



2018 -12- 19

Signature:

Full:

J. T. LEPMOOLLE

**DOCUMENT ROUTING FORM TO THE
PUBLIC PROTECTOR**

DATE : 18 DECEMBER 2018

RECEIVED FROM : MS P MOGALADI

BRANCH : ADMINISTRATIVE JUSTICE AND SERVICE DELIVERY

**DOCUMENT TO : ADV B MKHWEBANE
PUBLIC PROTECTOR**

**SUBJECT : REPORT ON AN INVESTIGATION INTO ALLEGED
MALADMINISTRATION BY THE MASTER OF THE SOUTH
GAUTENG HIGH COURT, INVOLVING THE IRREGULAR
APPOINTMENT OF THE PROVISIONAL LIQUIDATOR AND
SUBSEQUENT FAILURE TO SUPERVISE THE
PROVISIONAL LIQUIDATOR RESULTING IN PREJUDICE TO
MR SIPHO DUBE**

PURPOSE : FOR PUBLIC PROTECTOR'S APPROVAL

CEO'S COMMENTS: _____

PP'S COMMENTS: _____



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Enquiries: Ms P Mogaladi

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Mr Vusi Madonsela

Director General

Department of Justice and Constitutional Development

329 Pretorius Street

PRETORIA

0001

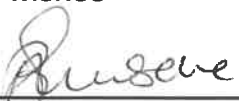
Dear Mr Madonsela

**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**

Please find attached a copy of my report no. 26 of 2018/19 on an investigation into the alleged maladministration by the Master of the South Gauteng High Court involving the allegations of irregular appointment of and failure to supervise a provisional liquidator resulting in prejudice to the Complainant, due to the alleged incapacitation of his company and stripping of assets of the company.

Your attention is specifically directed to the remedial action contained in paragraph 7 of the report as well as the monitoring of remedial action as contained in paragraph 8 of the report

Best wishes



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 19/12/2018



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Enquiries: Ms P Mogaladi

Tel No: (012) 366 7113

E-mail: ponak@pprotect.org

Honourable M Masutha, MP

Minister of Justice and Correctional Services

329 Pretorius Street

PRETORIA

0001

Dear Minister Masutha

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
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ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 19/12/2018



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Enquiries: Ms P Mogaladi

Tel No: (012) 366 7113

E-mail: ponak@pprotect.org

Mr Sipho Dube

Per email: siphod@endulwini.com

Dear Mr Dube

**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**

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Best wishes

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

DATE: 19/12/2018



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Tel No: (012) 366 7113

E-mail: ponak@pprotect.org

Ms Tessie Bezuidenhout
Acting Chief Master
Office of the Chief Master
SALU Building
316 Thabo Sehume Street
PRETORIA
0001

Dear Ms Bezuidenhout


**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**

Please find attached a copy of my report no. 26 of 2018/19 on an investigation into the alleged maladministration by the Master of the South Gauteng High Court involving the allegations of irregular appointment of and failure to supervise a provisional liquidator

resulting in prejudice to the Complainant, due to the alleged incapacitation of his company and stripping of assets of the company.

Your attention is specifically directed to the remedial action contained in paragraph 7 of the report as well as the monitoring of remedial action as contained in paragraph 8 of the report

Best wishes



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 19/12/2018



MEMORANDUM

**TO: ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR**

**FROM: MS P MOGALADI
EXECUTIVE MANAGER: AJSD**

**SUBJECT: REPORT ON AN INVESTIGATION INTO ALLEGED
MALADMINISTRATION BY THE MASTER OF THE SOUTH GAUTENG
HIGH COURT, INVOLVING THE IRREGULAR APPOINTMENT OF THE
PROVISIONAL LIQUIDATOR AND SUBSEQUENT FAILURE TO
SUPERVISE THE PROVISIONAL LIQUIDATOR RESULTING IN
PREJUDICE TO MR SIPHO DUBE**

DATE: 18 DECEMBER 2018

1. PURPOSE

- 1.1 The purpose of this memorandum is to request the Public Protector to approve and sign a report and covering letters on an investigation into the alleged maladministration by the Master of the South Gauteng High Court (the Master), involving the allegations of irregular appointment of and failure to supervise a provisional liquidator resulting in prejudice to the Complainant, due to the alleged incapacitation of his company and stripping of assets of the company.

2. BACKGROUND

- 2.1 AJSD conducted an investigation into the alleged maladministration by the Master of the South Gauteng High Court (the Master), involving the allegations of irregular appointment

of and failure to supervise a provisional liquidator resulting in prejudice to the Complainant, due to the alleged incapacitation of his company and stripping of assets of the company.

2.2 In the main, the complaint was regarding the process pursued by the Master in appointing the provisional liquidator of the company; as well as the failure by the Master relating to the supervision of the provisional liquidator's administration of the company.

2.3 The investigation is concluded and a final report is attached hereto for approval and signature

3. RECOMMENDATION

3.1 It is recommended that the Public Protector approve and sign the attached report and covering letters to the parties.

Kind regards



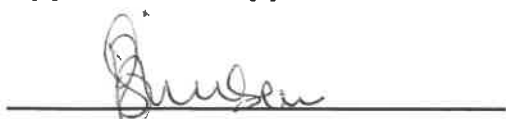
MS. PONATSHEGO MOGALADI
EXECUTIVE MANAGER: AJSD
DATE: 18/12/2018



MR VUSSY MAHLANGU
CHIEF EXECUTIVE OFFICER:
DATE: 19/12/2018

Comments: _____

Approved/~~Not approved~~



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
Date: 19/12/2018

Comments: _____

**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**



*Allegations of maladministration against the Master of the South Gauteng High Court,
involving the irregular appointment of and failure to supervise a provisional liquidator*

Report 26 of 2018/19

ISBN No 978-1-928366-83-6

**REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION BY THE
MASTER OF THE SOUTH GAUTENG HIGH COURT, INVOLVING THE IRREGULAR
APPOINTMENT OF THE PROVISIONAL LIQUIDATOR AND SUBSEQUENT FAILURE
TO SUPERVISE THE PROVISIONAL LIQUIDATOR RESULTING IN PREJUDICE TO MR
SIPHO DUBE**

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Executive Summary

- (i) This is my report 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.
- (ii) The report relates to an investigation into the alleged maladministration by the Master of the South Gauteng High Court (the Master), involving the allegations of irregular appointment of and failure to supervise a provisional liquidator resulting in prejudice to the Complainant, due to the alleged incapacitation of his company and stripping of assets of the company.
- (iii) The Complainant is Mr Sipho Dube, the Managing Director of Endulwini Resources Limited, a company registered under registration number 1998/010416/06 and placed under provisional liquidation as per court order of the South Gauteng High Court, Johannesburg (the court) dated 17 November 2011. The company has since been placed under final liquidation as per court order of the aforementioned court, dated 21 December 2012.
- (iv) In the main, the complaint was regarding the process pursued by the Master in appointing the provisional liquidator of the company; as well as the failure by the Master relating to the supervision of the provisional liquidator's administration of the company.
- (v) The Master did not dispute the said appointment of the provisional liquidator, but disputed that it had the authority to consider the provisional liquidator's conduct relating to the administration of the company. To this end, the Master argued that he was *functus officio*; as the decision made by the latter could not be reneged upon, as such exercise falls within the exclusive function of the courts.
- (vi) On analysis of the complaint, the following issues were identified and investigated:
 - (a) Whether the Master improperly appointed the provisional liquidator;

- (b) Whether the Master unduly refused to revoke the decision to appoint the provisional liquidator and to appoint a joint liquidator;
 - (c) Whether the Minister failed to determine a policy providing for matters relating to liquidators;
 - (d) Whether the Complainant suffered any prejudice as a result of the alleged conduct of the Master
- (vii) The investigation process commenced with an attempt to mediate with a view to endeavouring the parties to resolve the dispute by mutual agreement. When the mediation failed, a formal investigation, conducted through meetings and interviews with Complainant and relevant officials of the Master; as well as inspection of all relevant documents; analysis and application of all relevant laws, policies and related prescripts. A
- (viii) Key laws and policies taken into account to help me determine if there had been maladministration by the Master and prejudice to the Complainant were principally those imposing administrative standards and procedures that should have been upheld by the Master or its officials when appointing provisional liquidators; the role of the Master relative to conduct of provisional liquidators as well as the exercise of authority and direction by the Chief Master over the respective Masters of the High Courts.
- (ix) Having considered the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by the Master, my findings are the following:
- (a) **Regarding the propriety of the appointment of the provisional liquidator by the Master, I find that:**
 - (aa) The allegation that the Master followed an improper process in appointing the provisional liquidator is substantiated.

- (bb) The Master made appointment of the provisional liquidator in a manner inconsistent with the provisions of the Promotion of Administrative Justice Act (PAJA).
- (cc) The Master, on more than one occasion, referred to appointment in line with legislation and the Minister of Justice (the Minister) and policy. However, it was found that there was no legislation or approved policy regulating the appointment process of liquidators, which matter the Master also eventually conceded to. The process followed in the appointment of the provisional liquidator was characterised by gross irregularities and maladministration. The irregularities included:
 - (i) Reference to and application of the so called *forty-eight (48) hour notice* period which was not documented in a policy determined by the Minister; and was therefore improper and prejudicial;
 - (ii) The 48-hour notice practices pursued by the Masters in appointing liquidators rendered the process followed in appointment of liquidators unfair, unjust and susceptible to abuse by unscrupulous lawyers and liquidators. The notice period of 48 hours is too short, unreasonable, and improper and prejudicial and it was not documented in the policy or regulations determined by the Minister or the Chief Master's directives.
 - (iii) The notice period also did not comply with the requirements of just administrative action as envisaged in section 33 of the Constitution. It is also found lacking in terms of the section 195 of the Constitutional, which provide for the basic values and principles governing public administration; said to be upheld by the Masters' offices.
- (dd) The Master's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

(b) Regarding whether the Master irregularly refused to remove/revoke the appointment of the provisional liquidator and to appoint a joint liquidator, I find that:

- (aa) The allegation that the Master irregularly refused to remove/revoke the appointment of the provisional liquidator and to appoint a joint liquidator is substantiated.
 - (bb) The Master irregularly and improperly refused to remove the provisional liquidator and stated that she is *functus officio*.
 - (cc) The Master has power conferred by legislation, the regulatory duty to investigate the allegations levelled against the provisional liquidator and to act thereupon. Section 379(1) & (2) of the Companies Act No. 61 of 1973 clearly provides that the Master may remove a liquidator from office, or effect such removal, through the court, on the grounds listed therein. This power is further reinforced by section 389(6) of the Companies Act, which empowers the Master to restrict the powers of a liquidator, which powers the Master failed to enforce.
 - (dd) The Master indicated that the application to the Court for the extension of powers by the provisional liquidator cannot be seen to have been in the interest of ensuring sustainability of the company. The Master's allusion to such conduct being in contradiction to the preserving and maintaining objectivity *vis-à-vis* his failure to act in this regard as per the Company's Act amounts to a regulatory failure.
 - (ee) The Master's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
- (c) Regarding whether the Minister failed to determine a policy providing for matters relating to liquidators I find that:**
- (aa) There was no policy determined by the Minister in place when the Master appointed the provisional liquidator herein.

- (bb) It is noted that the Minister determined a policy with a commencement date of 31 March 2014, it is also noted that the said policy was imposed with an interdict on 13 January 2015 in the case of *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & Others and another application* 2015 (2) SA 430 (WCC).
- (cc) The Minister unsuccessfully challenged this decision in the Supreme Court of Appeal decision in *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* (693/15) [2016] ZASCA 196 and the Constitutional court decision in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20
- (dd) The Judicial Matters Amendment Act specifies the necessity of a policy when appointing provisional liquidators, highlighting the need for promoting *consistency, fairness, transparency*. The absence of policy gave rise to lack of uniformity in the exercise of discretion by the respective of the Masters.
- (ee) Although the policy was subsequently developed and set aside by the courts as indicated above, the Minister's failure to timeously develop policy or regulations or directives on the appointment process of liquidators amounts to maladministration envisaged in section 6(4)(a)(i) of the Public Protector and improper conduct as envisaged in section 182(1) of the Constitution.
- (d) Regarding whether the Complainant suffered any prejudice as a result of the alleged improper conduct of the Master, I find that:**
- (aa) The allegation is substantiated;
- (bb) The failure by the Master to look into the freezing of assets of the company or the application for the extension of powers, on the basis that the Master was *functus officio* was not only unlawful, but caused the Complainant frustration, inconvenience and distress.

-
- (cc) The failure by the Master to consider the complaint of freezing assets of the company or the application for the extension of powers amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector and improper conduct as envisaged in section 182(1) of the Constitution.
- (x) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred, while addressing systemic deficiencies in the Masters of the High Courts, is the following:
- (aa) The forty-eight (48) hour practice is to be abolished and refrained from further use by the Master of the South Gauteng High Court within one (1) month from the date of this report.
- (bb) The Master of the South Gauteng High Court must, within three (3) months from the date of this report, develop and implement directives and guidelines regarding the exercise of the Master's discretionary powers in the appointment of provisional liquidators;
- (cc) The Master of the South Gauteng High Court must within one (1) month from date of the Report, issue a written apology to the Complainant, apologising for the delay and /or his failure to deal with the conduct of the provisional liquidator;
- (dd) The Minister of Justice and Correctional Services must within six (6) months from the date of this report, determine the policy regulating the appointment process of the provisional and final Liquidators, in terms of section 158(2) of the Insolvency Act and in accordance with the constitutional court judgment in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*. The Policy should also regulate the process for the removal of the provisional and final liquidator by Master of the High Court.

REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION BY THE MASTER OF THE SOUTH GAUTENG HIGH COURT, INVOLVING THE IRREGULAR APPOINTMENT OF AND FAILURE TO SUPERVISE A PROVISIONAL LIQUIDATOR RESULTING IN PREJUDICE TO THE COMPLAINANT.

1. INTRODUCTION

- 1.1. This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published section 8(1) of the Public Protector Act, 1994 (the Public Protector Act) following an investigation into the alleged maladministration by the Master of the South Gauteng High Court (the Master) in the appointment of a liquidator for a company under liquidation as well as the alleged failure by the Master to supervise/oversee the said liquidator, resulting in prejudice to the Complainant.
- 1.2. The report is published in terms of section 8(2A)(a) of the Public Protector Act and submitted, in terms of section 8(3) of the Public Protector Act, to the following persons:
 - 1.2.1. The Minister of the Department of Justice and Correctional Services, Mr Michael Masutha.
 - 1.2.2. The Director-General of the Department of Justice and Constitutional Development, Mr Vusi Madonsela;
 - 1.2.3. The Acting Chief Master of the High Courts, Ms Theresia Bezuidenhout
- 1.3. A copy of the report is also provided to the Complainant, Mr Sipho Dube in terms of section 8(3) of the Public Protector Act.

- 1.4. The report relates to an investigation into the alleged maladministration by the Master of the South Gauteng High Court, involving the irregular appointment of and failure to supervise a provisional liquidator resulting in prejudice to the Complainant.

2. THE COMPLAINT

- 2.1 The Complainant, Mr Sipho Dube, approached the Public Protector on 19 December 2011 with the following allegations against the Master:
- 2.1.1 In the year 2011, Africa Commodities Group Resources (Pty) Ltd (first Applicant) and Africa Commodities Group Trading (Pty) Ltd (second Applicant) lodged a petition with the South Gauteng High Court (the court), for the provisional liquidation of the company. However, both Applicants are not creditors of the company nor do they have any claim against the company.
- 2.1.2 The matter was set down prematurely for 15 November 2011, a date on which the Complainant (as Respondent in the matter) was required to file an opposing affidavit. Accordingly, a Notice of Motion against this date was filed before the court by the Complainant's attorneys. Thereafter, the matter was then set down for 16 November 2011 by the Applicants; and subsequent thereto, the court granted a provisional liquidation order on this date, with a return date set for 31 January 2012. The Complainant was however not served with a copy of the abovementioned court order by the applicants.
- 2.1.4 Upon appointment of the provisional liquidator, the Master considered requisitions for the election of a provisional liquidator from false, non-existing creditors (the Applicants) of the company, within a period of 48-hours, said to be the standard period used in practice. The Master also failed to consider Complainant's requisitions in his capacity as a trustee and director of Nomvula Trust and Mhlambi Finance (Pty) Ltd respectively. Furthermore, the Master only consulted with the

Applicant's attorneys during the said election process. On 07 December 2011, the Master wrongfully proceeded to appoint the provisional liquidator Mr Van Zyl of Progressive Administrators (Pty) Ltd, relying on requisitions of companies with non-existent claims.

- 2.1.5 He only became aware of both the court order and the appointment when the provisional liquidator visited the company in December 2011, with the Certificate of appointment said to have been issued by the Master, informing him of the provisional liquidation. The provisional liquidator did not show the Complainant the court order granting an order for provisional liquidation and the Certificate that the provisional liquidator had, reflected errors and it was not properly stamped. To this end, there would appear to have been collusion between the Applicant's attorneys and the provisional liquidator as the court order was never served on the company as the Respondent nor was it made aware of the notice to lodge requisitions for the appointment of a provisional liquidator of choice.
- 2.1.6 The entire Master's appointment process was plagued with irregularities, as the appointed provisional liquidator had frozen all the company's bank accounts, including those of subsidiary companies that had not been provisionally liquidated; on 05 December 2011, which date preceded his appointment by the Master. As a result thereof, the company was unable to meet its financial obligations including remunerating its employees.
- 2.1.7 Further to the above, the provisional liquidator approached the court, without the knowledge of the Master, for an application of additional powers which had the effect of affording him (the provisional liquidator) powers of a final liquidator. The application succeeded and an order to this effect was granted on 20 December 2011. Having requested the Master to act and with no action thereto, the order was eventually challenged with funds held in trust by the Respondent's attorney's, however the provisional liquidator failed to file a replying affidavit to this end and

further took over the funds held to defend the matter, which thus rendered the Respondent's attorneys incapable of pursuing the matter further.

2.1.8 The Complainant requested the Master to either remove the provisional liquidator, or to appoint a second joint provisional liquidator, but to no avail. The Complainant further stated that the co-appointed liquidator whom the Master appointed with the provisional liquidator, was inactive as most of the decisions are made by Mr Van Zyl.

2.1.9 The Complainant requested the Public Protector to investigate the process followed by the Master in appointing the provisional liquidator.

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; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)*, Chief Justice Mogoeng stated the following, when confirming the powers 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 values 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 endeavor 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 In the matter of ***President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)***, the full court held as follows regarding the powers of the Public Protector:-

- 3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment)
- 3.7.2 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);
- 3.7.3 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective. (paragraph 85 and 152 of the judgment)
- 3.7.4 There is nothing in the Public Protector act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4) (c) (ii) of the Public Protector Act (paragraph 91 and 92 of the judgment)
- 3.7.5 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(paragraph 100 and 101 of the judgment):
 - 3.7.5.1 Conduct an investigation;
 - 3.7.5.2 Report on that conduct; and
 - 3.7.5.3 To take remedial action.

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- 3.7.6 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (paragraph 104 of the judgment)
- 3.7.7 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Paragraph 105 of the report). This was a finding on NEF judgment as well.
- 3.7.8 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (paragraph 107 and 108 of the Judgment).
- 3.7.9 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).
- 3.8 The jurisdiction and power to investigate was not disputed by any of the parties. However, the jurisdiction to investigate the provisional liquidator's conduct was questioned by the Master, to which matter the following is pointed out:
- 3.8.1 The Public Protector is empowered by both the Constitution as well as the enabling legislation; the Public Protector Act, to investigate any conduct in state affairs or in the public administration in any sphere of government; as well as public administration in connection with the affairs of government at any level or of a person performing a public function.
- 3.8.2 The provisional liquidator, as appointed by the Master, was so appointed in the furtherance of public administration. In other words, if the duty of administering a public function were to be removed from the chain of events giving rise to the appointment, then in that event there would be no appointment of liquidators by the Master.

- 3.8.3 Therefore, although the Public Protector could investigate the conduct of the provisional liquidator in his performance of a public function as mandated by the Master; the investigation regarding the provisional liquidator's conduct was confined to the Master's supervisory and regulatory duty over liquidators

4 THE INVESTIGATION

4.1. Methodology

- 4.1.1. The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.
- 4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a complaint without conducting an investigation, through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.
- 4.1.3 The complaint was initially classified as an Early Resolution matter capable of resolution by way of a conciliation process or mediation in line with section 6(4)(b) of the Public Protector Act, 1994. However, after several attempts to conciliate the matter, it was escalated into an investigation. The conciliation process however failed due to the following:
- 4.1.3.1 The Deputy Master of the South Gauteng High Court (for reporting purposes, the office is categorically referred to as the Master) stated that the appointment of the provisional liquidators was confirmed by a court order, and that the provisional liquidator was further granted additional powers and thus the actions in the administration of the estate by the provisional liquidator fall within the ambit of the extended powers as granted by the court order;

4.1.3.2 The Deputy Master further stated that she is not able to review the court's decision of the granting of the extended powers, nor can she dictate to the provisional liquidator on the administration of the estate concerned;

4.1.3.3 The Deputy Master maintained a *functus officio* stance in that she stated that she was not in a position to review her decisions made herein;

4.1.3.4 The Deputy Master held the view that the facts of the matter did not justify the removal of the provisional liquidator. Based on the above, I therefore proceeded with a full investigation.

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 Master acted improperly in relation to the appointment of the provisional liquidator. I also had to determine if the Master had discharged his regulatory duty against the provisional liquidator.

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 or organ of state to prevent maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of 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. The investigation revealed that it involved much more than determining issues surrounding the appointment and regulation of the provisional liquidator. A number of issues relating to maladministration were uncovered during the investigation.

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

4.3.1. Whether the Master improperly appointed the provisional liquidator;

4.3.2. Whether the Master unduly refused to revoke the decision to appoint the provisional liquidator and to appoint a joint liquidator;

4.3.3. Whether the Minister has determined a policy providing for matters relating to the appointment of liquidators;

4.3.4. Whether the Complainant suffered any prejudice as a result of the alleged conduct of the Master

4.4. The Key Sources of information

4.4.1 Documents:

4.4.1.1 Minutes of conciliation meeting held on 03 February 2012.

4.4.2 Correspondence sent and received:

4.4.2.1 An email addressed to the Deputy Master from the office of the Public Protector dated 19 December 2011;

4.4.2.2 An email addressed to the office of the Public Protector from the Deputy Master dated 03 January 2012;

4.4.2.3 A letter addressed to Emerald Green Communications (Pty) Ltd from Bowman Gilfillan Attorneys dated 19 January 2012;

4.4.2.4 An email addressed to the Deputy Master from the office of the Public Protector dated 31 January 2012;

4.4.2.5 A letter addressed to the office of the Public Protector from Complainant dated 06 February 2012;

4.4.2.6 An email addressed to the Deputy Master from the office of the Public Protector dated 07 February 2012;

4.4.2.7 A letter addressed to the Deputy Master from the provisional liquidator of Progressive Administration (Cape) (Pty) (Ltd) dated 15 February 2012;

4.4.2.8 An email addressed to the Deputy Master from the office of the Public Protector dated 17 February 2012;

4.4.2.9 An email addressed to the office of the Public Protector from the Deputy Master dated 22 February 2012;

4.4.2.10 A letter addressed to Master from Zwiegers Attorneys date 07 March 2012;

4.4.2.11 An email addressed to the office of the Public Protector from Complainant dated 12 March 2012;

4.4.2.12 A letter addressed to Complainant from the office of the Public Protector dated 11 December 2013;

4.4.2.13 A letter addressed to the office of the Public Protector from Complainant dated 29 January 2014;

- 4.4.2.14 A letter addressed to the Chief Master from the office of the Public Protector dated 11 April 2014;
- 4.4.2.15 An email addressed to the office of the Public Protector from the Chief Master dated 19 May 2014;
- 4.4.2.16 An email addressed to the Chief Master from the office of the Public Protector dated 18 September 2015;
- 4.4.2.17 An email addressed to the Public office of the Protector from the Chief Master dated 29 September 2015;
- 4.4.2.18 An email addressed to the Public Protector from the Chief Director in the Chief Master's office;
- 4.4.2.19 An email addressed to the Chief Director in the Chief Master's office dated 14 June 2016;
- 4.4.2.20 An email addressed to the Chief Director in the Chief Master's office dated 22 August 2016;
- 4.4.2.21 An email addressed to the Public Protector from the Chief Director in the Chief Master's office dated 23 August 2016.

4.5 Attempted conciliation:

- 4.5.1 A conciliation meeting was held on 03 February 2012. The following persons were present-
 - a) Public Protector Advocate Thuli Madonsela (Chairperson)
 - b) Mr Risenga Maruma (Public Protector official)
 - c) Ms Dinkie Dube (Public Protector official)
 - d) Mr Sipho Dube (Complainant)
 - e) Mr Wigers (Attorney of the Endulwini Resources Trust)
 - f) Ms Mariaan Barnard (Deputy Master of the South Gauteng High Court/ Respondent)

4.6 Notices issued in terms of section 7(9) of the Public Protector Act:

4.6.1 At the conclusion of the investigation, a notice in terms of section 7(9) of the Public Protector Act was issued to the following parties to comment and/or make submissions on the intended findings:

4.6.1.1 The Chief Master of the High Courts dated 23 September 2014;

4.6.1.2 The Master of the South Gauteng High Court dated 23 September 2014;

4.6.1.3 The Minister of Justice and Constitutional Development dated 12 February 2018;

4.6.1.4 Reminder to the Minister dated 30 October 2018;

4.6.1.5 The comments of the interactions with the Chief Master were assessed and where appropriate, integrated in the factual and maladministration findings.

4.6.2 Legislation and other prescripts Acts

4.6.2.1 The Constitution of the Republic of South Africa, 1996;

4.6.2.2 The Judicial Matters Amendment Act, 16 of 2003 (the Judicial Matters Amendment Act);

4.6.2.3 The Promotion of Administrative Justice Act of 2000 (PAJA);

4.6.2.4 The Insolvency Act of 24 of 1936 (the Insolvency Act);

4.6.2.5 The Companies Act, 61 of 1973 (the Companies Act).

4.5.1 Case Law

- 4.5.1.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)
- 4.5.1.2 *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017);
- 4.5.1.3 *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & Others and another application* 2015 (2) SA 430 (WCC)
- 4.5.1.4 *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* (693/15) [2016] ZASCA 196
- 4.5.1.5 *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20

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 Master improperly appointed the provisional liquidator:

Common cause issues

- 5.1.1 It is common cause that the appointment of the provisional liquidator was made by the Master pursuant to a court order placing the company under provisional liquidation.

Issues in dispute

- 5.1.2 The main issue in dispute is whether or not the Master followed a fair and proper process in appointing the provisional liquidator.
- 5.1.3 The Complainant alleged that in 2011 a petition was lodged with the high court for the provisional liquidation of his company and the matter was set down prematurely for 15 November 2011, a date on which the company was required to file an opposing affidavit. The matter was then heard on 16 November 2011 by the applicants; and subsequent thereto, the court granted a provisional liquidation order on this date, with a return date set for 31 January 2012. The company was however not served with a copy of the court order and thus could not submit requisitions to the Master within the Master's stipulated period, which period was said to be within 48 (forty-eight) hours from the date of the court order.
- 5.1.4 Complainant further alluded that when considering requisitions for the election of a provisional liquidator, the Master's process was flawed in that:

- a) The Master failed to consider requisitions of major creditors of the company; namely Nomvula Trust and Mhlaba Finance (Pty) Ltd;
 - b) The appointment of Mr Van Zyl as the provisional liquidator was based on non-existent claims said to be that of the joint Applicants, who in fact did not have any claims against the company;
 - c) The Master failed to enquire into the validity of the requisitions that provided for the appointment of Mr Van Zyl, despite requests for same by him (Complainant).
 - d) On 07 December 2011, the Master proceeded to appoint the provisional liquidator based on the above, and therefore that the appointment of the provisional liquidators was irregular. The date on the certificate of appointment was incorrect, in that it cited the date of appointment as 05 December 2011 instead of 07 December 2011.
- 5.1.5. The Master on the other hand contended that the order of the court providing for the provisional liquidation of the company was dated 16 November 2011, which date was accepted by the Master as being the date on which the order was granted. Upon provisional liquidation of a company, the assets of such company would vest with the Master, until such a time that a provisional liquidator has been appointed. It is therefore essential that the creditors of such company elect a provisional liquidator in order to secure and maintain the assets of the company concerned.
- 5.1.6. The Master further contended that as per section 18 (1) of the Insolvency Act, once an order for liquidation has been issued by a court; the Master (in accordance with policy determined by the Minister), appoints a provisional liquidator for the estate in question, who is required to give security to the Master for the proper performance of his duties and who would hold such office until the appointment of a final liquidator. Such appointment is provided for in terms of section 368 of the Companies Act, which also requires appointment to be made in terms of policy

determined by the Minister. In this regard, the Master prioritizes transparency and openness.

- 5.1.7. The Master confirmed that there was no policy determined by the Minister in place providing for the process to be pursued in appointing liquidators. In response to the notice issued in terms of section 7(9) of the Public Protector Act, the Master stated that in the absence of policy, when an order for liquidation is received from a court, the Master affords creditors an opportunity to submit requisitions for appointment of a liquidator.
- 5.1.8. A notice, known as the *forty-eight (48) hour notice*, would then be placed on the Master's notice board, specifying when the Master intends to consider the provisional appointment of a liquidator; thus providing creditors with the opportunity to submit their requisitions timeously. This forty-eight hour notice process is currently being utilised in the Pretoria and Johannesburg offices of the Master only.
- 5.1.9. The requisitions to be submitted to the Master consist of an affidavit providing basic information about the creditor; the amount of claim of the creditor; the cause of action as well as details of the signatory on the requisition. These requisitions are considered at face-value by the Master. Upon expiration of the forty-eight (48) hour notice, the Master would then consider all original requisitions timeously received, which ought to comply with the Master's standard requirements. An appointment for a provisional liquidator would be considered once the file of the estate in question is referred to the Master's panel (consisting of the Deputy Master and two Assistant Masters), based on the requisitions on file.
- 5.1.10. In the subject matter herein, the appointment of the provisional liquidator was considered by the Master's panel on 29 November 2011, whereby the Master took cognizance only of requisitions that were submitted timeously (within forty-eight hours). Two requisitions with the total value amount of Fourteen Million Four Hundred and Sixty-Four Thousand and Eight rand (R 14 464 008.00) were lodged in favour of Progressive Administrators (Pty) Ltd. Another requisition with the value

of twenty-five thousand, thirty rand and ninety-three cents (R 25 030.93) was lodged in favour of Xirimele Trustees.

- 5.1.11. The Complainant, in his capacity as the duly authorised trustee of the Nomvula Trust and the Director of Mhlaba Finance (Pty) Ltd lodged copies of requisitions for the total value of Eleven Million Six Hundred Thousand rand (R 11 600 000.00) in favour of Mr Du Plessis. The Master's panel did not consider the aforementioned requisitions as they did not reach the Master timeously and further, only copies thereof were submitted.
- 5.1.12. Accordingly, the Master proceeded to appoint Progressive Administration (Pty) Ltd on the basis of the value of the requisitions lodged in favour thereof. In terms of the Master's discretionary appointment (referred to as the BEE or PDI), the provisional liquidator was co-appointed with Ms M.E Malatsi on 07 December 2011, whose name was recorded on a list of approved liquidators kept by the Master.
- 5.1.13. With regard the Complainant's allegation that the Master failed to consider requisitions of major creditors of the company, namely; Nomvula Trust and Mhlaba Finance (Pty) Ltd, the Complainant has not disputed that these requisitions were not submitted within the Master's 48 hour period.
- 5.1.14. Although the requisitions received by the Master from the Complainant (as a trustee of Nomvula Trust and the Director of Mhlaba Finance) did not reach the Master timeously and only copies thereof were submitted, it is noted that the total value of these requisitions were of a substantial amount that did not differ considerably from the value of requisitions in terms of which the Master made the provisional appointment. However, it should be noted that had original requisitions lodged in favour of Mr Du Plessis reached the Master timeously, the Master would still have not been in a position to appoint Mr Du Plessis as the provisional liquidator as the total value of requisition lodged in his favour (R 11 600 000.00) was surpassed by that lodged in favour of the appointed provisional liquidator (R 14 464 008.00).

- 5.1.15. With regard to the allegation that the appointment of Mr Van Zyl as the provisional liquidator was based on non-existent claims said to be that of the joint Applicants, who in fact did not have any claims against the company; the Complainant alleged that the Master failed to enquire into the validity of the requisitions provided for the appointment of Mr Van Zyl, despite requests for same by him. It should be noted that these matters related to the court proceedings in the application of the compulsory winding up of the company, which process precedes the appointment of liquidators (including provisional liquidators).
- 5.1.16. The court having issued a court order for the provisional liquidation of the company is a matter that falls squarely within the jurisdiction of the court and not the Master. The investigation by the Public Protector did not relate to this process as this allegation related to a court decision.

Application of the relevant law

- 5.1.17. The Judicial Matters Amendment Act provides that the appointment of a provisional liquidator be made in terms of a policy. Section 16 of Judicial Matters Amendment Act states that as soon as a winding-up order has been made in relation to a company the Master may, in accordance with policy determined by the Minister, appoint any suitable person as provisional liquidator of the company concerned, who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator.
- 5.1.18. The Master's initial allusion was that the appointment of a provisional liquidator was made in line with policy determined by the Minister and later allusion was that no such policy exists, the change in statements is rather bizarre and contradictory. The Master's final stance however, was that no policy exists and therefore the Master utilized the so called *48 hour notice rule*.

- 5.1.19. The Promotion of Just Administrative Act, 2000 (PAJA) sets out the manner in which procedurally fair administrative action affects any person should follow. In terms of section 3(1) of PAJA, administrative action which materially and adversely affects the rights of any person must be procedurally fair. Section 3(2)(b) requires that an administrator provide adequate notice of proposed action, a reasonable opportunity to make representations; a clear statement of the administrative action as well as adequate notice of the right to request reasons in terms of section 5.
- 5.1.20. When tested against the requirements for just administrative action; an enquiry into whether a period of 48-hours suffices is necessitated. In addition to the above, is the nature of court processes, of which not all interested parties are privy to and as such could be prejudiced as a result thereof. This aspect brings in the following questions of reasonableness:
- a) Whether all parties who have an interest in the matter ought to have reasonably known of the notice placed at the premises of the Master?
 - b) Would the parties also know where at the premises of the Master, to seek out this notice?
 - c) Adding to this, is the inconsistent application of this rule, where some offices of the Master apply same whereas others do not; and thus the general public do not have access to the same information; and thus cannot be said to have reasonable general knowledge of same, in any event.
- 5.1.21. All the above are requirements envisaged in section 33 of the Constitution, which provides that everyone has the right to administrative justice that is lawful, reasonable and procedurally fair. The driving vehicle of the aforementioned provision is PAJA. Section 3(1) thereof provides that administrative action which materially and adversely affects the rights of any person must be procedurally fair, whereas section 3(2) demands that adequate notice of administrative action be given. The Master, as an administrator, is required to prescribe to the aforementioned provisions.

Conclusion

5.1.22. Considering the interests of creditors that need to be safe-guarded, it cannot be concluded that 48-hour notice meets the notion of just administrative action nor does it promote constitutional obligations. This appointment seems hurried, taking into consideration the necessity to have due regard of the interests of the other creditors.

5.1.23. In addition to the above, section 195 read with 237 of the Constitution demands that every organ of state, including the Master, place the rights of the public at the forefront by means of promoting good public administration.

5.2 Regarding whether the Master failed and/or refused to revoke the appointment of the provisional liquidator and to appoint a joint liquidator:

Common cause issues

5.2.1 It is common cause that the Master appointed a provisional liquidator on 07 December 2011.

Issues in dispute

5.2.2 The key issue for factual determination was whether or not the Master failed and/or refused to consider revocation of the appointment of the provisional liquidator where the Master is empowered to do so by an empowering provision.

5.2.3 The Complainant argued that the provisional liquidator had failed to meet the objective of maintaining and preserving the assets of the company in that he had frozen all the company's assets, including those of subsidiary companies that had not been provisionally liquidated. As a result thereof, the company had been unable to meet its financial obligations, including remunerating its employees.

5.2.4 Furthermore, the provisional liquidator had approached the court for the application of extension of powers (which application succeeded), without the knowledge of the Master. This afforded the liquidator draconian powers, which had the effect of

- placing the company in a position as though it were facing final liquidation. The co-liquidator appointed by the Master, Ms Malatsi, was inactive and the provisional liquidator had on several occasions made unilateral decisions where the company was concerned. The Complainant had requested the Master to remove the provisional liquidator but to no avail.
- 5.2.5 On the point of the provisional liquidator having frozen the assets of the company, including assets of companies not involved in the liquidation, the Master stated that he would enquire into same.
- 5.2.6 Regarding the application by the provisional liquidator to the court for the extension of powers, the Master stated that he was not aware of same and held the view that such conduct would be in direct conflict with the objective of maintaining and preserving the assets of the company. Furthermore, the Master held that the extension of powers would lead to depletion of the company's assets prior to the hearing of the final liquidation process, and that a formal investigation into the matter would be undertaken.
- 5.2.7 The Master's investigation outcome was that the application for the extension of powers by the provisional liquidator was on the face of the Complainant's refusal to cooperate with the provisional liquidator and further that the services of the employees of the company became suspended by operation of law upon the granting of the provisional liquidation order.
- 5.2.8 Furthermore, the Master stated that a court would only grant additional powers to a provisional liquidator where it deems fit to do so and thus the Master found no grounds as provided for in the Companies Act upon which to remove the provisional liquidator. To this end, the Master cited that he was *functus officio* in the appointment of the provisional liquidator and that the Complainant would have to approach the courts for a review of the decision thereof.

5.2.9 No evidence was submitted by the Master that he did look into the freezing of assets of the company or the application for the extension of powers. Instead, the Master responded that he was *functus officio*, contrary to the earlier submission.

Application of the relevant law

5.2.10 The legislation that was applicable at the time of the complaint is the Companies Act 61, 1973. Section 379(1) provides for the following instances upon which the Master may remove a liquidator from his office. The grounds listed are as follows:

- (a) That he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as liquidator or has been authorised, specially under a general power of attorney, to vote for on behalf of a creditor, member or contributory at a meeting of creditor, members or contributories of the company which he is the liquidator and has acted or purported to act under such special authority or general power of attorney; or
- (b) That he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or
- (c) That his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as liquidator; or
- (d) That the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a member's voluntary winding-up, majority of the members of the company, or, in the case of a winding-up of a company limited by guarantee, the majority of the contributories, has requested him in writing to do so; or

- (e) That in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.

5.2.11 Section 381(1) of the Companies Act provides that the Master shall take cognisance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action as he may think expedient.

Conclusion

- 5.2.12 The Master has the authority to restrict the powers of a provisional liquidator as stipulated in section 386(6) of the Companies Act. Furthermore, in terms of section 379(2) of the Company's Act, the Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.
- 5.2.13 Therefore the Master has wide powers conferred by legislation to either remove a liquidator or approach the court for such removal and there is no evidence that the Master exercised any of the regulatory powers and oversight over the provisional liquidator.
- 5.2.14 As a result of the above, the Master's submission that he was *functus officio* and therefore could not act against the Provisional liquidator is legally unfounded and therefore has no legal basis.

5.3 Regarding whether the Minister failed to determine a policy providing for matters relating to liquidators:

Issues in dispute

- 5.3.1 The key issue for factual determination was whether or not the Master acted fairly when appointing the provisional liquidator. The issue in respect of existence of a policy is one that arose during the course of the investigation and I then decided to investigate this conduct on my own initiative, in terms of section 6 and 7 of the Public Protector Act.
- 5.3.2 The Master confirmed that there was no policy determined by the Minister in place providing for the process to be pursued in appointing liquidators. In a meeting held to discuss the response to the notice issued in terms of section 7(9) of the Public Protector Act, the Master stated that a Policy on Appointment of Insolvency Practitioners was developed and was imposed with an interdict.
- 5.3.3 The Policy on Appointment of Insolvency Practitioners was published in the Government Gazette on 7 February 2014 and on 17 October 2014 an amendment of paragraphs 6 and 7 were published. According to paragraph 2, the objective of the policy is to “*promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination*”. The commencement date of the policy was supposed to be 31 March 2014.
- 5.3.4 The policy which was said to replace all previous policies and guidelines related to the appointment of insolvency practitioners in the Masters' offices made provision for different categories on insolvency practitioners. These categories based on racial grouping and alphabetical order within each category would be used by the Master to appoint insolvency practitioners.

5.3.5 It was confirmed that the policy was indeed imposed with an interdict in the case of *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & Others and another application* 2015 (2) SA 430 (WCC). The Supreme Court of Appeal (SCA) in *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* (693/15) [2016] ZASCA 196 once again ruled against the Minister and found the policy to be invalid and unconstitutional as it did not serve the purpose to which it was intended.

5.3.6 The Minister and the Chief Master appealed the order issued by the Supreme Court of Appeal to the Constitutional court and the court in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20 held that the policy cannot achieve the desired results of transformation of the insolvency industry and is therefore irrational

Applicable law

5.3.7 Section 158(2) of the Insolvency Act read with 16 of Judicial Matters Amendment Act states that the Minister may determine policy for the appointment of a provisional trustee by the Master in order to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.

Conclusion

5.3.8 It is noted that the first legislation, the Insolvency Act, which spoke to the appointment of liquidators is an Act dating back to 1936. There is no evidence to support that since the abovementioned year, efforts have been made to have such policy determined.

5.3.9 Furthermore, the proposed policy was supposed to come into existence three years post the cause of complaint herein.

- 5.3.10 Save for the unjustified so called forty-eight (48) hour notice, it is noted that there is currently no system in place to inform all creditors whose rights would be affected by the liquidation, about the notice of provisional liquidation and appointment of liquidators(including provisional). Of particular importance would be the employees of the company who were not adequately informed of the liquidation underway and who were without salaries since December 2011, due to the assets of the company having been frozen. While there is a need for prompt action by the Master, a forty-eight (48) hour notice placed at notice boards of the Master's office poses risk as only a few individuals who are privy to the court process would be aware of such notice. This practice goes against the lawful, reasonable and procedural fairness requirements of PAJA.
- 5.3.11 A notice in terms of section 7(9) of the Public Protector affording the Minister an opportunity to comment on my intended findings was issued on 12 February 2018. The Minister responded by letter dated 14 March 2018 and indicated that judgement on the Policy on Appointment of Insolvency Practitioners was reserved by the Constitutional Court on 02 November 2017. Further that upon the judgement being pronounced my office will be favoured with a copy and the Department will advise me of the way forward after applying its mind to the judgement. The judgement was issued by the Constitutional Court on 05 July 2018 and on 30 October 2018 the Minister was once again afforded an opportunity to comment my intended findings as communicated in the abovementioned notice dated 12 February 2018. To date a response from the Minister has not been received by my office.
- 5.3.12 It is therefore my conclusion that non-existence of the policy regulating the appointment and removal process of the liquidators is not only unlawful, but render the insolvency industry monopolized to the detriment of the most vulnerable citizens, especially the companies under liquidations and the employees of those companies under liquidations.

5.4 Regarding whether the Complainant suffered any prejudice as a result of the alleged conduct of the Master:

Issues in dispute

- 5.4.1 The Complainant alleged the entire Master's appointment process was plagued with irregularities, as the appointed provisional liquidator had frozen all the company's bank accounts, including those of subsidiary companies that had not been provisionally liquidated and as a result thereof, the company was unable to meet its financial obligations including remunerating its employees.
- 5.4.2 Further to the above, the Master allowed the provisional liquidator approached the court, without the knowledge of the Master, for an application of additional powers which had the effect of affording him (the provisional liquidator) powers of a final liquidator.
- 5.4.3 The Master on the other hand disputed the allegation that his conduct was improper and that the Complainant was improperly prejudiced by such conduct. The Master maintained that it acted properly and that liquidation process was based on a court decision that compelled the Master to appoint a liquidator.
- 5.4.4 No evidence was submitted by the Master that he did look into the allegations of freezing of assets of the subsidiary companies that had not been provisionally liquidated or the application for the extension of powers. Instead, the Master responded that he was *functus officio*. This caused the Complainant frustration, inconvenience and distress. The Complainant however failed to provide any documentary proof to substantiate his pecuniary loss.

Application of the relevant legal framework

- 5.4.5 The underlying principle of the remedial action that the Public Protector considers in terms of section 182(1)(c) of the Constitution is to ensure that the Complainant is restored to the position that he would have been in had it not been for the maladministration. The Public Protector uses her discretion when applying this

principle and seeks to ensure reasonable and fair remedies, taking into account the circumstances of each case.

Conclusion

5.4.6 The failure by the Master to look into the freezing of assets of the subsidiary companies that had not been provisionally liquidated or the application for the extension of powers and responding that the Master was *functus officio* caused the Complainant frustration, inconvenience and distress. A finding of maladministration is sufficient to result in a remedy to the Complainant as the Public Protector has the following three separate powers:

- 5.4.6.1 Conduct an investigation;
- 5.4.6.2 Report on that conduct; and
- 5.4.6.3 To take remedial action.

6. FINDINGS

Having considered the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by the Master, my findings are the following:

6.1 Regarding the propriety of the appointment process of the provisional liquidator by the Master, I find that:

- 6.1.1. The allegation that the Master followed an improper process in appointing the provisional liquidator is substantiated.
- 6.1.2. The Master made appointment of the provisional liquidator in a manner inconsistent with the provisions of the Promotion of Administrative Justice Act (PAJA).
- 6.1.3. The Master, on more than one occasion, referred to appointment in line with legislation and the Minister of Justice (the Minister) and policy. However, it was

found that there was no legislation or approved policy regulating the appointment process of liquidators, which matter the Master also eventually conceded to. The process followed in the appointment of the provisional liquidator was characterised by gross irregularities and maladministration. The irregularities included:

- 6.1.3.1 Reference to and application of the so called *forty-eight (48) hour notice* period which was not documented in a policy determined by the Minister; and was therefore improper and prejudicial;
- 6.1.3.2 The 48-hour notice practices pursued by the Masters in appointing liquidators rendered the process followed in appointment of liquidators unfair, unjust and susceptible to abuse by unscrupulous lawyers and liquidators. The notice period of 48- hours is too short, unreasonable, and improper and prejudicial and it was not documented in the policy or regulations determined by the Minister or the Chief Master's directives.
- 6.1.4. The notice period also did not comply with the requirements of just administrative action as envisaged in section 33 of the Constitution. It is also found lacking in terms of the section 195 of the Constitutional, which provide for the basic values and principles governing public administration; said to be upheld by the Masters' offices.
- 6.1.5. The Master's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.
- 6.2 Regarding whether the Master refused to remove/revoke the appointment of the provisional liquidator and to appoint a joint liquidator, I find that:**
 - 6.2.1. The allegation that the Master refused to remove/revoke the appointment of the provisional liquidator and to appoint a joint liquidator is substantiated.
 - 6.2.2. The Master refused to remove the provisional liquidator and stated that she is *functus officio*.

- 6.2.3. The Master has power conferred by legislation, the regulatory duty to investigate the allegations levelled against the provisional liquidator and to act thereupon. Section 379 (1) & (2) of the Companies Act clearly provides that the Master may remove a liquidator from office, or effect such removal, through the court; on the grounds listed therein. This power is further reinforced by section 389(6) of the Companies Act, which empowers the Master to restrict the powers of a liquidator and which powers the Master failed to enforce.
- 6.2.4. The Master indicated that the application to the Court for the extension of powers by the provisional liquidator cannot be seen to have been in the interest of ensuring sustainability of the company. The Master's allusion to such conduct being in contradiction of the preserving and maintaining objective *vis-à-vis* his failure to act in this regard as per the Company's Act; amounts to a regulatory failure.
- 6.2.5. The Master's conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector and improper conduct as envisaged in section 182(1) of the Constitution.
- 6.3. Regarding whether the Minister unduly delayed and failed to determine a policy providing for matters relating to liquidators, I find that:**
- 6.3.1 The allegation is substantiated;
- 6.3.2 There was no policy determined by the Minister in place when the Master appointed the provisional liquidator herein;
- 6.3.3 It is noted that the Minister determined a policy with a commencement date of 31 March 2014, it is also noted that the said policy was imposed with an interdict on 13 January 2015 in the case of *SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & Others and another application* 2015 (2) SA 430 (WCC).
- 6.3.4 The Minister unsuccessfully challenged this decision in the Supreme Court of Appeal decision in *Minister of Justice and Constitutional Development and Another*

v South African Restructuring and Insolvency Practitioners Association and Others (693/15) [2016] ZASCA 196 and the Constitutional Court decision in Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others [2018] ZACC 20.

- 6.3.5 The Judicial Matters Amendment Act specifies the necessity of a policy when appointing provisional liquidators, highlighting the need for promoting *consistency, fairness, transparency*. The absence of policy gave rise to lack of uniformity in the application of the law by the respective offices of the Masters.
- 6.3.6 The failure by the Minister to timeously issue, directives of a proposed policy to be followed in the appointment of liquidators amounts to gross maladministration envisaged in section 6(4)(a)(i) of the Public Protector and improper conduct as envisaged in section 182(1) of the Constitution.
- 6.4 Regarding whether the Complainant suffered any prejudice as a result of the alleged conduct of the Master I find that:**
- 6.4.1 The allegation is substantiated;
- 6.4.2 The failure by the Master to look into the freezing of assets of the subsidiary companies that had not been provisionally liquidated or the application for the extension of powers and responding that the Master was *functus officio* caused the Complainant improper prejudice, in the form of frustration, inconvenience and distress.
- 6.4.3 The failure by the Master to consider the complaint of freezing assets of the subsidiary companies that had not been provisionally liquidated or the application for the extension of powers of the Provisional liquidators amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector and improper conduct as envisaged in section 182(1) of the Constitution.

7. REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred, while addressing systemic deficiencies in the Masters of the High Courts, is the following:

- 7.1 The forty-eight (48) hour practice is to be abolished and refrained from further use by the Master of the South Gauteng High Court within one (1) month from the date of this report.
- 7.2 The Master of the South Gauteng High Court must, within three (3) months from the date of this report, develop and implement directives and guidelines regarding the exercise of the Master's discretionary powers in the appointment of provisional liquidators;
- 7.3 The Master of the South Gauteng High Court must within one (1) month from date of the Report, issue a written apology to the Complainant, apologising for the delay and /or his failure to deal with the conduct of the provisional liquidator;
- 7.4 The Minister of Justice and Correctional Services must within six (6) months from the date of this report, determine the policy regulating the appointment process of the provisional and final Liquidators, in terms of section 158(2) of the Insolvency Act and in accordance with the constitutional court judgment in *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*. The Policy should also regulate the process for the removal of the provisional and final liquidator by Master of the High Court.

8. MONITORING AND IMPLEMENTATION

- 8.1 The Master is to submit an implementation plan indicating how the remedial action referred to above will be implemented, within 30 days from the date of this final report.
- 8.2 The Minister of Justice and Correctional Services must, within thirty (30) days from the date of this Report, submit an implementation plan indicating how the remedial actions referred to 7.4 above will be implemented.
- 8.3 The submission of the implementation plan and the implementation of my remedial actions shall, in the absence of a Court Order directing otherwise, be complied with within the period prescribed herein.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 19/12/2018