SIX YEARS AND COUNTING

A report on an investigation into alleged maladministration by the Gauteng Department of Infrastructure Development in relation to the administration of the Suikerbosrand Project

Report No: 14 of 2014/2015
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EXECUTIVE SUMMARY

(i) "Six Years and Counting" is my report as the Public Protector issued in terms of Section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act No. 23 of 1994 (the Act).

(ii) The report communicates my findings and appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, pursuant to an investigation into the alleged maladministration by the Gauteng Department of Infrastructure Development (the Department) relating to the Department’s administration of the Suikerbosrand Project involving the upgrading of the water supply to the nature reserve in the area at the cost of R8, 657,745.63 (the Project). The complaint was lodged by Mr Nathaniel Letlape (the Complainant) on 26 October 2011 on behalf of Shatsane Systems Solutions (Pty) Ltd, a Leondale based black small contractor specializing in civil and building works, alleging that:

(a) The main contractor, Moteko Construction Cost Consultants JV (Moteko), which was contracted to upgrade the water supply to the Suikerbosrand Nature Reserve, was improperly appointed in contravention of a fair, transparent and cost effective procurement process. However, the Complainant subsequently withdrew the allegation on the basis that he did not have any evidence to back such, and that in making the allegation he had relied on the feedback received from the investigator who indicated to him that the Chief Director, Mr Richard Makhumisani had said in a meeting with him that he knew of no tender process being undertaken in respect of this Project.
(b) The Department failed in its duty of overseeing the smooth running of the Project, thus causing delay in the completion of the Project;

(c) During the Project, there was mismanagement of state funds and disregard for procurement policies, Treasury Regulations and the Public Finance Management Act No 1 of 1999 (the PFMA);

(d) The Complainant was not paid for services rendered on the Project; and

(e) The Complainant incurred penalties due to delays to the Project, which delays were not caused by the Complainant.

(iii) The investigation process included correspondence, interviews and the sourcing and analysis of documents. Applicable legislation, regulations and policies were also considered and applied. Upon completion of the investigation, a notice in pursuit of section 7(9) of the Act and a discretionary notice were issued on 15 September 2014 to the Head of Department (HOD) of the Department and the Complainant respectively, indicating my provisional findings and envisaged remedial action. The HOD responded to the section 7(9) notice with a written letter dated 3 October 2014. It is worth noting that my jurisdiction and powers, including remedial powers under section 182(1)(c) of the Constitution, were not challenged. I was not surprised because on 14 August 2014, the Premier, Speaker and other top leaders of Gauteng Province announced to the nation that they understand the Constitution to give my office the power to investigate and remedy maladministration, in cooperation with organs of state and pledged to cooperate, including, implementing remedial action.

(iv) On analysis of the complaint the following issues were considered and investigated:
(a) Was the main contractor, Moteko, appointed irregularly in violation of a fair, transparent and cost effective procurement process that complied with procurement policies, Treasury Regulations and the PFMA?

(b) Did the Department fail to play its oversight role effectively to ensure the smooth running and timely completion of the Project?

(c) Did the Department fail to manage the state funds allocated for the Project appropriately?

(d) Did the Department unduly fail to pay for work done on the Project by the Complainant, and if so, was the Complainant improperly prejudiced?

(v) The standard used to assess the propriety of the Department's conduct principally involved analysis of laws, policies and prescripts regulating procurement. Key among the standard setting instruments I relied on are those imposing a responsibility on the Department to appoint Moteko in terms of a procurement process that is fair, transparent and cost effective. These include:

(a) Section 217 of the Constitution and the Treasury Regulation 16A3.2 issued in terms of section 76(4)(c) of the PFMA. The requirement is that procurement of public goods and services should be executed in terms of procurement and provisioning system that is "fair, equitable, transparent, competitive and cost effective", and in compliance with relevant Treasury Regulations and institutional policies. The relevant regulatory framework dictates certain requirements starting from demand management to monitoring, evaluation and payment for services provided according to contract specifications.
(b) In making determination on whether the Department played its oversight role effectively to ensure the smooth running and timely completion of the Project and if the Department failed to manage state funds allocated to the Project appropriately, I was primarily guided by section 45 of the PFMA. The requirement is that "an official in a department, trading entity or constitutional institution (c) must take effective and appropriate steps to prevent, within that official’s area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due."

a. To determine if the Department unduly failed to pay for work done on the Project by the Complainant, and if so, was the Complainant improperly prejudiced, I relied, among others, on Treasury Regulation 8.2.3. The requirement is that, "Unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice or in the case of civil claims, from the date of settlement or court judgment". However, I had to take into account whether or not the Complainant’s contract was directly with the Department and to make a determination of the Department’s responsibilities in the circumstances.

(c) In testing proper conduct regarding the treatment of small business persons in procurement within state affairs, I relied on Touchstones from previous reports of the Public Protector, particularly the report titled Unsettled Settlement. On general procurement, I also considered principles crystallised in reports such as Against the Rules, Against the Rules Too and Poisoned Processes.

(vi) In his response to my section 7(9) notice, the HOD did not dispute my provisional findings or the appropriate remedial action I intended to take. The HOD submitted that a new contractor was appointed on 22 October 2013 to
complete the Suikerbosrand Project and further that the site was handed over on 22 November 2013 and work commenced on 9 December 2013. The HOD indicated that the outstanding work on the Project would be completed before end of 2014 within the current budget. However and quite surprisingly, the HOD indicated that the Department is not aware of any outstanding payment to Tau Pride Moteko (TPM) with regard to the Project and that the final account would only be drawn up once the Project is completed. He also stated that disciplinary action would be considered against officials that may have failed to comply with relevant prescripts. In the light of disputed matters, the investigation had to help me make a determination on whether a qualified person oversaw and provided required guidance to the Project.

(vii) Before going to specific findings on the specific issues that were investigated, it should be of great concern to the Gauteng Government that exactly Six (6) years down the line, a relatively small scale infrastructural Project that commenced on 17 November 2008 and was supposed to be completed on 20 May 2009; remains incomplete. Although this investigation did not go into a systemic enquiry, I would like to draw attention to the fact that the issues raised in this report regarding the management of infrastructure procurement, might transcend this single tender. I will therefore be calling on the Department to use lessons from this Project to review all infrastructure tenders or contracts issued recently and still in the process of implementation including current tenders being advertised as at the date of this report. The benefit would be to avoid delays in infrastructure caused by contract and tender disputes and to ensure quality deliverables. This is particularly important as the National Development Plan (NDP) places emphasis on infrastructure development and naturally this will entail a lot of procurement of services and goods. It would be appreciated if the Department includes its findings and remedial action on this aspect in its 2014/15 Annual Report.
Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, I make the following findings:

(a) Whether Moteko was appointed irregularly in violation of a required fair, transparent and cost effective procurement process that complies with procurement policies, Treasury Regulations and the PFMA:

(aa) The allegation that Moteko was appointed irregularly in violation of the required fair, transparent and cost effective procurement process although subsequently withdrawn by the Complainant, was found to be unsubstantiated during the preliminary investigation;

(bb) My office’s preliminary investigation established that Moteko was initially appointed pursuant to it responding to an advertisement dated 3 December 2004 that appeared in the local newspapers, after it had expressed interest in a follow up advertisement that called for an Expression of Interest by Project Management Resource Groups (PMRGs). Moteko and other service providers responded to the advertisement and were shortlisted. That process was followed by an Adjudication Council meeting that decided based on Moteko’s credentials relating to engineering projects, to award it a contract to oversee several projects in Gauteng Province.

(cc) With regard to the Suikerbosrand Project Moteko was appointed by way of an Instruction to Perform Work within permissible deviation in terms of Treasury Regulation 16A6.4.

(dd) The Department’s failure to open the Suikerbosrand Project to a fair, equitable, transparent, competitive and cost effective
procurement process and opting for an IPW with a view to fast track service delivery was not viable and cannot be justified;

(ee) Contrary to what was anticipated by the IPW, the Project has been plagued by delays and it remains incomplete 6 years since it was commenced on 17 November 2008 and was supposed to have been completed on 20 May 2009;

(b) Whether the Department failed to play its oversight role effectively to ensure the smooth running and timely completion of the Project:

(aa) The allegation that the Department failed to play its oversight role effectively to ensure the smooth running and timely completion of the Project was found to be substantiated;

(bb) The Department through Mr Eksteen failed to ensure that the service providers appointed to deliver the Project completed it within the period specified or shortly thereafter;

(cc) Mr Eksteen failed to rein in Mr Singo who most of the time failed to attend site meetings where his input was required to move the Project forward and who also provided Shatsane with incorrect and inadequate drawings for the installation of a pipe on a bridge, electrical connections and pumps for a pump house;

(dd) Such failure is in violation of paragraph 3 of the National Treasury Supply Chain Management Guide which provides that demand management is the first phase of SCM and further that the objective is to ensure that the resources required to fulfill the needs identified in the strategic plan of the institution are delivered at the correct
time, price and place and that the quantity and quality will satisfy those needs.

(ee) The Department's violation of the National Treasury Supply Chain Management prescripts in this regard constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1995.

(c) Whether the Department failed to appropriately manage the state funds allocated for the Project:

(aa) The allegation that the Department failed to appropriately manage the state funds allocated for the Project were found to be substantiated;

(bb) The Department failed to account for the monies allegedly paid to Mr Singo irregularly in the Project despite being alerted to a possible fraudulent inflation of KSB payment invoices by Mr Singo using Shatsane’s letterheads;

(cc) The Department also failed to ensure the effective, efficient, economical and transparent use of financial resources involved in the Project in violation of section 195(1)(b) of the Constitution and section 45 of the PFMA; and

(dd) The conduct of the Department in this regard was improper as envisaged in section 182(1) of the Constitution and constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994.
(d) Whether the Department unduly failed to pay for work done on the Project by the Complainant, and if so, was the Complainant improperly prejudiced:

(aa) The allegation that the Department unduly failed to pay for work done on the Project by the Complainant was found to be substantiated;

(bb) It has been established that when Moteko was unable to pay Shatsane, Shatsane approached the Department directly and the Department paid thus creating a legitimate expectation that in case of failure by Moteko to pay Shatsane the Department would pay. The Department has also on 26 November 2010, by way of a letter to Shatsane, attempted to impose penalties in the sum of R4, 200,740.98 on Shatsane for delays in the Project, which delays were as a result of the non-cooperation on the project by Mr Singo.

(cc) The Complainant’s company is still owed a sum of R9 622 075.08 for the services rendered in the Project and a final account was submitted to the Department on 13 September 2011;

(dd) The failure by the Department to pay the Complainant within 30 days of receipt of his invoices was in violation of Treasury Regulation 8.2.3;

(ee) Such failure constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994; and
(ff) The Complainant was improperly prejudiced by the Department's failure to pay him for work done on the project by his company.

(ix) The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution is the to call upon:

(a) The Head of Department

(aa) To ensure that the Project is finalised within 3 months from the date of this report and within budget;

(bb) To ensure that appropriate action is taken against those officials responsible for the delay in completion of the Project and improper conduct associated therein;

(cc) To ensure that the Complainant is paid all monies due to his company within 90 days from the date of the final report. The monies owed to be verified in consultation with the Complainant and Moteko must be paid in tranches. The first payment must be made within 30 days from the date of this report.
REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION BY
THE GAUTENG DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT WITH
REGARD TO THE ADMINISTRATION OF THE SUIKERBOSRAND PROJECT

1. INTRODUCTION

1.1 "Six Years Still Counting" is my report as the Public Protector issued in terms of
section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the
Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public
Protector Act).

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to the
following people:

1.2.1 Member of the Executive Council (MEC) responsible for Infrastructure
Development in the Gauteng Provincial Government, Ms N Mayathula-Khoza;
and

1.2.2 Head of the Gauteng Department of Infrastructure Development (HOD), Mr
Bethuel Netshiswini.

1.3 A copy of the report is also provided to the Complainant.

1.4 The report relates to an investigation into the alleged maladministration by the
Gauteng Department of Infrastructure Development with regard to the
administration of the Suikerbosrand Project.
2. **THE COMPLAINT**

2.1 The Complaint was lodged on 26 October 2011 on behalf of Shatsane Systems Solutions (Pty) Ltd, a Leondale based black small contractor specializing in civil and building works regarding what he alleged to be maladministration of the Suikerbosrand Project (the Project), involving the Gauteng Department of Infrastructure Development (the Department). The Complainant alleged that:

2.1.1 Moteko Construction Cost Consultants JV (Moteko) was appointed to do work for the Department valued at **R8,657,745.63**, without following proper procurement policies, and

2.1.2 Moteko subcontracted **Shatsane Systems Solutions (Pty) Ltd** on 21 November 2008, the Complaint’s company, to provide labour and material for the Project. However, as soon as Shatsane commenced its work, it began experiencing problems, which it reported to the Department, but the Department failed to intervene.

2.2 The Project officially commenced on 17 November 2008, and should have been completed on 20 May 2009, but due to the numerous delays, the Project was still incomplete at the time the complaint was lodged on 26 October 2011.

2.3. On numerous occasions during meetings with Mr Eksteen and others involved in the Project, the Complainant informed Mr Eksteen that Mr Christopher Singo (Mr Singo) of M.O.S.A. Engineering (M.O.S.A), who was the engineer overseeing the Project, was not providing the team with the necessary support in that Mr Singo:
2.3.1 Provided Shatsane with incorrect and inadequate drawings for the installation of a pipe on a bridge, electrical connections and pumps for a pump house;

2.3.2 Seldom attended site meetings, where his input was required to move the Project forward; and

2.3.3 Would disappear from the Project for several months at a time and Mr Eksteen knew about this, but he took no action, which in turn delayed the Project. Mr Singo’s role in the Project was to provide designs for all the work on site and ensure that work is done according to specifications and to oversee the quality of the work.

2.4 There is no link between M.O.S.A and Moteko as they are both ultimately answerable to the Department. The terms of the Project were that the contractors build a reservoir, lay a 13km pipe line, build and equip a pump station and an access road to the pump station.

2.5 According to the Complainant, to remedy the issue of the incorrect drawings, Mr Singo requested KSB Pumps and Valves (Pty) Ltd (KSB) to do the drawings, for which service KSB charged R365, 359.48. To reimburse KSB, Mr Singo invoiced the Department R478, 986.28 and paid KSB R219, 298.25, while he pocketed R259, 688.03. This was reported to Mr Eksteen, but he took no action.

2.6 The Complainant further alleged that Shatsane paid KSB an amount of R723, 684.21 for the installation, commissioning and testing of the pumps, but has not been reimbursed this amount by Moteko which claims that it cannot reimburse Shatsane until it, Moteko, has been reimbursed by the Department. It must be explained that the reason Shatsane got involved in these payment issues was because Shatsane appointed KSB as a specialist contractor for the supply and
installation of the pumps which were specified in the bill of quantities, hence they had to pay KSB and subsequently get reimbursed by the Department through Moteko. Initially, KSB had been appointed by Mr Singo to do the electricals that would run the pump house, because he (Mr Singo) had failed to provide the designs to the contractor, Shatsane. Subsequently, Shatsane subcontracted KSB to attend to the mechanicals of the Project.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides that the Public Protector has the power 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. Additional powers are given by the Public Protector Act, to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism that the Public Protector may deem appropriate in any situation.

3.4 The Gauteng Department of Infrastructure Development is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.
3.5 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 7 of the Public Protector Act gives the Public Protector the authority to on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of the Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.

4.2 Approach to the investigation

4.2.1 As with every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?
4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the Department or organ of state to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for correcting maladministration and redressing its consequences. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Was the main contractor, Moteko, appointed irregularly in violation of the required fair, transparent and cost effective procurement process that complied with procurement policies, Treasury Regulations and the PFMA?
4.3.2 Did the Department fail to play its oversight role effectively to ensure the smooth running and timely completion of the Project?

4.3.3 Did the Department fail to manage the state funds allocated for the Project appropriately?

4.3.4 Did the Department unduly fail to pay for work done on the project by the Complainant, and if so, was the Complainant improperly prejudiced?

4.4 The Key Sources of Information

4.4.1 Interviews conducted

4.4.1.1 Several telephonic and personal interviews with the Complainant;

4.4.1.2 Interview with Mr Mmakwena Selepe, the former acting Chief Director for the Department, on 26 September 2012;

4.4.1.3 Interview with Mr Greg Adiuba Yong, a civil engineer at M.O.S.A on 6 November 2012;

4.4.1.4 Interview with Mr Eksteen, the Internal Project Planner for the Department, on 9 November 2012;

4.4.1.5 Interview with Mr Sizwe Vilakazi of Moteko, on 9 November 2012;

4.4.1.6 Interview with Mr Singo on 27 November 2012;

4.4.1.7 Interviews with Mr Richard Makhumisani, the Department’s Chief Director, on 12 February 2013 and 8 March 2013;
4.4.1.8 Telephonic interview with Mr Bruce Williams of IR Consulting Engineers (Pty) Ltd, on 6 March 2013;

4.4.1.9 Telephonic interview with Mr Johannes Tokwana of KSB on 11 March 2013.

4.4.1.10 Telephonic interview with Department’s Head of Supply Chain Management, Ms Tina Majozzi on 14 February 2014 and receipt of answers to questions put to her in writing. The responses from Ms Majozzi are dated 26 February 2014 and signed off by the Head of Department Mr B. Netshiswinzhe. Follow up interview with Ms Majozzi on 11 July 2014.

4.4.2 Inspection in loco

4.4.2.1 An inspection in loco was also conducted at the Project site on 15 November 2012.

4.4.3 Correspondence

4.4.3.1 Letter dated 8 July 2011, from Moteko to Shatsane informing Shatsane that it must vacate the Project site; and

4.4.3.2 Letter dated 22 January 2013, from the Department placing Moteko on notice.

4.4.3.3 Correspondence dated 26 February 2014 from Ms Tina Majozzi responding to questions put to her in writing. Attached to her response is the tender advert dated 03 December 2004 to which Moteko responded and was
subsequently awarded work on the Suikerbosrand Project by way of an IPW.

4.4.4 Documents

4.4.4.1 Document dated 17 February 2010 entitled “Cover Page for Consultants” showing payment authorised by Mr Eksteen, from the Department to M.O.S.A, in the sum of R478,986.28;

4.4.4.2 IPW from the Department to Moteko dated 29 October 2007;

4.4.4.3 Agreement between Shatsane and Moteko, dated 21 November 2008 for the provision of labour for the Project, with the contract amount stated as R3,733,945.98;

4.4.4.4 Agreement between Shatsane and Moteko, dated 21 November 2008, for the provision of material for the Project, with the contract amount stated as R4,923,799.65;

4.4.4.5 Tax Invoice No 20091002C from M.O.S.A to the Department, dated 17 February 2010, for the amount of R478,986.28;

4.4.4.6 Report on the Project compiled by the Complainant, dated 12 March 2013.

4.4.4.7 Document entitled “Department of Public Transport, Roads & Works” Chief Directorate Capital Works – EVALUATION CERTIFICATE NO 10, dated 13 September 2011 – detailing and itemizing services rendered but not paid for – Totalling R5,421,334.10; and
4.4.4.8 Document dated 26 November 2010 detailing “Penalties” incurred by Shatsane – Totalling R4, 200,740.98.

4.4.4.9 Documents received from Ms Majozi, the Departments Head of Supply Chain Management:

(i) Call for Expression of Interest by PMRG’s.
(ii) Minutes of the Departmental Acquisition Council Meeting.
(iii) Minutes of the Adjudication Council that took the decision to Appoint Moteko -dated 5 July 2006.
(v) Summary of Current Infrastructure Projects being managed by Moteko.

4.4.5 Legislation and other prescripts

4.4.5.1 Public Finance Management Act No 1 of 1999 (PFMA);
4.4.5.2 National Treasury Regulations;
4.4.5.3 Construction Industry Development Board (CIDB);
4.4.5.4 Regulations and Supply Chain Management Practices;
4.4.5.5 Preferential Procurement Policy Frame work Act No 5 of 2000;
4.4.5.6 Preferential Procurement Regulation 2011;
4.4.5.7 General Conditions of Contract – GCC; and
4.4.5.8 Constitution of the Republic of South Africa 1996.
4.4.5.9 The Department’s internal procurement policy which is to a large extent guided by the above listed Acts, Regulations and Policy documents.
4.4.5.10 Public Protector Touchstones or principles established in previous reports dealing with similar matters, mainly public procurement requirements and regulation of the payment of small and medium enterprises.
5. STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

5.1 Whether Moteko was appointed irregularly in violation of the required fair, transparent and cost effective procurement process that complied with procurement policies, Treasury Regulations and the PFMA:

5.1.1 Section 217(1) of the Constitution requires 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.

5.1.2 The above requirement is further emphasised in Treasury Regulation 16A 3.2(a) [Treasury Regulations issued in terms of the Public Finance Management Act, 1999 (PFMA)], which provides that a supply chain management system must be fair, equitable, transparent, competitive and cost effective.

5.1.3 In terms of section 76(4)(c) of the PFMA, the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA and in this regard, Treasury Regulation 16A.3.2 duly provides the following: "16A 3.2A supply chain management system referred to in paragraph 16A.3.1 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;
(iv) risk management; and
(v) regular assessment of supply chain performance.

5.1.6 Regulation 11(a) of the Regulations issued in terms of the Preferential Procurement Policy Framework Act, 2000, provides that an organ of state must, prior to making an invitation for tenders properly plan for and as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders is to be made.

5.1.7 In February 2004, the National Treasury issued a document entitled "Supply Chain Management: A Guide for Accounting Officers/Authorities" (SCM Guide). The purpose of the SCM Guide was to give guidance to accounting officers in fulfilling their roles within the SCM framework.

5.1.8 Paragraph 3 of the SCM Guide sets out guidelines in regard to demand management and reads as follows:

Demand management 3.1 Introduction

3.1.1 Demand management is the first phase of SCM. The objective is to ensure that the resources required to fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs. As part of this element of SCM, a total needs assessment should be undertaken.
This analysis should be included as part of the strategic planning process of the institution and hence will incorporate the future needs.

3.1.2 It is vital for managers to understand and utilise sound techniques to assist them in their planning, implementation and control activities. As part of the strategic plan of the institution, resources required for the fulfilment of its obligations should be clearly analysed. This includes a detailed analysis of the goods, works and services required, such as how much can be accomplished, how quickly and with what materials, equipment, etc. (emphasis added)

5.1.9 This document is applicable to all accounting officers and contains the following principles:

a) The identification of a need is the initiating trigger to a procurement process.

b) The fulfilment of the need should form part of the strategic objectives of the department and a needs analysis should therefore be part of the strategic planning process.

c) Sound techniques should be utilised in conducting the needs analysis.

d) The need should be linked to the budget.

5.1.10 Paragraph 1.3.2.2 of the SCM Guide states that Demand Management is the beginning of the supply chain where-

a) a needs assessment is done to ensure that goods or services are acquired in order to deliver the agreed service;

b) specifications are precisely determined;

c) requirements are linked to the budget; and

d) the supplying industry has been analysed.
5.1.11 However, Treasury Regulation 16A6.4 makes provision for deviation from the above requirements in 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.

5.1.12 I was assisted by Touchstones from previous reports of the Public Protector, particularly reports titled Against the Rules, Against the Rules Too and Poisoned Processes in applying the principles enunciated above with regard to proper conduct in procurement management. In Against the Rules, a flow chart is set out on how the supply chain management process should unfold if properly managed from demand management to legitimate payment for services or goods, in compliance with the law and related prescripts. The narrative also deals extensively with circumstances under which deviations may be acceptable and the proper way to effect such deviations.

5.2 Whether the Department failed to play its oversight role effectively to ensure the smooth running and timely completion of the Project and whether the Department failed to manage state funds allocated to the Project appropriately.

5.2.1 Section 195(1)(b) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the promotion of efficient, economic and effective use of resources.

5.2.2 Section 45(a) of the PFMA requires of an official in a department to ensure that the departmental systems of financial management and internal control are carried out within the area of responsibility of that official;
5.2.3 Section 45(b) further provides that an official in a department is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility.

5.2.4 Section 45(c) provides that an official in a department must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any other collection of revenue due.

5.2.5 It then follows that the Department's officials responsible for the Suikerbosrand Project were obliged to ensure the effective, efficient, economical and transparent use of financial and other resources involved in the Project. They were further obliged to take effective and appropriate steps to prevent any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure in the Project.

5.3 Whether the Department unduly failed to pay for work done on the Project by the Complainant, and if so, was the Complainant improperly prejudiced:

5.3.1 Treasury Regulation 8.2.3 requires that unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice or, in the case of civil claims, from the date of settlement or court judgment.

5.3.2 It then follows that the Department was obliged to pay the Complainant within 30 days of receipt of his company's invoices. Notwithstanding that the Complainant's company was not directly contracted to the Department but was contracted to Moteko, the Department is responsible for payments not made to
the Complainant’s company by virtue of the fact that Moteko was in terms of its contract with the Department performing a public function on behalf of the Department within the meaning of section 239 of the Constitution. The conduct of Moteko is therefore imputed to the Department.

5.3.2 A Public Protector report titled *Unsettled Settlement* provided some assistance with considerations regarding the payment of entrepreneurs, particularly small and medium enterprises contracting with the state. Among other things, the report highlights the importance of cash flow in determining the sustainability and growth of small and medium enterprises and the responsibility of organs of state not to unduly become part of the problem regarding such cash flow.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 Whether Moteko was appointed irregularly in violation of the required fair, transparent and cost effective procurement process that complied with procurement policies, Treasury Regulations and the PFMA:

6.1.1 The Complainant’s case

6.1.1.1 The Complainant alleged that Moteko was not appointed in accordance with a fair, transparent and cost effective procurement process for the completion of the Project. However, in his response to my discretionary notice he withdrew the allegation.

6.1.2 The Department’s case

6.1.2.1 In his evidence during the course of the investigation, Mr Selepe, the then Acting Chief Director for the Department, indicated that the Department
contracted Moteko by way of an Instruction to Perform Work (IPW). When asked whether he knew of any tender process being followed preceding the IPWs to Moteko, he indicated that to his knowledge Moteko was appointed correctly by way of a tender which was subsequently followed by an IPW.

6.1.2.2 Mr Selepe further explained that an IPW is a written instruction issued by the Department to a service provider to do specific work on its behalf. This method of procurement, the issuing of an IPW, is applicable when a tender has been advertised in the open market for the public to respond. Companies are selected to form part of a list of qualified service providers using a defined criterion. The Department would thereafter negotiate standard rates or agree on gazetted rates for all work to be issued to successful service providers on the list. Mr Eksteen confirmed that the Department had appointed Moteko by way of an IPW, to manage the Project, and M.O.S.A (represented by Mr Singo) to oversee the implementation of the Project. With respect to the foregoing, Mr Eksteen was asked about the possible duplication of roles between Moteko and M.O.S.A, and his response was that it was unusual to have so many consultants on a single project of this nature. The evidence obtained by my office indicated that M.O.S.A was contracted to the Department but there was no evidence to indicate how it was appointed whether by tender or otherwise.

6.1.2.3 Mr Makhumisani, the Chief Director for the Department, when asked whether Moteko was appointed in accordance with a fair, transparent and cost effective procurement process, he said he knew of no tender process being undertaken in respect of this Project.

6.1.2.4 Ms Tina Majozi when asked whether Moteko was appointed by way of open tender process, she confirmed that they were appointed fairly by way of a
tender process. Ms Majozl provided a copy of the tender advertisement dated 3 December 2004, and other documents to indicate how the tender process was adjudicated upon.

6.1.3 Independent evaluation

6.1.3.1 The evidence of Mr Selepe and Ms Majozl including the evidence of tender documents provided is sufficient proof that the Complainant’s initial allegation in this regard albeit withdrawn at a later stage could not be backed by any evidence of wrongdoing. The investigation did not reveal any evidence that would indicate that Moteko was appointed in a manner that contravened a fair, transparent and cost effective procurement process with regard to its responsibility to oversee several projects in the Gauteng Province. It has been established that the reason the Chief Director had no knowledge of a tender process being undertaken in respect of the Project was that he joined the Department when the project had already commenced and when Mr Eksteen had already left the Department.

6.1.3.2 It was established during the investigation that Moteko was initially appointed pursuant to it responding to an advertisement dated 3 December 2004 that appeared in the local newspapers, after it had expressed interest in a follow up advertisement that called for an Expression of Interest by Project Management Resource Groups (PMRGs). Moteko and other service providers responded to the advertisement and were shortlisted. That process was followed by an Adjudication Council meeting that decided based on Moteko’s credentials relating to engineering projects, to award it a contract to oversee several projects in the Gauteng Province.
6.1.3.3 With regards to the Suikerbosrand Project (the Project), Moteko was appointed to oversee that Project, which fell under the abovementioned projects, by way of an Instruction to Perform Work (IPW).

6.1.3.4 Notwithstanding that Moteko was initially appointed through a proper tender process, what remains to be determined by measuring the conduct against the rules is whether in the circumstances of the Suikerbosrand Project appointment by way of an Instruction to Perform Work was appropriate.

6.2 Whether the Department failed to play its oversight role effectively to ensure the smooth running and timely completion of the Project and whether the Department failed to manage state funds allocated to the Project appropriately:

6.2.1 The Complainant’s case

6.2.1.1 The Complainant alleged that the Department did not play its oversight role effectively to ensure the smooth running and timely completion of the Project.

6.2.1.2 According to the Complainant, the Project officially commenced on 17 November 2008 and was meant to be completed on 20 May 2009, but due to the numerous delays, the Project to this day, is still incomplete.

6.2.1.3 He allegedly complained to Mr Eksteen that Mr Singo was not providing the necessary support on the Project in that although Mr Singo did provide drawings, these were inadequate as they lacked the proper details required to perform the work. These shortcomings on the part of Mr Singo were brought to Mr Eksteen’s attention but he did not intervene.
6.2.1.4 The Complainant further alleged that to remedy the issue of the incorrect drawings, Mr Singo requested KSB to redo the drawings, which it did and installed the requisite electrical works.

6.2.1.5 He further alleged that the incorrect work that Mr Singo had done cost approximately R80, 000, but the work by KSB cost R365, 359.48.

6.2.1.6 The Complainant alleged that in order to pay KSB for its work, Mr Singo requested that the Department pay him R478, 986.28 because Shatsane had failed to do the work.

6.2.1.7 He further alleged that the Department deposited this amount directly into M.O.S.A’s bank account and M.O.S.A paid KSB R219, 298.25, while Mr Singo misappropriated R259, 688.03.

6.2.1.8 The Complainant alleged further that due to not being paid in full by Mr Singo, KSB withdrew from the Project thus further delaying the completion of the Project. The Complainant alleged that although Shatsane had paid KSB in full an amount of R723, 684.21 for the installation, commissioning and testing of the pumps that were part of the Project, Shatsane has never been compensated in full by Moteko. Consequently, according to the Complainant, Shatsane is owed Project fees in the sum of R5, 421,334.10 and the sum of R4, 200,740.98 for penalties incurred on the Project.

6.2.1.9 The Complainant also alleged that Mr Singo used Shatsane letterheads to try and claim R478, 986.28 from the Department in order to pay KSB, without Shatsane’s knowledge and approval. It was only when Mr Eksteen brought it to the attention of Shatsane that their invoice dated 20 January
2010 was unsigned, that they realised that Singo had used Shatsane letterheads to try and claim monies from the Department. These actions by Mr Singo, the Complainant alleges, were tantamount to fraud.

6.2.2 The Department's case

6.2.2.1 Mr Eksteen conceded that the Department faced challenges with the running of the Project and that Mr Singo's failure to attend crucial site meetings was problematic.

6.2.2.2 Mr Eksteen stated that the state funds were managed adequately, although there were challenges encountered regarding nonpayment or late payment of service providers.

6.2.2.3 Mr Eksteen also conceded, when asked, that Shatsane was indeed owed monies for services rendered in respect of the Project. Mr Eksteen also conceded that Mr Singo had submitted wrong drawings and that he did not do anything about it.

6.2.2.4 The Department conceded through its representative, Mr Eksteen, during an interview with the investigator that it failed to rein in Mr Singo who was the person who delayed the timely completion of the Project. Mr Eksteen indicated to the investigator that it was difficult for him to rein in Mr Singo since there was a problem of paying him as there was no money to pay the service providers.

6.2.3 Independent evaluation

6.2.3.1 It is common cause that the project that was meant to take a few months has taken a little over six (6) years and is still incomplete.
6.2.3.2 The Project was beset with delays that were not as a result of forces of nature that could not be prevented or controlled. Mr Eksteen conceded that the Project remained incomplete, but did not indicate which service provider was responsible for that. The site visit conducted served only to prove that the Project was incomplete, but there was no expert evidence to show how much more work was outstanding and whose responsibility it was to attend to that work.

6.2.3.3 What has become evident is that the exact roles of the different service providers and their relationships with each other and with the Department were not clarified.

6.2.3.4 Although all parties agreed that Mr Singo was absent from Project meetings several times, it is disputed whether a qualified representative was present as delegated by Mr Singo. It is also disputed whether Mr Singo, despite his lengthy absences, provided the required guidance to the Project, and Mr Singo denied that he had provided incorrect drawings. However, the fact that KSB had to be roped in to provide correct drawings is proof that Mr Singo provided incorrect drawings.

6.2.3.5 Further, the fact that the Project remains incomplete is an indication that Mr Singo as the person responsible for overseeing the implementation of the Project failed to execute his mandate. Such failure can be attributed to the Department by the failure of Mr Eksteen to rein in Mr Singo when it became evident that his conduct had an adverse effect on the project.

6.2.3.6 Mr Eksteen admitted that the Department experienced challenges concerning the payment of service providers, but denied that there was any mismanagement of Project funds.
6.2.3.7 However, Mr Eksteen did not rebut the allegation that he failed to take any action when it was reported to him that Mr Singo had requested KSB to rectify the incorrect drawings submitted by him for which he had charged the Department R80, 000, and that KSB had charged R365, 359.48 in that regard. Mr Eksteen further did not rebut the allegation that he also failed to take any action when it was also reported to him that to reimburse KSB, Mr Singo invoiced the Department an amount of R478, 986.28 and paid KSB an amount of R219, 298.25 and kept the remaining R259, 688.03 for himself.

6.2.3.8 The failure by Mr Eksteen to rebut the allegations made in this regard by providing evidence to the contrary indicates that the allegation regarding the mismanagement of Project funds is not without merit.

6.3 Whether the Department unduly failed to pay for work done on the Project by the Complainant, and if so, was the Complainant improperly prejudiced:

6.3.1 The Complainant’s case

6.3.1.1 The Complainant submitted a copy of the contract (provision of labour) between Shatsane and Moteko, dated 21 November 2008, the main terms of which were:

(i) “That whereas the Gauteng Provincial Government has appointed Moteko to provide full professional services, the supply of labour for the completion of the Link Northern Waterline for the amount of R3, 733, 945.98 (VAT Incl).”
(ii) "It is the intention of Moteko to enter into an agreement with Shatsane to provide labour as per priced Bill of Quantities for the supply of labour only."

6.3.1.2 Similarly the agreement for the provision of material reads the same save for the inclusion of the amount, which is R4, 923,799.65. Both contracts with Moteko were signed on 21 November 2008, and Shatsane commenced worked on the same date.

6.3.2 The Department's case

6.3.2.1 Mr Eksteen conceded that he was aware that the Complainant was owed money for work done on the Project amounting to the sum of R5,4 Million, however the Department was unable to pay due to delays by Treasury to avail funds timeously. In his response to the section 7(9) notice, the HOD indicated that the Department paid Moteko a total of R6 512 083.50 for all their services, including construction works and that the Department is not aware of any outstanding payments to them.

6.3.3 Independent evaluation

6.3.3.1 It was conceded that the Department had challenges regarding the payment of service providers and that the Complainant has not been paid for services rendered.

6.3.3.2 It is noted that although the Department admitted that the Complainant was owed money for services rendered on the Project, the exact amount owed is in question and will have to be verified by the Department. This on its own is a source of concern as procurement documents should specify who will be paid how much, on delivering what and who is to determine if
delivery is according to specifications, before payment is made. Ordinarily it is the work of quantity surveyors that to do the last part.

7. MEASURING CONDUCT AGAINST THE RULES

7.1 Whether Moteko was appointed irregularly in violation of the required fair, transparent and cost effective procurement process that complied with procurement policies, Treasury Regulations and the PFMA:

7.1.1 Section 217(1) of the Constitution requires 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.

7.1.2 The above requirement is further emphasised in Treasury Regulation 16A3.2(a), which provides that a supply chain management system must be fair, equitable, transparent, competitive and cost effective.

7.1.3 However, Treasury Regulation 16A6.4 makes provision for deviation from the above requirement in 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.

7.1.4 It is noted that Moteko was initially appointed through a process in which an advertisement that called for an Expression of Interest by Project Management Resource Groups (PMRGs) was issued on 3 December 2004.
It is further noted that subsequent to the responses received from the PMRGs, the shortlisted bids underwent adjudication at the Adjudication Council meeting that decided to appoint Moteko based on its credentials in relation to engineering projects, to oversee a number of projects in the Gauteng Province. It has since been established that the Suikerbosrand Project was one of those projects.

7.1.5 However, with regard to the Suikerbosrand Project in particular, Moteko was appointed by way of an IPW. It has been established that an IPW is a written instruction issued by the Department to a service provider to do specific work on its behalf. It has also been established that this method of procurement is used when a tender had been previously advertised in the open market for the public to respond. Accordingly potential service providers are selected to form part of a list of qualified service providers using a defined criterion. The Department would thereafter negotiate standard rates or agree on gazetted rates for all work to be issued to successful service providers on the list.

7.1.6 It has also been established that the IPW is a departmental strategy used in order to be responsive to its professional services’ needs without the need to call for quotations or tenders every time the service is required. The method is accordingly designed to save time and hastens service delivery in accordance with the deviation from normal procurement processes permissible in terms of Regulation 16A6.4.

7.1.7 However, in the light of well documented delays in a Project that commenced on 17 November 2008 and was supposed to be completed on 20 May 2009, it cannot be said that the appointment of Moteko by way of an IPW achieved its objective to save time and hasten service delivery as anticipated. The Department did not advance cogent reasons why the Project is beset with delays despite its option of an IPW under the circumstances. In fact, the HOD
has indicated in his response to my section 7(9) notice that a new contractor was appointed on 22 October 2013 and commenced work on the Project on 9 December 2013.

7.1.8 In terms paragraph 3 of the SCM Guide, demand management is the first phase of SCM. The objective is to ensure that the resources required to fulfill the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs.

7.1.9 Notwithstanding that the HOD indicated that the project would be completed before end of 2014 within the current budget, there is no guarantee that costs related to risk management would not escalate. There has clearly been a failure to deliver the project at the correct time in accordance with paragraph 3 of the National Treasury SCM Guide.

7.1.10 Therefore in the light of the above the failure to open the Suikerbosrand Project to a fair, equitable, transparent, competitive and cost effective procurement process although not unlawful was not viable and cannot be justified.

7.2 Whether the Department failed to play its oversight role effectively to ensure the smooth running and timely completion of the Project; and whether the Department failed to appropriately manage the state funds allocated for the Project:

7.2.1 Section 195(1)(b) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the promotion of efficient, economic and effective use of resources.
7.2.2 Section 45(a) of the PFMA requires of an official in a department to ensure that the departmental systems of financial management and internal control are carried out within the area of responsibility of that official;

7.2.3 Section 45(b) further provides that an official in a department is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility.

7.2.4 Section 45(c) provides that an official in a department must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any other collection of revenue due.

7.2.5 It then follows that the Department's officials responsible for the Suikerbosrand Project were obliged to ensure the effective, efficient, economical and transparent use of financial and other resources involved in the Project. They were further obliged to take effective and appropriate steps to prevent any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure in the Project.

7.2.6 The Department's officials responsible for the Project, Mr Eksteen in particular was obliged to be accountable for the monies allegedly irregularly paid to Mr Singo in the Project. Mr Eksteen was equally obliged to ensure that the Project is completed within the set timeframes to prevent occurrence of fruitless and wasteful expenditure due to non-completion. It is noted that the Project commenced on 17 November 2008 and was supposed to be completed on 20 May 2009.
7.3 Whether the Department unduly failed to pay for work done on the Project by the Complainant, and if so, was the Complainant improperly prejudiced:

7.3.1 Treasury Regulation 8.2.3 requires that unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice or, or in the case of civil claims, from the date of settlement or court judgment.

7.3.2 It then follows that the Department had an obligation to pay the Complainant within 30 days of receipt of his company’s invoices. Notwithstanding that the Complainant’s company was not directly contracted to the Department but was contracted to Moteko, the Department is responsible for payments not made to the Complainant’s company by virtue of the fact that Moteko was in terms of its contract with the Department performing a public function on behalf of the Department within the meaning of section 239 of the Constitution. The conduct of Moteko is therefore imputed to the Department.

7.3.3 It must be noted that the Department was the overall principal in charge of the Project and although Shatsane was contracted to Moteko and Moteko in turn to the Department, in instances where Shatsane did not receive payment from Moteko, Shatsane would directly approach the Department for payment.

7.3.4 This relationship, as articulated above, is confirmed by the fact that on 26 November 2010, by way of a letter to Shatsane, the Department attempted to impose penalties in the sum of R4, 200,740.98 on Shatsane for delays in the Project, which delays were as a result of the non-cooperation on the project by Mr Singo.
7.3.5 Shatsane has allegedly not been paid for work done in the sum of R5, 421,334.10 by Motoko and Motoko by the Department, and due to the fact that the overall project principal is the Department, Shatsane is entitled to claim the aforementioned amount from the Department if such amount is verified to be due and payable.

7.3.6 Over and above the claim leveled against the Department above, Shatsane is similarly further entitled to claim penalties against the Department in the sum of R4, 200,740.98 for delays emanating from their removal from the Project, if such amount is verified to be due and payable.

7.3.7 It then follows that Shatsane is entitled to be reimbursed by the Department in the sum of R9, 622,075.80 being in respect of work done plus penalties provided that such amount is verified to be due and payable.

8. FINDINGS

General Observations

I did not conduct a systemic investigation in this regard, however I am concerned the issue might be deeper that just this one tender. I will therefore appreciate it if the Department could review all tenders issued and still in the process of implementation including current tenders being advertised as at the date of this report. The benefit would be to avoid delays in infrastructure caused by contract and tender disputes and to ensure quality deliverables. It would be appreciated that the Department report on progress in this regard by end of February 2015.
Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

8.1 Whether Moteko was appointed irregularly in violation of the required fair, transparent and cost effective procurement process that complied with procurement policies, Treasury Regulations and the PFMA:

8.1.1 The allegation that Moteko was appointed irregular in violation of the required fair, transparent and cost effective procurement process although subsequently withdrawn by the Complainant, was found to be unsubstantiated during my office’s preliminary investigation;

8.1.2 My office’s preliminary investigation established that Moteko was initially appointed pursuant to it responding to an advertisement dated 3 December 2004 that appeared in the local newspapers, after it had expressed interest in a follow up advertisement that called for an Expression of Interest by PMRGs. Moteko and other service providers responded to the advertisement and were shortlisted. That process was followed by an Adjudication Council meeting that decided based on Moteko’s credentials relating to engineering projects, to award it a contract to oversee several projects in the Gauteng Province.

8.1.3 With regard to the Suikerbosrand Project Moteko was appointed by way of an IPW within permissible deviation in terms of Treasury Regulation 16A6.4.

8.1.4 The Department’s failure to open the Suikerbosrand project to a fair, equitable, transparent, competitive and cost effective procurement process and opting for an IPW with a view to fast track service delivery was not viable and cannot be justified;
8.1.5 Contrary to what was anticipated by the IPW, the Project has been plagued by delays and it remains incomplete 6 years since it was commenced on 17 November 2008 and was supposed to be completed on 20 May 2009;

8.2 Whether the Department failed to play its oversight role effectively to ensure the smooth running and timely completion of the Project:

8.2.1 The allegation that the Department failed to play its oversight role effectively to ensure the smooth running and timely completion of the Project was found to be substantiated;

8.2.2 The Department through Mr Ekstein failed to ensure that the service providers appointed to deliver the Project completed it within the period specified or shortly thereafter;

8.2.3 Mr Ekstein failed to rein in Mr Singo who most of the time failed to attend site meetings, where his input was required to move the Project forward and who also provided Shatsane with incorrect and inadequate drawings for the installation of a pipe on a bridge, electrical connections and pumps for a pump house;

8.2.4 Such failure is in violation of paragraph 3 of the SCM Guide which provides that demand management is the first phase of SCM and further that the objective is to ensure that the resources required to fulfill the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those need.

8.2.5 The Department’s violation of the National Treasury SCM prescripts in this regard constitutes improper conduct as envisaged in section 182(1) of the
Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1995.

8.3 Whether the Department failed to appropriately manage the state funds allocated for the Project:

8.3.1 The allegation that the Department failed to appropriately manage the state funds allocated for the Project were found to be substantiated;

8.3.2 The Department failed to account for the monies allegedly paid to Mr Singo irregularly in the Project despite being alerted to a possible fraudulent inflation of KSB payment invoices by Mr Singo using Shatsane's letterheads;

8.3.3 The Department also failed to ensure the effective, efficient, economical and transparent use of financial resources involved in the Project in violation of section 195(1)(b) of the Constitution and section 45 of the PFMA; and

8.3.4 The conduct of the Department in this regard was improper as envisaged in section 182(1) of the Constitution and constitutes maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994.

8.4 Whether the Department unduly failed to pay for work done on the Project by the Complainant, and if so, was the Complainant improperly prejudiced:

8.4.1 The allegation that the Department unduly failed to pay for work done on the Project by the Complainant was found to be substantiated;

8.4.2 It has been established that when Moteko was unable to pay Shatsane, Shatsane approached the Department directly and the Department paid thus
creating a legitimate expectation that in case of failure by Moteko to pay Shatsane the Department would pay. The Department has also on 26 November 2010, by way of a letter to Shatsane, attempted to impose penalties in the sum of R4, 200,740.98 on Shatsane for delays in the Project, which delays were as a result of the non-cooperation on the project by Mr Singo.

8.4.3 The Complainant’s company is still owed a sum of R9 622 075.08 for the services rendered by his company in the Project to which a final account was submitted to the Department on 13 September 2011;

8.4.4 The failure by the Department to pay the Complainant within 30 days of receipt of his invoices was in violation of Treasury Regulation 8.2.3;

8.4.5 Such failure constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act No. 23 of 1994; and

8.4.6 The Complainant was improperly prejudiced by the Department’s failure to pay him for work done on the project by his company.

9. REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution is the following:

9.1 The Head of Department

9.1.1 To ensure that the Project is finalised within 3 months from the date of this report and within budget;
9.1.2 To ensure that appropriate action is taken against those officials responsible for the delay in completion of the Project and improper conduct associated therein;

9.1.3 To ensure that the Complainant is paid all monies due to his company within 90 days from the date of the final report. The monies owed to be verified in consultation with the Complainant and Moteko must be paid in tranches. The first payment must be made within 30 days from the date of this report.

10. MONITORING

10.1 The Public Protector requires an implementation plan from the Head of Department indicating the steps that have been taken and the procedures that have been implemented in line with the remedial action taken in paragraph 9 above, this should be done within 30 days from date of this Report.

[Signature]
ADV THULI N. MADONSELA
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 18/12/2014

Assisted by: Mr L Pupuma of Makaula Zilwa Incorporated