report, review and amend the Recruitment And Selection Policy of the Provincial Legislature and in particular paragraph 7 thereof. Any uncertainties and adverbs such as “etc.” as captured in paragraph 7.1.1 should be removed from the policy as they leave room for manipulation and abuse in the process of recruitment and selection.
- (bb) Within thirty (30) working days from the date of the approval of the reviewed Recruitment and Selection Policy of the Provincial Legislature, provide training on recruitment and selection processes as contained in the said policy. Ensure that any principle that is to be recognized during the recruitment and selection processes are documented in a form of circulars or included in the policy for future reference.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IRREGULAR APPOINTMENT OF THE SENIOR MANAGER: COMMUNICATIONS BY THE MPUMALANGA PROVINCIAL LEGISLATURE

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, 1994 (the 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 my investigation:
 - 1.2.1. The Speaker of Mpumalanga Provincial Legislature, Ms B. Shiba;
 - 1.2.2. The Secretary of Legislature, Mr L. Mwali;
 - 1.2.3. The former Speaker of Mpumalanga Provincial, Ms V.S. Siwela; and
 - 1.2.4. The former Speaker of Mpumalanga Provincial, Mr W Lubisi.
- 1.3. A copy of the report is also provided to Mr T.R. Nkosi, the Complainant to inform him about the outcome of my investigation.
- 1.4. The report relates to an investigation into allegations of irregular appointment of a Senior Manager: Communications by the Mpumalanga Provincial Legislature (the Legislature).

2. THE COMPLAINT

- 2.1. On 19 December 2016, I received a complaint from Mr Tom Nkosi (the Complainant) who was a former employee of the Legislature and a candidate for

the position of Senior Manager: Communications, with a request that I must intervene and investigate what he perceived as maladministration relating to an irregular appointment of Ms ZS Memela (Ms Memela) to the position of Senior Manager: Communications by the Legislature. He alleged that:

- 2.1.1. He participated in an interview for the post of Senior Manager: Communications in October 2011 at the Legislature;
- 2.1.2. The members of the interview panel were:
 - (a) Ms Nono Thulo;
 - (b) Mr Linda Tshabalala (Chairperson);
 - (c) Mr Solly Dlamini; and
 - (d) Mr Arendse (Secretariat).
- 2.1.3. Days after the interviews, he met some of the interview panel members who congratulated him on his new appointment, unaware that he had not been appointed;
- 2.1.4. He pursued the matter with Mr Tshabalala, who was the Chairperson of the interviewing panel, who informed him that the then Speaker of the Legislature, Mr William Lubisi, had been summoned to the ANC Provincial Office by the former Premier, Mr David Mabuza, to reverse the decision of the interview panel;
- 2.1.5. He tried unsuccessfully to get hold of Mr Lubisi;
- 2.1.6. He reported the matter to the Public Service Commission (PSC) and his case was used to “blackmail” the Legislature to renew the contract of the PSC Provincial Commissioner; and
- 2.1.7. He also reported the matter to the anti-corruption line, but it was investigated by the Office of the Premier and nothing came of it.

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) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

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

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

presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that **she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence** (Para 71(a));

3.5.8. She **has the power to determine the appropriate remedy and prescribe the manner of its implementation** (Para 71(d))

3.5.9. “Appropriate” means nothing less than effective, suitable, proper or **fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption**, in a particular case (Para 71(e));

3.6. The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, *“When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*

3.7. Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101);

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

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

- 3.9. Mpumalanga Provincial Legislature (the Legislature) is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.
- 3.10. The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties..

4. THE INVESTIGATION

4.1. Methodology

- 4.1.1. The investigation of the complaint was conducted in terms of section 182(1)(a) of the Constitution which gives me the power 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; to report on that conduct; and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.
- 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 investigate and report my findings regarding any complaint lodged.
- 4.1.3. The investigation entailed interviews, meetings and correspondence with the Complainant and relevant officials of the Mpumalanga Legislature as well as exchange of and the analysis of relevant documentation, conducted research, and consideration and application of relevant laws, policies, regulatory framework and jurisprudence. This was done with a view to making a determination of

maladministration, prejudice and improper prejudice and impropriety in terms of powers conferred on me by the Constitution and the Public Protector Act.

4.1.4. My investigation team also interviewed the former Secretary of Legislature, Mr L.B. Tshabalala; the former Executive Manager: Corporate Services, Ms D.N. Thulo and the Chief Director: Corporate Services in the Office of the Premier, Mr J.S. Dlamini on 31 August 2018. The former Speaker, Mr Lubisi, was interviewed on 10 June 2019.

4.1.5. During the investigation process, I served two notices in terms of section 7(9) of the Public Protector Act (section 7(9) notices) on the Secretary of the Legislature and the former Speaker of the Legislature on 1 July 2019 to afford them an opportunity to respond to my intended findings. The responses from both the Secretary and the Speaker of the Legislature were received through letters dated 19 July 2019, respectively and their submissions contained therein were factored into this report.

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:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?
- (d) In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the 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. In this particular case, the factual enquiry principally focused on whether or not the Mpumalanga Provincial Legislature irregularly appointed Ms Z.C. Memela to the position of Senior Manager: Communications.

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department to prevent maladministration.

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

4.2.5. Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

4.3. On analysis of the complaint, the following issues were considered and investigated:

4.3.1. Whether the Mpumalanga Provincial Legislature irregularly appointed Ms ZS Memela to the position of Senior Manager: Communications; and

- 4.3.2. Whether the Complainant and other candidates were prejudiced by the conduct of the Mpumalanga Provincial Legislature for loss of an employment opportunity under the circumstances.

4.4. The Key Sources of information

4.4.1. Documents

- 4.4.1.1. A copy of a job advertisement dated 10 July 2011;
- 4.4.1.2. A copy of the minutes of the meeting held on the 17th of October 2011;
- 4.4.1.3. A copy of a media statement dated 08 December 2011;
- 4.4.1.4. A copy of an appointment letter to Ms Z.C Memela dated 23 November 2011;
- 4.4.1.5. A copy of the employer's details from Department of Labour dated 14 January 2013;
- 4.4.1.6. A copy of the memorandum from Mr A.J Arendse to Mr J.B Silinda dated 04 May 2015;
- 4.4.1.7. A copy of a request for access to record of public body dated 09 December 2016;
- 4.4.1.8. A copy of a newspaper article dated 25 October 2016;
- 4.4.1.9. A copy of a notice of Internal Appeal dated 13 March 2017;
- 4.4.1.10. A copy of a Recruitment and Selection Policy dated 20 October 2008;
- 4.4.1.11. A copy of the Mpumalanga Provincial Legislature Service and Administration Act, 2006;
- 4.4.1.12. A copy of the Financial Management of Parliament and Provincial Legislature Act, 2009.

4.4.2. Correspondence sent and received

- 4.4.2.1. A copy of a letter to Ms Ngwenya P from my office dated 25 April 2017;
- 4.4.2.2. A copy of a letter to Ms Ngwenya P from my office dated 04 May 2017;
- 4.4.2.3. A copy of a letter to my office from Mr T Mdakane dated 22 June 2017;
- 4.4.2.4. A copy of an email sent by Tom Nkosi to my office dated 18 July 2017;

- 4.4.2.5. A copy of a letter to my office from Mr Tom Nkosi dated 18 October 2017;
- 4.4.2.6. A copy of a letter from my office to Ms BT Shongwe dated 03 April 2018;
- 4.4.2.7. A copy of a letter to my office from Mr LJ Mwale dated 26 April 2018;
- 4.4.2.8. A copy of the memorandum from Hon. VS Siwela to my office dated 29 May 2018;
- 4.4.2.9. A copy of a letter from my office to Mrs VS Siwela dated 01 August 2018;
- 4.4.2.10. A copy of a letter emailed to Ms Nono Thulo from my office dated 07 August 2018;
- 4.4.2.11. A copy of a letter from my office to Mr Solly Dlamini dated 07 August 2018;
- 4.4.2.12. A copy of a letter from my office to Mr Linda Tshabalala dated 07 August 2018;
- 4.4.2.13. A copy of a letter from Mrs VS Siwela to my office dated 28 August 2018;
- 4.4.2.14. A copy of email from my office to Mr Tom Nkosi dated 15 February 2019;
- 4.4.2.15. A copy of a letter from my office to Mr TR Nkosi dated 27 February 2019;
- 4.4.2.16. A copy of a Section 7(9)(a) sent to Mr William Lubisi dated 02 July 2019;
- 4.4.2.17. A copy of a Section 7(9)(a) sent to Mr Linda Mwali dated 02 July 2019;
- 4.4.2.18. A copy of a letter to my office from Mr William Lubisi dated 19 July 2019;
- 4.4.2.19. A copy of a letter to my office from Mr Thomas Nkosi dated 03 June 2019;
- 4.4.2.20. A copy of a letter to my office from Mr LJ Mwale dated 19 July 2019.

4.4.3. Meetings held

- 4.4.3.1. Meeting held with Mr LB Tshabalala, Ms DN Thulo and MR JS Dlamini on 31 August 2018;
- 4.4.3.2. Meeting held with Mrs VS Siwela dated 20 February 2019; and
- 4.4.3.3. Meeting with Mr W Lubisi on 10 June 2019.

4.4.4. Legislation and other prescripts

- 4.4.4.1. The Constitution of the Republic of South Africa, 1996;
- 4.4.4.2. The Mpumalanga Provincial Legislature Service and Administration Act, 2006;
- 4.4.4.3. Financial Management of Parliament and Provincial Legislatures Act, 2009.

4.4.4.4. Mpumalanga Provincial Legislature Recruitment and Selection Policy dated 20 October 2008.

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

5.1. Regarding whether the Mpumalanga Provincial Legislature irregularly appointed Ms ZS Memela to the position of Senior Manager: Communications.

Common Cause Issues

- 5.1.1. It is common cause that the Legislature advertised a vacancy for the position of Senior Manager: Communications in July 2011.
- 5.1.2. The advertisement listed the qualifications and requirements, *inter alia*, as follows:
- (a) A Bachelor's degree in Communication/Marketing/Public Relations or an equivalent;
 - (b) In-depth understanding of the legislative environment and processes; and
 - (c) 5 years' experience in Media and Communications.
- 5.1.3. The advertisement did not state or mention employment equity preference as an additional requirement.
- 5.1.4. It is not disputed that the Complainant attended an interview for the post of Senior Manager: Communications at the Legislature which was conducted on Monday, 17 October 2011. The interview panel recommended three names of appointable candidates, namely the Complainant, Ms JB Julies and Ms Memela.

The appointment of Ms Memela was approved by Mr Lubisi on 22 November 2011.

Issues in dispute

- 5.1.5. The Complainant argued that the Legislature irregularly appointed a person who was not deserving the position of Senior Manager: Communications instead of him when he had performed well during the interviews to an extent that he was congratulated on his new appointment.
- 5.1.6. It is the Complainant's assertion that he made enquiries with the chairperson of the interview panel and the then Secretary of the Legislature, Mr Tshabalala, who informed him that Mr Lubisi had been summoned to the ANC Provincial Office by former Premier David Mabuza to reverse the decision of the panel to appoint him. The interview panel comprised of Mr Tshabalala, as the Chairperson, Ms Thulo, Messrs Dlamini and Arendse.
- 5.1.7. In response to my letter of enquiry dated 3 April 2018, the Speaker of the Legislature, Ms VS Siwela, stated in a letter dated 29 May 2018, that the prerogative to appoint any potential employee rested with the employer which was within the ambit of the applicable policies of the institution i.e. the Mpumalanga Provincial Legislature Recruitment and Selection Policy. The Legislature's gender balance prior to 2011 was nine (9) males and only one (1) female and in 2012 it was nine (9) males and five (5) females and for the period December 2014 it was ten (10) males and eight (8) females. Therefore, the appointment of Ms Memela was a conscious decision taken to address gender imbalances within Senior Management in the institution.
- 5.1.8. A report on interviews conducted for the post of Senior Manager: Communications held on Monday 17 October 2011 was obtained and perused by my investigation team.

5.1.9. According to the report, six (6) candidates were interviewed for the post and their final scores were recorded as follows:

(a) Mr SS Ngobeni	48%
(b) Ms JB Julies	55%
(c) Ms TP Madubandla	49%
(d) Mr T Nkosi/Complainant	78%
(e) Mr P Mbenyane	49%
(f) Ms ZC Memela	54%

5.1.10. Based on the overall scores and competency assessments conducted, the panel recommended that the Complainant, Ms JB Julies and Ms Memela be considered for appointment to the position of Senior Manager: Communications with effect from 01 December 2011.

5.1.11. Further to the above, the panel recorded in its interview report that the Complainant's overall performance during the interview was 78%. He was self-employed at the time of the interviews in the media industry and with vast experience in the communication environment. The Complainant was previously head of Communications in the Mpumalanga Legislature and was also part of the team that developed communication strategies and procedures in the Legislature after the 1994 elections. He had excellent management experience and proved himself to be a good leader.

5.1.12. According to the competency assessment overview contained in the interview panel's report, the Complainant met the set requirements for the position and was recommended for appointment. Of the ten (10) competencies assessed, three (3) were identified for development while seven (7), were rated as having the required strength and adequacy. The date of the assessment was, however, not provided and no copy of the assessment report was made available.

- 5.1.13. Ms JB Julies's overall performance during the interview was 55% and she had experience in the communication environment at the time and was already a Senior Manager: Communications in the Department of Agriculture, Rural Development and Administration in Mpumalanga where she was part of the Management team. She had good management and leadership qualities and had developed communication policies and strategies for the Department.
- 5.1.14. Ms Julies' competency assessment overview also contained in the interview panel's report indicated that she met the set requirements of the position and was recommended for appointment. Of the ten (10) competencies assessed, one (1) was identified for development while nine (9) were rated as having the required strength and adequacy for the position of Senior Manager: Communications. The date of the assessment was, however, not provided and no copy of the assessment report was provided.
- 5.1.15. Ms Memela's overall performance during the interview was 54% and she was the Senior Manager: Communications and Events at the Gert Sibande District Municipality at the time of the interview. She had the necessary experience for the position and was exposed to management positions. She had shown good leadership qualities. Under the competency assessment overview, the interview panel stated that Ms Memela *"did not meet the set requirements of the position and she was not recommended for appointment"*. Of the ten (10) competencies assessed, five (5) were identified for development and the other five (5), were rated as having the strength and adequacy.
- 5.1.16. The interview panel's recommendations for the appointment of Ms Memela was supported by Mr Tshabalala on 15 November 2011. These recommendations for appointment were approved by Mr Lubisi on 22 November 2011.
- 5.1.17. It was revealed by Mr Tshabalala in a meeting held on 31 August 2018, between my investigation team and the members of the interview panel, that it was always the practice for the Legislature to recommend the top three candidates

for appointment. From the top three names submitted and recommended for appointment, the prerogative rested with the Speaker to select one candidate from the three names. However, in my view the said prerogative should be properly exercised and not lead to prejudice or unfairly discriminated to other candidates. A wrongful decision cannot be tolerated just because the person who took it has a prerogative.

- 5.1.18. In the same meeting, members of the interview panel denied having congratulated the Complainant for having emerged as the successful candidate in the interviews.
- 5.1.19. My investigation team interviewed Mr Lubisi on 10 June 2019 in order to determine the criteria he followed in the selection of the best suitable candidate from the three (3) names recommended by the panel. Mr Lubisi indicated that he introduced certain principles which were considered when recruiting candidates for the Legislature and that they were agreed upon. Such principles included Gender Equity, which was the most important, Disability, Youth and that all Districts were to be represented in the Legislature. He added that all executives in the Legislature knew about these principles.
- 5.1.20. He stated that at the time he was with the Legislature, there was only one female in Executive Management and two or three females in Senior Management. In the appointments which were made at the time, the Legislature tried to recruit more females than males because the majority of senior managers were males. The other important principle, according to Mr Lubisi, was that the Legislature represents the people of Mpumalanga as a whole and therefore people who are appointed therein must reflect the demographics of the Province and must also represent the different Districts.
- 5.1.21. He agreed that the advertisement was supposed to indicate that preference would be given to female candidates but according to him, it was going to be impossible to state that they were looking for someone from a particular District

in the Province. In conclusion, according to Mr Lubisi, Ms Memela was appointed because she is a female residing in the Gert Sibande District which was not represented in the Legislature at the time. However, these principles which management was apparently aware of, were not recorded anywhere or in any document which would serve as a source of reference.

- 5.1.22. In his response to the Section 7(9) notice, the former Speaker, Mr Lubisi made two (2) main points in his submission. That is, during his tenure as the Speaker, the Legislature's recruitment was based on gender balance and geographical spread. The Legislature recruited more women and he had to ensure that all Districts of the Province were represented by introducing certain policy principles to be considered when appointing candidates in the Legislature, which include geographical representation in addition to issues of women, youth and disability. However, the issue of geographical representation is not included or mentioned in the recruitment policy of the Legislature.
- 5.1.23. Mr Lubisi argued that paragraph 7 of the Recruitment policy indicates that the following issues should be considered i.e. disability, health status, race, religion, marital status etc. but that is not a closed list, it also has the adverb etc., hence he introduced the other principles the geographical representation. Based on these considerations, he took a decision to appoint Ms. Memela as the Senior Manager: Communications as no female incumbent both in the Executive or Senior Management was from the Gert Sibande District.
- 5.1.24. The Secretary may have been the Accounting Officer but the authority to appoint Senior Managers rested with the Speaker, who was the Executive Authority. The Secretary was delegated to advertise, shortlist, interview and recommend to the Speaker of the Legislature for the approval of the appointment.

Application of the relevant law

- 5.1.25. Section 195(1) of the Constitution, 1996 provides that public administration must be governed by the democratic values and principles enshrined in the Constitution. It requires, *inter alia*, a high standard of professional ethics and accountable public administration which is impartial, fair and transparent. It also requires good human-resource management and career-development practices, to maximise human potential.
- 5.1.26. The process followed by the Legislature in the appointment of Ms Memela was expected to be transparent, fair and without bias. A high standard of professional ethics and fairness dictates that the candidate with the highest score be appointed. Even with the application of employment equity, the Legislature was expected to be fair and without bias, this would have been achieved by recommending a female who performed better than other female candidates. Failure to do so by the Legislature would amount to the contravention of the principles and values espoused in section 195 of the Constitution.
- 5.1.27 In ensuring transparency and fairness and a process which is without bias, the Provincial Legislature argued that the appointment of Ms Memela was done to promote the principle of gender and geographical representation. These mentioned principles were however not mentioned in the advert and geographical representation is not stated in the policy.
- 5.1.28 In terms of section 195 of the Constitution, the Provincial Legislature is obligated to promote good human resource management. The former Speaker, as the Executive Authority of the Legislature had an obligation to ensure that appointments were done in accordance with applicable laws and prescripts to promote the provision of section 195 of the Constitution.
- 5.1.29 Section 5(1) of the Financial Management of Parliament and Provincial Legislature Act, 2009 identifies the Speaker of Parliament as the Executive

Authority who is accountable only to Parliament for the sound financial management of Parliament.

5.1.30 Section 4 of the Financial Management of the Mpumalanga Provincial Legislature Act states that:

(3) The Executive Authority appoints the Accounting Officer.

5.1.31 In terms of the above section, the Speaker as the Executive Authority has the power to appoint any person to serve as the Accounting Officer. Mr Lubisi as the former Speaker appointed Mr Tshabalala as the Acting Secretary of the Provincial Legislature and Accounting Officer who facilitated the appointment of Ms Memela.

5.1.32 Section 6 of the Financial Management of Parliament and Provincial Legislature Act, 2009 identifies the Secretary of Legislature as the Accounting Officer.

“(1) The Secretary to Parliament is the Accounting Officer.

(2) The Accounting Officer is accountable to the Executive Authority for the financial management of Parliament.

5.1.33 The Secretary of the Legislature, Mr Tshabalala, as the former Accounting Officer was involved in the shortlisting and chairing the interview panel for the Senior Manager position. In his capacity as the Accounting Officer, he recommended to the Speaker, Mr Lubisi, who at the time was the Executive Authority of the Legislature to approve the appointment of any of the three recommended names. The Executive Authority being Mr Lubisi, approved the appointment of Ms Memela.

5.1.34 The recommendation of three names to the Speaker for approval is not provided for by the Recruitment policy and initially it was not clear what criteria was

followed by the Speaker when approving the appointment of a candidate from the recommended three names. Had gender as the determining factor being taken into consideration or applied properly by the Speaker, the second best candidate being Ms Julies who is also a female, would have been appointed to the position. The issue of geographical representation is not covered in the policy nor is it recorded anywhere.

5.1.35 Section 20 of the Mpumalanga Provincial Legislature Service and Administration Act states that:

(1) The recruitment and appointment of employees shall be made by the Secretary in consultation with the Speaker.

(2) In making appointments and filling of post, due regard shall be had to equality and the other democratic values enshrined in the Constitution.

(3) In recruitment and appointment of candidates relevant legislation and human resources practices shall be considered.

5.1.36 According to the above section, the responsibility to appoint employees rests with the Secretary, who has to consult with the Speaker. The Provincial Legislature is also required to ensure that due regard is given to equality and the other democratic values enshrined in the Constitution and to consider relevant legislation and human resources practices when making appointments. However, little to no regard was given to these values of the Constitution when Ms Memela was appointed to the position of Senior Manager. The principles of equality and fairness did not apply at all since Mr Nkosi who emerged as the successful candidate was overlooked for the position and Ms Julies who was a runner up and a female candidate was also overlooked for the position.

5.1.37 Paragraph 3 of the above policy requires the Provincial Legislature to consider relevant human resources practices when making appointment. The Recruitment policy of the Legislature makes no provision for the principle of geographical area of a candidate in deciding an appointment, however, it provides for the recognition of gender. Therefore, had due regard being given

to the applicable Recruitment policy, Ms Julies was a right candidate for the position since the principle of geographical representation is not recognised by the Recruitment policy nor is it documented anywhere for it to be officially recognised.

- 5.1.38 Paragraph 4 of the Mpumalanga Provincial Legislature Recruitment and Selection Policy (Recruitment and Selection Policy) dated 20 October 2008, states the following:

"The following principles will guide the implementation of this policy:

- ***Fairness, equity, representativeness in the Recruitment and Selection process"***

- 5.1.39 The principle of fairness as stated in the Recruitment and Selection Policy was expected to be complied with during the recruitment and appointment of the Senior Manager: Communications. According to the recorded overall score of the top three (3) candidates, the Complainant scored highest and the incumbent of the post scored the third highest. The Recruitment and Selection Policy does not make any provision for the interview panel to recommend three (3) candidates for appointment and give the Speaker the prerogative to appoint a candidate from the three (3) names by the panel resulting in the principle of fairness being overlooked.

- 5.1.40 Paragraph 7 of the Recruitment and Selection Policy states that:

7.1 RECRUITMENT

"The process should at all times comply with affirmative action considerations, i.e. disability, gender, health status, race, religion, marital status, etc."

- 5.1.41 The Complainant was the highest performer with an overall score of 78%, followed by Ms Julies with an overall score of 55% and the third was Ms Memela with an overall score of 54%. Therefore, if indeed gender balance was taken into consideration as a determining factor, Ms JB Julies should have been appointed to the position of Senior Manager: Communications because she was the second highest in terms of the score and overall performance and not Ms ZS Memela who was not even recommended for appointment by the Competency Assessment agency.
- 5.1.42 Paragraph 7 of the recruitment policy outlines the principles to be taken into consideration when appointments are made. The adverb etc. as provided above allows for the recognition of other principles which might be relevant at the time, however, these principles are to be officially documented to serve as terms of reference.
- 5.1.43 The above is supported by paragraph 7.1.1 of the Recruitment policy which provides that the Speaker may issue directives regarding the manner in which vacancies must be advertised at any stage for a specific period. During such a period the Legislature will not have the option to work in accordance with the Recruitment policy, but will abide by the relevant circular and the prescribed processes and procedures. Therefore, it was the former Speaker's duty to ensure that these principles mentioned as the basis of the appointment of Ms Memela are documented in a form of a circular for a specific period. A mere verbal directive to deviate from policy cannot according to the Recruitment policy be recognised as official.
- 5.1.44 In the case of *Solidarity and others v Department of Correctional Services and others* 2016 ZACC 18 at para 95 (c) (d) (e), Justice Zondo made the following order:
- “
- (c) *Those individual applicants who had applied for appointment to posts that remain vacant to this day or that are presently vacant even if they had*

subsequently been filled must be appointed to those posts and be paid remuneration and accorded the benefits attached to those respective posts;

(d) Those individual applicants who had applied for appointment to posts that were subsequently filled and are presently filled must be paid the remuneration and be accorded the benefits attached to those respective posts;

(e) The orders in (c) and (d) shall operate with retrospective effect from the date with which the individual applicants would have been appointed to the respective posts had they not been denied appointment”.

5.1.45 According to the *Solidarity* case, those who were supposed to have been appointed to certain positions, but were not due to the improper conduct of the state organ, are entitled if the said positions are filled then the individuals must be paid the remunerations plus benefits attached to those posts.

5.1.4.6 However, in the current matter the *Solidarity* case does not apply in that there was only one post available and it is not clear as to who was going to be appointed had the Legislature decided not to appoint Ms Memela. Had the Legislature followed due process and applied the equity principle properly, Ms Julies would have been appointed. Conversely, had the Legislature decided not to apply or consider the gender balance issue they would have appointed the Complainant. Neither the Complainant nor Ms Julies had acquired the authority or right to claim the position given to Ms Memela. However, that does not made the conduct of the Legislature proper.

5.1.47 In the *Naidoo v Minister of Safety and Security and Another (JS 566/2011) [2013] ZALCJHB 19; [2013] 5 BLLR 490 (LC); 2013 (3) SA 486 (LC); (2013) 34 ILJ 2279 (LC) (15 February 2013)* the Court noted that “*whilst acknowledging the management prerogative this court would nevertheless interfere with a decision made by a functionary if it is proved that the decision maker acted*

irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud or failed to apply his or her mind or unfairly discriminated.

- 5.1.48 The above passage basically says that in exercising his prerogative the former Speaker was expected to base the prerogative on principles of rationality, fairness, applying one's mind, fair discrimination and the absence of biasness. Therefore, the prerogative alone is not sufficient to justify any act by the decision maker.

Conclusion

- 5.1.49 Based on the evidence gathered, it can be concluded that in the appointment of Ms Memela, the Legislature did not apply employment equity provisions properly nor did they comply with constitutional values, their own legal prescripts or policy directives.
- 5.1.50 It can also be concluded that the practice of recommending three candidates by the interview panel and the prerogative of the Speaker to appoint anyone from the list, is not contained in the Recruitment policy.
- 5.2 Regarding whether the Complainant and other candidates were prejudiced by the conduct of the Mpumalanga Provincial Legislature for loss of employment opportunity under the circumstances.**

Common cause issues

- 5.2.1 It is common cause that the Complainant emerged as the highest and top performer during the interviews for the vacant position of Senior Manager: Communications. The second and third candidates were females respectively, however, the third female was appointed by the Speaker citing gender imbalance or preference and representation of all districts within the jurisdiction of the Legislature.

- 5.2.2 The Competency Assessment conducted on Ms Memela revealed that she was not suitable or recommended for appointment. However, the interview panel recommended her as one of the top three candidates for appointment.

Issues in dispute

- 5.2.3 It is disputed by the Legislature that the Complainant was prejudiced as a result of the appointment of Ms Memela.
- 5.2.4 The Complainant argued that the conduct of the Legislature in irregularly appointing Ms Memela as the Senior Manager: Communications caused prejudice to him for loss of employment opportunity and so as the salary and benefits of a Senior Manager: Communications.
- 5.2.5 The basis for the Legislature's argument, as contained in a letter dated 29 May 2018 from Ms Siwela, was that the appointment of Ms Memela was a conscious decision taken to address gender imbalances within senior Management in the institution.
- 5.2.6 Mr Lubisi also provided in his response to the section 7(9) notice that due regard in terms of geographical representation was taken into consideration as one of the underlying principles. However, these stated principles were not listed in the advert as principles which would be taken into consideration in making an appointment. And they were also not recorded in any document.

Application of the relevant legal prescripts

- 5.2.7 Paragraph 4 and 7 of the Mpumalanga Provincial Legislature Recruitment and Selection Policy (the policy) dated 20 October 2008, clearly outlines the principles as stated afore, that need to be observed by the Legislature when

appointments of staff are made. These principles include equity, fairness and representativeness.

- 5.2.8 The stated principles of gender and geographical location of candidates were not properly applied by the Executive Authority who approved the appointment because. If gender imbalances was an issue, Ms Julies being a runner up and female candidate should have been given preference. If geographical location of a candidate was a determining factor, then it should have been issued in a form of a circular as provided by section 7.1.1 of the policy or at least contained in some document for transparency sake. Therefore, in the absence of the application of the given principles, gender included, Mr Nkosi emerged as the deserving candidate for the position.

Conclusion

- 5.2.9 Based on the evidence gathered, it can thus be concluded that the Complainant together with Ms Julies suffered prejudice in a form of loss of employment opportunity which came as a result of the appointment of Ms Z.C. Memela as the Senior Manager: Communications.

6 FINDINGS

Having regard to the evidence, the regulatory framework determining the standard the Mpumalanga Provincial Legislature should have complied with and the impact on the Complainant, I therefore make the following findings:

- 6.2 **Regarding whether the Mpumalanga Provincial Legislature irregularly appointed Ms ZS Memela to the position of Senior Manager: Communications.**

- 6.2.1 The allegation that the Mpumalanga Provincial Legislature irregularly appointed Ms ZS Memela to the position of Senior Manager: Communications in 2011, is substantiated.
- 6.2.2 The conduct of the Legislature in appointing Ms Z.C. Memela, who obtained a third position during the interviews, is improper. The argument forwarded by the Legislature that the decision was taken on gender imbalance principles, cannot be accepted, as the Legislature would have then appointed Ms Julies, another candidate, who is a female and performed better than Ms Memela in the interview.
- 6.2.3 Therefore, the conduct of the Legislature was neither transparent, fair nor without bias and thus in violation of section 195(1) of the Constitution and section 20 of the Mpumalanga Provincial Legislature Service and Administration Act.
- 6.2.4 The argument around the introduction of the principle of geographical representation was also unfairly applied, as it did not comply with the affirmative action considerations mentioned in paragraph 7.1 of the Recruitment policy. Paragraph 4 of the policy of the Legislature states that fairness is a guiding principle in the implementation of the policy. The appointment of Ms ZS Memela being the third highest candidate was not done on the principle of equality and fairness. Therefore, the conduct of the Legislature is in contravention of paragraphs 4 and 7 of the policy.
- 6.2.5 The conduct of the Legislature, particularly Mr Lubisi in the irregular appointment of Ms Memela, constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3 Regarding whether the Complainant and other candidates were prejudiced by the conduct of the Mpumalanga Provincial Legislature under the circumstances.

- 6.3.1 The allegation that the conduct of the Legislature prejudiced the Complainant and other candidates for loss of employment opportunity, is substantiated.
- 6.3.2 The Mpumalanga Provincial Legislature contravened section 7 of the Recruitment policy by appointing Ms ZC Memela to the position of Senior Manager: Communications, citing reasons of addressing gender imbalances and geographical representation. However, if gender balance was, as provided by the policy into account, then Ms Julies, who scored higher at the interviewing stage, was a deserving candidate for appointment.
- 6.3.3 The conduct of the Legislature in irregularly appointing Ms Memela resulted in not only the Complainant suffering prejudice for loss of an employment opportunity to work for the Legislature as Senior Manager: Communications, but Ms Julies as well.
- 6.3.4 Such conduct constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7. REMEDIAL ACTION

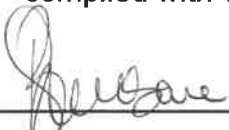
In the light of the above, and having taken into account evidence before me, the fact that honesty and integrity are paramount for the execution of duties by the Speaker of the Legislature as the Executive Authority and all the relevant facts before me, the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution is the following:

7.1. The Secretary of the Mpumalanga Legislature, Mr L Mwali must:

- 7.1.1 Within sixty (60) working days from the date of the issuing of this report , review and amend the Recruitment And Selection Policy of the Provincial Legislature and in particular paragraph 7 thereof. Any uncertainties and adverbs such as “etc.” as captured in paragraph 7.1.1 should be removed from the policy as they leave room for manipulation and abuse in the process of recruitment and selection.
- 7.1.2 Within thirty (30) working days from the date of the approval of the reviewed Recruitment and Selection Policy of the Provincial Legislature, provide training on recruitment and selection processes as contained in the said policy. Ensure that any principle that is to be recognized during the recruitment and selection processes are documented in a form of circulars or included in the policy for future references.

8. MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTION

- 8.1 The Secretary of the Legislature must within twenty (20) working days from the date of this report, submit to my office the implementation plan with timelines indicating how the remedial action mentioned above will be implemented.
- 8.2. Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied with within the stated period.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 16/09/2019