CLOSING REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

PUBLIC PROTECTOR
SOUTH AFRICA

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INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT RELATING TO THE FAILURE BY THE PUBLIC INVESTMENT CORPORATION (SOC) LIMITED TO CONDUCT DUE DILIGENCE PRIOR TO PROVIDING FUNDING ASSOCIATED WITH THE DAYBREAK FARMS (PTY) LIMITED TRANSACTION

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List of acronyms

Adv	Advocate
BPC	Basis Points Capital (Pty) Ltd
ACEO	Acting Chief Executive Officer of the PIC, Mr Vuyani Hako
AFPO	Afrgri Poultry Consortium
AIPF	Associated Institutions Pension Fund
CDH	Cliffe Dekker Hofmeyer Incorporated Attorneys
CEO	Chief Executive Officer
B-BBEE	Broad-Based Black Economic Empowerment
BoD	Board of Directors
Complainant	Mr PL Mahlangu
CCF	Compensation Commissioner Fund
CCPF	Compensation Commissioner Pension Fund
Constitution	The Constitution of the Republic of South Africa, 1996
Daybreak	Daybreak Farms Limited registered under registration number 2011/015025/07
DoA	Delegation of Authority
Dr Khoza	Dr Reuel Khoza, the Chairperson of the PIC Board of Directors
EBITDA	Earnings Before Interest, Taxes, Depreciation, and Amortization
Email	Electronic mail correspondence
GDP	Gross Domestic Product
GEPF	Government Employees Pension Fund
Hlehle	Hlehle-Lwazi 2013 Solutions (Pty) Ltd
McKenzie	McKenzie and Company
MP	Member of Parliament
PEPSSME FIP	Private Equity, Priority Sector and Small Medium Enterprise Fund Investment Panel
PIC	Public Investment Corporation (SOC) Ltd established on 1 April 2005 in accordance with the Public Investment Corporation Act, 2004 [Act No. 23 of 2004]
PMC: UI	Portfolio Management Committee: Unlisted Investments
Public Protector Act	Public Protector Act 23 of 1994
RIC	RIC Solutions 2013 (Pty) Ltd
UIF	Unemployed Insurance Fund
SCA	Supreme Court of Appeal
SOC	State Owned Company

Executive Summary

(i) This is the Public Protector's closing report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] ("the Public Protector Act").

(ii) The closing report communicates the findings in terms of section 182(1)(b) of the Constitution, following an investigation into allegations of maladministration and improper conduct relating to the failure by the Public Investment Corporation (SOC) Limited ("the PIC") to conduct due diligence prior to providing funding relating to the Daybreak Farms (Pty) Limited transaction.

(iii) The closing report is submitted to Mr PL Mahlangu ("the Complainant"), the Chairperson of the PIC Board of Directors, Dr David Masondo and the Chief Executive Officer of the PIC, Mr Abel Sithole, in terms of section 8(1) read with section 8(3) of the Public Protector Act, 1994.

(iv) The complaint was lodged by Mr PL Mahlangu (the Complainant) on 03 September 2019.

(v) In essence, the allegations by the Complainant are that:

(a) On 23 August 2018, Daybreak Farms Ltd (Daybreak), a company duly registered and incorporated in accordance with the applicable laws of the Republic of South Africa under registration number 2011/015025/07, approached Hlehle-Lwazi 2013 Solutions (Pty)Ltd (Hlehle) to falsify documents for the purposes of their Broad-Based Black Economic Empowerment (the B-BBEE) verification.

(b) That, in August 2018 (whilst he was Hlehle's Representative), Hlehle was approached and requested by Daybreak to enter into a B-BBEE Development

Agreement (a business to black business transaction, where the aim is to provide contributions to assist in the operating, financial and development towards business sustainability) (the Agreement), as well as to backdate and sign the Agreement to reflect a date of 1 April 2016.

(c) That the PIC did not conduct due diligence prior to providing funding to Daybreak through allocations (public funds) from the Government Employees Pension Fund (the GEPF) the Unemployment Insurance Fund (the UIF) and the Compensation Commission Fund (the CCF).

(vi) As a consequence, the Complainant approached the Public Protector and requested that an investigation be instituted with a view to determine whether the conduct of the PIC constituted maladministration and improper conduct.

(vii) Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:

(a) Whether the PIC failed to conduct due diligence when providing funding to Daybreak through public funds which it (the PIC) administered on behalf of the GEPF, the UIF and the CCF, and if so, whether the conduct constituted maladministration and improper conduct.

(viii) Key laws taken into account to help me determine if there was improper conduct were principally those imposing ethical standards that should have been upheld by PIC. They are the following:

(a) **The Constitution of the Republic of South Africa, 1996** which is the supreme law of the Republic and provides that any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

(b) **Public Protector Act No. 23 of 1994**, which confers investigatory powers in respect of any alleged maladministration in connection with the affairs of government at any level and the manner in which such powers are exercised.

(c) **The Public Investment Corporation Act No. 23 of 2004**, which established the PIC as a juristic person outside the public service.

(d) **The Companies Act No. 71 of 2008**, which provides for the powers of the directors of companies and their functions, as well as the manner in which such powers are exercised when acting in that capacity.

(e) **The Public Finance Management Act No. 1 of 1999**, which provides for the fiduciary duties of the accounting authorities, as well as regulating financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments.

(f) **The Financial Advisory and Intermediary Services Act No. 32 of 2002**, which regulates the rendering of certain financial advisory and intermediary services to clients.

(ix) Having considered the evidence as well as the regulatory framework determining the standard that should have been complied with by the PIC and/or any other persons that were involved in the facilitation of funding associated with the Daybreak transaction, I now make the following findings:

(a) **Regarding whether the PIC failed to conduct due diligence when providing funding to Daybreak through public funds which it (the PIC) administered on behalf of the GEPF, the UIF and the CCF, and if so, whether the conduct constituted maladministration and improper conduct:**

(aa) The allegation that the PIC failed to conduct due diligence when providing funding to Daybreak through public funds which it (the PIC) administered on behalf of the GEPF, the UIF and the CCF, **is not substantiated.**

(bb) In terms of section 76(3)(a), (b) and (c)(i) to(iii) of the Companies Act, 2008 read with section 76(3(a)(b) and (d) of the PFMA, 1999, the members of the PIC Board of Directors, as the accounting authority, are required to exercise the duty of utmost care to ensure reasonable protection of the assets of the PIC and act solely in the best interests of the PIC with fidelity, honesty and integrity in managing the financial affairs of the PIC.

(cc) The evidence obtained during the investigation indicates that, prior to approval by the PIC's PEPSSME FIP of the PIC's participation in the acquisition of Daybreak, the PIC Board directed the PIC to appoint service providers to conduct due diligence.

(dd) In particular, RIC Solutions (Pty) Ltd was appointed to conduct technical due diligence, McKinsey and Company was appointed to conduct commercial due diligence, Cliffe Dekker Hofmeyr Incorporated Attorneys was appointed to conduct Legal due diligence and drafting of Legal Agreements, Basis Points Capital (Pty) Limited was appointed to conduct Financial Model Review; Investec was appointed to conduct valuation of the business and Genesis Analytics (Pty) Limited was appointed to prepare a social impact and strategy in respect of the transaction.

(ee) Therefore, by appointing service providers to conduct due diligence the PIC Board and the PIC complied with the provisions of section 195 of the Constitution, 1996, section 76(3)(a), (b) and (c)(i) to(iii) of the Companies Act, 2008 read with sections 50(a)(b) and (d), 76(3(a)(b) and (d) of the PFMA, 1999.

(ff) In the circumstances, the conduct of the PIC Board and the PIC did not constitute improper conduct as envisaged by section 182(1) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.

(gg) In light of the foregoing, there is no remedial to be taken by the Public Protector as contemplated in section 182(1)(c) of the Constitution.

1. INTRODUCTION

1.1. This is the Public Protector's advisory report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, [Act No. 108 of 1996] (the Constitution) and published in terms of section 8(1) of the Public Protector Act, [Act No. 23 of 1994] ("the Public Protector Act").

1.2. The report communicates the findings in terms of section 182(1)(b) of the Constitution, following an investigation into allegations of maladministration and improper conduct relating to the failure by the Public Investment Corporation (SOC) Limited ("the PIC") to conduct due diligence prior to providing funding relating to the Daybreak Farms (Pty) Limited transaction

1.3. The closing report is submitted to Mr PL Mahlangu ("the Complainant"), the Chairperson of the PIC Board of Directors, Dr David Masondo and the Chief Executive Officer of the PIC, Mr Abel Sithole, in terms of section 8(1) read with section 8(3) of the Public Protector Act, as well as 8(3) of the Public Protector Act, 1994.

1.4. THE COMPLAINT

1.4.1. The complaint was lodged by Mr PL Mahlangu (the Complainant) on 03 September 2019.

1.4.2. In essence, the allegations by the Complainant are that:

1.4.2.1. On 23 August 2018, Daybreak Farms Ltd (Daybreak), a company duly registered and incorporated in accordance with the applicable laws of the Republic of South Africa under registration number 2011/015025/07, approached Hlehle-Lwazi 2013 Solutions (Pty) Ltd (Hlehle) to falsify documents for the purposes of their Broad-Based Black Economic Empowerment (the B-BBEE) verification.

1.4.2.2. It is the Complainant's contention that, in August 2018 (whilst he was Hlehle's Representative), Hlehle was approached and requested by Daybreak to enter into a B-BBEE Development Agreement (a business to black business transaction, where the aim is to provide contributions to assist in the operating, financial and development towards business sustainability) (the Agreement), as well as to backdate and sign the Agreement to reflect a date of 1 April 2016.

1.4.2.3. That the PIC did not conduct due diligence prior to providing funding to Daybreak through allocations (public funds) from the Government Employees Pension Fund (the GEPF) the Unemployment Insurance Fund (the UIF) and the Compensation Commission Fund (the CCF).

1.5. As a consequence, the Complainant approached the Public Protector and requested that an investigation be instituted with a view to determine whether the conduct of the PIC constituted maladministration and improper conduct.

2. ISSUES IDENTIFIED AND INVESTIGATED

2.1. **Based on the analysis of the complaint, the following issue was identified to inform and focus the investigation:**

2.1.1. Whether the PIC failed to conduct due diligence when providing funding to Daybreak through public funds which it (the PIC) administered on behalf of the GEPF, the UIF and the CCF, and if so, whether the conduct constituted maladministration and improper conduct.

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 of the Republic of South Africa, 1996 (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 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. Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

3.4. 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, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

4. **THE INVESTIGATION**

4.1. **The investigation process**

4.1.1. The Public Protector conducted a preliminary investigation into the matter in terms of section 7(1) of the Public Protector Act, 1994, to determine the merits of the complaint and also to determine how the matter concerned should be dealt with.

4.1.2. The investigation process included correspondence and the exchange of documentation between the Public Protector and the Chairman of the PIC's

Board of Directors, Dr Reuel Khoza and the PIC's Acting Head of Legal, Ms Lindiwe Dlamini.

4.1.3. In line with section 7(4)(b) of the Public Protector Act, 1994, as well as the principles enunciated in the matters between the ***Public Protector v Mail and Guardian*[1]*,*** as well as ***Mdwaba Mthunzi v Nonxuba Zuko***[2], on 15 November 2019, a letter in terms of the section supra was issued to the Chairman of the PIC's Board of Directors, Dr Reuel Khoza requesting him to submit a detailed response to the allegations made by the Complainant, as well as documents and/or information relevant to the matter under investigation by the Public Protector.

4.1.4. All relevant documents and correspondence were obtained and analysed. Relevant laws, policies and related prescripts were also considered and applied throughout the investigation.

4.2. **Approach to the investigation**

4.2.1. The investigation was approached using an enquiry process that seeks to find out:

(a) What happened?

(b) What should have happened?

(c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

(d) 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?

[1] (422/10 [2011] ZASCA 108 (1 June 2011)
[2] [2018] ZAGPJHC 44 (9 March 2018)

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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

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 or complied with by the Department and/or its employees to prevent maladministration and improper conduct.

4.2.4. The enquiry regarding the remedial or corrective 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 Department and/or its employees complied with the regulatory framework setting the applicable standards for good administration.

4.2.5. At the outset of the investigation it was noted that, the origin of the complaint was the alleged approval by the PIC Private Equity, Priority Sector and Small Medium Enterprise Fund Investment Panel (the PEPSSME FIP) of the participation of the PIC in the acquisition of Daybreak for a total investment of One Billion One Hundred and Ninety One Million Rand Only (R1, 191 billion) on 2 April 2015 i.e. four (4) years before the complaint was lodged with the Public Protector.

4.2.6. Section 6(9) of the Public Protector Act, 1994 provides that, *"Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned".*

4.2.7. Undeniably, in terms of section 6(9) of the Public Protector Act, 1994 (the Act) the Public Protector is barred from entertaining complaints reported after two

(2) years from the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported does not, in itself, bar the Public Protector from investigating. Instead, it is mainly the interest of justice that dictates whether it should be investigated or not. In this case, it is in the interest of justice to investigate and establish whether the PIC failed to conduct due diligence to providing funding associated with the Daybreak Farms (Pty) Limited transaction.

4.2.8. In the case between ***South African Bureau of Standards v The Public Protector***[3], the North Gauteng High Court the court held that,

"As with most claims and complaints, there is for good reason, time-frames within which such must be instituted or laid. In this instance, the Public Protector Act has set a time-limit of 2 years. Entertaining a complaint which is older than 2 years certainly calls for exceptional circumstances. The underlying reason for time-frames is the trite maxim; justice delayed is justice denied. Underpinning this principle is the prejudice parties suffered when time has lapsed. To mention, but a few; no finality of a matter, evidence lost, memories failing and legislation and policies evolving".

4.2.9. As supplementary jurisprudence in respect of the issue of "special circumstances" it is clear that in the case between ***Gordhan v Public Protector and Others*** the North Gauteng High Court held that,

"In view of the provisions of section 6(9) and the fact that the complaints emanate from a decade ago, one would expect the Public Protector to set out why she had jurisdiction to entertain this complaint".

4.2.10. Therefore, regarding the exercise of the discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute 'special circumstances', some of

[3] 34290/15A) [2019] ZAGPPHC 101 (27 March 2019)

the special circumstances that was taken into account to exercise the discretion favourably to accept this complaint, include the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether this office would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether a refusal to investigate perpetuates the violation of section 195 of Constitution; whether any remedial action will redress the imbalances of the past. What constitutes 'special circumstances' depends on the merits of each case.

4.2.11. Since the incident or matter concerned occurred more than two (2) years prior to the reporting of the matter, the Public Protector exercised her discretion in terms of section 6(9) of the Act to entertain the complaint based on the fact that the alleged failure by the PIC to conduct due diligence prior to providing funding associated with the Daybreak Farms (Pty) Ltd transaction had the potential of exposing the PIC to the possible loss of public funds thereby impacting negatively on the fiscus.

4.3. **The Key Sources of Information**

4.3.1. **Documents**

4.3.1.1. A copy of the Complainant's complaint document dated on 4 April 2019;

4.3.1.2. A copy of a Notice dated 15 November 2019 issued in terms of section 7(4)(b) of the Act containing the allegations made by the Complainant, as well as requesting for the submission of a response to the allegations and documentation relevant to the issue under investigation addressed to the Chairperson of the Public Investment Corporation's Board of Directors, Dr Reuel Khoza;

4.3.1.3. A copy of a response from the Chairperson of the Public Investment Corporation's Board of Directors, Dr Reuel Khoza dated 15 January 2020, addressed to the Public Protector;

4.3.1.4. A copy of a Report compiled by Investec Investment Banking entitled *"Afgri Poultry Indicative Valuation"* dated June 2013;

4.3.1.5. A copy of an extract of the PIC's Portfolio Management Committee: Unlisted Investments dated 18 November 2014;

4.3.1.6. A copy of a Report compiled by Genesis Analytics (Pty) Ltd entitled "Social Impact and Strategy for the Public Investment Corporation dated 23 January 2015;

4.3.1.7. A copy of a Report compiled by RIC Solutions (Pty) Ltd entitled *"Project Bluebird Technical Due Diligence"* dated 10 February 2015;

4.3.1.8. A copy of a Report compiled by Cliffe Dekker Hofmeyr Incorporated entitled *"Legal due diligence in respect of the business of Afgri Poultry (Pty) Ltd"* dated 13 February 2015;

4.3.1.9. A copy of a Report compiled by Basis Points Capital (Pty) Ltd entitled *"Afgri Poultry Financial Model Review"* dated February 2015;

4.3.1.10. A copy of commercial due diligence conducted by McKinsey and Company;

4.3.1.11. A copy of the Resolution passed on 2 April 2015 by the members of PIC's Private Equity, Priority Sector and Small Medium Enterprise Fund Investment Panel.

4.3.2. **Correspondence Sent and Received**

4.3.2.1. A copy of a Notice dated 15 November 2019 issued in terms of section 7(4)(b) of the Act containing the allegations made by the Complainant, as well as requesting for the submission of a response to the allegations and documentation relevant to the issue under investigation addressed to the Chairperson of the Public Investment Corporation's Board of Directors, Dr Reuel Khoza;

4.3.2.2. A copy of a response from the Chairperson of the Public Investment Corporation's Board of Directors, Dr Reuel Khoza dated 15 January 2020, addressed to the Public Protector;

4.3.2.3. A copy of a Notice dated 17 March 2022 in terms of Rule 42(1) of the Public Protector's Investigation Rules addressed to the Complainant affording him the opportunity to make representations in connection with the intended closure of the complaint within fourteen (14) days of delivery of the notification.

4.3.3. **Legislation and other prescripts**

4.3.3.1. The Constitution, 1996;

4.3.3.2. The Public Protector Act, 1994 [Act No. 23 of 1994];

4.3.3.3. The Public Investment Corporation Act No. 23 of 2004;

4.3.3.4. The Companies Act No. 71 of 2008;

4.3.3.5. The Public Finance Management Act No. 1 of 1999;

4.3.3.6. The Financial Advisory and Intermediary Services Act No. 32 of 2002;

4.3.3.7. The PIC's Treating Customers Fairly ("TCF") Policy.

4.4. **Websites**

4.4.1.1. www.pic.gov.za;
4.4.1.2. www.publicprotector.org;
4.4.1.3. www.daybreakfarms.co.za;

4.4.2. **Case Law**

4.4.2.1. *Public Protector v Mail and Guardian* (422/10 [2011] ZASCA 108 (1 June 2011);

4.4.2.2. *Mdwaba Mthunzi v Nonxuba Zuko [2018] ZAGPJHC 44 (9 March 2018);*

4.4.2.3. *South African Bureau of Standards v The Public Protector 34290/15A) [2019] ZAGPPHC 101 (27 March 2019);*

4.4.2.4. *Fisheries Development Corporation of S A Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) td and Others 1980(4) SA 156 (W)*

5. **THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS:**

5.1. **Regarding whether the PIC failed to conduct due diligence when providing funding to Daybreak through public funds which it (PIC) administered on behalf of the GEPF, the UIF and the CCF, and if so, whether the conduct constituted maladministration and improper conduct:**

Common Cause Issues

5.1.1. On 2 April 2015, the PIC's Private Equity, Priority Sector and Small Medium Enterprise Fund Investment Panel (the PEPSSME FIP) approved the participation of the PIC in the acquisition of Daybreak for a total investment of One Billion One Hundred and Ninety One Million Rand Only (R1, 191 billion).

Issue in Dispute

5.1.2. The issue for determination was whether the PIC failed to conduct due diligence when providing funding to Daybreak through public funds administered on behalf of the GEPF, the UIF and the CCF.

5.1.3. As indicated in *supra*[4], the Complainant alleged that the PIC failed to conduct due diligence when providing funding to Daybreak through public funds administered on behalf of the GEPF, the UIF and the CCF.

5.1.4. On15 January 2020, in a letter addressed to the Public Protector, the Chairman of the PIC's Board of Directors, Dr Reuel Khoza (Dr Khoza) disputed the allegations made by the Complainant and asserted, through the Acting Chief Executive Officer (ACEO), Mr Vuyani Hako (Mr Hako) that the PIC, as the sole shareholder in Daybreak, was not aware of the allegations directed against Daybreak or any of its (Daybreak) employees.

5.1.5. The PIC asserted through Mr.Hako in its response that enquiries were made with its employees serving on Daybreak's BoD, as well as to the Chief Executive Officer (the CEO) of Daybreak as to whether they (PIC employees and the CEO of Daybreak) were aware of the allegations made by the Complainant and both employees confirmed that they were not aware of the allegations nor were such allegations ever brought to their attention. The CEO of Daybreak (ostensibly Mr Boas Seruwe) denied the allegations.

5.1.6. In rebutting the allegations made by the Complainant, Mr Hako asserted (in paragraph 4 of the response) that, in 2014 (date not provided) the PIC was approached by an Afrgri Poultry Consortium (AFPO), a consortium of black entrepreneurs led by Matome Maponya Investment (Pty) Ltd, for funding to acquire One Hundred percent (100%) of AFGRI Poultry (which was at a later stage renamed Daybreak Farms (Pty) Ltd) and Kinross Mill from Afrgri (Pty) Ltd.

[4] Paragraph 1.4

5.1.7. According to Mr Hako, on 2 April 2015, the PIC's PEPSSME FIP approved the participation of the PIC in the acquisition of Daybreak for a total investment of One Billion One Hundred and Ninety One Million Rand Only (R1, 191 billion) as follows:

(a) *A capital amount of up to Eight Hundred and Ninety Two Million Rand Only (R892 million) in the form of debentures instruments;*

(b) *A capital amount of up to Two Hundred and Ninety Nine Million Seventy Nine Thousand Rand Only (R299,79 million) in the form of a senior debt funding; and*

(c) *An amount of Thirty Six Rand Only (R36.00) to acquire thirty six percent (36%) equity in AFRGRI Poultry on behalf of the GEPF, UIF and the CCF.*

5.1.8. Mr Hako also asserted that, in 2016 (date not provided) Afrgri Poultry experienced a number of challenges which resulted in the investment being restructured. The restructuring resulted in the PIC, on behalf of the GEPF, UIF and the CCF, holding 100% equity interest in Daybreak.

5.1.9. In addition, Mr Hako asserted that, every investment by the PIC was informed by the provisions of the investment mandates entered into between the PIC and the GEPF, UIF and the CCF (collectively referred to as clients). Mr Hako contends that the PIC would not consider any potential investment if such an investment did not comply with the clients' mandates.

5.1.10. Furthermore, Mr Hako asserted that it is worth noting that all investments are subjected to and governed by a BoD's approved investment process, policies and frameworks. This he said, includes the Delegation of Authority (the DOA) framework which outlines, *inter alia*, the roles, responsibilities and authority of various role-players within the unlisted investment processes.

5.1.11. According to Mr Hako, part of this investment processes include the execution of the due diligence on any potential transaction. The due diligence would, typically, depending on the transaction, cover amongst others, legal and regulatory; commercial; operational; technical; financial (including valuations) and environmental, social and governance.

5.1.12. Mr Hako further asserted that, internal resources could be utilised to conduct due diligence or same could be outsourced to external consultants governed by an approved Unlisted Procurement Policy.

5.1.13. However, the decision to outsource depended on a number of factors which, included but was not limited to, the complexity of the transaction, the availability of internal resources and the skills required.

5.1.14. It is Mr Hako's contention that, following the Portfolio Management Committee: Unlisted Investments (the PMC: UI) meeting held on 18 November 2014, a team was approved with a view to conduct due diligence in respect of the initial Daybreak transaction. In addition, Mr Hako asserted that the following external entities were appointed to conduct due diligence in respect of the Daybreak transaction:

#	Entity Name	Due Diligence Conduced
1.	RIC Solutions (Pty) Ltd	Technical Due Diligence
2.	McKinsey & Company	Commercial Due Diligence
3.	Cliffe Dekker Hofmeyr Incorporated Attorneys	Legal Due Diligence and Drafting of Legal Agreements
4.	Basis Points Capital (Pty) Ltd	Financial Model Review
5.	Investec	Valuation
6.	Genesis Analytics (Pty) Ltd	Social Impact Strategy and Impact Report

5.1.15. Mr Hako further asserted that, the Daybreak transaction was approved on 2 April 2015 and the legal agreements were concluded on 14 May 2015. Furthermore, the funds were disbursed on 27 May 2015.

5.1.16. In addition, Mr Hako asserted that upon disbursement, the investment was transferred to the post investment monitoring and reporting division.

5.1.17. Consistent with Mr Hako's response, it was noted from the minutes of the PMC UI meeting held on 18 November 2014 that, the PMC UI approved the request to proceed to the due diligence phase of the project Bluebird transaction, which entailed the PIC advancing senior ranking term facility totalling approximately Eight Hundred and Fifty Million Rand Only (R850 million) to a B-BBEE grouping led by Matome Maponya Investments for the acquisition of 100% of poultry operations of Agri Operations Ltd was discussed.

5.1.18. It was also noted by the Public Protector's investigation team that, a consortium led by Matome Maponya Investment (Pty) Ltd (collectively referred to as Afrgri Poultry Consortium (AFPO) made a firm offer to Afrgri Ltd and/or Afrgri Operations Ltd to acquire 100% of Afrgri Poultry and Kinross Mill (a business unit within Afrgri Animal Feeds).

5.1.19. Following the offer, on 2 April 2015, the PIC (acting in its capacity as the authorised representative of the GEPF, UIF and the CCF, referred to as the company)'s PEPSSME FIP held a meeting wherein the intention by the company to fund AFPO to acquire 54% shareholding in Afrgri Poultry, on behalf of the GEPF, UIF and the CC, 36% shareholding of the business and management and the remaining 10% shareholding by the staff was discussed.[5]

5.1.20. It was also noted by the Public Protector's investigation team that, the PEPSSME FIP resolved in the meeting referred to *supra*, that the PIC (acting on behalf of the GEPF, the UIF and the CCF) was authorised to participate in the acquisition of Afrgri Poultry for a total investment amount of One Billion Two Hundred and Two Million Rand Only (R1.202 billion) as follows:

[5] Minutes of the PEPSSME FIP meeting held on 2 April 2015

(a) *A capital amount of up to R892 million in the form of debentures instruments whereby PIC would be entitled to Fifty percent (50%) pre-tax profits as interest;*

(b) *A capital amount of up to R299, 79 million in the form of a senior debt funding, inclusive of transaction fees in the form of a senior debt funding at prime rate minus One percent (1%). The investment amount was to be disbursed on effective date subject to completion of transaction documents;*

(c) *An amount of R36 to acquire 36% equity in Afrgri Poultry. The equity acquired by the GEPF, UIF and the CC was intended to be unencumbered for the duration of their participation as shareholders in Afrgri Poultry;*

(d) *The investment would have a blended internal rate of return of Seventeen percent (17%); and*

(e) *The PIC would retain the right to nominate and appoint at least two (2) directors for as long as it is a shareholder in Afrgri Poultry.*

5.1.21. In addition, it was further noted from the resolution taken by members of the PEPSSME FIP on 2 April 2015 that, the PEPSSME FIP resolved that the CEO or his designate duly appointed in terms of the company's delegation of authority, acting individually or jointly, be authorised to:

(a) *Negotiate, settle, agree, execute and sign all documents and any related documents required to be negotiated, settled, executed and signed by the company in terms of the above resolutions;*

(b) *Negotiate and agree to any amendments to each agreement and/or document and/or any related document to be concluded by the company in terms of the above resolutions;*

(c) *To do all things, take any action and perform any and all actions as may be necessary to give effect to the above resolutions; and*

(d) *Insofar as the CEO and/or his designate has done or taken any of the actions pursuant to the above matters before the date of the resolution, such action/s be ratified.*

5.1.22. On 16 October 2013, the PIC and McKinsey & Company (McKinsey) concluded an agreement in which McKinsey was appointed to conduct commercial/market due diligence in respect of Project Green (Green), followed by a market due diligence report which was issued by McKinsey on 30 October 2013.

5.1.23. According to the findings made by McKinsey, it was established that Green had successfully developed from its co-operative beginnings in 1923 into the largest agribusiness in South Africa with operations in grain management, financial services, equipment, poultry, animal feed, food processing and retail. In addition, it was established that Green had achieved 7.4% per annum revenue growth and 2, 2% Pre-tax Profit Margin (PBT margin) improvement since 2006.

5.1.24. McKinsey also established that Green had a limited growth prospects in South Africa with 5.5% per annum base case revenue growth and Earnings before Interest, Taxes, Depreciation, and Amortization (EBITDA) margins of 9.0% by 2018, compared to management forecasts of 5.6% and 11.6%.

5.1.25. Based on its view on the key risks existing in the market and the impact on revenue drivers at the time, McKinsey established that the Green would have a growth of 3.6% with regard to downside case revenue and 7.9% EBITDA margins by 2018.

5.1.26. Regarding the upside case growth, McKinsey established that the Green would have a 10.1% per annum growth with 10,4 % of EBITDA margins with

8.5% per annum due to upside risk in the market at that time and 1.5% growth per annum from potential expansion into sub-Saharan Africa starting with grain management and equipment in Ethiopia, Kenya and Tanzania.

5.1.27. Notwithstanding the above, McKinsey emphasised that although Green's business segments represents potentially attractive growth platforms to move into other parts of Africa with long-term growth opportunities, this expansion was not factored in management's plans (at the time) and the resource allocation at the time were unlikely to deliver the available upside.

5.1.28. Regarding the Base Case (Markets at the time), McKinsey established that Green's relevant markets in South Africa worth One Hundred and Ten Billion Rand Only (R110 billion) revenue could be expected to grow at 5.9% per annum.

5.1.29. In addition, McKinsey emphasised that taking into account the industry trends and the competitive landscape per segment, as well as implications for market share, Green would reasonably be able to achieve overall revenue growth of 5.5% per annum base case and EBITDA margins of 9.0% compared to management forecast of 5.6% and EBITDA margins of 11.6%.

5.1.30. In substantiating the growth forecast differences between itself and that of Green management, McKinsey indicated in the report that the biggest growth forecast was in the Financial Services (+6% pts v management) and Oil Protein and Milling (+7% pts) segments.

5.1.31. Furthermore, in terms of the 2018 totals the largest difference were in the Financial Services (+35%) revenues and in EBITDA Poultry and Oil Protein segments (-75% and -41% respectively).

5.1.32. Regarding Grain Management in South Africa, McKinsey indicated in the report that it expected market revenue of Two Billion Rand Only (R2 billion) to grow at 3.75% per annum.

5.1.33. According to McKinsey, this was based on the outlook of flat volume growth driven by the declining cultivated land for maize (-2% per annum) balanced by an expected increase in yield (2% per annum). In addition, McKinsey indicated that price growth was expected to be slower than inflation (4% per annum) given pricing pressures from increasingly available cheap substitutes. Furthermore, McKinsey indicated that the overall industry and regulation were very mature and competitive disruption from similar agribusiness players was unlikely given regional footprints and little incentives to try gain a share.

5.1.34. McKinsey emphasised that it did not expect market share erosion due to cheap substitutes (on farm storage options), though these did not compete for high-volume, high-quality segment resulting in a limited market share decline of 1% pts by 2018 from the current (at the time of the report) share of 27%. As a consequence, McKinsey concluded that Green could expect revenue growth of 3, 0% per annum (-2, 4% per annum) and EBTIDA margins of 54% for this segment compared to 7.1% per annum growth and margins of 52% in the management case.

5.1.35. Regarding the Financial Services in South Africa, McKinsey indicated that it expected market revenue of Sixteen Billion Rand Only (R16 billion) to grow at 7.8% across the farmer and corporate segments. This, according to McKinsey, was driven by high demand for agricultural financing, though debt levels suggested that market penetration was already high and growth could slow slightly from historical levels.

5.1.36. McKinsey continued by indicating that, the overall industry was not fully mature, and strong growth observed over the past decade was expected to continue with the interested players from agribusiness and traditional banking sectors likely to take an interest.

5.1.37. Based on Green's unique product offering tailored to farmers, partnership agreement with the Land Bank and strong customer relationships, Green was placed well ahead of potential competitors to capture 0.1% pts market share by 2018 from the current share of 2.1% across both farmer and corporate segments.

5.1.38. In addition, McKinsey indicated that, given the fact that Green's model was replicable, it expected competition to intensify and market the share to stabilise. Consequently, it expected revenue growth of 8.7% per annum and EBITDA margins of 31% for this segment compared to management forecasts of 2.4% per annum and EBITDA margins of 44%.

5.1.39. Regarding Animal Feed in South Africa, McKinsey indicated that it expected market revenue of Nineteen Billion Rand Only (R19 billion) to grow at 7, 1% per annum. According to McKinsey, this was driven by the demand for animal proteins which largely tracks nominal growth of 5% per annum.

5.1.40. In addition, market prices were expected to grow at a slightly less than inflation (3% per annum) as grain prices were expected to stabilise in the short-term and the market pricing was typically on a cost-plus basis.

5.1.41. McKinsey also indicated that, the poultry feed outlook was challenging given the fact that the main competitors in this segment were the other top four (4) poultry producers with much stronger up-take of feed (60-70% integrated) and that some of Green's contracted off-take (-20% of current volumes) would expire in 2014.

5.1.42. Notwithstanding the above, McKinsey indicated that opportunities may exist in other feed segment (ruminants) and modifying this mix could help Green minimise market share loss to <2% pts by 2018 from the current share of 16%. Consequently, McKinsey indicated that Green could expect revenue growth of 4, 9% per annum and EBITDA margins of 5.2% compared to management case for Green of 1.7% per annum and EBITDA margins of 5, 9%.

5.1.43. Regarding Food Processing in South Africa, McKinsey indicated that it expected market revenue of Nineteen Billion Rand Only (R19 billion) in respect of oil proteins to grow at 4.9% per annum. According to McKinsey, this was driven by the demand for meal volumes tied to feed volume growth (4% per annum) and demand for oil tied to population growth (0.6% per annum).

5.1.44. McKinsey continued by indicating that domestic soya meal and oil consumption were largely met by imports but significant capacity expansions coming online (over 4000 tonnes/day) were likely to be competing to replace import volumes. Furthermore, McKinsey indicated that Green could reasonably capture additional 1, 4% pts market share resulting in revenue growth of 10.5% per annum and EBITDA margins of 5.5% compared to management forecasts for Green for 17.5% and EBITDA margins of 6.8%.

5.1.45. In addition, McKinsey indicated that it expected market revenue of One Billion Rand (R1 billion) in respect of milling to grow at 2.6% per annum. According to Mckinsey, the market outlook was stable given the limited volume growth driven by flat or declining volumes in maize and wheat output.

5.1.46. Furthermore, McKinsey indicated that market prices were expected to grow below inflation in the short-term given high commodity prices at the time. McKinsey also indicated that, in this segment, Green had a strong market niche and given its production assets, competitors had little incentive to attempt to gain significant market share.

5.1.47. Consequently, McKinsey expected Green to be able to maintain the market share of around 65% resulting in revenue growth of 8.9% per annum and EBITDA margins of 8.9% compared to management forecasts for Green of 16, 2% and EBITDA margins of 8.4%.

5.1.48. Regarding Equipment in South Africa, McKinsey indicated that it expected the market revenue of Sixteen Billion Rand Only (R16 billion) to grow at 5.4% per annum. This, according to McKinsey was based on the fact that the overall industry and regulation were mature with high level of mechanisation. Further that Green was aligned to the market leader with a very good brand positioning.

5.1.49. Furthermore, McKinsey indicated that overall agriculture capex growth was expected to slow (5% per annum) based on heavy investment over the past decade. In addition, McKinsey indicated that no significant shifts in overall industry, regulation or competition was expected and given Green's alignment with the market leader it (Green) was reasonably well-placed to maintain market share of 10%. Consequently, McKinsey was of the opinion that Green could expect revenue growth of 5.4% per annum and EBITDA margins of 5, 6% compared to 0.5% per annum growth and EBITDA margins of 5.4% in the management case.

5.1.50. Regarding Poultry in South Africa, McKinsey indicated that it expected the market revenue of Thirty Seven Billion Rand Only (R37 billion) to grow at 5.3% per annum. This, according to McKinsey was based on the market demand for poultry meat was forecasted to grow at a slightly slower than Gross Domestic Product (GDP) as per historical trends. Furthermore, McKinsey indicated that market prices were expected to grow below inflation (1% per annum) given world prices at record levels were forecasted to level out or decline.

5.1.51. In addition, continued price pressure was expected due to strong competition from imports. The industry was highly competitive with concentrated buyers (top 5 making up over 70% of the market) and strong buyer power with pressure from cheap imports from Brazil with structural cost advantage likely to remain a long-term threat even with anticipated regulatory changes.

5.1.52. McKinsey emphasised that with management's plans to shift product mix, it anticipated Green to be able to minimise share loss to 0.3% pts and almost maintain market share to 2018.

5.1.53. Consequently, McKinsey was of the opinion that Green could expect revenue growth of 3.9% per annum and EBITDA margins of 3.4% compared to 5.6% per annum growth and EBITDA margins of 13.6% in the management case.

5.1.54. Regarding International and Other forecasts, McKinsey indicated that the management forecasts of 4.1% per annum growth with EBITDA margins of 8.3% by 2018 (compared to the current 9.0%) were reasonably achievable given the current plans. It also indicated that 90% of these sales were forecasted to come from Australia and Africa. Furthermore, McKinsey indicated that given Green's demonstrated track record of achieving strong growth in the markets making up of this forecast (i.e. equipment in Zimbabwe) and its strong record in Zambia, the management was well placed to deliver in this segment.

5.1.55. McKinsey also provided a Downside and Upside Scenarios in respect of the markets. Regarding the Downside Scenario, McKinsey indicated that there exists the biggest risks affecting Green's business based on the reduced grain production due to the loss of agricultural land driven by mining in Green's regions and potential for bad seasons. Furthermore, McKinsey indicated that additional risks were mainly around Green's ability to maintain market share in grain management, poultry and feed, as well as whether capacity expansions in food processing would generate full revenue potential.

5.1.56. As a consequence, McKinsey indicated that the overall impact of these factors was revenue growth of 3.6% per annum with EBITDA margin of 7.9% by 2018 compared to base case growth of 5.5% per annum and 9.0% EBITDA margin.

5.1.57. Regarding the Upside Scenario, McKinsey indicated that Green, as coming from two components: positive variability on key risks affecting the current footprint (8.5% per annum revenue growth) and a further potential upside, if Green were to expand into new sub-Saharan African markets (1.5% per annum), its revenue growth would amount to 10.1% per annum and EBITDA margin of 10.4% by 2018.

5.1.58. McKinsey also indicated that it had modelled the upside and downside footprint scenarios at the time on similar drivers, i.e. grain production assuming slower loss of agricultural land due to mining (1% per annum compared to 2% in the base case) and good seasons (higher yields based on historical volatility).

5.1.59. In addition, McKinsey indicated that it assumed constant market share across all segments which included Grain Management. According to McKinsey, the impact of these factors affecting the footprint was revenue growth of 8.5% per annum and EBITDA margin of 10.2% by 2018.

5.1.60. Furthermore, McKinsey indicated that over the coming decades, sub-Saharan Africa (SSA) represented one of the most exciting opportunities in Agriculture globally with approximately 60% of the world's available untapped arable cropland and strong demographic and macro-economic growth drivers.

5.1.61. In this regard, McKinsey advised that Green should logically build on where it has established presence, i.e. Ghana and Zambia. According to McKinsey, outside of the existing geographies, the market-level analysis of both the value creation potential and the ease of capturing business environment identified Nigeria, Ethiopia, Kenya and Tanzania as potential further markets for geographic expansion.

5.1.62. In addition, the McKinsey indicated that in the SSA, there was a large and well recognised need for improved quantity and quality of grain storage. Excluding the replacement of inadequate storage (with 30% (+) losses of harvest) approximately eleven (11) million tonnes of additional capacity would be required across the four (4) key markets alone by 2018 driven by:

(a) *Grain production was expected to increase dramatically across many parts of the SSA from 2013 to 2018. This, according to McKinsey should drive the need for an additional two (2) million tonnes of capacity alone;*

(b) *Supply chains were expected to grow with inter-regional and international trade. According to McKinsey, the United Nations (the UN) Food and Agriculture Organisation (the FAO) suggested mature markets need of storage capacity equivalent to 120% of annual production; and*

(c) *Food security programmes announced by the Governments of Nigeria and Kenya include national grain storage facility totalling four million tonnes from Green.*

5.1.63. Regarding the Upside Scenario, McKinsey indicated that the heavy agricultural equipment market in sub-Saharan Africa was expected to increase six-fold by 2020. Despite this major growth, Green could face significant obstacles in trying to capture key markets due to factors beyond its control.

5.1.64. McKinsey also indicated that, given Green's long-standing association with John Deere through the existing agreements in South Africa and other Southern African countries, the market outlook for Green was tied to John Deere's success in catering for emerging customers, as well as accessing more of John Deere's distribution footprint in sub-Saharan Africa.

5.1.65. Furthermore, McKinsey emphasised that the most attractive John Deere's markets were already served by major international distributors (i.e. TATA in Nigeria) making it difficult for Green to enter in these geographical area.

5.1.66. McKinsey also emphasised that in the event Green had the opportunity to take over distribution in Ethiopia, Kenya and Tanzania from the current distributors, this could add revenue of approximately Four Hundred and Forty Million Rand Only (R420 million) with approximately Fifty Million Rand Only (R50 million) in gross profit (distributor commission) in 2018.

5.1.67. In addition, McKinsey further indicated that, although the financial services in Africa had a significant long-term potential, there was a limited penetration. As a consequence, McKinsey was of the opinion that there was a significant opportunity for Green to capture value for equipment financing due to the lack of a supplier able to provide finance across the region, as well as competition from John Deere's in-house financing option.

5.1.68. Furthermore, McKinsey indicated that under the Upside scenario of market entry to East Africa, including Ethiopia, Kenya and Tanzania, in both Grain Management and Equipment, if Green was able to execute successfully through developing the right government relationships and navigating the financial restrictions, Green could add approximately (R580 million revenue in 2018 (R420 million from Equipment) or approximately 108% over management forecast revenue for its existing SSA footprint.

5.1.69. McKinsey also indicated, in respect of East Africa, that it was of the opinion that Green should consider developing a broad presence in Nigeria to gain exposure to longer-term market growth (10 years +). According to McKinsey, the opportunities in grain management and equipment were both very attractive.

5.1.70. In this regard, McKinsey further indicated that by 2018, grain management could add approximately Seventy Million Rand Only (R70 million) revenue which was not factored in the base case. Equipment presented a very attractive growth potential (over 20% per annum to 2020), however, it would require John Deere to reconsider its licenses.

5.1.71. It emphasised that, although the environment was known to be challenging and risky, the opportunity was important enough to be worth considering.

5.1.72. McKinsey also indicated that the successful execution would require different resources and skills than those Green had at the time. Furthermore, in five (5) to (10) year timeframe, this upside potential would be small relative to the very promising broader long-term opportunity. However, early entry would certainly position Green well to participate in the longer-term growth.

5.1.73. It was also noted by the Public Protector's investigation team that, the PIC procured the services of RIC Solutions 2013 (Pty) Ltd (RIC) with a view to conduct technical due diligence in respect of Project Bluebird, which entailed the PIC advancing senior ranking term facility totalling approximately Eight Hundred and Fifty Million Rand Only (R850 million) to a B-BBEE grouping led by Matome Maponya Investments for the acquisition of 100% of poultry operations of Agri Operations Ltd.

5.1.74. On 10 February 2015, RIC issued a report which focused on the production, environmental and staff aspects of the entities forming part of Project Bluebird, namely Afrgri Poultry and Kinross Feed Mill. RIC indicated in the report that, the technical due diligence was conducted focused mainly on the production, environmental and staff aspects of the entities forming part of Project Bluebird following the purchase of the entire AFGRI Poultry Division (Afrgri) and Kinross Feed Mill by Matome Maponya Investments.

5.1.75. According to RIC, at the time of the technical due diligence, AFGRI was processing approximately One Million Two Hundred Thousand (1.2 million) broiler birds per week. RIC indicated that the Delmas abattoir could produce both fresh and frozen birds and with the expansion of the facility underway, the facility could increase its production capacity by 53%. Also that the breeder facilities and hatchery had the capacity of producing One Million Seven Hundred Thousand (1.7 million) chicks per week in line with the planned processing expansions.

5.1.76. Regarding the Kinross Feed Mill, RIC indicated that the facility had the maximum production capacity of Eighteen Thousand (18 000) tonnes per month. This, according to RIC, was insufficient to supply the entire AFGRI Poultry Division. As a consequence, RIC advised that production mill capacity structure needed to be expanded to Thirty Thousand (30 000) tonnes per month taking into account the space available within the mill structure.

5.1.77. Regarding Afrgri, RIC indicated that Afrgri was a corporate company which was delisted from the Stock Exchange (ostensibly the Johannesburg Stock Exchange). According to RIC, it came as no surprise that the Policies and Standard Operating Procedures (the SOPs) implemented were comprehensive, well maintained and encompassing.

5.1.78. In addition, RIC indicated that no major shortfall could be identified and this was confirmed through the high risk rating scores (the higher the score the more the risk is covered) achieved through the independent Marsh Annual Risk Audits. Furthermore, RIC indicated that environmental regulations were stringently adhered to and any advised corrective actions were implemented by AFGRI.

5.1.79. Regarding key staff and management involved in the poultry farming, hatchery, and abattoir, as well as feed mill, RIC indicated that the staff was found to be well-versed with their responsibilities and were highly experienced in their respective specialised fields. However, RIC identified the marketing department as a sector that should be focussed upon for improvement.

5.1.80. Regarding training, RIC indicated that an extensive staff training programmes were implemented across the various business sub-sectors and across the respective employment levels. According to RIC, skills development was clearly apparent and the majority of the labour employed were initially unskilled and required training in order to complete the assigned work responsibilities successfully.

5.1.81. Consequently, RIC indicated that its technical due diligence process did not unearth any major operational concerns or critical legislative breaches and the business was found to be technically sound and of good standing.

5.1.82. Similarly, it was noted that PIC procured the services of Cliffe Dekker Hofmeyer Incorporated Attorneys (CDH) with a view to conduct due diligence in respect of the business of AFGRI following the intention of the PIC to participate in the acquisition of 30% of the issued share capital of AFGRI held by AFGRI Operations (a wholly owned subsidiary of Afrgri) and issued a report on 13 February 2015.

5.1.83. Regarding the analysis of the operational structure of AFGRI, CDH indicated that Afrgri was a subsidiary of Afrgri Operations, holding 100% of the issued share capital of Afrgri and had three (3) operating divisions, namely Afrgri Agri Services, AFGRI Financial Services and Afrgri Foods.

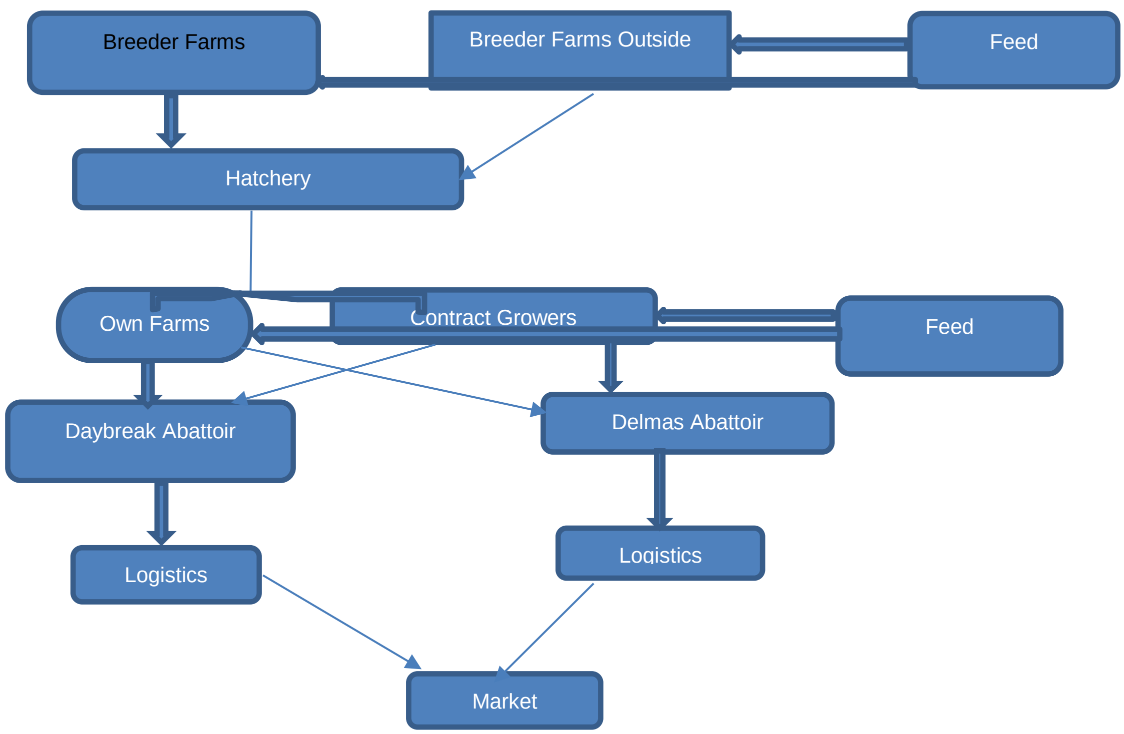
5.1.84. AFGRI Foods specialises in agricultural processing and food production sectors through three (3) business units housed in separate subsidiaries, namely AFGRI Animal Feeds, Nedan Proprietary Limited (Nedan) and Afrgri.

5.1.85. AFGRI Animal Feed manufactures and sells animal feed (including dairy and poultry feed), including complete feed and high-protein concentrate feed for poultry. Through Nedan, AFGRI supplies (i) plant oils and soya based products for animal feed; and (ii) plant oils and soya based products for human consumption.

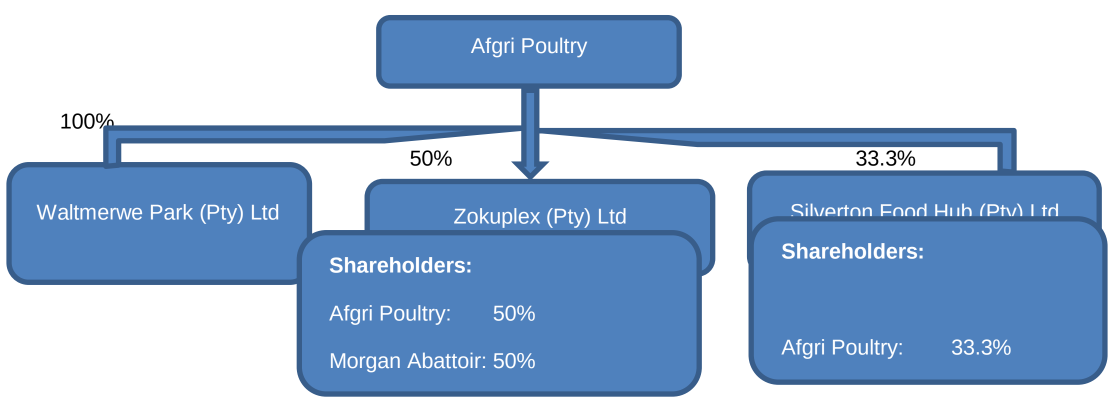
5.1.86. The AFGRI Poultry operation focuses on supplying customers with high quality poultry meat products by using efficient and cost-effective methods. The Hubbard grandparent operations supplies breeding stock which includes two (2) separate farms and a hatchery.

5.1.87. Day-old broiler chicks are supplied to independent contract growers and own broiler farms which grow the chicks to the optimal slaughter weight. These broilers are then processed through two abattoirs, both certified as halaal facilities. While most of the product consist of Individually Quick Frozen (IQF) portions, fresh and frozen whole birds and by-products were also sold to retail chains and independent wholesalers.

5.1.88. CDH continued by indicating that, AFGRI had a number of business divisions that enables it to conduct its business, this includes the Midway Chicks, the hatchery, broiler farms, abattoirs, logistics, marketing, administration and management. In this regard, CDH provided the following diagrammatic representation of the Afgri process:



5.1.89. The following diagrammatic representation was provided to depict Afgri Group's Structure:



5.1.90. According to CDH, AFGRI Poultry is a 50% shareholder in Zokuplex (Pty) Ltd and a 33.3% shareholder in Silverton Food Hub (Pty) Ltd.

5.1.91. Regarding AFGRI Poultry's corporate governance, CHD indicated that the entity had ten (10) directors and AFGRI Operations held 100% of AFGRI Poultry. In addition, the authorised share capital was one thousand (1000) shares and the issued share capital was one hundred (100) shares.

5.1.92. Its auditor was Mr Wikus Roos of PriceWaterhouseCoopers Incorporated, its company secretary was Ms Dimakatso Marion Shikwinya. The entity holds a bank account with ABSA Bank Limited. CDH continued by indicating that AFGRI had not adopted a Memorandum of Incorporation (the MoI) and was still governed by Articles of Incorporation.

5.1.93. According to CDH, the directors of AFGRI may raise or borrow for the purposes of the company business such sum or sums of money as they thought fit. The directors may secure the repayment of or raise any such sum or sums as aforesaid by mortgage of charge upon the whole of any part of the property and assets of the company, present and future, or by the issue, at such price as they thought fit, of debentures either charged upon the whole or any part of the property and assets of the company or not so charged or in such other way as the directors thought expedient.

5.1.94. CDH continued by indicating that subject to such restrictions as may be applicable, any member of AFGRI may transfer all or any of his shares by instrument in writing in any usual or common form or any other form which the directors may approve.

5.1.95. Regarding water licences, CDH indicated that AFGRI Poultry was in contravention of the law as it did not have water licences. As a consequence, it (CDH) advised that the proposed transaction should include an event of default in terms of which should the water licences not be issued within twelve

(12) months it would trigger an event of default and the PIC could reserve its rights.

5.1.96. Regarding material agreements, CDH indicated that the following material agreements should be noted for the purposes of the Proposed Transaction:

5.1.96.1. **Borrowing of AFGRI Poultry:**

5.1.96.1.1. CDH indicated that AFGRI Poultry concluded term loans with Grocapital Financial Services denominated in South African Rand (SA Rand) and secured by property plant and equipment with a carrying value of One Hundred and Seventy Nine Million Rand Only (R179 000 000.00).

5.1.96.1.2. The loans were repayable in monthly instalments with interest charged at prime less 0.5% as follows:

(a) *Two loans with instalments of One Hundred and Thirty Two Thousand Four Hundred and Eighty Two Rand Only (R132 482.00) and One Million Three Hundred and Sixty Four Thousand Four Hundred Rand Only (R1 364 400.00) with the last instalment due in January 2015;*

(b) *Two loans with instalments of Seven Hundred and Eighty Five Thousand Seven Hundred and Fourteen Rand Only (R785 714.00) and Four Hundred and Forty Eight Thousand Eight Hundred and Ninety Eight Rand Only (R448 898.00) with the last instalment due in February 2017; and*

(c) *Two loans with instalments of Three Million One Hundred and Forty One Thousand Nine Hundred Rand Only (R3 141 900.00) and One Million Three Hundred and Forty Seven Thousand Eight Hundred and Seventy Five Rand Only (R1 347 875.00) with the last instalment due in May 2020.*

5.1.96.1.3. In addition, CHD indicated that AFGRI Poultry had concluded three instalments Sale Agreements with Grocapital Financial Services for the HP-Expansion at Breeders and Hatchery and Equipment on the newly built farm Rietvalei. The last instalments of which were due on 15 February 2015 and 31 January 2015.

5.1.96.2. **Midway Chix (Pty) Ltd:**

5.1.96.2.1. CDH indicated that three (3) concluded term loans with Land Bank denominated in SA Rand and secured by property plant and equipment with a carrying value of Sixty Three Million Rand Only (R63 million).

5.1.96.2.2. According to CDH, two loans were repayable in monthly instalments of Seventy Three Thousand Two Hundred and Eighty Nine Rand Only (R73 289.00) and Three Hundred and Ten Thousand Nine Hundred and Nineteen Rand Only (R310 919.00) with the last instalment due in January 2015.

5.1.96.2.3. The third loan, according to CDH, was repayable in monthly instalments of One Million Two Hundred and Ninety Nine Thousand Six Hundred and Four Rand Only (R1 299 604.00) with the last instalment due in May 2010.

5.1.96.2.4. CDH also indicated that AFGRI Poultry had advised that Midway Chix has since been liquidated and the business of Midway was bought in September 2012 and therefore the above loans were being serviced by AFGRI Poultry.

5.1.96.3. **Rossgro Broiler Farms:**

5.1.96.3.1. In this regard, CDH indicated that AFGRI Poultry acquired the assets and operations of Rossgro during the 2010 Financial Year, which included the purchase of Rossgro abattoir and assets.

5.1.96.3.2. According to CDH, the value of the property, plant and equipment associated with the acquisition amounted to Two Hundred and Twenty Million Rand Only (R220 000 000.00). In addition, CDH indicated that no long term funding was raised for the acquisition of Rossgro.

5.1.96.4. **Sale of Shares Claims Agreement:**

5.1.96.4.1. CDH indicated that, in terms of the Sale of Shares Agreement AFGRI Operations wished to sell the Sale Shares to Afpo and Afpo wished to buy the Sale Shares and AFGRI Kinross Business for a consideration price made up as follows:

(a) *One Billion and One Hundred Million Rand Only (R1 100 000 000.00) payable by Afpo to AFGRI Operations on the closing date (as defined in the agreement);*

(b) *Five Million Rand Only (R5 million) payable by Afpo to AFGRI Operations within six (6) months following AFGRI Poultry's 2016 Financial Year end, provided that the First Year Profit Warranty was met; and*

(c) *One Hundred and Forty Five Million Rand Only (R145 million) payable by Afpo to AFGRI Poultry within six (6) months following AFGRI Poultry's 2017 Financial Year end, provided that the Second Year Profit Warranty was met.*

5.1.96.4.2. In the event that AFGRI Poultry did not achieve the First Year Profit Warranty and/or the Second Year Profit Warranty the purchase consideration payable as set out above, as the case may be, would be reduced proportionately.

5.1.96.4.3. According to the agreement, the First Year Profit Warranty and the Second Year Profit Warranty were based on the following assumptions which Afpo undertook to comply with the continuation of the AFGRI Poultry management and strategy as at the signature date of the agreement; continuation of the AFGRI Poultry mix as at the signature date; and no abnormal items or losses deducted from EBIT.

5.1.96.4.4. Furthermore, the purchase consideration was based on the average monthly Networking Capital of the nine (9) months preceding the signature date being Two Hundred and Twenty One Million Rand Only (R221 000 000.00).

5.1.96.4.5. CDH further indicated that, the agreement recorded that on the effective date of the transaction, the Signature Date Net Working Capital shall be compared to the actual Networking Capital of AFGRI Poultry on the Effective Date. Should the Effective Date Networking Capital be more than the Signature Date Networking Capital, the amount of such difference shall be deducted from the purchase consideration and should the Effective Networking Capital be less than the Signature Date Networking Capital, the purchase consideration shall be increased with the amount of such difference.

5.1.96.4.6. In addition, CDH indicated that in terms of the agreement, any claim for the breach of warranty claims shall be submitted within two (2) years from the closing date of the transaction.

5.1.96.4.7. AFGRI Operations shall not be liable for any claim unless the amount of liability finally adjudged as being payable or agreed to be paid by AFGRI Operations pursuant to that claim exceeding Four Hundred Thousand Rand Only (R400 000.00) in which Afpo shall be able to claim the whole amount of such claim and not merely the excess. Furthermore, in terms of the agreement, the maximum aggregate liability of AFGRI Operations pursuant to a claim shall not exceed an amount equal to the purchase consideration allocated to the Kinross Mill in terms of the Sale of Business Agreement.

5.1.96.5. **Sale of Business Agreement:**

5.1.96.5.1. CDH indicated that, in terms of the Sale of Business Agreement AFGRI Operations wished to sell the Business to AFGRI Poultry and AFGRI Poultry wished to buy the Business with effect from the Business Transfer Event subject to the fulfilment of certain suspensive conditions, which were to be fulfilled by not later than forty five (45) business days from the signature date.

5.1.96.5.2. CDH also indicated that, in terms of the agreement, AFGRI Operations undertook to AFGRI Poultry that it will continue to provide essential business continuity and support services to AFGRI Poultry and the Kinross Mill for a period not less than twenty four (24) months after the Business Transfer Event at the cost scale incurred by AFGRI Operations for such services as at the Business Transfer Event.

5.1.96.5.3. According to the agreement, the above business support services included the provision of office space, information technology services, payroll and human resources services, treasury services as were at the time provided to AFGRI Operations and Kinross Mill.

5.1.96.5.4. Regarding the Kinross Mill, CDH indicated that AFGRI Operations undertook to continue to provide day to day management, raw material procurement and formulation services to Kinross Mill for a period of not less than twenty four (24) months after the Business Transfer Event at the following costs basis, (a) management fee; (b) procurement fee; and a formulation fee at an aggregate cost of Fifty Rand Only (R50.00) per ton of animal feed purchased with annual escalation per consumer price index.

5.1.96.5.5. In addition, CDH indicated that in terms of the agreement, AFGRI Operations granted AFGRI Poultry a ten (10) year right of first refusal to supply all animal feeds that the Kinross Mill could not supply to fulfil AFGRI Poultry's internal requirements at the raw material procurement costs plus a margin of Five Hundred and Twenty Rand Only (R520.00) per ton.

5.1.96.6. **Indelible By-Product Supply Agreement:**

5.1.96.6.1. Regarding the Indelible By-Product Supply Agreement, CDH indicated that in terms of this agreement, AFGRI Operations undertook to supply (for a period of ten (10) years) AFGRI Animal Feeds with all the chicken feathers, mala and coagulated blood with moisture content not exceeding 70% that AFGRI Poultry would produce at a cost of One Hundred Rand Only (R100.00) per ton.

5.1.96.6.2. In turn AFGRI Poultry undertook, in terms of the agreement, that in the event of the Eagle Creek Indelible By-Products Supply Agreement terminating for whatsoever reason, it would grant AFGRI Animal Feeds a right of first refusal to purchase the indelible by-products supplied by AFGRI Poultry on the same terms and conditions and for the same period.

5.1.96.7. **Feather Meal Supply Agreement:**

5.1.96.7.1. Regarding the Feather Meal Supply Agreement, CDH indicated that the review of the agreement pointed that AFGRI Animal Feeds would supply (for a period of ten (10) years) AFGRI Poultry with Feather Meal produced from the indelible by-products purchased in terms of the Indelible By-Product Supply Agreement.

5.1.96.8. **Broiler Hatching Egg Supply Agreement:**

5.1.96.8.1. Regarding the Broiler Hatching Egg Supply Agreement, CDH indicated that the review of the agreement pointed that AFGRI Operations undertook, in favour of AFGRI Animal Feeds that AFGRI Animal Feeds would continue to be supplied (for a period of ten (10) years) of animal feeds from their Pietermaritzburg Mill in terms of the Broiler Hatching Egg Supply Agreement. The price of the feeds would be the raw material procurement costs plus a margin of Five Hundred and Twenty Rand Only (R520.00) per ton.

5.1.96.9. **Sale of Properties Agreement:**

5.1.96.9.1. Regarding the Sale of Properties Agreement, CDH indicated that the review of the agreement pointed that Daybreak Properties (Springs) (Pty) Ltd as the seller, sold the properties *("voetstoots")* to Daybreak as purchaser with effect from the effective date (as defined in the agreement). In addition, CDH indicates that in terms of the agreement, the purchase price of Two Million Two Hundred and Sixty Nine Thousand Rand Only (R2 269 000.00) had been fully paid for the properties by the purchaser to the seller through an interest free loan which was granted to the purchaser by the seller prior to the effective date.

5.1.96.10. **Midway Chix Sale of Business Agreement:**

5.1.96.10.1. Regarding the Midway Chix Sale of Business Agreement, CDH indicated that the review of the agreement pointed that Midway Chix sold its business and related assets and activities operated under the name of Midway Chix (Pty) Ltd as a going concern subject to the purchaser acquiring the business, the Midway Chix (Pty) Ltd would be deregistered.

5.1.96.10.2. In addition, the agreement recorded that AFGRI Poultry would acquire the business as a going concern with effect from 01 October 2012, including the business assets and liabilities. Furthermore, the purchase consideration would be payable on an interest-free loan account, which interest free loan account would be settled at the discretion of AFGRI Poultry Finance Director or his nominee.

5.1.96.11. **Shavewood (Pty) Ltd:**

5.1.96.11.1. Regarding Shavewood (Pty) Ltd, CDH indicated that the review of the transaction pointed that AFGRI Poultry sold its shares held in Shavewood (Pty) Ltd for an amount of Two Million and Four Hundred Thousand Rand Only (R2 400 000.00).

5.1.96.11.2. The purchase price was payable in forty eight (48) monthly instalments of Fifty Thousand Rand Only (R50 000.00) and the last instalment was due in February 2015. In terms of the transaction, AFGRI Poultry undertook to continue with the arrangement, including but not limited to the price, packaging and payment terms, for the purchase of wood shavings from the company for a period of not less than four (4) years, subject to:

(i) the pricing of such wood shavings being market related and reviewed and adjusted annually, such adjustments in price not to ever escalate with more than the applicable consumer price index applicable to such period and

(ii) the quality of the wood shavings therefore being acceptable to AFGRI Poultry.

5.1.96.11.3. In this regard, CDH recommended that a separate supply agreement should be concluded between AFGRI Poultry and Shavewood (Pty) Ltd in respect of the supply of wood shavings.

5.1.96.12. **Five Year Production Agreement:**

5.1.96.12.1. Regarding the Five Year Production Agreement, CDH indicated that the review of the transaction pointed that AFGRI Poultry had concluded six (6) Five Year Production Agreements on 11 May 2009. Four (4) of the agreements were concluded with Rossouw Pluimvee whilst two (2) of the agreements were concluded with Rossgro Broiler Farms for the rearing of day old chicks.

5.1.96.12.2. According to CDH, the above contracts were for a period of five (5) years and would thereafter continue indefinitely on condition that either party would have the right to cancel the said agreement with a minimum of three (3) rearing cycles written notice.

5.1.96.13. **Broiler Supply and Caretaker Agreements:**

5.1.96.13.1. Regarding the Broiler Supply and Caretaker Agreements, CDH indicated that the review of the transaction pointed that AFGRI Poultry had concluded twenty (20) Broiler Supply and Caretaker Agreements with various entities at or about 2014 for a period of three (3) years subject to renewal for the supply of day-old chicks.

5.1.97. Regarding immovable property, CDH indicated that it was provided with seven (7) titled deeds which confirmed that AFGRI Poultry owned the following land parcels:

No.	Description	Location
1.	Portion 21 of the Farm Geluk 234	Mpumalanga Province
2.	Farm Worthing 713	Limpopo Province
3.	Portion 9 of the Farm Merinovlakte 495	Limpopo Province
4.	Remaining Extent of Portion 5 of the Farm Diep Putten 625	Limpopo Province
5.	Portion 32 of the Farm Welgedacht 74	Gauteng Province
6.	Remaining Extent of Portion 25 of the Farm Welgedacht 74	Gauteng Province

7.	Remaining Extent of Portion 23 of the Farm Welgedacht 74	Gauteng Province
8.	Remainder of Portion 42 of the Farm Holfontein 71	Gauteng Province
9.	Remaining Extent of Portion 49 (a portion of portion 20) of the Farm Putfontein 26	Gauteng Province
10.	Holding 78, 79, 80 and 81 of Droogfontein Agricultural Holdings	Gauteng Province
11.	Portion 10 (a portion of portion 3) of the Farm Rietvalei 195	Mpumalanga Province

5.1.98. According to CDH, most of the above properties were encumbered by way of mortgage bonds which were registered originally in the name of Grocapital Financial Services but have since been ceded to the Land Bank. In addition, CDH established that there were three (3) general notarial bonds and aggregate capital sum of Eight Hundred and Twenty Nine Million Three Hundred and Ten Thousand Rand Only (R829 310 000.00) originally registered in favour of Grocapital Financial Services but subsequently ceded in favour of the Land Bank.

5.1.99. CDH also indicated that it had reviewed lease agreements and it established that AFGRI Poultry had leased the following properties:

No.	Description	Location
1.	Portion 2 of the Farm Waaikraal Nr 556	Mpumalanga Province
2.	Cropping land on the farm Portion 10 (a portion of portion3) of the Farm Rietvalei 195	Mpumalanga Province
3.	Remainder of Portion 32 of the Farm Welgedacht 74	Gauteng Province
4.	Remaining Extent of Portion 25 of the Farm Welgedacht 74	Gauteng Province

5.	Remaining Extent of Portion 48 of the Farm Welgedacht 74	Gauteng Province
6.	Portion 8 of Farm Modderfontein	Mpumalanga Province

5.1.100. In addition, CDH indicated that the review of the business lease agreements revealed that:

(a) AFGRI Poultry leased 116 Modderfontein Road, Rietkol from Mr Tony Rovani and Catherine Rovani for a period of one (1) year from 1 December 2014 to 30 November 2015 for a monthly rental amount of Four Thousand Five Hundred Rand Only (R4 500.00) per square metre(sqm);

5.1.101. Furthermore, CDH indicated that the review of a sale of property agreement revealed that AFGRI Poultry purchased the remaining extent of Portion 8 of the Farm Modderfontein 236 (Mpumalanga) for an amount of One Hundred and Eighty Nine Thousand Seven Hundred and Twenty Two Rands Only (R189 722.00) with effect from 30 September 2009.

5.1.102. Regarding litigation and potential claims, CDH established the following:

5.1.102.1. **Claims by AFGRI Poultry:**

Claimant	**Defendant**	**Counter Claim by Defendant**	**AFGRI Claim**	**Background**	**Provision for possible bad debts**	**Success of claim**
AFGRI Poultry Balfour Magistrate Court-Case Number 165/2012	De Wit WCJ	N/A	Claim for arrear rental and damages- R135 474. 99	The parties concluded a lease agreement on 21/08/2009 for cropping and grazing land. The defendant's arrear rental amounts to R35 472.99. The	N/A	Judgment awarded in favour of AFGRI Poultry on 15/11/2015

				defendant further failed to return the land and in good order and condition and the plaintiff claims R100 000.00 as damaged (Actual damages amounted to R106 455.83 but the difference was abandoned to bring the claim with the District Court's jurisdiction)		
AFGRI Poultry	JA Chix CC Andries Jacobus Rudolph	N/A	Claim arising from a written Acknowledgement of Debt- R982 806.00	The parties concluded an Acknowledgement of Debt. JA Chix CC acknowledged it was indebted to AFGRI Poultry in the sum of R982 806.00 and undertook to pay the sum of R50 000.00 per week to settle the debt. JA Chix CC defaulted and AFGRI Poultry instituted and action for the sum of R982 806.00	N/A	Default judgment was awarded in favour of AFGRI Poultry on 4/11/2014. A writ of execution was issued on 25/11/2014.

5.1.102.2. **Potential Claims by AFGRI Poultry:**

Claimant	**Defendant**	**Counter Claim by Defendant**	**Background**	**Success of Claim**
AFGRI Poultry	**Hebron**	N/A	Breach of Contract by the Defendant	Sent letter with notice to cancel the agreement.

AFGRI Poultry	Rock Farm	N/A	Breach of Contract by the Defendant	Way forward being determined

5.1.102.3. **AFGRI Poultry's cases pending at the Commission for Conciliation Mediation and Arbitration (CCMA):**

Name of Employee	Description	Recommendation	Outcome
SACCAWU	Organisational rights	Conciliation	Pending
Thapelo Dladla	Unfair dismissal-misconduct	Conciliation	Pending- referred to arbitration
Jacobus Johannes (Koos) Powell	Unfair dismissal-misconduct	Conciliation/Arbitration	Pending
CCRAWUSA	Organisational rights	Arbitration	Pending

5.1.103. It was further noted that, Matome Maponya Investments (Pty) Ltd appointed Basic Points Capital (BPS) as its advisor, to carry out a financial review of a financial model that was prepared by the representatives of Matome Maponya Investments (Pty) Ltd to acquire a controlling shareholding interest in AFGRI Poultry.

5.1.104. In terms of the agreement, BPS was mandated to, *inter alia*:

(a) *Review the base case of the Model and the reasonableness of the assumptions therein; conduct a thorough due diligence on the Model, review the tax assumptions and accounting treatments applied in the Model to ascertain that they largely comply with the applicable legislation and industry norms in South Africa;*

(b) *Give an opinion on the completeness of the Model and suitability of the model for future use for the purposes of comparing expected figures to actual figures and the ability for new figures to be used for future projections;*

(c) *Review of the valuation done by the client and the reasonableness of the calculated purchase price and review of the valuation methods used and the completeness thereof and if required, recommend additional valuation methods that would need to be done;*

(d) *Work out the PIC's expected IRR using the Model; and give grading for the Model, based on the PIC's rating scale.*

5.1.105. In February 2015, following the in-depth financial review of the model, BPS issued a report in which it made the following findings:

(a) The model was logically constructed and the formulae, algorithms and calculations were arithmetically accurate;

(b) *The model's input sheets were clearly marked and the financial statements figures have been accurately pulled from the input sheets. The model could be used to project a Balance Sheet, Profit and Loss Statements, Cash Flow Statements;*

(c) Based on a comparison with its independent valuation, which was adjusted for the capacity expansion which was underway, BPS considered the valuation presented in the financial model fair; and

(d) A detailed capital structure had been provided in the model that shows both the breakdown of instruments used to fund the acquisition, the funding of working capital and assets of the business, an amortisation schedule of the various instruments, debt coverage ratios and a detailed breakdown of the returns to various investors in the transaction.

5.1.106. Consequently, BPS concluded that, it was of the opinion that the financial model accurately reflected the historical position and performance of AFGRI Poultry and fairly projected the future financial position and performance of the company. In addition, BPS indicated that, based on its in-depth review of the financial model, it would award a Grade Three rating based on the PIC rating scale.

5.1.107. It was further noted by the Public Protector's investigation team that Investec Bank Limited (Investec) was commissioned to conduct, through its Corporate Finance Division, the valuation of AFGRI Poultry. Investec indicated that, based on an equity value adjusted for debt of R545.8 million and cash of R1.6 million as at June 2013, AFGRI Poultry estimated Enterprise Valuation range was between R1.2 billion and R1.5 billion.

5.1.108. Matome Maponya Investments (Pty) Ltd commissioned Genesis Analytics (Pty) Ltd (Genesis) to prepare an independent social impact report and strategy in relation to the transaction that had been prepared for the poultry operations of AFGRI Poultry to be sold to an empowerment consortium led by Matome Maponya Investments (Pty) Ltd.

5.1.109. On 23 January 2015, Genesis issued a final report in which it recommended that in order to maximise the social value of the transaction:

(a) As part of funding condition considerations, the social impact strategy be adopted in principle by Daybreak, Matome Maponya Investments (Pty) Ltd and the PIC pending the preparation of a detailed design and implementation plans;

(b) Appropriate financial resources be committed and allocated by Daybreak and Matome Maponya Investments (Pty) Ltd, alternatively by the PIC, to prepare a detailed strategy design and implementation plan, and that a time limit is set in which the social impact strategy of Daybreak is to be finalised;

(c) Appropriate financial and people resources are allocated by Daybreak and Matome Maponya Investments (Pty) Ltd to implement and manage the social impact strategy;

(d) A time limit is set in which the social impact strategy of Daybreak is implemented, possibly within eighteen (18) months from the date of the transaction;

(e) If need be, an inclusive business fund is established by Daybreak, Matome Maponya Investments (Pty) Ltd or the PIC to finance the strategy;

(f) The responsibility for the design and implementation of the social impact strategy is assigned at the executive level as part of key performance indicators;

(g) Monitoring and evaluation framework is developed as part of the detailed strategy design so that the social impact of the programmes can be accurately assessed and so that the learnings can improve future implementation of the strategy, and also so that the Daybreak experience can be used to demonstrate success to the rest of the industry; and

(h) The PIC considers the assessment of socio-economic impact, as well as the development of social impact strategies on all of the PIC's transactions where pension funds are used to finance discounted transactions in favour of social or transformational value of the transaction.

5.1.110. Following the resolution taken by the PEPSSME FIP on 2 April 2015, as well as technical, commercial and legal due diligence and financial model review conducted by RIC, McKinsey, CDH and BPS, the PIC participated in the acquisition of Daybreak for a total investment of One Billion One Hundred and Ninety One Million Rand Only (R1, 191 billion) as follows:

(a) A capital amount of up to Eight Hundred and Ninety Two Million Rand Only (R892 million) in the form of debentures instruments;

(b) *A capital amount of up to Two Hundred and Ninety Nine Million Seventy Nine Thousand Rand Only (R299,79 million) in the form of a senior debt funding; and*

(c) *An amount of Thirty Six Rand Only (R36.00) to acquire thirty six percent (36%) equity in AFRGRI Poultry on behalf of the GEPF, UIF and the CC.*

Notice In Terms Of Rule 42(1) of the Public Protector Investigation Rules:

5.1.111. On 17 March 2022, a Notice in terms of Rule 42(1) of the Public Protector Rules was issued to the Complainant with a view to afford him the opportunity to make representations in connection with the intended closure of matter by not later than 31 March 2022.

5.1.112. Notwithstanding the above, the Complainant failed to provide a response nor make representations in connection with the intended closure of the complaint within 14 days of delivery of the notification, which necessitated that the Public Protector proceed with the closing of the file.

Application of the relevant legislation and prescripts

5.1.113. **The Constitution of the Republic of South Africa, 1996**

5.1.113.1. The Constitution which is the supreme law of the Republic provides in section 2 that, *"The Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".*

5.1.113.2. Section 182(1) of the Constitution provides that, "*The Public Protector has the power, as regulated by national legislation-*

(a) to investigate any conduct in <u>state affairs, or in the public administration in any sphere of government</u>, 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.

5.1.113.3. Section 195 of the Constitution, 1996 provides that public administration in every sphere of government must be underpinned by amongst others that, the following the democratic values and principles-

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained;

(b) Efficient, economic and effective use of resources must be promoted;

(c) Public administration must be development-oriented;

(d) Services must be provided impartially, fairly, equitably and without bias;

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making

(f) <u>Public administration must be accountable</u>;

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information;

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated;

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to —

(i) administration in every sphere of government;

(ii) organs of state; and

(iii) public enterprises.

5.1.113.4. Section 239(b)(ii) of the Constitution defines an organ of state as follows:

"Unless the context indicates otherwise -

"Organ of state' means:

(a) …; or

(b) Any other functionary or institution -

(i) …; or

(ii) Exercising a public power or performing a public function in terms of any legislation but does not include a court or judicial officer".

5.1.114. **The Public Investment Corporation Act, 2004 ("the PIC Act")**[6]

5.1.114.1. Section 2(1) of the PIC Act, 2004) provides that, *"There is hereby established a juristic person, an institution outside the public service, to be known as the Public Investment Corporation Limited".*

5.1.114.2. In terms of section 4 of the PIC Act, 2004 the main object of the corporation is to be a financial services provider in terms of the FAIS Act.

5.1.114.3. Section 9(1) of the PIC Act, 2004 provides that, *"The corporation must, in terms of the FAIS Act, obtain authorisation from the Registrar as a financial service provider".*

5.1.114.4. Section 10(1) of the PIC Act, 2004 provides that, *"The corporation may invest every deposit or portions of a deposit, with regard to the period, if any, after the expiration of which such a deposit or portions of such a deposit may again become necessary for use, on behalf of the depositor concerned in accordance with the investment policy of the corporation".*

5.1.115. **The Public Protector Act, 1994 ("the PPA, 1994")**[7]

5.1.115.1. Section 6(4)(a)(i) of the **Public Protector Act No. 23 of 1994** (the Act) provides that *"The Public Protector shall be competent to investigate, on his or her own initiative or receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level".*

5.1.115.2. Section 6(9) of the Act provides that, *"Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two (2) years from the occurrence of the incident or matter concerned".*

[6] Act No. 23 of 2004
[7] Act No. 23 of 1994

5.1.115.3. The PIC is juristic person established in terms of section 2 of the PIC Act, 2004, registered with the Companies and Intellectual Properties Commission (the CIPC) under company registration number 2005/009094/30 and a Financial Services Provider under FSP licence number 19777.

5.1.115.4. Furthermore, the PIC is an organ of State as contemplated in sections 239 of the Constitution and listed as national public entity in Schedule 3 (Part B) of the Public Finance Management Act, 1999 [Act No. 1 of 1999] (the PFMA). Like all organs of State, the PIC is required to discharge all of its duties and functions in accordance with the law. The PIC's conduct should be beyond reproach and it is expected to measure up to policy considerations and legislative prescripts that regulate its conduct. These requirements must also be understood together with the basic values governing public administration in section 195(1) of the Constitution.

5.1.115.5. Based on the above provisions, the Public Protector duly asserts her jurisdiction over the affairs or administration of PIC as envisaged above and it is further apposite to indicate that the mandate and powers of the Public Protector were not disputed by PIC in this instance.

5.1.116. **The Companies Act, 2008 ("the CA, 2008")**

5.1.116.1. Section 76(3)(a), (b) and (c)(i) to(iii) of the **Companies Act No. 71 of 2008** (The CA, 2008) provides that, *"Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-*

(a) in good faith and for a proper purpose;
(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person-

i. *carrying out the same functions in relation to the company as those carried out by that director; and*

ii. *having the general knowledge, skill and experience of that director".*

5.1.116.2. Section 6(1) and (3) of the PIC Act, 2004 provides that, *"The Minister must, in consultation with Cabinet, determine and appoint the members of the board. The members of the board must be appointed on the ground of their knowledge and experience, with due regard to the FAIS Act, which, when considered collectively, should enable the board to attain the objects of the corporation".*

5.1.117. **The Public Finance Management Act, 1999 ("the PFMA, 1999")[8]**

5.1.117.1. Section 49(1) and (2)(a) of the **Public Finance Management Act No. 1 of 1999** (the PFMA, 1999) provides that, *"Every public entity must have an authority which must be accountable for the purposes of this Act. If the public entity has a board or other controlling body, that board or controlling body is the accounting authority for that entity"*

5.1.117.2. Section 50(a)(b) and (d) of the PFMA, 1999 provides that, *"The accounting authority for a public entity must-*

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity;

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity;

[8] Act No. 1 of 1999

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state".

5.1.117.3. The Members of the PIC Board of Directors, as the accounting authority, are required to exercise the duty of utmost care to ensure reasonable protection of the assets of the PIC and act solely in the best interests of the PIC with fidelity, honesty and integrity in managing the financial affairs of the PIC.

5.1.117.4. The responsibilities of the Board are separate and distinct from those of management. The Board exercises sound leadership, integrity and independent judgment in pursuit of strategic goals and objectives, to achieve long-term sustainability, growth and prosperity, while always remaining cognisant of the best interests of all stakeholders.

5.1.117.5. The Board is accountable for the overall performance and affairs of the PIC. It leads ethically and provides leadership within a framework of prudent and effective control, thereby ensuring that the PIC's ethics are managed effectively and that the PIC is a responsible corporate citizen.[9]

5.1.117.6. The principle of exercising the duty of care and skill was articulated by the court in the case of ***Fisheries Development Corporation of S A Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) td and Others***[10] where Margo J said at 166 D-E:

"Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof.

Gower (op cit at 602 et seq) refers to the striking contrast between the directors' heavy duties of loyalty and good faith and their very light obligations of skill and diligence. Nevertheless, a director may not be

[9] https://www.pic.gov.za/who-we-are/our-leadership/board-of-directors

[10] 1980(4) SA 156 (W)

indifferent or a mere dummy. Nor may he shelter behind culpable ignorance or failure to understand the company's affairs."

5.1.118. **The Financial Advisory and Intermediary Services Act, 2002 ("the FAIS Act")**[11]

5.1.118.1. In terms of section 1 of the FAIS Act) ***"financial services provider"*** *means any person, other than a representative, who as a regular feature of the business of such person-*

(a) furnishes advice; or

(b) furnishes advice and renders any intermediary service; or

(c) renders an intermediary service;

5.1.118.2. Section 8(1) of the FAIS Act provides that, *"With effect from a date determined by the Minister by notice in the Gazette a person may not act or offer to act as a financial services provider unless such person has been issued with a licence under section 8".*

5.1.118.3. It is evident that, the PIC was authorised to act, as envisaged in section 9(1) of the PIC Act, as a financial services provider effect from 06 December 2005 by the Financial Services Board (now the Financial Sector Conduct Authority (FCSA)) under Financial Service Provider (FSP) number 19777.

5.1.118.4. Therefore, the conduct of the PIC in acting as a financial services provider is in accord with the objects of the FAIS Act, 2002 read with the PIC Act, 2004, especially the requirement of acting as a service provider following the issuing of a licence by the FCSA.

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[11] Act No. 37 of 2002

5.1.119. **The PIC's Treating the Customer Fairly Policy ("the TCF Policy")**

5.1.119.1. Paragraph 5(5.1) of the TCF Policy provides that, **"***The TCF Guidance for Asset Managers states that FSPs and their representatives must at all times render financial services honestly, fairly, with due skill and diligence and in the interest of their Clients. This requires that we incorporate the 6 ("six") outcomes set out in the TCF Guidance for Asset Managers from the FSCA. A failure to ensure compliance with the 6 ("six") principles may constitute a breach of this obligation"*.

5.1.119.2. Paragraph 5(5.2) of the TCF Policy provides that, *"The TCF approach seeks to ensure that fair treatment of clients is embedded within the culture of FSPs. TCF uses a combination of market conduct principles and explicit rules to drive the delivery of clear and measurable fairness outcomes, and enforce the delivery of these outcomes through imposing a range of visible and credible deterrents to unfair treatment".*

5.1.119.3. In terms of paragraph 5(5.3) of the TCF Policy, the purpose of this policy is to set out the TCF outcomes being adopted by the PIC and the policy in place to ensure compliance with these outcomes. TCF is applied across the investment business activities in the course of achieving the PIC mandate.

5.1.119.4. Paragraph 5(5.4) of the TCF Policy provides that, *"This policy is aligned with the PIC approved Compliance Framework and Manual in order to ensure adherence to the necessary compliance laws, rules and standards. The Compliance function provides support to management in the PIC compliance risk management process, specifically in respect of management's identification, assessment, management and monitoring of compliance risks".*

5.1.119.5. Paragraph 7(7.1.3) of the TCF Policy provides that, *"Due diligence processes are conducted by the various divisions prior to investment decisions being made. The due diligence process includes members of the Listed and Unlisted divisions acting in terms of their DOA, Deal/Investment Team* *assigned, Risk and Compliance, Legal, and Environmental, Social and Governance (ESG). Moreover, the PIC has various governance structures that form part of the investment decision making process, including the Executive Committee, Investment Committee and Board. The Audit and Risk Committee provides overall monitoring and assurance and in certain instances, where applicable, the Social and Ethics Committee".*

5.1.119.6. The PIC is compelled to conduct due diligence prior to making investment decisions and/or providing funding derived from public funds to any entity.

5.1.120. As evidenced *supra*, prior to approval by the PIC's PEPSSME FIP of the PIC's participation in the acquisition of Daybreak for a total investment of One Billion One Hundred and Ninety One Million Rand Only (R1, 191 billion), the PIC and Matome Maponya Investment (Pty) Ltd commissioned the following entities to conduct due diligence and final reports outlining key risks identified and the proposed mitigants were issued:

No.	Entity Name	Due Diligence Conducted
1.	RIC Solutions (Pty) Limited	Technical due diligence
2.	McKinsey And Company	Commercial due diligence
3.	Cliffe Dekker Hofmeyr Incorporated Attorneys	Legal due diligence and drafting of Legal Agreements
4.	Basis Points Capital (Pty) Limited	Financial Model Review
5.	Investec	Valuation
6.	Genesis Analytics (Pty) Limited	Social Impact Strategy

5.1.121. The commissioning of entities by the PIC and Matome Maponya Investments (Pty) Ltd to conduct due diligence in respect of the Daybreak transaction was in accord with the provisions of section 195 of the Constitution as stipulated above, especially the requirements of ethical standards, transparency and accountability.

Conclusions that could be made based on the application of the law to the facts:

5.1.122. Having regard to the investigation conducted in the matter, the evidence and information obtained therewith it can be concluded that, the PIC conducted due diligence prior to providing funding and participating in the acquisition of Daybreak for a total investment of R1, 191 billion.

6. FINDINGS

Having considered the evidence as well as the regulatory framework determining the standard that should have been complied with by the PIC and/or any other persons that were involved in the facilitation of funding associated with the Daybreak transaction, I now make the following findings:

6.1. Regarding whether the PIC failed to conduct due diligence when providing funding to Daybreak through public funds which it (the PIC) administered on behalf of the GEPF, the UIF and the CCF, and if so, whether the conduct constituted maladministration and improper conduct:

6.1.1. The allegation that the PIC failed to conduct due diligence when providing funding to Daybreak through public funds which it (the PIC) administered on behalf of the GEPF, the UIF and the CCF, **is not substantiated.**

6.1.2. In terms of section 76(3)(a), (b) and (c)(i) to(iii) of the Companies Act, 2008 read with section 76(3(a)(b) and (d) of the PFMA, 1999, the members of the PIC Board of Directors, as the accounting authority, are required to exercise the duty of utmost care to ensure reasonable protection of the assets of the PIC and act solely in the best interests of the PIC with fidelity, honesty and integrity in managing the financial affairs of the PIC.

6.1.3. The evidence obtained during the investigation indicates that, prior to approval by the PIC's PEPSSME FIP of the PIC's participation in the acquisition of Daybreak, the PIC Board directed the PIC to appoint service providers to conduct due diligence.

6.1.4. In particular, RIC Solutions (Pty) Ltd was appointed to conduct technical due diligence, McKinsey and Company was appointed to conduct commercial due diligence, Cliffe Dekker Hofmeyr Incorporated Attorneys was appointed to conduct Legal due diligence and drafting of Legal Agreements, Basis Points Capital (Pty) Limited was appointed to conduct Financial Model Review; Investec was appointed to conduct valuation of the business and Genesis Analytics (Pty) Limited was appointed to prepare a social impact and strategy in respect of the transaction.

6.1.5. Therefore, by appointing service providers to conduct due diligence the PIC Board and the PIC complied with the provisions of section 195 of the Constitution, 1996, section 76(3)(a), (b) and (c)(i) to(iii) of the Companies Act, 2008 read with sections 50(a)(b) and (d), 76(3(a)(b) and (d) of the PFMA, 1999, as well as paragraph 7(7.1.3) of the TCF Policy.

6.1.6. In the circumstances, the conduct of the PIC Board and the PIC did not constitute improper conduct as envisaged by section 182(1) of the Constitution, 1996 and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act, 1994.

(hh) In light of the foregoing, there is no remedial to be taken by the Public Protector as contemplated in section 182(1)(c) of the Constitution.

7. REASON FOR CLOSURE

7.1. In view of the foregoing, the Public Protector closes this investigation on the basis that the allegation made by the Complainant was not substantiated.

7.2. It was established that, prior to approval by the PIC's PEPSSME FIP of the PIC's participation in the acquisition of Daybreak, the PIC Board directed the PIC to appoint service providers to conduct technical due diligence, commercial due diligence, legal due diligence and drafting of legal agreements, as well as financial model review, valuation and social impact strategy and final reports outlining key risks identified and the proposed mitigations were issued.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 29/04/2022