

**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**



**REPORT NO. 129 OF 2019/2020
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***"Allegations of maladministration, abuse of power and tender irregularities by the
Transport, Education and Training Authority"***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION,
ABUSE OF POWER AND TENDER IRREGULARITIES BY THE TRANSPORTATION
EDUCATION AND TRAINING AUTHORITY**

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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 (the Constitution) and section 8(1) of the Public Protector Act 1994 (Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration, abuse of power, interference with the supply chain management (SCM) processes and contravention of the selection and recruitment policies by certain senior officials of the Transport Education Training Authority (TETA), listed as a national public entity under Schedule 3 of the Public Finance Management Act 1 of 1999.
- (iii) The complaint was lodged by Ms SG Sibambato, a former TETA Manager: Corporate Services (the Complainant), who was employed by TETA from 05 April 2009.
- (iv) **The Complainant alleged that:**
 - (a) The TETA irregularly awarded Nkwame Mahuma Consulting (Nkwame Consulting) a contract for the provision of Corporate Governance Compliance Services without following Treasury Regulations and TETA's SCM processes and procedures;
 - (b) The TETA irregularly procured Deloitte to conduct IT infrastructure technical assessment for the design of IT projects, notwithstanding advice from the Complainant who was the Bid Adjudication Committee (BAC) Chairperson, the Treasury Department and TETA's Consultant Phakamole;

- (c) Furthermore, the TETA's Chief Executive Officer, Ms Maphefo Anno-Frempong, previously known as Ms Matlala, (the CEO), misrepresented the facts during the TETA's Board meeting held on 31 March 2010, stating that the procurement process and subsequent awarding of a contract to Deloitte were properly done;
- (d) An employee of Deloitte, Mr Thokozani Kubheka, was appointed as a consultant Chief Financial Officer (the CFO) at the TETA. He procured the services of Deloitte Property Division for rectification of the TETA's utility account and further provided advice on a building donated by Transnet which is situated at Oxford Road, without following SCM processes, Public Finance Management Act, 1999 (the PFMA) and Treasury Regulations;
- (e) The CEO interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube, which was recommended by a consultant from 21st Century, despite procurement processes having already been effected. The consultant confronted the Complainant in the presence of the Chief Operating Officer (the COO) and she was questioned on reason/s for her not inviting the company that was recommended by the CEO;
- (f) The TETA had a contract with Mondial IT Solutions Company and continued to utilise the service of Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solutions Company;
- (g) The TETA further appointed Mr Rob Mudau, a Labour Consultant, to chair the disciplinary enquiry of Ms T Coldwell, a Manager employed in the Durban office, without following TETA's SCM Policy;
- (h) The CEO interfered and expressed interest in the recruitment and selection of the following staff members: Mr Obakeng Mmono, the Personal Assistant to the CEO; Mr P Batlang, the former Corporate Services Manager; Mr

Mogomotsi Kgantsi, the Chief Operations Officer (the COO), Mr Dladla, Executive Officer, Freight Handling Chamber; and Mr ME Maluleke, the Procurement Officer;

- (i) The Complainant was dismissed on framed charges in that she was alleged to have interfered with the job specifications of the position of the Procurement Officer during the recruitment for this post; and
- (j) The Complainant was dismissed on framed charges for reporting the conduct of the CEO to the Minister of Higher Education.
- (v) The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on such conduct and to take appropriate remedial action; and in terms of Section 6 (5) of the Public Protector Act, 1994 (Public Protector Act), that regulates the manner in which power conferred by section 182 of the Constitution may be exercised in respect of public entities.
- (vi) In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect¹. The Constitutional Court further held that: *"When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."* of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4)(a) of the Public Protector Act, which

¹ [2016] ZACC 11; 2016 (3)SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in state affairs, or in the public administration in any sphere of government.

(vii) Based on analysis of the complaint, the following issues were identified and investigated:

- (aa) Whether the TETA irregularly awarded Nkwame Mahuma Consulting a contract for the provision of Corporate Governance Compliance Services without following its Supply Chain Management processes and procedures and Treasury Regulations;
- (bb) Whether the TETA irregularly appointed Deloitte to conduct an IT infrastructure technical assessment for the design of IT projects without following its Supply Chain Management processes and procedures and Treasury Regulations;
- (cc) Whether the conduct of Mr Thokozani Kubheka, a consultant Chief Financial Officer at the TETA who was also an employee of Deloitte, in procuring the services of Deloitte Property Division for rectification of the TETA's utility account, amounted to a conflict of interest and violation of the TETA's Supply Chain Management processes and procedures and Treasury Regulations;
- (dd) Whether the TETA irregularly appointed Mr Rob Mudau, a Labour Consultant, to preside over the disciplinary enquiry of Ms T Coldwell, the TETA's Manager at the Durban office, without following the TETA's Supply Chain Management Processes and Procedures;

- (ee) Whether the CEO improperly interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube despite procurement processes having been already effected;
- (ff) Whether the TETA improperly proceeded to utilize the services of Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solution Company;
- (gg) Whether the CEO improperly interfered and expressed interest in the recruitment and selection of the following TETA personnel:
 - (a) Mr P Batlang; Corporate Services Manager
 - (b) Mr O Mmono; Personal Assistant to CEO
 - (c) Mr M Kgantsi; Chief Operating Officer
 - (d) Mr L Dladla; Executive Officer: Freight Handling Chamber
and
 - (e) Mr ME Maluleke: Procurement Officer.
- (hh) Whether the TETA improperly dismissed the Complainant based on framed charges; and
- (ii) Whether the Complainant or the South African taxpayer was prejudiced by the conduct of the TETA in the circumstances.
- (viii) Key laws and policies taken into account to determine if there had been improper conduct and maladministration by the TETA and prejudice to the Complainant were principally those imposing administrative standards that

should have been complied with by the TETA and or its officials, are the following:

- (aa) The Constitution, 1996
- (bb) The Public Finance Management Act 1 of 1999 (PFMA).
- (cc) Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the PFMA.
- (dd) The TETA's Supply Chain Management Processes and Human Resource Policy and Procedure Manual.
- (ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(a) Regarding whether the TETA irregularly awarded Nkwame Mahuma Consulting a contract for the provision of Corporate Governance Compliance Services without following the TETA's Supply Chain Management Processes and Procedures and Treasury Regulations.

- (aa) The allegation that the TETA irregularly awarded Nkwame Mahuma Consulting a contract for the provision of corporate governance compliance services without following the TETA's supply chain management processes and procedures and Treasury Regulations, is substantiated.
- (bb) The contract was awarded to Nkwame Mahuma Consulting without following an open tender process. The TETA failed to comply with Section 217 of the Constitution of the Republic of South Africa, 1996 in procuring the services of Nkwame Mahuma Consulting. Section 217 provides that *"government*

procurement systems must be fair, equitable, transparent, competitive and cost-effective"

- (cc) The TETA failed to comply with National Treasury Practice Note 8 of 2007/2008 and Clause 5.2.32 of the TETA's SCM policy in that it was not impractical to invite competitive bids. Evidence provided indicates that there was no urgency nor an emergency in the circumstances.
- (dd) The TETA did not comply with National Treasury Practice Note 8 and the TETA's SCM policy Clause 7.4 in that the procurement was above the prescribed threshold. Evidence provided indicated that the procurement was for R687 078.00 which necessitated the invitation of bids.
- (ee) The extension of the Contract and the expenditure was irregular as there cannot be an assessment in terms of value to the TETA since there was no competitive bidding process followed in terms of Treasury Regulations. The Board ought to have taken disciplinary action against the Complainant, however it forfeited its right to institute the disciplinary action as per the Settlement Agreement that was entered into between the Board and the CEO under Labour Court case number J2240/12. The Board did not pursue any disciplinary action to conclusion within the stipulated timeframes incorporated therein. The Board instead appointed a task team termed 'Expanded Task Team' comprising of the Chairperson of the Board, the Late Mr June Dube, and members Mr Wyndham Evans, Ms Trudy Sebastian and Mr Geoff Jacobs. The Expanded Task team found that the documents and explanation provided by the CEO justified her actions regarding the procurement process that was approved.
- (ff) The TETA's conduct in awarding the Contract to Nkwame Mahuma Consulting constitutes 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.

- (b) **Regarding whether the TETA irregularly appointed Deloitte to conduct an IT infrastructure technical assessment for the design of IT projects without following its Supply Chain Management processes and procedures and Treasury Regulations.**
- (aa) The allegation that the TETA irregularly appointed Deloitte to conduct IT infrastructure technical assessment for the design of IT project without following SCM processes and Treasury Regulations, is substantiated.
- (bb) The CEO approved the closed / limited bidding process and the reasons provided cannot be justified. The CEO authorised and submitted deviations to the Board, who approved such deviations. The CEO is an Office bearer and the Accounting Officer of the TETA and is as such accountable in ensuring compliance with the legislative prescripts, regulations and policies. Clause 11 of the TETA's SCM Policy stipulates that:
- "Above the estimated value of R500 000 00 (VAT inclusive), is an open tender. Accounting Officer should invite all competitive bids from all procurement above R500 000.00."*
- (cc) It is noted that the CEO of the TETA, as the accounting officer, failed to compile a report within ten (10) working days to the relevant Department of Higher Education and Training (the DHET), Treasury and the Auditor General with regard to this deviation as required in terms of National Treasury Practice Note 8 of 2007/2008 at Paragraph 3.4.3 and in terms of TETA's SCM Policy clause 6.2.2.29(2).
- (dd) The CEO of the TETA also failed to include the description of goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed bidding process except to rely on the advice of Mondial IT Solutions. Furthermore, she failed to indicate how early delivery was key in this case, how it was impractical or impossible for the

TETA to pursue a competitive bid process as well as how this situation could be classified as urgent.

- (ee) The Expanded Task Team found that the documents and explanation provided by the CEO justified her actions regarding the procurement process that was approved.
- (ee) The TETA's conduct in approving a closed / limited bidding process without ensuring compliance with the applicable legislation and Treasury guidelines, constitutes 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.
- (c) **Regarding whether the conduct of Mr Thokozani Kubheka, a consultant Chief Financial Officer at the TETA who was also an employee of Deloitte, in procuring the services of Deloitte Property Division for rectification of the TETA's utility account, amounted to a conflict of interest and violation of the TETA's Supply Chain Management processes and procedures and Treasury Regulations.**
- (aa) The allegation that there was a conflict of interest in Mr Thokozani Kubheka, a consultant CFO at the TETA, who was also an employee of Deloitte, in procuring the services of Deloitte Property Division for rectification of the TETA's utility account without following SCM processes and Treasury Regulations, is not substantiated.
- (bb) Deloitte Property Division did not render any service in terms of the acceptance of the quotation signed by the COO Mr Kgantsi on behalf of the TETA and Deloitte in terms of the Deviation.
- (cc) The TETA's conduct especially that of the CEO does not 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.

- (d) Regarding whether the TETA appointed Mr Rob Mudau, a Labour Consultant to chair the disciplinary enquiry of Ms T Coldwell, a Manager employed in the Durban office, without following the TETA's Supply Chain Management Processes and Procedures.**
- (aa) The allegation that the TETA appointed Mr Rob Mudau, a labour consultant to chair the disciplinary enquiry of Ms T Coldwell, a manager employed in the Durban office without following the TETA's Supply Chain Management Processes and Procedures, is substantiated.
- (bb) The TETA failed to follow its SCM policy and the Deviation and approval for payment was approved by the Board. The TETA's conduct especially that of the CEO in awarding the Contract to Rob Mudau constitutes 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.
- (e) Regarding whether the CEO interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube despite procurement processes having been already effected.**
- (aa) The allegation that the CEO interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube despite procurement processes having been already effected, is not substantiated.

- (bb) There is no evidence supporting the Complainant's contention that the CEO interfered or expressed an interest in procuring the services of a company called S-Cube. Further, there is no evidence of the CEO influencing the procurement processes of the TETA's HR Integrated systems.
- (cc) I am unable to make a finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (f) **Regarding whether the TETA continued to utilise the services of Mr Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solution Company.**
- (aa) The allegation that the TETA continued to utilise the services of Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solutions Company, is not substantiated.
- (bb) There is no evidence submitted that substantiates this allegation.
- (cc) I am unable to make a finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act
- (g) **Regarding whether the CEO interfered and expressed interest in the recruitment and selection of the following personnel:**

Mr P Batlang: Corporate Services Manager
- (aa) The allegation that the CEO irregularly appointed the late Mr P Batlang and that she further confessed to the Complainant that Mr Batlang was "her person" and that they previously worked together in the North West Department of Transport, is not substantiated.

- bb) The TETA's recruitment processes was followed with pre-screening and the scores together with the Competency Results reveal that Mr Batlang received the highest percentage. There is no evidence submitted that substantiates the allegation that the CEO displayed bias towards the appointed candidate.
- (cc) There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Mr Obakeng Mmono: Personal Assistant to the CEO

- (aa) The allegation that the CEO irregularly appointed Mr Obakeng Mmono as her personal assistant, is not substantiated.
- (bb) The CEO was part of a panel of interviewers which included the Complainant as Corporate Services Manager and Mr Mmono was selected as the best candidate for the position of PA to the CEO. Mr Mmono was previously employed by the Department of Transport in the North West. Section 4.4 of the TETA's Recruitment Policy dated 28.2.2008 allows for equal treatment of both internal and external candidates.
- (cc) There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act

Mr Mogomotsi Kgantsi: Chief Operating Officer

- (aa) The allegation that Mr M Kgantsi was irregularly appointed to the position of Chief Operating Office, is not substantiated as there is no evidence indicating that the recruitment process was flawed.

- (bb) There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Mr L Dladla: Executive Officer: Freight Handling Chamber

- (aa) The TETA Recruitment Policy have been complied with in respect of the processes followed for the appointment of Mr L Dladla to the position of Executive Officer: Freight Handling Chamber in Durban. There is no indication that the CEO interfered with the appointment of Mr Dladla to the said post. The allegation is not substantiated.
- (bb) There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act

Mr ME Maluleke: Procurement Officer

- (aa) The allegation that the CEO unduly influenced the recruitment of the Procurement Officer, Mr ME Maluleke, is not substantiated.
- (bb) The CEO was on maternity leave and she submitted that the TETA's Recruitment and Selection Policy and processes was followed. According to available evidence Mr Maluleke was interviewed for the post on 07 July 2009 and had scored the highest 207 followed by Ms MN Modudu. The Complainant herself was one of the interview panelists. The internal candidate Ms Skosana was not successful and the position was awarded to Mr Maluleke. The delay in appointing the successful candidate was due to the adjustment of the procurement officers' salary which was found not to be market related and required the Board's approval.

- (cc) There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (h) **Regarding whether the TETA improperly dismissed the Complainant based on framed charges:**
 - (aa) The allegation that the TETA improperly dismissed the Complainant based on framed charges, is not substantiated.
 - (bb) The TETA served the Complainant with a notice to attend a disciplinary hearing on 27 February 2011. The Chairperson of the disciplinary hearing found the Complainant guilty of six of the seven charges with the exception of the charge of altering the job specification for the Procurement Officer post.
 - (cc) The Complainant took this matter to the CCMA and it was found that the dismissal by the TETA was fair. It therefore cannot be said that the Complainant was dismissed on framed or fabricated charges.
 - (dd) There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act
- (i) **Regarding whether the Complainant and the South African taxpayer suffered prejudice as a result of the alleged improper conduct of the CEO.**
 - (aa) The allegation that the South African taxpayer was prejudiced by the alleged improper conduct of the CEO, is substantiated.
 - (bb) The CEO's failure to comply with the TETA's procurement processes outlined in the Constitution, Treasury Regulations, the TETA's Policy and SCM Guide

in the procurement and appointment of Deloitte to conduct IT infrastructure technical assessment for the design of IT project and Mr Mudau of Global Competencies Development for the chairing of Ms Coldwell's disciplinary hearing is prejudicial to the South African taxpayer in that the deviation processes that she followed prevented the TETA from accessing a wide spectrum of potential service providers.

- (cc) The allegation that the TETA brought trumped up and fabricated charges against the Complainant as a result of her highlighting procurement irregularities, is not substantiated. The Complainant was not improperly prejudiced in the TETA's compliance with its disciplinary policy in taking disciplinary action against her.
- (x) **The appropriate remedial action that I am taking in pursuit of section 182(1) (c) of the Constitution is the following:**
 - (a) **The Minister of Higher Education must:**
 - (aa) Take cognisance of the improper conduct and findings of maladministration of the TETA Board and senior officials.
 - (bb) Ensure that appropriate disciplinary action is taken in terms of section 84 of the PFMA against the remaining Board members.
 - (cc) Further ensure that the implementation of the remedial action is taken in compliance with section 182(1)(c).

(b) The Chairperson of the TETA Board must ensure that

- (aa) Within three (3) months of date of this report, conduct an evaluation into the effectiveness of all Procurement and Human Resource policies to determine systemic deficiencies, ensure that all relevant staff is trained on the TETA's procurement policies and legislative prescripts governing procurement in the public sector to prevent recurrences of transgressions identified in this report.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, ABUSE OF POWER AND TENDER IRREGULARITIES BY SENIOR OFFICIALS OF THE TRANSPORTATION EDUCATION AND TRAINING AUTHORITY

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of the investigation:
 - 1.2.1 The Minister of Higher Education, the Honorable Dr Blade Nzimande;
 - 1.2.2 The Chairperson of the TETA Board, Ms Nomagcisa Tsipa-Sipoyo
 - 1.2.3 The Chief Executive Officer, Ms Ms Maphefo Anno-Frempong nee Matlala.

2. THE COMPLAINT

- 2.1 The complaint was lodged on 13 May 2011, by Ms SG Sibambato, a former TETA Manager: Corporate Services (the Complainant), who was employed by the TETA from 5 April 2009. In the main, the allegations against the TETA are, *inter alia*, as follows:
 - 2.1.1 The TETA irregularly awarded Nkwame Mahuma Consulting (Nkwame Consulting) a contract for the provision of Corporate Governance Compliance

Services without following Treasury Regulations and TETA's SCM processes and procedures;

- 2.1.2 The TETA irregularly procured Deloitte to conduct IT infrastructure technical assessment for the design of IT projects, notwithstanding advice from the Complainant who was the Bid Adjudication Committee (BAC) Chairperson, the Treasury Department and the TETA's Consultant Phakamole;
- 2.1.3 Furthermore, the TETA's Chief Executive Officer, Ms Maphefo Anno-Frempong, previously known as Ms Matlala, (the CEO), misrepresented the facts during the TETA's Board meeting held on 31 March 2010, stating that the procurement process and subsequent awarding of a contract to Deloitte were properly done;
- 2.1.4 An employee of Deloitte, Mr Thokozani Kubheka, was appointed as a consultant Chief Financial Officer (the CFO) at the TETA. He procured the services of Deloitte Property Division for rectification of the TETA's utility account and further provided advice on a building donated by Transnet which is situated at Oxford Road, without following SCM processes, Public Finance Management Act, 1999 (the PFMA) and Treasury Regulations;
- 2.1.5 The CEO interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube, which was recommended by a consultant from 21st Century, despite procurement processes having already been effected. The consultant confronted the Complainant in the presence of the Chief Operating Officer (the COO) and she was questioned on reason/s for her not inviting the company that was recommended by the CEO;
- 2.1.6 The TETA had a contract with Mondial IT Solutions Company and continued to utilise the service of Mr Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solutions Company;

- 2.1.7 The TETA further appointed Mr Rob Mudau, a Labour Consultant, to chair a disciplinary enquiry of Ms T Coldwell, a Manager employed in the Durban office, without following the TETA's SCM Policy;
- 2.1.8 The CEO interfered and expressed interest in the recruitment and selection of the following staff members: Mr Obakeng Mmono, the PA to the CEO; Mr P Batlang, the former Corporate Services Manager; Mr Mogomotsi Kgantsi, the Chief Operations Officer (the COO), Mr L Dladla, the Executive Officer, Freight Handling in the Durban Office; and Mr ME Maluleke, the Procurement Officer;
- 2.1.9 The Complainant was dismissed on framed charges in that she was alleged to have interfered with the job specifications of the position of the Procurement Officer during the recruitment for this post; and
- 2.1.10 The Complainant was dismissed on framed charges for reporting the conduct of the CEO to the Minister of Higher Education.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 Mandate of the Public Protector

- 3.1.1 The Public Protector is an independent constitutional institution established in terms of section 18(1) (a) of the Constitution to support and strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

- 3.1.2 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”.*

3.1.3 Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.1.4 The Public Protector's powers are regulated and amplified by the Public Protector Act, which states, among others, that Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purpose of an investigation.

3.1.5 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.² The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*³ The Court further confirmed the Public Protector's powers as follows:

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

³ *Supra* at para [73].

3.1.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

- a) 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);
- b) 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);
- c) 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) ;
- d) 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);
- e) 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);

- f) 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);
- g) She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d)); and
- h) “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).

3.1.6 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others*, North Gauteng High Court Case no 91139/2016 (13 December 2017), the Court held as follows:

- a) *“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. (Paragraphs 85 and 152)*
- b) *There is nothing in the Public Protector Act that prohibits 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 (paras 91 and 92)*

c) 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 (paras 100 and 101):

- I. Conduct an investigation;*
- II. Report on that conduct; and*
- III. To take remedial action.*

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

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

f) The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (Paras 107 and 108);

g) Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (Para 112)."

3.1.7 However, the Public Protector would like to emphasise that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature⁴. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of civil damages or sorry money given its adjudicative and judicial nature.

⁴ Sidumo et al vs Rustenburg Platinum Mines Limited et al, 2008(2) SA 24 (CC) at 235.

- 3.1.8 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter. TETA is a schedule 3A state owned entity and, consequently I have the requisite jurisdiction to investigate any conduct that is alleged or suspected to be improper or to result in any impropriety or prejudice.
- 3.1.9 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.
- 3.1.10 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar me from investigating. Instead, it is mainly *the interests of justice* that dictate whether I should investigate the matter or not. In this case, I submit that there is a huge public interest in the manner in which public administration or governing of public affairs are handled.

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on 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 recognises the Public Protector's authority to investigate and report her/his findings regarding any complaint lodged.

4.1.3 The TETA is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls within the ambit of the Public Protector's mandate. The jurisdiction of the Public Protector was not disputed by the TETA.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

- 4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?
- 4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeal⁷ (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.
- 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 or complied with by the government institutions that were under investigation to prevent maladministration and prejudice. In this case, key reliance was placed on institutions' comprehensive SCM Policies in addition to national laws, policies and guidelines.
- 4.2.4 My office's own institutional touchstones, being principles from previous reports, are always, and were also taken into account.
- 4.2.5 The enquiry regarding remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. 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 organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.2.6 In the case of conduct failure as was the case in the complaint investigated, remedial action seeks to right or correct identified wrongs while addressing

⁷ *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA)*,

any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.

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

4.3 The Investigation Process

- 4.3.1 The investigation process commenced with a preliminary investigation in terms of section 7(1) of the Public Protector Act, which included interviews and meetings with the Complainant, analysis of the relevant documentations; conducted research; consideration and application of the relevant laws, regulatory framework and jurisprudence,

- 4.3.2 The Public Protector conducted interviews with the CEO, Ms Anno-Frempong.

4.4 On the analysis of the complaint, the following issues were identified to inform and focus on the investigation:

- 4.4.1 Whether the TETA irregularly awarded Nkwame Mahuma Consulting a contract for the provision of Corporate Governance Compliance Services without following its Supply Chain Management processes and procedures and Treasury Regulations;
- 4.4.2 Whether the TETA irregularly appointed Deloitte to conduct an IT infrastructure technical assessment for the design of IT projects without following its Supply Chain Management processes and procedures and Treasury Regulations;
- 4.4.3 Whether the conduct of Mr Thokozani Kubheka, a consultant Chief Financial Officer at the TETA, who was also an employee of Deloitte, of procuring the

services of Deloitte Property Division for rectification of the TETA's utility account amounted to a conflict of interest and violation of the TETA's Supply Chain Management processes and procedures and Treasury Regulations;

4.4.4 Whether TETA irregularly appointed Mr Rob Mudau, a Labour Consultant, to preside over the disciplinary enquiry of Ms T Coldwell, the TETA's Manager at the Durban office, without following TETA's Supply Chain Management Processes and Procedures;

4.4.5 Whether the CEO improperly interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube despite procurement processes having been already effected;

4.4.6 Whether the TETA improperly proceeded to utilise the services of Mr Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solution Company;

4.4.7 Whether the CEO improperly interfered and expressed interest in the recruitment and selection of the following TETA personnel:

4.4.7.1 Mr P Batlang; Corporate Services Manager

4.4.7.2 Mr O Mmono; Personal Assistant to the CEO

4.4.7.3 Mr M Kgantsi; Chief Operation Officer

4.4.7.4 Mr L Dladla; and Executive Officer: Freight Handling Chamber

4.4.7.5 Mr ME Maluleke: Procurement Officer

4.4.8 Whether the TETA improperly dismissed the Complainant based on framed charges; and

4.4.9 Whether the Complainant and the South African taxpayer was prejudiced by the conduct of the TETA in the circumstances.

4.5 Key Sources of information

4.5.1 Correspondence and Meetings

- 4.5.1.1 Allegations letter sent via email dated 26 April 2012 from Public Protector addressed to the TETA.
- 4.5.1.2 Correspondence to and from the Complainant
- 4.5.1.3 Correspondence and meetings with the CEO Ms Anno-Frempong
- 4.5.1.4 Telephonic consultation with Mr Johan Smook
- 4.5.1.5 Correspondence and meeting with the Chairperson of the Board, the late Mr June Dube 24 February 2018
- 4.5.1.6 Meetings with the Complainant.
- 4.5.1.7 Section 7(9) Notices dated 7 August 2019 that were sent to the Minister of Higher Education Dr Nzimande, the Chairperson of the Board, Ms Nomaqcisa Tsipa-Sipoyo and the CEO, Ms Anno-Frempong, nee Matlala.
- 4.5.1.8 Acknowledgement of receipt and response from Ms Anno-Frempong to the Section 7(9) Notice received on 26 August 2019.

4.5.2 *Legislation and other legal prescripts*

- 4.5.2.1 The Constitution
- 4.5.2.2 The Public Protector Act
- 4.5.2.3 Public Finance Management Act 1, 1999 (PFMA) and Regulations
- 4.5.2.4 The TETA's Human Resource Manual
- 4.5.2.5 TETA's Supply Chain Policy

4.5.3 Case Law

- 4.5.3.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).
- 4.5.3.2 *President of the Republic of South Africa v Office of the Public Protector and Others*, Case no 91139/2016 [2017] ZAGPPHC 747.
- 4.5.3.3 *Sidumo et al vs Rustenburg Platinum Mines Limited et al*, 2008(2) SA 24 (CC) at 235.
- 4.5.3.4 *Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa* 1996(4) SA744 (CC) at 161.
- 4.5.3.5 *Public Protector versus Mail and Guardian*, 2011(4) SA 420 (SCA).
- 4.5.3.6 *Minister of Home Affairs et al vs Public Protector et al* 2017(2) SA 597 (GP).

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

5.1 Regarding whether the TETA irregularly awarded Nkwame Mahuma Consulting a contract for the provision of Corporate Governance Compliance Services without following its Supply Chain Management processes and procedures and Treasury Regulations:

Common cause issues

- 5.1.1 The TETA appointed Nkwame Consulting as per a letter of award signed by the CEO on 29 July 2010, for the provision of Corporate Governance Review of the TETA.
- 5.1.2 Nkwame Consulting was paid an amount of **R687 078.00** for work done in terms of its Corporate Governance Review contract.

Issues in dispute

- 5.1.3 The Complainant averred that the TETA appointed Nkwame Consulting without following Treasury Regulations and the TETA's SCM processes and procedures in that they did not procure the services through a tender process and furthermore, the procured service provider was not on the TETA's database.
- 5.1.4 In response to the allegations submitted per correspondence letters dated 26 April 2012 and subsequent follow up interview questions, the CEO responded by furnishing my investigation team with several arch-lever files containing documentary evidence. The CEO submitted to the then Chairperson of the Board, the late Mr June Dube, her response dated 15 August 2012, to the TETA's Notice to Suspend her, that Nkwame Consulting was appointed through direct negotiation. She indicated that the COO was mandated by the Office Bearers meeting on 25 June 2010 to draft Terms of Reference for conducting Corporate Governance Review. The following officials were present at the Office Bearers' meeting, the Chairperson was the late Mr Dube, Ms Mlotshwa, the Vice Chairperson, the CEO, the COO and the CFO Mr Kubheka. The CEO indicated that the scheduled meeting with the service providers for 27 July 2010 did not take place owing to diary conflicts and that the COO submitted a Deviation Motivation dated 29 June 2010 to the CEO for approval.

- 5.1.5 The Deviation Motivation dated 29 June 2010 was a motivation to request the CEO to approve the appointment of a service provider to conduct a review of the corporate governance framework in line with clause 5.10.6.3 of the National Treasury SCM Guide for Accounting Officers. The Deviation Motivation was signed by the CEO on 6 July 2010.
- 5.1.6 The CEO further submitted that Nkwame Consulting was an individually owned entity and in terms of clause 5.10.6.3 of the National Treasury SCM Guide for Accounting Officers, services may be procured from a sole consultant provided certain conditions are met.
- 5.1.7 The CEO submitted documentary evidence in the form of a Letter of Award to Nkwame Consulting dated 29 July 2010. The contents of this letter reflect that Nkwame Consulting was appointed after an invitation to bid, which was followed by a rigorous assessment and evaluation process. However, this is in direct contradiction to the response provided by Mr S Nduwana, the CFO of the TETA who indicated in a Management report dated 25 July 2012 which was addressed to the Auditor General (the AG), that a motivation for deviation dated 29 June 2010 from the normal procurement processes was prepared by the COO and approved by the CEO.
- 5.1.8 As per the Management Report dated 25 July 2012, the COO cited time constraints as the main reason in the motivation and confirmed that the TETA did not have a service provider for corporate governance review on their database. The request for the deviation dated 29 June 2010 was approved by the CEO on 6 July 2010 for work to commence in August 2010.
- 5.1.9 The CFO further indicated in response to the AG's audit finding of non-compliance with SCM processes, which would result in the irregular expenditure, that Nkwame Consulting CC was a sole proprietor and that they rendered the services to the TETA as an individual consultant as per the National Treasury SCM Guide for Accounting Authorities.

- 5.1.10 However, the AG's audit finding and recommendation was that the TETA did not have appropriate means in place to monitor compliance with laws and regulations. The AG recommended that a checklist be created to monitor compliance. Further that deviations above R500 000.00 had not been disclosed by the TETA. However, the AG did not make a finding of an irregular expenditure in the AG's report.

Application of the relevant legal prescripts

- 5.1.11 Section 217 of the Constitution provides that government procurement systems must be *"fair, equitable, transparent, competitive and cost-effective."*
- 5.1.12 Section 38 (1)(a)(iii) of the PFMA mandates an accounting officer of a department, trading entity or constitutional entity to ensure that the department, constitutional and trading entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
- 5.1.13 Furthermore, Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the PFMA, March 2005 provide in 16A3.2 that procurement must:
- "(a) be fair, equitable, transparent, competitive and cost effective;"*
- 5.1.14 In this case, the TETA secured the services of Nkwame Consulting through direct negotiation and a Deviation Memorandum that was approved by the CEO which was *not fair, equitable, transparent, competitive and cost-effective.*
- 5.1.15 The CEO further recorded in an appointment letter dated 29 July 2010 to Nkwame Consulting that the entity was appointed after a rigorous assessment and evaluation process. However the evidence at my disposal

clearly contradicts this assertion as the entity was appointed in terms of a Deviation Motivation thereby circumventing the core elements of the Constitution and Treasury Regulation in that there was no competitive bidding, no transparency and fairness, equity in terms of fair dealing and cost effectiveness in terms of obtaining value for money.

- 5.1.16 In compliance with its Constitutional obligation and with Treasury Regulation 16A3.1, the TETA established a SCM system for the acquisition of goods and service. Paragraph 6.2.2.11 of the TETA's SCM Policy, 2008, (p19) provides for public invitation for competitive bids as follows:

- “(1) The procedure for the invitation on open competitive bids, are as follows:*
- (a) Any invitation to prospective service providers to submit bids must be advertised in the Government Tender Bulletin and may be advertised as a public advertisement in newspapers commonly circulated locally, the website of the TETA or any other appropriate ways, for thirty (30) days.to fourteen (14) days, and*
- (b) the information contained in a public advertisement, must include –*
- (i) the closure date, time and venue for the submission of bids, which may not be less than 30 days in the case of transactions over R1 million (VAT included), or which are of a long term nature, or 14 days in any other case, from the date on which the advertisement is placed in a newspaper, subject to subparagraph 6.2.2.11(2);*
- (ii) a statement that bids may only be submitted on the bid documentation provided by TETA; and*
- (iii) date, time and venue of any proposed site meetings or briefing sessions.”*

- 5.1.17 Evidence at my disposal indicates that the services procured from Nkwame Consulting were not done in terms of paragraph 6.2.2.11 of the TETA's SCM

Policy. The services were, as evidence revealed, procured through a deviation from the normal procurement process in line with paragraph 6.2.2.29 of the TETA's SCM Policy.

- 5.1.18 Paragraph 3.4.3 of the National Treasury Practice Note 8 of 2007/08 Supply Chain Management: *Threshold values for the procurement of goods, works and services by means of petty cash, verbal/written price quotations or competitive bids* regulates, *inter alia*, urgent, emergency or sole supplier cases, and provides as follows:

"Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process."

- 5.1.19 As noted in Treasury Regulation 16A6.4 procurement other than by means of competitive bidding is permissible in certain circumstances, viz, in urgent and emergency cases an invitation to bid may be dispensed with. There is no evidence submitted by the CEO motivating the negative consequences that would arise should the services be obtained through the normal invitation to bid processes. The value of the services provided in this instance was less than R1 million.

5.1.20 Clause 5.2.32 of the TETA's SCM Policy provides that:

"The CEO may dispense with the official procurement process established by this policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only in an emergency, if such goods or services are procured or available from single provider only, for the acquisition of specialized goods or services where specifications are difficult to compile, in any other exceptional case where it is impractical or impossible to follow the official procurement process."

5.1.21 The CEO submitted a Motivation for Deviation dated 29 June 2010 stating that following on the establishment of a new Board and its standing committees, the Board members were subjected to a comprehensive corporate governance training and a need was identified to review the overall corporate governance framework within the organization. The specific objective was to source and contract the services of a corporate governance specialist to conduct an assessment of the effectiveness and adequacy of the governance structures, policies and processes to enhance good corporate governance practices and ethics.

5.1.22 It must be noted that the services of corporate governance are not only available from a single source provider. Further, it cannot be said that it would be difficult to compile the specifications of corporate governance services. The TETA's Motivation for Deviation further does not indicate reasons for it being impractical or impossible to follow official procurement processes. Furthermore, evidence provided indicate that there was no urgency nor an emergency in the circumstances.

5.1.23 Clause 3.4.1 of the National Treasury Practice Note 8 of 2007/2008 indicates that accounting officers should invite competitive bids for all procurement above R500 000.00.

- 5.1.24 In terms of clause 7.4 of the TETA's SCM Policy, an accounting officer should invite bids for all procurement above R500 000.00 and the 90/10 preference system for the acquisition of goods or services with rand value of R500 000.00 applies.
- 5.1.25 The TETA did not comply with National Treasury Practice Note 8 and the TETA's SCM Policy in that the procurement was above the prescribed threshold. Evidence provided indicates that the value of the procurement was R687 078.00, which necessitated the invitation of bids.
- 5.1.26 With reference to the CEO's use of single source selection of Nkwame Mahuma Consulting, the relevant paragraphs 5.10.5 and 5.10.6 as per the National Treasury SCM Guide for Accounting Officers are noted hereunder:

"5.10.5 Single-source selection

5.10.5.1 Single-source selection of consultants does not provide the benefits of competition in regard to quality and cost and lacks transparency in selection and could encourage unacceptable practices. Therefore, single-source selection should be used only in exceptional cases. The justification for single-source selection should be examined in the context of the overall interests of the client and the project.

*5.10.5.2 Single-source selection may be appropriate only if it presents a clear advantage over competition:
for tasks that represent a natural continuation of previous work carried out by the firm; where a rapid selection is essential (for example, in an emergency operation); for very small assignments; or when only one firm is qualified or has experience of exceptional worth for the assignment.*

5.10.5.3 The reasons for a single-source selection should be recorded and approved by the accounting officer/authority or his/her delegate prior to the conclusion of a contract”⁸.

5.10.6.3 Individual consultants should be selected on the basis of their qualifications for the assignment. They may be selected on the basis of references or through comparison of qualifications among those expressing interest in the assignment or approached directly by the accounting officer / authority. Individuals employed by the accounting officer / authority should meet all relevant qualifications and should be fully capable of carrying out the assignment. Capability is judged on the basis of academic background, experience and as appropriate, knowledge of the local conditions, such as local language, culture, administrative system and government organization.

5.1.27 The CEO did not submit any evidence to substantiate in this case that a single source presented a clear advantage over competition.

5.1.28 The Accounting Authority of the TETA is also enjoined in terms of section 51(1)(a)(iii) of the PFMA, to ensure that the public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. The Auditor General (AG) found that the deviations above R500 00-00 were not disclosed by the CEO and was in contravention of the TETA's SCM Policy paragraph 6.2.2.29(2) and further that in terms of paragraph 6.2.2.29(1)(a) and (b) must be reported to the Board at the next Board meeting. It must also be recorded in the Annual Financial Statement (AFS) as a note. The CFO responded to the finding of non-disclosure of the deviations by stating that the paragraph 6.2.2.29(1) and (2) as noted in the SCM is under review and will be amended as it is being confused with irregular expenditure and fruitless and expenditure which must be reported in the AFS.

⁸ National Treasury SCM Guide for Accounting Authority 2004

- 5.1.29 Evidence submitted during the course of this investigation by the CEO revealed further that the TETA Board appointed OMA Chartered Accountants Inc. on 31 May 2011 to investigate transgressions into SCM procurements processes under the stewardship of the CEO. The draft report dated 30 January reveals that the deviation was not justified and the expenditure must be regarded irregular. Further that the TETA should consider disciplinary action against the CEO and COO for irregular expenditure.
- 5.1.30 The CEO, in response to my Notice issued to the TETA on 12 August 2019 in terms of section 7(9) of the Public Protector Act, submitted that the Complainant was in charge of procurement as she was the Corporate Service Manager. Further that the Board sanctioned certain deviations in the procurement of Nkwame Consulting for Corporate Governance Review services, hence she did not participate in any wrongdoing with regard to the flouting of the TETA's procurement processes.
- 5.1.31 The CEO as the accounting officer of the TETA, is responsible for any non-compliance to the entity's governance instruments inclusive of the regulatory and legislative prescripts governing procurement for the entity.
- 5.1.32 It is also noted that the TETA Board in compliance with the recommendation of OMA report and in consultation with the Department of Higher Education and Training did take a resolution to commence with disciplinary action against the CEO. The CEO was suspended on 21 August 2012. However the CEO instituted a civil action against the Board and a Settlement Agreement was signed between the parties, setting aside the suspension.
- 5.1.32.1 The essential terms of the agreement were that the TETA would institute disciplinary action against the CEO within fourteen (14) days, failing which the TETA will abandon or waive any right to do so in future; Further no such disciplinary action would take place without first going through a mediation/conciliation; If no such disciplinary action is taken within 14 days,

the CEO to return to work immediately (after lapse of 14 days); If disciplinary action is taken then it must be concluded by 30 September 2012, failing which the CEO will return to work on 01 October 2012. The Board did not go through the disciplinary process within the prescribed timeframe and ultimately appointed an Expanded Task Team comprising of the Chairperson of the Board, the Late Mr June Dube, and members Mr Wyndham Evans, Ms Trudy Sebastian and Mr Geoff Jacobs which found that the documents and explanation provided by the CEO justified her actions regarding the procurement process that she had approved.

Conclusion

- 5.1.33 The evidence canvassed above clearly reveals that the TETA did not comply with the Constitution, Treasury Regulation Practice Notice 2007/8 and the TETA's SCM processes in procuring the services of Nkwame Mahuma Consulting for the provision of Corporate Governance Review for the organisation through deviation from normal procurement processes as was motivated by the COO and approved by the CEO.
- 5.1.34 The Board did not conclude any formal disciplinary action against the CEO as recommended by the OMA investigation and in terms of the Settlement Agreement the Board had subsequently concluded with the CEO. The Board was precluded from taking any disciplinary action in future concerning this particular matter. The Board accepted the Expanded Task team conclusion that the allegations against the CEO were unfounded and it would be inappropriate to take any action against her.
- 5.2 Regarding whether the TETA irregularly appointed Deloitte to conduct an IT infrastructure technical assessment for the design of IT projects without following its Supply Chain Management processes and procedures and Treasury Regulations:**

Common cause issues

- 5.2.1 The CEO appointed Deloitte on 10 January 2010 to conduct IT infrastructure technical assessment for the design of the TETA's IT projects.
- 5.2.2 The Complainant was the chairperson of the Bid Evaluation Committee (BEC) and bids were opened in the presence of the BEC members.

Issues in dispute

- 5.2.3 The Complainant submitted correspondence to the COO on 14 October 2009 raising concerns with regard to the non-compliance with the TETA's SCM Policy that a limited bid was justifiable given that there were a limited number of vendors with specialised SETA solutions. The Complainant argued that the CEO was not justified in acceding to Mondial IT Solutions' advice/recommendations in adopting a limited or restricted bid process.
- 5.2.4 The Complainant further contended that the CEO misrepresented the facts during the TETA Board meeting held on 31 March 2010, by informing it that the procurement processes were followed in the awarding of a contract to Deloitte.
- 5.2.5 The CEO submitted to my office in response to the allegations presented to her on 26 April 2012, evidence in a form of a Motivation Memorandum dated 12 October 2009 that was addressed to all the office bearers within the TETA. The memorandum indicated that Mondial IT Solutions was requested to undertake an analysis of the TETA's IT infrastructure. Based on the recommendations of Mondial IT, the CEO requested an approval of a limited/single source bid approach given that there were few IT service providers in the market that had a SETA environment experience and expertise. The CEO further argued in the same motivation that the

unprecedented business disruptions at the TETA warranted the need for a close bidding process.

- 5.2.6 The CEO also confirmed in a letter from her attorney dated 4 August 2018 to my office in response to a request to provide further information that as Mondial IT Solutions was appointed as the TETA's IT advisor, she relied on their advice to procure by means of a limited or closed bidding process. Mondial IT Solutions drafted the specifications or terms of reference for the potential service providers. The selection of the service provider was done on a closed bid process and the Request for Proposal was sent to four companies. Of the four, only two responded namely, Deloitte and Praxis.
- 5.2.7 Presentations were made and the following final scores were allocated to the two bidders Praxis 79.69% and Deloitte was 82.66%.
- 5.2.8 The evaluation process was conducted on a 90/10 principle, as the value of the contract was above R500 000.00.
- 5.2.9 The Committee's recommendation was that Deloitte Consulting should be appointed.
- 5.2.10 The CEO indicated that as the bid amount exceeded her delegation, a memorandum for deviation was submitted to the Board for the approval of the limited bidding process. Further, that the BEC was chaired by the Complainant and the report recommended Deloitte with an overall score of 82.66%.
- 5.2.11 A report on comments and recommendation was submitted by Mondial IT Solutions and they supported Deloitte over Praxis on the basis that Deloitte was technically better and more comprehensive. The report was presented to the Board on 26 November 2009.

5.2.12 The Board awarded the contract to Deloitte thereby sanctioning the limited bidding process and the outcome of the evaluation of the two companies that tendered for IT integrated service. This is evidenced by the Board minutes number 77 dated 26 November 2009.

5.2.13 A letter of award to provide IT services for the TETA was signed by the CEO on 19 January 2010.

Application of the relevant legal prescripts

5.2.14 Section 217 of the Constitution provides that when an organ of state, whether in the provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

5.2.15 In compliance with its Constitutional obligation in terms of section 217 and in adherence with Treasury Regulation 16A3.1, the TETA has in place a SCM system for the acquisition of goods and service. Paragraph 6.2.2.11 of the TETA's SCM Policy, 2008,(p19) provides for public invitation for competitive bids. The process outlined indicates that there must be an invitation to bid advertised in the Government Tender Bulletin, in the local newspapers and the TETA website for a period of 30 days to 14 days. The Invitation to bid must further record the date, time and venue for the submission and closure of bids which in the case of transaction in excess of R2 million (vat included) may not be less than 30 days. It must also record the date time and venue for any site meetings or briefing sessions

5.2.16 The CEO did not follow the process outlined above, in that the evidence submitted indicated that the procurement of Deloitte was done in terms of a single source procurement process. The relevant paragraphs 5.10.5 and

5.10.6 as per the National Treasury SCM Guide for Accounting Officers are noted hereunder:

"5.10.5 Single-source selection

5.10.5.1 Single-source selection of consultants does not provide the benefits of competition in regard to quality and cost and lacks transparency in selection and could encourage unacceptable practices. Therefore, single-source selection should be used only in exceptional cases. The justification for single-source selection should be examined in the context of the overall interests of the client and the project.

5.10.5.2 Single-source selection may be appropriate only if it presents a clear advantage over competition:

for tasks that represent a natural continuation of previous work carried out by the firm; where a rapid selection is essential (for example, in an emergency operation); for very small assignments; or when only one firm is qualified or has experience of exceptional worth for the assignment.

5.10.5.3 The reasons for a single-source selection should be recorded and approved by the accounting officer/authority or his/her delegate prior to the conclusion of a contract"⁹.

5.10.6.3 Individual consultants should be selected on the basis of their qualifications for the assignment. They may be selected on the basis of references or through comparison of qualifications among those expressing interest in the assignment or approached directly by the accounting officer / authority. Individuals employed by the accounting officer / authority should meet all relevant qualifications and should be fully capable of carrying out the assignment. Capability is judged on the basis of academic background, experience and as appropriate,

⁹ National Treasury SCM Guide for Accounting Authority 2004

knowledge of the local conditions, such as local language, culture, administrative system and government organization

5.2.17 The CEO opted for a limited bidding process in contravention of the TETA's SCM prescripts. The CEO advanced the argument that she relied on the advice from Mondial IT Solutions as the TETA's IT advisors, to procure by means of a limited or closed bidding process in that there are a limited number of vendors with SETA environment experience and expertise. However, the justification is not supported as there are a number of IT service providers in the market and the failure to utilise an open tender process compromised the procurement process.

5.2.18 Paragraph 6.2.2.15 of the TETA SCM Policy of 2008 states that:

"An urgent case is where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical, however lack of prior planning should not be construed as urgent."

5.2.19 The CEO submitted that there were four different service providers providing the TETA with IT services and ultimately it became impractical and inefficient to address challenges in cases of a breakdown of services as each service provider blamed the other and failed to take responsibility which led to her taking the initiative to source a single IT service provider. This contention cannot be used to support the fact that the CEO should have ensured that there was proper planning in the re-evaluation of the IT services provided by the four service providers or alternatively to undertake a proper procurement process to consolidate all the services.

5.2.20 The National Treasury issued Practice Note 8 of 2007/2008 wherein, *inter alia*, urgent, emergency or sole supplier cases were further regulated. Paragraph 3.4.3 thereof provides as follows:

"Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotation or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers/authorities are required to report within ten (10) working days to the relevant Treasury and the Auditor General all cases where goods and services above the value of R1million were procured in terms of Treasury Regulation 16A6.4. The report must include the description of goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed bidding process".

- 5.2.21 It is noted that the CEO of the TETA, as the accounting officer, failed to compile a report within ten (10) working days to the relevant Department of Higher Education and Training (the DHET), Treasury and the Auditor General with regard to this deviation as required in terms of National Treasury Practice Note 8 of 2007/2008 at Paragraph 3.4.3 and in terms of the TETA's SCM Policy clause 6.2.2.29(2).
- 5.2.22 In February 2004, the National Treasury issued a document entitled "*Supply Chain Management: A Guide for Accounting Officers/Authorities*" (the SCM Guide). The purpose of the SCM Guide is to give guidance to accounting officers in fulfilling their roles within the SCM framework.
- 5.2.23 The SCM Guide at paragraph 4.7.5.1 notes that in urgent and emergency cases, an institution may dispense with the competitive bidding process, but must act in a manner that is in the best interest of the State.
- 5.2.24 The SCM Guide defines an "*emergency case*" as:

"A case where immediate action is necessary in order to avoid a dangerous or risky situation or misery.

An "urgent case" is defined as a case where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical. This definition is however, subject to the qualification that a lack of proper planning should not be constituted as an urgent case."

5.2.25 The CEO of the TETA also failed to include the description of goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed bidding process except to rely on the advice of Mondial IT Solutions. Furthermore, she failed to indicate how early delivery was key in this case, how it was impractical or impossible for the TETA to pursue a competitive bid process as well as how this situation could be classified as urgent.

5.2.26 The CEO, in her opting to utilise the limited bidding process, did not meet all the requirements for the deviation and further failed to demonstrate that this case was characterised by an urgent and emergency situation where it was either impossible or impractical to conduct the invitation of competitive bids.

5.2.27 In terms of section 50 of the PFMA, the CEO as the accounting officer and the TETA Board as the accounting authority of a public entity has to observe the following fiduciary duties:

"(1) The accounting authority for a public entity must—

- (a) ...*
- (b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;*
- (c) on request, disclose to the executive authority responsible for that public entity or the legislature to which the public entity is accountable, all material facts, including those reasonably discoverable, which in any way may*

influence the decisions or actions of the executive authority or that legislature; and

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

(2) A member of an accounting authority or, if the accounting authority is not a board or other body, the individual who is the accounting authority, may not—

(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act; or

(b) use the position or privileges of, or confidential information obtained as, accounting authority or a member of an accounting authority, for personal gain or to improperly benefit another person.

(3) A member of an accounting authority must—

(a) disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority; and

(b) withdraw from the proceedings of the accounting authority when that matter is considered, unless the accounting authority decides that the member's direct or indirect interest in the matter is trivial or irrelevant."

5.2.28 Section 83 of the PFMA stipulates that:

"(1) The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently—

(a) fails to comply with a requirement of section 50, 51, 52, 53, 54 or 55; or

(b) makes or permits an irregular expenditure or a fruitless and wasteful expenditure".

- 5.2.29 The CEO stated that she acted in the best interest of the TETA by opting for a limited bidding when she noted that there was a challenge with regard to the four companies taking ownership of the IT problems that the TETA encountered. However, in terms of ensuring good governance and in compliance with the TETA's constitutional obligation and SCM prescripts, she did not act in the best interest of the TETA.
- 5.2.30 The CEO in response to my section 7(9) Notice issued to the TETA as noted above submitted that the AG did not during its audit make any finding of "unauthorised, irregular or fruitless expenditure" with regard to the procurement of Deloitte IT. The TETA did not comply with National Treasury Practice Note 8 of 2007 /2008 and Clause 5.2.32 of the TETA's SCM policy in that it was not impractical to invite competitive bids.
- 5.2.31 The CEO's decision which is sanctioned by the TETA Board in the procurement of Deloitte via a limited / single source bid approach cannot be regarded as acting in the best interest of the TETA. Therefore the expenditure with regard thereto is regarded as irregular in terms of section 83 of the PFMA.

Conclusion

- 5.2.32 Based on the information and evidence assessed it can be concluded that the CEO and the Board did not appoint Deloitte in compliance with the applicable legal prescripts and prescribed SCM procedures.
- 5.3 Regarding whether the conduct of Mr Thokozani Kubheka, a consultant Chief Financial Officer at the TETA, who was also an employee of Deloitte, of procuring the services of Deloitte Property Division for rectification of the TETA's utility account amounted to a conflict of interest and violation of the TETA's Supply Chain Management processes and procedures and Treasury Regulations:**

Common cause issues

- 5.3.1 Mr Thokozani Kubheka acted as a consultant CFO at the TETA during 2010 and 2011 whilst employed by Deloitte.
- 5.3.2 Deloitte had a consultancy agreement with the TETA to provide Financial Management Services. The CFO advised the CEO that Deloitte Property Division could be approached to assist with the rectification of the Utility account and provide advice regarding the donated property by Transnet. A submission dated 20 August 2010 was drafted by the CFO and the Complainant motivating deviation for approval to procure the services of Deloitte to investigate and rectify the TETA's utility account with the City of Johannesburg and to provide advice on the donated property.
- 5.3.3 The Complainant contended that the TETA's SCM Policy in procuring the services of Deloitte property division was not followed in that there were no tender process followed.
- 5.3.4 The Complainant argued that the CEO also endeavored to influence her on how to structure the deviation motivation on procurements which appeared to be in contravention of the TETA's SCM Policy.
- 5.3.5 The CEO submitted that the Request for Approval of Deviation Motivation for the Rectification of the TETA Randburg Office Utility Account and the Advisory Services on Donated Property at Oxford Road was to invoke the CEO's authority in terms of paragraph 5.2.32(i) (SCM Policy 1 April 2009) to dispense with the official procurement processes and procure any required goods or services through any convenient process including direct negotiation but only in specific instances e.g. in the case of an emergency.
- 5.3.6 The CEO submitted evidence in the form of minutes of a meeting held with the Complainant on 8 October 2010 that due to a conflict of interest posed

by the CFO drafting the Request for Deviation, that the motivation be corrected and be drafted by the Complainant as Corporate Service Manager in order to mitigate the risk. The Deviation was accordingly signed and approved by the CEO on 20 August 2010.

- 5.3.7 On the same day of approval of the contract on 20 August 2010, Deloitte submitted a proposal to rectify the TETA's utility bill and provide advice on a donated property from Transnet situated at Oxford Road, Johannesburg.
- 5.3.8 Deloitte submitted a quotation for R28 336.00 for the transfer and donation of the property situated at Oxford Road, Johannesburg, and a proposal of accepting a forty percent (40%) of the savings for a settlement amount negotiated with the Municipality regarding the Utility Account which was accepted by the COO, Mr Kgantsi on 10 November 2010.
- 5.3.9 The motivation revealed that the deviation was an emergency situation which was necessary in the circumstances to dispense with the official procurement process established by the TETA's SCM Policy.
- 5.3.10 On perusing the documentary evidence submitted by the CEO in response to the Complainant's allegations sent to the TETA, I noted a representation from the CEO dated 15 August 2012 responding to the TETA's Notice to suspend her. In that letter the CEO contended that the motivation for deviation was justified on the basis that there was a very real threat from the City of Johannesburg Metropolitan Municipality (City of Joburg) in cutting off services to the TETA, as the utility account was unpaid when she was employed with the TETA in 2008. She further submitted that she negotiated with Deloitte to perform the work on a contingency basis ensuring that there would not be any disconnections. Ultimately the TETA paid the arrears owing to the City of Joburg and the contract ended without the TETA having to pay Deloitte for the project as it was negotiated on a contingency basis.

Application of the relevant legal prescripts

- 5.3.11 Section 217 of the Constitution mandates all organs of state when contracting for goods or services, to do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- 5.3.12 The CEO in submitting a Deviation Motivation to procure Deloitte Property Division services to assist with the TETA's utility account did not comply with the Constitution. The procurement was flawed in that it was not done in a fair equitable, transparent, competitive and cost effective manner.
- 5.3.13 Section 38 of the PFMA provides that: *"Accounting Authorities must ensure that the public entity has and maintains an appropriate procurement provisioning system which is fair, equitable, transparent, competitive and cost-effective"*.
- 5.3.14 The TETA has established an SCM provisioning system that regulates the procurement processes that is in line with the Constitution, Treasury Regulation and PFMA. TETA's SCM policy, 1 April 2009 paragraph 5.2.32 provides for the CEO to dispense with the official procurement processes only in the following instances:
- "i) In an emergency;*
 - ii) If the goods or services are produced or available from a single provider only;*
 - iii) For the acquisition of specialized goods or services where specifications are difficult to compile;*
 - iv) In any other exceptional case where it is impractical or impossible to follow the official procurement processes."*

- 5.3.15 The CEO submitted that the outstanding arrears on the TETA's utility account and the real threat of cut offs from the City of Joburg warranted procurement through a Deviation Motivation. As noted above, the SCM policy makes provision for procurement in the event of an emergency or where it is impractical to follow official procurement processes.
- 5.3.16 The fact that the TETA failed to manage its payments to the City of Joburg resulting in arrears, cannot be regarded as an emergency situation that exonerates the CEO's failure to follow proper procurement processes and her use of the Deviation process as outlined in the SCM policy paragraph 5.2.32 above.
- 5.3.17 In terms of clause 10.1.3 of the TETA's SCM policy (1 April 2009), the product and services valued between R10 000.00 to R30 000.00, the following procedure will apply:
- i) The end user must complete a motivation letter to the respective manager*
 - ii) The manager/executive officer must sign the motivation letter.*
 - iii) The manager must complete the specification for the service or product*
 - iv) Manager to identify potential providers and obtain the necessary quotations.*
 - v) After reviewing the quotes, the respective manager must recommend and forward the quotation to the SCM officer*
 - vi) Recommendation document is forwarded to the SCM officer to conduct due diligence on the process.*
 - vii) SCM officer must sign off the process and submit documents to the CFO to verify availability of funds and moderate due diligence process and procedures*
 - viii) CFO submits the documents to the CEO for approval/authorization*

ix) EO approves and submits the documents to the SCM officer"

5.3.18 The CEO did not comply with the TETA's SCM processes. The Deviation Motivation illustrating an urgent and emergency situation was brought about by the TETA's lack of planning and ensuring that it pays for services rendered by the City of Joburg Municipality.

5.3.19 In order to determine whether there was a conflict of interest in the Acting CFO by advising or recommending Deloitte Property Division as the company that the CEO should consider in providing the abovementioned services, the definition of conflict of interest as noted hereunder is persuasive in arriving at the conclusion that the Acting CFO, in trying to act in the best interests of the TETA, inadvertently promoted his employer Deloitte, in securing services wherein potential companies were excluded in competing as is required in terms of section 217 of the Constitution.

*"A **conflict of interest** is a situation in which an individual has competing interests or loyalties. Conflicts of interest involve dual relationships; one person in a position in one relationship and a relationship in another situation"*¹⁰

5.3.20 The Complainant highlighted the conflict of interest in one area only, namely the drafting of the Motivation by the CFO. The CFO also improperly sought to promote his employer's interest, in that he advised that Deloitte has a property division that could assist the TETA in resolving the challenges regarding the utility account and the donated property. The perceived conflict was addressed in that the CEO instructed the Complainant as CSM to draft the Motivation for Deviation for her approval. This does not take away the fact that the CEO sanctioned a process that deviated from the TETA's SCM processes.

¹⁰ Jean Murray: Business Law and taxes Article on What is Conflict of Interest

- 5.3.21 The CEO submitted that upon her return from maternity leave in March 2011, she noted that the CFO and the Complainant failed to follow through with the procurement of the service provider Deloitte, and she resolved the matter directly with the City of Joburg. There was no payment to Deloitte property division as there were no services rendered by them, hence there was no irregular expenditure incurred as outlined in section 38(1)(a)(iii) of the PFMA.

Conclusion

- 5.3.22 Based on the assessment of the evidence outlined above, the CEO flouted the legal prescripts in procuring Deloitte Property Division through a deviation from the TETA's procurement policy. The 'emergency' was simply poor planning in ensuring that the TETA's utility account was properly managed.

- 5.3.23 However, as noted in para 5.3.21, the CEO resolved the matter directly with the City of Joburg and no payment was made to Deloitte property division.

- 5.4 Regarding whether the TETA irregularly appointed Mr Rob Mudau, a Labour Consultant, to preside over the disciplinary enquiry of Ms T Coldwell, the TETA Manager at the Durban office, without following the TETA's Supply Chain Management Processes and Procedures:**

Common cause issues

- 5.4.1 It is common cause that a Labour Consultant, Mr Rob Mudau, of Global Competencies Development was appointed by the TETA to preside over the Disciplinary Inquiry of Ms T Coldwell. Mr Mudau was appointed through a Deviation Motivation dated 29 September 2010, approved by the CEO. The Deviation Motivation does not record the fees that would be paid.

- 5.4.2 The Disciplinary hearing took place in Pretoria on 3 and 4 May 2010. Mr Modau of Global Competencies Development presided over the proceedings of the said hearing.

Issues in dispute

- 5.4.3 The Complainant argued that Mr Mudau was appointed in contravention of the TETA's SCM Policy. She further contended that Mr Mudau was not on the TETA's database and further that there were service providers on the database that could have been sourced.
- 5.4.4 The CEO submitted a copy of the Deviation Motivation dated 29 September 2010. The Deviation Motivation was done to regularise payment to Global Competencies Development. That the approval for deviation was done after the services were rendered by Mr Mudau on 04 May 2010. The information contained in the motivation indicated that disciplinary action was being taken against an official who was a senior executive officer and due to the sensitivity, the critical and urgent nature of the matter and further that the services were of a specialised nature and limited suppliers existed in the country, it was not practical to source three quotations, hence the deviation from SCM process.
- 5.4.5 It was further submitted that Messrs. Fluxman Attorneys who were on the TETA's database were not available during the period in which the services were required. A further reason for the deviation was to also pay the consultant, Mr Mudau.
- 5.4.6 An undated copy of the contract which was only signed by the service provider, Global Competencies Development, reflects that the duration of the Contract was from December 2008 to May 2009. The contract stipulates that Global Competencies Development shall be paid a fee of R1 500.00 per hour and capped at R115 000-00 inclusive of VAT. Mr Rob Mudau was paid an

amount of R42 000.00 for the services rendered in connection with the disciplinary action against Ms Coldwell.

Application of relevant legal framework

5.4.7 In terms clause 6.2.2.29 of the TETA's SCM Policy:

"(1) The CEO may:

- (a) In cases for R2000.01 up to R1000 000.00 and the approval for the accounting authority for cases over R1000 000.00, dispense with official procurement processes established by the policy and to procure any goods or services through any convenient process, which may include direct negotiations, but only,*
 - (i) In an urgent or emergency case;*
 - (ii) If such goods or services are produced or available from the provider only;*
 - (iii) For the acquisition of special works of art or historical objects where specifications are difficult to compile; or*
 - (iv) In any other exceptional case where it is impractical or impossible to follow the official procurement processes;"*

5.4.8 The CEO indicated in the Deviation Motivation that disciplinary action was being taken against an official who was a senior executive officer and due to the sensitivity, the critical and urgent nature of the matter and further that the services were of a specialised nature and limited suppliers existed in the country, it was not practical to source three quotations, hence the deviation from SCM process. This contention is untenable as my office was not

provided with any evidence that there was research done in this to justify the failure to procure in terms of the TETA's SCM process.

5.4.9 Further Practice Note SCM 3 of 2003, states that when procuring the services of a consultant it should be done by means of a competitive bidding process wherever possible. The services procured from Mr Rob Mudau was not of such a nature as to be unique to justify deviation from normal process of procurement.

5.4.10 The deviation was therefore not justified, as the CEO should have ensured that there were more than one supplier on their database for the service that was required.

Conclusion

5.4.11 Based on the evidence outlined it is noted that the CEO did not obtain the services of Mr Rob Mudau in compliance with the TETA's SCM processes and further sanctioned the Deviation Motivation after the services were rendered in order to pay the service provider.

5.5 Regarding whether the CEO interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube despite procurement processes having been already effected:

Common cause issues

5.5.1 The TETA had an HR system in place and the CEO directed the Complainant to investigate the effectiveness of the current HR system.

5.5.2 S-Cube did not submit any bid documents nor was it appointed by the TETA.

Issues in dispute

- 5.5.3 The Complainant averred that the CEO had a meeting (date unknown) with an S-Cube representative at the TETA's office and she was requested to attend the presentation.
- 5.5.4 She submitted at this meeting that a tender procurement process for HR integrated systems was already initiated and bids were received. The Complainant argued that the CEO's conduct was irregular because a proper procurement process had been undertaken.
- 5.5.5 The CEO, in her submission dated 14 August 2018 through her attorneys, denied any knowledge of a company called S-Cube or appointing the said service provider for the required HR integrated services.
- 5.5.6 There is no evidence submitted that illustrates that the CEO unduly influenced the Complainant in ensuring that S-Cube be given preference in the procurement of the HR integrated systems. As the Complainant indicated the procurement process were already at an advanced stage when S-Cube made its presentation to the CEO and Complainant. S-Cube was not appointed as a preferred service provider for the HR integrated systems.

Application of relevant legal framework

- 5.5.7 Paragraph 6.1.3 (1) (a) of TETA SCM Policy details the delegated authority conferred by the Accounting Authority to the CEO to enable her to exercise the supply chain management responsibilities function in terms of sections 38(1)(a)(iii); 38(1)(b) and 51(1)(iii) of the PFMA.
- 5.5.8 The CEO in terms of her delegated authority is mandated to ensure that the SCM policy is implemented.

- 5.5.9 The conduct of the CEO in consenting to allow S-Cube to do a presentation on its HR Integrated systems does not amount to improper interference as the procurement process were at an advance stage and the bids were closed. S-Cube did not tender.

Conclusion

- 5.5.10 Based on the available evidence I cannot conclude that the CEO flouted any legislative procurement processes.

- 5.6 **Regarding whether the TETA improperly proceeded to utilise the services of Mr Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solution Company:**

Common cause

- 5.6.1 Mr Johan Smook was employed by Mondial IT Solutions and he submitted a proposal to the CEO to manage the TETA's IT services on 09 January 2009. A full presentation of the proposal was presented to the TETA Board. The Board approved the Deviation Motivation dated 04 February 2009.
- 5.6.2 Mondial IT Solutions was awarded a contract by the Board to assess and integrate the TETA's Information Management Systems which was outsourced to four different service providers.
- 5.6.3 Mr Smook was the appointed liaison and IT Consultant within Mondial IT Solutions that managed the project. The Project was dealt with in two phases which commenced in 2009 and continued until finalisation in 2011.
- 5.6.4 Mr Smook resigned from Mondial IT Solutions on 11 December 2009.

Issues in dispute

- 5.6.5 The Complainant contended that the TETA continued to utilise the services of Mr Smook as an independent consultant whilst having an active contract in place with Mondial IT Solutions.
- 5.6.6 The CEO submitted that the IT Contract with Mondial was extended in terms of a Contract Change Note, to manage the transitional hand over from the existing four IT vendors to Deloitte who was appointed to take over the IT services for the TETA. The duration of the contract was from 01 January 2010 to December 2010 with an option to extend same for one more year.
- 5.6.7 Email communication between Mr Smook and the TETA from April 2011 to 02 November 2011, reveal that Mr Smook continued to facilitate the extension of the contract and payment of outstanding invoices on behalf of Mondial IT.
- 5.6.8 Mr Smook informed my investigation team during a telephonic consultation with him on 15 October 2018, that he was never employed by the TETA as an independent IT Consultant. He did not invoice the TETA on his own account. He was paid for services rendered by Mondial IT Solutions during the duration of the contract with the TETA. Mr Smook further contented that the TETA did not retain his services after he had resigned from Mondial IT Solutions.

Application of Relevant Legal Framework

- 5.6.9 Section 217 of the Constitution of the Republic of South Africa, 1996 provides that "government procurement systems must be fair, equitable, transparent, competitive and cost-effective".

- 5.6.10 Evidence obtained during this investigation confirms that the TETA had an existing contract with Mondial IT Solutions signed in June 2009 wherein it undertook to provide IT advisory service to the TETA. The contract was signed by Mr Smook on behalf of Mondial IT Solutions. The Mondial IT Solutions contract was extended in terms of a contract change note. There was no new tender process that was in conflict with the procurement process outlined in section 217 of the Constitution
- 5.6.11 There is no supporting evidence indicating that the TETA contracted with Mr Smook as an independent IT Consultant whilst the Mondial IT Solutions Contract was in place. Further, no evidence was obtained to corroborate the allegation that the TETA paid Mr Smook directly for services rendered as an IT Consultant.

Conclusion

- 5.6.12 Based on the evidence outlined it can be concluded that the TETA did not contravene the Constitutional imperative outlined in section 217 in procuring the services of Mr Smook. There is no evidence submitted to indicate that Mr Smook rendered IT services to the TETA outside of his contractual obligation with Mondial IT Solutions.

5.7 Whether the CEO interfered and expressed interest in the Recruitment and Selection of the following personnel:

5.7.1 Mr. P Batlang: Corporate Services Manager

Common cause issues

- 5.7.1.1 The post of Corporate Services Manager was advertised with a closing date of 19 September 2008. The requirements for the post were as follows:

- 5.7.1.2 An appropriate HR related degree or relevant tertiary qualification with a minimum of five (5) years' experience in a Human Resource Management and Development / Corporate Services management position; a well-developed sense of responsibility and accountability; experience in Corporate Services functions, Change Leadership and Transformation, Performance management, Human Resources Development Recruitment, Selection, Employment Equity, Employee wellness Management, Management
- 5.7.1.3 Knowledge of Labour Relations Act, Employment Equity Act, Skills Development Act, Compensation for Occupational Injuries and Diseases Act, Basic Conditions of Employment Act
- 5.7.1.4 All applications must be accompanied by a motivation letter and confirmation that the minimum requirements are met. Further that the TETA will conduct a competency test as part of the selection process.
- 5.7.1.5 The late Mr Batlang, Mr Shirindza, Ms Mangoale and Ms Vuyiso were shortlisted for interviews which were held on 02 October 2008. On the day of the interviews Ms Vuyiso did not report as she was not available. The remaining three (3) candidates were subjected to screening and competency tests by an independent consulting company Lead Assess. The following table reflects the interview results:

Consolidated Scores by Panelists for Post Corporate Services Manager (CSM)

Name of Candidate	Position applied: CSM	Panelists: M Matlala	Panelists: L Mlotshwa	Panelists: T Ramakgolo	Panelists: L Dladla	Total	Average	%	Comments
FE Shirindza	CSM	38	43	43	41	165	41.25	79.32	None
NT Mangoale	CSM	32	42	41	35	150	37.5	72.11	None

LBAT Vuyiso	CSM	-	-	-	-	-	-	-	Did not turn up
KP Batlang	CSM	43	47	40	40	170	42.5	81.73	None

Total Number of scoring points: 52

Minimum scores to be achieved: 75%

5.7.1.6 The scores reflect that Mr Batlang received the highest score, followed by Mr Shirindza and Ms Mangoale. Mr Batlang and Mr Shirindza went for Competency Assessments and the best candidate was offered the post. Mr Batlang was assessed as partially suitable whereas Mr Shirindza was assessed as not suitable. The evidence submitted reflects that the CEO was part of the interviewing panel. However the Minutes dated 01 October 2008 do not reflect anything untoward in terms of preferential candidates. The resolution taken was that the candidate with the highest score be appointed to the post. The scores together with the Competency Results reveal that Mr Batlang received the highest percentage being 81.73% whilst the remaining two candidates received 79.32% and 72.11%, respectively.

5.7.1.7 A letter dated 09 October 2008 signed by the CEO, offered Mr Batlang the position of Corporate Services Manager which he accepted on 10 October 2008.

5.7.1.8 Mr Batlang was offered the position of Corporate Services Manager on 09 October 2008.

Issues in dispute

5.7.1.9 The Complainant alleged that the appointment of Mr Batlang was irregular in that the CEO had known Mr Batlang. Furthermore, that the CEO had informed her that Mr Batlang was "her person"

- 5.7.1.10 The CEO contends that although she was part of the interview panel, she did not unduly influence the outcome of the interviews and scores that were obtained.
- 5.7.1.11 The scores reflect that Mr Batlang received the highest scores, followed by a second candidate. Both candidates went for Competency Assessments and the best candidate was offered the post.
- 5.7.1.12 That the appointment of Mr Batlang was in terms of the TETA's recruitment and selection policy.
- 5.7.1.13 The evidence submitted confirmed that the CEO was part of the interview panel. However the Pre-Interview Minutes dated 01 October 2008 do not reflect anything untoward in terms of preferential candidates. The resolution taken was that the candidate with the highest score be appointed to the post. The scores together with the Competency Results reveal that Mr Batlang received the highest percentage being 81.73% whilst the remaining two candidates received 79.32% and 72.11%, respectively.

Application of relevant legal framework

- 5.7.1.14 The TETA's Recruitment and Selection Policy dated 28 February 2008, reflects that the purpose of the said policy is to ensure that the TETA attracts the best suitable candidate, provide for a recruitment process that is transparent, procedurally and substantively fair in accordance with employment equity and Labour Relations Act and to ensure equitable treatment of all applicants, both internally and externally in line with the principles of the Employment Equity Act.
- 5.7.1.15 Clause 3f and 3g of the Policy states that the CEO is mandated to make offers of employment and the TETA Board will monitor and audit the appointment of the TETA staff.

- 5.7.1.16 Clause 4 dealing with procedural requirements and the relevant information provides that "Internal candidates must have at least 18 months experience in their current position before they are considered for promotion, lateral moves or transfers".
- 5.7.1.17 The advertisement must be done internally and externally simultaneously. In line with Succession Plan Policy when a vacancy becomes available with the TETA, the CEO together with the relevant Managers and sub-structures of the Board, as well as taking into account the TETA equity profile and action plan, determine if there is any appropriate capacity and or staff with potential within the TETA to fill the vacancy. If such person/s are identified with the correct qualification, knowledge, experience and skills mix, that after an interview and thorough assessment of performance and competence, that the person best suited be appointed to the position.
- 5.7.1.18 Screening and final selection will be identical for both internal and external process. A pre-interview screening process will be used to reject unsuitable and shortlist suitable applicants in a fair and equitable manner. The process shall be conducted by the TETA Human Resource and Remuneration Committee (HRRC) member, a designated member of the TETA Management or by an outsourced reputable recruitment and selection agency which shall be monitored by the TETA HRRC and compulsory reference checks must be done by an impartial party not involved in the process.
- 5.7.1.19 Reference checks must be done on the job profile of the position, the advertisement, the shortlist of the candidates to be interviewed and the Applicants CV. The interview Panel must meet prior to the interview and agree on Confirmation of the appointment of the interview Panel and mandate, who the primary interviewer will be and who is the decision maker, the questions to be asked together with the evaluation criteria, the scoring

process and minimum scoring requirements. The interviews are to be recorded.

5.7.1.20 The Policy further provides that as a guarantee of maintaining the highest levels of performance the minimum scores that must be achieved for a candidate to be considered as a viable option are as follows:

- Managers: 75%
- ETDP: 75%
- Assistant ETDP: 70%
- Admin Assistant: 70%

5.7.1.21 The Interview Panel will hold a panel discussion after the interview to discuss their joint impression and individual scoring in order to ascertain consensus on the suitability of the applicants. The Panel will then make a recommendation to the CEO in a written and signed minute regarding the successful candidate suitable for appointment. The CEO or duly authorised delegate will then make an Offer of Employment to the successful candidate.

5.7.1.22 The record of the interviews must be kept for a period of 12 months in line with the Document Control Policy and Procedures of the TETA and should include the following:

- Interview checklist and job profile
- Advertisement and documents relating to external outsourcing and selection of candidates to be interviewed
- List of Candidates, CV's, Pre-interview panel discussion, Questions and Evaluation criteria
- Score sheets, post panel discussions and written minute to the CEO
- A copy of the Offer of Employment and Acceptance by the successful candidate

5.7.1.23 As reflected in the TETA's Recruitment Policy dated 28 February 2008, noted above internal and external candidates must be treated equally in compliance with Employment Equity Act and Labour legislation.

5.7.1.24 Evidence submitted indicated there was compliance with the TETA's Recruitment Policy. The post was advertised and a selection process ensued whereby shortlisted candidates were interviewed. The HR Manager was part of the interviewing panel. The interview panel recommended Mr Batlang as he had scored the highest points. The CEO confirmed the appointment.

Conclusion

5.7.1.25 Based on the evidence submitted, there is no indication that the CEO improperly influenced the recruitment and selection of Mr Batlang to the post of Corporate Services Manager.

5.7.2 Mr. Obakeng Mmono: Personal Assistant to the CEO

Common cause issues

5.7.2.1 The post of Personal Assistant (PA) to the CEO was advertised. Candidates were shortlisted and the panel for the interviews comprised of the CEO, COO and an HR Administrator.

5.7.2.2 Mr Mmono was appointed as the successful candidate for the post of PA to the CEO. The CEO approved and signed Mr Obakeng Mmono's Offer and Appointment Letter as well as his relocation costs in terms of the TETA Relocation Policy.

Issues in dispute

- 5.7.2.3 The Complainant alleged that the CEO took over the interview process in the appointment of her PA, in that she prepared the assessment test herself as she had indicated that HR was taking too long and moved the interview dates to an earlier date while there was an agreement that the interviews would be conducted on 11 August 2010.
- 5.7.2.4 The CEO denied having received a faxed CV directly from Mr Obakeng Mmono because of their previous relationship. She stated that all letters for the appointment of new staff are signed by her after the relevant interviews and recommendations by the interviewing panel, which does not include the CEO for junior positions other than staff in the CEO's office such as her PA.
- 5.7.2.5 A letter dated 03 March 2011 from the TETA to the Complainant reveals that the interview file of Mr Mmono together three (3) other personnel files were missing. There is therefore no evidence reflecting that the CEO declared her relationship with the interviewee Mr Mmono at the interview nor is there any evidence indicating that his CV was faxed directly to her.
- 5.7.2.6 According to the CEO's submission through her attorney dated 14 August 2018, an invitation (undated email) was sent to the CEO, the COO: Mr Kgantsi, CFO: Mr Kubheka and Khosi, Sheila Masuku and Helen Zondo requesting their attendance at the interviews of the CEO's PA scheduled for the 30 July 2010 from 10am to 4pm.
- 5.7.2.7 The CEO further submitted that the Complainant was responsible for the overall recruitment process. A Memorandum dated 03 August 2010 from the HR Administration Assistant, Ms M Msimango submitted through the Complainant, as the Corporate Services Manager recommended the permanent appointment of Mr Mmono to the position of Personal Assistant to the CEO and further recorded that the process and procedures as outlined in the Recruitment and Selection Policy were adhered to.

Application of relevant legal framework

5.7.2.8 Paragraph 6 of the TETA's Recruitment and Selection Policy dated 28 February 2008 prescribes the composition of the interview panel. The Policy provides that the interview panel must comprise of a minimum of four persons, two from the TETA Human Resource Committee, the Human Resource Manager, Line Manager and subject expert. In this instance, the CEO was present as the Line Manager. Paragraph 7 outlines the interview process and indicates that the interview panel must meet before the interview to discuss and agree on issues relating to who the primary interviewer and decision maker would be, the questions to be asked and the evaluation criteria, the scoring process and housekeeping arrangements.

5.7.2.9 The Report of the TETA Staff SCM & Risk Management Workshop held on 20 and 21 April 2009 at Lesedi Cultural Village, item (14) facilitated by Mrs Anno-Frempong and the Phakamole Consulting provides as follows regarding the declaration of conflict of interest;

"In terms of the conflict of interest provision staff should disclose interest as and when becoming aware that friends or family were supplying services or goods so that any conflict could be managed. When involved in Bid adjudication you should not score tenders of companies where friends and families were involved. A register should be kept of all interest" The same principle is applicable in recruitment and selection, including interviews;

Conclusion

5.7.2.10 There is no evidence reflecting that the CEO declared her relationship with the interviewee, Mr Mmono at the interview, nor is there any evidence indicating that he faxed his CV directly to her. Mr Mmono was found to be a suitable candidate and was appointed as a PA to the CEO. There is no evidence submitted to suggest that the CEO interfered or irregularly

appointed Mr Mmono in contravention of the Recruitment and Selection Policy. The recommendation to appoint Mr Mmono was submitted by the Complainant in terms of a Memorandum dated 03 August 2010.

5.7.3 Mr Mogomotsi Kgantsi: Chief Operating Officer

Common cause

- 5.7.3.1 The post of Chief Operating Officer was advertised and the shortlisted candidates were referred to Works Dynamics (Pty) Ltd for psychometric competency assessment.
- 5.7.3.2 On the available evidence submitted, it is noted that only ten (10) candidates applied for the above-mentioned position and three (3) candidates withdrew.
- 5.7.3.3 It was further noted that two interviews were rescheduled and one candidate failed to attend the re-scheduled interview. The assessment panel submitted that, of the six (6) interviewed candidates, Mr Kgantsi and Mr Naicker scored the highest.

Issues in dispute

- 5.7.3.4 The Complainant submitted that the appointment of Mr Kgantsi was irregular in that when she perused his personnel file she noted a competency report that stated he was not competent for the COO position. She states that his appointment was therefore not in accordance with the TETA's recruitment processes.
- 5.7.3.5 The CEO responded stating that the recruitment processes were followed and submitted evidence in support of the appointment of Mr Kgantsi.

- 5.7.3.6 On perusal of the evidence it was noted that Mr Kgantsi had scored the highest
- 5.7.3.7 A pre-screening process was undertaken and psychometric reports from the outsourced agency were submitted for the shortlisted candidates. Evidence was received in respect of Messrs. Kgantsi and Naicker's competency screening. Mr Kgantsi received a total score of 207 with no score by one of the panelist Mr Le Roux – recorded in the Comments column. The average score rated for him was recorded as 34.50 and a percentage of 0.86 of the total score. The Competency assessment rating report recorded as not suitable.
- 5.7.3.8 Mr Naicker, scored a total of 225, average score of 32.14 and a percentage of 0.86 of the total score. The Competency assessment rating report of partially suitable.

Application of relevant legal framework

- 5.7.3.9 The TETA's Recruitment and Selection Policy as noted above in paragraph 7.7.1.3 makes provision for applications from internal candidates. The policy also allows for pre-screening process as noted in clause 5. The relevant clause states that pre-interview screening may be used to reject unsuitable and shortlist suitable applicants but that it must be done in a fair and equitable manner. Further, that it shall be conducted by a TETA HRRC member, a designated member of the TETA Management or by an outsourced reputable recruitment and selection agency which shall be monitored by the TETA HRRC. Compulsory reference and qualification check are to be conducted on all shortlisted candidates prior to appointment.
- 5.7.3.10 Paragraph 6 of the Policy details the composition of the interview panel and it states that the Panel will comprise of a minimum of four person made up of two members from the TETA HRRC, the Human Resource Manager, the

relevant line manager and subject matter expert may be required in the inherent job requirement. Where possible there should at least be one female in the recruitment panel.

5.7.3.11 Paragraph 7 sets out the interview process that commences with ensuring that the interview panel receives all documentation relating to the interview at least seven days prior to the interview taking place. The documents include the job profile, advertisement, shortlist of candidates and CV's. The questions must be structured, objective and job related. Further, the same set of questions must be asked of each applicant to ensure a fair and equitable process. Panel discussion must be held after the interviews to discuss their joint impression and individual scoring of the applicants in order to ascertain consensus on the suitability of the applicants.

5.7.3.12 The records of the interviews must be kept for 12 months and or in line with the Documents Control Policy and Procedures of the TETA.

Conclusion

5.7.3.13 The TETA Recruitment Policy was followed. Evidence of pre-screening and shortlisting of candidates as noted in the TETA's policy was complied with. Mr Kgantsi was appointed based on the above mentioned average percentage score even though the Competency Assessment Report noted that he was considered not suitable. The CEO, as noted in the Recruitment and Selection Policy is mandated to appoint the recommended candidate as per HR recommendation.

5.7.4 Mr L Dladla: Executive Officer: Freight Handling Chamber

Common cause

- 5.7.4.1 The position of Executive Officer: Freight Handling Chamber (Durban) was advertised with a closing date of June 2010 detailing key performance areas and minimum requirements for the position.
- 5.7.4.2 On the available evidence provided, three candidates were shortlisted for the post, viz, D Mosalo, F Shirindza and L Dladla. The interviews were scheduled for 31 August 2010. The CEO, COO and the Complainant as the Corporate Services Manager were part of the interview panel.

Issues in dispute

- 5.7.4.3 The Complainant alleged that the CEO confronted her and the successful candidate indicating to them that she suspected that the interview questions were leaked. The Complainant submitted that she and the CEO prepared the questionnaire on the morning of the interview which was accepted by the panel.
- 5.7.4.4 The CEO denies interfering in the interview process and contended that the Complainant as Corporate Service Manager motivated for the employment of Mr Dladla as he scored the highest.
- 5.7.4.5 On the available evidence submitted by the Respondent, it is noted that Mr Dladla scored the highest of 216 with an average of 0.86% followed by Ms Mosalo with 196 and an average of 0.76% and Mr Shirindza of 180 with an average of 0.71%.
- 5.7.4.6 The Complainant submitted a motivation dated 02 September 2010 to the CEO requesting approval for the permanent appointment of Mr Dladla to the post of Executive Officer: Freight Handling Chamber.

- 5.7.4.7 The CEO then sent an Offer of Employment letter dated 02 September 2010 to Mr Dladla offering him the post as the successful candidate which he accepted on 03 September 2010.

Application of relevant legal framework

- 5.7.4.8 The Respondent submitted their Recruitment and Selection Policy dated 28 February 2008 which is applicable for both permanent and Contract staff. The TETA's Recruitment and Selection Policy reflects that the purpose of the said policy is to ensure that the TETA attracts the best suitable candidate, provide for a recruitment process that is transparent, procedurally and substantively fair in accordance with employment equity and Labour Relations Act legislations and to ensure equitable treatment of all applicants, both internally and externally in line with the principles of the Employment Equity Act
- 5.7.4.9 Clause 3c of the policy reflects that should an existing position be vacant, authorisation to recruit must be obtained from the CEO.
- 5.7.4.10 Clause 3f of the policy further indicates that the CEO is mandated to make Offers of Employment.

Conclusion

- 5.7.4.11 According to the TETA Recruitment and Selection Policy the CEO is mandated to make offers of Employment to successful candidates and there is no indication of any improper interference by the CEO with regard to the recruitment and selection process that unfolded.

5.7.5 Mr ME Maluleke: Procurement Officer

Common cause issue

- 5.7.5.1 The position of the Procurement Officer post was re-advertised in March 2010 with a detailed job profile and requirements with a closing date of 29 March 2010. A three year tertiary qualification in Public Administration /Supply Chain Management with extensive relevant experience; Appropriate administrative experience in the areas of basic financial management and personnel administration; knowledge of the PFMA, Treasury Regulations and procurement policies and procedures; Supply Chain asset and risk management skills; excellent interpersonal skills and a strong verbal and written communication skills. In addition, the advertisement indicated that a competency test will be conducted as part of the selection process. Interviews were conducted during July 2010.

Issues in dispute

- 5.7.5.2 The Complainant alleged that the CEO informed her that should an internal candidate be recommended then she would consider headhunting for a suitable candidate, notably from RTMC.
- 5.7.5.3 The CEO submitted that the appointment of Mr Maluleke took place whilst she was on maternity leave. She submitted that according to available evidence, the TETA followed its Recruitment and Selection Policy in that Mr Maluleke was interviewed for the post on 07 July 2009 and had scored the highest 207 followed by Ms MN Modudu. The Complainant was one of the panelists.
- 5.7.5.4 The delay in the appointment of Mr Maluleke was due to the salary that was not market related and had to be adjusted. A memorandum was drafted and submitted by HR Administrative Assistant, Ms Msimango, recommended by the Complainant and approved by the Acting CEO, Mr Kgantsi. The memorandum reflected that the position of Procurement Officer was

advertised internally and externally. The salary scale had to be adjusted and the Human Resource and Recruitment Committee (HRRC) motivated and obtained the Board's approval, hence approval to appoint Mr Maluleke was required.

5.7.5.5 The internal candidate, Ms Skosana was not successful and the position was awarded to Mr M Maluleke as evidenced in a Motivation dated 10 December 2010 from the Complainant to the Acting CEO Mr M Kgantsi.

5.7.5.6 Mr Kgantsi then wrote a letter to Mr Maluleke on 13 December 2010 offering him the position of Procurement Officer and a contract of employment was signed on 10 January 2011.

Application of relevant legal framework

5.7.5.7 The TETA's Recruitment and Selection Policy dated 28 February 2008 was followed.

5.7.5.8 The TETA's Recruitment and Selection Policy dated 28 February 2008 reflects that the purpose of the said policy is to ensure that the TETA attracts the best suitable candidate, provide for a recruitment process that is transparent, procedurally and substantively fair in accordance with employment equity and Labour Relations Act legislations and to ensure equitable treatment of all applicants, both internally and externally in line with the principles of the Employment Equity Act.

5.7.5.9 Section 4.4 of the Policy allows for equal treatment of both internal and external candidates. Ms Skosana was an internal candidate acting in the position. However, as per the Recruitment Policy she competed with other candidates and an independent company conducted a psychometric screening process as per the Policy.

Conclusion

5.7.5.10 As noted in the Recruitment and Selection Policy, the processes of shortlisting the eight (8) candidates, pre-screening, credit checks and interviews took place.

5.7.5.11 There is no evidence to corroborate the Complainant's assertion that the CEO threatened and followed an alternative process of headhunting.

5.8 Regarding whether the TETA improperly dismissed the Complainant based on framed charges:

Common cause issues

5.8.1 The Complainant was appointed as Corporate Services Manager at the TETA in 2009. Towards the end of 2010 she was charged on allegations of misconduct and was placed on suspension pending disciplinary hearing. On 27 January 2011, the TETA served the Complainant with a notice to attend a disciplinary hearing and the following charges were brought against her:

- a) Charge 1- Gross negligence in that during the month of September 2010, the Complainant failed and /or omitted to verify and ensure payment of the salary of the newly appointed employee of the TETA, Mr Obakeng Mmono, which left the company open to audit queries and costly legal claims;
- b) Charge 2- Gross negligence in that the Complainant failed and or omitted to verify and ensure payment of a newly appointed intern wages, Ms ES Ndala, during the months of October and November 2010, which resulted in audit queries and further put the name of the company into disrepute and possible subjection to unnecessary litigation;

- c) Charge 3- Gross negligence in that during the month of December 2010, the Complainant failed and / or omitted to verify and ensure payment of the salary of Sibongile Ngwenya , Andre Smit and Elleanor Salmon which left the Company open to audit queries and costly legal claims;
- d) Charge 4- Misconduct in that the Complainant willfully and deliberately changed the job specification for the position of Procurement Officer in order to suit her preferred candidate. Such action could have prejudiced the TETA in appointing an incumbent who does not possess the requisite skills, knowledge and attributes inherent in such a position;
- e) Charge 5- Gross negligence, in that on 27 September 2010 the Complainant submitted incorrect data of the TETA Employment Equity statistics for the development of the strategic plan document. This had the potential to put the name of the organization into disrepute as it would be seen as disorganized and lacking discipline;
- f) Charge 6 –Serious dereliction of duties, in that on 27 September 2010 the Complainant failed to submit the Strategic Plan inputs for her division at the agreed timeframe thereby negatively affecting the organizational input and subsequent submission to the Minister of Higher Education and Training and to Treasury; and
- g) Charge 7 – Willful deceit of board members and top management in that on 28 September 2010, the Complainant sent out an email which suggested that the information from Human Resource section was left blank on the draft Strategic Plan document whereas she knew that she failed to submit her report on time, as was required. The Complainant's action negatively affected the credibility of the COO as it seemed as if he deliberately excluded the Complainant's input from submissions, which was not so.

Issues in dispute

- 5.8.2 The Complainant disputed the charges brought against her declaring same is trumped up and based on fabricated evidence except for Charge 5 relating to the submission of Employment Equity statistics which she conceded that the information was incorrect, but that she subsequently corrected it. The Complainant pleaded not guilty to the other charges.
- 5.8.3 The Complainant was found guilty on all charges except for charge 4 and a dismissal was recommended on 31 March 2011. The Complainant approached the CCMA on the basis of unfair dismissal. The CCMA confirmed the substantive and procedural fairness of the Complainant's dismissal.
- 5.8.4 The Complainant subsequently approached the Labour Court and the matter has not proceeded due to the fact that the Complainant cannot afford the legal fees.

Application of relevant legal framework

- 5.8.5 Constitution – section 23(1) states that everyone has a right to a fair labour practice.
- 5.8.6 The Labour Relations Act, section 191 relates to disputes about unfair dismissals and unfair labour practices: The following sections are applicable
- “(1)(a) If there is a dispute about the fairness of a dismissal or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing within to-*
- (i) a council, if the parties to the dispute fall within the registered scope of that council; or*
- (ii) the Commission, if no council has jurisdiction”.*

- 5.8.7 The Complainant referred the dispute to the CCMA and subsequently to the Labour Court in exercising her Constitutional right and in compliance with the Labour Relations Act 66 of 1995.

Conclusion

- 5.8.8 Based on the evidence submitted by the TETA it can be concluded that the TETA acted in accordance with its disciplinary policy in taking action against the Complainant when it was found that the staff were not paid on time, personnel files were missing and employment equity data submitted was incorrect. The CCMA upheld the Complainant's dismissal.

- 5.9 Regarding whether the Complainant and the South African taxpayer were prejudiced by the conduct of the TETA.**

Common cause issues

- 5.9.1 The TETA appointed Nkwame Consulting on 29 July 2010 as per letter of award signed by Ms M Matlala (the CEO), for the provision of Corporate Governance Review of the TETA. Nkwame Consulting was paid an amount of R687 078-00 for work done in terms of its Corporate Governance Review contract.
- 5.9.2 The CEO of the TETA appointed Deloitte on the 10 January 2010 to conduct IT infrastructure technical assessment for the design of the TETA's IT projects.
- 5.9.3 It is common cause that the Labour Consultant, Mr Mudau of Global Competencies Development was appointed by the TETA to chair the Disciplinary Inquiry of Ms T Coldwell

Issues in dispute

- 5.9.4 The Complainant avers that the TETA irregularly appointed Nkwame Consulting without following Treasury Regulations and the TETA's Supply Chain Management Processes and Procedures, in that they did not procure the services through a tender process and in addition, they procured a service provider that was not on their database which was prejudicial to the TETA.
- 5.9.5 The TETA did not comply with SCM policy in that the CEO was not justified in acceding to Mondial IT Solutions advice / recommendations in adopting a limited or restricted bid process in the procuring and appointment of Deloitte
- 5.9.6 The CEO's action in adopting a restricted bid process prejudiced prospective bidders who could have participated in an open tender process that would have ensured that the TETA obtained value for money in a fair and transparent manner.
- 5.9.7 The TETA did not comply with the SCM process in procuring the services of Deloitte property division.
- 5.9.8 With regard to the appointment of Mr Rob Mudau of Global Competencies Development, the CEO submitted that Messrs. Fluxman Attorneys who were on the TETA's database were not available during the period in which the services were required. The matter was urgent and further the services were of a specialist nature and there are limited suppliers in the country and it was not practical to source three quotations.

Application of relevant legal framework

- 5.9.9 Section 217 of the Constitution of the Republic of South Africa, 1996 provides that *"government procurement systems must be fair, equitable, transparent, competitive and cost-effective"*.
- 5.9.10 Treasury Regulations for departments, trading entities, constitutional institutions and public entities issued in terms of the Public Finance Management Act, 1999, March 2005 provide in 16A3.2 that procurement must:
"(a) be fair, equitable, transparent, competitive and cost effective;.."
- 5.9.11 The CEO did not comply with section 217 of the Constitution and Treasury Regulations that has been published giving effect to the Constitutional principles of fairness, equitable, transparent, competitive and cost effective. The CEO did not comply with section 217 of the Constitution in that the securing of the services of Nkwame Consulting via direct negotiation is in direct conflict with the Constitutional principles of fairness, equitable, transparent, competitive and cost effective. The procurement of Deloitte for rendering IT technical assessment through a limited bidding process was in direct conflict of the Constitutional principles. In addition the procurement of the service of Rob Mudau of Global Competencies Development was also in contravention of the Constitutional principles.
- 5.9.12 Clause 3.4.1 of the National Treasury Practice Note 8 of 2007/2008 provides that accounting officers should invite competitive bids for all procurement above R500 000.00.
- 5.9.13 Clause 11 of the TETA's SCM Policy stipulate that:
"Above the estimated value of 500 000 00 (VAT inclusive), is an open tender. Accounting Officer should invite all competitive bids from all procurement above R500 000.00."

- 5.9.14 The CEO of TETA as the accounting officer is required to comply with the Constitution, National Treasury Practice Note 8 and TETA's SCM policy in ensuring that a competitive bidding process is undertaken in the procurement of services that is above the prescribed threshold of R500 000.00 as was the case in this instance, Nkwame Consulting services amounted to R687 078.00, and Deloitte for the provision of IT technical assessment.
- 5.9.15 The TETA SCM Policy Paragraph 6.2.2.15 states that:
"An urgent case is where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical, however lack of prior planning should not be construed as urgent."
- 5.9.16 Paragraph 3.2.30 provides for the CEO to dispense with the official procurement processes only in the following instances, viz
- "i) In an emergency;*
 - ii) If the goods or services are produced or available from a single source;*
 - iii) For the acquisition of specialized goods or services where specifications are difficult to compile;*
 - iv) In any other exceptional case where it is impractical or impossible to follow the official procurement processes."*
- 5.9.17 The SCM Guide at paragraph 4.7.5.1 notes that in urgent and emergency cases, an institution may dispense with the competitive bidding process but must act in a manner that is in the best interest of the State.
- 5.9.18 The CEO was required to comply with the SCM Policy in the appointment of Nkwame Consulting, Deloitte and Rob Mudau of Global Competencies Development. The sanctioning of deviation by the Board does not regularize the non-compliance with the TETA's SCM policy.

- 5.9.19 Therefore the TETA was prejudiced in that it did not have the benefit of a competitive bidding process and comparing other service providers. The other service providers were prejudiced in that they were denied an opportunity to bid and compete for the tenders.

Conclusion

- 5.9.20 It can be concluded that the CEO of the TETA did not comply with the Constitutional prescripts, Treasury Regulation and the TETA'S SCM Policy in procurement of the services of Nkwame Mahuma for Corporate governance training, Deloitte for TETA's IT infrastructure technical assessment for the design of IT projects and Rob Mudau of Global Competencies Development to chair a disciplinary hearing.
6. Having considered the evidence, the regulatory framework determining the standard the TETA should have complied with I am making the following adverse findings against the TETA:
- 6.1 **Regarding whether the TETA irregularly awarded Nkwame Mahuma Consulting a contract for the provision of Corporate Governance Compliance Services without following the TETA's Supply Chain Management Processes and Procedures and Treasury Regulations.**
- 6.1.1 The allegation that the TETA irregularly awarded Nkwame Mahuma Consulting a contract for the provision of corporate governance compliance services without following the TETA's supply chain management processes and procedures and Treasury Regulations, is substantiated.
- 6.1.2 The Contract was awarded to Nkwame Mahuma Consulting without following an open tender process. The TETA failed to comply with Section 217 of the Constitution of the Republic of South Africa, 1996 in procuring the services of Nkwame Mahuma Consulting. Section 217 provides that "*government*

procurement systems must be fair, equitable, transparent, competitive and cost-effective”.

- 6.1..3 The TETA failed to comply with National Treasury Practice Note 8 of 2007/2008 and Clause 5.2.32 of TETA's SCM policy in that it was not impractical to invite competitive bids. Evidence provided indicates that there was no urgency nor an emergency in the circumstances.
- 6.1..4 The TETA did not comply with National Treasury Practice Note 8 and the TETA's SCM policy Clause 7.4 in that the procurement was above the prescribed threshold. Evidence provided indicated that the procurement was for R687 078.00 which necessitated the invitation of bids.
- 6.1.5 The extension of the Contract and the expenditure was irregular as there cannot be an assessment in terms of value to the TETA since there was no competitive bidding process followed in terms of Treasury Regulations.
- 6.1.6 Therefore the TETA's conduct in awarding the Contract to Nkwame Mahuma Consulting constitutes 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.
- 6.2 Regarding whether the TETA irregularly appointed Deloitte to conduct an IT infrastructure technical assessment for the design of IT projects without following its Supply Chain Management processes and procedures and Treasury Regulations.**
- 6.2.1 The allegation that the TETA irregularly appointed Deloitte to conduct IT infrastructure technical assessment for the design of IT project without following SCM processes and Treasury Regulations, is substantiated.

6.2.2 The CEO approved the closed / limited bidding process and the reasons provided cannot be justified. The CEO authorised and submitted deviations to the Board, which approved such deviations. The CEO is an Office bearer and the Accounting Officer of the TETA and is as such accountable for ensuring compliance with the legislative prescripts, regulations and policies. Clause 11 of the TETA's SCM Policy stipulates that:

"Above the estimated value of R500 000 00 (VAT inclusive), is an open tender. Accounting Officer should invite all competitive bids from all procurement above R500 000.00."

6.2.3 It is noted that the CEO of the TETA, as the accounting officer, failed to compile a report within ten (10) working days to the relevant Department of Higher Education and Training (the DHET), Treasury and the Auditor General with regard to this deviation as required in terms of National Treasury Practice Note 8 of 2007/2008 at Paragraph 3.4.3 and in terms of the TETA's SCM Policy clause 6.2.2.29(2).

6.2.4 The CEO of the TETA also failed to include the description of goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed bidding process except to rely on the advice of Mondial IT Solutions. Furthermore, she failed to indicate how early delivery was key in this case, how it was impractical or impossible for the TETA to pursue a competitive bid process as well as how this situation could be classified as urgent.

6.2.5 The TETA's conduct in approving a closed / limited bidding process without ensuring compliance with the applicable legislation and Treasury guidelines, constitutes 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 conduct of Mr Thokozani Kubheka, a consultant Chief Financial Officer at the TETA who was also an employee of Deloitte, in procuring the services of Deloitte Property Division for rectification of the TETA's utility account, amounted to a conflict of interest and violation of the TETA's Supply Chain Management processes and procedures and Treasury Regulations.

6.3.1 The allegation that there was a conflict of interest in Mr Thokozani Kubheka, a consultant CFO at the TETA, who was also an employee of Deloitte, in procuring the services of Deloitte Property Division for rectification of the TETA's utility account without following SCM processes and Treasury Regulations, is not substantiated.

6.3.2 Deloitte Property Division did not render any service in terms of the acceptance of the quotation signed by the COO Mr Kgantsi on behalf of the the TETA and Deloitte in terms of the Deviation.

6.3.3 The TETA's conduct especially that of the CEO does not 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.

6.4 Regarding whether TETA appointed Mr Rob Mudau, a Labour Consultant to chair the disciplinary enquiry of Ms T Coldwell, a Manager employed in the Durban office, without following TETA's Supply Chain Management Processes and Procedures:

6.4.1 The allegation that the TETA appointed Mr Rob Mudau, a labour consultant to chair the disciplinary enquiry of Ms T Coldwell, a manager employed in the Durban office without following the TETA's Supply Chain Management Processes and Procedures, is substantiated

5.4.2 The TETA failed to follow its SCM policy and the Deviation and approval for payment was approved by the Board. The TETA's conduct especially that of the CEO in awarding the Contract to Rob Mudau constitutes 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.

6.5 Regarding whether the CEO interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube despite procurement processes having been already effected:

6.5.1 The allegation that the CEO interfered and expressed an interest in the procurement of HR Integrated Systems from a company called S-Cube despite procurement processes having been already effected, is not substantiated.

6.5.2 There is no evidence supporting the Complainant's contention that the CEO interfered or expressed an interest in the procurement of services of a company called S-Cube. Further, there is no evidence that the CEO influenced the procurement processes of the TETA's HR Integrated systems.

6.5.3 I am unable to make a finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.6 Regarding whether the TETA continued to utilise the services of Mr Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solution Company:

6.6.1 The allegation that the TETA continued to utilise the services of Johan Smook as an IT Consultant even after he had resigned from Mondial IT Solutions Company, is not substantiated.

6.6.2 There is no evidence submitted to substantiate this allegation.

6.6.3 I am unable to make a finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.7 Regarding whether the CEO interfered and expressed interest in the recruitment and selection of the following personnel:

Mr P Batlang: Corporate Services Manager

6.7.1 The allegation that the CEO irregularly appointed the late Mr P Batlang and that she further confessed to the Complainant that Mr Batlang was “her person” and that they previously worked together in the North West Department of Transport, is unsubstantiated.

6.7.1.1 The TETA's Recruitment processes were followed with pre-screening and the scores together with the Competency Results reveal that Mr Batlang received the highest percentage. There is no evidence submitted that substantiates the allegation that the CEO displayed bias towards the appointed candidate.

6.7.1.2 There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Mr Obakeng Mmono: Personal Assistant to the CEO

6.7.2 The allegation that the CEO irregularly appointed Mr Obakeng Mmono as her personal assistant, is unsubstantiated.

- 6.7.2.1 The CEO was part of a panel of interviewers which included the Complainant as Corporate Services Manager and Mr Mmono was selected as the best candidate for the position of PA to the CEO. Mr Mmono was previously employed by the Department of Transport in the North West. Section 4.4 of the TETA's Recruitment Policy dated 28.2.2008 allows for equal treatment of both internal and external candidates.
- 6.7.2.2 There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Mr Mogomotsi Kgantsi: Chief Operating Officer

- 6.7.3 The allegation that Mr M Kgantsi was irregularly appointed to the position of Chief Operating Office is not substantiated as there is no evidence indicating that the recruitment process was flawed.
- 6.7.3.1 There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Mr L Dladla: Executive Officer: Freight Handling Chamber

- 6.7.4 The TETA Recruitment Policy were complied with in respect of the processes followed in the appointment of Mr L Dladla to the position of Executive Officer: Freight Handling Chamber in Durban. There is no indication that the CEO interfered with the appointment of Mr Dladla to the said post.
- 6.7.4.1 There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

Mr ME Maluleke: Procurement Officer

- 6.7.5 The allegation that the CEO unduly influenced the recruitment of the Procurement Officer, Mr ME Maluleke, is unsubstantiated.
- 6.7.5.1 The TETA's Recruitment and Selection Policy and processes were followed. The pre-screening and the scores together with the Competency Results reveal that Mr Batlang received the highest percentage. There is no evidence submitted to substantiate the allegation that the CEO displayed bias towards the appointed candidate.
- 6.7.5.2 There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 6.8 Regarding whether the TETA improperly dismissed the Complainant based on framed charges.**
- 6.8.1 The allegation that the TETA improperly dismissed the Complainant based on framed charges, is unsubstantiated.
- 6.8.2 The TETA served the Complainant with a notice to attend a disciplinary hearing on 27 February 2011. The Chairperson of the disciplinary hearing found the Complainant guilty of six (6) of the seven charges with the exception of the charge of altering the job specification for the Procurement Officer post.
- 6.8.3 The Complainant took this matter to the CCMA and it was found that the dismissal by the TETA was fair. It therefore cannot be said that the Complainant was dismissed on framed or fabricated charges.

6.8.4 There is no finding of improper conduct with regard to this issue as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.9 Regarding whether the Complainant and the South African taxpayer suffered prejudice as a result of the alleged improper conduct of the CEO.

6.9.1 The allegation that the South African taxpayer were prejudiced by the alleged improper conduct of the CEO, is substantiated.

6.9.2 The CEO's failure to comply with the TETA's procurement processes outlined in the Constitution, Treasury Regulations, the TETA's Policy and SCM Guide in the procurement and appointment of Deloitte and Mr Mudau is prejudicial to the South African taxpayer in that the deviation processes that she followed prevented the TETA from accessing a wide spectrum of potential service providers.

6.9.3 The allegation that the TETA brought trumped up and fabricated charges against the Complainant as a result of her highlighting procurement irregularities, is unsubstantiated. The Complainant was not improperly prejudiced in the TETA compliance with its disciplinary policy in taking disciplinary action against her.

7. REMEDIAL ACTION

7.1 In an endeavour to ensure that appropriate remedial action is implemented, I have taken cognisance of the internal investigation that was undertaken when the Complainant escalated her complaint to the Minister of Higher Education on the 09 March 2011 and the response to the Department by the TETA Board.

- 7.1.1 The Minister informed Parliament in response to Question 2256 dated 24 August 2012 that the TETA Board appointed OMA Chartered Accountant Incorporated to conduct an investigation with regard to the CEO's non-compliance with approved TETA procurement policy in the appointment of preferred service providers. The OMA report indicated that the closed bid processes utilised in the procurement of Deloitte IT did not serve the best interest of the TETA and there was mismanagement of the supply chain processes.
- 7.1.2 In pursuant of the OMA findings, the Board suspended the CEO on 21 August 2012. In response thereto the CEO brought an application in the Labour Court, Johannesburg case number J2240/12 against the Board to set aside the suspension on 07 September 2012. The TETA Board signed an out of Court Settlement which was made an order of Court. Essentially, the Board agreed to setting aside the suspension of the CEO and replacing it with special leave. Further, that any disciplinary proceedings that informed the suspension must be brought against the CEO within fourteen (14) days and should this not be done, the CEO will resume her duties at the TETA. In addition, any disciplinary action if taken must be preceded by mediation / conciliation. Further, that such action should be concluded before 30 days.
- 7.1.3 The TETA Board did not pursue and conclude any disciplinary action against the CEO and I am precluded from interrogating the terms of the Settlement Agreement that was concluded which was made an Order of Court in terms of section 182(3) of the Constitution and section 6(6) of the Public Protector Act. However as recorded in my findings in paragraph 6 above, the CEO and the TETA failed to adhere to procurement policy and prescripts.
- 7.2 The appropriate remedial action that I am taking in pursuit of section 182(1) (c) of the Constitution is the following:

7.2.1 The Minister of Higher Education must:

- 7.2.1.1 Take cognisance of the improper conduct and findings of maladministration by the TETA Board and the CEO.
- 7.2.1.2 Ensure that appropriate action is taken in terms of section 84 of the PFMA against the remaining Board members.
- 7.2.1.3 Further ensure that the implementation of the remedial action is taken in compliance with section 182(1)(c).

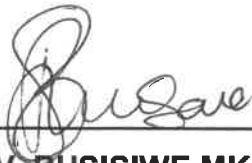
7.2.2 The Chairperson of the TETA Board must ensure that:

- 7.2.2.1 Within three (3) months of this report, conduct an evaluation of the effectiveness of all Procurement and Human Resource policies to determine systemic deficiencies and ensure that all relevant staff are trained on the TETA's procurement policies and legislative prescripts governing procurement in the public sector to prevent recurrences of transgression identified in this report.

8. MONITORING

- 8.1 The Chairperson of the Board must submit an Implementation Plan to the Public Protector within 30 (thirty) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.
- 8.2 I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of *Economic Freedom Fighters v Speaker of*

the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others[2016]ZACC 11, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial actions prescribed in this Report are legally binding on the Municipal Manager unless they obtain an *Interim Interdict* or *Court Order* directing otherwise.



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

DATE: 06/03/2020