Allegations of improper prejudice as a result of a failure by Geoscience to pay invoices submitted for services rendered and failure to pay interest thereon for late payment

REPORT ON AN INVESTIGATION INTO THE ALLEGED IMPROPER PREJUDICE SUFFERED IN RELATION TO THE NON-PAYMENT OF INSEARCH RECRUITMENT PROJECTS AND THE EARLY TERMINATION OF THE CONTRACT AWARDED IN THAT REGARD BY THE COUNCIL FOR GEOSCIENCE
# INDEX

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Summary</td>
<td>3</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
<td>11</td>
</tr>
<tr>
<td>2. THE COMPLAINT</td>
<td>13</td>
</tr>
<tr>
<td>3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR</td>
<td>14</td>
</tr>
<tr>
<td>4. THE INVESTIGATION</td>
<td>15</td>
</tr>
<tr>
<td>5. EVIDENCE AND INFORMATION OBTAINED</td>
<td>22</td>
</tr>
<tr>
<td>6. THE ADMINISTRATIVE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH BY COUNCIL FOR GEOSCIENCE</td>
<td>29</td>
</tr>
<tr>
<td>7. FINDINGS</td>
<td>35</td>
</tr>
<tr>
<td>8. REMEDIAL ACTION</td>
<td>38</td>
</tr>
<tr>
<td>9. MONITORING</td>
<td>39</td>
</tr>
</tbody>
</table>
Executive Summary

(i) This is the report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates the Public Protector's findings and the appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into the alleged improper conduct and prejudice suffered in relation to the non-payment of Insearch Recruitment Projects CC and the early termination of the contract awarded in that regard by the Council for Geoscience (Geoscience).

(iii) The complaint was lodged by Ms. Vionne Tembo, the owner and Chief Executive Officer of a small enterprise called Insearch Recruitment Projects CC registered as a Close Co-operation (CK No. 2003/097958/23) on 11 June 2014, alleging that:

(a) Geoscience owed her company an amount of R1 297 482.81 excluding interest for services rendered (the provisioning of 17 Technical Assistance for Sample Handling and Preparation) flowing from a tender awarded in November 2012. The Complainant indicated that the aforesaid amount is constituted by unpaid invoices for April and May 2014 including four (4) temporary staff added and invoices for protective clothing bought for the temporary staff; and

(b) Geoscience terminated the contract three months prior to its expiry.
On receipt of the Complainant’s initial complaint on 11 February 2014, a conciliation process in terms of section 6(4)(b)(i) of the Public Protector Act followed on 19 February 2014. The outcome of same was an admission by Geoscience that it had acted in breach of an agreement with the Complainant which resulted in her being prejudiced by not receiving the income she would have received had there been no such breach of agreement. Geoscience breached the agreement with the Complainant by appointing a person who did not participate in the interview process which was outsourced to the Complainant’s company. Consequently Geoscience agreed to pay the Complainant an amount of R164 730.00 in lieu of the permanent placement fee for a Human Resource Manager. The amount constituted 85% of the total fee for the permanent placement of a Human Resource Manager.

The investigation was conducted in terms of section 182 of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, 1994, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level. Geoscience did not contest or dispute the powers and jurisdiction of the Public Protector to investigate the matter and take appropriate remedial action.

Based on analysis of the complaint, the following issues were identified to inform and focus the investigation:

a) Whether Geoscience unduly failed to pay the Complainant’s company’s invoices for services rendered in terms of the contract entered into between the parties;
b) Whether Geoscience improperly terminated a contract entered into with the Complainant’s company;

c) Whether Geoscience unduly failed to pay the Complainant’s company interest on invoices paid after 30 days of submission; and

d) Whether the Complainant suffered prejudice in the circumstances.

(vii) The investigation process commenced with e-mail correspondence from the Public Protector’s Office addressed to Mr Vincent Gumede at Geoscience dated 31 July 2014, requesting a response to the Complainant’s allegations and the reasons for the early termination of the contract entered between Geoscience and the Complainant’s company. A formal investigation was conducted through meetings, correspondence and telephone calls with the relevant officials of Geoscience.

(viii) The key laws, policies and related prescripts taken into account to help the Public Protector determine if there had been improper conduct or maladministration by Geoscience and prejudice to the Complainant were principally those imposing standards that should have been complied with by Geoscience and its officials when dealing with the payment of service providers.

(ix) In this regard the Public Protector took into account that the conduct of Geoscience relating to the payment of the Complainant’s company for services rendered had to comply with section 38(1)(f) of the Public Finance Management Act No. 1 of 1999 (PFMA), National Treasury Regulation 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010, which provides for payment of service providers within (30) days after submission of an invoice.
(x) With regard to the interest claimed by the Complainant, the Public Protector took into account that the conduct of Geoscience had to comply with section 1 of the Prescribed Rate of Interest Act No. 55 of 1975 which provides that if a debt bears interest and the rate at which interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run.

(xi) The Public Protector was further guided by section 182(1)(a) of the Constitution, which mandates the Public Protector to investigate any conduct in state affairs, or in the public administration, in any sphere of government, that is alleged to result in any impropriety or prejudice in determining whether the Complainant had suffered any prejudice.

(xvi) Having regard to the evidence, the regulatory framework determining the standard which Geoscience should have complied with and the impact on the Complainant, the Public Protector makes the following findings:

a) Regarding whether Geoscience unduly failed to pay the Complainant’s company’s invoices for services rendered in terms of the contract entered into between the parties the Public Protector finds that:

(aa) The allegation that Geoscience unduly failed to pay the Complainant’s company’s invoices for services rendered in terms of the contract is not substantiated;

(bb) By 12 September 2014 Geoscience had paid the Complainant’s company’s eight (8) outstanding invoices
amounting to R601 706.25 excluding the invoices submitted for June, July and August 2014;

(cc) Geoscience’s refusal to pay the invoices submitted for June, July and August 2014 did not violate any law or legal prescript since no services were rendered by the Complainant’s company; and

(dd) The Public Protector is accordingly unable to find that the conduct of Geoscience constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act No. 23 of 1994 and ultimately improper conduct as envisaged in section 182(1) of the Constitution.

b) Regarding whether Geoscience improperly terminated the contract entered into with the Complainant’s company, the Public Protector finds that:

(aa) The allegation that Geoscience improperly terminated the contract entered into with the Complainant’s company three (3) months prior to its expiry is not substantiated;

(bb) On proper construction, the contract of Eighteen (18) months, which was linked to a budget of R2 078 000.00, commenced on 1 February 2013 and terminated on 31 May 2014 once the budget had been exhausted; and

(cc) The Public Protector is accordingly unable to find that the conduct of Geoscience constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act No. 23 of 1994 and ultimately improper conduct as envisaged in section 182(1) of the Constitution.
c) Regarding whether Geoscience unduly failed to pay the Complainant’s company interest on invoices paid after 30 days of submission, the Public Protector finds that:

(aa) The allegation that Geoscience unduly failed to pay the Complainant’s company interest on invoices paid after 30 days of submission is substantiated;

(bb) Geoscience paid fifteen (15) of the Complainant’s company’s invoices after 30 days of receipt in contravention of paragraph 2 of the contract entered into between the parties, section 38(1)(f) of the PFMA, the National Treasury Regulation 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010, which requires payment to be made within 30 days of receipt of invoices;

(cc) The failure by Geoscience to pay fifteen (15) of the Complainant’s company’s invoices within 30 days of receipt as stipulated in paragraph 2 of the contract entered into between the parties, section 38(1)(f) of the PFMA, the National Treasury Regulation 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010 constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994; and
(dd) The Complainant is entitled to be paid interest at the rate of 15.5% per annum in terms of section 1(1) and (2) of the Prescribed Rate of Interest Act No. 55 of 1975, on all invoices which were not paid within 30 days of receipt as stipulated in the contract entered into between the parties, section 38(1)(f) of the PFMA, the National Treasury Regulation 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010.

d) Regarding whether the Complainant suffered prejudice in the circumstances, the Public Protector finds that:

(aa) Geoscience’s failure to pay the Complainant’s company on time and the failure to pay the Complainant’s company’s interest on payments made after 30 days of receipt of invoices prejudiced the Complainant.

(bb) As a small enterprise with limited cash flow, the Complainant’s business was deprived, to its operational detriment of a timeous source of income to which it was entitled to in terms of the contract entered into between the parties.

(xix) The appropriate remedial action the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where she and her business would have been had Geoscience not conducted itself improperly, is the following:

(a) The Board of Geoscience must ensure that its Acting Chief Executive Officer implement the remedial action taken by the Public Protector within the specified timeframes;
(b) The Acting Chief Executive Officer of Geoscience must ensure that interest owed to the Complainant’s business on all invoices paid after 30 days of receipt is paid at the rate of 15.5% per annum within 30 days from the date of this report;

(c) The Acting Chief Executive Officer of Geoscience must consider taking appropriate action in terms of the Public Finance Management Act No. 1 of 1999 against any official who might have been responsible for the late payment of the Complainant’s company’s invoices resulting in fruitless and wasteful expenditure;

(d) The Acting Chief Executive Officer of Geoscience must write a letter of apology to the Complainant for the delay in paying interest owed to her company within 30 days from the date of this report;

(e) The Acting Chief Executive Officer of Geoscience must provide the Public Protector with proof of payment of the interest owed to the Complainant’s company immediately when payment is made within 30 days from the date of this report; and

(f) The Public Protector will request an Action Plan from the Acting Chief Executive Officer of Geoscience indicating how the remedial action will be implemented, within 30 days of the issuing of this report.
REPORT ON AN INVESTIGATION INTO THE ALLEGED IMPROPER PREJUDICE SUFFERED IN RELATION TO THE NON-PAYMENT OF INSEARCH RECRUITMENT PROJECTS AND THE EARLY TERMINATION OF THE CONTRACT AWARDED IN THAT REGARD BY THE COUNCIL FOR GEOSCIENCE

1. INTRODUCTION

1.1 Overview

1.1.1 This is the report of the Public Protector, issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act) following an investigation into the alleged improper prejudice suffered in relation to the non-payment of Insearch Recruitment Projects CC and the early termination of the contract awarded in that regard by the Council for Geoscience (Geoscience).

1.1.2 The report is submitted in terms of section 8(1) of the Public Protector Act, to:

1.1.2.1 The Chairperson of the Board of the Council for Geoscience, Prof P E Ngoepe; and

1.1.2.2 The Acting Chief Executive Officer of the Council for Geoscience, Mr S Sikhosana.

1.1.3 A copy of the report is also provided to the Complainant, Ms Vionne Tembo in terms of section 8(3) of the Public Protector Act.

1.1.4 The report relates to an investigation into the alleged improper prejudice suffered in relation to the non-payment of Insearch Recruitment Projects CC and the early termination of the contract awarded in that regard by the Council for Geoscience (Geoscience).
1.2 Background

1.2.1 Ms Vionne Tembo (the Complainant) initially approached the Public Protector per correspondence dated 11 February 2014, regarding the alleged failure by Geoscience to pay her company’s invoice relating to the permanent placement of a Human Resource Manager. In the aforesaid correspondence the Complainant requested the Public Protector’s office to assist her to get payment from Geoscience. The Complainant further requested the Public Protector’s office to be part of the meeting on 19 February 2014 at her company’s Fourways offices, in which the matter of her company’s payment was discussed with the representatives of the Geoscience.

1.2.2 The Public Protector played a conciliatory role at the meeting of 19 February 2014 in assisting the parties to come to an agreement regarding the payment.

1.2.3 During the meeting it transpired that Geoscience had decided to appoint someone else as Human Resource Manager who had not participated in the interview process which was outsourced to the Complainant’s company. During the meeting it was also agreed between the parties that since Geoscience had reneged on an agreement it had with the Complainant’s company regarding the placement of a Human Resource Manager, it would pay a portion of what would have been due to the Complainant’s company had there been no breach of the agreement.

1.2.4 The Complainant subsequently wrote to the Public Protector per letter dated 3 April 2014 and advised that Geoscience had paid a sum of R164 730.00 to her company in lieu of the permanent placement fee for a Human Resource Manager. The amount constituted 85% of the total fee for the placement of a permanent Human Resource Manager as
agreed at the meeting of 19 February 2014. Prior to making the aforesaid payment, Geoscience had raised the issue of the validity of the Complainant’s Company’s Tax Clearance Certificate. However, the issue was resolved in that at the time the tender was awarded the Complainant’s company had submitted a valid Tax Clearance Certificate to Geoscience.

2 THE COMPLAINT

2.1 The Complainant subsequently lodged another complaint with the Public Protector on 11 June 2014 on behalf of Insearch Recruitment Projects CC (Complainant’s company) alleging the following:

2.1.1 Her company was awarded a tender in November 2012 and its scope and framework was supposed to commence in January 2013. However, there were issues that some of the managers at Geoscience would still be on leave at the beginning of January 2013 and would not be available to orientate the new staff. It was then agreed that the assumption of duties by the new staff be postponed to February 2013;

2.1.2 Geoscience owed her company an amount of R1 297 482.81 excluding interest for services rendered (the provisioning of seventeen (17) Technical Assistance for Sample Handling and Preparation). The Complainant indicated that the aforesaid amount was constituted by unpaid invoices for April and May 2014 including four (4) temporary staff added and invoices for protective clothing bought for the temporary staff; and

2.1.3 Geoscience terminated the contract three months prior to its expiry.

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:

"The Public Protector has the power as regulated by national legislation—

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.¹ The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."²

3.4 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

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¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
² Supra at para [73].
3.5 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.6 Geoscience is an organ of state within the meaning of section 239 of the Constitution as it performs a public function in terms of the Geoscience Act No. 100 of 1993, and its conduct amounts to conduct in state affairs as a result, the matter falls within the ambit of the Public Protector’s mandate.

3.7 The Public Protector’s power and jurisdiction to investigate this matter 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 6 of the Public Protector Act recognises the Public Protector’s authority to investigate and report his or her findings regarding any complaint lodged.

4.1.3 The initial complaint lodged with the Public Protector on 11 February 2014 was resolved through conciliation held on 19 February 2014. The settlement reached on that day was that Geoscience would pay the Complainant’s company 85% of the total fee for the placement of a
permanent Human Resource Manager which amounted to R164 730.00. Geoscience had breached an agreement entered into with the Complainant’s company by appointing someone else as Human Resource Manager who did not participate in the interview process that was outsourced to the Complainant’s company.

4.2 Approach to the Investigation

4.2.1 Like 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 or improper conduct?

4.2.1.4 In the event of improper conduct or 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 was resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the allegation that Geoscience improperly failed to pay the Complainant’s company interest on invoices not paid within thirty (30) days of receipt was substantiated.

4.2.3 The enquiry regarding what should have happened, focused on the law and other rules that regulate the standard that should have been met by
Geoscience to prevent improper conduct or maladministration and prejudice to the Complainant. In this case, key reliance was placed on the Contract (Provisioning of 17 Technical Assistance for Sample Handling and Preparation) entered into between the parties, section 38(1)(f) of the Public Finance Management Act No. 1 of 1999 (PFMA), the Prescribed Rates of Interest Act No. 55 of 1975, National Treasury Regulations Rule 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration or improper conduct. 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 organ of state in this case Geoscience, complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the complaint, the following issues were considered and informed the focus of the investigation:

4.3.1 Whether Geoscience unduly failed to pay the Complainant’s company’s invoices for services rendered in terms of a contract entered into between the parties;

4.3.2 Whether Geoscience improperly terminated the contract entered into with the Complainant’s company;

4.3.3 Whether Geoscience unduly failed to pay the Complainant’s company interest on invoices paid after 30 days of submission; and

4.3.4 Whether the Complainant suffered prejudice in the circumstances.
4.4 The Key Sources of Information

4.1 Correspondence

4.1.1 E-mail dated 28 March 2014 addressed to Mr Vincent Gumede at Geoscience, requesting a response to the allegations that Geoscience is refusing to pay the Complainant’s company despite an agreement reached at the meeting of 19 February 2014;

4.1.2 Follow up e-mail dated 31 March 2014 to the e-mail referred to above.

4.1.3 Letter dated 3 April 2014 received from Complainant advising of payment made by Geoscience as agreed at the meeting of 19 February 2014;

4.1.4 Letter of a follow up complaint dated 11 June 2014 received from Complainant;

4.1.5 E-mail dated 29 July 2014 addressed to Complainant requesting a copy of the contract entered into between her company and Geoscience;

4.1.6 E-mail dated 31 July 2014 addressed to Mr Vincent Gumede at Geoscience, requesting a response to the allegations made in the follow up complaint;

4.1.7 Follow up e-mail dated 8 August 2014 addressed to Mr Vincent Gumede at Geoscience;

4.1.8 E-mail dated 12 August 2014 from Mr Vincent Gumede at Geoscience acknowledging receipt of e-mail dated 8 August 2014 from the Public Protector;

4.1.9 Response received from Mr Vincent Gumede at Geoscience per e-mail dated 20 August 2014;
4.1.10 Follow up e-mail dated 20 August 2014 to the response referred to above;

4.1.11 E-mail dated 20 August 2014 addressed to the Complainant providing her with feedback received from Geoscience;

4.1.12 E-mail dated 21 August 2014 addressed to Mr Vincent Gumede at Geoscience proposing a meeting with the parties;

4.1.13 Follow up e-mail dated 26 August 2014 addressed to Mr Vincent Gumede at Geoscience regarding the proposed meeting referred to above;

4.1.14 E-mail dated 27 August 2014 received from Mr Vincent Gumede at Geoscience confirming 28 August 2014 as the date of the proposed meeting;

4.1.15 E-mail dated 23 September 2014 addressed to Mr Vincent Gumede at Geoscience requesting him to respond to the Complainant’s enquiry;

4.1.16 E-mail dated 17 October 2014 received from Mr Vincent Gumede at Geoscience with an attachment regarding the calculation of interest owed and proofs of payment of invoices submitted by the Complainant’s company;

4.1.17 E-mail dated 24 October 2014 received from the Complainant with an attachment regarding the calculation of interest owed and documents relating to the contract entered into between the parties;
4.1.18 E-mails dated 11 November 2014 addressed to Mr Vincent Gumede at Geoscience and the Complainant exchanging documents received from the respective parties relating to the interest owed and invoices paid;

4.1.19 E-mails dated 18 November 2014 addressed to Mr Vincent Gumede at Geoscience and the Complainant requesting their responses to the documents exchanged between the parties;

4.1.20 E-mail dated 15 January 2015 received from Mr Vincent Gumede at Geoscience with a schedule of the Complainant’s company’s invoices paid by Geoscience;

4.1.21 E-mail dated 16 January 2015 received from the Complainant as a response to the e-mail referred to above;

4.1.22 Follow up e-mail dated 3 March 2015 addressed to the Complainant regarding interest owed by Geoscience;

4.1.23 E-mail dated 30 March 2015 received from the Complainant as a response to the e-mail referred to above;

4.1.24 Revised schedule of interest owed by Geoscience received from the Complainant per e-mail dated 26 May 2015;

4.1.25 E-mail dated 4 June 2015 with section 7(9) notice attached addressed to the Acting CEO of Geoscience, Mr Simon Sikhosana; and

4.1.26 E-mail dated 12 June 2015 received from Mr Vincent Gumede at Geoscience with the Acting CEO of Geoscience’s response to the section 7(9) notice attached.
4.2 Meetings and Interviews

4.2.1 Meeting held with the Complainant and the representatives of Geoscience at the Complainant’s company’s offices at Fourways on 19 February 2014;

4.2.2 Meeting held with the Complainant and the representatives of Geoscience at Geoscience offices on 28 August 2014; and

4.2.3 Meeting held with the Complainant and representatives of Geoscience at Geoscience offices on 13 October 2014.

4.3 Notice issued in terms of section 7(9) of the Public Protector Act, 1994 to:

4.3.1 Acting CEO of Geoscience, Mr Simon Sikhosana dated 28 May 2015.

4.4 Response to the notice in terms of section 7(9) of the Public Protector Act, 1994 from:

4.4.1 Acting CEO of Geoscience, Mr Simon Sikhosana’s response dated 8 June 2015.

4.5 Legislation and other prescripts

4.5.1 Public Finance Management Act No. 1 of 1999.

4.5.2 Prescribed Rate of Interest Act No. 55 of 1975.

4.5.3 National Treasury Regulations (Regulation 8.2.3).

4.5.4 National Treasury General Conditions of Contract, July 2010 (paragraphs 16.3).
5. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

5.1 Whether Geoscience unduly failed to pay the Complainant's company's invoices for services rendered in terms of the contract entered into between the parties:

Common Cause

5.1.1 It is common cause that the parties entered into a contract for the provisioning of 17 technical assistance for sample handling and preparation signed by the then Geoscience Chief Executive Officer, Mr Mxolisi Kota on 24 January 2013 on behalf of Geoscience and signed by the Complainant, Ms Vionne Tembo on 18 January 2013 on behalf of her company (Insearch Recruitment Projects CC).

5.1.2 It is also common cause that the contract provided that it is for the period of Eighteen (18) months starting from 1st February 2013 to 31st July 2014, for a total fixed price of R2 078 000.00 including VAT and subject to CPIX.

5.1.3 It is also not in dispute that at the time the Complainant lodged a follow up complaint with the Public Protector on 11 June 2014, there were a number of her company's invoices which had not been paid by Geoscience as will be illustrated in the subsequent paragraph.

5.1.4 The Public Protector noted that subsequent to the Complainant lodging a follow up complaint on 11 June 2014, the following outstanding invoices were paid on 12 September 2014 by Geoscience:
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<th>Period invoice remained unpaid</th>
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<td>7 600-00</td>
<td>31/05/2014&quot;</td>
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5.1.5 The Public Protector also noted that on 30 March 2015, the Complainant confirmed after reconciling her company’s bank statements against a list of Geoscience’s proofs of payments made to her company that all the invoices had been paid by Geoscience except those issued by her company in June, July and August 2014 respectively, after the contract had been terminated.

Issues in dispute

5.1.6 The Complainant initially argued that her company was entitled to be paid for invoices issued in June, July and August 2014 respectively on the basis that the contract provided that it is for the period of Eighteen (18) months starting from 1st February 2013 to 31st July 2014.

5.1.7 Geoscience countered that the contract had been terminated as the funds budgeted for it had been paid to the Complainant’s company and exhausted. The contract clearly stipulated that the total fixed price is R2 078 000.00 including VAT subject to CPIX. Therefore Geoscience’s argument in this regard is sustainable.
5.1.8 Upon investigation, it was discovered that the Complainant’s company did not render any services after the contract was terminated at the end of May 2014. The Complainant subsequently abandoned her claim in this regard after Geoscience explained to her that the duration of the contract had to be interpreted in conjunction with the budget allocated for the contract. The Complainant had been labouring under the mistaken belief that her company was entitled for compensation for June, July and August 2014 respectively as she was of the view that Geoscience had breached the contract by terminating.

5.1.9 It then follows that the fact that the Complainant’s company did not render any services after the contract was terminated, Geoscience is not liable to pay her company for the invoices issued by it in June, July and August 2014 respectively.

5.2 Whether Geoscience improperly terminated the contract entered into with the Complainant’s company

5.2.2 The Complainant submitted that Geoscience had terminated the contract entered into with her company three (3) months prior to the stipulated eighteen (18) months period.

5.2.3 In response Geoscience argued that the contract had been terminated because the funds budgeted for the project had been exhausted and that the funds budgeted for the project had all been paid to the Complainant’s company. In this regard Geoscience submitted a schedule of remittance advices of payments of all the valid invoices issued by the Complainant’s company, which amounted to a sum of R2 389 700.00. However, and independent calculation by the Public Protector’s investigator of all the Complainant’s company’s invoices paid by Geoscience as indicated at paragraph 5.3.3 below reveals that a sum of R2 823 984.11 was paid to the Complainant’s company.
5.2.4 The Public Protector noted that the aforesaid amount of R2 389 700.00 allegedly paid to the Complainant’s company as submitted by Geoscience was not disputed by the Complainant. It is also clear from the aforesaid that the actual amount paid to the Complainant’s company exceeded the total fixed contract price of R2 078 000.00 agreed to by the parties.

5.2.5 Therefore once the contract price agreed to by the parties had been exhausted, Geoscience’s obligation to make any additional payments became extinct. The Public Protector is therefore inclined to accept Geoscience’s version in this regard.

5.3 Whether Geoscience unduly failed to pay the Complainant’s company interest on invoices paid after 30 days of submission:

5.3.1 The Complainant submitted that her company is entitled to interest amounting to R168 552.55 on all invoices not paid within 30 days of submission as undertaken by Geoscience in the contract entered into between the parties.

5.3.2 The Complainant submitted a schedule of all invoices not paid within 30 days of submission and the interest calculated at the rate of 15.5% per annum in that regard. The schedule marked as Annexure C was accordingly attached to the section 7(9) notice which was addressed to the Acting CEO of Geoscience.

5.3.3 The Public Protector has noted that Geoscience’s Chief Executive Officer undertook in the contract to make payment for the services rendered in accordance with the terms and conditions of the contract within 30 days after receipt of an invoice.
5.3.4 In response to the Complainant’s claim for interest, Geoscience submitted a spreadsheet with an amount of R37 479.36 being interest calculated at the rate of 15.5% and another amount of R88 169.03 being interest calculated at the rate of 2% per month.

5.3.5 Geoscience argued that the interest calculations submitted by the Complainant were incorrect. It is noted that Geoscience’s calculation of interest did not include all the invoices paid after 30 days of being issued as indicated in the following table compiled after Geoscience’s proofs of payments were collated and reconciled:

<table>
<thead>
<tr>
<th>Invoice no.</th>
<th>Payment date</th>
<th>Total Amount paid</th>
<th>Invoice amount</th>
<th>Date invoice issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>12292</td>
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<td>134 472-50</td>
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</tr>
<tr>
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<td>-</td>
<td>135 303-75</td>
<td>30/04/2013*</td>
</tr>
<tr>
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</tr>
<tr>
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<td>31/07/2013</td>
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<tr>
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<td>117 903-41</td>
<td>31/08/2013</td>
</tr>
<tr>
<td>12330</td>
<td>04/11/2013</td>
<td>310 080-00</td>
<td>139 840-00</td>
<td>30/09/2013*</td>
</tr>
<tr>
<td>12330</td>
<td>-</td>
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</tr>
<tr>
<td>12335</td>
<td>-</td>
<td>-</td>
<td>31 920-00</td>
<td>31/10/2013</td>
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<tr>
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<td>-</td>
<td>113 240-00</td>
<td>31/10/2013</td>
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<tr>
<td>12356</td>
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<td>31/12/2013</td>
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<tr>
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<td>164 730-00#</td>
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<td>-</td>
<td>-</td>
<td>88 397-50</td>
<td>31/01/2014*</td>
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</table>
### Table

<table>
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<tr>
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<th>Date</th>
<th>Description</th>
<th>Amount (R)</th>
<th>Payment Date</th>
</tr>
</thead>
<tbody>
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<td></td>
<td>20 140-00</td>
<td>31/01/2014</td>
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<td>30/04/2014</td>
</tr>
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</tr>
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<td>24/05/2013</td>
<td>91 580-00</td>
<td>91 580-00</td>
<td>31/03/2013</td>
</tr>
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<td>20/03/2013</td>
<td>370 600-70</td>
<td>134 615-00</td>
<td>28/02/2013</td>
</tr>
</tbody>
</table>

**TOTAL** 2 823 984-11 2 823 984-11

### KEY

* - Depicts invoices paid after more than 30 days of submission.

# - Depicts actual invoice not attached to proof of payment and/or invoice number not submitted with proof of payment and date on which invoice was issued.

### 5.3.6

Geoscience further argued that the contract entered into with the Complainant’s company did not provide for the levying of interest and further indicated that the Complainant’s company’s invoices indicated that interest will be charged at 2%. It is noted that the Complainant’s company’s invoices are printed on the face that they should be paid in 15 days and that 2% will be charged for late payment.

### 5.3.7

The Public Protector has noted that as correctly pointed out by Geoscience, the contract entered into with the Complainant’s company...
did not provide for the levying of interest. Similarly the 2% allegedly being the interest percentage the Complainant’s company is entitled to charge according to Geoscience is also not provided for in the contract. Therefore the 2% penalty for late payment as it appears on the face of the Complainant’s company’s invoices is not a term of the contract entered into between the parties. In fact the Public Protector discovered that the 2% penalty for late payment is a generic condition on all invoices issued by the Complainant’s company to all its debtors.

5.3.8 In his response to the section 7(9) notice, the Acting CEO of Geoscience simply submitted that Geoscience is not liable to pay the Complainant’s company any interest or monies demanded whatsoever without advancing any evidence to the contrary or indicating the legal basis for that submission.

5.3.9 In the circumstances the Public Protector is persuaded that the 2% per month charged by the Complainant’s company for late payments was specifically intended to be a penalty for late payments by all its debtors rather than interest on overdue payments by Geoscience.

5.3.10 Therefore, the only issue that remained to be determined is what Geoscience is liable for as the correct percentage of interest due to the Complainant’s company.

5.4 Whether the Complainant suffered prejudice in the circumstances:

5.4.1 The evidence obtained revealed that fifteen (15) of the Complainant’s company’s invoices were not paid within thirty (30) days of receipt by Geoscience.
5.4.2 Geoscience could not provide any justifiable reasons why it had failed to pay the Complainant’s company’s invoices within thirty (30) days of receipt as agreed in the contract.

5.4.3 The Complainant submitted that Geoscience’s failure to pay her company’s invoices within thirty (30) days of receipt as agreed in the contract, subjected her company to cash flow challenges which resulted in her having to apply for an overdraft facility to pay the temporary staff to her company’s detriment.

6. THE ADMINISTRATIVE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH BY COUNCIL FOR GEOSCIENCE

6.1 Whether Geoscience unduly failed to pay the Complainant’s company’s invoices for services rendered in terms of the contract entered into between the parties:

6.1.1 The contract entered into between the parties provided that it is for a period of Eighteen (18) months starting from 1st February 2013 to 31st July 2014 and that it is for a total fixed price of R2 078 000.00 including VAT and subject to CPIX.

6.1.2 It has been established in the evidence that subsequent to the Complainant lodging a follow up complaint with the Public Protector on 11 June 2014, she confirmed on 30 March 2015 that all her company’s outstanding invoices were paid by Geoscience on 12 September 2014.

6.1.3 The only remaining issue in dispute to be determined in this regard was whether Geoscience was liable to pay the Complainant’s company for invoices issued in June, July and August 2014 respectively, after the contract entered into between the parties had been terminated.
6.1.4 In this regard it has also been established in the evidence that upon termination of the contract entered into between the parties, the Complainant’s company did not render any services to Geoscience.

6.1.4 It then follows that Geoscience was not liable to pay the Complainant’s company for invoices issued in June, July and August 2014 respectively as no services were rendered.

6.1.5 Furthermore once the R2 078 000.00 including VAT and subject to CPIX funds budgeted for the project in terms of the contract were exhausted, the contract became extinct by operation of law and all the obligations of the parties arising therefrom also became extinct and unenforceable.

6.1.6 In the circumstances there was no improper conduct on the part of Geoscience by refusing to pay the Complainant’s company for invoices issued in June, July and August 2014 respectively.

6.2 Whether Geoscience improperly terminated the contract entered into with the Complainant’s company:

6.2.1 As already indicated in the preceding paragraph, the contract entered into between the parties provided that it is for a period of Eighteen (18) months starting from 1st February 2013 to 31st July 2014 and that it is for a total fixed price of R2 078 000.00 including VAT and subject to CPIX.

6.2.2 On proper construction of the contract entered into between the parties, the duration of the contract is linked to the fixed price. Therefore once the contract price agreed upon by the parties had been exhausted, Geoscience’s obligations arising out of the contract including to make any additional payments to the Complainant’s company became extinct.
6.2.3 It has been established in the independent evidence collated by the Public Protector that Geoscience paid an amount of R2 823 984.11 to the Complainant's company for all its invoices issued. The said amount clearly exceeded the total fixed price of R2 078 000.00 including VAT and subject to CPIX agreed to by the parties in terms of the contract entered into.

6.2.4 It then follows that once the total fixed price of R2 078 000.00 including VAT and subject to CPIX had been exhausted, Geoscience was within its rights to terminate the contract.

6.2.5 Therefore there was no improper conduct on the part of Geoscience by terminating the contract entered into with the Complainant's company.

6.3 Whether Geoscience unduly failed to pay the Complainant's company interest on invoices paid after 30 days of submission:

6.3.1 Paragraph 2 of the contract entered into by the then Geoscience Chief Executive Officer, Mr Mxolisi Kota on behalf of Geoscience with the Complainant's company provides that:

"I undertake to make payment for the services rendered in accordance with the terms and conditions of the contract within 30 days after receipt of an invoice." (Own emphasis)

6.3.2 Section 38(1)(f) of the PFMA provides that the accounting officer for a department, trading entity or constitutional institution must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period.

6.3.3 The National Treasury Regulation 8.2.3 of the National Treasury Regulations issued in terms of the PFMA, requires that unless
6.3.4 Paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010 further provides that payments shall be made by the purchaser, but in no case later than thirty (30) days after submission of an invoice or claim by the supplier.

6.3.5 It has been established in the evidence at paragraph 5.3.3 that Geoscience failed to pay fifteen (15) of the Complainant's company's invoices within thirty (30) days of receipt.

6.3.6 Geoscience’s conduct in this regard was in violation of paragraph 2 of the contract entered into between the parties and its statutory obligations in terms of section 38(1)(f) of the PFMA, National Treasury Regulation 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010.

6.3.7 Accordingly the remaining issue in dispute to be determined is whether the Complainant's company is entitled to claim interest from Geoscience at the rate of 15.5% per annum.

6.3.8 It has been established in the evidence that the contract entered into between the parties did not make provision for the levying of interest.

6.3.9 In its initial submission to the Public Protector, Geoscience did not deny that the Complainant's company is entitled to levy interest on invoices not paid within thirty (30) days of receipt but argued that the rate at which such interest is to be levied should be 2% per month as indicated at paragraph 5.3.4. Geoscience calculated such interest only on the
Complainant's company's nine (9) invoices instead of fifteen (15) which were not paid within 30 days of receipt. However, in his response to the section 7(9) notice, the Acting CEO of Geoscience denied that Geoscience is liable to pay the Complainant's company any interest.

6.3.10 Section 1 of the Prescribed Rate of Interest Act No. 55 of 1975 provides for interest on a debt to be calculated at a prescribed rate in certain circumstances.

6.3.11 Section 1(1) provides that:

"If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed under subsection (2) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise." (Own emphasis)

6.3.12 Section 1(2) provides that:

"The Minister of Justice may from time to time prescribe a rate of interest for the purposes of subsection (1) by notice in Gazette."

6.3.13 In the absence of any agreement between the parties the rate of interest applicable to this matter for the purposes of subsection (1) was prescribed at 15,5% per annum by Government Notice R1814 in Government Gazette 15143 of 1 October 1993.

6.3.14 The Complainant is within her right in terms of section 1 of the Prescribed Rate of Interest Act No. 55 of 1975 to charge interest at the
rate of 15.5% even though interest is not provided for in the contract entered into between the parties.

6.3.15 Geoscience's duty to pay interest to the Complainant's company flows from the contract itself by virtue of the failure to make payment within the period undertaken in the contract.

6.3.16 Similarly in Scoin Trading (Pty) Limited v Bernstein, Gillies Martin NO\(^3\), the Supreme Court of Appeal held that the duty to pay interest arose from the contract itself and the failure to perform on due date.

6.3.17 Accordingly Geoscience's duty to pay interest to the Complainant's company arose from the contract itself by virtue of its failure to pay the Complainant's company's invoices by the 30\(^{th}\) day after receipt.

6.3.18 The Public Protector therefore emphasises that Geoscience's obligation to pay interest to the Complainant's company does not arise from what is printed on the Complainant's company's invoices but rather from the failure to pay within thirty (30) days after receipt of an invoice as agreed to in the contract entered into between the parties. Such obligation in the absence of an agreement or custom in that regard, is determined in terms of section 1 of the Prescribed Rate of Interest Act No. 55 of 1975.

6.4 Whether the Complainant suffered prejudice in the circumstances:

6.4.1 The contract entered into between the parties provided for the payment of the Complainant's company by Geoscience within thirty (30) days of receipt of its invoices for services rendered.

\(^3\) (29/10) [2010] ZASCA 160 (1 December 2010) at paras [27] and [28].
6.4.2 The failure by Geoscience to comply with its obligations to pay within thirty (30) days of receipt of the Complainant’s company’s invoices under the contract resulted in prejudice to the Complainant.

6.4.3 Geoscience’s failure to pay the Complainant’s company in accordance with the terms of the contract entered into between the parties unfairly deprived it of a source of income to its operational detriment. In the circumstances the Complainant was forced to apply for a bank overdraft facility at an additional interest rate charged to her company’s bank account to be able to pay the temporary employees placed at Geoscience.

7. FINDINGS

Having regard to the evidence, the regulatory framework determining the standard which Geoscience should have complied with and the impact on the Complainant, the Public Protector makes the following findings:

7.1 Regarding whether Geoscience unduly failed to pay the Complainant’s company’s invoices for services rendered in terms of the contract entered into between the parties the Public Protector finds that:

7.1.1 The allegation that Geoscience unduly failed to pay the Complainant’s company’s invoices for services rendered in terms of the contract is not substantiated;

7.1.2 By 12 September 2014 Geoscience had paid the Complainant’s company’s eight (8) outstanding invoices amounting to R801 706.25 excluding the invoices submitted for June, July and August 2014;
7.1.3 Geoscience’s refusal to pay the invoices submitted for June, July and August 2014 did not violate any law or legal prescript since no services were rendered by the Complainant’s company; and

7.1.4 The Public Protector is accordingly unable to find that the conduct of Geoscience constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act No. 23 of 1994 and ultimately improper conduct as envisaged in section 182(1) of the Constitution.

7.2 Regarding whether Geoscience improperly terminated the contract entered into with the Complainant’s company, the Public Protector finds that:

7.2.1 The allegation that Geoscience had improperly terminated the contract entered into with the Complainant’s company three (3) months prior to its expiry is not substantiated;

7.2.2 On proper construction, the contract of Eighteen (18) months, which was linked to a budget of R2 078 000.00, commenced on 1 February 2013 and terminated on 31 May 2014 once the budget had been exhausted; and

7.2.3 The Public Protector is accordingly unable to find that the conduct of Geoscience constitutes maladministration as envisaged in section 6(4)(i) of the Public Protector Act No. 23 of 1994 and ultimately improper conduct as envisaged in section 182(1) of the Constitution.
7.3 Regarding whether Geoscience unduly failed to pay the Complainant’s company interest on invoices paid after 30 days of submission, the Public Protector finds that:

7.3.1 The allegation that Geoscience unduly failed to pay the Complainant’s company interest on invoices paid after thirty (30) days of submission is substantiated;

7.3.2 Geoscience paid fifteen (15) of the Complainant’s company’s invoices after thirty (30) days of receipt in contravention of paragraph 2 of the contract entered into between the parties, section 38(1)(f) of the PFMA, the National Treasury Regulation 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010, which requires payment to be made within thirty (30) days of receipt of invoices;

7.3.3 The failure by Geoscience to pay fifteen (15) of the Complainant’s company’s invoices within thirty (30) days of receipt as stipulated in paragraph 2 of the contract entered into between the parties, section 38(1)(f) of the PFMA, the National Treasury Regulation 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010 constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act 23 of 1994; and

7.3.4 The Complainant is entitled to be paid interest at the rate of 15.5% per annum in terms of section 1(1) and (2) of the Prescribed Rate of Interest Act No. 55 of 1975, on all invoices which were not paid within 30 days of receipt as stipulated in the contract entered into between the parties, section 38(1)(f) of the PFMA, the National Treasury Regulation 8.2.3 and paragraph 16.3 of the National Treasury General Conditions of Contract, July 2010.
7.4 Regarding whether the Complainant suffered prejudice in the circumstances, the Public Protector finds that:

7.4.1 Geoscience's failure to pay the Complainant's company on time and the failure to pay the Complainant's company's interest on payments made after 30 days of receipt of invoices prejudiced the Complainant.

7.4.2 As a small enterprise with limited cash flow, the Complainant's company was deprived, to its operational detriment of a timeous source of income entitled to in terms of the contract entered into between the parties.

8. REMEDIAL ACTION

The appropriate remedial action the Public Protector taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where she would have been had Geoscience not conducted itself improperly, is the following:

8.1 The Board of Geoscience must ensure that its Acting Chief Executive Officer implement the remedial action taken by the Public Protector within the specified timeframes;

8.2 The Acting Chief Executive Officer of Geoscience must ensure that interest owed to the Complainant's company on all invoices paid after thirty (30) days of receipt is paid at the rate of 15.5% per annum within 30 days from the date of this report;

8.3 The Acting Chief Executive Officer of Geoscience must consider taking appropriate action in terms of the Public Finance Management Act No. 1 of 1999 against any official who might have been responsible for the
late payment of the Complainant's company's invoices resulting in fruitless and wasteful expenditure;

8.4 The Acting Chief Executive Officer of Geoscience must write a letter of apology to the Complainant for the delay in paying interest owed to her company within thirty (30) days from the date of this report;

8.5 The Acting Chief Executive Officer of Geoscience must provide the Public Protector with proof of payment of the interest owed to the Complainant's company immediately when payment is made within thirty (30) days from the date of this report; and

8.6 The Public Protector will request an Action Plan from the Acting Chief Executive Officer of Geoscience indicating how the remedial action will be implemented, within thirty (30) days of the issuing of this report.

9. MONITORING

9.1 The Public Protector will monitor that the remedial action taken in this report is implemented within the set timeframes.

ADV. BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 17/02/2017
Assisted by: Mr M I Matlawe
Senior Investigator: Quality Assurance