

**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
NO. 23 OF 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO. 20 OF 2016/2017

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***“Allegations of procurement irregularities, nepotism, victimization and
corruption within Tshwane South College”***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF PROCUREMENT
IRREGULARITIES, MALADMINISTRATION, NEPOTISM, CORRUPTION AND
VICTIMISATION OF EMPLOYEES WITHIN TSHWANE SOUTH COLLEGE**



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Executive Summary

- (i) This is the Public Protector's report issued in terms of Section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act No. 23 of 1994.
- (ii) The report communicates the Public Protector's findings and the appropriate remedial action taken in terms of Section 182(1)(b) of the Constitution, pursuant to an investigation into the alleged improper conduct involving maladministration, abuse of power by the Principal of the Tshwane South College (TSC) Mr J Chiloane (the principal), tender irregularities, improper appointment of consultants Kwinana and Associates (Kwinana) and GMZ Consulting (GMZ). Allegations of failure by the erstwhile Member of Executive Council, Honourable Motshekga (the erstwhile MEC Motshekga) responsible for Gauteng Department of Education (the GDE) and Acting Head Of Department Mr L Davids to provide the outcome of the Gauteng Shared Service Centre (GSSC) Forensic Report. It further communicates the Public Protector's findings into allegations of failure by the former MEC Creecy¹ responsible for the GDE to implement the recommendations of the 2008 GSSC Forensic Report into Tshwane South College. The investigation also deals with alleged harassment of whistle-blowers and prejudice suffered by them in this regard.
- (iii) The original complaint was lodged on 10 March 2011 with the Public Protector by Mr C M S Moalusi, an employee of the TSC Pretoria West Campus, and the Chairperson of the Tshwane South College Workplace Forum (TSC Forum) on behalf of members of TSC Forum who were employees of the TSC from all four (4) campuses. He alleged that the Principal and the Deputy Principal, Ms Debra Malete, (the Deputy Principal) were harassing staff members who spoke out

¹ Honourable Creecy is now the Member of Executive Committee responsible for Finance in Gauteng



against corruption, maladministration, nepotism and poor business practices at the TSC. He further alleged that they reported this conduct to the erstwhile MEC Motshekga who commissioned a forensic investigation into the matter. Although the TSC Forum members were not provided with a copy of the GSSC Forensic Report, on finalisation of the investigation the erstwhile MEC Motshekga suspended the Principal and dismissed the Deputy Principal. However, the former MEC Creecy reinstated the Principal and the Deputy Principal without consulting the TSC Forum members and since their reinstatement, TSC Forum members were subjected to harassment, victimization and orchestrated suspensions and dismissals.

- (iv) The second complaint was lodged with the Public Protector by Mr T Ncalo, former Chairperson of the TSC Council (the Council), on 03 July 2012. Mr Ncalo complained about the improper appointment of GMZ Consulting by the Acting Principal, Mr Kraft, to conduct disciplinary hearings and the improper appointment of Kwinana by the Principal to conduct an investigation into his honorarium claims.
- (v) The third complaint was lodged with the Public Protector by Mr W Shitlhavani and Mr E Ledwaba on the 19th of August 2014 on behalf of approximately 90 former employees of the TSC, who also formed part of the TSC Forum, alleging that they were dismissed by the Principal because they participated in industrial action wherein they complained about corruption, maladministration, abuse of power, nepotism and poor business practice. They further alleged that the TSC Atteridgeville campus had approximately 160 employees at the time, however approximately 100 employees were either dismissed or their contracts were not renewed.
- (vi) The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (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 section 6(4) of the Public Protector Act (the Act) regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(vii) On analysis of the complaint the following issues were considered and investigated:

- (a) Whether the erstwhile MEC Motshekga and the Acting HOD Mr L Davids, improperly failed to provide a copy of the GSSC Forensic Report, communicate the outcome of the investigation to the Complainants, or furnish them with reasons thereof.
- (b) Whether the former MEC Creecy improperly failed to implement the recommendations of the GSSC Forensic Report when they reinstated the Principal despite findings of tender irregularities, corruption, maladministration and nepotism made against him.
- (c) Whether the Principal upon his reinstatement abused his power, harassed and victimised TSC Forum members by improperly subjecting them to disciplinary hearings and subsequent dismissals as a result of reporting his conduct to the erstwhile MEC Motshekga.
- (d) Whether the TSC Council and the Principal improperly appointed Kwinana and Associates to conduct a forensic investigation.
- (e) Whether the TSC Council and the erstwhile Acting Principal, Mr Kraft, improperly appointed GMZ consulting to conduct disciplinary hearings.
- (f) Whether the Deputy Principal failed to disclose an alleged conflict of interest with GMZ Consulting and if so, whether Acting Principal Mr Kraft failed to manage the conflict of interest in appointing GMZ Consulting.

- (g) Whether the Complainants suffered prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.
- (viii) The investigation process was conducted in the form of an inquisitorial process, which included consultations and correspondence with the Complainants, the former MEC Creecy, officials of the GDE, the Minister of Higher Education Dr B E Nzimande and officials of the Department of Higher Education and Training (DHET), Minister of Basic Education, Mrs M A Motshekga, the Principal Mr Chiloane, Mr Chiloane's attorney Mr Bongani Khoza and officials of TSC. Relevant documents and the applicable legal framework were also sourced and analysed. Interviews were also conducted and at the conclusion of the investigation persons who appeared to be implicated by evidence, were served with notices advising them of such and were given an opportunity to challenge such evidence.
- (ix) Applicable prescripts regulating fair administration, protected disclosures, employee rights, work place disciplinary procedures, procurement, contract management and the role and responsibilities of the TSC and GDE were considered. The conduct of the TSC and GDE were measured against these prescripts. Key regulatory frameworks that informed the investigation were the Promotion for Administrative Justice Act No. 3 of 2000 (PAJA), Protected Disclosures Act No. 26 of 2000 (the PDA), Public Finance Management Act No. 1 of 1999 and the Further Education and Training Colleges Act No. 16 of 2006 (the FETC Act).
- (x) The standard applied to assess the propriety or impropriety of the conduct of state functionaries is principally as set out in Section 195 of the Constitution which stipulates the basic values and principles governing public administration. The provisions of the PDA were also taken into account, primarily because the Public Protector is one of the institutions authorised under the PDA to receive protected



disclosures, thus serving as a “safe harbour” for those wishing to make disclosures of suspected improprieties in the exercise of state power and control over public resources. While the PDA does not specifically instruct the Public Protector, the Auditor-General and others to investigate the content of a disclosure, it is a given that such disclosure needs to be followed up, particularly in the light of section 195 of the Constitution as interpreted by the Constitutional Court in *Khumalo vs MEC for Education Kwazulu Natal*².

(xi) Having regard to the evidence, the regulatory framework determining the standard the Department should have complied with, the Public Protector makes the following findings:

(a) Regarding whether the erstwhile MEC Motshekga and the Acting HOD, Mr L Davids improperly failed to provide a copy of the GSSC Forensic Report, communicate the outcome of the investigation to the Complainants, or furnish them with reasons thereof:

(aa) The allegation that the erstwhile MEC Motshekga did not provide the Complainants with a copy of the GSSC Forensic Report, communicate the outcome to them or furnish them with reasons thereof is substantiated;

(bb) While the first Complainants made a protected disclosure in the form of a dossier submitted to the erstwhile MEC Motshekga, she did not provide them with a copy of the report or the outcome thereof;

(cc) In terms of section 46(3) of the FET Act the erstwhile MEC Motshekga was only obliged to provide the Council of the College with a copy of the

² 2013 ZACC 49



report of her investigation. There was no statutory duty on the erstwhile MEC Motshekga to provide a copy of the report to any other third party;

- (dd) In terms of section 32(1) (a) of the Constitution everyone has the right to access to any information held by the state. The Complainants thus had a right to obtain a copy of the GSSC Forensic Report, however they had to invoke this right by applying for access to the report in terms of PAIA;
- (ee) According to the principle of redress as contained in The White Paper on Transforming Public Service Delivery, Government Gazette No. 18340, MEC Motshekga and the Acting HOD Mr L Davids were obliged to provide the Complainants with a clear and timeous response to their complaints and to take action to address mistakes or failures identified in the process of dealing with such complaints;
- (ff) The erstwhile MEC Motshekga and Acting HOD Mr L Davids had a duty in terms of section 195(1)(f) and (g) of the Constitution which states that the public administration must be governed by the democratic values and principles enshrined in the Constitution including inter alia the following: public administration must be accountable and transparency must be fostered by providing the public with timely accessible and accurate information. Therefore the respondents had a duty to attend to the complaints in a transparent manner by providing the Complainants with timeous and accurate information. They were bound to act in an accountable and ethical manner in the investigation of these complaints and to address any irregularity or unlawful action uncovered in the course of the investigation;
- (gg) The erstwhile MEC Motshekga and Acting HOD L Davids failed to comply with the principles of fair procedures as laid down in section 33



of the Constitution and section 3(2) of PAJA when they failed to advise the Complainants about the outcome of the GSSC Forensic Investigation or alternatively to provide them with reasonable grounds for withholding the GSSC Forensic Report; and

- (hh) There is no rational reason for erstwhile MEC Motshekga and the Acting HOD Mr L Davids to have failed to provide the Complainants with a copy of the GSSC report or provide them with reasons thereof. Their conduct constitutes maladministration as envisaged in section 6 (4) (a) (i) of the Public Protector Act, and is improper conduct as envisaged in section 182 (1) of the Constitution.
- (b) Regarding whether former MEC Creecy improperly failed to implement the recommendations of the GSSC Forensic Report when they reinstated the Principal, Mr Chiloane, despite findings of tender irregularities, corruption, maladministration and nepotism made against him:**
- (aa) The allegation that the former MEC Creecy failed to implement the recommendations of the GSSC Forensic Report is partially substantiated;
- (bb) When the former MEC Creecy assumed office in 2009 she continued implementing the recommendations of the GSSC Forensic report by continuing with disciplinary action against the Principal and the Deputy Principal. She subsequently withdrew the disciplinary hearing and reinstated the Principal based on the second legal opinion which was in contrast with the earlier one;
- (cc) However, her subsequent decision to withdraw the disciplinary action and reinstate the Principal is an “*administrative action*” in terms of

section of the Promotion of Administrative Justice Act No. 3 of 2000 adversely affecting the Complainants;

(dd) In doing so, former MEC Creecy failed to follow proper procedures as outlined in section 3(2) of the PAJA therefore violating the complainants' right to just administrative action as envisaged in section 33 of the constitution; and

(ee) Their conduct constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and is improper conduct as envisaged in section 182(1) of the Constitution.

(c) Regarding whether Principal Chiloane upon his reinstatement abused his power, harassed and victimized TSC employees by improperly subjecting them to disciplinary hearings and subsequent dismissals as a result of reporting his conduct to the erstwhile MEC Motshekga:

(aa) The allegation that the Principal victimised and harassed TSC employees by subjecting them to disciplinary action and termination of their contracts as a result of their disclosure to MEC Motshekga is substantiated;

(bb) The Complainants were charged with various acts of misconduct;

(cc) Accordingly, all disciplinary hearings, dismissals and non-renewal of fixed terms contracts against the first Complainants amount to unfair labour practice in terms of section 197 of the Labour Relations Act;

(dd) The conduct of the Principal in this regard constitutes abuse of power, maladministration as envisaged in section 6(4)(a)(i) of the Public



Protector, and is improper conduct as envisaged in section 182(1) of the Constitution.

(d) Regarding whether the TSC Council and the Principal, Mr Chilioane improperly appointed Kwinana to conduct a forensic investigation:

- (aa) The allegation that the TSC Council and Principal improperly appointed Kwinana and Associates to investigate the fraudulent honorarium claims is substantiated;
- (bb) The TSC Council and the Principal conceded that they procured the services of Kwinana without following a competitive bidding process but rather by following an emergency procurement process which they claimed was authorised by MEC Creecy.
- (cc) The Principal as the Accounting Officer of the TSC in appointing Kwinana made no provision for a fair, equitable, transparent, competitive and cost effective procurement process as required by section 217 of the Constitution.
- (dd) The deviation to procure Kwinana and Associates' services on an "emergency basis" was irregular in terms of National Treasury Regulation 16A6.4 which requires goods and services to be procured through means other than a competitive bidding process. National Treasury Practice Note 8 of 2007/2008 defines an emergency processes to procure goods and services. It highlights that "emergency procurement" process will only apply in serious, unexpected and potentially life threatening circumstances which require immediate rectification;



- (ee) Mr Ncalo had since resigned from the TSC and no further honorarium claims could be made by him;
- (ff) Section 9(1) of the FETC Act requires that the college Council provide an adequate oversight role in the supply chain management to ensure that the minimum standard in which procurement is conducted is not inferior to those contained in the PFMA. The college council failed to provide this oversight function in procuring the services of Kwinana; and
- (gg) The conduct of the Principal and TSC Council with regards to the above constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and is improper conduct as envisaged in section 182 (1) of the Constitution.
- (e) Regarding whether the TSC Council and the erstwhile Acting Principal, Mr Kraft improperly appointed GMZ Consulting to conduct disciplinary hearings:**
- (aa) The allegation that the TSC Council and the Acting Principal Mr Kraft improperly appointed GMZ Consulting to conduct disciplinary hearings at TSC is substantiated;
- (bb) The DHET conceded in its response dated 28 August 2013 that GMZ Consulting was appointed by the Acting Principal Mr Kraft without following a competitive process but through an emergency procurement process;
- (cc) The Acting Principal Mr Kraft in appointing GMZ Consulting made no provision for a fair, equitable, transparent, competitive and cost effective procurement process as required by section 217 of the Constitution.



- (dd) The deviation to procure GMZ Consulting services on an “*emergency basis*” was irregular in terms of National Treasury Regulation 16A6.4 which requires goods and services to be procured through means other than a competitive bidding process. National Treasury Practice Note 8 of 2007/2008 defines an emergency processes to procure goods and services. It highlights that “*emergency procurement*” process will only apply in serious, unexpected and potentially life threatening circumstances which require immediate rectification;
- (ee) The conduct of the Acting Principal Mr Kraft and the former Chairperson of the TSC Council, Mr Ncalo constitutes maladministration as envisaged in section 6 (4)(a)(i) of the Public Protector Act and constitutes improper conduct as envisaged in section 182(1) of the Constitution;
- (f) Regarding whether the Deputy Principal, Ms D Malete, failed to disclose an alleged conflict of interest with GMZ Consulting and if so, whether Acting Principal Mr Kraft failed to manage the conflict of interest in appointing GMZ Consulting:**
- (aa) The allegation whether the Deputy Principal failed to disclose an alleged conflict of interest with GMZ Consulting and if so, whether Acting Principal Mr Kraft failed to manage the conflict of interest in appointing GMZ Consulting is unsubstantiated; and
- (bb) There was no evidence found to support the allegation that the Deputy Principal failed to disclose a conflict of interest with GMZ Consulting, further no link was established between the Deputy Principal and GMZ Consulting.

(g) Regarding whether the Complainants suffered prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act:

- (aa) The allegation that the Complainants suffered prejudice is substantiated.
- (bb) The Complainants who were members of the TSC Forum submitted a dossier to the erstwhile MEC Hon Motshekga who commissioned an investigation which led to the disciplinary action been taken against the Principal. While the erstwhile MEC did not deem it appropriate to provide the members of the TSC Forum with a response or a copy of the report or furnish them with reasons, they were kept in the dark.
- (cc) While the former MEC Hon Creecy reinstated the Principal back to his position without consulting the members of the TSC Forum it came as a shock to them that despite serious allegations of corruption made against the Principal in the 2008 GSCC Forensic Report, he was being brought back to manage them. They knew that the Principal was going to victimize them as they were the whistle blowers who made the disclosure to the erstwhile MEC Hon Motshekga. Upon the Principal's reinstatement they marched to the Head office of the TSC and vandalised the property of the TSC and the Principal because they were not happy about his reinstatement.
- (dd) Their rights or their legitimate expectations to be protected as whistle blowers were adversely affected by the decision of the erstwhile MEC Motshekga not to communicate to them the outcome of the GSSC forensic investigation.

- (ee) Further their rights and their legitimate expectation that after making a protected disclosure they would be notified of the outcome, action would be taken against implicated officials and they would not be subjected to any victimisation. They were adversely affected by the decision of the former MEC Creecy not to continue with disciplinary hearing against the Principal and reinstating him to the TSC.
- (ff) The reinstatement of the Principal where the Complainants were expected to report to him, placed them, as members of the TSC Forum, in jeopardy of facing victimization and harassment in the form of unwarranted disciplinary hearings and other forms of unfair labour practice.
- (gg) As a result of such hearings and the non-renewal of contracts, some of the Complainants have been dismissed and had their contracts terminated. Those who are still employed continue to suffer victimization and harassment in a form of disciplinary hearings.
- (hh) Those who are no longer employed by TSC are unable to find employment elsewhere in other colleges, as the TSC has blacklisted their names on the public servants payroll system, Persal.
- (ii) These Complainants are now living in poverty, with their houses having been re-possessed by financial institutions as a result of non-payment on bonds. They are unable to meet financial obligations in terms of payments to their policies and finance their children's educational needs. Further, their family life has been affected as they are no longer able to support their dependents.
- (jj) The second Complainant resigned from his position as Chairperson of the Council. He failed to make representations to Kwinana and



Associates during their investigation into his honorarium claims made during his term as the Chairperson. Therefore, he could not have been prejudiced.

- (xii) Taking into account the lapse of time since the lodging of complaints, the appropriate remedial action the Public Protector is taking in pursuit of Section 182(1) of the Constitution is the following :

The Minister of Higher Education:

- (a) The Minister of Higher Education must conduct an inquiry to review the dismissals and disciplinary actions taken against the members of the TSC Forum.
- (b) The inquiry should also explore the possibility of compensating members of the TSC Forum that suffered prejudice as a result of the dismissals and disciplinary actions if it is found that they have suffered occupational detriment as a result of the protected disclosure.
- (c) The Minister of Higher Education must consider instituting disciplinary actions against the Principal, Mr Chiloane, in terms of section 16A (2) of the Public Service Act for failing to take necessary disciplinary action against Acting Principal Mr Kraft, Ms Bouwer and Ms Jonker, by not terminating the GMZ Consulting contract timeously and for conflict of interest in that he participated in the disciplinary hearings of employees in which he was the subject matter.
- (d) Establish mechanisms to effect the protection of employees who make protected disclosures at TSC.



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- (e) To oversee compliance that the TSC Council takes appropriate steps to rectify the current procurement policy of the College and to ensure that it complies with the standards of the PFMA and Treasury Regulations.

The TSC Council:

- (f) The TSC Council must take appropriate steps to rectify the current procurement policy of the College and to ensure that it complies with the standards of the PFMA and Treasury Regulations.
- (g) The TSC Council must adopt monitoring and support mechanisms in the Finances and SCM processes of the College to ensure that a sufficient oversight role is provided by Council.
- (h) To create a division within the TSC complaints management unit which will handle protected disclosures



REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF PROCUREMENT IRREGULARITIES, MALADMINISTRATION, NEPOTISM, CORRUPTION AND VICTIMISATION OF EMPLOYEES WITHIN TSHWANE SOUTH COLLEGE

1 INTRODUCTION

- 1.1 This is the Public Protector's report issued in terms of Section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) read with Section 8(1) of the Public Protector Act No. 23 1994 (the Public Protector Act).
- 1.2 The Report is submitted to the following in terms of section 8(1) of the Public Protector:
 - 1.2.1 Minister of Higher Education and Training, Hon. Dr. B.E Nzimande;
 - 1.2.2 Minister of Basic Education, Hon. Ms M A Motshekga;
 - 1.2.3 The Member of Executive Council (MEC) of Gauteng Department of Education (the GDE) Mr Panyaza Lesufi;
 - 1.2.4 The Member of Executive Council (MEC) of Gauteng Provincial Treasury, Ms B Creecy;
 - 1.2.5 The Director General, Department Higher Education and Training (the DHET), Mr G F Qonde;
 - 1.2.6 The Principal Mr J Chiloane (the Principal) of the Tshwane South College (the TSC), in terms of section 8(1) of the Public Protector Act; and



1.2.7 The former Deputy Principal Ms. D Maletse of the Tshwane South College (the TSC), in terms of section 8(1) of the Public Protector Act.

1.3 A copy of the report will also be provided to the Complainants, Messrs C M S Moalusi, E Ledwaba, W Shitlavane and Mr T Ncalo.

1.4 The report relates to an investigation into the alleged improper conduct involving maladministration, abuse of power by the Principal, Mr Chiloane, tender irregularities, improper appointment of Kwinana and Associates (Kwinana) and GMZ Consulting and alleged failure by the erstwhile MEC Motshekga responsible for Gauteng Department of Education (the GDE) and Acting HOD Mr L Davids to provide the outcome of the Gauteng Shared Service Centre (GSSC) Forensic Report. It further communicates the Public Protector's findings into allegations of failure by the former MEC Creecy responsible for the GDE to implement the recommendations of the 2008 GSSC Forensic Report into TSC. The investigation also deals with alleged harassment of whistle-blowers and prejudice suffered by them in this regard.

2 THE COMPLAINT

2.1. The original complaint was lodged with the Public Protector on 10 March 2011 by Mr C M S Moalusi an employee of the TSC Pretoria West Campus and the Chairperson of the Tshwane South College Workplace Forum (TSC Forum) on behalf of members of the TSC Forum who were employees of the TSC from all four (4) campuses, namely the Atteridgeville, Centurion, Pretoria West and Odi. He alleged the following:

2.1.1. That the Principal and the Deputy Principal were harassing members of the TSC Forum who spoke out against corruption, maladministration, nepotism and bad business practice at the TSC;



- 2.1.2. That they reported this conduct and submitted a dossier to the erstwhile MEC Motshekga who commissioned a forensic investigation into the allegations. Although TSC Forum members were not provided with a copy of the Forensic report, on finalisation of the investigation the erstwhile MEC Motshekga suspended the Principal and dismissed the Deputy Principal;
- 2.1.3. That the erstwhile MEC Motshekga requested the Gauteng Shared Service Centre (GSSC) to conduct a forensic investigation into these allegations. The GSSC Forensic Report found that the Principal Mr J Chiloane, the Deputy Principal, Ms D Malete and the Procurement Officer, Mr Goodman Mnisi, were involved in tender irregularities and abuse of power;
- 2.1.4. That subsequently the Principal and the Deputy Principal were placed on precautionary suspension. However, the Principal was reinstated by the former MEC Creecy, despite the damning findings against him in the GSSC Forensic Report;
- 2.1.5. That upon his reinstatement the Principal harassed and victimised employees who are members of the TSC Forum by subjecting them to disciplinary hearings and subsequent dismissals as a result of reporting his conduct to the erstwhile MEC Motshekga;
- 2.1.6. That contract employees' whose contracts were previously renewed on an annual basis were not renewed on the basis of having being part of the TSC Forum members who reported the Principal to the erstwhile MEC Motshekga;
- 2.1.7. That the former MEC Creecy reinstated Principal and the Deputy Principal without consulting the TSC Forum members. Upon their reinstatement TSC Forum members were subjected to harassment, victimization and orchestrated suspensions and dismissals; and



- 2.1.8. That the erstwhile MEC Motshekga and the erstwhile Acting Head of Department Mr Len Davids did not communicate the outcome of the GSSC Forensic Report to the Complainants or furnish reasons therefore, but instead sent the report to the Principal, the Deputy Principal and the erstwhile Chairperson of the Council, Mr Brigadier Walters (Mr Walters).
- 2.2. The second complaint was lodged with the Public Protector by Mr W Shitlhavani and Mr E Ledwaba on 19 August 2014 on behalf of approximately 90 former employees of the TSC, who also formed part of the TSC Forum alleging that they were dismissed by Principal because they participated in industrial action wherein they complained about corruption, maladministration, abuse of power, nepotism and poor business practice. He further alleged that the TSC Atteridgeville campus had approximately 160 employees at the time, however, approximately 110 employees were either dismissed or their contracts were not renewed.
- 2.3. The third complaint was lodged with the Public Protector by Mr T Ncalo, former Chairperson of the TSC Council (the Council) on 03 July 2012. Mr Ncalo complained about the improper appointment of GMZ Consulting to conduct disciplinary hearings and Kwinana and Associates to conduct an investigation against his honorarium claims. He alleged the following:
- 2.3.1 That he was appointed as the Chairperson of the TSC Council in December 2010 and the Principal was reinstated in April 2011. Upon his reinstatement the Principal undertook an investigation against him in an attempt to discredit him, as he was uncovering corruption and maladministration issues at the TSC, and forced him to vacate his position as the Chairperson of the TSC Council;
- 2.3.2 That the Principal had improperly appointed a company named Kwinana and Associates Gauteng Incorporated (Kwinana) to conduct a forensic investigation into the alleged fraudulent honorarium claims made by him;



- 2.3.3 That Kwinana was not properly registered with the Companies and Intellectual Property Commission (CIPC) or with South African Institute of Chartered Accountants (SAICA) and thus the findings of the investigation could not be validated;
- 2.3.4 That during the process of the aforementioned investigation Kwinana did not consult with him, thereby failing to afford him the opportunity to present his side of the story;
- 2.3.5 That he only resigned as Chairperson of the TSC Council and not as a member of TSC Council and as such he was entitled to the Terms of Reference of the investigation that was being conducted against him;
- 2.3.6 That proper procurement processes were not followed in the appointment of service provider GMZ Consulting, which was appointed to conduct disciplinary hearings at the TSC, despite Mr Ncalo's objection to the appointment. Furthermore, the Principal despite being on suspension contacted him and asked him to support the appointment of GMZ Consulting;
- 2.3.7 That according to a company report on GMZ Consulting which Mr Ncalo had obtained, GMZ Consulting was only registered as a company in March 2011 whereas they were appointed by TSC in February 2011; and
- 2.3.8 That the Deputy Principal influenced the appointment of GMZ Consulting due to her relationship with the company.

3. THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1. The Public Protector is an independent constitutional institution established in terms of section 181(1) (a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.



3.2. Section 182(1) of the Constitution provides that:

"The Public Protector has the power, as regulated by national legislation-

(a) to investigate, any conduct related to state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or that would result in any impropriety or prejudice;

(b) to report on that conduct;

(c) to take appropriate remedial action."

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

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

3.5. The TSC is a public college established in terms of the FETC Act as a result this matter falls within the jurisdiction of the Public Protector.

3.6. The Principal initially challenged the Public Protector's jurisdiction, with his attorney Mr Khoza arguing very strongly and persistently, that a matter such as this belongs to the courts where it can be dealt with appropriately using established procedures in the courts. The Principal and Mr Khoza were duly referred to section 182 of the Constitution and the Public Protector Act which specifically insulate only court decisions and judicial functions, respectively, from



the jurisdiction of the Public Protector. Significantly, section 182 gives the Public Protector power to investigate any conduct in state affairs that is alleged or suspected to be improper or prejudicial, to report on that conduct and to take appropriate remedial action³.

3.7. The attention of the Principal and Mr Khoza was further drawn to the fact that it was, in the Public Protector's considered view, the intention of the architects of our democracy that when ordinary citizens with limited means seek to exact accountability in the exercise of state power and control over public resources there is an accessible mechanism that levels the playing field between them and the mighty state which has enormous resources and time in its hands.

3.8. A consideration of the role of the Public Protector regarding the protection of alleged whistle-blowers, must also take into account that the framers of the PDA specifically singled out the Public Protector and the Auditor-General as "safe harbours" for whistle-blowers for a reason. That reason must, in the Public Protector's considered view, include the ability to use the powers that the Public Protector has to investigate and redress maladministration and other forms of improper conduct.

4. THE INVESTIGATION

4.1. Methodology

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

³ This position was confirmed by the North Gauteng High Court in *Minister of Home Affairs and Another v Public Protector of the Republic of South Africa and Another* (76554/2013) [2016] ZAGPPHC 921; [2017] 1 All SA 239 (GP) (26 October 2016)

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(4)(b) of the Public Protector Act gives the Public Protector the authority to resolve matters without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation or any other means that may be expedient in the circumstances. The investigation process further involved assessment of documents, analysis of applicable policies, witness interviews, sourcing of documents, applicable law and related prescripts

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 if there is deviation does that deviation amount to improper conduct or maladministration?

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

4.2.2. As it is customary, the "*what happened*" enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. To arrive at a finding on what happened, the investigation, like all others, relied on oral and documentary submissions by the complaint, affected

parties, the TSC and the GDE. In this particular case, the factual enquiry focused on the whistleblowing by the employees of the TSC which led to the investigation by the GSSC, the communication of the GSSC Forensic Report outcome, the disciplinary action against the Principal and the Deputy Principal, the subsequent disciplinary action against the officials of the TSC Forum and the appointment of service providers by the TSC.

4.2.3. The enquiry regarding what should have happened, focused on the law or rules that regulate the standard that should have been met by the TSC and Department of Higher Education to prevent maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for correcting maladministration and redressing its consequences. Where a Complainant has suffered prejudice, the idea is to place the Complainant 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.

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

4.3.1 Whether the erstwhile MEC Motshekga and the Acting HOD Mr L Davids, improperly failed to provide a copy of the GSSC Forensic Report, communicate the outcome of the investigation to the Complainants, or furnish them with reasons thereof?

4.3.2 Whether the former MEC Creecy improperly failed to implement the recommendations of the GSSC Forensic Report when they reinstated the Principal despite findings of tender irregularities, corruption, maladministration and nepotism made against him.



- 4.3.3 Whether the Principal upon his reinstatement abused his power, harassed and victimised TSC Forum members by improperly subjecting them to disciplinary hearings and subsequent dismissals as a result of reporting his conduct to the erstwhile MEC Motshekga.
- 4.3.4 Whether the TSC Council and the Principal improperly appointed Kwinana and Associates to conduct a forensic investigation.
- 4.3.5 Whether the TSC Council and the erstwhile Acting Principal, Mr Kraft, improperly appointed GMZ consulting to conduct disciplinary hearings.
- 4.3.6 Whether the Deputy Principal failed to disclose an alleged conflict of interest with GMZ Consulting and if so, whether Acting Principal Mr Kraft failed to manage the conflict of interest in appointing GMZ Consulting.
- 4.3.7 Whether the Complainants suffered prejudice as envisaged in section 6(4) (a) (v) of the Public Protector Act.
- 4.4. The Key Sources of Information**
- 4.4.1. Correspondence sent and received**
- 4.4.1.1. Correspondences between the Public Protector and the Principal; and
- 4.4.1.2. Letter from Mr Chiloane TSC Principal's attorney dated 13 March 2015.
- 4.4.2. Documents**
- 4.4.2.1 Appointment letter of Mr Ncalo as Member of TSC Council from MEC Honourable Barbara Creecy GDE dated 11 October 2010;



- 4.4.1.3. Letter from Mathye attorneys to TSC Secretary of Council dated 22 September 2011;
- 4.4.1.4. Letter from MEC Honourable Barbara Creecy to Ms Makgabo dated 11 October 2011;
- 4.4.1.5. Correspondence from MEC GDE to TSC Secretary dated 11 September 2011;
- 4.4.1.6. Letter of Appointment of Forensic Auditors Kwinana and Associates dated 14 September 2011;
- 4.4.1.7. Correspondence from Mathye Attorney to Couzyn Hertzog and Horak Attorneys dated 09 November 2011;
- 4.4.1.8. Correspondence from Mathye Attorneys to MEC Honourable Barbara Creecy GDE dated 9 November 2011;
- 4.4.1.9. Correspondence from MEC Honourable Barbara Creecy GDE to TSC Secretary dated 09 November 2011;
- 4.4.1.10. Letter from Mr Magabe secretary of Tshwane South College TSC to Barbara Creecy MEC GDE dated 14 November 2011;
- 4.4.1.11. Letter from Couzyn Hertzog and Horak Attorneys to Mr Chiloane CEO of Tshwane South College TSC dated 15 November 2011;
- 4.4.1.12. Letter from Couzyn Hertzog and Horak Attorneys to Mathye Attorneys dated 15 November 2011;
- 4.4.1.13. Acknowledgment of Appointment of forensic Audit receipt letter from MEC GDE to TSC Secretary dated 15 November 2011;

- 4.4.1.14. Letter from Mathye Attorneys to Couzyn Hertzog and Horak Attorneys dated 30 November 2011;
- 4.4.1.15. Letter from Mathye Attorneys to MEC GDE dated 9 December 2011;
- 4.4.1.16. Correspondence from Kwinana and Associates to Independence Regulatory Board for Auditors (IRBA) dated 10 April 2012;
- 4.4.1.17. Correspondence from Kwinana and Associates addressed to Council Members of TSC dated 12 April 2012;
- 4.4.1.18. Letter from The College Council Chairperson to MEC Honourable Barbara Creecy GDE dated April 26 2012;
- 4.4.1.19. Letter from TSC Secretary Mr N Magabe to Kwinana and Associates dated 8 May 2012;
- 4.4.1.20. Letter from Couzyn Hertzog and Horak Attorneys to Mr Chiloane TSC CEO dated 9 May 2012;
- 4.4.1.21. Correspondences between the Mr Chiloane the Principal/ Tshwane South college and the members of the TSC Workplace Forum;
- 4.4.1.22. Correspondences between the Attorneys of the TSC and the TSC Workplace Forum;
- 4.4.2.1. Report by Support Chief Financial Officer: TSC dated 28 August 2013;
- 4.4.2.2. Report by Ms Jonker former finance manager to Mr Chiloane CEO of Tshwane South College TSC dated 26 September 2011;



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- 4.4.2.3. Report by Ms Boucher, CFO for the TSC to Mr Chiloane CEO of Tshwane South College TSC dated 27 September 2011;
- 4.4.2.4. Procurement Document of the TSC dated 17 August 2006;
- 4.4.2.5. Procurement Policy of the TSC adopted on 18 November 2011;
- 4.4.2.6. Forensic Report by Kwinana and Associates dated 8 December 2011;
- 4.4.2.7. High Court Notice of Motion in the matter between TL Ncalo vs Gauteng MEC for Education and Tshwane South College, no case number provided dated 7 February 2012;
- 4.4.2.8. Affidavit of Mr Ncalo dated 15 September 2011;
- 4.4.2.9. Legal Opinion from Couzyn Hertzog and Horak Attorneys to Mr Chiloane CEO TSC dated 13 April 2012;
- 4.4.2.10. Report of the Independent Auditors to the Members of the Tshwane South College dated 30 July 2010;
- 4.4.2.11. Report of the Independent Auditors to the Council of Tshwane South College dated 13 October 2015;
- 4.4.2.12. Report of the Independent Auditors to the Council of Tshwane South College dated 19 August 2010;
- 4.4.2.13. Report of the Independent Auditors to the Council of Tshwane South College dated 31 July 2013;



- 4.4.2.14. Report of the Independent Auditors to the Gauteng Provincial Legislature on Tshwane South College 26 July 2012;
- 4.4.2.15. Copies of Invoices and payments made to GMZ Consulting by internet banking for the period February 2011 to March 2013;
- 4.4.2.16. Legal Opinion from Kunene Rampala and Botha Attorneys addressed to Gauteng Department of Education dated 31 October 2008;
- 4.4.2.17. Legal Opinion from Adv. Motau, representing the GDE during Mr Chiloane's disciplinary hearings dated 11 November 2009;
- 4.4.2.18. GSSC Forensic Report and Supporting Documents;
- 4.4.2.19. Newspaper cuttings and articles relating to issues at the TSC;
- 4.4.2.20. Pictures submitted by the Principal to the Public Protector about the riot and vandalism at the TSC; and
- 4.4.2.21. Report of Auditor- General dated 31 December 2013.
- 4.4.3. Interviews conducted**
- 4.4.3.1. Interview with the former MEC Hon. B Creecy, Chief Director Human Resources, Director of Further Education and Training, Mr M Mokgatle on 3 October 2011;
- 4.4.3.2. Interview with the second Complainants Mr Shithlavani and Mr Ledwaba on 27 January 2014;

- 4.4.3.3. Interview with Mr Mike Davison FET - Project Manager CFO on 28 February 2014;
- 4.4.3.4. Interview with the Principal, Mr Chiloane, Tshwane South College on 3 June 2014;
- 4.4.3.5. Interview with the former Acting Principal Mr Johan Kraft , Tshwane South College on 15 September 2014;
- 4.4.3.6. Interview with Ms Rina Jonker, the former Financial Manager, Tshwane South College on 10 September 2014;
- 4.4.3.7. Interview with Ms Sonja Boucher the Chief Financial Officer, Tshwane South College on 22 September 2014;
- 4.4.3.8. Interview with the Deputy Principal, Ms Malete, Tshwane South College on 22 September 2014;
- 4.4.3.9. Interview with the second Complainant Mr Shithlalani on 26 February 2015;
- 4.4.3.10. Interview with the TSC Forum member Mr A Arnold on 12 March 2015;
- 4.4.3.11. Interviews with Mr T Ncalo and TSC Forum members on 24 August 2014, 27 and 28 February 2015, 04 March 2015, 02 March 2015 and 27 May 2015; and
- 4.4.3.12. Interview with the second Complainants Mr E Ledwaba and Mr A Mshuqwana on 02 March 2015.
- 4.4.4. Websites consulted/ electronic sources**
- 4.4.4.1. www.saica.co.za

4.4.4.2. www.irba.co.za

4.4.4.3. www.cipc.co.za

4.4.5. Legislation and other prescripts

4.4.5.1. The Constitution of the Republic of South Africa No.1996;

4.4.5.2. The Public Management Finance Act No. 1 of 1999;

4.4.5.3. Further Education and Training Colleges Act No.16 of 2006;

4.4.5.4. The Companies Act No. 71 of 2008;

4.4.5.5. The Auditing Professions Act No. 26 of 2005;

4.4.5.6. Treasury Regulations 2005 Gazette No. 27388

4.4.5.7. Framework for Supply Chain Management dated 5 December 2003;

4.4.5.8. Schedule 1 (Section 18) Standard College Statute;

4.4.5.9. The King III Report on Corporate Governance released 01 September 2009;

4.4.5.10. Employment of Educators Act No.76 1998 (Act No. 76 of 1998);

4.4.5.11. Protected Disclosure Act No. 26 of 2000;

4.4.5.12. Promotion of Administrative Justice Act No.3 of 2000; and

4.4.5.13. Labour Relations Act No. 66 of 1995.

5. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

5.1. Regarding whether the erstwhile MEC Motshekga and the Acting HOD Mr L Davids, improperly failed to provide a copy of the GSSC Forensic Report, communicate the outcome of the investigation to the Complainants, or furnish them with reasons thereof?

5.1.1. During a meeting held on 03 October 2011 with the former MEC Creecy and the GDE officials it was conceded that the erstwhile MEC Motshekga commissioned the GSSC Forensic Investigation following the receipt of a dossier on behalf of TSC Forum. However, the GSSC Forensic Report was not given to the first Complainants by the erstwhile MEC Motshekga and the Acting HOD Mr L Davids.

5.1.2. In her response to section 7(9) letter the erstwhile MEC Motshekga confirmed that she received a dossier from the Complainants regarding the allegations of tender irregularities, maladministration and abuse of power in July 2008. She confirmed that she requested the GSSC to conduct an investigation and the report was submitted on 31 October 2008.

5.1.3. The erstwhile MEC Motshekga submitted that the function of providing a copy of the GSSC Forensic Report should have been performed by the Labour Relations function of the GDE. She submitted further that she became the Minister of Basic Education in May 2009 and the former MEC Creecy should have released the outcome of the investigation to the Complainants during the period of their complaint.

5.1.4. In her response to the section 7(9) the former MEC Creecy confirmed that the GSSC Forensic Report was only communicated to the Principal, the Deputy Chairperson and former Chairperson of the TSC Council, Mr Walters. She confirmed that there was no statutory duty on the erstwhile MEC Motshekga to provide the Complainants with a copy of the report. She further submitted that the



Complainants should have exercised their rights in terms of section 32(1)(a) and (b) of the Constitution, 1996 and section 11 of the Promotion of Access to Information Act 2 of 2000 (PAIA).

5.1.5. The former MEC Creecy in response to the section 7(9) notice does not dispute that the erstwhile MEC Motshekga and the Acting Head of Department did not provide the Complainants with copies of the GSSC Forensic Report or the outcome but she submitted that:

“... is the prerogative and responsibility of the MEC and the Head of Department to commission forensic investigation, where it is deemed appropriate and necessary. Similarly it is within the prerogative of the MEC and the Head of Department, where they deem it appropriate and necessary, not to publicly release the finding of a forensic investigation...”

...there are simply no grounds for the Public Protector to arrive at a finding that former MEC Motshekga and Acting HOD, Mr Len Davids, were in breach of any of the procedures of the Constitution or PAIA”.

5.1.6. Although the Minister of Higher Education (the Minister) acknowledges that the Complainants were not provided with copies of the GSSC Forensic Report he submitted that there was patent instantaneous contradictions and ambiguity in the Public Protector’s section 7(9) notice to him. He further submitted that the Public Protector’s findings *“are clearly a far cry from any logical reasoning conclusion, one that no assessor of evidence, having properly applied his or her mind to the facts”.*

5.1.7. He further submitted that the Public Protector seems to have contradicted and misdirected itself in this regard in that, although the Public Protector concluded that there was no rational basis to provide Complainants with a copy of the response/ GSSC Forensic Report, the Public Protector acknowledged that there

was no statutory obligation in terms of the FETC Act. According to the Minister of Higher Education the MEC was only obliged to provide a copy to the TSC Council.

- 5.1.8. The Minister further argued that there was no attempt by the Public Protector's office to seek clarity from either the erstwhile MEC Motshekga or the Acting HOD Mr Davids as to the reasons why the Complainants were not provided with the GSSC Forensic Report. He proceeded to speculate reasons as to why the erstwhile MEC Motshekga did not provide the Complainants with the GSSC Forensic Report.
- 5.1.9. Despite the Minister's contention that the Complainants had a right in terms of section 32 of the Constitution but failed to invoke it, he submitted that the Complainants are the ones who initially raised the matter with the MEC and therefore had a legitimate expectation to be informed about progress thereof, but that does not give them a right to be entitled to the GSSC Forensic Report. He further argued that any decision on how to proceed with the matter after receiving the GSSC Forensic Report was within the erstwhile MEC Motshekga's prerogative.
- 5.1.10. He further submitted that although he accepted the Public Protector's conclusion that the erstwhile MEC Motshekga did not comply with section 33 of the Constitution he speculated that she had reasonable and justifiable ground to depart from the provisions of section 3(4) of PAJA. He argued that the following were further sufficient, reasonable and justifiable reasons as to why the Complainants were not provided with the copy of the report:
- 5.1.10.1. The nature and sensitivity of the GSSC Forensic Report;
 - 5.1.10.2. The issue of potential prejudice to the officials implicated therein;
 - 5.1.10.3. The lack of compelling reasons for the Complainants to be provided with the report; and

5.1.10.4. Other mechanisms through which the Complainants could have otherwise obtained the report.

5.1.11. He submitted further that the rights of the implicated officials in the GSSC Forensic Report took precedence over the rights of the Complainants. He further submitted that *"...it is our considered view that the Public Protector's findings are misdirected"*.

5.1.12. In light of the above it is clear that the erstwhile MEC Motshekga does not deny that the Complainants were not provided with the GSSC Forensic Report. She placed the responsibility on the GDE and former MEC Creecy to provide the outcome of the investigation to the Complainants. However, the former MEC Creecy and the Minister argued that it was the prerogative of the incumbents' executive authorities not to provide the outcome and the complainants should have exercised their rights to access to information.

5.1.13. The version of the erstwhile MEC Motshekga's is more acceptable than that of the Minister and the former MEC Creecy given that she acknowledged that the Complainants should have been given the outcome of the investigation. This issue will be further amplified when the standard which had to be complied with is discussed under the following heading.

5.2 Regarding whether the former MEC Creecy improperly failed to implement the recommendations of the GSSC Forensic Report when they reinstated the Principal despite findings of tender irregularities, corruption, maladministration and nepotism made against him.

5.2.1 During the meeting held on 03 October 2011, the former MEC Creecy confirmed that the GDE did implement the recommendations of the GSSC Forensic Report. She submitted that upon receipt of the GSSC Forensic Report the erstwhile MEC



Motshekga and the then HOD, Mr M Petjie, placed the Principal on precautionary transfer and initiated disciplinary actions against him and the Deputy Principal.

- 5.2.2 The former MEC Creecy submitted further that the disciplinary hearing against the Deputy Principal was conducted on 29 November 2010 and concluded. The disciplinary tribunal found her guilty of misconduct for failure to disclose her business relationship and the sanction was dismissal. She lodged an appeal in terms of section 191(1) & 191(5) of the Labour Relations Act No 66 of 1995 to the General Service Sectorial Bargaining Council. The Arbitrator issued an award on 26 July 2011 in her favour and ordered that she should be reinstated from 1 February 2011. The GDE did not appeal the matter and the Deputy Principal was reinstated.
- 5.2.3 The former MEC Creecy obtained a legal opinion from Adv T Motau SC dated 11 November 2009 which supported the recommendations of the GSSC Forensic Report in relation to the Principal's disciplinary action. The legal opinion from Adv. Motau SC confirmed that there was a *prima facie* case against the Principal and that there were prospects of succeeding in proving that the employee was guilty. Notably Adv. Motau SC also advised that since the matter was in the public domain there was an additional reason why the matter should be allowed to run its course.
- 5.2.4 According to the documents received during the meeting held on 3 October 2011 with the former MEC Creecy, she obtained a second legal opinion from Kunene Rampala Botha Law Firm during January 2010. This legal opinion advised that there were gaps in the GSSC Forensic Report that would make the prosecution of the disciplinary proceedings cumbersome. Based on this legal opinion, the former MEC Creecy withdrew the charges against the Principal and reinstated him. The aforementioned decision by the former MEC Creecy was never communicated to the Complainants.



- 5.2.5 In her response the erstwhile MEC Motshekga confirmed that she ordered the investigation and suspended the officials involved and any issues pertaining to the matter should have been handled by the Labour Relations Unit within the GDE.
- 5.2.6 While the GDE contends that they did implement the recommendations of the GSSC Forensic Report, the Complainants submitted that the GDE failed to implement same. They submitted that had the GSSC Forensic Report been implemented the Principal would have gone through the full disciplinary process and would have not been reinstated.
- 5.2.7 The Minister submitted that the former MEC Creecy fully implemented the GSSC Forensic Report by instituting disciplinary action against the Principal and the Deputy Principal. He further contends that the suspension of the officials became public knowledge. On the other hand Mr Khoza denied that the Principal and the Deputy Principal were suspended due to the outcome of the GSSC Forensic Report.
- 5.2.8 The former MEC Creecy in response to section 7(9) notice submitted that *"...the HOD and I were the employers of the Principal and as such were entitled to take decision in relation to matters relating to his employment"*. She further submitted that *"the exercise of the employer's prerogative to appoint, reinstate or indeed bring disciplinary charges against an employee cannot in each case involve consultation with all the constituencies who may be affected by such decision"*. She further submitted that *"...there is no nexus between the decision to re-instate the Principal in his position and his potential subsequent conduct"*.
- 5.2.9 She concluded that it was because of the evidence of the Principal and Mr Mnisi in the Deputy Principal's arbitration where the arbitrator's ruling had negative impact in relation to them, she proceeded to take legal advice. She submitted that the advice from Adv. Motau SC highlighted a lack of witnesses and the only

witness being Brigadier Walters. The second legal opinion highlighted gaps in the GSSC Forensic Report which would make it difficult to proceed with the prosecution of the disciplinary hearing. She submitted that as MEC of Education at the time she had a statutory duty not to incur fruitless and wasteful expenditure with an unnecessary prosecution of charges with little prospect of success.

- 5.2.10 The former MEC Creecy conceded that she decided to mediate after considering the state of affairs at the TSC campus which included continuous unrest, assaults, sabotage and major disruptions taking place over an extended period of time. She further conceded that stakeholders (including the Complainants) agreed on all other issues but they failed to agree on the issue of the Principal's reinstatement.
- 5.2.11 The Minister conceded that former MEC Creecy and/or the GDE did not follow the proper procedures as set out in section 3(2) of PAJA. He submitted that in terms of section 6(1) of the same Act any person may institute a proceedings for a judicial review of an administrative action. He further submitted that his rights were not materially or adversely affected by the former MEC Creecy's decision, but the Complainants rights. He submitted further that the Complainants were the appropriate parties to approach the High Court or relevant tribunal in this regard and they have since failed to enforce their rights.
- 5.2.12 The Minister further argued the following: that despite him not having insight to the GSSC Forensic Report, the two legal opinions on which the former MEC Hon Creecy's decision to withdraw disciplinary action against the Principal was based on (*sic*), and despite not being provided with reasons as to why the arbitrator's ruling in favour of the Deputy Principal was not appealed, he does not believe that the former MEC Creecy's decisions were fundamentally and legally flawed and as such he or the court could not interfere with the decisions.
- 5.2.13 Former MEC Creecy submitted that the decision to reinstate the Principal was informed by both legal opinions and the Deputy Principal's arbitration award. The



Public Protector has noted that the former MEC Creecy's decision to reinstate the Principal was taken in January 2010 prior to the arbitration award of the Deputy Principal which was only issued on 26 July 2011.

5.2.14 Furthermore, the former MEC Creecy's insistence on the justification for her decision could not simply ignore the fact that Adv. Motau SC legal opinion concludes that ".... *We advised that with the evidence of the investigators and the witnesses, we should be able to put up a prima facie case warranting an answer. For this reasons we advised that there are prospects that the DOE [sic] will succeed in proving that the employee is guilty....In addition to the above, this matter is in the public domain and that is an additional reason why it should run its course.*" While the second legal advice from KRB Attorneys identified gaps on the GSSC Forensic report, it is difficult to accept the former MEC Creecy's justification of choosing the later legal advice and ignoring the earlier one. The Public Protector therefore, finds it difficult to accept the former MEC Creecy's submission of reinstating the principal based on legal opinion acceptable.

5.3 Regarding whether the Principal upon his reinstatement abused his power, harassed and victimised TSC Forum members by improperly subjecting them to disciplinary hearings and subsequent dismissals as a result of reporting his conduct to the erstwhile MEC Hon Motshekga.

5.3.1 It is common cause that the Complainants submitted a dossier to the erstwhile MEC Hon Motshekga alleging that the Principal, the Deputy Principal and the Procurement Manager were involved in maladministration, abuse of power, tender irregularities and corruption. The erstwhile MEC Motshekga initiated an investigation through the GSSC which confirmed allegations made by the Complainants in the dossier against the Principal and the Deputy Principal. The Principal was placed on precautionary transfer and the Deputy Principal went through a disciplinary inquiry and she was found guilty and dismissed, but later reinstated by the former MEC after she appealed.

- 5.3.2 It is also not disputed that employees of the TSC (including members of the TSC Forum) were involved in various industrial actions wherein they were raising their dissatisfaction regarding the management of the TSC. The former MEC Creecy and the HOD L Davids had to appoint Acting Principals, a new council and also mediators in order to bring stability to the TSC.
- 5.3.3 It is also not disputed that the former MEC Creecy dropped the charges and reinstated the Principal after taking legal advice. It is also common cause that the Complainants (excluding Mr Ncalo) as people who reported the Principal to the MEC were at odds with his reinstatement.
- 5.3.4 What is disputed is the following:
- (a) That the Complainant made a protected disclosure to the erstwhile MEC Motshekga; and
 - (b) That the Complainants were subjected to disciplinary action, dismissals and termination of contracts as a result of the disclosure.
- 5.3.5 It is worth noting that while the Principal and his attorney Mr Khoza did not make any reference to the dossier in any of their submissions including the protected disclosure. They surprisingly refer to the disclosure made to the Public Protector as the alleged protected disclosure. The Public Protector's office has always referred to the disclosure made to the erstwhile MEC by the TSC Forum which resulted in the GSSC Forensic Report, the precautionary transfer of the Principal, his reinstatement and subsequent unhappiness of employees.
- 5.3.6 During the interview with the Principal on 18 June 2012 and in his letter dated 06 March 2015, the Principal denied that upon his reinstatement he victimized and harassed TSC employees by subjecting them to disciplinary action as a result of

their disclosure to the erstwhile MEC Motshekga and submitted that the decision was not made by him, but by the Council. He submitted the following⁴:

5.3.6.1 That the TSC Forum is not legally recognized within the TSC as it was formed by rebellious employees who wanted to run the college as they wished;

5.3.6.2 On the allegations of deliberate non-renewal of employees' contracts, the Principal denied it being attributed to the disclosure and maintained that lecturers/ employees are appointed based on operational requirements;

5.3.6.3 When asked as to why he terminated the contracts of employees who were members of the TSC Forum regardless of them been working at the TSC for long period, he further maintained that the FETC Act provides that for every 30 students there must be 1 lecturer and when it comes to workshops, for every 15 students there must be 1 lecturer. Therefore, lecturers are appointed in line with that provision. The Principal maintained that the FETC Act gave powers to the Council to create posts and fill vacancies when they arise. In response to the section 7(9) notice Mr Khoza submitted that in some instances permanent appointments were made by the College following the recruitment process and it would amount to fruitless and wasteful expenditure to retain contract employees whilst permanent appointments have been made;

5.3.6.4 The Principal maintained that there are no whistle-blowers in the TSC. He further mentioned that during his absence the so called concerned group/ rebels group was running the TSC and it arrived to a situation whereby lecturers/employees will be paid twice for the very same job that they have been employed to do;

5.3.6.5 He maintained that employees who were dismissed, were dismissed for committing gross-misconduct. He made reference to an employee who reported

⁴ This was reiterated by Mr Khoza in response to my section 7(9) letter to the Principal



to be sick while he/she was performing remunerative work for another college. Furthermore, in the past 2 years, 11 staff members were dismissed;

5.3.6.6 The Principal's attorney, Mr Khoza, in a letter dated 17 March 2015 submitted that the Public Protector's office is misleading itself since the majority of the persons that have referred the matter to the Public Protector office were no longer employed by the TSC. Therefore, he was of the opinion there were no disclosures made in this regard;

5.3.6.7 In response to section 7(9) notice Mr Khoza insisted that the Public Protector has been "*interestingly and surprisingly convinced by misleading information furnished by the employees. The latter statement is made based on the report sent by the Office of the Public Protector to the Minister of Higher Education and Training wherein recommendations were made*".... without affording implicated officials an opportunity to make representations⁵. Mr Khoza reiterated the events of the 2nd February 2010⁶, and indicated that the employees were found guilty of committing criminal offences and therefore it was necessary for the employer to "*...deal with the matter, the employees were thus charged and have been undergoing a disciplinary enquiry which they have been delaying.*" On 20 August 2015 the employees launched an urgent application at the Labour Court in order to stop the disciplinary enquiry and the Court ruled against them. He further stated that the employees then approached the Office of the Public Protector to frustrate the process and that the Public Protector's office is being used in an effort to divert the matter.

5.3.7 Mr Khoza further submitted that the employees have alleged that the information disclosed to the Public Protector amounts to Protected Disclosure, however his

⁵ It is clear that Mr Khoza had privy to the section 7(9) notice directed to the Minister of Higher Education. By virtue of their nature section 7(9) notices are confidential.

⁶ The 2010 strike that occurred when the Principal was reinstated at TSC and the Deputy Principal was assaulted by employees.

client, the Principal Mr Chiloane, denies that the same information amounts to a Protected Disclosure. Accordingly Mr Khoza contended that there was no disclosure made by the employees that were protected in terms of the PDA and therefore no occupational detriment suffered by the employees. He concluded that *“there was no nexus between the so-called disclosure made by the employees and the decision to charge the employees for misconduct ...the employees actions ...cannot be hidden under the so called disclosure”*. He argued about the right of the employer to discipline the employees.

- 5.3.8 In her response to section 7(9) notice the former MEC Creecy submitted that, the Public Protector’s provisional findings are both wrong in law and in fact. She submitted that *“...in the event that any of the employees who were of the view that their inquiries were either unfair and/ conducted in biased or technically flawed manner, they would have entitled appeal their findings..... also have been entitled to seek further legal redress in the appropriate legal forum in the event their appeal failed. This did not take place.”*
- 5.3.9 She further argue that, she is *“at loss to understand how the Public Protector can state that in relation to disciplinary process in which people were entitled to be represented and results of which they could appeal, but which they did not, that all disciplinary process, including the dismissal and non-renewal of fixed terms contracts amounts to an unfair labour practice.”* She concluded that *“as it turns out, the conduct of fair and independent disciplinary inquiries which were not the subject of appeal as well as criminal convictions appear to indicate that the principal did not abuse his position”*.
- 5.3.10 Mr Khoza submitted that the Principal and the Deputy Principal denied that they testified against the employees during the disciplinary hearings, but admit that they testified during disciplinary hearing sentencing procedures on behalf of management, on whether the relationship of trust has broken down.

- 5.3.11 Upon perusal of the documents received from the former MEC Creecy regarding the TSC, the following are the sequence of events that took place at the TSC between and after the Principal was reinstated:
- 5.3.11.1 Following the attempted mediation process initiated by the former MEC Creecy wherein she conceded that, together with all the relevant stakeholders they could not reach an agreement regarding the issue of the Principal's reinstatement, she reinstated him based on the second legal opinion in January 2010. On 02 February 2010 the Principal was back at the TSC;
- 5.3.11.2 Employees embarked on an industrial action which resulted in damage to the TSC property and the Principal's property. The Deputy Principal was assaulted;
- 5.3.11.3 The former MEC Creecy decided to place the Principal on special leave;
- 5.3.11.4 In April 2010 the Principal and the Deputy Principal instituted legal action against the GDE, the TSC and the TSC employees for the damages incurred during the industrial action. The Principal, further challenged his removal from the TSC. This was further confirmed by the Principal during the interviews and his letters referred to above.
- 5.3.11.5 Following mediation, the Principal returned to the TSC in April 2011.
- 5.3.12 According to the suspension notices issued during the period of February 2011 and May 2011, approximately 17 members of the TSC Forum were served with notices to appear before the disciplinary hearings for various acts of misconduct, which *inter alia* included, gross insubordination, prejudice to the administration and discipline of the college, participation in an unlawful industrial action, contravention of a court interdict, contravention of conditions of suspensions, committing various criminal acts: malicious damage to property, bringing the



name of the college into disrepute, failure to comply with a directive, intimidation of Acting Principal Mr Kraft, insulting and swearing at the Deputy Principal.

- 5.3.13 According to the sanction dated 28 August 2013 submitted by Chairperson of the Disciplinary hearings and letters issued by the Principal to the first Complainants, the disciplinary hearings against them were concluded 28 August 2013.
- 5.3.14 According to the Chairperson of the disciplinary hearings, findings dated 04 July 2013, 24 (twenty four) employees were charged with various act of misconduct. According to the sanction referred to above 16 (sixteen) employees were found guilty of various charges of misconduct and 3 (three) of them resigned prior to the sanction being issued. Out of the remaining 13 (thirteen), (four) employees namely, Mr M N Kganakga, Mr Collin Ngobeni, Mr E Ledwaba and Mr W Letwaba were given final written warnings and the rest were dismissed.
- 5.3.15 According to the notices to appear before the disciplinary hearings dated 02 September 2013, the aforementioned employees were charged for committing a criminal offence by the Principal.
- 5.3.16 According to the notice of disciplinary action dated 09 October 2012, Mr E Ledwaba was charged with contravention of TSC procurement policy and unjustifiable prejudice. The disciplinary enquiry went on until 2 September 2014 when he resigned. According to the Principal's letter dated 09 September 2014, the Principal informed him that he is deemed to have been discharged in terms of section 14(1)(d) of the Employment of Educators Act No. 76 of 1998.
- 5.3.17 During September 2013 the Complainants were notified about the outcome of their disciplinary inquiry.
- 5.3.18 According to the transcripts of Case no 14/2155/10 dated 05 December 2013, the Principal laid criminal charges against the Complainants and they were found

guilty by the Pretoria Magistrate Court, sentenced to a fine of thirty eight thousand rands (R38 000.00) and imprisonment which was wholly suspended.

- 5.3.19 According to the letter addressed to the Acting CEO, Mr Jordan, dated 09 November 2009; there were contract employees in the employ of the TSC for periods between 5 to 10 years having their contracts renewed annually. The aforementioned letter recommended that they should be employed permanently. According to copies of termination letters submitted by the first Complainants dated 16 May 2011 approximately 10 employees' contracts were terminated.
- 5.3.20 According to the Principal's letter dated 17 June 2014 he indicated to the Public Protector that he could not interfere with the hearings on his return on 7 April 2011 because he was advised by both the GDE and South African Democratic Teachers Union (SADTU) to stay clear of such as it would be seen as trying to settle the score with the former employees who were at the time charged with misconduct.
- 5.3.21 The former MEC Creecy appointed mediators to mediate, she conceded that the mediation team could not reach the agreement regarding the reinstatement of the Principal.
- 5.3.22 In the circumstance, after having looked and the events leading to the dismissal of the Complainants the Public Protector is persuaded by the version of the first Complainants, whose versions the Public Protector must indicate is also corroborated by oral and written submission of the Complainants, the erstwhile MEC Motshekga and the former MEC Creecy.
- 5.3.23 The Public Protector is accordingly convinced that the first Complainants made a disclosure to the erstwhile MEC Motshekga in what they believed to be improprieties by the Principal, the Deputy Principal and the Procurement Manger Mr Mnisi into the affairs of the TSC. The allegations were investigated and the



Principal was charged by the erstwhile MEC Motshekga. However, the Principal was reinstated by the former MEC Creecy.

- 5.3.24 Furthermore, the Public Protector is of the view that the Principal was instrumental in the disciplinary process by virtue of signing the actual Disciplinary Notices, terminating Complainants' contracts, testifying against the employees and issuing of dismissal letters and then later charging those who were not dismissed by the Chairperson of the Disciplinary Hearing. It is logical to accept that the Principal acted in vengeance, in order to ensure that those who were instrumental in the submission of the dossier to the erstwhile MEC Motshekga are removed of the TSC.
- 5.3.25 Furthermore, the Public Protector is also persuaded by the Complainants' version that the Principal upon his reinstatement victimized and harassed TSC employees by subjecting them to disciplinary actions and termination of their employment contracts. Therefore, the Complainants' version seems to be more probable because of the following:
- 5.3.25.1 The Principal signed the notices of disciplinary hearings, termination of employment contracts, and dismissal letters upon his return in April 2011 despite having being allegedly advised not to interfere in the disciplinary hearings by the GDE and SADTU; and
- 5.3.25.2 Furthermore, those Complainants who were not dismissed by the Chairperson of the disciplinary hearing on 28 August 2013 were charged by the Principal for committing criminal offences on 02 September 2013.



5.4 Regarding whether the TSC Council and Principal Mr Chiloane improperly appointed Kwinana and Associates to conduct a forensic investigation :

- 5.4.1 The DHET in its response letter to the Public Protector's office dated 28 August 2013 does not dispute that Kwinana was appointed by the TSC Council without following a competitive procurement process but submit that the appointment was made on emergency basis.
- 5.4.2 The former MEC Creecy did not want to comment of the procurement process and submitted that the appointment of service providers was the responsibility of the TSC Council and Executive Management.
- 5.4.3 However, what was disputed is the following:
- 5.4.3.1 That the appointment was made on emergency basis and was necessary as it was an instruction of the former MEC Hon Creecy; and
- 5.4.3.2 That Kwinana was not registered with the relevant statutory bodies to conduct the investigation.
- 5.4.4 According to the DHET letter referred above the following are events that took place in appointing Kwinana:
- 5.4.4.1 The Principal laid allegations of fraud against Mr Ncalo, the second Complainant during August 2011 pertaining to the fraudulent honorarium claims submitted by Mr Ncalo;
- 5.4.4.2 Kwinana was the duly appointed external auditors of the TSC and their appointment was recommended by the TSC Council and approved by the MEC on an emergency basis;



5.4.4.3 There was a letter addressed to the former MEC from both the Principal and the then TSC Council Interim Chairperson Mr Skosana dated 11 October 2011 which stated the following:

- (a) Mr Chiloane approached Mr Ncalo on the 21 September 2011 regarding the claims;
- (b) Thereafter on 22 September 2011, Mr Ncalo addressed a letter to the Secretary of the Council whereby he had tendered his resignation as Chairperson of the Council;
- (c) A meeting was held with the Council on 22 September 2011, whereby the Principal informed the Council of allegations levelled against Mr Ncalo and the confrontation with Mr Ncalo on 21 September 2011; and
- (d) A General Council meeting was held on 04 October 2011 wherein Mr Ncalo's resignation was accepted by the Council.

5.4.5 In a letter dated 11 October 2011 the former MEC Creecy acknowledged receipt of the letter submitted to her and requested the TSC Council *"to appoint an independent forensic audit on the alleged allegations of mismanagement and misappropriation of funds within the College."*

5.4.6 According to the response in a letter to the Public Protector written by the Chairperson of TSC Council, Mr Skosana on 03 April 2014, an Executive Council Meeting was held on 13 October 2011, whereby it was resolved by the Executive Council that Kwinana were the *"duly appointed external auditors of Tshwane South College. Their appointment to conduct the forensic investigation was approved by the Council, on an emergency basis"*.



- 5.4.7 In a letter addressed to the former MEC Creecy from the Secretary of TSC Council dated 14 November 2011, it is noted that the appointment of forensic auditors was done on 14 October 2011 and that the preliminary report was expected on 18 November 2011.
- 5.4.8 A letter of appointment dated 14 October 2011, signed by the TSC Council Interim Chairperson, Mr MP Skosana, was sent to Kwinana to conduct a forensic investigation into the validity of the honorarium claims made by Mr Ncalo.
- 5.4.9 During an interview conducted by the investigation team with the Principal on 12 June 2013, he stated that Kwinana have been the external auditors of the TSC "since time immemorial". He further stated that they wanted to conduct the investigation on an urgent basis and as such they were aware of the capabilities of Kwinana, so they appointed them. This was further reiterated by Mr Khoza in response the section 7(9) notice. He submitted that the terms of reference indicated that the report was to be compiled within four days. He submitted further that Mr Ncalo threatened legal action against the TSC and the GDE, which he eventually did and the TSC could not defend itself without a report. He further submitted that given the timeframe of going for an open tender would have delayed the process.
- 5.4.10 The Forensic Report by Kwinana dated 08 December 2011 indicated that Kwinana contacted Mr Ncalo in order to interview him regarding the investigation. However Mr Ncalo's attorneys responded that he was not willing to be interviewed unless he was provided with the terms of reference of the investigation. On 10 February 2012 Mr Ncalo lodged an urgent application at the North Gauteng High Court against the GDE and the TSC to prevent the investigation. The application was dismissed with costs as the investigation was already completed.



- 5.4.11 Independently sourced evidence from statutory regulatory bodies by the Public Protector's investigation team confirmed the following in relation to allegations of non-compliance with registration requirements by Kwinana:
- 5.4.11.1 The Independent Regulatory Board for Auditors which is the regulatory body that has duty to ensure the registration of Auditors and compliance with the IRBA standards (the IRBA) confirmed that Kwinana was at the time of the appointment registered and complied with their role and regulatory requirements.
 - 5.4.11.2 Accordingly the South African Institute of Chartered Accountants (SAICA) the accountancy body in South Africa and confirmed that registration with their institution was voluntary and not a regulatory requirement; and
 - 5.4.11.3 The Companies Intellectual Property Commission (CIPC) confirmed that registration has no effect on the status of the company to conduct audits. The discrepancies raised with regards to spelling errors in names at the CIPC that were alluded to, regarding Kwinana were due to administrative capturing errors either on the part of CIPC or Kwinana. In any event Kwinana was given the opportunity to rectify their data on CIPC.
- 5.4.12 The letter from the former MEC Creecy dated 11 October 2011 does not indicate that the forensic investigation should be conducted on an emergency basis.
- 5.4.13 Accordingly, Mr Ncalo's version seems to be more probable only with regards to the procurement process followed in the appointment of Kwinana because the TSC Council and the Principal followed an emergency procurement process when there was no emergency at the time, as Mr Ncalo had already resigned from TSC and no further honorarium claims could be made by him.



- 5.4.14 Although the Principal insisted that the investigation was urgent there is no other evidence which can substantiate that the investigation was urgently required. Furthermore, the former MEC Creecy did not instruct that the appointment of Kwinana be made on emergency basis without following proper procurement procedure, but instead she submitted that the appointment of the TSC service provider is the responsibility of the Council and Executive Management.
- 5.5 Regarding whether the TSC Council and the erstwhile Acting Principal, Mr Kraft improperly appointed GMZ Consulting to conduct an investigation:**
- 5.5.1 The DHET conceded in its response dated 28 August 2013 that, GMZ Consulting was appointed to conduct disciplinary actions against employees of TSC who were involved in an unprotected industrial action by the Acting Principal Mr Kraft without following a competitive process but by following an emergency procurement process.
- 5.5.2 In the interview with the Acting Principal Mr Kraft on 15 September 2014, he stated that he had requested the Procurement Manager, Mr Mnisi, to obtain names of suitable service providers from the data base in order for him and Mr Ncalo, to interview them. The Procurement Department had given them the name of GMZ Consulting to be interviewed first.
- 5.5.3 He stated that during February 2011, he together with Mr Ncalo, the Deputy Principal and Ms Jonker met with GMZ Consulting at the Holiday Inn, Pretoria, whereby GMZ Consulting was appointed to conduct the disciplinary hearings of the lecturers. No further interviews were held with other service providers.
- 5.5.4 The Acting Principal Mr Kraft also indicated that no service level agreement or contract was drawn up with GMZ Consulting and that he had no idea as to the rates that they would be charging for their services.

- 5.5.5 According to invoices of payments made to GMZ Consulting, Ms Jonker initially made payments to GMZ Consulting for the period of February 2011 to August 2011. One invoice was approved by Mr Ncalo and one by Ms Bouwer, the Chief Financial Officer. Other invoices were approved by the Acting Principal Mr Kraft and some were not approved at all.
- 5.5.6 In the invoices dated from October 2011 to February 2013, Ms Bouwer made payment to GMZ Consulting by herself, with only one invoice dated 25 February 2013 being approved by the Principal.
- 5.5.7 During the interview with Mr Ncalo on 25 August 2014, he maintained that he was uncomfortable with the appointment of GMZ Consulting but accepted it. He submitted that the Principal contacted him and requested him to support the appointment of GMZ Consulting.
- 5.5.8 During the interviews conducted with the Deputy Principal and Ms Jonker on 10 September 2014, they also supported the Acting Principal Mr Kraft's version regarding the appointment of GMZ Consulting.
- 5.5.9 In his response to the section 7(9) notice, Mr Khoza denied that Acting Principal Mr Kraft appointed GMZ Consulting, but submitted that it was initiated by Mr Ncalo and the terms of reference and fees were discussed with Mr Ncalo.
- 5.5.10 Mr Ncalo's version seems to be more probable with regards to the appointment of GMZ Consulting, as the evidence indicates that the appointment of GMZ Consulting was made following a meeting with GMZ Consulting and without following the procurement policy. However, Mr Ncalo was complicit in the procurement process.



5.6 Regarding whether the Deputy Principal Ms D Malete failed to disclose an alleged conflict of interest with GMZ Consulting and if so, whether Acting Principal Mr Kraft failed to manage the conflict of interest in appointing GMZ Consulting

5.6.1 Analysis of the CIPC report reveals no link between Deputy Principal and GMZ Consulting. No evidence was found confirming the alleged relationship. However a forensic analysis regarding cell phones and banking information was not done.

5.7 Regarding whether the Complainants suffered prejudice as envisaged in section 6 (4) (a) (v) of the Public Protector Act

5.7.1 The following members of the TSC Forum made submissions regarding the extent of the prejudice suffered as the result of the alleged whistle-blowing:

5.7.1.1 Mpho D Lebethe alleged that she had brought to the attention of GDE officials information relating to fraudulent documentation used by one of the employees applying for a post to the Principal, but she was however dismissed by the Principal as a result of her divulging this information. She alleged that she was unable to support herself financially and her policies lapsed, she was also unable to support or sustain her children's education.

5.7.1.2 Tshamiseka R Maranela alleged that the Principal refused to renew her contract and alleged that this was because she was a member of the TSC Forum. She alleged that she was unable to support herself financially, her policies lapsed and she was unable to support her children's education.

5.7.1.3 Elsie Makgwadi alleged that she was falsely accused of sexually harassing a female colleague as a result of her refusal to testify as a witness for the Principal against another colleague. She alleged that she was demoted and later

hospitalized. As a result of the demotion she was consequently unable to support herself financially.

- 5.7.1.4 Rantopa E Rammego alleged that his contract was terminated by the Principal as a result of him actively participating in the TSC Forum. He alleged that he was unable to support himself financially, pay his medical bills, pay his son's university fees, also suffers from raised levels of anxiety, recurring insomnia, headaches and hypertension.
- 5.7.1.5 Aubrey Mshuqwana alleged that he was dismissed due to the fact that he agreed with the contents of the dossier that was presented to the GDE by the TSC Forum. He alleged that as a result of the dismissal he suffered loss of income, was unable to pay his bond and was unable to financially support his children. He also alleged that he was unable to continue with his studies and could not find employment due to the fact that he was blacklisted in the Public Service employment Persal system and his medical aid was terminated.
- 5.7.1.6 Susana W Simelane alleged that she was dismissed for being an active member of the TSC Forum. He alleged that he suffered loss of income, could not afford his daughter tertiary education and his insurance policies lapsed.
- 5.7.1.7 William Letwaba alleged that he was subjected to disciplinary hearings for being an active member of the TSC Forum and was convicted and fined internally an amount of R38 000 for public violence. He further alleged that as a result he was admitted to hospital on several occasions and was treated for severe stress.
- 5.7.1.8 Victoria M Selokela alleged that after nine years of employment, her contract was terminated by the Principal for being part of the TSC Forum. She alleged that as a result she suffered emotionally, financially and her children were unable to proceed with their tertiary education.



- 5.7.1.9 Joseph Boshola alleged that he was dismissed by the Principal for being an active member of the TSC Forum. He alleged that as a result he suffered loss of income, he was blacklisted with the credit bureau, and his insurance policies lapsed and was unable to pay for his children's education.
- 5.7.1.10 Anthony M Mthombeni alleged that he was dismissed by the Principal for being an active member of the TSC Forum. He alleged that as a result he suffered loss of income, his policies lapsed, his car was repossessed, and he could not afford to pay his children's school fees.
- 5.7.1.11 Prieska Mokoena alleged that her contract was terminated by the Principal for being an active member of the TSC Forum. She alleged that as a result her policies lapsed and she suffered from depression.
- 5.7.1.12 Lebea P Marutha alleged that his contract was terminated by the Principal for being an active member of the TSC Forum. He further alleged that as a result he lost his income and was blacklisted with the credit bureau.
- 5.7.1.13 Raymond Phiri alleged that his contract was terminated by the Principal for being an active member of the TSC Forum. He alleged that as a result, his insurance policies lapsed, he could not afford to pay for his children's school funds and he was unable to pay for his father's burial.
- 5.7.1.14 Collin Ngobeni alleged that he was charged criminally for malicious damage to property and public violence of which he was convicted and fined R38 000. He alleged further that he was thereafter subjected to internal disciplinary hearing and suspended by the Principal for having committed a criminal offence. He alleged further that he was victimized for being an active member of the TSC Forum as he was a part of the meeting wherein the decision to compile a dossier to the erstwhile MEC Motshekga was taken. He suffered financial

constraints due to legal fees incurred.

- 5.7.1.15 Chriseldah Mabitsela alleged that she was dismissed by the Principal for being an active member of the TSC Forum. She further alleged that as a result she suffered loss of income, her mortgage bond lapsed, her insurances lapsed and she was unable to pay for her son's tertiary education.
- 5.7.1.16 Emily S Mohale alleged that her contract was terminated by the Principal for being an active member of the TSC Forum. She further alleged that as a result, her insurance policies lapsed, she was unable to pay for her children's education and she was blacklisted by the credit bureau.
- 5.7.1.17 Teishe R Phiri alleged that his contract was terminated by the Principal for being an active member of the TSC Forum. He further alleged that as a result, he was unable to pay his children's education, he was blacklisted by the credit bureau and his furniture was repossessed, he was unable to pay rent and his policies lapsed.
- 5.7.1.18 Rababa F Matlala alleged that his contract was terminated by the Principal for being an active member of the TSC Forum, and was a constant target of victimization by the Principal. He alleged that as a result, he suffered loss of income, his policies lapsed, he was unable to fund his tertiary education, and he was unable to repay his creditors. He further alleged that he was not shortlisted for a post which he occupied since February 2007 when it was advertised as a permanent post in 2011, the Principal wrote very damning remarks on his service certificate which jeopardized his chances of getting employment elsewhere and he has a criminal record.
- 5.7.1.19 Motlalepula J Makhanya alleged that his contract was terminated by the Principal because he was involved with the Public Protector's proceedings on allegations of maladministration, nepotism and bad business at TSC. He

further alleged that as a result he suffered loss of income, he is unable to pay children's education and his insurance policies lapsed.

- 5.7.1.20 John M Tshehla alleged his contract was terminated by the Principal for being an active member of TSC Forum. He alleged that as a result, all his bank accounts are in serious debts and his children are unable to attend school.
- 5.7.1.21 Tshegofatso O Modipane alleged that his contract was terminated by the Principal because he was involved with the Public Protector's proceedings on allegations of maladministration and nepotism at TSC. He further alleged that as a result, he was unable to pay his children's school fees, could not support his family financially and his insurance policies lapsed.
- 5.7.1.22 Jeremiah Makhavhu alleged that his contract was terminated by the Principal for being an active member of the TSC Forum. He further alleged that as a result of this, he was never employed since he lost his job, he is unable to make payments for his house. He alleged that this incident has put strain in his family, as a result he lost his wife and son because he cannot support them.
- 5.7.1.23 Petrus S Moila alleged that his contract was terminated by the Principal for being an active member of the TSC Forum. He further alleged that as a result he was unable to pay maintenance for his children, his insurance policies lapsed and his car was repossessed as he could not make payments.
- 5.7.1.24 Peter S Matlala alleged that his contract was terminated by the Principal for being an active member of the TSC Forum. He further alleged that as a result he suffered financially, and he was blacklisted by the credit bureau and could not pay for his children's education.



- 5.7.1.25 Regina Warie alleged that her contract was terminated by the Principal for being an active member of the TSC Forum. She further alleged that as a result she couldn't support her son financially as she is a single parent and suffered psychologically due to loss of income.
- 5.7.1.26 Mokgadi A Moasa alleged that her contract was terminated by the Principal for being an active member of the TSC Forum. He further alleged that as a result she was unable to pay her creditors, her children could not go to school, she was blacklisted by her creditors with the credit bureau and her family suffered because she was the breadwinner.
- 5.7.1.27 Joseph Ratiba alleged that his contract was terminated by the Principal for being an active member of the TSC Forum. He further alleged that as a result he could not pay his mortgage bond, medical bills, school fees and he sold his car to pay some of his creditors.
- 5.7.1.28 Jacob R Sefolo alleged that he was dismissed by the Principal for something that happened when he was on an approved family responsibility leave. He further alleged that as a result he is no longer living with his children because he cannot support them financially.
- 5.7.1.29 Abram Sambo alleged that his contract was terminated by the Principal for being an active member of the TSC Forum. He further alleged that as a result his house was repossessed, his insurance policies and investments lapsed.
- 5.7.1.30 Famanda W Shitlhavani alleged that he was suspended and dismissed by the Principal for being an active member of the TSC Forum. He alleged that as a result he was unable to pay his mortgage bond, municipal property rates, and maintenance of his children. He further alleged that all his insurance policies lapsed. He was employed by Tshwane North College and his contract was

terminated due to the issues related to his dismissal at the TSC.

- 5.7.1.31 Eric Ledwaba alleged that he was suspended and dismissed by the Principal for being an active member of the TSC Forum. He alleged that as a result he suffered loss of income, he lost his medical aid, he lost all his insurance policies, his wife had a miscarriage as a result, he missed employment opportunities due to his blocked Persal number, and he was forced to sell his house. He further alleged that his standard of living deteriorated and the well-being of his wife, children and mother (who is suffering from chronic illness) has been negatively affected.
- 5.7.1.32 Albert A Arnold alleged that he was suspended on a number of occasions and dismissed by the Principal for being an active member of the TSC Forum. He alleged that as a result he suffered significant financial losses, his life insurance policies lapsed and therefore forfeiting all benefits thereto. He alleged further that his retirement annuities could not reach their anticipated potential growth, his medical aid membership lapsed, and he was unable to find alternative employment because his certificate of service is obsolete, he was unable to study further and he has lost financial credibility.
- 5.7.1.33 Catherine Khumalo alleged that she was victimized by the Principal because of a dossier regarding corruption, nepotism and maladministration. She further alleged that as a result she was charged with theft and was never informed of the outcome of the investigation, she cannot find alternative employment, she became blacklisted with government Public Service Persal System, she suffered financial loss, her certificate of service is obsolete, her policies lapsed and she was unable to fund her children's tertiary education.
- 5.7.1.34 Zwelinzima A Bucwa alleged that he was suspended and ultimately dismissed by the Principal for being part of the TSC Forum and participating in the TSC Forum meetings. He alleged that as a result he suffered loss of income and

the medical aid lapsed, he was unable to pay for his children's tertiary education. He further alleged that his insurance policies lapsed and he became compelled to use part of his pension to pay for his mortgage bond.

- 5.7.1.35 Kgapjane D.E Makwela alleged that he was exposed to different forms of corruption, maladministration, nepotism and was dismissed due to the fact that he raised the issues to his colleagues. He alleged that as a result he suffered loss of income, he was blacklisted with the credit bureau, he is unable to pay for his children's education, he cannot afford to pay rent and his medical aid lapsed. He further alleged that he was victimized as he was considered central to the unrest, was refused access to write his exams as he was a registered student.
- 5.7.1.36 Mishack N Kganakga alleged that he was suspended by the Principal for being part of the TSC Forum and participating in the TSC Forum activities. He further alleged that as a result he suffered serious financial constraints and depression.
- 5.7.2 Mr Khoza made submissions to the Section 7(9) notice issued to the Principal stating that the Complainants are misleading the Public Protector's office and created a "smoke screen" to divert attention from their misconduct. He conceded that the Complainants acted in a manner that they did, following a decision taken by the former MEC Creecy to reinstate the Principal and the Deputy Principal to their respective positions. He further submitted that this resulted in the Complainants damaging the property of the TSC and that of the Principal.
- 5.7.3 He further submitted that the TSC was granted an interdict against the Complainants which prohibited them from committing further acts of violence, intimidation, assault, harassment, rendering the TSC ungovernable and interfering with the administration of the TSC.



contended that the protected disclosure was made to the Public Protector's office not to the erstwhile MEC Motshekga as alleged by the Complainants.

6 THE ADMINISTRATIVE STANDARDS THAT SHOULD HAVE BEEN COMPLIED WITH BY THE TSHWANE SOUTH COLLEGE

6.1 Regarding whether the erstwhile MEC Hon Motshekga and the Acting HOD, Mr L Davids improperly failed to provide a copy of the GSSC Forensic Report, communicate the outcome of the investigation to the Complainants, or furnish them with reasons thereof:

6.1.1. The rights of the Complainants to the information obtained by the MEC in the course of the investigations, are regulated by, *inter alia*, section 32(1) of the Constitution which provides that everyone has the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights.

6.1.2. Section 195(1) of the Constitution specifically directs that public administration must be governed by democratic values and principles, of which high standard of professional ethics must be promoted and maintained; efficient, economic and effective use of resources must be promoted; public administration must be accountable; and transparency must be fostered by providing the public with timely, accessible and accurate information.

6.1.3. The Constitutional Court confirmed that a public functionary has a Constitutional obligation, based on the principles of accountability and transparency in terms of section 195(1) (f) (g) and section 7(2) of the Constitution, to attend to any



irregularity brought to its attention and to take steps to “correct (redress) the unlawfulness, within the boundaries of the law and the interests of justice⁷.”

- 6.1.4. In terms of section 195 of the Constitution the MEC (and HOD) therefore did not only have a duty to attend to the complaints in a transparent manner by providing the Complainants with timeous and accurate information, but were also duty bound to act in an accountable and ethical manner in the investigation of these complaints and to address any irregularity or unlawful action uncovered in the course of the investigation.
- 6.1.5. The Promotion of Access to Information Act (the PAIA) is the national legislation contemplated in section 32(2) of the Constitution to give effect to the constitutional right of access to information held by the State (and) to promote effective, efficient and good governance and to promote transparency⁸. The office of the MEC is an organ of state and the GSSC report was therefore held by the State as contemplated by section 32(1) (a) of the Constitution.
- 6.1.6. Section 11 of PAIA gives effect to the right of access to information held by public bodies and section 18 provides for the procedure to be followed when person requests information held by the state. In the *Magidiwana* case the Court held that there was no constitutional obligation on the President to release the Marikana Commissions' final report and that the applicants have failed to exercise their rights under PAIA.

⁷ In the case of *Khumalo and Another v Member of the Executive Council for Education: Kwazulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC) (18 DECEMBER 2013)*

⁸ This was reiterated by the court in the recent unreported judgment of the North Gauteng High Court in the case of *Magidiwana & Association of Mineworkers and Construction Union v President of the Republic of South Africa and Others Case No 40805/15* ('the Marikana case')

- 6.1.7. It is only in terms of the FETC Act where the former MEC Creecy was only required to provide the TSC Council with a copy of the report regarding her investigation. The Complainants had in terms of section 32 of the Constitution a right to the GSSC report however, on the other hand they had to invoke this right by applying for access to the report in terms of PAIA. The White Paper on Transforming Public Service Delivery⁹ (the *Batho Pele* White Paper) states that, when complaints are made, “*citizens should receive a sympathetic, positive response.*” In paragraph 4.7 of the White Paper clear guidance on remedying mistakes and failures are also provided to national and provincial departments.
- 6.1.8. The *Batho Pele* principle of Redress requires a completely new approach to complaint handling and requires National and Provincial departments to review and improve their complaints systems. One of the principles highlighted in the Whitepaper is “*responsiveness*”. The response to a complaint, however trivial, should take full account of the individual's concerns and feelings. Where a mistake has been made, or the service has fallen below the promised standard, the response should be immediate, starting with an apology and a full explanation; an assurance that the occurrence will not be repeated; and then whatever remedial action is necessary.
- 6.1.9. In terms of the *Batho Pele* White Paper the former MEC Creecy and the HOD of the Department Mr B Ngobeni were obliged to provide the Complainants with a clear and timeous response to the complaint and to take action to address the mistakes or failures identified in the process of dealing with such complaint.
- 6.1.10. In Magidiwana/ Marikana case, the Court also dealt with the rationality of the position adopted by the President “– *not to release the Marikana Commissions' final report.*” The Court referred to and applied the dictum from the case of

⁹ Notice 1459 of 1997



*Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)*¹⁰ and concluded that the decision of the President not to release the Marikana Commission's final report at that point in time, was not irrational.

6.1.11. Although the Minister in his response to the Public Protector's section 7(9) notice argued that there may have been a range of reasons why the erstwhile MEC Motshekga did not release the report, the erstwhile MEC Motshekga submitted that the responsibility was for her successor and the HOD of the GDE Mr B Ngobeni to release the report or to communicate the outcome of the report. Although the Minister and the former MEC Creecy argued that it was the prerogative of the erstwhile MEC Motshekga to release the copy of the report or communicate the outcome it is still clear that there appears to be no rational reason for the former MEC Creecy to have failed to give the Complainants a copy of the GSSC report or provide them with reasons.

6.1.12. The GDE is in terms of the Promotion of Administrative Justice Act (PAJA) an "organ of state" and its decision amounts to "administrative action" as defined in section 1 of PAJA. The erstwhile MEC Hon Motshekga and the Acting HOD Mr

¹⁰ "Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful. The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately.[108] A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision."



L Davids by virtue of their positions are in terms of the definition of “*administrative action*” persons performing public function in terms of the empowering legislation which is the FETC Act. Therefore, in terms of section 1 of PAJA the GDE, the erstwhile MEC Motshekga and the Acting HOD Mr L Davids qualify to be an “*Administrator*” and their decisions taken in terms of section 1 of PAJA are “*administrative actions*”.

- 6.1.13. In terms of section 1 of PAJA, a “*decision*” includes failure to take a decision. The Complainants expected the GDE to communicate the outcome of their complaint.
- 6.1.14. Section 3(1) of PAJA, provides that an “*administrative action*” which materially and adversely affects the rights or legitimated expectations of any person must be procedurally fair”. However, a fair procedure depends on the circumstances of each case¹¹.
- 6.1.15. The Complainants expected the GDE to inform them about any decision or proposed decision as required by PAJA. The Department was further required to follow fair procedures laid down in section 3(2) of PAJA.
- 6.1.16. The conduct of the GDE had to comply with section 3(2) of PAJA unless reasonable grounds or justification exist to warrant the GDE to depart from the provision of this section as provided for in section 3(4) of PAJA.
- 6.1.17. In order for the GDE to depart from the requirements laid down in section 3(2) of PAJA the GDE was required to take into account *inter alia*, the objects of the empowering provision; the nature and purpose of, and the need to take, the administrative action; the likely effect of the administrative action; the urgency of

¹¹ Section 3(2) Of Promotion of Administrative Justice Act, 2000



taking the administrative action or the urgency of the matter; and the need to promote an efficient administration and good governance.

6.2 Regarding whether former MEC Creecy improperly failed to implement the recommendations of the GSSC Forensic Report when they reinstated the Principal Mr Chiloane despite findings of tender irregularities, corruption, maladministration and nepotism made against him:

- 6.2.1. The former MEC Creecy's duties and powers to take action in respect of financial or other maladministration of a serious nature at a Public College are derived from section 46 of the FETC Act. In terms of section 46 the former MEC Creecy may appoint a person to conduct an investigation at a public college if *inter alia* circumstances arise at the college that involve financial or other maladministration of a serious nature, seriously undermine the effective functioning of the college, and the council of the college has failed to resolve such circumstances, and the appointment is in the interests of continuing education and training in an open and democratic society.
- 6.2.2. In terms of section 46(2) the person appointed in terms of subsection (1) must, in terms of the terms of reference specified by the Minister/MEC within 30 days of his or her appointment, conduct an investigation at the public college in question, and within 60 days after his or her appointment report in writing to the MEC the findings of his or her investigation, and suggest appropriate measures to resolve the matter. The MEC must as soon as practicable furnish a copy of the report referred to in subsection (2) to the council concerned.
- 6.2.3. Section 46(4) provides that if an audit of the financial records of a public college, or an investigation reveals financial or other maladministration of a serious nature at a public college or the serious undermining of the effective functioning of a public college, the MEC may, after consultation with the council of the public college concerned, if practicable, and despite any other provision of this Act,



appoint a person as administrator to take over the authority of the council or the management of the college and such person may perform all the functions relating to governance or management on behalf of the college for a period determined by the MEC which period may not exceed two years.

- 6.2.4. The erstwhile MEC Motshekga complied with the provisions of section 46 when she appointed the GSSC to conduct an investigation into the affairs of the TSC following receipt of a dossier from the first Complainants. The GSSC investigation revealed serious financial irregularities and other maladministration at TSC which undermined its effective functioning. The erstwhile MEC Motshekga placed the Principal on precautionary transfer and appointed an administrator in compliance with section 46(4).
- 6.2.5. The provisions of PAJA as outlined above are also applicable under this issue.
- 6.2.6. The former MEC Creecy decided to reinstate the Principal after she withdrew disciplinary actions against him. The employees who were adversely affected by the former MEC Creecy's decision embarked on unprotected industrial action in a bid to prevent Principal Mr Chiloane from coming back to the TSC.
- 6.2.7. The former MEC Creecy was a member of the Executive. Implementation of legislation was confirmed to be "*administrative action*" In *Parmaceutical Manufactures Association of SA: In re Ex parte President of the RSA and Others 2000(2) SA 674 (CC)* by the Constitutional court.
- 6.2.8. In doing so the former MEC Hon Creecy was required to be guided by the principles laid down by the Constitutional Court in deciding whether or not the decision as a member of the executive is an administrative action. She was required to look at the nature of the action and not her position.



6.2.9. The decision by the former MEC Creecy to withdraw disciplinary hearing is in terms of section 1 of PAJA an “administrative action”. This was supported by the Eastern Cape High Court in *Despatch High School v Head, Department of Education Eastern Cape, and others 2003 (1) SA (CKH)* when It held that decision to initiate disciplinary proceedings is administrative action, and a high degree of procedural fairness is required.

6.2.10. The former MEC Creecy’s decision to withdraw the disciplinary hearing against the Principal adversely affects the rights of the Complainants. As a result of this decision the Principal was reinstated and the Complainants organised an industrial action owing to their dissatisfaction with his return. As a result of this industrial action they were charged with misconduct and subsequently dismissed.

6.2.11. The former MEC Creecy’s decision is in terms of the provision of common law reviewable in court. In *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council 1903 TS 111 at 115*, Innes CJ described the common law power of review as follows: “Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court”.

6.3 Regarding whether Principal Mr Chiloane upon his reinstatement abused his power, harassed and victimized TSC employees by improperly subjecting them to disciplinary hearings and subsequent dismissals as a result of their reporting his conduct to the erstwhile MEC Motshekga:

6.3.1. In order for the Complainants dossier to qualify as a “disclosure” in terms of the Public Disclosure Act, section 1 of the PDA requires the disclosure to contain



information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show *inter alia* that a criminal offence has been committed, is being committed or is likely to be committed and a miscarriage of justice has occurred, is occurring or is likely to occur.

- 6.3.2. The Complainants were employees of the TSC and members of the TSC Forum at the time of the disclosure, and they disclosed the conduct of the Principal (an employee of the GDE) to erstwhile MEC Motshekga.
- 6.3.3. In terms of section 1 of the PDA, a “*protected disclosure*” qualifies as a disclosure made to *inter alia* to an employer in accordance with section 6¹² and a Member of Cabinet or of Executive Council of province in accordance with section 7¹³. The Complainants submitted their disclosure in good faith to the erstwhile MEC Motshekga, as the person who was in terms of the FETC Act responsible for the GDE.
- 6.3.4. The MEC was a member of the Executive of the Legislature and the College fell under her area of responsibility as referred to in section 7(c) of the PDA.
- 6.3.5. Employees who were Members of the TSC Forum were subjected to disciplinary hearing for various acts of misconduct since February 2011. Furthermore, there were contract employees who were also members of the TSC Forum whose contracts were not renewed.
- 6.3.6. The definition of “*occupational detriment*” as outlined in section 1 of the PDA provide for instances which amount to “*occupational detriment*” in relation to

¹² Section 6(1) of is discussed above under Chapter 5

¹³ Section 7 is discussed above under Chapter 5



working environment of an employee. Instances which amount to “occupational detriment” include being subjected to disciplinary hearings, dismissed, suspended, demoted, harassed or intimidated; being threatened with any of the actions referred to paragraphs (a) to (g) of the definition of “occupational detriment” of the definition of protected disclosure; being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

- 6.3.7. Section 4(1)(b) of the PDA provides that an employee who has been subjected to, is subjected or may be subjected to an occupational detriment, may *inter alia* pursue any other process allowed by or prescribed by law.
- 6.3.8. Any dismissal in breach of section 3 of the PDA is deemed to be an automatically unfair dismissal as contemplated in section 187 of that Act as outlined in section 4(2) provides *inter alia*, that for the purposes of the Labour Relations Act. This was confirmed by the Court in *Minister for Justice and Constitutional Development and Another v Tshishonga (JA6/07) [2009] ZALAC 5; [2009] 9 BLLR 862 (LAC); (2009) 30 ILJ 1799 (LAC) (2 June 2009)*.
- 6.3.9. To arrive at a conclusive answer regarding a possible breach by the Executive Authority (the erstwhile MEC Motshekga and the former MEC Creecy) and the TSC management (TSC council and management), we have to enquire whether the Executive Authority and TSC management had a duty to protect members of the TSC Forum from occupational detriment as defined in section 1 of the PDA after they disclosed to the erstwhile MEC Motshekga. In the previous Public Protector reports titled *They Called It Justice* report No 23 of 2012/13, and *Rocking The Boat* report No 4 of 2016/17, the answer was in the affirmative.
- 6.3.10. The central reasoning underpinning the two reports abovementioned, is that once an employee has blown the whistle- they are prone to be subjected to retaliation and it is the responsibility of top management, including the Executive



Authority, should they be aware of such whistle-blowing, to take measures to exact accountability against alleged wrongdoers while implementing measures to ensure as far as possible, that the alleged wrongdoers do not abuse their power to silence whistle-blowers or retaliate against them. In the case at hand, there is also no doubt that the Complainants made a protected disclosure and the Executive Authority has always been aware of the disclosure.

- 6.3.11. The approach takes into account that it is very rare that a person would be dismissed or punished for whistle-blowing and that the occupational detriment principally takes the form of pretext charges.
- 6.3.12. The question that arises is how to distinguish pretext from legitimate charges. For example, does it mean once a person has blown the whistle-, they are untouchable? Not at all. National and global jurisprudence, including *Motha* and *Tshishonga*, tend to compare the treatment of the whistle-blower with normal prescripts outlining disciplinary, incapacity and grievance procedures. If there is an unexplained deviation and the measures taken against the whistle-blower cannot be rationally explained, subjection to an occupational detriment is inferred.
- 6.3.13. In the case at hand it is not disputed that the Complainants committed various acts of misconduct, which included participation in unauthorized industrial action, disruptions and damage to property. However, one should always bear in mind there is always a direct nexus between the alleged acts of misconduct and the disclosure. One may conclude that had the erstwhile MEC Motshekga and the former MEC Creecy complied with legislative and administrative prescripts as required, some of the alleged acts of misconduct committed by the Complainants may have been avoided.



6.4 Regarding whether the TSC Council and the Principal improperly appointed Kwinana and Associates:

- 6.4.1. Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.
- 6.4.2. The FETC Act and its accompanying statutes places a management and administration duty on the Principal of the TSC as its Accounting Officer. It further places a governance responsibility on the TSC Council as the Governance structure of TSC matters, to ensure that the minimum standard in which procurement is conducted is not inferior to those contained in the Public Finance Management Act 1 of 1999 (the PFMA).
- 6.4.3. Section 9(1) of the FETC Act states that the Council of the Public College forms part of the Governance structures of Public Colleges. In terms of Chapter 3 of the FETC Act, Council has an oversight role in the Supply Chain Management process as well as the College finances and should therefore ensure that policies and processes provide for fairness, equitableness, transparency, competitiveness, and cost effectiveness. Section 13 of the FETC Act states that the Principal of the Public College is responsible for the management and administration of the College and Section 30(2) of the College statues states that the Principal is the Chief Executive and accounting officer of the College.
- 6.4.4. In the pursuance of Good Governance and good administrative processes and in accordance with Section 25(1)(c) of the FETC Act, the Public College is to implement internal audit and risk management systems that are not inferior to the standards contained in the PFMA. This would include internal risks pertaining to procurement. Thus the Treasury Regulations emanating from the PFMA sets the tone and standard for procurement and supply chain systems of institutions.



- 6.4.5. In terms of section 76(4)(c) of the PFMA, the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies, concerning, inter alia, the determination of a framework for an appropriate procurement and provisioning system (supply chain management framework) which is in keeping with the dictates of Section 217(1) of the Constitution.
- 6.4.6. Regulation 16A3. 29(a) of the National treasury Regulations states that a supply chain management system referred to in paragraph 16A.3.1 must be *“fair, equitable, transparent, competitive and cost effective”*. National Treasury Regulation 16A6.4 regulates the procurement of goods and services through means other than competitive bidding. As such National Treasury Practice Note 8 of 2007/2008 regulates the use of emergency processes to procure goods and services. It highlights that *“urgent procurement”* process will only apply where early delivery is of critical importance and the utilisation of the standard procurement process is either impossible, or impractical. An *“emergency procurement”* process will only apply in serious, unexpected and potentially life threatening circumstances which require immediate rectification.
- 6.4.7. In terms of Chapter 2, Part 2 of The Auditing Professions Act, the IRBA is the Regulatory body that has duty to ensure the registration of Auditors and compliance with the IRBA standards.
- 6.4.8. Companies Act regulates the registration of companies.
- 6.4.9. Having established in the legal and regulatory framework, the TSC’s specific processes and procedures that should have been followed in the appointment of Kwinana, it is clear that what happened deviated remarkably from what should have happened.



- 6.4.10. Although Kwinana was appointed as the TSC Internal Auditors prior to their appointment to investigate the fraudulent honorarium claims submitted by Mr Ncalo, proper procurement processes were not followed.
- 6.4.11. The Principal argued that the appointment was done on an emergency basis, however the deviation to procure Kwinana on an emergency basis was irregular. Mr Ncalo had since resigned from the TSC and no further honorarium claims could be made by him, as such there was no emergency.
- 6.4.12. The contention of Mr Khoza that Mr Ncalo had threatened the TSC with legal action cannot be accepted as Mr Ncalo had resigned on 22 September 2012 and the evidence does not indicate that this was the reason for an emergency process. Mr Ncalo's court application was only submitted in February 2012.
- 6.4.13. The Principal, as the Accounting Officer of the TSC, in appointing Kwinana made no provision for a fair, equitable, transparent, competitive and cost effective procurement process to be followed as required by Section 217 of the Constitution.
- 6.4.14. The Council of the TSC failed to provide an adequate oversight role in the Supply Chain Management as required by Section 9 (1) of the FETC Act to ensure that the minimum standard in which procurement is conducted is not inferior to those contained in the PFMA.
- 6.4.15. According to the independently sourced evidence, Kwinana was compliant with the relevant statutory requirements of the IRBA and CIPC.



- 6.5 Regarding whether the TSC Council and the erstwhile Acting Principal, Mr Kraft improperly appointed GMZ consulting to conduct an investigation:**
- 6.5.1 As mentioned above the provisions of section 217 of the Constitution, section 76(4) (c) of the PFMA, section 9(1); section 13; and section 25(1) (c) of the FETC Act, Treasury Regulations 16A3.2 (a); 16A.3.1, 16A6.4a and section 30 (2) the College Statutes outline the standards that should have been complied with, regarding procurement and are also applicable to this issue.
- 6.5.2 GMZ Consulting was appointed by the Acting Principal, Mr Kraft in consultation with the former Chairperson of the TSC Council, Mr Ncalo and the Deputy Principal. Although Mr Ncalo submitted that he was not in favour of the appointment he was present at the meeting wherein a decision to appoint GMZ Consulting was taken.
- 6.5.3 The Acting Principal Mr Kraft made no provision for a fair, equitable, transparent, competitive and cost effective procurement process to be followed in appointing GMZ Consulting as required by Section 217 of the Constitution.
- 6.5.4 The former Chairperson of the TSC Council, Mr Ncalo who participated in the process failed to provide an adequate oversight role in the Supply Chain Management as required by Section 9 (1) of the FETC Act, to ensure that the minimum standard in which procurement is conducted is not inferior to those contained in the PFMA.
- 6.5.5 Due to the improper procurement process that was followed there was no service level agreement with GMZ Consulting and as a result invoices for payments that were submitted by GMZ Consulting were not verified and assessed before payments were authorised. An amount of almost R 9 million within a period of 2 years for conducting of disciplinary hearings for 22 employees was incurred.



- 6.5.6 The current TSC Council failed to implement internal audit and risk management systems as required Section 25(1)(c) of the FETC Act, which resulted in payments being made to GMZ Consulting without proper verifications and assessments.
- 6.5.7 The Companies and Intellectual Property Commission (CIPC) report indicated that GMZ Consulting was established and registered as a company long before it was appointed by the TSC.
- 6.6 Regarding whether the Deputy Principal Ms D Maletle failed to disclose an alleged conflict of interest with GMZ Consulting and if so, whether Acting Principal Mr Kraft failed to manage the conflict of interest in appointing GMZ Consulting:**
- 6.6.1 According to paragraph 3(3)(1) of the Public Service Code of Conduct an employee should not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties.
- 6.6.2 No evidence was found confirming the alleged relationship between the Deputy Principal Ms Maletle and GMZ Consulting.



7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard the department should have complied with; the Public Protector makes the following findings:

- 7.1 Regarding whether the erstwhile MEC Motshekga and the Acting HOD, Mr L Davids improperly failed to provide a copy of the GSSC Forensic Report, communicate the outcome of the investigation to the Complainants, or furnish them with reasons thereof:**
- 7.1.1** The allegation that the erstwhile MEC Motshekga did not provide the Complainants with a copy of the GSSC Forensic Report, communicate the outcome to them or furnish them with reasons thereof is substantiated;
- 7.1.2** While the first Complainants made a protected disclosure in the form of a dossier submitted to the erstwhile MEC Motshekga, she did not provide them with a copy of the report or the outcome thereof;
- 7.1.3** In terms of section 46(3) of the FET Act the erstwhile MEC Motshekga was only obliged to provide the Council of the College with a copy of the report of her investigation. There was no statutory duty on the erstwhile MEC Motshekga to provide a copy of the report to any other third party;
- 7.1.4** In terms of section 32(1) (a) of the Constitution everyone has the right to access to any information held by the state. The Complainants thus had a right to obtain a copy of the GSSC Forensic Report, however they had to invoke this right by applying for access to the report in terms of PAIA;
- 7.1.5** According to the principle of redress as contained in The White Paper on Transforming Public Service Delivery, Government Gazette No. 18340, MEC



Motshekga and the Acting HOD Mr L Davids were obliged to provide the Complainants with a clear and timeous response to their complaints and to take action to address mistakes or failures identified in the process of dealing with such complaints;

- 7.1.6 The erstwhile MEC Motshekga and Acting HOD Mr L Davids had a duty in terms of section 195(1)(f) and (g) of the Constitution which states that the public administration must be governed by the democratic values and principles enshrined in the Constitution including inter alia the following: public administration must be accountable and transparency must be fostered by providing the public with timely accessible and accurate information. Therefore the respondents had a duty to attend to the complaints in a transparent manner by providing the Complainants with timeous and accurate information. They were bound to act in an accountable and ethical manner in the investigation of these complaints and to address any irregularity or unlawful action uncovered in the course of the investigation;
- 7.1.7 The erstwhile MEC Motshekga and Acting HOD L Davids failed to comply with the principles of fair procedures as laid down in section 33 of the Constitution and section 3(2) of PAJA when they failed to advise the Complainants about the outcome of the GSSC Forensic Investigation or alternatively to provide them with reasonable grounds for withholding the GSSC Forensic Report; and
- 7.1.8 There is no rational reason for MEC Motshekga and the Acting HOD Mr L Davids to have failed to provide the Complainants with a copy of the GSSC report or provide them with reasons thereof. Their conduct constitutes maladministration as envisaged in section 6 (4) (a) (i) of the Public Protector Act, and is improper conduct as envisaged in section 182 (1) of the Constitution.



- 7.2 Regarding whether former MEC Creecy improperly failed to implement the recommendations of the GSSC Forensic Report when they reinstated the Principal, Mr Chiloane, despite findings of tender irregularities, corruption, maladministration and nepotism made against him:**
- 7.2.1 The allegation that the former MEC Creecy failed to implement the recommendations of the GSSC Forensic Report is partially substantiated;
- 7.2.2 When the former MEC Creecy assumed office in 2009 she continued implementing the recommendations of the GSSC Forensic report by continuing with disciplinary action against the Principal and the Deputy Principal. She subsequently withdrew the disciplinary hearing and reinstated the Principal based on the second legal opinion which was in contrast with the earlier one;
- 7.2.3 However, her subsequent decision to withdraw the disciplinary action and reinstate the Principal is an “*administrative action*” in terms of section of the Promotion of Administrative Justice Act No. 3 of 2000 adversely affecting the Complainants;
- 7.2.4 In doing so, former MEC Creecy failed to follow proper procedures as outlined in section 3(2) of the PAJA therefore violating the complainants’ right to just administrative action as envisaged in section 33 of the constitution; and
- 7.2.5 Their conduct constitutes maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act and is improper conduct as envisaged in section 182 (1) of the Constitution.



7.3 Regarding whether Principal Chiloane upon his reinstatement abused his power, harassed and victimized TSC employees by improperly subjecting them to disciplinary hearings and subsequent dismissals as a result of reporting his conduct to the erstwhile MEC Motshekga:

7.3.1 The allegation that the Principal victimised and harassed TSC employees by subjecting them to disciplinary action and termination of their contracts as a result of their disclosure to MEC Motshekga is substantiated;

7.3.2 The Complainants were charged with various acts of misconduct;

7.3.3 Accordingly, all disciplinary hearings, dismissals and non-renewal of fixed terms contracts against the first Complainants amount to unfair labour practice in terms of section 197 of the Labour Relations Act;

7.3.4 The conduct of the Principal in this regard constitutes abuse of power, maladministration as envisaged in section 6(4)(a)(i) of the Public Protector, and is improper conduct as envisaged in section 182(1) of the Constitution.

7.4 Regarding whether the TSC Council and the Principal, Mr Chiloane improperly appointed Kwinana to conduct a forensic investigation:

7.4.1 The allegation that the TSC Council and Principal improperly appointed Kwinana and Associates to investigate the fraudulent honorarium claims is substantiated;

7.4.2 The TSC Council and the Principal conceded that they procured the services of Kwinana without following a competitive bidding process but rather by following an emergency procurement process which they claimed was authorised by MEC Hon Creecy.



- 7.4.3 The Principal as the Accounting Officer of the TSC in appointing Kwinana made no provision for a fair, equitable, transparent, competitive and cost effective procurement process as required by section 217 of the Constitution.
- 7.4.4 The deviation to procure Kwinana and Associates' services on an "emergency basis" was irregular in terms of National Treasury Regulation 16A6.4 which requires goods and services to be procured through means other than a competitive bidding process. National Treasury Practice Note 8 of 2007/2008 defines an emergency processes to procure goods and services. It highlights that "emergency procurement" process will only apply in serious, unexpected and potentially life threatening circumstances which require immediate rectification;
- 7.4.5 Mr Ncalo had since resigned from the TSC and no further honorarium claims could be made by him;
- 7.4.6 Section 9(1) of the FETC Act requires that the college Council provide an adequate oversight role in the supply chain management to ensure that the minimum standard in which procurement is conducted is not inferior to those contained in the PFMA. The college council failed to provide this oversight function in procuring the services of Kwinana; and
- 7.4.7 The conduct of the Principal and TSC Council with regards to the above constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and is improper conduct as envisaged in section 182 (1) of the Constitution.



7.5 Regarding whether the TSC Council and the erstwhile Acting Principal, Mr Kraft improperly appointed GMZ Consulting to conduct disciplinary hearings:

- 7.5.1 The allegation that the TSC Council and the Acting Principal Mr Kraft improperly appointed GMZ Consulting to conduct disciplinary hearings at TSC is substantiated;
- 7.5.2 The DHET conceded in its response dated 28 August 2013 that GMZ Consulting was appointed by the Acting Principal Mr Kraft without following a competitive process but through an emergency procurement process;
- 7.5.3 The Acting Principal Mr Kraft in appointing GMZ Consulting made no provision for a fair, equitable, transparent, competitive and cost effective procurement process as required by section 217 of the Constitution.
- 7.5.4 The deviation to procure GMZ Consulting services on an “*emergency basis*” was irregular in terms of National Treasury Regulation 16A6.4 which requires goods and services to be procured through means other than a competitive bidding process. National Treasury Practice Note 8 of 2007/2008 defines an emergency processes to procure goods and services. It highlights that “*emergency procurement*” process will only apply in serious, unexpected and potentially life threatening circumstances which require immediate rectification;
- 7.5.5 The conduct of the Acting Principal Mr Kraft and the former Chairperson of the TSC Council , Mr Ncalo constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and constitutes improper conduct as envisaged in section 182 (1) of the Constitution;



7.6 Regarding whether the Deputy Principal, Ms D Malete, failed to disclose an alleged conflict of interest with GMZ Consulting and if so, whether Acting Principal Mr Kraft failed to manage the conflict of interest in appointing GMZ Consulting:

7.6.1 The allegation whether the Deputy Principal failed to disclose an alleged conflict of interest with GMZ Consulting and if so, whether Acting Principal Mr Kraft failed to manage the conflict of interest in appointing GMZ Consulting is unsubstantiated; and

7.6.2 There was no evidence found to support the allegation that the Deputy Principal failed to disclose a conflict of interest with GMZ Consulting, further no link was established between the Deputy Principal and GMZ Consulting.

7.7 Regarding whether the Complainants suffered prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act:

7.7.1 The allegation that the Complainants suffered prejudice is substantiated.

7.7.2 The Complainants who were members of the TSC Forum submitted a dossier to the erstwhile MEC Motshekga who commissioned an investigation which led to the disciplinary action been taken against the Principal. While the erstwhile MEC did not deem it appropriate to provide the members of the TSC Forum with a response or a copy of the report or furnish them with reasons, they were kept in the dark.

7.7.3 While the former MEC Creecy reinstated the Principal back to his position without consulting the members of the TSC Forum it came as a shock to them that despite serious allegations of corruption made against the Principal in the 2008 GSCC Forensic Report, he was being brought back to manage them. They knew that

the Principal was going to victimize them as they were the whistle blowers who made the disclosure to the erstwhile MEC Motshekga. Upon the Principal's reinstatement they marched to the Head office of the TSC and vandalised the property of the TSC and the Principal because they were not happy about his reinstatement.

- 7.7.4 Their rights or their legitimate expectations to be protected as whistle blowers were adversely affected by the decision of the erstwhile MEC Motshekga not to communicate to them the outcome of the GSSC forensic investigation.
- 7.7.5 Further their rights and their legitimate expectation that after making a protected disclosure they would be notified of the outcome, action would be taken against implicated officials and they would not be subjected to any victimisation. They were adversely affected by the decision of the former MEC Creecy not to continue with disciplinary hearing against the Principal and reinstating him to the TSC.
- 7.7.6 The reinstatement of the Principal where the Complainants were expected to report to him, placed them, as members of the TSC Forum, in jeopardy of facing victimization and harassment in the form of unwarranted disciplinary hearings and other forms of unfair labour practice.
- 7.7.7 As a result of such hearings and the non-renewal of contracts, some of the Complainants have been dismissed and had their contracts terminated. Those who are still employed continue to suffer victimization and harassment in a form of disciplinary hearings.
- 7.7.8 Those who are no longer employed by TSC are unable to find employment elsewhere in other colleges, as the TSC has blacklisted their names on the public servants payroll system, Persal.

7.7.9 These Complainants are now living in poverty, with their houses having been re-possessed by financial institutions as a result of non-payment on bonds. They are unable to meet financial obligations in terms of payments to their policies and finance their children's educational needs. Further, their family life has been affected as they are no longer able to support their dependents.

7.7.10 The second Complainant resigned from his position as Chairperson of the Council. He failed to make representations to Kwinana and Associates during their investigation into his honorarium claims made during his term as the Chairperson. Therefore, he could not have been prejudiced.

8. REMEDIAL ACTION

8.1 The Minister of Higher Education:

- 8.1.1 The Minister of Higher Education must conduct an inquiry to review the dismissals and disciplinary actions taken against the members of the TSC Forum.
- 8.1.2 The inquiry should also explore the possibility of compensating members of the TSC Forum that suffered prejudice as a result of the dismissals and disciplinary actions if it is found that they have suffered occupational detriment as a result of the protected disclosure.
- 8.1.3 The Minister of Higher Education must consider instituting disciplinary actions against the Principal, Mr Chiloane, in terms of section 16A (2) of the Public Service Act for failing to take necessary disciplinary action against Acting Principal Mr Kraft, Ms Boucher and Ms Jonker, by not terminating the GMZ Consulting contract timeously and for conflict of interest in that he participated in the disciplinary hearings of employees in which he was the subject matter.

- 8.1.4 Establish mechanisms to effect the protection of employees who make protected disclosures at TSC.
- 8.1.5 To oversee compliance that the TSC Council takes appropriate steps to rectify the current procurement policy of the College and to ensure that it complies with the standards of the PFMA and Treasury Regulations.
- 8.2 The TSC Council:**
- 8.2.1 The TSC Council must take appropriate steps to rectify the current procurement policy of the College and to ensure that it complies with the standards of the PFMA and Treasury Regulations.
- 8.2.2 The TSC Council must adopt monitoring and support mechanisms in the Finances and SCM processes of the College to ensure that a sufficient oversight role is provided by Council.
- 8.2.3 To create a division within the TSC complaints management unit which will handle protected disclosures



9. MONITORING

9.1 The Minister of Higher Education and Training and TSC Council to:

9.1.1 The Minister of the DHET and TSC Council is required to submit an implementation plan of action in respect of the remedial action to be taken, indicating timelines, within 60 days of the issuing of this report;

9.1.2 The Minister and TSC Council must submit a progress report monthly until the remedial action are implemented; and

9.1.3 The Public Protector will monitor the implementation of the remedial action taken in this report.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF SOUTH AFRICA
DATE: 31/03/2017

Assisted by:

*Ms Vanessa Mundree: Senior Investigator: Governance and Integrity Branch; and
Mr. Nditsheni Raedani: Senior Investigator: Complaints and Stakeholder Management*