

**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**

CORPORATISATION OF THOROUGHBRED HORSERACING IN GAUTENG.

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND
IMPROPER CONDUCT IN CONNECTION WITH A MEMORANDUM OF UNDERSTANDING
ENTERED INTO BETWEEN THE GAUTENG PROVINCIAL GOVERNMENT AND THE GAUTENG
HORSERACING INDUSTRY IN 1997 WHICH SUBSEQUENTLY LED TO THE CORPORATISATION
OF THE HORSERACING INDUSTRY**



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LIST OF ACRONYMS

ABET	Adult Basic Education and Training
ADV	Advocate
AGM	Annual General Meeting
ANC	African National Congress
ARG	Africa Racing Group
CC	Competition Commission
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CIPC	Companies and Intellectual Property Commission
Constitution	The Constitution of the Republic of South Africa No. 108 of 1996
CT	Competition Tribunal
DAFF	Department of Agriculture, Forestry and Fisheries
DED	Gauteng Department of Economic Development
DG	The Director-General
DTI	Department of Trade and Industry
EXCO	Executive Council
GGB	Gauteng Gambling Board
GHI	Gauteng Horsereading Industry
GPG	Gauteng Provincial Government
HOD	Head of Department
Howard Commission	Commission of Enquiry on gambling policy for the new South Africa headed by Justice Howard
HRA	Highveld Racing Authority
HRB	Highveld Racing Board
HRDF	Horse Racing Development Fund
Ian Jayes	Mr Alfred Edward Jayes
Jockey Club	The Jockey Club of South Africa
JSE	Johannesburg Stock Exchange
KC Attorneys	Ka-Mbonane Cooper Attorneys (GGB and DED Attorneys)



KEMA	Ms Phindi Kema (1st complainant)
MANJOO	Mr Hanif Manjoo (3rd complainant)
MEC	Member of the Executive Council
MoU	Memorandum of Understanding
NGB	National Gambling Board
NHA	National Horseracing Authority
NTBA	National Thoroughbred Breeders Association
PGL or Phumelela	Phumelela Gaming and Leisure (Pty) Ltd
Portfolio Committee	Parliament’s Portfolio Committee on Trade and Industry
PPA	Public Protector Act 23 of 1994
PPSA	Public Protector South Africa
RA	The Racing Association
RFP	Request For Proposals
ROODT INC.	Roodt Incorporated Attorneys (Phumelela’s Attorneys)
RT	The Thoroughbred Horse Racing Trust
SABA	South African Bookmakers Association
SC	Steering Committee
SAGA	South African Grooms Association
SGM	Special General Meeting
SIMOTO	Mr Chophelikhaya Simoto (2nd complainant)
SIT	Spatial Investigative Tribunal
SIU	Special Investigating Unit
SRSA	Sport and Recreation South Africa (The Department)
TAB	Totalisator Agency Board
TBVC STATES	Transkei, Bophuthatswana, Venda and Ciskei Homelands
THI	The Transvaal Horseracing Industry



"After 1990, when the ANC was unbanned, they changed the story and said we must corporatise racing because we must be very careful as the ANC will come in and take the assets. They put fear into the members of the clubs"

Mr Alfred Edward "Ian" Jayes: 15 March 2018.

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 section 8(1) of the Public Protector Act, 1994.
- (ii) The report communicates my findings and the appropriate remedial action that I am taking in terms of section 182(1)(a) of the Constitution, following an investigation into allegations of maladministration and improper conduct in connection with a Memorandum of Understanding (MoU) entered into between the Gauteng Provincial Government and the Gauteng Horseracing Industry in 1997, which subsequently led to the corporatisation of the horseracing industry in South Africa.
- (iii) The investigation was conducted following three (3) complaints lodged by Ms Phindiwe Kema on 22 January 2012, who at material times hereto and in lodging the complaint was representing a company named and styled *Africa Race Group (Pty) Limited* that was involved in race horses breeding. The second complaint was lodged by Mr Chophelikhaya Simoto on 16 April 2012, who was at all material times hereto and in lodging the complaint duly representing over four thousand (4000) members affiliated with the *South African Grooms Association*. The third complaint was lodged by Mr Hanif Manjoo, a former member of the Gauteng Gambling Board's Horseracing Committee on 21 January 2013.

(iv) THE COMPLAINTS

(a) Ms Phindiwe Kema's complaints:

- (aa) In the main, Ms Phindiwe Kema's complaint was that, the Gauteng Provincial Government had entered into an agreement with the *National Horseracing Authority* in 1997, which resulted in the restructuring and corporatisation of the horseracing industry.



- (bb) According to Ms Kema, on 15 December 1995, the former MEC for Finance and Economic Affairs in the Gauteng Provincial Government, Mr Jabu Moleketi (Mr Moleketi) communicated with the Highveld Racing Authority and issued a directive for the horseracing industry in Gauteng to corporatise. As a consequence of Mr Moleketi's directive aforesaid, on 13 June 1997, the Gauteng Provincial Government (GPG) entered into a Memorandum of Understanding (MoU) with the Gauteng Horseracing Industry with a view to corporatise the industry into a single entity as directed by the MEC.
- (cc) The 1997 MoU entered into between the Gauteng Provincial Government and the Horseracing Industry was illegitimate as the Provincial government had no authority to corporatise (privatise) the South African Horseracing industry through the establishment of *Phumelela Gaming and Leisure Ltd* and thus endowing it with industry assets such as racecourses which include those falling outside the jurisdictional area of the Gauteng Provincial Government and in other provinces such as the Eastern Cape, Free State and Northern Cape thus creating a monopoly.
- (dd) In 2002, the Eastern Cape Racing Club gave away Arlington Racecourse in Port Elizabeth to Phumelela for one rand (R1.00). According to Ms Kema, the Eastern Cape Racing Club were not the owners of the racecourse but were conferred a custodial and management function to look after the racecourse and horseracing interests of the Eastern Cape horseracing people (members). Ms Kema contended that the Eastern Cape Racing Club had to seek the necessary government approvals underpinned by a proper transparent public participation process and that none of that ever occurred, she challenges Phumelela's legitimate ownership of this racecourse as she believes it's only through this Gauteng 1997 MoU that they could base their right to own this racecourse; and that they do not wish to use it for horseracing purpose, they must return it to its horseracing people;
- (ee) This corporatisation of the industry was never intended to benefit the sector and the people of South Africa. According to Ms Kema, it created a monopoly for the benefit of a select few (Phumelela shareholders, including Markus Jooste's Kalamojo Trust) who were mostly white privileged individual shareholders at the expense of the entire horseracing industry in the Republic.



- (ff) In her complaint, Ms Kema further alleged that as a consequence of the corporatisation of the industry, it has since imploded and lost over 85 000 jobs. The Stud Farms are also alleged to have decreased from 1482 to 167 from the year of corporatisation (1997) to 2013. This is according to the September 2013, National Horseracing Report to the Parliament's Portfolio Committee on Trade and Industry.
- (gg) According to Ms Kema, the Memorandum of Understanding entered into between the Gauteng Provincial Government and Gauteng Horseracing Industry (which later became Phumelela) is unjustified as it is used by the entity to control and capture the National Horse Racing Authority (The National Regulator) of the Horseracing Industry in the Republic.
- (hh) Further thereto, the 50% of the annual gambling levy estimated to be around R70 million a year paid by Provincial Gambling Boards to Phumelela Gaming and Leisure Ltd is not accounted for and as such, there is no transparency on how these public funds are being utilised by the entity.
- (ii) With respect, so stated Ms Kema, these funds should be paid to the National Horse Racing Authority in its capacity as the National Regulator of the Horseracing Industry in the Republic to enable it to manage the affairs of the industry in the Republic independently and without undue influence from entities such as Phumelela; and
- (jj) The Gauteng Provincial Government bequeathed the South African Totalisator Agency Board, (TAB) to Phumelela Gaming and Leisure (Pty) Ltd at no cost. Ostensibly, this was one of the terms of the MoU. Due to the said agreement, the horseracing clubs in Gauteng and other provinces "*handed over*" racecourses to Phumelela Gaming and Leisure (Pty) Ltd for free, some of which were later sold at a huge profit to the Phumelela.
- (b) **Mr. Chophelekhaya Simoto's complaint**
- (aa) Mr Simoto alleged that during the corporatisation negotiations, it was agreed that an amount of R17, 5 million in public funds emanating from the *Horse Racing Development Fund* was allocated for the construction of single and married quarters at the Newmarket Racecourse for the benefit of the grooms, however, the shareholders of Phumelela, so it is alleged, upon receipt of these funds distributed the money amongst themselves and did not utilise it for its intended purpose.



- (bb) Further thereto, Mr Simoto complained that the grooms are not well taken care of and recognised in the horseracing industry. They are treated in an inhumane manner. They are made to sleep with the horses in the stables and when they travel to races, they are made to travel with a horse in a trailer that is drawn by a vehicle thus putting their lives at risk and a conduct which is in violation of the road traffic and transportation laws of the Republic.
- (cc) Ms Simoto further alleged that there is no provision for the grooms in the event that they die in the line of duty as there is no medical aid or provident fund. He stated that the grooms die like dogs whilst the horses are more important than the grooms in that there is medical aid and retirement benefits for the horses and not the grooms that look after them.
- (c) **Mr. Hanif Manjoo's complaint:**
- (aa) Mr Manjoo alleged that in corporatising the horseracing industry in the Gauteng Province, the Gauteng Provincial Government failed to take into consideration the objections to corporatisation of the industry in the province raised by the Gauteng Gambling Board's Horseracing Committee;
- (bb) In disposing of the assets, the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi disregarded legislative prescripts regulating the disposal of the government's assets when transferring government's assets, which included the *Totalisator Agency Board (Transvaal) (TAB)*, to Phumelela Gaming and Leisure (Pty) Ltd; and;
- (cc) That the industry was still not transformed and continues to benefit a privileged few contrary to what was agreed to by the parties during the corporatisation negotiations process.
- (v) By virtue of the provisions of section 6(9) of the Public Protector Act No. 23 of 1994, I cannot consider any complaint unless it is reported to me within two years from the occurrence of the issue or matter concerned, unless I decide that special circumstances warrant an investigation.
- (vi) In exercising this discretion, I had to take into consideration that the origin of the complaint was an alleged agreement entered into by the GPG in 1997, i.e. 15 years before the complaint was lodged with the Public Protector.



(vii) Nonetheless, due to the allegations made by the complainants that the impact of this agreement resulted and still continues in prejudice to her and other persons or entities interested to participate in the mainstream horseracing industry in South Africa, I decided to permit the investigation of the allegations made by the Complainant and to report on the findings in accordance with the provisions of the Public Protector Act, 1994.

(viii) **Based on the analysis of the complaints, as well as media reports covering concerns raised in connection with the manner in which the horseracing industry in South Africa continues to be managed since the corporatisation and the information that came to my attention from various sources, the following issues were identified to inform and focus the investigation:**

- (a) **Issue 1:** Whether Mr Jabulani Moleketi had the requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng resulting in the conclusion of the Memorandum of Understanding in 1997, and if not so, whether the conduct constitutes maladministration or improper conduct;
- (b) **Issue 2:** Whether the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary processes when corporatising the Gauteng Horseracing Industry, and if so, whether the conduct constitute maladministration or improper conduct;
- (c) **Issue 3:** Whether public funds were allocated from the Horseracing Development Fund during the corporatisation process for the benefit of the grooms and for the upgrading of stabling facilities at the Newmarket Racecourse, and if so, how much was allocated and how was it spent;
- (d) **Issue 4:** Whether the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela; and whether some of these racecourses bequeathed to Phumelela were later sold by Phumelela and the proceeds of the sales shared among Phumelela' shareholders.



- (ix) The investigation process included exchange of documentation between the Public Protector, *Gauteng Department of Economic Affairs* (formerly Department of Finance and Economic Affairs), Gauteng Gambling Board Chief Registrar of Deeds: Department of Rural Development and Land Reform, as well as Phumelela Gaming and Leisure (Pty) Ltd;
- (x) Correspondence was also exchanged between, the Public Protector and the former Chief Executive Officer of Phumelela Gaming and Leisure (Pty) Ltd, Mr Riaan Du Plessis, as well as their legal representatives, *Messrs Roodt Incorporated*. In all these exchanges, Phumelela Gaming and Leisure (Pty) Ltd raised objections to the Public Protector investigating the matter ostensibly basing their objection on the fact that Phumelela Gaming and Leisure (Pty) Ltd is a private company and that the Public Protector lacks jurisdiction to investigate private companies.
- (xi) Meetings were held on 15 August 2013 and 13 September 2013, between the Public Protector, the Complainant and the officials of the Gauteng Department of Economic Development, Adv Peter Holl: Chief Director: Governance; Adv Funeka Njobe: Chief Director: Legal Services, Mr S Dlangalala: Director: Governance; and Mr Edward Lalume: Chief Operations Officer of the Gauteng Gambling Board;
- (xii) A meeting was also held on 25 September 2014, with Mr Makhukhu Mampuru of the Gauteng Department of Economic Development, the complainant and her attorney Ms U Soni and Adv P Holl, the Chief Director: Governance of the Gauteng Department of Economic Development.
- (xiii) On 6 April 2017, a meeting was also held with the Member of the Executive Council responsible for the Gauteng Department of Economic Development, Mr Lebogang Maile, MPL and his team, which included Messrs Ngoato Phadime, Peter Holl, Simon Masisi-Letele, Funeka Njobe, Gerry Hertzberg and Mr S Dewey. The meeting was also attended by the Chief Executive Officer of the Gauteng Gambling Board, Mr Steven Ngubeni who was in the company of his Chief Operations Officer, Mr Edward Lulambe and the Gambling Board's Legal Advisor, Mr Lucky Lukhwareni. The meeting was also attended by Ms Phindi Kema who was in the company of Mr Hilton Isaacson, and Justice Templeton Mageza.



- (xiv) On 15 March 2018, a meeting was also held with a former stakeholder in the Horseracing Industry in the Gauteng Province, Mr Alfred Edward "*Ian*" Jayes who is also an interested party in the matter.
- (xv) Subpoenas in terms of sections 7(4) and (5) of the Public Protector Act, 1994 were issued against all relevant stakeholders who the Public Protector had reason to believe would be of assistance to her in the investigation of this matter and interviews were held with the Complainants, the former MEC for Finance and Economic Affairs in the Gauteng Provincial Government who also concluded the Memorandum of Understanding with the Gauteng Horseracing Industry, Mr Jabulani Moleketi.
- (xvi) Subpoenas were also issued against Messrs. Steven Ngubeni and Edward Lalumbe of the Gauteng Gambling Board, the former Acting Head of the Department of Economic Development in the Gauteng Provincial Government, Mr Makhukhu Mampuru, Mr Ian Jayes, Mr Robin Bruss of the National Horseracing Authority, Mr Sean Coleman of the South African Bookmakers Association, Adv Brett Maselle, Mr Jeremy Marshall, Mr Peter Gibson, Mr Owen Heffer,
- (xvii) Subpoenas were further issued against Messrs Bernard Kantor and Rian Du Plessis of Phumelela, as well as Larry Weinstein, Barry Walters whose subpoenas were deferred following a court order interdicting the holding of public hearings in the investigation of the matter, and Lyndon Barends of the National Horseracing Authority.
- (xviii) On 4 September 2018, the Public Protector intended to conduct the investigation in a transparent manner and by way of public hearings. Phumelela obtained a Court Order interdicting the public hearings hence it was decided to conduct one on one interviews with relevant stakeholders.
- (xix) All relevant documents and correspondence were obtained and analysed in particular, copies of, the 1997 Memorandum of Understanding, title deeds of the properties such as racecourses, disposal of business agreements, company registration documents, stakes agreement etc. Relevant laws, policies and related prescripts were also considered and applied throughout the investigation.



- (xx) Notices issued in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994, were issued to the former MEC for Economic Development and Finance in the Gauteng Provincial Government, Mr Jabulani Moleketi, the Director-General of the Department of Trade and Industry, Mr Lionel October, the Head of the Department of Economic Development in the Gauteng Provincial Government, Ms Pumla Ncapayi, the Chief Executive Officer and the Board of Directors of the National Horsing Authority, Mr Vee Moodley, the Chief Executive Officer of the Gauteng Gambling Board, Mr Steven Ngubeni as well as the Chairperson of the Board of Directors and the Chief Executive Officer of Phumelela Gaming and Leisure (Pty) Ltd, Messrs. Bernard Kantor and John Stuart respectively, with a view to affording them a further opportunity to respond to the those aspects of the investigation which in the Public Protector's view may implicate them to their detriment or an adverse finding pertaining to them may result.
- (xxi) Responses to the section 7(9) notices that were the most peculiar were from Mr Jabu Moleketi and Phumelela Gaming and Leisure (Pty) Ltd. In his response, Mr Moleketi did not appear to appreciate that the corporatisation of the Thoroughbred Horsing may not have been the ideal solution to challenges that the sport may have faced. He did not seem to appreciate that the approach of taking a non-profit sport and turn it into a commercial enterprise may not have been ideal. He just did not appreciate the fact that the privatisation of the sport which he initiated did not achieve the desired objectives instead it polarised one racial grouping from another. He further did not seem to appreciate the damage caused by the privatisation of the industry, in particular, that he facilitated taking the sport from the people and handing it over to a select few individuals who would later become shareholders of Phumelela Gaming and Leisure (Pty) Ltd.
- (xxii) In its response to the section 7(9) notice, Phumelela Gaming and Leisure (Pty) Ltd, as they have been doing throughout the investigation of this matter, were still hell-bent on frustrating it by asking that I do not release the report without them having questioned and cross-examined witnesses who assisted in the investigation of this matter. The history of the investigation will prove that it was not in the interest of Phumelela Gaming and Leisure (Pty) Ltd that it be concluded and a report on the outcome thereof be released.
- (xxiii) Since the beginning of the investigation, Phumelela Gaming and Leisure (Pty) Ltd has been hell-bent on frustrating it. They started by stating that I do not have jurisdiction to investigate the matter as it is private in nature and I do not have power to interfere with commercial transactions.



- (xxiv) They also argued that the assets that were in dispute were not government assets but private and later, they interdicted the public hearings which I called to solicit views from key stakeholders in the industry as well as members of the public on what happened and what would be the ideal solution to the problem. They have been hopping from one excuse to another with a view to frustrate the investigation and delay the release of the report.
- (xxv) With respect, it will neither be in the public interest nor that of the complainants to further delay the conclusion of this matter and the release of the report on the outcome thereof. The matter has long been outstanding without reaching finality. At some stage and at the instance and request of Phumelela Gaming and Leisure (Pty) Ltd, an attempt was made to settle the matter between the parties. I tried to mediate on same. However Phumelela Gaming and Leisure (Pty) Ltd reneged on some of their undertakings and I took a conscious decision to ensure that the matter reach finality either way. Therefore, exercising my discretion, I am unable to give Phumelela Gaming and Leisure (Pty) any further indulgence to cross examine witnesses. Public interest dictates that I release this report without delay. In the event that Phumelela Gaming and Leisure (Pty) so wishes, it can take the report on review with the Gauteng High Court.
- (xxvi) Key laws taken into account to help determine if there had been maladministration or improper conduct by the organs of state who were involved in the matter were principally those imposing administrative standards that should have been upheld by the GPG. Those are the following:
- (a) **The Constitution, 1996** which is the supreme law of the Republic. Section 1(c) thereof provides that *"the Republic of South Africa is one, sovereign, democratic state founded on the supremacy of the Constitution and the rule of law."*
 - (b) Section 2 of the Constitution, 1996 which provides that *"the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*
 - (c) Chapter 2 of the Constitution, 1996 which enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.



- (d) Section 125(2)(a) and (b) of the Constitution, 1996 which provides that *"the Premier as the executive authority with other members of the Executive Council, by implementing provincial legislation in the province within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise."*
- (e) Section 133(1) of the Constitution, 1996 which provides that *"the members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier."* Section 132(2) further provides that *"the Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them."*
- (f) Section 182(1)(a) to (c) of the Constitution, 1996, which provides that *"the Public Protector has the power, as regulated by national legislation 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; to report on that conduct; and to take appropriate remedial action."*
- (g) **The Public Protector Act, 1994** which gives effect to the provisions of section 182(1)(a) to (c) of the Constitution, 1996. Section 6(4)(a)(i) of the Public Protector Act, 1994 provides that *"the Public Protector shall be competent to investigate on his or her own initiative or receipt of a complaint maladministration in connection with the affairs of government at any level."*
- (h) Section 6(4)(9) of the Public Protector Act, 1994, which provides that *"except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned."*
- (i) **Regulation 247 of the Gauteng Gambling Regulations, 1995** (the Regulations) which provides that *"the levy contemplated in section 61 of the Act, payable for the benefit of the Sports Development Fund contemplated in section 100 of the Act, shall be paid to the holder of totalisator licence contemplated in section 53 of the Act on gross revenue of a totalisator conducted by it, calculated at such percentage and in respect of such bets as prescribed in Regulation 254."*



- (j) **The Competition Act 89 of 1998**, which provides for the establishment of a Competition Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court;
- (k) **The Horse-Racing and Betting Ordinance 24 of 1978**, which provides for the restriction, regulation and control of horseracing, as well as betting, licences, taxes and fees in connection therewith;
- (l) **Section 16 of the Deeds Registry Act of 1937**, which provides that *"save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar: Provided that notarial attestation shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond:*

Provided further that where the State acquires all the land held under any title deed, whether by way of expropriation or otherwise, or where a local authority by virtue of the provisions of any law acquires all the land held under a title deed by any other such authority, the registrar shall make such alterations and entries in his registers and such endorsements on any such title deed as may be necessary to register transfer to the State or such authority, as the case may be, of the property so acquired free of charge, and that the provisions of subsection (4) (a) of section 31 of this Act shall apply mutatis mutandis in respect of such a transfer by endorsement.

(xxvii) **During the investigation of the matter, I made the following observations:**

- (a) Thoroughbred Horseracing appear to be a sport only reserved for the elite.
- (b) A Memorandum of Understanding was signed by Mr Jabu Moleketi on 30 June 1997 for and on behalf of the Gauteng Provincial Government, giving away the sport of Horseracing in Gauteng Province to a select few individuals who would later become shareholders of Phumelela Gaming and Leisure (Pty) Ltd.



- (c) He therefore took away the sport from the people and handed it on a silver platter to the shareholders of Phumelela Gaming and Leisure (Pty) Ltd.
- (d) It may well be that the intentions to corporatise Thoroughbred Horseracing in the Republic were noble, however, it did not achieve the desired outcomes.
- (e) It appears that the Gauteng Provincial Government's intentions were to protect the new entity which later became Phumelela Gaming and Leisure (Pty) Ltd at all costs and ensured that it succeeded.
- (f) So many role-players and architects of the corporatisation of the horseracing industry subsequently became directors of a private company, Phumelela Gaming and Leisure (Pty) Ltd.
- (g) Some government officials who were involved in the corporatisation process resigned from their government positions and took employment with Phumelela Gaming and Leisure (Pty) Ltd as if the process was employment creation.
- (h) The process of corporatisation of the industry was not in the public interest at all. It better served the rich and the elite in the society thus making the rich, richer.
- (i) The shareholders of Phumelela Gaming and Leisure (Pty) Ltd unjustifiably benefitted from public funds in the form of fifty percent (50%) of the six percent (6%) levy on bookmakers, paid to the entity by the Gauteng Gambling Board.
- (j) There is an anomaly with regard to the funding for the operations of National Horse Racing Authority as the Regulator being funded by Phumelela Gaming and Leisure (Pty) Ltd thus being dependent on the entity, one of the industry players thus compromising the independence of the Regulator. The Regulator must be a statutory body sanctioned by government.



(xxviii) Having regard to the evidence as well as the regulatory framework determining the standard that should have been complied with by the Gauteng Provincial Government, government officials who assisted in the process of corporatisation, the Gauteng Gambling Board and any other provincial gambling boards that were involved in the process as well as the National Horseracing Authority in its official capacity as the Regulator of the Horseracing industry in the Republic, I am making the following findings;

(a) **Regarding whether Mr Jabulani Moleketi had the requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng, which resulted in the conclusion of the Memorandum of Understanding in 1997, if not so, whether the conduct constitute maladministration or improper conduct;**

(aa) The allegation that Mr Jabulani Moleketi did not have the requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng, which resulted in the conclusion of the impugned June 1997 MoU **is not substantiated.**

(bb) It is not the competence of a province to conclude an agreement that would bind other provinces but a national competence. Therefore, the agreement entered into between the Gauteng Provincial Government and the Gauteng Horseracing Industry was intended to regulate the industry in Gauteng Province and not the other provinces. However, it appears as though the agreement was used to attract other provinces into similar arrangements.

(cc) Mr Moleketi was therefore granted a mandate by the Executive Council of the Gauteng Provincial Government to represent the province in the negotiations aimed at the reorganisation and restructuring of the horseracing industry in the Gauteng Province. However the intentions and purpose of the restructuring of the industry were not realised.

(dd) It is apparent that **there was and still is** a difference between the intended purposes and objectives of the MoU and what actually transpired in the implementation thereof.



- (ee) The restructuring of the industry did not achieve its objectives of inclusivity in that the object of having a certain percentage of black empowerment groups was not realised. The entire restructuring of the horseracing industry which was initiated in the Gauteng Province culminating in other provinces following suit was not in the best interests of the members of the public who were affectionate about the sport and those who used their hard earned money to bet for a winning horse.
- (ff) Based on the information and evidence obtained during the investigation, it is clear that the whole restructuring process was never intended to attract other racial groupings into horseracing but to maintain the keeping of the thoroughbred horseracing by one racial grouping which is the white minority group at the expense of black majority citizens and constituencies who are affectionate of thoroughbred horseracing.
- (gg) The National Horseracing Authority failed to exercise its role of being a Regulator of the horseracing industry. Further thereto, it failed to safeguard the horseracing assets. The financing of the Regulator by Phumelela Gaming and Leisure (Pty) Ltd is inappropriate.
- (hh) The Gauteng Provincial Gambling Board paid 50% of public funds in annual levies on bets to Phumelela Gaming and Leisure (Pty) Ltd.
- (ii) Therefore, the allegation that Mr Jabulani Moleketi did not have requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng, which resulted in the conclusion of the Memorandum of Understanding in 1997, has no merit and could not be substantiated by the information and documentation obtained during the investigation.
- (b) **Regarding whether the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary processes when corporatising the Gauteng Horseracing Industry, if so, whether the conduct constitute maladministration or improper conduct;**
- (aa) The allegation that the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary processes when corporatising the Gauteng Horseracing Industry, **is not substantiated.**



- (bb) It is common knowledge that under the previous regime the majority of South Africans were excluded from public life. In remedying the situation, section 118(1)(a) of the Constitution, 1996 (which flows from section 1(c) of the Constitution, 1996) introduced a duty on the National Assembly, the National Council of Provinces and provincial legislatures to facilitate public participation or involvement when executing their legislative and other processes of the legislature and its committees. The main aim in this regard is to encourage the public to have meaningful inputs into the decision-making processes by government in all spheres.
- (cc) It was established from the information and evidence received during the investigation that, following the Gauteng Provincial Cabinet approval of the negotiations with the horseracing industry, as well as the process to be followed in reaching an agreement between the provincial government and the industry with regard to the "privatisation" of the sport, the Horseracing Industry in the Gauteng Province issued circulars to all its members (comprising of the Newmarket Turf Club, Turffontein Racing Club and Gosforth Park Turf Club which included the Benoni Turf Club and Germiston Sporting Club) notifying them of Special general Meetings wherein the corporatisation of the horseracing industry in the Gauteng Province would be the subject of discussion and resolution in connection therewith would be taken.
- (dd) It was also established that, following consultations with the Horseracing Industry in Gauteng Province, the Gauteng Provincial Government, issued a notice (Notice 3928 of 1997) published in the Gauteng Provincial Gazette No. 427 calling all interested parties to submit comments on the proposed amendment of the Gauteng Gambling and Betting Act No 4 of 1995 by not later than 6 January 1998.
- (ee) Therefore, the exercise and/or execution of all executive powers conferred in terms of the provisions of section 125 of the Constitution, 1996, must at all material times conform to the principle of legality envisaged in section 1(c) of the Constitution, 1996.
- (ff) The allegation that the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary processes when corporatising the Gauteng Horseracing Industry has no merit and could not be supported by the information and evidence obtained during the investigation.



- (c) **Regarding whether there were public funds allocated from the Horseracing Development Fund during the corporatisation process for the benefit of the grooms and for the upgrading of stabling facilities at the Newmarket Racecourse;**
- (aa) The allegation that public funds allocated from the Horseracing Development Fund during the corporatisation process for the upgrading of stabling facilities and for the construction of single and married quarters for the benefit of the grooms at the Newmarket Racecourse, **is substantiated.**
- (bb) According to the information and documents obtained during the investigation, the Newmarket Turf Club applied for a grant to an amount of R17, 5 million for the erection of stabling facilities from the Horseracing Development Fund, which was approved by the Highveld-Racing and Betting Board in a meeting held on 11 December 1996.
- (cc) It was established that the approval of the grant was subject to the fulfilment of a further condition that, part thereof must be utilised for the construction of single and married quarters for the benefit of the grooms in the Newmarket Turf Club. However, it was established during the investigation that a portion of the funds were utilised at the Randjesfontein Training Centre, the Vaal Turf Club (which is situated in the Free State Province) and Turffontein Racecourse.
- (dd) In paragraph 2.4 of a correspondence addressed to the Public Protector on 10 November 2017 Phumelela Gaming and Leisure (Pty) Ltd admitted that it had utilised part of the grant on the stabling in Gauteng and the Vaal Race course since 2002 Turf Club and Turffontein Racecourse.
- (ee) In the circumstances, the failure to utilise public funds allocated from the Horseracing Development Fund for the purposes which it was intended constitutes maladministration envisaged by section 6(4)(a)(i) of the Public Protector Act, 1994.
- (d) **Regarding whether the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela; and some of racecourses subsequently bequeathed to Phumelela were later sold by Phumelela and the proceeds of the sales shared among Phumelela' shareholders;**



- (aa) The allegation that the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela, **is not substantiated.**
- (bb) As indicated herein above, the land on which the Arlington and Bloemfontein Racecourses were not, prior to their transfer to Phumelela, either owned by the municipalities and/or government. According to the information obtained during the investigation, Erf 4192 Walmer and remainder of Erf 4034 Walmer, were consolidated to form Erf 4195 in the extent 59, 4687 hectares, under Certificate of Consolidated Title T73200/1993 on 17 September 1993;
- (cc) The information also indicates that, Erf 4195 in the extent of 59, 4687 hectares was registered in the name of *"The Trustees"* for the time being of the East Cape Racing Club under T4987/1995 in 1994, and was transferred to the Trustee of the St. Andrew's Racing Club as a result of a sale of agreement on 1 July 1994, for an amount of R1 856 851.00;
- (dd) Furthermore, on 23 July 2003, the remainder of the property under T4987/1995, being the remainder of Erf 4195 Walmer in the extent of 52,9746 hectares was transferred to East Cape Racing (Pty) Limited under T67540/2003;
- (ee) The registration information in respect of the July 2003 transfer relating to T67540/2003, indicates that six properties were held and registered in the name of East Cape Racing (Pty) Limited;
- (ff) The information further indicates that Erfs 4191 and 4192 Walmer were transferred from Arlington Sandpits CC (registration number CK86/00841/23) to *"The Chairman for the time being"* and as such the Trustee of the St. Andrew's Racing Club by means of an exchange transaction (Title Deed No. T73197/1993); and
- (gg) With regard to the land on which the Bloemfontein Turf Club is located, the information obtained from the Bloemfontein Deeds Registry indicates that Portion 4 and 12 of the of the Farm Sunnyside 2620, Bloemfontein District were consolidated in terms of Deed of Transfer T1940/1928 and T10764/1979;



- (hh) The information also indicates that Portion 13 of the Farm Sunnyside 2660, Bloemfontein District, Free State province was previously registered in the name of Phumelela by virtue of Deed of Transfer T31235/1999. The property was bought from the Bloemfontein Turf Club on 15 December 1998, for the amount of R3, 5 million. Phumelela subsequently sold the property to Calantha Properties (Pty) Limited on 17 January 2007, for R32 million by virtue of Deed of Transfer T22368/2007. Phumelela is the owner of Portion 15 of the farm Rietfontein 152, situated in Heilbron District, Free State Province by virtue of Deed of Transfer T24808/2003.
- (ii) It was further established from the information obtained during the investigation that Calantha Properties (Pty) Limited transferred the property to M5 Developments (Pty) Limited by virtue of Deed of Transfer T11636/2009; and that M5 Developments (Pty) Limited transferred the property to Space Securitisation (Pty) Limited by virtue of Deed of Transfer T11637/2009.
- (jj) I did not investigate the allegation that certain racecourses subsequently transferred to Phumelela, were improperly sold by Phumelela and the proceeds of the sales shared among Phumelela’ shareholders on the basis that the issue fell beyond my investigatory mandate conferred in terms of section 182(1)(a) of the Constitution and which are given effect by the provisions of section 6(4)(a)(i) of the Public Protector Act, 1994.
- (kk) Notwithstanding the above, I observed the following in connection with the allegation made by Ms Phindiwe Kema;
- (a) Gosforth Park Racecourse was obtained by Phumelela for nothing and it later sold the racecourse on 6 September 2002, to Gosforth Park Properties (Pty) Limited for R18, 5 million;
- (b) Newmarket Turf Club was obtained by Phumelela for nothing and it later sold the racecourse on sold on 18 May 2005, to ITAS Services (Pty) Limited, Nanini CC t/a REJEM and Rand Sporting Club (Pty) Limited (amount unspecified); and
- (c) Bloemfontein Racecourse was obtained by Phumelela for nothing and it later sold the racecourse on sold on 17 January 2007, to Calantha Properties (Pty) Limited for R32 million.



(II) Therefore, the allegation that the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela, has no merit and could not be substantiated by the information and documentation obtained during the investigation.

(xxix) The appropriate remedial action that I am taking as contemplated in section 182(1)(a) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report is the following;

(a) The President, His Excellency, President Matamela Cyril Ramaphosa to take urgent and appropriate steps to;

(aa) Take note of the report and constitute a Ministerial Committee under the stewardship of the Minister responsible for Trade and Industry that will be tasked with a duty to establish a statutory and independent body that will serve as a Regulator for Thoroughbred Horseracing in the Republic; and

(bb) Consider that the committee be constituted of the Ministers responsible for, Labour, Agriculture Forestry and Fisheries, Human Settlements as well as Sport and Recreation.

(b) The Minister of Trade and Industry to take urgent and appropriate steps to;

(aa) Lead the process of establishment of a statutory and independent body that will serve as a Regulator for Thoroughbred Horseracing in the Republic;

(bb) Establish a Secretariat to the Ministerial Committee that will be composed of legally qualified officials, Accountants and people who are knowledgeable about Thoroughbred Horseracing in the Republic.

(cc) Embark on a consultation process with all industry players and stakeholders involved in Thoroughbred Horseracing in the Republic with a view to making a determination on how they prefer that horseracing be managed going forward so that the sport could be taken back to its initial custodians, the people; and;



- (dd) Should a need arise, the Ministerial Committee appointed by the President to embark on a benchmarking exercise to learn best practises in as far as horseracing is concerned.
- (c) **The Minister of Sport and Recreation to take urgent and appropriate steps to;**
 - (aa) Take cognisance of the report and ensure that the transformation of Thoroughbred Horseracing in the Republic is expedited.
 - (bb) Ensure that the sporting side of the Thoroughbred Horseracing in the Republic is properly regulated
- (d) **The Premier of the Gauteng Provincial Government and all other Provincial Premiers to:**
 - (cc) Take cognisance of the report and ensure that the Ministerial Committee appointed by the President is provided with the necessary support to enable it to achieve its objectives.
 - (dd) Ensure that the statutory body that is appointed as the Regulator of Thoroughbred Horseracing in the Republic is capacitated to enable it to perform its functions independently and without fear, favour or prejudice;
 - (ee) Ensure that the 50% bookmakers levy which is paid to Phumelela Gaming and Leisure (Pty) Ltd is withdrawn and transferred to the new entity that will serve as a Regulator for Thoroughbred Horseracing in the Republic for its operations as well as the development and transformation of the horseracing industry and also assist in looking into a new beneficial funding model;
 - (ff) With the assistance of the SIU, the Premier of the Gauteng Provincial Government all other Provincial Premiers whose provinces were affected by the corporatisation of the Thoroughbred Horseracing in the Republic, to request the President to issue a Proclamation in terms of section 2(1) of the Special Investigating Units and Special Tribunals Act, 1996 to investigate the:
 - (a) unlawful appropriation or expenditure of public money or property;
 - (b) unlawful, irregular or unapproved acquisitive acts, transactions, measures or practices; and



- (c) intentional or negligent loss of public money by organs of state referred to in this report, with a view to institute civil action for the recovery of the loss of public money by organs of state in the corporatisation of the Thoroughbred Horseracing in the Republic.

- (gg) The Gauteng Premier to extend an apology to the complainants for the inconvenience and frustrations they experienced as a consequence of the corporatisation of Thoroughbred Horseracing as well as consider compensating them for any losses they incurred in trying to bring to the attention of the Gauteng Provincial Government the injustices occasioned by the corporatisation of the Thoroughbred Horseracing in the province.

- (e) **The CEO and the Board of Directors of the Gauteng Gambling Board to take urgent steps to:**
 - (aa) Take cognisance of the report and in consultation with the newly appointed Regulator for Thoroughbred Horseracing in the Republic, conduct an audit of all state-owned assets which were transferred to Phumelela Gaming and Leisure (Pty) Ltd for a song with a view to establishing their origin, value on transfer and ownership prior to transfer, as well as to establish whether they were utilised for the benefit of the horseracing industry and citizens who are affectionate about the sport of horseracing;

 - (bb) Ensure that the 50% bookmakers levy which is paid to Phumelela Gaming and Leisure (Pty) Ltd by the Gauteng Gambling Board is withdrawn and transferred to the new entity that will serve as a Regulator for Thoroughbred Horseracing in the Republic for its operations as well as the development and transformation of the horseracing industry and also assist in looking into a new beneficial funding model;

 - (cc) Recover from Phumelela Gaming and Leisure (Pty) Ltd the balance of the funds which were earmarked for the erection of single and married quarters for the benefit of the grooms in the Gauteng Province and ensure that a Trust is established for the grooms and other low-skilled employees in the horseracing industry.



REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT IN CONNECTION WITH A MEMORANDUM OF UNDERSTANDING ENTERED INTO BETWEEN THE GAUTENG PROVINCIAL GOVERNMENT AND THE GAUTENG HORSERACING INDUSTRY IN 1997 WHICH SUBSEQUENTLY LED TO THE CORPORATISATION OF THE HORSERACING INDUSTRY.

1. INTRODUCTION

- 1.1. This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2. The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation:
 - 1.2.1. His Excellency, President Matamela Cyril Ramaphosa;
 - 1.2.2. The Speaker of the National Assembly, Hon. Ms Baleka Mbete, MP;
 - 1.2.3. The Chairperson of the National Council of Provinces, Hon. Ms Thandi Modise, MP;
 - 1.2.4. The Minister of Trade and Industry, Dr Rob Davies, MP;
 - 1.2.5. The Chairperson of the Parliament's Portfolio Committee on Trade and Industry, Hon J Fubbs;
 - 1.2.6. The Premier of the Gauteng Province, Hon David Makhura; and all other Provincial Premiers
 - 1.2.7. The Member of the Executive Council responsible for the Gauteng Department of Economic Development, Hon Lebogang Maile;
 - 1.2.8. The Director-General of the Department of Trade and Industry; Mr Lionel October;
 - 1.2.9. The Head of the Department Gauteng Economic Development, Ms Pumla Ncapayi;
 - 1.2.10. The former Member of the Executive Council responsible for the Gauteng Department of Finance and Economic Affairs, Mr Jabulani Moleketi;
 - 1.2.11. The Chief Executive Officer of the Gauteng Gambling Board, Mr Steven Ngubeni;
 - 1.2.12. The Chief Executive Officer of the National Horseracing Authority, Mr Vee Moodley; and
 - 1.2.13. The Chief Executive Officer of Phumelela Gaming and Leisure (Pty) Ltd, Mr John Stuart; and;
 - 1.2.14. Copies of the report are also provided to Messrs Phindiwe Kema, Chophekhaya Simoto and Hanif Manjoo, the complainants to inform them about the outcome of the investigation.



- 1.3. The report relates to an investigation into allegations of maladministration and improper conduct in connection with a Memorandum of Understanding entered into between the Gauteng Provincial Government and the Gauteng Horseracing Industry in 1997, which subsequently led to the corporatisation of the horseracing industry in South Africa.

2. THE COMPLAINTS

- 2.1. On 22 January 2012, a complaint was lodged by a business woman based in the Eastern Cape Province, who was at all material times hereto, representing a company named and styled *Africa Race Group (Pty) Limited (ARG)* that was involved in race horse breeding, Ms. Phindiwe Kema. The complaint was in connection with allegations of maladministration and improper conduct as a consequence of a Memorandum of Understanding (MoU) entered into between the Gauteng Provincial Government (GPG) and the Gauteng Horseracing Industry in 1997, which subsequently led to the corporatisation of the horseracing industry.
- 2.2. Following thereto, and on 16 April 2012, a further complaint was received from Mr. Chophelekhaya Simoto, who was at all material times hereto and in lodging the complaint duly representing over four thousand members affiliated with the *South African Grooms Association (SAGA)*.
- 2.3. It was Mr Simoto's complaint that, following the corporatisation of the horseracing industry, the grooms, who are the personnel taking care and looking after the horses, were treated inhumanely and that public funds which were earmarked for the development and construction of single and married quarters for the grooms were misappropriated and ended up in the pockets of shareholders of Phumelela Gaming and Leisure (Pty) Ltd.
- 2.4. On 21 January 2013, another complaint was received from Mr. Hanif Manjoo, a former member of the Gauteng Gambling Board's Horseracing Committee with allegations that since the corporatisation of the horseracing industry, there was no transformation of the sport of horseracing which was in violation of the material terms of the MoU entered into between the industry and the Gauteng Provincial Government. He further raised issue with the disposal of government assets as a result of the corporatisation of the industry as well as the Gauteng Provincial Government's failure to take into consideration objections that were raised about the corporatisation of the industry and its effects.



2.5. The details of each complaint are dealt with hereunder;

2.5.1. Ms. Phindiwe Kema's Complaint:

2.5.1.1. In the main, Ms Phindi Kema's complaint was that, the Gauteng Provincial Government had entered into an agreement with the *National Horseracing Authority* in 1997, which resulted in the restructuring and corporatisation of the horseracing industry.

2.5.1.2. According to Ms Kema, on 15 December 1995, the former MEC for Finance and Economic Affairs in the Gauteng Provincial Government, Mr Jabu Moleketi (Mr Moleketi) communicated with the Highveld Racing Authority and issued a directive for the horseracing industry in Gauteng to corporatize.

2.5.1.3. As a consequence of Mr Moleketi's directive aforesaid, on 13 June 1997, the Gauteng Provincial Government (GPG) entered into a Memorandum of Understanding (MoU) with the Gauteng Horseracing Industry with a view to corporatize the industry into a single entity as directed by the MEC.

2.5.1.4. In his correspondence addressed to the Chairman of the Highveld Racing Authority on 15 December 1995 under the subject, "*PRIVATISATION*" Mr Moleketi stated;

"I confirm my statement at the HRB meeting of 11 December 1995 when I said that I wanted the racing industry to be privatised by the end of 1996. It is untenable for the provincial government to be involved in the industry.

The reason for this is historical due to the non-proprietary (club) status of the industry and which was dependant on the HRDF for its development needs and in recent years also for part of its running costs needs. The lack of accountability of the industry necessitated provincial government controlling the flow of funds from the HRDF to the industry.

As we are entering a new gambling dispensation, the time is right to rectify the situation and place the racing industry in the same proprietary (vested ownership) position as any other business, thereby ensuring the necessary accountability.

I believe the obvious way this can be achieved is for the industry to be corporatized into a public company with the shareholders having to pay for their shares...

- 2.4.1.5. In her complaint, Ms Kema argued that the 1997 MoU entered into between the Gauteng Provincial Government and the Horseracing Industry was illegitimate as the provincial government had no authority to corporatise (privatise) the South African Horseracing industry through the establishment of *Phumelela Gaming and Leisure Ltd* and thus endowing it with industry assets such as racecourses which include those falling outside the jurisdictional area of the Gauteng Provincial Government and in other provinces such as the Eastern Cape, Free State and Northern Cape thus creating a monopoly.
- 2.4.1.6. In 2002, the Eastern Cape Racing Club gave away Arlington Racecourse in Port Elizabeth to Phumelela for one rand (R1.00). According to Ms Kema, the Eastern Cape Racing Club were not the owners of the racecourse but were conferred a custodial and management function to look after the racecourse and horseracing interests of the Eastern Cape horseracing people (members) and had to seek the necessary government approvals underpinned by a proper transparent public participation process and that none of that ever occurred.
- 2.4.1.7. She challenges Phumelela's legitimate ownership of this racecourse as she believes it's only through this Gauteng 1997 MoU that they could base their right to own this racecourse; and that they do not wish to use it for horseracing purpose, they must return it to its horseracing people.
- 2.4.1.8. According to Ms Kema, the corporatisation of the industry was never intended to benefit the sector and the people of South Africa. According to Ms Kema, it created a monopoly for the benefit of a select few (Phumelela shareholders, including Markus Jooste's Kalamojo Trust) who were mostly white privileged individual shareholders at the expense of the entire horseracing industry in the Republic.



- 2.5.1.10. According to Ms Kema, the Memorandum of Understanding entered into between the Gauteng Provincial Government and Gauteng Horseracing Industry (which later became Phumelela) is unjustified as it is used by the entity to control and capture the National Horse Racing Authority (The National Regulator) of the Horseracing Industry in the Republic.
- 2.5.1.11. Further thereto, the 50% of the annual gambling levy estimated to be around R70 million a year paid by Provincial Gambling Boards to Phumelela Gaming and Leisure Ltd is not accounted for and as such, there is no transparency on how these public funds are being utilised by the entity.
- 2.5.1.12. With respect, so stated Ms Kema, these funds should be paid to the National Horse Racing Authority in its capacity as the National Regulator of the Horseracing Industry in the Republic to enable it to manage the affairs of the industry in the Republic independently and without undue influence from entities such as Phumelela; and
- 2.5.1.13. The Gauteng Provincial Government bequeathed the South African Totalisator Agency Board, (TAB) to Phumelela Gaming and Leisure (Pty) Ltd at no cost. Ostensibly, this was one of the terms of the MoU. Due to the said agreement, the horseracing clubs in Gauteng and other provinces "*handed over*" racecourses to Phumelela Gaming and Leisure (Pty) Ltd for free, some of which were later sold at a huge profit to the Phumelela.
- 2.5.2. **Mr. Chophelikhaya Simoto's complaint:**
- 2.5.2.1. Mr Simoto alleged that during the corporatisation negotiations, it was agreed that an amount of R17, 5 million in public funds emanating from the *Horse Racing Development Fund* was allocated for the construction of single and married quarters at the Newmarket Racecourse for the benefit of the grooms, however, the shareholders of Phumelela, so it is alleged, upon receipt of these funds distributed the money amongst themselves and did not utilise it for its intended purpose.

2.4.2.2. Further thereto, Mr Simoto complained that the grooms are not well taken care of and recognised in the horseracing industry. They are treated in an inhumane manner. They are made to sleep with the horses in the stables and when they travel to races, they are made to travel with a horse in a trailer that is drawn by a vehicle thus putting their lives at risk and a conduct which is in violation of the road traffic and transportation laws of the Republic. The pictures below depict the inhumane manner under which the grooms live.





2.5.2.3. Mr Simoto further alleged that there is no provision for the grooms in the event that they die in the line of duty as there is no medical aid or provident fund. He stated that the grooms die like dogs whilst the horses are more important than the grooms in that there is medical aid and retirement benefits for the horses and not the grooms that look after them.

2.5.3. **Mr. Hanif Manjoo's complaint:**

2.5.3.1. Mr Manjoo alleged that in corporatising the horseracing industry in the Gauteng Province, the Gauteng Provincial Government failed to take into consideration the objections to corporatisation of the industry in the province raised by the Gauteng Gambling Board's Horseracing Committee;

2.5.3.2. In disposing of the assets, the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi disregarded legislative prescripts regulating the disposal of the government's assets when transferring government's assets, which included the *Totalisator Agency Board (Transvaal) (TAB)*, to Phumelela Gaming and Leisure (Pty) Ltd; and;

2.5.3.3. That the industry was still not transformed and continues to benefit a privileged few contrary to what was agreed to by the parties during the corporatisation negotiations process.

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 that:

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

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



- 3.3. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.
- 3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs.
- 3.5. The Public Protector is also bestowed with power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.6. In the constitutional court, (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 (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)*), Chief Justice Mogoeng stated the following, when confirming the powers the public protector:
- 3.6.1. Complaints are lodged with the Public Protector **to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);
- 3.6.2. 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);
- 3.6.3. Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, **she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint** (para 68);
- 3.6.4. 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) ;



- 3.6.5. 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);
- 3.6.6. 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);
- 3.6.7. 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));
- 3.6.8. **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (para 71(d));
- 3.6.9. "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));
- 3.7. The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, "*When remedial action is binding, compliance is not optional, and 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.*"
- 3.8. During the investigation, Phumelela Gaming and Leisure (Pty) Ltd had been afforded ample opportunity to participate and assist the Public Protector in probing the matter. However, they made several attempts to frustrate the investigation by raising various excuses not to entertain it, such as lack of jurisdiction to investigate the matter, assets being private to transactions that are commercial in nature as well as other excuses.



- 3.9. All key stakeholders who were implicated in the investigation were afforded a further opportunity to respond as contemplated in section 7(9) of the Public Protector Act and all of them responded. One of the responses that was most peculiar was that of Phumelela Gaming and Leisure (Pty) Ltd. In its response, the entity, as they have been doing throughout the investigation of this matter, were still hell-bent on frustrating the investigation by asking that I do not release the report without them having questioned and cross-examined witnesses who assisted in the investigation. The history of the investigation will prove that it was not in the interest of Phumelela Gaming and Leisure (Pty) Ltd that it be concluded and a report on the outcome thereof be released.
- 3.10. Fair enough, in terms of section 7(9)(b)(ii) of the Public Protector Act, 1994 Phumelela Gaming and Leisure (Pty) is entitled through the Public Protector to question witnesses that have been determined by the Public Protector but this does not in any way take away the powers conferred on the Public Protector by section 7(1)(b)(i) of the Public Protector Act which provides that the format and procedure to be followed in conducting an investigation shall be determined by the Public Protector with due regard to the circumstances of each case.
- 3.11. Since the beginning of the investigation, Phumelela Gaming and Leisure (Pty) Ltd has been hell-bent on frustrating it. They started by stating that I do not have jurisdiction to investigate the matter as it is private in nature and I do not have power to interfere with commercial transactions. They also argued that the assets that were in dispute were not government assets but private and later, they interdicted the public hearings which I called to solicit views from key stakeholders in the industry as well as members of the public on what happened and what would be the ideal solution to the problem. They have been hopping from one excuse to another with a view to frustrate the investigation and delay the release of the report.
- 3.12. Exercising my discretion, I had to make a determination whether the interests of Phumelela Gaming and Leisure (Pty) Ltd superseded those of members of the public who love the sport of Horseracing, other key stakeholders in Horseracing and critically, the complainants who lodged the complaints seven (7) years ago and have been patiently waiting for an outcome of the investigation. In this regard, I accordingly came to a conclusion that it will neither be in the public interest nor that of the complainants to further delay the conclusion of this matter and the release of the report on the outcome thereof.



- 3.13. The matter has long been outstanding without reaching finality. At some stage and at the instance and request of Phumelela Gaming and Leisure (Pty) Ltd, an attempt was made to settle the matter between the parties. I tried to mediate on same. However Phumelela Gaming and Leisure (Pty) Ltd reneged on some of their undertakings and I took a conscious decision to ensure that the matter reach finality either way. Therefore, exercising my discretion, I was unable to give Phumelela Gaming and Leisure (Pty) any further indulgence to cross examine witnesses. Public interest dictates that I release this report without delay. In the event that Phumelela Gaming and Leisure (Pty) so wishes, it can take the report on review with the Gauteng High Court.
- 3.14. In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation. Such legislation includes *inter alia*, the Public Protector Act 23 of 1994 and legislations such as the Prevention and Combating of Corrupt Activities Act 12 of 2004.
- 3.15. The Public Protector Act elaborates on the investigation powers of the Public Protector. Section 6(4) of the Public Protector Act specifically provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged:
- 3.15.1. Maladministration in connection with the affairs of government at any level; or
 - 3.15.2. Abuse or unjustifiable exercise of power or other improper conduct by a person performing a public function; or
 - 3.15.3. Improper or dishonest act; or
 - 3.15.4. Improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
 - 3.15.5. Act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person.
- 3.16. Section 6(4)(c)(i) of the Public Protector Act provides that the Public Protector may, during or after an investigation, if he or she is of the opinion that the facts disclose a commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions.



- 3.17. Section 6(4)(c)(ii) of the Public Protector Act provides that the Public Protector may if he or she deems it advisable, refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.
- 3.18. Section 6(9) of the Act provides that except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned.
- 3.19. Section 7(1)(b)(i) of the Public Protector Act provides that **the format and procedure to be followed in conducting an investigation shall be determined by the Public Protector** with due regard to the circumstances of each case.”
- 3.20. Section 7(2) of the Act provides that notwithstanding anything to the contrary contained in any law, no person shall disclose to any other person the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, the Deputy Public Protector or a person designated by the Public Protector to conduct an investigation.
- 3.21. Further thereto, section 7(4)(a) of the Public Protector Act provides that, for purposes of conducting an investigation, the Public Protector may direct any person to submit an affidavit or affirmed declaration to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on a matter being or to be investigated.
- 3.22. The Public Protector Act goes further and provides in section 7(5) that a direction referred to in subsection (4)(a) shall be by way of a subpoena containing particulars of the matter in connection with which the person subpoenaed is required to appear before the Public Protector and shall be signed by the Public Protector and served on the person subpoenaed either by a registered letter sent through the post or by delivery by a person authorized thereto by the Public Protector.



- 3.23. Section 7(4)(b) that, The Public Protector or any person duly authorised thereto by him or her may request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on the matter being or to be investigated.
- 3.24. Section 7(9)(b)(i) of the Act provides that a person who may have been adversely implicated during an investigation by the Public Protector shall be afforded an opportunity to be heard in connection therewith by way of giving evidence and section 7(9)(b)(ii) provides that such person or his or her legal representative **shall be entitled, through the Public Protector**, to question other witnesses **determined by the Public Protector**, who have appeared before the Public Protector in terms of this section.
- 3.25. The Gauteng Provincial Government, as well as the Gauteng Gambling Board are organs of state and their conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector's mandate to investigate. The Public Protector's power and jurisdiction to investigate, report and take appropriate remedial action was not disputed by any of the parties.
- 3.26. However, Phumelela and its attorneys raised concerns about the investigation into Phumelela Gaming and Leisure (Pty) Ltd.'s private business dealings and operations that did not relate to state affairs and therefore fell outside the ambit of the Public Protector's jurisdiction.
- 3.27. Due to the nature of the complaint, I had to take cognisance of Phumelela's dealings with the respective role players in the horse racing industry and its business operations as it related to whether or not the decision of the Gauteng Provincial Government complained about, resulted in impropriety or prejudice. Reference in the report to such matters is accordingly limited to the extent that it may relate to state affairs.
- 3.28. Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute 'special circumstances', some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the fact that, in as much as the cause of action arose with the conclusion of the MoU in 1997 which led to the corporatisation of horseracing in Gateng, its effects are being felt to this day.



3.29. I also had to consider the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in public administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainant persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitute ‘special circumstances’ depends on the merits of each case?

4. THE INVESTIGATION

4.1. Methodology

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

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute relating to allegations of improper conduct or maladministration.

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 they would have been but for the maladministration or improper conduct?



- 4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the corporatisation of the horseracing industry that was initiated by the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, achieved its desired objectives and was in the best interests of the members of the public who are affectionate of the thoroughbred horseracing.
- 4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Gauteng Provincial Government and/or any other organ of state such as the Gauteng Gambling Board to prevent maladministration and improper conduct.
- 4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing consequences of the improper conduct or maladministration.
- 4.3. **Based on the analysis of the complaints, as well as media reports covering concerns raised in connection with the manner in which the horseracing industry in South Africa continues to be managed since the corporatization and the information that came to my attention from various sources, the following issues were identified to inform and focus the investigation:**
- 4.3.1. Whether Mr Jabulani Moleketi had the requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng resulting in the conclusion of the Memorandum of Understanding in 1997, if not so, whether the conduct constitute maladministration or improper conduct;
- 4.3.2. Whether the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary processes when corporatising the Gauteng Horseracing Industry, and if so, whether the conduct constitute maladministration or improper conduct;



- 4.3.3. Whether there were public funds allocated from the HRDF during the corporatisation process for the benefit of the grooms and for the upgrading of stabling facilities at the Newmarket Racecourse, and if so, how much was allocated and how was it spent; and
- 4.3.4. Whether the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela; and whether some these racecourses bequeathed to Phumelela were later sold by Phumelela and the proceeds of the sales shared among Phumelela' shareholders.

4.4. The Key Sources of information

4.4.1. Documentation;

- 4.4.1.1. Copies of the complaints;
- 4.4.1.2. A copy of the Howard Commission of Inquiry Report of March 1993;
- 4.4.1.3. Minutes of a meeting of the Highveld Horse Racing and Betting Board held on 11 December 1995;
- 4.4.1.4. Letter from the Member of the Executive Council responsible for the Gauteng Department of Finance and Economic Affairs addressed to the Chairman of the Highveld Racing Association dated 15 December 1995;
- 4.4.1.5. Minutes of a meeting of the Highveld Horse Racing Association held on 20 October 1995 and 9 January 1996;
- 4.4.1.6. Minutes of meetings of the Gauteng Racing Business Plan Steering Committee held on 25 September 1996 and 3 April 1997;
- 4.4.1.7. Minutes of the Plenary Meetings between the GPG and the Gauteng horse racing industry, dated 18 December 1996, 27 February 1997, 11 March 1997 and 26 March 1997;
- 4.4.1.8. Minutes of a meeting of the Gauteng Racing Business Plan Steering Committee held on 3 April 1997;
- 4.4.1.9. MoU concluded between the Gauteng horse racing industry and the GPG dated 30 June 1997;



- 4.4.1.10. Disposal of Business Agreements concluded between Phumelela and the East Cape Racing Club, Totalisator Agency Board, Transvaal ("TAB"), the Turffontein Racing Club, Newmarket Turf Club, Gosforth Park Racing Club, Highveld Racing Authority, Griqualand West Racing Club, Bloemfontein Turf Club, Vaal Turf Club dated 9 July 1999, 28 April 1999, 24 November 1997, 15 December 1998 respectively;
- 4.4.1.11. GPG Notice No. 2017 of 1997: Dissolution of the Horse Racing Development Fund in terms of section 99(5) of the Gauteng Gambling Act No. 4 of 1995, as amended: Provincial Gazette dated 19 August 1998;
- 4.4.1.12. GPG Notice No. 2422 of 1998: Transfer of Highveld Racing Authority to Phumelela Gaming and Leisure (Pty) Limited: Provincial Gazette No: 533 dated 7 October 1998;
- 4.4.1.13. GPG Notice No: 2423 of 1998: Transfer of Totalisator Agency Board (Transvaal) to Phumelela Gaming and Leisure (Pty) Limited in terms of section 53B of the Gauteng Gambling Act No. 4 of 1995, as amended: Provincial Gazette No: 533 dated 7 October 1998;
- 4.4.1.14. An Agreement between Phumelela and Horse Racing Association, signed on 19 August 1999;
- 4.4.1.15. Shareholders' Agreement between the Trustees of the Thoroughbred Horse Racing Trust, Gride Investments (Pty) Limited ("Gride"), Vela Phumelela Investments (Pty) Limited ("Vela"), Indyebo Investments (Pty) Limited ("Indyebo"), Dihla Investment Holdings (Pty) Limited ("Dihla"), the Racing Association and Phumelela, signed on 16 April 2002;
- 4.4.1.16. Non-Confidential Final report of the Competition Commission in the matter of Africa Race Group (Pty) Limited v Phumelela Gaming and Leisure (Pty) Limited, Gold Circle (Pty) Limited and Phumelela Gold Circle Enterprises (Pty) Limited (Case No. 2011JUN0096) (undated);
- 4.4.1.17. Draft Memorandum of Agreement of Sale of the Arlington Racecourse between Phumelela and Africa Race Group;
- 4.4.1.18. Email correspondence between Ms Kema and Mr du Plessis of Phumelela dated 17 August 2012 and 4 and 7 January 2013;
- 4.4.1.19. Deeds of transfer of the land constituting the Arlington, Turffontein, Newmarket, Vaal, Gosforth Park, Bloemfontein, Kimberley Horse Racecourses.



4.4.2. Correspondence sent and received

- 4.4.2.1. A copy of a letter dated 16 July 2012, from the Public Protector addressed to the former Gauteng MEC of Finance and Economic Affairs, Mr Jabu Moleketi;
- 4.4.2.2. Response letter from the former Gauteng MEC of Economic Development dated 7 August 2012 addressed to the Public Protector;
- 4.4.2.3. A copy of a letter dated 5 March 2013, from Ms U Soni of *Messrs Burmeister, de Lange Soni Incorporated Attorneys* addressed to the Public Protector;
- 4.4.2.4. Letter from the Public Protector dated 7 August 2013 addressed to the former Acting Municipal Manager Mr. Johann Mettler, of the Nelson Mandela Bay Municipality;
- 4.4.2.5. Response letter from the former Acting Municipal Manager, Mr. Johann Mettler, of the Nelson Mandela Bay Municipality dated 29 August 2013 addressed to the Public Protector;
- 4.4.2.6. Letter from the Public Protector dated 27 September 2013 to Mr J Roodt of Roodt Incorporated Attorneys, assisting the Complainant;
- 4.4.2.7. Letter from the Public Protector dated 3 October 2013 addressed to the former Gauteng MEC of Economic Development, Mr Jabu Moleketi;
- 4.4.2.8. A letter dated 6 October 2013 from the former Gauteng MEC of Economic Development, Mr Jabu Moleketi addressed to the Public Protector;
- 4.4.2.9. A letter from Mr A Chaane, the Acting Head of Department, Gauteng Department of Economic Development dated 1 November 2013 addressed to the Public Protector;
- 4.4.2.10. A letter from the Public Protector dated 2 November 2013 addressed to the Chief Executive Officer of the Horse Racing Association, Mr I Wainstein;
- 4.4.2.11. A letter from Mr Wainstein dated 25 September 2013 addressed to the Public Protector;
- 4.4.2.12. Letters from Mr J Roodt of Roodt Incorporated Attorneys, acting on behalf of Phumelela Gaming and Leisure (Pty) Ltd. dated 30 October 2013, 13 February 2014, 27 February 2014 and 11 March 2014 respectively, addressed to the Public Protector;
- 4.4.2.13. Public Protector's correspondence dated 13 February 2014 and 27 February 2014 addressed to Mr J Roodt of Roodt Incorporated Attorneys on behalf of Phumelela Gaming and Leisure (Pty) Ltd.
- 4.4.2.14. A letter from the Public Protector addressed to the Chief Registrar of Deeds, Department of Rural Development and Land Reform Mr S Lefafa dated 11 March 2014; and
- 4.4.2.15. E-mail correspondences from the Public Protector dated 2 December 2014 and 8 December 2014 respectively, addressed to Mr Riaan du Plessis of Phumelela.



4.4.3. Interviews, Meetings and *in Loco* inspections conducted

- 4.4.3.1. Meetings were held on 15 August 2013 and 13 September 2013, between the Public Protector and , the Complainant and the following officials of the Gauteng Department of Economic Development, Adv P Holl: Chief Director: Governance; Adv F Njobe: Chief Director: Legal Services; Mr S Dlangalala: Director: Governance; as well as Mr Edward Lalume: Chief Operations Officer of the Gauteng Gambling Board;
- 4.4.3.2. Meetings were further held between the Public Protector and Ms Kema, on 17 April 2012, 14 May 2012, 17 May 2012, 20 February 2013, 30 April 2013, 1 August 2013, 20 August 2013, 5 September 2013, 19 September 2013, 18 October 2013 and 26 August 2014;
- 4.4.3.3. A meeting was held on 25 September 2014 between the Public Protector, Mr M Mampuru of the Gauteng Department of Economic Development, the Complainant and her attorney Ms U Soni and Adv P Holl, the Chief Director: Governance of the Gauteng Department of Economic Development;
- 4.4.3.4. On 6 April 2017, a meeting was also held with the Member of the Executive Council responsible for the Gauteng Department of Economic Development, Mr Lebogang Maile, MPL and his team, which included Messrs Ngoato Phadime, Peter Holl, Simon Masisi-Letele, Funeka Njobe, Gerry Hertzberg and Mr S Dewey. The meeting was also attended by the Chief Executive Officer of the Gauteng Gambling Board, Mr Steven Ngubeni who was in the company of his Chief Operations Officer, Mr Edward Lulambe and the Gambling Board's Legal Advisor, Mr Lucky Lukhwareni. The meeting was also attended by Ms Phindi Kema who was in the company of Mr Hilton Isaacson, and Justice Templeton Mageza.
- 4.4.3.5. Meeting held on 13 November 2017 between the Public Protector of the Public Protector and Mr Jabulani Moleketi; and;
- 4.4.3.6. On 15 March 2018, a meeting was also held with a former stakeholder in the Horseracing Industry in the Gauteng Province, Mr Alfred Edward "*Ian*" Jayes who is also an interested party in the matter.



- 4.4.3.7. Meetings called upon by way of a subpoena in terms of sections 7(4) and (5) of the Public Protector Act, were held with all relevant stakeholders who the Public Protector had reason to believe would be of assistance to her in the investigation of this matter and hearings were thus held with the complainants, the former MEC for Finance and Economic Affairs in the Gauteng Provincial Government who also concluded the Memorandum of Understanding with the Gauteng Horseracing Industry, Mr Jabulani Moleketi.
- 4.4.3.8. Subpoenas were also issued against Messrs. Steven Ngubeni and Edward Lalumbe of the Gauteng Gambling Board, the former Acting Head of the Department of Economic Development in the Gauteng Provincial Government, Mr Makhukhu Mampuru, Mr Ian Jayes, Mr Robin Bruss of the National Horseracing Authority, Mr Sean Coleman of the South African Bookmakers Association, Adv Brett Maselle, Mr Jeremy Marshall, Mr Peter Gibson, Mr Owen Heffer,
- 4.4.3.9. Subpoenas were further issued against Messrs Bernard Kantor and Rian Du Plessis of Phumelela, as well as Larry Weinstein, Barry Walters whose subpoenas were deferred following a court order interdicting the holding of public hearings in the investigation of the matter, and Lyndon Barends of the National Horseracing Authority.
- 4.4.3.10. On 4 September 2018, the Public Protector intended to hold public hearings into the matter. Phumelela obtained a Court Order interdicting the hearings hence it was decided to proceed with the investigation employing one on one interviews with complainants, organs of state complained against as well as all other relevant stakeholders who were willing to assist the Public Protector by participating in the investigation.
- 4.4.3.11. On 21 September and 9 October 2018, the Public Protector met with representatives of Phumelela Gaming and Leisure (Pty) Ltd under the stewardship of the entity's Chairperson of the Board of Directors, Mr Bernard Kantor with a view to settling the dispute. However, those negotiation could not bear fruit as the parties could not reach a settlement agreement.

4.4.4. Legislation and other prescripts

- 4.4.4.1. The Constitution of the Republic of South Africa, 1996;
- 4.4.4.2. The Public Protector Act 23 of 1994;
- 4.4.4.3. The Horse-Racing and Betting Ordinance 24 of 1978



- 4.4.4.4. The Gauteng Gambling and Betting Act No. 4 of 1995 (as amended);
- 4.4.4.5. The Deeds Registries Act No. 47 of 1937;
- 4.4.4.6. The Competition Act No. 89 of 1998.
- 4.4.4.7. Special Investigating Units and Special Tribunals Act No 74 of 1996

4.4.5. **Websites consulted/ electronic sources**

- 4.4.5.1. www.publicprotector.org;
- 4.4.5.2. www.gded.gov.za;
- 4.4.5.3. www.srsa.gov.za;
- 4.4.5.4. www.gqb.org.za;
- 4.4.5.5. www.phumelela.com;
- 4.4.5.6. www.cipc.co.za;
- 4.4.5.7. www.dti.gov.za;
- 4.4.5.8. www.nhra.co.za;

4.4.6. **Case law**

- 4.4.6.1. *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT143/15; CCT171/15) [2016] ZACC 11; (2016) (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016);
- 4.4.6.2. *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (5) BCLR 391 (CC)



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. Issue 1: Whether Mr Jabulani Moleketi had the requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng, which resulted in the conclusion of the Memorandum of Understanding in 1997, if so, whether the conduct constitute maladministration and improper conduct;**

Issues that are Common Cause

It is not disputed that;

- 5.1.1. The Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi and Messrs Brian Mehl, Peter Jaeger and Derrick Wiid, representing the Gauteng Horseracing Industry, concluded a Memorandum of Understanding (MoU) on 30 June 1997, which was preceded by protracted discussions and negotiations between the parties based on advice obtained from independent professional consultants, the object of which was to make the industry more competitive and economically viable.
- 5.1.2. As a consequence of the said Memorandum of Understanding, an entity under the name and style *Phumelela Gaming and Leisure (Pty) Ltd (Phumelela)* was established and took control of the horseracing industry in the Republic thus corporatising (privatising) the industry. Various assets were bequeathed to Phumelela at no cost to them and only for the benefit of the entity's shareholders.
- 5.1.3. As a result of the Memorandum of Understanding, Phumelela was in a position to coerce other provinces such as the Free State and the Eastern Cape provinces to also follow suit and join in the corporatisation of the horseracing industry in the Republic.



Issues that are in dispute

- 5.1.4. The issue for my determination is whether the Executive Council of the Gauteng Provincial Government, granted the MEC for Finance and Economic Affairs, Mr Jabulani Moleketi an authority to act on its behalf during the discussions, negotiations and resolutions taken in concert with the Gauteng Horseracing Industry to corporatise (privatise) the horse racing the industry in the Gauteng Province;
- 5.1.5. I also had to determine whether Mr Jabulani Moleketi had the mandate from the Gauteng Provincial Government Executive Council to conclude the Memorandum of Understanding (MoU) signed on 30 June 1997, which provided for *inter alia* the corporatisation of the industry of the horseracing in the Gauteng province.
- 5.1.6. Further thereto, I had to determine whether the corporatisation of the horseracing industry in the Gauteng Province was in the best interests of the members of the public and the South African citizens who were affectionate of horseracing in the Republic.

The Gauteng Provincial Government's Cabinet Resolution taken on 16 April 1997 under Reference Number: 083 of April 1997

- 5.1.7. In a Gauteng Provincial Government's Cabinet Memorandum under reference number 083 of April 1997, under the subject, "*Transformation of the Gauteng Horse Racing Industry*" the Gauteng Provincial Government's Executive Council (EXCO) took a resolution authorising and approving the terms of the agreement between the Gauteng Provincial Government and the Gauteng Horseracing Industry and the implementation of same as binding.
- 5.1.8. The purpose of the Cabinet Memorandum was to request the Provincial Cabinet (EXCO) to note and approve the agreement between the Department of Finance and Economic Affairs and the Horseracing Industry and further approve the implementation of the agreement.
- 5.1.9. It also approved the appointment of Messrs. Sello Rasethaba, a Member of the Gauteng Gambling and Betting Board, Mr Michael Maher, who is also a member of the Board as well as Mr Mpho Ramafalo who is an official from the Provincial Department of Finance and Economic Affairs as members of the Interim Board of the Horse Racing Industry in Gauteng.



5.1.10. Paragraph 3 of the memorandum seeks to provide a background on the Horseracing Industry in the Gauteng Province and states that this particular sporting field has been run as exclusive clubs with the privileged few individuals participating. According to the memorandum, to achieve the objectives of inclusiveness and empowerment, the industry was instructed to corporatise by 31 December 1996.

5.1.11. It is further stated in the memorandum that the instruction referred to above entailed that the Racing Industry would become one organised institution that would be run and managed along commercial lines. Ostensibly, this instruction resulted in a series of negotiations between the department and the Racing Industry on the process of corporatisation. Apparently, the protracted negotiations led to an agreement in principle on 27 March 1997.

5.1.12. Prior to that, and on 6 November 1996, the Provincial Cabinet approved the negotiations with the horseracing industry as well as the process to be followed in reaching an agreement between the provincial government and the industry with regard to the "privatisation" of the sport. Attached to the Cabinet Memorandum was a copy of the proposed Memorandum of Understanding to be entered into between the Gauteng Provincial Government and the Gauteng Horseracing Industry.

The Memorandum of Understanding entered into by and between the Gauteng Provincial Government and the Gauteng Horseracing Industry on 30 June 1997

5.1.13. On 30 June 1997, the Gauteng Provincial Government, duly represented by the Member of the Executive Council responsible for the Department of Finance and Economic Affairs, Mr Jabulani Moleketi and the Horse Racing Industry in Gauteng including the three Gauteng Clubs, duly represented by Messrs Brian Mehl, Peter Jaeger and Derrick Wiid, entered into a Memorandum of Understanding (MoU).

5.1.14. The purpose of the Memorandum of Understanding was to re-organise and restructure the business of Racing Industry into a single corporate structure that would be listed in the Johannesburg Stock Exchange (JSE) as soon as practically possible. This new company was expected to have a broad base of shareholders with specific emphasis on previously disadvantaged communities. **To give effect to the MoU, the parties agreed and accepted that;**

5.1.14.1. The assets of the Totalisator Agency Board (Transvaal) (TAB), the Highveld Racing Authority (HRA) and the existing clubs would be incorporated into a new company and for the purposes of listing in the JSE, the shareholders of the new company would be comprised of the following;

The Racing Trust	30%
Black Economic Empowerment Groups	22.5%
Strategic Investor(s) Management	20%
Employee Share Program	2.5%
General Public	15%
Racing Public	10%

5.1.14.2. According to the agreement, the terms of the charter of the Racing Trust including the closure clause was expected to have been drafted by the Interim Board and approved by the parties to the MoU. Further thereto and in terms of the agreement, a Racing Association comprising the owners, the club members and other persons or groups of persons that the interim Board would agree upon, representing racing in Gauteng was expected to make available the image of racing to this new company in terms of a laid-down stakes policy.

5.1.14.3. Paragraph 2 of the MoU, provides for the implementation of the agreement and states in sub paragraph 2.1 that there shall be an Interim Board comprising of six (6) members, with three (3) appointed by the racing industry and another three (3) by the Gauteng Provincial Government.

5.1.14.4. In terms of paragraph 2.2 of the Memorandum of Understanding, the Interim Board was expected to draft an implementation plan within two (2) months of the signing of the Memorandum of Understanding, which was anticipated to include issues relating to the selection of black empowerment groups, strategic investor(s) partners, and/or management groups, compiling the racing trust’s charter, ensuring the incorporation of racing assets into the new company, preparing the new company for hand-over to the new Board elected by the new shareholders, and dealing with all other related issues.



- 5.1.14.5. According to paragraphs 2.3 and 2.4 of the Memorandum of Understanding the approval of the plan referred to above, was expected to take place before 15 August 1997 and once approved, the Interim Board would ensure that the plan is implemented. It is an express term of the Memorandum of Understanding that both the Gauteng Provincial Government and the Racing Trust would be equitably compensated for the assets that were transferred to the new company.
- 5.1.14.6. Paragraph 3 of the Memorandum of Understanding provides for matters of Taxation and states that it is the prerogative of the Gauteng Provincial Government to decide on the level of taxation that it would impose on the new company. It was accepted that once listing in the JSE had occurred, the rate of the Totalisator tax would be five percent (5%) on turnover and that the tax would be applied on a basis consistent and equitable with that imposed on other forms of gambling.
- 5.1.14.7. In terms of paragraph 4 of the Memorandum of Understanding it was agreed and accepted that in order to provide for the protection for the new company, an investigation should be conducted into the possibility of providing an initial exclusive Totalisator license to the new company for a period of up to ten (10) years. It was further recognised that the new company would be eligible to apply for gambling or gaming licenses in accordance with the provisions of the Gauteng Gambling and Betting Act and Policy.
- 5.1.14.8. It was further agreed and accepted that a three percent (3%) levy on bookmakers, being fifty percent (50%) of the then six percent (6%) levy on bets would be passed on to the new company.
- 5.1.14.9. In conclusion it was agreed and accepted that if necessary, legislation would be introduced to the Gauteng Provincial Legislature to give effect to the Memorandum of Understanding. The Memorandum of Understanding was signed in Johannesburg on 30 June 1997 as follows:



Both the Provincial Government and the Racing Trust will be equitably compensated for the assets that are transferred to the new company.

3) Taxation

It is the prerogative of Government to decide on the level of taxation it will impose on the new company. It is accepted that, once listing has occurred, the rate of totalisator tax will be 5% (five percent) on turnover and that the tax will be applied on a basis consistent and equitable with that imposed on other forms of gambling.

It is agreed that a 3% (three percent) levy on Bookmakers, being 50% (fifty percent) of the current 6% (six percent) levy on bets, would be passed on to the new company.

4) Licences

In order to provide for protection to this new company it was agreed to investigate the possibility of providing an initial exclusive totalisator licence to the new company for a period of up to 10 (ten) years.

It is recognised that the new company will be eligible to apply for gambling / gaming licences in accordance with the Gauteng Gambling and Betting Act and policy provisions.

General

If necessary, legislation will be introduced to the Gauteng Provincial Legislature to give effect to this memorandum of understanding.

Thus done and witnessed at Johannesburg on this the 30th Day of JUNE 1992

P. Moleketi
FOR AND ON BEHALF OF THE GAUTENG
PROVINCIAL GOVERNMENT DULY AUTHORISED

Daniel M. ...
FOR AND ON BEHALF OF THE GAUTENG
HORSE RACING INDUSTRY DULY AUTHORISED

5.1.15. During the investigation, it was established that, Mr Moleketi's correspondence of 15 December 1995 addressed to the Chairperson of the HRA, Mr J B Walters was the set in motion the privatisation of the Horseracing industry in South Africa. Subsequently and as a result of the directive from Mr Moleketi, it was decided that a business plan be drafted and all other racing clubs as well as the industry stakeholders be encouraged to support the idea of the privatisation of thoroughbred horseracing in Gauteng.

5.1.16. During or about 21 September 1992, the former State President of the Republic of South Africa, His Excellency, President F W De Klerk appointed a commission of inquiry headed by the Judge President of the Natal Division of the Supreme Court (at the time), Justice James Allan Howard. The initial terms of reference of the inquiry were to inquire into and report on the questions concerning lotteries, sports pools and scratch card games.

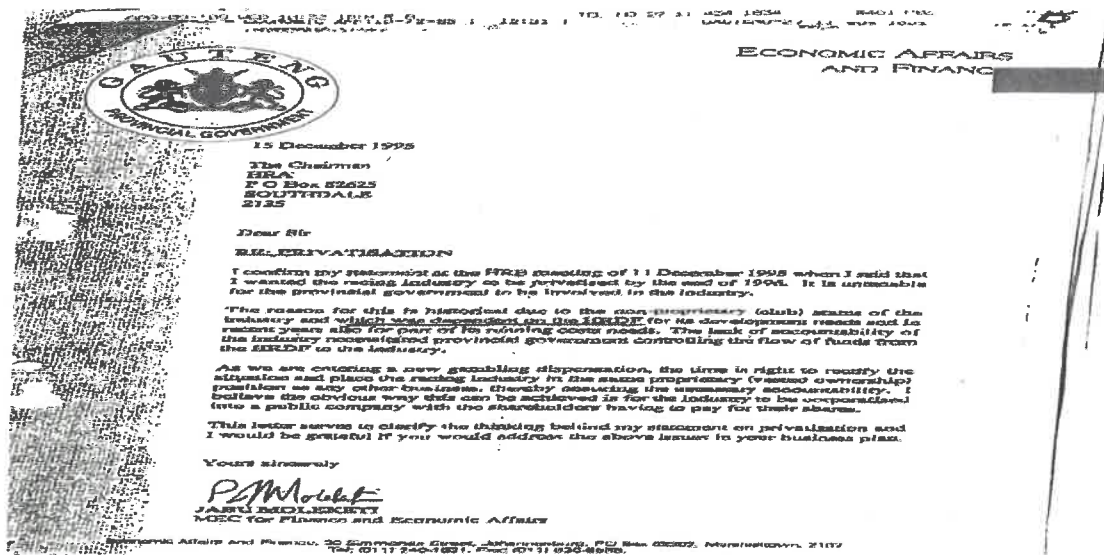


- 5.1.17. On 28 November 1992, the terms of reference were extended to include questions relating to gambling games that were prohibited by law. In March 1993, the commission issued its report and in paragraph 2.2 it is stated that at the time, betting in horseracing was the only legalised form of gambling in South Africa, either, on the Totalisator or with a licence to bookmakers. In paragraph 4.1, it is noted that, *"horse-racing is a major industry and a vital sector of the South African economy, that it is peculiarly vulnerable to competition from alternative forms of gambling such as lotteries and casino gaming, and that such forms of gambling should not be legalised without measures to promote the co-existence and viability of horse-racing."*
- 5.1.18. According to Justice and in paragraph 4.7, it is stated that, *"There is no evidence to suggest that the horse-racing industry in South Africa has been adversely affected to any substantial degree by casino gambling in the TBVC states."* In paragraph 4.9 of the report, it is stated that, *"Although it is not normally the function of government to protect one industry against another, gambling and its regulation and control are matters in the public domain. Throughout the civilised world, it is strictly controlled in the public interest, and not necessarily in accordance with the free market principles. We consider it to be in the public interest that the horse-racing industry remains viable and that reasonable measures should therefore be taken to ensure its survival in the face of competition from alternative forms of gambling."*
- 5.1.19. On 16 July 2012, enquiries about the complaints were made with the Department of Economic Development and Planning. On 7 August 2012, the department provided the Public Protector with information and documentation on the matter. They also brought to the attention of the Public Protector that **Messrs. Bain and Company**, were an international firm of consultants that were appointed to advise the industry on the issue of privatisation (corporatisation) of the horseracing industry and that **Messrs Deloitte and Touché** assisted the departmental technical committee on the evaluation and negotiation process for the privatisation of the industry. Further engagements were made by the department and the Public Protector culminating in various meetings.
- 5.1.20. On 27 September 2013, enquiries were also made with Phumelela Gaming and Leisure (Pty) Ltd, (Phumelela) the new company that was established subsequent to the corporatisation of the horseracing racing industry in Gauteng and in accordance with the approval of the provincial EXCO. Phumelela instructed its legal representatives, Messrs Roodt Incorporated to respond to the Public Protector enquiries on its behalf.



5.1.21. Phumelela responded on 30 October 2013, and stated that pursuant to the Memorandum of Understanding entered into between the parties, the thoroughbred horseracing industry in Gauteng was reorganised and restructured. In this regard, Phumelela was incorporated as a public company and listed on the JSE. Further thereto, a Thoroughbred Horseracing Trust for purposes of promoting the interests of thoroughbred horseracing and transformation in the racing industry was established as well as the establishment of the Racing Association comprising of racehorse owners, club members and certain group of persons.

5.1.22. It was also confirmed that Phumelela acquired the assets of the *Totalisator Agency Board of Transvaal* ("the TAB"), the Highveld Racing Authority ("the HRA") and the Gauteng Clubs. In a Highveld Horseracing and Betting Board meeting held on 11 December 1995, the MEC for Finance in Gauteng, Mr Jabulani Moleketi, expressly stated that , the government' s intention with "privatisation" (corporatisation) was that the racing industry should be run according to normal business principles and compete with other forms of gambling in a free market environment. In a letter dated 15 December 1995, Mr Moleketi confirmed his statement and said:



5.1.23. According to the correspondence from Phumelela, the entity entered into disposal agreements and thus acquired Totalisator Agency Board (Transvaal), Transvaal Racing Club and Johannesburg Turf Club (Turffontein Club), Newmarket Turf Club, Germiston Sporting Club and Benoni Turf Club (Gosforth Park Club) the Horseracing Association (HRA), HRA Transport (Pty) Ltd, and North Rand Training Centre (Pty) Ltd.



5.1.24. As a result of the disposal of the above assets, an amount of R115 500 000.00 was credited into the books of account of Phumelela Gaming and Leisure (Pty) Ltd. Subsequently, so it is stated, racing industries in other provinces also wished to join the corporatisation process and Phumelela entered into further disposal agreements under which it agreed to acquire Griqualand West Racing Club (Kimberley Racecourse), Totalisator Agency Board (Free State), Bloemfontein turf Club (Bloemfontein Racecourse), Vaal Turf Club (Vaal Racecourse), East Cape Racing Club (Fairview and Arlington Racecourses).

5.1.25. However, and contrary to the response by Phumelela to enquiries by the Public Protector, a circular was issued to members of the Bloemfontein Turf Club following a special general meeting held on 25 November 1996, advising members of the club that the corporatisation of Gauteng racing is at an advanced stage. The message read as follows:

CIRCULAR TO MEMBERS OF THE BLOEMFONTEIN TURF CLUB

CORPORATISATION

1. HISTORY

As reported to Members of the Special General Meeting held on 25 November 1996, the Club had various options open to it and the Members at that Meeting gave a Mandate to the Stewards to negotiate with the Gauteng Steering Committee and to report back to the Members before any final decision was made.

The corporatisation of Gauteng racing is at an advanced stage and Gauteng have submitted a proposal for the inclusion of the Free State Racing Industry in the Gauteng Corporatisation process, and discussions are being held for the possible inclusion of Free State Racing.

A Mandate to negotiate the proposed basis for the inclusion of the Free State Racing Industry into the Gauteng Corporatization process was given by Free State Province on 1 September 1997.

A negotiating team has been appointed by the MEC, Finance and Economic Affairs Free State Province, Mr. Z.A. Dingane and comprises:

- Mr W Segal - Free State Racing and Betting Board
- Mr C W Botha - Chairman Vaal Turf Club
- Mr R Aboud - Chairman Bloemfontein Turf Club
- Mr J Blair - Free State Racing and Betting Board

Mr Humphrey L Ngomongwe, Deputy Director General for Finance and Economic Affairs will also be part of the Provincial team.

2. UNDERSTANDING WITH THE FREE STATE PROVINCIAL GOVERNMENT

Mr Z.A. Dingani, MEC for Finance and Economic Affairs of the

5.1.26. In the Eastern Cape, the East Cape Racing Club Management Board issued a circular to members of the East Cape Racing Club, advising of the primary long term objective which the Club could achieve following an information meeting addressed by the Gauteng Interim Board on the Gauteng corporatisation process. Paragraph 4 of the circular reads as follows:



3.4 Disposal Of Assets.

Each of the three racing Clubs (Turfontein, Newmarket and Gosforth Park), will dispose of its entire business as a going concern, together with all its assets and liabilities, to the new company. The new company will allot shares to the Racing Trust in consideration of all these businesses, so that initially the Racing Trust will be the sole shareholder to whom the full value for the disposals will accrue. No consideration will be paid to any of the Racing Clubs themselves.

3.5 Shareholders Of The New Company:

It is envisaged that initially the Racing Trust will be the sole shareholder of the new company. The other groups of shareholders will then be introduced. The Black economic empowerment groups and the strategic investor(s)/management group(s) will be introduced as and when they are identified and appropriate arrangements made with them.

The racing public and the general public will be introduced by way of a public offer of shares which would be listed on the Johannesburg Stock Exchange. The racing public will be made up of all the different participants in the racing industry in Gauteng, including Members of the three racing Clubs and owners. While they will be required to pay the same price for their shares as the general public in the public offering, they will enjoy a preferent allocation. All shares issued after those issued to the Racing Trust will be issued at a market related price.

3.6 Members Rights And Privileges:

The proposed new Racing Association will secure its Members' rights and privileges by agreement with the new company.

4. East Cape Racing Club Joining The Gauteng Corporatisation Process:

The primary objective of the East Cape Racing Club is to ensure the future viability of the sport of horse racing in the Eastern Cape. It is with this in mind that the Board of Stewards, as well as those Members of the Club who were present at an information meeting held recently, were addressed by the Gauteng Interim Board on the process outlined above.

The Board of Stewards is of the opinion that subject to successful negotiations with the new corporate company and the Racing Association (which would include a stakes policy) and the Provincial Government (which would include a tax policy) the primary long term objective of the Club as stated above can be best achieved.

Should the East Cape Racing Club decide to join the corporatisation process, the Club would dispose of its entire business as a going concern, together with all its assets and liabilities to the new corporate company. The club and its owners would be relieved of all obligations on the part of NLRWC, which would seek to secure the future of horse racing in the Eastern Cape Province.

Special General Meeting:

If the East Cape Racing Club is to join the Gauteng corporatisation process, all the Club's assets would have to be disposed of to the new company. In terms of paragraph 8.2 of the Rules and Regulations (Constitution) of the East Cape Racing Club no immovable property of the Club may be sold or mortgaged nor may the major assets of the Club be sold or mortgaged or in any way encumbered, unless such sale, mortgage or encumbrance has been approved by the resolution of not less than three-fourths of the votes of Members present at a Special General Meeting of the Club of which at least 30 days notice setting out details of the assets proposed to be sold, mortgaged or encumbered and the reasons therefore has been given to every Member of the Club in writing and at which meeting at least one half of the Members of the Club entitled to vote are present.

Accordingly, a Special General Meeting of the Members has been convened by the Stewards to take place on Wednesday, 20th January 2009 at 10:00 for the purpose of obtaining the approval of the Members to the East Cape Racing Club joining the Gauteng corporatisation process and to obtain the Members' authorisation, in so far as and to the extent that their authorisation is necessary, for the Stewards to do everything on behalf of the East Cape Racing Club to join the Gauteng corporatisation process. The authorisation sought from the Members includes a specific authority to dispose of and transfer the whole of the East Cape Racing Club's business and undertaking together with all its assets, property, revenue and liabilities for those purposes.

RESOLUTION:

Full details of the Resolution are contained in the Notice of Meeting to which the Circular to Members is attached.

General:

Members are urged to attend the Special General Meeting and participate in the decision making at that meeting. The matters to be considered are clearly of the greatest importance for the whole of the Racing Industry in the Eastern Cape and all who are involved in it.

5.1.27. In his written response dated 06 October 2013, Mr. Moleketi stated that "it is also important to point out that there are no provisions in the MoU in terms of which I, in my capacity as the representative of the Gauteng Provincial Government, either directly or indirectly sought to bind any other province to the principles of the MoU.

I am acutely aware of the provisions of, inter alia, Chapter 6 of the Constitution of the Republic of South Africa and Part A of both Schedule 4 and 5 which would not permit any one province from infringing on the competence of another. As such any allegation that the MoU bound provinces other than the Gauteng Provincial Government is baseless and without merit.(sic)".



5.1.28. Apparently Phumelela allotted and issued to the Racing Association, five (5) ordinary shares at a subscription price of 12.5 cents in aggregate. Phumelela denied that the assets referred to above were transferred at no cost to them. Further thereto, it is their view the transaction did not require public participation process as there was no parliamentary piece of legislation as the racing clubs were private legal subjects.

Phumelela shareholding from inception until its listing on the Johannesburg Stock Exchange.

5.1.29. As indicated in paragraph 8.1.15 herein above, it was agreed and accepted by the parties that in order to give effect to the Memorandum of Understanding, for the purposes of listing the new company (subsequently Phumelela) on the JSE, the shareholders of the new company would be comprised of a broad-base shareholders with emphasis on the previously disadvantaged communities (HDI's).

5.1.30. On 18 February 2014, enquiries were made with the JSE regarding Phumelela' shareholding from its inception until its listing in 2002. The JSE responded on 26 May 2014, and stated that it does not have the information requested on the basis that it did not keep the information requested, but same could be obtained from Phumelela's Transfer Secretary.

5.1.31. Nevertheless, the JSE submitted details of Phumelela' subsidiary companies which was extracted from its 2002 prospectus and its subsequent annual reports from the date of its listing. The information extracted denotes the following:



DETAILS OF SUBSIDIARY COMPANIES

Name of subsidiary	Date and place of incorporation (South Africa unless stated otherwise)	Issued ordinary share capital (R)	Percentage held directly or indirectly	Effective date of becoming a subsidiary	Principal business	Directors
Highveld Racing Authority Technical Services (Proprietary) Limited (Registration number 1983/00126/07)	7 January 1983 Pretoria	8	100	1 April 1999	Television broadcast	A F Wintour
HRA Racehorse Transport (Proprietary) Limited (Registration number 1990/007294/07)	5 December 1990 Pretoria	3 600	100	April 1999	Dormant	A F Wintour
Rand Sporting Club (Proprietary) Limited (Registration number 1923/007377/07)	16 January 1923 Pretoria	200	100	April 1999	Property holding	A F Wintour
Hadrian Investments Limited (Registration number 1971/000631/07)	15 January 1971 Pretoria	200	100	1 April 1999	Property holding	A F Wintour
Shelani Investments Limited (Registration number 1970/015382/07)	23 January 1970 Pretoria	200	100	April 1999	Property holding	A F Wintour
Injector Investments Limited (Registration number 1970/015383/07)	23 November 1970 Pretoria	200	100	1 April 1999	Property holding	A F Wintour

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Name of subsidiary	Date and place of incorporation (South Africa unless stated otherwise)	Issued ordinary share capital (R)	Percentage held directly or indirectly	Effective date of becoming a subsidiary	Principal business	Directors
Chenford Investments (Proprietary) Limited (Registration number 1970/015381/07)	23 November 1970 Pretoria	200	100	April 1999	Property holding	A F Wintour
Transvaal Racing Holdings (Proprietary) Limited (Registration number 1935/022224/07)	18 June 1946 Pretoria	17 500	100	1 April 1999	Property holding	A F Wintour
National Professional Investors (Proprietary) Limited (Registration number 1990/019816/07)	8 September 1990 Pretoria	100	100	1 April 1999	Dormant	A F Wintour
Phumelela Gaming and Leisure Services (Proprietary) Limited (Registration number 1990/02701/07)	21 October 1992 Pretoria	1	100	1 April 1999	Management services	A F Wintour, A F Wintour, A F Wintour, A F Wintour, A F Wintour
International Training Centre (Proprietary) Limited (Registration number 1980/002202/07)	22 September 1985 Pretoria	1	100	1 April 1999	Dormant	A F Wintour
Trade (Proprietary) Limited (Registration number 1972/005202/07)	23 May 1972 Pretoria	1 070	100	1 December 1999	Property holding	A F Wintour
Totipotator Property Investments (Proprietary) Limited (Registration number 1977/002315/07)	25 July 1977 Pretoria	50 000	100	1 December 1999	Property holding	A F Wintour

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2002

<u>Name of subsidiary</u>	<u>Date and place of incorporation (South Africa unless stated otherwise)</u>	<u>Issued ordinary share capital (R)</u>	<u>Percentage held directly or indirectly</u>	<u>Effective date of becoming a subsidiary</u>	<u>Principal business</u>	<u>Directors</u>
East Cape Racing (Proprietary) Limited (Registration number 1997/020640/07)	1 December 1997 Pretoria	100	100	8 December 1999	Thoroughbred horseracing and betting	M W Rishworth
TAB North West (Proprietary) Limited (Registration number 1996/000641/07)	23 January 1996 Pretoria	4 000	10 (Note 1)	5 November 2001	Totalisator betting	B D Mehl J S Tennant

Note 1:
In terms of the agreement with all the other shareholders of Tab North West, Phumelela appoints and controls the board members and has full management authority and it is therefore treated as a subsidiary in terms of the Act.

5.1.32. It was established from the information obtained during the investigation that the entities listed hereunder were selected by the Interim Board as Black Empowerment Groups in Phumelela, as contemplated by the MoU:

- (a) Vela Phumelela Investments (Pty) Limited;
- (b) Indyebo Investments (Pty) Limited; and
- (c) Dihla Investments Holdings (Pty) Limited.

5.1.33. It was also established that Gride Investments (Pty) Limited, joined the entities herein referred to above as part of Black Empowerment Group contemplated by the MoU on 21 June 2000.

5.1.34. On 25 September 2018, I requested company registration documents from the *Companies and Intellectual Properties Commission* (CIPC), with a view to determine the new company shareholding after listing with the JSE. From the information received, I have noted that the current shareholding of the new company is as follows;

No.	Entity Name	Directors	%
1.	Thoroughbred Horse Racing Trust	Unknown	26,72
2.	Kalamojo Trading & Investments (Pty) Ltd	Potgieter Stefanus Johannes du Toit; Bernard David Herberg; and Bernard Kantor	9,19
3.	IHH Company (Pty) Limited	Phillipa Anastassopoulos	8,58
4.	Yerranzano Property Investments Limited	Unknown	4,39



5.	Gride Investments Holdings (Pty) Limited	Gideon Napoleon Sam; Peter Orde Goldhawk; Hajera Kajee; and Leslie Daniel Williams	4,17
6.	Dihla Investment Holdings (Pty) Limited	Nomsa Martina Matlala; Elijah Nkosi; Musawenkosi Arthur Zwane; and Letlhoo Merika Jacob Tsitsi	3,66
7.	Du Plessis, WA	Unknown	3,64
8.	Vela Phumelela Investments	Tlou Clement Mabotja; Ndeleni Dupree Albert Vilakazi; and Ntsikane Simon Mahlangu	3,43
9.	Racing Association	Unknown	3,08

NB: The information obtained during the investigation indicates that Mr Bernard Kantor resigned as a Director of Kalamojo Investments (Pty) Ltd on 16/02/2018.

Taxation of the new company

5.1.35. As indicated in paragraph 8.1.15.8 herein above, the parties to the Memorandum of Understanding agreed and accepted that a three percent (3%) levy on bookmakers, being fifty percent (50%) of the then six percent (6%) levy on bets would be passed on to the new company.

5.1.36. On 9 September 2018, I conducted an interview with the Chief Operations Officer (COO) of the Gauteng Gambling Board, Mr Edward Lalumbe (Mr Lalumbe), the object of which was to determine whether it was rational for the Gauteng Gambling Board to pass on, to the new company, a three (3%) percent levy on bookmakers, being fifty (50%) percent of the six (6%) percent levy on bets.

5.1.37. In his response to my inquiries Mr Lalumbe made reference to sections 13, 45 and 46 of Horse-Racing and Betting Ordinance No. 24 of 1978 (the Ordinance), as well as to the Horse-Racing Ordinance Regulations and stated that *"prior to the corporatisation of the horseracing industry, the taxation of the racing industry was legislated by the Horse-Racing and Betting Ordinance No. 24 of 1978."*



5.1.38. He continued by stating that in considering the provisions of the Ordinance, *inter alia*:-

- (a) taxes were collected from gross takings of totalisators for the benefit of the Province,
- (b) taxes were collected from pay-outs by bookmakers, for the benefit of the Province;
- (c) levies were held by the operator of a totalisator as commission; and
- (d) monies were paid to the racing club which held the specific race-meeting or held by the Board.

5.1.39. On 26 October 2018, I conducted an interview with the Chief Executive Officer of the Gauteng Gambling Board, Mr Steven Ngubeni (Mr Ngubeni) with a view to determine the amount of levies collected by the Gauteng Gambling Board and later passed on to Phumelela since its inception and listing on the JSE.

5.1.40. It was confirmed that for the period 1997 to 2016, an amount of R711 578 000.00 emanating from the bookmaker's tax and levies was passed on to Phumelela by the Gauteng Gambling Board. Hereunder a copy of a distribution statement submitted by the Gauteng Gambling Board:

**Gauteng Gambling Board
Bookmaker Tax distributions and payments to Phumelela**

Year	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Gauteng Bookmaker tax collections	22497	40021	30953	25635	20236	21073	26002	22581	23950	27563	33470
Gauteng Bookmaker levies collections (6%)	4438	7828	21956	48904	37766	37500	46458	40784	43332	49620	55824
PGL Distribution (3%)	2219	3914	10978	24402	18883	18750	23229	20392	21665	24810	27912
Minus the Handling Fee for GGB	72	72	72	72	72	72	72	72	72	72	72
Phumelela payments	2147	3842	10896	24330	18811	18078	23157	20320	21594	24738	27840

Year	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Gauteng Bookmaker tax collections	37160	36518	35496	44229	51914	65182	78224	93439	115961	131186	173591
Gauteng Bookmaker levies collections (6%)	61028	63488	63392	71394	80902	95018	106902	103570	117756	126350	143602
PGL Distribution (3%)	30614	31744	31696	35697	40151	47509	54801	51785	58878	63175	71801
Minus the Handling Fee for GGB	72	72	72	240	240	240	240	240	240	240	240
Phumelela payments	30442	31672	31624	35457	39911	47299	54161	51545	58638	62935	71561

Totals amounts collected (1997-2018)
Gauteng Bookmaker tax collected = 1155081
Gauteng Bookmaker levies collected = 1428012
PGL Distribution = 714506
Minus the Handling Fee for GGB = 2928
Phumelela Payments = 711578

* Distribution description TAB TVL becomes Phumelela 1999
 ** collection on behalf of other provinces from inception until 2000
 *** The figures above are in millions (000)



Utilisation of the Memorandum of Understanding to inhibit new entrants from participating in the industry

5.1.41. Ms Phindiwe Kema alleged that the approval granted by the Gauteng Provincial Government for the corporatisation of the industry in the province to the NHA, gave Phumelela and Gold Circle unfair preference and dominance in the industry, including totalisator licences, as well as assets belonging to the racing industry which was used by the latter to make it difficult for new entrants to participate in the industry.

5.1.42. On 04 September 2018 the first Complainant alleged that following the conclusion of the Memorandum of Understanding between the parties in the Gauteng Province, members of the Gauteng Horseracing Industry improperly utilised the said agreement to entice other provinces, including the Free State and Eastern Cape Provinces to join in the corporatisation process in the Gauteng Province, thereby making it difficult for new entrants to participate in the mainstream economy.

5.1.43. In his response dated 06 October 2013, Mr Jabulani Moleketi stated that; *"it is also important to point out that there are no provisions in the MoU in terms of which I, in my capacity as the representative of the Gauteng Provincial Government, either directly or indirectly sought to bind any other province to the principles of the MoU. I am acutely aware of the provisions of, inter alia, Chapter 6 of the Constitution of the Republic of South Africa and Part A of both Schedule 4 and 5 which would not permit any one province from infringing on the competence of another. As such any allegation that the MoU bound provinces other than the Gauteng Provincial Government is baseless and without merit."*

5.1.44. On the other hand, the GDFEA, in a written response from the former Head of the Department, Mr Albert Chanee dated 01 November 2013, stated that;

"Government's involvement was merely to encourage the industry to organise itself in such a manner as it can compete with other forms of gambling. Various clubs organize themselves as an industry and appointed representatives to engage government."



The government was not involved in the actual negotiations between the various members of the industry or racing turf clubs. Accordingly the disposal and sale of assets between various clubs and the new company to be formed which ultimately became Phumelela was between industry players.”(sic)

5.1.45. It was established during the investigation that in or around September 2010, *Africa Race Group*, duly represented by Ms Phindiwe Kema, initiated negotiations with Phumelela which were aimed at ARG purchasing the Arlington Racecourse, which was already licenced and allocated 36 racing days/meetings at a cumulative purchase price of R50 million, nevertheless, the negotiations were struck with insurmountable obstacle on account that:-

- (a) Phumelela swiftly applied to the Eastern Cape Gambling Board (ECGB) for the amendment of the terms of the Arlington Racecourse licence, so that such licence and the Arlington race meetings be transferred to Fairview Racecourse located in Port Elizabeth; and
- (b) that Africa Race Group, upon the successful purchase of Arlington, must utilise Phumelela’s totalisator licence and betting platforms in order to run its horseracing business in Arlington.

5.1.46. Africa Race Group found Phumelela’s demands offensively unreasonable and anti-competitive and as a consequence thereof, ARG lodged a complaint with the Competition Commission (CC) on 9 June 2011, alleging horizontal and restrictive practices in the horseracing industry, under reference ***Africa Race Group (Pty) Limited v Phumelela Gaming and Leisure (Pty) Limited, Gold Circle (Pty) Limited and Phumelela Gold Circle Enterprises (Pty) Limited-2011JUN0096***, which was later amended on 25 January 2012, to include the NHA as a third Respondent.

5.1.47. Consequently, on 8 October 2014, the Competition Commission was requested to provide an Investigation Report in connection therewith. It was established from a Final Report submitted by the Competition Commission that ,Ms Kema, in particular alleged that there existed a collusive relationship between Phumelela and Gold Circle characterised by several horizontal arrangements between the two entities, namely:

- (i) *an agreement entered by the entities which allowed Phumelela and Gold Circle to merge their tote licences nationally in order to expand the tote pool (commonly known as Commingling Agreement), as well as other foreign horseracing administrators; and*



(ii) *a joint venture enterprise, known as Phumelela Gold Enterprise (Pty) Limited, was created by the parties with a view to manipulate prices and advance their interests (Phumelela and Gold Circle).*

5.1.48. Ms Phindiwe Kema also alleged that there existed market allocation between Phumelela and Gold Circle on the basis that Phumelela was due to benefit from a merger notification filed by Gold Circle in 2011, in which Gold Circle was to sell its Cape Town racecourse to Kenilworth Racing, which would ultimately be controlled by the majority shareholders in Phumelela, whilst at the same time Phumelela would manage the tote business in connection therewith. Further that the National Horseracing Authority was utilised as a conduit to frustrate and inhibit potential participant's entry into the horseracing industry on account that it (NHA) was not independent as it was comprised and dominated by directors/members of both Phumelela and Gold Circle.

5.1.49. I have considered the complaint lodged with the CC and established that the CC found that there existed no evidence to sustain the contention that Phumelela and Gold Circle's conduct contravened the provisions of the Competition Act, 1998, and further that the conduct did not amount to anti-competitive behaviour envisaged in section 4(1)(a) and (b) of the Competition Act, 1998.

5.1.50. On 13 November 2017 and 9 November 2018 respectively, Mr Jabu Moleketi was interviewed in connection with the corporatisation of the Thoroughbred Horseracing industry in Gauteng and later, the entire country in particular to seek clarity on the circumstances that led to the conclusion of the MoU between the GPG and the and the Gauteng Horse Racing Association as well as the role he played in the process that led to the conclusion of the MoU.

5.1.51. According to Mr Moleketi, he was designated the responsibility of Provincial MEC for Finance and Economic Affairs in Gauteng and one of his first responsibility was to put in place what was referred to as the Legislative Environment Framework to enable the Provincial EXCO operate within the framework of the law.



- 5.1.52. Amongst his first responsibilities as the MEC responsible for Finance in the province was to prepare a Provincial Budget as well as a framework for the procurement of goods and services as well as the legal framework that would regulate gambling in the Province. Critically, and in as far as the regulation of gambling activities in the Province, considerations were made to the fact that as government, they could not be both the Regulator and a participant at the same time.
- 5.1.53. In Gauteng Province at the time, Horseracing was considered as the only legally recognised form of gambling and as the MEC for Finance, he was responsible for the regulation of the horseracing industry in Gauteng. According to Mr Moleketi, it was during that time that the Provincial EXCO took a decision to corporatize Horseracing in Gauteng.
- 5.1.54. With regard to public funds that were placed in the Horseracing Development Fund, Mr Moleketi stated that the fund was operated as a section 21 entity and its primary function was to oversee investment in the horseracing industry. He also stated that the funds held in the Horseracing Development Fund, were contributed by stakeholders in the Horseracing industry and at some instances it was utilised to curb diseases affecting race horses. With regard to funds from the Horseracing Development Fund that were earmarked for the construction of grooms quarters, Mr Moleketi stated that he visited stabling facilities to inspect accommodation for the horse minders (grooms) who were predominantly black people, and found the conditions deplorable.
- 5.1.55. As a consequence thereof, the government took a decision that part of the funds held in the Horseracing Development Fund should be utilised for the benefit of the grooms. He did not know the initiator or architect of the idea of corporatisation of the industry in Gauteng. According to Mr Moleketi, when the process of the corporatisation of the Horseracing industry in Gauteng was undertaken, it was never intended to include other provinces and does not know how other provinces followed suit but they were not part of the MoU.
- 5.1.56. On 27 March 2019, notices were issued in terms of the provisions of section 7((a) of the Public Protector Act, 1994 was issued against the Gauteng Department of Economic Development, as well as the Gauteng Gambling Board, thus affording the department and the board an opportunity to be heard prior to making a final determination on the matter.



5.1.57. The section provides that: *"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."*

5.1.58. On 27 March 2019, section 7(9)(a) Notices in terms of the Public Protector Act were issued to Mr Jabu Moleketi, the HOD of the DED in the Gauteng Provincial Government, Ms Pumla Ncapayi, the CEO of the Gauteng Gambling Board, Mr Steven, Ngubeni, the DG of the Department of Trade and Industry, Mr Lionel October, the CEO and Board of Directors of the National Horseracing Authority, Mr Vee Moodley as well as the CEO and Chairman of the Board of Directors of Phumelela Gaming and Leisure (Pty) Ltd, Messrs. John Stuart and Bernard Kantor. Section 7(9)(a) of the Public Protector Act, 1994 provides that;

"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

Mr Jabulani Moleketi's response dated 9 April 2019 to a notice issued in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994;

5.1.59. Mr Jabulani Moleketi responded to the notice on 9 April 2019. In his response, he did not appear to appreciate the damage that was caused by the corporatisation of the industry. He further did not appear to appreciate that the corporatisation of the industry was not in the public interest but only served to benefit a chosen few who were closer to the process.

5.1.60. In his response, Mr Moleketi only stated that he had no further substantive issues or queries to raise with regard to the investigation into the corporatisation of the horseracing industry in the Gauteng Province. Further that that he regarded the matter as finalised. In this regard, he wrote;



I have no further substantive issues or queries to raise, with regards to the investigations relating to the Corporatisation of the Horseracing Industry in Gauteng and will now regard this matter as finalised.

Yours faithfully


PJ MOLEKETI

5.1.61. **The Director-General of the Department of Trade and Industry, Mr Lionel October** responded to the notice on 10 April 2019. At the outset, he expressed his and the department's appreciation at the investigation into the corporatisation of the horseracing industry. However, he stated that his department did not participate in the MoU entered into between the GPG and the Gauteng Horseracing Industry. He confirmed the role of his department as the custodian of the national gambling policy.

5.1.62. With regard to the regulation of the horseracing industry in general, Mr October stated that the horseracing industry is self-regulated as the National Gambling Act, 2004, only regulates the betting aspect of the horseracing industry, whilst the National Horseracing Authority (a self-regulating body in the horseracing industry) regulates the racing, training and breeding in the horseracing industry.

5.1.63. Further thereto, he stated that as way to regulate the industry, the 2016 National Gambling Policy approved by Cabinet provided for the recognition of self-regulation in the horseracing industry which will empower the National Gambling Regulator (a body that will replace the National Gambling Board) to monitor the National Horseracing Authority on its work and to set the criteria that will guide regulation of the horseracing industry in the country.

5.1.64. He concluded his response by extending his department's support towards the investigation and findings that were communicated in the notice issued in accordance with the provisions of section 7(9)(a) of the Public Protector Act, 1994. Below is an extract from his response;



The horse racing industry is self-regulated as the National Gambling Act, 2004 only regulates the betting part of horseracing while the National Horseracing Authority of South Africa (NHA), a self-regulation body of horseracing, regulates the racing, training and breeding of horseracing. Issues relating to the grooms do not fall within the legislative mandate of gambling. As a way to regulate the industry, the 2016 National Gambling Policy approved by Cabinet provides for the recognition of self-regulation in the horseracing industry which, will empower the National Gambling Regulator (body that will replace the National Gambling Board) to monitor the NHA on its work and to set the criteria that will guide regulation of horseracing in the country. The policy approach is incorporated in the National Gambling Amendment Bill that will be tabled in Parliament for approval soon after the elections.

Over and above the processes above, I support the investigation and the findings that came out as expressed in the Notice from your office.

Yours sincerely

Lionel October
Director-General
Date: 10/04/2019

- 5.1.65. On 17 April 2019, the **Gauteng Department of Economic Development as well as the Gauteng Gambling Board** (hereinafter referred to as the Gauteng Government) submitted a joint response. They were assisted in preparing the response by Messrs *Ka-Mbonane Incorporated Attorneys*. In its response, the Gauteng Government stated with regard to the corporatisation of the industry, there was no need for public participation at the time. However, they confirmed that key stakeholders were consulted. They further confirmed that a notice was publicized in the provincial government gazette to all interested parties to submit comments on the amendment of the Gauteng Gambling and Betting Act 4 of 1995.
- 5.1.66. Regarding the manner in which the HRDF funds were used, the Gauteng Government did not want to commit itself. With regard to the withdrawal of the 3% bookmakers' tax that is paid to Phumelela by the Gauteng Gambling Board, the Gauteng government confirmed that they are already taking steps to withdraw this payment. In this regard they took steps effective from 1 April 2019 to stop paying the 3% of the bookmakers' tax to Phumelela.
- 5.1.67. **The National Horseracing Authority** responded to the section 7(9) notice on 24 April 2019. The entity commenced its response by giving an overview and stating that based on the sequence of events, it is clear that there has been a difference between the intentions of the MoU and what had actually transpired. They then provided a lengthy background about the entity. Other than that the official response received from the NHA appear to have been a white wash compared to an unsigned and undated version of the response which was obtained during the investigation.



5.1.68. **Phumelela Gaming and Leisure (Pty) Ltd** responded to the section 7(9) notice on 23 April 2019. Its response was peculiar in that the entity opted not to respond to each and every allegation contained in the notice but chose which aspects of the notice to respond to and in doing so, they argued that *MA Gamede v The Public Protector* is not applicable in this case. As a consequence thereof, they demanded that I need to share relevant evidence with Phumelela and afford them an opportunity to be heard in respect of such evidence and afford them an opportunity to question unnamed witnesses. They requested an undertaking by 2 May 2019 that I will not release the report failing which they will approach the court for necessary relief.

5.1.69. In paragraph 4 of the response, Phumelela states as follows;

5.1.64.1 Paragraph 8.2 of the notice pertains to whether the Gauteng Provincial Government improperly failed to invite public participation and/or follow parliamentary process when the Gauteng Racing Industry was corporatised.

5.1.64.2 In paragraph 4.2 of the Notice, it is stated that *"the failure by the Gauteng Provincial Government to invite public participation when corporatising the horseracing industry...was inconsistent with the provisions of the Constitution."*

5.1.64.3 According to Phumelela, they presumed that I based my provisional findings on:

5.1.64.3.1 section 118(1)(a) of the Constitution of the Republic of South Africa, 1996, which provides that a provincial legislature must facilitate public involvement in the legislative and other processes of the legislature and its committees; and

5.1.64.3.2 submissions by Phumelela, Mr Jabu Moleketi and the Racing Association, to the effect that no public participation was required.

5.1.64.4 However, this finding appears to be both factually and legally untenable, for the following reasons:

5.1.64.5 The process in the terms of which the thoroughbred horseracing industry in Gauteng was corporatised included extensive negotiations between all identified stakeholders in the industry and the Provincial Government.



- 5.1.64.6 Subsequent to the conclusion of the Memorandum of Understanding ("the MOU") on 30 June 1997, the Gauteng Gambling Act, 4 of 1995 (the Gauteng Act") was amended to provide for privatisation of the thoroughbred horseracing in Gauteng.
- 5.1.64.7 These amendments were published for public comment, in the form of an amendment bill, on 10 December 1997 in the Gauteng Provincial Gazette, General Notice 3928 of 1997. A copy of this notice is annexed hereto marked Annexure A.
- 5.1.64.8 The preamble to the amendment bill states, *inter alia*, that the Bill is to provide for the Totalisator Agency Board (Transvaal) and the Highveld Racing Authority to dispose of their business as going concern. The Bill also proposed amendments to Section 53B and 98(21) of the Gauteng Act, to provide for the transfer of the assets of the Totalisator Agency Board (Transvaal) and the Highveld Racing Authority to any person approved by the MEC.
- 5.1.64.9 The amendment bill came into effect on 3 April 1998 and on 7 October 1998 the MEC published notices of the transfer of the assets of the Totalisator Agency Board (Transvaal) and the Highveld Racing Authority to Phumelela, in the Gauteng Provincial Gazette. These notices, which are annexed as annexure B, provided for the public inspection of the MOU and the agreements reached between Phumelela and the Totalisator Agency Board (Transvaal) and the Highveld Racing Authority.
- 5.1.64.10 The procedure adopted by the MEC obviously constitutes public involvement in the legislative and other processes of the legislature and its committees as contemplated in the Constitution.
- 5.1.64.11 According to Phumelela, the finding that there was a failure to invite public participation was therefore unsustainable.
- 5.1.70. With regard to the corporatisation and Phumelela's role in the industry, Phumelela stated as follows;
- 5.1.65.1 The Notice makes several preliminary findings regarding the intention and purpose of the privatisation of the horseracing industry. These include:



- 5.1.65.1.1 that the corporatisation of the horseracing industry in the Gauteng Province was not in the best interests of the public who were "affectionate of horse racing in the Republic";
- 5.1.65.1.2 that the privatisation of the sport was for the benefit of the white minority group of shareholders of Phumelela (erroneously referred to as Phumelela Gaming and Leisure (PTY) Ltd;
- 5.1.65.1.3 that the intentions and purpose of the restructuring were never realised;
- 5.1.65.1.4 that the restructuring of the industry did not achieve its objectives of inclusivity in that the object of having a certain percentage of black empowerment groups was not realised; and
- 5.1.65.1.5 that *"it appears that the whole restructuring process was never intended to attract other racial groups into the sport of horseracing but to maintain or keeping [sic] the sport by one racial group which is the white minority group at the expense of black majority citizens and constituencies."*
- 5.1.65.2 Phumelela disputes all of these findings for, *inter alia*, the following reasons:

Transformation of the industry

- 5.1.65.2.1 At the outset, it is important to understand the true intention of the parties to the MOU in regard to transformation, on a proper interpretation of the MOU. It must be understood that the MOU intended that participation by previously disadvantaged persons in the business of Gauteng thoroughbred horseracing would be achieved through shareholding in Phumelela.
- 5.1.65.2.2 The MOU contemplated that the business of the Racing Industry in Gauteng would be more re-organised and restructured into a single listed corporate entity (Phumelela), and that Phumelela was to "have a broad base of shareholders with specific emphasis on previously disadvantaged communities." The MOU went on to specify that [f]or "the purposes of listing", 22,5% of Phumelela's shares would be held by "Black Economic Empowerment Groups" to be identified by Phumelela's interim board. At the time of listing, Phumelela met this requirement.



- 5.1.65.2.3 What the MOU did not contemplate, was that, once Phumelela was listed, its black shareholders would be locked into their investment in perpetuity with no prospect of realising their participation. Moreover, the listed shares in Phumelela are freely tradeable and available for investment by any person, without discrimination or hurdle on any basis, including race.
- 5.1.65.2.4 As the owner of horseracing venues, and as the organiser of thoroughbred horseracing events, Phumelela provides a service to racehorse owners, trainers, jockeys, punters and betting operators. This service enables racehorse owners, trainer and jockeys to compete thoroughbred racehorses for stakes, and it provides the platform for betting on the outcome of races for the benefit of betting operators and punters. Additionally, the offering includes stabling, training facilities and staff accommodation at the horseracing venues on a contracted basis to thoroughbred racehorse owners, trainers and support staff. The staging of racing is an extremely costly undertaking and is loss-making.
- 5.1.65.2.5 The stakeholders in the thoroughbred horseracing industry to whom Phumelela, as the licenced owner of horseracing facilities and as the organiser of racing events, provides its services, are independent business operators. In particular, Phumelela has no financial interest in or control over:
- 5.1.65.2.6 Breeders of thoroughbred horses, whose activities resort under the agricultural sector, and whose transformation obligations are matters for sectoral determination;
- 5.1.65.2.7 Owner of thoroughbred racehorses, who are independent investors in and owners of racehorses, and who, subject only to the rules governing the participation in racing events and contractual obligations in respect of rented facilities at racing venues, are not answerable to Phumelela, and who are independently responsible for their own transformation obligations; and
- 5.1.65.2.8 Trainers of racehorses, who run independent businesses on contract with the owners of the horses under their care, and whose transformation obligations are not under Phumelela's control.



- 5.1.65.2.9 The MOU certainly did not contemplate that Phumelela would assume responsibility for the transformation of the entire sport of thoroughbred horseracing through transformation of all stakeholders in the industry. Phumelela's ability to transform clearly went no further than the agreed level of black shareholding in Phumelela.
- 5.1.65.2.10 Save that the MOU contemplated that, in order to afford it the opportunity to become competitive, Phumelela would be exclusively granted the Gauteng tote licence for a period of 10 years (which period of exclusivity has long expired leaving the market for the tote licences open to new competitors), the tote betting and bookmaker business operated by Phumelela are separate and distinct from the business of owning racecourses and staging races. These businesses are conducted under their own separate licences in competition with other totes and bookmakers, not only on the outcome of horseraces, but on the outcome of a variety of events, including other sporting events. Entry into and transformation of the betting and gaming industry are within the purview of the provincial gambling boards. Phumelela is answerable to these regulators for the transformation objectives set in various betting and gaming licences held by it.
- 5.1.65.2.11 In the light of all the foregoing, it is unreasonable, irrational and factually incorrect to state that the transformation objectives stated in the MOU favoured the white minority, were not achieved or prevented entry to black persons into the entire racing industry. Phumelela complied with the transformation objectives in the MOU and is in compliance with its statutory empowerment obligations. For the rest of the stakeholders in the industry, Phumelela is unable to control transformation in the breeding, ownership and training of thoroughbred racehorses.

The corporatisation process

- 5.1.65.2.12 It is also important to understand the reasons for the corporatisation process. The corporatisation and restructuring of the thoroughbred horseracing industry in Gauteng were negotiated between the industry and Provincial Government with the objective of ensuring the sustainability and survival of the industry, without the need for constant financial support from Government.



5.1.65.2.13 The corporatisation process (including the betting tax referred to below) was intended to ensure the survival of the thoroughbred industry which was and remains, heavily los-making. This industry provides a substantial amount of direct and indirect employment and stimulates economic activity. Accordingly, the preliminary finding that the corporatisation process was not in the interest of the members of the public who were affectionate about" the sport and who bet on the sport, is factually incorrect and unsustainable.

The betting tax

5.1.65.2.14 The corporatisation process included an agreement between Government and the industry, which was recorded in paragraph 3 of the MOU, regarding the division between Government and the industry of a tax levied on punters' winnings on fixed-odds bets taken on horseracing. This agreement was given effect to by the Gauteng Government in 1998, by amending the Gauteng Gambling Regulations.

5.1.65.2.15 In terms of these regulations, bookmakers would be obliged to withhold 6% of a punters' winnings on horseracing bets and pay this amount, as betting tax, to the Gauteng Gambling Board. The Gambling Board, in turn, would pay half of this betting tax to Phumelela.

5.1.65.2.16 This tax is referred to in several paragraphs of the Notice. While no substantive conclusion regarding the tax is reached in the Notice, it is stated that you met with the employees of the Gauteng Gambling Board to determine whether it was rational for the Board to pass on the tax to Phumelela.

5.1.65.2.17 The tax is levied in terms of the Gauteng Act read with the Gauteng Gambling Regulations. The rationality of provincial gambling regulations does not fall within your Constitutional mandate. Accordingly, we do not address the averments in the Notice regarding the betting tax but reserve our client's right to do so, should it become necessary.



Application of the relevant law and prescripts

5.1.71. The Constitution of the Republic of South Africa, 1996 (the Constitution) which was promulgated on 18 December 1996, and came into effect on 04 February 1997, replacing the Interim Constitution of 1993, is the key legislation regulating the appointments of Premiers and MEC's, as well as the exercise of public power by same.

5.1.72. Section 125(2)(a) and (b) of the Constitution, 1996 further provides that *"the Premier, as the executive authority with other members of the Executive Council, by implementing provincial legislation in the province within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise."*

5.1.73. Section 133(1) of the Constitution, 1996 provides that *"the members of the Executive Council of a province are responsible for the functions of the executive assigned to them by the Premier."* Section 132(2) further provides that *"the Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them."*

5.1.74. Regulation 247 of the Gauteng Gambling Regulations, 1995 (the Regulations) provides that *"the levy contemplated in section 61 of the Act, payable for the benefit of the Sports Development Fund contemplated in section 100 of the Act, shall be paid to the holder of totalisator licence contemplated in section 53 of the Act on gross revenue of a totalisator conducted by it, calculated at such percentage and in respect of such bets as prescribed in Regulation 254."*

5.1.75. The Competition Act 89 of 1998, is the key legislation providing prohibited restrictive horizontal practices. Sections 4(1)(a) and (b) of the Competition Act provides that *"an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-*

(a) *it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or*

(b) *it involves any of the following restrictive horizontal practices:*



- (i) directly or indirectly fixing a purchase or selling price or any other trading condition;*
- (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
- (iii) collusive tendering."*

5.1.76. Section 8(c) of the Competition Act, provides that *"it is prohibited for a dominant firm to engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive, gain."*

5.1.77. Based on the information and evidence obtained during the investigation, it is apparent that Mr Jabulani Moleketi was authorised to act on behalf of the Gauteng Provincial Government to enter into discussions and negotiations with the Gauteng Horseracing Industry for the corporatisation of the horseracing industry in the province, which resulted in the conclusion of the MoU in 1997, and acted within the powers afforded to him in terms of section 125 of the Constitution, 1996.

5.1.78. However, the corporatisation of the sport of horseracing was not in the best interests of the members of the public who were affectionate of the sport and the constituencies who were fond of the sport with some making a living out of it. Instead, the privatisation of the sport was for the benefit of a white minority group of shareholders of Phumelela Gaming and Leisure (Pty) Ltd.

5.1.79. Further thereto, the corporatisation of the horseracing industry in the Republic did not ensure participation of black people in the sport. It has and continues to be dominated by one minority race group in particular whites at the expense of the black majority citizens and constituencies who would otherwise be interested in the sport.

Conclusion

5.1.80. In the circumstances, it can be stated that Mr Jabu Moleketi may have had good intentions by initiating the privatisation of Thoroughbred Horseracing in Gauteng. However the privatisation of the sport did not achieve the desired outcomes. It was used to polarise a certain section of the society by another.



- 5.2. **Issue 2: Whether the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary consultation processes when corporatising the Gauteng Horseracing Industry, and if not so, whether the conduct constitute maladministration or improper conduct;**

Issues that are Common Cause

- 5.2.1. It is not disputed that prior to corporatisation, the horseracing industry in the Gauteng province and the other parts of the Republic was exclusively run by clubs with privileged individuals, and with the advent of casinos and other forms of gambling, the Gauteng Horseracing Industry approached the Gauteng Provincial Government with a proposal to reduce the levels of taxation on gambling on horse races to make it more viable and competitive with other forms of legalised gambling. As a consequence thereof, the industry was instructed to re-organise itself into a single entity with black shareholding that will be run and managed along commercial lines.

Issues that are in Dispute

- 5.2.2. The issue for my determination is whether the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary consultation process when corporatising the Gauteng Horseracing Industry, which is in direct contravention of the principle of legality expressed in the Constitution, 1996.
- 5.2.3. Ms Phindiwe Kema and Mr Chophelikhaya Simoto alleged that the Gauteng Provincial Government did not invite public participation and/or follow any parliamentary consultation process when corporatising the horseracing industry, which resulted in monopolisation of the horseracing industry in favour of two private companies, Phumelela and Gold Circle, which constitutes improper conduct and maladministration.
- 5.2.4. In a written response dated 30 October 2013, *Messrs Roodt Incorporated Attorneys*, acting on behalf of Phumelela Gaming and Leisure (Pty) Ltd, stated that the racing clubs were private legal subjects and therefore no Parliamentary Act or public participation process was required for the corporatisation of the industry. The letter reads as follows:



5.2.5. In response, Mr Jabulani Moleketi, in interviews conducted on 13 November 2017 and 09 November 2018 respectively, stated that there was no need to invite public participation and/or follow a parliamentary consultation processes on account that the intention to corporatise the industry was not to create a new entity.

5.2.6. In a written response dated 16 April 2019 to a section 7(9)(a) notice issued on 26 March 2019 in connection with the allegation that the Gauteng Department of Economic Development, duly represented by Mr Jabulani Moleketi failed to invite public participation and/or follow parliamentary consultation process when corporatising the Gauteng Horseracing Industry, *Messrs Ka-Mbonane Incorporated Attorneys*, acting on behalf of the Gauteng Department of Economic Development averred in paragraph 11 that,

"In the instance of corporatisation of the horseracing industry, dual approach was utilised, so as to ensure that all material parties, were duly notified, and provided an opportunity to make representations."

5.2.7. The Gauteng Department of Economic Development continued by asserting, in paragraph 12 of the response that, *"The first facet of public participation employed in this instance, involved extensive consultation, with key stakeholders, regarding the process of corporatisation which would be undertaken. To this end, each relevant association, club, and Board with particular interest in the process of corporatisation was consulted. By way of example, the Newmarket Turf Club, Turffontein Racing Club, Gosforth Park Turf Club were consulted with, and to this end, each club aforementioned, issued circulars to the members thereto."*

5.2.8. In addition, the Gauteng Department of Economic Development further asserted, in paragraph 13 of the response that, *"The more generalised standard was met, whereby in terms of the process of the passing of provincial legislation and amending of provincial legislation and regulations, notice, by publication in the provincial gazette, is given to all interested parties, to submit written comments on any proposed amendments or intended passing of legislation."*



5.2.9. On the other hand, the Racing Association, duly represented by Mr Larry Wainstein stated in a written response dated 23 November 2013, that according to his understanding, the affairs of the horseracing industry as a sport were not regulated by legislation. Further that members of each racing club were legal entities of each racecourse, who elected stewards to act in their interests as regards to strategy, policy and overseeing the management of the racecourses, therefore public participation during the corporatisation process was not required.

5.2.10. It was established from the information and documentation obtained during the investigation that, following the Gauteng Provincial Cabinet approval of the negotiations with the horseracing industry, as well as the process to be followed in reaching an agreement between the provincial government and the industry with regard to the "privatisation" of the sport, the Horseracing Industry in the Gauteng Province issued circulars to all its members (comprising of the Newmarket Turf Club, Turffontein Racing Club and Gosforth Park Turf Club which included the Benoni Turf Club and Germiston Sporting Club) notifying same of Special general Meetings wherein the corporatisation of the horseracing industry in the Gauteng Province would be the subject of discussion and resolution in connection therewith would be taken.

Application of the relevant laws and prescripts

5.2.11. The Constitution, 1996 prescribes the principle of legality to which the exercise of public power has to conform. Section 1(c) of the Constitution, 1996 provides that *"the Republic of South Africa is one, sovereign, democratic state founded on the supremacy of the Constitution and the rule of law."* Section 2 of the Constitution, 1996 provides that *"the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

5.2.12. It is common knowledge that, under the previous regime, the majority of South Africans were excluded from participation in decision making, decisions which would in effect adversely affect them. In remedying the situation, section 118(1)(a) of the Constitution, 1996 introduced a duty on the National Assembly, the National Council of Provinces and provincial legislatures to facilitate public participation or involvement when executing their legislative and other processes of the legislature and its committees.



5.2.13. The principle of the exercise of public power expressed in section 125 of the Constitution, 1996 is further expressed in the case of *Albutt v Centre for the Study of Violence and Reconciliation and Others*¹ where the Constitutional Court found that;

“It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. All this flows from the supremacy of the Constitution.

The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected.

But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution.”

5.2.14. The exercise of Executive powers conferred in terms of the provisions of section 125 of the Constitution, 1996, should at all material times conform to the principle of legality as contemplated in section 1(c) of the Constitution, 1996.

Conclusion

5.2.15. The allegation that the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation when corporatising the horseracing industry in the Gauteng Province and thus inconsistent with the provisions of the Constitution, 1996, has no merit and could not be supported by the evidence obtained and analysed during the investigation.

¹ 2010 (5) BCLR 391 (CC)

- 5.3. **Issue 3: Whether there were public funds allocated from the HRDF during the corporatisation process for the benefit of the grooms and for the upgrading of stabling facilities at the Newmarket Racecourse, and if so, how much was allocated and whether it was utilised for the intended purposes;**

Issues that are Common Cause

5.3.1. It is not disputed that the Horseracing Development Fund was formed in accordance with the provisions of the now repealed Horse-Racing and Betting and Ordinance, 1978, the purpose of which was to further the financing of capital projects and developments identified by the horseracing industry in the Gauteng province.

5.3.2. It is also not disputed that prior to the corporatisation of the Gauteng Horseracing Industry, the Newmarket Turf Club applied for a grant from the HRDF for the erection of stabling complex at the Newmarket Racecourse, which was approved on 11 December 1996.

Issues that are in Dispute

5.3.3. The issue for my determination is whether there were public funds allocated from the HRDF for the benefit of the grooms, if so, how much was allocated and whether same was utilised for the intended purposes.

5.3.4. In a meeting held on 26 March 2018 with the Public Protector, Mr Simoto, in the capacity of the President of the South African Grooms Association, stated that during the corporatisation of the horseracing industry in the Gauteng Province, an amount of R17, 5 million emanating from the Horseracing Development Fund, was allocated for the construction of stabling complex, as well as single and married quarters at the Newmarket Racecourse for the benefit of the grooms, however, the shareholders of Phumelela, so it is alleged, upon receipt of these funds, distributed the money amongst themselves and did not utilise it for its intended purpose.

5.3.5. In support of Mr Simoto's allegations, Mr Alfred Edward Jayes (Mr Ian Jayes) was interviewed on 15 March 2018 and 05 September 2018 respectively, At the interview, he stated that during the previous regime horseracing was heavily taxed at 14, 5% on their annual turnover and horseracing clubs found it difficult to fund maintenance and identified capital projects.



5.3.6. As a consequence thereof, the Gauteng Provincial Government established the HRDF, whose primary objective was to administer developmental grants on behalf of the horseracing clubs and to which the clubs applied for grants to meet the expenditure.

5.3.7. According to Mr Jayes, the fund derived its funds from a tax sacrifice in the province, a portion of which was paid by horseracing, therefore all the money in the fund was public money. Further, that at the time of the formation of the HRDF, the fund had the balance of over R33 million which included the R17, 5 million earmarked for the upgrading of stabling facilities, as well as for the construction of single and married quarters for the grooms.

5.3.8. In addition, prior to the corporatisation of the industry, there existed no stables at the Newmarket Turf Club and that the horses were housed in private stables on private properties adjacent to the racecourse. As a result thereof, the Newmarket Turf Club applied for a grant from the HRDF with a view to erect stables to accommodate four hundred (400) horses, as well as single and married quarters for the grooms on the property adjacent to the racecourse which was successively approved by the Horseracing Development Fund.

5.3.9. Further that following the approval of the grant on 11 December 1995, Phumelela Gaming and Leisure (Pty) Ltd utilised R3, 6 million of the grant, which was generated through tax collections in the Transvaal (Gauteng), to upgrade the Vaal Racecourse stabling facilities despite the fact that the Vaal Racecourse was situated in the Free State Province and thus not eligible to benefit from the approved grant and the balance of R13,9 million transferred into Phumelela's account as accumulated profits for the 2002 financial year.

5.3.10. It was established that the Highveld-Horseracing and Betting Board (the Board), which was subsequently transferred to Phumelela Gaming and Leisure (Pty) Ltd, convened a meeting on 11 December 1995, wherein a grant applied for by the Newmarket Turf Club (situated in the Gauteng Province) was placed on the agenda for discussion.



5.3.11. According to the minutes of the Board meeting held on 11 December 1996, chaired by Mr. Moleketi, it was resolved to approve a grant for the upgrading of stabling facilities at the Newmarket Turf Club subject to the fulfilment of the Board's conditions relating to married quarters and small contractors and a further condition that any shortfall between the actual cost and the amount of the grant be financed by the industry.

5.3.12. According to the correspondence from Phumelela Gaming and Leisure (Pty) Ltd, the Gauteng Gambling Board made recommendations to the MEC for the Department of Finance and Economic Affairs, Mr Jabulani Moleketi, relating to the dissolution of the Horseracing Development Fund in terms of the provisions of section 95(5) of the Gauteng Gambling and Betting Act, 1995, which empowered the MEC to dissolve the Horseracing Development Fund and deal with the assets as he deemed fit. Phumelela's correspondence further states that, on 19 August 1998 the MEC gave notice that he had resolved to dissolve the Horseracing Development Fund, inter alia, on the following basis:

5.3.12.1. *Phumelela receives cession of a claim of R6 713 755.00 against the Free State Horse Racing Development Fund;*

5.3.12.2. *Phumelela assumes all liabilities in respect of any approved outstanding grants, which includes a stabling grant of R17, 500 000.00 to the Newmarket Turf Club (Newmarket); and*

5.3.12.3. *The balance of the HRDF of R35 000 000.00 is transferred to Phumelela, after the Gauteng Provincial Government withdraws R44 000 000. 00 for its own purposes.*

The Dissolution of the Horse-Racing Development Fund and the Transfer of the Highveld Racing Authority), as well as the Totalisator Agency Board (Transvaal) (TAB).

5.3.13. It was confirmed that Mr Jabulani Moleketi, advised the Chief Executive Officer of the Gauteng Gambling Board, in an undated letter with a subject "Horse Racing Corporatisation/Dissolution of the HRDF" that he had taken a decision to dissolve the Horseracing Development Fund, pursuant to the Board's recommendation to dissolve same in in terms of the provisions of the Gauteng Gambling and Betting Act, 1995. The letter reads as follows:



FINANCE AND ECONOMIC AFFAIRS
 FINANSIES EN EKONOMIESE SAKE (31)
 TSA DITJHELETE LE IKONOMI
 EZEZIMALI NE ZOMNOHO 254

Our Ref: M R / EAF 10/ 5/ 2

The Chairman
 Gauteng Gambling Board
 PRETORIA
 Telefax : [012] 325 - 6557

**DRINGEND
 URGENT**

Dear Viscent

RE : HORSE RACING CORPORATISATION /
 DISSOLUTION OF THE HRDF

The above matter refers.

Pursuant to the board's recommendation to dissolve the Horse Racing Development Fund ("the Fund"), in terms of Section 99(5) of the Gauteng Gambling Act, 4 of 1995, as amended, I have now taken a decision to dissolve the Fund on the following basis:

1. Monthly levies received by the Fund between now and the final dissolution of the Fund be paid to TAB as grants. These grants be paid at the end of the month following the month of collection, retrospectively with effect from 31 July 1998;
2. All loans in the Fund be written off, with the exception of the Free State Horse Racing Development Fund loan in the amount of R 6 713 755 - 00. The latter loan is to be ceded to Phumelela;
3. TAB (and subsequently Phumelela) assumes all liabilities in respect of any approved outstanding grants and to that extent make good any shortfall should this be necessary;
4. The balance in the fund should be transferred to TAB or to Phumelela should TAB be dissolved prior to such transfer; and
5. The final financial statements be prepared and audited by the Auditor - General.

I have already received and signed an indemnity agreement from TAB and Phumelela. It indemnifies the Gauteng Provincial Government and the Gauteng Gambling Board against any claim whatsoever, which may be made by any interested party subsequent to the dissolution of the Fund. A copy is enclosed herewith.

Finance and Economic Affairs, 64 Main Street, Johannesburg, Private Bag 2027, Matieland 2107.
 Tel: (011) 355-8000. Fax: (011) 355-8048

5.3.14. It was also confirmed that following the letter above, Mr Jabulani Moleketi published a Notice in the Gauteng Provincial Government Gazette No. 516 of 19 August 1998, under reference number Notice 2017 of 1998, in which he made known the dissolution of the Horseracing Development Fund and the manner in which the balance in the Fund and assets would be dealt with. The Notice in this regard reads as follows;

NOTICE 2017 OF 1998

DEPARTMENT OF FINANCE AND ECONOMIC AFFAIRS

DISSOLUTION OF THE HORSE-RACING DEVELOPMENT FUND IN TERMS OF SECTION 99 (5) OF THE GAUTENG GAMBLING ACT, No. 4 OF 1995, AS AMENDED

Notice is hereby given that I, Philip Jabulani Moleketi, Member of the Executive Council for Finance and Economic Affairs hereby, on the recommendation of the Gauteng Gambling Board, dissolves the Horse-Racing Development Fund ("the Fund") by virtue of Section 99 (5) of the Gauteng Gambling Act, No. 4 of 1995, as amended. This is pursuant to a Memorandum of Understanding concluded between the Gauteng Provincial Government and the Horse-Racing Industry in Gauteng dated 30 June 1997 to corporatise the industry.

The Fund is dissolved on the following basis:

1. All loans in the Fund are written off, with the exception of the Free State Horse Racing Development Fund loan in the amount of R6 713 755,00. The latter loan is hereby ceded to Phumelela Gaming and Leisure Limited ("Phumelela");
 2. Trustee Agency Board (Transvaal) ("TAB") (and subsequently Phumelela) assumes all liabilities in respect of any approved outstanding grants and to that extent have undertaken to make good any shortfall should this be necessary. An indemnity agreement has been entered into between TAB, Phumelela and the Provincial Government in this regard;
 3. The balance in the fund will be transferred to TAB or to Phumelela should TAB be dissolved prior to such transfer of the balance; and
 4. The final financial statements shall be prepared and audited by the Auditor-General.
- The Memorandum of Understanding and the Indemnity Agreement mentioned above are available for inspection at the address mentioned below.

For enquiries contact: Mr Mpho Ramafela, 64 Main Street, corner of Harrison Street, Johannesburg. Tel. (011) 355-8048.



5.3.15. Additionally, Phumelela stated, in a correspondence herein referred to above, that on 7 October 1998, the MEC published Notices, under references Notice 2422 of 1998 and Notice 2423 of 1998, in terms of section 98 of the Gauteng Gambling and Betting Act, 1995, approving the transfer by the Horse Racing Authority, as well as the Totalisator Agency Board (Transvaal) of their assets and liabilities, rights and obligations as a going concern to Phumelela. The Notices in this regard reads as follows:

R. J. MOLEKETI

NOTICE 2422 OF 1998

DEPARTMENT OF FINANCE AND ECONOMIC AFFAIRS

TRANSFER OF HIGHVELD RACING AUTHORITY (HRA) TO PHUMELELA GAMING AND LEISURE LIMITED IN TERMS OF SECTION 98 OF THE GAUTENG GAMBLING ACT, NO. 4 OF 1995, AS AMENDED

Notice is hereby given that I, Philip Jabulani Moleketi, Member of the Executive Council for Finance and Economic Affairs hereby approve of the transfer by Highveld Racing Authority of its assets and liabilities, rights and obligations as a going concern to Phumelela Gaming and Leisure Limited (Registration Number 97/19810/06) in terms of Section 98 of the Gauteng Gambling Act, No. 4 of 1995, as amended (upon the terms and conditions recorded in an agreement between those two parties, dated 30 September 1998).

This is pursuant to a Memorandum of Understanding concluded between the Gauteng Provincial Government and the Horse-Racing Industry in Gauteng dated 30 June 1997 to corporatise the industry.

The Memorandum of Understanding and the Agreement mentioned above are available for inspection at the address mentioned below.
For enquiries contact: Mr Mpho Ramafiso, 94 Main Street, cnr. Harrison Street, Johannesburg. Tel. (011) 355-8048.

NOTICE 2423 OF 1998

DEPARTMENT OF FINANCE AND ECONOMIC AFFAIRS

TRANSFER OF TOTALISATOR AGENCY BOARD (TRANSVAAL) (TAB) TO PHUMELELA GAMING AND LEISURE LIMITED IN TERMS OF SECTION 98 OF THE GAUTENG GAMBLING ACT, NO. 4 OF 1995, AS AMENDED

Notice is hereby given that I, Philip Jabulani Moleketi, Member of the Executive Council for Finance and Economic Affairs hereby approve of the transfer by Totalisator Agency Board (Transvaal) of its assets and liabilities, rights and obligations as a going concern to Phumelela Gaming and Leisure Limited (Registration Number 97/19810/06) in terms of Section 98 of the Gauteng Gambling Act, No. 4 of 1995, as amended (upon the terms and conditions recorded in an agreement between those two parties, dated September 30, 1998).

This is pursuant to a Memorandum of Understanding concluded between the Gauteng Provincial Government and the Horse-Racing Industry in Gauteng dated June 30, 1997 to corporatise the industry.

The Memorandum of Understanding and the Agreement mentioned above are available for inspection at the address mentioned below.

R. J. MOLEKETI

For enquiries contact: Mr Mpho Ramafiso
94 Main Street, cnr. Harrison Street, Johannesburg. Tel. (011) 355-8048

5.3.16. In a response to the enquiries dated 30 October 2013, Phumelela submitted the Stakes Agreement dated 19 August 1999, and stated as follows:

"Phumelela acquired the business of the Newmarket Turf Club in terms of the corporatisation of the horse racing industry. By agreement with the racing Association, the liability in respect of the outstanding grant of R17, 5 million (seventeen million five hundred thousand rands) was discharged by an undertaking by Phumelela to apply as much of that as is necessary for the provision of additional stabling facilities."



5.3.17. According to the Stakes Agreement submitted, Phumelela acknowledged in paragraph 8.2 that it had received from the HRDF, an amount of R17, 5 million which was earmarked for stabling facilities. Phumelela further asserted that on 8 May 2002, in Sandton, Gauteng Province, an agreement to delete paragraph 8.2 of the Main Agreement was concluded with the Horse Racing Association.

5.3.18. In addition, Phumelela denied that it had an obligation to spend the R17, 5 million on the development of stabling and grooms facilities and stated that a condition of the dissolution of the HRDF was that it would assume all liabilities in respect of the outstanding grants and not to apply and utilise money received for outstanding grants in a specific manner, and further that it had spent more than the amount received from the HRDF on the development of stabling and grooms facilities.

5.3.19. In a letter dated 10 November 2017, Phumelela provided a financial breakdown structure (below), indicating the manner in which money allocated from the Horseracing Development Fund was utilised since 2004;

CAPITAL SPEND ON STABLING FACILITIES			
NO.	PURPOSE	YEAR	AMOUNT
1.	Stabling	2004	R 397 520, 70
2.	Stabling	2005	R 910 645,65
3.	Stabling	2006	R 904 216,78
4.	Stabling	2007	R 2 122 268,58
5.	Stabling	2008	R 2 058 293,78
6.	Stabling	2009	R 502 621, 00
7.	Stabling	2010	R 2 974 542,85
8.	Stabling	2011	R 3 207 198,30
9.	Stabling	2012	R 1 097 880,10
10.	Stabling	2013	R 255 678,96
11.	Stabling	2014	R 280 060,28
12.	Stabling	2015	R 242 864,20
13.	Stabling	2016	R 506 174,60
14.	Stabling	2017	-
Total			R 16 176 137,78



5.3.20. Phumelela also stated that it had spent R646 090.00 for the refurbishment of various grooms quarters, R 70 082.00 for 28 fire hose reels complete fire system for the Vaal Turf Club stables and R 3 500 000.00 was spent on grooms quarters in 2002, bringing the amount spent for the period 2002 to 2016 to R19 676 137. 78.

5.3.21. According to the information obtained during the investigation, it was established that the Chief Operating Officer and Finance Director of Phumelela, Mr Andreas Heide (Mr Heide), in a letter dated 24 September 2014, stated that;

"The matter of the R17, 5 million HRDF reserve has once again raised ugly head in the public domain. For the record the reserve was initially earmarked for the improvement and upgrading of stabling facilities and not solely for grooms' quarters. Grooms appear to have been disingenuously advised that the R17, 5 million is due and payable to them. This is clearly not the case and is factually incorrect.

However, and in the greater interest of setting this matter once and for all, we have completed a review of Phumelela's financial records for the past ten years as they relate to the stables and grooms' quarters at Randjesfontein, the Vaal and Turffontein. According to these records, the company has spent in excess of R24 million in upgrading and maintaining these facilities. The obligation has accordingly been met and any further debate is simply a moot point."

5.3.22. On 10 November 2017, Phumelela, through its attorneys of record, *Roodt Incorporated*, responded to my inquiries for an explanation on how the amount of R17.5 million in public funds was utilised and said;

"At the outset we deem it necessary to record that the allegations made by the second Complainant are factually and legally untenable, for the following reasons:-

(a) *our client was not under any obligation to "hand over" the money received from the HRDF to grooms. A portion of it was initially subject to the condition that married grooms' quarters be constructed at Newmarket Racecourse and it is patently incorrect to assert that any portion of the grant was intended to be paid over to the grooms;*

(b) *our client was under no obligation to consult with grooms prior to the receipt of the money as claimed in paragraph 5(i)(a) of your letter."*



5.3.23. Phumelela, in the letter herein referred to above, continued by stating that *"to the best of our client's knowledge:*

(a) The grant referred to in your letter was applied for in 1995 by the Newmarket Race Club (the Club) for building of new stables at the Newmarket Racecourse. The HRDF approved the grant, subject to the condition that a portion thereof be utilised for the construction of married grooms' quarters at the Newmarket Racecourse.

(b) Subsequent to the approval of the grant, a decision was taken by the Gauteng Government that, pending finalisation of the corporatisation of the horseracing industry (which was ongoing at the time), the grant would be retained by the HRDF. The HRDF held the view that the entity to be formed through the corporatisation process should determine how to best apply the grant.

5.3.24. Furthermore, Phumelela stated that section 99(5) of the Gauteng Gambling and Betting Act, 1995 empowered the MEC to dissolve the HRDF and deal with the assets as he deemed fit, on the recommendation of the G.G.B. On 19 August 1998, the MEC gave notice that he had resolved to dissolve the HRDF and that Phumelela would assume all liabilities in respect of any approved outstanding grants, which included the relevant stabling grant.

5.3.25. Phumelela, through its attorneys of record, *Messrs Roodt Incorporated*, continued by stating that Phumelela concluded a disposal of business agreement with the Club. In terms of the agreement, effective from 01 April 1999, the Club disposed of its entire business and all its assets, as a going concern.

5.3.26. Upon dissolution of the Club, the members thereof became members of the Racing Association (the RA). As a result thereof, the RA had the power to waive the need to apply the amount of the grant for the original purposes at Newmarket.

5.3.27. According to Phumelela's attorneys of record, Phumelela concluded a Stakes Agreement with the Racing Association which provided for the corporatisation of the horseracing industry. In clause 8.2 of that agreement, Phumelela undertook to apply as much of the aforementioned grant as was necessary for the provision of additional stabling facilities in Gauteng and the Vaal Racecourse.



5.3.28. Phumelela stated that approximately R3, 5 million was spent on stabling at the Vaal before this clause was deleted from the agreement in a subsequent addendum thereto. Further that it had spent in excess of the amount of the grant on stabling in Gauteng and the Vaal Racecourse since 2002.

5.3.29. It was also established that following the approval of the grant by the Board, the Chairman of the Newmarket Turf Club, Mr. Joe van Streepen stated, in the Newmarket Turf Club's Newsletter published in February 1997, addressed to the members that:

"The long awaited and debated stabling complex to be built on Newmarket Racecourse was given the go ahead when a HRDF grant of R17, 5 million was approved for this purpose by the Highveld Horseracing and Betting Board in a meeting held on 11 December 1995. Plans for a secure stabling complex, similar to the one at Turffontein Racecourse, have been completed and 440 boxes will shortly be built on the stretch of land adjacent to the Heidelberg Road entrance. In addition to the stables, both single and married accommodation for grooms will be provided and negotiations are currently underway with the Alberton Town Council to purchase land adjacent to the racecourse for this purpose."

5.3.30. It was further established that Raceco (later Phumelela) acknowledged, in clause 8.2 of the Stakes Agreement concluded on 19 August 1999, between itself and the RA, duly represented by Mr. KE Latilla, that it has received from the HRDF an amount of R17, 5 million which was earmarked by that Fund for stabling facilities.

5.3.31. Furthermore, it was established from Phumelela's Financial Statement for year ended 31 July 2002, under contingencies and liabilities that Phumelela stated that the capital reserve obligation on stables was withdrawn and the balance of R13, 9 million has accordingly been transferred directly to accumulated profits. Below is an extract from Phumelela Gaming and Leisure (Pty) Ltd's Financial Statement for the 2002 financial year;

FOR THE YEAR ENDED 31 JULY 2018

25. COMMITMENTS AND CONTINGENCIES (continued)

25.2 The Racing Association

During the year the stakes agreement between Phumelela and the Racing Association in terms of which the company was to grant R10 million to The Thoroughbred Horse Racing Trust conditional upon the company listing and spend up to R17,5 million of capital reserve on stables was amended as follows:

- the grant became unconditional on 14 June 2002 (date of listing). Phumelela is now obliged to make payment of the grant to the Trust out of the proceeds of the disposal of the properties making up the Gosforth Park Racecourse. The amount payable will now be an amount equal to the difference between the purchase price received and R9 250 000 but subject to a maximum of R10 million. Until the properties are sold Phumelela is obliged to make available to the Racing Trust an amount of approximately R80 000 per month for the education and training of jockeys
- the capital reserve obligation on stables was withdrawn and the balance of R13,9 million has accordingly been transferred directly to accumulated profits in the current year

5.3.32. The pictures below depicts the deplorable conditions in which the grooms live in some of the racecourses subsequently transferred and administered by Phumelela Gaming and Leisure (Pty) Ltd.



5.3.33. The information obtained also indicates that Newmarket was sold in 2005 for R22 million to a property developer. Phumelela reached a deal with the new owners that it would continue to lease Newmarket for R1 000 a month to stage a maximum of 36 race meetings a year until 31 May 2012. However, in 2006, the Newmarket owners paid Phumelela R40 million to terminate the lease agreement. In February 2007 racing ceased and Newmarket was demolished and a mall built on the property. Hereunder a photo of the mall;



5.3.34. During the interview held with Mr Ian Jayes on 15 March 2018, he stated that, because of the racing clubs were heavily taxed, the GPG decided to establish a Horseracing Development Fund comprising of members of the horseracing industry, the GGB and the provincial government with a view to assist them with funding for developmental projects. He stated that the procedure was that if the clubs wanted money to do something, they had to apply for a grant from that fund and they were not allowed to do anything before the grant was approved. When the grant was approved then they got their money and they went ahead and get what they applied for and money had to be spent for the reason for which it was applied for and granted. He confirmed that these funds were public funds.

5.3.35. According to Mr Jayes, there was a little group within racing who were talking of the privatisation of horse racing, but racing was already privately owned, the horses were owned by private individuals, the assets were owned by the clubs and the members collectively owned it and they were private people so there wasn't any public owning of horse racing, therefore, the talk of privatisation was actually stupidity.



5.3.36. He stated that, members of the clubs were told that, "After 1990, when the ANC was unbanned then they changed their story and said now we must "corporatise racing" because you must be very careful because the ANC will come and take the assets and they put the fear in the members of the of the clubs" and the steering committee that was responsible for the corporatization of the horse racing industry used that as an excuse to get the clubs to agree to transfer of their assets and a company called 'Phumelela' Gaming and Leisure Limited was formed and all the assets of the clubs were subsequently transferred to Phumelela at no cost to them.

5.3.37. Subsequently, so stated Mr Jayes, Phumelela managed horseracing in the country and the clubs fell away altogether, there were no more clubs and there were just race courses and those race courses went to Phumelela. Before Phumelela was formed, the Newmarket Racecourse in Alberton, what you should also understand is that there were no stables for the horses on the race course, the horses were housed in private stables on private property adjacent to the race course, the problem was that in terms of the then Group Areas Act, those properties were in white residential areas and the municipal council would not give permission to build accommodation for black people in those properties.

5.3.38. According to Mr Jayes, black grooms could not stay near where the horses were accommodated and they were told that they could only live in the near township of Thokoza, also to understand that other stables start work 04h00 in the morning and it was impossible for the grooms to commute from Thokoza to Newmarket as a consequence of which, the grooms could only stay in makeshift accommodation on those properties.

5.3.39. When he was asked to describe what grooms were and whether they were people looking after the horses, Mr Jayes explained that grooms were employees of a trainer. Since they were black, they lived in very difficult conditions but they had to do it because they couldn't get to work at such time which was required to even start with. The Newmarket turf club applied to the HRDF for a grant to build 400 stables on its racing property and to build accommodation for single and married for the grooms on the property just near the race course, it was a block of flats there so they were going to buy that block as well for the grooms.



5.3.40. According to Mr Jayes, the grant was approved and he provided proof to that effect which read, "the long awaited and debated stabling complex to be built on Newmarket Racecourse was given a go ahead when a HRDF grant of R17.5million rand was approved for this purpose by the Highveld Horse-Racing and Betting Board in a meeting held on 11 December 1995." Below is a notice issued by the Newmarket Turf Club in February 1996.



Newmarket Turf Club Members Newsletter February 1996



MESSAGE FROM THE CHAIRMAN

Dear Member

In December 1995 the Highveld Racing Authority (HRA) received a letter from Mr Jabu Moleketi, MEC for Finance and Economic Affairs in Gauteng, which called for the privatisation of the Horse-Racing Industry on the Highveld by the end of 1996.

The HRA, at a subsequent special board meeting, unanimously agreed to support Mr Moleketi's call for privatisation and to incorporate the concept into the Five Year Business Plan currently being finalised for submission to the Gauteng Provincial Government.

Privatisation will effectively transform the Horse-Racing Industry from non-proprietary (Club) to proprietary (vested ownership) status, thereby ensuring the necessary accountability for more effective control of the Industry.

The Stewards of the Newmarket Turf Club believe that privatisation, coupled with the introduction of a new advantageous tax dispensation to place all forms of gambling on a level playing field, will be beneficial to both Gauteng Racing and our Club's Members.

Should privatisation proceed, the concept of Club Membership and Club Stewards will disappear, however current Members will be invited to participate in what promises to be the venture that ensures the viable long term future of Horse-Racing in this province. I accordingly encourage you to remain a Member of our Club during this time of change, particularly since Members will have to be compensated in one way or another for relinquishing their nominal ownership of the Club and its assets.

JOE VAN STREEPEN
Chairman : Newmarket Turf Club

The long awaited and debated stabling complex to be built on Newmarket Racecourse was given the go ahead when a HRDF grant of R17,5 million was approved for this purpose by the Highveld Horse-Racing and Betting Board in meeting held on 11 December 1995.

The Newmarket based trainers, currently located on the Newmarket Smallholdings adjacent to the racecourse, have, with the able assistance of our Chairman, been campaigning for the development of such a complex for some years now due to the deteriorating security situation on the smallholdings.

Plans for a secure stabling complex, similar to the one at Turffontein Racecourse, have been completed and 40 boxes will shortly be built on the stretch of land adjacent to the Heidelberg Road entrance. In addition to the stables, both single and married accommodation for grooms will be provided and negotiations are currently underway with the Alberton Town Council to purchase land adjacent to the racecourse for this purpose. The access tunnel, which connects the smallholdings and the racecourse, will be sealed off necessitating the total relocation of horses from the smallholdings as only those based in the new stabling complex will be permitted to utilise the training facilities on course.

Tenders for the project close in March and it is anticipated that the complex will be completed by the beginning of next year.



5.3.41. According to Mr Jayes, before the stables could be built, Phumelela came into existence and the spoke about closing certain racecourses. He stated that, at the time that the grant was applied for, Mr Andrew Feinstein was the MEC responsible for Finance in the Gauteng Provincial Government and he conducted an inspection in loco at Newmarket racecourse. When he saw the living conditions of the grooms, he was shocked. For instance ablution facilities were disgusting.

5.3.42. Following thereto, so stated Mr Jayes, Mr Feinstein said if there were no grooms accommodation, there shall be no grant from the HRDF as a consequence of which it was agreed that the grooms' accommodation would be constructed. At the time when Phumelela took over horseracing, the HRDF had approximately R33million in the fund of which approximately R1million was reserved for promotion whilst R600 000.00 was for the Jockey Clubs to improve its testing in the laboratories and R17.5million was reserved for the stables and grooms accommodation for the Newmarket racecourse. The balance of it was just in the fund and it was never committed.

5.3.43. Subsequently, Mr Jabu Moleketi was appointed in the capacity of a MEC responsible for Economic Affairs and Finance in the Gauteng Provincial Government. According to Mr Jayes, Phumelela stated that the funds that were in Horseracing Development Fund were given to them to use as they please. He testified that Phumelela got all the money which was in the HRDF, that's about R33million. Portion of that money was put in reserves for the stabling and paying out those other two grants that were approved before him. They paid those other two items to the jockey clubs and R17.5million was put in reserve because they were not going to build stables anymore but the said that they will put in in reserve. By that time, they were also planning to sell Newmarket racecourse.

5.3.44. According to Mr Jayes, R3.6million of the funds in the HRDF were allocation for building extensions at the Vaal racecourse. He found this problematic because the Vaal racecourse is in the Free State and the money in the HRDF was generated in and for Gauteng. So they took that money and spent it in the Free State and the balance of R13.9million was kept in reserves.



5.3.45. Mr Jayes stated that in the 2002 annual financial statements of Phumelela, it is indicated that a capital reserve obligation on stables had been withdrawn and the balance of R13.9million has accordingly been transferred directly to accumulated profits in the current year. So Phumelela took public funds money and shared them amongst its shareholders. Below is an extract from Phumelela's 2002 financial statements.

FOR THE YEAR ENDED 31 JULY 2002

25. COMMITMENTS AND CONTINGENCIES (continued)

25.2 The Racing Association

During the year the stakes agreement between Phumelela and the Racing Association in terms of which the company was to grant R10 million to The Thoroughbred Horse Racing Trust conditional upon the company listing and spend up to R17,5 million of capital reserve on stables was amended as follows:

- the grant became unconditional on 14 June 2002 (date of listing). Phumelela is now obliged to make payment of the grant to the Trust out of the proceeds of the disposal of the properties making up the Gosforth Park Racecourse. The amount payable will now be an amount equal to the difference between the purchase price received and R9 250 000 but subject to a maximum of R10 million. Until the properties are sold Phumelela is obliged to make available to the Racing Trust an amount of approximately R80 000 per month for the education and training of jockeys
- the capital reserve obligation on stables was withdrawn and the balance of R13,9 million has accordingly been transferred directly to accumulated profits in the current year.

5.3.46. On 4 and 5 September 2018, the complainants, Ms Phindi Kema and Messrs Chophelikhaya Simoto and Hanif Manjoo were interviewed. At her interview, Ms Kema stated that, subsequent to the formation of Phumelela Gaming and Leisure (Pty) Limited (Phumelela), a Johannesburg Stock Exchange listed company, flowing from a Memorandum of Understanding (MoU) entered into between the Gauteng Provincial Government (GPG) and the Gauteng Horseracing Industry, the industry had been dominated by the three major role-players who were Phumelela, an entity established in 1997, which conducts its business in the eight provinces of South Africa, in partnership with the Racing Trust (shareholder in Phumelela), which conducts its business at Kenilworth Racecourse in the Western Cape Province, Gold Circle (Pty) Limited (Gold Circle) which conducts its business in the Kwazulu-Natal Province and which relies on Phumelela for funding; and the National Horse Racing Authority (NHRA), which is not statutory body, its role is to regulate the day to day affairs of the racing industry by providing steward who ensure regulations affecting the industry are adhered to.



5.3.47. Regarding the NHRA which is a Regulator of the industry; Ms. Kema stated that she is concerned at its financial dependency on Phumelela Gaming and Leisure (Pty) Ltd. According to Ms Kema, the financial affairs of the NHRA which is supposed to be an independent Regulator of the industry were currently administered by Phumelela as the NHRA did not have a Financial Manager responsible to provide the service.

5.3.48. She further stated that the appointment of the NHRA's former Chief Executive Officer, Mr. Lyndon Barends (Mr. Barends) was improper as he was, prior to his appointment, sequestrated. In this regard Ms. Kema stated that Mr. Barends' sequestration issues appeared in media reports of 04 September 2018.

5.3.49. In connection with a complaint that she lodged with the Competition Commission (CC), Ms. Kema stated that the complaint emanated from Phumelela, Gold Circle and the NHRA's anti-competitive behaviour, in particular the vertical and horizontal relationship indicative of collusion between the entities, with the latter allowing Phumelela and Gold Circle to continue with its prejudicial conduct on account that it derives its funding from Phumelela, which made it difficult for new entrants to enter and/or participate in the horse industry.

5.3.50. On whether the GPG was cited as a respondent in the CC complaint, Ms. Kema stated that she was aware that the GPG was the one that created the monopoly which subsequently led to the formation of Phumelela, however, that was not cited in her challenge at the CC as she was more focused on entities which ran the horse racing industry in the country and made it difficult for her and other interested parties to participate in the industry.

5.3.51. On the status of the CC's investigation, Ms. Kema stated that the CC extended the investigation on two occasions and in December 2014, she received correspondence from the CC informing her that it will no longer be pursuing the matter and/or investigation due to the lapse of time.



5.3.52. She additionally stated that, separate from her 2010 complaint lodged with the CC, she objected to the merger between Thoroughbred Horse Racing Trust (which held 35% shareholding in Phumelela) and Phumelela on the basis that it would have given Phumelela more market share of the racing industry, as a consequence thereof, the CC ruled in her favour. According to her, Phumelela disguised the merger as a merger between the Thoroughbred Horse Racing Trust and Gold Circle, Western Cape which she brought to the attention of the CC.

5.3.53. She said afterwards, Phumelela lodged an appeal against the CC's ruling in the Competition Tribunal (CT) wherein the CT found that the CC did not make its point clear and as a consequence thereof, the application was upheld. Consequently, Kenilworth Racing (Pty) Limited (Kenilworth) was realised giving Phumelela the managing and/or decision-making powers over Kenilworth under the stewardship of Phumelela's Racing Manager, Mr. Clyde Basil.

5.3.54. Ms. Kema continued by stating that subsequent to the CT dismissing her matter, the South African Bookmakers Association (SABA) lodged a complaint with the CC in connection with intellectual property rights, in which it argued that Phumelela did not own intellectual property rights, therefore it was not eligible to charge management fees. (In this regard, she made reference to a matter between Phumelela and Hollywood Bets which Hollywood Bets won.)

5.3.55. Ms. Kema, conceded that the complaint she lodged with the CC, as well as her objection to merger of the Thoroughbred Horse Racing Trust and Gold Circle, Western Cape were not connected to the conduct of the GPG.

5.3.56. In providing a description of the term corporatisation, Ms Kema stated that;

"According to a research conducted, corporatisation is the act of reorganising the structure of a government-owned entity into a legal entity with the corporate structure found in publicly traded companies. These companies tend to have a Board of Directors, management and shareholders. However, unlike publicly traded companies, the government is typically the company's only shareholder and that the shares in the company are not traded publicly."



- 5.3.57. In explaining her understanding of the concept of corporatisation, Ms. Kema said that it was the first time she came across the concept, however, she stated that it meant privatisation, which requires involvement of all stakeholders and the public prior to a decision being made private a sector.
- 5.3.58. Regarding whether the GPG held shares in an entity it had created through corporatisation (Phumelela), Ms. Kema stated that the GPG and National Government does not have shareholding and/or control over Phumelela.
- 5.3.59. In responding to a question on whether the MoU signed by the GPG and the Gauteng horse racing industry was solely intended for the corporatisation of the horse racing industry in the Gauteng Province, Ms. Kema conceded that it was meant for the Gauteng Province, however, the new entity used same to lure other provinces to be part of the process.
- 5.3.60. She stated that the reasons why there is a Draft National Gambling Amendment Bill (which was initially introduced in 2010 and kept on being amended to date) currently being discussed before Parliament's Portfolio Committee on Trade and Industry was that the DTI was only institution which has the competency to regulate the horse racing industry which abdicated its responsibilities, hence the GPG took over and improperly corporatised the industry.
- 5.3.61. On the impact of corporatisation, Ms. Kema stated that corporatisation of the horse racing industry led to the loss of over 85 000 jobs in the industry, with Phumelela shedding 2000 jobs. She said this has also led to horse breeders closing down their breeding farms on account of financial losses brought by corporatisation.
- 5.3.62. She also stated that Phumelela took the MoU and presented it to East Cape Racing Club with a warning that the African National Congress (ANC) government has agreed to corporatise the industry (an aspect not known by the Eastern Cape Government) and informed same that for them to be sustainable and continue with racing activities, they need to be part of the corporatisation process and as a result, the East Cape Racing Club conceded to be included in the process.



- 5.3.63. She stated that when she was approached by Phumelela, she was only interested in the horse racing with a view to bring change in the Eastern Cape racing industry by inviting other counties to stage their racing festivals in the province, and as a result of corporatisation the breeding side in the industry has declined since Phumelela's focus is in the Gauteng Province only and yet it continued to collect 3% tax from the Eastern Cape Gambling Board.
- 5.3.64. Ms. Kema further stated that she has in her personal capacity, lost out on business opportunities related to horse racing in the Eastern Cape province, for which she had signed agreements with overseas partners, which still stands and that the overseas partners were threatening to sue her for breach of agreements on her failure to deliver in terms of the agreements. This she said was equated to Phumelela's outrageous price on a racecourse she had intended to purchase together with her overseas partners.
- 5.3.65. Regarding the Memorandum of Understanding entered into on 30 June 1997 between the Gauteng Provincial Government and the Horseracing industry in Gauteng, including the three (3) Gauteng clubs duly represented by Messrs Brian Mehl, Peter Jaeger and Derrick Wiid, Ms. Kema raised a concern on why the Eastern Cape Province was affected by a MoU which was initiated by the Gauteng Province. She said that this conduct constituted territorial overreach on the part of the GPG and therefore improper.
- 5.3.66. In connection with the structure and composition of the new company to be listed on the Johannesburg Stock Exchange (JSE), resultant to the conclusion of the MoU, she stated that although the MoU intended to have previously disadvantaged communities, black people in particular, as one of its shareholders, this was not the case.
- 5.3.67. She stated that the Horse Racing Trust, which is the majority shareholder in Phumelela, mentioned in a MoU did not comprise black people, and that South African Sports Confederation and Olympic Committee (SASCOC) was approached by Phumelela with a view to ensure that it adhere to the broad-based black empowerment principle, as a consequence thereof, Gride Investment subscribed to 5% of the BEE shareholding referred to in the MoU.



- 5.3.68. Regarding a strategic investor mentioned in the MoU, Ms. Kema stated that the latter was an entity named and styled Kalamojo (Pty) Limited, owned by the Chairman of Phumelela Board of Directors, Mr. Barnard Kantor and the former Chief Executive Officer of Steinhoff International Holdings Limited, Mr. Markus Jooste (who are both members of the Racing Association).
- 5.3.69. She continued by stating that, by virtue of Mr. Markus Jooste being a major role player in the Racing Association, he became eligible to be a director in Phumelela, and subsequently began to acquire shares through Kalamojo (Pty) Limited which escalated him to Phumelela's Board of Directors wherein he took strategic decisions which affected the entity and the horse racing industry at large.
- 5.3.70. Regarding the appointment of Interim Board Members of the new entity (Phumelela), three of whom were to be appointed by the racing industry stakeholders and the other three by the government (GPG), Ms. Kema stated during the process, Mr. Mpho Ramafalo (a Project Manager responsible for the corporatisation process) was appointed to the Interim Board, however, when it came to implementation of the MoU, government was not part of the process.
- 5.3.71. She also stated that shortly after the listing of the new entity on the JSE in 2002, Mr. Peter Malungani became a director and shareholder of Phumelela. In responding to the Public Protector's question on whether other black people representing the government were brought into the entity, Ms. Kema stated that no other governmental officials were brought in.
- 5.3.72. She further stated that people from other industries, such as Mr. Peter Malungani (an Executive Director of Investec Bank whose Managing Director was chaired by Mr. Barnard Kantor), who later became the Chairman of the entity and at a later stage traded his shares in Phumelela for R40 million, were instead brought into the entity.
- 5.3.73. In connection with the transfer of assets, Ms. Kema stated that the transfer of racecourses began with the "hand-over" of the Gosforthpark Racecourse (managed by the Gosforth Club) situated in Germiston, by the GPG which spread to other provinces. She also stated that afterwards, Gosforthpark Racecourse was sold to Wesbank even before Phumelela could take ownership of same in a deal facilitated by Mr. Peter Lindenberg.



5.3.74. Regarding whether she knew of government assets which were transferred to the new entity in return for an equitable compensation, Ms. Kema stated she knew of the Totalisator Agency Board (TAB) which was transferred by the GPG to a new entity and continued by stating that the government was never equitably compensated for this asset as envisaged in the MoU.

5.3.75. Regarding the prerogative of the government to decide on the level of taxation to be imposed on the new entity, Ms. Kema stated that prior to corporatisation, the horse racing industry paid 16% tax to the government and that post corporatisation it was a statutory duty of the Provincial Gambling Board (GGB) to collect 6% of tax from the winning bets and thereafter the Gambling Board would acquire 3% of the tax collected and the remaining 3% will then be paid to the new entity.

5.3.76. She continued by stating that in terms of the MoU, immediately after the listing of the new entity, the taxation percentage on the new entity should have been reduced to 5%, however, such did not happen that the new entity does not pay corporate tax like in other countries, e.g. Australia. Further that the 3% tax paid to the new entity by the regulator (GGB) accrued from the racing industry is not utilised to redress socio-economic impact of gambling in the country. She said that the transaction itself was a corrupt transaction.

5.3.77. In connection with the totalisator licence which Phumelela was approved to operate for a period of ten years, Ms. Kema stated that latter's ten years totalisator licence expired and that currently same is renewable on an annually.

5.3.78. She further stated that according to her, the TAB, transferred by the GPG to Phumelela, should have been operated the same way as the National Lotteries Board (NLB) and not controlled by a private entity. Ms. Kema emphasised that prior to corporatisation, the TAB was controlled by the Jockeys Club.

5.3.79. With regard to the monopoly of the industry in favour of two private entities, Ms. Kema stated that the two entities, Phumelela and Gold Circle, monopolised the industry in that they are the ones who decides who has to be accepted or not accepted, on their own terms, to participate in the industry.



5.3.80. Regarding the process to be followed when one seeks to be part of the horse racing industry in general, Ms. Kema stated that one needs to make an application to the National Horse Racing Association (NHRA), which according to her is controlled by Phumelela on account that the Chief Executive Officer of same is appointed by Phumelela, for confirmation that the applicant meets the standards required prior to approaching the relevant Provincial Gambling Board for licensing, which will approve same upon congruence from the NHRA.

5.3.81. Ms Kema concluded her testimony by stating that she would like the GPG to provide her with the reasons on why it had privatised (corporatised) the horse racing industry since it did not have the competency to do so, as the competency resides with the Department of Trade and Industry (DTI).

5.3.82. Further that, she would like to see one of the departments of government, in particular, the Department of Agriculture, Forestry and Fisheries or Department of Sports and Recreation, taking over the control and/or regulatory powers of the horse racing side of the industry, as racing in itself is a sport.

5.3.83. She also said that she would like to see the creation of a regulatory body by the government which will adopt a module similar to the one utilised in Hong Kong, wherein profits accrued from the industry is injected back to the industry for development and not to a private entity.

Summary of Evidence of Mr. Hanif Mahommed Manjoo at the interviews held on 04 September 2018 at the offices of the Public Protector in Pretoria

5.3.84. In his address to the Public Protector, Mr. Hanif Manjoo commenced his testimony by confirming that he is a former employee of the Gauteng Gambling Board and served on its Horse Racing Gambling Sub-committee. He stated that on 19 January 2013, he lodged a complaint with the Public Protector relating to the corporatisation of the horse racing industry in the Gauteng Province, the launching of a Memorandum of Understanding (MoU), deviation from the salient principles of a MoU, followed by corruption nepotism, disposal of assets, lack of transformation and job losses, especially by black people in the industry.



5.3.85. According to Mr. Manjoo, the corporatisation process was initiated by the then Gauteng Member of the Executive Council responsible for the Department of Finance, Mr Jabulani Moleketi with a press statement in which he stated that that government is embarking on a process of economic transformation of the horse racing industry in the Gauteng Province (in a form of privatisation).

5.3.86. He stated subsequent to the media statement he raised his concern on the lack of transformation in the industry and indicated that there was only one black horse owner, at the time, namely, Mr Richard Maponya. He continued by stating that he engaged his fellow Sub-Committee Board member Mr. Michael Maher to discuss the corporatisation of the industry and they both agreed that instead of corporatising the industry, same should be unbundled, which included the following:-

5.3.87.1. The constraints on ownership and getting of colours must be removed;

5.3.87.2. The reduction of entry fee with a view to allow black people to enter the industry and become owners and trainers;

5.3.87.3. The reduction of tax must be reduced for owners which at the time was 9% which was going to the province (Treasury).

5.3.87. Mr. Manjoo stated that a MoU was drawn up by the office of Mr. Moleketi in consultation with the horseracing authority. He continued by stating that he held a belief that the GGB was supposed to be responsible for all deliberations and negotiations regarding the MOU but the process was hijacked from us by Mr Moleketi.

5.3.88. The gambling board was summoned into Mr Moleketi's office, there we were presented with the MOU and there we raised a few points of concern regarding the MOU, which were then implemented by Mr Moleketi in consultation with Mr Barry Walters. It was then tabled at the Gauteng Legislature. There were one or two questions but nothing major.

5.3.89. Before the corporatisation the law regulating the Horseracing industry was the Transvaal Horseracing Ordinance. The new gambling act was applicable during this process of corporatisation. After corporatisation black people lost their jobs, they became the first victims of the process.



- 5.3.90. About 3500 people lost their jobs from TAB. TAB was the betting side of the horseracing industry, and they were answerable to the Gauteng Gambling Board. TAB was a branch of the government entity. The TAB and Horseracing Authority was then incorporated into Phumelela.
- 5.3.91. Three horseracing tracks, Newmarket, Germiston and Turffontein Racecourses were owned by government, they were provincial assets that were transferred to Phumelela, including training centres, Randjesfontein (this was also purchased by province). The transfer occurred without compensation to the province, they got them for free.
- 5.3.92. Immediately when corporatisation took place you had directors from Investec, Mr Marcus Jooste, and the CEO of Steinhoff all of them came on and infiltrated the various sectors of the horseracing industry, including the owners, the regulatory body (Horseracing Authority) and the TAB also.
- 5.3.93. In terms the MOU, the BEE partner was never identified who it was supposed to be. My understanding was that you go to the punters first and get them to participate as empowerment partners but that didn't happen. The MOU was changed because they were supposed to give the grooms 5%. There was no active advertising to the public inviting them to come into the industry. The day the MOU was signed I went to Free State to discuss the MOU with the CEO of the gambling board there.
- 5.3.94. I am aware that there was a levy that would be imposed of 6% on bookmakers which was payable to the government and half of that would be given to Phumelela, and the bookmaker would also be charged for the TV rights.
- 5.3.95. The Jockey Club was a self-regulatory body it would receive its financing from colour registering, the TAB would give it a percentage of its income. The TAB was generating the revenue. TAB was part of government.
- 5.3.96. According to Mr Manjoo, there is a lack of transformation of the horseracing industry. He requested the Public Protector to investigate the disposal of state assets and whether the MEC had the legal right to dispose of those assets.



5.3.97. MOU was meant for BEE participation but this never happened. Went to Randjesfontein and met with the Grooms and I saw the conditions and in Newmarket also where they were living in stables and I insisted we must put it on the table, but how they went about it I don't know.

5.3.98. Essentially evidence is the lack of transformation in the industry and that the corporatisation failed to transform the horseracing industry.

Summary of the evidence of Mr Chophelikhaya Simoto during the interviews held on 5 September 2018 at the offices of the Public Protector in Pretoria

5.3.99. Mr Simoto commenced his evidence by stating that, he had worked as a groom for many years and in 2004 he was appointed as the President of South Africa Grooms Association (SAGA), which represents approximately 4000 grooms around South Africa. SAGA was registered as an NPO and is a national association with its offices situated in Cape Town.

5.3.100. He explained that in February 1995 government realized that the industry was very important and needed to be funded. Subsequently industry was funded by 52.5 million. He explained that as grooms they work with horses from birth, assist in growth of horses. Once a horse is a year old the grooms input the bridling, maintain and teach horses how to run, how to pace themselves.

5.3.101. Jockeys on the other hand, take the horses from grooms and only race the horses. The grooms are extremely important and without them there would no horseracing industry without them.

5.3.102. Once realizing that they were being mistreated and abused, they approached government in 1994/1995. The former President, Mr Nelson Mandela undertook to look into the situation and stated that he would begin in Gauteng and allocate funding and also looking into the living conditions and pertinent issues for grooms.

- 5.3.103. Mr Mandela upon arrival in Gauteng delegated the responsibility of looking into the industry to Mr Jabu Moleketi. Mr Moleketi then decided to take money from the Horseracing Development Fund (HRDF), which he believes was formed by government, and distribute to the horseracing clubs. (Newmarket, Turffontein Club, Millerton Club, Philippi Club etc.). It was decided that these clubs be formed into one organization that would operate. HRDF was disbanded and be given to the company to be formed. Phumelela was formed.
- 5.3.104. Phumelela was to take funding (R50 something) which was categorized and R17.5 million to be given for grooms accommodation. The mistake done by government i.e. Mr J Moleketi was that grooms not be called when making decisions. All this information was received from Ian Jayes, who was a part of the Committee. Even though there was no association for grooms at the time the funding was announced the Committee could have called the Unions and be told what was happening (Oil, Chemical (OGWU) Union).
- 5.3.105. Barry Waters who received the money. He was Chairman of the Horseracing Committee. Grooms of Gauteng were to benefit from the R17, 5 million. Funding allocation for married and unmarried grooms: there were different structures to be built for married and unmarried grooms. No stables and accommodation were constructed at New Market Club. He heard that in Vaal stables (not sure of club) were built and R13.9 million was remaining in the funding for grooms. He does not know what happened R13.5 million.
- 5.3.106. With regard to the current living conditions of the grooms Mr Simoto stated that in Turffontein they **built grooms shacks**. Grooms were taken out of good living spaces for horses and shacks built for them. You would live with the horse next door. Grooms would live in structures made from planks. Turffontein did have a compound but 10 people would have to reside in one leaving no space for lamps to be placed.
- 5.3.107. Since matter is being investigated by Parliament, on 14 August 2018 the Portfolio Committee on Labour visited Randjesfontein club. All the white people working at the club ran away leaving one lady to answer to the Committee. Committee made statement to Parliament.
- 5.3.108. He stated that one hundred (100) grooms share two (2) waterborne toilets that are not in good working condition. Water is available at times, however, the Grooms mostly have to bath outside. There were showers but they no longer work.



- 5.3.109. According to Mr Simoto, as people who are a part of the industry and have grown up in the industry. With the knowledge and skills that we have about the industry we would like to enter the industry and be horse trainers, owners and breeders. All categories which the white people are a part of. All those things are learnt.
- 5.3.110. There should be an ABET at the training centers. We were thinking that with that money, if we receive it, that we can develop things that are benefits to grooms. E.g. provident funds which the white people have and have created on their own. There is no funding and assistance to help out grooms when being unfairly treated (e.g. a groom was beaten by an owner and he has since lost his job and his kids have stopped going to school). Develop groom schools to develop skills and licenses.
- 5.3.111. The money must include all the interest from the date funding was given. Grooms should be given monitoring and implementation powers with regards to funding given to them. As it stands nothing is being done to assist the grooms and basically Phumelela is refusing. The Gauteng and Cape Town Gambling boards are giving money (R75 million and R18 million) to Phumelela for development of the industry but grooms are not benefiting. All Gambling Boards except Durban is contributing to Phumelela for development.
- 5.3.112. According to Mr Simoto, the grooms have no provident fund and are not registered for Compensation. They are paid cash. Some are paid through the banks but no payslips. Portfolio Committee instructed Labour was to place inspectors all over the country to ensure compliance with Labour laws (Compensation Fund, UIF etc.). They are paid R2000 a month.
- 5.3.113. Mr Simoto concluded his testimony by requesting the Public Protector to investigate the whereabouts of the funds that were taken from the Horseracing Development Fund which were earmarked for the construction of grooms' quarters.
- 5.3.114. He raised concerns at the operation and management of the Regulating body, the National Horseracing Authority as he was of the view that it was not being managed in a manner that is transparent. E.g.: Rich people approaches the NHRA, after abusing (death, beatings) a groom, and are found not guilty and pay small fines. Owners are not held accountable. Marcus Jooste runs the show. People are not treated the same. The CEO of Phumelela is also chairman of NHRA, there is no independence;



5.3.115. They have tried to open a groom's school (being assisted by overseas funders). White people in the industry shut it down because they realized that they would develop.

Summary of evidence of Mr. Robin Lesley Bruss led during the interviews that were held on 06 September 2018 at the offices of the Public Protector in Pretoria

5.3.116. Mr. Robin Bruss (Mr. Bruss), commenced his evidence by stating that he has been involved in the industry since 1975 and has more than 40 years' experience. During his testimony, he stated that, he served on the National Thoroughbred Breeders Association (NTBA) for a period of nine years, as well as on the National Horse Racing Authority (NHRA) Board of Directors from 2006 to 2015. Further that he was reappointed to the NHRA in January 2018 after taking a short break.

5.3.117. Mr. Bruss continued by stating that he had appeared in Parliament of the Republic of South Africa on two occasions, firstly in 2011 as the representative of the NTBA in connection with the discussions on the National Gambling Policy which looked at the sustainability of the horse racing industry, and secondly in 2013, in the capacity of the NHRA representative, at the Department of Trade and Industry (DTI)'s Public Hearings.

5.3.118. He further stated that he was also invited to be part of the DTI' Study Group on Gambling Policy which looked on the direction the industry should take going forward, as well as the shortcomings thereof. Mr. Bruss stated that he spearheaded the export of the South African bred horse which had the potential of generating over R1 billion in revenue.

5.3.119. With regard to the corporatisation of the industry, Mr. Bruss stated that he was a member of Trainers and Owners Association (TOA) at the time of corporatisation of the industry which subsequently collapsed. He said that the GPG was the one which, in 1995 came with idea to do away with the colonial regulatory system of the industry with a view to create a transparent vehicle for the sport, preservation and advancement of the sport, and ensure that the sport is transformed.



5.3.120. He continued by stating that as a consequence thereof, the GPG emerged with a MoU which sought to create a public entity which would be transparent and whose primary objective was to be utilised as a vehicle for transformation, as well as to ensure that the industry becomes sustainable, which in essence seemed to be a radical idea. However, the system which was set up did the opposite of what was intended.

5.3.121. He said that instead of the advancing the sport of horseracing and create employment, 85 000 jobs were lost and a considerable number of horse breeder farms were shut down. Mr. Bruss stated that by the end July 2018, only 167 (out of 480 farms prior to corporatisation) were horse breeder farms were left, which indicated a 90% decline in horse breeding.

5.3.122. He stated that he was distressed to see an industry which was rated third in the economic sector, after agriculture and mining, finding itself in an unstable position. Further that over the past 15 years, he had the industry declining every year, which led to massive job losses and massive disruption in every aspect of the business, in particular the agriculture, sporting and gambling sectors.

5.3.123. Mr. Bruss stated that he was not part of the corporatisation negotiations team, however, subsequent to the negotiations, eight of the race clubs, namely, Turffontein, Newmarket, Gosforthpark (which consisted of the Benoni Race and Germiston Turf Clubs , Vaal Race Clubs, were asked, in their Special General Meetings, to vote the assets of these clubs to the new corporate entity, on premise that:-

5.3.123.1. The Racing Trust, which will hold shares in a new company, would be established and devote itself in the promotion of members' interests with specific emphasis on development and transformation;

5.3.123.2. A new Racing Association would be established to represent the traditional racing interests of club members and owners in the Gauteng Province. This association would control the racing industry's intellectual property, including broadcasting and television rights; and through this safeguard the levels at which stakes are paid;

5.3.123.3. The tax to be imposed on the industry would be applied on an equitable basis consistent with that imposed on other forms of gaming.



5.3.123.4. In addition the industry's share of 6% levy imposed on bookmakers would be increased to 50% of that levy. (3% to government and 3% to the new entity)

5.3.124. He continued by stating that as a consequence thereof, the GPG emerged with a MoU which sought to create a public entity which would be transparent and whose primary objective was to be utilised as a vehicle for transformation, as well as to ensure that the industry becomes sustainable, which in essence seemed to be a radical idea. However, the system which was set up did the opposite of what was intended.

5.3.125. He said that instead of advancing the sport and create employment, 85 000 jobs were lost and a considerable number of horse breeder farms were shut down. Mr. Bruss stated that by the end July 2018, only 167 (out of 480 farms prior to corporatisation) were horse breeder farms were left, which indicated a 90% decline in horse breeding.

5.3.126. He further stated that interested stakeholders, e.g. the grooms, in the industry were not consulted prior to the corporatisation of the industry.

5.3.127. On his understanding of the concept of corporatisation, Mr. Bruss stated that the idea was to take assets of horseracing and all the organisations were collapsed – horseracing single entity, let sport (section 21 company – the racing association) share in ownership of the company, introduce BEE and transformation vehicle. BEE owns 25%, sport owns 35%. Two thirds of company would then be owned by sport and empowerment, leaving one third to be engine that drives sport and empowerment forward.

5.3.128. With regard to taxation, Mr. Bruss stated that in the old dispensation horseracing was heavily taxed at 9% on turnover and since it was the only legitimate form of gambling it generated huge amount of tax for the government. He said that with the advent of the new dispensation and the introduction of casinos which were to be taxed at 2, 5%, the racing industry could not compete.

5.3.129. Mr. Bruss further stated that the bookmaker's levy varied. He said that there was a point in time when, before the corporatisation process, the government tried to charge the bookmakers 12% levy and it realised that the level of turnover dropped by half and when they dropped it to 6%, the turnover shot up.



- 5.3.130.Regarding the prerogative of the GPG to determine level of taxation to be imposed on new company, Mr. Bruss stated that once listing ensued, the rate of totalisator tax was to be 6% on turnover and it is agreed that 3% levy on bookmakers, being 50% of current 6% levy will be passed to new company.
- 5.3.131.In his response on whether a MoU was ever amended with regard hereto, Mr. Bruss stated that in one document, signed by Mr. Jabulani Moleketi, indicates that a percentage of betting tax will go to horseracing industry but at a later stage, his signature appeared on document which stated that portion of the betting tax will be paid to Phumelela.
- 5.3.132.Regarding the structure of the new entity, Mr. Bruss stated as follows:-
- 5.3.133.1.Consequent to the Racing Association not being eligible to hold shares in a listed company, there was a need to register a trust, which was ultimately named the Thoroughbred Horse Racing Trust, which held 30% shares in the new entity;
- 5.3.133.2.Regarding the Broad-Based Black Empowerment (BEE) groups, Mr. Bruss stated according to the Shareholder Agreement, BEE groups initially held 22,5% held shareholding, which was later increased to 25%, in the new entity;
- 5.3.133.3.He said that there was no Strategic Investors and Management in the entity and the shares were subsequently reallocated, however, he did not mention to whom same was reallocated to;
- 5.3.133.4.Regarding employee shares(share option scheme of the new entity employees), he referred the Public Protector to the Listing Prospectus which he undertook to provide to the latter;
- 5.3.133.5.Regarding the general public, Mr. Bruss stated that these were the shares which were sold immediately after the listing of the entity. He referred these shares as free flow shares, which he said even the directors of Phumelela were eligible to buy;
- 5.3.133.6.Regarding the racing public shares, he stated that these were shares which were sold prior to the listing of the new entity, which he subscribed for about R25 000 at R0, 50 per share and when the share price increased to R4.00, he sold same.



5.3.133. Pertaining to the issue of the disposal of assets, Mr. Bruss stated that he did not know whether the government ever owned assets prior to the corporatisation process. In this regard, he said that the TAB, a creature of statute, and as a consequence thereof, it meant that the government owned its assets.

5.3.134. Regarding the Stakes Agreement of 2002, he stated that in 2013 the new entity subverted the Stakes Agreement which he said was improper on account that the amendment of the Stakes Agreement could only be achieved by consultation with every members and reduced in writing and therefore it cannot be changed unilaterally.

5.3.135. Regarding paragraph 8.2 of the Original Stakes Agreement, which provided that the new entity acknowledged that it had received from the Horse Racing Development Fund (HRDF) an amount of R17.5 million, which was earmarked for stabling facilities, Mr. Bruss stated that he was aware that a fund was created for development in the industry. He continued by saying that the purpose of the HRDF, was to ensure that race clubs who were to embark on capital developments and/or projects have the necessary funds for utilisation with a view to satisfy same.

5.3.136. In connection with the dissolution of the HRDF, Mr. Bruss stated that he had no idea and/or information in connection with the dissolution of the HRDF. He however, stated that the issue relating to the dissolution of the HRDF and the transfer of monies held by same, including the R17, 5 million for the construction of single and married quarters for the benefit of the grooms, had been a subject of contention between Mr. Ian Jayes and Phumelela for the past seventeen years.

5.3.137. He stated that Phumelela was legally challenged and it produced documents in which it claimed that it was given authority by the GPG to disburse money received as it deemed fit and therefore it had no case to answer. He continued by stating that Phumelela indicated that it has spent significant amounts on upgrading accommodation for grooms, however, according to him yet there is no indications that grooms accommodation is not what it ought to be.



5.3.138. On whether it was proper for Phumelela to declare the grant transferred on dissolution of the HRDF as profit, reference in this regard was made to Phumelela's 2002 Annual Report, Mr. Bruss stated that it was improper to do as the money was clearly earmarked for the construction of grooms accommodation and not to be utilised as windfall profit for shareholders.

5.3.139. Mr. Bruss stated on record that prior to his appearance before the Public Protector (05 September 2018), he was approached by the Chairman of Phumelela Board of Directors, Mr. Bernard Kantor regarding the best horse racing model and wherein he was requested to engage Ms. Kema in connection therewith.

5.3.140. Mr. Bruss stated that the best **business model in horseracing in the world was the Hong Kong and Japan Models**, in which the government and the community are involved with the gambling industry.

5.3.141. Gambling is used as a vehicle for community development. In that way, money is not paid to a private company with a view to enrich shareholders at the expense of community. He further said that the Hong Kong Jockey Club is the biggest contributor to community development and contributes over \$2 billion a year towards same.

5.3.142. As a consequence thereof, Mr. Bruss was requested by the Public Protector to compile a Draft Proposal based on Hong Kong model and submit same within seven days, which will be presented to all stakeholders in the industry with a view to reach an amicable resolution of the matter.

Summary of evidence led by Mr. Peter Gibson during the interviews held on 06 September 2018 at the offices of the Public Protector in Pretoria

5.3.143. Mr. Gibson (Mr. Gibson), commenced his evidence by stating that he was a qualified Optometrist (a profession he relinquished in 2003 when he was offered an opportunity to head Horse Racing South Africa (Pty) Limited (HRSA). During his testimony, he stated that the HRSA was a non-profit organisation. Its main primary functions and/or objectives were:

5.3.144.1. *The internationalisation of the horse racing industry (which was built around the exportation of South African horses (a trade component);*



5.3.144.2. *Running of a quarantine station, which the industry had developed under the auspices of the Department of Agriculture, Forestry and Fisheries (DAFF);*

5.3.144.3. *Serve as a broad government liaison platform for both Trade and Agriculture; and*

5.3.144.4. *To provide funding mechanism for various industry development initiatives, part of which was the commissioning of the Environmental Impact Study.*

5.3.144. Mr Gibson continued by stating that the HRSA was a separate company officially recognised by the Department of Trade and Industry. However, in 2014 HRSA was shut down due to the withdrawal of funding by certain shareholders, in particular, Phumelela and the Racing Association.

5.3.145. Regarding the corporatisation of the industry, Mr Gibson stated that he was not a part of the industry when corporatisation took place. His mandate started in 2003 with the main focus being international exposure.

5.3.146. Mr Gibson was never a shareholder and had no involvement in corporatization. HRSA was an independent company and had agreed that it would have no involvement in the operations of the shareholders.

5.3.147. Ever since corporatization, statistics show that decline in participation across the aspects of the industry has not strived. Including the fact that, now as other forms of gambling have been introduced, the horse racing industry now accounts for only 3% of the industry. The health of the industry nowhere near to what it should/could have been given the fact that the industry started as a monopoly. 3% of the total gaming pie (including sporting (biggest growth), casinos etc.)

5.3.148. The cause of industry collapse is underfunding (race horse owners don't get a reasonable return on their investment they give less to the industry). The ethos of the sport of racing (the comradery) has been belittled due to over corporatisation.



5.3.149. There are two (2) main sources of funding from the industry. One comes from the tote (managed by the operators) and the other comes from the book makers (don't pay contribution from turnover but collect tax). Racing relies primarily on gambling.

5.3.150. Comparative Model-Hong Kong is a partnership between government and the sport of racing. Profits made are redistributed to communities for development and money going back into the sport. In the South African Model- you have bookmakers pay no turnover and only collect tax and an operator (Phumelela mainly) use profits to pay dividends to shareholders and pay nothing to the sport. Leaving the system vulnerable.

5.3.151. To see if the sport is representative of all people of South Africa you would have to break it up into sectors. The majority of employment is rural people who support the breeding and the training industry. Ownership is dominated by the white older generation. Indians also participate but need growth in women owners.

5.3.152. The biggest challenge of getting into the horseracing industry is money. Some refer to it as the sport of kings. Cost on average of R10 000 p/m to maintain a horse. About R200 000 up towards R350 000 to buy a horse. It's a rich man's sport. No one is however precluded from entering the industry.

5.3.153. The application for a license (to become owner) costs about R4000. It entitles the owner to race horses and design colors horses will wear. Black males can own horses but don't feel comfortable within the industry. Everyone is subjected to the same process. Historically it was difficult to get a license but now it is easier.

5.3.154. It is Mr Gibson's view that Phumelela should not have been listed (a company owes a fiduciary duty to shareholders) instead maybe register as an NPO with same objectives. Around the world no Associations are listed because a corporatization through a listed entity makes a few rich.

5.3.155. He is of the view that the industry is about to collapse because of lack exporting. The exporting is impacted by the African Horse Sickness (a virus that kills horses). Horses now had to go through the quarantine area in Cape Town and travel via Mauritius and it takes about 6 months (if going to Dubai) to export a horse which in turn kills competitiveness.

5.3.156. With regard to employment within the industry, he stated that:

5.3.157.1. In terms of a 1996 study – in the Western Cape alone 50 000 people were employed by the industry. Making it about 100 000 people in the country being employed by the sport.

5.3.157.2. Updated view- environmental impact study (2009 finalised 2011) - employment in industry had declined significantly.

5.3.157.3. Released that- major employment was in the breeding environment (low skilled rural employees, included grooms that have certain skills), 2nd biggest employment sector was training (grooms that have training skills).

5.3.157.4. Human contact is very important in horse maintenance.

5.3.157.5. The importance of grooms is realized by the owners.

5.3.157.6. If funding was properly steered towards the industry owners would be able to pay grooms better salaries and improve the work environment.

5.3.157.7. The industry needs proper funding. This could contribute to:

5.3.158.1. Development of education for grooms and trainers;

5.3.158.2. Develop a well-structured industry.

5.3.157. The operators and bookmakers must fund the industry and not just pay tax and not pay on profits made (turnover).

5.3.158. The non-independence of the National Horse Racing Authority due to its funding by Phumelela is problematic and thus compromises it as a Regulator. This presents a conflict of interest.

5.3.159. To remedy the situation, he was of the view that a funding model needed to be developed which would direct funding to sport, grow participation, and improve sustainability and inclusiveness. Further thereto, he felt that a healthy monopoly is beneficial, e.g. Totes need to be a monopoly to thrive.

Summary of evidence led by Mr. Sean Gray Coleman at the interviews held on 27 September 2018 at the offices of the Public Protector in Pretoria

5.3.160. Mr. Sean Coleman commenced his testimony by stating that he was appointed to the position of Chief Executive Office of the South African Bookmakers Association (SABA) in 2009. Prior to his appointment he was a member of the Kwazulu-Natal Bookmakers Control Committee with an aggregate of 13 years in the horse racing industry, in particular, bookmakers business.

5.3.161. In narrating the history of horse racing and gambling, Mr. Coleman stated that prior to the South African democratic dispensation, gambling in general was prohibited, with an exception to horse racing in the erstwhile four Provinces (Transvaal, Free State, Natal and Cape) in the Republic, which bestowed the industry with a legal monopoly in the country.

5.3.162. He continued by stating that the racecourses were established, owned and operated by non-profit voluntary associations known as "turf clubs". Further that the only betting which was allowed, at the time, was the on-course betting (betting at racecourses), however, the rules in this regard were lessened to make provision for off-course horse racing betting in various outlets, which were operated by independent bookmakers and by the Totalisator (operated by the turf clubs) through the broadcasting of horse racing meeting/events on television and radio, in particular *Tellytrack* channel which took over from *Supertrack*.

5.3.163. In explaining the role of bookmakers in the horse racing betting, Mr. Coleman stated that the latter sells risk to punters in a form of fixed odds on the outcome of a particular race meeting. In a nutshell, if a punter places a bet at those odds and wins, the latter will be paid in accordance with such odds.

(This he said ensures that the risk of losing or winning is appropriately spread out amongst the punters and that the odds offered paid will not result in large losses to the bookmaker.)



5.3.164. With regard to the taxation of the industry, Mr Coleman testified that bookmakers paid the Gauteng Government 6% tax levied on all winning bets and Phumelela was granted half of that 6% tax revenue. This was codified in Regulation 276 of the Gauteng Gambling Regulations. According to Mr Coleman, this practice could also be found in other provinces legislation. He made an example about the Western Cape Province and stated that the 3% tax is paid over to Kenilworth Racing whilst in KwaZulu-Natal, it is paid to Gold Circle.

5.3.165. With regard to Phumelela's monopoly, he stated that the entity had monopoly power over betting to the exclusion of independent bookmakers. They also have monopoly and effective control over the broadcast of all racing in South Africa through its majority and controlling stake in the Tellytrack partnership and they receive a steady income stream from the bookmakers 3% tax.

5.3.166. Mr Coleman argued that in corporatizing the industry, the Gauteng Provincial Government appear to have had clear intentions of protecting the new entity and ensure that it thrived.

Application of the relevant laws and prescripts

5.3.167. The Horse-Racing and Betting Ordinance, 1978 (the Ordinance), which was repealed by the Gauteng Gambling and Betting Act, 1995 regulated and controlled horseracing, betting, licenses, taxes and fees connected therewith in the former Transvaal Province. The Ordinance further provided for the establishment of the HRDF, the objective of which was to promote horseracing.

5.3.168. Section 43A(1) provides that "*there is hereby established a fund, to be known as the Horse-racing Development Fund (hereinafter referred to as the Fund), for promoting horse-racing,* whilst section 43A(4) provides that "*no moneys shall be paid from the Fund without the approval of the Administrator.*"



Conclusions

5.3.169. Based on the information obtained during the investigation, and with the application of the legal framework to the facts of the matter it can be concluded that public funds allocated from the Horseracing Development Fund, with an additional condition by the Board that part of the grant be utilised for the construction of single and married quarters for the benefit of the grooms were not utilised for the purposes for which they were intended.

5.4. **Issue 3: Whether the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela; and some of racecourses subsequently bequeathed to Phumelela were later sold by Phumelela and the proceeds of the sales shared among Phumelela' shareholders;**

Issues that are Common Cause

5.4.1. It is not disputed that following the conclusion of the Memorandum of Understanding between the parties in Gauteng, horseracing industries in other provinces resolved, in their respective Special General Meetings, to be included in the corporatisation process embarked on by horseracing industry in Gauteng.

5.4.2. It is also not disputed that as a consequence thereof, the Eastern Cape Racing Club, which held race meetings and totalisator licences in the Eastern Cape Province, concluded a Disposal of Business Agreement on 22 June 1999, in which the whole of the Club's business, together with movable and immovable properties were disposed and transferred to Phumelela as a going concern.

5.4.3. It is further not disputed that the East Cape Club, acting in concurrence with the East Cape Racing (Pty) Limited, a company registered in accordance with the provisions of section 19 of the Eastern Cape Gambling and Betting Act No. 5 of 1997, concluded an Agreement for the Transfer of Assets, in which it was agreed that the Club's business, as well as its immovable property should be disposed and transferred to Phumelela.



5.4.4. It is also not disputed that the Bloemfontein Turf Club, pursuant to the conclusion of the MoU between the Free State Provincial Government and the Free State Horseracing Industry on 15 December 1997, concluded a Disposal of Business Agreement with Phumelela on 14 December 1998, in which it agreed to dispose its business as a going concern, together with all its assets of every kind, movable and immovable, corporeal and incorporeal to Raceco.

5.4.5. It is further not disputed that the Totalisator Agency Board (Free State), pursuant to an understanding between the Free State Provincial Government and the Free State Horseracing Industry, the Vaal Turf Club and the Bloemfontein Turf Club, concluded a Disposal of Business Agreement with Phumelela on 15 December 1998, in which it agreed to dispose its business as a going concern, together with all its assets of every kind, movable and immovable, corporeal and incorporeal to Raceco.

Issues that are in Dispute

5.4.6. The issue for my determination is whether the land on which the *Arlington Racecourse* is situated was owned by the Nelson Mandela Metropolitan Municipality) as alleged by the first Complainant, as well as whether the land on which *Bloemfontein Turf Club* is situated, was owned by the Bloemfontein Municipality at the time of the transfer to Phumelela.

5.4.7. Ms Phindiwe Kema alleged that Phumelela paid R1.00 for the municipal land on which the Arlington and Bloemfontein racecourses are situated and that Phumelela, subsequent to the transfer of these land, later sold same at exorbitant price for its benefit.

5.4.8. The Gauteng Department of Economic Development, in a written response dated 20 April 2017, stated that the process of re-organising the industry and exchange of assets between Phumelela Gaming and Leisure (Pty) Ltd and the various clubs occurred outside the Gauteng Provincial Government engagements. Accordingly, the Gauteng Provincial Government does not have any information on the original ownership of the land previously held by clubs including title owners, subsequent transferees and sale values.



Regarding the ownership of the land on which the Arlington Racecourse is situated:

- 5.4.9. On 7 August 2013, following an insight by the Public Protector that the Nelson Mandela Metropolitan Municipality was in the process of negotiating the sale of the Arlington Racecourse with Phumelela for an amount of R50 million, the Public Protector requested the Nelson Mandela Metropolitan Municipality to put in abeyance the negotiations towards the sale of the Arlington Racecourse pending the finalisation of the investigation into the appropriateness of the transfer of state properties to Phumelela.
- 5.4.10. The Nelson Mandela Metropolitan Municipality responded on 29 August 2013, and confirmed that there were initiatives by the municipality to acquire the land on which the Arlington Racecourse is located, the purpose of which was to utilise same to address housing issues in the Walmer Township, however, such initiatives were taken over by the Eastern Cape Department of Human Settlements (the Department) and the negotiations have since been between the Department and Phumelela.
- 5.4.11. Further thereto, the Nelson Mandela Metropolitan Municipality stated that it was prepared to put the negotiations towards the purchase of the land on which the Arlington Racecourse is located in abeyance pending the finalisation of the investigation by the Public Protector.
- 5.4.12. The Public Protector issued a letter on 27 September 2013, to Phumelela calling for the submission of copies of Deeds of Transfer for all the properties that were transferred to Phumelela, following the conclusion of the Memorandum of Understanding by the parties in the Gauteng Province.
- 5.4.13. In a written response dated 30 October 2013, through its legal representative, *Messrs. Roodt Incorporated*, Phumelela stated that it was still in the process of obtaining Deeds of Transfer in respect of racecourses that were transferred to Phumelela.
- 5.4.14. As a result of the delay in the submission of the information and documentation requested on the part of Phumelela, on 13 February 2014, a request for copies of Deeds of Transfer for all the properties that were transferred to Phumelela, was sent to the Chief Registrar of Deeds in the Department of Rural Development and Land Reform, Mr S Lefafa.



- 5.4.15. Subsequently, on 4 November 2015, (with reference made to a letter dated 30 October 2013) Phumelela stated that following the corporatisation of the horseracing industry in Gauteng, the racing clubs in other provinces, including the Eastern Cape, wished to join in the corporatisation of the horseracing industry.
- 5.4.16. Accordingly, Phumelela entered into a disposal of business agreement with the East Cape Racing Club on 9 July 1999, in terms of which the issuing of racecourse licence in respect of, *inter alia*, Arlington Racecourse to Phumelela was a suspensive condition.
- 5.4.17. Phumelela further stated that at the time of concluding the Disposal of Business Agreement with the East Cape Racing Club incorporated East Cape Racing (Pty) Ltd for the purpose of applying for a racecourse licence and on 1 October 1999, a racecourse licence was issued to the Company on the condition that the East Cape Racing Club's assets be transferred to the Company.
- 5.4.18. Phumelela also stated that on 13 August 1999, the East Cape Racing Club and the Company (Phumelela) concluded a transfer of assets agreement in terms of which the East Cape Racing Club's business and assets were transferred to the Company in terms of Deed of Transfer number T67540/2003, which included the transfer of properties comprising the Arlington Racecourse to the Company.
- 5.4.19. Further thereto, Phumelela reiterated that none of the transactions described in the response letter herein referred to above, in any manner, directly or indirectly, to the administration or appropriation of funds by the Gauteng Provincial Government nor was any provincial or other government institution a party to any of the transactions.
- 5.4.20. Following Phumelela's response, a subpoena, calling for the submission of copies of past and present Title Deeds relating to the Arlington Racecourse and the Bloemfontein Turf Club, as well as all Title Deeds of racecourses owned wholly or partially by the Phumelela was issued on 20 March 2017, against the Chief Registrar of Deeds: Department of Rural Development and Land Reform Ms. Carlize Knoesen. The following was established from Ms Carlize Knoesen response dated 18 April 2017;
- (a) In July 1994, Erf 4195 Walmer located in the administrative District of Port Elizabeth, in extent of 59, 4687 hectares was registered in the name of "*The Trustees*" for the time being of the East Cape Racing Club, under T4987/1995;



- (b) The transfer in terms of the above was given by The Chairman for the time being and as such the Trustee of the St. Andrew's Racing Club as a result of a sale of agreement on 1 July 1994 for an amount of R1, 856, 851.00.

5.4.21. On 23 July 2003 the remainder of the property under T4987/1995, being the remainder of Erf 4195 Walmer in the extent of 52,9746 hectares was transferred to East Cape Racing (Pty) Limited under T67540/2003.

5.4.22. Ms Carlize Knoesen further stated that the registration information in respect of the July 2003 transfer relating to T67540/2003, indicated that the following properties were held and registered in the name of **East Cape Racing (Pty) Ltd** and were sold to the transferee by the **East Cape Racing Club** on 15 July 2002, for an amount of **R1.00 (one rand)**:

- (a) The remainder of Erf 4195 Walmer, situated in the Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth, in the extent of 52,9746 hectares;
- (b) The Farm Apex No. 12, situated in the Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth, in the extent of 132, 6211 hectares;
- (c) The remainder of Farm Progress No. 13, Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth, in the extent of 58, 7451 hectares;
- (d) The remainder of Farm Progress South No. 406, Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth, in the extent of 177, 3349 hectares;
- (e) The remainder of Farm Progress North No. 405, Nelson Mandela Bay Metropolitan Municipality, Division of Uitenhage, in the extent of 192, 4560 hectares; and
- (f) Erf 6991 Walmer, Nelson Mandela Bay Metropolitan Municipality, Division of Port Elizabeth, in the extent of 7, 3961 hectares.

5.4.23. The DED, in its response dated 20 April 2017, to concerns I have raised in a meeting held on 06 April 2017 with Hon Maile in connection with the ownership and sale of the lands on which racecourses transferred to Phumelela are located, stated that the Gauteng Department of Economic Development does not have any information on the original ownership of land previously held by clubs including title owners, subsequent transferees and sale values.



Regarding the ownership of the land on which the Bloemfontein Turf Club is situated:

5.4.24. It was confirmed from the records held by Bloemfontein Deeds Registry submitted by Ms Knoesen, that Phumelela is the owner of Portion 15 of the Farm Rietfontein 152, district Heilbron, Free State Province by virtue of Deed of Transfer T24808/2003;

(a) Portion 13 of the Farm Sunnyside 2660, District Bloemfontein, Free State province was previously registered in the name of Phumelela by virtue of Deed of Transfer T31235/1999. The property was bought from the Bloemfontein Turf Club on 15 December 1998, for the amount of R3,5 million;

(b) Phumelela subsequently sold the property to Calantha Properties (Pty) Limited on 17 January 2007, for R32 million by virtue of Deed of Transfer T22368/2007.

5.4.25. It was further confirmed that Calantha Properties (Pty) Limited transferred the property to M5 Developments (Pty) Limited by virtue of Deed of Transfer T11636/2009; and that M5 Developments (Pty) Limited transferred the property to Space Securitisation (Pty) Limited by virtue of Deed of Transfer T11637/2009;

5.4.26. Further thereto, it was confirmed that before the Bloemfontein Turf Club transferring Farm Sunnyside 2660 by virtue of Deed of Transfer T31235/1999, to Phumelela, it was consolidated from two components, namely Portion 4 and 12 of the Farm Sunnyside 2620, District Bloemfontein respectively held by Deed of Transfer T1940/1928, as well as T10764/1979.

The sale of racecourses transferred to Phumelela following the conclusion of the Memorandum of Understanding

5.4.27. It is also not disputed that on separate occasions, the Arlington Racecourse and the Bloemfontein Turf Club, including their movable and immovable properties were sold by Phumelela to third parties, however, Phumelela, denied that the proceeds of any disposal of racecourses subsequently transferred by the clubs in Gauteng was used for the benefit of a few Phumelela shareholders.

5.4.28. In a letter dated 30 October 2013, Phumelela stated as follows;

"The restructuring of the horseracing industry, which resulted in the acquisition of various racecourses, did not impose any obligation on Phumelela to follow any process outside of its normal corporate processes to dispose of any of its assets. Nor was Phumelela's ability to dispose of its assets limited in any way either by agreement or in terms of its Constitution (sic)".

5.4.29. It was established that following the Gauteng corporatisation process, the following racecourses and their businesses as a whole, together with their movable and immovable properties were acquired by Phumelela as a going concern;

Properties acquired by Phumelela in the Gauteng Province:

- (a) Totalisator Agency Board (Transvaal);
- (b) Transvaal Racing Club and Johannesburg Turf Club t/a Turffontein Racecourse;
- (c) The Newmarket Turf Club;
- (d) Germiston Sporting Club and Benoni Turf Club t/a Gosforth Park Racecourse;
- (e) Highveld Racing Authority;
- (f) HRA Racehorse Transport (Proprietary) Limited; and
- (g) North Rand Training Centre (Proprietary) Limited.

5.4.30. It was also established that following the inclusion of the Eastern Cape Horseracing Industry in the Gauteng corporatisation process, Phumelela acquired the Arlington and Fairview Racecourses situated in Port Elizabeth, together with their movable and immovable properties as a going concern.

5.4.31. Further thereto, in the Free State Province, it was established that Phumelela acquired the following racecourses, together with their movable and immovable properties as a going concern;

- (a) Griqualand West Racing Club (Kimberley Racecourse);
- (b) Totalisator Agency Board (Free State);
- (c) Bloemfontein Turf Club (Bloemfontein Racecourse); and
- (d) Vaal Turf Club (Vaal Racecourse);



5.4.32. It was established from the information and documents obtained during the investigation that the issue raised by the first Complainant involved private establishments, and as a consequence thereof, an investigation in connection therewith was not conducted. Nevertheless, it was noted from the information obtained that;

- (a) *Gosforth Park Racecourse* was sold on 6 September 2002, to *Gosforth Park Properties (Pty) Limited* for R18, 5 million;
- (b) *Newmarket Turf Club* was sold on 18 May 2005, to *ITAS Services (Pty) Limited, Nanini CC t/a REJEM and Rand Sporting Club (Pty) Limited* (amount unspecified); and
- (c) *Bloemfontein Horse Racecourse* was sold on 17 January 2007, to *Calantha Properties (Pty) Limited* for R32 million.

Application of the relevant laws and prescripts

5.4.33. The Deeds Registries Act, 1937 (the Act) is an enabling legislation which deals with the manner in which the transfer of ownership of land should be conducted.

5.4.34. Section 16 of the Act provides that *"Save as otherwise provided in this Act or in any other law the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar: Provided that notarial attestation shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond:*

Provided further that where the State acquires all the land held under any title deed, whether by way of expropriation or otherwise, or where a local authority by virtue of the provisions of any law acquires all the land held under a title deed by any other such authority, the registrar shall make such alterations and entries in his registers and such endorsements on any such title deed as may be necessary to register transfer to the State or such authority, as the case may be, of the property so acquired free of charge, and that the provisions of subsection (4) (a) of section 31 of this Act shall apply mutatis mutandis in respect of such a transfer by endorsement.



Conclusions

5.4.35. Based on the information obtained during the investigation, and with the application of the legal framework to the facts it may be concluded that the land on which the Arlington Racecourse and the Bloemfontein Turf Club are located, were previously owned by private establishments at the time of the transfer to Phumelela and not by municipalities or government as alleged by the first Complainant.

6. OBSERVATIONS

- 6.1 Thoroughbred Horseracing appear to be a sport only reserved for the elite.
- 6.2 A Memorandum of Understanding was signed by Mr Jabu Moleketi on 30 June 1997 for and on behalf of the Gauteng Provincial Government, giving away the sport of Horseracing in Gauteng Province to a select few individuals who would later become shareholders of Phumelela Gaming and Leisure (Pty) Ltd. He therefore took away the sport from the people and handed it with a silver platter to the shareholders of Phumelela Gaming and Leisure (Pty) Ltd.
- 6.3 It may well be that the intentions to corporatise Thoroughbred Horseracing in the Republic were noble, however, it did not achieve the desired outcomes.
- 6.4 It appears that the Gauteng Provincial Government's intentions were to protect the new entity which later became Phumelela Gaming and Leisure (Pty) Ltd at all costs and ensured that it succeeded.
- 6.5 So many role-players and architects of the corporatisation of the horseracing industry subsequently became directors of a private company, Phumelela Gaming and Leisure (Pty) Ltd.
- 6.6 Some government officials who were involved in the corporatisation process resigned from their government positions and took employment with Phumelela Gaming and Leisure (Pty) Ltd as if the process was employment creation.
- 6.7 The process of corporatisation of the industry was not in the public interest at all. It better served the rich and the elite in the society thus making the rich, richer.



6.8 In South Africa post 1994, gaming licensing became strictly regulated with the coming into effect of a new National Gambling Act 33 of 1996 and all licensing in terms of that legislation could only be undertaken through open public invitations to Bid.

6.9 The definition of "betting" in the Act means to "... stake any money or thing of value or, expressly or impliedly, undertake, promise or agree to stake any money or thing of value on the result or contingency of or relating to any sporting or athletic contest, competition, tournament or game usually attended by the public..."

6.10 Section 13 (1)(e) provides –

"(1) Subject to the provisions of this Act, gambling in the Republic shall be regulated in accordance with the following principles:

(a) Gambling activities shall be effectively regulated, controlled, policed and licensed;

(b)

(c) ...

(d) ...

(e) The issuing of licences in respect of any gambling activity shall be transparent, fair and equitable;

(f) ... "

6.11 There is no legislation, law or similar provision in the Constitution of South Africa at national, provincial or local levels of government, permitting for the awarding of a gambling, wagering or betting license by an MEC of a province in a private/ privatised manner.

6.12 The Gauteng Gambling Act, 4 of 1995 and the regulations promulgated under the legislation required that the newly established Provincial Gambling Board call for applications for licences by means of a 'RFP'. The purpose being to invite the public to apply for licences through an open bidding process.

6.13 The Provincial Gaming Board issues the Bids, invites proposals through different forms of advertising and interacts with the public and interested participants in the licensing process. The Boards decision, as is the decision of a Member of the Executive Committee, constitutes 'administrative action' and is accordingly reviewable by the Courts in terms of the Promotion of Administrative Justice Act, 3 of 2000.



- 6.14 The shareholders of Phumelela Gaming and Leisure (Pty) Ltd unjustifiably benefitted from public funds in the form of fifty percent (50%) of the six percent (6%) levy on bookmakers, paid to the entity by the Gauteng Gambling Board.
- 6.15 There is an anomaly with regard to the funding for the operations of National Horse Racing Authority as the Regulator being funded by Phumelela Gaming and Leisure (Pty) Ltd thus being dependent on the entity, one of the industry players thus compromising the independence of the Regulator. The Regulator must be a statutory body sanctioned by government.

7. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

- 7.1. **Regarding whether Mr Jabulani Moleketi had the requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng, which resulted in the conclusion of the Memorandum of Understanding in 1997, if not so, does the conduct constitute maladministration or improper conduct;**

7.1.1. The allegation that Mr Jabulani Moleketi did not have the requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng, which resulted in the conclusion of the impugned June 1997 MoU **is not substantiated.**

7.1.2. It is not the competence of a province to conclude an agreement that would bind other provinces but a national competence. Therefore, the agreement entered into between the Gauteng Provincial Government and the Gauteng Horseracing Industry was intended to regulate the industry in Gauteng Province and not the other provinces. However, it appears as though the agreement was used to attract other provinces into similar arrangements.



7.1.3. Mr Moleketi was therefore granted a mandate by the Executive Council of the Gauteng Provincial Government to represent the province in the negotiations aimed at the reorganization and restructuring of the horseracing industry in the Gauteng Province. However the intentions and purpose of the restructuring of the industry were not realized.

7.1.4. The restructuring of the industry did not achieve its objectives of inclusivity in that the object of having a certain percentage of black empowerment groups was not realized. The entire restructuring of the horseracing industry which was initiated in the Gauteng Province culminating in other provinces following suit was not in the best interests of the members of the public who were affectionate about the sport and those who used their hard earned money to bet for a winning horse.

7.1.5. It appears that the whole restructuring process was never intended to attract other racial groups into the sport of horseracing to maintain of keeping the sport by one racial group which is the white minority group at the expense of black majority citizens and constituencies.

7.1.6. The National Horseracing Authority failed to exercise its role of being a Regulator of the horseracing industry. Further thereto, it failed to safeguard the horseracing assets. The financing of the Regulator by Phumelela is inappropriate.

7.1.7. The Gauteng Provincial Gambling Board paid 50% of public funds in annual levies on bets to Phumelela.

7.1.8. Therefore, the allegation that Mr Jabulani Moleketi did not have requisite authority from the Gauteng Provincial Government to enter into discussions and negotiations for the corporatisation of the horseracing industry in Gauteng, which resulted in the conclusion of the Memorandum of Understanding in 1997, has no merit and could not be substantiated by the information and documentation obtained during the investigation.

7.2. Regarding whether the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary processes when corporatising the Gauteng Horseracing Industry, if so, whether the conduct constitute maladministration or improper conduct;



- 7.2.1. The allegation that the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary processes when corporatising the Gauteng Horseracing Industry, **is not substantiated.**
- 7.2.2. It is common knowledge that under the previous regime the majority of South Africans were excluded from public life. In remedying the situation, section 118(1)(a) of the Constitution, 1996 (which flows from section 1(c) of the Constitution, 1996) introduced a duty on the National Assembly, the National Council of Provinces and provincial legislatures to facilitate public participation or involvement when executing their legislative and other processes of the legislature and its committees. The main aim in this regard is to encourage the public to have meaningful inputs into the decision-making processes by government in all spheres.
- 7.2.3. It was established from the information and evidence received during the investigation that, following the Gauteng Provincial Cabinet approval of the negotiations with the horseracing industry, as well as the process to be followed in reaching an agreement between the provincial government and the industry with regard to the "privatisation" of the sport, the Horseracing Industry in the Gauteng Province issued circulars to all its members (comprising of the Newmarket Turf Club, Turffontein Racing Club and Gosforth Park Turf Club which included the Benoni Turf Club and Germiston Sporting Club) notifying them of Special general Meetings wherein the corporatisation of the horseracing industry in the Gauteng Province would be the subject of discussion and resolution in connection therewith would be taken.
- 7.2.4. It was also established that, following consultations with the Horseracing Industry in Gauteng Province, the Gauteng Provincial Government, issued a notice (Notice 3928 of 1997) published in the Gauteng Provincial Gazette No. 427 calling all interested parties to submit comments on the proposed amendment of the Gauteng Gambling and Betting Act No 4 of 1995 by not later than 6 January 1998.
- 7.2.5. Therefore, the exercise and/or execution of all executive powers conferred in terms of the provisions of section 125 of the Constitution, 1996, must at all material times conform to the principle of legality envisaged in section 1(c) of the Constitution, 1996.



7.2.6. The allegation that the Gauteng Provincial Government, duly represented by Mr Jabulani Moleketi, improperly failed to invite public participation and/or follow parliamentary processes when corporatising the Gauteng Horseracing Industry has no merit and could not be supported by the information and evidence obtained during the investigation.

7.3. Regarding whether there were public funds allocated from the Horseracing Development Fund during the corporatisation process for the benefit of the grooms and for the upgrading of stabling facilities at the Newmarket Racecourse;

7.3.1. The allegation that public funds allocated from the HRDF during the corporatisation process for the upgrading of stabling facilities and for the construction of single and married quarters for the benefit of the grooms at the Newmarket Racecourse, **is substantiated.**

7.3.2. As indicated herein above, the Newmarket Turf Club applied for a grant to an amount of R17, 5 million for the erection of stabling facilities from the Horseracing Development Fund, which was approved by the Highveld-Racing and Betting Board in a meeting held on 11 December 1996.

7.3.3. Furthermore, the information obtained during the investigation indicates that public funds which were allocated from the Horseracing Development Fund and earmarked for the erection of stabling facilities at the Newmarket Turf Club with a condition that part thereof must be utilised for the construction of single and married quarters for the benefit of the grooms was utilised at the Randjesfontein Training Centre, the Vaal Turf Club (which is situated in the Free State Province) and Turffontein Racecourse.

7.3.4. In the circumstances, the failure to utilise public funds allocated from the Horseracing Development Fund for the purposes which it was intended constitutes maladministration envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.

7.4. Regarding whether the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela; and some of racecourses subsequently bequeathed to Phumelela were later sold by Phumelela and the proceeds of the sales shared among Phumelela' shareholders;



7.4.1. The allegation that the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela, **is not substantiated.**

7.4.2. As indicated herein above, the land on which the Arlington and Bloemfontein Racecourses were not, prior to their transfer to Phumelela, either owned by the municipalities and/or government. According to the information obtained during the investigation, Erf 4192 Walmer and remainder of Erf 4034 Walmer, were consolidated to form Erf 4195 in the extent 59, 4687 hectares, under Certificate of Consolidated Title T73200/1993 on 17 September 1993;

7.4.3. The information also indicates that, Erf 4195 in the extent of 59, 4687 hectares was registered in the name of "*The Trustees*" for the time being of the East Cape Racing Club under T4987/1995 in 1994, and was transferred to the Trustee of the St. Andrew's Racing Club as a result of a sale of agreement on 1 July 1994, for an amount of R1 856 851.00;

7.4.4. Furthermore, on 23 July 2003, the remainder of the property under T4987/1995, being the remainder of Erf 4195 Walmer in the extent of 52,9746 hectares was transferred to East Cape Racing (Pty) Limited under T67540/2003;

7.4.5. The registration information in respect of the July 2003 transfer relating to T67540/2003, indicates that six properties were held and registered in the name of East Cape Racing (Pty) Limited;

7.4.6. The information further indicates that Erfs 4191 and 4192 Walmer were transferred from Arlington Sandpits CC (registration number CK86/00841/23) to "*The Chairman for the time being*" and as such the Trustee of the St. Andrew's Racing Club by means of an exchange transaction (Title Deed No. T73197/1993); and

7.4.7. With regard to the land on which the Bloemfontein Turf Club is located, the information obtained from the Bloemfontein Deeds Registry indicates that Portion 4 and 12 of the of the Farm Sunnyside 2620, Bloemfontein District were consolidated in terms of Deed of Transfer T1940/1928 and T10764/1979;



7.4.8. The information also indicates that Portion 13 of the Farm Sunnyside 2660, Bloemfontein District, Free State province was previously registered in the name of Phumelela by virtue of Deed of Transfer T31235/1999. The property was bought from the Bloemfontein Turf Club on 15 December 1998, for the amount of R3, 5 million. Phumelela subsequently sold the property to Calantha Properties (Pty) Limited on 17 January 2007, for R32 million by virtue of Deed of Transfer T22368/2007. Phumelela is the owner of Portion 15 of the farm Rietfontein 152, situated in Heilbron District, Free State Province by virtue of Deed of Transfer T24808/2003.

7.4.9. It was further established from the information obtained during the investigation that Calantha Properties (Pty) Limited transferred the property to M5 Developments (Pty) Limited by virtue of Deed of Transfer T11636/2009; and that M5 Developments (Pty) Limited transferred the property to Space Securitisation (Pty) Limited by virtue of Deed of Transfer T11637/2009.

7.4.10. I did not investigate the allegation that certain racecourses subsequently transferred to Phumelela, were improperly sold by Phumelela and the proceeds of the sales shared among Phumelela' shareholders on the basis that the issue fell beyond my investigatory mandate conferred in terms of section 182 of the Constitution and which are given effect by the provisions of section 6(4)(a)(i) of the Public Protector Act, 1994.

7.4.11. Notwithstanding the above, I have observed the following in connection with the allegation made by Ms Phindiwe Kema;

- (a) Gosforth Park Racecourse was sold on 6 September 2002, to Gosforth Park Properties (Pty) Limited for R18, 5 million;
- (b) Newmarket Turf Club was sold on 18 May 2005, to ITAS Services (Pty) Limited, Nanini CC t/a REJEM and Rand Sporting Club (Pty) Limited (amount unspecified); and
- (c) Bloemfontein Racecourse was sold on 17 January 2007, to Calantha Properties (Pty) Limited for R32 million.

7.4.12. Therefore, the allegation that the land on which the Arlington and Bloemfontein Racecourses are located, were owned by municipalities and/or government at the time of the transfer to Phumelela, has no merit and could not be substantiated by the information and documentation obtained during the investigation.



8. REMEDIAL ACTION

The appropriate remedial action I am taking as contemplated in section 182(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following;

8.1 The President, His Excellency, President Matamela Cyril Ramaphosa to take urgent and appropriate steps to;

8.1.1 Take note of the report and constitute a Ministerial Committee under the stewardship of the Minister responsible for Trade and Industry that will be tasked with a duty to establish a statutory and independent body that will serve as a Regulator for Thoroughbred Horseracing in the Republic; and

8.1.2 Consider that the committee be constituted of the Ministers responsible for Labour, Agriculture Forestry and Fisheries, Human Settlements as well as Sport and Recreation.

8.2 The Minister of Trade and Industry to take urgent and appropriate steps to;

8.2.1 Lead the process of establishment of a statutory and independent body that will serve as a Regulator for Thoroughbred Horseracing in the Republic;

8.2.2 Establish a Secretariat to the Ministerial Committee that will be composed of legally qualified officials, Accountants and people who are knowledgeable about Thoroughbred Horseracing in the Republic.

8.2.3 Embark on a consultation process with all industry players and stakeholders involved in Thoroughbred Horseracing in the Republic with a view to making a determination on how they prefer that horseracing be managed going forward so that the sport could be taken back to its initial custodians, the people; and;

8.2.4 Should a need arise, the Ministerial Committee appointed by the President to embark on a benchmarking exercise to learn best practises in as far as horseracing is concerned.



8.3 The Minister of Sport and Recreation to take urgent and appropriate steps to;

8.3.1. Take cognisance of the report and ensure that the transformation of Thoroughbred Horseracing in the Republic is expedited.

8.3.2. Ensure that the sporting side of the Thoroughbred Horseracing in the Republic is properly regulated

8.4 The Premier of the Gauteng Provincial Government and all other Provincial Premiers to:

8.3.1 Take cognisance of the report and ensure that the Ministerial Committee appointed by the President is provided with the necessary support to enable it to achieve its objectives.

8.3.2 Ensure that the statutory body that is appointed as the Regulator of Thoroughbred Horseracing in the Republic is capacitated to enable it to perform its functions independently and without fear, favour or prejudice;

8.3.3 Ensure that the 50% bookmakers levy which is paid to Phumelela Gaming and Leisure (Pty) Ltd is withdrawn and transferred to the new entity that will serve as a Regulator for Thoroughbred Horseracing in the Republic for its operations as well as the development and transformation of the horseracing industry and also assist in looking into a new beneficial funding model;

8.3.4 With the assistance of the SIU, the Premier of the Gauteng Provincial Government and all other Provincial Premiers whose provinces were affected by the corporatisation of the Thoroughbred Horseracing in the Republic, to request the President to issue a Proclamation in terms of section 2(1) of the Special Investigating Units and Special Tribunals Act, 1996 to investigate the:

8.3.4.1 unlawful appropriation or expenditure of public money or property;

8.3.4.2 unlawful, irregular or unapproved acquisitive acts, transactions, measures or practices; and

8.3.4.3 intentional or negligent loss of public money by organs of state referred to in this report, with a view to institute civil action for the recovery of the loss of public money by organs of state in the corporatisation of the Thoroughbred Horseracing in the Republic.



8.3.5 The Gauteng Premier to extend an apology to the complainants for the inconvenience and frustrations they experienced as a consequence of the corporatisation of Thoroughbred Horseracing as well as consider compensating them for any losses they incurred in trying to bring to the attention of the Gauteng Provincial Government the injustices occasioned by the corporatisation of the Thoroughbred Horseracing in the province.

8.5 The CEO and the Board of Directors of the Gauteng Gambling Board to take urgent steps to:

8.4.1 Take cognisance of the report and in consultation with the newly appointed Regulator for Thoroughbred Horseracing in the Republic, conduct an audit of all state-owned assets which were transferred to Phumelela Gaming and Leisure (Pty) Ltd for a song with a view to establishing their origin, value on transfer and ownership prior to transfer, as well as to establish whether they were utilised for the benefit of the horseracing industry and citizens who are affectionate about the sport of horseracing;

8.4.2 Ensure that the 50% bookmakers levy which is paid to Phumelela Gaming and Leisure (Pty) Ltd by the Gauteng Gambling Board is withdrawn and transferred to the new entity that will serve as a Regulator for Thoroughbred Horseracing in the Republic for its operations as well as the development and transformation of the horseracing industry and also assist in looking into a new beneficial funding model;

8.4.3 Recover from Phumelela Gaming and Leisure (Pty) Ltd the balance of the funds which were earmarked for the erection of single and married quarters for the benefit of the grooms in the Gauteng Province and ensure that a Trust is established for the grooms and other low-skilled employees in the horseracing industry.



9. MONITORING

- 9.1. The Director-General in the Presidency to submit an implementation plan indicating how the remedial action taken in paragraph 8.1 above will be implemented, within 30 days working days from date of the report;
- 9.2. The Director-General of the Department of Trade and Industry to submit an implementation plan indicating how the remedial action taken in paragraph 8.2 above will be implemented, within 30 days working days from date of the report.
- 9.3. The Director-General of the Department of the Gauteng Provincial Government to submit an implementation plan indicating how the remedial action taken in paragraph 8.3 above will be implemented, within 30 days working days from date of the report.
- 9.4. The Chief Executive Officer of the Gauteng Gambling Board to submit an implementation plan indicating how the remedial action taken in paragraph 8.4 above will be implemented, within 30 days working days from date of the report.
- 9.5. All actions directed in this report as part of the remedial action taken by the Public Protector in terms of the Public Protector's powers under section 182(1)(c) of the Constitution must be finalised within six (6) months from date of the report.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 06/05/2019

Assisted by: Good Governance and Integrity Branch