
"PRE-EMPTED APPOINTMENT"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, ABUSE OF POWER AND IRREGULAR EXPENDITURE IN THE APPOINTMENT OF A LEGAL FIRM AS SERVICE PROVIDER FOR THE DEPARTMENT OF FINANCE IN THE NORTH WEST PROVINCE
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Executive Summary

(i) “Pre-empted appointment” is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector’s Act, 1994.

(ii) The report communicates the Public Protector’s findings and directives on remedial action following an investigation into allegations of maladministration, irregular, unauthorised expenditure and possible abuse of power and corruption by the former Member of the Executive Council (MEC) for Finance, officials in the office of the latter and officials in the Department of Finance (Department) in the North West Province involving the appointment of a legal firm to assist the office of the MEC with, *inter alia*, disciplinary processes against three officials of the Department and subsequent legal matters during 2011.

(iii) The Committee on Public Accounts in the North West Legislature (NWSCOPA) invited the Public Protector Representative in the North West, the office of the Auditor-General in the North West, the Public Service Commission in the North West and the South African Police Services to a special meeting on 31 January 2013 where allegations of, *inter alia*, mismanagement of public funds, the abuse of power and possibilities of corruption were raised against the background of a quotation based procurement process followed by the Department. As a result, an amount of approximately R 14,976,119.48 was ultimately paid to Morake Incorporated (Morake Inc.), a legal firm based in Rustenburg by the Department.

(iv) During the briefing from NWSCOPA, it was suggested that the agencies mentioned in the paragraph above should jointly and/or severally
investigate the allegations and then submit reports to NWSCOPA on their findings and suggested remedial actions.

(v) The Auditor-General (AG) was asked to investigate the procurement process followed. However, the AG was unable to submit a report in this regard as its mandate focuses on Regulatory Auditing to support other agencies, the Public Protector therefore was requested to include the findings of the AG in her report. The investigation was to further cover the possibility of any maladministration in the procurement process as reported by the Auditor-General and the possibility of abuse of power by the MEC and/or officials in her office.

(vi) The Public Service Commission was given a written mandate by the Chairperson of NWSCOPA defining its terms of reference to investigate the suspension of the HOD for Finance and two (2) others with specific reference to the following:

(a) The regularity of the suspensions of the following employees –

(aa) Mr J N T Mohlala – the Head of the Department (HOD);
(bb) Ms H Kasirivu – the former Chief Financial Officer (CFO) of the Department;
(cc) Mr M Mogoane – the former Chief Director: Municipal Finance Management (CD: MFM) in the Department.

(vii) The Public Service Commission (PSC) issued a report titled: “REPORT ON AN INVESTIGATION TO ESTABLISH WHETHER THE REGULATORY FRAMEWORK GOVERNING SUSPENSION FROM DUTY WAS FOLLOWED DURING THE SUSPENSION OF THREE SENIOR MANAGERS IN THE DEPARTMENT OF FINANCE; NORTH WEST” on the investigation conducted in terms of the written mandate
received from NWSCOPA, with findings and direction/recommendations to be implemented.

(viii) The South African Police Services, Commercial Crime Unit, was specifically requested to focus on any criminal aspects as defined in the Prevention and Combatting of Corrupt Activities Act, 2004, and on allegations of corruption and fraud of the mentioned business entities that were awarded contracts for goods and services by the Department during the procurement process.

(ix) The Public Protector considered and investigated the following issues:

(a) Whether or not the conduct of any officials or office bearers amounted to any maladministration or abuse of power in order to secure the appointment of Morake Inc. to assist the office of the MEC with legal matters;

(b) Was the initial procurement of Morake Inc. on a quotation basis using the “urgency” mechanism under SCM prescripts, unlawful, improper or in violation of any applicable law and/or prescripts?

(c) Did the MEC interfere with the SCM process resulting in Morake Inc. being unfairly preferred and was there an undeclared conflict of interest by the MEC?

(d) Was the extension of the contract of Morake Inc. to other matters leading to an approximate R16 million bill, unlawful, improper and in violation of any applicable SCM law and/or prescripts?

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1 The enquiry includes propriety of accepting the fee of R2 800.00 per hour.
(e) Was the invoices submitted by Morake Inc. duly checked by officials of the Department and did the invoices contain incorrect or misleading information resulting in overbilling and overpayment and, accordingly, amount to fruitless and wasteful expenditure?

(f) Was it necessary for Morake Inc. and ultimately the Department to appoint Senior Council to assist with the initiation and finalisation of the disciplinary proceedings?

(g) Was the procurement of Valostar 263 CC, to provide recording and transcription services unlawful, improper and/or in violation of any applicable law and/or prescripts?

(h) Did the MEC subject officials unwilling to violate supply chain prescripts to any occupational detriment, including stage-managing the suspension and subsequent dismissal of 3 (three) senior officials?

(i) Were the provisions of the Prevention and Combating of Corrupt Activities Act violated by the MEC or any other person as alleged? The issue was considered but not investigated and instead referred to the Directorate for Priority Crime Investigation (the Hawks).

(x) The Public Protector makes the following findings:

(a) The re-wording and amendment of the appointment letter of Morake Inc. by Mr Molefe, the former Director in the office of the MEC for Finance in the North West Province, ultimately signed and issued by the acting HOD, amounts to improper conduct, abuse of power and maladministration.
(b) The procurement process followed by the Department in securing the services of Morake Inc. was flawed, unlawful and in violation of section 217 of the Constitution, 1996; Sections 16A6.1 and 16A9.1 of National Treasury Regulations (2005) issued in terms of the Public Finance Management Act, 1999 and Sections 3 and 4 of the Preferential Procurement Regulations, 2001 which resulted in irregular expenditure for invoices submitted that were not covered by the quotation process. Treasury Regulation 16A6.1 was contravened in respect of amounts paid to Morake Inc. which exceeded the threshold of R500 000. There is no indication that National Treasury was approached to condone the practice followed.

(c) There is a lack of evidence with regard to the notion that the former MEC for Finance influenced the appointment of Morake Inc. or gave instructions to flout procurement processes as alleged.

(d) Although Section 10.5.1 and 10.5.2 of Practice Note Number SCM 3 of 2003, issued by National Treasury, allows for the extension of the services rendered by a service provider, it could not have been the intention of National Treasury that this could be done where a competitive bidding process was not followed from the outset. The process followed to extend the services of Morake Inc. initially appointed in terms of the quotation process to be portrayed by a so-called tender process later, amounts to gross maladministration.

(e) The manner in which invoices and statements of accounts submitted by Morake Inc. were checked and assessed by officials before payment was approved amounts to gross negligence, maladministration and ultimately irregular expenditure. Evidence, especially traveling costs claimed by Morake Inc., indicates that there are discrepancies and double billing in the invoices submitted, resulting in overpayment by the Department.
Supporting evidence in the form of actual invoices/receipts were not presented to substantiate the disbursements as claimed on the invoices submitted by Morake Inc.

(f) The appointment of Senior Counsel to attend to legal matters which, seemingly, did not require such a high level of expertise is contra the obligation placed on the Department to efficiently, economically and effectively apply state resources as contemplated in section 195(1)(b) of the Constitution, 1996 and amounts to maladministration. The Department did not explore more cost effective avenues such as utilising their own Human Resource Unit to initiate and draft the disciplinary charges and merely outsource the presiding duties during the disciplinary hearings.

(g) Proper procurement process was not followed in the appointment of Valostar 263 CC by the Department. Payments to this company resulted in irregular expenditure to the amount of R845,211.40. When the Department realised that the amount already paid to Valostar exceeded the threshold of R500 000-00 the continuation of the services was claimed as disbursements on the account of Morake Inc.

(h) There is no supporting evidence that proves or disproves that the former MEC subjected officials unwilling to violate supply chain prescripts to any occupational detriment, including stage-managing the suspension and subsequent dismissal of 3 (three) senior officials. The later issues are addressed by the report issued by the Public Service Commission.

(xi) Remedial action be taken as envisaged by section 182(1)(c) of the Constitution is that:
(a) The Acting Head of the Department is to take urgent and appropriate steps to:

(aa) Improve the Supply Chain Management System of the Department to ensure that Bid Specification, Bid Evaluation and Bid Adjudication Committees evaluate procurement processes;

(bb) Ensure that the officials of the SCM Division and the members of bid committees are trained on the prescripts of the National and Provincial Treasuries in respect of demand and acquisition management;

(cc) Audit amounts claimed by Morake Inc. for traveling on the same date and claimed against different individual invoices resulting in double payment for travelling by the Department as mentioned in paragraph 7.2.2.3 with the view to recover amounts paid as double payment from Morake Inc.

(dd) Take corrective measures to prevent a recurrence of the failure in demand management process referred to in this report.

(b) The Premier of the North West Province is to ensure, in terms of Treasury Regulation 4.1.3, that the Executing Authority of the Department initiates an investigation into the conduct of the Head of the Department and the former Chief Director in the office of the MEC of Finance with a view of taking disciplinary action against them.

(c) The findings of the PSC are noted and the direction/recommendations as mentioned in paragraph 10.9.3 of this report is to be implemented.
(d) The Commercial Crime Unit and/or Directorate: Priority Crime Investigation of the South African Police Service should conduct a thorough scrutiny of the relationships between the Directors of Morake Inc. and/or Valostar 263 CC and the former MEC and former Director in the office of the MEC for Finance, the Acting HOD and members of the relevant BEC’s and the BAC of the Department.

(e) The Law Society of the Northern Provinces is requested to audit the invoices submitted by Morake Inc. to establish whether or not the fees charged by Morake Inc. is exorbitant or not and to establish any possible misconduct.

(f) The Directorate for Priority Crime Investigation (the Hawks) is to conduct a further investigation into whether or not a corrupt relationship existed between the MEC, Mr L L Mabe, and Morake Inc and any other role players involved in the procurement of the services of Morake.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, ABUSE OF POWER AND IRREGULAR EXPENDITURE IN THE APPOINTMENT OF A LEGAL FIRM AS SERVICE PROVIDER FOR THE DEPARTMENT OF FINANCE IN THE NORTH WEST PROVINCE

1. INTRODUCTION

1.1 "Pre-empted Appointment" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, 1996 and section 8(1) of the Public Protector Act, 1994 to the:

1.2.1 North West Provincial Standing Committee on Public Accounts (NWSCOPA);

1.2.2 The Premier of the North West Province;

1.2.3 The present and former MEC for Finance in the North West Province;

1.2.4 The present and former Director in the office of the MEC for Finance in the North West Province; and

1.2.5 The acting Head of the Department of Finance in the North West Province.
1.2.6 The President of the Law Society of the Northern Provinces, Mr P B Mabunda.

1.3 The report is also provided to the Complainants in terms of section 8(3) of the Public Protector Act.

1.4 The report communicates the Public Protector's findings and directives on remedial action following an investigation into the allegations of maladministration, irregular, unauthorised expenditure and possible abuse of power by the Member of the Executive Council (MEC) and/or officials in the office of the latter and/or Department of Finance (Department) in the North West Province in the appointment of a legal firm to assist the office of the MEC with, *inter alia*, disciplinary procedures against 3 (three) officials of the Department and subsequent legal matters.

2. THE COMPLAINT

2.1 Overview of the complaint received:

The following background and allegations are inter alia raised in a document from a whistle-blower directed to NWSCOPA and which was circulated to the representatives mentioned in paragraph 2.2 below:

2.1.1 On the 22 July 2011, the Head of Finance Department, Mr Johannes Mohlala, was suspended on account of soured relations with the then MEC, Ms Louisa Mabe.

2.1.2 MEC Mabe also suspended the CFO, Ms Herrieta Kasirivu, and the Chief Director for Municipality Finance, Mr Mogoane, for allegedly
failing to account on a monthly and quarterly performance of their units to the Executive Authority.

2.1.3 Presumably, the soured relations started when the MEC gave the CFO and the Head of Department an instruction to violate the Supply chain Management policies, which they did not want to comply with.

2.1.4. The CFO and the Chief Director for Municipality Finance were ultimately dismissed in April and May 2012 respectively, and they are currently appealing their dismissal through the Public Service Bargaining Council.

2.1.5. It was stated that the MEC became angry when the HOD advised her about the violation of the government Policies and the implications thereof, and she regarded the conduct as insubordination and a failure to carry out her orders.

2.1.6. The MEC wanted to take part in the procurement processes after the suspension of the HOD and the CFO to award tenders to her buddies (cronies) and friends.

2.1.8. The then MEC intentionally decided not to involve Labour Relations, Human Resources, the Office of the State Law Adviser in the Office of the Premier and the State Attorney, during the disciplinary process of the HOD, CFO and the Chief Director to ensure transparency, fairness and the value for money, but chose to procure the services of a legal firm for the purpose.

2.1.9. Junior officials were appointed to act i.e. Mr Geo Paul was appointed to act as HOD and Ms Sophie Koikanyang was appointed to act as
CFO and that allegedly led to them being intimidated and manipulated to sign inappropriate procurement orders.

2.1.10 The Office of the former MEC deviously obtained the approval of a deviation to the tender process on the basis of a so-called urgency or self-created urgency that was approved by the Acting Head of the Department.

2.1.11 The Office of the MEC received quotations from the legal firms in Rustenburg prior to writing to the HOD for an approval. The tariffs of the quotes obtained were as follows:

2.1.11.1 Mogau Attorneys- R1 500.00
2.1.11.2 Van Velden-Duffey- R2 500.00
2.1.11.3 Morake Incorporated- R2 800.00

2.1.12 Although Mogau was the cheapest the most expensive firm, Morake Inc., was appointed by the Department.

2.1.13 Morake Inc. is a junior attorney with four years post admission experience, with no experience in Labour law, public finance or the public service.

2.1.14 Simon Morake, the Director of Morake Inc., is believed to be connected or a friend to both MEC Mabe and Mr Chris Molefe, the Director in the Office of the MEC, as they all originate from Rustenburg.

2.1.15 Tender number NWDF105/2011 was issued by the Department of Finance to appoint a panel of the legal advisors to provide legal service for a period of two years, but at that time Morake Inc. was
already providing these services without a formal tender. It is stated
that one of the conditions of the tender was that the Department would
solicit quotations from the approved panel of the legal service
providers whenever the service is required. The Department never
followed the condition of sourcing quotations from the approved panel
but continued with the services of Morake in terms of the tender.

2.1.16 In terms of the tender documents submitted, Kgomo Mokhetle Inc. in
Mmabatho, was the cheapest in all aspects, charging R980.00 per
hour for a Director while Morake Inc. Attorneys was expensive as it
charged R2 800.00 per hour.

2.1.17 Morake Inc. was also appointed to provide a service to the amount of
R94 309.72, in a matter between the Department of Finance and the
Department of Health. The transaction is dubious, as two departments
in the North West Government cannot institute legal action against
each other.

2.1.18 Morake Inc. submitted fictitious invoices or fraudulently inflated prices
on invoices to defraud the Department of Finance, the travelling claims
of R2 800 per hour were also charged daily even when the Directors
were accommodated in Mahikeng.

2.1.19 The Department of Finance appointed Valostar 263 CC to offer the
service of recording and transcription for the disciplinary hearing of the
HOD, CFO and the Chief Director Municipality Finance. The company
charged R12 000 per day recording and R2.50 per page for
transcription, the total costs for recording and transcripts amounted
more than a million rand. The procurement of Valostar 263 CC was
not tendered.
2.1.20 It was further alleged that the said Valostar 263 CC belongs to the spouse or a business partner of Mr Simon Morake, the Director of Morake Inc.

2.2 Background to the Complaint:

2.2.1 NWSCOPA invited the representatives of the Public Protector in the North West, the office of the Auditor-General in the North West, Public Service Commission in the North West and the South African Police Services to a special meeting on 31 January 2013 where allegations of inter alia mismanagement of public funds, the abuse of power and possibilities of corruption were raised against the background of a procurement process followed in the appointment of a legal firm for the North West Department of Finance in 2011.

2.2.2 Morake Incorporated (Morake Inc.), a law firm based in Rustenburg, was appointed on 4 August 2011 by the acting HOD of the North West Department of Finance, Mr G Paul, to assist the office of the MEC with, inter alia, the disciplinary processes against three officials in the Department and subsequent legal matters.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector was established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice,
to report on that conduct and take appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.3 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4 The Office of the Member of the Executive (MEC) of Finance in the North West Provincial Government is an organ of state and the conduct of its former incumbent and officials amounts to conduct in state affairs, as a result this matter falls within the ambit of the Public Protector’s mandate.

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

4. THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR

4.1 The Public Protector considered and investigated the following issues:

4.1.1 Whether or not the conduct of any officials or office bearers amounted to any maladministration or abuse of power in order to secure the appointment of Morake Inc. to assist the office of the MEC with legal matters;

4.1.2 Was the initial procurement of Morake Inc. on a quotation basis using the “urgency” mechanism under SCM prescripts, unlawful, improper or in violation of any applicable law and/or prescripts?
4.1.3 Did the MEC interfere with the SCM process resulting in Morake Inc. being unfairly preferred and was there an undeclared conflict of interest by the MEC?

4.1.4 Was the extension of the contract of Morake Inc. to other matters leading to an approximate R16 million bill, unlawful, improper and in violation of any applicable SCM law and/or prescripts?

4.1.5 Was the invoices submitted by Morake Inc. duly checked by officials of the Department and did the invoices contain incorrect or misleading information resulting in overbilling and overpayment and, accordingly, amount to fruitless and wasteful expenditure?

4.1.6 Was it necessary for Morake Inc. to appoint Senior Council to assist with the draft of disciplinary proceedings and further briefs to assist with the disciplinary proceedings?

4.1.7 Was the procurement of Valostar 263 CC, to provide recording and transcription services unlawful, improper and or in violation of any applicable law and/or prescripts?

4.1.8 Did the MEC subject officials unwilling to violate supply chain prescripts to any occupational detriment, including stage-managing the suspension and subsequent dismissal of 3 (three) senior officials?

4.1.9 Were the provisions of the Prevention and Combating of Corrupt Activities Act violated by the MEC or any other person as alleged? The issue was considered but not investigated and instead referred to the Directorate for Priority Crime Investigation (the Hawks).
5. THE INVESTIGATION

5.1 The investigation was conducted in terms of Section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, 1994 with the assistance of the office of the Auditor-General (AG) in the North West Province and the office of the Public Service Commission and comprised of:

5.1.1 Interviews and consultations, correspondence and telephonic communication between the office of the Public Protector South Africa in the North West and the Auditor-General and Public Service Commission in the North West.

5.1.2 Interviews and consultation, correspondence and telephonic communication between the Public Protector South Africa and the acting Head (HOD) of the Department of Finance, the former Director in the office of the MEC for Finance.

5.2 Consideration of the following legislation and legal prescripts:

5.2.1 The Constitution of the Republic of South Africa, 1996;
5.2.2 The Public Protector Act, 23 of 1994;
5.2.3 The Public Finance Management Act, 1 of 1999;
5.2.4 National Treasury Regulations; and
5.2.5 The Executive Members’ Ethics Act, 82 of 1998.

5.3 Research conducted on:

5.3.1 Procedures to be followed in terms of the Supply Chain Management processes as prescribed in the PFMA and Treasury Regulations.
5.3.2 In the process of finding answers to all of the issues investigated, the Public Protector was informed by the following inquiry:

5.3.2.1 What happened? This is a factual inquiry resolved on a balance of probabilities.

5.3.2.2 What should have happened? This establishes the standard that the impugned conduct should have upheld based on applicable law, policy and considerations of administrative justice and applicable sector benchmarks, and

5.3.2.3 Whether there is a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, maladministration, improper enrichment or conduct resulting in unlawful or improper prejudice to any person or the State, as envisaged in the Public Protector Act. The outcome depends on the extent of conduct deviation if any from the standard that should have been complied with.

5.4 During the briefing from NWSCOPA it was suggested that the agencies mentioned should jointly and/or severally investigate the allegations and then submit reports to NWSCOPA about their findings and suggested remedial actions.

5.5 The Auditor-General is to investigate the procurement process followed. However, due to the fact that the AG cannot submit a report in this regard as the institutional mandate focuses on Regulatory Audit to support other agencies, the Public Protector was requested to include the findings of the AG in its report. The investigation was to include the possibility of any maladministration in the procurement
process as reported by the Auditor-General and the possibility of an abuse of power by the MEC and/or officials in her office.

5.6 The Public Service Commission was given a written mandate by the Chairperson of NWSCOPA defining its terms of reference to investigate the suspension of the HOD for Finance and two (2) others with specific reference to the following:

5.6.1 The regularity of the suspensions of the following employees –

5.6.1.1 Mr J N T Mohlala – the Head of the Department (HOD);
5.6.1.2 Ms H Kasirivu – the former Chief Financial Officer (CFO) of the Department; and
5.6.1.3 Mr M Mogoane – the former Chief Director: Municipal Finance Management (CD: MFM) in the Department.

5.7 The South African Police Services, Commercial Crime Unit, was specifically requested to focus on any criminal aspects as defined in the Prevention of Corrupt Activities Act, 2004, and to allegations of corruption and fraud of the mentioned business entities that were awarded contracts for goods and services by the Department during the procurement process.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The Supply Chain Management Process: The appointment of Morake Inc.

6.1.1 On 15 July 2011 a letter from the Director in the office of the MEC, Mr Chris Molefe (Molefe), was submitted to the Supply Chain
Management/Tender Board under the heading "REQUEST OF REGISTRATION OF MORAKE INCORPORATED ATTORNEYS AND CONVEYANCERS, stating that:

"The MEC have (sic) previously used the services of this company, for the Department related duties, therefore the office is requesting that this company be registered as soon as possible, so that the Department could arrange payment of the above-mentioned company."

6.1.2 A supplier registration form for Morake Attorneys was captured on the database of the Department and supplier code 16932-000 was allocated on the system.

6.1.3 On 28 July 2011, Molefe, submitted a letter to the CFO (Ms Harriet Kasirivu) of the Department under the subject heading: APPOINTMENT OF LEGAL FIRMS, stating that:

"I hereby write to inform you that the office of the MEC has appointed three legal firms over a period of two years to assist the office of the MEC in any legal matters should a need arise.

The three legal firms who submitted their profiles are:

1. Morake Incorporated Attorneys and Conveyancers;
2. Van Velden and Duffey; and
3. Kgomo Mokhetle and Tlou Attorneys."

6.1.4 Notably, procurement process was not followed in terms of the PFMA to substantiate the contention that an appointment was made to any of the Legal Firms mentioned.
In response to this request, the acting HOD of the Department, informed the office of the MEC on the same day in writing suggesting specific procedures to be followed in order for the Department to comply with relevant procurement processes and two options were stated namely:

6.1.5.1 If the total cost of the project was less than R500 000.00 the process ensue go via a sealed quotation from the Legal Firms and furthermore that it was important that criteria was set for the required job so that all participants could understand the nature of the job and quote correctly. In terms of the SCM policy there was a need to follow the 80/20 principle during evaluation.

6.1.5.2 If the cost of the project was more than R500 00.00, to follow an open tender process and appoint the best bidder for the period of two years.

6.1.5.3 The suggestion was made to follow option 2 to procure the required services.

6.1.5.4 On 29 July 2011, Molefe directed a letter to the acting HOD with the subject heading REQUEST FOR DEVIATION FROM COMPETITIVE BIDS. The following are extracts from the said letter:

"Hon Louisa Mabe suspended the substantive Head of Department of Finance on 22 July 2011.

It is important that the MEC develop a charge sheet and provide it to suspended person within 14 days of suspension. It is impractical to follow normal procurement process to appoint a legal firm to assist the MEC to draft the charge sheet."
I hereby request to deviate the competitive bid process according to section 16 A 6.4. We will ensure the following process:

- At least 3 quotations will be requested
- The charge out rate per hour will be compared with DPSA rate."

6.1.6 On page 2 of the letter under the heading Comments the acting HOD replied:

"Request for the deviation from Competitive Bids to appoint a legal Firm. Considering the urgency of the matter and steps you are going to follow as per above you may deviate from the normal bidding process as per section 16 A 6.4. The amount should not exceed R500,000" (Our emphasis).

6.1.7 Again on the same day (28 July 2011), Chris Molefe submitted a letter to the acting Head of the Department under the heading “SUBMISSION OF DOCUMENTS FOR PENDING LEGAL PROCESS” and stated:

"Kindly receive the quote from Legal firms as discussed earlier."

6.1.8 Three quotations from the Legal Firms as mentioned in paragraph 7.1.3 accompanied this letter. All the quotations were dated 26 July 2011.

6.1.9 The acting HOD signed a letter of appointment on 4 August 2011 under the heading NWDF71/2011: APPROVAL FOR THE APPOINTMENT OF A LEGAL FIRM – OFFICE OF THE MEC, stating that:

"The Accounting Officer has on 29th July 2011 approved the request for the appointment of a legal firm for a duration to assist the MEC Office for the development of charge sheet and assistance with legal
matters to conclude the suspension cases for an amount not exceeding R500 000."

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<td>Candidate Attorney per hour</td>
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6.1.10 Another letter with the heading “NWDF71/2011: APPROVAL FOR THE APPOINTMENT OF A LEGAL FIRM" dated 5 August 2011 and signed on 4 August 2011 by the acting HOD and Morake read:

"We refer to the above-mentioned subject matter.

The Acting Accounting Officer has on 29th July 2011 approved the request for the appointment of Morake Incorporated Attorneys for the duration of 18 months to assist the MEC with the following:

3. The disciplinary proceedings and other
4. Legal matters

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</table>

The reports will be submitted to the MEC and the Department will be responsible for all disbursements for the services rendered. (our emphasis).
Morake Incorporated Attorneys will be responsible to appoint relevant service providers for the proceedings in consultation with the office of the MEC." (Emphasis added).

(According to the acting HOD this was the only letter of appointment that was issued to Morake Inc. after the letter mentioned in paragraph 6.1.6 was changed or amended on the instructions of Molefe. Furthermore, noticeably, there was no mention of the threshold of R500 000 in this letter.) It is also quite strange that the appointment of Morake was made on 29 July 2013, but that the letter of appointment was only signed by the Acting HOD on 4 August 2013.

6.1.11 In this regard the appointment letter refers to the fact that the Department will be responsible for all disbursements for the services rendered.

6.1.12 "Disbursement" means a sum of money paid by an attorney in a matter other than as fees or charges.

6.1.13 Attorney and Own Client Costs are the costs for which the client is liable to his attorney, for services rendered or disbursements incurred on his behalf. These costs are governed by a private agreement or contract entered into between the attorney and his client at the outset of the mandate (sometimes referred to as a “Legal Services Contract”).

---

2 Meaning of "disbursement" as defined in the 2001 Legal Aid guide – http://www.pmg.org.za/docs/2002/appendices/020212LegalAid.htm -
6.1.14 The appointment letter furthermore states that Morake Inc. will be responsible for the appointment of service providers for the proceedings in consultation with the office of the MEC.

6.1.15 On 19 August 2011, Morake submitted an invoice DC001/08/2011 dated 29 August 2011 to the office of the MEC for payment for services rendered for an amount of R237 440.16. The account was submitted to the SCM section of the Department for payment by Molefe and payment was effected on 1 September 2011. On the statement of the account of Morake which accompanied the invoice the heading only read: "From: 29 July 2011". Noticeably, there are no dates mentioned as to when the specified services as listed were rendered. The same applies for invoice DC002/08/2011 dated 16 September 2011.

6.1.16 Evidence however, indicates that the services of Morake Inc. were rendered before the appointment letter was signed by the HOD. In this regard an invoice of Adv. HvR Woudstra that was submitted to Morake Inc. dated 28 July 2011 refers. Dates between 13 July 2011 and 28 July 2013 appear on the invoice where reference is made to the subject matter "MEC FINANCE, NORTH WEST PROVINCE / HOD FINANCE DEPARTMENT (MR JNT MOHLALA) NORTH WEST PROVINCE".
### IN/ RE: MEC FINANCE, NORTH WEST PROVINCE/ HOD FINANCE DEPARTMENT (MR JNT MOHLALA) NORTH WEST PROVINCE

<table>
<thead>
<tr>
<th>Date/Datum</th>
<th>Amount/ Bedrag</th>
</tr>
</thead>
<tbody>
<tr>
<td>13/07/2011</td>
<td>Peruse and consider documents received from attorney regarding disciplinary matter and advise him on this. 10h00 – 10h45 (45 min)</td>
</tr>
<tr>
<td>10h45 – 11h45 (1 hour)</td>
<td>Discuss further procedure with attorney and draft letter regarding these requirements</td>
</tr>
<tr>
<td>18/07/2011</td>
<td>Consult with MEC and attorney on procedure to be adopted regarding disciplinary matter 10h00 - 12h15 (2 hours 15 min)</td>
</tr>
<tr>
<td>10h45 – 11h45 (1 hour)</td>
<td>Draft letters to the Premier and draft pre-suspension and suspension letters and settle same 12h15 – 13h30 (1 hour 15 min)</td>
</tr>
<tr>
<td>23/07/2011</td>
<td>Consultation with MEC and attorney on position HOD; possible charges CFO and Chief Director 09h00 – 12h30 (3 hours 30 mins)</td>
</tr>
<tr>
<td>25/07/2011</td>
<td>Start drafting letter regarding laptop and cell phone HOD; drafting letter re suspension of CFO and Chief Director; start perusing two files regarding disciplinary charges against the HOD for the purposes of drafting charges against him 08h30 – 13h00 (4 hours 30 min) 13h30 – 14h00 (2 hours 30 min)</td>
</tr>
<tr>
<td>26/07/2011</td>
<td>Continue perusing two files regarding HOD for purposes of drafting charges 08h30 – 13h00 (4 hours 30 min)</td>
</tr>
<tr>
<td>27/07/2011</td>
<td>Peruse and consider draft report of Auditor-General and discuss same with attorney and draft memo to him in this regard; continue to peruse and consider files HOD re preparation for charges against him 09h45 – 13h00 (3 hours 15 min) 14h00 – 16h15 (2 hours 15 min)</td>
</tr>
<tr>
<td>28/07/2011</td>
<td>Finalise perusing of two files re HOD and start with drafting of memorandum to attorney and client on all present charges against the HOD, CFO and Chief Director and settle same 09h15 – 12h45 (3 hours 30 min)</td>
</tr>
</tbody>
</table>

Total time spent: 31 hours 30 min @ R2 600.00/hour 81 900.00

Total before VAT/ Totaal voor BTW 81 900.00
VAT/ BTW (14%) 11 466.00
TOTAL/ TOTAAL 93 366.00

6.1.17 The amount for the payment of the invoice of Adv. Woudstra is listed under item 23 as a disbursement on the statement of account by Morake Inc. of invoice DC001/08/2011 dated 29 August 2011.

6.1.18 On 19 September 2011, Morake submitted a second account for the amount of R254 820.64 for payment, which was effected on 27
September 2011. The total amount of the two invoices submitted was R492 260.80.

6.1.19 The Department allegedly realised that the threshold of R500 000 on the quotation based process followed was to be exceeded and then published advertisements inviting bids (tenders) in the print media. The bid number is referred to as NWDP105/2011 and the bid description read: "Appointment of a panel of legal advisers to provide legal and other services to the Department of Finance as and when required". The bid documents were made available from 27 September 2011 and the closing date for the bids was 12 October 2011.

6.1.20 An Evaluation Committee considered the bids received from prospective legal firms on 10 November 2011 and submitted its recommendations to the Departmental Procurement Committee to consider the appointment of a panel of legal firms in terms of the advertised tender on 18 November 2011. Three elimination phases were followed. During the first phase five (5) companies did not comply. During phase 2, nine (9) companies were eliminated and ultimately 6 companies were approved to be listed. Morake Inc. was one of the companies that qualified.

6.1.21 Appointment letters were sent to all the qualifying firms that formed the selected panel. One of the requirements stated in the appointment letter reads: "Quotations will be solicited from the approved panel of service providers, thus the service providers have the responsibility to ensure that their companies are duly registered in the NWPG supplier database".
6.1.22 No evidence could be obtained indicating that Morake Inc. or any of the listed legal firms submitted any quotations for services to be rendered under tender NWDF 105/2011.

6.1.23 Morake Inc. continued to render services to the office of the MEC and submitted invoices for payment to the Department. Noticeably, some of the invoices included reference to legal services that pertain to a matter of the Department of Finance/Department of Health.

6.1.24 Documents and comments contained in a report received from the Auditor-General in the North West Province relating to the appointment of Morake state the following:

“Payments made based on three quotations obtained:

<table>
<thead>
<tr>
<th>No</th>
<th>Order date</th>
<th>Invoice date</th>
<th>Payment approval</th>
<th>Order number</th>
<th>Invoice number</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
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<td>07G025825P</td>
<td>DC002/08/2011</td>
<td>254,820.64</td>
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Requirements

Treasury regulations refer:

16A6.1 Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.

National Treasury practice note no 8 of 2007/2008:
3.3 Above the transaction value of R10 000 but not exceeding R 500 000 (vat included)

3.3.1 Accounting officers / authorities should invite and accept written price quotations for requirements up to an estimated value of R500 000 from as many suppliers as possible, that are registered on the list of prospective suppliers.

Preferential Procurement Policy Framework Act, 2000; GN R725 of 10 August 2001:

Regulations:

3. The 80/20 preference point system.—(1) The following formula must be used to calculate the points for price in respect of tenders/procurement with a Rand value equal to, or above R30 000 and up to a Rand value of R500 000.

Findings:

Although three written price quotations were obtained the following discrepancies were noted:

a) Quotations (NWDF 71/2011) were only requested for the fee structure from three different attorneys and not for the specific service to be rendered.

b) Quotations were requested directly by Mr Molefe (Office of the MEC) and supply chain unit (SCM) were not involved in obtaining quotations.

c) Only Rustenburg based attorneys were requested for quotations.

d) Quotations were not evaluated using the 80/20 preference point system as required by the PPPFA. Furthermore the highest quotation (Morake Incorporated) was selected with no reason to justify it.
e) Quotations were obtained on 26/27 July 2011 although approval to deviate from the SCM process, from the accounting officer (Mr G Paul) were only given on 29 July 2011.

f) Payments were made although the charge sheets were not completed by the attorney.”

6.2.1 The following payments were made based on the so-called tender (NWDF105 of 2011) Provision of legal services:

<table>
<thead>
<tr>
<th>Order date</th>
<th>Invoice date</th>
<th>Payment approval</th>
<th>Order number</th>
<th>Invoice number</th>
<th>Amount</th>
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<td>DC013/04/2012</td>
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<td>DC015/04/2012</td>
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<td>2012/06/12</td>
<td>2012/06/06</td>
<td>JJ Mosia</td>
<td>07G027603P</td>
<td>DC023/05/2012</td>
<td>536,192.72</td>
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</tbody>
</table>
“Requirements

Preferential Procurement Policy Framework Act, 2000; GN R725 of 10 August 2001: Regulations refer:

6. The 90/10 preference point system for the sale and letting of assets.—(1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value above R500 000
Findings:

a) Although a formal tender process (NWDF105/2011) was followed for appointing a panel of legal advisors the following discrepancies were noted:

b) The departmental evaluation committee in evaluating the tenders only evaluated the tenders for functionality (10 points) and not also on price (90 points). As a result when legal services are required the department should obtain price quotations from the panel and evaluate the price (90 points) before awarding a contract for services. This was not done by the department.

c) As per letter from the accounting officer (Mr Paul) to the panel of legal firms quotations shall be invited from them when legal services are required, however no quotations were invited from the panel and only Morake Incorporated with the highest rate per hour were appointed for the disciplinary cases.

d) As per letter from the accounting officer to the panel of legal advisors they are appointed from 18 November 2011 until 17 November 2013. As per list of payments and invoices an amount of R1,601,396.55 was invoiced to the department from Morake Incorporated on 29 November 2011 – this is unrealistic taken into account tender only awarded on 18 November 2011.

e) Morake Incorporated were appointed on 05 August 2011 (letter from Mr G Paul signed on 04 August 2011) to provide legal services for a period of 18 months to the department. – This appointment was done before the other panel members were appointed on 18 November 2011.

f) The following discrepancies were noted from the review of invoices of Morake Incorporated:
i) Ernst and Young were paid an amount of R1,248,963.80 – the department did not verify whether services were rendered before this amount was paid.

ii) Adv Woudstra were paid an amount of R4,335,391.00 – the department did not verify whether services were rendered before this amount was paid.

iii) Adv Dreyer and Kirstein were paid an amount of R906,219.00 – the department did not verify whether services were rendered before this amount was paid.

iv) Every invoice submitted include telephone cost of +/- R7 000 = R7 000 x 3 cases = R21 000 per month invoiced – the department did not verify whether services were rendered before this amount was paid.

v) Valostar 263 were paid R612,699 – this is in addition to the amount paid directly by the department as invoiced from Valostar 263 CC.”

(The above references to costs refer to ‘examples’ of disbursements claimed by Morake for 3rd parties, including the inflated telephone costs.)

6.2.2 In perusing the statements of accounts submitted by Morake Inc. with invoices, the following anomalies have been noted by the Public Protector:

6.2.2.1 Statement of account submitted with invoice DCDC006/03/2012 dated 9 March 2012 (disciplinary proceedings of Mr Mogoane) reflects under date entry 6/2/12 traveling costs from Rustenburg to Mahikeng and back to Rustenburg for which hourly rates and disbursements were claimed. Statement of account submitted with invoice DC007/03/2012 dated 9 March 2012 (disciplinary proceedings of Mr Mohlala) reflects under date entry 6/2/12 traveling costs from Rustenburg to Mahikeng
and following that disciplinary hearing was attended on 6 (day 1), 7 (day 2), and 8/02/12 (day 3) with a return journey back to Rustenburg on 8/02/2012 for which hourly rates and disbursements were claimed. In this regard the Department has thus paid twice for traveling costs from Rustenburg to Mahikeng and back to Rustenburg. Furthermore, considering that Morake attended disciplinary hearings on 6,7,and 8 February 2012 in Mahikeng, the return journey from Mahikeng back to Rustenburg as claimed for on 6/2/2012 raises suspicion.

6.2.2.2 Statement of account submitted with invoice DC006/04/2012 (disciplinary proceedings Mohlala) reflects under date entry 23/04/2012 traveling costs from Rustenburg to Mahikeng and back for which hourly rates and disbursements were claimed. The statement of account submitted with invoice DC013/04/2012 also reflects travelling costs on date 23/04/2012 from Rustenburg to Mahikeng and return including hourly rates and disbursements. In this regard the Department has thus paid twice for traveling costs, hourly rates and disbursements from Rustenburg to Mafikeng and back to Rustenburg on the same date.

6.2.2.3 Statement of account (disciplinary proceedings Mohlala) submitted with Invoice DC036/08/2012 reflects under date entry 25.07.12 that travel was undertaken from Rustenburg to Mahikeng (3 hours) to attend disciplinary a hearing (1 day). On the statement of account (Department of Health: Peolwane) that accompanied Invoice DC034/08/2012 an entry on the same date, 25.07.2012 reflects travel cost from Rustenburg to Pretoria and back. Directors’ fees were claimed in both these instances, seeing that Morake only has one director this issue raise some serious concerns as to the validity of the claims submitted.
6.3 The Supply Chain Management Process: Appointment of Valostar 236 CC.

6.3.1 Quotations were allegedly obtained from three service providers for recording and transcribing services during the proceedings at the disciplinary hearings of three officials of the Department of Finance.

6.3.2 However, evidence could not be obtained that the quotes were submitted with a formal request for approval by the SCM section of the Department or that any company was formally appointed.

6.3.3 On 17 November 2011 a letter was directed by Molefe to the SCM section under the heading "MOTIVATION FOR USING VALOSTAR 236 WHICH IS NOT THE CHEAPEST" and which stated:

"The office requests the approval for the services of Valostar for the following reasons;

1. Unlike Digital Audio Recording Transcriptions which is the cheapest, Valostar 236 comes from the Province.
2. It is owned by the historically disadvantaged.
3. It is owned by a woman.”

6.3.4 Evidence could not be obtained that the services of Valostar 236 CC were ever approved following the request. In the minutes dated 28 February 2012 of the Departmental Procurement Committee (DPC) mention is made under NWFD173/2011 that the Committee has noted the approval for the recording in the Office of the MEC for Hearing of Mr Mohlala, Mr Mogoane and Ms Harriet Kasirivu to an amount of R144 026.40.
6.3.5 Similar notations for approval by the DPC were recorded during meetings held on 30 May 2012 and 23 August 2012. The amounts recorded are the following:

### 30 May 2012

<table>
<thead>
<tr>
<th>REFERENCE</th>
<th>SUPPLIER</th>
<th>DESCRIPTION</th>
<th>TOTAL AMOUNT (VAT INCL.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NWDF04/2012</td>
<td>Valostar 236</td>
<td>Disciplinary Hearing of Mr Malele Mogoane</td>
<td>R150,566.00</td>
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<tr>
<td>NWDF05/2012</td>
<td>Valostar 236</td>
<td>Disciplinary Hearing Mr JNT Mohlala</td>
<td>R66,850.00</td>
</tr>
<tr>
<td>NWDF24/2012</td>
<td>Valostar 236</td>
<td>Disciplinary Hearing of Ms Harriet Kasirivu Invoice</td>
<td>R193,872.50</td>
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<tr>
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<td></td>
<td>Invoice #0226</td>
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### 23 August 2012

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<tr>
<th>REFERENCE</th>
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<th>DESCRIPTION</th>
<th>TOTAL AMOUNT (VAT INCL.)</th>
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<tr>
<td>NWDF39/2012</td>
<td>Valostar 236</td>
<td>Disciplinary Hearing of Mr Mohlala</td>
<td>R182,722.50</td>
</tr>
</tbody>
</table>

6.3.6 On 18 July 2012 Mr Mammen from SCM in the Department submitted a letter to the acting HOD under the heading "PAYMENT TO VALOSTAR" that reads as follows:

"The above-mentioned company was used to record the proceeding of the disciplinary hearing of the three senior managers in our department. The Departmental Procurement Committee approved the
first three payments on the basis that it won't exceed the R500,000.00. The forth payments were submitted to the DPC for approval on the 2nd May 2012. The DPC approved the payment on condition that the Acting Head of Department must approve the payments. The total amount at this stage is R662,488.90. It exceeds the limit of R500,000.00 for quotations.

The fifth payments request was submitted by the MEC office to the SCM on the 17th July 2012 for processing the payments. The amount is R182,722.50. The total payments will be R842,211.40.

The SCM unit humbly requests the Acting Head of Department to approve both the payments. The supplier is looking for his payments. After the HOD approval, the SCM unit will submit to the DPC for approval.

The acting HOD made the following comments:

Approval is granted considering the following:
- Continuation of same service provider for the same cases.
- DPC should consider for approval
- Initial estimates was this process does not exceed R500,000.00
- SCM unit now need to get more quotations to make final awarding in time with SCM process.

6.3.7 Documentation and comments contained in a report received from the Auditor-General in the North West Province relating to the appointment of Valostar 236 CC.
6.3.8 “Payments made by the Department direct to Valostar 263 CC;

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
<th>Date</th>
<th>Order no</th>
<th>Payment approved by</th>
</tr>
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<tbody>
<tr>
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<tr>
<td>VALOSTAR 263</td>
<td>150,655.00</td>
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<td>07G027293P</td>
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<td>VALOSTAR 263</td>
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<td><strong>845,211.40</strong></td>
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</table>

Requirements

Treasury regulations refer:
16A6.1 Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.

NATIONAL TREASURY PRACTICE NOTE NO 8 OF 2007/2008 refer:

3.3 ABOVE THE TRANSACTION VALUE OF R10 000 BUT NOT EXCEEDING R 500 000 (VAT INCLUDED)

3.3.1 Accounting officers should invite and accept written price quotations for requirements up to an estimated value of R500 000 from as many suppliers as possible, that are registered on the list of prospective suppliers.

3.4.1 Accounting officers should invite competitive bids for all procurement above R 500 000.

Preferential Procurement Policy Framework Act, No 2000; GN R725 of 10 August 2001: Regulations refer:
a) The 80/20 preference point system.—(1) The following formula must be used to calculate the points for price in respect of tenders/procurement with a Rand value equal to, or above R30 000 and up to a Rand value of R500 000.

b) The 90/10 preference point system for the sale and letting of assets.—(1) The following formula must be used to calculate the points for price in respect of tenders with a Rand value above R500 000

Findings:

a) Although three written price quotations were obtained the following discrepancies were noted:

b) Two of the three quotations requested were not valid quotations i.e no dates or for what specific service to be rendered.

c) Quotations were requested directly by Mr Molefe (Office of the MEC) and supply chain unit (SCM) were not involved in obtaining quotations.

d) Only Rustenburg / Pretoria based suppliers were requested for quotations.

e) Quotations were not evaluated using the 80/20 preference point system as required by the PPPFA. Furthermore the second highest quotation (Velostar) was selected with no reason to justify it.

f) Total payments is above R500 000 therefore competitive bidding process should have been followed.”

6.3.9 It was noticed that since August 2012 on the "statement of account" that was submitted with the invoices of Morake Inc. claims and payment for Valostar 236 CC as disbursements were listed as follows:
### INVOICE DATE (MORAKE) | AMOUNT CLAIMED AS DISBURSEMENT (EXCLUDING FEES ADDITIONALLY CHARGED)
--- | ---
30 August 2012 | R112,417.50
30 August 2012 | R127,545.00
28 September 2012 | R181,077.50
4 December 2012 | R155,672.50
**Total** | **R576,712.50**

6.3.10 Besides the amounts claimed directly by Valostar 236 CC the Department has thus also paid additional amounts as disbursements on invoices submitted by Morake Inc.

6.4 **Alleged excess payment made to Morake Inc. to the estimated amount of R21 133 832.20 as recorded on the BAS System:**

6.4.1 In this regard the Auditor-General reported as follows:

"We obtained and inspected the general ledger of provincial treasury as at 31 December 2012 and it indicated a total amount of R22,361,228.66 paid to Morake Inc. as beneficiary.

“We obtained the payment vouchers and noted a payment made to SITA of R6,892,908.38 that was incorrectly classified as a payment to Morake Inc. for legal fees”. (Our emphasis).

"The actual payments made to Morake Inc until 31 December 2012 is R15,468,380.28."
The amount of R15,468,380.28 is made up of the amounts paid to Morake Inc. by virtue of the amount of R492,260.80 paid under Payments made based on three quotations obtained” (See paragraph 6.2) and the amount of R14,976,119.48, based on tender (NWDF105 of 2011) Provision of legal services. (See paragraph 6.2.1).

6.4 Comments received on the provisional report from the former MEC for Finance in the North West, Ms L Mabe:

6.4.1 On the appointment of Morake Inc., Ms Mabe states the following:

"I need to re-emphasise the fact that on the documentation obtained by the Public Protector’s assistant, Adv J. Raubenheimer and his team, there is not even a single document that can be ascribed to the person of the MEC for Finance having either given direct instructions to appoint Morake Inc. or to flout procurement processes as alleged.

To the contrary, the official in the office of the MEC, Mr Chris Molefe, is the one whom it is alleged that has written letters dated 15 July 2011, 28 July 2012 and 29 July 2011 wherein he made mention of the name of the MEC…

"… I wish to categorically deny that I have ever given Molefe any of the instruction (sic) and/or directives communicated in the said letters and have a strong suspicion that all these consulted a name-dropping exercise and as the Public Protector has correctly recommended, appropriate disciplinary action must be investigated and those who are found to have wrongfully used their positions must be brought to book."
6.4.2 On the procurement process followed Ms Mabe inter alia indicated that; "...the Public Finance Management Act and the Treasury Regulations are very clear in terms of the roles and responsibilities of Accounting Officers and other senior managers in the department in as far as ensuring that the resources are utilised efficiently and economically. To this end, the procurement of goods and services is done through a process which is outlined in the SCM Regulations and it is not even suggested that either the MEC or any of her staff members participated in these committees at any stage".

6.4.3 Invoices submitted by Morake Inc. for payment: In this regard Ms Mabe indicated that it would not be expected of the MEC to have received and scrutinised each and every invoice received for services rendered from all those who were sub-contracted by the law firm. This is a responsibility of the relevant supply chain management and financial management practitioners within the department.

6.4.4 On the involvement of Morake Inc. in the litigation involving Peolwane Properties and the Department of Public Works, Roads and Transport and the Department of health, Ms Mabe indicated that it was resolved by an EXCO resolution which mandated the Department of Finance to do investigation as Treasury and in the process obtained an urgent legal opinion on the matter in as far as the commitment of provincial budget over a long period of time was concerned. In this regard a litigation process was already in progress when the Department of Finance was mandated as expounded above and it was therefore necessary and in the best interest of the provincial government to deviate from the usual procurement processes and utilise the services of a firm of attorneys that was already appointed.
6.5 A response to the provisional report was received from the MEC of Finance, Mr P M Sebegoe, dated 15 August 2013 in which he stated that: “the issue of Morake appeared on the previous Audit trail and at the time did not pick up these irregularities, and that was the report I had to rely on, until the recent side issues we raised.”

6.6 He further indicated that after the issues in question were brought to his attention he instructed his newly created Legal Services to attend to same and that they are still in the process of doing same.

6.7 The Public Protector received a further response from Mr J J Mosia, the director MEC’ Support, dated 15 August 2013 in which he stated that: “…the only reason for the Director on the MEC’s Office Mr Chris Molefe being signatory to the transaction/ Invoices of Morake Inc was merely for the purpose of confirming that the sittings of the disciplinary hearing took place.”

6.8 He further stated that: “…given the circumstances I have alluded to even if there are irregularities or flaws underlying this tender I would have had no recourse to review the process unless if I was fully briefed such that I could advise the MEC accordingly.

I can only confirm the dates I had signed for in relation to invoices from Morake Inc are in line with sittings that took place and were signed for that purpose only and wish to reiterate that the authorisation of payments of invoices of Morake Inc was squarely the responsibility of supply chain management (SCM) in accordance with the conditions of tender.”
7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 The Procurement Process followed:

7.1.1 In view of the above report by the AG and other documentation obtained, the questions were raised with the acting HOD of the Department and henceforth the responses received:

7.1.1.1 Allegedly the quotations were requested directly by Mr Molefe (Office of the MEC for Finance) and the Supply Chain Management (SCM) of the Department was not involved in obtaining quotations

(i) Is the Process followed procedurally correct?

“Manager in the Office of the MEC is the most suitable person considering the nature of the service required. Also the amount requested was limited to below R500 000. In other similar cases in the department managers are requested to get quotation and submit to the SCM Unit for the decision making. At the time of decision making nothing strange was noted in the Office Manager in getting quotations and submit to the SCM Unit.”

7.1.1.2 Only Rustenburg based attorneys were requested to quote, whereas the officials charged for alleged misconduct were all based in Mahikeng and that the disciplinary process would be conducted in the Mahikeng area.

(i) Any motivation why this process was followed?
"Three quotations were submitted by CM to our SCM office with a verbal request that MEC is more comfortable to work with Morake Attorneys and this firm is at Rustenburg so MEC could meet with them before she leaves home. Also the sensitivity of the matter was mentioned.

I am not sure why these quotations were all obtained from Rustenburg alone. Please check with Chris Molefe."

7.1.1.3 Quotations were not evaluated using the 80/20 preference point system as required by the PPPFA. The highest quotation (Morake Incorporated) was selected.

(i) What was the reason for the deviation from the preferential point system and why was the highest quotation selected and awarded?

"The quotations were not fully evaluated by using 80/20 preference point system as required by the PPPFA. Because it is not a formal tender process and the amount is less than R500,000 no evaluation or adjudication committees involved in the process. Please note that the preference points for all the three suppliers were zero considering no body provided any proof for claiming the points. The rates submitted were the following:

<table>
<thead>
<tr>
<th>Level of Expertise</th>
<th>Morake</th>
<th>Van Velden</th>
<th>Mogau</th>
</tr>
</thead>
<tbody>
<tr>
<td>Director</td>
<td>R 2 800/hr</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Professional Assistance</td>
<td>R1 500/hr</td>
<td>R2 500/hr</td>
<td>R1 500/hr</td>
</tr>
</tbody>
</table>
Calculation of costs as per quotations on an estimated 100 hours:

<table>
<thead>
<tr>
<th>Level of Expertise</th>
<th>Number of Hours</th>
<th>Morake</th>
<th>Van Velden</th>
<th>Mogau</th>
</tr>
</thead>
<tbody>
<tr>
<td>Director</td>
<td>20</td>
<td>56 000</td>
<td>50 000</td>
<td>30 000</td>
</tr>
<tr>
<td>Professional Assistance</td>
<td>30</td>
<td>45 000</td>
<td>75 000</td>
<td>45 000</td>
</tr>
<tr>
<td>Candidate attorney</td>
<td>50</td>
<td>37 500</td>
<td>125 000</td>
<td>75 000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100 (Hours)</strong></td>
<td><strong>R138 500</strong></td>
<td><strong>R250 000</strong></td>
<td><strong>R150 000</strong></td>
</tr>
</tbody>
</table>

The rates as quoted by the three firms only Morake was quoted for a Director. Others did not specify what level of officials will be used. Morake’s rate was the cheapest if we use an estimated 100 hours (20hrs for Director, 30 hrs for Professional assistance and 50 hrs for candidate attorney). At the time of choosing the firms it was also unknown that how many hours of Director would be required during the whole case proceedings."

7.1.1.4 Quotations were already obtained on 26/27 July 2011. Despite guidelines on procedures to be followed as directed to the office of the MEC from the accounting officer (letter dated 28 July 2011), the approval to deviate from the SCM process was given on 29 July 2011.
(i) Any motivation as to why the Department continued with the specific deviated process followed?

"The deviation letter was provided on 29 July 2011. At the time of providing deviation I was not aware of quotations were already obtained for the appoint (sic) of a Legal Person to assist Office of the MEC."

7.1.1.5 Morake Incorporated was appointed by the accounting officer vide his letter NWDF71/2011: APPROVAL FOR THE APPOINTMENT OF A LEGAL FIRM –OFFICE OF THE MEC on 4 August 2011 to perform specific functions namely “to assist the MEC for the development of charge sheet and assistance with legal matters to conclude the suspension cases for an amount of not exceeding R500 000.” However, a second letter of appointment under the same reference NWDF71/2011 dated 5 August 2011, but already signed on 4 August 2011 (our emphasis), was issued to Morake Incorporated for a duration of 18 months to assist the MEC with the following: “3. The disciplinary proceedings and other 4. Legal Matters.” (sic). In the appointment letter it is also mentioned that the Department will be responsible for all the disbursements for the services rendered and that Morake will be responsible to appoint relevant service providers for the proceedings in consultation with the office of the MEC.

(i) Was the appointment of Morake in the second letter also subject to the threshold of R500 000 as contained in the first appointment letter dated the same day, and if not, was a further or separate procurement process followed in terms of the PFMA for this appointment?
"It is our normal practice to send the approval letter to the requester and through the manager to the Supplier. When the original letter was sent to the Office Manager – Chris Molefe, it was returned by him to our SCM Staff to make few changes as suggested by the MEC Office. The second letter with changes were sent to the Supplier and that is the one they signed for.

In fact the understanding not to exceed the limit of R500 000 was clearly written to the Office Manager and he understood the implication of it. The letter to Chris Molefe was never withdrawn. The submission from the C Molefe for deviation and the reply from the Accounting Officer the conditions of deviation clearly stipulate the need to keep the cost within R500,000. This was clear when he approached the SCM Unit for an open Tender process during October 2011."

(ii) The quotations were submitted to the SCM Unit for selecting a supplier by Chris Molefe, the Director in the Office of the MEC;

(iii) As explained earlier requests less than R500 000 does not go through formal evaluation or adjudication committee like a Tender process other than just comparison of the prices. This selection process by appointing an evaluation and adjudication committee was only started recently for all procurements more than R30 000. In the case of Morake’s appointment only a comparison of rates were done to see how will be the possible charge out for 100 hours as explained in the other report. This approval was later ratified by the DPC in their register.”
7.1.1.6 Payments were made on two (2) invoices to Morake on orders 07G025642 dated 01/09/2011 (R237440.16) and 07G025825 dated 27/09/2011 (R254820.64) totalling an amount of R 492 260.80. It is alleged that despite the amount paid, the completion of charge sheets and to conclude the suspension cases, for which the firm was initially appointed and contracted, was not completed by Morake at the time of the payment of the invoices.

(i) Is there a responsibility to oversee that the services initially contracted for were indeed rendered before payment is made, and if so, what steps were taken to address this?

"During June 2011 MEC issued a letter informing all the Departmental staff about withdrawal of all HR Powers such as appointments, dismissals etc from the HOD.

No discussion was done with Acting HOD about other two suspensions. All these were managed from the Office of the MEC. Acting HOD heard from the CFO that MEC was trying to suspend CFO. Acting HOD took initiative to go and talk to MEC and suggested to reconsider and to move CFO to another section and continue with internal disciplinary route. But MEC continued with her action and told Acting HOD not to be involved in these matters. Also mentioned that friendship with CFO should not affect judgment.

It is important to note that MEC didn’t involve any internal officials and the Acting HOD to advise or assist in the entire three case proceedings.

During November 2011, MEC was told by Legal People that suspension of two SMS by the MEC was not procedurally correct and MEC told Acting HOD to cancel the suspension of CFO and bring her
back for one day and suspend her again by the Acting HOD. Acting HOD suggested to MEC the suspension letter written by Executive Authority cannot be withdrawn by Acting HOD and it was really unfair to play with life of people. MEC withdrew the suspension of CFO and as per MEC instruction Acting HOD suspended CFO again.

Instruction from the MEC to the Acting HOD was to continue with Treasury activities and run the Department effectively. MEC was taking care of all disciplinary issues.

Please note that none of the Departmental Staff were involved in the whole case proceedings. The Office of the MEC was responsible for validating the services and signing of the invoices before payment. All payment invoices were gone through the MEC Office for sign off before the payment.”

"It was confirmed by the the acting CFO and SCM officer that a verbal request from MEC office specifically from Chris Molefe with changed words to the first letter was brought to the SCM Office before the second letter was written. During the change the limit was never agreed to exceed the threshold of R500 000"

7.1.1.7 Payments totalling R1,601,396.55 were made to Morake on an invoice submitted on 29 November 2011. On the invoice reference is made to payment for services for “Health / Peolwane” which allegedly does not relate to the disciplinary proceedings of the three incumbents.

(i) Was a procurement process followed for the services for the Department of Health/Peolwane matter or was this invoice covered by the appointment under NWDF71/2011. Furthermore,
the invoice submitted by Morake seems to be unrealistic taken into account that tender NWDF105/2011 was only awarded on 18 November 2011.

" Formal appointment of the Legal Firms to assist the Department with Legal matters were only done on 18 November 2011. The payment was effected only after the Tender was awarded. We cannot confirm that whether the MEC Office engaged the Service Provider before the appointment in November 2011. "

7.1.2 Formal Tender Process (NWDF 105/2011)

7.1.2.1 The departmental evaluation committee in evaluating the tenders only evaluated the tenders for functionality (10 points) and not also on price (90 points).

(i) Was this the case, and if so, why was there a deviation?

"Price was a determining factor as stated per the comparative sheet provided to you. The challenge was that each Service providers were quoting different prices for various types of services. But price was one of the major factors. You could check the Tender file for this clarification. Please note that the purpose the Tender was to identify service providers who could assist the Department in the Legal Process.

This is a standard wording which was added to all the letters. During the Tender the service providers were already provided the rates per hour and it is not necessary to have same rate again. No further quotations were solicited before the firms were appointed. The MEC
office should consider the rotation of suppliers when new assignments were done. Office of the MEC continued with Morake Attorneys.

You are also requested to consider the Circular 3 of 2003 clause 10.5.2 in this regard. As per this circular under special circumstances the department may consider the continuation of the same service provider."

7.1.2.2 In a letter from the accounting officer to the Director in the office of the MEC dated 8 December 2011, it is stated under terms and conditions: “Quotations will be solicited from the approved panel of service providers, thus the service providers have the responsibility to ensure that their companies are duly registered in the NWPG supplier database.” This clause is also contained in the letters of appointment to the successful firms in terms of bid NWDF105/2011.

(i) Was quotations solicited from all the firms listed as the panel in terms of bid NWDF105/2011 to continue with the disciplinary process of the 3 officials, and if not, the reasons therefore?

No response on this question was received from the acting HOD.

7.1.2.3 From the panel of Attorneys, Morake was instructed to proceed with the drafting of charges for the three incumbents and finalise the disciplinary hearings against them. (See letter from Acting Head of the Department to the Chairperson of Scopa dated 24 January 2013).
(i) Was there an appointment letter to Morake in this regard, and on what basis e.g. without further quotations as mentioned above, was Morake appointed?

"An appointment letter was issued to all service providers after the completion of the Tender process. As part of this process Morake was also informed that they have been appointed as the Legal Advisors of the Department of Finance for a period of 2 years. No other letter was written to them from the SCM Offices."

"We are not sure whether there was any letter written by the Office of the MEC to Morake after the Tender Approval by the SCM Unit. But it is clear that all the charge out rates used by Morake as per the invoices were in line with the Tender rates. The Acting CFO at that time was explaining to me that the Tender process was done to appoint a service provider considering the initial amount of approval possibly to exceed the R500 000 quotation approval. This is the provision provided in the SCM regulation. SCM regulation says that if the initial amount likely to exceed the R500 000 mark then proceed with the Tender Process. This is what the SCM Unit have done."

7.1.3 Invoices submitted by Morake Incorporated for payment by the Department.

7.1.3.1 Did the Department verify the disbursements claimed on the invoices submitted by Morake, and if so, was documentary evidence obtained/requested from Morake to substantiate the disbursements claimed?

"As indicated earlier all the payments were validated by the Office of the MEC and signed off by the Head of Staff before any payment was
processed. The authenticity of the services rendered was certified by the MEC Office. The payment division did not go further than the detailed claim list.

Since the permanent Legal person started in this Department we requested her to go through all the invoices with disbursement list to do a detailed verification to see the authenticity of claims and we stopped all the payments due to this service provider since that time until the verification is completed. If there is anything wrongfully claimed that will be recovered from the Affected Service providers.

Provincial internal auditors were also requested to join the team to fast track the process. A copy of the letter is attached for your perusal.”

7.1.3.2 Valostar 263 was paid R612,699 by Morake Incorporated and claimed as disbursement – this is in addition to the amounts already paid directly by the Department as invoiced from Valostar 263 CC.

"On 18 July 2012 the Acting HOD requested the SCM Unit to go with normal SCM procurement process to award the job to a suitably qualified service provider. This request was made by the Acting HOD in seeing that the Valostar 263 already exceeded the threshold of R500,000. A copy specifying the need for a new appointment of the service provider is attached for your perusal.

It looks like Office of the MEC continued with the same service provider for the remaining part of the case proceeding.
It was really an oversight from the payment team to detect this matter before the payment was done. In case there is any discrepancy it will be recovered from the Morake Incorporated as part of verification.”

7.1.3.3 The invoices submitted and processed by Morake allegedly did not conform to the prescribed format required by the Department to effect payment.

(i) Is this allegation correct, and if so, why was the invoices not returned to the supplier for correction before payments were made?

“There is no prescribed format specified by the Department to the service provider. But this was the practice by the Service provider to put dates next to the services rendered.”

7.1.4 Appointment of Valostar 263.

7.1.4.1 It is alleged that the Department of Finance possesses state of the art recording and transcription equipment. However, quotations for the recording and transcription of proceedings for the disciplinary hearings of three senior managers in the Department were obtained.

"We do have recording equipment. Acting HOD was requested to provide this equipment by the Office of the MEC for the first hearing and was provided. Unfortunately this equipment was not working on that day and some other equipments (sic) were tried but not effective. Later the hearing was stopped because of the technical problems experienced.”
7.1.4.2 Although three written price quotations were obtained for the services of supplying recording and transcribing services, the following is alleged:

Two of the three quotations requested were not valid quotations e.g. no dates or for what specific service to be rendered.

(i) Any motivation as to why the process was not stopped or referred back for the soliciting of quotations afresh?

"It is true that two of the submitted quotation carries no valid date. But it was submitted together with the submission."

7.1.4.3 Quotations were requested directly by Mr Molefe (Office of the MEC) and the supply chain unit (SCM) of the Department was not involved in obtaining quotations.

(i) Is this procedurally correct?

"As explained earlier manager in the Office of the MEC is the most suitable person considering the nature of the service required. In other similar cases in the department managers are requested to get quotation and submit to the SCM Unit for the decision making. Only after receiving the approval the services should be started. In this case there was no formal approval granted by anybody to appoint the service provider Valostar 263."

7.1.4.4 Only Rustenburg / Pretoria based suppliers were requested quotations whereas it was known that the disciplinary proceedings were to be held in Mahikeng. .
(i) Any motivation for this process followed?

A motivation letter requesting the SCM Unit to consider the appointment of Velostar 263 even though they are not the cheapest is attached for your perusal.

The essence of the letter reads: "The office requests the approval for the services of Valostar 263 for the following reasons:

1. Unlike Digital Audio Recording Transcriptions which is the cheapest, Valostar 263 comes from the Province.
2. It is owned by the historical disadvantaged
3. It is owned by a woman."

7.1.4.5 Quotations were not evaluated using the 80/20 preference point system as required by the PPPFA. Furthermore the second highest quotation (Velostar) was selected.

(i) What was the reason for the deviation from the preferential point system and why was the second highest quotation selected and awarded?

No formal approval was granted by anybody to appoint the service provider Valostar 263. So the 80/20 principle could not be followed in substance.

7.1.4.6 Total payments by the Department escalated to an amount of R845 211.40 which was ultimately above the R500 000 thresholds of quotation based bids.
(i) What was the motivation to approve payments exceeding the threshold of R500 000, and furthermore, why did Morake then invoice the department further for services by Velostar as disbursements? (See 4.2 above).

The amount department paid to this Company exceeds the threshold of R500,000. Please note the following in this regard:

- Each and every payment was approved by the DPC before a payment was done;

- When the payment likely to be exceeding the limit a special request was submitted to the Accounting Officer to consider the payment. The Accounting Officer did provide the approval on 18 July 2012 by taking into account the following:
  - Changing the service provider for the same cases may cause the delay in the progress;
  - DPC should consider each payment for approval;
  - Initial estimates was that this amount does not exceed the R500 000;
  - SCM Unit needs to follow necessary SCM process for further services;
  - A copy of the approval is attached for your perusal.

- The cumulative payments exceeded the threshold, the excess amount paid need to be informed to the Auditor General and Provincial Treasury and need to be regularized.

As explained above the claim through Morake was not picked up by the payment division at the time of payment. This will be rectified
during the verification of service delivery and necessary steps will be taken in this regard.

7.2 Response received from Mr Chris Molefe, former Director in the office of the MEC for Finance on the following questions raised:

7.2.1 Allegedly the quotations were requested directly by the Office of the MEC for Finance and the supply chain unit (SCM) of the Department was not involved in obtaining quotations.

(i) What is the motivation for the procedure followed?

"…It is important to note the following.

1. Firstly that, months prior to the appointment of legal firms I had discussed the need to acquire legal services to assist the MEC office with both CFO and Superintendent General (HOD). Unfortunately there had not been a positive movement in this regard. (NO LEGAL UNIT). It is as well important to note that at this stage the department had not as yet established a legal unit.

2. It is as well important to note that units such as Communications, MISS and Legal Services are attached to the office of the MEC politically but administratively they account to HOD.

With regard to the procurement (sic) process, the allegations that SCM was not involved is misleading, irresponsible and void of all truth. The standard practice of all centres directorates is that chief users/responsible manager’s source quotations for the service required and send them to Supply Chain to check compliance and
further process them for procument (sic) or send them back to chief users/responsible managers for correction if there is non-compliance.

It is also important to note that the MEC office had always sourced quotations for any other required services. As such, there is nothing irregular about the process followed with regard to sourcing of quotations for the said required services.

As such the said quotations were sent to supply chain to check compliance of non-compliance and for them to approve or disapprove.”

7.2.2 Only Rustenburg based attorneys were requested to quote, whereas the officials charged for alleged misconduct were all based in Mahikeng and that the disciplinary process would be conducted in the Mahikeng area.

(i) What was the motivation in only requesting quotations from Rustenburg based Attorney Firms?

"I amongst others approached one Mafikeng based company which turned me down on the basis that they were representing the suspended (HOD) Superintendent General. They said it would create a conflict of interest. Other Mafikeng based companies did not respond.”

7.2.3 Quotations were already obtained on 26/27 July 2011. Despite guidelines on procedures to be followed as directed to the office of the MEC from the accounting officer (letter dated 28 July 2011), the approval to deviate from the SCM process was given on 29 July 2011.
(i) Any motivation as to why the Department continued with the specific deviated process followed?

"Prior to a letter from the Acting HOD (dated 26/27 July 2011) there had been discussions between myself and the Acting HOD. He as well verbally advised me with regard to the process to be followed."

7.2.4 Payments were made on two (2) invoices to Morake on orders 07G025642 dated 01/09/2011 (R237440.16) and 07G025825 dated 27/09/2011 (R254820.64) totalling an amount of R 492 260.80. It is alleged that despite the amount paid, the completion of charge sheets and to conclude the suspension cases, for which the firm was initially appointed and contracted, was not completed by Morake at the time of the payment of the invoices.

(i) Is there a responsibility to oversee that the services initially contracted for was indeed rendered before payment is made, and if so, what steps were taken to address this?

"Practically what happened in following the process is that we first went the three quotations route but, upon realizing that there were other emerging cases and that the price might exceed R500.000, we then went the tender route.

Therefore, my little understating of Finance Management says practically there was never deviation because we went the R500.000 route and upon realizing that the price might exceed as other cases emerged we went the tender route."

7.2.5 Payments totalling R1,601,396.55 were made to Morake on an invoice submitted on 29 November 2011. On the invoice reference
is made to payment for services for “Health / Peolwane” which allegedly does not relate to the disciplinary proceedings of the three incumbents.

(i) Was a procurement process followed for the services for the Department of Health/Peolwane matter and how was Morake appointed to render this service? Furthermore, the invoice submitted by Morake seems to be unrealistic taken into account that tender NWDF105/2011 was only awarded on 18 November 2011.

"My recollection on the matter is such that at that time there was a court application and as such, in line with the requirements of the bid/tender, Morake was roped in to assist."

7.2.6 What was the motivation for following a tender process only after the services of Morake had already been obtained, and why was a tender process not followed from the outset?

7.2.7 Did the Department verify the disbursements claimed on the invoices submitted by Morake, and if so, was documentary evidence obtained/requested from Morake to substantiate the disbursements claimed?

The following are examples of disbursements claimed by Morake on some of his invoices:

(i) Ernst and Young was paid an amount of R1,248,963.80
(ii) Advocate Woudstra was paid an amount of R4,335,391.00
(iii) Advocates Dreyer and Kirstein were paid an amount of R906,219.00

(iv) A number of invoices submitted includes telephone cost of
+/- R7000 = R7000 x 3 cases = R21000 per month invoiced

"With regard to invoices not conforming to prescribed format required by the Department, I today double-checked with Head of Supply Chain who indicated that there is no such prescribed format for invoices."
"But as well, I believe that Supply Chain is well placed to deal with such non-compliance."

7.2.8 Valostar 263 was paid R612,699 by Morake Incorporated and claimed as disbursement – this is in addition to the amounts already paid directly by the Department as invoiced from Valostar 263 CC.

7.2.9 The invoices submitted and processed by Morake Inc. allegedly did not conform to the prescribed format required by the Department to effect payment. In this regard reference was made to the list of services rendered, including disbursements but no dates were supplied per line item nor was any proof of disbursement invoice supplied.

(i) Why were the invoices not returned to the supplier for correction before the invoices were submitted to effect payment?

"With regard to 3.3 invoices not conforming to prescribed format required by the Department, I today double-checked with Head of Supply Chain who indicated that there is no such prescribed format for invoices."
"But as well, I believe that Supply Chain is well placed to deal with such non-compliance."

7.3 There is a lack of evidence to support the notion that the former MEC for Finance influenced the appointment of Morake Inc. or gave instructions to flout procurement processes as alleged.

7.4 No evidence alludes to the fact that the procurement of goods and services during the tender process which followed and as outlined in the SCM Regulations, were influenced or participated in by either the former MEC or any of her staff members.

7.5 Invoices submitted by Morake Inc. for payment had to be received and scrutinised by the relevant supply chain management and financial management practitioners within the department.

7.6 Evidence was not provided to prove or disprove the allegations of fictitious invoices or fraudulently inflated prices on invoices to defraud the Department of Finance. However, the Public Protector noted that R 2 800.00 per hour was claimed as fees by Morake Inc. for traveling from Rustenburg to Mafikeng and return (2 hours) plus an additional fee of R5.00/km as disbursement and on some invoices accommodation was included and on others, not where hearings were scheduled for 2 days or more. No supporting evidence in the form of actual invoices/receipts was submitted with the disbursements as claimed on the invoices submitted by Morake Inc.
8. LEGAL AND REGULATORY FRAMEWORK

8.1 The Constitution, 1996

8.1.1 Section 125 provides that the executive authority of a province is vested in the Premier of that province.

8.1.2 The Premier exercises the executive authority, together with the other members of the Executive Council by, inter alia, co-ordinating the functions of the provincial administration and its departments.

8.1.3 Section 132(2) provides that the Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.

8.1.4 Members of the Executive Council of a province are, in terms of section 133, responsible for the functions of the executive assigned to them by the Premier. They are accountable collectively and individually to the legislature for the exercise of their powers and the performance of their functions.

8.1.5 Section 133(3) provides that members of the Executive Council of a province must act in accordance with the Constitution.

8.1.6 The conduct of members of Executive Councils is regulated by section 136, which provides that:
“(1) Members of the Executive Council of a province must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Executive Council of a province may not-

(a) undertake any other paid work;
(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.” (own emphasis).

8.2 Procurement regime and National Treasury Regulations

8.2.1 The constitutional imperatives relating to procurement are encapsulated in section 217 of the Constitution, which stipulates that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

8.2.2 In terms of section 38 of the PFMA, it is the general responsibility of the accounting officer to ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

8.2.3 Section 76(4)(c) of the PFMA provides that the National Treasury may make regulations or issue instructions applicable to all institutions to
which this Act applies concerning, among others, the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

8.2.4 Treasury Regulations and instructions issued in terms of section 76, are, in terms of section 1 of the PFMA, regarded as part of that Act. It therefore has the same legal application and compliance requirements as if it were part of the PFMA.

8.2.5 Regulation 16A of the (National) Treasury Regulations sets out the framework for Supply Chain Management and provides inter alia that:

“16A.3 Supply chain management system

16A3.1 The accounting officer or accounting authority of an institution to which these regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution for—

(a) the acquisition of goods and services; and
(b) …

16A3.2 A supply chain management system referred to in paragraph 16A3.1 must—

(a) be fair, equitable, transparent, competitive and cost effective;
(b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);
(c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and
(d) provide for at least the following:

(i) demand management;
(ii) acquisition management;
(iii) logistics management;
(iv) disposal management;
(v) risk management; and
(vi) regular assessment of supply chain performance.

16A.4 Establishment of supply chain management units

16A.4.1 The accounting officer or accounting authority must establish a separate supply chain management unit within the office of that institution’s chief financial officer, to implement the institution’s supply chain management system.

... 

16A.6 Procurement of goods and services

16A.6.1 Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury. (our emphasis)

16A.6.2 A supply chain management system must, in the case of procurement through a bidding process, provide for—

(a) the adjudication of bids through a bid adjudication committee;
(b) the establishment, composition and functioning of bid specification, evaluation and adjudication committees;
(c) the selection of bid adjudication committee members;
(d) bidding procedures; and
(e) the approval of bid evaluation and/or adjudication committee recommendations.”

8.2.6 Regulation 16A6.4 provides that if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.

8.3 The Executive Members’ Ethics Act, 1998

8.3.1 Section 2 of this Act provides that the President must publish a code of ethics prescribing standards and rules aimed at promoting open, democratic and accountable government and with which Cabinet members, Deputy Ministers and Members of Executive Councils (MECs) of provinces must comply.

8.3.2 The code of ethics must include, inter alia, provisions requiring Cabinet members, Deputy Ministers and MECs at all times to act in good faith and in the best interest of good governance. It must also include provisions prohibiting Cabinet members, Deputy Ministers and MECs from, inter alia:

8.3.2.1 acting in a way that is inconsistent with their office;

8.3.2.2 exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests; and
8.3.2.3 acting in a way that may compromise the credibility or integrity of their office or of the government.”

8.4 The Executive Ethics Code

8.4.1 Paragraphs 2.3(a), (b) and (e) of the Executive Ethics Code, referred to in paragraph 6.2 above provides that:

“Members may not:

…

(a) act in a way that is inconsistent with their position;

…

(b) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their financial and/or personal interests”.

9. ANALYSIS AND CONCLUSION

9.1 The services of Morake Inc. were pre-empted to be obtained as service provider for the Department. The fact that the services of Morake was preferred by the MEC as it is stated: “That the MEC is more comfortable to work with Morake Attorneys and this firm is at Rustenburg so MEC could meet with them before she leaves home”, and, that the name of Morake was registered on the database of the Department prior to any quotations received from Morake Inc. corroborate this viewpoint. Evidence from an account of Adv. Woudstra, as instructed by Morake Inc., shows that he had been briefed and utilised in dealing with the disciplinary matter of the former HOD before Morake Inc. had been appointed by the Department.
9.2 The initial purpose of the appointment of a legal firm on quotation basis was to deviate from the procurement process of tenders to assist the MEC to draft charge sheets on an urgent basis as encapsulated in paragraph 7.1.5.4 for the disciplinary process of the officials of the Department and not any other legal matters. Expanding the mandate of the services to be conducted under the term "and other legal matters" abused the deviation from the tender process.

9.3 The re-wording and amendment of the appointment letter of Morake Inc. by Mr Molefe, the former Director in the office of the MEC for Finance in the North West Province, ultimately signed and issued by the acting HOD, raises serious concern. Not mentioning the threshold of R500 000 in the appointment letter and broadening the scope of the required services nullified the initial purpose of soliciting quotations and amounts to an abuse of power by Molefe. Appointment on a quotation basis can only be made if the threshold is up to R500 000-

9.4 The advertising of a tender to and the soliciting of bids for the purpose of creating a panel of Legal Firms are considered as only to be “lip service” to conceal improprieties that lead to unfinished work and payments that would exceed a threshold of R500 000 in terms of the quotation process followed. None of the Legal Firms appointed on the panel was requested to submit any further quotations as stipulated in their appointment letters. In this regard the tender process was not followed by the Department which is contrary to the prescripts of the SCM policy, PFMA and Treasury Regulations.
9.5 Morake was not formally appointed in terms of the tender process which followed later. Although provision\(^3\) is made by National Treasury – that a service provider could extend his/her services – it was not the intention of National Treasury that this can be done where a competitive bidding process was not followed from the outset. Surely, it cannot apply where the quotation process was followed with a threshold of R500 000 and then just merely extended to eventually cover amounts that add-up to millions of Rand in the end.

9.6 The request for Morake Inc. to assist with a legal matter involving the Department of Health/Peolwane, although covered for by the so-called "other legal matters" in the appointment letter under the quotation procurement process, were never quoted for or solicited through any procurement process.

9.7 The amounts claimed by Morake Inc. for traveling on the same date and claimed on different individual invoices resulting in double payment for travelling by the Department as mentioned in paragraph 7.2.3 of the report, raises serious concern as to how invoices and statements of accounts were perused and checked by officials before payment was approved. Evidence was not provided to prove or disprove the allegations of fictitious invoices or fraudulently inflated prices on invoices to defraud the Department of Finance. However; the Public Protector noticed that R 2 800.00 per hour was claimed as fees by Morake Inc. for traveling from Rustenburg to Mafikeng and return (2 hours) plus an additional fee of R5.00/km as disbursement and on some invoices accommodation was included and on others not where hearings were scheduled for 2 days or more. No supporting evidence

\(^3\) Section 10.5.1 and 10.5.2 Practice Note Number SCM 3 of 2003
in the form of actual invoices/receipts was submitted with the disbursements as claimed on the invoices submitted by Morake Inc.

9.8 No proper procurement process was followed in the appointment of Valostar 263 CC which resulted in irregular expenditure. Furthermore, when it was realised that payment to Valostar has exceeded the threshold of R500 000 on the quotation system, further payment of services to Valostar were merely added as disbursements on the account of Morake Inc.

9.9 The Public Service Commission issued a report titled: “REPORT ON AN INVESTIGATION TO ESTABLISH WHETHER THE REGULATORY FRAMEWORK GOVERNING SUSPENSION FROM DUTY WAS FOLLOWED DURING THE SUSPENSION OF THREE SENIOR MANAGERS IN THE DEPARTMENT OF FINANCE; NORTH WEST” on the investigation conducted in terms of the written mandate received from NWSCOPA.

9.9.1 The findings of the PSC are:

9.9.1.1 "The definition of “Employer” as contained in Resolution 1 of 2003 of the PSCBC does not indicate that the MEC is the Employer of the HOD. The SMS Handbook, however, indicates that in respect of the HOD, the “Employer” is defined as the relevant EA.

9.9.1.2 In accordance with the principles of natural justice, Mr Mohlala, Ms Kasirivu and Mr Mogoane were all afforded the opportunity to provide the MEC with reasons in writing why they should not be placed on precautionary suspension.
9.9.1.3 The MEC suspended Mr Mohlala in accordance with the Delegation of Powers and Duties by the Premier of the North West Province and in accordance with the provisions of the SMS Handbook.

9.9.1.4 The Acting HOD suspended Ms Kasirivu in accordance with the authority provided by Resolution 1 of 2003 of the PSCBC as well as the SMS Handbook.

9.9.1.5 The suspensions of Ms Kasirivu and Mr Mogoane were dealt with by the Department in an inconsistent manner in view of the following:

9.9.1.6 The suspension of Ms Kasirivu was withdrawn by the MEC on 7 February 2012 and she was suspended again by the Acting HOD in writing on 14 February 2012.

9.9.1.7 Mr Mogoane’s suspension was not withdrawn by the MEC as in the case of Ms Kasirivu, but he was informed in writing on 26 January 2012 that the Acting HOD had “ratified” the decision of the MEC to place him on precautionary suspension.

9.9.1.8 In accordance with the principles of sound administration and good governance, the Acting HOD was not in a position to “ratify” the decision of the MEC to place Mr Mogoane on precautionary suspension. In fact, it is the MEC as the higher authority than the HOD who should actually “ratify” decisions by the HOD.

9.9.1.9 The PSC took note of the following findings of the arbitration award in the GPSSBC in respect of Ms Kasirivu.

9.9.1.10 The MEC was overall an employer in the Department and her suspension of Ms Kasirivu is regarded as lawful.
9.9.1.11 There was nothing unfair about Ms Kasirivu being kept on suspension while her disciplinary hearing continued.

9.9.1.12 The suspension of Ms Kasirivu is not unreasonably long to the extent that it fell outside the 60 days within which disciplinary action must have been taken.

9.9.1.13 Although the Arbitrator found that the MEC was overall an employer in the Department (paragraph 6.7.1 above refers), the PSC is of the view that in the instance of Ms Kasirivu the Employer is the Acting HOD in accordance with the authority provided by Resolution 1 of 2003 of the PSCBC as well as the SMS Handbook.

9.9.1.14 In all three cases, the Department did comply with the prescribed 60 day period from the date of suspension within which a disciplinary hearing against an employee should be instituted. However, given the complexity of the cases, the disciplinary hearings were postponed beyond the prescribed 60 day period. According to interviews conducted with Mr Mohlala, Ms Kasirivu and Mr Mogoane, the extension of the 60 day period was as per mutual agreement of the parties.

9.9.1.15 As all the regulatory processes were duly followed in the suspensions of Mr Mohlala, Ms Kasirivu and Mr Mogoane, “the PSC is of the view that their suspensions were not irregular”.

9.9.2 Additional findings relevant to suspensions:

9.9.2.1 It has been confirmed with the Department that a departmental policy regarding the handling of precautionary suspensions and the handling
of disciplinary cases does not exist. The Department is currently utilising the Disciplinary Code and Procedures for the Public Service.

9.9.2.2 It is found that in the absence of a departmental policy in this regard, the Department has been inconsistent in the handling of the suspensions under review in that, Mr Mohlala was given 24 hours to provide reasons as to why he should not be suspended, whereas Ms Kasirivu and Mr Mogoane were given 48 hours.

9.9.2.3 In terms of the Guide for the preparation of the Annual Report for the year ended 31 March 2012, departments should have reported on the number of people precautionary suspended during the period 1 April 2011 to 31 March 2012. Perusal of the 2011/2012 Annual Report of the Department revealed that the Department did report that three employees were on precautionary suspension during the 2011/2012 financial year for longer than 30 days. The PSC confirmed with the Department that the three employees referred to in the Annual Report were Mr Mohlala, Ms Kasirivu and Mr Mogoane.

9.9.2.4 In terms of the Circular on Labour Relations Reporting Templates, departments are required to provide information to the Department of Public Service and Administration (DPSA) on, inter alia, the misconduct register. Although the Department indicated that information on the three suspension cases under scrutiny was provided to the DPSA, documentary proof in this regard was not made available to the PSC.

9.9.2.5 Failure to provide documents requested (i.e. the lack of records) is tantamount to non-compliance with the following responsibilities placed on the HOD:
a) Section 13 of the National Archives and Records Service of South Africa Act, 1996, stipulating that Government bodies should manage their records in a well-structured record keeping system, and to put the necessary policies and procedures in place to ensure that their record keeping and management practices comply with the requirements of the Act.

b) The HOD, as the Accounting Officer of the Department, is in terms of section 38 of the Public Finance Management Act, 1999, responsible for the maintenance of an effective, efficient and transparent system of internal control.

9.9.3 Direction/Recommendation by the PSC:

9.9.3.1 "Based on the above findings, the PSC –

a) directs in terms of section 5(8) of the Public Service Act, 1994 (as amended) that through the assistance of the DPSA, the Department should develop a policy on the management of precautionary suspensions and disciplinary processes with a view to expediting the finalisation of disciplinary cases and ensuring consistency in approach; and;

b) recommends that the Department should as a matter of urgency develop and implement effective and efficient record keeping practices".

9.10 Evidence could not be obtained that the former MEC of Finance in the North West was directly involved in instructing the Director in the Office of the MEC, Mr Molefe, to solicit and appoint Morake Inc. as service provider to handle the disciplinary processes of the officials.
9.10.1 The contention by Ms Mabe that Morake Inc. who was allegedly already appointed as a law firm, to also assist with the legal process of the Peolwane matter and to deviate from the usual procurement processes cannot be supported and raises serious concern as to be indicative in the manipulation of the procurement process followed. The latter amounts to gross maladministration.

9.11 The responses received from the current MEC, Mr P M Sebegoe, and the Director MEC’ Support, Mr J J Mosia, could unfortunately not take the investigation conducted by the Public Protector any further.

10 FINDINGS

The Public Protector’s findings are the following:

10.1. The re-wording and amendment of the appointment letter of Morake Inc. by Mr Molefe, the former Director in the office of the MEC for Finance in the North West Province, ultimately signed and issued by the acting HOD, amounts to improper conduct, abuse of power and maladministration.

10.2. The procurement process followed by the Department in securing the services of Morake Inc. was flawed, unlawful and in violation of section 217 of the Constitution, 1996; Sections 16A6.1 and 16A9.1 of National Treasury Regulations (2005) issued in terms of the Public Finance Management Act, 1999 and Sections 3 and 4 of the Preferential Procurement Regulations, 2001 which resulted in irregular expenditure for invoices submitted that were not covered by the quotation process. Treasury Regulation 16A6.1 was contravened in respect of amounts paid to Morake Inc. which exceeded the threshold of R500 000. There
is no indication that National Treasury was approached to condone the practice followed.

10.3. There is a lack of evidence with regard to the notion that the former MEC for Finance influenced the appointment of Morake Inc. or gave instructions to flout procurement processes as alleged.

10.4. Although Section 10.5.1 and 10.5.2 of Practice Note Number SCM 3 of 2003, issued by National Treasury, allows for the extension of the services rendered by a service provider, it could not have been the intention of National Treasury that this could be done where a competitive bidding process was not followed from the outset. The process followed to extend the services of Morake Inc. initially appointed in terms of the quotation process to be portrayed by a so-called tender process later, amounts to gross maladministration.

10.5. The manner in which invoices and statements of accounts submitted by Morake Inc. were checked and assessed by officials before payment was approved amounts to gross negligence, maladministration and ultimately irregular expenditure. Evidence, especially traveling costs claimed by Morake Inc., indicates that there are discrepancies and double billing in the invoices submitted, resulting in overpayment by the Department. Supporting evidence in the form of actual invoices/receipts were not presented substantiate the disbursements as claimed on the invoices submitted by Morake Inc.

10.6. The appointment of Senior Counsel to attend to legal matters which, seemingly, did not require such a high level of expertise is contra the obligation placed on the Department to efficiently, economically and effectively apply state resources as contemplated in section 195(1)(b)
of the Constitution, 1996 and amounts to maladministration. The Department did not explore more cost effective avenues such as utilising their own Human Resource Unit to initiate and draft the disciplinary charges and merely outsource the presiding duties during the disciplinary hearings.

10.7. Proper procurement process was not followed in the appointment of Valostar 263 CC by the Department. Payments to this company resulted in irregular expenditure to the amount of R845,211.40. When the Department realised that the amount already paid to Valostar exceeded the threshold of R500 000-00 the continuation of the services was claimed as disbursements on the account of Morake Inc.

10.8. There is no supporting evidence that proves or disproves that the former MEC subjected officials unwilling to violate supply chain prescripts to any occupational detriment, including stage-managing the suspension and subsequent dismissal of 3 (three) senior officials. The later issues are addressed by the report issued by the Public Service Commission.

11. REMEDIAL ACTION

The Public Protector intends directing that the following remedial action be taken in terms of section 182(1)(c) of the Constitution:

11.1 The Acting Head of the Department is to take urgent and appropriate steps to:

11.1.1 Improve the Supply Chain Management System of the Department to ensure that Bid Specification, Bid Evaluation and Bid Adjudication Committees evaluate procurement processes;
11.1.2. Ensure that the officials of the SCM Division and the members of bid committees are trained on the prescripts of the National and Provincial Treasuries in respect of demand and acquisition management;

11.1.3. Audit amounts claimed by Morake Inc. for traveling on the same date and claimed against different individual invoices resulting in double payment for travelling by the Department as mentioned in paragraph 7.2.2.3 with the view to recover amounts paid as double payment from Morake Inc.

11.1.4. Take corrective measures to prevent a recurrence of the failure in demand management process referred to in this report.

11.2. The Premier of the North West Province is to ensure, in terms of Treasury Regulation 4.1.3, that the Executing Authority of the Department initiates an investigation into the conduct of the Head of the Department and the former Chief Director in the office of the MEC of Finance with a view of taking disciplinary action against them.

11.2.1. The findings of the PSC are noted and the direction/recommendations as mentioned in paragraph 10.9.3 of this report is to be implemented.

11.2.2. The Commercial Crime Unit and/or Directorate: Priority Crime Investigation of the South African Police Service should conduct a thorough scrutiny of the relationships between the Directors of Morake Inc. and/or Valostar 263 CC and the former MEC and former Director in the office of the MEC for Finance, the Acting HOD and members of the relevant BEC’s and the BAC of the Department.
11.2.3. The Law Society of the Northern Provinces is requested to audit the invoices submitted by Morake Inc. to establish whether or not the fees charged by Morake Inc. is exorbitant or not and to establish any possible misconduct.

11.2.4. The Directorate for Priority Crime Investigation (the Hawks) is to conduct a further investigation into whether or not a corrupt relationship existed between the MEC, Mr L L Mabe, and Morake Inc and any other role players involved in the procurement of the services of Morake.

12 MONITORING

12.1 The Premier of the North West and the Acting Head of the Department are to submit to the NWSCOPA, copied to the Public Protector, an implementation plan in respect of the remedial action mentioned in paragraph 11 above within 30 days of the date of the issuing of this report.

12.2 All remedial action should be implemented within 6 months of the report being made public by the NWSCOPA.

ADV. T N MADONSELA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 20 / 08 / 2013
Assisted by: Adv J Raubenheimer
Provincial Representative: North West