

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



**Report Number 2 of 2019/20**

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE IRREGULAR  
APPOINTMENT OF MR LUCKY NTSANGWANE TO THE POSITION OF SENIOR  
MANAGER: RESEARCH BY THE SOUTH AFRICAN WEATHER SERVICE**

*“Allegations of the Irregular Appointment of Mr Lucky Ntsangwane by the  
South African Weather Service”*



March 2019

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### **Executive Summary**

- (i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and hereby published in terms of section 8 of the Public Protector Act, 1994.
- (ii) The report relates to an investigation into allegations of irregular appointment of Mr Lucky Ntsangwane to the position of Senior Manager: Research at the South African Weather Service.
- (iii) The complaint was lodged anonymously with my office on 04 December 2017, wherein it is alleged that the position for Senior Manager: Research Ref Number: WS03/060217 was advertised by the South African Weather Service in June 2017. One of the requirements for the position was that the candidate should possess a PhD qualification in Research or Meteorology or related field.
- (iv) The Complainant alleged that the candidate that was eventually appointed to the position did not possess the required qualification and relevant experience for the post.
- (v) On analysis of the complaint, the following issue was identified to inform and focus the investigation:-
  - (a) Whether Mr Lucky Ntsangwane's appointment to the position of Senior Manager: Research was improper, as he did not possess the requisite qualification for the advertised position , and if so, whether such appointment amounted to maladministration as contemplated by section 6(4)(a)(ii) of the Public Protector Act, 1994.
- (vi) The investigation process commenced with a preliminary investigation, followed by a formal investigation which was conducted through the

exchange of correspondence with Mr Jerry Lengoasa, the Chief Executive Officer of South African Weather Service, interviews with the current Acting Chief Executive Officer , Mr Mnikeli Ndabambi , the General Manager :Human Capital Management, Ms Mphafudi, Senior Manager: Human Capital Management, Ms Khanyisa Hanisi and the Recruitment Consultant, Ms Faith Borotho, issuing of Notices in terms of section 7(9)(a) of the Public Protector Act, 1994 and responses thereto received from Mr Jerry Lengoasa and perusal of the relevant documents/correspondence received as well as the analysis and application of the relevant laws, policies and related prescripts.

(vii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:-

**(a) Regarding Whether Mr Lucky Ntsangwane’s appointment to the position of Senior Manager: Research was improper, as he did not possess the requisite qualification for the advertised position, and if so, whether such appointment amounted to maladministration as contemplated by section 6(4)(a)(ii) of the Public Protector Act, 1994:**

(aa) The allegation that the appointment of Mr Ntsangwane by SAWS was improper as he did not possess the requisite qualification for the advertised position, is substantiated.

(bb) Mr Ntsangwane did not meet the minimum requirements for the advertised position, and his application should not have been considered for shortlisting.

(cc) Having regard to the evidence placed before me, I find that, by approving the shortlisting to include Mr Ntsangwane, and subsequently proceeding to appoint him to the position, the CEO’s conduct amounts to improper conduct, in that the CEO failed to meet

the standard imposed upon him by section 195 of the Constitution and paragraph 5 of the SAWS Recruitment and Selection Policy.

- (dd) The appointment of Mr Ntsangwane to the position, is irregular and amounted to maladministration as contemplated by section 6(4)(a)(ii) of the Public Protector Act, 1994.
- (viii) The appropriate remedial actions I am taking as envisaged in section 182(1)(c) of the Constitution with a view of redressing the improper conduct are the following:

**The Board of SAWS to within 30 days of this report:**

- (a) Lodge an application to the relevant court to have the appointment of Mr Ntsangwane to the position of Senior Manager, Research declared unlawful and set aside.
- (b) Note my findings and hold the CEO accountable, by taking appropriate disciplinary action against the CEO for his improper conduct, in approving of the shortlisting and appointment of Mr Ntsangwane to the position of Senior Manager, Research despite him not meeting the requirements of the advertisement and causing the SAWS to incur costs to review the appointment in court.
- (c) Review and improve the SAWS Recruitment and Selection Policy by including processes to be followed in the advertising, shortlisting, interview and appointment phases of the recruitment process.

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS RELATING TO THE  
IRREGULAR APPOINTMENT OF MR LUCKY NTSANGWANE TO THE POSITION OF  
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**1. INTRODUCTION**

- 1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and published in terms of section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 This report, specifically the findings therein, are submitted, in terms of section 8(3) of the Public Protector Act, to the following people:
  - 1.2.1 The Chairperson of the Board Ms Nana Magamola; and
  - 1.2.2 The Chief Executive Officer, Mr Jerry Lengoasa;
- 1.3 The report relates to an investigation into allegations of the irregular appointment of Mr Lucky Ntsangwane to the position of Senior Manager: Research at the South African Weather Service (SAWS).

**2. THE COMPLAINT**

- 2.1 The complaint was lodged with my office anonymously on 04 December 2017, in which it is alleged that:
  - 2.1.1 The position of Senior Manager: Research Ref Number: WS03/060217 was advertised by SAWS in June 2017. One of the requirements for the position

was that the candidate should possess a PhD qualification in Research or Meteorology or related field; and

- 2.1.2 The candidate that was eventually appointed to the position did not possess the required qualification and relevant experience for the post.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

- 3.2 Section 182(1) of the Constitution provides:-

*“The Public Protector has the power as regulated by national legislation-*

- (a) to investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action.”*

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

- 3.4 In ***Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC) and (5) BCLR 618***, the Constitutional Court per Mogoeng CJ held that the remedial action taken by

the Public Protector has a binding effect [at para 76]. The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences”*.

- 3.4 In the above-mentioned matter of the ***Economic Freedom Fighters v Speaker of the National Assembly and Others***, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:
- 3.4.1 Complaints are lodged with the Public Protector to **cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);
- 3.4.2 An appropriate remedy must mean **an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced**. (para 67);
- 3.4.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints is the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, **she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint** (para 68);



- 3.4.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their **nature, context and language**, to determine what course to follow. (para 69);
- 3.4.5 Every complaint requires **a practical or effective remedy** that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);
- 3.4.6 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the **subject-matter of investigation** and the **type of findings made**. (para 71);
- 3.4.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “*action*” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that **she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence**; (para 71(a);
- 3.4.8 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (para 71(d));
- 3.4.9 “Appropriate” means nothing less than effective, suitable, proper or **fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption**, in a particular case (para 71(e));

- 3.4.10 In the matter of the ***President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)***, the court held as follows, when confirming the powers of the Public Protector;
- 3.4.10.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment);
- 3.4.10.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);
- 3.4.10.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers( paragraph 100 and 101 of the judgment):
- a) Conduct an investigation;
  - b) Report on that conduct; and
  - c) To take remedial action.
- 3.4.10.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings. (paragraph 104 of the judgment);
- 3.4.10.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court.

(Paragraph 105 of the report). This was a finding on the NEF judgment as well;

- 3.4.10.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108 of the Judgment);
- 3.4.10.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112 of the judgment);
- 3.4.10.8 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by national legislation;
- 3.4.10.9 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and abuse or unjustifiable exercise of power in the conduct of state affairs or an improper or dishonest act by any person in the employ of government at any level;
- 3.4.11 The SAWS is a national public entity and its conduct falls within the Public Protector’s mandate to investigate; and
- 3.4.12 The Public Protector’s powers and jurisdiction to investigate and take appropriate remedial action was not disputed by the South African Weather Service.

## **4. THE INVESTIGATION**

### **4.1 The Investigation Process**

- 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.
- 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.
- 4.1.3 The investigation process included an exchange of correspondence with Mr Jerry Lengoasa, the Chief Executive Officer of SAWS (CEO), interviews with the current Acting CEO, Mr Ndabambi (Mr Ndabambi), the General Manager: Human Capital Management, Ms Mphafudi (Ms Mphafudi), Senior Manager: Human Capital Management, Ms Hanisi (Ms Hanisi) and the Recruitment Consultant, Ms Borothe (Ms Borothe), analysis of relevant documentation, conducted research, and the consideration and application of relevant laws, regulatory framework and jurisprudence.
- 4.1.4 Issuing of notices in terms of section 7(9)(a) of the Public Protector Act, 1994 and responses thereto received from the CEO and perusal of the relevant documents/correspondence received as well as the analysis and application of the relevant laws, policies and related prescripts.
- 4.1.5 During the investigation process, notices in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notice) were served on the CEO, dated 15 January 2019, to afford him an opportunity to respond to my provisional

findings. His response was received on 05 February 2019 and the submissions contained therein have been considered in this report.

## **4.2 Approach to the investigation**

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?

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

4.2.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the appointment of Mr Ntsangwane was improper as he did not possess the requisite qualification for the advertised position.

4.2.1.6 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been complied with by the CEO, to prevent any improper conduct resulting in prejudice.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration. Where the Complainant has suffered any prejudice, the idea is to place him/her as close as possible to where he/she would have been had the CEO complied with the regulatory framework setting the applicable standards for proper conduct and good administration.

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

4.3.1 Whether Mr Lucky Ntsangwane's appointment to the position of Senior Manager: Research was improper, as he did not possess the requisite qualification for the advertised position , and if so, whether such appointment amounted to maladministration as contemplated by section 6(4)(a)(ii) of the Public Protector Act, 1994.

**4.4 The key sources of information**

**4.4.1 Documents received and considered:-**

4.4.1.1 Copy of advertisement for the position Senior Manager, Research Ref Number WS03/060217;

4.4.1.2 Curriculum Vitae and application of Mr Lucky Ntsangwane;

4.4.1.3 Shortlisting documents of candidates;

4.4.1.4 Email sent from Ms Borothe to Mr Ndabambi on 08 August 2017;

4.4.1.5 Email response sent from Mr Ndabambi to Ms Borothe and the CEO on 16 August 2017;

4.4.1.6 Interview scoring sheet for interview held on 25 August 2017;

4.4.1.7 Memorandum for the appointment of Mr Lucky Ntsangwane approved by the CEO on 29 September 2017; and

4.4.1.8 Employment contract entered into between SAWS and Mr Lucky Ntsangwane signed on 29 September 2017.

**4.4.2 Correspondence sent and received:**

4.4.2.1 Letter sent from the Public Protector to the CEO, SAWS, dated 24 August 2017;

4.4.2.2 Response received from the CEO, SAWS, dated 24 August 2017;

**4.4.3 Notices issued and responses received:**

4.4.3.1 Notice issued in terms of section 7(9)(a) of the Public Protector Act to the CEO, dated 15 January 2019; and

4.4.3.2 Response to section 7(9) (a) Notice from the CEO, dated 05 February 2019.

**4.4.4 Interviews Conducted:**

4.4.4.1 Interview conducted with Ms Faith Borothe, and the investigation team on 02 October 2018;

4.4.4.2 Interview conducted with Ms Hanisi and the investigation team on 02 October 2018;

4.4.4.3 Interview conducted with Ms Mphafudi and the investigation team on 03 October 2018;

4.4.4.4 Interview conducted with the CEO, and the investigation team on 09 October 2018; and

4.4.4.5 Interview conducted with Mr Ndabambi and the investigation team on 18 October 2018.

**4.4.5 Legislation and other prescripts:**

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

4.4.5.2 The Public Protector Act No 23 of 1994;

4.4.5.3 SAWS Recruitment and Selection Policy approved on 20 June 2017

**4.4.6 Case law:**

4.4.6.1 *Kwadukuza Municipality v Rajamoney and Others* (D880/10) [2013] ZALCD 17 (13 June 2013),

4.4.6.2 *KwaZulu Department of Transport v Hoosen and Others*, 2016 37 ILJ 156 (LC)

4.4.6.3 *Letsogo v Department of Economy and Enterprise Development and Others* (JR350/16) [2018] ZALCJHB 48; (2018) 39 ILJ 851 (LC) (9 January 2018)



4.4.6.4 *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) (18 December 2013)*

#### **4.4.7 Public Protector’s Touchstones:**

##### **4.4.7.1 Report No. 22 of 2017/2018**

4.4.7.1.1 The issue, *inter alia*, was whether the Board of Gateway Airport Authority Limited (GAAL) failed to authenticate and/or verify the former CEO’s qualification records and Curriculum Vitae.

4.4.7.1.2 The finding was that the Board failed to authenticate and/or verify the former CEO’s qualifications records and Curriculum Vitae which constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

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

**5.1 Regarding Whether Mr Lucky Ntsangwane’s appointment to the position of Senior Manager: Research was improper, as he did not possess the requisite qualification for the advertised position, and if so, whether such appointment amounted to maladministration as contemplated by section 6(4)(a)(ii) of the Public Protector Act, 1994.**

**Common cause issues**

- 5.1.1 SAWS advertised the position of Senior Manager: Research (the Position), Reference Number WS03/06217 both internally and externally in June 2017. The closing date for applications was 14 July 2017.
- 5.1.2 One of the requirements for the position included possession of a PhD degree in Research or Meteorology or related field.
- 5.1.3 It is not disputed that Mr Lucky Ntsangwane was shortlisted, interviewed and subsequently appointed to the position of Senior Manager: Research effective from 01 October 2017.
- 5.1.4 It is also not disputed that Mr Lucky Ntsangwane did not possess the PhD degree in Research or Meteorology or related field.

**Issues in dispute**

- 5.1.5 The issue for my determination is whether or not, SAWS, improperly appointed Mr Ntsangwane to the position of Senior Manager: Research, despite him not possessing the requisite qualifications and thus not meeting the requirements for the Position.
- 5.1.6 During the meeting held between my investigation team and SAWS senior officials on 02 October 2018, evidence was obtained which indicated that an e-mail was forwarded from Ms Borotho, the Recruitment Consultant to Mr Ndabambi, the then Executive: Infrastructure and Information Systems on 08 August 2017, relating to the summary of applicants for the Position as well as their Curriculum Vitae's (CVs).

- 5.1.7 The evidence also indicated that on 16 August 2017 Mr Ndabambi forwarded his response to the e-mail from Ms Borotho to the CEO and copied Ms Borotho on the e-mail. The e-mail stated as follows:

*"Dear CEO*

*Attached are applicants and the first level short listing for Senior Manager Research. I suggest we take the 6 highlighted in green that meet all the requirements. Then we take Ntsangwane who is our internal candidate from the yellow highlighted, he does not have PHD but he is acting SM already. Then the total will be 7."*

- 5.1.8 In the response from SAWS to the Public Protector dated 31 March 2018, SAWS submitted that eighteen(18) candidates applied for the Position and that four (4) candidates were shortlisted for the interviews, namely, Mr Lucky Ntsangwane; Dr Patience Mativandlela ; Professor Themba Dube and Dr Velaphi Msimang.

- 5.1.9 The interviews were conducted on 25 August 2017, and the interview panel comprised of the CEO as the Chairperson; Mr Ndabambi; Dr Mphekgo Maila, the External Subject Expert and Ms Hanisi.

- 5.1.10 Further evidence obtained during meetings held between the investigation team and officials of SAWS, indicates that according to the interview panel's memorandum , the candidates' scoring summaries were as follows:

Candidate	Mr. Jerry Lengoasa	Mr. Mnikeli Ndabambi	Dr. Mphekgo Maila	Total
Mr Lucky	17.5	16	19	52.5

Ntsangwane				
Dr Patience Mativandlela	14.5	13	14	41.5
Prof. Themba Dube	18.5	20	24	62.5
Dr. Velaphi Msimang	22	19	20	61

- 5.1.11 According to the response from SAWS, the following was noted from paragraph 4 of the formal motivation,

*“INTERVIEWS OUTCOME*

*The panel referred the top two candidates; namely Mr Ntsangwane and Dr Msimang for psychometric assessment to further ascertain their suitability for the role. After consideration of the interviews, the assessment results as well as affordability of each candidate, the panel unanimously agreed that Mr Ntsangwane is the recommended candidate for the role although he does not possess a PhD as required, the Recruitment and Selection Policy makes provision that existing employees be afforded an opportunity to fulfil future human capital needs of the organization. ....”*

- 5.1.12 The memorandum of appointment was compiled by Ms Borocho, supported by Ms Hanisi, recommended by Ms Mphafudi, and approved by the CEO on 29 September 2017.
- 5.1.13 Mr Ntsangwane consequently signed his employment contract for the Position on 29 September 2017. He was appointed on a five (5) year fixed term

contract effective 01 October 2017, on a total cost to company of R1 150 000.00(One Million One hundred and fifty Thousand Rands) per annum.

- 5.1.14 During the interview held with the investigation team and Ms Mphafudi on 03 October 2018, she stated that the shortlisting of candidates are based on the requirements for the Position as stated in the advertisement. She further stated that the doctorate (PhD) level of degree was required as the employees reporting to the Senior Manager: Research are lead scientists or chief scientists, who currently hold PhD qualifications or studying towards a PhD qualification. In her opinion, it would make sense that a PhD qualification is a requirement for the Position to enable the appointed candidate to supervise research and lead the team.
- 5.1.15 Ms Mphafudi further indicated that the CEO had approved the requirements for the Position together with the advertisement. She stated that when she became aware that the recommended candidate for appointment, did not meet the requirements for the Position, she raised her concern with the CEO and Ms Hanisi about it. However she stated that she was ignored and Ms Hanisi was instructed by the CEO *“to go with the appointment of Mr Ntsangwane”*.
- 5.1.16 Ms Mphafudi also indicated that paragraph 6.6 of the Recruitment and Selection Policy of SAWS (the Policy) that was used to motivate the appointment of Mr Ntsangwane, cannot be justified as motivation for the Position. It was confirmed that this paragraph is used for training and development of internal candidates, and that a candidate should meet the requirements for the Position to be appointed.

- 5.1.17 Evidence provided further confirmed that the CEO was the Chairperson of the interview panel and also approved the appointment of Mr Ntsangwane. Ms Mphafudi stated that this created a conflict, as normally the Chairperson of the panel and the approver of the appointment are two separate individuals.
- 5.1.18 During the interview held with the CEO and the investigation team on 09 October 2018, the CEO stated that he joined SAWS in May 2017, and that he was aware that the Position became vacant as a result of the resignation of the previous incumbent.
- 5.1.19 The CEO also stated that during the June 2017 strategic review session with the Board and EXCO, a discussion was held on how to turn the institution around to achieve its mandate and how to restructure the institution. Part of the change process was to restructure the institution.
- 5.1.20 The CEO stated that he engaged Ms Hanisi and Ms Mphafudi in the discussions relating to the requirements that would go into the advertisement for the Position, and that the CEO's role was to approve the advertisement, which he subsequently did.
- 5.1.21 The CEO further stated that the Human Resources Section and the Acting Executive: Weather and Climate were involved in the shortlisting process, and that as the CEO, he approved the shortlisting. He stated that he was aware that Mr Ntsangwane did not possess a PhD qualification as required by the advertisement, but that he was agreeable that Mr Ntsangwane be shortlisted as *“there is a provision for fair consideration of internal candidates when they do apply”*.

- 5.1.22 The CEO further confirmed that he was part of the interview panel and served as the Chairperson of the panel.
- 5.1.23 The CEO also stated that on the strength of the interviews and the strategic intent of the institution, it was his view that Dr Msimang and Mr Ntsangwane were the two candidates who could give strength to the strategic direction of SAWS.
- 5.1.24 The CEO further stated that according to him, Professor Dube, the number one candidate, did not perform well in terms of scoring, and was not convincing in his approach to the questions, despite him being previously employed by SAWS. Part of the panel discussion was also that Dr Msimang was not an atmospheric scientist.
- 5.1.25 The CEO stated that the two candidates were then recommended for psychometric assessment, namely Dr Msimang and Mr Ntsangwane.
- 5.1.26 The CEO further stated that he had taken a policy decision of the Board, in line with the strategic objectives of SAWS and the decision by the Board to retain Black scientists, and also to allow for internal candidates to be considered.
- 5.1.27 The CEO indicated that as per paragraph 5 of the Policy, no separate request was made to condone the requirements for the Position and deviate from the policy, but that a recommendation was made on the motivation for the appointment of the Position, which he approved.
- 5.1.28 During the interview held with the Mr Ndabambi on 18 October 2018, he stated that he is currently the Acting CEO of SAWS, and that at the time of the interviews for The Position, he was the Executive Manager: Infrastructure and

Information Systems, which was a new role. When the process of filling the Position started, he was the General Manager: Operations.

- 5.1.29 He also indicated that he had made technical inputs into the advertisement as per the job profile for the Position.
- 5.1.30 He stated that he was involved in the shortlisting process and that there was communication between him and Ms Borotho. He stated that internally there were discussions about people that are within the organisation who have potential, and there was a need to improve the development of these people, including Mr Ntsangwane.
- 5.1.31 He stated that his rationale for including Mr Ntsangwane in the shortlist, was that he acted in the Position for a while and had demonstrated capabilities which were also commended by the Board members.
- 5.1.32 He conceded that in recommending Mr Ntsangwane to be shortlisted for the Position, he was acting contrary to the requirements of the advertisement. He indicated that Mr Ntsangwane was added as a candidate, and that the CEO as the Accounting Officer did not object to this recommendation.
- 5.1.33 He indicated that he was part of the interview process, and he only became aware later of the overall performance of the candidates, as he previously did not have insight into information regarding which candidate had performed the best, as the total scores of the candidates was never discussed by the panel.
- 5.1.34 He stated that he had given Mr Ntsangwane an opportunity to be shortlisted, based on his reasons stated above, but that according to him Mr Ntsangwane did not perform well in the interview.



- 5.1.35 He also stated that after the psychometric test, the CEO met with him and indicated that he (the CEO) had received information that Dr. Msimang was not suitable, and that Mr Ntsangwane would thus be the preferred candidate. Mr Ndabambi again stated that he agreed with this as he was not aware as to who the best candidate was in terms of the final scoring.
- 5.1.36 He stated that the paragraph used in the motivation for Mr Ntsangwane's appointment, is used to prepare a pool of candidates that meet the requirements of a position and are able to compete for a post. He stated that the said paragraph should not have been not used to justify the appointment.
- 5.1.37 Mr Ndabambi further indicated that if the CEO wanted to deviate from a policy, a recommendation would have been submitted to the Board who would consider approval for the deviation.
- 5.1.38 In his response, dated 05 February 2019 to the section 7(9) Notice, the CEO asserted that although Mr Ntsangwane was appointed without meeting the PhD requirement for the position, it was never his intention to act improperly or commit any misconduct and that he had at all times acted in good faith and in the best interests of the SAWS.
- 5.1.39 He further stated that his involvement in both the shortlisting and interview process, was as a result of SAWS having only one executive with technical expertise at the time that the appointment process was ongoing and that under normal circumstances he, as the CEO he would have not been involved in the process until the recommendation for approval was made to him.
- 5.1.40 He further supported his response during the interviews to the reason for including Mr Ntsangwane in the shortlist, citing that he (Mr Ntsangwane) had been with the organisation for some time, had acted in the position of Senior

Manager, Research and was an internal candidate who needed to be afforded an opportunity in line with the SAWS policy on Recruitment and Selection.

- 5.1.41 He asserted that he noted my observation in the Section 7(9) Notice that the reliance on the paragraph used in the policy could not be justified, but that he was advised by Ms Hanisi that the provision in the policy was relevant and applicable.
- 5.1.42 The CEO , further denied Ms Mphafudi’s statement that she had raised the issue with him and stated that he had no recollection of her having raised such concern.
- 5.1.43 He stated that Ms Hanisi had at no stage during the recruitment process raised any concern that the process was not compliant with the human resource and other prescripts, and that her being an expert in human resource had supported the recruitment process.
- 5.1.44 The CEO further conceded that there were some flaws in the SAWS recruitment processes, caused by circumstances at the time resulting in him being involved in the shortlisting, interview and approval of the appointment.
- 5.1.45 He stated that a review of all internal processes and revision of policies will go a long way towards remedying the flaws identified in the Section 7(9) notice.

#### **Application of the relevant law**

- 5.1.46 Section 195(1) of the Constitution, 1996, stipulates that public administration must be governed by the democratic values and principles enshrined in the Constitution. It requires *inter alia* a high standard of professional ethics and accountability in public administration.

- 5.1.47 Paragraph 1, of the Executive Summary of SAWS Recruitment and Selection Policy approved on 20 June 2017, states as follows:

*"SAWS is committed to the recruitment and selection of those competencies to ensure , amongst others, fairness and transparency in the process of appointment of candidates who are competent and can contribute to SAW's long term success.*

- 5.1.48 In terms of Paragraph 5 of the SAWS Recruitment and Selection Policy *"the CEO shall ensure that the controls are established to implement this policy and may in furtherance of this responsibility, condone in writing any deviation , where it meets the strategic objectives from SAWS and / or the inherent requirements of any vacancy from time to time; and ...."*

- 5.1.49 Paragraph 6.6 states that *"Existing employees should be afforded the opportunity to fulfil the future human capital requirements. Management, assisted by HCM, shall continuously engage with existing employees to identify (i) training needs (ii) career paths, (iii) scarce and critical skills, amongst existing employees.*

- 5.1.50 In the matter of *Kwadukuza Municipality v Rajamoney and Others* (D880/10) [2013] ZALCD 17 (13 June 2013), the court set out the following:

*"For the requirements of an advertised post to be met therefore, cognisance must be taken of the objective of the policy to ensure that the candidate who best meets the selection criteria is appointed. The short listing of a candidate who least meets the set selection criteria will ordinarily fly on the clear face of the objective of the policy. Such short listing would then be arbitrary as contrary to the selection criteria. The applicant set out requirements to be met for the contested post. The fairness of the selection process lay in the screening of all candidates against the set requirements in a similar approach.*

*It has to be borne in mind that there would be people who desired to apply for the contested post but did not submit their applications merely because they did not meet the set requirements. It would also be unfair to set all candidates who met all requirements against any candidates who lack any of the requirements”*

- 5.1.51 In the case of *KwaZulu Department of Transport v Hoosen and Others*, 2016 37 ILJ 156 (LC), where the facts were very similar to the present case, the Judge found that the promotion of a candidate who did not meet the requirements of the advertised post amounted to an unfair labour practice. The Judge set out that the employee’s *“promotion was irregular by want of his meeting the minimum criterion for the position.”*
- 5.1.52 In the case of *Letsogo v Department of Economy and Enterprise Development and Others* (JR350/16) [2018] ZALCJHB 48; (2018) 39 ILJ 851 (LC) (9 January 2018) the judgement stated that “ *...in short, to compete in the process, to be shortlisted, or even considered for appointment an applicant for employment must possess the necessary qualifications. Only then can you as the employer consider other factors such as training, skills, competence, knowledge and the need to redress imbalances of the past. The selection panel can only consider those candidates that so to say pass muster, that is, those that meet the minimum requirements as set out in the advertisement. “Screening of applicants should take place according to the initial criteria for the job.”*
- 5.1.53 In the *Khumalo and Another v Member of the Executive Council for Education: KwaZulu- Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) (18 December 2013) , (Khumalo Case), it was found that appointments made irregularly are not automatically null and void as the appointed candidate

has labour rights. It was further held in this case that only a court can grant a “*just and equitable*” order in terms of section 172(1)(b) of the Constitution, when considering the consequences of declaring a decision unlawful. The Court explicitly viewed **functionaries as being not entitled but duty bound to seek redress of an irregularity in a court of law.**

### **Conclusion**

- 5.1.54 The CEO, admittedly set out the requirements to be met for the post to be contested in the approved advertisement. In approving the shortlisting of Mr Ntsangwane, he deviated from the requirements of the Position, to include Mr Ntsangwane even though he did not possess a PhD qualification as required by the advertisement.
- 5.1.55 Section 195 of the Constitution, as well as SAWS Recruitment and Selection policy, requires a process of transparency and fairness in the recruitment and selection process. The case law referred to above also indicated that such shortlisting is contrary to the selection criteria and the fairness of the selection process, whereby the screening of all candidates against the set requirements should be approached in a similar manner. Mr Ntsangwane’s application should have been eliminated at the very first stage.
- 5.1.56 Other applicants would have applied for the position, however did not submit their applications because they knew that they did not meet the set requirements of the position as stated in the advertisement.
- 5.1.57 Any deviation from the advertised requirements of the position, would have required the CEO to condone in writing the PHD qualification for the position, as per paragraph 5 of the Policy, prior to advertising the position, to ensure that a fair and transparent process is undertaken. Due process was also not

followed in deviating from sections of the Recruitment and Selection Policy regarding the requirements for the position.

- 5.1.58 The submission by the CEO that he acted in line with the policy decision of the Board, cannot be accepted, as this decision was never included in the Recruitment and Selection Policy.
- 5.1.59 Mr Ntsangwane did not possess the necessary qualification, and therefore consideration of other factors such as training, competence and knowledge to address the retention of Black scientists and internal candidates, could only be considered after him having met the minimum requirements for the Position.
- 5.1.60 In any event the clause in the policy relied upon to motivate the purported appointment, cannot be justified. It is clear that this clause requires SAWS to **identify training needs (ii) career paths, (iii) scarce and critical skills, amongst existing employees** that would meet their human capital needs and prepare them to compete for positions in order to fulfil future human capital requirements.
- 5.1.61 I therefore find the CEO's explanation in response to the section 7(9) notice dated 05 February 2019, that Mr Ntsangwane needed to be afforded an opportunity in line with the SAWS policy on Recruitment and Selection as indefensible. I am of the view that any attempt to apply Paragraph 6.6 of SAWS Recruitment and Selection Policy, was done only to justify the inclusion of Mr Ntsangwane in the shortlisting after the fact. If indeed the CEO had acted in good faith, and believed that the provision in the policy was relevant and applicable, he ought to have included it in the advertisement to afford other candidates an equal opportunity, as he had ultimately approved the advertisement.

- 5.1.62 In line with the Khumalo case that stated that until a court pronounces on the validity of the act (the appointment), the act exists in fact and has legal effect in terms of which its legal consequences will continue to exist. This would mean that the appointment or promotion, irrespective of the irregularities, would remain valid until and unless a court of law declares the action unlawful.

## 6. FINDINGS

Having considered the evidence received during the investigation, the regulatory framework determining the standard that should have been complied with, I make the following findings:

- 6.1 **Regarding Whether Mr Lucky Ntsangwane’s appointment to the position of Senior Manager: Research was improper, as he did not possess the requisite qualification for the advertised position, and if so, whether such appointment amounted to maladministration as contemplated by section 6(4)(a)(ii) of the Public Protector Act, 1994.**
- 6.1.1 The allegation that the appointment of Mr Ntsangwane was improper as he did not possess the requisite qualification for the advertised position, is substantiated.
- 6.1.2 Mr Ntsangwane did not meet the minimum requirements for the advertised position, and his application should not have been considered for shortlisting.
- 6.1.3 Having regard to the evidence placed before me, I find that, by approving the shortlisting to include Mr Ntsangwane, and subsequently proceeding to appoint him to the position, the CEO’s conduct amounts to improper conduct,



in that he failed to meet the standard imposed upon him by section 195 of the Constitution and paragraph 5 of the SAWS Recruitment and Selection Policy.

- 6.1.4 The appointment of Mr Ntsangwane to the position, is irregular and amounted to maladministration as contemplated by section 6(4)(a)(ii) of the Public Protector Act, 1994.

## **7. REMEDIAL ACTION**

In light of the above, and having taken into account evidence before me, the appropriate remedial action I am taking in terms of section 182(1) (c) of the Constitution with a view of redressing the improper conduct are the following:

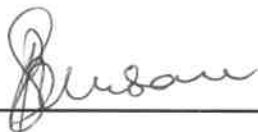
### **7.1 The Board of SAWS to within 30 days of this report:**

- 7.1.1 Lodge an application to the relevant court to have the appointment of Mr Ntsangwane to the position of Senior Manager, Research declared unlawful and set aside.
- 7.1.2 Note my findings and hold the CEO accountable, by taking appropriate disciplinary action against him for his improper conduct, in approving the shortlisting and appointment of Mr Ntsangwane to the position of Senior Manager: Research despite him not meeting the requirements of the advertisement and causing the SAWS to incur costs to review the appointment in court.
- 7.1.3 Review and improve the SAWS Recruitment and Selection Policy by including processes to be followed in the advertising, shortlisting, interview and appointment phases of the recruitment process.



**8. MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTION**

- 8.1 The Board of SAWS must, within fifteen (15) working days from the date of the issuing of this Report and for approval by the Public Protector, submit the implementation plan to the Public Protector indicating how the remedial action referred to in paragraphs 7.1 of this Report will be implemented.
- 8.2 In line with the Constitutional Court judgment in the matter of ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*** [2016] ZACC 11, and in order to ensure the effectiveness of Office of the Public Protector, the remedial actions prescribed in this Report are legally binding , unless set aside by a Court order.



**ADV. BUSISIWE MKHWEBANE**

**PUBLIC PROTECTOR OF SOUTH AFRICA**

**DATE:** 30/04/2019