UPHOLDING THE PROFESSION

A report on an investigation into the alleged acts of abuse of power and other acts of maladministration in the procedure of procuring and engaging South African Lawyers by the Former Attorney General and the Malawi Electoral Commission
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EXECUTIVE SUMMARY

‘Upholding the Profession’ is a report on an investigation that my Office carried out into allegations of abuse of power and other acts of maladministration in the procedure of procuring and engaging South African (SA) lawyers by the former Attorney General (AG) and Malawi Electoral Commission (MEC).

The investigation was motivated by a complaint dated 14th April, 2020 lodged with my Office by Youth and Society (YAS). The Complaint alleged that the then AG of the Republic of Malawi Mr. Kalekeni Kaphale Senior Counsel (SC) committed various acts of maladministration in the manner in which he procured the services of SA Lawyers Dumisa Buhle Ntsebeza SC and Counsel Elizabeth Makhanani Baloyi-Mere.

Some of the specific acts of maladministration included that the former AG continued to act and assist MEC in the procurement of the SA lawyers despite the Constitutional Court holding that his representation of MEC was clear abandonment of his constitutional role; that the former AG acted illegally, improperly and irregularly by bringing the said SA Lawyers into the country on 8th March, 2020 before their procurement process was completed on 10th March, 2020 that the said former AG acted unreasonably and contrary to principles of procurement for procuring the said legal services at the unjustified sum of $788,500 and that the former AG flouted procurement procedures by failing to subject the procurement of the SA Lawyers to an open tender the same not being amenable to a waiver from open tendering.
The investigation focused mainly on 5 issues; whether procurement procedures were followed in the recruitment of the SA Lawyers; whether the legal fees charged by the SA layers were reasonable; whether the SA Lawyers were paid legal fees in accordance with the Retainer Agreement; Whether the former AG acted improperly by assisting MEC to procure the SA Lawyers when the Constitutional Court adjudged that his representation of MEC in the election case amounted to abandonment of his Constitutional role and whether the former AG received fees from MEC for the services he provided them when he represented MEC in the High Court.

After the investigation the following acts of maladministration were established;

i. The failure of MEC, to have a clear and set description of requirements for the service they wanted was contrary to procurement procedures and the ambiguity in description created an uneven playing field.

ii. The use of single sourcing the services of Mboweni Maluleke Inc. Attorneys when the grounds upon which single sourcing could be used were not met and before obtaining approval from Public Procurement and Disposal of Asset Authority (PPDA) to use single sourcing methods was illegal.

iii. The failure by the former AG and former MEC Chairperson to negotiate fees that were reasonable was maladministration.

iv. The surrendering of the soft copy of the Constitutional Court record by the MEC Chairperson and the former AG to the SA lawyers even before the procurement processes had begun was clearly unreasonable and a mockery to the procurement guidelines.

v. The pressure exerted by the MEC Chairperson on the Internal Procurement and Disposal Committee (IPDC) to the extent that they failed to properly deliberate on this procurement and merely rubber stamped the decisions that were made by the MEC Chairperson and the AG was improper.

vi. The Former AG and MEC Chair acted illegally for facilitating the travel of Mboweni Maluleke Inc. A to Malawi and start executing the Retainer Agreement before a ‘No Objection’ had been received from the PPDA.

vii. The failure by the PPDA to articulate with certainty what method of procurement was used in this matter was an abrogation of duty.

viii. The failure by the Board to reconvene and deliberate on the technical report was an abdication of their duty and contrary to the set internal procedures at the PPDA.
ix. The apparent bulldozing to the grant of the no objection by especially the PPDA Chairperson before the Anti-Corruption Bureau (ACB) clearance was obtained was maladministration.

x. The failure by the PPDA Board Chairperson to declare his conflict of interest at the PPDA meeting on the issue of procurement of the South African lawyers was serious breach of the law.

xi. Relying on the professional judgment of the Former AG and MEC regarding suitability of the legal firm for the assignment and the reasonableness of the costs by the PPDA Director General (DG) is an abdication of duty and contrary to the oversight role the PPDA is supposed to be playing.

xii. The failure by the DG of PPDA to request the Board an extension for the date of the meeting for preparation of the technical report on the request for procurement of the SA Lawyers by MEC and failure to impress on the Board on the importance of such report was maladministration.

xiii. The suppression of facts by the DG of PPDA in the minutes of the PPDA Board extra ordinary meeting where he deliberately removed the issue of technical report to make it look like it was not one of the conditions for the granting of no objection was a serious maladministration.

xiv. The failure by the ACB to do a thorough scrutiny of the submission by PPDA and specific search on Mboweni Maluleke Inc. Attorneys as it is a foreign based law firm fell short of providing the necessary check that is expected by sending such high value or single sourced procurements to the ACB.

xv. The former AG acted improperly, unconstitutionally and contrary to the Constitutional Court’s determination by involving himself with sorting out accommodation issues of the SA Lawyers at Umodzi and also by going further to negotiate downwards on behalf of MEC the legal fees for the lawyers after their admission was denied.

xvi. Whilst fully aware that he was illegally appointed to the membership of the PPDA Board, Mr Madalitso Mmeta continued to serve on the Board anyway. Accordingly he was not only an accomplice to this illegality but also acted below required ethical standards for a lawyer.

xvii. The former Chief Secretary knowingly, deliberately or out of sheer incompetence facilitated the illegal appointment of Mr Mmeta as member of the PPDA Board.
In addressing the foregoing acts of maladministration the report contains directives that I have made as follows;

i. MEC through the new Commission and advice from the current AG should bring the matter of the retainer agreement between MEC and Mboweni Maluleke Inc. Attorneys to a logical conclusion. This should be done 30th June, 2021.

ii. But for the former AG Mr. Kalekeni Kaphale, SC and former MEC Chairperson Justice Jane Ansah (rtd) abusing their powers and breaching procurement laws the SA lawyers would not have come to Malawi. I thus direct that the former AG and former MEC Chair should refund in equal amounts K3,155,248 which is the Malawi public funds money that was expended on the SA lawyers through accommodation, beverages and meals at BICC Umodzi Park hotel for the period the lawyers were in the country. This money should be paid back to MEC and proof of payment should be submitted to my Office by 28th April 2021.

iii. ACB should come up with specific guidelines that the Bureau will have to follow when scrutinising submissions for no objection with clear timelines to ensure efficiency. The Bureau should do this and give my Office a copy of the same by 30th September, 2021.

iv. The DG and Deputy DG handled the procurement of the SA lawyers with high level of incompetency. I therefore direct that the Board of PPDA assess and decide on the suitability and competency of both DG and his Deputy for these posts. The outcome of that assessment should be communicated to my Office by 28th May, 2021.

v. The Accountant General should verify if the **K 165,650, 130.00** balance from the money Treasury had given to MEC to pay the SA lawyers remained unused in MEC Account by 30th June, 2020. This confirmation should be provided to Malawians and copied to my Office by 28th May, 2021.

vi. The former PPDA Chairperson Mr. Madalitso M’meta was illegally appointed on the PPDA Board. He knew or ought to have known of his illegal appointment but continued to sit on that Board regardless. Further to this he never recused himself nor declared his conflict of interest when the PPDA Board was considering the submission from MEC on the procurement of SA Lawyers. To ensure justice for all this, I direct that Mr. M’meta should reimburse the People of Malawi through the PPDA the sum of **MK 8, 757,557.07** which is the amount that according to the PPDA was expended on Mr. M’meta in terms of Airtime, sitting allowances, T&T allowances and conference and accommodation for the period that he illegally
served on the PPDA Board between November 2018 to June 2020. This should be done and proof of the same should be furnished to my office by Mr. M’meta and the PPDA by the 28th May, 2021.

vii. The former Chief Secretary played a big role in the illegal appointment of Mr. M’meta as PPDA Board member and chairperson. This was done deliberately, intentionally or out of sheer incompetency both of which make his suitability as Judge of the High Court questionable. I therefore direct that the Judicial Service Commission deliberate and determine this issue. The outcome of this process should be communicated to my office and all Malawians by 28th May, 2021.

viii. The Office of the President (OPC) is directed to follow the law as it is crafted and from the next appointments ensure that it is the Secretary to the Treasury (ST) that is responsible for facilitating the appointment of members of the PPDA. The same concept should apply to all Boards where there is a procedure laid out in the Act and the Minister is the Appointing Authority.

ix. The appointing Authority for the PPDA, namely the Minister of Finance should ensure that in informing the confirmed Members of the Board, those who were not confirmed by PAC should equally be informed with accompanying reasons.

x. The PPDA or the ST in calling for nominations from organizations should ensure that they stipulate the educational requirement of the nominees as provided by the law in their communication to the Organization.

xi. The OPC is further directed to remove the Comptroller of Statutory Corporations from all Boards where he is not provided for as his inclusion as an ex-officio member is contrary to the law.

xii. Finally, the confirmation process is there to provide checks and balances and to ensure that only those who are suitable and meet the requirements of the law become members of the Authority. It is therefore strongly recommended that in order for Public Appointment Committee of Parliament (PAC) to play its role effectively, where the candidates are to be nominated by their organizations, Parliament should go beyond just requesting Curriculum Vitae (CVs) and also request certified letters of nomination from the relevant organisations.
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ASSOCIATIONS
ACB : ACB
AG : Attorney General
CEO : Chief Elections Officer
CJ : Chief Justice
CV : Curriculum Vitae
DG : Director General
DSC : Department of Statutory Corporations
IPDC : Internal Procurement and Disposal Committee
MCCCI : Malawi Confederation of Chambers and Commerce and Industry
MEC : Malawi Electoral Commission
MLS : Malawi Law Society
OPC : Office of the President and Cabinet
ORT : Other Recurrent Transactions
PAC : Public Appointment Committee of Parliament
PDE : Procuring and Disposing Entity
PPDA : Public Procurement and Disposal of Asset Authority
PPDA Act : Public Procurement and Disposal of Public Assets Act
SA : South African
SC : Senior Counsel
SADC : Southern Africa Development Community
ST : Secretary to the Treasury
YAS : Youth and Society
1. COMPLAINT
The Office of the Ombudsman received a complaint on 14th April, 2020 from Youth and Society (the Complainant) alleging that the then Attorney General (AG) of the Republic of Malawi Mr. Kalekeni Kaphale committed various acts of maladministration in the manner in which he procured the services of South African (SA) Lawyers SC Dumisa Buhle Ntsebeza and Counsel Elizabeth Makhanani Baloyi-Mere. The alleged acts of maladministration are as follows:

i. That the former AG acted improperly or irregularly in that despite the Constitutional Court finding that his representation of the Malawi Electoral Commission (MEC) in the election case was an abandonment of his role as AG (AG) and disqualified him from so acting, he continued to act and/ or assist MEC by involving himself in the procurement of services of lawyers from South Africa to represent MEC in the appeal before the Supreme Court of Appeal.

ii. That the former AG acted illegally, improperly and irregularly by bringing the said SA lawyers into the country on 8th March, 2020 before the procurement process had finalised on 10th March, 2020 as evidenced by the former AG’s alleged correspondence to Umodzi Hotel dated 11th March, 2020 on the settlement of the said lawyer’s accommodation Bills.

iii. That the former AG breached provisions of the Public Procurement and Disposal of Public Assets Act (PPDA Act), in particular there was failure to float an open tender for legal services despite the procurement of the legal services in this case not being amenable to a waiver for open tender proceedings.

iv. That the AG also acted illegally in that having opted for the alleged single sourcing method he also deliberately failed to ensure that the Anti-Corruption Bureau (ACB) vetted this single sourcing as is the requirement under the PPDA Act for single source method and any high value procurement such as this one.

v. That the AG acted unreasonably and contrary to the principles of procurement and the required conduct of public officials in procurement, for procuring the said legal services at a sum of USD 788,500.00 to be drawn from public funds. It was specifically mentioned that the said amount was unjustified considering the amount of services to be provided.

vi. Albeit not directly connected to the above complaint, there was also an allegation that the AG received legal fees from the MEC for the services he provided when representing the Commission. Allegedly this was indicated by the Chairperson of MEC during the press briefing conducted on 13th March, 2020.
2. LEGAL MANDATE OF THE OMBUDSMAN

i. The Office of the Ombudsman is an independent institution established by the 1994 Republican Constitution of Malawi and is complemented by the Ombudsman Act. The Office of the Ombudsman has powers under section 123(1) of the Constitution to investigate any and all cases where it is alleged that a person has suffered an injustice and there is no remedy available by way of court proceedings or there is no practicable remedy available to that person.

ii. In addition, under section 5(1) of the Ombudsman Act, the Ombudsman has the mandate to inquire and investigate any complaint laid before the Ombudsman concerning any alleged instance of unfair treatment, abuse of power to name a few, by any organ or employee of the government.

iii. In the present case the Complainant was alleging abuse of public funds and abuse of power by a public officer therefore, prima facie this fell in the ambit of the Office of the Ombudsman. I however, had to assess whether the Complainant had no remedy reasonably available to it by way of court proceedings or that it had no practicable remedy available to it.

iv. In our assessment the Complainant could not take this matter before the courts as it required interfacing with various offices from the executive branch of the government such as the MEC, The Public Procurement and Disposal of Assets Authority, the ACB and also private institutions such as Umodzi Park in order to gather the necessary documents to assess whether there was merit in the complaint or not. The courts therefore were not a viable option for the complainant as the Courts decide cases based on evidence produced before them by litigants. This matter therefore needed the powers of the Ombudsman which include her requiring role players to release any information and documentation they might have on the subject matter of the complaint.

v. I also took cognizance of the fact that the Malawi Law Society (MLS) had informed the nation that they were setting up a special committee to probe allegations that the SA Lawyers were paid K 300 million, half of the amount agreed legal fees before they worked for it. I therefore inquired from the MLS on the terms of reference for the Committee undertaking this task in order to ascertain whether through their probing, the Complainant herein would have its issues addressed meaning it had a remedy available to it.

vi. The MLS on 27th April, 2020 requested my office to proceed investigating the matter as they were going to deal with the procurement issue and the gaps they had identified in that procurement during the hearing for admission of the SA
lawyers which the court subsequently disposed of without going into the merits of the matter. The MLS therefore, still wanted to appreciate whether the process of procurement at that time had saved public funds involved or any part of it.
3. SCOPE OF INVESTIGATIONS
Looking at the allegations made by the Complainant, the MEC was also made the Respondent in this matter as they were the procuring entity. If therefore, there were any breaches in the procurement procedures then as an institution they would have to respond as well.
4. ISSUES
The issues as raised by the Complainant can be summarized as follows:

i. Whether procurement procedures were followed when procuring the services of SA Lawyers SC Dumisa Buhle Ntsebeza and Counsel Elizabeth Makhanani Baloyi-Mere.

ii. Whether the legal fees that were charged by Mboweni Maluleke Inc. Attorneys were reasonable in the circumstances.

iii. Whether Mboweni Maluleke Inc. Attorneys were paid legal fees in accordance with the retainer agreement.

iv. Whether the former AG acted improperly or irregularly by continuing to assist MEC in procurement of services of lawyers from South Africa to represent the MEC in the appeal before the Supreme Court of Appeal despite the Constitutional Court finding that his representation of MEC in the election case was an abandonment of his role as AG.

v. Whether the AG received legal fees from MEC for the services he provided when representing them in the High Court sitting as a Constitutional Court.
5. EVIDENCE GATHERED

5.1 The AG

i. The AG Mr. Kalekeni Kaphale, SC in response to the allegations levelled against him informed my office that his accusers have the legal burden of proof and the initial evidential burden of proof. He stated that his accusers have the legal duty to adduce prima facie evidence substantiating matters they accuse him of as the burden can only be reversed by statute.

ii. He stated that the allegations appear to show at most, if not at all that they are speculative and have no legal basis in fact or in law. He therefore, requested further and better particulars and materials in support in order for him to fully attend to them as without such he would be assuming the burden of proof, something which the law abhors.

iii. The rest of his response was couched in the same manner, where he requested that his accusers should avail him particulars of any statute or law that he breached in providing advice to the Commission in the procuring of lawyers to replace him.

iv. He further requested particular provisions of the PPDA Act which bar single source procurement of legal services, evidence that he was the procuring entity and hence flouted procurement laws, any retainer agreement that he signed as a procuring entity and minutes of the Internal Procurement and Disposal Committee (IPDC) or Commission meeting that he participated in relating to the procurement.

v. The AG was reminded of the roles, functions and powers of the Ombudsman. In particular, he was reminded that under the Constitution and the Ombudsman Act, the Ombudsman has powers to demand production of information from any public body and question any person believed to be connected to the investigation the Ombudsman is carrying out.

vi. In his second response to the allegations he then stated that in regards to the nature of legal advice he provided to MEC, this is privileged information between a lawyer and his client. He pointed out that neither the Ombudsman Act nor the Constitution creates a waiver or inroad into the legal professional privilege relating to communication between a lawyer and his client as such his submission would be in broad terms.

vii. He stated that MEC needed to engage lawyers to replace him. Preferably of SC status like himself. More so since they would have to handle the matter at
appeal level. MEC Chairperson indicated that she had approached a few local SC who had declined the brief.

viii. On request he advised them to approach SA lawyers because of the heavy use our courts have made on SA Constitutional and public law jurisprudence and comparatively high cost of engaging English Counsel like MEC did in the 1999 elections case.

ix. MEC through its Chairperson sought his assistance in identifying the replacement lawyers. He obliged, mostly because it was a mere case of assisting in acquiring the services of replacement lawyers and had nothing to do with his inputting into the merits of the case on appeal.

x. He stated that his advice to MEC on the lawyers to replace him was non-binding. They were free to take or leave it. More so as the MEC IPDC and later Commissioners themselves would have to approve whichever lawyers he would have suggested as well as the proposed terms of their engagement, and following this the Public Procurement and Disposal of Asset Authority (PPDA) and the ACB would have to do likewise before the retainer was signed.

xi. He emphasised that there were therefore 4 layers of approvals and checks regarding his proposal before a retainer would be signed and he did not participate in any of the 4 of the approval processes. He further highlighted that other lawyers would sit or be part of the approvals; like at the IPDC of MEC; in the Commission itself, where the Chairperson is a lawyer, at PPDA where the Chairperson is a lawyer and at ACB where the Director General (DG) is a lawyer.

xii. In regards to the process of identifying the lawyers he stated that his identification was by way of a mere recommendation. The IPDC at MEC and the Commission itself would later discuss the lawyers and their terms and approve if seen fit, followed by PPDA and ACB. He had no influence over these.

xiii. Due to time constraints as the appeal had already been filed, it was decided to head hunt the lawyers. There was no time for placing advertisements. Once the lawyers were identified, the ultimate decision on the lawyers and their legal fees was solely that of MEC’s IPDC, where he did not sit, the Commission itself, the PPDA and ACB. This was all done with the awareness of the laws relating to single source procurement and the need to have PPDA and ACB approvals before any retainer could be signed. He stated that MEC Secretariat was aware of this fact and he repeated the advice to them.
xiv. He stated that in his private practice he has interacted with SA Attorneys and it was easy to contact a few that gave names of instructing Attorneys that he could contact who would arrange lead SCand Junior Counsel of renowned experience.

xv. He informed MEC Chairperson about this and after establishing initial contact with the instructing Attorneys, Mboweni, Maluleke, he and the Chairperson travelled to South Africa to meet the instructing Attorneys and their preferred lead and junior Counsel. He briefed them on the history of the case; the SA lawyers asked them very pertinent questions and he also interviewed them at length as to their competence and capabilities and this made them to be satisfied of their capacity and competence in electoral matters.

xvi. He further stated that in as far as single sourcing is concerned, there is no law or criteria that guides and usually it is their reputation that determines who to settle for.

xvii. He reiterated that the lawyers identified were subsequently approved by MEC IPC, the Commissioners, the PPDA and the ACB before the retainer was signed up. He also restated that this is not the first time the Malawi Government and MEC has single sourced external legal services both locally and internationally.

xviii. In regards to the legal costs and work to be done by the lawyers he stated that there was a lot of work to be done by the lawyers. The trial process and record ran over 93 arch files. Trial had taken over six months. The amount of workload involved meant that the lawyers had to drop everything and focus on the material. Then there would be the local Constitution, local election statutes and comparative international constitutional and election jurisprudence to consider.

xix. The lawyers would also need to write their arguments and present them in court. This and local charge out of hourly rates for lawyers in Sandton, South Africa must have and did inform the quote which nonetheless, was negotiated downwards at the initial meeting and they forced them to include their expenses in their quoted fees as negotiated downwards.

xx. He pointed out that wherever lawyers practice they have a break-even charge out rates dictated by local expenses on things like rent, human resource, stationery etc, they cannot reduce their charge out hourly rate simply because the services will be rendered in a less developed economy like Malawi. They would go out of business if they did that. Therefore, a London lawyer engaged to do work in Malawi will charge London rates as his expenses are payable in London.

xxi. The fee negotiated in South Africa was not binding on MEC IPDC, the Commissioners or on PPDA and the ACB and it was clearly subject to approval
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by IPDC of MEC, the Commissioners, the PPDA and ACB. No retainer would have possibly been signed without all the four approvals above. All the 4 bodies had the liberty to check and compare the rates/costs. His office did not bar them from doing so.

xxii. The costs were discussed and agreed upon by the IPDC at MEC, the Commissioners themselves, the PPDA and the ACB. His office did not attend those four approval meetings at all. All these offices gave their approvals to the fees before the retainer was signed.

xxiii. He stated that the fees were also subsequently halved after last minute failure by the lawyers to come to Malawi to argue the appeal.

xxiv. The SA lawyers would have come to Malawi to sign the retainer and seek their admission immediately after. They could not be admitted whilst in South Africa as the Chief Justice (CJ) had initially refused to admit them in April 2020 for the sole reason that they were outside of Malawi when their admission application was moved.

xxv. It had been hoped by the SA lawyers that MEC, PPDA and ACB approvals would be granted in time to seek admission whilst they were in Malawi. They, at their own insistence and at their own cost, paid their own fares into Malawi. Whilst here, it transpired there would be some delays in the retainer signing and admission process. By the draft retainer they were to bear all their disbursement and expenses. His letter of 11th March, 2020 to Umodzi Park is very clear that much as their initial accommodation was to be paid for by MEC, this sum would be deducted from their costs.

xxvi. The letter to Umodzi Park originated from his chambers and not the procuring entity because he was the principal legal advisor to Government including MEC and as he had been involved, at MEC’s request, in the identification of the lawyers and was still briefing them with his handover material when they were here.

xxvii. He would not have managed to deliver all briefing material to them in South Africa, more so as it was uncertain they would be engaged. Much of the material was given to them in Malawi to take home after the retainer was signed.

xxviii. Their coming to Malawi was therefore at their own behest, and was necessary (a) to sign the retainer agreement; (b) to seek admission while here; (c) to receive a full briefing from him and (d) to collect material while here.

xxix. For as long as the lawyers came at their own cost and expense and the retainer agreement attest to this fact, it is difficult for him to see how anyone can say he
brought SA Lawyers into Malawi improperly or irregularly, more so, where, as here, it was necessary that they be present in Malawi physically for their admission.

xxx. Most importantly, according to the AG the trip was at no cost or expense on the part of MEC.

xxxi. In his conclusion the former AG wondered that, where then, is the abuse of power, when all he did was to recommend attorneys and MEC IPDC and the Commissioners, the PPDA and finally, the ACB, separately and individually, subjected the recommendation to scrutiny and approved the same prior to signing the retainer?

xxxii. Further the fact that he has never sat in any of the approval meetings should go to show that he never abused his position or any power; more so as there were other lawyers involved at every approval stage. For as long as any of the 4 approval stages were free to decline the proposal, one cannot make out a case of abuse of power or maladministration as alleged he therefore prayed for a dismissal of the complaint.

5.2 MEC

i. The MEC in their submission stated that the allegations levelled against them were not true. They denied to have paid the AG for the legal work he was conducting on their behalf. The AG was engaged by MEC in accordance with section 20 of the Electoral Commission Act. Throughout the proceedings, the AG did not demand or raise a bill to MEC for any payment. An audit of MEC’s Accounts should be able to settle that issue.

ii. In regards to the procurement of foreign legal services, they stated that after the judgment of the High Court sitting as a Constitutional Court was delivered on 3rd February, 2020 MEC held a meeting and made a resolution to appeal against the judgment to the Supreme Court of Appeal. Having considered the order of the Court that the AG should cease acting on behalf of MEC, MEC resolved to strengthen the legal team by hiring a lawyer to replace the AG. The idea was that the lawyer would lead the legal team. It was specifically resolved that the lawyer should be well experienced at the minimum of SC status.

iii. The Chairperson with the technical assistance of the AG was responsible for identifying a suitably qualified lawyer with experience and expertise comparable to that of Senior Counsel.
iv. Efforts to hire a lawyer in Malawi were not successful. MEC, with reliance on the professional judgment of the AG and the Chairperson, identified Mr. Dumisa Tsebenza, SC and Counsel Elizabeth Makhanani Baloyi Mere practicing as Mboweni Maluleke Inc. Attorneys.

v. The agreement was duly reduced into writing under a Legal Service Retainer Agreement. According to the copy of the retainer agreement that MEC provided, the pertinent provisions are:

a. The services of Mboweni Maluleke Inc. Attorneys were for the agreed sum of $788,500.00 (Seven hundred and Eighty thousand and five hundred US Dollar) for the duration of the litigation process, until the matter was to be brought to finality and or as the parties may agree to the extension of the term.

b. The retainer agreement further stipulated that 50% of the agreed fee was payable in advance on or before 13th March, 2020. The remaining 50% was payable upon finalization of the matter.

c. The retainer fee was non-refundable.

d. All the work that the lawyers were to do and disbursements related thereto pertaining to the services would be covered in the agreed fee.

vi. The procurement process for the services went through the MEC’s Internal Procurement and Disposal of Assets Committee (IPDC). MEC submitted a letter dated 6th March, 2020 together with minutes of the IPDC meeting held on 6th March, 2020 and applied for a ‘No Objection’ from the Public Procurement and Disposal of Assets Authority (PPDA).

vii. By letter dated 11th March, 2020 the PPDA granted MEC a ‘No Objection’ to use single sourcing for the procurement of legal services. It was emphasised that the ‘No Objection’ was granted on reliance of the professional judgement regarding suitability of the lawyers hired as technically assisted by the AG.

viii. MEC further stated that eventually the CJ refused to have the SA lawyers admitted to practice. Further, owing to Covid-19 restrictions, the lawyers failed to join the Commission’s legal team. MEC has therefore, withheld payment to the lawyers and has not remitted any money in payment under the Legal Services Retainer Agreement. The issue is awaiting MEC’s review and resolution on how it should be concluded.

ix. MEC reiterated that the SA lawyers were identified by the Chairperson and the AG as such they do not have the technical information on how the lawyers were particularly identified.
x. They also reiterated that no deposit was paid to the SA lawyers for any work carried out in respect of the Appeal. They however, confirmed that the SA lawyers came into the country and were accommodated at Umodzi Park during the days they stayed in the country. The lawyers were involved in the preparations for the application for suspension of application of the judgment of the High Court sitting as a Constitutional Court which was set for hearing before the Supreme Court of Appeal. They further stated that MEC is yet to receive any invoice covering the accommodation expense for the lawyers’ stay at the hotel.

xi. In regards to the letter that the AG wrote to Umodzi Park, MEC stated that even though it was the procuring entity and the ones hosting the lawyers, it was the office of the AG that had assisted and coordinated the travel of the lawyers to Malawi. It is therefore, not strange at all that the letter to Umodzi Park came from the AG.

xii. The basis for the legal fees was the work which the lawyers were to carry out. Counsel Dumisa Ntsebenza, SC was engaged to be part of the legal team as lead Counsel. He was specifically required to come up with positions to be taken by MEC. He was required to review the entire Court Record, prepare the written submissions for use by the legal team in court and finally argue the appeal on behalf of MEC. The fees agreed covered all his undertakings and that of his associates from the date of engagement to date of hearing of the appeal. The fees included air travel, waiting and accommodation.

xiii. The MEC stated that they did not have a provision for the expenditure for this appeal in its 2019/2020 budget. This was an unplanned event. Funds to settle the fees would have been separately requested from Treasury. MEC did not have any extra or outstanding budget line to call for virement for this purpose.

xiv. Still noting some gaps in MEC’s evidence I engaged the Chief Executive Officer (CEO) for MEC Mr. Samuel Alfandika, Deputy CEO responsible for Finance and Administration Mr. Harris Potani and MEC’s legal counsel Mr David Matumika Banda on 30th July, 2020.

xv. During the meeting, the CEO Mr Alfandika explained that as a controlling officer at MEC he dealt with all the management issues that included recruitment processes, disciplinary issues, and procurement issues. He provided the oversight of all the mentioned processes. His core responsibilities as far as elections were concerned were that he was the principal advisor on matters of elections to MEC.

xvi. He explained that the retainer agreement was signed by Mr. Harris Potani Deputy CEO who was responsible for Operations.
xvii. With regard to the IPDC, Counsel Banda recalled that he did appear before the
IPDC to shed some light on the issue although he was not a member of the
IPDC. He went as a legal expert. The Deputy CEO then explained that usually
the IPDC called some experts just for guidance and these did not appear on the
minutes as their role was just to guide the committee on a certain issue. They
also did not include in their minutes the interaction with those experts.

xviii. On the issue of engaging and identifying the SA lawyers they explained that the
decision to engage an expert who was SC was made by MEC. They had done the
due process of trying to identify lawyers locally and when they could not find any
expert in Malawi to handle the appeal case, the Chairperson of the Commission
and the AG identified the SA lawyers.

xix. The IPDC simply took what they were given. Since single sourcing and
obtaining a ‘no objection’ is allowed in the laws of public procurement, they
wrote to PPDA on 6th March 2020 for the ‘no objection’. The PPDA had to
handle the issue with their Board and also get clearance from ACB. They received
feedback on 11th March, 2020 that they had been granted a ‘no objection’.

xx. They explained further that it was justifiable to use single sourcing because firstly
there was the issue of time; they had to consider if there was enough time to
allow a thorough procurement process which would ordinarily take a minimum
of 40 days. In their case, they did not even have two weeks. Secondly they
searched for lawyers within the country and failed to secure the quality lawyers
required. This is when they went outside.

xxi. It was stated that it was the former Chairperson of MEC and the former AG
who were in a position to state which other legal firms were approached in South
Africa. With regard to this to this procurement the CEO stated that he was not
competent enough to assess lawyers and determine whether they were
competent. Therefore, the Chairperson and AG were the ones who had the
necessary expertise to identify the lawyers.

xxii. They informed me that the Chairperson and AG travelled to South Africa on
1st March, 2020 and returned on 3rd March, 2020 using MEC’s funds and they
reported to the IPDC after they had travelled to South Africa that they settled
for Mboweni Maluleke Inc. Attorneys.

xxiii. It was further explained by MEC that single sourcing was still allowed under the
PPDA Act even if the services were being sought outside the country. MEC
wrote PPDA and explained to them the predicament that they were in and that
there was an urgent need of a SC and asked them to give authority to go ahead
and engage the SA lawyers. They were given the authority with ‘no objection’. MEC’s presumption therefore, was that PPDA carried out all due processes before granting the ‘no objection’.

xxiv. Before the conclusion of the procurement process they were only treating the terms of the contract as proposed terms of engagement. It was only when PPDA had granted a ‘no objection’ to hire the lawyers that MEC signed the contract.

xxv. Mr. Potani who is also the MEC IPDC Chairperson stated that it dawned upon them that this was international bidding, but international bidding according to the laws required about 45 days, one had to put up an advert in local and international newspapers for 45 days, but considering the urgency of the legal services, they sought directions from the PPDA and even went as far as meeting PPDA Board to discuss the matter.

xxvi. They stressed that in practice there were consultations which were done prior to making a formal request to the PPDA and most of the times they knew beforehand that there would be no objection because there were thorough discussions before the actual request.

xxvii. They added that for all the procurements they had done for the fresh elections they had to go out of their way in terms of procurement otherwise those elections would not have taken place. Most of the procurements that they did for the elections were by single sourcing, locally and internationally, including the printing of ballot papers. An international company in Dubai printed the ballot papers and that was by single sourcing. They could not do international bidding in the time that they had otherwise the fresh elections would not have taken place. He recalled meeting the PPDA and informing them that he could not manage the elections if the PPDA Act was followed to the letter. The PPDA informed him that if he did not want to strictly comply with the provisions of the PPDA Act he should meet the Board, which he did. The procurement of the lawyers was the same situation.

xxviii. The CEO further explained that the SA lawyers came into the country on the 8th March, 2020 and MEC was supposed to host them but all the coordination in terms of their travel was being done by the AG. MEC took over after they arrived in the country.

xxix. The contract was signed in Malawi after the granting of the no objection. When they came to Malawi they held a series of meetings as they participated in the preparations for the application for Stay of Execution, this was around 13th March, 2020.
xxx. The draft of the retainer agreement was prepared in South Africa that is why it showed 2nd March, 2020 because the date was not changed but the actual signing took place in Lilongwe after the granting of the ‘no objection’.

xxxi. In terms of footing the bill at Umodzi Park, the lawyers were supposed to pay for their own travel and accommodation. The letter to Umodzi Park came in because the lawyers were never paid anything and in the absence of their payment then someone had to pay their bills. So the situation was either to pay them or foot their bills and then take out that amount when paying them. However, MEC did not pay the bills, and they were not sure how the bills were settled or who settled them.

xxxii. They further stated that the letter to Umodzi Park was written by the AG despite the fact that there was handover and MEC was responsible for accommodation and internal travel because all the expenses were embedded in the contract so it was not so straight forward for MEC to take up any costs. This was due to the fact that from the beginning their travel arrangements were being made by the AG and not MEC. He said that indeed the travel arrangement was administrative but the contract stipulated that the lawyers would take care of their own travel and accommodation and MEC was outside that arrangement that was why MEC did not make any arrangements of that sort.

xxxiii. On the issue of instructing IPDC to treat the retainer agreement as a quotation and not a contract the Deputy CEO said that to them what was drafted in South Africa was not a contract, a contract is signed by both parties. They looked at the draft just as terms that the parties desired and not a contract. They admitted that there was no breakdown for the services to be provided in the contract itself, the items and details of how the figures were arrived at for it to qualify as a quotation but this was what was presented to them as how much the lawyers wanted to be paid.

xxxiv. MEC’s legal counsel Mr. Banda added that under normal circumstances the lawyers from South Africa would have presented their quotation but this was a situation where the former AG and former MEC Chairperson had already identified the legal house. So what was presented to MEC was the agreed terms between the former AG and Chairperson and the lawyers. The document was not a quotation but it was just a request to treat it as a quotation until they get no objection from the PPDA to finalize the contract.

xxxv. They further explained that the contract was effective when it was signed, prior to that there was no contract. They agreed that under normal procurement
processes what starts is a quotation and it was important to get a proper quotation but this was in March and the Appeal was coming on 15th April, 2020. The IPDC therefore only proceeded from the point of the AG and the Chairperson having already negotiated the terms. They therefore, agreed that the IPDC was just endorsing what the AG and Chairperson had done.

xxxvi. MEC further stated that when they received the letter from the PPDA Ref. No. PPDA/03/70 dated 11th March, 2020 where the PPDA was informing them that they “may now proceed to contact Mboweni Maluleke Inc. Attorneys for further steps in contract administration. We kindly request you to see to it that all legal formalities relating to Public procurement are adhered to,” they contacted the AG and informed him that they now had a ‘no objection’, and inquired on how to proceed i.e. whether to go into negotiations. MEC was advised that the terms of the contract were already negotiated and settled. There was therefore nothing else for MEC to negotiate.

xxxvii. I queried the MEC Management on why the CEO as the controlling officer appears to have been side-lined in this whole procurement process. Mr. Alfandika said that the procurement was done in two parts. Firstly, the former AG and former MEC Chairperson went to South Africa and identified the lawyers. This was technical and as such it was handled by the 2 who have legal expertise. There is not much input he as the CEO would have given as he had no such expertise. The second part was administrative in nature that was why it was handed over to the administration and the IPDC. Mr. Alfandika explained that his role was to ensure that he provided everything that was required for the PPDA to make an informed decision in terms of whether to grant a no objection or not. It was incumbent on the PPDA to look at the process and object or guide. With PPDA proceeding to grant a ‘no objection’ there was not much that he could do as a controlling officer but to proceed. If there were flaws, then the PPDA Board or the ACB would have pointed out such flaws to MEC.

xxxviii. When asked if they were expecting the Mboweni lawyers to make requests for their payment the answer was that they were not sure looking at the time that had gone by and the fact that the Mboweni lawyers had not made any demands. To state that the matter was closed would be premature. It was for the new MEC to consider.

xxxix. After their admission was not granted and also due to travel restrictions that had come with Covid-19, it became apparent that would not be able to lead the legal team during the appeal. Accordingly, on 28th April, 2020 MEC wrote the AG
seeking his advice as the intention of MEC under the agreement was to beef up the legal team when the lawyers had come. They were supposed to take a leading role and argue the matter on behalf of MEC.

tax. The AG in response through letter Ref. No. MJCA/AG/081 dated 30th April, 2020 informed them that he had negotiated the fees downwards to half the amount that was agreed upon in the retainer agreement as they had not done the full work. The letter further advised MEC to ensure payment was settled within 30 days. At the time of the inquiry the issue was still hanging. MEC’s Legal Counsel added that the contract was frustrated but there were some payments which were justified for them to pay such as the travel and accommodation costs. He further stated that thus far, the SA lawyers had not demanded for anything suggesting that maybe they were also of the view that the contract was frustrated and as such they could not make any demands.

taxi. In terms of legal fees, PPDA in the letter Ref. No. PPDA/03/70 dated 11th March, 2020 advised MEC that “as per practice, we request you obtain a letter from the Secretary to the Treasury, at the Ministry of Finance to ascertain that funds will be available for this task.” They explained that they were always seeking the Secretary to Treasury’s (ST) assurance on the availability of funds because in their budget they did not have much in terms of legal fees so they were relying on Government to give them special funding to meet the costs of legal fees. They wrote the Secretary to Treasury on 18th of March, 2020 under letter Ref. No. ELC/30101.

taxii. They received a letter from the ST on 9th April, 2020 informing them that they had been funded K 296,302,530.00 as Other Recurrent Transactions (ORT) for the month of April 2020 to cater for the 50% payment to Mboweni Maluleke Inc. Attorneys. They were further advised to ensure that they used the money for the intended purpose.

taxiii. This money that was released to MEC to pay Mboweni lawyers was however, used to pay the local legal firm Churchill and Norris after getting clearance from the ST to use the money to pay Churchill and Norris through letter dated 15th April, 2020 Ref. No. FIN/BD/2/2/17/460.

taxiv. MEC stated that and provided Vouchers showing that for the High Court Constitutional Case No. 1 of 2019 they paid Mr. Tamando Chokotho of Churchill and Norris K 212,586,288.00 under voucher number 271PV7043446 paid by cheque number 145646 and then another cheque of K 34,522,950.00 under voucher number 271PV7051284 paid by cheque number 152830.
xlv. From the K 296, 302, 530.00 funds that were intended for Mboweni Maluleke Inc. Attorneys which was the Appeal at the Supreme Court, once they received authorisation from the ST they paid Mr. Tamando Chokotho of Churchill and Norris K 110, 675,000.00 This amount was broken down in K 87, 500,000.00 net payable under voucher number 271PV7056394 paid by cheque number 157859 and then K 7,500,000.00 and K 15, 675,000.00 as withholding tax and VAT respectively.

xlvi. KP transport and EKAS Investment were paid K 3, 564,900.00 and K 8,125,000.00 respectively, as MEC had incurred some liabilities after hiring buses from the two institutions for its use during the May 2019 electoral process.

xlvii. The sum of K 8, 12 5,000.00 was transferred to the CEO’s account to make payments for the electoral polling activities. (This amount was included in the balance currently in the account).

xlviii. After paying the above transaction, a balance of K 165,650,130.00 was taken back by Treasury in line with the year-end procedures by which all balances funded by the IFMIS are taken back to Vote Number one on 30th June, 2020.

xlix. The CEO further stated that the Commission did make another payment K 84,450,000.00 to Churchill & Norris of which net amount payable was K 68,250,000.00 under voucher number 271PV705839 paid by cheque 159025. The other deduction for the gross figure was withholding Tax and VAT. They stressed however, that this amount was not drawn from the K 296,302,530.00 that was funded to pay the SA lawyers.

l. In his final remarks the CEO said that this was a peculiar procurement process because of two issues. One being limited time and the other being that this was a special procurement of works for which they had to rely on experts to do the identification. This was exactly what happened. There were different authorities in the process, the internal IPDC could handle some things and note issues but if there were things they felt had a bearing on the approvals then they would consult PPDA. Once consultation was made and a ‘no objection’ was granted the assumption was that the entity that oversaw procurement in the country had looked at the case and had found merit in the submission otherwise they would not have proceeded to so grant the ‘no objection’.

li. MEC further disputed that the AG in assisting them to identify lawyers was acting contrary to the Supreme Court decision. They stated that the AG was an advisor to all Government institutions when it came to legal matters. What he did was to ensure that the technical part was handled properly.
lii. MEC’s legal counsel added that the AG was faulted by the Courts because the matter was constitutional in nature and the court directed that it was improper for the AG to be taking more of a strict client-lawyer relationship because he had a role of protecting the provisions of the Constitution. He was therefore ordered to stop representing MEC. It was however appropriate for him to take up the role of ensuring that he found a better counsel to take over the matter. It was important for him to meet the lawyers to do a proper hand over. They added that it was not just the AG who went to South Africa but the former MEC Chairperson as well, so MEC was represented at that stage through the Chairperson.

liii. In regards to time being a constraint and why MEC did not explore other options, Counsel Banda explained that there was always room to seek for an extension of time at the court but they did not try to seek the extension because all the applications that they made to court were being turned down so they did not even consider making an application for an extension of time just so as to find other lawyers.

5.3 Former Chairperson of MEC Justice of Appeal Dr. Jane Ansah, SC

i. I contacted the former Chairperson of MEC Justice of Appeal Dr. Jane Ansah, SC as there was certain information that I still needed to understand and MEC Secretariat could not respond on as they had no knowledge.

ii. She stated that the AG was consulted in his capacity as the lawyer representing MEC and not in his capacity as the AG. MEC Commission resolved to engage lawyer and she went ahead on the basis of single sourcing to engage a lawyer. This was in accordance with the law.

iii. When she saw that for one reason or another the local lawyers turned down MEC she thought it wise to get lawyers from outside Malawi. Having been AG before, she knew that the AG must know lawyers outside as she did then. Further, he was in private practice and in the course of duty he may have established contacts with lawyers outside Malawi, therefore, it was easy for him to contact lawyers outside Malawi taking into consideration the time constraints.

iv. She further stated that MEC Commission resolved to engage a replacement lawyer of the same level as the then Hon. AG and that resolution was not changed under any circumstances and was never changed.

v. In regards to the legal basis for the letter she wrote the AG dated 19th February, 2020 in which she was seeking permission from the AG in order to source the additional lawyer externally, to which he responded by stating “I hereby authorize
the Commission to engage a suitably qualified attorney at Senior Counsel Level from within the SADC region to represent the Commission in the handling of the Appeal. I will have to vet the lawyer so engaged before a formal retainer is entered into.” She stated that the communication was more of assistance to identify lawyers from outside Malawi. The lawyers were going to handle the case on appeal; it is the AG who was going to give them a brief, having handled the matter at the High Court level. From his knowledge, he would assist MEC to identify appropriate lawyers who would continue with the case on appeal with the same zeal, working pace and expertise.

vi. She further stated that during that time MEC was very busy and time was of the essence. MEC had to meet timelines. Apart from the preparations for the appeal, there were interlocutory applications at the court and at the same time, MEC had started implementing the court order viz; preparations for fresh elections. This called for fast tracking lots of activities such as procurement of materials that were going to be used in registration and other activities.

vii. Further, MEC was answering a number of queries including PAC meetings at Parliament. Apart from MEC’s own meetings there were meetings with stakeholders. So it was unavoidable to seek assistance from someone who was in a position to quickly come up with their desired results. In this case qualified, competent and experienced lawyers.

viii. She emphasized that the AG’s response and assistance to recommend lawyers was not binding on MEC. The MEC had to make its own decision in accordance with the law as to whether to engage the identified lawyers or not. The law provided guidelines and procedures for procurement. At MEC, there was an internal procurement Committee (IPDC) which scrutinized each and every proposed procurement. The IPDC’s approval to procure was subject to approval by Public Procurement and Disposal Authority (PPDA). The engagement of the SA lawyers went through the two-tier scrutiny.

ix. In regards to whether she consulted or considered a number of law firms in the Southern Africa Development Community (SADC) region she stated that due to time constraints it was not possible to follow the normal procurement procedure through adverts, tenders etc. they used single sourcing process and this was according to the law. They went by recommendation hence, there were no other law firms in the SADC region that were approached before they settled for Mboweni Maluleke Attorneys Inc.

x. Due to the prevailing circumstances as explained above, MEC did not advertise but procured through single sourcing. This was the same process that was
followed when MEC approached lawyers in Malawi. That being the case, there were no other SA firms that were approached apart from Mboweni Maluleke Attorneys Inc. who were recommended to them by reliable sources through the then AG. If they had turned them down, only then would they have approached others as was the case with Malawian Law firms.

xi. In Malawi they started with Sacranie, Gow & Co. At first they agreed and MEC immediately settled for them. As they were about to start the procurement process, Sacranie, Gow & Co. retracted their acceptance. That is when MEC approached other lawyers such as Mr Patrice Nkhono of Mbendera & Nkhono Associates who declined stating that he was busy with a criminal case. They then went down the ladder in an effort to get at least a lawyer. She contacted Mr. Joseph Chiume who agreed but indicated that he was in agreement with the Constitutional Court’s interpretation of section 80(2) of the Constitution. That being one of MEC’s grounds of appeal, MEC could not engage him.

xii. They then contacted Counsel Arthur Nanthuru who also turned them down as he was engaged by Parliament on an assignment closely related to the case. When she asked Counsel Nanthuru to provide her with contacts for Counsel Alan Chinula, so that they could ask him to represent them, he informed her that Counsel Chinula was also engaged by Parliament.

xiii. Lastly she approached Counsel Maureen Kondowe who could also not assist her. Counsel Kondowe could not give her any recommendations for any lawyers who could assist MEC informing her that at that point most lawyers had not renewed their licences.

xiv. Justice Ansah added that Counsel Noel Chalamanda who at first agreed to represent MEC and started so doing suddenly informed them that he was going away on duties and he could not continue as agreed. She also stated that at that point it was pertinent to note that Mr. Chokotho who had represented MEC together with the Hon. AG then, had not renewed his licence and as such for a period MEC used in-house lawyer to file their legal documents.

xv. She concluded this issue by stating that all her contacts with the lawyers was through telephone discussions, except for Counsel Maureen Kondowe whom she had viva voce discussions.

xvi. She informed me that they settled for Mboweni Maluleke Attorneys Inc. because they were looking for lawyers with expertise in Election cases. After interacting with them they concluded that they would ably represent them.
xvii. They gave Mboweni Maluleke Attorneys Inc. a soft copy of 93 files. It took them one week to print some of the 93 files. They never completed printing in that week. When they came to Malawi for admission to the Malawi bar and to meet their lawyer in Malawi and also to prosecute the interlocutory application, they had to give them the remaining unprinted files in hard copies. It was clear that these lawyers were working round the clock. Further, their legal fees which included the handling of interlocutory application before the court, disbursements, airfare for four lawyers, accommodation and food was within the accepted fees in Malawi and South Africa.

xviii. The basis for the legal fees that was agreed with Mboweni Maluleke Attorneys Inc. was that they were going to represent them on appeal and there were 93 lever files that they had to go through in preparation for the hearing. They also had to read through meticulously a very long judgment of 500 plus pages.

5.4 Legal Counsel Approached by MEC
i. I verified with the legal Counsel who the MEC Chairperson had stated that she had approached if they would be willing to take up instructions from MEC to represent them in the elections case before the Supreme Court of Appeal of Malawi.

ii. SC Mr. Shabir Latif of Sacranie, Gow & Company confirmed that on 17th February, 2020 he was approached by MEC through their in-house Counsel David Matumika Banda to provide legal services in the elections case; SC Mr. Patrice Nkhono of Mbendera & Nkhono Associates confirmed that in February 2020 he received a call from Justice of Appeal Ansah inquiring whether he would be prepared to represent MEC; Mr. Arthur Nanthuru of Nanthuru & Associates confirmed that on 18th February, 2020 he was contacted by the former Chairperson of MEC; Ms. Maureen Kondowe of Konsewa Law Consulting confirmed that on 20th February, 2020 she got a call from the former Chairperson and later the same day met with the Chairperson over possible representation of MEC; and Mr. Noel Chalamanda of Knight & Knight confirmed that on 9th February, 2020 he received a message from the AG over possible representation of MEC for a stay of execution hearing however, he had declined and indicated to the AG in their communication that he had already informed MEC Chairperson that he had other commitments.

Last but not least, Mr. Joseph Chiume of Chiume & Co. also confirmed that he was contacted by the former MEC Chairperson and that he did not take up the assignment.
5.5 Mboweni Maluleke INC. Attorneys
   i. I attempted to contact Mboweni through their contact information that is on the
      letter head of the retainer agreement and also through contacts from a google
      search. My calls did not go through and the email I sent to their address went
      unanswered.

5.6 Umodzi Park
   i. At the time the SA lawyers were checking out, the AG through Ref. No.
      MJCA/AG/133 dated 11th March, 2020 had informed Umodzi Park that the
      lawyers would not be able to access the deposit they were supposed to be paid
      by MEC as such the hotel should allow them to check out and forward the bill
      to his office and the office of the MEC.
   ii. When I referred to Umodzi Park the letter from the AG and inquired from them
      who settled the bill for the SA lawyers, Umodzi Park stated that at the time when
      the letter from the AG came, the hotel had an active account of MEC for other
      transactions including lawyers who were putting up and using the hotel’s
      facilities. They also owed MEC money from a cancelled conference. They
      therefore, debited the MEC account a sum of MK 3, 155, 248 that was incurred
      by the SA lawyers from the 8th to 12th March, 2020.

5.7 PPDA
   i. The DG of the PPDA stated that on 6th March, 2020, their office received a
      submission from the MEC requesting for a ‘No Objection’ to use single sourcing
      method of procurement to procure legal services from Mboweni Maluleke Inc.
      Attorneys of South Africa at a lump sum cost of USD 788,500.00.
   ii. On the same day, 6th March, 2020 the PPDA issued a notice of Extra-Ordinary
      Board Meeting inviting members to convene and deliberate on the submission
      of MEC stated above and also other submissions of MEC.
   iii. On 9th March, 2020 the Board convened at Sunbird Mount Soche Hotel in
      Blantyre, where the submissions by MEC were deliberated on, including the one
      for the procurement of legal services. The Board approved the submission for
      the procurement of Legal Services subject to the following conditions:
         (a) that, in accordance with section 37(11) of the Public Procurement and
             Disposal of Assets Act (No. 27 of 2017), the request from MEC should be
             referred to the ACB for vetting and direction; and
(b) that MEC should provide evidence of the efforts it made to procure the legal services locally, before approaching foreign service providers Mboweni Maluleke Inc. Attorneys.

iv. On 10\textsuperscript{th} March, 2020 MEC submitted a sworn statement confirming that MEC Chairperson had personally approached five local lawyers (Senior Counsel), before approaching the foreign lawyers.

v. On 11\textsuperscript{th} March, 2020 the PPDA wrote a letter to the ACB, asking the office to vet the procurement process.

vi. On the same day, the 11\textsuperscript{th} March, 2020 the ACB granted a ‘No Objection’ for MEC to go ahead and procure legal services from Mboweni Maluleke Inc. Attorneys.

vii. Again on the same day of 11\textsuperscript{th} March, 2020 the PPDA granted a ‘No Objection’ to MEC to engage Mboweni Maluleke Inc. Attorneys to provide legal services.

viii. On 18\textsuperscript{th} June, 2020 we had a hearing under oath for the DG Mr. Elias Hausi and the Deputy DG, Mrs. Irene Mulewa in order to understand more on the various methods of procurement and in particular the methods of procurement which were followed in this case.

ix. The DG stated that all communications that happened in this matter were written communication except for the phone call from the Deputy Chief Elections Officer Mr. Hamsini. The Deputy CEO had called Mr. Hausi in advance informing them of this particular procurement and stating that the matter was urgent and needed to be treated as such.

x. In regards to single sourcing method of procurement, they stated that under section 37 of the PPDA for single sourcing procurement to be granted a no objection, the request has to meet one of the requirements under that provision. They further said under the Act emergency means any act that would have caused loss of life and or property.

xi. They stated that what was happening around MEC during the period just after the May 2019 elections up to the Fresh Presidential Elections in June 2020 was not tantamount to loss of life but it was affecting the whole country, causing unrest and disruption which in the long run had to be considered as an emergency. The reason why it was possible to have the June 2020 elections was that it had been treated as an emergency. They further clarified that emergency and urgency are not the same thing, they do however, go hand in hand in some cases.

xii. The request by MEC was for single sourcing but the Board stated that it did not qualify for single sourcing as such they treated it as restricted tendering that is...
why the Board stated that they would not consider the request until MEC could prove that they had approached more than one possible legal firm. That is why the Board requested evidence, hence the sworn affidavit of Justice of Appeal Dr. Jane Ansah. If the Board had been making its decision based on single sourcing approach, there would have been no need to ask for the evidence of the other legal firms being approached.

xiii. The DG when asked why the minutes from the Board that they provided stated “In its analysis of whether MEC can be granted an approval to single source the services from Mboweni Maluleke Inc. Attorneys, the Board stated that such decision is not going to be based on urgency but on the willingness and based on non-availability of legal practitioners at Senior Counsel level in Malawi.” The DG stated that the minutes might state that but the substance of it is that the Board refused the single source method because there was no urgency as such the Board stated that they will consider a restricted tendering.

xiv. The requirement by MEC was that the lawyers had to be the level of Senior Counsel, the PPDA Director General and Deputy Director General, not being lawyers themselves were not sure whether all those that were approached were of SC level. When asked how the PPDA was then satisfied that those who were approached were the level of SC they stated that the role of PPDA is to ensure that proper procurement procedures have been followed and these checks start at the IPDC level at the procuring entity as such a procurement officer and a technocrat of the service being procured have to be present at the IPDC level.

xv. Their expectation as PPDA was that the procurement person who was trained at the same school as their technical people, had to make sure that proper procurement methods had been followed and everything had been complied with in as far as public procurement was concerned. The technical person, although not required by law, had to sit at the IPDC in order for them to give their technical expertise. When it came to the PPDA they just checked whether the processes had been followed. It was therefore possible that they could transact on a matter and not have some information as they based their decision on what had been submitted to them from an institution.

xvi. They explained that in restricted tendering there was normally a list of suppliers which they strictly chose from whilst for single sourcing one supplier was directly chosen.
xvii. In as far as this procurement was concerned they stated that based on the documentation they received, the Board positioned that it could not be single sourcing as Malawi had its own SC that was why they requested the evidence of having approached local Senior Counsel. According to them the list of the 5 lawyers from Malawi and the one lawyer from South Africa was what made it restricted tender. Section 37(3) of the PPDA Act provided for circumstances under which restricted tender could be used, one of which was when the goods or services were only available from a limited number of suppliers, all whom were known to the procuring and disposing entity. In this case a limited number of suppliers came in because they wanted lawyers of SC level.

xviii. When asked whether there were only 5 lawyers of SC level in Malawi, PPDA stated that when procuring a lawyer one went for competence. The law, under the Procurement Regulations provided for a list of five suppliers, it was therefore their view that the list of five lawyers was sufficient. Because the lawyers were approached and they refused they could safely say that the documentation that was submitted by MEC was sufficient to meet the restricted tendering method. A supplier who refused to provide a service would not provide a quotation, therefore, it could not in this case be expected that MEC would have had the required quotations.

xix. When asked whether it was still restricted tendering when the procurement was no longer within Malawian borders and crossed over to South Africa, or whether they were then using single sourcing method, the DG stated that it depended on the interpretation. There was MEC on the one hand stating that they were doing single sourcing but the Board on the other hand stating that since there were a number of lawyers then they would treat it as restricted tendering, restricting it to the number of legal firms which were approached. In their reasoning they were looking at law firms, 5 of which were Malawian and 1 was foreign, the Board stated that it was to be treated as restricted tendering and they ended up with a foreign law firm. They then could not state with certainty whether that changed the method from restricted to the single sourcing method.

xx. When probed further the Deputy DG stated that once the procurement had left Malawian borders it became single sourcing that was why even MEC themselves requested approval to single source the foreign law firm. The PPDA stated that once they failed to find a supplier in Malawi and they crossed over to South Africa, it had become a single sourcing procurement as such the procurement had to meet the exceptions under section 37(9). However, whether the
exceptions were met, that is, whether in South Africa, it was only Mboweni Maluleke Inc. Attorneys which could provide the required legal services then that could only be answered by MEC.

xxi. The DG then stated that as a regulator of procurement in the country, they were not sure whether once they had changed the geographical region then the process had to start all over again. For them, the process was ongoing, it had started from Malawi, and they did not treat it as exclusive. They could not comment on whether the chosen law firm was the only firm in South Africa providing this service saying only MEC could answer that question.

xxii. They however, did admit that there was no consideration or discussion by their institution of which procuring method should have been applied when the border was crossed. They stated that they were hearing from my office that perhaps once no lawyers were found in Malawi and MEC decided to go to South Africa then they should also have considered a number of lawyers with the requisite expertise in South Africa. Accordingly, the required procedures of advertising internationally ought to have been followed or at least providing clear and proper justifications of why they opted for this particular law firm. Their assumption, as they could not speak for MEC, was that they single sourced Mboweni Maluleke Inc. Attorneys because they had dealt with them before or maybe they opted for them after doing their research.

xxiii. PPDA reiterated that they did find themselves in situations where they had to rely on the information provided to them by the procuring entity. In this case there was the office of the AG which was working hand in hand with MEC, once all these entities had provided their input then they were in a position to understand the reasons the Board arrived at the decision it did.

xxiv. The PPDA stated that procuring of the legal services from Mboweni Maluleke Inc. Attorneys was urgent just like the procurement of other materials for the elections was. If PPDA was to go strictly by the book, then Malawians would not have voted in the timeframe that was given by the court. The elections were possible because MEC was allowed to do single sourcing for some of the materials otherwise the elections would have been in December 2020 to allow for strict adherence to the laws. Everything that was happening at MEC involving elections was pausing a great threat to human life, people were ready to vote and if voting was delayed there was a possibility that there could have been riots and people could lose life in the long run.
xxv. When asked why the law provided for the PPDA to give a ‘no objection’ to procurement methods they stated that it was because the PPDA was the regulatory body for procurement and the no objection signified that the PPDA agreed with the procurement process and the procurement documentation. In this case there were several things that were looked into, the first being whether the procurement was done by an IPDC and they were satisfied that a duly constituted IPDC sat and met over this procurement. Further they checked whether single sourcing method was appropriate and they were satisfied although the Board was not initially satisfied. The processes were scrutinized based on the information and documents that had been provided which always had the minutes of the IPDC meeting.

xxvi. According to the DG, in hindsight, it was difficult for him to state whether they could have done anything differently and better and that procurement was a difficult area. They most times did find themselves in situations where they had to answer the question of whether something was urgent or if it was an emergency. He further stated that in this case this was the first time that the full Board met without any member being represented and also that after the meeting the processes that followed were done in a speedy manner thereby giving him the impression that there might have been a sense of urgency amongst the Board members themselves.

xxvii. Responding to a similar question as to whether in hindsight they could have done better the Deputy DG stated that a lot of things had changed in the country and the past 11 months had given own lessons some of which suggested law amendment to incorporate circumstances that happened in the instant case for example distinction between urgency and emergency. According to her the question was therefore a difficult one to respond to, but they were still learning because each and every procurement process was a learning process since they each came with particular circumstances. But regarding this particular process it would not be fair for her to state what she had learnt as there was a lot that she had learnt and there was a lot that she needed to understand thoroughly.

xxviii. The DG further interjected that they had also learnt that as much as they tried to do due diligence when these processes were happening, the direction was that they needed to do even more, such as consulting further the experts in the relevant field, if it was an engineering issue then to consult Malawi Institute of Engineers, in this case the Malawi Law Society, albeit within the seemingly limited time. He stated that this was doable as it was not something so completely
outside of what they had to be doing if they were a fully-fledged institution. For example, if they maintained a price index, and they wanted to check the prices of masks, they would be able to check the quoted prices against the range of prices in the index. They could also have an index for professionals, so that when one wanted to recruit auditors then they could consult ICAM, when they want to recruit lawyers they should be able to consult the MLS and so forth. They were signing many Memoranda of Understanding in order to have these linkages to support their regulation work.

xxix. When asked how long on average it took for the ACB to respond to letters, the DG stated that it took 2 to 3 days but on this issue it took one day, because before this procurement MEC had submitted so many requirements soon after the court judgment stating that if they were to do their work, then their requests needed to be fast tracked. They took that letter to the ACB which made an undertaking to fast track their requests in order to ensure that MEC complied with the judgment.

5.8 Technocrats from the PPDA

i. Noting that there were still gaps in the evidence I received from the DG and the Deputy DG in terms of the procedure the PPDA followed when a Procuring and Disposing Entity (PDE) made a submission to the PPDA, I requested for a meeting with the other technocrats from the PPDA on 1st October, 2020, namely, Ms. Miriam Salika the Advisory Services Manager, Mrs. Mary Mbekeani Chief Monitoring, Compliance Enforcement Officer and Mr. Timothy Kalembo, Assistant Director of Regulatory and Review. The officers were selected as they were working on this matter according to the minutes of the Board of the 9th March, 2020.

ii. In terms of assistance to the Board, the technocrats stated that the PPDA Act mandated the Board to grant no objections for procurements that were of high value. The process operationally within the PPDA was that when a submission came in requiring a no objection, the DG received it, then minuted it to the responsible desk officer for the particular entity within the PPDA as each and every institution had a desk officer.

iii. Once the desk officer received the submission they reviewed it technically to assess whether it was in line with the provisions of the Act. That analysis would then be sent to the DG. If the procurement was within the threshold of approval for the DG which was K 500 million for goods and services and K 1 billion for
works he would approve or give his comments or recommendations for further action. If the procurement was above the DG’s threshold of approval, the analysis or review by the desk officer would be forwarded to the Board for their approval or guidance.

iv. There were also high value procurements which would go to the Board and had to go for vetting before the ACB. High value procurements were not defined by the Act, however, through practices, the amounts which went to the Board were considered to be of high value as such would also go to the ACB. The consensus at the moment was that all single sourcing should go to the ACB in accordance with section 37(11) of the PPDA Act.

v. Once an MDA had made a submission to PPDA, they would look for the IPDC meeting minutes to ensure that the decision for a procurement award was arrived at by the IPDC as it was the competent committee to make the award. They also looked at whether the procurement was advertised in the print media. Furthermore, they looked at the advert itself to see the period the bidders were given and the bids that the bidders had submitted to the Procuring Entities. They also looked at the compliance levels of the evaluation process vis-à-vis what the Procuring entity stated was going to be the process. They also assessed the documentation that the bidders submitted.

vi. For this particular procurement they stated that the submission was submitted to the PPDA on the 8th or 9th March, 2020 as that was when they had an Extra-Ordinary Board meeting. As technical officers they only learned of this particular agenda item at the meeting itself. The Procurement was presented to the Board before the analysis by the desk officer was made. As the agenda item was discussed, the majority of the members were of the view that this procurement should be approved however a few had reservations as there was no technical report.

vii. There were also two other issues that were raised apart from the one above by the Board making a total of issues raised during the meeting to three. The other two issues were that this being a high value procurement there should be an approval by the ACB and lastly, since there was no evidence that the MEC Chairperson contacted Senior Counsel, that evidence should be provided.

viii. As they were leaving that particular meeting, the secretariat was tasked to look into the three issues. There was written communication from SC Shabir Latif to MEC, but the other lawyers were contacted orally by the MEC Chairperson as such there was a suggestion by some Board Members that the MEC Chairperson...
should swear an affidavit to that effect. ACB was written to by the DG and inegards to the technical report the technical team who were present at the
meeting sat down and did a technical assessment on the 10\textsuperscript{th} March, 2020 in the
evening. They submitted the report to the DG.

ix. According to their assessment the following were the 7 issues that they raised
with the procurement.

a. That MEC had proceeded to contact the five legal practitioners implying
the use of restricted tendering procedure prior to getting an approval from
the DG which is what the law under section 37\textsuperscript{(10)} of the PPD Act
dictated should happen where a PDE is using a method other than the
open tender method.

b. That MEC should have clearly specified the level of legal practitioner that
it intended to engage. It was unclear how the five practitioners were
identified as from the list that they were given only one was listed as Senior
Counsel.

c. MEC did not provide written evidence that the legal practitioners were
contacted and the indication of their unavailability to take up the Appeal
case. It was only SC Shabir Latif who MEC had indicated was willing to
take up the issue to represent MEC but on one aspect only.

d. There was indication that the procurement process had already been
initiated by the PDE.

e. There was some indication that the contract was already entered into and
this was what was submitted by MEC as a quotation.

f. If the position in (e) above was correct and the contract at that point was
binding then clause 3.1 of the contract stated that 50\% of the fee was
payable in advance thus on or before 13\textsuperscript{th} March, 2020 contrary to the
Public Procurement Regulation which provided that advance payment
should not exceed 20\% and that anything above 50\% should require prior
approval of the Director General.

g. Clause 20 of the document stated that ‘the agreement will become
effective on the effective date.’ Clause 21 further states that ‘the effective
date is agreed to be the 2\textsuperscript{nd} March, 2020 in spite of the fact that the parties
may have signed the agreement after this date.’ This implies that there was
intention to have the agreement signed on 2\textsuperscript{nd} March, 2020
x. I showed them copies of the minutes of the 9th March, 2020 for the Extra-Ordinary Board meeting which appeared as follows at the end:

“In its analysis of whether MEC can be granted an approval to single source the services from Mboweni Maluleke Inc. Attorneys, the Board stated that such a decision is not going to be based on urgency but on the willingness and non-availability of legal practitioners at Senior Counsel Level in Malawi.

The Board asked Management to:-(a) Engage MEC so that it shares with the Board copies of letters to show that all the Senior Counsels in Malawi were contacted.
(b) Sending the submission by MEC to the ACB for vetting in line with Section 37(11) of the PPD Act.
(c) Upon Satisfaction of these, the Board was to grant a No Objection.”

The three officers maintained that according to them there were three issues that needed to be looked into at the close of that meeting. There was issue (a) missing from the minutes which was the technical assessment.

xi. They also stated that at the end of the Extra Ordinary Meeting on the 9th March, 2020 they did not have the sense that the procurement was approved as there were the three activities which were conditions for the final decision.

xii. They did not attend any meetings after they gave their submission to the DG as such they did not know whether the Board met again after the initial Extra-Ordinary Board meeting to make a final decision.

xiii. They stated that normally, the Board did not sit for each and every approval to procurement. The Controlling officer contacted the Board members via email for some approvals through round robin. So there was a possibility it was done in that way however, that would only be speculation on their part.

xiv. They stated that the normal practice after the Board had sat and made its decision was that the DG communicated the decision made by the Board to the desk officer who then drafted the letter to the PDE. They were not sure at their level whether that approval for no objection was granted to MEC as no feedback was given to them and to the desk officer on what the decision was.

xv. I showed them letter from the PPDA to MEC Ref. No. PPDA/03/70 dated 11th March, 2020 granting MEC a “No objection” and inquired whether all letters to PDEs concluded in the manner that this letter did and whether reliance on a
PDE which had an interest in the matter was in tandem with their oversight role. The said letter to MEC concluded as follows:

“In arriving at the decision to grant the No Objection, the Authority has also relied on your professional judgment regarding suitability of the legal firm for the assignment, the reasonableness of the lump sum fee charged, and the process undertaken in arriving at the decision to settle for the firm.”

xvi. The officers stated that this was not how the letters were normally written as reliance on the judgment of the PDEs would defeat the whole purpose of the legal instruments and their oversight role. They reiterated that in this case as stated the letter did not come from the desk officer or any of the other technical officers who were working on this matter as such it was the first time seeing the letter. It must have come from the DG.

xvii. Looking at what the technocrats stated, I called back the DG and the Deputy DG on 25th November, 2020, in order for them to address me on some of the evidence given by the technocrats as I was concerned that the DG had suppressed important information when I interacted with him. When I queried them about how many conditions the Board set at the conclusion of the Extra Ordinary Board meeting, they stated that apart from the two conditions that were contained in the minutes of the Board meeting, there was an additional condition which was for management to make an analysis and make a recommendation to the Board.

xviii. This issue according to the DG was raised by Director Musopole during the meeting. He stated that this aspect was not included in the minutes because it came as the Board was concluding its meeting. After the meeting, the five officers from the PPDA, namely the DG himself, the Deputy DG Mrs. Irene Mulewa, Mr. Kalembo, Mrs. Salika and Mrs. Mbekeani remained at Mount Soche Hotel to write the Board minutes.

xix. The PPDA DG and the Deputy DG further stated that technical team did not write the analysis and technical report as requested by the Board because they stated that as far as they were concerned the Board should not have approved the procurement as the reasons for the procurement were weak.

xx. The PPDA DG stated that he consulted Mr. M’meta as the Chairperson of the Board informing him of the position of the technical officers and Mr. M’meta stated that if the technical officers had contrary views as the Board was discussing and concluding they should have stated as much during the Board meeting itself.
before the Board had concluded and made its decision, otherwise it meant the Board would have to reconvene. Mr. M’meta then instructed him to proceed as per what the Board had decided.

xxi. The PPDA DG stated that the technical analysis is supposed to guide the Board in order for it to make its decision, that is the whole reason why the technical officers were in the meeting, therefore, as it was being discussed, the technical officers should have been interjecting and giving their technical advice. When I queried him on when normally a technical report was prepared he stated that it was normally done before the meeting. He conceded that he did not request the technical officers to prepare the technical report before the meeting as there was no time. He further conceded that he did not ask the Board Chairperson for more time to prepare for the meeting including the technical report. The Board had its meeting on 9th March, 2020 a day after MEC had made its submission. His expectation was that the technical officers would advise and give guidance during the meeting.

xxii. He further stated that the officers, especially the desk officer Mrs. Mary Mbekeani knew about this procurement being on the agenda of the extra-ordinary Board meeting as the submission from MEC landed in her hands. He clarified that when he received the submission he sent it to her as the desk officer but he could not remember what the instructions to her were but normally the instructions would be for the desk officer to work on the submission.

xxiii. He reiterated that the technical officers did not produce a report afterwards. He further stated that the technical officers did not stay long at the meeting as they stated that they were tired. He also reiterated that during the meeting when they were writing the minutes for the Board meeting that was when they told him and the Deputy DG that the said procurement should not have been approved, it should have been cancelled. He said it was beyond his threshold of procurements he could authorize, as such when the Chairperson stated that they should proceed there was nothing he could do. At the insistence of the Deputy DG the DG undertook to go and check at the office if he had received the technical assessment report or not.

xxiv. He stated that there could be another set of minutes which the Chairperson of the Board Mr. M’meta signed which would be a more accurate reflection of what was discussed at the meeting. When I queried how the Chairperson could have signed the minutes when there was no subsequent meeting where the Board members could have confirmed the minutes he stated that because it was an Extra-ordinary meeting as such the Chairperson could sign on his own. He undertook to check if there were signed minutes by the Chairperson.
xxv. The DG and Deputy DG stated that the Board did not reconvene to discuss the three conditions as it was agreed that the ‘No Objection’ had to be issued the following day whether the conditions were satisfied or not and that is why the letter to ACB was sent the following day. There was no provision for the Board to meet again as such they took it that the Board had approved because even after this meeting the majority of the members such as the Chief Secretary and the Solicitor General were returning to Lilongwe.

xxvi. He stated that this procurement was never considered before any other Board meeting after the extra-ordinary Board meeting because by the time they were having the other Board meetings, it was already noted that the procurement had been cancelled and the lawyers were not hired. He did not recall who informed him of the cancellation.

xxvii. When I queried him if it was proper for a PDE to start executing the service contract prior to being granted a ‘No Objection’, they stated that if by the time the Board was meeting on the 9th March, 2020 MEC had already brought the lawyers into the country then they were not informed. Normally they did not expect the PDE to start executing the contract before a ‘No Objection’ had been granted. If they had known of this information they would not have granted the ‘No Objection’ as they could not issue one retrospectively.

xxviii. The DG stated that where a PDE proceeded to start executing a contract before a ‘No Objection’ had been granted then it was deemed a misprocurement. He further stated that the old regulations did not specify penalties which could be meted out against a PDE which misprocured, however, according to the Act where there was a misprocurement the law provided for a penalty of K500,000.00 which was payable to the PPDA. As an office they would do an audit and send a report to the parent ministry and eventually parliament to take to task the controlling officer. This would be done in their annual report under section 6 of the Act.

xxix. The DG and Deputy DG further stated that where there was to be an advance payment in a contract, the same would have to be secured by some form of security such as a bank guarantee. This would have to be provided during the contract administration and it was the role of the PDE to get the same and secure its payment.

xxx. He further stated that after a decision had been made by the Board, normally the desk officer would draft a letter to the PDE to communicate the decision. In this case the desk officer for MEC did not draft the letter as the three technical officers did not conclude the meeting with them as they stated that they were tired.
xxx. The DG also stated that for complex procurements they could not be sure that the information they had been provided was correct as such when they wrote the letter granting the ‘No Objection’ to the PDE they always informed them that they were relying on their expertise and knowledge. In this case, in terms of the price they had to make it clear to MEC that they were relying on their information, knowledge and expertise on the fees agreed. The PPDA did not have expertise on each and every procurement so they relied on the information provided by the PDE.

xxxii. When I queried why they could not contact the experts who could assist them to determine some of the issues, for example the MLS in this case, they stated that they dealt with a large volume of procurements and where possible they did seek expert advice. They had however, set up a research unit whose purpose was to research and check on reasonable prices to be charged for goods and services.

xxxiii. After our meeting on 24th November, 2020 the DG provided me with evidence that I requested. He addressed several of the issues I had raised but I noted he did not address whether he received a technical report or not from his officers. Looking at the response he provided me, of key interest is a chain of email proving that the Board deliberated and made a decision after the Extraordinary Board meeting on the 9th March, 2020.

xxxiv. According to an email which originated from the DG to the members of the Board on 11th March, 2020 at 12:49 AM titled “BOARD RESOLUTION TO PROCURE LEGAL SERVICES TO REPRESENT MEC IN AN APPEAL CASE, the DG is informing the Directors of this procurement. The first to respond is Director Musopole at 7:35 AM and she stated:

“DG, this is noted. Please provide a formal analysis of the request, which was not available during the meeting and which was also a condition to this approval.”

xxxv. The Chairperson Mr. M’meta responded at 12:50PM and stated:

“DG, I have gone through the sworn statement of the [PDE’s] Chairperson. Further, the Board had deliberated and passed a resolution to grant a ‘No-objection’ subject to the solicitation of further information from the PDE. In view of the response from the PDE, kindly proceed to issue a ‘No-Objection subject to the ACB’s response.

Also take note of the following house-keeping matters that arose during the extraordinary board meeting but do not impact on the resolution of the Board’s decision.
Ordinarily, the ACB’s response should precede the Board’s deliberations and in any event it should also precede the communication of the Board’s decision.

The ACB’s mandate is to vet and not authorise procurement methods nor the issuance of a no objection.

The analysis from the PPDA’s secretariat should be made alongside the submission for authorization to the Board. This facilitates the ease of the deliberations. This notwithstanding, it remains within the powers of the Board to decide matters before it.

Kindly proceed with the issuance of the ‘No-objection.’”

Director Musopole responded again and stated:

“Chair, For the sake of clarity, the no objection is subject to ACB vetting hence the Secretariat should only do so upon receipt of the ACB clearance and not before.”

5.9 ACB

i. The ACB stated that the ACB was a Government Department established under section 4 of the Corrupt Practices Act. It generally had two mandates, namely, corruption prevention and law enforcement.

ii. The Director General of ACB stated that the DG of the PPDA wrote the ACB requesting their office to vet the procurement of legal services from Mboweni Maluleke Inc. Attorneys by MEC. The request was made in accordance with section 37 (11) of the PPDA Act (No. 27 of 2019) which required the ACB to vet single-source method of procurement and high value procurement, pursuant to section 10 of the Corrupt Practices Act (CPA).

iii. In the absence of clear legal framework specifying how the vetting of single source methods of procurement or high value procurements should be done by the ACB, when conducting the vetting process under section 37(11) of the PPDA Act, the ACB basically used both its corruption prevention mandate as well as law enforcement mandate.

iv. Using the corruption prevention mandate, they looked at or examined if the laid down procedures for a particular procurement were followed by the procuring entity (PE). In this regard, they looked at how the tendering and or bidding processes were done by the PE, they also examined minutes of the PE’s IPDC,
among other things. Every PE that requested for the grant of a “No Objection” from the PPDA submitted to the PPDA the relevant documentation supporting their proposed procurement, for the PPDA’s analysis.

v. Thus when requesting for the vetting of a single-source method of procurement or high value procurement, the PPDA had to clearly indicate to the ACB that according to their analysis of a request from a particular PE, they were convinced with the PE’s justification for the use of a single-source method of procurement or the high value procurement.

vi. Using the law enforcement mandate, they checked in their data base to see if the entity from which a PE wanted to procure goods or services had any criminal record. They also checked if they had a recorded complaint, report, allegation or any information of corruption against the entity. They also checked if the entity was under any investigation or was being prosecuted by the ACB or any other law enforcement agency. They also liaised with other law enforcement agencies such as the Fiscal and Fraud Unit of the Malawi Police Service to check if they had any criminal record for that particular entity.

vii. With respect to the issue at hand, the ACB used both the corruption prevention mandate as well as the law enforcement mandate in carrying out the vetting process. They verified and confirmed that MEC had followed all the laid down procedures in the procurement of the legal services from Mboweni Maluleke Inc. Attorneys, they did an open search which indicated that Mboweni Maluleke Inc. Attorneys was a lawfully registered law firm operating in Gauteng, South Africa, with Caphus Mboweni and Hlawulekani Maluleke as the Principal Attorneys.

viii. Besides, the DG personally met the former AG, Mr. Kalekeni Kaphale, SC, at his chambers at the Ministry of Justice & Constitutional Affairs to inquire more from him about the proposed procurement of legal services from the foreign based lawyers. The former AG told him that one of the reasons why MEC opted to hire foreign lawyers was that MEC was looking for SC to represent them in their appeal at the Malawi Supreme Court of Appeal, against the decision of the Constitutional Court in the Presidential Elections Case.

ix. The DG reported that according to the former AG, MEC had failed to secure any legal representation by SC in Malawi. Precisely, the former AG informed the DG that none of the SC in Malawi was ready and willing to represent MEC in the appeal case, apart from Mr. Shabir Latif. However, the DG was further informed by the former AG that even though Mr. Shabir Latif, SC had accepted to provide his legal services to MEC in the appeal case, Mr. Latif indicated that
the provision of his legal services to MEC would not include his physical appearance in court on behalf of MEC and also that he would only work on two of the fourteen or so grounds of appeal that MEC had come up with. According to the former AG, MEC felt that the proposal by Mr. Latif was unattainable since they were looking for a SC to represent MEC in their appeal case, including appearing in court on their behalf, hence the option of hiring the foreign based lawyers.

x. Therefore, having verified and confirmed that all the laid down procedures for the procurement of the legal services from Mboweni Maluleke Inc. Attorneys were followed by MEC, on the one hand; and also that they did not have a record of criminality on the part of Mboweni Maluleke Inc. Attorneys, on the other hand; they proceeded to grant a “No Objection” to MEC to go ahead with the procurement of the legal services from Mboweni Maluleke Inc. Attorneys.

xi. However, mindful of the fact that Mboweni Maluleke Inc. Attorneys were foreign based, coupled with the fact that the ACB was not given adequate time to conduct a thorough vetting of the foreign based lawyers, they decided to reserve their right to investigate the procurement of the legal services or the engagement of the foreign based lawyers by MEC in the event that they came across evidence or information that pointed to a breach of the PPDA Act, the Corrupt Practices Act or indeed any other law relating to the procurement in question.

5.10 MLS
i. I inquired from the MLS on how many lawyers according to their list of admitted legal practitioners who had valid practicing licenses at the material time fitted the criteria of ‘a lawyer of comparable competence to level of senior Counsel’. The Law Society stated that they had 440 duly licenced members at the material time. This included Legal Practitioners with substantial experience on Malawi electoral laws and some of whom were SC at the Malawi Bar. Based on this, the MLS believed that there was no local shortage of technical capability or capacity to fulfil the procurement requirement for legal services in the appeal case concerned.

ii. If at all an advert was floated in the papers with clear specifications, those that qualified would have applied. If MEC could have failed to get the requisite number of applications, then there would have been justification for single
sourcing. They however, observed that on 11th March, 2020 the PPDA issued a ‘No Objection’ to Single Sourcing for the Procurement of Legal Services in favour of the Electoral Commission at the price of $788, 500.

iii. I further inquired what their research indicated was a reasonable amount in terms of legal fees that the SA lawyers should have charged for this matter. The MLS stated that they had no specific amount but they looked at the circumstances and the guidance in Part III of Legal Practitioners Scale and Minimum Charges Rules. According to Part III of Legal Practitioners Scale and Minimum Charges Rules, whenever the Scale charges were not applicable, the legal practitioner can charge such sum as may be fair and reasonable having regard to all the circumstances of the case and in particular to the complexity of the matter or the difficulty or novelty of the questions raised; the importance of the matter to the client; the skill, labour, specialized knowledge and responsibility involved therein on the part of the legal practitioner; the time expended by the legal practitioner.

iv. On this account, the MLS was of the view that the sum of $788, 500 was an unreasonably exorbitant charge on the public purse for the work to be done by the foreign lawyers. They provided me with the Society’s Affidavit and Skeleton Arguments filed with the Court to support the objection they were raising in regards to the admission for SA lawyers. According to MLS these two documents provided the full detailed perspective and legal analysis that the Society took on the matter which they believed provided sufficient legal objection to the appointment of foreign Counsel.

v. The MLS further stated that from the Court file, the substance of these perspectives was not contested by MEC. Ordinarily, in the absence of any substantive contest from MEC, they believed that the Court was going to uphold the objection. However, the Court never got to the stage of engaging the objection. The matter was decided on a preliminary point concerning the physical availability of the foreign applicants for admission.

vi. Finally, I asked them to comment on the AG’s involvement vis-a-vis identifying and negotiating with the SA Lawyers in view of the sentiments of the Court sitting under Constitutional Reference No. 1 of 2019, where the AG was informed that his role in the matter should have been limited to providing general legal advice to the MEC and he should not have taken a partisan role in the Constitutional proceedings.

vii. They stated that from Paragraphs 1488-1495 of the Court judgement, the Constitutional Court was very candid in advising the Honourable AG to remain
a neutral and impartial legal advisor to the Government in the case and in future proceedings. If the Supreme Court proceedings were looked at as future proceedings, perhaps the AG would best have left the task of identifying the SA lawyers to MEC itself. Given the immediately preceding scathing remarks against him, the Honourable AG ought to have exercised restraint in any further involvement in order to avoid the appearance of bias. However, because he still remained in office as AG after the Constitutional Court judgment, technically, he remained principal legal advisor to Government and bound by the very text of the judgment to impartially assist MEC as government entity if MEC sought his legal advice in identifying alternative lawyers.

viii. Further, details explaining how exactly and to what extent the Honourable AG was involved in identifying the SA Counsel would be of much help but on the face of it, and without more, the raw task of identifying lawyers for MEC did not look to the MLS like part of ordinary legal advisory services to a Government entity by an AG. It looked more of an administrative function best suited for MEC itself.

5.11 ST

i. I inquired from the ST how much public funds were paid towards costs, flights, legal fees or any other payments to the SA lawyers and also for him to address me on whether the amount was within MEC’s budget and if not whether proper procedures and the law were followed for MEC to get the funding for the case. The ST submitted documents to me which his office had on the matter.

ii. According to the documents provided, on 18th March, 2020 under letter Ref. No. ELC/30101 MEC wrote the ST requesting for funding as they stated that they had entered into a retainership agreement with Mboweni Muleleke Inc. Attorneys to lead the Presidential election appeal case.

iii. The letter further stated that the legal services had been procured at a cost of USD 788,500 and the PPDA had granted them a No Objection and the 50% payment in the sum of USD 394,250 was now due as per the invoice that Mboweni Muleleke Inc. Attorneys sent to MEC dated 3rd March, 2020. MEC was therefore requesting for special funding for the immediate payment of the legal services as per the agreed terms and conditions.

iv. On 6th April, 2020 a memo was written to the Minister of Finance from the then ST Mr. Cliff Chiunda informing the Minister of MEC’s request. The ST further
informed the Minister that the 2019/2020 budget for MEC did not have allocation for the Court case hence the extra-budgetary request.

v. The former ST further stated to the Minister that considering the importance of the matter at hand and the fact that there was no provision in the 2019/2020 budget, he was seeking approval that extra budgetary resources amounting to Malawi Kwacha equivalent of USD 394,250 be provided to MEC to be used to pay the lawyers representing MEC in the presidential Elections appeal case.

vi. The Minister approved the memo on the same day the 6th April, 2020.

vii. On 9th April, 2020 Ref. No. FN/BD/2/2/31/460 the office of the ST wrote MEC advising them that they had funded their institution K 296,302,530.00 for Other Recurrent Transactions (ORT) for the month of April, 2020 and the funds were to cater for the fifty percent advance payment to MEC lawyers, Mboweni Maluleke Inc. Attorneys.

viii. On the 9th of April, 2020 the ST again wrote a memo to the Minister after he had received another letter from MEC in which a total of K 100,675,000 was being requested in order for MEC to pay their lawyers working on the Constitutional case. The ST was therefore, seeking authority to once again adjust the vote upwards as MEC’s 2019/20 budget did not have such an allocation.

ix. On the 14th April, 2020 the Minister responded to the Memo and informed the ST that MEC “should use part of the lawyers’ fees from South Africa.”

x. On the 6th October, 2020 I met the ST Mr. Chauncy Simwaka and the Deputy Budget Director Mrs. Priscilla Fachi. They reiterated that the documents that they provided my office were the only ones they could trace within their office and even after making inquiries.

xi. In regards to MEC getting extra budgetary funding to pay for the legal services or any other activity, they stated that extra budgetary funding is requested where the amount required for that particular activity is not provided for under the entity’s approved financial year budget. The institution therefore requests for extra funding for that activity. The request is made to the Minister and the Minister then takes it before Cabinet for approval. Once Cabinet approves, an adjustment under the particular vote of the requesting office is made. However, the practice since time immemorial is that most of the requests come as emergencies, they are therefore, process and then take them to cabinet for their information, as at that stage the process will have been done and payment made.

xii. They then go to Parliament later after the adjustments have been made, either upwards or downwards. The adjustments are then presented at the next sitting
of Parliament. In this particular case since the issue was for the last financial year, it meant that the documentation that was before Parliament at the time of the meeting had those adjustments for MEC.

xiii. The money for the extra-budgetary allocation comes from either revenue where the country has additional revenue, or if there is no revenue and it is felt that the activity is critical then the government borrows, that is where the deficit that may have been there increases. For example, in the budget for 2019/2020 Malawi ended up with a bigger deficit than what the country started with and one of the contributing factors could be these extra budgetary resources.

xiv. The ST refuted that they took money intended for one institution or vote and vire to another institution or vote. However, after assessing activities to be carried out by various Ministries Departments and Agencies (MDAs) they could discuss with the MDAs and push back or defer certain of their activities in order to use those funds for the extra-budgetary funding needed.

xv. In the event that the requesting institution does not spend money that they had requested and were funded, in normal circumstances at the end of the financial year all the balances are returned to Account number one. In this case they needed to check with the Accountant General as to which account the funds were in at the end of the financial year. If the funds were transferred to another operating account that was not within the Government account, then at the end of the Financial year the funds in that operating account would not be swept back to account number one as the operating account is outside of the government accounts system.

xvi. The ST stated that there are so many reasons why institutions require extra budgetary resources and one of such is poor planning. He however stated that there is need to tighten the granting of extra-budgetary resources as they can also be easily abused. More so as there is already unforeseen expenditures that is already provided for in the budget and under the law for real critical emergencies. The law provides that not more than 2% of the approved annual budget be used for unforeseen expenditures.

6. THE LAW

6.1 Establishment, Powers and Composition of PPDA

i. Section 4 of the PPDA Act establishes the Public Procurement and Disposal of Assets Authority as a public body responsible for the administration of the Act. Section 5(1) stipulates that the Authority shall be responsible for the regulation,
monitoring and oversight of public procurement and disposal of assets in Malawi.

ii. The Authority has various powers which are provided under section 6 of the Act, one of which is through subsidiary legislation, to:
   a) set and enforce monetary thresholds for regulating procurement functions;
   b) subject to paragraph (a), issue a "No Objection" for procurements above the set prior review thresholds;
   c) subject to paragraph (a), the Authority shall set a limit below which a "No Objection" shall be considered or issued by the Director General; any "No Objection" above the limit shall be subject to the approval of the Authority.

iii. According to the Public Procurement and Disposal Regulations applicable at the time the threshold for the DG was MK 500,000,000.00 in goods and services and MK 1 billion in works.

iv. Section 7 of the PPDA Act provides for the membership of the Authority which consists of the following five members appointed by the Minister from the following organizations:
   a) one member nominated by the Malawi Law Society;
   b) one member nominated by the Malawi Institute of Procurement and Supply;
   c) one member nominated by the Malawi Institute of Engineers;
   d) one member nominated by Malawi Confederation of Chambers of Commerce and Industry (MCCCI); and
   e) one member nominated by the Institute of Chartered Accountants in Malawi.

v. The following ex-officio members also form part of the Authority:
   a) the Chief Secretary or his representative;
   b) the Secretary to the Treasury or his representative; and
   c) the Solicitor General or his representative.

6.2 Establishment of Internal Procurement and Disposal Committees

i. Section 26 (1) of the PPDA Act establishes in all procuring and disposing entities Internal Procurement and Disposal Committees (IPDC). The functions of the Internal Procurement and Disposal Committees shall include:
   a) ascertaining the availability of funds to pay for each procurement;
   b) approving the methods of procurement and disposal to be used in each case;
c) approving the procurement and disposal plans for the procuring and disposing entity;
d) appointing the chairperson of the bid opening from amongst its membership;
e) appointing ad-hoc evaluation team for the examination, evaluation and comparison of bids;
f) reviewing and approving bid evaluation reports;
g) reviewing and approving any contract amendments; and  
h) such other functions as may be prescribed for the committees by the Regulations.

ii. Regulation 18 of the Procurement Regulations provides further functions for the Internal Procurement Committees. In particular regulation 18(h) stipulates that such committees have the power to approve specific terms and conditions relating to i) contract amounts; ii) completion periods; and iii) stages and conditions of part payments.

6.3 Procurement Methods

i. Section 37(1) of the Act stipulates that public procurement shall be realized by means of open methods of tender proceedings, subject to the exceptions provided in the procurement section, and as may be prescribed in the regulations.

ii. Section 37 (2) states that subject to the approval of the Director General, the application of subsection (1) may be waived in the case of national defence or national security related procurement to the extent that such procurement is determined to be of a sensitive nature, in accordance with regulations.

iii. Section 37(3) provides for the restricted tender method. This method may be used in the following cases:

   a) when the goods, works or services are only available from a limited number of suppliers, all of whom are known to the procuring and disposing entity; and 

   b) the time and cost of considering a large number of bids is disproportionate to the value of the procurement.

iv. Under subsection 4 a two stage-tendering is provided for. A tender may be held in two stages in the following cases:

   a) when it is not feasible at the outset of the procurement proceedings to define fully the technical or contractual aspects of the procurement; or 

   b) when, because of the complex nature of the goods, works and services to be procured, the procuring and disposing entity wishes to consider various
technical or contractual solutions, and to negotiate with bidders about the relative merits of those variants, before deciding on the final technical or contractual specifications.

v. Section 37(5) provides for, an international tender (otherwise referred to as an "international competitive bidding"). This involves publication in the international media of the invitation to submit bids, or to apply for pre-qualification.

vi. According to Section 37 (6) international competitive bidding shall be held in the cases where:
   a) the estimated value of the stated procurement exceeds the amount set by regulations;
   b) the goods, works or services are not available under competitive price and other conditions from more than two suppliers in Malawi; or
   c) a supplier was not identified by a national tender proceeding.

vii. Section 37 (7) provides for the request for proposals method, which is one to be used for the procurement of consultancy services.

viii. There is then the request for quotations method that is provided for under section 37(8). This may be used for the procurement of goods, works and routine services when the estimated value of the procurement does not exceed the amount set by the regulations.

ix. Section 37(9) provides for Single-source method. This is permitted only in the following circumstances:
   a) where the estimated value of the procurement does not exceed the amount set in the regulations;
   b) where only one supplier has the technical capability or capacity to fulfill the procurement requirement, or only one supplier has the exclusive right to manufacture the goods, carry out the works, or perform the services to be procured;
   c) where there is an emergency need for the goods, works and services; or:
   d) where the procuring and disposing entity, having procured goods, works and services from a supplier, determines that additional goods, works or services need to be procured from the same source for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology, or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring and disposing entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness
of the price and the unsuitability of alternatives to the goods or services in question.

e) Under section 37 (10), the use of the method of procurement other than open tender or, in the case of procurement of consultancy services, a method other than request for proposals, is subject to approval by the Director General; and the procuring and disposing entity shall note in the record of the procurement proceedings the grounds for the choice of the procurement method: Provided that when seeking approval from the Director General to use the method other than open tender or the case of procurement of consultancy services, a method other than request for proposals, the procuring and disposing entity shall provide written reasons with sufficient clarity to the Director General for the choice of the procurement method.

f) Section 37 (11) Single source method of procurement or any high value procurement shall be subject to vetting by the ACB, pursuant to the powers conferred on the Bureau under section 10 of the Corrupt Practices Act. Cap 7:04.

g) High Value procurement are according to section 37 (12) prescribed by the Authority through regulations.

6.4 Procurement Desk Instructions

i. According to the Desk Instructions for Public Procurement, issued by the Director of Public Procurement in 2003, regardless of whichever method one chooses to use, the first step is to raise a requisition. According to desk instruction 1, this must be raised at the start of any procurement method as it serves a number of purposes, which include documenting the goods or services required. The requisition must be accompanied by a description of requirements.

ii. According to the Desk Instructions 2C, the description of requirements is a key document which is used throughout the procurement process. The description is crucial as it forms part of the contract, defining the services to be supplied; they set the technical standard or deliverables against which the services performed can be judged, prior to acceptance. They also inform bidders of the procuring entity’s requirements.

iii. Desk instruction 3 then provides for the standard operating procedure for selecting the appropriate method for each procurement.

iv. After coming up with the requisition and description of requirements, the procuring unit then has to recommend the most appropriate method, taking
into account the estimated value, when the items are required, the potential sources for the procurement and any other relevant details. The procurement unit is responsible for recommending the procurement method to be used and is also responsible for obtaining all the necessary approvals from the PPDA.

7.0 ANALYSIS OF LAW AND THE EVIDENCE GATHERED
7.1 Whether the Procurement Process was Followed
7.1.1 Description of Goods and Services to be Procured
i. Where a need arises for an entity to procure goods or services a decision has to be made as to which particular goods or services the entity wants to procure. The procuring unit in the institution therefore has to raise a requisition. In raising the requisition, the procuring unit or entity comes up with the specifications or the description of the goods or services that they want to procure. This according to the desk instructions enables those who want to supply the goods or services to know what they have to meet or fulfil and in turn it allows the procuring entity to be able to measure whether the goods or services they have been supplied meet what they requested for.

ii. In this case MEC Secretariat informed me that they had one specification, namely a legal practitioner with experience and expertise comparable to that of a Senior Counsel. The term ‘experience and expertise comparable to a Senior Counsel’ was not properly defined as such it is not clear whether that meant a lawyer who was conferred the status of a SC or who had practiced for the number of years required to qualify as SC which is a minimum of 15 years or one who had litigated challenging cases that one would expect someone at the level of SC would take up.

iii. Looking at the lawyers approached by the former Chairperson of MEC, this term was equally not clear to them as a procuring entity. There were two SC approached namely, Mr. Patrice Nkhono, SC and Mr. Shabir Latif, SC. MEC then approached other legal practitioners who according to the 2019 MLS list of admitted Legal practitioners span from one with 25 years standing at the bar to one with 9 years standing at the bar. This change in the specifications or going down the ladder according to the MEC Chairperson was so that they could just find someone as they were being turned down. One wonders how those lawyers who had not at that stage practiced for at least 15 years thus not at SC level had been identified by the former MEC Chairperson. The fact that they were able to
go lower in their requirements signify to me that they had a wider pool to choose from.

iv. As the procurement process went on, the former Chairperson added to the specifications or description of requirements. Once in South Africa according to the former Chairperson, they specifically wanted someone with experience in Election matters. MEC therefore in my view were unsure of the exact specifics of what they were looking for. This failure by MEC to have a clear and set description of requirements for the service they wanted was contrary to procurement procedure and the ambiguity in description created an uneven playing field as one cannot state for sure what it is that MEC was looking for and also why they failed to contact more lawyers than they did since they were able to lower the specifications.

7.1.2 Methods of procurement

i. Once there is description of the requirement of the services that need to be procured, according to Desk Instruction 3, the procurement unit must recommend the method of procurement to be used.

ii. The former MEC Chairperson and the Former AG started off by approaching 5 lawyers in the country between 9th and 20th February, 2020. This therefore suggests that the method being used at this stage was restricted tendering. According to section 37 (3) of the PPDA Act, this method is supposed to be used when the goods or services are only available from a limited number of suppliers, all of whom are well known to the PDE and the time and cost of considering a large number of bids is disproportionate to the value of the procurement.

iii. Having failed to get lawyers from the pool that they had approached, the former MEC Chairperson and former AG then approached Mboweni Maluleke Inc. Attorneys in South Africa. No other lawyers were approached in the SADC region and in South Africa; they just went directly for this law firm as they were recommended to them by reliable sources of the former AG. From my reading of the law and also what the former Chairperson and former AG stated, they were at this stage, single sourcing.

iv. The justification used by MEC to use the single source method was that the legal services were required very urgently due to time constraints associated with the court proceedings such that the use of other methods of procurement were not
feasible and because the MEC had not successfully identified SC who would take up the matter in Malawi.

v. Single Sourcing according to the Act, is only permitted where only one supplier has the technical capability or capacity to fulfil the procurement requirement or only one supplier has the exclusive right to manufacture the goods or perform the services to be procured. This method of procurement is also permitted where there is an emergency need for the goods or services. In addition, the method is also used where the PDE had previously procured goods or services from a Supplier and need to procure additional goods to ensure standardisation or compatibility.

vi. An emergency according to Desk Instructions 3 is not any requirement which is urgent. It has actually been defined under section 2 of the PPDA Act as “a situation which poses an imminent threat to physical safety of the population or damage to property”.

vii. From looking at what the law provides, this procurement therefore, did not fit the exceptions that allow a PDE to use single sourcing method. The fact that MEC could not find a lawyer in Malawi is not a ground which allows MEC as a PDE to cross the borders and pick and choose one law firm in South Africa. In my view what should have occurred was international competitive bidding as MEC felt that the services were not available or they were unable to identify one who could provide the services in Malawi. Instead as stated they opted to single source in South Africa.

viii. The DG and Deputy DG of the PPDA tried to stretch the meaning of emergency and stated that to an extent what was happening with MEC although not an immediate threat to life, was nonetheless affecting the whole country as it was causing unrest and in the long run it was considered an emergency. The Deputy DG even expressed that the generous interpretation applied to the term ‘emergency’ was why as a country we were able to have the elections in June 2020 because those elections were treated as an emergency and various times and processes required for the procurements of necessary materials were abridged.

ix. It is general knowledge that between May 2019 and around June 2020 the political space in the country was very charged as a result of persistent demonstrations by people agitating for fresh presidential elections. The demonstrations were accompanied by destruction of property across the country. I therefore can see merit in treating these elections as an emergency. The Country needed to vote and move on. However, I am failing to appreciate
how MEC being under limited time to appeal to the Supreme Court seeking to overturn the decision of the Constitutional Court that ordered the said fresh presidential elections that people actually wanted can be considered as an emergency, namely a situation which was posing an imminent threat to the population or damage to property. It simply was not. Moreover, I find the argument by Counsel David Matumika Banda that MEC could not make an application to the Court for extension of the dates of the impending appeal hearing because at that time the Courts were simply dismissing all of MEC’s applications for a lack of a better word a bit insulting to the Courts as it creates the impression that the Courts were just prejudiced against MEC at the time when it was MEC itself making legally unsound applications.

x. The Board during its meeting of the 9th March, 2020 according to the minutes, also rejected the ground of emergency as a basis for single sourcing and instead stated that the basis should be willingness and non-availability of legal practitioners at SC level. The DG refuted what the minutes, which were written by himself were stating and informed me that the Board stated that the procurement did not qualify for single sourcing as such they treated it as restricted tendering that is why the Board held the position that they would not consider the request until MEC could prove that they had approached more than one possible legal firm. He further stated that if the Board had been making its decision based on single sourcing approach, there would have been no need to ask for the evidence of the other legal firms being approached.

xi. If one goes with what the DG stated that the approval by the Board was for restricted tendering and not for single sourcing then one wonders why the DG on 11th March, 2020 wrote a letter to MEC approving single sourcing when that was not what was approved by the Board. As stated above, it is also puzzling that the DG and his Deputy could also not confidently respond to the question whether in restricted tendering you can lump together legal practitioners from within the Country and those outside. They also could not respond as to whether the method of procurement that was being followed when approaching lawyers from within the country was restricted tendering and then they switched to single sourcing when they crossed the borders. As stated in the evidence, the DG of the oversight institution on public procurement in the country informed me that MEC would be better placed to answer on which method was used in this $788,500.00 procurement.
xii. Surely, it cannot be true that Mboweni Maluleke Inc. Attorneys are the only legal firm in South Africa with the technical capability or capacity to provide the legal services that were being requested. In addition, I very much doubt that they are the only law firm in South Africa with the exclusive right to handle election matters.

xiii. Again, in the matter at hand, therefore, it is safe to say all the key institutions including the oversight procurement institution in the country were not able to tell me clearly what method of procurement was being followed.

7.1.3 IPDC

i. Where a PDE intends to use any method other than the open tender method, section 37(10) of the PPDA Act requires that approval must be sought from the DG and provide written reasons with sufficient clarity to the DG for the choice of the procurement method. This is supposed to be done prior to use of this method.

ii. In this case the former MEC Chairperson and the former AG after deciding between them that the best method to be used was single sourcing, they caught a flight on the 1st March, 2020 to the Republic of South Africa and met with Mboweni Maluleke Inc. Attorneys either on the same day or the day after, negotiated the terms and even had Mboweni Maluleke Inc. Attorneys sign the agreement on 2nd March, 2020. According to their evidence the former Chairperson and the former AG, had at this stage even handed over a soft copy of 93 files to Mboweni Maluleke lawyers to enable them to start printing and working on the matter, whilst they had not even gotten authority from the PPDA to use this method of procurement as the law requires. They only sought authority from the PPDA to be granted a no objection 4 days later, on the 6th March, 2020. This was a breach of the law and the laid down procedures. This should have been picked up and addressed by the IPDC.

iii. The purpose of IPDCs are amongst other things, to ensure that a PDE’s procurement is consistently in line with the laws and recognized good practices. Under the applicable laws, the committees are empowered to inter alia, approve the methods of procurement and disposal to be used in each case.

iv. In this case, the procurement did go through the IPDC but this was simply a process of rubber stamping the work and decisions already made by the former MEC Chairperson and the former AG as was also admitted by the MEC secretariat. There were no substantive deliberations according to the minutes...
dated 6th March, 2020 of the IPDC or any issues raised by the IPDC members. They simply stated what they were told by the CEO and agreed to proceed with the application for a ‘No Objection’ to use single sourcing. As the MEC CEO stated in his evidence, as an institution they do a lot of procurement, I would therefore like to believe that the members of the IPDC must have had observations on this procurement and I find it strange that on this one they did not. As admitted by MEC there were simple issues such as unavailability of a quotation. The members instead of requesting a proper quotation were being directed to treat the retainer agreement as a quotation despite the fact that the details in the retainer agreement fell short of what is stipulated in a quotation.

v. In addition, as was correctly pointed out by the former AG, at this stage the IPDC also at some point engaged the Legal Counsel of MEC before granting the approval as such proper deliberations should have taken place and should have been documented. This did not happen.

vi. The IPDC is one of the check points of a procurement process as such it is imperative that members do their jobs properly. I have no doubts however, that the failure to deliberate on the issues properly was not due to a laissez-faire attitude or a lack of awareness of the law of the IPDC as I have already alluded to, instead I am of the view it was due to the fact that the former Chairperson and the former AG, (both very senior officials) had already negotiated everything to the point of the other side signing the agreement. Hence the IPDC members had their hands tied.

vii. Following from the above, I am of the firm view that there was outright pressure from the Commissioners or at least the Chairperson on this whole procurement to the extent that so many players in the procurement process failed to do their jobs properly. I am further fortified in my position by just looking at how the whole Board of the PPDA equally failed to provide the second check point in the procedure as will be seen further in the report. The Board instead was more focused on ensuring that the procurement worked at all cost and that they met the time frame of MEC.

viii. To make it worse, according to the evidence gathered, Mboweni Maluleke Inc. Attorneys came into the country on the 8th of March, 2020 and started executing the retainer agreement before the Board had even deliberated on this procurement meaning this was obviously before MEC had received a response to their 6th March 2020, request for no objection from the PPDA. Regardless of whatever assurances were being given behind closed doors, the fact remains that
by the time Mboweni Maluleke Inc. Attorneys came into the country and started working on this matter, MEC did not have an approval to procure their services. The procurement of the SA lawyers by MEC was therefore a misprocurement.

7.1.4 Granting of ‘No Objection’ by the PPDA

i. Once a submission is made to the PPDA in order to seek approval to use any method other than open tendering, the procedure operationally according to the technocrats from the PPDA is that the DG assign the submission of the PDE to the responsible desk officer for the particular entity. The desk officer then reviews the submission technically to assess whether it is in line with the provisions of the PPDA Act. That analysis is sent to the DG if the procurement is within the threshold of approval for the DG which is K 500 million for goods and services and K 1 billion for works. If it is in order he so approves or gives his comments or recommendations for further action. If the procurement is above the DG’s threshold of approval, the analysis or review by the desk officer is forwarded to the Board for their approval or guidance.

ii. In the matter at hand this internal procedure did not happen. In fact, the technical officers learnt about this procurement at the Extraordinary Board meeting itself as it was not appearing on the agenda. Although the DG stated that Mrs. Mbekeani the MEC desk officer knew about this procurement, I do not believe this was the case. To begin with there is no evidence of him submitting this to Mrs. Mbekeani. Moreover, MEC made this submission on the 6th March, 2020, and according to MEC during that time they had made several communications to the DG about this procurement. The Extraordinary Board meeting took place 3 days later on 9th March, 2020. This in my view was enough time for an officer of the level of Mrs. Mbekeani to produce a technical report, the only reason she did not do so was because the DG never informed her of this procurement and neither did he forward the submission from MEC to her as per the normal internal procedure as he was handling it by himself.

iii. The lack of a technical assessment report was one of the three reasons why the Board did not give an approval on the material day. Interesting enough the minutes of the Extraordinary Board meeting do not show that there was even an issue of a missing technical assessment report and the DG and Deputy DG did not any point either in their written submission to me nor during our first interaction tell me that there was an issue of a technical assessment.
iv. The Minutes of the Extraordinary Board meeting at the end state: 

“The Board asked Management to:

(a) Engage MEC so that it shares with the Board copies of letters to show that all the Senior Counsels in Malawi were contacted;
(b) Sending the submission by MEC to the ACB for vetting in line with Section 37(11) of the PPD Act.
(c) Upon satisfaction of these, the Board was to grant its “No objection.”

v. I am of the view that there was clearly a deliberate attempt to suppress some material facts by the PPDA to my office and this was done in such a crass manner that even the numbering of the minutes still reflected that there had been issue which was removed.

vi. I am even more convinced that this was deliberately done as the reason why the issue of the technical report is not reflected in the minutes does not make sense to me. The DG stated that the minutes do not reflect that there was a need for a technical report because it came at the end of the meeting. This is an unconvincing reason if there ever was one. The meeting had not concluded when this issue was brought up by Director Musopole as such it should have been incorporated in the minutes to reflect everything that transpired in that meeting. I am further fortified that the issue of the technical report was one of the conditions to the granting of no objection because the email provided to me by the DG clearly shows Director Musopole raising the same issue. She stated in her email to the DG copied to the Directors on 11th March, 2020 that “please provide a formal analysis of the request, which was not available during the meeting and which was also a condition to this approval.”

vii. From my reading of the minutes, it was upon satisfaction of these three conditions that the Board would grant the ‘No objection’. The issue of the technical report was therefore, clearly and deliberately removed from the minutes because that report did not support the granting of the ‘No Objection’ by the Board and if one goes by what the Board had agreed when concluding their meeting on the 9th March, 2020 that the three conditions needed to be satisfied, then they should not have approved this procurement.

viii. The DG and the Deputy DG stated that the technical officers did not produce a written technical report. Again I do not believe them. There was a technical assessment report which was prepared by the technocrats on 10th March, 2020 clearly highlighting 7 issues that were wrong with this procurement. Even if the
DG and the Deputy DG in this instance are telling the truth that there was no written technical assessment report, the fact remains that they knew from what the technical officers had told them after the Extraordinary Board meeting that the procurement had too many issues as such it should not have been approved. On this basis alone no reasonable Board ought to have approved the procurement.

ix. I also do not accept the reason advanced by the Board Chairman that if the technical officers had any issues then they should have raised it during the meeting. I do not accept this because the technical report was an assignment that the technical officers were asked to do after the meeting, one therefore wonders how the Chairperson could refuse the advice being given because it was done after the meeting as the Board itself had instructed.

x. It is obvious that there was need for the Board to meet again because technical assessment report was not favourable to the procurement as such there was need for further deliberations. Even if it meant the Board reconvening, that in my view would have been a better option than proceeding with a flawed procurement which was costing the government millions of kwachas. However, the fact of the matter as was stated by the DG is that regardless of what the technical assessment report was going to advise, the Board and in particular the Chairperson was going to go through with the procurement anyway. This is further observed in the email trail amongst the Board members themselves where the Chairperson whilst recognizing that a no Objection from ACB precedes deliberation and decision of the Board and that in this case the ACB response had not yet been granted still asked the DG to proceed issuing the no objection to much displeasure of Director Musopole who raised the same issue but apparently without response.

xi. One need not wonder why the Chairperson of the Board was so geared to proceed with the procurement regardless of whether the decision was procedural and legally sound or not. To him there was personal interest in ensuring that these lawyers are procured to handle this appeal. It is a matter of general knowledge that the Chairperson Mr. M’meta was one of the lawyers for Professor Arthur Peter Mutharika, the Second Respondent in the elections case in the Constitutional Court. He argued for the Second Respondent in court during the hearing and his name even appears on the quorum of the judgment of the Constitutional Court. If MEC was going to prevail in the appeal, then the
Second Respondent’s May 2019 election victory was going to be upheld. This was the exact reason Mr. M’meta and his colleagues were in Court.

xii. It is clear therefore that Mr. M’meta found himself in a conflict of interest situation. His private interests conflicted with his public duties as Chairperson of the Board of PPDA. The best he ought to have done was to recuse himself from this meeting and let other Board members deliberate and decide on the issue. At the very least he ought to have declared his interest in this matter. He did none of that.

7.1.5 Vetting by the ACB

i. The evidence suggests that this procurement was vetted by the ACB as is required by the law. However, the manner in which this vetting was done left a lot to be desired and rendered this ‘check point’ useless. According to the ACB they did an open search as their database did not have any information about Mboweni Maluleke Inc. Attorneys. The open search indicated that Mboweni Maluleke Inc. Attorneys was a lawfully registered law firm operating in Gauteng, South Africa, with Caphus Mboweni and Hlawulekan Maluleke as the Principal Attorneys. ACB however admitted that they did not do a thorough search on this law firm as it is a foreign based law firm as they did not have adequate time to do a thorough check on the foreign based law firm as one would expect them to in accordance with their law enforcement mandate. The ACB DG was comforted for not doing a thorough vetting because he met the former AG in person where he got an explanation of why MEC opted to hire the foreign lawyers and also because he reserved the right to investigate the procurement of the legal services.

ii. As stated by the former AG, there were 4 layers of approvals and checks in a procurement process and in all those layers, there were lawyers. The ACB being one of those approving entities and being headed by the DG, a lawyer himself ought to have subjected this procurement to proper scrutiny to ensure that the submission from MEC complied with all the legal requirements. This was supposed to be done in an independent manner. If the DG failed in his duty then that is on him regardless again, of whatever assurances were given behind closed doors.

iii. In addition, the subject matter, being a foreign law firm, ACB had to do its job properly and thoroughly in South Africa to satisfy Malawians that this law firm had a clean record both in Malawi and South Africa. The focus of the ACB
should not have been granting the ‘No Objection’ within the limited time they were given as it is supposed to be an independent institution. ACB’s focus should have been on doing its job properly. The whole point of requiring this step by ACB is to act as a check, to stop a possible procurement that could cost the country or that is fraudulent. There was failure in that regard. Coming after the fact to investigate the law firm and even prosecute is not good enough.

7.1.6 Granting of ‘No Objection’ to MEC

i. After the approval of ‘No Objection’ by the ACB on 11th March, 2020, the DG of the PPDA wrote to MEC informing them of the ACB’s clearance on the same day. As stated by the technocrats of the PPDA, the normal procedure is that after the Board has sat and made its decision, the DG communicates the decision made by the Board to the desk officer who then drafts the letter to PDE. But this was no ordinary procurement as such the DG did the communication to the PDE himself. In fact, the technocrats were not able to tell me whether a ‘No Objection’ had been granted to MEC or not by the PPDA. It was clear from their expressions that they only got to see the letter of ‘No Objection’ from the PPDA to MEC during my interaction with them.

ii. The letter itself, as stated in the evidence, left a lot to be desired. The said letter to MEC concluded as follows:

“In arriving at the decision to grant the No Objection, the Authority has also relied on your professional judgment regarding suitability of the legal firm for the assignment, the reasonableness of the lump sum fee charged, and the process undertaken in arriving at the decision to settle for the firm.”

iii. The PPDA is responsible for the regulation, monitoring and oversight of public procurement and disposal of assets in Malawi according to section 5 of the PPDA Act. As an oversight institution they cannot be placing reliance on what the PDE has submitted or stated. The PDE has interest in the matter and as such they obviously want to be granted the no objection. It does not matter if those making a request are lawyers, one would have expected the PPDA to consult the legal professional body where they felt they were out of their depth. Ideally the representative of the legal professional body who sits on the Board should have guided the PPDA Board so that they could make their own independent decision but as can be seen in this matter, the Chairperson of the Board was that person
and he was clearly going to have this procurement succeed one way or another. Relying on the PDE and not doing their own independent assessment defeats their oversight role and was a failure on the PPDA to do its job properly.

7.2 Whether Mboweni Maluleke Inc. Attorneys were Paid Legal Fees in Accordance with the Retainer Agreement

i. Per the evidence, the agreed sum that was in the retainer agreement was $788,500.00. Mboweni Maluleke Inc. Attorneys raised an invoice for $394,250.00 on 3rd March, 2020 which was 50% of the agreed amount.

ii. The ST funded MEC the sum of K296,302,530.00 which was the Kwacha equivalent of the amount raised in the invoice. However, this amount was not paid to Mboweni Maluleke Inc. Attorneys. Instead when MEC asked for more funding from the ST to pay the sum of K110,675,000.00 to Churchill and Norris, the ST advised them to use part of the K296,302,530.00 to pay Churchill and Norris which they did. They also provided me with further proof of payment to KP Transport and EKAS Investment for the sum of K3,564,900.00 and K8,125,000.00 respectively. A further K8,125,000.00 was transferred to the CEO’s account.

iii. The remaining amount of K165,650,130.00 according to MEC was taken back by the Treasury in line with end of year procedures. When I inquired about this, from the Accountant General Mrs. Jean Munyenyembe, she informed me that she could only confirm of unutilized funds in the MEC account after an audit of the 2019/20 Financial year is done by the National Audit Office. According to her the audit was supposed to have been completed by December 2020 but due to other challenges it had not been done but she was certain that by end of April 2021 the audit of the 2019/20 Financial year have will have been completed.

iv. No funds according to the evidence I have gathered were therefore transferred to South Africa to Mboweni Maluleke Inc. Attorneys.

v. MEC however, did pay for the accommodation and upkeep of Mboweni Maluleke Inc. Attorneys between 8th and 11th March, 2020 when they stayed at Umodzi Park. The MEC CEO stated that he was not aware who settled the bill, however, according to Umodzi Park, MEC had an active account at the hotel. They therefore, debited the MEC account the sum of K3,155,248.00 after offsetting an amount that the hotel owed MEC for a cancelled conference. MEC
therefore, paid for the bills of accommodation and upkeep of Mboweni Maluleke Inc. Attorneys for the time they were in Malawi from the 8th to 11th March, 2020.

7.3 Whether the Legal Fees Charged were Reasonable in the Circumstances

i. The legal fee initially charged in this matter was $ 788,500.00. At an exchange of $1 to ZAR 16.64 applicable then, this translated to ZAR 13,128,525.00 and at an exchange rate of 737.6962 which was applicable in March 2020 this was equivalent to K 581,673,453.7. According to retainer agreement this was to cover the merit consideration, advice, preparation and prosecution of the appeal before the Supreme Court of Appeal.

ii. I asked the MLS what their research had indicated as the appropriate amount to be charged for such an appeal when the lawyer was a SC based in Johannesburg and they stated that they had no specific amount. However, looking at the circumstances and guidance in Part III of the Legal Practitioners (Scale and Minimum Charges) Rules, they were of the view that $ 788,500 was unreasonably exorbitant. They also considered the fact that the only work that had to be done by the SA lawyers was perusing the court record of appeal, the written arguments and the case authorities exchanged and filed in relation to the appeal and presenting the appeal before the Supreme Court for an hour or there about.

iii. Without any proper research on their part or even a comparative or estimated cost that ought to be paid to a local SC handling such a matter against a SC from South Africa handling such a matter, one wonders how they reached the conclusion in their arguments to the court that the costs were unreasonable.

iv. Nonetheless, I still have to make my finding on this aspect and despite these being solicitor own client fees as such the legal practitioner can charge such sums as may be fair and reasonable in the circumstances there still needs to be some form of an assessment of whether the public funds that were set to go to the SA lawyers were reasonable in the circumstances.

v. My starting point was to find out how the system in South Africa works. From my understanding in South Africa when you want to engage an advocate you approach a law firm of Attorneys who identifies and then gives a brief to the advocates. The details of how much was going to Mboweni Inc. Maluleke Attorneys and how much to the Advocates is between Mboweni Maluleke Inc. and the counsel they engaged. When it comes to what I gathered, the factors that were taken into account when coming up with the fees was the job that was going to be done by the SA lawyers, namely merit consideration, advice, preparation and prosecution of the appeal. This involved reviewing and analysing at least 93
A4 Arch lever files. In addition, the AG in his response then stated that the lawyers attracted hourly rates for lawyers based in Sandton South Africa which from my informal research revealed that they are at the top spectrum of earners in legal fees. This from my search makes sense for the SC Dumisa Buhle Ntsebeza as it appears he practices in the Johannesburg Bar since 2008 but the Junior Counsel Elizabeth Makhanani Baloyi Mere seems to be a Pretoria based lawyer which attract lesser charges.

vi. From my research, the rates for SC or Silks as they call them range from ZAR 40,000.00 up to ZAR 80,000.00 a day for a 10 hours day. This translates to ZAR 4,000.00 to ZAR 8,000.00 an hour. For Junior lawyers the range appears to be between ZAR 20,000.00 to ZAR 40,000.00 a day for a 10 hours day which translates to ZAR 2,000.00 to ZAR 3,000.00 an hour.

vii. In terms of the hours that were going to be spent on this appeal I considered the period between the day when the no objection was granted as that would have been the period that legally the procurement would have come into effect and as such, when they could have started working on the appeal, which was on 11th March, 2020 and the date of the Appeal which was on 15th April, 2020. They therefore had 34 days in between including Saturdays and Sundays.

viii. On a daily basis one works an average of 8 to 10 hours a day, however, looking at the importance of the matter and the limited time, one can expect to work around 15 hours a day. It therefore means that they each could only possibly have worked 510 hours on this appeal.

ix. Therefore, for the SC if one assumes he was earning a maximum in the range of legal fees which would probably be at ZAR 80,000 a day for a 10 hour working day hence ZAR 8,000.00 an hour which comes up to ZAR 4,080,000 for the duration of this assignment, then the amount payable to him ought to have been $ 245,045.00.

x. For the Junior Counsel at the highest rate of ZAR 40,000.00 a day for a 10 hours day, this translates to ZAR 4,000.00 an hour. For the 510 hours she would have spent on this assignment it translates to ZAR 2,040,000.00 which was $ 122,522.52 at that time. This therefore means, one would have expected a total amount of $ 367,567.52 to be paid to the SA Lawyers I am therefore, of the view that the sum of $ 788, 500.00 that was charged was unreasonable. I make this finding mindful that I already took into account the highest rates that lawyers in South Africa charge which I believe are also based on the complexity of the matters as well as the experience and expertise of those lawyers. In the present
circumstances, even if regard were to be had for the importance of the matter to the client, it would not justify the sum of $788,500 when the sum of $367,562.52, which is less than half, has already been arrived at using the highest applicable rates as well as a generous 15 hour day.

7.4 Whether the Former AG acted Improperly or Irregularly by Continuing to Assist MEC in View of the Constitutional Court’s Finding

i. In the matter of Dr. Saulos Klaus Chilima & Dr. Lazarus McCarthy Chakwera v Professor Arthur Peter Mutharika & Electoral Commission, Constitutional Reference No. 1 of 2019 (Unreported) at pages 415 to 417 paragraphs, 1488 to 1494, the court stated that the AG according to section 98(6) of the Constitution is the principal legal adviser to the government, thus he is expected to provide impartial legal advice to Government. Therefore, whenever a Constitutional matter emerges and the office of the AG is not a party to those proceedings, he must still take a position as defender of the Constitution. The Complainant is of the view that by continuing to assist MEC in the procurement of legal services when the court disqualified him from doing so, the AG was acting improperly.

ii. Once MEC needed to find additional legal representation, the AG took several steps to assist MEC to find his replacement. The first act that I have noted was that he contacted one of the local legal practitioners from Malawi, Mr. Noel Chalamanda of Knight & Knight on 9th February, 2020 requesting him to prepare for the stay of execution hearing that was coming up on the 11th February, 2020. As stated in the evidence, Mr. Chalamanda was not able to take up the assignment. The second act he took was when the MEC Chairperson could not identify lawyers in Malawi, the former AG identified lawyers from South Africa through his contacts that he built through his private law practice/work. He then travelled to South Africa to meet the lawyers with the former MEC Chairperson. During the trip he briefed the SA lawyers about the case and interviewed them at length in order to assess their competence and capabilities. He further negotiated the terms of the retainer agreement with the MEC Chairperson.

iii. I am inclined to agree with the MLS and MEC that after the Constitutional judgment the AG was still the Principal Legal Advisor to the government as such if his opinion was sought on the identification and suitability of the foreign lawyers then he was obligated to assist MEC. According to Chapter 15 of the
MLS Code of Ethics, the duties and obligations of a lawyer when he is ceasing representation of the client demands that the lawyer does so in a manner that he does not leave a client stranded and unrepresented in the middle of a trial. To this end the lawyer must endeavour to avoid prejudice to the client and must cooperate with successor Counsel. His interaction with the SA lawyers in my view was necessary for him to hand over the matter to them properly.

iv. That said there were however still few facts, which from the get go made me uncomfortable and made me question whether the former AG was playing an advisory role to MEC or whether he was going over and above his role and was actually the one calling the shots and the PDE, namely, MEC was just doing his bidding. The first one was the letter that he wrote to Umodzi Park informing them that there were delays in the finalisation of the procurement protocols as such Umodzi Park should allow the South Africa lawyers to check out and the bills should be sent either to his office or to MEC. As I expressed to MEC during my interaction with them, this was purely an administrative issue which the PDE should have handled and not the AG himself.

v. The second issue I was uncomfortable with was when Mboweni Maluleke Inc. Attorneys were denied admission to the Courts of Malawi and MEC wrote to the former AG seeking guidance on costs and how to proceed with the matter since the SA lawyers would not be able to take lead in the appeal and did not do the full work that they were supposed to. The former AG informed them that he had already handled the matter and had negotiated the fees downwards to half the amount that was agreed upon in the retainer agreement as they had not done the full work. He did this all on his own prior to being consulted by the PDE.

vi. Moreover, it should be noted that I received this complaint before the Supreme Court of Appeal heard and pronounced itself on this matter. In its judgment of 8th May 2020 between pages 110 to 115 the Supreme Court affirmed the decision of the Constitutional Court. In so determining the Court further positioned that the Constitutional Court should not have waited until the final judgement to pronounce itself on this issue and allow the AG continue representing the Second Respondent. The Supreme Court further observed that based on the record of the Constitutional Court the AG knew or ought to have known that representing MEC was wrong. I am aware that these sentiments by the Supreme Court came after the fact and thus may be almost redundant to the issues before
That said they provide a moment of self-reflection for the former AG Mr. Kalekeni Kaphale and all the future AGs in Malawi.

8.0 ESTABLISHED ACTS OF MALADMINISTRATION

i. The failure of MEC, the procuring entity, to have a clear and set description of requirements for the service they wanted was contrary to procurement procedure and the ambiguity in description created an uneven playing field as one cannot state for sure what it is that MEC was looking for and also why they failed to contact more lawyers than they did since they were able to lower the specifications as evidenced by the other lawyers that were approached. This was maladministration.

ii. The use of single sourcing the services of Mboweni Maluleke Inc. Attorneys when the grounds upon which single sourcing could be used were not met and before obtaining approval from PPDA to use single sourcing methods was contrary to the procurement laws and thus maladministration by the former Chairperson of MEC and also the former AG who was advising MEC during this procurement process.

iii. The failure by the former AG and former MEC Chairperson to negotiate fees that were reasonable was maladministration.

iv. The surrendering of the soft copy of the Constitutional Court record by the MEC Chairperson and the former AG to the SA lawyers even before the procurement processes had begun was clearly unreasonable and a mockery to the procurement guidelines. It was maladministration.

v. The pressure exerted by the MEC Chairperson on the IPDC to the extent that they failed to properly deliberate on this procurement and merely rubberstamped the decisions that were made by the MEC Chairperson and the AG was improper and thus maladministration.

vi. By facilitating that Mboweni Maluleke Inc. Attorneys travel to Malawi and start executing the retainer agreement before a ‘No Objection’ had been received from the PPDA was a breach of the procurement laws by MEC and thus maladministration.

vii. The failure by the PPDA to articulate with certainty what method of procurement was used in this matter was an abrogation of duty and thus maladministration.
viii. The failure by the Board to reconvene and deliberate on the technical report was an abdication of their duty and contrary to the set internal procedures at the PPDA. It was dangerous to ignore the technical officers who are more conversant with public procurement than the Board members. This was maladministration.

ix. The apparent bulldozing to the grant of the no objection by especially the PPDA Chairperson before the ACB clearance was obtained was maladministration.

x. The failure by the PPDA Board Chairperson to declare his conflict of interest at the PPDA meeting on the issue of procurement of the SA lawyers was a serious breach of the law.

xi. Relying on the professional judgment of the Former AG and MEC regarding suitability of the legal firm for the assignment and the reasonableness of the costs by the PPDA DG is an abdication of duty and contrary to the oversight role the PPDA is supposed to be playing. This was maladministration.

xii. The failure by the DG to request the Board for an extension of time for the date of the meeting in order for the PPDA Secretariat to prepare and present the technical report on the request for procurement of the SA Lawyers by MEC and the failure to impress on the Board on the importance of such report was maladministration.

xiii. The suppression of facts by the DG in the minutes of the PPDA Board extraordinary meeting where he deliberately removed the issue of the technical report to make it look like it was not one of the conditions for the granting of no objection was a serious maladministration.

xiv. The failure by the ACB to do a thorough scrutiny of the submission by PPDA and specific search on Mboweni Maluleke Inc. Attorneys as it is a foreign based law firm fell short of providing the necessary check that is expected by sending such high value or single sourced procurements to the ACB. This failure by the ACB was thus maladministration.

xv. The former AG acted improperly, unconstitutionally and contrary to the Constitutional Court’s determination by involving himself with sorting out accommodation issues of the SA Lawyers at Umodzi Park and also by going further to negotiate downwards on behalf of MEC the legal fees for the lawyers after their admission was denied.
9.0 DIRECTIVES

Section 126 (a) of the Constitution provides that where investigations of the Ombudsman reveal sufficient evidence to satisfy him or her that an injustice has been done, the Ombudsman shall direct that appropriate administrative action be taken to redress the grievance.

i. MEC through the new Commission and advice from the current AG should bring the matter of the retainer agreement between MEC and Mboweni Maluleke Inc. Attorneys to a logical conclusion. As a country we cannot afford to have such loose ends. This should be done and the report of the same should be furnished to me by 30th June, 2021.

ii. The coming of SA lawyers into Malawi was as a result of abuse of power and a breach of procurement laws by the Former MEC Chairperson and former AG. Without their misconduct these lawyers would not have come into Malawi. Much as no public money was spent on their legal fees as a result of their non-admission they still spent Malawi public funds when they came into the country through hotel bills at Umodzi Park which were eventually paid by MEC. I direct that the Former MEC Chair Justice Jane Ansah and Former AG Kalekeni Kaphale pay back to MEC in equal amounts a total sum of K3,155,248.00 being the total expenses incurred by the Mboweni lawyers at BICC Umodzi Park in beverages, meals and accommodation for the period between 8th to 12th March, 2020. This money should be paid back to MEC and proof of such payment should be submitted to my Office by 28th April, 2021.

iii. All the three mentioned entities, namely the PPDA, MEC and ACB seriously need to strive to adhere to the legal principles whilst discharging their legal functions. In particular, I direct that ACB should come up with specific guidelines that the Bureau will have to follow when scrutinising submissions for no objection with clear timelines to ensure efficiency. The Bureau should do this and give my Office a copy of the same by 30th September, 2021.

iv. The conduct of the DG and his deputy in this matter left a lot to be desired. Most of the things they did and or omitted to do revealed high levels of incompetence. Being heads of a body that oversees procurement to date they could not tell with certainty what procurement method was used in procurement of these lawyers leaving that determination to MEC. They failed to advise the Board appropriately about the importance of the technical report and for lack of a better word conveniently omitted mention of the technical report in the minutes. I thus direct that the Board of PPDA assess and decide on the suitability and competence of
both Director General and his Deputy for these posts. This should be done and a report of the same should be furnished to my Office by 28th May, 2021.

v. The Accountant General should verify if the **K 165,650, 130.00** balance from the money Treasury had given to MEC to pay the SA lawyers remained unused in MEC Account by 30th June, 2020. This confirmation should be provided to Malawians and copied to my Office by 28th May, 2021.

**10.0 UNANTICIPATED FINDINGS**

i. In the course of this investigation an allegation that the Chairperson of the PPDA Board, who is a Member of the MLS was not nominated by the MLS as the law requires also came to my attention. I, therefore, invoked section 126 of the Constitution, which empowers me to determine the extent of any of my investigations to look into this aspect.

ii. I made inquiries with MLS, Parliament of Malawi, PPDA, Ministry of Finance, Office of the President and Cabinet (OPC), Former Chief Secretary to the Government, Counsel Madalitso M’meta, MCCCI and a nominee of MCCCI.

**10.1 MLS**

i. I queried the MLS on this and further requested them to address me on what steps they took to address the illegality, if it was indeed true. The MLS informed me that they were requested through letter Ref. No. ODPP/01/59 on 26th January, 2018 by the Director of Public Procurement to nominate two members of the MLS, preferably with experience in procurement related matters for the Honourable Minister’s consideration and appointment to the membership of the Authority.

ii. The MLS informed Mr. John Suzi-Banda and Ms. Innocentia Ottober through emails on 8th February, 2018 that the President of the MLS would like to nominate them for the appointment on the PPDA Board. They further asked both of them if this was in order and if so if they could submit their Curriculum Vitaeas (CV) which they would forward to the Director of Public Procurement.

iii. The MLS informed the DG of PPDA that they had nominated Counsel John Suzi-Banda and Counsel Innocentia Ottober through a letter dated 12th February, 2018.

iv. It later came to their knowledge that Counsel Madalitso M’meta was the one who attended interviews before the PAC and appointed to the Board. He was also appointed Chairperson of the Board. The MLS therefore, confirmed that Counsel M’meta was not nominated by the Society.
v. They further informed me that following the appointment, MLS on 31st January, 2019 wrote the Honourable AG then, Mr. Kalekeni Kaphale, SC, informing him that they heard that Counsel Madalitso M’meta was appointed sometime back by the Minister notwithstanding that he was not nominated by the Society. They further stated that they had nothing against Counsel M’meta, however, it was their view that the said appointment was contrary to what the law clearly stipulates and thus illegal and they requested that the appointment should be reversed and one of their nominees be appointed instead. They never received a response.

vi. When the issue was raised through the media by concerned members of the MLS, they were invited to make submissions before PAC in 2019 which they did. They stated that they were banking on the decision of PAC following the hearing to correct the mistake and they are yet to receive that decision to date.

10.2 PPDA

i. The PPDA stated that the process of appointing Board members involved nominating professional Bodies, the Ministry of Finance and Parliament. They further stated that they do not have full records of the process. Suffice to say that, through letters dated 26th January, 2018 Ref. No. ODPP/01/59 they wrote to the Malawi Institute of Procurement and Supply; Institute of Chartered Accountants in Malawi; The Malawi Law Society; The Malawi Confederation of Chambers of Commerce (MCCCI) and Industry and Malawi Institute of Engineers requesting each of these institutions to nominate two of their members, preferably with experience in procurement related matters for the Honourable Minister’s consideration and appointment to the membership of the Authority.

ii. The Institutions nominated the following people:

Malawi Institute of Procurement and Supply : Mrs. Benadette Tafatsa Maele

: Mr. Amos Nyambo

The Malawi Law Society : Mr. John Suzi-Banda

: Ms. Innocentia Ottober

The Institute of Chartered : Mrs. Constance Musopole
iii. From the list of names that they received, they forwarded the ten names to the Minister of Finance, Economic Planning and Development on 15th May, 2018. In the said memo to the Minister, the Acting Director of Public Procurement also informed the Minister that Mr. Lekani Leslie Katandula had declined to be considered as such they had submitted the name of Mr. Phatiswayo Mughogho as his replacement.

iv. The PPDA does not know the process that was followed to narrow the names down to five as that took place at the Ministry of Finance. All they know is that the five candidates who were selected from the ten names and whose names they submitted to the National Assembly through a letter dated 8th May, 2018 were:

i) Mr. Amos Nyambo - Chairperson
ii) Mrs. Constance Musopole - Vice Chairperson
iii) Mr. John Suzi-Banda - Member
iv) Mr. Lekani Leslie Katandula - Member
v) Eng. Dr. Paul Kulemeka - Member

v. The PPDA did not have the letter from the Ministry of Finance informing them of the five nominees who were selected. They did state however, that the five candidates above were informed of their appointments to the PPDA by the then ST Mr. Ben Botolo. Letters dated 2nd May, 2018 Ref. No. ST/2/11 were sent to Eng. Martin Mathias Chizalema and Mr. Gospel Mavutula. Again through letters written on 7th May, 2018 Ref. No. ST/2/11 for Mrs. Constance Musopole, Mr. Amos Nyambo, Mr. John Suzi-Banda. There was however, also another engineer Eng. Dr. Paul Kulemeka who was also written to on the 7th May, 2018. In total six candidates were therefore, written to being informed of their appointments.

vi. The content of the letter was the same, each person was informed of their appointment by the Minister of Finance and Economic Development as a
member of the PPDA, subject to confirmation by the Public Appointments Committee.

vii. From the five names that the DG of PPDA submitted to Parliament, and who were already informed of their appointment by the ST, three names were not found on the list of candidates who were invited for the interviews before PAC. The letter of invitation for interviews before PAC dated 12th October, 2018 originated from the OPC and was signed for by Mr. Cliff Chiunda on behalf of the Chief Secretary to the Government. It contained the following names:

i) Mr. Madalitso M’meta
ii) Mrs. Constance Musopole
iii) Engineer Martin Chizalema
iv) Mr. Gospel Mavutula
v) Mr. Amos Nyambo

viii. From this list therefore, Eng. Paul Kulemeka, Mr. Lekani Katandula and Mr. John Suzi-Banda who were on the original list that the PPDA had sent to Parliament were no longer there.

ix. From the list of those who went to interviews before PAC another name was dropped at the time the members were finally appointed on 29th November, 2018. According to a letter from the Comptroller of Statutory Corporations Mr. Stuart Ligomeka to the DG of the PPDA the composition of the Board was as follows:

i) Mr. Madalitso M’meta - Chairperson
ii) Eng. Martin Chizalema - Member
iii) Mr. Amos Nyambo - Member
iv) Mrs. Constance Musopole - Member
v) Chief Secretary to the Government /his representative - Ex-Officio
vi) Secretary to the Treasury / his representative - Ex-Officio
vii) Solicitor General & Secretary for Justice & Constitutional Affairs/ his representative - Ex-Officio
viii) Comptroller of Statutory Corporations/his representative - Ex-Officio (By Co-option or invitation).

x. From this Mr. Gospel Mavutula did not make it on to the list as such the MCCC was not represented on the Board.
10.3 Parliament of Malawi

i. The Clerk of Parliament Mrs. Fiona Kalemba through communication dated 28th September, 2020 informed me that the Acting DG of PPDA Mr. Arnold M.J. Chirwa, submitted names of Board members for the PPDA appointed by the Ministry of Finance, Economic Planning & Development through a letter dated 8th May, 2020. The Appointees were as follows:

   i) Mr. Amos Nyambo - Chairperson
   ii) Mrs. Constance Musopole - Vice Chairperson
   iii) Mr. John Suzi-Banda - Member
   iv) Mr. Lekani Leslie Katandula - Member
   v) Eng. Dr. Paul Kulemeka - Member

ii. Following the submission, her office requested the Acting DG to submit CV for the appointees to facilitate the confirmation process, through a letter dated 25th June, 2018.

iii. The Public Appointments Committee scheduled hearings for the appointees and her office wrote the Acting DG informing him of the schedule for the appointees to appear before PAC and further reminded him to submit the appointees’ Curriculum Vitae.

iv. In response to the letters from her office, a Mrs. Miriam Salika, writing for the DG, informed her office as follows:

   i) That the PPDA, was unable to provide the CV for the appointees;
   ii) That Mr. Lekani Katandula had declined the appointment and therefore, a replacement procedure had commenced; and
   iii) That the PPDA would make a fresh submission for the complete list of appointees and their Curriculum Vitae.

v. Following the letter signed by Ms. Mirriam Salika PAC cancelled the confirmation hearings.

vi. The PPDA submitted a fresh list of appointments through a letter dated 6th August, 2018 signed by the Acting DG Mr. Timothy Kalembo. The names of the appointees were as follows:

   i) Mr. Amos Nyambo
   ii) Mrs. Constance Musopole
   iii) Mr. John Suzi Banda
   iv) Mr. Gospel Mavutula
   v) Eng. Martin Chizalema
vii. Following that submission, PAC scheduled confirmation hearings. Her office informed the Acting DG of the PPDA about the schedule of hearings and copied the letter to the Chief Secretary to the Government.

viii. The Chief Secretary to the Government wrote to her office on 8th August, 2018 stating that “the Government does not recognize the appointment of the members which were invited for confirmation hearings by the Public Appointments Committee of Parliament. My office is yet to write to you on the appointment of Board of Directors for the Authority as per established procedure. You are therefore, requested to rescind the confirmations of the said appointees.”

ix. In view of the communication, the confirmation hearings were canceled and the Acting DG of the PPDA was advised to take heed of the contents of the letter from the Chief Secretary to the Government.

x. The office of the Chief Secretary to the Government submitted a list of members of the PPDA through a letter dated 2nd October, 2018 signed by Mr. C.K. Chiunda for the Chief Secretary to the Government. The list of appointees was as follows:

   i) Mr. Madalitso M’meta    -  Chairperson
   ii) Mrs. Constance Musopole  -  Member
   iii) Eng. Martin Mathias Chizalema  -  Member
   iv) Mr. Amos Nyambo        -  Member
   v)  Mr. Gospel Mavutula     -  Member
   vi) Chief Secretary to the Government -  Ex-Officio
   vii) Secretary to the Treasury   -  Ex-Officio
   viii) Solicitor General & Secretary for Justice -  Ex-Officio

xi. The Committee proceeded to schedule confirmation hearings for the Members of the Authority. The schedule of confirmation hearings was communicated to the Chief Secretary to the Government through a letter dated 12th October, 2018.

xii. The Committee conducted confirmation hearings and confirmed three appointees, namely:

   i) Mr. Madalitso M’meta    -  Chairperson
   ii) Engineer Martin Chizalema -  Member; and
   iii) Mr. Amos Nyambo        -  Member
xiii. The Committee did not confirm the appointment of Mr. Gospel Mavutula while the confirmation hearing of Ms. Constance Musopole was postponed at the request of the appointee.

xiv. Mrs. Constance Musopole later appeared before PAC for a confirmation hearing on 7th November, 2018 and the Committee confirmed the appointment.

xv. On 13th January, 2020, the Chairperson of PAC received a letter from a whistle blower alleging illegal appointments which included the appointment of Mr. Madalitso M’meta as a Member of the PPDA.

xvi. The Committee deliberated on the matter and summoned the President of the MLS through a witness summons dated 21st January, 2020 to explain the role played by the Society in the appointment of Mr. Madalitso M’meta as a member of the PPDA.

xvii. Mr. Burton Mhango and Ms. Martha Kaukonde, President and Secretary of the MLS, respectively, appeared before the Committee during which they confirmed that the MLS had nominated Mr. John Suzi-Banda and Mrs. Innocentia Ottober, out of which Mr. John Suzi-Banda was appointed.

xviii. The Committee summoned the Minister of Finance, Economic Planning and Development to explain his role in the appointment as an appointing Authority. However, due to the Covid-19 pandemic, the meeting was canceled and instead the Minister was requested to submit written evidence.

xix. Through a letter dated 15th April, 2020, the Minister of Finance, Economic Planning and Development at that time Mr. Joseph Mwanamveka, committed to normalize the filling of the post in line with the law within the shortest time possible. The Committee in response to this letter gave the Minister until 30th June, 2020 to withdraw Mr. Madalitso M’meta from the PPDA. As at the time we started these investigations this had not been done.

10.4 Ministry of Finance and Economic Planning

i. Through a letter dated 5th October, 2020 the ST Mr. Chauncy Simwaka sent to me documents that he was able to gather from his office regarding this matter.

ii. Through Memo Ref. No MF/6/1 dated 7th May, 2018 the then ST Mr. Ben Botolo wrote to the Minister where he recommended five names to be appointed as members of the PPDA based on their qualifications. The said members were:

   i) Mr. Amos Nyambo - Chairperson
   ii) Mrs. Constance Musopole - Vice Chairperson
   iii) Eng. Dr. Paul Kulemeka - Member
iv) Mr. John Suzi-Banda - Member
v) Mr. Lekani Leslie Katandulu - Member

iii. The memo further proposed that the effective date for the appointments should be 2nd May, 2018 until 1st May, 2021 as the appointees had to first be confirmed by PAC. The Minister approved the memo and as such the names contained in the memo on 7th May, 2018.

iv. He then also furnished me with the letter Ref. No. PPDA/C3/101 dated 6th August, 2018 in which the Acting DG of the PPDA submitted the names approved by the Minister to Parliament.

v. Considering that the Ministry of Finance is the key and mandated office in the appointment of members to the PPDA the information provided was simply not enough. On the 6th October, 2020 I met the ST Mr. Simwaka and the Deputy Budget Director Mrs. Priscilla Fachi.

vi. The ST stated that his office did not have the information other than the documents that he submitted to me. He checked the office of the ST, the office of the Minister and the office of the Public Finance Management Systems which in their Ministry coordinated the parastatal institutions, however, he was not able to find the information.

vii. He said the process of appointment was that names were approved by the Minister and the approved list went to the OPC for announcement, after which the Minister would write the individuals informing them of their appointment before they could go to PAC for confirmation.

10.5 OPC

i. The OPC in their letter dated 12th January, 2021 stated that the appointing authority for PPDA Board members was the Ministry of Finance as provided under section 7(1) (a) of the Public Procurement and Disposal of Assets Act (2017) through the Department of Statutory Corporations (DSC).

ii. They further stated that the duty of the OPC in this regard is to submit names of nominees to Parliament for confirmation. The letter advised me to engage Ministry of Finance on the issue of membership. In addition, they stated that the names that were submitted to Parliament were duly approved, as such the expectation, if otherwise, was that Parliament would have rejected the names and given proper direction on the matter as it did from time to time. They concluded by undertaking to do better in future appointments and confirmation of other boards.
10.6 Former Chief Secretary to the Government

i. I contacted the former Chief Secretary to the Government to address me on the contents of the letter Ref. No. CS/S/001 dated 8th August, 2018 to the Clerk of Parliament where he informed the Clerk of Parliament that the government did not recognise the list of names that was submitted by the PPDA and also to explain how the name of Mr. Madalitso M’meta found itself amongst the names of nominees when he was not nominated by the MLS.

ii. Through a letter dated 7th October, 2020, he stated that the Office of the Chief Secretary to the Government did not assume the role of soliciting names of nominees to the Clerk of Parliament. Rather the office just facilitated the process of receiving the names from the Ministry of Finance to the Clerk of Parliament.

iii. He further stated that section 89 of the Constitution is an overriding section of the supreme Law of the land which in essence gives the President of the Republic the powers to appoint persons to public office. What happened in the present scenario was that the officers of the PPDA wrote directly to Parliament when the governance rules required that the list should have been given to the Ministry of Finance and the Ministry of Finance should have given the list to the OPC. The OPC then would have sent the names to the President. This is the procedure up to now when appointing Members of Boards in public bodies.

iv. He referred me to an article on the recent appointments of Board Members in Public Bodies which was reported in the Daily Times Newspaper of 24th September, 2020 titled “Chakwera appoints professionals into Boards.” By this heading, according to the former Chief Secretary, the writer of the article was clearly acknowledging that all appointments of Board Members were finally approved or noted by his Excellency Dr. Lazarus Chakwera, the President of the Republic of Malawi. Yet when you examine all the pieces of legislation or other instruments of creation of these bodies it is the Ministers who are primary appointing authorities.

v. On the name of the Comptroller of Statutory Corporations included as ex-officio member of the PPDA Board, there was a statement that it was by invitation only, that is to say, the office would only be invited as and when the Board felt the need to do so. The Comptroller was not a member per se, but just an invitee, in the same way that the PPDA would invite any officer in the Public Service to attend its meeting.
10.7 Counsel Madalitso M’meta
i. I gave Counsel M’meta an opportunity to comment on the allegations that he sat on the PPDA without legal authority as his appointment did not follow the law. Through a letter dated 4th September, 2019 he informed me that he was not privy to the appointment process that was followed to appoint him. Suffice to say, he was, in the course of the appointment process, invited to and did attend interviews before the Public Appointments Committee of Parliament. He further stated that it did not at any point exercise his mind that he was sitting on the Board illegally and therefore did not take any steps to correct or probe the anomaly.

10.8 MCCCI
i. I contacted the MCCCI as I noticed that for the two years that the Board operated they were not represented. Despite reminders I did not get feedback from them.

10.9 Nominee of MCCCI
i. Mr. Gospel Mavutula stated that he got a phone call from the MCCCI requesting him to email his CV as his name had been proposed by the Confederation to represent the private sector in the PPDA.
ii. He got a letter on 2nd August, 2020 through the PPDA which was duly signed by the ST dated 2nd May, 2018 advising him of his appointment. On 12th October, 2018 he got communication from Parliament asking him to appear before it for interviews on 16th October, 2018, which he did attend.
iii. He never got further communication after that, he only learnt through the press of the orientation of members of the PPDA in Mangochi. His name was not there.

11.0 THE APPLICABLE LAW
i. The PPDA is created under section 4 of the PPDA Act with the mandate to amongst other functions, be responsible for regulation, monitoring and overseeing public procurement and disposal of assets in Malawi.
ii. According to section 7(1) (a) of the Act the Authority shall consist of five members appointed by the Minister from the following organizations:
   (i) one member nominated by the Malawi Law Society;
   (ii) one member nominated by the Malawi Institute of Procurement and Supply;
(iii) one member nominated by the Malawi Institute of Engineers;  
(iv) one member nominated by the MCCI; and  
(v) one member nominated by the Institute of Chartered Accountants in Malawi.

iii. Section 7(1) (b) further provides that the following *ex-officio* members shall form part of the membership:

   (i) the Chief Secretary or his representative;  
   (ii) the Secretary to the Treasury or his representative; and  
   (iii) the Solicitor General or his representative.

iv. Under Section 7(2) it is provided that the members of the Authority other than the *ex-officio* members, shall have a minimum of a bachelor’s degree in their respective fields, obtained from a reputable institution and their appointment shall be subject to the approval of the Public Appointments Committee. The section clearly stipulates that any member of the Authority must be nominated by the oversight and regulating Authority that they belong to.

v. The Minister is empowered to appoint the Chairperson and the Vice Chairperson from amongst the members appointed by him under section 7(3) of the Act.

vi. Under Section 7 (5) every member of the Authority is entitled to be paid by the Authority such allowances as the Authority with the approval of the Minister may determine.

12.0 ANALYSIS OF THE EVIDENCE GATHERED AND THE LAW

i. The law on the appointment of the members in this case is clear and straightforward. The MLS, the Malawi Institute of Procurement and Supply, the Malawi Institute of Engineers, the Malawi Confederation of Chambers of Commerce and Industry and the Institute of Chartered Accountants are each supposed to nominate members who have a minimum of bachelor’s degree in their respective fields. Once they are nominated they are then appointed by the Minister and then they have to cross one more hurdle of being confirmed by the Public Appointments Committee.

ii. In this case it is clear that Mr. Madalitso M’meta was not nominated by the MLS. From the documentation provided to me it is clear that his name was only included after the then Chief Secretary Mr. Lloyd Muhara informed the Clerk of Parliament that Government did not recognize the appointment of members who were invited for confirmation hearings by PAC. It was after this that the Office of the Chief Secretary on 2nd October, 2018 through letter Ref. No.
14/01/22/VII informed the Clerk of Parliament that it had pleased his Excellency to appoint Mr. Madalitso M’meta, Mrs. Constance Musopole, Engineer Mr. Martin Mathias Chizalema, Mr. Amos Nyambo and Mr. Gospel Mavutula as members of the Authority.

iii. The OPC itself did not provide a response that explained what transpired in this particular case. The former Chief Secretary did give a response that addressed some of the issues that I raised, however, in my view, he deliberately avoided addressing the appointment of Mr. Madalitso M’meta. Even if he had provided justification, it still remains that the Mr. Madalitso M’meta’s appointment breached the law and was thus illegal.

iv. Mr. M’meta himself was also unconvincing and nonchalant in his response. I do not for a second believe that he did not know how members of the Authority were appointed according to the law and that his appointment breached the law. As stated in the evidence the MLS had contacted their members asking them if it was in order to put their names forward as possible nominees and if so in order, for their members to send their Curriculum Vitae. Mr. Gospel Mavutula also stated that the MCCC took the same approach and contacted him informing him of his nomination. This communication from the nominating organization is something one would expect to receive if one was being nominated by the said organization. Mr. M’meta never received such communication from the MLS. This should have raised red flags to him.

v. In addition, I do not believe that he was not aware that the MLS had raised the issue of his nomination with the AG or that a whistle blower from his own fraternity had raised the issue of his nomination with Parliament months later. He was aware of all this but he simply did not care and continued to illegally discharge functions of the Board of PPDA and draw from public funds when he did not have the legal mandate to be so functioning as Board member and drawing such funds. This is a lawyer who at the time of appointment in 2018 had been standing at the bar for thirteen years according to the list of admitted Legal Practitioners of the MLS; one would therefore have expected him to have queried about his appointment after his appointment came into question but he did not do so because he was very much aware he was sitting on that Board illegally.

vi. The MLS in my view also failed to correct this illegality. When I asked them on what steps they took to address this illegal appointment it seems they left this issue in the hands of others to sort it out for them. Firstly, they stated that they
wrote to the then AG on 31st January, 2019 and requested that the appointment should be reversed and one of their nominees be appointed instead. To date they have not received a response from the AG. The MLS leadership also stated that they were banking on the decision of PAC following the hearing to correct the mistake and once again to date they are yet to receive that decision from PAC. As an oversight body on legal practitioners and an advocate of the Rule of Law one would have expected that the MLS would have gone to Court to have the decision to appoint Mr. M’meta reviewed and have him removed. They also could have disciplined their member for holding a Board position illegally and representing the MLS on the Board without the MLS’ authority. None of this was done.

vii. The membership of the Board further provides for which *ex-officio* members are part of the Board. Section 7(1) (b) provides for the Chief Secretary or his representative; the ST or his representative; and the Solicitor General or his representative and no one else. It is therefore, puzzling how the Comptroller of Statutory Corporation is coming in. The former Chief Secretary stated that the office of the Comptroller of Statutory Corporations would only be invited as and when the Board felt the need to do so. He further stated that the Comptroller was therefore, not a member per se, but just an invitee, in the same way that the PPDA could invite any officer in the Public Service to attend its meetings.

viii. With all due respect this explanation is very lacking. If the Comptroller is like any other member who the PPDA would invite, then one wonders why the position required special mention. Either all possible invitees to the PPDA should have been mentioned or the wording of the law should have been followed and those not mentioned by the law should not be featuring as members as their inclusion as *ex-officio* members when the law has not so provided is illegal.

ix. It has also not escaped my attention that this seems to be the trend with almost all the Boards that the Comptroller of Statutory Corporations seems to have a place on a table where the law has not provided room for him to be placed. Out of the list of 67 Boards of Directors who were recently appointed, only two Acts, namely, the National Council for Higher Education Act Cap.30:12 and Malawi Bureau of Standards Act Cap. 51:02 of the Laws of Malawi provide for the Comptroller of Statutory Corporations as an *ex-officio* member. His inclusion on to the Boards, especially those which have expressly stated who the members of the Board are, including the *ex-officio* members is therefore, contrary to the law and thus illegal. If the OPC feels strongly about the need for having the
Comptroller of Statutory Corporations on all these Boards then they need to assess why and make the necessary legal amendments to all the laws.

x. The procedure for appointing the members of the PPDA has also become anything but straight forward, and in my considered view it is simply because of the OPC usurping powers clearly granted to the Ministry of Finance. The Act provides that once members of the Authority are nominated by their organizations, they are then appointed by the Minister and then they have to cross one more hurdle of being confirmed by the Public Appointments Committee.

xi. The list of appointed members as already stated was confirmed by the Minister and the PPDA wrote to Parliament communicating the same. It is therefore, surprising that Mr. Muhara informed the Clerk of Parliament that the Government did not recognize the names that were submitted to Parliament simply because the names did not come from his office. He informed the Clerk of Parliament that “My office is yet to write to you on the appointment of Board of Directors for the Authority as per established procedure.”

xii. The Former Chief Secretary denied that he assumed the role of soliciting names of nominees by rejecting the list of names that were being called for confirmation before PAC. He stated that his role was just to facilitate the process of receiving names from the Ministry of Finance to the Clerk of Parliament. He further stated that what happened in the present scenario was that the officers of the PPDA wrote directly to Parliament when the governance rules required that the list should have been given to the Ministry of Finance and the Ministry of Finance should have given the list to the OPC. The OPC then would have sent the names to the President. This according to him was the procedure up to now when appointing Members of Boards in public bodies.

xiii. The documents tell a different story for me, the Chief Secretary and his office did not just facilitate the process of receiving names from the Ministry of Finance. They hijacked the whole process and submitted their own list to the Clerk of Parliament. As stated already after the Minister of Finance approved the names, the following day was when the PPDA communicated to Parliament. I would therefore like to believe that the PPDA was informed what to do by the Ministry of Finance. If, however, the agreed practice was that such nominations needed to come through the line Ministry and that the PPDA had no mandate to write directly to Parliament, then in my view, if the Appointing Authority was the Minister of Finance then the ST should have been the one facilitating the
appointments and writing to Parliament. The OPC should merely have been informed of who the members were after the Minister’s appointment and confirmation by PAC.

xiv. The justification that what they did was in accordance with governance rules is also untenable. There cannot be governance rules on the procedure to be followed when appointing members of the Authority or any other Board for that matter which conflict with an Act of Parliament dictating what should be followed when appointing such members of the Board. The OPC therefore acted outside its powers and contrary to the procedure set down by the Act.

xv. The individuals who were appointed by the Minister and confirmed by PAC were informed of their successful appointment by the Comptroller of Statutory Corporation Mr. Stuart Ligomeka on 29th November, 2018. The ST and in essence the Ministry of Finance were merely copied in the communications to the members appointed. As stated above, it should be the ST himself doing what the Comptroller of Statutory Corporations took upon himself or under the instructions of the Chief Secretary to do. I have not been furnished with any communication from the Ministry of Finance to show that for whatever reason, the Minister of Finance delegated to the Comptroller of Statutory Corporations the assignments that he undertook pertaining to this appointment. His writing to the members of the Board and to the PPDA was therefore, irregular.

xvi. The procedure as stipulated by the law seems to further have been distorted in that it is the President who was made the Appointing Authority and not the Minister. The former Chief Secretary stated that section 89 of the Constitution gives the President powers to appoint persons to public office. This section being a Constitutional provision, overrides the appointment as stipulated in the PPDA Act. I have gone through this section carefully, it is a general provision stipulating powers and duties of the President. The only sub section and paragraph that I feel fits what the former Chief Secretary was alluding to is Section 89 (1) (d) as the rest of those provisions are so specific to the circumstances to which they apply and do not fit into this scenario.

xvii. Section 89 (1) (d) states that “the President shall have powers to make such appointments as may be necessary in accordance with powers conferred upon him or her by the Constitution or an Act of Parliament.” This provision does not give a blank cheque to the President to make appointments anyhow. Such appointments must be in accordance with the Constitution or an Act of Parliament. Thus any appointment by the President has to be specifically provided for in the Constitution or Act of
Parliament. Some of the specific constitutional provisions giving appointment powers to the President are section 98 (3) on the appointment of the AG and section 101(1) on the appointment of the Director of Public Prosecutions. In as far as the Acts of Parliament are concerned section 6A of the Corrupt Practices Act specifically gives President powers to appoint the DG of the ACB. The PPDA Act does not give powers to the President to appoint members of the Authority and therefore I do not see how it can be argued that based on section 89 the President has overriding powers over what has clearly been outlined in an Act of Parliament which he assented to.

xviii. To further try to justify the role of the President in the appointment of the members of the PPDA or any other Boards on the basis that even the Daily Times Newspaper of 24th September, 2020 acknowledged that all appointments of Board Members were finally approved or noted by his Excellency Dr. Lazarus Chakwera, the President of the Republic of Malawi when according to the statutes creating such Boards it is the Ministers who are primary appointing authorities is shocking to say the least. To begin with I took time to read the press release itself dated 23rd September 2020 and I noted that much as it was signed by the Secretary to President and Cabinet it simply says ‘Government has appointed boards of directors….’ It does not state that the appointment has been made by the President but rather Government which can be a Minister or other public office or officer. Moreover, I posit that Journalists could be holding the view that it is the President who does the appointments because of the long time illegality created by OPC on the appointments of Boards. One therefore, does not expect those with legal minds who ought to know the law better to equate a journalist’s interpretation of how appointments are being done as being the accepted way of doing things.

xix. The makers of the law are intentional in their drafting. The law is crafted the way it is in order to provide checks and balances. It is therefore imperative that things are not read into the law when they are not provided. To allow such would lead to abuse of power for individual gains as it clearly happened in this case.

13.0 REMEDIES

i. Section 126 (a) of the Constitution provides that where investigations of the Ombudsman reveal sufficient evidence to satisfy him or her that an injustice has been done, the Ombudsman shall direct that appropriate administrative action be taken to redress the grievance.
ii. Mr. M’meta’s run on the Board has been overtaken by events as all Boards were dissolved in June 2020 and new ones have since been appointed. However, as stated this is an individual who was on this Board illegally and he knew or ought to have known as much. For as long as there are willing participants dancing to tunes of public servants who abuse their power and become the law on to themselves, public institutions will be run based on personal prejudices and public funds will continue to go where they ought not to go.

iii. Mr. M’meta drew from Public funds in line with Section 7 (5) of the PPDA Act which provides that every member of the Authority is entitled to be paid by the Authority such allowances as the Authority with the approval of the Minister may determine. There was no legal basis for him to draw any public funds. As much as one would argue that he put in the work, it still does not absolve him of the illegality as this was a service that he was not mandated to provide in the first place.

iv. Any reasonable lawyer with as much experience as Mr. M’meta ought to have known this and ensure things were corrected before assuming that role. Accordingly, without the legal mandate to sit on that Board, his work was voluntary and should not have cost tax payers a single Tambala. To determine otherwise would bring disorder and tantamount to mocking the legal and administrative processes that are supposed to guide public appointments and leave such appointments at the mercy of personal whims and interests as opposed to public interests.

v. I further take cognisance of my finding above of conflict of interest against Mr. M’meta in the procurement of SA lawyers which has all the elements of corrupt practices under section 25D of the Corrupt Practices Act. To ensure justice for all this, I direct that Mr. M’meta should reimburse the People of Malawi through the PPDA the sum of MK 8,757,557.07 which is the amount that according to the PPDA was expended on Mr. M’meta in terms of Airtime, sitting allowances, T&T allowances and conference and accommodation for the period that he illegally served on the PPDA Board between November 2018 and June 2020. This should be done and proof of the same should be furnished to my office by Mr. M’meta and the PPDA by the 28th May, 2021.

vi. The former Chief Secretary Justice Lloyd Muhara played a big role in the illegal appointment of Mr. M’meta as board member and Chairperson of the PPDA. Him being a lawyer and judge of the High Court serving in that highest office in public service ought to have known and done better. From my analysis above he
perpetrated this illegality deliberately and intentionally or out of sheer incompetence, both of which make his suitability as Judge of the High Court questionable. I therefore direct that the Judicial Service Commission deliberate and determine this issue. The outcome of this process should be communicated to my office and all Malawians by 28th May, 2021.

vii. The OPC is directed to follow the law as it is crafted and from the next appointments ensure that it is the ST that is responsible for facilitating the appointment of members of the PPDA. The same concept should apply to all Boards where there is a procedure laid out in the Act and the Minister is the Appointing Authority.

viii. The appointing Authority, namely the Minister of Finance should ensure that in informing the confirmed Members of the Board, those who were not confirmed by PAC should equally be informed with accompanying reasons.

ix. The PPDA or the ST in calling for nominations from organizations should ensure that they stipulate the educational requirement of the nominees as provided by the law in their communication to the Organization.

x. The OPC is further directed to remove the Comptroller of Statutory Corporations from all Boards where he is not provided for as his inclusion as an ex-officio member is contrary to the law.

xi. Finally, the confirmation process is there to provide checks and balances and to ensure that only those who are suitable and meet the requirements of the law become members of the Authority. It is therefore strongly recommended that in order for PAC to play its role effectively, where the candidates are to be nominated by their organizations, Parliament should go beyond just requesting the CVs and also request certified letters of nomination from the relevant organisations.
14.0 **RIGHT OF REVIEW**
Any dissatisfied party is entitled to apply for review of this report by the High Court pursuant to section 123 (2) of the Constitution within 3 months from the date hereunder.

Dated this 4\textsuperscript{th} Day of March, 2021

\[\text{Signature}\]

Martha Chizuma

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