

**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**

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***“Allegations of worsening conditions within the health facilities/hospitals in
the Eastern Cape Province”***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF WORSENING
CONDITIONS WITHIN THE HEALTH FACILITIES/HOSPITALS IN THE EASTERN
CAPE PROVINCE**

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EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- (ii) The report communicates the findings and appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of worsening conditions within the health facilities/hospitals in the Eastern Cape province.
- (iii) The investigation commenced on 30 July 2020 as an own initiative intervention in terms of section 6(4) of the Public Protector Act, on the grounds of information that came to the attention of the Public Protector from media reports relating to the poor conditions at health facilities/hospitals in the Eastern Cape province.
- (iv) In order to obtain clarity as to what was alleged in the media, the Deputy Public Protector, Adv Kholeka Gcaleka (DPP) and an investigation team of the Public Protector South Africa (PPSA) visited certain identified health facilities in the Eastern Cape and conducted site inspections. The inspection entailed indiscriminately interviewing staff members, union representatives and patients.
- (v) The investigation therefore sought to examine a number of factors, including the availability of health care, human resources, physical infrastructure and vital equipment, machinery, Personal Protective Equipment (PPE) and staff morale in hospitals, in the light of the strain added by outbreak of the Covid- 19 pandemic.

(vi) On 04 to 05 August 2020, the following hospitals were visited and inspected by the PPSA investigation team :

- (a) Uitenhage Hospital
- (b) Livingstone Hospital
- (c) Mthatha Hospital
- (d) Sulenkama Hospital (also known as the Nessie Knight Hospital).

(vii) **On analysis of the allegations and available information, the following issues were identified and investigated:**

- (a) Whether the administration of health by the Eastern Cape Department of Health (ECDoH) at the Nessie Knight Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration;
- (b) Whether the administration of health by the ECDoH at the Mthatha Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration;
- (c) Whether the administration of health by the ECDoH at the Livingstone Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration; and
- (d) Whether the administration of health by the ECDoH at the Uitenhage Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration.

(viii) Having considered the evidence and information obtained during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding whether the administration of health by the ECDoH at the Nessie Knight Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration:

- (aa) The allegation that the administration of health by the ECDoH at Nessie Knight Hospital does not accord with the obligations imposed by the Constitution and the law is substantiated.
- (bb) Observations made during the on-site inspection undertaken by PPSA investigation team revealed systemic deficiencies, such as staff shortages, lack of adequate medical equipment, insufficient supply of PPE, poor physical infrastructure such as dilapidated buildings, lack of vehicles, lack of laundry services and poor supply of water as detailed in evidence.
- (cc) The same systemic deficiencies were echoed in submissions by the hospital management and union representatives that were engaged during interaction with the investigation team.
- (dd) The observations and findings were not disputed by the ECDoH. The ECDoH has failed to ensure appropriate conditions for the enjoyment, delivery and access to adequate as well as effective health care services for the community of Sulenkama.
- (ee) Such failure by ECDoH amounts to contravention of section 195(1) (e) and (f) of the Constitution, section 237 of the Constitution, section 27(1) and section 25(1) and (2) of the NHA as well as the Regulations, as shown in the application of the law to the facts.
- (ff) The conduct of the ECDoH accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a)(i) of the Public Protector Act.

(b) Regarding whether the administration of health by the ECDoH at the Mthatha Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration:

- (aa) The allegation that the administration of health by the ECDoH at the Mthatha Hospital does not accord with the obligations imposed by the Constitution and the law is substantiated.
- (bb) Observations made during the on-site inspection that was undertaken by the PPSA investigation team revealed acute systemic deficiencies such as inadequate physical infrastructure, the lack of a mortuary, shortage of office space, inadequate office equipment, shortage of human resources, lack of vehicles, inadequate medical equipment or machinery and inadequate supply of other essential resources like PPE which are all necessary to sustain an effective health facility, as detailed in evidence.
- (cc) The same systemic deficiencies were echoed in the submissions by the hospital management and union representatives and staff that were engaged during interaction with the investigation team.
- (dd) The observations and findings were not disputed by the ECDoH.
- (ee) The ECDoH has failed to ensure appropriate conditions for the enjoyment, delivery and access to adequate as well as effective health care services for the community of Mthatha.
- (ff) Such failure by ECDoH amounts to contravention of section 195(1) (e) and (f) of the Constitution, section 237 of the Constitution, section 27(1) and section 25(1) and (2) of the NHA and the Regulations, as shown in the application of the law to the facts.

(gg) The conduct of the ECDoH accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.

(c) Regarding whether the administration of health by the ECDoH at the Livingstone Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration.

(aa) The allegation that the administration of health by the ECDoH at Livingstone Hospital does not accord with the obligations imposed by the Constitution and the law is substantiated.

(bb) Observations made during the on-site inspection that was undertaken by the PPSA investigation team revealed systemic deficiencies such as acute staff shortages, inadequate physical infrastructure, shortage of medical equipment or machinery and insufficient supply of other resources like PPE which are all necessary to sustain an effective health facility, as detailed in evidence.

(cc) The same systemic deficiencies were echoed in submissions by the hospital management and in the submissions by union representatives that were engaged during interaction with the investigation team.

(dd) The observations and findings were not disputed by the ECDoH.

(ee) The ECDoH has failed to ensure appropriate conditions for the enjoyment, delivery and access to adequate as well as effective health care services for the community around Port Elizabeth.

(ff) Such failure by ECDoH amounts to contravention of section 195(1) (e) and (f) of the Constitution, section 237 of the Constitution,

section 27(1) and section 25(1) and (2) of the NHA as well as relevant Regulations as shown in the application of the law to the facts.

(gg) The conduct of the ECDoH accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a)(i) of the Public Protector Act.

(d) Regarding whether the administration of health by the ECDoH at the Uitenhage Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration.

(aa) The allegation that the administration of health by the ECDoH at Uitenhage Hospital does not accord with the obligations imposed by the Constitution and the law is substantiated.

(bb) Observations made during the on-site inspection that was undertaken by the PPSA investigation team revealed systemic deficiencies such as acute staff shortages, shortage of vehicles and inadequate supply of resources like PPE which are all necessary to sustain an effective health facility, as detailed in evidence.

(cc) The same systemic deficiencies were echoed in the submissions by the hospital management and by union representatives that were engaged during interaction with the investigation team.

(dd) The observations and findings were not disputed by the ECDoH.

(ee) The ECDoH has failed to ensure appropriate conditions for the enjoyment, delivery and access to adequate as well as effective health care services for the community around Uitenhage.

- (ff) Such failure by ECDoH amounts to contravention of section 195(1) (e) and (f) of the Constitution, section 237 of the Constitution, section 27(1) and section 25(1) and (2) of the NHA and the Regulations, as shown in evidence.
- (gg) The conduct of the ECDoH accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.
- (ix) The Public Protector notes and acknowledges the challenges and constraints faced by the ECDoH, as well as the context within which health services are delivered in the Eastern Cape Province namely, the serious infrastructure backlogs from the former homelands.
- (x) Based on the action plans submitted by the ECDoH detailing how the shortcomings and deficiencies in each of the four hospitals will be addressed and taking into consideration submissions made by both ECDPWI and ECPT, the appropriate remedial action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution is the following:
 - (a) **In respect of the Nessie Knight Hospital, the Head of the ECDoH to take appropriate steps to ensure that:**
 - (aa) Within the 2021/22 Medium Term Expenditure Framework (MTEF)¹ the ECDoH and where appropriate in consultation with Eastern Cape Department of Public Works and Infrastructure (ECDoPWI) as well as Eastern Cape Provincial Treasury (ECPT) finalises the following projects:

¹ MTEF sets out spending plans of the national and provincial governments. It aims to ensure that budgets reflect Government's social and economic priorities and give substance to Government's reconstruction and development commitments.

- (i) Construction of the new residences for the staff;
 - (ii) Fencing of the hospital grounds;
 - (iii) Installing water supply in the residences;
 - (iv) Renovation of the male, female and TB wards;
 - (v) Construction of a concrete drive way;
 - (vi) Renovation of the kitchen and Central Sterile Supply Department;
 - (vii) Installation of new ceilings in the ward's passage(s) as part of and the main hospital building renovations;
 - (viii) Refurbishment of hospital equipment and installation of piped oxygen;
 - (ix) Upgrading the IT connectivity within the hospital;
 - (x) Replacing of the old fleet of vehicles and the laundry machines;
 - (xi) Sourcing additional funding from the Provincial/National Treasury to pay creditors and critical service providers, including contractors on projects and
 - (xii) Addressing shortages in human resources.
- (bb) Sufficient PPE for the hospital is supplied within 30 (thirty) days from the date of this report.
- (b) In respect of Mthatha Hospital, the Head of the ECDoH to take appropriate steps to ensure that:**
- (aa) Vehicles from other health care facilities are reassigned for the benefit of the Mthatha Hospital, within thirty (30) days from the date of this report;
 - (bb) A submission is made to the Provincial/National Treasury for assistance with the timely settlement of medico legal claims relating to the hospital to avoid the further attachment of the assets of the hospital, within thirty (30) days from the date of this report;

- (cc) The Mthatha Hospital utilises the mortuary at the Sir Henry Elliot Hospital within sixty (60) days from the date of this report;
 - (dd) Within 2021/22 MTEF, the ECDoH and where appropriate in consultation with ECDoPWI as well as Eastern Cape Provincial Treasury (ECPT) finalises the following projects:
 - (i) Upgrading the IT connectivity within the hospital;
 - (ii) Filling of the vacant positions;
 - (iii) Procurement of the laundry machines;
 - (iv) Renovating and upgrading the infrastructure of the hospital.
 - (ee) Sufficient PPE for the hospital is supplied within 30 (thirty) days from the date of this report.
- (c) In respect of Livingstone Hospital, the Head of the ECDoH to take appropriate steps to ensure that:**
- (aa) The recruitment process for the vacant leadership positions at the hospital is finalised within 60 days from the date of this report;
 - (bb) The filling of other critical positions at the hospital is prioritised;
 - (cc) Interns appointed as from April 2021 are placed at the hospital to assist;
 - (dd) The organogram for the hospital is finalised within 90 days from the date of this report and the relevant Treasury engaged for additional funds to fill vacant positions;
 - (ee) An integrated mental health strategy for public hospitals is developed for the Nelson Mandela Bay Metropolitan area, within 90 days from the date of this report;

- (ff) External Service providers are appointed for the maintenance of the laundry and other vital equipment at the hospital, within 90 days from the date of this report;
 - (gg) Within 2021/22 MTEF the ECDoH and where appropriate in consultation with ECDoPWI as well as Eastern Cape Provincial Treasury (ECPT) conducts a full conditional assessment of the hospital buildings in order to develop a cost based strategy for planning and budget allocation over the MTEF for refurbishment of the facility, subject to budget availability;
 - (hh) The Maintenance Unit at the hospital conducts routine or scheduled maintenance and regularly attend to blocked drains in order to avoid blockages and disruption of operations; and
 - (ii) Sufficient PPE for the hospital is supplied within 30 (thirty) days from the date of this report.
- (d) In respect of Uitenhage Hospital the Head of Department for ECDoH to take appropriate steps to ensure that:**
- (aa) The organogram of the hospital with the correct classification of posts is completed within ninety (90) days from the date of this report;
 - (bb) The recruitment process for the leadership positions at the hospital is completed within sixty (60) days from the date this report;
 - (cc) The filling of other critical vacant positions at the hospital is prioritised;

- (dd) The correct classification of the hospital is finalised within ninety (90) days from the date of this report;
 - (ee) A comprehensive security assessment is conducted at the hospital to inform the 2021/2022 Procurement Plan in terms of the additional security required within 90 days from the date of this report;
 - (ff) Within 2021/22 MTEF the ECDoH and where appropriate in consultation with ECDoPWI as well as Eastern Cape Provincial Treasury (ECPT) finalises the following projects:
 - (i) Repairing of air conditioners and lifts in the hospital including settlement of the OTIS account for the repairs to be effected;
 - (ii) Conditional assessment of the Nurses Home to be conducted to inform budget and planning over the MTEF
 - (iii) Procurement of a new mobile X-RAY; and
 - (iv) Identification of space for renovation and upgrades where necessary.
 - (gg) Sufficient PPE for the hospital is supplied within 30 (thirty) days from the date of this report.
- (e) The appropriate recommendation in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Head of Department of ECDPWI is as follows:**
- (aa) The Public Protector, in terms of section 6 (4) (c) (ii) of the Public Protector Act, refers to the Head of the Department of ECDPWI, this matter for consideration of technical infrastructural support and renovation needs where it appears necessary in relation to the identified and other public health facilities in the province of EC.

(f) The appropriate recommendation in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Head of Department of ECPT is as follows:

(aa) The Public Protector, in terms of section 6 (4) (c) (ii) of the Public Protector Act, refers to the Head of the Department of ECPT, this matter for consideration of financial support and oversight where it appears necessary in relation to the identified and other public health facilities in the province of EC.

(g) The appropriate recommendation in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Director General(s) for National Department of Health and Department of Justice and Constitutional Development is as follows:

In the *Member of the Executive Council for Health, Gauteng Provincial Government v PN* [2021] ZACC, the Constitutional Court ruled that while the defendant is liable for 100% of the plaintiff's agreed or proved damages, the order has nothing to do with "the how". The focus is on being liable to compensate.²

Consequently, it is now acceptable/possible to arrange for structured settlements and periodical payments for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State. This is necessary to protect the constitutional responsibility to provide healthcare which is at risk due to increasing budget pressures facing the ECDoH.

According to ECPT, a total of R 2. 519 billion has been paid from 2014/15 to 2018/20. For the current financial year, as at 31

² *Member of the Executive Council for Health, Gauteng Provincial Government v PN* [2021] ZACC 6 at para 23 and 24.

December 2020, an amount of R905 108 million has been paid for the medico-legal claims. These are projected to grow over the MTEF period.

- (aa) Within 90 (ninety) from the date of issue of this report take the necessary steps to speed up the process of finalising the current State Liability Amendment Bill, which seeks to amongst other things make provision for structure settlement orders which would include periodic payments in cases of medical negligence against the State.
- (bb) The National Department of Health to consider taking over medico-legal claims as they affect most of the provinces.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF WORSENING CONDITIONS WITHIN THE HEALTH FACILITIES/HOSPITALS IN THE EASTERN CAPE PROVINCE

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 published in terms of section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).
- 1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following persons to note the outcome of investigation and to implement the remedial action taken:
 - 1.2.1 The President of the Republic of South Africa, Mr Cyril Ramaphosa;
 - 1.2.2 The Minister of Finance, Mr Tito Mboweni;
 - 1.2.3 The Minister of the Department of Public Service and Administration, Mr Senzo Mchunu;
 - 1.2.4 The Premier of Eastern Cape, Mr Lubabalo Oscar Mabuyane;
 - 1.2.5 The Acting Minister of Health, Ms Mmamoloko Kubayi-Ngubane MP;
 - 1.2.6 The Acting Minister in the Presidency, Ms Khumbudzo Ntshavheni MP;
 - 1.2.7 The Minister of Justice and Constitutional Development, Mr Ronald Lamola MP;
 - 1.2.8 The Director-General for Health, Dr Sandile Buthelezi;
 - 1.2.9 The Director-General in the Presidency, Mrs Phindile Baleni;

- 1.2.10 The Director-General for Department of Justice and Constitutional Development, Adv Doctor Mashabane,
- 1.2.11 The Member of the Executive Council of the Eastern Cape Provincial Government (MEC) for Health, Ms Nomakhosazana Meth;
- 1.2.12 The MEC for Public Works and Infrastructure, Mr B Madikizela;
- 1.2.13 The Acting Head of the Eastern Cape Department of Health (ECDoH), Dr S Zungu;
- 1.2.14 The Head of the Eastern Cape Department of Public Works and Infrastructure, Mr T L Manda and
- 1.2.15 The Head of the Eastern Cape Department of Provincial Treasury, Mr Daluhlanga Majeke.

2. OWN INITIATIVE INVESTIGATION

- 2.1 The investigation commenced on 30 July 2020 as an own initiative intervention by the Public Protector South Africa (PPSA) in terms of section 6(4) of the Public Protector Act, on the grounds of information that came to the attention of the Public Protector from media reports, as referred to below.
- 2.2 In July 2020, a number of media outlets made several allegations against the health facilities in the Eastern Cape Province³, the crux of those

³ <https://www.medicalbrief.co.za/archives/eastern-cape-hospitals-crisis-patients-fight-one-another-for-oxygen/>

<https://www.medicalbrief.co.za/archives/doctors-and-nurses-desert-patients-in-eastern-cape-hospital/>

<https://www.bbc.com/news/world-africa-53396057>

<https://www.bbc.com/news/av/world-africa-53410406/coronavirus-in-south-africa-staff-terrified-to-work-in-eastern-cape-hospitals>

<https://www.dailymaverick.co.za/article/2020-06-01-eastern-cape-hospitals-in-crisis-as-health-workers-stay-away/>

<https://www.news24.com/citypress/news/eastern-cape-healthcare-has-collapsed-sick-people-are-fighting-each-other-20200628>

allegations being that:

- 2.2.1 There is a shortage of water supply at some hospitals;
- 2.2.2 A bath is used to store water in one hospital in Port Elizabeth area. A bath is filled up whenever there is supply and then staff members use a small bucket to scoop some out to flush toilets and wash their hands;
- 2.2.3 This is how health workers at the Emergency Medical Services (EMS) facilities in the Eastern Cape survive, as there is no running water at some facilities;
- 2.2.4 The EMS staff members do not even have enough water to shower when they return after picking up and dropping off patients at hospital, as required under Covid-19 protocols.
- 2.2.5 Patients have to walk down the passage to wash their hands, even in their weak state of health.
- 2.2.6 There are no bathrooms or showers for the nurses working at some facilities.
- 2.2.7 Staff members alleged that even making a cup of tea is a mission.
- 2.2.8 The facilities also do not have enough ambulances.
- 2.2.9 Staff shortages mean they battle to cope as one (1) nurse end up attending or nursing up to fifty (50) patients.
- 2.2.10 Unhygienic conditions are prevalent at the health facilities.

2.2.11 Abandoned hospital beds lie strewn in front of a Covid-19 testing station. Used drips, mattresses, gloves and plastic aprons litter the floor, with rats converging around open drains and feeding off the litter and blood spatter.

2.2.12 Waste material is everywhere. In the corridors of a hospital, dirty laundry and boxes marked “*danger, infectious waste*” lie in the passages.

2.2.13 The afore-mentioned are some of the challenges health workers in the Eastern Cape experience on a daily basis.

2.2.14 There are reportedly five hundred (500) patients on the waiting list to receive cancer treatment and there is a breakdown of vital machines that causes a further delay in the provision of treatment.

2.2.15 Nurses are forced to act as cleaners in some instances and security guards are often forced to cover up for absent medical staff and carry patients into casualty.

2.2.16 New-born babies have died in overcrowded and understaffed wards.

2.2.17 All the above reported systemic or institutional failures are alleged to have been exposed by the outbreak of Covid- 19.

2.2.18 The health system in the Eastern Cape is alleged to be collapsing or crumbling at the height of the global pandemic of the Covid- 19 virus.

2.3 In order to obtain clarity as to what was alleged in the media, the Deputy Public Protector, Adv Kholeka Gcaleka (DPP) visited certain identified health facilities in the Eastern Cape and conducted site inspections. The inspection entailed indiscriminately interviewing staff members, union representatives and patients.

2.4 The investigation therefore sought to examine a number of factors, including the availability of health care, human resources, physical

infrastructure and vital equipment, machinery, Personal Protective Equipment (PPE) and staff morale in hospitals, in the light of the strain added by outbreak of the Covid- 19 pandemic⁴.

2.5 On 04 to 05 August 2020, the following hospitals were visited and inspected by the PPSA investigation team led by the DPP:

2.5.1 Uitenhage Hospital

2.5.2 Livingstone Hospital

2.5.3 Mthatha Hospital

2.5.4 Sulenkama Hospital (also known as the Nessie Knight Hospital).

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”.

⁴ Eastern Cape like the rest of South Africa, faces an unprecedented crisis following the invasion of the COVID-19 virus, which poses a clear and present danger to human life.

- 3.3 Section 182(2) of the Constitution 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. The Public Protector is also given the powers to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.⁵ The Constitutional Court further held that:

*“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*⁶

- 3.5.1 In the above-mentioned constitutional matter, Mogoeng CJ, stated amongst other things the following, when confirming the powers of the Public Protector:
- 3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 65);
- 3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights

⁵ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

⁶ *Supra* at para [73].

entrenched in the *Constitution* cannot properly be upheld or enhanced (paragraph 67);

3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour 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 the effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

3.5.5 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 (paragraph 69);

3.5.6 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 (paragraph 70);

3.5.7 The Public Protector's power to take 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 (paragraph 71);

3.5.8 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 the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence (paragraph 71(a);

3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d); and

3.5.10 “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 (paragraph 71(e).

3.6 In the matter of the *President of the Republic of South Africa vs Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017)*, the court held as follows, when confirming the powers of the Public Protector:

3.7 The constitutional power is curtailed in the circumstances wherein there is conflict with obligations under the constitution (para 71);

3.8 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (para 82);

3.9 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (para 100 and 101):

- a) Conduct an investigation;
- b) Report on that conduct and
- c) To take remedial action;

- 3.10 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);
- 3.11 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105);
- 3.12 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (para 107 and 108); and
- 3.13 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (para 112).
- 3.14 The ECDoH is an organ of state and its conduct amounts to conduct in state affairs, thus the matters referred to in paragraph 2 above fall within the ambit of the Public Protector's mandate to investigate.
- 3.15 The ECDoPWI as well as ECPT are relevant provincial government departments with a supportive role towards the ECDOH for infrastructural development and financial needs.
- 3.16 As a result, the Public Protector solicited submissions from ECDoPWI as well as ECPT in respect of this matter, with an indication of the scope of current or planned future work in any of the implicated health facilities in EC. These submissions were solicited in the light of the fact that the respective core functions and legislative mandates of ECDoPWI and ECPT entail amongst other things financial support to departments, maintenance of government owned buildings grounds and premises, including provision and management of immovable properties which serves as a platform for the efficient delivery of various government services.

3.17 However, the investigation itself was conducted against the ECDoH Department of Health and it is important to take note that the Public Protector was not investigating the ECDoPWI and ECPT *per se* but rather the ECDOH.

3.18 The jurisdiction of the Public Protector was not disputed by any of the parties involved.

4 THE INVESTIGATION

4.1 Methodology

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

4.1.2 Section 6(4)(a) of the Public Protector Act provides *inter alia*, that that the Public Protector has the powers to investigate, at his or her own initiative any alleged maladministration in connection with the affairs of government at any level.

4.2 Approach to the investigation

4.2.1 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 or other improper conduct?

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong and what action should be taken?

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.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulates the standard that should have been met by the ECDoH to prevent improper conduct and/or maladministration as well as prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct and maladministration, where possible and appropriate.

4.3 On analysis of the allegations and available information, the following issues were identified and investigated:

4.3.1 Whether the administration of health by the ECDoH at the Nessie Knight Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration;

4.3.2 Whether the administration of health by the ECDoH at the Mthatha Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration;

4.3.3 Whether the administration of health by the ECDoH at the Livingstone Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration; and

4.3.4 Whether the administration of health by the ECDoH at the Uitenhage Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration.

4.4 The Key Sources of information

Observations made during on-site visit

4.4.1 Observations made during the on-site visits by the DPP and the PPSA investigation team at the four identified hospitals on 04 and 05 August 2020.

Documents

4.4.2 Copy of a City Press/News 24 Online Article dated 28 July 2020.

Correspondence between the PPSA and:

4.4.3 Ms N Nondabula, the Chief Executive Officer of the Nessie Knight Hospital, dated 07 August 2020 and 12 August 2020;

4.4.4 Dr LP Mayekiso, the Acting Chief Executive Officer of the Uitenhage Hospital, dated 07 August 2020 and 18 August 2020;

4.4.5 Dr M Xamlashe, the Acting Chief Executive Officer of the Livingstone Hospital, dated 07 August 2020 and 19 August 2020;

4.4.6 Dr R Kaswa, the Acting Chief Executive Officer of Mthatha Hospital, dated 07 August 2020 and 12 August 2020;

4.4.7 Ms S Stokwe of the National Education, Health and Allied Workers Union (NEHAWU), dated 7 and 17 August 2020;

4.4.8 Dr T Mbengashe, the former Head of ECDoH dated 11 September 2020;
and

4.4.9 Dr S Zungu: the Acting Head of ECDoH dated 02 October 2020;

4.4 Legislation and other legal prescripts

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

4.4.2 The Public Protector Act, 23 of 1994;

4.4.3 The National Health Act 61 of 2003;

4.4.4 Public Finance Management Act 1 of 1999;

4.4.5 Government Immovable Assets Management Act 19 of 2007 and

4.4.6 Norms and Standards Regulations applicable to different categories of health establishments, issued as per Government Gazette 67 No. 41419 dated 02 February 2018.

4.5 Case law

4.5.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);

4.5.2 President of the Republic of South Africa vs Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017);

4.5.3 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd, 2012 (2) SA 104 CC;

4.5.4 Public Protector and Mail& Guardian Ltd (2011) ZASCA 108 and

4.5.5 Member of the Executive Council for Health, Gauteng Provincial Government v PN [2021] ZACC 6.

4.6 Notices issued in terms of section 7(9) of the Public Protector Act

4.6.1 Notices were issued in terms of section 7(9) of the Public Protector Act to:

4.6.1.1 Dr S Zungu, the Acting Head of the ECDoH on 10 February 2021. She responded on 17 February 2021;

4.6.1.2 Mr T L Manda, the Head of the Eastern Cape Department of Public Works (ECDoPWI) and Infrastructure on 10 February 2021. He responded on 10 May 2021.

4.6.1.3 Mr Daluhlanga Majeke, the Head of Department of the Eastern Cape Provincial Treasury on 12 April 2021. He responded on 20 April 2021.

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

5.1 Regarding whether the administration of health by the ECDoH at the Nessie Knight Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration

Common cause or undisputed facts

5.1.1 On 05 August 2020, the Deputy Public Protector, Adv. Kholeka Gcaleka (DPP) led the PPSA investigation team which visited and conducted an inspection at Nessie Knight Hospital in Sulenkama, outside Qumbu in the Eastern Cape.

5.1.2 During the inspection, the DPP and the team were assisted by the Chief Executive Officer of the Nessie Knight Hospital, Ms N Nondabula, who took the team in and around the premises of the health facility.

5.1.3 The ECDoH is responsible for the delivery of public healthcare services throughout the province of Eastern Cape to ensure that the province's healthcare system is functional.

Issues in Dispute

5.1.4 In July 2020, media reports repeatedly highlighted the challenges faced by public and healthcare practitioners on the frontline fighting the Covid- 19 pandemic.

5.1.5 Concerned about the widespread negative reports across the media spectrum, which all painted a grim picture about the deteriorating service delivery conditions at various health facilities within the Eastern Cape, the Public Protector authorized an immediate own initiative intervention/investigation into the allegations to establish the veracity of the claims made in the press statements.

PRELIMINARY OBSERVATIONS, INTERVIEWS AND INSPECTIONS *IN LOCO* CONDUCTED AT THE NESSIE KNIGHT HOSPITAL

5.1.6 The following is a list of most visible systemic, administrative and infrastructural challenges and deficiencies observed during the site inspection conducted by the DPP and the PPSA investigation team:

5.1.6.1 The hospital building is an old house, built in 1929 by missionaries as humanitarian work and it was not originally designed to be a hospital.

5.1.6.2 There are problems with buildings and fixtures, for example shortages of space, leaking roofs, broken toilets, toilets shared by males and females, unsecured cracking building walls with old paint peeling off.

- 5.1.6.3 Non-payment to service providers appointed to conduct renovations, resulting in them terminating their services and leaving the site without notice or knowledge of the hospital management.
- 5.1.6.4 Serious water challenges as the hospital is still using boreholes and some of the blocks within the facility have no water at all.
- 5.1.6.5 Staff shortages in all areas, including clinical, nursing and support services such as cleaners, porters and general assistants were also recorded as being further exacerbated by infection with Covid -19 of about twenty five (25) existing skeletal staff⁷.
- 5.1.6.6 Infection of staff by the Covid-19 virus was attributed to inadequate supply of PPE and lack of infrastructure, such as a quarantine room that is appropriate.
- 5.1.6.7 Total lack of equipment such as piped oxygen, the hospital is still using one old cylinder gas oxygen with no more spares.
- 5.1.6.8 Blood Pressure and X-Ray machines are not enough, susceptible to regular breakdown due to lack of maintenance and being irreparable.
- 5.1.6.9 Laundry machines are old and irreparable, as a result the hospital is no longer able to wash its own linen, but rely on neighbouring hospitals for laundry services.
- 5.1.6.10 Old and insufficient motor vehicles often get breakdowns, leaving the hospital with no means to deliver and collect its laundry to other hospitals where it is washed.
- 5.1.6.11 There is no Intensive Care Unit (ICU) and no High Care Unit (HCU) available at the hospital.
- 5.1.6.12 The facility has only one room for Patients Under Investigation (PUI).

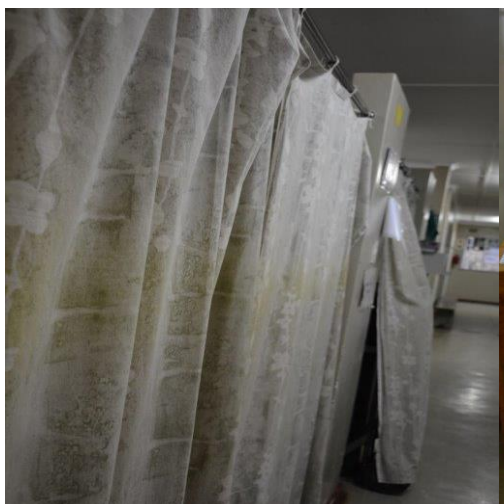
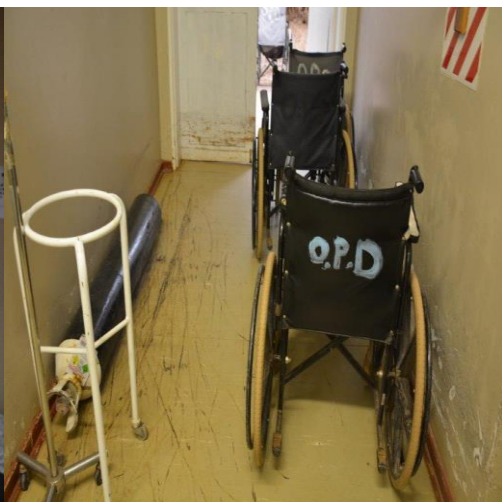
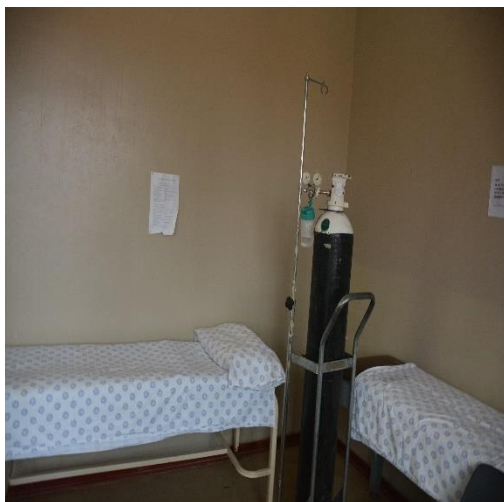
⁷ Health workers are integral to the functioning of the health care system. Without sufficient numbers of health workers no health care system can fulfil its obligations (our emphasis).

5.1.6.13 Shortages of supplies (medical, office, cleaning and maintenance).

5.1.7 The observations recorded from paragraph 5.1.6 above are further illustrated by photographs that the investigation team took on 05 August 2020 during site inspection at the Nessie Knight Hospital. Some of these photographs are shown below:



REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF WORSENING CONDITIONS WITHIN THE HEALTH FACILITIES/HOSPITALS IN THE EASTERN CAPE PROVINCE



SUBMISSION BY THE NESSIE KNIGHT HOSPITAL MANAGEMENT

5.1.8 On 13 August 2020, the PPSA received further submissions from the management of the Nessie Knight Hospital, addressing the following issues:

Profile of the Nessie Knight Hospital

5.1.8.1 Nessie Knight is a level 1 district hospital, located in the deep rural area of Sulenkama. It was built in 1929 with mud blocks, except the Out Patient Department (OPD) and Casualty Unit, which were built with concrete blocks and an asbestos roof that is still intact.

5.1.8.2 The hospital serves a population of eighty six thousand seven hundred and twenty five (86 725), according to a 2016 Statistics South Africa report, with thirteen (13) feeder clinics and eighteen (18) municipal wards within twenty six (26) wards for the whole Mhlonto Local Municipality area, in the OR Tambo District Municipality. It is 30 km away from the town of Qumbu.

5.1.8.3 There are one hundred and fifty (150) approved beds and one hundred (100) usable, which were reduced to sixty eight (68) in August 2018 due to the closure of the male ward, with twenty (20) beds and a TB ward with sixteen (16) beds. These structures were unsafe to both staff and patients.

5.1.8.4 It provides all district hospital level 1 services, according to the hospital package, except rehabilitative services, which are referred to other hospitals due to inability to attract rehabilitation staff.

Physical Infrastructure

5.1.8.5 The Nessie Knight Hospital is characterized by a dilapidated physical building and other infrastructure.

State of emergency for trauma

5.1.8.6 There is no designated space for casualty, the hospital uses spaces closed with curtains as an emergency area.

Medical Emergency Area

5.1.8.7 All emergency cases are attended to in the emergency trauma unit in the OPS, as there is no designated area for emergencies.

Intensive Care Unit (ICU) and High Care Unit

5.1.8.8 There are no ICU and High Care Units at the hospital. A High Care Unit has been catered for in the current renovations that are being done. There are renovations currently underway, the male adult ward with twenty (20) beds, a female ward with fourteen (14) beds and a Tuberculosis (TB) ward.

5.1.8.9 The double storey building (Umhlobo) was demolished and a ward with twenty (20) beds will be built. Renovations were done in the kitchen, Central Sterilizing Supply Department building (CSSD) and to the ceilings in the passage. A concrete driveway to the OPD is in progress.

5.1.8.10 There is no generator room, as it was demolished by Khethwayo Construction Company due to its dilapidated state.

Operating Theatre

5.1.8.11 The layout is not appropriate for an operating theatre, it does not meet the current standard as it does not have piped medical gases, nitrite oxide etc.

Store Room

5.1.8.12 Supplies are kept in different areas throughout the hospital, as there is no storeroom.

Gateway Clinic

5.1.8.13 The Gateway Clinic was operating from a partitioned hall.

Laundry

5.1.8.14 The Laundry Room needs renovation, as it is in a bad state.

X-Ray Building

5.1.8.15 The X - Ray Department is in a dire state and needs renovation.

Hospital Fencing

5.1.8.16 The building is well fenced and a new gate was installed.

Underground water pipes

5.1.8.17 The underground water pipes are made of asbestos and galvanized steel. This will pose disaster in future, if not replaced.

Water and electricity supply

5.1.8.18 The hospital uses borehole water supply and electricity is available.

State of the Mortuary

5.1.8.19 All fifteen (15) drawers in the mortuary are functional.

State of accommodation for nursing and clinical staff

5.1.8.20 Amanzabantu Services (Pty) Ltd Construction Company built state of the art accommodation for nurses and clinical staff. The rooms are categorized as follows:

One bedroom house - Forty (40)

Two bedroom house – Twelve (12)

Three bedroom house – Three (3)

5.1.8.21 All the houses are furnished and electrified. Water supply is currently being connected from the reservoir tank and water pump. Each house has a solar system as a backup for electricity interruptions.

Exposed electrical cables

5.1.8.22 Khethwayo Construction Company absconded the construction site at the hospital on 28 February 2019 and left electrical cables exposed. The area is fenced but cables remain exposed.

Sheltered corridors

5.1.8.23 Sheltered corridors would be highly appreciated, as there are currently none.

Landscaping of the hospital grounds

5.1.8.24 The hospital grounds are uneven and difficult to maintain. One staff member got injured whilst cutting grass.

Outside toilets for the staff of the Stores Department

5.1.8.25 Toilets used by staff members are in a derelict state.

Old Nurses Home

5.1.8.26 The home is in a dire state, the electricity wiring was condemned for use by Sakhiwo Consortium technicians.

Paediatric Ward

5.1.8.27 The ward does not have a staff toilet and bathroom. There is only one entrance that will make it difficult to evacuate patients during disaster.

Pharmacy Department

5.1.8.28 There is no pharmacy in the hospital. Pharmaceutical services are provided in a small dispensary room.

Security Guard room

5.1.8.29 There is no security guard room. Khethwayo Construction Company demolished it and provided a small movable container.

Operating Theatre

5.1.8.30 The operating theatre table is old, but functional.

Helipad

5.1.8.31 There is no dedicated space for a helicopter, which makes it difficult to transfer a maternity case by helicopter

Workshop

5.1.8.32 The building is in a dire state and needs renovation.

Construction Companies on site

5.1.8.33 Amanzabantu Services (Pty) Ltd constructed the new residences and fencing. They were in the process of installing water supply to the houses.

5.1.8.34 Mayibuye i-Afrika is renovating male, female and TB wards.

5.1.8.35 Ntshengele Company was appointed for the construction of the concrete drive way.

5.1.8.36 Staff members of the Department of Public Works are renovating the kitchen and replacing ceilings.

5.1.8.37 Khethwayo Construction Company absconded from the construction site on the 28 February 2019.

Motor Vehicles

5.1.8.38 The following vehicles are available:

VEHICLE TYPE/MODEL	REGISTRATION	ODOMETER AS AT 31 JULY 2020
Toyota Corolla Quest	GGZ 819 EC	157606 km
Toyota Corolla Quest	GGZ 949 EC	94 012 km
ISUZU Double Cab	GGV 743 EC	147170 km
Toyota Hilux Single Cab	GGZ 534 EC	169159 km

Equipment

5.1.8.39 There are vital medical equipment/machinery shortages

Laundry

5.1.8.40 The non-functional laundry equipment (washing machine, dryer, iron) were donated a long time ago. The hospital does its laundry at other nearby hospitals, since May 2020.

X-Ray Machine

5.1.8.41 The X- ray machine is very old, it is working but often breaks down.

Kitchen and food service

5.1.8.42 There are two (2) 5 plate stoves and one (1) 3 plate stove. Only the 3 plate stove is functional. There is also a 3 plate gas stove that is used during power outages. There are no appropriate food trolleys.

Medical equipment

5.1.8.43 There is a shortage of medical equipment such as Continuous Positive Airway Pressure (CPAP), ultrasound, baby warmers, blood pressure machines, suction machines, mobile X-ray, dyna map and Electrocardiogram (ECG) machines.

Piped Oxygen

5.1.8.44 There is no piped oxygen throughout the hospital, including the operating theatre. Smartech Woman (Pty) Ltd from Gauteng did an assessment for the installation of piped oxygen and ventilators.

Oxygen Report as at 12 August 2020

ITEM	QUANTITY
Oxygen Cylinders in the storeroom	37
Oxygen cylinders in the wards (in use)	9
Oxygen cylinders (spare)	8

State of bed linen

5.1.8.45 The ECDoH supplied the hospital with bed linen in February 2020.

Oxygen Bank

5.1.8.46 There is no Oxygen Bank in the hospital.

Diesel Tanks

5.1.8.47 There are currently two (2) tanks.

Water Tanks

5.1.8.48 There are no backup water tanks, should water pumps break down.

Personal Protective Equipment stock at hand at the Stores Department

5.1.8.49 Minimum levels of PPE are available and are ordered from the Mthatha Depot of the ECDoH, as they provide the approved quality of PPE.

TYPE	QUANTITY AVAILABLE
KN95	1000
Surgical masks	90 Boxes X 40 inside with 200 pieces
N95	650 pieces
Sterile gloves	1500 pairs
Disposable gowns	600
Head caps	1200
Shoe covers	3000
Eye shields	200
Goggles	600
Exam gloves	30 Boxes X 10 inside, 50 in a box
Scrub soap	75 Litres
Sanitizer	500ml X 19 5 Litres X 8

Human Resources

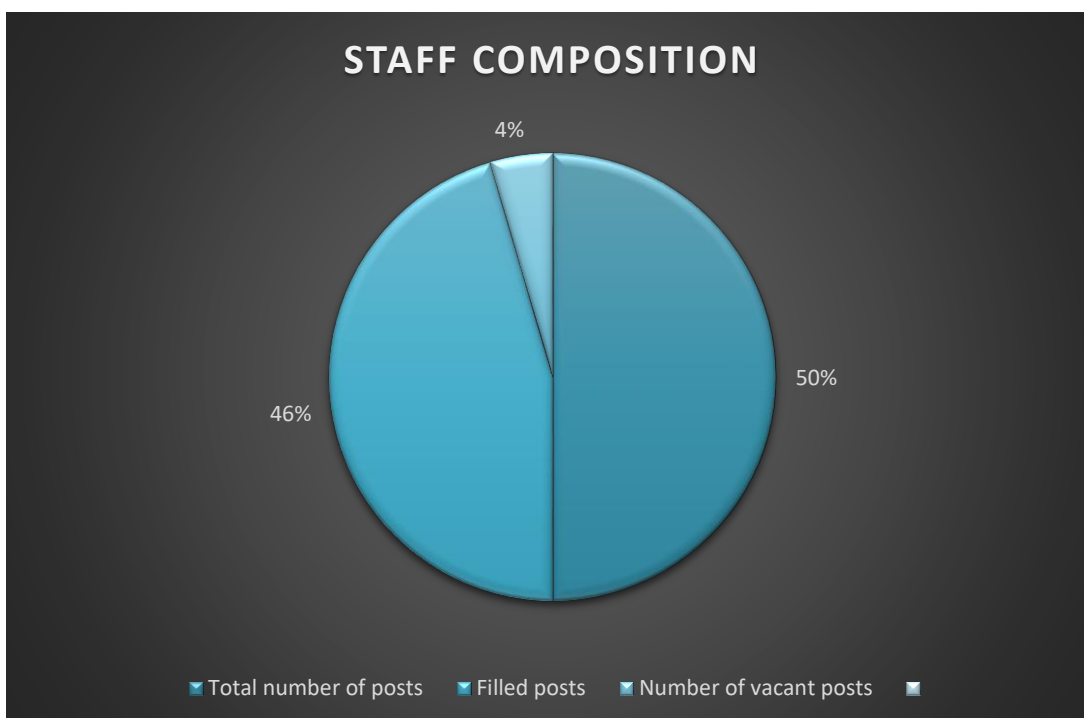
Staff composition

Total number of posts = 267 as at 25 May 2020

5.1.8.50 Number of filled posts: 243

Number of vacant posts: 24

Vacancy rate: 8.9 %



Additional staff provided by the Easter Cape Provincial Government due to the Codid-19 pandemic

5.1.8.51 The facility was allocated ten (10) Expanded Public Works Programme (EPWP) workers and three (3) nursing assistants.

Transversal Systems

5.1.8.52 There are no systems (BAS, Logis, and Persal). The hospital depends on the Dr Malizo Mpehle Memorial Hospital and the District Office of the ECDoH in this regard.

The impact of Covid-19 on staff

5.1.8.53 There were twenty eight (28) confirmed cases, twenty seven (27) recovered and at least one (1) died.

5.1.8.54 A distress session was scheduled to be conducted by the employee wellness officer from the district office for staff members on the 19 August 2020. The wards and units with confirmed cases were fumigated.

Arrangements in place to handle Covid-19 patients

5.1.8.55 The Eastern Cape Provincial Government provided two (2) VIP toilets and a tent with hundred (100) chairs, to be utilised as a waiting area for patients waiting to be screened. Renovations for thirty-four (34) additional beds for Covid-19 patients are in progress. Staff members are undergoing training on Covid-19 and receiving emotional support.

Committees

5.1.8.56 Risk and Occupational Health and Safety Committees are in place and functional.

Applicable Legal Framework

5.1.9 In terms of section 239 of the Constitution of the Republic of South Africa, 1996 an '*organ of state*' means—

- (a) "*Any department of state or administration in the national, provincial or local sphere of government; or*
- (b) *Any other functionary or institution—*
 - (i) *Exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
 - (ii) *Exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.*"

5.1.10 Based on the afore-going constitutional provisions, the ECDoH is an organ of state and a department constituted at a provincial sphere of government.

5.1.11 Section 195(1) of the Constitution, 1996 provides amongst other things that:

“Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a)*
- (b)*
- (c)*
- (d)*
- (e) People’s needs must be responded to....;*
- (f) Public administration must be accountable;*

5.1.12 It goes without saying that ECDOH is expected to respond to people’s needs and to be accountable when engaging in the administration of health facilities.

5.1.13 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay.

5.1.14 The ECDOH is expected in the ordinary administration of health facilities to meet and diligently perform constitutional obligations without delay as indicated in section 237 of the Constitution.

5.1.15 Section 27 of the Constitution provides *inter alia*:

1) *Everyone has the right to have access to –*

(a) Health care services.....;

(b);

(c)

2) *The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”*

5.1.16 Progressive realization as contemplated by the Constitution can only be understood to mean that, no matter what level of resources they have at their

disposal, it requires that governments must take immediate steps within its means towards the fulfilment of these rights.

5.1.17 While the positive obligations imposed on the government by section 27(1) and (2) of the Constitution do not entitle the people of Eastern Cape to claim healthcare on demand, instead they require of the government to develop a comprehensive and workable plan to meet its obligations.

5.1.18 In the seminal case of the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,⁸ the Municipality (an organ of state) argued that it could not provide temporary accommodation to a group of evicted persons as it did not have an adequate budget for the fulfilment of its obligations. In rejecting the Municipality's argument, the Constitutional Court held as follows:

*"This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."*⁹

5.1.19 While budgetary limitations and challenges exist, such should not be allowed to completely take away explicit constitutional objectives and deny people proper health care services.

5.1.20 Furthermore, according to the World Health Organisation (WHO), the right to health includes access to timely, equitable, acceptable, and affordable health care of appropriate quality¹⁰. The word "*equitable*" means providing

⁸ 2012 (2) SA 104 CC, Paragraph 74.

⁹ Our underlining.

¹⁰ <http://www.who.int/mediacentre/factsheets/fs323/en/> [accessed on 21 August 2020]

health care that does not vary in quality on account of gender, ethnicity, geographic location, and socio-economic status.¹¹

5.1.21 Section 155(6)(a) and (7) of the Constitution stipulates amongst other things, the following:

“(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must -

(a) provide for the monitoring and support of local government in the province; and...

(7) The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)

5.1.22 The implication of the above provisions is that provincial governments have powers to establish municipalities that could support the provinces in its legal obligations by rolling out bulk municipal services to the areas where hospitals are located.

5.1.23 No matter what level of resources it has at its disposal, progressive realization requires that government takes immediate steps within its means towards the fulfilment of these rights. Regardless of resource capacity, the elimination of discrimination and improvements in the public systems must be acted upon as a priority.

5.1.24 Section 214 of the Constitution provides amongst other things for an equitable shares and allocations of revenue among the national, provincial and local spheres of government taking into account, the need to ensure that

¹¹ Emphasis added.

the provinces and municipalities are able to provide basic services and perform the functions allocated to them; the fiscal capacity and efficiency of the provinces and municipalities, developmental and other needs of provinces, local government and municipalities; economic disparities within and among the provinces; obligations of the provinces and municipalities in terms of national legislation.

5.1.25 The EC can be regarded as the poorest province in terms of Gross Domestic Product per capita.¹² It is clear that due to its economic situation, EC province finds itself in worse situation than most other provinces due to historical underdevelopment. As a result, the constitutional responsibility contained in section 27 is at risk due to budgetary limitation facing ECDoH. It is exactly against this backdrop that a need for equitable revenue allocation referred to in section 214 of the constitution becomes highly desirable for the province of EC in order to realise its health care efficacy.

5.1.26 Section 18(2)(e)(f) of the Public Finance Management Act¹³ (PFMA) states the following with regard to Provincial Treasury:

“A Provincial Treasury-

(e) may assist provincial departments and provincial public entities in building their capacity for efficient, effective and transparent financial management;

(f) may investigate any system of financial management and internal control applied by a provincial department or a provincial public entity”.

5.1.27 Section 6(2) (d) of the PFMA stipulates that National Treasury (NT) may assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management.

5.1.28 The above enjoins ECPT and NT to assist ECDOH with financial support in building its capacity for efficient management of health facilities in the

¹² <https://www.worldatlas.com/articles/the-richest-and-poorest-provinces-of-south-africa.html> accessed on 21 April 2021.

¹³ Act 1 of 1999.

province of EC.

5.1.29 Section 3 of the State Liability Act¹⁴ (SLA) provides inter alia:

- (3) (a) *“A final court order against a department for the payment of money must be satisfied-*
- (i) within 30 days of the date of the order becoming final; or*
 - (ii) within the time period agreed upon by the judgment creditor and the accounting officer of the department concerned.*
- (b) (i) *The accounting officer of the department concerned must make payment in terms of such order within the time period specified in paragraph (a) (i) or (ii).*
- (ii) *Such payment must be charged against the appropriated budget of the department concerned.*
- (4) *If a final court order against a department for the payment of money is not satisfied within 30 days of the date of the order becoming final as provided for in subsection (3) (a) (i) or the time period agreed upon as provided for in subsection (3) (a) (ii), the judgement creditor may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury.¹⁵*
- (5) *The relevant treasury must, within 14 days of service of the final court order as provided for in subsection (4), ensure that-*
- (a) the judgment debt is satisfied; or*
 - (b) acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt, should there be inadequate funds available in the vote of the department concerned”.*

¹⁴ Act 20 of 1957.

¹⁵ Our underlining.

5.1.30 The above provisions becomes more relevant to ECPT and ECDOH in relation to medico legal claims owed by Mthatha hospital, which has resulted in the sheriff attaching the vehicles and other assets in the health facility.

5.1.31 Government Immovable Assets Management Act¹⁶ (GIAM) provides for the management of an immovable asset that is held or used by a national or provincial department; to ensure the coordination of the use of an immovable asset with the service delivery objectives of a national or provincial department.

5.1.32 Section 4 (2) OF GIAM provides that:

“A custodian -

(a) acts as a caretaker in relation to an immovable asset of which it is the custodian;

(b)

(c) is subject to section 18, liable for any action or omission in relation to an immovable asset of which it is the custodian, excluding an act or omission in good faith.”

5.1.33 Section 13 (1) (d) of GIAM provides as follows:

“The accounting officer of a custodian must, for all immovable assets for which that custodian is responsible – ensure that all activities that are associated with common law ownership are executed including –

(i) managing an immovable asset throughout its life cycle;

(ii) assessing the performance of the immovable asset;

(iii) assessing the condition of the immovable asset at least every fifth year;

(iv) identifying the effect of the condition of the immovable asset on service delivery ability;

(v) determining the maintenance required to return the immovable asset to the state in which it would provide the most effective service;

(vi) estimating the cost of the maintenance activities identified;”

¹⁶ Act 19 of 2007.

5.1.34 The above should be understood to obligate the ECDPWI to assess the condition of the immovable assets continuously at least every fifth year and determine the maintenance requirements, in this instance health facilities in the province of EC.

5.1.35 Section 3 of the National Health Act 61 of 2003 (NHA) lists the responsibilities of the Minister of Health as follows:

“The Minister must, within the limits of available resources-

- a) endeavour to protect, promote, improve and maintain the health of the population;*
- b) promote the inclusion of health services in the socio-economic development plan of the Republic;*
- c) determine the policies and measures necessary to protect, promote, improve and maintain the health and well-being of the population;*
- d) ensure the provision of such essential health services, which must at least include primary health care services, to the population of the Republic as may be prescribed after consultation with the National Health Council; and*
- e) equitably prioritise the health services that the State can provide.”*

5.1.36 The powers and obligations of the Director-General of the Department of Health in terms of section 21 of the NHA include:

5.1.36.1 The issuing and promoting adherence to norms and standards on health matters, including the provision of health services, which include social, physical and mental health care; and

5.1.36.2 Promoting adherence to norms and standards for the training of human resources for health.

5.1.37 Section 21(5) of the NHA further provides that the Director-General must integrate the health plans of the national department and provincial departments annually and submit the integrated health plans to the National Health Council.

5.1.38 Section 25(1) of the NHA stipulates that the relevant member of the Executive Council of a Provincial Government (MEC) responsible for Health must ensure the implementation of the national health policy, norms and standards in his or her province.

5.1.39 Section 25(2) of the NHA lists a number of powers and obligations of the head of a provincial department of health¹⁷:

- a) planning, co-ordinating and monitoring health services and evaluating the rendering of health services;
- b) planning, managing and developing human resources for the rendering of health services;
- c) controlling and managing the cost and financing of public health establishments and public health agencies;
- d) facilitating and promoting the provision of comprehensive primary health services and community hospital services;
- e) controlling the quality of all health services and facilities.

5.1.40 Sections 77-79 of the NHA provides for the creation of an Office of Health Standards and Compliance (OHSC). It envisages a broad role for the OHSC in advising on health standards, revising or setting standards, monitoring

¹⁷ The head of the provincial department must act in accordance with national health policy and the relevant provincial health policy in respect of or within the relevant province. On observance of the state of affairs at health facilities and on the evidence traversed there has been an apparent lapse in adherence to the relevant policy guidelines of the National Health Act.

compliance, reporting on non-compliance, and advising on strategies to improve quality.

- 5.1.41 The National Health Act Norms and Standards Regulations applicable to different categories of health establishments, issued as per Government Gazette 67 No. 41419 dated 02 February 2018¹⁸ (Regulations were promulgated with the purpose to promote and protect the health and safety of users and health care personnel. The Regulations stipulates *inter alia* the following:

Medicines and Medical Supplies

“10(1) The health establishment must comply with the provisions of the Pharmacy Act, 1974 and the Medicines and Related Substances Act, 1965.

(2) For the purposes of sub -regulation (1), the health establishment must-

(a) implement and maintain a stock control system for medicine and medical supplies; and

(b) The health establishment must ensure the availability of medicines and medical supplies for the delivery of services”.

Medical Equipment

“13(1) Health establishment must ensure that the medical equipment is available and functional in compliance with the law.

(2) For the purpose of sub -regulation (1) the health establishment must ensure that equipment is:

(a) licensed where required from the relevant licensing body; and

(b) in accordance with the essential equipment list in all clinical service areas”

¹⁸ Signed off by Minister of Health: Dr A Motsoaledi on 15 January 2018.

Human resources management

- “19.(1) The health establishment must ensure that they have systems in place to manage health care personnel in line with relevant legislation, policies and guidelines.*
- (2) For the purposes of sub -regulation (1), the health establishment must, as appropriate to the type and size of the establishment: -*
- (a) have and implement a human resource plan that meet the needs of the health establishment;*
 - (b) have a performance management and development system in place; and*
 - (c) have a system to monitor that health care personnel maintain their professional registration with the relevant councils on an annual basis”.*

Management of buildings and grounds

- 14(1) The health establishment and their grounds must meet the requirements of the building regulations.*
- (2) For the purposes of sub- regulation (1), a health establishment must as appropriate for the type of buildings and grounds of the establishment:-*
- (a) have all the required compliance certificates in terms of the building regulations;*
 - (b) have a maintenance plan for buildings and the ground;*
 - (c) ensure emergency exit and entrance points are provided in all service areas and kept clear at all times; and*
 - (d) have ventilation systems that maintain the inflow of fresh air, temperature, humidity and purity of the air within specified limits set for different service areas such as theatres, kitchen and isolation units”.*

Engineering services

“15(1) The health establishment must ensure that engineering services are in place.

(2) For the purposes of sub -regulation (1) a health establishment must have: 24-hour electrical power, lighting, medical gas, water supply and sewerage disposal system.

Transport management

“16(1) The health establishment must ensure that vehicles used to transport users and health care personnel are safe and well maintained.

(2) For the purposes of sub -regulation (1), a health establishment must ensure that;

(a) vehicles, owned or used, are licensed and maintained; and

(b) drivers have valid driver's license and or public transport driving permit”.

Occupational health and safety

“20 The health establishment must comply with the requirement of the Occupational Health and Safety Act, 1993”.

5.1.42 It follows that the ECDoH has an obligation to observe and adhere to the above mentioned Regulations of the NHA, which are intended to govern the state of health facilities in the Eastern Cape Province.

5.1.43 Section 6(4)(a) of Public Protector Act 23 of 1994, provides amongst other things that Public Protector may initiate own investigation in connection with allegations of maladministration within the public service.

5.1.44 As already indicated above, in July 2020 the mainstream media made several damning allegations against the health facilities in the Eastern Cape

Province. Based on all these media reports, there was a compelling need for the Public Protector South Africa to enquire into the allegations of malfeasance within the health establishments.

- 5.1.45 In the seminal case between the Public Protector and Mail & Guardian Ltd¹⁹, the court held as follows:

“The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro action in appropriate circumstances. Although the Public Protector may act upon complaints that are made, he or she may also take the initiative to commence an enquiry, and on no more than ‘information that has come to his or her knowledge’ of maladministration, malfeasance or impropriety in public life”.

- 5.1.46 Informed by the above judicial precedent, the Public Protector took the initiative to investigate the veracity of the media reports that alleged worsening conditions within public health facilities in the province of EC.

Conclusion

- 5.1.47 It can be concluded from observations made during the on-site visits that were undertaken by the PPSA investigation team as recorded above and the submissions of hospital management and the ECDOH that the ECDoH has failed to ensure appropriate conditions for the enjoyment and delivery of health care services for the community of Sulenkama.
- 5.1.48 All recorded systemic deficiencies such as staff shortages, shortages of medical equipment, poor building infrastructure, which were not disputed by the ECDoH have a negative impact on the level of care that is provided to patients at the hospital.

¹⁹ (2011) ZASCA 108 (1 June 2011) at paragraph 9.

5.1.49 The ECDoH failed to provide adequate physical infrastructure, such as proper buildings, medical supplies and medical equipment, machinery in the laundry, motor vehicles, human resources and other resources like PPE, which are all necessary to sustain an efficient and effective health facility.

5.1.50 It can further be deduced from interactions with staff, union representatives and with hospital management and the ECDoH, that the ECDoH generally failed to adequately administer Nessie Knight in the manner envisaged by the Constitution and the NHA, which would promote access to quality healthcare and enable the staff to provide effective access to the healthcare services to which the community is entitled to.

5.2 **Whether the administration of health by the ECDoH at Mthatha Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration**

Common cause or undisputed facts

5.2.1 On 05 August 2020, the Deputy Public Protector: Adv Kholeka Gcaleka (DPP) led the PPSA investigation team that visited and conducted an inspection at Mthatha Hospital.

5.2.2 During the inspection, the DPP and the investigation team were assisted by the Acting Chief Executive Officer of the Mthatha Hospital, Dr R P Kaswa, who took the team in and around the premises of the health facility.

5.2.3 The ECDoH is responsible for the delivery of public healthcare services throughout the province of EC to ensure that the province's healthcare system is functional.

Issues in Dispute

- 5.2.4 In July 2020 media reports repeatedly highlighted the challenges faced by public and healthcare practitioners on the frontline fighting the Covid -19 virus.
- 5.2.5 Concerned about the *widespread negative reports across the media spectrum*, which painted a grim picture about the deteriorating service delivery conditions at various health facilities within Eastern Cape, the Public Protector authorised an immediate own intervention/investigation into the allegations to establish the veracity of the claims made in the press statements.
- 5.2.6 As indicated, this own accord intervention to inspect Mthatha Hospital was made with a view to establish whether or not the alleged state of affairs within the public healthcare facilities in the Eastern Cape resulted in improper conduct or maladministration.

PRELIMINARY OBSERVATIONS, INTERVIEWS AND INSPECTIONS *IN LOCO* CONDUCTED IN MTHATHA:

- 5.2.7 The following is a list of most visible systemic, administrative and infrastructural deficiencies witnessed during the site inspection conducted by the investigation team:
- 5.2.7.1 No vehicles are available at the hospital as all vehicles were attached by the Sheriff due to the hospital owing service providers and this is impeding services, such as outreach activities and deliveries.
- 5.2.7.2 The hospital has no mortuary, as a result bodies often remain in the wards for a long period waiting for transportation to the neighbouring hospital. The bodies of patients that have succumbed to Covid-19 are highly infectious.

- 5.2.7.3 There are shortages of bed linen and staff are sometimes forced to treat patients on beds with no linen.
- 5.2.7.4 There are insufficient oxygen points.
- 5.2.7.5 There is a shortage of vital medical equipment/machines, as a result the same vital equipment must be wheeled from one unit to another and sharing the same equipment between Covid-19 and non-Covid-19 wards, which poses a major health risk.
- 5.2.7.6 There is an inadequate supply of PPE such as N95 masks for high risk areas. Sometimes, substandard PPE and normal surgical masks are used in high risk areas such as Covid-19 wards, thereby putting lives of the frontline health workers at risk.
- 5.2.7.7 The Emergency for Trauma Unit has only three (3) beds as a result triage is done in the tent outside the building.
- 5.2.7.8 The Medical Emergency Unit has only four (4) beds, as a result there is often congestion and overflow of patients into the corridors.
- 5.2.7.9 The facility has no Person Under Investigation (PUI) Unit for the maternity ward for suspected cases of Covid-19.
- 5.2.7.10 There is no approved organogram, the facility is currently using a split structure.
- 5.2.7.11 Shortage of nursing and clinical staff has been a recurring problem and Covid-19 is further exposing this shortage as more staff members get infected and have to quarantine.
- 5.2.7.12 Too many unfilled vacant positions with staff acting without permanent appointment, such as the Chief Executive Officer (CEO), Head of the Clinical Unit and Senior Manager: Medical Services.

SUBMISSION BY THE MTHATHA HOSPITAL MANAGEMENT:

5.2.8 On 14 August 2020, the PPSA investigation team received further submissions from the Mthatha Hospital management, addressing the following issues:

Profile of the Mthatha Hospital

5.2.9 The Mthatha Regional Hospital serves a population of 1, 3 million over a 12 096 square km area. The referring institutions include:

- 5.2.9.1 St Barnabas Hospital
- 5.2.9.2 Nessie Knight Hospital
- 5.2.9.3 Canzibe Hospital
- 5.2.9.4 Madzikane Hospital
- 5.2.9.5 Zithulele Hospital
- 5.2.9.6 CHC (Nganelizwe, Mbekweni, Mhlakulo, Baziya)
- 5.2.9.7 Isilimela Hospital
- 5.2.9.8 Dr Malizo Mpehle Hospital

Leading causes of death

- 5.2.10 TB, Human Immunodeficiency Viruses (HIV/AIDS) (both males and females), trauma in males between 15 -24 years (80%) and most currently Covid-19.
- 5.2.11 Currently the facility is faced with challenges that may result in health workers not being able to do their best.

Physical infrastructure at the Covid-19 and Persons Under Investigation Wards

- 5.2.12 Both the Covid-19 and PUI wards have thirty (30) beds each. They were created by repurpose of the Paediatric, Gynaecology and Surgical wards, which led to the limitation of these disciplined functions. Infrastructure support is needed to create extra beds for infectious disease outbreaks.

Filing space

- 5.2.13 There is no proper designated space for filing, as a result files are scattered in various areas (wards) within the hospital. Failure to retrieve files timeously leads to late responses to requests for access to information.

State of the Mortuary

- 5.2.14 The hospital shares a mortuary with the Nelson Mandela Academic Hospital.

Laundry

- 5.2.15 Laundry services are shared with the Nelson Mandela Academic Hospital. The daily linen supply does not meet patients' needs.

Office space

- 5.2.16 Three (3) sections in the hospital are sharing one small office space, which is not a conducive work environment. Renovations of the old lab inside the complex would bring relief.
- 5.2.17 The Communication Department's office is very small. It is shared by the Senior Manager and a Personal Assistant, and there is not enough space to store communication equipment.

- 5.2.18 The Occupational Health and Safety Department does not have office space and tea room.

IT Network

- 5.2.19 There is no network connection for virtual services, due to financial constraints.

Motor vehicles

- 5.2.20 There are currently two (2) vehicles shared between Nelson Mandela Academic Hospital and Mthatha Hospital, which impacts on smooth operations. Civil litigation cases against the ECDoH resulted in the attachment of twelve (12) of the hospital's vehicles. Immediate intervention from National Head Office of the Department of Health is required to release the vehicles.

Maternity area

- 5.2.21 There is no designated space for boarder mothers.

Covid-19 Isolation Ward

- 5.2.22 Pipes in the roof of this ward are leaking, which resulted in damage to the ceiling and cubicles. There are only thirteen (13) oxygen points.

Equipment

- 5.2.23 There are vital medical equipment/machinery shortages

Computers

- 5.2.24 Eleven (11) staff members in the Finance and Supply Chain Management (SCM) Unit share one (1) computer desktop, resulting in delays in SCM

processes. There is only one (1) laptop, one (1) cell phone each for Quality Assurance and Infection Prevention and Control (IPC). There is no furniture, electric appliances, printers and communication equipment.

X-Ray Machine and Personal Protective Equipment (PPE)

5.2.25 There is no portable X-Ray machine. There is also shortage of PPE for dealing with Covid-19 patients and protective clothing for staff working in the theatre and labour ward.

Human Resources

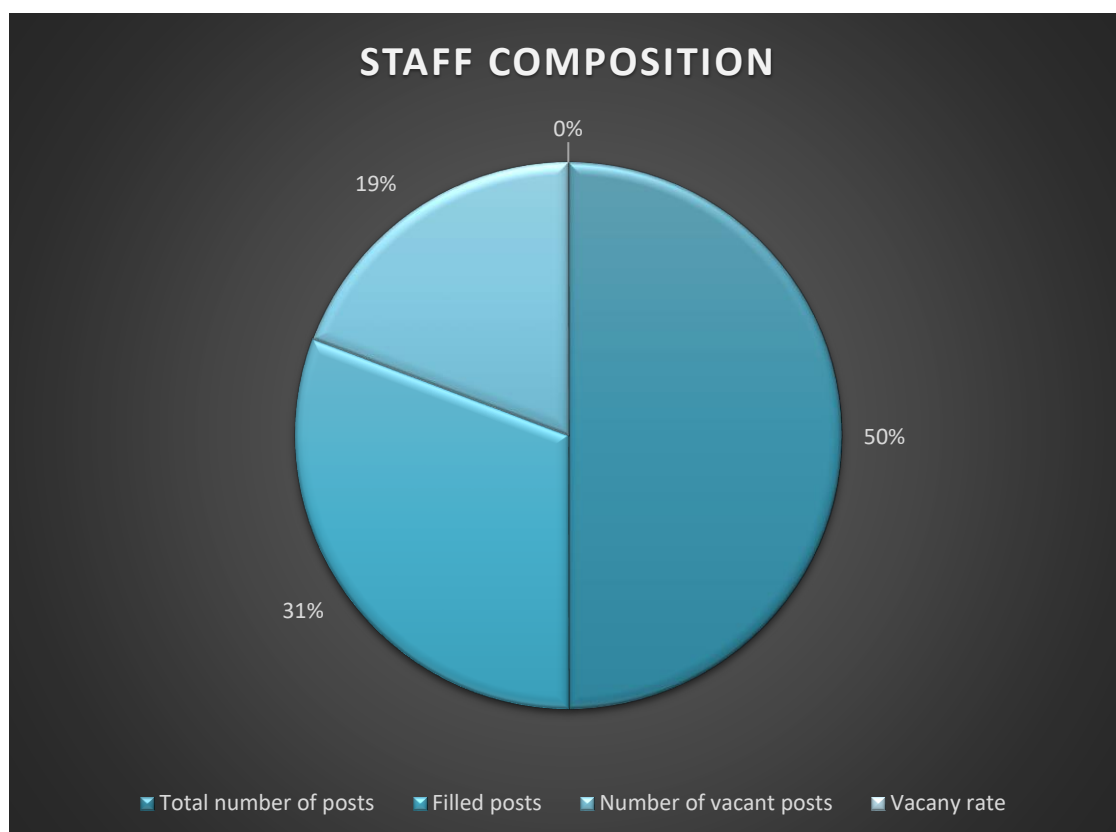
STAFF COMPOSITION -

5.2.26 Total number of posts: 1300

5.2.27 Number of filled posts: 800

5.2.28 Number of vacant posts: 500

5.2.29 Vacancy rate: 38.4



Staff shortages

5.2.30 There are staff shortages in critical departments within the hospital that has to ensure that the day to day operations are implemented. As a result there are challenges in the following areas:

- 5.2.30.1 Medical Officers;
- 5.2.30.2 Head of Clinical Unit;
- 5.2.30.3 Clinical Support;
- 5.2.30.4 Facilities;
- 5.2.30.5 Supply Chain Management;
- 5.2.30.6 Human Resources and General Admin and
- 5.2.30.7 Strategic Support Services.

5.2.31 Critical posts have been abolished on the Persal establishment. Among the four (4) ICU trainers, three (3) are working in the Neonatal High Care Unit and the other one (1) is in the High Care Unit with eight (8) beds.

5.2.32 The Finance and SCM Units depend on interns to function.

5.2.33 There are four (4) staff members in the electrical and mechanical section in the Facilities Unit. The electrical staff render services to both Mthatha Hospital and the Sir Henry Elliot hospital.

5.2.34 Currently there is no staff in the Clinical Engineering Section and Strategic Support Service office. Staff has been allocated to the Quality Assurance and Infection Prevention and Control offices as there is no designated permanent staff for these offices.

5.2.35 A Professional nurse of the Casualty Department was assigned the additional duties of the OHS practitioner, creating a gap at Casualty.

5.2.36 The Communication Office is understaffed as it has only one staff member.

Applicable Legal Framework

5.2.37 The relevant provisions of the applicable legal framework are referred to in paragraph 5.1 above and apply *mutatis mutandis* to the situation at the Mthatha Hospital. For the sake of brevity the same applicable legal framework shall not be repeated here.

Conclusion

5.2.38 It can be concluded from the observations made during the on-site visit at the hospital that were undertaken by the investigation team as recorded above and the submissions of hospital management and the ECDOH that the ECDoH has failed to ensure appropriate conditions for the enjoyment and delivery of health care services for the community of Mthatha.

5.2.39 All recorded systemic deficiencies such as staff shortages, shortages of medical equipment, poor building infrastructure, which were not disputed by the ECDoH have a negative impact on the level of care that is provided to patients at the hospital.

5.2.40 The ECDoH failed to provide sufficient physical infrastructure and resources, such as a proper mortuary, office space, office equipment, human resources, vehicles, medical equipment/machinery and other necessary items such as PPE, which are all necessary to sustain an effective health facility.

5.2.41 It can further be deduced from interactions with staff, union representatives and with hospital management that the ECDoH generally failed to adequately administer the Mthatha Hospital in manner envisaged by the Constitution and NHA, which would promote access to quality healthcare and enable the staff to provide effective access to the healthcare services, to which the community is entitled to.

5.3 Whether the administration of health by the ECDoH at the Livingstone Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration.

Common cause or undisputed facts

- 5.3.1 On 04 August 2020, the Deputy Public Protector: Adv Kholeka Gcaleka (DPP) team led the PPSA investigation team that visited and conducted an inspection at Livingstone Tertiary Hospital (Livingstone Hospital) in Eastern Cape.
- 5.3.2 During the inspection, the DPP and the investigation team were assisted by the Acting Chief Executive Officer of hospital, Dr M Xamlashe and Dr A Knock who took the team in and around the premises of the health facility.
- 5.3.3 The ECDoH is responsible for the delivery of public healthcare services throughout the province of Eastern Cape to ensure that the province's healthcare system is functional.

Issues in Dispute

- 5.3.4 In July 2020 media reports repeatedly highlighted the challenges faced by public and healthcare practitioners on the frontline fighting the Covid-19 pandemic.
- 5.3.5 Concerned about the widespread negative reports across the media spectrum, which painted a grim picture about the deteriorating service delivery conditions at various health facilities within Eastern Cape, the Public Protector authorised an immediate own initiative intervention/investigation into the allegations to establish the veracity of the claims made in the press statements.
- 5.3.6 As indicated, this own accord intervention to inspect Livingstone Hospital was made with a view to establish whether or not the alleged state of affairs

within the public healthcare facilities in the Eastern Cape resulted in improper conduct or maladministration.

PRELIMINARY OBSERVATIONS, INTERVIEWS AND INSPECTIONS *IN LOCO* CONDUCTED IN AT THE LIVINGSTONE HOSPITAL:

5.3.7 The following is a list of most visible systemic, administrative and infrastructural deficiencies made during the site inspection conducted by the investigation team:

5.3.7.1 Instability in leadership caused by undue delays in filling senior management positions such as Chief Executive Officer.

5.3.7.2 Structural discontent, lack of an organogram and severe under-funding of the hospital.

5.3.7.3 Lack of synergy between the hospital and the Eastern Cape Provincial Government and lack of support of the hospital by the Provincial Government.

5.3.7.4 Overcrowding of the hospital due to lack of district hospitals in the area to treat patients with minor illnesses.

5.3.7.5 Psychiatric patients are still accommodated at the hospital, as a result their Casualty Department must still deal with psychiatric patients who are potentially dangerous at times.

5.3.7.6 Shortage of PPE, such as gumboots, gloves, body bags, and thermometers.

5.3.7.7 Shortage of nursing and non-clinical staff, such as cleaners and porters, as a result the conditions at the hospital are often unhygienic;

5.3.7.8 There was a surge of Covid-19 infections amongst the staff. 340 workers were infected.

- 5.3.7.9 The drainage area at the hospital is problematic, worsening the rat infestation.
- 5.3.7.10 The laundry of the Dora Nginza Hospital add to the strain at the hospital and the health care workers and nurses end up doing the laundry and cleaning.
- 5.3.7.11 Laundry is sometimes outsourced and gets lost and remains unaccounted for.
- 5.3.7.12 The theft of medication is a cause for concern.
- 5.3.7.13 Food services remain a major concern as there are no materials to cover patients food after being dished;
- 5.3.7.14 One of the kitchens has been out of service since 2010.
- 5.3.7.15 Vital machines/equipment are not being maintained, as a result patients get transferred to private hospitals at high costs;

SUBMISSIONS BY THE LIVINGSTONE HOSPITAL MANAGEMENT AND NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION (NEHAWU):

- 5.3.8 On 19 August 2020, PPSA received further submissions from the Livingstone Hospital Management and from Ms S Stokwe, the Regional Secretary of NEHAWU²⁰ of the Thabo Moshoeshoe Region, addressing the following issues:

Profile of the Livingstone Hospital

- 5.3.9 The Livingstone Hospital is situated in Port Elizabeth, within the Nelson Mandela Bay Health District and services a population of 1, 742, 974 (one

²⁰ NEHAWU as a stakeholder at Livingstone Tertiary Hospital.

million seven hundred and forty two thousand nine hundred and seventy four), as per the 2016 mid- year population statistics. The area incorporates Port Elizabeth, Uitenhage and Dispatch, stretching from Colchester (in the east) to Jeffreys Bay (in the west). The Livingstone Hospital receives patients from:

- 5.3.9.1 Uitenhage;
 - 5.3.9.2 Paterson;
 - 5.3.9.3 Somerset East;
 - 5.3.9.4 Graaff-Reinet;
 - 5.3.9.5 Cradock;
 - 5.3.9.6 Middelburg;
 - 5.3.9.7 Humansdorp;
 - 5.3.9.8 Hankey;
 - 5.3.9.9 Patensie (Langkloof);
 - 5.3.9.10 Joubertina;
 - 5.3.9.11 Port Alfred;
 - 5.3.9.12 Grahamstown;
 - 5.3.9.13 Alexandria;
 - 5.3.9.14 Kareedouw; and
 - 5.3.9.15 Willowmore and other clinics CHC's and hospitals in the Province.
- 5.3.10 The Livingstone Hospital consists of two hospital sites, namely: Livingstone and the Port Elizabeth Provincial Hospital. Livingstone has six hundred and sixty one (661) beds and Port Elizabeth Provincial has two hundred and sixty six (266) beds).
- 5.3.11 The current Infection Prevention and Control Coordinator appointed ratio for the Livingstone Hospital is 1:667 and the norm is 1: 250 beds.

Leading causes of admission in at the Livingstone Hospital:

A – Chronic Illness	B – Acute Illness	C – Psychiatric Cases
Hypertension	Gastro Enteritis	Psychosis
Diabetes	Malnutrition	Suicides
Epilepsy	Viral Meningitis	
Heart Failure/Heart conditions	Pneumonia	
HIV/AIDS and Opportunistic Infections	Hepatitis A and B	
Tuberculosis	Infection e.g. scabies, dermatitis, allergies,	
Cervical, Breast, Oesophagus and Prostate cancer	Cataracts	
Cerebral Vascular Accidents	Trauma	
Meningitis	Drug overdose	
Urological conditions	Tonsillectomy	
Haematology	Septic Circumcision	
	Priapism	

Physical building infrastructure at the Livingstone Hospital

5.3.12 Some hospital buildings do not comply with the Infection Prevention and Control (IPC) Regulations. No environmental IPC controls, no cross ventilation in ICU, Out Patient Department (OPD's) and Accident and Emergency Units. The hospital depends on natural ventilation only.

LIVINGSTONE HOSPITAL	PORT ELIZABETH PROVINCIAL HOSPITAL
<ul style="list-style-type: none"> • The buildings are in good condition except for some areas in the Nurse’s home, the roof is in poor condition and the cost to repair it will be five R5 million. • There is currently a contract in place to do the repairs to the buildings. • There is no fencing at the hospital that has resulted in a number of employees being robbed and assaulted by criminals who have easy access to the facilities. • The hospital has procured an automated kitchen facility system, which was to benefit all patients. The intention was to ensure proper food preparation that will contribute towards quality health care and ensure the food reaches the patients in its desired state according to dietary requirements. 	<ul style="list-style-type: none"> • The site is health hazard, there is little to no ventilation. • Paint is peeling from the walls, floors are uneven and pose a risk to patients and staff. • The waiting area is small, not enough seating, no drinking water for patients except in the toilets. • No intercom to communicate with patients and staff alike. • Some areas have been renovated and the biggest section of the hospital is in a poor state, including the Nurse’s home. • The Nurse’s home is unsafe and need drastic improvement. • The Union is concerned about the level of neglect around the maintenance of hospital infrastructure especially the Nurse’s home at the hospital. The hospital still accommodates employees and students, even after it was declared inhabitable by the Department of Public Works. • The closure of the Casualty Unit was done without consideration of the community it serves and resulted in overcrowding.
<ul style="list-style-type: none"> • A mortuary at the hospitals and has a capacity of sixty (60) 	<ul style="list-style-type: none"> • The mortuary cabinets are not in good condition, but there is a contract in place to do the repairs.
<ul style="list-style-type: none"> • Good infrastructure relating to electricity and there are 	<ul style="list-style-type: none"> • A total of five (5) generators supply the hospital with power during outages.

<p>generators in place during power outages.</p> <ul style="list-style-type: none"> • The hospital site has an extra 6.6 Kva line feeding sections of the hospital and the cost to remove this extra incoming line is R 7 million 	<ul style="list-style-type: none"> • The switch gear is over fifty (50) years old and needs urgent replacement.
<ul style="list-style-type: none"> • Currently water supply is through holding tanks with a capacity of 1.2 million litres • There is contract in place to deal with water issues. 	<ul style="list-style-type: none"> • The site receive water directly from the municipality. • Due to the life span of the water tank, water leaks occurs

Equipment and machinery

- 5.3.13 There is a general lack of resources such as vital clinical machines, oxygen points, linen and laundry services and poor food service. In the therapeutic and radiation sphere, equipment is almost non-existent. A plan was developed to purchase new machinery, but the available budget insufficient to purchase a new machine. Equipment is not calibrated.
- 5.3.14 There are no industrial technicians and clinical engineers to assist with minor repairs, everything depends on non-existent Service Level Agreements (SLA's). No maintenance contracts and SLA in place for critical equipment such as C-ARMS, Fluoroscopy etc.
- 5.3.15 There is regular breakdown of laundry machines. The central laundry that is located at the Livingstone Hospital is neglected. The initial plan for the laundry was to cater for whole region, it had staff complement of 108 employees, but currently there are only 34 employees due to resignations, death and attrition. The ECDoH has opted to outsource the laundry services for the district and now it is only serving three (3) hospitals (Dora Nginza, Livingstone and Port Elizabeth Provincial).

- 5.3.16 There is insufficient supply of clean linen at the hospital. Patients use their own bedding because of the shortage. The Casualty Unit also does not have enough linen for patients.
- 5.3.17 The Livingstone Hospital does not have a dedicated women's imaging section where mammography and bone densitometry etc. takes place. In general, the equipment should be replaced with the latest technology available, as this improves imaging and is necessary in training a facility like, such as the Livingstone Hospital.
- 5.3.18 The Cath-lab that was procured in 2018 with the intention to ensure quality service and suspend the use of private hospitals, has not been used to date. Purchased at an amount of seventeen million eight hundred thousand rand (R17, 800.000.00) without any maintenance plan, the machine was not fully installed and its warranty is no longer valid.

Kitchen facility and food service

- 5.3.19 The kitchen equipment was bought in 2010 and has not been in use ever since it was installed. In the year 2010, during the preparations for the Soccer World Cup hosted by South Africa, the Livingstone Hospital procured an automated kitchen facility system costing millions of Rand. This was to benefit all patients admitted to the hospital.
- 5.3.20 The intention was to ensure that a proper food preparation system that will contribute towards the quality health care for all patients was in place and ensuring that food reaches the patient in the desired state and according to dietary requirements. The Livingstone Hospital Management submitted a plan to the Head Office of the ECDoH to ensure there are proper staffing ratios at the main kitchen to render the services and achieve the desired efficiency and effectiveness on food provision. To date, the kitchen remains unused.

Personal Protective Equipment (PPE)

Internal Factors

- 5.3.21 Vast quantities of PPE were required for the protection of all categories of staff, this outstripped the ordering capacity and consumable budget for the Livingstone Hospital.
- 5.3.22 There was no obvious Covid-19 budget for the Livingstone Hospital for the procurement of PPE. A new procurement team that was solely appointed for the provision of PPE was formed from the existing staff and the SCM Unit, and procurement and systems had to be learned from scratch. End-users of certain items, such as gloves, were not equipped for big orders.
- 5.3.23 SCM revealed large deficiencies with regards to good relationships with companies, due to non-payment for goods and services and this was at institutional and metro level within the depot.
- 5.3.24 The quality of certain stock leaves much to be desired and called into question its very procurement. Unfortunately, the staff is not in a position to question quality as it is in dire need of the items. Stock arrived unpacked, unlabelled and of varying sizes and types as one delivery and furthermore, many delivery notes were incorrect with an inadmissible vagueness.

External factors

- 5.3.25 The inability to import goods due to the lockdown restrictions, led to inflation of prices due to high demand and this resulted in failure of many requests due to buy outs/deviations from the Livingstone Hospital, before central procurement took over.
- 5.3.26 The Livingstone Hospital reached middle ground of PPE usage, with increased awareness from all categories of staff, in respect of the correct use of PPE,

what the norms are for day to day use and in what areas. This coupled with an improved procurement insight and support from Head Office of the ECDoH has helped quell some initial PPE troubles that were experienced in March, April and May 2020.

- 5.3.27 There are still troublesome areas, these are still in the domain of gloves, both sterile and non-sterile for which there is still no answer. Due to trade issues and raw material, the supply of N95 masks is short, and the KN95 masks is not an adequate alternative for many because of size and fit.

Description of PPE stock:

DESCRIPTION	QUANTITY AVAILABLE
Digital Thermometer	37 (donated stock)
Surgical masks	92195
Apron	56700 (donated stock)
Surgical gloves	1200 + 42030
Examination gloves	16500
Mask respirator	19835 (6520 donated stock)
Boot covers	192
Eye protection	413
Sanitizers and Disinfectants	15124, 4460 litres of stock on hand is donated stock
Body Bags	2510
Gowns	10995
Coverall	883
Visor	12153 (donated stock)

Human Resources

- 5.3.28 Staff members leaving the hospital are not replaced. A three (3) months process is prolonged to eighteen or twenty (18-20) months due to the Provincial Cost Containment Committee (PCCC).

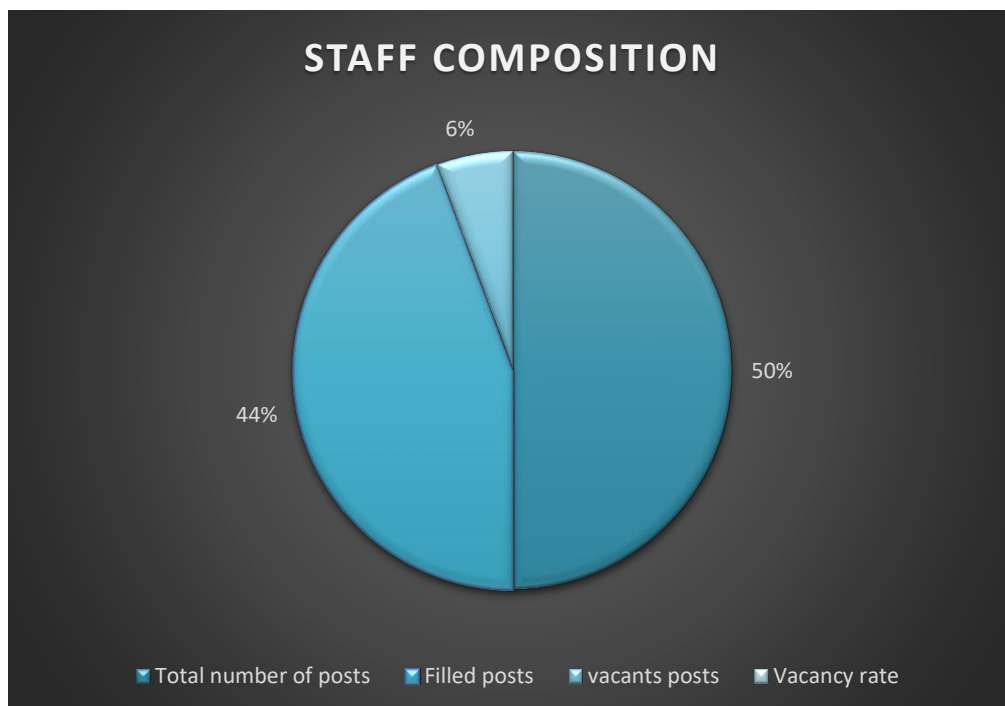
- 5.3.29 Non-clinical posts are not being filled, resulting in health professionals assisting with clerical and porting duties etc.
- 5.3.30 Medical Casualty is the busiest area in the hospital with insufficient physicians, it is poorly staffed. The current organogram is equivalent to that of a district hospital. Some services, such as rehabilitation had to be stopped due to staff shortage.
- 5.3.31 The Optometry Department has only two (2) staff members that consult with +/- four hundred (400) patients per week. There is chronic nursing staff shortage and lack of professional nurses to staff the areas optimally, as a result patient care is compromised.
- 5.3.32 There are no dedicated porter services. Nurses and doctors have to transport patients from reception to casualty and X-rays etc.
- 5.3.33 There is a need for defined functional psychiatry referral services for the Nelson Mandela Metropolitan area.
- 5.3.34 The Trauma Unit has to deal with a high number of gunshot wound injuries (gang related) and motor vehicle accidents and it requires dedicated nursing resources, security personnel and infrastructure to keep staff safe.
- 5.3.35 There is a shortage of cleaners, especially during the night. In recent months there has been an exodus of Senior Managers at the Livingstone Hospital, due to whistleblowing by organised labour for gross financial misconduct in the institution. To date, the institution has managed to stand on its feet because of dedicated officials who showed loyalty and took it upon themselves to ensure that services and leadership remain paramount. The posts approved for the hospital to function optimally are still hanging between the ECDoH Head Office Human Resources and the PCCC.

STAFF COMPOSITION

TOTAL NUMBER OF POSTS : 2517

Number of filled posts : 2233

Number of vacant posts : 284



Impact of Covid-19 on the staff

- 5.3.36 There was an almost total failure of support services during the run up and height of the initial surge of Covid-19. This led to huge amounts of stress in the entire system. There was no Information Technology (IT) and administrative assistance available and everything had to be done by the doctors alone at huge cost to them.
- 5.3.37 Doctors and sisters were compelled to spray beds themselves, clean floors and surfaces, buy their own bleach and mops and provide any cleaning assistance. Deficiencies in staff were highlighted with regards to porter services, general assistance, laundry, linen bank, seamstresses and nursing staff. Total collapse of the EMS with inability to collect patients and move patients from hospitals to a transfer facility, such as the field hospitals.

- 5.3.38 A phase based approach has been employed at the Livingstone Hospital to assist staff with the psychological sequelae of the pandemic. Managers are provided with concise but useful information to manage distress within their specific units. Any staff members experiencing distress related to Covid-19 can arrange to be seen by psychologist.
- 5.3.39 Stress management and general coping workshops have been presented. Staff and supporting staff were educated on Covid-19 and all its aspects such as donning/doffing etc.

Covid-19 patients

- 5.3.40 Wards P2 and P3 have been revamped to accommodate Covid-19 patients. A renovated P1 ward through the Business Chamber resulted in additional eighty (80) beds capacity. The Oncology Department was moved to create space to be used as rooms for additional isolation beds for PUI. Medical wards on the fourth and fifth floors were utilised for PUI and Covid-19 space, and basement fitted with seventy (70) extra oxygen points in case of a surge being identified.

Applicable Legal Framework

- 5.3.41 The relevant provisions of the applicable legal framework are referred to in paragraph 5.1 above and apply *mutatis mutandis* to the Livingstone Hospital. The same provisions shall not be repeated here for the sake of brevity.

Conclusions

- 5.3.42 It can be concluded from observations made during the on-site visits that were undertaken by the PPSA investigation team as recorded above and the submissions of hospital management and the ECDOH that the ECDoH has failed to ensure appropriate conditions for the enjoyment and delivery of health care services for the community that the Livingstone Hospital serves.

- 5.3.43 The ECDoH failed to provide sufficient physical infrastructure such as proper human resources, medical equipment/machinery and other resources like PPE, which are all necessary to sustain an effective health facility.
- 5.3.44 All these recorded systemic deficiencies, which were not disputed by the ECDoH, has a negative impact on the level of care that is provided to patients by the hospital
- 5.3.45 It can further be deduced from interactions with staff, union representatives and with hospital management that the ECDoH generally failed to adequately administer the Livingstone Hospital in manner envisaged by the Constitution and NHA, which would promote access to quality healthcare and enable the staff to provide effective access to the healthcare services to which the community is entitled to.
- 5.4 **Whether the administration of health by the ECDoH at Uitenhage Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration.**

Common cause or undisputed facts

- 5.4.1 On 04 August 2020, the Deputy Public Protector, Adv Kholeka Gcaleka (DPP) team led the PPSA investigation team that visited and conducted an inspection at Uitenhage Hospital in Eastern Cape.
- 5.4.2 During the inspection, the DPP and the team was assisted by the Acting Chief Executive Officer of Uitenhage Hospital, Dr LP Mayekiso and Dr Kapp who took the team in and around the premises of the health facility.
- 5.4.3 The ECDoH is responsible for the delivery of public healthcare services throughout the province of EC to ensure that the province's healthcare system is functional.

Issues in Dispute

- 5.4.4 In July 2020 media reports repeatedly highlighted the challenges faced by public and healthcare practitioners on the frontline fighting the Covid-19 pandemic.
- 5.4.5 Concerned about the widespread negative reports across the media spectrum, which painted a grim picture about the deteriorating service delivery conditions at various health facilities within Eastern Cape, the Public Protector authorised an immediate own initiative intervention/investigation into the allegations to establish the veracity of the claims made in the press statements.
- 5.4.6 As indicated, this own accord intervention to inspect Uitenhage Hospital was made with a view to establish whether or not the alleged state of affairs within the public healthcare facilities in the Eastern Cape resulted in improper conduct or maladministration.

PRELIMINARY OBSERVATIONS, INTERVIEWS AND INSPECTIONS *IN LOCO* CONDUCTED AT THE UITENHAGE HOSPITAL:

- 5.4.7 The following is a list of most visible systemic, administrative and infrastructural deficiencies made during the site inspection conducted by the investigation team at the Uitenhage Hospital:
- 5.4.7.1 Delays in filling all vacant positions including senior management positions such as the Chief Executive Officer and Clinical Manager;
- 5.4.7.2 Chronic staff shortages in all areas which has been exacerbated by about ninety (90) staff members who tested positive for and two (2) deaths as a result of Covid-19;

- 5.4.7.3 The hospital is registered as a Regional Hospital, but it is functioning as a District hospital and this has resulted in staff complement being disproportional;
- 5.4.7.4 The workload for the doctors is too high and they are often expected to work excessive hours, as a result of clinical staff shortages;
- 5.4.7.5 The contract for a Triage Tent has expired and the structure is weak, it cannot withstand strong wind, as a result it has blown down during assessment of patients;
- 5.4.7.6 There is a shortage of disposable bins, decanters, oxygen points and PPE; and
- 5.4.7.7 Medical equipment such as portable X-Ray machines are in working condition.

SUBMISSION BY THE UITENHAGE HOSPITAL MANAGEMENT:

- 5.4.8 On 18 August 2020, the PPSA investigation team received further submissions from the Uitenhage Hospital management, addressing the following issues:

Profile of the Uitenhage Hospital:

- 5.4.9 The Uitenhage Provincial Hospital was categorised as a Regional Hospital in 2012. The hospital serves a population of three hundred and forty four thousand one hundred and twenty five (344 125) from Sub district B and sixty four thousand and one (64 001) from the area of the Sunday Valley Municipality, with 13 (thirteen) feeder community health clinics (CHC), two (2) satellite clinics, three (3) despatch clinics (Joe Slovo, Masekhane, Kwa Nobuhle) and five (5) CHC (Rosedale, Middle Street, Park Centre, satellites: Kruis river, Rocklands).

5.4.10 The Uitenhage Hospital refers patients to Dora Nginza Hospital, the Livingstone Hospital, Elizabeth Donkin Hospital and TB hospitals. It has a total of 238 beds in the hospital + 18 unused beds (Ward 5 B).

Physical infrastructure

5.4.11 There is limited space for filing, archiving and ventilation is also a challenge at the hospital.

State of the Mortuary

5.4.12 The mortuary has seven (7) operational trays and has a shortage of eight (8). The Covid -9 container has capacity of six (6) double shelved trays that can accommodate twelve (12) bodies.

5.4.13 The management and control of mortuary trays has been addressed with the mortuary staff and porters. The assessment of specifications is awaited for procurement. An advertisement for mortuary attendants has been placed.

Vehicles or state of transport

5.4.14 Currently the Uitenhage hospital has three (3) motor vehicles namely –

- (a) One (1) 17 Seater Bus that transports patients and
- (b) Two (2) Sedans - One for official duties and another for patients.

5.4.15 There is a need for additional two (2) sedans, since the ones in place have a lot of mileage. The other vehicle will assist with Outreach, which is compromised.

5.4.16 A need for a heavy duty vehicle has also been identified.

Intensive Care and High Care Units

- 5.4.17 The High Care Unit has five (5) beds, two (2) isolation single bed wards and three (3) general beds with wall-mounted, multi-parameter monitors, infusion pumps, oxygen points with compressed air and ventilator.

Accommodation for nursing and clinical staff

- 5.4.18 The Doctors' residence was upgraded in 2016 (repainting, doors and electrical). All flats were fitted with security gates and burglar bars in 2018. Extra flats were built to accommodate eight (8) students.
- 5.4.19 There is no accommodation for nurses currently, as the building was damaged by a leaking reservoir in the roof. Community service nurses are accommodated in the Doctors' quarters, when space is available.

Lifts and access doors

- 5.4.20 There is an urgent need to fix the lifts, as they pose a risk to both patients and staff. Access doors and air conditioners are not working, especially in the wards, theatre, Pharmacy and Emergency Unit.
- 5.4.21 The lifts are a hazard to both the patients and the staff. They need urgent replacement. The A and B elevators were installed in 1998-1999. The C and D lifts have been in place since hospital was established. A number of patients and staff have been stuck in the elevators for hours.
- 5.4.22 There is also a need for extra security guards and lighting of dark areas within the hospital premises.

Equipment and machinery

- 5.4.23 The hospital is awaiting repairs of dysfunctional oxygen points.
- 5.4.24 All equipment in the High Care Unit is in working order.

Kitchen and Laundry

5.4.25 Three food warmers and conventional ovens are not functional. Fumigation is not done monthly, as it should. The hospital is currently using a service provider, due to shortage of staff and equipment.

Human Resources

STAFF COMPOSITION

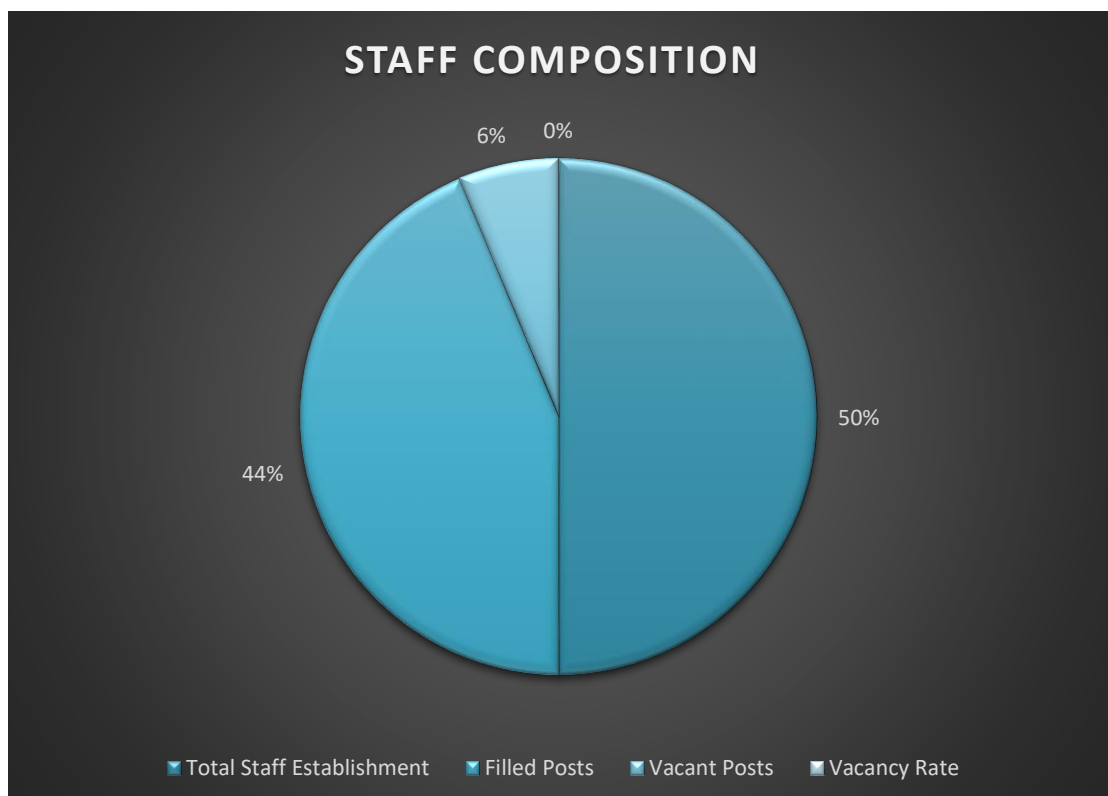
TOTAL STAFF ESTABLISHMENT: 697

Number of filled posts: 610

Number of vacant posts: 87

Vacancy rate: 23%

5.4.26 The posts of Chief Executive Officer and Clinical Manager (Medical) were advertised on 28 July 2020 and the closing date was the 07th August 2020. Preparation for the recruitment and selection process are underway to fill the positions, as soon as possible.



Impact of Covid-19 on staff

- 5.4.27 Emotional stress prevails regarding impact of Covid-19 on staff health, family relations and the increase of the number of deaths due to Covid-19. There is prevalent exhaustion of sick leave and stigmatization, if diagnosed. There is also a delay in remuneration for overtime worked due to rotation of staff in the Human Resource Department. The shortage of nursing staff poses a challenge as there were only two professional nurses allocated per shift, which was not ideal in an intensive care setting where infectious patients are treated.

Mitigation of psychological stress

- 5.4.28 Staff members are encouraged to access psychology services available by means of telephonic consultations.

Report of the Risk Assessment Committee

- 5.4.29 All departments of the hospital were visited and assessed regarding risk of exposure to Covid-19 and guidance given in terms of risk reduction strategies. Each department has been tasked to look at mitigation strategies ,focusing on the following:

- (a) Engineering controls
- (b) Administration controls
- (c) PPE and equipment
- (d) Safe work practice.

- 5.4.30 Basic Risk Reduction Strategies Implemented -

- (a) All staff members were trained on Covid-19 related issues.
- (b) Daily screening of staff members and availability of testing services.
- (c) All patients to be screened before entering the facility.

- (d) Entry points reduced.
- (e) Flu vaccine offered to all health workers.
- (f) Sick employees were encouraged to stay home and follow OHS procedures.
- (g) Basic hand hygiene measures and availability of alcohol based hand rub (ABHR)
- (h) Surgical masks to be worn at all times.
- (i) Social distancing measure etc.

Personal Protective Equipment

PRODUCT DESCRIPTION	QUANTITY
Surgical Gloves	45
Examination Gloves	35900
Surgical Masks	1007
Mask Respirator	22667
Apron	16100
Eye Protection	107
Visor	247
Gowns	2617
Coveralls	22
Digital Thermometer	6
Sanitizers and Disinfectants	74
Body Bags	405
Shoe-String bags	0
Spray Bottles	0
Bio-hazard bags	0
Boot covers	0

Applicable Legal Framework

5.4.31 The relevant provisions of the applicable legal framework are referred to in paragraph 5.1 above and apply *mutatis mutandis* to the Uitenhage Hospital. The same legal framework shall not be repeated here for the sake of brevity.

Conclusion

5.4.32 It can be concluded from observations made during the on-site visit at the Uitenhage Hospital undertaken by the PPSA team as recorded above and the submissions of hospital management and the ECDOH that the ECDoH has failed to ensure appropriate conditions for the enjoyment and delivery of health care services at Uitenhage Hospital.

5.4.33 The ECDoH failed to ensure provision of sufficient human resources, vehicles and adequate resources such as PPE, which are all necessary to sustain an effective health facility.

5.4.34 All these recorded systemic deficiencies, which were not disputed by the ECDoH have a negative impact on the level of care that is provided to patients in the facility.

5.4.35 It can further be deduced from interactions with staff, union representatives and with hospital management that the ECDoH generally failed to adequately administer Uitenhage Hospital in manner envisaged by the Constitution and NHA, which would promote access to quality healthcare and enable the staff to provide effective access to the healthcare services to which the community is entitled to.

5.5 WRITTEN REPRESENTATIONS MADE BY THE ECDoH:

5.5.1 On 11 September 2020, the former Head of the ECDoH, Dr T Mbengashe, was afforded an opportunity to respond to the observations made by the PPSA investigation team during the on-site visits to the four hospitals and

the submissions made by the management of the hospitals and the labour union.

5.5.2 Ms Nonhlanhla Nkosi, the General Manager in the office of the Head of ECDoH responded on 02 October 2020 and stated that:

5.5.3 The ECDoH has a Provincial Quality Assurance Unit, designated to investigate and act upon all concerns raised by health service users, as well health care providers.

5.5.4 In response to the pronouncement declaring Covid -19 a pandemic, the ECDoH implemented plans and various measures to protect health service users and staff. It can be confirmed that though the facilities are under immense pressure with respect to volumes of patients seeking health services, various measures are in place to promote provisioning of quality health care services

5.5.5 The ECDoH adopted a multidisciplinary team approach, specifically responsible for hospital upgrades towards additional isolation beds and Intensive Care Units in preparation for the surge in numbers of those in need of admission, as well as infrastructure and additional recruitment of clinical and non-clinical staff.

5.5.6 As of July 2020, the Provincial Quality Assurance Teams, reinforced by experts from World Health Organization have been conducting onsite visits to health establishments to verify and support the implementation of the guidelines and protocols with respect to application of patient safety measures.

5.5.7 Health establishments that have challenges are supported to develop quality improvement plans as well as with formulation of clinical governance structures.

5.5.8 Further, that the ECDoH expressed its appreciation for the Public Protector's preliminary observations and is committed to address all the issues raised.

5.5.9 The Public Protector duly acknowledges quick interventions made by ECDoH following the site inspection by the investigation team, such as advertisement of certain positions to address personnel/staff shortages and the construction of additional new wards/infrastructure at Nessie Knight Hospital in Sulenkama.

5.6 RESPONSE TO THE NOTICES ISSUED IN TERMS OF THE PROVISIONS OF SECTION 7(9)(a) OF THE PUBLIC PROTECTOR ACT

5.6.1 On 10 February 2021 as well as on 12 April 2021, the Public Protector issued notices in terms of section 7(9)(a) of the Public Protector Act to the Acting Head of the ECDoH, the Head of the Eastern Cape Department of Public Works and Infrastructure and the Head of ECPT, affording them an opportunity to respond to the evidence and information obtained during the investigation and the intended findings to be made.

5.6.2 Dr S Zungu, the Acting Head of the ECDoH (Dr Zungu) responded on 17 February 2021. Dr Zungu's response was in the form of the action plans of the ECDoH for each hospital, including timeframes by when some of the findings will be addressed, whilst also providing progress or an indication where findings have already been attended to. The action plans were incorporated into the remedial action by the Public Protector.

5.6.3 The ECDoH did not dispute any of the observations or findings made from the investigation, but the Acting Head indicated that ECDoH is confronted with the enormous challenge of medico legal claims, which adversely impacts the Department's ability to deliver uninterrupted and quality health care services to the people of the province. In the 2020/21 year, the ECDoH has already paid R922, 795 million in medico legal claims.

5.6.4 Further, that the impact of the payment of the medico legal claims is that the ECDoH struggles to appoint critical staff, procure the necessary medical supplies and to effect much needed repairs in most of the ageing hospital

infrastructure and equipment. In instances where the ECDoH is not able to honour court orders, the Sheriff attaches its assets (cars, office furniture and computer equipment), including the Department's own bank account. The impact of this on service delivery is quite severe.

- 5.6.5 Notwithstanding the above challenges, the ECDoH is engaging with other relevant government departments in the Eastern Cape Province, to assist with long-term solutions to the challenge of medico legal claims so that the Department's allocated funds can be used for its intended purpose of addressing some of the findings highlighted by the Public Protector.
- 5.6.6 In addition, it was indicated that the ECDoH inherited serious infrastructure backlogs from the former homelands. While progress has been made to improve health infrastructure in the last 26 years since democracy, there is still much more to be done to get all the facilities to the level required for certification as Ideal Clinics and Ideal Hospital, in preparation for National Health Insurance (NHI) roll out.
- 5.6.7 Dr Zungu stated that the ECDoH remains committed to deliver quality health services to the people of the Eastern Cape Province and welcomes the role of the Public Protector in keeping the Department accountable in this regard.
- 5.6.8 Mr D Majeke: The Head of Department for ECPT (Mr Majeke) responded as per submission dated 20 April 2021. Of significance in Mr Majeke's response was a letter²¹ from the Member of Executive Council for Finance (MEC) Honourable M Mvoko, addressed to Minister of Finance: Honourable T Mboweni. This letter was a formal request from ECPT to National Treasury seeking financial assistance and support to the ECDoH in terms of section 6(2)(d) of PFMA read with section 214(2) of the Constitution.
- 5.6.9 The basis of the request for financial assistance from National Treasury hinged mainly on reasons related to shortfalls due to budget cuts, increasing accruals and payables, an increase in the medico-legal claims and additional appointments to address Covid-19 pandemic.

²¹ Dated 11 February 2021.

5.6.10 Accordingly, the ECPT requested additional funding from NT of R3.363 billion for the ECDoH in the current financial year and 12.924 billion over the 2021 MTEF, as tabulated below.

Additional funding request by ECPT to NT:

Budget Cost pressures: R'000	FINANCIAL YEARS				TOTAL
	2020/21	2021/22	2022/23	2023/24	R'000
Overall Budget	1 182 897	1 518 310	1 339 988	1 401 627	5 442 823
Compensation of Employees (CoE)	449 897	751 592	583 001	562 749	2 302 239
Non- Negotiable item: Non- CoE	733 000	766 718	801 987	838 878	3 140 583
Payment of creditors	1 205 913	2 602 255	-	-	3 808 168
Accruals	-	2 602 255	-	-	2 602 255
Outstanding payables	1 205 913	-	-	-	1 205 913
Medico-Legal Claims	905 108	946 743	990 293	1 035 847	3 877 991
Actual Paid	905 108	946 743	990 293	1 035 847	3 877 991
Outstanding claims	-	-	-	-	-
Covid -19	70 000	1 178 055	928 942	982 891	3 159 818
Compensation of Employees (CoE)	70 00	836 219	928 942	982 821	2 817 982
Non-CoE pressures	-	33 780	-	-	33 780
Vaccine Rollout	-	308 056	-	-	308 056

Total	3 363 918	6 245 363	3 259 223	3 420 295	16 288 799
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5.6.11 It was further emphasized by ECPT that a total of R2, 519 billion has been paid from 2014/15 to 2019/20 by ECDoH in medico-legal claims. For the current financial year as at 31 December 2020, an amount of R 905, 108 million has been paid for medico-legal claims. These are projected to grow over the MTEF period. Further that the ECDoH is facing a new trend or challenge whereby court orders are effected through the writs of execution served on the ECDoH bank account.

5.6.12 Mr TL Manda: The Head of Department for EDPWI (Mr Manda) responded as per submission dated 10 May 2021 and indicated *inter alia*:

“The budget for the maintenance of Health Facilities is voted under the ECDoH vote. DPWI only provides technical support but has no control over the ECDoH’s voted budget.

In about 2012, ECDOH engaged Coega Development Corporation (CDC) to undertake maintenance of Health Facilities in the entire province. This then limited the role of ECDPWI with regards to its mandate of managing state facilities (in this case Health Facilities).

When relations between ECDoH and CDC had challenges, ECDoH engaged a consortium that was Sakhiwo Health Solutions to manage its projects. The contract between ECDoH and Sakhiwo Health Solutions expired in January 2020.

In order to implement the projects Sakhiwo Health Solutions and ECDoH procured a databased contract to attend to their day to day maintenance requirements. The contract period for this database expired in March 2020. However due to Covid-19 disruptions, ECDoH had to extend the period of its database contractors up to end of July 2021.

During the course of 2019 the accounting officer of ECDoH advised the ECDPWI accounting officer of the intention to assign all maintenance programs to ECDPWI.

The preparatory work for the take over the maintenance of Health Facilities was disrupted by the emergence of Covid-19. (ECDPWI was assigned to refurbish a total of 61 Health Facilities in order to prepare for Covid-19 patients)

In preparing for full implementation of Health Facilities maintenance program, ECDPWI is in the process of concluding documents that will pave the way for the procurement of various service providers that will be appointed to carry out the maintenance of Health facilities across the province.

It is anticipated that ECDPWI will finalize the procurement process as at the end of June 2021. This will ensure that service providers are appointed on time before the expiry of the extended contract period of the ECDoH appointed database contractors. ECDPWI shall then take full responsibility of all the Health Facilities in the province”.

5.6.13 The ECDPWI further commented on the future developments on the sampled four (4) health facilities by the Public Protector as follows:

“The identification of health facilities that either require repairs and renovations, refurbishments and alterations and upgrading is the responsibility of ECDoH.

The identified facilities / projects would be included in the planning document that is termed as Infrastructure Program Management Plan (IPMP). The IPMP will contain projects that are funded over the Medium Term Expenditure Framework (MTEF) period (three-year period).

The IPMP would then be given to ECDPWI which will comprise of the list of the identified projects. DPWI would then respond to the IPMP with the infrastructure Project Implementation Plan (IPIP) which shall detail the implementation approach of the IPMP.

Once the IPIP has been signed by the accounting officers, ECDoH planning unit shall, in conjunction with the ECDoH clinical services unit, produce the initiation report for each identified project.

ECDPWI shall only proceed with the implementation of each individual project once the initiation report from ECDoH has been received”.

5.6.14 ECDPWI’s comment on the four (4) sampled projects by the Public Protector are as follows:

(a) Nessie Knight Hospital

5.6.15 ECDPWI submitted that the records indicate that the first building of this hospital was commissioned in 1926 with the help of missionaries using the material that was viable at the time. The hospital has expanded over years. Due to the nature of the material that was used to construct the hospital, dilapidation crept in as the years went by. Records indicate that ECDoH attempted to make some infrastructure improvements but in a phased approach.

5.6.16 This resulted in the construction of the staff accommodation which is due to be commissioned in due course. Furthermore DPWI renovated some old buildings (female, male and TB wards together with the Mhlobo Building) as part of the 61 facilities that were prepared for Covid-19 isolation beds). For 2021, ECDoH has assigned the project for the upgrading of the hospitals to ECDPWI. The initiation report has been provided to ECDPWI which is in the process of formulating the scope of work that will see the total revamp of the facility.

5.6.17 ECDPWI is currently busy with the design of the hospital as per the guidance that has been provided in the initiation report. It is expected that the procurement of the service provider shall commence on the third quarter of 2021/2022 financial year.

(b) Mthatha Hospital

5.6.18 ECDPWI is repurposing the old Sir Henry Hospital. Buildings have been refurbished and the facility has a total of about 150 hospital beds. Furthermore a 100 bed facility is being constructed at the Sir Henry Hospital site. ECDPWI has also commenced with the procurement process of the revamping of the last outstanding buildings. All this work is anticipated to be completed at the end of 2021 calendar year.

5.6.19 These are currently earmarked for Covid-19 beds. However, ECDPWI has been advised that Mthatha General Hospital will relocate to the repurposed and expanded Sir Henry Hospital. When all the work has been completed, which is anticipated to be the end of the 2021 calendar year, the hospital capacity will be increased to about 300 hospital beds.

(c) Livingstone Hospital

5.6.20 ECDPWI repurposed the basement parking into a 73 bed facility to accommodate Covid-19 isolation beds. ECDPWI has been further advised that there is an upgrading of the Cathlab Building which is being implemented by ECDoH through the assistance of Sakhiwo Health Solutions. The IPMP for 2021 financial year contains two projects for the hospital which are as follows:

- (i) Doctors' accommodation;
- (ii) Refurbishment of P-Block

- 5.6.21 ECDoH's planning unit has advised ECDPWI that it is still consulting internally before they can issue the Initiation Report. ECDPWI would only proceed with any of these projects once it receives the initiation report.

(d) Uitenhage Hospital

The hospital is not funded in the 2021/2022 financial year. There was an attempt to refurbish some building for Covid-19 isolation beds. However the project was among the few that could not be proceeded with to avoid the over commitment on the Covid-19 grant allocation. ECDPWI shall be advised by ECDoH for any other interventions required for the facility.

6. FINDINGS

6.1 Regarding whether the administration of health by the ECDoH at the Nessie Knight Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration:

6.1.1 The allegation that the administration of health by the ECDoH at Nessie Knight Hospital does not accord with the obligations imposed by the Constitution and the law is substantiated.

6.1.2 Observations made during the on-site inspection undertaken by PPSA team revealed systemic deficiencies, such as staff shortages, lack of adequate medical equipment, insufficient supply of PPE, poor physical infrastructure such as dilapidated buildings, lack of vehicles, lack of laundry services and poor supply of water as detailed in evidence.

6.1.3 The same systemic deficiencies were echoed in submissions by the hospital management and union representatives that were engaged during interaction with the investigation team.

6.1.4 The observations and findings were not disputed by the ECDoH.

- 6.1.5 The ECDoH has failed to ensure appropriate conditions for the enjoyment, delivery and access to adequate as well as effective health care services for the community of Sulenkama.
- 6.1.6 Such failure by ECDoH amounted to contravention of section 195(1) (e) and (f) of the Constitution, section 237 of the Constitution, section 27(1) and section 25(1) and (2) of the NHA as well as the Regulations, as shown in evidence.
- 6.1.7 The conduct of the ECDoH accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a)(i) of the Public Protector Act.
- 6.2 **Regarding whether the administration of health by the ECDoH at the Mthatha Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration:**
- 6.2.1 The allegation that the administration of health by the ECDoH at the Mthatha Hospital does not accord with the obligations imposed by the Constitution and the law is substantiated.
- 6.2.2 Observations made during the on-site inspection that was undertaken by the PPSA investigation team revealed acute systemic deficiencies such as inadequate physical infrastructure, the lack of a mortuary, shortage of office space, inadequate office equipment, shortage of human resources, lack of vehicles, inadequate medical equipment or machinery and inadequate supply of other essential resources like PPE which are all necessary to sustain an effective health facility, as detailed in evidence.
- 6.2.3 The same systemic deficiencies were echoed in the submissions by the hospital management and union representatives and staff that were engaged during interaction with the investigation team.
- 6.2.4 The observations and findings were not disputed by the ECDoH.

- 6.2.5 The ECDoH has failed to ensure appropriate conditions for the enjoyment, delivery and access to adequate as well as effective health care services for the community of Mthatha.
- 6.2.6 Such failure by ECDoH amounted to contravention of section 195(1) (e) and (f) of the Constitution, section 237 of the Constitution, section 27(1) and section 25(1) and (2) of the NHA and the Regulations, as shown in evidence.
- 6.2.7 The conduct of the ECDoH accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.
- 6.3 **Regarding whether the administration of health by the ECDoH at the Livingstone Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration.**
- 6.3.1 The allegation that the administration of health by the ECDoH at Livingstone Hospital does not accord with the obligations imposed by the Constitution and the law is substantiated.
- 6.3.2 Observations made during the on-site inspection that was undertaken by the PPSA investigation team revealed systemic deficiencies such as acute staff shortages, inadequate physical infrastructure, shortage of medical equipment or machinery and insufficient supply of other resources like PPE which are all necessary to sustain an effective health facility, as detailed in evidence.
- 6.3.3 The same systemic deficiencies were echoed in submissions by the hospital management and in the submissions by union representatives that were engaged during interaction with the investigation team.
- 6.3.4 The observations and findings were not disputed by the ECDoH.

- 6.3.5 The ECDoH has failed to ensure appropriate conditions for the enjoyment, delivery and access to adequate as well as effective health care services for the community around Port Elizabeth.
- 6.3.6 Such failure by ECDoH amounted to contravention of section 195(1) (e) and (f) of the Constitution, section 237 of the Constitution, section 27(1) and section 25(1) and (2) of the NHA as well as relevant Regulations as shown in evidence.
- 6.3.7 The conduct of the ECDoH accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.
- 6.4 **Regarding whether the administration of health by the ECDoH at the Uitenhage Hospital accords with the obligations imposed by the Constitution and the law and if not, whether such failure amounts to improper conduct and maladministration.**
- 6.4.1 The allegation that the administration of health by the ECDoH at Uitenhage Hospital does not accord with the obligations imposed by the Constitution and the law is substantiated.
- 6.4.2 Observations made during the on-site inspection that was undertaken by the PPSA investigation team revealed systemic deficiencies such as acute staff shortages, shortage of vehicles and inadequate supply of resources like PPE which are all necessary to sustain an effective health facility, as detailed in evidence.
- 6.4.3 The same systemic deficiencies were echoed in the submissions by the hospital management union representatives that were engaged during interaction with the investigation team.
- 6.4.4 The observations and findings were not disputed by the ECDoH.

- 6.4.5 The ECDoH has failed to ensure appropriate conditions for the enjoyment, delivery and access to adequate as well as effective health care services for the community around Uitenhage.
- 6.4.6 Such failure by ECDoH amounted to contravention of section 195(1) (e) and (f) of the Constitution, section 237 of the Constitution, section 27(1) and section 25(1) and (2) of the NHA and the Regulations, as shown in evidence.
- 6.4.7 The conduct of the ECDoH accordingly constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1.1 The Public Protector notes and acknowledges the challenges and constraints faced by the ECDoH, as well as the context within which health services are delivered in the Eastern Cape Province.

7.2 Based on the action plans submitted by the ECDoH detailing how the shortcomings and deficiencies in each of the four hospitals will be addressed and taking into consideration submissions made by both ECDPWI and ECPT, the appropriate remedial action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution is the following:

7.3.1 In respect of the Nessie Knight Hospital, the Head of the ECDoH to take appropriate steps to ensure that:

7.3.1.1 Within the 2021/22 Medium Term Expenditure Framework (MTEF) the ECDoH and where appropriate in consultation with Eastern Cape Department of Public Works and Infrastructure (ECDoPWI) as well as Eastern Cape Provincial Treasury (ECPT) finalises the following projects:

- (a) Construction of the new residences for the staff;

- (b) Fencing of the hospital grounds;
- (c) Installing water supply in the residences;
- (d) Renovation of the male, female and TB wards;
- (e) Construction of a concrete drive way;
- (f) Renovation of the kitchen and Central Sterile Supply Department;
- (g) Installation of new ceilings in the ward's passage(s) as part of and the main hospital building renovations;
- (h) Refurbishment of hospital equipment and installation of piped oxygen;
- (i) Upgrading the IT connectivity within the hospital;
- (j) Replacing of the old fleet of vehicles and the laundry machines;
- (k) Sourcing additional funding from the Provincial/National Treasury to pay creditors and critical service providers, including contractors on projects and
- (l) Addressing shortages in human resources.

7.3.1.2 Sufficient PPE for the hospital is supplied within 30 (thirty) days from the date of this report.

7.3.2 In respect of Mthatha Hospital, the Head of the ECDoH to take appropriate steps to ensure that:

7.3.2.1 Vehicles from other health care facilities are reassigned for the benefit of the Mthatha Hospital, within thirty (30) days from the date of this report;

7.3.2.2 A submission is made to the Provincial/National Treasury for assistance with the timely settlement of medico legal claims relating to the hospital to avoid the further attachment of the assets of the hospital, within thirty (30) days from the date of this report;

7.3.2.3 The Mthatha Hospital utilises the mortuary at the Sir Henry Elliot Hospital within sixty (60) days from the date of this report;

7.3.2.4 Within 2021/22 MTEF, the ECDoH and where appropriate in consultation ECDoPWI as well as Eastern Cape Provincial Treasury (ECPT) finalises the following projects:

- (a) Upgrading the IT connectivity within the hospital;
- (b) Filling of the vacant positions;
- (c) Procurement of the laundry machines; and
- (d) Renovating and upgrading the infrastructure of the hospital.

7.3.2.5 Sufficient PPE for the hospital is supplied within 30 (thirty) days from the date of this report.

7.3.3 In respect of Livingstone Hospital, the Head of the ECDoH to take appropriate steps to ensure that:

7.3.3.1 The recruitment process for the vacant leadership positions at the hospital is finalised within 60 days from the date of this report;

7.3.3.2 The filling of other critical positions at the hospital is prioritised;

7.3.3.3 Interns appointed as from April 2021 are placed at the hospital to assist;

7.3.3.4 The organogram for the hospital is finalised within 90 days from the date of this report and the relevant Treasury engaged for additional funds to fill vacant positions;

7.3.3.5 An integrated mental health strategy for public hospitals is developed for the Nelson Mandela Bay Metropolitan area, within 90 days from the date of this report;

7.3.3.6 External Service providers are appointed for the maintenance of the laundry and other vital equipment at the hospital, within 90 days from the date of this report;

7.3.3.7 Within 2021/22 MTEF the ECDoH and where appropriate in consultation ECDoPWI as well as Eastern Cape Provincial Treasury (ECPT) conducts a full conditional assessment of the hospital buildings in order to develop a costed strategy for planning and budget allocation over the MTEF for refurbishment of the facility, subject to budget availability;

7.3.3.8 The Maintenance Unit at the hospital conducts routine or scheduled maintenance and regularly attend to blocked drains in order to avoid blockages and disruption of operations; and

7.3.3.9 Sufficient PPE for the hospital is supplied within 30 (thirty) days from the date of this report.

7.3.4 In respect of Uitenhage Hospital the Head of Department for ECDoH to take appropriate steps to ensure that:

7.3.4.1 The organogram of the hospital with the correct classification of posts is completed within ninety (90) days from the date of this report;

7.3.4.2 The recruitment process for the leadership positions at the hospital is completed within sixty (60) days from the date this report;

7.3.4.3 The filling of other critical vacant positions at the hospital is prioritised;

7.3.4.4 The correct classification of the hospital is finalised within ninety (90) days from the date of this report;

7.3.4.5 A comprehensive security assessment is conducted at the hospital to inform the 2021/2022 Procurement Plan in terms of the additional security required within 90 days from the date of this report;

7.3.4.6 Within 2021/22 MTEF the ECDoH and where appropriate in consultation ECDoPWI as well as Eastern Cape Provincial Treasury (ECPT) finalises the following projects:

- (a) Repairing of air conditioners and lifts in the hospital including settlement of the OTIS account for the repairs to be effected;
- (b) Conditional assessment of the Nurses Home to be conducted to inform budget and planning over the MTEF;
- (c) Procurement of a new mobile X-RAY; and
- (d) Identification of space for renovation and upgrades where necessary.

7.3.4.7 Sufficient PPE for the hospital is supplied within 30 (thirty) days from the date of this report.

The appropriate recommendation in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Head of Department of ECDPWI is as follows:

7.3.4.8 The Public Protector, in terms of section 6 (4) (c) (ii) of the Public Protector Act, refer to the Head of the Department of ECDPWI, this matter for consideration of technical infrastructural support and renovation needs where it appears necessary in relation to the identified and other public health facilities in the province of EC.

The appropriate recommendation in pursuit of section 6(4) (c)(ii) of the Public Protector Act to the Head of Department of ECPT is as follows:

7.3.4.9 The Public Protector, in terms of section 6 (4) (c) (ii) of the Public Protector Act, refer to the Head of the Department of ECPT, this matter for consideration of financial support and oversight where it appears necessary in relation to the identified and other public health facilities in the province of EC.

The appropriate recommendation in pursuit of section 6(4)(c)(ii) of the Public Protector Act to the Director General(s) for National Department of Health and Department of Justice and Constitutional Development is as follows:

In the *Member of the Executive Council for Health, Gauteng Provincial Government v PN* [2021] ZACC, the Constitutional Court ruled that while the defendant is liable for 100% of the plaintiff's agreed or proved damages, the order has nothing to do with "the how". The focus is on being liable to compensate.²²

Consequently, it is now acceptable/possible to arrange for structured settlements and periodical payments for the satisfaction of claims against the State as a result of wrongful medical treatment of persons by servants of the State. This is necessary to protect the constitutional responsibility to provide healthcare which is at risk due to increasing budget pressures facing the ECDoH.

According to ECPT, a total of R 2. 519 billion has been paid from 2014/15 to 2018/20. For the current financial year, as at 31 December 2020, an amount of R905 108 million has been paid for the medico-legal claims. These are projected to grow over the MTEF period.

7.3.4.10 Within 90 (ninety) from the date of issue of this report take the necessary steps to speed up the process of finalising the current State Liability Amendment Bill, which seeks to amongst other things make provision for structure settlement orders which would include periodic payments in cases of medical negligence against the State.

7.3.4.11 The National Department of Health to consider taking over medico-legal claims as they affect most of the provinces.

²² *Member of the Executive Council for Health, Gauteng Provincial Government v PN* [2021] ZACC 6 at para 23 and 24.

8. MONITORING

- 8.1 The Acting Head of the ECDoH must submit an Implementation Plan to the Public Protector within thirty (30) working days from the date of receipt of this report, indicating how the remedial action referred to in paragraph 7 above will be implemented and thereafter a quarterly update report indicating progress made by the end of each quarter.
- 8.2 In terms of the Constitutional Court Judgement in the matter of *Economic Freedom Fighters v Speaker of the national Assembly and other; Democratic Alliance v Speaker of the national Assembly and others [2016] ZACC 11*, and in order to ensure the effectiveness of the Public Protector South Africa, the remedial action taken in this report are legally binding on the Acting Head of the ECDoH, unless a court directs otherwise.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 28/06/2021



Assisted by: Vusumuzi Xolani Dlamini
Eastern Cape Provincial Representative
Public Protector South Africa