

The Public Protector v Mail & Guardian and Others 2011 (4) SA 420 (SCA): at para 143, Nugent JA said:

“Truth and deceit know no status or occupation. One expects integrity from high office but experience shows that at times it is not there. And while experience shows that journalists can be cavalier there are times when they are not.”

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A. INTRODUCTION

1. One of the lead stories published by the Sunday Independent in its edition of 26 January 2020, headlined “**PSC boss hires mistress as ethics official**”, caused shockwaves within the public sector, prompting the Minister of Public Service and Administration, Mr Senzo Mchunu (“the Minister”), to telephone the Chairperson of the Public Service Commission, Advocate RK Sizani (“the Chairperson”) and request him to purchase the newspaper as part of observing one of the Sunday protocols.
2. Upon reading the story, the Chairperson called the Minister to assure him that he would ensure that the allegations would be promptly investigated. Concerned about the serious allegations published in the media and affecting the public service, the Minister, on 26 January 2020, issued a media statement to all media houses. In the media statement, the Minister made reference to his telephone discussion with the Chairperson confirming that the allegations would be investigated.
3. On 27 January 2020, the Chairperson addressed a memorandum to all staff members of the PSC concerning the media allegations, assuring them that the allegations would be investigated. The Chairperson addressed another memorandum to all commissioners on the same day, informing them of the steps to be taken to deal with the media allegations.

4. On 28 January 2020, I was appointed by the Office of the State Attorney in Pretoria (“the State Attorney”) to investigate the veracity of the media allegations made against the “PSC boss”. Following my appointment, I requested to be furnished with all the relevant documents concerning the filling of the position of Chief Director: Professional Ethics (“the position”). I was also instructed to provide a legal opinion as to whether there are grounds to warrant the PSC recommending to the President of the Republic (“the President”) to suspend the Director-General (“the DG”).
5. On 30 January 2020, I duly furnished the State Attorney with the opinion setting out the legal basis for the PSC to recommend to the President the suspension of the DG pending the finalisation of the investigation. The Chairperson, following a discussion with other Commissioners of the PSC in the plenary, resolved to act pursuant to my opinion and addressed a letter to the President on 6 February 2020, urging the President to suspend the DG pending the finalisation of the investigation. To date, the President has not suspended the DG.
6. From 10 to 18 February 2020, I issued an interview schedule to relevant PSC staff and officials I wished to interview as part of my investigation. On or about 4 February 2020, I received an e-mail from the State Attorney informing me that the investigation had been put on hold. In response to my enquiry, the reason advanced for this suspension was that it is the President that has to commission the investigation as it involves the alleged

misconduct of the DG of the Public Service Commission, Dr Dovhani Colbert Mamphiswana (“Dr Mamphiswana”).

7. On 27 February 2020, the President replied to the Chairperson’s letter dated 6 February 2020 by way of a Presidential Minute, President Act No. 43. In this Minute, the President charged the Minister with investigating whether there had been any improper conduct on the part of the DG during the filling of the position and if so, to make recommendations on the appropriate remedial action, if any, that should be taken against the DG.
8. During all this time (from February to May 2020), this investigation remained suspended and only on or about 3 June 2020, I was instructed by the State Attorney to resume the investigation, to which I agreed. I duly commenced the interviews with the PSC officials and staff during the period 8 to 25 June 2020.
9. The delay is regretted but it was beyond my control as I could only act upon receipt of instructions from the State Attorney.

B. MEDIA ALLEGATIONS

*Learned Joffe J said in **Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another 1995 (2) SA 221 (T)** at 227I - 228A:*

“It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. . . It must advance communication between the governed and those who govern.”

10. According to media allegations, as per the two journalists, Mzilikazi wa Afrika¹ and Karabo Ngoepe were approached by a whistle-blower alleging, inter alia, the following:

10.1. that the DG allegedly chaired a panel which recommended the appointment of the mother of his child as Chief Director: Professional Ethics;

10.2. the Chief Director commenced her duties on 1 December 2019;

10.3. the DG failed to recuse himself from the process;

¹ The author of the book “Nothing Left To Steal”, published in 2014 by Penguin Publishers. The book details various accounts of public and private sector corruption in South Africa.

- 10.4. the whistle-blower submitted a complaint to the PSC's Deputy Chairperson;
- 10.5. the DG did not disclose his relationship with the Chief Director;
- 10.6. the Chief Director failed to disclose to the panel if there was anything in her personal or official life that may cause embarrassment to the PSC if her appointment was successful;
- 10.7. the interviews were conducted on 23 October 2019;
- 10.8. the DG has done favours for the incumbent before at the PSC;
- 10.9. the DG chaired another interview that interviewed the incumbent in 2012 when the incumbent was pregnant;
- 10.10. the incumbent was later appointed as Provincial Director: Free State;
- 10.11. the incumbent gave birth around February 2013; and
- 10.12. the Sunday Times has seen a home affairs application form in which the DG was registered as the father of a child born out of wedlock.

11. It appears, when reading the article, that the DG was afforded an opportunity to respond to the allegations. He is reported to have responded as follows:

“I don’t want to respond to issues about my private life to the media...I am not going to talk about matters of the PSC to the media.”

12. According to the media, there was no response obtained from the Chief Director.

13. The Sunday Independent’s journalists did not disclose their sources and that has been endorsed by our courts². In ***South African Broadcasting Corporation v Avusa Ltd and Another*** 2010 (1) SA 280 (GSJ), the Learned Willis J held as follows at paras 30 and 31:

“[30] The court accepts that one of the most valuable assets of a journalist is his or her source. Sources enable journalists to provide accurate and reliable information. Sources are often in possession of sensitive facts which they would be unwilling to disclose without a guarantee that their identities will not be revealed. The protection of journalists’

² *Bosasa Operation (Pty) Ltd v Basson and Another* 2013 (2) SA 570 (GSJ). In this case, Bosasa approached the court seeking relief to have Mr Adriaan Basson disclose the sources who informed him about corruption between the company and the Department of Correctional Services. The court dismissed with costs Bosasa’s attempt to have media sources disclosed.

sources is therefore fundamental to the protection of press freedom. As Lord Denning has observed:

'(I)f [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known.'

[31] The court also accepts that journalists in open and democratic societies throughout the world recognise the importance of preserving the confidentiality of their sources and that they consider it to be their duty to protect their sources' confidentiality. The Sunday Times gives examples of a variety of media codes of conduct which recognise this duty in its answering affidavit. These codes include the SABC's Editorial Code of Ethics which provides that, 'We shall not disclose confidential sources of information.'"

14. The media's role in a constitutional democracy is to ensure that taxpayers are informed of what is happening in government. No law in a democratic state should preclude journalists from exposing alleged corruption,

irrespective of who is alleged to be involved. A journalist without sources is like a serpent without venom or a desert without sand.

15. In *Tshishonga v The Minister of Justice and Constitutional Development*³, the Labour Court found that disclosures to the media by a public servant about impropriety in the workplace were protected disclosures in terms of section 9 of the Protected Disclosures Act 26 of 2000 (“the PDA”). The Minister of Justice and Development who, at the time, was Dr Penuel Maduna (“Dr Maduna”), appealed to the Labour Appeal Court⁴ and the appeal was dismissed with costs.
16. Mr Tshishonga was a public servant who was instructed telephonically by Dr Maduna to appoint Mr Enver Motala to the panel of liquidators to the Master of the High Court. Mr Tshishonga found that instruction improper and informed Advocate Vusi Pikoli, who was the Director-General of the Department of Justice at the time.
17. Out of frustration and having complained to the Public Protector, Minister in the Presidency (Dr Essop Pahad), Mr Tshishonga held a press conference and disclosed all the improprieties relating to Dr Maduna’s conduct and his friendship with Mr Motala. Challenged to thwart Mr Tshishonga’s serious allegations, Dr Maduna, instead of addressing the allegations leveled against him as Minister of Justice, elected to blacken

³ [2007] 4 BLLR 327 (LC); 2007 (4) SA 135 (LC)

⁴ [2009] 9 BLLR 862 (LAC); (2009) 30 ILJ 1799 (LAC)

the character of Mr Tshishonga by calling him a “dunderhead...and a Bantustan relic”.

18. In his memoir, ***My Second Initiation***⁵, Advocate Pikoli had this to say about the incident at pages 110-111:

“...I then received a call late one night from Minister Maduna instructing me to remove Tshishonga from his post. Maduna did not care where I moved him, he just wanted him moved. Of course, I wanted to know why but Maduna couldn’t really explain...”

In retrospect, I feel that it was a moment of weakness that I failed to defend Tshishonga against Maduna. I don’t believe that I protected Maduna from any allegations of corruption, but I do feel that I shouldn’t have acted against Tshishonga in the way I did. I could have done more to side with Tshishonga, but instead chose to do what the minister wanted.

That experience, unbeknown to me at the time, actually prepared me for what was to come as that, too, would be a request from the justice minister, albeit a different one, that would mark my career as national director of public prosecutions (NDPP).”

19. The PDA has since been amended (in 2017). However, the principles of section 9 of the PDA remain relevant. In ***Tshishonga***, the Labour Court

⁵ Pikoli & Wiener. *My Second Initiation*. Publisher: Picador Africa. 2013

held at para 256 that *“Disclosure of wrongdoing cannot be a breach of confidence”*.

C. AUTHORITY TO INSTITUTE INVESTIGATION

20. The Chairperson of the PSC is an Executive Authority (“EA”) as defined by section 1 of the PSA. Sections 7 and 8 of the PSA give the following as functions of the Chairperson of the EA:

“(7) An executive authority has all those powers and duties necessary for-

(a) the internal organisation of the department concerned, including its organisational structure and establishment, the transfer of functions within that department, human resources planning, the creation and abolition of posts and provision for the employment of persons additional to the fixed establishment; and

(b) the recruitment, appointment, performance management, transfer, dismissal and other career incidents of employees of that department, including any other matter which relates to such employees in their individual capacities, and such powers and duties shall be exercised or performed by the executive authority in accordance with this Act.

(8)(a) The relevant executive authority may, subject to paragraphs (b) and (c), perform any act in connection with any matter which relates to or arises from the employment

or the conditions of service of a person formerly employed in the public service whilst he or she was so employed in the department concerned.”

21. In terms of section 9 of the PSA, the EA may appoint any person in his or her department in accordance with this Act and in such manner and on such conditions as may be prescribed.
22. Section 11 of the PSA deals with the appointments and filling of posts. It provides:

“11 Appointments and filling of posts

- (1) *In the making of appointments and the filling of posts in the public service due regard shall be had to equality and the other democratic values and principles enshrined in the Constitution.*
- (2) *In the making of any appointment in terms of section 9 in the public service-*
- (a) *all persons who applied and qualify for the appointment concerned shall be considered; and*
- (b) *the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act 55 of 1998), the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.”*

23. The Chairperson, as EA, has authority to institute this investigation in accordance with the provisions of the PSA.

D. TERMS OF REFERENCE

24. On 8 June 2020, the Chairperson issued another memorandum to staff setting out the terms of reference. The following was stated:

“TO: ALL STAFF

FROM: CHAIRPERSON

*SUBJECT: **AMENDED TERMS OF REFERENCE: INVESTIGATION INTO ALLEGATIONS OF NEPOTISM IN THE FILLING OF THE POST OF CHIEF DIRECTOR: PROFESSIONAL ETHICS***

- 1. As you all know, in my memorandum issued on 29 January 2020, I announced the appointment of Advocate Smanga Sethene to investigate the allegations made in relation to the above-mentioned allegations.*
- 2. The investigation is proceeding with a slight amendment to the terms of reference. The investigation will look into the following:*
 - 2.1 Compliance with prevailing prescripts in the filling of the post of Chief Director: Professional Ethics.*

- 2.2. *Whether the employee affected was allegedly conflicted as stated in the media article in relation to the filling of the above-mentioned post.*
- 2.3. *Any matter relevant to this investigation.*
3. *Please note that all interested and affected parties who have any information or documentary evidence relating to the above may contact the investigator directly at his email and physical address as previously provided.*

Kind Regards,

For: RK SIZANI

CHAIRPERSON

DATE: 8 JUNE 2020"

E. SHORTLISTING PROCESS

25. The PSC advertised the vacant position on or around July/August 2019, and whilst the previous incumbent was serving notice. The closing date and time for receipt of applications was 6 September 2019 at 15:45. On 9 October 2019, shortlisting took place by the panel constituted by the following officials:

- 25.1. Dr Dovhani Mamphiswana as Chairperson of the panel;
- 25.2. Mr Matome Malatsi (Mr Malatsi), Deputy Director-General: Integrity and Anti-Corruption;

- 25.3. Ms Irene Mathenjwa (Ms Mathenjwa), Deputy Director-General: Monitoring and Evaluation; and
- 25.4. Ms A Tsienyane from Human Resources Management, who served as an observer and secretariat.
26. Approximately 99 applicants applied and only four were shortlisted. The shortlisted applicants were:
- 26.1. Dr SCJ Hoogenraad-Vermaak [H. Ed., BA, BA Hons., MA, Ph.D];
- 26.2. Dr P Naidoo [B.Proc., MBA, DBA, Ph.D];
- 26.3. Mr C Jacobs [B.Soc.Sc, B.Soc.Sc Hons, M.Phil]; and
- 26.4. Ms BP Mogwe [BCom, BCom Hons., Postgrad Diploma: Management] (Ms Mogwe).
27. According to the advertisement, the position required an experienced person with a recognised Bachelor's degree or equivalent qualification (New NQF Level 7) in Public Management, Social Sciences or related field. A post- graduate qualification (New NQF Level 8 and above) with courses relevant to the area of public management and public administration would be an added advantage. A further requirement was five years' experience

at Senior Management level in the field of Professional Ethics and proven experience in applied research.

28. According to the CVs of the shortlisted applicants, Dr Hoogenraad-Vermaak had been the Director: Ethics and Code of Conduct Management at the Department of Public Service and Administration (“the DPSA”) since September 2013, giving him six years of experience in the field of ethics in the public service. He developed and presented ethics management programmes to Ethics Officers and Ethics Committee in various government departments, government components, heads of departments and public servants. He also conducted Ethics Research and ethics surveys for public administration in 2015 and 2018 which were used as baselines for Public Service Regulations review in 2016. He chaired phase one of the National Anti-Corruption Strategy, which culminated in the publication of a Diagnostic Report outlining the anti-corruption and ethics issues facing government. He attended training programmes offered by the Ethics Institute of South Africa and the University of Pretoria.
29. The appointed Chief Director, Ms Mogwe, had no ethics training at all according to her own CV. There is no indication in her CV as to whether she had the necessary five years of experience in the field of Professional Ethics in accordance with the requirements of the position she was ultimately appointed to.

30. The explanation tendered to me during the interviews, justifying her being shortlisted on the basis that Provincial Directors deal with ethics amongst others, is with respect, without basis. In fact, if that feeble justification was anything to go by, Ms Mogwe could have best being described as a generalist who, *inter alia*, dealt with professional ethics one of the many aspects of her duties as and when it was necessary.
31. I find that the members of the panel that shortlisted Ms Mogwe did not apply their minds properly to what it means to have five years' experience in the field of professional ethics. I doubt the intention of the PSC in filling this position was that an ideal candidate should be a generalist in order to be able to advise the entire public service.

F. INTERVIEWS FOR INVESTIGATION

32. I conducted a series of interviews with employees of the PSC. The Chairperson also agreed to be interviewed. For reasons not furnished to me, the Deputy Chairperson of the PSC, Mr Ben Mthembu declined the invitation. So did Commissioner Seloane, Chairperson of Ethics and Integrity.
33. On 8 June 2020, the DG arrived with one Mr Edgar Lamola ("Mr Lamola") who introduced himself as a Labour Relations Officer, representative and colleague of the DG, and said that he would speak on behalf of the DG.

The DG confirmed same. Further, Mr Lamola stated that he is employed by the Department of Energy.

34. Mr Lamola started by questioning my authority to conduct the investigation as the President has delegated such function to the Minister. Mr Lamola went on to demand to see a letter of my appointment. I explained to Mr Lamola and the DG that the investigation I was conducting relates to the DG's role as a member of the panel as I was duty bound to interview all members of the panel. I adjourned the interview to obtain my brief from the State Attorney which was later shown to Mr Lamola and DG.
35. Despite providing them with proof of my appointment and reasons for the DG to be interviewed, Mr Lamola and the DG were adamant that the DG would not answer any questions I would put to him.
36. Mr Lamola, as the Labour Relations Officer in the public service, was discourteous and condescending towards me. At some point, he deemed it fit to school me about the Apleni⁶ case. I can only characterise Mr Lamola's participation in the interview as the DG's representative as a dilatory tactic.

⁶ *Apleni v President of the Republic of South Africa and Another* [2018] 1 All SA 728 (GP). Prof Hlengiwe Mkhize (at the time Minister of Home Affairs) suspended Mr Apleni, Director-General of the Department of Home Affairs. Mr Apleni approached court to have the suspension declared unlawful as only the President was empowered, in terms of section 12(1)(a) of the Public Service Act 103 of 1994, to decide any career incidents involving the heads of National Departments. The Pretoria High Court found in favour of Mr Apleni.

37. In the end, the DG placed it on record that the investigation could be concluded without his participation as he was anticipating cooperating in the process sanctioned by the President.
38. On 10 June 2020, Ms Mogwe arrived for an interview, (strangely) accompanied by Mr Lamola. Mr Lamola, in an arrogant manner, raised the very same issues he had presented when he came with the DG concerning, *inter alia*, my authority to conduct this investigation. Ms Mogwe also stated that she would subject herself only to the process sanctioned by the President.
39. On 23 June 2020, as a last attempt, I addressed separate e-mails to Dr Mamphiswana and Ms Mogwe, inviting them for interviews on 24 June 2020. In the e-mails, I stated that should they wish not to attend my interviews, at least, they should clarify if they are parents to a child. Further to that, I requested that they should furnish me with proof of media statements they individually issued to the media disputing the serious allegations published by the newspaper on 26 January 2020.
40. Dr Mamphiswana ignored my e-mail in that he did not respond to it. Ms Mogwe responded by stating that my investigation was infringing on her privacy and that I was at liberty to conclude my investigation without her participation. Ms Mogwe also questioned why I wanted to conclude my investigation in a “rushed” fashion. Whether Mr Lamola’s conduct reflects

that of typical legal dilettante or legal charlatan in the manner in which he represented Dr Mamphiswana and Ms Mogwe, is not for me to judge.

41. Two employees, interviewed separately, informed me that they have known Ms Mogwe since 2009 and added that, as of 2010, they had become friends. Both stated that they did attend the baby shower organized on behalf of Ms Mogwe. One friend stated that she organised the baby shower that was held at the PSC premises. The other friend stated that she only attended the one that took place at Centurion.
42. Despite having been or regarded themselves as friends to Ms Mogwe, both employees stated that she has never told them who the father of her child is. One friend was told that the father is some gentleman from Mafikeng whose name was never mentioned. The other friend was told that she would never know who the father is.
43. Ms Amanda Kelengeshe (“Kelengeshe”) intimated to me that on 23 October 2019, Ms Mogwe came to her office and was the last candidate to be interviewed. According to Ms Kelengeshe, Ms Mogwe informed her that after the interview, she (Ms Mogwe) coincidentally met, in the lady’s restroom, a member of the panel, Ms Mathenjwa, who allegedly said to Ms Mogwe “Well done, Sisi”.
44. Ms Kelengeshe said Ms Mogwe appeared calm after the interview and stated that it went very well but the DG seemed impatient. As a parting shot

prior to her departure, Ms Mogwe allegedly informed Ms Kelengeshe that she would be looking for a place to live in the Centurion area so that her child would have access to good schools. Ms Kelengeshe did not think anything was unusual about the contemplated plans for relocation from Bloemfontein to Pretoria being mentioned immediately after the attendance of the interview.

45. On 27 January 2020, Mr Malatsi, DDG: IAC says he had discussions with Ms Mogwe regarding the media allegations and Ms Mogwe broke down and asked Mr Malatsi: “Did it have to come this”?
46. Mr Johannes Mudau (“Mr Mudau”), Director: Integrity and Anti-Corruption, stated that he too, had advised Ms Mogwe to approach the Chairperson and show remorse as the relationship between her and Dr Mamphiswana was known. Mr Mudau said that Ms Mogwe had declared that *“she is not remorseful at all.”*
47. The Chairperson, when interviewed, stated that it was prudent for him, in his capacity as the Executive Authority of the PSC, to have the allegations investigated. He stated to me that Dr Mamphiswana had never disclosed his alleged relationship with the candidate appointed to the position at any stage, not even on 27 January 2020, when the Chairperson held a meeting with Dr Mamphiswana regarding the publication of the allegations in the media.

48. The Chairperson, on being asked whether he was aware of either a memorandum sent to staff of the PSC or a media statement issued by Dr Mamphiswana and Ms Mogwe refuting allegations published in the media, the answer tendered by the Chairperson was negative: a stern NO. That was the same answer provided by all PSC employees interviewed for this investigation.

49. Ms Mathenjwa, Mr Malatsi and Ms Kholofelo Sedibe, DDG: Leadership and Management, stated to me that at no stage in any management meeting chaired by the DG was the matter concerning media allegations ever raised. Only Mr Malatsi raised the matter with the DG in their private discussions. Mr Malatsi stated to me that Dr Mamphiswana's response was: "My father never told me things will be easy...".

G. TRUTH

50. As an investigator, armed with no powers to compel a government department to furnish me with relevant information, I asked Mr Malatsi to approach the Department of Home Affairs ("Home Affairs") in terms of section 9 of the Public Service Commission Act 46 of 1997 ("the PSC Act"), as amended, to enquire if there was any truth to the alleged relationship between the DG and Chief Director as published in the media. I also asked Mr Malatsi to ensure that he obtained an affidavit from Home Affairs

51. An affidavit was duly obtained from an official at Home Affairs. Annexed thereto was an affidavit for the use of natural parents (biological parents) of a child born out of wedlock in terms of section 25 (2) of the Births and Deaths Registration Act 51 of 1992.

52. The following is stated in the affidavit:

“I Dovahani Colbert Mamphiswana, identity number/passport number [REDACTED] and Boitumelo Pertunia Mogwe, identity number/passport number [REDACTED].

We are the biological parents of a child [REDACTED] with the identity number [REDACTED] born out of wedlock at Pretoria on [REDACTED]

We apply for the alteration of the above-mentioned child’s surname in terms of section 25(2) of the Birth and Death Registration Act, 1992 (Act No. 51 of 1992)”

Signed by both Dr Mamphiswana and Ms Mogwe on 13 August 2019.

53. Attached to the above affidavit were the copies of the identity documents of the parents and the child’s birth certificate.

54. As evinced in the documents obtained from Home Affairs, both Dr Mamphiswana and Ms Mogwe attended at the Centurion Home Affairs offices on 13 August 2019 and their affidavit was commissioned by an official at Home Affairs.
55. During August 2019, the position in issue had been advertised and the closing date for the submission of applications was 6 September 2020.

H. ETHICS AND DISCLOSURE OF CONFLICT OF INTEREST

56. All members of the panel signed a declaration form. The Chairperson of the panel, Dr Mamphiswana, also signed a declaration in which he stated:

*“I, Dovichani Mamphiswana (full names) hereby declare that I do not have any vested interest in any candidates(s) interviewed for the post(s) of **Chief Director: Professional Ethics** in the unit/Component/ **Branch: Integrity and Anti-Corruption** and therefore agree that should it be verified that I misinformed the Committee, disciplinary measures be instituted against me in terms of the applicable departmental prescripts or legal framework.*

Signed at Arcadia/PSC House on 23 October 2019

Signed by: Dr Mamphiswana”

57. Public Service Regulations of 2016 (“the Regulations”), published in terms of PSA state the following, in particular, Regulation 13(a-f):

“13. Ethical conduct

An employee shall-

- (a) not receive, solicit or accept any gratification, as defined in section 1 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), from any employee or any person in return for performing or not performing his or her official duties;*
- (b) not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties;*
- (c) not conduct business with any organ of state or be a director of a public or private company conducting business with an organ of state, unless such employee is in an official capacity a director of a company listed in schedule 2 and 3 of the Public Finance Management Act;*
- (d) recuse herself or himself from any official action or decision-making process which may result in improper personal gain, and this shall immediately be properly declared by the employee;*
- (e) immediately report to the relevant authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes a contravention of any law (including, but not limited to, a criminal offence) or which is prejudicial to the interest of the public, which comes to his or her attention during the course of his or her employment in the public service;*
- (f) refrain from favouring relatives and friends in work related activities and not abuse his or her authority or influence*

another employee, nor be influenced to abuse his or her authority;

(g) ...;

(h) ...;

(i) ...;

(j) ...; and

(k) ...”

58. All candidates were asked a very important question that required disclosure under the heading: **Conclusion**. The question was couched in the following terms:

“8. Are you aware of anything in the past that can lead to the embarrassment for the Public Service, should your candidature prove to be successful?

59. Ms Mogwe’s answer to this question as recorded by Dr Mamphiswana is: NO! Dr Mamphiswana knew that the answer tendered by Ms Mogwe was a clearly calculated misrepresentation of facts within his ken. Dr Mamphiswana knew that he shared a special bond with Ms Mogwe.
60. Mr Malatsi on scoring Ms Mogwe’s interview performance, recorded NO as an answer to the question posed. Ms Mathenjwa did not record Ms Mogwe’s answer to the question for reasons that are at best flimsy.

61. It is not clear why Ms Mogwe, faced with this specific question that required her to disclose a material fact, answered in the negative when she knew that the Chairperson of the very same panel was the father of her child.
62. As evinced by the documents furnished to me, at no stage did Dr Mamphiswana recuse himself in terms of Regulation 13(d). To date, Dr Mamphiswana has not acted in accordance with Regulation 13(e).
63. The appointment of Ms Mogwe to the position of Chief Director: Professional Ethics constitutes a premeditated deceit, dishonesty, fraud and corruption calculated to deceive other members of the panel, the Chairperson of the PSC, public service and the citizens of the Republic of South Africa. Through this appointment, the image of the PSC and its recruitment process have been put into disrepute by the DG, who ought to have been the custodian of ethics, integrity and anti-corruption.
64. Regulation 91 underscores the issue of ethical conduct of senior managers in the following terms:

“91. Ethics and conduct

Members of the SMS shall

- (a) display the highest possible standards of ethical conduct;*
- (b) set an example to those employees reporting to them and maintain high levels of professionalism and integrity in their interaction with political office-bearers and the public;*

- (c) *ensure that they minimise conflicts of interest and that they put the public interest first in the performance of their functions; and*
- (d) *avoid any conflict of interest that may arise in representing the interests of his or her department and being a member of a trade union, as defined in section 213 of the Labour Relations Act.”*

65. Both Dr Mamphiswana and Ms Mogwe are expected in terms of Regulation 91 to act in the manner prescribed.

66. Further, as employees of the State, Dr Mamphiswana and Ms Mogwe are enjoined to act in terms of the Constitution in the performance of their duties. Regulation 11 underscores that contention in the following terms:

“11. Adherence to Constitution and other laws

An employee shall

- (a) *be faithful to the Republic and honour and abide by the Constitution and all other law in the execution of his or her official duties;*
- (b) *put the public interest first in the execution of his or her official duties;*
- (c) *loyally execute the lawful policies of the Government of the day in the performance of his or her official duties;*
- (d) *abide by and strive to be familiar with all legislation and other lawful instructions applicable to his or her conduct and official duties; and*
- (e) *cooperate with public institutions established under the Constitution and legislation in promoting the interest of the public.”*

67. Dr Mamphiswana is an Accounting Officer in terms section 38 of the Public Finance Management Act 1 of 1999, ("the PFMA"), as amended, shoulders immense statutory responsibilities and has fiduciary responsibilities towards the State and its citizens. Acting ethically forms an essential part of financial prudence and fiscal discipline.
68. On 25 May 2012, Dr Mamphiswana was the DDG: Integrity and Anti-Corruption at the PSC and was a member of the panel that shortlisted and interviewed other candidates for a position of Provincial Director: Limpopo. Ms Mogwe was one of the candidates shortlisted and interviewed. Ms Mogwe was not appointed to that position. It is probable that Ms Mogwe was in the early stages of her pregnancy as their child was born within nine months after that interview.
69. The conduct of Dr Mamphiswana to brazenly shortlist, interview and recommend for appointment, the mother of his own child, is professionally unethical. So is Ms Mogwe's conduct in that she agreed to be interviewed by the father of her child and failed to disclose that material fact. This was nepotism *par excellence*. It was dishonesty calculated to disadvantage other applicants who applied for the position. It is, in fact, criminal.

I. FRAUDULENT PAYMENT OF DECEMBER 2019 SALARY

70. Ms Mogwe was scheduled to commence her duties effective from 1 December 2019. As she was going to report to Mr Malatsi, Ms Mogwe

asked for leave for two reasons: to write a hand-over report and make arrangements for relocation from Bloemfontein to Pretoria. Mr Malatsi granted Ms Mogwe leave on those two reasonable and legitimate grounds. Mr Malatsi stated that Ms Mogwe was to remain in Bloemfontein for the proper hand-over, which Ms Mathenjwa knew about. Ms Mathenjwa confirmed same.

71. According to Ms Mathenjwa and Mr Malatsi, Ms Mogwe never performed any duties in her new role as Chief Director. However, Ms Mogwe was paid a full salary for December 2019 “without lifting a finger”.
72. Ms Mathenjwa, who was expected to receive a hand-over report about the operations in the Free State office where Ms Mogwe was the Provincial Director, was not furnished with any hand-over report by Ms Mogwe. Ms Mathenjwa had no explanation for her failure to request the hand-over report from Ms Mogwe.
73. Ms M Mabowa, Director: Professional Ethics, Research and Promotion, was appointed to act in terms of section 32 of the PSA as Chief Director: Professional Ethics from 1 September 2019 to 29 February 2020.
74. On 15 November 2019, Ms Mathenjwa, Acting DG, withdrew the acting appointment of Ms Mabowa effective from 30 November 2019. Ms Mabowa stated that throughout December 2019, Ms Mogwe did not report for duty at the headquarters in Pretoria. The only time Ms Mabowa interacted with

Ms Mogwe was on 9 December 2019 at the conference of International Anti-Corruption that was held in Pretoria.

75. Ms Mogwe was granted leave by Mr Malatsi on the pretext that she was writing a hand-over report for Ms Mathenjwa. Ms Mogwe also used her relocation as a ploy to remain in Bloemfontein during December 2019.
76. This was a calculated fraud by Ms Mogwe to be paid a salary for the month of December 2019 as Chief Director for doing nothing.

J. BREACH OF OTHER LAWS

77. The fraudulent employment of Ms Mogwe, spearheaded by Dr Mamphiswana connotes that Dr Mamphiswana contravened the general responsibilities of accounting officers in terms of section 38 of the PFMA. This conduct constitutes financial misconduct in terms of section 81(1) of the PFMA.
78. The conduct of Ms Mogwe, by her failure to disclose in her interview a material conflict of interest (ie, the relationship between her and Dr Mamphiswana), contravened section 45(c) of the PFMA. During her interview, she was an employee of the PSC. Ms Mogwe's conduct also constitutes financial misconduct in terms of section 81(2) of the PFMA.

79. The conduct of Dr Mamphiswana and Ms Mogwe amounts to corruption in terms of sections 3, 4 and 10 of the Prevention and Combating of Corrupt Activities Act 12 of 2004, as amended (PRECCA).

K. RECOMMENDATIONS

80. Having found that the appointment of Ms Mogwe is the result of nepotism, deceit, dishonesty, corruption and fraud, it is recommended that the Chairperson consider taking the following steps:

- 80.1. immediately approach the relevant law enforcement agency to open a case of fraud, corruption and contravention of the provisions of the PFMA against Dr Mamphiswana and Ms Mogwe;
- 80.2. immediately take appropriate disciplinary steps against Ms Mogwe;
- 80.3. alternatively, approach the court to have the appointment reviewed and set aside as the appointment was premised on nepotism, corruption and fraud;
- 80.4. institute civil claims against Ms Mogwe and Dr Mamphiswana to reimburse the PSC for all the money paid to her as Chief Director: Professional Ethics;

- 80.5. institute an audit investigation into the appointments of senior managers at the PSC;
- 80.6. consider providing training on ethics to all PSC employees irrespective of their rank;
- 80.7. immediately furnish the President with this report to enable the President to consider acting against Dr Mamphiswana in terms of section 12(1)(a) of the PSA read with section 16A(1);
- 80.8. immediately furnish this report to Minister Mchunu;
- 80.9. make this report available to Dr Mamphiswana and Ms Mogwe;
- 80.10. ensure that all the PSC employees who assisted in this investigation are not subjected to any occupational detriment as defined in section 1 of the PDA;
- 80.11. to make this report together with the interview transcripts available to the PSC staff members by posting it on its website;
and
- 80.12. ensure that the documents obtained from the Department of Home Affairs are not made public as they contain the particulars of the child.

L. CONCLUSION

81. Sections 196(1) and (2) of the Constitution state that (1) There is a single Public Service Commission for the Republic; and (2) The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation.
82. The Constitution enjoins the PSC to effectively promote a high standard of professional ethics in the public service. Unfortunately, what is adverted above in this report paints a picture of a custodian of good governance in the public service who is professionally unethical.
83. It must be borne in mind that an accounting officer of a state institution shoulders huge fiduciary responsibilities to the State, public service, citizens and public purse. The accounting officer of the PSC must be a fit and proper person whose ethical conduct should be beyond reproach.
84. Any alleged misconduct that has the potential to bring the image of the PSC into disrepute warrants an independent investigation. I have wrestled to find the constitutional rationale for the DG of the PSC to be appointed by the President. The PSC reports to Parliament and not to the President.

85. Nepotism is a brazen assault to constitutional values and principles. It is blatant corruption. It erodes public confidence in the government employment practices.
86. The media's role in the constitutional democracy and in the fight against corruption must be encouraged. The material media allegations published by Sunday Independent on 26 January 2020 are to a major extent premised on truth.
87. The real and uncelebrated patriots are the whistle-blowers and Tshishongas of this land. Keep blowing that whistle! Izwe Lethu! iAfrika!



S SETHENE

SANDTON CHAMBERS

DATE: 8 JULY 2020