

**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**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**REPORT NO: 28 OF 2018/19**

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT  
REGARDING MR DONDO MOGAJANE'S APPLICATION FOR THE POSITION OF  
DIRECTOR-GENERAL AT NATIONAL TREASURY AND HIS SUBSEQUENT  
APPOINTMENT TO THE SAME POSITION BY NATIONAL TREASURY**

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### **Executive Summary**

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and hereby published in terms of section 8(2A)(a) of the Public Protector Act, 1994.
- (ii) The report relates to an investigation into allegations of a failure by Mr Dondo Mogajane (Mr Mogajane) to disclose that he had a criminal record in his application form for the position of Director-General at the National Treasury.
- (iii) The complaint was lodged anonymously on 22 August 2017, in which it is alleged that on 26 April 2017, Mr Mogajane applied for the position of Director-General at National Treasury.
- (iv) He had in his Z83 application form, under questionnaire *"Have you ever been convicted of a criminal offence or been dismissed from employment"*, indicated *"NO"* with a mark; and
- (v) It is alleged that he accordingly rendered false information to National Treasury during the application process for his employment, as he had a criminal record, in that he had previously been found guilty for contravening the Road Traffic Act, 1996, during 2011.
- (vi) In essence, the complaint is that Mr Mogajane misrepresented facts about his personal record thereby concealing pertinent information which reflected on his suitability or otherwise for the position of Director-General at National Treasury, to which he was appointed by the former Minister of Finance, Mr Malusi Gigaba, MP (former Minister Gigaba).
- (vii) On analysis of the complaint, the following issues were identified to inform and focus the investigation:-

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- (a) Whether Mr Dondo Mogajane, failed to disclose his criminal record on the application form for the position of Director-General of National Treasury, and if so, whether such conduct amounted to an improper or dishonest act as contemplated by section 6(4) of the Public Protector Act, 1994; and
  - (b) Whether the conduct of former Minister Gigaba in the appointment of Mr Dondo Mogajane as Director-General of National Treasury, was improper as contemplated by section 6(4) of the Public Protector Act, 1994.
- (viii) The investigation process commenced with a preliminary investigation, followed by a formal investigation which was conducted through the exchange of correspondence with Mr Mogajane, the former Ministers of Finance, Mr Malusi Gigaba and Mr Nhlanhla Nene, issuing of Notices in terms of section 7(9)(a) of the Public Protector Act, 1994 and responses thereto received from Mr Mogajane and former Minister Gigaba, inspection and perusal of the relevant documents/correspondence received as well as the analysis and application of the relevant laws, policies and related prescripts.
- (ix) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:-
- (a) **Regarding whether Mr Dondo Mogajane, failed to disclose his criminal record on the application form for the position of Director-General of National Treasury, and if so, whether such conduct amounted to an act or omission, as contemplated by section 6(4) of the Public Protector Act, 1994:**
    - (aa) The allegation that Mr Mogajane, failed to disclose a criminal record on the Z83 application form for the position of Director-General at the National Treasury, is substantiated;



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- (bb) It is trite that Mr Mogajane had a duty in law to act honestly and in good faith towards his employer, which required him to disclose his criminal conviction on his Z83 application form;
- (cc) Mr Mogajane however did not discharge this duty towards his employer. He did not disclose his criminal record in his application for the DDG position during 2015 and, after being made aware of the criminal record in 2015, he acted dishonestly in his application for the in his Z83 application form for the position of Director-General during 2017 by failing to disclose that he had a criminal record.
- (dd) In so doing, Mr Mogajane failed to meet the standard imposed upon him to act with integrity and honestly towards his employer; and
- (ee) Such failure therefore constitutes impropriety and/or dishonesty and amounts to improper conduct as envisaged in section 6(4)(a) of the Public Protector Act.
- (b) **Regarding whether the conduct of former Minister Gigaba in the appointment of Mr Dondo Mogajane as Director-General of National Treasury, was improper as contemplated by section 6(4) of the Public Protector Act, 1994:-**
- (aa) The allegation that the conduct of former Minister Gigaba in the appointment of Mr Dondo Mogajane as Director-General of National Treasury was improper, as contemplated by section 6(4) of the Public Protector Act, 1994, is substantiated.

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- (bb) Evidence presented before me confirm that former Minister Gigaba knew or ought to have reasonably known about Mr Mogajane's failure to disclose the criminal record in his Z83 application form. Former Minister Gigaba's ostensible failure to verify the information in the Z83 application form was in violation of Chapter 2, paragraph 8.7(3) of the SMS Handbook.
  - (cc) Former Minister Gigaba proceeded to approve the memorandum for the filling of the position of Director-General of National Treasury on 30 May 2017, thereby tacitly condoning the impropriety.
  - (dd) Former Minister Gigaba failed to ensure that the Director-General acts in compliance with the values of the Constitution of always acting in good faith, upholding high standard of professional ethics and accountability.
  - (ee) He also failed to apply his mind and act reasonably in considering the appointment of Mr Mogajane as the Director General of National Treasury.
  - (ff) Former Minister Gigaba's conduct was therefore irrational and unreasonable under the circumstances and consequently amounts to improper conduct as contemplated by section 6(4) of the Public Protector Act, 1994.
- (x) The appropriate remedial actions I am taking as envisaged in section 182(1)(c) of the Constitution are the following:

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**The President of the Republic of South Africa to:**

- (a) **Within 30 days of this report, take appropriate disciplinary action against Mr Mogajane in terms of sections 16A of the Public Service Act for blatantly and dishonestly making false representation of material facts (non-disclosure of criminal conviction) in his Z83 Application Form for the post of Director-General at the National Treasury.**
  
- (b) **Note my findings, observations and take the following requisite steps, within 60 days of this Report, to cause a review of the current screening and selection process for Heads of Departments/Director-Generals/Deputy Director Generals (HoDs/DGs/DDGs) in the relevant prescripts to-**
  - (aa) **Ensure that Executive Authorities of the Departments comply with their obligations in terms of section D of the Public Service Regulations and the SMS Handbook to verify all relevant information pertaining to the suitability of candidates for appointment of Head of Departments, prior to the engagement with the Minister for the Public Service and Administration as well as with the Cabinet; and**
  
  - (bb) **Align the selection, recruitment and appointment process of Heads of Departments to the recent interpretation of section 12(1)(a) by the Courts in the Apleni and Mlangana judgments referred to in this Report.**

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER CONDUCT REGARDING MR DONDO MOGAJANE'S APPLICATION FOR THE POSITION OF DIRECTOR-GENERAL AT NATIONAL TREASURY AND HIS SUBSEQUENT APPOINTMENT TO THE SAME POSITION BY NATIONAL TREASURY**

**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 His Excellency, President Cyril Ramaphosa, MP;
- 1.2.2 The Minister of Finance, Mr Tito Mboweni, MP;
- 1.2.3 The Director-General of National Treasury, Mr Dondo Mogajane; and to
- 1.2.4 The former Minister of Finance, Mr Malusi Gigaba.
- 1.3 The report relates to an investigation into allegations of a failure by Mr Dondo Mogajane to disclose a criminal record in his application form for the position of Director-General of National Treasury.

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## **2 THE COMPLAINT**

2.1 The complaint was lodged anonymously on 22 August 2017, in essence alleging that:-

2.1.1 On 26 April 2017, Mr Dondo Mogajane applied for the position of Director-General of the Department of National Treasury (National Treasury).

2.1.2 Mr Mogajane accordingly rendered false information to National Treasury during the application process for his employment, as he had a criminal record, in that he had been found guilty for contravening the Road Traffic Act, 1996, during 2011.

## **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."*

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- 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.

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- 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 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); and
- 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 National Treasury is a national government department 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 National Treasury.

#### **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 former Minister Gigaba, the Presidency: Republic of South Africa and the then Minister of Finance, Mr Nhlanhla Nene, MP (former Minister Nene), analysis of relevant documentation, conducted research, and the consideration and application of relevant laws, regulatory framework and jurisprudence.

4.1.4 Limitations to the investigation are that we were advised by former Minister Nene, in a letter, dated 05 April 2018, that the interview process was not recorded and that there are no transcripts available of the interview proceedings.

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 Mr Dondo Mogajane (Mr Mogajane) and former Minister Gigaba, dated 04 September 2018, respectively, to afford them an opportunity to respond to my provisional findings. Responses

were received from Mr Mogajane and former Minister Gigaba on 02 and 09 October 2018 respectively and the submissions contained therein have been factored 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 amount 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 Director-General and the former Minister of Finance, Mr Gigaba, acted improperly in relation to the:-

4.2.1.5.1 Failure by Mr Mogajane to disclose the criminal record on the application form for the position of Director-General at National Treasury; and

- 4.2.1.5.2 Former Minister Gigaba's appointment of Mr Mogajane as the Director-General of National Treasury.
- 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 former Minister of Finance, Mr Gigaba and the Director-General, Mr Mogajane, 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 former Minister of Finance and/or the Director-General 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 Dondo Mogajane, failed to disclose his criminal record on the application form for the position of Director-General of National Treasury, and if so, whether such conduct amounted to an improper or dishonest act, as contemplated by section 6(4) of the Public Protector Act, 1994.
- 4.3.2 Whether the conduct of former Minister Gigaba in the appointment of Mr Dondo Mogajane as Director-General of National Treasury was improper, as contemplated by section 6(4) of the Public Protector Act, 1994.



**4.4 The key sources of information**

**4.4.1 Documents received and considered:-**

- 4.4.1.1 Application Form Z83, dated 06 October 2014 and the recruitment documents of Mr Mogajane;
- 4.4.1.2 Memorandum for the appointment of Mr Mogajane as DDG: Public Finance, approved by former Minister Nene on 21 April 2015;
- 4.4.1.3 Letter from the State Security Agency to former Director-General of National Treasury, Mr L Fuzile, dated 27 March 2015;
- 4.4.1.4 Letter from the Director: Security Management to Human Resource Management of National Treasury, dated 24 May 2017;
- 4.4.1.5 Memorandum for the appointment of Mr Mogajane as Director-General, approved by former Minister Gigaba on 30 May 2017;
- 4.4.1.6 Cabinet Memo Extract, dated 07 June 2017;
- 4.4.1.7 Letter from SAQA to National Treasury, dated 13 June 2017;
- 4.4.1.8 Letter from the State Security Agency to former Minister Gigaba, dated 24 May 2017;
- 4.4.1.9 Z83 application form, dated 26 April 2017, and the recruitment documents of Mr Mogajane;

- 4.4.1.10 Employment contract entered into by and between the Government of the Republic of South Africa and Mr Mogajane, dated 15 June 2017;
- 4.4.1.11 Letter of offer of employment addressed to Mr Mogajane, dated 28 June 2017;
- 4.4.1.12 Letter titled: "Security Clearance: Mr Mogajane AD: ID 69\*\*\*\*\*80" from L Jafta, the Acting Director-General of the State Security Agency, dated September 2018; and
- 4.4.1.13 A copy of a Security Clearance Certificate issued to Mr Mogajane, dated 06 September 2018.
- 4.4.2 Correspondence sent and received:**
- 4.4.2.1 Letter from the Public Protector to former Minister Gigaba, dated 24 August 2017;
- 4.4.2.2 Letter from the Public Protector to former President Jacob Zuma, dated 24 August 2017;
- 4.4.2.3 Letter from former Minister Gigaba to the Public Protector, dated 31 August 2017;
- 4.4.2.4 Letter from the Public Protector to former Minister Gigaba, dated 05 September 2017;
- 4.4.2.5 Letter from the Public Protector to former Minister Gigaba, dated 23 October 2017;

- 4.4.2.6 Letter from the Public Protector to Director-General in the Presidency, Dr Cassius Lubisi, dated 23 October 2017;
- 4.4.2.7 Letter from former Minister Gigaba to the Public Protector, dated 20 November 2017;
- 4.4.2.8 Letter from Director-General in the Presidency to the Public Protector, dated 30 November 2017;
- 4.4.2.9 Letter from Director-General in the Presidency to the Public Protector, dated 26 January 2018;
- 4.4.2.10 Letter from the Public Protector to former Minister Nene, dated 22 March 2018;
- 4.4.2.11 Letter from former Minister Nene to the Public Protector, dated 05 April 2018;  
and
- 4.4.2.12 Letter from the Public Protector to former Minister Nene, dated 14 June 2018.
- 4.4.3 Inspection *In loco*:-**
- 4.4.3.1 *Inspection in loco* conducted of Cabinet minutes, dated 07 June 2018, at the cabinet office at Union Buildings, Pretoria, Room 55 West Wing on 12 February 2018.
- 4.4.4 Notices issued and responses received:**
- 4.4.4.1 Notice issued in terms of section 7(9)(a) of the Public Protector Act to former Minister Gigaba, dated 04 September 2018;

- 4.4.4.2 Notice issued in terms of section 7(9)(a) of the Public Protector Act to the Director-General, Mr Mogajane, dated 04 September 2018;
  - 4.4.4.3 Response to section 7(9)(a) Notice from Director-General, Mr Mogajane, dated 02 October 2018; and
  - 4.4.4.4 Response to section 7(9)(a) Notice from former Minister Gigaba, dated 09 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 The Road Traffic Act, 1996;
  - 4.4.5.4 The Public Service Act, 1994;
  - 4.4.5.5 Public Service Regulations, 2015;
  - 4.4.5.6 SMS Handbook, SMS Handbook, issued by the Minister of Public Service and Administration, dated 2009
  - 4.4.5.7 National Treasury Policy on Recruitment and Selection, dated 2009; and
  - 4.4.5.8 Executive Protocol: Principles and Procedures for the Employment of Heads of Departments and Deputy Director-Generals Nationally, 2013.

**4.4.6 Case law:**

- 4.4.6.1 *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ
- 4.4.6.2 *Bhembe v Independent Development Trust* (2015) 24 CCMA 7.17.1.
- 4.4.6.3 *Eskom Holdings Ltd v Fipaza and Others* (JA 56/10) [2012] ZALAC 40.
- 4.4.6.4 *LTE Consulting (PTY) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JR1289/14) [2017] ZALCJHB 291.
- 4.4.6.5 *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2442 (LAC).
- 4.4.6.6 *Department of Home Affairs and Another v Ndlovu and Others* (2014) 35 ILJ 3340 (LAC).
- 4.4.6.7 *G4S Secure Solutions SA (PTY) Ltd v Ruggiero N.O and Others* (CA2/2015) [2016] ZALAC 55; (2017) 38 ILJ 881 (LAC).
- 4.4.6.8 *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988(3) SA 132 (A) at 152A-D
- 4.4.6.9 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004(4) SA 490 (CC).
- 4.4.6.10 *Apleni v President of the Republic of South Africa and Another* (65757/2017) [2017ZAGPPHC; [2018] 1 All SA 728 (GP) (October 2017)
- 4.4.6.11 *Mzamo Micheal Mlengana v Minister of Agriculture, Forestry and Fisheries* (76891/2017) [2018] ZAGPPHC 547 (23 April 2017)

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#### **4.4.6 Public Protector's Touchstones:**

##### **4.4.7.1 "When Governance and Ethics Fail": Report No. 23 of 2013/2014**

4.4.7.1.1 The issue, *inter alia*, was whether Mr Motsoeneng fraudulently misrepresented his qualifications to the South African Broadcasting Authority (SABC), including stating that he had passed matric when applying for employment (based on his application form).

4.4.7.1.2 The finding was that *"Mr Motsoeneng had committed fraud by stating in his application form that he had completed matric from Metsimantsho High School... His blame of Mrs Swanepoel and the SABC management that stating that they knew he had not passed matric is disconcerting... The conduct is improper and constitutes a dishonest act as envisaged in section 6(4) (a) (ii) and (iii) of the Public Protector Act"*.

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

4.4.7.2.1 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.

4.4.7.2.2 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 Dondo Mogajane, failed to disclose his criminal record on the application form for the position of Director-General of National Treasury, and if so, whether such conduct amounted to an improper or dishonest act, as contemplated by section 6(4) of the Public Protector Act, 1994.**

**Introduction**

- 5.1.1 The main duties and responsibilities for the position of the Director-General of the National Treasury is to produce a sound and sustainable national budget and equitable division of resources between the three spheres of government, manage government's financial assets and liabilities through prudent cash management, asset restructuring and management of debt portfolio, support South Africa's participation in international finance and development policy and institutions, including the IMF, World Bank, G20 and Organisation for Economic Cooperation.**
- 5.1.2 With the above-mentioned key duties and responsibilities, especially looking after the South African fiscus in the annual budget of R1.67 trillion, honesty and integrity are paramount to the execution of duties by the Director-General of the National Treasury.**

**Common cause facts**

- 5.1.3 National Treasury advertised the position of Director-General for a fixed term five (5) year contract on 28 April 2017.
- 5.1.4 In his Z83 application form for the position of Director-General of National Treasury, dated 26 April 2017, Mr Mogajane indicated "NO" to the question "Have you ever been convicted of a criminal offence or been dismissed from employment?"
- 5.1.5 Pre-employment suitability checks conducted by the State Security Agency (SSA) on 24 May 2017 indicated that Mr Mogajane had a criminal record in relation to a violation of the Road traffic Act, 1996 in 2011.
- 5.1.6 Mr Mogajane was appointed to the position of Director-General of National Treasury, during June 2017.

**Issues in dispute**

- 5.1.7 The sequence of events and the evidence acquired during the investigation is not disputed by Mr Mogajane. The issue that remains for my determination is whether, at the time of application for the position of Director-General of National Treasury, Mr Mogajane failed to discharge his duty as an applicant for employment in the public service, to accurately and honestly disclose requested and relevant information.
- 5.1.8 A letter from the Office of the SSA was submitted to former Minister Gigaba, titled "Pre-employment Screening: Candidate for the Post of Director-General", dated 24 May 2017, in which a criminal record was found against Mr Mogajane's

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name. It stated that Mr Mogajane had been found guilty of an offence in terms of the Road Traffic Act, 1996, during 2011.

- 5.1.9 The pre-screening letter further stated that it would be valid until Mr Mogajane was appointed as Director-General. If appointed, he should complete a Z204 form that would have to be forwarded to the SSA for vetting investigations for the purpose of security clearance.
- 5.1.10 However, the authenticity of the letter dated 24 May 2017 from SSA to former Minister Gigaba is questionable. The letter contains various discrepancies relating to the font used and page design. The font on the first page differs from the one in the second page whilst one page also has a footer whereas the other does not.
- 5.1.11 Be that as it may, the evidence indicates that the Pre-employment Screening letter, dated 24 May 2017, which is referred to above, was attached as an annexure to a further letter, dated 24 May 2017, titled "Security screening results for Mogajane Andrew Dondo: "69\*\*\*\*\*80", from the Director: Security Management of National Treasury, Ms Faith Leeuw, addressed to Ms Caroline Modibane the Human Resources Management: Recruitment of National Treasury. The latter correspondence provided as follows:-

*"1. Your request to screen the below mentioned refers.*

*2. State Security Agency (SSA) has issued the attached results. Annexure A*

*3. No negative information of security relevance was obtained with regard to the candidate.*

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4. ...

5. *The candidate has a criminal record i.e. he was found guilty for contravening the Road Traffic Act in Kempton Park in 2011. With regards to his appointment, the following factors should be considered:*

*5.1 The type and seriousness of the crime committed;*

*5.2 The period within which the crime was committed;*

*5.3 Whether or not the official has been rehabilitated;*

*5.4 Whether or not this is his first offence;*

*5.5 The nature of work to be executed by the official; and*

*5.6 Any likelihood of reoccurrence.*

*6. After considering the factors mentioned above, you are being advised that Mr Mogajane cannot be denied employment because of the crime committed, however should the employee be appointed in the position, he should be made aware of the outcome of these results, so that he can either request clearance from the South African Police Services (SAPS).*

*7. It should also be noted that this does not necessarily imply that the department will be appointing officials with criminal record, each case will be dealt with on its own merit and Security Management will advise accordingly.*

*8. The candidate, if appointed must complete a Z204 form (security clearance form) that must be submitted within 14 days to Security Management in order to conduct necessary investigations, at the end of which a relevant security clearance will be considered."*

5.1.12 The Security Manager's above memorandum to the Human Resource Department although being in line with paragraph 3.4.8 the National Treasury

Policy on Recruitment and Selection, went beyond just reporting, but also recommended that the criminal record should not be used to deny the applicant employment.

- 5.1.13 It is noted that it is unclear how the Security Manager, Ms Faith Leeuw, arrived at the conclusion that Mr Mogajane could not be denied employment based on the finding that he had a criminal record. It would be rational for Ms Leeuw to advise the Human Resources Department on the factors that would have to be considered once SSA confirms a criminal record. It is therefore surprising that she would reach such a conclusion with all relevant stakeholders having made the relevant inputs.
- 5.1.14 On 30 May 2017, former Minister Gigaba approved a memorandum recommending the appointment of Mr Mogajane to the position of Director-General of National Treasury for a period of five (5) years, with effect from date of assumption of duty.
- 5.1.15 In a letter, dated 31 August 2017, and in response to the allegations put to former Minister Gigaba in a letter, dated 24 August 2017, he indicated that:-

*"...both the department and Mr Mogajane are aware of the State Security Agency's (SSA) personnel suitability checks that mentioned a criminal record in relation to a violation of the Road Traffic Act 93 of 1996 in 2011.*

*The SSA report concluded that the crime committed cannot be used to deny the applicant employment.*

*All correspondence to the DPSA and the Cabinet memo did mention the finding of the SSA with regard to the Road Traffic Act violation.*

*December 2018*

*I had a discussion with Mr Mogajane regarding his response to the said question on the Z83 and he indicated that the interpretation of the question is implied as per special note 4 of the Z83. He had in his previous interview for the DDG post which he held prior to this post voluntarily disclosed this conviction. At the DG position interviews this issue was never asked.*

*It is thus my submission that there has never been any intention on his part to withhold this information. The information on the Z83 is thus not Mala-fide..."*

- 5.1.16 It is worth noting that the foregoing memorandum from the Security Manager at National Treasury, Ms Faith Leeuw proceeds to misquote the SSA's screening report of 24 May 2017 in many respects, including the conclusion that the crime committed cannot be used to deny the applicant employment which is not articulated in the SSA's report.
- 5.1.17 It can also be construed that former Minister Gigaba is uncertain of the true facts regarding the SSA screening report and to some extent, the information on the Z83 form, which indicates failure to conduct due diligence when going through the documents submitted to him for Mr. Mogajane's appointment.
- 5.1.18 In a response to the abovementioned letter, I requested further details and information regarding Mr. Mogajane's application for the position of Deputy Director-General (DDG) of National Treasury, in a letter dated 23 October 2017.
- 5.1.19 I received a response from former Minister Gigaba in a letter, dated 20 November 2017. The letter included the advert for the position of DDG; Mr Mogajane's Z83 application form, dated 06 October 2018; his Curriculum Vitae; qualifications; SSA's Pre-employment screening letter, dated 27 March 2015; a memorandum for filling of the position of Deputy Director-General, approved by

former Minister Nene, dated 21 April 2015 and an extract of the Z204 vetting form.

- 5.1.20 Upon perusal of Mr. Mogajane's Z83 application form for the position of DDG, dated 06 October 2014, it was further discovered that in respect of the question "Have you been convicted of a criminal offence or been dismissed from employment?" he had also marked "NO".
- 5.1.21 The SSA's "Pre-employment Screening: Candidate for the post of Deputy Director-General at the National Treasury", dated 27 March 2015, indicated that Mr Mogajane has a criminal record, in that he was found guilty of reckless or negligent driving, during 2011.
- 5.1.22 The pre-employment screening referred to above also indicated that Mr Mogajane had a negative credit record in that he had a judgment against him, during 2011, for the amount of R4570.00.
- 5.1.23 The pre-employment screening also stated that the inability of a person to manage his/her finances could pose a security risk. Further thereto, that the pre-employment screening would be valid until the candidate was appointed, and if appointed, the candidate should complete a Z204 form that must be forwarded to the SSA in order to conduct the necessary vetting investigations, at the end of which the relevant security clearance would be considered.
- 5.1.24 A memorandum which was approved by former Minister Nene on 21 April 2015, titled "Proposed Filling of the Advertised Position of Deputy Director-General: Public Finance, within the Public Finance Division", confirmed that the SSA had found a criminal record in Mr Mogajane's name and further that his appointment would be subjected to security clearance.

- 5.1.25 On perusal of the extract of the Z204 vetting form deposited on 24 March 2017, Mr. Mogajane submitted on the question *"Have you ever been convicted or are there any pending cases for a criminal/departmental offence(s)? (Admission of guilt outside a court must also be submitted)"* that he had committed a traffic offence in Kempton Park, in 2012 or 2013 and was given a fine for the transgression.
- 5.1.26 In a letter, dated 05 April 2018, Minister Nene indicated that *"...I would like to re-emphasise that there has never been any intention on Mr Mogajane's part to withhold any information in this regard."*
- 5.1.27 In his response, dated 02 October 2018 to the section 7(9) Notice, Mr Mogajane asserted that he applied for the post of DDG: Public Finance of National Treasury in 2014 and was unaware that he had a criminal record for having paid an admission of guilt fine in 2011 for contravening the Road Traffic Act, hence when he completed the Z83 application form in 2014, he answered in the negative to the question whether he had a criminal record.
- 5.1.28 Mr Mogajane asserted that he only became aware of his criminal record after his interview for the position of DDG, when the Head of Security of National Treasury, Ms Faith Leeuw brought it to his attention. Mr Mogajane stated that subsequent to his appointment as DDG, he disclosed the details of his criminal conviction.
- 5.1.29 Mr Mogajane asserted further in his response that, contrary to what is stated in the response by former Minister Gigaba, dated 31 August 2017, he did not disclose the previous conviction during his interview for the position of DDG as



he was at the time unaware of the existence of the criminal record and he did not interpret the form in a manner which justifies no as an answer.

- 5.1.30 Mr Mogajane submitted that due to his work pressure in his capacity as DDG, his Z83 application form for the post of Director-General was filled on his behalf by the Divisional Support Manager, Ms Mmatshupo Maldi, who assumed that he had no criminal record, and that he did not check its accuracy when he signed it.
- 5.1.31 Mr Mogajane acknowledged that he ought to have checked the Z83 application form for accuracy prior to signing it, but failed to do so. He however asserted that he had no intention to mislead the National Treasury, Cabinet or anyone else with regard to the criminal record concerned and he had no intention to hide the particular fact, neither did he intend to misstate the true factual position.
- 5.1.32 Mr Mogajane conceded that he had a duty of good faith, transparency and accountability towards his employer and affirmed that his unblemished record demonstrates that he had always upheld these values and had scrupulously conducted himself in accordance with the highest ethical and professional standards. He asserted that the Z83 application form was inadvertently inaccurate, and that it is evident in the vetting forms that he made full disclosure of such a criminal record when he completed the relevant forms.
- 5.1.33 Mr Mogajane further asserted that his criminal record was brought to the attention of National Treasury and Cabinet and that his conduct therefore did not amount to improper conduct as envisaged in section 182(1)(a) of the Constitution.

**Application of the relevant law**

5.1.34 Section 195 of the Constitution explicates the values and principles required in public administration. It requires, *inter alia*, a high standard of professional ethics and accountability in public administration.

5.1.35 Similarly, paragraph 11.1 of the Executive Protocol: Principles and Procedures for the Employment of Heads of Departments (HODs) and Deputy Directors-General (DDGs) Nationally, of 2013 (Executive Protocol), states that:

*"A HoD shall display the highest possible standards of ethical conduct; and set an example to subordinates and maintain high levels of professionalism and integrity in their interaction with political office-bearers, fellow employees and the Public"*

5.1.36 Paragraph 11.2 of the Executive Protocol further states that:

*"A HoD is expected to comply with the Code of Conduct provided for in Chapter 2 of the Public Service Regulations"*

5.1.37 Chapter 12, Paragraph 13 of the Public Service Regulations, 2015, states that an employee shall:

*"(a) execute his or her official duties in a professional and competent manner;*

...

*(l) promote sound, efficient, effective, transparent and accountable administration;*

...



- (o) *not misrepresent himself or herself or use the name or position of any other employee to influence any decision making process or obtain any undue benefit*".

5.1.38 It is commonplace that in order to maintain a relationship of trust between the employer and employee, it is important that both parties have reciprocal obligations in that regard. In *Sappi Novoboord (Pty) Ltd v Bolleurs* (1998) 19 ILJ at paragraph 7, the court held:-

*"It is an implied term of the contract of employment that the employee will act in good faith towards his employer and that he will serve his employer honestly and faithfully.....I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him."*

5.1.39 In *Bhembe v Independent Development Trust* (2015) 24 CCMA 7.17.1, the Commissioner indicated that:-

*"...dishonesty must be intentional...in general, there is no obligation on an employee to disclose anything in his or her past which might prejudice him or her, however, in certain circumstances there may be a duty on an employee to disclose previous misconduct especially when it is of such a nature that it disqualifies him or her from the new appointment."*

5.1.40 In the matter of *Eskom Holdings Ltd v Fipaza and Others* (JA 56/10) [2012] ZALAC 40, Ndlovu JA held the same as Conradie JA in *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 (SCA), that:-

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*"The policy considerations appertaining to the unlawfulness of failure to speak in a contractual context – a non-disclosure- have been synthesised into a general test of liability. The test takes into account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (Speight v Glass and Another 1961 (1) SA 778 (D) at 781H-783 B). That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful (BOE Bank Ltd v Ries 2002 (2) SA 39 (SCA) at 46 G-H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (Pretorius and Another v Natal South Sea Investment Trust Ltd...1965 3 SA 410 (W) at 418 E-F)."*

- 5.1.41 In *LTE Consulting (PTY) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (JR1289/14) [2017] ZALCJHB 291, the court was requested to consider whether the commissioner's finding that the employee was not guilty of dishonestly misrepresenting his CV was reasonable. In making the finding that the commissioner's decision was unreasonable, the court relied on three decisions.
- 5.1.42 The first was *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2442 (LAC). In this case an employee had misrepresented that she had a driver's license in her application for employment and was dismissed for dishonesty. A CCMA commissioner found her dismissal to be substantively unfair and reinstated her. The award was subsequently upheld on review by the Labour Court, but the Labour Appeal

Court reversed the decision on appeal, finding the award unreasonable on the following basis:-

*"...to place an employee who was guilty of dishonesty back in her position where honesty and integrity are paramount to the execution of duties, is to my mind grossly unreasonable, but more importantly, it cannot be right and proper to reinstate or re-employ a person in a position that was secured by the making of false statements."*

- 5.1.43 The second judgment was *Department of Home Affairs and Another v Ndlovu and Others (2014) 35 ILJ 3340 (LAC)*. In this case an employee had been dismissed for misrepresenting his qualifications on his CV. In upholding the dismissal the Labour Court held that:-

*"The fact that the misrepresentation in the CV might very well not have induced the first respondent's appointment to the post most certainly does not detract from the fact of the first respondent's initial dishonesty. The dishonesty as contained in the CV is ultimately what underpins the substantive fairness of the first respondent's dismissal. Why did the first respondent put in his CV that which is untrue? He knew how to describe the MBA degree which was then unfinished. He could have described the bachelor of technology marketing degree similarly if he found it necessary to mention it at all in his CV."*

- 5.1.44 The final judgment is that of *G4S Secure Solutions SA (PTY) Ltd v Ruggiero N.O and Others (CA2/2015) [2016] ZALAC 55; (2017) 38 ILJ 881 (LAC)*. The facts of this case are similar to the evidence gained during the investigation pertaining to Mr Mogajane's appointment as DDG of National Treasury. In this case an employee had two criminal convictions which he had failed to disclose in his application for employment. He had claimed that he was unaware of the

convictions when he applied for employment and when he applied for promotion. The basis for his belief was that he had not served jail time for either of the incidences and had been punished at the time they arose. In the first case committed while he was a minor he had received six lashes and in respect of the second incident he had paid a fine. The Labour Appeal Court upheld the dismissal and held that:-

***“...It is difficult to understand how the arbitrator could reasonably have concluded that Ntloko was unaware of the status of his criminal record and could have denied having any criminal conviction. Consequently, I must agree that the arbitrator’s finding that Ntloko did not knowingly failed (sic) to disclose his criminal conviction when he was employed and when he applied for promotion is one that cannot be reasonably justified on the evidence before him, and must be set aside.”***

***“In the circumstances, the arbitrator’s finding must be replaced with a finding that the applicant was indeed guilty of not disclosing his criminal conviction on both occasions.”***

5.1.44.1 The court further stated at paragraph 30 that:-

***“The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees.”***

5.1.44.2 At paragraph 26, the court held that:-

***"The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led to our courts repeatedly to find that the presence of dishonesty makes restoration of trust, which is at the core of the employment relationship, unlikely."***

5.1.44.3 The court further stated in paragraph 27 that:

***"An employer is entitled to full disclosure of all relevant information when a decision is being made to employ a person.....and where an express question is asked of a potential employee, an employee is entitled to expect an honest answer in response."***

5.1.45 The Z83 application form<sup>1</sup> for employment provides that:

"...

***This form may be used to identify candidates to be interviewed. Since all applicants cannot be interviewed, you need to fill in this form completely, accurately and legibly. This will help to process your application fairly...***

#### **SPECIAL NOTES**

1. ***All information will be treated with the strictest confidentiality and will not be disclosed or used for any purpose than to assess the suitability of a person, except in so far as it may be required and permitted by law. Your personal details must correspond with the details in your ID or passport.***

2. ...

<sup>1</sup> Issued in terms Government Gazette No.21590, 29 September 2000

3. ...
4. *This information will only be taken into account if it directly relates to the requirements of the position.*
5. ...
- ...

### **DECLARATION**

*I declare that all the information provided (including any attachments) is complete and correct to the best of my knowledge. I understand that any false information supplied could lead to my application being disqualified or my discharge if I am appointed:*

*..."*

### **Conclusion**

- 5.1.46 I am of the view that the position of Director-General, which Mr Mogajane currently occupies is of significant importance in society. He is responsible for the administration of National Treasury and consequently the national budget, especially looking after the South African fiscus with the annual budget of R1.67 trillion. Honesty and integrity are therefore paramount for the execution of duties by the Director-General of National Treasury. A high standard of ethics, accountability and honesty is accordingly expected of him.
- 5.1.47 In considering Mr Mogajane's failure to disclose his criminal record in his application for the position of DDG during 2015, I cannot accept Mr Mogajane's version as reasonable that he was unaware that he had a criminal record because he had paid an admission of guilt fine in 2011, for contravening the Road Traffic Act, and hence, when he completed the Z83 application form in

2014, he answered in the negative, the question whether he had a criminal record or not.

- 5.1.48 The requirements to complete the Z83 form accurately and the declaration by the applicant that any false information supplied could lead to the application being disqualified or applicant's discharge from employment if appointed, signifies that honesty is an important fact for the appointment.
- 5.1.49 I therefore find Mr Mogajane's explanation in response to the section 7(9) notice dated 02 October 2018, that he did not complete the Z83 application form, but that it was completed on his behalf by Ms Mmatshapo Maldi and he merely signed it without checking it for accuracy first, inexcusable. I am of the view that Mr Mogajane was the applicant and ultimately the signatory of the Z83 application form and should accordingly take full responsibility for the information contained therein.
- 5.1.50 I accordingly arrive at the conclusion that Mr Mogajane had a duty to act honestly and in good faith towards his employer, which required him to disclose his criminal conviction on his Z83 application form.
- 5.1.51 Mr Mogajane has not discharged his duty towards his employer and has acted dishonestly in his application for the DDG position during 2015 and again in his Z83 application form for the position of Director-General during 2017.
- 5.1.52 The fact that the criminal conviction of Mr Mogajane may very well not have induced Mr Mogajane's appointment to the post of Director-General, most certainly, that does not detract from the fact of Mr Mogajane's acted dishonesty.
- 5.1.53 I do not know what would have been the reaction of the President and that of the Cabinet toward the candidacy of Mr Mogajane, had this misrepresentation

of facts in the application form brought to their attention, which misrepresentation I have concluded herein to be blatantly dishonest conduct.

5.1.54 I also picked up an anomaly regarding the offer of employment to Mr Mogajane by former Minister Gigaba which is signed on 28 June 2017 whereas the contract of employment signed between the two parties is dated 15 June 2017, some days before receipt of the offer referred to.

5.2 **Regarding whether the appointment of Mr Dondo Mogajane as Director-General of National Treasury by former Minister Gigaba was improper, and if so, whether such conduct amounted to maladministration as contemplated by section 6(4) of the Public Protector Act, 1994.**

**Common cause issues**

5.2.1 National Treasury advertised the position of Director-General for a fixed term five (5) year contract on 28 April 2017. The closing date for applications was 28 April 2017.

5.2.2 Four candidates were shortlisted, namely: Mr A D (Dondo) Mogajane; Mr S M T Shomang; Mr K Naidoo and Mr S R Zikode.

5.2.3 The interviews were conducted on 16 May 2017, and the selection committee was constituted by former Minister Gigaba; Minister A Dlodlo, MP, the then Minister of Communications; Minister G E Nkwinti, MP, the Minister of Rural Development and Land Reform; Mr N S Buthelezi, MP, the then Deputy Minister of Finance; Mr M Apleni, the then Director-General: Department of Home Affairs; Mr J S Ngomezulu, Deputy Director-General: Corporate Services and Ms P S Tomotomo, Chief Director: Human Resources Management.



- 5.2.4 The former Minister Gigaba was the chairperson of the selection committee.
- 5.2.5 Mr Dondo Mogajane (Mr Mogajane) was appointed to the position of Director-General of National Treasury, during June 2017.

**Issues in dispute**

- 5.2.6 The issue for my determination was whether former Minister Gigaba, failed to comply with the relevant prescripts, principles and procedures to be followed in the appointment of Mr Mogajane as the Director-General of National Treasury.
- 5.2.7 A Memorandum recommending the appointment of Mr Mogajane to the position of Director-General at National Treasury for a period of five (5) years was approved by former Minister Gigaba on 30 May 2017. Paragraph 3.5.3 of the memorandum in question stated that:-

*"The State Security Agency (SSA) confirmed that Mr Mogajane is a South African citizen and a finding was obtained on criminal records, however according to clause 5 and 6 of the SSA report; the crime was committed a while back in 2011. This was the first offence by Mr Mogajane and he has been rehabilitated with no likelihood of reoccurrence. The offence does not have any impact on the work that Mr Mogajane will be doing..."*

- 5.2.8 A certificate of evaluation of Mr Mogajane's qualifications was issued in a letter, dated 13 June 2017, to National Treasury, from the South African Qualifications Authority (SAQA).

**5.2.9** In the former Minister Gigaba's response letter, dated 31 August 2017, he indicated that:

***"...both the department and Mr Mogajane are aware of the State Security Agency's (SSA) personnel suitability checks that mentioned a criminal record in relation to a violation of the Road Traffic Act 93 of 1996 in 2011.***

***The SSA report concluded that the crime committed cannot be used to deny the applicant employment.***

***All correspondence to the DPSSA and the Cabinet memo did mention the finding of the SSA with regard to the Road Traffic Act violation.***

***I had a discussion with Mr Mogajane regarding his response to the said question on the Z83 and he indicated that the interpretation of the question is implied as per special note 4 of the Z83. He had in his previous interview for the DDG post which he held prior to this post voluntarily disclosed this conviction. At the DG position interviews this issue was never asked.***

***It is thus my submission that there has never been any intention on his part to withhold this information. The information on the Z83 is thus not Mala-fide..."***

**5.2.10** In a response to the abovementioned letter, I requested further details and information regarding Mr Mogajane's application for the position of Deputy Director-General at National Treasury.

**5.2.11** I received former Minister Gigaba's further response in a letter, dated 20 November 2017. The letter included the advert for the position of Deputy Director-General; Mr Mogajane's Z83 application form; Curriculum Vitae;

qualifications; State Security Agency's Pre-employment screening letter, dated 27 March 2015; a memorandum for filling of the position of Deputy Director-General and an extract of the Z204 vetting form.

- 5.2.12 Upon perusal of the Z83 application form for the position of Deputy Director-General, dated 06 October 2014, it was further discovered that in respect of the question *"Have you been convicted of a criminal offence or been dismissed from employment?"* Mr Mogajane had also indicated *"No"* with a mark.
- 5.2.13 The State Security Agency's *"Pre-employment Screening: Candidate for the post of Deputy Director-General at the National Treasury"*, dated 27 March 2015, indicated that Mr Mogajane had a criminal record, in that he was found guilty for reckless or negligent driving, during 2011.
- 5.2.14 A memorandum which was approved by Mr Nhlanhla Nene, the former Minister of Finance (former Minister Nene) on 21 April 2015, titled *"Proposed Filling of the Advertised Position of Deputy Director-General: Public Finance, within the Public Finance Division"*, confirmed that the State Security Agency had found a criminal record in the name of Mr Mogajane and further that his appointment would be subjected to a security clearance.
- 5.2.15 On perusal of the extract of the Z204 vetting form deposited on 24 March 2017, Mr Mogajane submitted on the question *"Have you ever been convicted or are there any pending cases for a criminal/departmental offence(s)? (Admission of guilt outside a court must also be submitted)"* that he had committed a traffic offence in Kempton Park, in 2012 or 2013 and was given a fine for the transgression.



- 5.2.16 In a letter dated 05 April 2018, former Minister Nene indicated that *"...I would like to re-emphasise that there has never been any intention on Mr Mogajane's part to withhold any information in this regard."*
- 5.2.17 Former Minister Gigaba's response dated 09 October 2018, to the Notice issued in terms of section 7(9)(a) of the Public Protector Act, 1994, stated that the process of appointing a Director-General had become one of the confidence boosting measures to the rating agencies and investors. Considering the sensitivity of the position to the state, the nation's finances and the integrity of National Treasury, former Minister Gigaba stated that he considered it prudent to consider someone with extensive knowledge of the sector and Mr Mogajane met all these requirements.
- 5.2.18 Former Minister Gigaba further asserted that at the time of the interviews, he had no evidence of the report by the SSA and therefore, there was no contradiction to the Z83 form submitted by Mr Mogajane during his application. Former Minister Gigaba conceded that the issue of Mr Mogajane's criminal record was never raised during the interview stage.
- 5.2.19 Former Minister Gigaba further asserted he had discussed the matter with Mr Mogajane and there was no intention on his part to deliberately mislead the process. Further thereto, that the appointment of Mr Mogajane was favourably considered by the markets and it positively impacted the economy of the country.

**Application of the relevant law**

- 5.2.20 The question for my determination was whether the appointment of Mr Mogajane as Director-General of National Treasury was improper, in light of the

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evidence that was available prior to the decision being taken to appoint Mr Mogajane.

5.2.21 That enquiry necessitates that I consider the procedural and substantive components of the appointment of Mr Mogajane and to consider whether it was reasonable for former Minister Gigaba, acting in his capacity as the former Minister of Finance and the chairperson of the selection committee, to approve the appointment of Mr Mogajane, notwithstanding the fact that Mr Mogajane did not disclose his criminal offence in his Z83 application form, for the position of Director-General of National Treasury.

5.2.22 In terms of section 16A (1) of the Public Service Act, 1994

*"An executive authority shall-*

- (a) Immediately take appropriate disciplinary steps against a head of department who does not comply with a provision of this Act or a regulation, determination or directive made thereunder;*
- (b) Immediately report to the Minister the particulars of such non-compliance;*  
*and*
- (c) As soon as possible report to the Minister the particulars of the disciplinary steps taken."*

5.2.23 In terms of section D.8 of the Public Service Regulations, 2015 the executive authority shall, before making a decision on an appointment, satisfy himself or herself about the suitability of the candidate:

*"D.8 Before making a decision on an appointment or the filling of a post, an executive authority shall—*

- (a) ***satisfy herself or himself that the candidate qualifies in all respects for the post and that her or his claims or his application for the post have been verified; and***
- (b) ***record in writing that verification."***

**5.2.24 Paragraph 3.4.8 of the National Treasury Policy on Recruitment and Selection dated 2009 provides that:-**

***"Candidates for certain positions who deal with sensitive information, which needs to be protected in the interest of the security of the state, may be subjected to security clearance vetting. Guidance will be given by the Director: Security Management in terms of their vetting policies and procedures. All Senior Management appointments will be subjected to security clearance vetting".***

**5.2.25 Similarly, chapter 8, paragraph 3.4(9) of the SMS Handbook, issued by the Minister of Public Service and Administration, provides that:-**

***"...All shortlisted candidates will be subjected to security vetting."***

**5.2.26 Furthermore, chapter 8, paragraph 8.7 (3) of the SMS Handbook, provides that:-**

***"Before making its final recommendation the selection committee should ensure that the information provided by the nominated candidate has been verified. This typically includes information pertaining to her/his educational qualifications, citizenship and experience. The final decision-maker should be advised accordingly."***

5.2.27 In that regard *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988(3) SA 132 (A) at 152A-D, the court held that:

*"Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests' of the statute and the tenets of natural justice. Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior motive; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones, or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforesaid."*

5.2.28 The decision in *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* was adopted with approval in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004(4) SA 490 (CC) at paragraph 45, in considering what constitutes a reasonable decision, the court stated that:

*"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of competing interests involved and the impact of the decision on the lives and well-being of those affected"*.

### **Conclusion**

- 5.2.29 Although the outcome of Mr Mogajane's , Pre-employment Screening in line with National Treasury's Recruitment and Selection Policy was conducted only conducted after interviews were conducted by the Selection Committee on 16 May 2017, the outcome SSA's previous pre-employment screening dated 27 March 2015 and the Z204 vetting form were on record at National Treasury and would have been contained in Mr Mogajane's personnel file, which file was readily available at National Treasury to former Minister Gigaba and/or should has been part of the recruitment pack for the panel members.
- 5.2.30 Even when the outcome of the 2017 pre-employment screening was forwarded to former Minister Gigaba on 24 May 2017, he still failed to disclose this information, which, in terms of the express provisions contained in the Z83 application form, had the potential to disqualify Mr Mogajane and to make a material difference to the recommendation of the Selection Committee, to Cabinet.
- 5.2.31 It is furthermore noted that in terms of section D of the Public Service regulations, 2015 there was an obligation on former Minister Gigaba, as the Executive Authority and a chairperson of the Selection Committee, to verify all the information submitted by Mr Mogajane. These were inclusive of his Curriculum Vitae and Z83 application form.
- 5.2.32 Also, the Z83 application form for the position of Director General should have been part of the interview pack given to all members of the selection committee. It was the responsibility of the chairperson of the selection committee to ensure that the all members of the selection committees are in possession of all the relevant documents which form part of the recruitment process.





- 5.2.33 The "**Special Notes 1**" of Z83 application form provides "**all information will be treated with the strictest confidentiality and will not be disclosed or used for any other purpose than to assess the suitability of a person, except in so far as it may be required and permitted by law**". This means that the information contained in the Z83 application form was materially important to the selection committee to assess the suitability of the candidate. In terms of the declaration in the Z83 application form, Mr. Mogajane declared that he understand that any false information supplied could lead to his application being disqualified or him being discharge if I am appointed. Accordingly, the selection committee could not have determined the suitability of Mr. Mogajane without having regard to the contents of Z83 application form, as false information could have resulted on disqualifying the candidate or dismissal of an employee.
- 5.2.34 The prescribed forms and memoranda contained in the *Protocol Document on the Principles and Procedures to be Followed for the Recruitment and Filling of Posts of Heads of Department (HODs) and Deputy Directors-General (DDGS) at National Level* makes it clear that the verification of information contained in the candidate's application form and *curriculum vitae*, as well as the outcome of the Security vetting "**pertaining to nominated candidate**" are sequential steps in the recruitment and selection process prior to consultation with the Minister for Public Service and Administration and with Cabinet.
- 5.2.35 I therefore conclude, in this regard, that the former Minister Gigaba, as the chairperson of the selection committee and responsible executive authority, failed to verify information contained in Mr. Mogajane application form and *curriculum vitae* and failed to disclose material information about Mr Mogajane's criminal record and his suitability for appointment as head of National Treasury, to the relevant stakeholders in the selection and recruitment process. Instead former Minister Gigaba took it upon himself, when the information was eventually verified and the outcome of the security vetting disclosed information

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that could in terms of the conditions of the application for employment disqualify Mr Mogajane from appointment, to determine his continued suitability for appointment, thereby flouting the governance processes and checks and balances envisaged by law.

5.2.36 Having regard to the above, I arrive at the conclusion that former Minister Gigaba had a duty to ensure that Mr. Mogajane had acted honestly, in good faith, in a transparent and accountable manner towards his employer. At the time when the information was disclosed to him and Former Minister Gigaba decided to proceed with the appointment, he failed to apply his mind to the facts before him. If he did, he misconceived the nature of the duty conferred upon him, as the responsible executive authority, to ensure that the person appointed in the position of the Director General of the National Treasury meet the standard imposed upon that person to act with integrity and honesty towards his employer.

5.2.37 The submission made by former Minister Gigaba to my office in a letter dated 31 August 2017, that the fact of Mr Mogajane's criminal record was discovered during the vetting process by the SSA during 2015, or that Mr Mogajane had voluntarily disclosed the fact of his criminal record during the interview stage for the position of DDG on or about 16 February 2015, is then subsequently contradicted by his submission to the section 7(9) notice on 09 October 2018, which I cannot accept as sound and reasonable.

## 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 Dondo Mogajane, failed to disclose his criminal record on the application form for the position of Director-General of National Treasury, and if so, whether such conduct amounted to an improper or dishonest act, as contemplated by section 6(4) of the Public Protector Act, 1994:-**
- 6.1.1** The allegation that Mr Mogajane, failed to disclose a criminal record on the Z83 application form for the position of Director-General at the National Treasury, is substantiated;
- 6.1.2** Mr Mogajane had a duty to act honestly and in good faith towards his employer, which required him to disclose his criminal conviction on his Z83 application form;
- 6.1.3** Mr Mogajane however did not discharge his duty towards his employer. He did not disclose his criminal record in his application for the DDG position during 2015 and, after being made aware of the criminal record in 2015, he acted dishonestly in his application for the in his Z83 application form for the position of Director-General during 2017 by failing to disclose that he had a criminal record;
- 6.1.4** In so doing, Mr Mogajane failed to meet the standard imposed upon him to act with integrity and honestly towards his employer; and
- 6.1.5** Such failure therefore constitutes impropriety or dishonesty and amounts to improper conduct as envisaged in section 6(4)(a) of the Public Protector Act.
- 6.2 Regarding whether the conduct of former Minister Gigaba was improper in the appointment of Mr Dondo Mogajane as Director-General of National Treasury, as contemplated by section 6(4) of the Public Protector Act, 1994:-**



- 6.2.1 The allegation that the conduct of former Minister Gigaba in the appointment of Mr Dondo Mogajane as Director-General of National Treasury was improper, as contemplated by section 6(4) of the Public Protector Act, 1994, is substantiated;
- 6.2.2 Evidence presented before me confirm that information of Mr Mogajane's criminal conviction was on record with National Treasury by virtue of the outcome of security screening in relation to his appointment as Deputy Director General in 2015 and should have been availed to the Selection Committee during the screening and selection process in 2017.
- 6.2.3 The outcome of the 2017 security screening and the confirmation of Mr Mogajane's criminal record was not obtained and disclosed during the prescribed engagement between the relevant Executive Authority (former Minister Gigaba) and the Minister for Public Service and Administration, as well as with Cabinet, or when it came to former Minister Gigaba's attention.
- 6.2.4 Former Minister Gigaba's ostensible failure to verify the information in the Z83 application form and to disclose the information to the other decision makers in the selection and recruitment process, was in violation of Section D of the Public Service Regulations, 2015, Chapter 8, paragraph 8.7(3) of the SMS Handbook;
- 6.2.5 Former Minister Gigaba proceeded to approve the memorandum for the filling of the position of Director-General of National Treasury on 30 May 2017, thereby tacitly condoning an element of dishonesty, which conduct does not meet the standard imposed on Mr Mogajane, wherein he is required to act with integrity and honestly towards his employer;
- 6.2.6 Former Minister Gigaba failed to ensure that the Director-General acts in compliance with the values of the Constitution of always acting in good faith, upholding high standard of professional ethics and accountability;



- 6.2.7 He also failed to apply his mind and act reasonably in considering the appointment of Mr Mogajane as the Director General of National Treasury; and
- 6.2.8 Former Minister Gigaba's conduct was therefore irrational and unreasonable under the circumstances and consequently amounts to improper conduct as contemplated by section 6(4) of the Public Protector Act, 1994.

## 7. OBSERVATIONS

- 7.1 In the consideration of the remedial action, I took note of recent developments around the interpretation of section 12(1)(a) of the Public Service Act by the courts in the matters of *Apleni v President of the Republic of South Africa and Another (65757/2017) [2017] ZAGPPHC 656; [2018]* and *Mzamo Michael Mlangana v Minister Of Agriculture Forestry And Fisheries CASE NO:76891/2017 (20 April 2018)*.
- 7.2 The SMS handbook states that the President has delegated his powers to the Deputy President and Ministers in a Letter of President dated 8 October 1999. However, the Courts found in the above judgments that the letter in which the then President purported to delegate his authority to Ministers was not valid because –
- 7.2.1 It did not comply with the provisions of s. 101 (1) (a) of the Constitution.
- 7.2.2 A decision by the President, if it is to have legal consequences, must be in writing. (*"As I have said, apart from the letter annexed to the Handbook, no other delegation was put before me"*).
- 7.2.3 The purported delegation was in any event rendered ineffective by the repeal of the provisions of s. 38 of the Public Service Act and no delegation in terms of the amended Public Service Act exists



- 7.3 Consequently, the Courts confirmed that the relevant authority for the appointment and of the taking of disciplinary steps against Heads of Departments are vested with the President.
- 7.4 Section 85(1) and (2) of the Constitution provide that *"the executive authority of the Republic is vested in the President and the President exercises the executive authority, together with the other members of the Cabinet"*. Section 12(1) of the Public Service Act provides that the appointment and other career incidents of the heads of department or national government component shall be dealt with by the President.
- 7.5 Although the appointment of the Director-Generals/Head of Departments (DGs/HoDs) are approved by the Cabinet, such approval is in line with section 85(2) of the Constitution, which provide that the President exercises the executive authority, together with the other members of the Cabinet.
- 7.6 However, I have observed that the appointment letters are being signed by the relevant Ministers without the necessary written delegation from the President. On proper interpretation of section 12(1) of the Public Service Act and having taking into account the judgment in *Apleni v President of the Republic of South Africa and Another* and *Mzamo Micheal Mlangana v Minister Of Agriculture Forestry And Fisheries*, Ministers do not have authority to appoint DGs/HoDs or take disciplinary action against DGs/HoDs or to sign appointment letters for the DGs/HoDs, unless they have been duly delegated such executive authority powers, in writing, by the President, in accordance with section 101 of the constitution.
- 7.7 The appointment of Mr Mogajane was duly approved by the President, in accordance with section 85(2) of the constitution. The signing of the appointment letter by the Minister of Finance, without the necessary written authority from the President (as I was not provided a copy of such written delegation), does not render the appointment Mr Mogajane void. His appointment remains valid or legally

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binding as it was as per approval of Cabinet through the Cabinet memo dated 07 June 2017.

## **8. REMEDIAL ACTION**

In light of the above, and having taken into account evidence before me, the fact that honesty and integrity are paramount for the execution of duties by the Director-General of National Treasury and all the relevant facts before me, the appropriate remedial action I am taking in terms of section 182(1) (c) of the Constitution are the following:

### **8.1 The President of the Republic of South Africa to:**

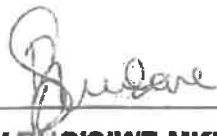
- 8.1.1 Within 30 days of this report; take appropriate disciplinary action against Mr Mogajane in terms of sections 16A of the Public Service Act for blatantly and dishonestly making false representation of material facts (non-disclosure of criminal conviction) in his Z83 Application Form for the post of Director-General at National Treasury.
- 8.1.2 Note my findings, observation and take the following requisite steps, within 60 days of this Report, to cause a review of the current screening and selection process for HoDs/DGs/DDGs in the relevant prescripts to-
  - 8.1.2.1 Ensure that Executive Authorities of the Departments comply with their obligations in terms of section D of the Public Service Regulations and the SMS Handbook to verify all relevant information pertaining to the suitability of candidates for appointment of Head of Departments, prior to the engagement

with the Minister for the Public Service and Administration as well as with the Cabinet; and

- 8.1.2.2 Align the selection, recruitment and appointment process of Heads of Departments to the recent interpretation of section 12(1)(a) by the Courts in the Apleni and Mlengana judgments referred to in this Report.

## 9. MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTION

- 9.1 The President 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 8.1 of this Report will be implemented.
- 9.2 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 on the President of the Republic of South Africa, unless the President obtain a Court order directing otherwise.



ADV. BUSISIWE MKHWEBANE

PUBLIC PROTECTOR OF SOUTH AFRICA

DATE: 18.12.2018

Assisted by Good Governance and Integrity Branch





**national treasury**

Department:  
**National Treasury**  
**REPUBLIC OF SOUTH AFRICA**

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**Adv B Mkhwebane**  
**Public Protector of the Republic of South Africa**  
**Private Bag X677**  
**PRETORIA**  
**0001**

Dear Adv Mkhwebane

**INVESTIGATION INTO ALLEGATIONS OF A FAILURE BY ME TO DISCLOSE A  
CRIMINAL RECORD IN MY APPLICATION FOR THE POSITION OF DIRECTOR-  
GENERAL AT NATIONAL TREASURY**

1. I refer to your notice dated 4 September 2018 in terms of section 7(1)(a) of the Public Protector Act of 1994 which contains preliminary findings in respect of an anonymous complaint lodged against me. My response is set out below.

**Background**

2. I applied for the post of Deputy Director-General ("DDG"): Public Finance in National Treasury in 2014. At the time, I was unaware that I had a criminal record for having paid an admission of guilt fine in 2011 for contravening the Road Traffic Act.
3. Hence, when I completed the Z83 form as part of my application in 2014, I answered the question as to whether or not I had a criminal record, in the negative.
4. I only became aware of the criminal record after I was interviewed for the position of DDG: Public Finance. The Head of Security at National Treasury, Ms Faith Leeuw

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INVESTIGATION INTO ALLEGATIONS OF A FAILURE BY ME TO DISCLOSE A CRIMINAL RECORD IN MY APPLICATION FOR THE POSITION OF DIRECTOR-GENERAL AT NATIONAL TREASURY

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brought this to my attention. When she did so, I explained that I had, until that point, been unaware of the existence of the criminal record.

5. Subsequent to my appointment as DDG, I was furnished with vetting forms. I duly completed those forms and disclosed the details of the criminal conviction.
6. I should point out that, contrary to what is stated in the response by Minister Gigaba dated 31 August 2017
  - 6.1. I did not disclose the previous conviction during my interview for the position of DDG. I could not have done so given that, at the time, I was unaware of the existence of the criminal record; and
  - 6.2. I did not interpret the form in a manner which justified "no" as an answer. This is explained more fully below.


**Application for the post of Deputy-General ("DG")**

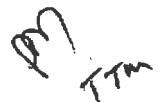
7. At the time that the post of DG for National Treasury became available, I was inundated with work in my capacity as DDG: Public Finance. In the face of immense work pressure, I requested the Divisional Support Manager, Ms Mmatshupo Maldi, to assist me with all the paper work needed for the application for the post of DG. She did so and completed the Z83 form for me. I signed the form without checking it for accuracy first.
8. I now realise that Ms Maldi assumed that I had no criminal record when she completed the form. This is why the form incorrectly reflected that I had no criminal record.
9. I accept unreservedly that I ought to have checked the form for accuracy prior to signing it. I take full responsibility for my failure to do so. However, I state categorically that I had no intention to mislead either National Treasury, Cabinet or anyone else with regard to my criminal record. Neither did I intend to misstate the true factual position. I point out that by that stage, I had already disclosed the details of the criminal conviction in vetting forms filed with National Treasury for ultimate submission to the SSA. There was absolutely no intention on my part to hide this fact from my employer.

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**Concluding remarks**

10. Your preliminary observations record that I have a duty of good faith, transparency and accountability towards my employer. I accept this unequivocally. My unblemished record demonstrates that I have always upheld these values and have scrupulously conducted myself in accordance with the highest ethical and professional standards.
11. The Z83 form was inadvertently inaccurate. At no time, did I have any intention of withholding any information from my employer. This is plainly evident from the fact that I made full disclosure of my criminal record in the vetting forms which were submitted to National Treasury before I applied for the position of DG. In this regard it is significant that my appointments as DDG and DG were made after my criminal record had been brought to the attention of National Treasury and Cabinet.
12. I therefore submit that, for the reasons set out above, my conduct does not amount to *improper conduct* as envisaged in section 182(1)(a) of the Constitution.
13. I thank you for affording me an opportunity to respond to the allegations levelled against me. I remain committed to co-operating with your office in the further investigation of this matter.

  
**DONDO MOGAJANE**  
**DIRECTOR-GENERAL**  
**DATE: 2/10/2018**



**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

CASE NO:

In the matter between:

**MINISTER OF FINANCE**

Applicant

and

**PUBLIC PROTECTOR**

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

Second Respondent

**DONDO MOGAJANE**

Third Respondent

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**SUPPORTING AFFIDAVIT**

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I, the undersigned,

**DONDO MOGAJANE**

do hereby make oath and say as follows:

1. I am employed as the Director-General by National Treasury.
2. The facts contained herein fall within my personal knowledge save where the contrary appears from the context, and are to the best of my belief both true and correct.

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3. I have read the founding affidavit deposed to by Minister Tito Mboweni and confirm the contents thereof insofar as it relates to me.



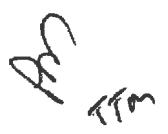
**DEPONENT**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at PRETORIA on this the 02<sup>nd</sup> day of FEBRUARY 2019, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



**COMMISSIONER OF OATHS**

**Ex Officio: Commissioner Of Oaths  
Ncedisa Nkala  
Practising Attorney  
14 Bureau Lane, Church Square  
Suite 804, Rentbel Towers  
Pretoria Central**



" 114 "

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

CASE NO:

In the matter between:

**MINISTER OF FINANCE**

Applicant

and

**PUBLIC PROTECTOR**

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

Second Respondent

**DONDO MOGAJANE**

Third Respondent

---

**SUPPORTING AFFIDAVIT**

---

I, the undersigned,

**MMATSHEPO MAIDI**

do hereby make oath and say as follows:

1. I am employed as a Director: Administration in the Office of the Director-General of the National Treasury.
2. The facts contained herein fall within my personal knowledge save where the contrary appears from the context, and are to the best of my belief both true and correct.
3. I have read the founding affidavit deposed to by Minister Tito Mboweni and confirm the contents thereof insofar as it relates to me.

*MM*  
*MMA*  
*MM*



DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at <sup>Pretoria</sup> JOHANNESBURG on this the 22 day of FEBRUARY 2019, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

*M.A.M.* 



COMMISSIONER OF OATHS

MICHELLE LOTTERING  
ADMIN CLERK  
28 Church Square  
President's Building,  
PRETORIA

DIRECTOR OF PUBLIC PROSECUTIONS  
PRIVATE BAG X300  
22 FEB 2019  
HIGH COURT SECTION  
PRETORIA 0001  
NORTH GAUTENG: PRETORIA

*M*

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

CASE NO:

In the matter between:

**MINISTER OF FINANCE**

Applicant

and

**PUBLIC PROTECTOR**

First Respondent

**THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

Second Respondent

**DONDO MOGAJANE**

Third Respondent

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**SUPPORTING AFFIDAVIT**


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I, the undersigned,

**FAITH LEEUW**

do hereby make oath and state that:

1. I am employed as a security manager by National Treasury.
2. The facts contained herein fall within my personal knowledge save where the contrary appears from the context, and are to the best of my belief both true and correct.
3. I have read the founding affidavit deposed to by Minister Tito Mboweni and confirm the contents thereof insofar as it relates to me.
4. In addition to what is stated by Minister Mboweni, I wish to state the following:

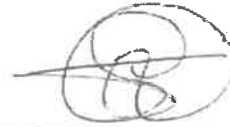
  
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- 4.1. The report by the Public Protector ("PP") makes adverse allegations against me in relation to my handling of the pre-employment screening letter issued by the State Security Agency ("SSA") prior to Mr Mogajane's appointment as Director General. Regrettably, I was not afforded an opportunity to respond to these injurious allegations prior to them being included in the PP's report. I submit that, to this extent, the PP's report is irregular;
- 4.2. To the best of my knowledge, the letter received from the SSA was authentic and entirely consistent with other SSA pre-employment screening letters that I have seen. In this regard, I confirm that I have come across numerous pre-employment screening letters from the SSA and have no reason to doubt the authenticity of this letter. In any event, had any concerns about the authenticity of the letter been raised by the Public Protector ("PP") prior to her issuing the report, these could have been appropriately addressed.
- 4.3. Furthermore, it is evident from the contents of the report that the PP lacks a proper understanding of the role and function of security management within a state department. Contrary to what is stated by the PP in her report, the purpose of the letter sent by Security Management to Human Resources on 24 May 2017 is not to quote and repeat what the SSA has already mentioned in its pre-employment screening letter. Given that the letter from the SSA is annexed thereto, the purpose of the letter from Security Management is to analyse the results, identify the risk and make recommendations to management for sound decision-making.
- 4.4. Furthermore, the letter from Security Management to Human Resources provides the considerations from a security perspective which could affect the recommendation made.

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4.5. All the results received from the SSA are analysed in terms of the SSA Standard Operating Procedure on pre-screening clearance ("PSC"). In terms of the SOP, traffic offenses are regarded as minor offences ought not to be used to disqualify a person from employment.



**DEPONENT**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at ~~JOHANNESBURG~~ <sup>CAPE TOWN</sup> on this the 19 day of FEBRUARY 2019, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

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pm*



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MRS SUTABABRAMS

**COMMISSIONER OF OATHS**



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