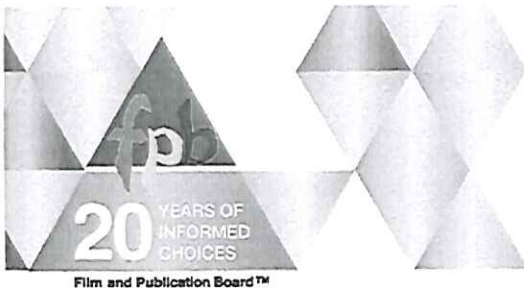


28/11/2017



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09 October 2017

Honourable Humphrey Maxegwana (MP)
Chairperson: Portfolio Committee on Communications
Parliament of the Republic of South Africa
90 Plein Street
Cape Town
8000

Per Email: Thembinkosi Ngoma [tngoma@parliament.gov.za]

Dear Chairperson

RE: TABLING OF A REPORT ON THE DISCIPLINARY MATTER AND RESIGNATION OF THE CEO, MR THEMBA WAKASHE

The purpose of this letter is to table a report on the matter of the former FPB CEO, Mr Themba Wakashe. The report details events and actions taken by the Council from the moment FPB received an anonymous complaint, up until a settlement of mutual termination was agreed.

The report includes all the critical information and is intended to appraise you and the Portfolio Committee about the matter.

Please note that, as stated in the report, Council has, to the best of its ability, dealt with the matter in terms of all the applicable legal and Constitutional prescripts.

Should you require any further information, please free to indicate.

Thank you for your indulgence in granting us a few more hours to submit the report.

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Thoko Mpumlwana', written over a horizontal line.

Thoko Mpumlwana (Mrs)
Chairperson: Council FPB

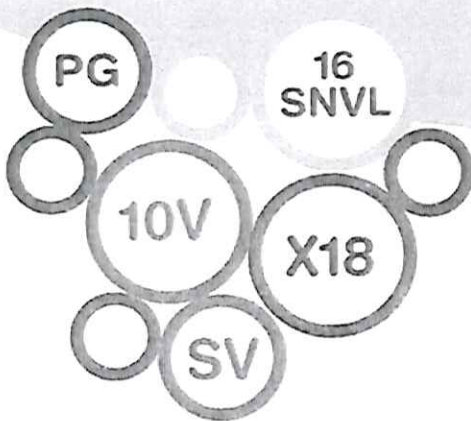
Copy to: Ms Ayanda Dlodlo, MP
Minister of Communications

FILM AND PUBLICATION BOARD

**REPORT TO THE PORTFOLIO COMMITTEE ON
COMMUNICATIONS**

**RE: THE DISCIPLINARY MATTER AND
RESIGNATION OF THE CEO
MR THEMBA WAKASHE**

09 OCTOBER 2017



We inform. You choose.

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1. INTRODUCTION

- 1.1 This report details the process since receipt of an anonymous complaint against the FPB CEO, Mr Themba Wakashe, and subsequent events, until his resignation following agreement of mutual separation.
- 1.2 This report will demonstrate all the relevant actions in a sequential order.
- 1.3 Although this report is intended to provide the full details of what transpired, Council has signed a confidentiality agreement with Mr Wakashe, which prevents either party from publicly disclosing certain aspects of the settlement without facing legal consequences.

2. BACKGROUND

- 2.1 Mr Wakashe was appointed by Council as FPB CEO from 1 December 2013, on a five-year fixed term contract. The appointment of the CEO was done in consultation with the Minister, in terms of the Films and Publications Act 65 of 1996, as amended.
- 2.2 The basic legal and administrative principles used by the FPB in all its work, include the Constitution that guarantees the rights to dignity, equality and fair administrative processes. In addition to that, section 9.3 of the Constitution prohibits discrimination on any of the grounds listed there, that include race, sexual orientation, religion, marital status, conscience, belief and culture.
- 2.3 The state has an obligation to respect, promote and to fulfil the rights contained in the Bill of Rights.
- 2.4 South African labour law is emphatic on principles of fair administrative procedure and stresses the importance of being procedurally and substantively fair in all labour disputes. In all such disputes, the burden of proof remains largely with the employer.
- 2.5 In addition, the FPB is guided in its work by internal policies and procedures, which include a Code of Ethics and Disciplinary Code and Procedures.
- 2.6 It is expected that where there is a balance of probability that an infringement could have occurred, the administrative authority should take action to establish the veracity of the alleged or suspected infringement. Whilst most

of such matters could be resolved internally, there is always a possibility that such matters could end up in a court of law, where the principle of reasonable doubt is taken into account in arriving at a decision.

- 2.7 The Prevention and Combating of Corrupt Activities Act (Whistleblow Act), enjoins all administrative bodies to act when serious complaints are levelled on an anonymous basis. It is in the interest of all parties, including the organisation and the person against whom the complaint is levelled, to establish the truth. The law accepts that a whistle-blower could be driven by malicious intent, hence the need to be thorough.
- 2.8 Labour law also accepts, especially at senior management, such as in this case, at the level of CEO, that the issue of breakdown in trust could be considered as a reasonable ground for mutual separation and/or termination of employment.
- 2.9 The principle of *audi alteram partem* is fundamental in adjudicating all disputes in our legal system. Council endeavoured to apply this principle in its dealing with this case.
- 2.10 Council always seeks to take decisions on a consensus basis. However, where there is a deadlock, the legislative and governance framework provides for voting, where the majority view prevails. In such cases the minority view is recorded. In the matter at hand, there were instances where there was no consensus, and Council members were free to express their different views, which are on record.
- 2.11 Although the initial complaint was against the CEO, the process expanded to include allegations against other Executives.
- 2.12 As will be seen below, Council consulted the Executive Authority at every critical stage of the process, right up till the end.
- 2.13 The sensitivity of the matter also required that we use external resources in adjudicating and obtaining relevant advice on the dispute. All this was done to keep objectivity and confidentiality, as well as protect the rights of the organisation and individual concerned.

3. THE CASE

- 3.1 On 7 May 2016, the Chairperson received an email complaint from a person who identified himself as John Smith. The email was also sent to the Minister and other Council members. After discussing the matter with the Minister, it was agreed that Council would be allowed to attend to the complaint internally, and to keep the Minister apprised.
- 3.2 In brief, the allegations included amongst others, travel irregularities, absenteeism, smelling of alcohol during working hours, running a private art dealership and lack of proper leadership.
- 3.3 The first step Council took was to alert Mr Wakashe to the allegation. Council requested him to study the allegations and provide a written response, which he did. After considering the CEO's submission, Council was not satisfied and decided to conduct a further enquiry to establish the veracity of the allegations, i.e. to determine whether any further action was necessary, or the matter could be closed.
- 3.4 A task team comprising Council members was established to conduct a preliminary enquiry. The enquiry included interviews with selected staff members, as well as union representatives. The interviewees were selected randomly with the assistance of the former Shared Services Executive, who was also responsible for human resources, from across occupational levels within the organisation.
- 3.5 The Task Team presented a report to Council and it transpired that there were more allegations that were levelled against other people. However, for the purpose of this report, we focus only on the CEO. Certain Council members were concerned with the quality of the Task Team's report, stating that it did not adhere to a standard for a report of that nature, and that some of the conclusions reached by the Task Team were without merit.
- 3.6 Below is a list of the most critical allegations that emerged from the Task Team report, as presented by staff:
1. Poor attendance of Council meetings;
 2. Absenteeism
 3. **Sexual harassment by the CEO;**

3.13 Based on the 2 findings of absenteeism and sexual harassment, Council was left with no option, and decided to pursue disciplinary action against the CEO.

3.14 However, having due regard to due process and Constitutional principles, especially the right to fair administrative process, Council sought legal advice on the interpretation of the conclusions and recommendations in the report. The legal advice given was that, on the face of the report, there was a case of gross misconduct, warranting disciplinary action.

3.15 Council took the allegation of sexual harassment seriously, taking into account the possibility of abuse of power by the CEO, hence it was resolved that he should be given an opportunity to answer for himself. Consequently, the CEO was placed on suspension pending a disciplinary hearing.

3.16 After consultation with legal counsel and Mr Wakashe's legal representatives, it was agreed that pre-dismissal arbitration proceedings in terms of section 188A of the Labour Relations Act be used to expedite the process.

4. SEQUENCE OF EVENTS

What follows below is a timeline of the sequence of critical events leading up to the mutual separation with the CEO:

1.	07 May 2016	Chairperson received an anonymous email complaining about the CEO.
2.	23 May 2016	The Chairpersons Committee held a scheduled meeting, at which the CEO was informed of the whistleblow allegations and requested to respond to them in writing.
3.	10 June 2016	Council held a special meeting at which the CEO's response was considered. Council was not satisfied with the response, and resolved to establish a Task Team to conduct a preliminary enquiry.
4.	15 June – 30 August 2016	Task Team conducts interviews of select staff members and a union representative. Task Team requests Internal Audit to do an enquiry on certain human resource issues, including the review of the biometric reports, time and attendance, and travel irregularities.

5.	29 August 2016	Internal Audit submits a report to the Task Team. The Task Team considers the report and attaches it to its own report to Council.
	19 September 2016	Task Team tables its report to Council at a special meeting. Council members request more time to study the report and resolve to reconvene at a later date for its discussion and way forward.
6.	23 September 2016	Council convenes a special meeting to deliberate on the Task Team report. At this meeting, Council resolves that the nature of the allegations against the CEO and other Executives are such that an in-depth investigation is desirable. Council also resolves to engage an external party to conduct the investigation, and that the CEO be placed on special leave.
7.	26 September 2016	Council Chairperson and Deputy Chairperson brief the Minister about the allegations, findings of the Task Team and the Council resolution to place the CEO on special leave.
8.	27 September 2016	The Chairperson writes a formal letter to the Minister, outlining all relevant issues and the internal Task Team enquiry.
9.	05 October 2016	The CEO, Mr Themba Wakashe, placed on special leave pending a full investigation. The special leave was for the period 5 th October to 15 th November 2016. The CEO accepted and signed the notification of special leave, agreeing to abide by all the terms imposed.
10.	10 November 2016	Following unforeseen delays in the appointment of an investigation service provider, the CEO's special leave was extended until 31 st January 2017.
11.	21 November 2016	SekelaXabiso (SkX) Forensics appointed as a preferred service provider to conduct the investigation.
12.	28 November 2016	A letter is written to the Portfolio Committee Chairperson, appraising him of the allegations against the CEO and the fact that he had been placed on special leave pending an independent investigation.
13.	5 December 2016 - 30 January 2017	SekelaXabiso conducts the investigation and, as part of the investigation, sets up an anonymous whistleblower line. It also conducts physical interviews with staff members who are willing to disclose any information. As part of the time and attendance enquiry, SkX is given remote access to the

		electronic diaries of all Executives and their PAs. Relevant HR documents are also made available to them.
14.	14 December 2016	Council holds a scheduled meeting, and at that meeting reviews the legality of the special leave. Council resolves to obtain legal opinion on the special leave.
15.	31 January 2017	SkX presents the final report with recommendations to Council at a special meeting convened for that purpose.
16.	01 February 2017	Council seeks legal advice on how to interpret and implement the investigation report. Bowman Gilfillan Attorneys are appointed to provide the legal advice as well as technical legal support when required.
17.	01 February 2017	An update letter is written to the Minister, advising her about the outcome of the investigation. The letter states further action that Council will take to resolve the matter, and also indicates that Mr Wakashe will return to work on 2 nd February 2017.
18.	02 February 2017	The CEO returns to work after expiry of the special leave.
19.	08 February 2017	Bowman Gilfillan tables the legal advice to the Council Chairperson.
20.	14 February 2017	An update letter is written to the Portfolio Committee Chairperson, informing him that the investigation had been concluded and Council had received a report, which it was still processing. The letter also mentions that Mr Wakashe's special leave had ended, and he was back at work.
21.	15 February 2017	Chairpersons Committee holds a meeting to consider the legal opinion and way forward. The responsible attorney is invited to the meeting to clarify certain issues.
22.	22 February 2017	Council holds a special meeting to consider the legal opinion on the special leave, as well as consider and/or ratify the decisions of the Chairpersons Committee taken on 15 February 2017.
23.	02 March 2017	The investigation report is submitted to the Minister for information, and she is also informed of the next steps to be taken, including Council's intention to use the services of legal experts in dealing with the matter, thus ensuring that all legal prescripts are observed and complied with.
24.	16 March 2017	Council holds a scheduled meeting, at which it deliberates on the legal opinion, amongst other matters which are part of ordinary business. At this meeting, Council resolves that

		disciplinary action should be instituted against the CEO and that he be suspended pending disciplinary proceedings. The CEO faces charges including sexual harassment, abuse of travel privileges and excessive absenteeism.
25.	17 March 2017	Both CEO is served with a notice of suspension with immediate effect.
26.	18 March to 21 March 2017	Charges are drawn in consultation with the lawyers (Bowmans Gilfillan).
27.	20 March 2017	Update letter sent to Minister
28.	22 March 2017	A charge sheet is served on the CEO and he is requested to respond to the charges in writing.
29.	27 March 2017	Letters written to the Directors-General of the Departments of Public Service and the Public Service Commission, requesting assistance with a resource that can serve as Initiator during the disciplinary hearing. The DG of Public Service approached Mr Sonwabo Shibane of COGTA and requested him to serve as Initiator, which he agreed to. Mr Shibane was briefed on 5 th April. However, once it was apparent to him that there was no witness for the sexual harassment charge, he became reluctant to proceed. He also proposed that all absenteeism charges be consolidated into one charge.
	27 March 2017	FPB and the CEO agree to proceed with the disciplinary matter using pre-dismissal arbitration proceedings, to speed up the process. The CEO is represented by attorneys throughout the process and signs consent to that effect.
30.	01 April 2017	The CEO doesn't respond to the charge sheet, but on 1 st April 2017, serves the FPB with a notice of motion in an urgent interdict application to the Labour Court. The core of his application is the validity of the suspension.
31.	03 April 2017	FPB enters a notice to defend the application.
32.	03 April 2017	Council meets the new Minister and Deputy Minister. At that meeting the Executive Authority is informed that the CEO is on suspension and the Acting CEO, seconded from the DoC is introduced. Council was also informed at the meeting that the FPB and MDDA would be reporting to the Deputy Minister.
33.	06 April 2017	The CEO's application is dismissed by the Labour Court on the basis that he failed to show urgency, and FPB is awarded partial costs.

5.3 The allegations levelled against Council, that it is homophobic and acted in an unconstitutional and discriminatory manner against Mr Wakashe, are rejected with contempt. The FPB and Council are bound by the Constitutional principles of equality, inclusivity and fairness, and have thus not acted against the spirit of the Constitution. On the contrary, we followed the laws and the policies ensuring that due process was observed at all times, unfortunately at great cost to the organisation. The focus on due process also resulted in delays, causing the process to take approximately 15 months, which is regrettable.

5.4 It is also not true that the stipulated working hours of 8h00 to 17h00 do not apply to the CEO. Much as it is true that Executives are required to engage with stakeholders and often work outside the office, they are still obligated to account for all their relevant working hours in line with organisational policies.

5.5 Excessive, unauthorised absenteeism is a very serious breach of the employment contract and trust relating to the employment relationship, which could result in a dismissal if proven. Council was mindful of this fact when it took the action it did.

5.6 Unfortunately, the process did not work out the way it was anticipated, resulting in the allegations not being properly tested. However, we have a duty to always act in the best interests of the organisation, as entrusted upon us by various pieces of legislation, including the PFMA.

We trust that the above information and detailed sequence of events provide the much-needed clarity on the relevant matters. We are available, as Council to answer any further questions that the Portfolio Committee might still raise.

Signed by



Thoko Mpumlwana (Mrs)

Chairperson: Council FPB

Date: 09/10/2017