
PUBLIC PROTECTOR
SOUTH AFRICA

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF CORRUPTION, PROCUREMENT IRREGULARITIES AND MALADMINISTRATION WITHIN THE DEPARTMENT OF WATER AND SANITATION (DWS)
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Executive Summary

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

(ii) The report relates to an investigation into allegations of corruption, procurement irregularities and maladministration within the Department of Water and Sanitation (the Department).

(iii) The complaint was lodged on 15 February 2017, by Mr Godrich Ahmed Gardee, MP (the Complainant), the General Secretary of the Economic Freedom Fighters party (EFF). According to the Complainant an anonymous letter was submitted to the EFF in connection with allegations of corruption and procurement irregularities within the Department, whereby the following allegations were made relating to the purchasing of the System Application and Product (SAP) licenses:

(a) SAP licenses were purchased for both the Department and Water Boards without following due process;

(b) The Department had existing licenses that could accommodate additional users, but still proceeded to procure new ones;

(c) The licenses for the Water Boards were procured on their behalf, without their consent or a needs analysis being conducted; and

(d) Mr Luvo Makasi, who is not an employee of the Department, had been influential in facilitating the deal of the SAP licenses, claiming to represent the interests of the former Minister of Water and Sanitation, Ms Nomvula Mokonyane, by giving direct instructions to senior officials within the Department.

(iv) On analysis of the complaint, the following issues were identified to inform and focus the investigation:-

(a) Whether the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, and if so whether such
conduct led to the department incurring; irregular and/or fruitless and wasteful expenditure as described in section 1 of the PFMA, maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

(v) The investigation process commenced with a preliminary investigation, followed by a formal investigation which was conducted through the exchange of correspondence with the Department and the Special Investigations Unit, interviews with officials from the Department, Mr Mkhize, the former Acting DG, Ms Zandile Mathe, Deputy Director-General (DDG): National Water Resources Infrastructure (NWRI) and Ms Magubane, the Project Coordinator. Section 7(9)(a) Notices were issued in terms of the Public Protector Act, 1994 to the Department, Mr Mkhize and Ms Mathe, Ms Magubane and the SAP Consultant. Responses thereto were received from the Department, Mr Mkhize and Ms Mathe, and have been considered in this report. Ms Magubane however, did not submit any response to the section 7(9) notice issued to her. Perusal of the relevant documents/correspondence received as well as the analysis and application of the relevant laws, policies and related prescripts was also conducted.

(vi) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:-

a. Regarding whether the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, and if so whether such conduct led to the department incurring; irregular and/or fruitless and wasteful expenditure as described in section 1 of the PFMA, maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

(aa) The allegation that the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, is substantiated.
(bb) Mr Mkhize and Ms Mathe failed to ensure that the procurement of the SAP licenses followed a process that is transparent, equitable and fair in line with Section 217 of the Constitution and National Treasury Regulation 16A3.2(d).

(cc) Mr Mkhize and Ms Mathe further failed to comply with section 38 and 45 of the PFMA in terms of their respective responsibilities.

(dd) Furthermore the Department failed to comply with the National Treasury Regulations 8.1, 8.2 and Practice Note 5 of the National Treasury Regulation when it entered a contract with SAP SA.

(ee) The conduct of Mr Mkhize and Ms Mathe amount to maladministration and improper conduct as envisaged in section 6(4) of the Public Protector Act, 1994.

(ff) The expenditure incurred as a result of the irregular extension amounts to irregular expenditure and fruitless and wasteful expenditure as defined in section 1 of the PFMA, 1999.

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

a. Regarding whether the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, and if so whether such conduct led to the department incurring; irregular and/or fruitless and wasteful expenditure as described in section 1 of the PFMA, maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

The Director General, DWS

(aa) To take note of my findings in respect of the above issue, and ensure that any future ICT procurement is aligned with the requirements of the
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF CORRUPTION, PROCUREMENT IRREGULARITIES AND MALADMINISTRATION WITHIN THE DEPARTMENT OF WATER AND SANITATION

1. INTRODUCTION

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

1.2 This report, specifically the findings therein, are submitted, in terms of section 8 of the Public Protector Act, to the following people:

1.2.1 Hon Lindiwe Sisulu, the Minister, Water and Sanitation;
1.2.2 Mr Tshangana the Acting Director General, DWS,
1.2.3 Adv. Mothibi, the Head SIU,;
1.2.4 Lt. General Lebeya the Head DPCI,
1.2.5 Mr Mkhize, the former Acting DG;
1.2.6 Mrs Zandile Makhathini, the DDG, NWRI;
1.2.7 Ms Patience Magubane, the Project Coordinator ;
1.2.8 The SAP Consultant;
1.2.9 Mr Godrich Ahmed Gardee, the Complainant

1.3 The report relates to an investigation into allegations of corruption, procurement irregularities and maladministration within the Department of Water and Sanitation (the Department).

2. THE COMPLAINT

2.1 The complaint was lodged on 15 February 2017, by Mr Godrich Ahmed Gardee, MP (the Complainant), the General Secretary of the Economic Freedom Fighters party (EFF). According to the Complainant an anonymous letter was submitted to the EFF in connection with allegations of corruption and procurement irregularities within the Department, whereby the following
Constitution, the State Information Technology Act, the relevant Treasury regulations and Departmental policies;

(bb) To take appropriate disciplinary action against Ms Mathe for the irregular and fruitless and wasteful expenditure incurred in the procurement of the SAP licences.

(cc) To continue to support the SIU in the civil litigation process and/or any other process currently under way by the SIU.

The Directorate of Priority Crime Investigation

(dd) Consider this report and establish if any acts of impropriety identified herein amount to acts of a criminal conduct in terms of the Prevention and Combating of Corrupt Activities Act, 2004 and if so, pursue criminal investigations against the perpetrators.

(viii) MONITORING

(a) The Director General, DWS must, within thirty (30) working days from the date of the issuing of this Report and for approval by the Public Protector, submit an implementation plan to the Public Protector indicating how the remedial action referred to in paragraphs vii of this Report will be implemented.

(b) In line with the Constitutional Court judgment in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11*, and in order to ensure the effectiveness of Office of the Public Protector, the remedial actions prescribed in this Report are legally binding, unless set aside by a Court order.
allegations were made relating to the purchasing of the System Application and Product (SAP) licenses:

2.1.1 SAP licenses were purchased for both the Department and Water Boards without following due process;

2.1.2 The Department had existing licenses that could accommodate additional users, but still proceeded to procure new ones;

2.1.3 The licenses for the Water Boards were procured on their behalf, without their consent or a needs analysis being conducted; and

2.1.4 Mr Luvo Makasi, who is not an employee of the Department, had been influential in facilitating the deal of the SAP licenses, claiming to represent the interests of the former Minister of Water and Sanitation, Ms Nomvula Mokonyane, by giving direct instructions to senior officials within the Department.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides:-

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

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."
3.3 Section 182(2) of the Constitution further directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 In *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC) and (5) BCLR 618*, the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect [at para 76]. The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences".

3.5 In the above-mentioned matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others*, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.5.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. (para 67);

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints which was the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69);

3.5.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);

3.5.6 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made. (para 71);

3.5.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence; (para 71(a);

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP) ; [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13
December 2017), the court held as follows, when confirming the powers of the Public Protector;

3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment);

3.6.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);

3.6.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers( paragraph 100 and 101 of the judgment):

   a) Conduct an investigation;
   b) Report on that conduct; and
   c) To take remedial action.

3.6.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (paragraph 104 of the judgment);

3.6.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Paragraph 105 of the report);

3.6.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct (paragraph 107 and 108 of the Judgment);
3.6.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112 of the judgment);

3.7 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and abuse or unjustifiable exercise of power in the conduct of state affairs or an improper or dishonest act by any person in the employ of government at any level;

3.8 The Department of Water and Sanitation is a national public entity and its conduct falls within the Public Protector's mandate to investigate; and

3.9 The Public Protector's powers and jurisdiction to investigate and take appropriate remedial action was not disputed by the Department.

4. **THE INVESTIGATION**

4.1 **The Investigation Process**

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.1.3 The investigation process included an exchange of correspondence with the Department, interviews, analysis of relevant documentation, conducted research, and the consideration and application of relevant laws, regulatory framework and jurisprudence.

4.1.4 During the investigation process, notices in terms of section 7(9)(a) of the Public Protector Act dated 8 October 2019 were issued to the Department,
Mr Mkhize the former Acting DG, Ms Mathe the DDG NWRI, Ms Magubane, the Project Coordinator, and the SAP Consultant.

4.1.5 Ms Magubane did not make any submission to the section 7(9) notice issue to her. All other submissions received have been considered in this report.

4.1.6 In her response to the section 7(9) dated Ms Mathe, inter alia, had certain reservations to my section 7(9) notice in that she was not afforded an opportunity to access the records and or documents in my possession in order to authenticate or test them, I refer him to the Gamede v Public Protector (99246/2015) [2018] ZAGPPHC 865; 2019 (1) SA 491 (GP) judgement, wherein it was stated that during the course of my investigation, you are not entitled to the evidence in my possession. Furthermore, the evidence relied on in the investigation was submitted by the Department and I am of the view that the Ms Mathe does had excess to such records, which she accordingly submitted during her interview with the investigation team.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or improper conduct?

4.2.1.4 In the event of maladministration or impropriety, what would it take to remedy the wrong or to place the Complainant as close as possible to where he/she would have been but for the maladministration or improper conduct?
4.2.1.5 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. In this particular case, the factual enquiry principally focused on the issues raised in the complaint.

4.2.1.6 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been complied with by the Department, to prevent any irregularities, maladministration and improper conduct.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of improper conduct or maladministration.

4.3 On analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.3.1 Whether the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, and if so whether such conduct led to the department incurring irregular and/or fruitless and wasteful expenditure as described in section 1 of the PFMA, maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

4.4 The key sources of information

4.4.1 Documents received and considered:-

4.4.1.1 Letter to Ms Margaret- Ann Diedrichs, the former Director-General (Ms Diedrichs) from, Ms Mathe, the Deputy Director-General (DDG): National Water Resources Infrastructure (NWRI) on 21 December 2015, titled "REQUEST APPROVAL FOR THE RENEWAL OF SAP LICENSES WITH UNLIMITED USER FRAMEWORK FOR A PERIOD OF THREE YEARS";

4.4.1.2 Submission addressed to the Director-General and signed by Ms Mathe with the title "REQUEST APPROVAL FOR EXTENSION OF SAP LICENSES
WITH UNLIMITED USER ACCESS FRAMEWORK FOR A PERIOD OF 5 YEARS dated 01 June 2016;

4.4.1.3 Minutes of the DBAC meeting held on 02 June 2016;

4.4.1.4 Revised submission submitted by Ms Mathe dated 3 June 2016;

4.4.1.5 Submission of Ms F O Kula, the Chairperson of the ITC, to the DBAC dated 9 June 2016;

4.4.1.6 Minutes of the DBAC dated 23 June 2016;

4.4.1.7 Email communication submitted by Ms Mnguti to Ms Mathe, Ms Magubane, Mr Mkhize, Ms Mbeki, and Ms Kula, Mr De Beer and Mr Opperman, on 23 June 2016;

4.4.1.8 Internal memorandum from Mr M Mofokeng (Mr Mofokeng), the Chief Financial Officer, Water Trading Entities (WTE) to the former DG dated 24 June 2016;

4.4.1.9 Submission addressing “queries raised by ITC” signed by Ms Mathe on 25 June 2016;

4.4.1.10 Submission indicating “correct the source of funding” signed by Ms Mathe on 24 June 2016;

4.4.1.11 Email from Mr Opperman to Ms Kula and Ms Magubane on 29 June 2016;

4.4.1.12 Submission by ITC Committee to the DBAC detailing the meeting held with the end-user on 29 June 2016;

4.4.1.13 Minutes of the DBAC dated “30 June 2015”;

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4.4.1.14 Email communication from Ms Mnguti to Ms Magubane sent on 1 July 2016 regarding the resolution of the DBAC meeting held on the 30 June 2016;

4.4.1.15 Correspondences from SAP SA dated 21 December 2015 and 9 June 2016;

4.4.1.16 Email communication from Ms Magubane with the SAP contract and the approved submission to Mr Puseletso Loselo, the Chief Director, Legal Services (Mr Loselo) on 11 July 2016;

4.4.1.17 Email communication from Ms Mathe to Ms Mmamathe Makhekhe-Mokhuane, the former Chief Information Officer on 11 July 2016.

4.4.1.18 Email communication from Ms Mmamathe Makhekhe-Mokhuane, the former Chief Information Officer to Ms Mathe on 11 July 2016;

4.4.1.19 Email communication from Mr Loselo forwarded an email to Ms Mathe regarding the SAP contract on 12 July 2016;

4.4.1.20 Email communication from Ms Magubane to Mr Leselo on 21 July 2016;

4.4.1.21 Internal memorandum from Ms Mathe to the Acting DG dated 21 July 2016;

4.4.1.22 Email communication from Mr Loselo to Ms Mathe and Acting DG on 21 July 2016;

4.4.1.23 Email communication from Ms Makhekhe-Mokhuane to Ms Magubane, copied to Mr Loselo, Mr Mkhize, Ms Mathe, the SAP Consultant and other SAPs representatives, National Treasury and SITA, on 22 July 2016;

4.4.1.24 Submission by Ms Mathe to the Acting DG to “REQUEST FOR APPROVAL OF PAYMENT TO SAP SA FOR INVOICE M6284038117 WHICH AMOUNTS TO R285,000,000.00(INCLUDING VAT) FOR THE STRATEGIC ACQUISITION OF SAP LICENSES WITH UNLIMITED USER ACCESS FRAMEWORK FOR A PERIOD OF 5 YEARS on 19 October 2016;
4.4.1.25 Sundry payment requisition compiled by Mr Piet Malatji 19 October 2016;

4.4.1.26 Submission by Ms Mathe to the Acting DG requesting approval to include the Strategic Procurement of SAP Licenses with unlimited user access framework for a period of five (5) years to the demand plan on 7 November 2016 she made a submission;

4.4.1.27 Submission by Mr Mofokeng to the Chief Procurement Officer, National Treasury on 27 February 2017;

4.4.1.28 Information received from SIU investigation team on 14 December 2018.

4.4.2 Correspondence sent and received:

4.4.2.1 Letter to the Director General of the Department requesting information dated 22 June 2017;

4.4.2.2 Response from the former Acting Director-Général (DG), Mr Sifiso Mkhize (Mr Mkhize), dated 31 July 2017;


4.4.2.4 Email Communication with SIU investigator and Public Protector on 28 March 2018 and 14 December 2018

4.4.3 Notices issued and responses received:

4.4.3.1 Notice issued in terms of section 7(9)(a) of the Public Protector Act to Ms Deborah Mochotlithe the former Acting Director-General (DG) dated 8 October 2019;
4.4.3.2 Notice issued in terms of section 7(9)(a) of the Public Protector Act to Ms Mathe, dated 8 October 2019;

4.4.3.3 Notice issued in terms of section 7(9)(a) of the Public Protector Act to SAP Consultant, dated 8 October 2019;

4.4.3.4 Notice issued in terms of section 7(9)(a) of the Public Protector Act to Ms Magubane, dated 8 October 2019;

4.4.3.5 Response to section 7(9)(a) Notice received from Mr M Tshangana, the current Acting DG, dated 19 November 2019;

4.4.3.6 Response to section 7(9)(a) Notice from the Ms Mathe dated 7 November 2019;

4.4.3.7 Response to section 7(9)(a) Notice from Mr Mkhize received on 27 October 2019; and

4.4.3.8 Response to section 7(9)(a) Notice from SAP Consultant dated 8 November 2019

4.4.4 Interviews Conducted:

4.4.4.1 Interview held with Mr Sithembile Senti (Mr Senti), the Executive Multi-Stakeholder Projects, SITA and the investigation team on 13 March 2019;

4.4.4.2 Interview held with officials from the Department and the investigation team on 15 March 2019;

4.4.4.3 Interview with Ms Mathe and the investigation team on 13 June 2019;

4.4.4.4 Interview held with Mr Mkhize, the former Acting DG, and the investigation team on 19 August 2019; and
4.4.4.5 Interview held with Ms Patience Magubane and the investigation team on 21 August 2019.

4.4.5 Legislation and other prescripts:

4.4.5.1 The Constitution of the Republic of South Africa, 1996;

4.4.5.2 The Public Protector Act No 23 of 1994;

4.4.5.3 The Public Finance Management Act 1 of 1999;

4.4.5.4 Agreement between RTMC and Labour for the FY2012/13, signed 25 October 2012; and

4.4.5.5 National Treasury Practice Note 8 of 2007/2008.

4.4.6 Case law:

4.4.6.1 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016 (3) SA 580 (CC) and (5) BCLR 618;

4.4.6.2 President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017); and

4.4.6.3 Minister of Transport v Prodiba (Pty) Ltd (20028/2014) [2015] ZASCA 38 (25 March 2015),

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 Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, and if so whether such conduct led to the department incurring; irregular and/or fruitless and wasteful expenditure as described in section 1 of the PFMA,
maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994

Common Cause Issues

5.1.1 It is common cause that in 2016 the Department purchased SAP licenses from SAP South Africa (SAP SA) for itself and the Water Boards.

Issues in dispute

5.1.2 The allegations made in the anonymous letter submitted by the Complainant are that, despite the Department having existing SAP licenses that could accommodate additional users, it still proceeded to procure new SAP licenses for itself and on behalf of the Water Boards, without their consent or a needs analysis being conducted.

5.1.3 Further thereto, it was alleged that Mr Luvo Makasi, who is not an employee of the Department, had been influential in facilitating the deal of the SAP licenses, claiming to represent the interest of the former Minister of Water and Sanitation, Ms Nomvula Mokonyane, by giving direct instructions to senior officials within the Department.

5.1.4 The issue for my determination is whether the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards.

5.1.5 Mr Sifiso Mkhize (Mr Mkhize), the former Acting Director-General (DG) in his response to the allegations dated 31 July 201, submitted evidence relating to the process followed by the Department in the procuring the SAP licenses.

5.1.6 Further information was received from meetings held with the Department on 15 March 2019; Ms Zandile Mathe (Ms Mathe) on 13 June 2019; Ms Patience Magubane (Ms Magubane) on 16 August 2019, and Mr Mkhize on 19 August 2019.
5.1.7 I am mindful that Ms Mathe has since changed her surname to Mrs Makhathini, however this report makes reference to only Ms Mathe as most of the submissions contained the surname "Mathe". Ms Mathe and Mrs Makhathini is the reference to the same individual.

**THE 2015 SAP LICENSE CONTRACT**

5.1.8 The evidence submitted by the Department indicates that on 21 December 2015, Ms Mathe, the Deputy Director-General (DDG): National Water Resources Infrastructure (NWRI), submitted a letter to Ms Margaret-Ann Diedricks, the former Director-General (Ms Diedricks) to "REQUEST APPROVAL FOR THE RENEWAL OF SAP LICENSES WITH UNLIMITED USER FRAMEWORK FOR A PERIOD OF THREE YEARS".

5.1.9 Paragraph 2.3 of the submission highlighted the reasons why the request for the renewal of the unlimited usage contract was critical, the reasons are as depicted below:

2.3 The renewal of the unlimited usage contract is critical to:

- continued operational agility and
- Current Unlimited Contract expires 31 December 2015 and the cost of not extending outweighs the current cost as put forward by SAP(estimated savings of 250mIZAR)
- Ensuring that the vision of and all outlined strategic are met
- Ease of Consumption: Unlimited consumption of software for 3 years
- The unlimited usage contract rewards for over-achievement of the business roadmap over the period between 18 months and 3 years after the contract date. If usage is higher, DWS does not pay additional license fees and avoids equivalent increase in their maintenance base
- Maintenance is locked during the term – however subject to SAP global increases after 2018
- Risk mitigation by not over committing to software licensees, whilst minimizing instances of shelf were
- The renewal of the unlimited usage contract will helps reduce DWS’s total cost of ownership

5.1.10 Paragraph 2.5 of the submission detailed the SAP product, the description and the cost associated with each item as follows:
5.1.11 Paragraph 3 of the submission stated that the funds for the project were available on the SAP Muratho budget. The submission was recommended by the Mr Mkhize, Chairperson of the Departmental Bid Adjudication Committee (DBAC) on 22 December 2015 and approved by Ms Diedricks on the same date.
5.1.12 Page 5 of the contract entered into between SAP SA and the Department indicated that the above contract was entered into on 22 December 2015 and further page 8 indicated that the amount of the said contract, as follows:

NOTE 1: LICENCE TERMINATIONS

The total net license fee for the Software licensed under this Order Form is R 113,428,844.70. This fee shall be subject to a one-time credit in the amount of R 26,000,000.00 for termination of Licensee’s right to use software previously licensed by Licensee from SAP (Terminated Licenses), resulting in a total Net License fee payable by Licensee of R 87,428,844.70.

Accordingly, the parties hereby agree that, upon the Effective Date, the provisions contained herein shall replace all prior software and maintenance agreements (including all appendices, order forms, written addendums and annexures to the Initial Agreement) entered into between SAP and Licensee prior to the Effective Date. Accordingly and for the avoidance of doubt, such Appendices / Order Forms previously entered into by the Licensee with SAP shall cease to exist and Licensee shall cease using the Terminated Licenses within 30 days after the date of production Use of the Software licensed under this Order Form.

THE 2016 SAP LICENSE CONTRACT

5.1.13 The evidence submitted by the Department indicates that a submission dated 01 June 2016 addressed to the Director-General and signed by Ms Mathe with the title "REQUEST APPROVAL FOR EXTENSION OF SAP LICENSES WITH UNLIMITED USER ACCESS FRAMEWORK FOR A PERIOD OF 5 YEARS" detailed inter alia the following:

5.1.14 Paragraph 1.1 "To obtain your approval for the extension of the SAP Licenses with unlimited user access framework for a period of five(5) years, to include the license requirements for DWS enterprise wide. i.e. WTE, Main Account, Water Boards and subsidiaries”.

5.1.15 Paragraph 2.1 under the heading "BACKGROUND AND DISCUSSION" stated "...It is SAP belief that in order for the department to deliver effectively on its mandate, simplified operational efficiency is required, through standardised application platform across DWS".
5.1.16 Paragraph 2.3 stated that the renewal of the unlimited usage contract is critical to:

"Continued operational agility and, Current unlimited agreement only covers WTE, the cost of not extending this agreement to other parts of the department outweighs the current cost put forward by SAP (estimated saving of 1.5 Billion ZAR),

......"

5.1.17 Paragraph 2.5 of the submission indicated the SAP SA product description and the cost associated for each item, with a total of R 450 256 943.34. Under Paragraph 3.1 it was stated that in terms of the financial implications "Funds are available on the SAP Muratho budget".

5.1.18 The submission required the recommendation of the Chairperson of DBAC and the approval of the Director-General, however their signatures were not appended thereto. During the interview with Ms Magubane, she indicated that she had received a copy of a business case and other documentation from Ms Mathe and was instructed by her to compile the above submission to the DBAC.

5.1.19 According to the minutes of the DBAC meeting held on 02 June 2016, Ms Mathe presented the above submission to the DBAC wherein it is recorded that she mentioned that "the request was a result of a qualification of the Auditor-General because of a lack of monitoring and oversight role of the funds transferred to the Water Boards and Municipalities by the Department".

5.1.20 Further thereto, Ms Mathe stated that SAP licenses from Head Office will be utilised and rolled out to the Water Boards and that failure to extend the license will be in contravention with the Auditor-Generals qualification.
5.1.21 It was further recorded on the minutes that the DBAC resolved that the end-user should:

"Submit the request to the Information Technology Government Committee for their recommendation of the submission;
Revise the heading if this is not an extension of a contract;
Remove main account from the request;
Quantify as to how many licenses will be required; and
Attach the budget from finance."

5.1.22 The minutes recorded that the Chairperson of DBAC was mandated to recommend the submission outside the meeting.

5.1.23 During the interview with Ms Mathe she reiterated that the need for the SAP licenses arose from the report of the Auditor-General wherein it was stated that funds transferred from NWRI to the Water Boards and Municipalities were not being accounted for, and that Mr Mkhize had instructed her to procure the SAP licenses.

5.1.24 According to the evidence from Ms Magubane, she indicated that she was advised via email by Ms Nondumiso Mnguti (Ms Mnguti), the DBAC Secretariat, that the DBAC did not recommend approval of the submission. She stated that Ms Mathe requested her to revise the submission and send it back to Ms Mnguti. The email from Ms Mnguti was also forwarded to Ms Mathe and Mr Johan De Beer who is a member of the Information Technology Committee (ITC).

5.1.25 Ms Magubane further stated that on 7 June 2016 she received a further email from Ms Mnguti advising her of the DBAC meeting held on 2 June 2016, wherein the DBAC did not recommend approval of the submission dated 1 June 2016 and indicated the resolutions taken by the DBAC. Ms Magubane stated that she had effected changes to the submission as requested by the DBAC and Ms Mathe and resubmitted it to the DBAC.
5.1.26 During the interview with Ms Magubane, she was asked to respond to certain aspects of the submission, including the statement made in paragraph 2.3 that "By negotiating this strategic licensing deal SAP has resulted in a financial saving of R1,5bn". She responded that she did not have direct knowledge of the information and that the submissions she drafted were done in consultation with SAP Consultant. She further stated that Ms Mathe had advised her to work with the SAP Consultant in drafting the submissions.

5.1.27 The evidence further indicates that following Ms Mathe's submission dated 3 June 2016, Ms F O Kula, the Chairperson of the ITC, submitted feedback dated 9 June 2016 to the DBAC highlighting that the ITC members had perused Ms Mathe's submission and raised the following questions that needed to be addressed as part of the submission:
To: The Chairperson: Departmental Bid and Adjudication Committee

FEEDBACK ON THE REQUEST FOR THE APPROVAL OF STRATEGIC PROCUREMENT OF SAP LICENSES WITH UNLIMITED USER ACCESS FRAMEWORK FOR A PERIOD OF 5 YEARS

1. PURPOSE

To provide feedback on the submission with the above subject after it has served at the Information Technology Committee.

2. BACKGROUND AND DISCUSSION

The submission served at the ITC meeting on 8 June 2016. Members of the ITC perused the submission and noted that the following questions needed to be addressed as part of the submission:

2.1 Business case

- A detailed proposal stating the requirement for each module and how the department will benefit from it.
- A similar assessment for each institution that we are buying the licenses for, which should also include the hardware and software needs that will arise because of this purchase.

2.2 Scope of licenses

- Which institutions are we buying the licenses for?
- What licenses for each institution are we buying (which modules)?
- How many licenses are we buying for each institution?
- Has there been an investigation in the institutions to determine what licenses they currently have and whether they have not also budgeted further for future licenses or even have unlimited licenses themselves?
- Has consultation been done with the institutions we are sponsoring and is there concurrence?
- Can the applicant demonstrate the challenges DWS is facing by not having centralized licenses with the water boards and its subsidiaries?

2.3 Nature of licenses

- Has a gap analysis been conducted on the licenses procured previously and the intended procurement to determine the need?
- Which licensed modules do the department need over and above the ones already owned by the department?
- Has readiness assessment been conducted to ensure good reception of the new modules in the department?
2.4 Cost

- What other costs will be incurred as a result of this purchase?
- ICT would like the applicant to share in the submission the nature of the 1.5 billion saving that will be realised because of this procurement.
- Can the cost be broken down so it can be clear what each module costs so that when a module is removed we can immediately see the total amount changing?

2.6 Previous Procurement

Previously EOH was appointed to provide SAP licenses to the department because SAP was not the most competitive bidder in the market. With that in mind, ITC recommends that when all the above concerns have been addressed, the applicant needs to advertise this as an open bid to gain competitive edge.

3. Recommendation

Taking into consideration the concerns raised by the committee, we hereby do recommend that the DBAC effects the user and the Office of the Chief Information Officer an opportunity to urgently prepare both the business case and terms of reference and further consult with SITA on the matter.

[Signature]

Chairperson: Information Technology Committee

Date: 9 June 2016

5.1.28 Ms Magubane stated that on the request of Ms Mathe, she had attended the meeting with ITC whereby ITC had provided guidance as to what was required for the submission and that Ms Mathe had tasked her to work with the ITC team to address the queries of the DBAC and incorporate the information contained in the submission into the State Information Technology Agency (SITA) business case and to resubmit to the DBAC.

5.1.29 Ms Magubane stated that on 23 June 2016, she was requested to attend the DBAC, as Ms Mathe was not available. The minutes of the DBAC dated 23 June 2016 indicated that Ms Magubane presented to the DBAC the reasons as to why the NWRI could not change their business case in line with the SITA business case. The DBAC recommend that:

5.1.29.1 Chairperson from the ITC convene a meeting with officials from NWRI, including Ms Magubane to finalise the matter as soon as possible and that the DDG should not form part of the meeting;
5.1.29.2 The end-user should respond to the questions by the ITC in order to address critical information that will assist in the business case development;

5.1.29.3 ITC should assist in developing the business plan and ensure that the end-user complies with the IT and other legislative requirements;

5.1.29.4 Final documents to be presented to the DDG for her to support the recommendation to the DBAC;

5.1.29.5 The submission to be ready for signature of the Chairperson no later than 2pm on 24 June 2016; and

5.1.29.6 The Chairperson was mandated to approve the submission outside the meeting.

5.1.30 The evidence indicates that on 23 June 2016 Ms Mnguti forwarded an email to Ms Mathe, Ms Magubane, Mr Mkhize, Ms Mbeki, and Ms Kula, Mr De Beer and Mr Opperman, to inform them that the DBAC had recommended the submission at its meeting subject to the recommendations highlighted in paragraph 9.1.25 above.

5.1.31 The evidence obtained from Ms Magubane indicates that Mr M Mofokeng (Mr Mofokeng), the Chief Financial Officer, Water Trading Entities (WTE) submitted an internal memorandum dated 24 June 2016 to the former DG, wherein he stated that it has come to his attention that a submission requesting DG’s approval for the strategic procurement of SAP Licenses with unlimited user access framework for the period of five years, had served before the DBAC on 23 June 2016.

5.1.32 In the internal memorandum Mr Mofokeng brought to the attention of the former DG the following:
5.1.32.1 SAP Muratho Project was coming to an end with the close out report having been presented to the Project steering Committee on 24 June 2016. There is no budget allocated to the Muratho Project in the current financial year 2016/2017 and therefore the funds for the SAP licenses were not available;

5.1.32.2 DWS has already acquired unlimited licenses to the value of R 178 million and does not require additional licenses;

5.1.32.3 The procurement of these licenses was not included in the demand plan;

5.1.32.4 The various Water Boards should be engaged to establish the need for these licenses as they might be using different packages;

5.1.32.5 Funding is not available for procurement of these additional licenses in WTE. The Department should consider approaching National Treasury for funding since there are no funds allocated for the procurement of these licenses in the WTE; and

5.1.32.6 Branch Finance: WTE was not consulted in this matter.

5.1.33 Mr Mofokeng recommended to the former DG to take note of the lack of funding for the procurement of the SAP Licenses with unlimited user access framework for the period of 5 years.

5.1.34 Ms Magubuane stated that based on the information she received from Ms Mathe and the SAP Consultant, a new submission was compiled, addressing the queries raised by ITC. The submission was signed by Ms Mathe on 25 June 2016, but Ms Magubane stated that this submission was erroneously dated 25 June 2016, and that she had in fact submitted it to Ms Kula on the 24 June 2016.

5.1.35 She further stated that she withdrew this submission to correct the source of funding in the submission requested by Ms Mathe, to indicate that the source of funding would read as follows “Funds will re-prioritised from the Revenue
from Raw Water Use and Tariffs”. This new submission was signed by Ms Mathe on 24 June 2016.

5.1.36 The evidence submitted to me by Ms Magubane and the Department indicates that on 29 June 2016, Mr Opperman forwarded an email to Ms Kula, attaching the draft document of the ITC’s feedback on the request for the approval for the strategic procurement of SAP licenses with unlimited user access framework for a period of 5 years. The email was also copied to Ms Magubane.

5.1.37 On the same date Ms Kula responded to Mr Opperman’s email indicating on her email that she had attached the document with a few corrections and that Mr Opperman should print the document for signature and forward it to the DBAC.

5.1.38 Ms Magubane provided a copy of the unsigned submission that was forwarded to her, and the Department provided the signed copy that was presented to the DBAC, wherein it was indicated that on 29 June 2016 ITC held a meeting to discuss the submission by the end-user and that ITC had identified the following concerns:

5.1.38.1 The procurement of the SAP licenses should go through SITA as it is above R 500 000.00 in terms of National Treasury Practice Note 5;

5.1.38.2 It was not clear as to how the procurement of these licenses will benefit DWS and its subsidiaries given current SAP deployments in some of the organisations;

5.1.38.3 It was not clear of the number of licenses or modules to be procured for each institution;

5.1.38.4 No evidence was provided to support that an investigation was done across all subsidiaries to determine which licenses they currently have and whether they have not also budgeted further for future licenses or even have unlimited licenses themselves; and
5.1.38.5 It was unclear how the applicant had arrived at the financial savings of R1, 5 billion when there is still deployment, maintenance and support cost which have to be further incurred by the Department.

5.1.39 The submission recorded that the ITC did not recommend the purchase of unlimited SAP licenses for the Department, and it was recommended that a proper feasibility study be conducted with the assistance from the IT Application Manager to ensure that the procurement implications and costs are clarified for the Department.

5.1.40 The minutes of the DBAC dated "30 June 2015", indicated that Ms Ndileka Mohapi was introduced as the new Chairperson of the DBAC as Mr Mkhize had been appointed as the Acting DG of the Department.

5.1.41 The minutes further recorded that on 15 June 2016, Ms Mathe indicated to the DBAC that it was not possible to advertise an open tender as SAP SA is the sole provider of software in South Africa and that she had never consulted with SITA in the past and that it was only now that the ITC requested for the tender to go via SITA. The minutes recorded that Ms Mathe mentioned that there was some negativity.

5.1.42 It was also recorded that Mr De Beer presented the ITC’s response to the DBAC informing the DBAC that Ms Mathe had submitted her request without consultation with the ITC or SITA. The request was referred by the DBAC to ITC for analysis and recommendation and that ITC did not support the request for approval by the DBAC.

5.1.43 The minutes further recorded that it was resolved that more work was needed on the submission by the end-user, and that a person from IT is to assist the end user to comply and resubmit the submission to the DBAC for review. Further that issues of consultation were to be taken into consideration.
5.1.44 Ms Magubane submitted evidence which indicated that on 1 July 2016 Ms Mnguti sent her an email informing her of the resolution of the DBAC meeting held on the 30 June 2016, wherein it was resolved that more work had to be done by the end-user and the recommended person from IT to assist the end-user to comply and resubmit the submission to the committee for review and that issues of consultation were to be taken into consideration.

5.1.45 Ms Magubane stated that in response to the email she had submitted two correspondences from SAP SA dated 21 December 2015 and 9 June 2016, in order to address the concerns raised by the ITC regarding previous procurement of SAP licenses.

5.1.46 Ms Magubane provided me with an email wherein she forwarded the SAP contract and the approved submission on the 11 July 2016 to Mr Puseletso Loselo, the Chief Director, Legal Services (Mr Loselo) requesting that he vets the SAP contract. Ms Mathe was copied on the email.

5.1.47 Ms Magubane further provided an email communication that was forwarded by Ms Mmamathe Makhekhe-Mokhuane, the former Chief Information Officer to Ms Mathe and copied to Mr Mkhize, Mr Loselo and herself. The contents of the email and Ms Mathe's initial email thereto is below:
5.1.48 Ms Magubane stated that on 12 July 2016 she received an email from Ms Mnguti informing her that the submission dated 24 June 2016 from Ms Mathe was recommended by the DBAC on 6 July 2016 and approved by Mr Mkhize, the Acting DG on 11 July 2016.

5.1.49 On 12 July 2016, Mr Loselo forwarded an email to Ms Mathe regarding the SAP Contract as shown below:
5.1.50 On 21 July 2016 Ms Magubane forwarded a new contract via email to Mr Loselo for vetting and had also attached an internal memorandum that Ms Mathe had submitted to the Acting DG relating to the recommendations of Legal Services on the contract.

5.1.51 The internal memorandum from Ms Mathe to the Acting DG dated 21 July 2016 is attached below.
5.1.52 Mr Loselo responded to the email on the same day, wherein he advised of the following regarding the contract:

5.1.52.1 The submission incorrectly indicated that the value of the contract was negotiated to below R 450 million;
5.1.52.2 Annexure A in clause 3.1, clause 6 and clause 10.3 clearly indicated that the support and maintenance was payable;

5.1.52.3 Clause 3.4 of the contract reflected the R76 million maintenance and support fees; and

5.1.52.4 Prior to the contract being submitted to legal services for vetting, the renegotiated contract value had to be approved in writing by the Accounting Officer as regulated by the Public Finance Management Act.

5.1.53 Ms Magubane stated that on 21 July 2016, a meeting was held with the Department and SAP representatives wherein contract negotiations had taken place. Subsequent to the said meeting, she forwarded an email correspondence to Mr Loselo which consisted of a new version of the SAP software license and support agreement which she obtained from SAP. The email was copied Mr Mkhize, Ms Mathe, the SAP Consultant, Ms Makhekhe Mokhuane and other SAP representatives.

5.1.54 On 22 July 2016 Ms Makhekhe-Mokhuane forwarded an email to Ms Magubane and copied Mr Loselo, Mr Mkhize, Ms Mathe, the SAP Consultant, other SAP representatives, National Treasury and SITA wherein she stated as follows

"Puseletso,

I strongly suggest that you get a written consent from both SITA and National Treasury before you act on a mandate of another institution knowingly".

5.1.55 Ms Magubane stated that she did not respond to the email as she was of the view that the email was not meant for her but for the attention of Mr Loselo.
5.1.56 On 13 March 2019, the investigation team held a meeting with Mr Sithembile Senti (Mr Senti), the Executive Multi- Stakeholder Projects at SITA. Mr Senti stated that in terms of the SITA Act, Departments are required to procure ICT related goods and services through SITA, and that SITA should indicate in writing that it was unable to provide the services itself. In that instance SITA will act as the procurement agent to acquire such services on behalf of the department.

5.1.57 He further indicated that in respect of the said project, SITA was informed by Ms Makhekhe-Mokhuane, the former CIO of concerns pertaining to the procurement of software licenses by the Department from SAP SA. He stated that he had advised her to forward him a correspondence in order for SITA to intervene in the matter. Ms Makhekhe-Mokhuane had subsequently forwarded him an email, which is referred to in paragraph 5.1.54 above.

5.1.58 Mr Senti further stated that the email was discussed with SITA Legal Advisor and the CEO, Dr Setumo Mohapi and the CEO had subsequently forwarded two correspondences to the Acting DG of the Department. The correspondence dated 19 July 2016 is indicated below:
Dear Mr Sihle Mkhize

RE: PROCUREMENT OF SAP PRODUCTS

1. Your email sent to various recipients copied to me on the 22nd July 2016 with the above mentioned subject matter, refer.

2. Notwithstanding the knowledge of the subject matter through the email referred to above, I however wish to confirm my understanding that such an email does not constitute a formal request to SITA in terms of the SITA Act and relevant regulations.

3. Subject to paragraph 2 above, I do note that there is a process being undertaken by your Department in respect of procurement of SAP products whose details are unknown to me. It does look like this procurement process is at such an advanced stage that the Department is about to enter into a contract with SAP. In this regard I would like to express the following limitations; that SITA:
   a. has no information, alternatively insufficient information in respect to the said procurement of SAP products by DWS.
   b. is unable to determine and confirm whether the current procurement falls within the mandate of the accounting officer of the DWS or it falls within the exclusive legislative mandate of SITA in terms of its Act and regulations

4. Due to reasons provided in para 3 above we intend on engaging with the Department to get the details of the intended procurement of SAP Products in order for us to be able to make a full assessment that will enable us to make a determination of the scope and the enabling mandate.

5. Furthermore, it is my considered advice that the Department should not enter into any contract in this regard, which may constitute irregular expenditure should the intended processes of assessment reveal that such a procurement of SAP Products is outside the mandate of the DWS accounting officer and is within the exclusive mandate of SITA in terms of its Act and Regulations.

Kind Regards

Dr Selumelo Mohapi
Chief Executive Officer

5.1.59 Mr Senti also stated that a further email was forwarded to Mr Mkhize, the Acting DG, and that in terms of that correspondence dated 22 July 2016, Dr Mohapi requested the following information:
5.1.59.1 The business case that triggered the need for the procurement of SAP products;

5.1.59.2 Assessment conducted on the SAP product in the DWS environment;

5.1.59.3 Process followed by the DWS in respect of the intended procurement;

5.1.59.4 Current contracts concluded between SAP and the Department, including the entities and Water Boards, and the status thereof;

5.1.59.5 The Bill of material/Module stacks and their price sheets pertaining to each contract;

5.1.59.6 All submissions relating to the intended procurement of SAP products; and

5.1.59.7 Any relevant information in respect of the intended SAP procurement process.

5.1.60 Mr Senti indicated that Mr Mkhize, the Acting DG, did not respond to the correspondences that were forwarded to him and that it was apparent that the Department had ignored the advice of Dr Mohapi and proceeded with the SAP procurement without involving SITA.

5.1.61 Evidence obtained from the Department indicates that on 19 October 2016, Ms Mathe made a submission to the Acting DG to "REQUEST FOR APPROVAL OF PAYMENT TO SAP SA FOR INVOICE M6284038117 WHICH AMOUNTS TO R285,000,000.00(INCLUDING VAT) FOR THE STRATEGIC ACQUISITION OF SAP LICENSES WITH UNLIMITED USER ACCESS FRAMEWORK FOR A PERIOD OF 5 YEARS"

5.1.62 Paragraph 2.2 of the submission stated that the total cost of the project is R513,292,915.41(including VAT), however the R 285,000,000.00(including VAT) is payable for implementation, whereas the remainder will be paid in the 2017/2018 financial year.
5.1.63 On 19 October 2016, Mr Mofokeng, supported the recommendation on the condition that "concerns on the budget availability is addressed and the recovery of this commitment from the Water Boards must be initiated as soon as possible". The submission was approved by the Acting DG on the same date.

5.1.64 The evidence indicates that on 19 October 2016, Mr Piet Malatji compiled the sundry payment requisition, which was checked and verified by Ms Magubane and the expenditure was authorised by Mr Mkhize, the Acting DG.

5.1.65 During the interview with the Department officials on 15 March 2019, it was pointed out that the Department did not receive any services for the payment of R 285,000,000.00 that was made to SAP SA.

5.1.66 Evidence obtained from Ms Mathe during the interview with her, indicates that on 7 November 2016, she made a submission to the Acting DG requesting approval to include the Strategic Procurement of SAP Licenses with unlimited user access framework for a period of five (5) years to the demand plan.

5.1.67 The submission in essence contained the same information that was used in the submissions for approval of the project. The recommendation was supported by the Mr Mofokeng and approved by Mr Mkhize, Acting DG on 5 December 2016.

5.1.68 Further evidence from Ms Mathe indicates that on 27 February 2017, Mr Mofokeng, made a submission to the Chief Procurement Officer, National Treasury, indicating that the Department had submitted its approved Procurement Plan for 2016/2017 financial year to National Treasury, but that the Department needed to add a new item to the original procurement plan which was approved by the Accounting Officer.

5.1.69 In the submission Mr Mofokeng highlighted Paragraph 5.1.2, and 3.1.1 of National Treasury SCM Instruction Note 2 of 2016/2017 regarding Procurement Plans.
5.1.70 Interview with Ms Mathe, the DDG: NWRI on 13 June 2016

5.1.70.1 Ms Mathe stated that Mr Mkhize, the Acting DG at the time, during a discussion with him in his office, instructed her to procure the SAP licenses for the Water Boards. She stated that she informed him that there was no budget, and that the Water Boards had a budget.

5.1.70.2 She stated that the 3 June 2016 submission was the beginning of the process to procure SAP licenses that included the Water Boards. Further that she wrote to the DBAC to get the DG to approve and then the procurement process can follow. She confirmed that the DBAC did not approve the submission, and stated that "she must not be involved". She submitted the email of DBAC wherein she stated that DBAC took the decision that she must not be involved in the matter.

5.1.70.3 She stated "...when the final document went for procurement, I was no longer involved, I was asked not to be involved". She reiterated that she was told to merely support the submission not to work on the document. She conceded that by appending her signature on the submission she was satisfied that the information on the submission was correct.

5.1.70.4 She stated that after signing the 24 June 2016 submission she was not involved in anything further, until she received an invoice for payment from SAP SA in October 2016.

5.1.70.5 She further stated that although she was no longer involved in the procurement process, she was aware of issues raised by the ITC through the exchange of emails, as well as the issues regarding SITA that were raised by the ITC to the Acting DG.

5.1.70.6 When Ms Mathe was questioned as to why she had not involved the ITC from the inception of the procurement process, she stated that the ITC was not willing to work with her, and knowing that the ITC serves on DBAC she decided to make her submission directly to DBAC.
5.1.70.7 When asked about how she came about the information on the submission which indicated the modules required by the Department and Water Boards, Ms Mathe stated that SAP SA had provided the information on the submission as "...I am too old to prepare submission, the Director in my office prepares submissions, I gave her an instruction, this is what is going to happen, but ask SAP to help you. ... SAP, especially the technical information they were working with the Accounts Executive, ‘SAP Consultant’ that whole analysis that we procure from Water Boards came from SAP, and all those modules, I don’t know those modules".

5.1.70.8 When asked if any of the information was verified, she stated that SAP SA was the only provider of SAP licences and that SAP SA is an Enterprise Resource Planning service provider. The only other service provider according to her knowledge, was Oracle, and that it would be costly to utilise another platform in the Department.

5.1.70.9 With regards to the meeting that was held with the Department and SAP SA on 21 July 2016, she stated that she was called to the meeting and that the CIO and Legal Services queried the amount to be spent by the Department for the SAP SA contract as it exceeded a billion rand.

5.1.70.10 She stated that subsequently she wrote to the Acting DG summarising the outcome of the meeting and explained that the cost of the contract had been amended to R450 million and no longer a billion as argued by the CIO and Legal Services. She argued that the final contract was negotiated by Legal Services and approved by the DG. It never came through her.

5.1.70.11 She stated further that there were no funds for the SAP licences project, as funds were committed for other infrastructure projects, but when “the Minister said it must go to SAP, we then had to take, the same thing on War on Leaks, when they say take, you must take” . She stated that this was also confirmed by the Minister in the media reports wherein the Minister stated that she had indeed instructed that SAP must be installed but not how it will be procured.
Ms Mathe's response to the allegations regarding Mr Luvo Makasi

5.1.70.12 On the allegations regarding Mr Luvo Makasi, Ms Mathe stated that the Minister would not want to engage with her and instead she would have briefing sessions with the Minister's Advisors. Ms Mathe explained that she first met Mr Luvo Makasi when he enquired about her strained relationship with Ms Diedricks. From thereon, it became a culture that she would meet and communicate with the Minister's Advisors, including Mr Makasi, Mr Thele Moema and Mr Moss Mphaga, to request them to advise the Minister on projects that were being "stifled" in the DG's office. She stated that she would say whenever there was an issue she would send an email "guys can we guys, can you please guide me here. Minister needs to know these, these thing has been in the DG's office can you please unlock it". She denied that Mr Makhasi was directly involved in the SAP licences contract.

5.1.71 Interview with Mr Mkhize, the former Acting DG on 19 August 2019.

5.1.71.1 During the interview with Mr Mkhize, he stated that his involvement with the SAP license project began when he was appointed as the Chairperson of the DBAC and thereafter as the Acting DG of the Department when he approved the appointment of SAP SA.

5.1.71.2 He stated that he was not aware if the project was included on the Department's Demand Plan and if it was approved and submitted to National Treasury. He further indicated that Ms Mathe had presented the need for the project at several executive meetings, wherein she indicated that in order for her branch to perform optimally she required the SAP software to meet their needs. He stated that he was unaware if any research and analysis was done to establish if the SAP licenses would in fact improve the Department's performance.

5.1.71.3 He stated further that he did not interrogate the facts of the submission, but was aware of certain presentations regarding the breakdown of costs and supposed savings, and that he had assumed that Ms Mathe had consulted
the Water Boards, and therefore did not verify any of the inputs on the submission.

5.1.71.4 When Mr Mkhize was questioned about the communications from SITA that were addressed to him, he indicated that SITA had reservations about the project, but had indicated to the Department that since it was at an advanced stage with the procurement process they should continue with the project.

5.1.71.5 He stated that the ITC is a sub-committee of DBAC and he was aware that the ITC had raised a number of issues relating to the project. He also stated that whoever had taken over as the Chairperson of DBAC had to ensure that all the issues previously raised by the DBAC were addressed and that when the submission was submitted to him as the Acting DG he would approve it based on the recommendation of the DBAC Chairperson.

5.1.71.6 He indicated that the purpose of the meeting held on 22 July 2016 with SAP SA, Legal Services and other Executive Managers of the Department, was to clarify certain issues that Legal Services had with the contract. He stated that subsequently Ms Mathe wrote a memorandum addressing the issues raised.

5.1.71.7 He stated that the issue raised by Legal Services regarding a competitive bidding process, was addressed through letters received by SAP SA indicating that only SAP SA could issue the unlimited licenses and that as such the procurement was for a sole service provider.

5.1.71.8 He stated that the Department had a long history with SAP SA dating back to 2006 and that substantial investment had already been made in SAP software. The investment in a new software would therefore be costly. In respect of the R285, 000, 00.00 payment made to SAP SA, Mr Mkhize stated that it was a partial payment made to SAP SA, as the Department did not have the full budget available for the project.

5.1.71.9 He conceded that in hindsight, certain aspects relating to the project could have been undertaken differently, including ensuring that a budget was available for the project.
Mr Mkhize’s response to the allegations regarding to Mr Luvo Makasi

5.1.71.10 Mr Mkhize further stated that he only had knowledge of Mr Luvo Makasi as a lawyer with Werkman’s Attorney and further stated that at no stage did Mr Makasi approach him regarding the SAP SA project. He also indicated that according to him Mr Makasi was not Minister Nomvulo Mokonyane’s Advisor.

5.1.72 Response to the Section 7(9) notice from the Department dated 19 November 2019

5.1.72.1 A section 7(9) notice that was issued to Ms Deborah Mochothlhithe, the former Acting Director-General (DG) on 10 October 2019 and a response was received on the 19 November 2019 from Mr M Tshangana, the current Acting DG.

5.1.72.2 Mr Tshangana indicated that the allegations relating to the SAP licences are subject of an investigation by the Special Investigating Unit’s (SIU) investigation, and that the Department’s Internal Audit and Risk section had also conducted an investigation on the same matter wherein it was found that the processes of procuring the SAP licences were irregular. He stated that as part of consequence management he is currently in the process of taking corrective measures against the implicated officials.

5.1.72.3 Mr Tshangana requested a meeting between the Department, SIU and myself before I issue the final report. He stated that he is “taking this precaution so that we do not proceed with actions which may unintendedly compromise the process alluded to above”.

5.1.72.4 With regards to Mr Tshangana’s response to the section 7(9) notice, I have indicated to him that that the Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
5.1.72.5 Furthermore section 182(1) of the Constitution provides:-

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

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

5.1.72.6 I have further notified him that I will be proceeding to issue my final report into the matter, as I do not view my report as compromising any processes already under way, as stated in his response.

5.1.73 Response to the Section 7(9) notice from Ms Mathe received on 7 November 2019

5.1.73.1 In response to the section 7(9) notice, Ms Mathe submitted she was instructed by the Acting DG to initiate the procurement of the SAP Licenses as a means of attending to the Auditor General’s concerns, and was not necessarily the sole end-user of the project.

5.1.73.2 She stated that the evidence indicates that she was removed from the DBAC to participate in the matter, and only instructed to sign the submission as the budget was from her branch. She further stated that this was not an indication that she did not know what she was signing, but that she was party to a departmental decision and process.

5.1.73.3 Ms Mathe further submitted that a letter from the former Minister Mokonyane to Minister Cwele, further clarifies and re-enforces that she was executing an Executive and Accounting Officer’s directive, and had therefore had not personally undertaken to consolidate the SAP Licenses.

5.1.73.4 Ms Mathe further mentioned that the Department never disputed the fact that the SAP project was a ministerial decision as stated by the Department’s
spokesperson in the undermentioned Independent Online publication dated 7 September 2018:

"The original process of the acquisition of SAP was approved by the executive authority (Mokonyane) and was duly finalized by the Accounting Officer as delegated by the PFMA.

"This approval was preceded by the ICT committee considerations and Bid Adjudication Committee recommendations," Ratau said.

At the time, Ratau said the department approved the tender to allow it to manage the funding on infrastructure projects and the entire source-to-tap network on a single platform; hence its extension to its subsidiaries and water boards.

"He said SAP technology provided such critical core business requirements and through leveraging economies of scale, the department was able to drive out this strategic programme."

5.1.73.5 Ms Mathe further submitted that she had complied with the Department’s SCM Policy, in respect of end user’s roles and responsibilities, in that; she ensured that there was approved funding. She complied with the SCM processes and ensured that there was the terms of reference. She however indicated that the Acting DG was the “real end-user”.

5.1.73.6 She stated that it was not her decision to accept SAP as the sole provider for the project nor was it within her authority to approve such a decision, as this decision went through the DBAC and also the DG. Ms Mathe stated that once the proposal was accepted, the issue of competition was then addressed and it was for that reason, that she allowed Ms Magubane to work with the SAP Consultant, and that this was further informed by decisions taken by both delegations of SAP and DWS negotiators.

5.1.73.7 Ms Mathe pointed out that Department’s negotiating team was led by the former Acting DG, Mr Mkhize as the “actual end-user” and Mr Loselo, the Chief Director, Legal Services.

5.1.73.8 Ms Mathe further submitted that the section 7(9) notice issued to her incorrectly mentioned that she was in contravention of section 38 and 57 of the PFMA as section 38 was applicable to the Accounting Officer of the Department and section 57 was applicable to schedule 3 entities as listed in the PFMA. She indicated that section 45 of the PFMA was applicable to the responsibilities vested in her, and she had complied with the relevant section.
5.1.73.9 Ms Mathe further made submissions to support her assertion that she was not solely responsible for the procurement of the SAP Licenses and that accountability also vested in the Accounting Officer, the DBAC, the ITC Committee, Legal Services, and the CFO in terms of their respective roles and responsibilities.

5.1.73.10 Ms Mathe also submitted that SAP is defined by the National Treasury as an Original Equipment/System Manufacturer (OEM), and that the Department's action to procure directly from SAP as an OEM was prudence on the Department's side as part of cost containment, which was later adopted by National Treasury and SITA as per National Treasury Circular 10 of 2016.

5.1.73.11 She stated that decisions relating to ICT-related goods and services vested in the Accounting Officer, and that in terms of State Information Technology Amendment Act, 2002 a distinction is made between services that must be provided by SITA and those that may be provided by SITA. She submitted that according to National Treasury Practice Note 5 of 2009/2010 the Accounting Officer reserves the right to reject the involvement of SITA in procuring goods and services, and that by approving the appointment of SAP, the Acting DG was therefore rejecting SITA's recommendation.

5.1.73.12 Ms Mathe denied that she issued an instruction to Ms Magubane to allow a SAP’s Consultant to draft internal submissions and that it was Ms Magubane who drafted the submission to the DBAC and ITC.

5.1.73.13 She submitted that at the time of procuring SAP licenses, it was understood that it was not a new requisition but rather a consolidation of the existing contracts, and therefore it was not necessary to include the item on the Department’s Demand Plan.
5.1.74 Response to the Section 7(9) notice from Mr Mkhize received on 27 October 2019

5.1.74.1 In his submission, Mr Mkhize stated that he was appointed as the CFO for the Department in November 2015 and assumed the position of Acting DG in June 2016 to December 2016. The permanent DG was appointed from 1 January 2017 and he returned to the position of CFO until he was again appointed in July 2017 to July 2018 as Acting DG. He further indicated that he had resigned from the Department in July 2018.

5.1.74.2 Mr Mkhize pointed out that the Department had a CFO for the Water Trading Entity and the CFO for the Department's main account and that he was the CFO for the Department's main account.

5.1.74.3 Mr Mkhize stated that the SAP software or technology was procured in terms of National Treasury Instruction Note Number 3 of 2016/2017, wherein deviation from inviting competitive bids is allowed in the case of sole provider procurement. He indicated that with regards to SAP software or technology, accredited partners of SAP are authorized to license it only on a limited basis and submitted a letter below from SAP SA confirming this.

5.1.74.4 He submitted further that the extension of the SAP software for availability on an unlimited user basis across the Department could only be done through SAP SA and not through its accredited partner network, and that dealing with SAP SA directly in respect of the unlimited user licence regime would cut out the middle man.

5.1.74.5 Mr Mkhize stated that the Department's WTE started using SAP software as far back as in 2006 and that it was not new for the DDG responsible to deal with this matter.

5.1.74.6 He stated that as the new Acting DG he was told of the Auditor General's report or finding against the Department for not having a common platform to manage its entities or follow the money since the Department transfers a
large part of its budget to these entities and that the 2016 agreement followed a motivation by Ms Mathe to the effect that it was more economical to leverage the economies of scale and provide an unlimited user licence from SAP SA.

5.1.74.7 He stated that further justification was provided with regards to cost savings and that, this agreement would result in the alignment of all contracts that existed at the time, and would result in no further charges on existing agreements with the conclusion of the 2016 agreement.

5.1.74.8 He submitted that Ms Mathe had also confirmed through an email to Chief Information Officer that all issues that were raised by the Information Technology committee were all resolved.

5.1.74.9 Mr Mkhize submitted that in respect of the budget for the SAP licences, the budget was under WTE, NWRI and CMA's and those entities would align their budget for the purpose of one unlimited user contract and that the technical matters were dealt with by the DDG and CFO of WTE as they dealt with the procurement of the SAP licenses prior to the intended adoption of the unlimited user license from SAP.

5.1.74.10 He further submitted that as standard procedure the DBAC Chairperson checks the budget issues before recommendation to the Acting DG. The DG signs on the basis of recommendations made after the DBAC processes, following interaction with ITC and the DDG NWRI.

5.1.74.11 He submitted that SITA liaised with the Chief Information Officer and he recalled an indication from SITA that the processes were so far advanced, that the contract could be concluded and finalised.

5.1.74.12 Mr Mkhize submitted that rationale for SAP as set out in the business case was for it to ensure that all entities are able to access the software, on an unlimited user basis, and thereby maximize the economies of scale. The entities had been users of SAP and the process of alignment of the contract would include them. With alignment there would no longer be individual contracts and existing budgets would be aligned with the contract.
5.1.74.13 Mr Mkhize submitted that at the time when he was Acting DG, the office of the Director General, did not have capacity to verify each and every submission that came through from various Deputy Director Generals. As the Acting DG he signed the submission on the strength of the recommendation and evidence submitted by the DDG, Ms Zandile Mathe and recommendation from DBAC Chairperson. The SAP licences were for a period of five (5) years and are still available to the Department and its entities.

5.1.74.14 Mr Mkhize further submitted that the first part of the process was to conclude the licence on an unlimited user basis. Thereafter modalities for implementation were to be put in place. He stated that he resigned from his position on 2 July 2018 and was not aware of what transpired in respect of implementation following the securing of the software licence.

5.1.75 Response to the Section 7(9) notice from SAP Consultant dated 8 November 2019

5.1.75.1 A section 7(9) notice was issued to a SAP’s consultant whose name was mentioned in the section 7(9) notice. The SAP Consultant submitted a response via his attorney stating that the citing of their client’s name in the notice had a direct and substantial impact on their client’s good name and reputation.

5.1.75.2 The attorney mentioned that their client had always acted in the scope of employment, and had conducted the duties associated thereto in that regard only, as a relationship manager between the Department and his employer.

5.1.75.3 The attorney therefore requested that their client’s name be redacted from the report.

5.1.75.4 Having considered the submission I have taken a decision to remove the name of the SAP Consultant, and as such my report therefore only makes reference to “SAP Consultant”.
Application of the Relevant Law

The Constitution

5.1.76 Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

The Public Finance Management Act, 1999 (PFMA)

5.1.77 The PFMA is the main legal instrument that regulates financial management and procurement in the public service. Its objectives are to regulate 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.

Fruitless and wasteful expenditure is defined by section 1 as: “expenditure which was made in vain and would have been avoided had reasonable care been exercised”; and

5.1.78 Irregular expenditure “as expenditure, other than unauthorised expenditure incurred in contravention of or that is not in accordance with a requirement of any applicable legislation”.

5.1.79 Section 38(1)(a) prescribes that the Accounting Officer must ensure that a department had, and maintained, effective, efficient and transparent systems of financial and risk management and internal control.
5.1.80 Section 38(1)(b) provides that the Accounting Officer of a department is responsible for the effective, efficient, economical and transparent use of the resources of the department.

5.1.81 Section 38(1)(c)(iii) stipulates that the Accounting Officer must manage available working capital efficiently and economically. Overall, the Accounting Officer should ensure that the whole department complied with the provisions of the PFMA, as the proper management of the Department’s resources fell with the Accounting Officer’s responsibilities.

5.1.82 Section 45 of the PFMA entrusts other officials of the department with responsibilities and provides that an official of a public entity:

"...

(a) must ensure that the system of financial management and internal control established for that department, trading entity or constitutional institution is carried out within the area of responsibility of that official;

(b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official’s area of responsibility;

(c) must take effective and appropriate steps to prevent, within that official’s area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;

(d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 44; and

(e) is responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official’s area of responsibility ".

National Treasury Regulations

5.1.83 In terms of section 76(4) (c) of the PFMA, National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies, concerning, inter alia, the determination of a framework for an
appropriate procurement and provisioning system (supply chain management framework) which is in keeping with the dictates of Section 217(1) of the Constitution.

5.1.84 Expenditure management of *inter alia*, public entities is regulated by Part 4 of the Treasury Regulations.

5.1.85 Regulation 8.1.1 provides that the Accounting Officer of an institution must ensure that internal procedures and internal control measures are in place for payment approval and processing. These internal controls should provide reasonable assurance that all expenditure is necessary, appropriate, paid promptly and is adequately recorded and reported.

5.1.86 In terms of Regulation 8.1.1, an official of an institution may not spend or commit public money except with the approval of the Accounting Officer or as properly delegated or authorised officer.

5.1.87 Regulation 16A3.2 (d) provides that:

"16A 3.2  A supply chain management system referred to in paragraph 16A.3.1 must –
be fair, equitable, transparent, competitive and cost effective;

..., 

..., 

provide for at least the following: –
demand management;
acquisition management;
logistics management;
disposal management;
risk management; and
regular assessment of supply chain performance."
5.1.88 National Treasury Regulation 16A6.4 regulates the procurement of goods and services by means other than competitive bidding provided that reasons for such deviation from inviting competitive bids must be recorded and approved by the Accounting Officer. As such National Treasury Practice Note 8 of 2007/2008 regulates the use of emergency processes to procure goods and services. It highlights that “urgent procurement” process will only apply where early delivery is of critical importance and the utilisation of the standard procurement process is either impossible, or impractical. An “emergency procurement” process will only apply in serious, unexpected and potentially life threatening circumstances which require immediate rectification.

5.1.89 Paragraph 3.2 of National Treasury Practice Note 5 of 2009/2010 states that SITA must provide the following services to national and provincial departments:

"Departments are required to procure ICT related goods and services through SITA, should SITA indicate in writing that it is unable to provide the services itself, SITA will act as the procurement agent to acquire such services on behalf of the department".

5.1.90 Paragraph 2 of the National Treasury Practice Note 5 of 2009/2010 states that in terms of the State Information Technology Amendment Act, 2002 and its subordinate regulations (herein referred to as prescribe legislation), accountability for decisions related to the procurement of ICT related goods and/or services is vested with the respective accounting officer or accounting authority. This is further emphasised in the PFMA which requires that Accounting Authorities be responsible for the effective, efficient, economical and transparent use of their institution resources.

5.1.91 Paragraph 3 of the Practice Note states:

"Summary of SITA SERVICES:

In terms of the SITA Act, a distinction is made between certain services that must be provided by SITA and certain services that may be provided by SITA."
Mandatory ("must") services that are to be provided by SITA

SITA must provide the following services to national and provincial departments:

Provide or maintain a private telecommunication network or a value added network;
Provide and maintain transversal or departmental specific information systems;
Provide data-processing or associated services for transversal or departmental specific information systems;
Provide IT (Information Technology) for Government;
Set standards for interoperability;
Set standards for ISS (Information security standards);
Set standards for Certification of IT acquisition;
Certify all acquisitions for standard compliance;
Eliminate duplication; and
Leverage economies of scale."

5.1.92 Departments are required to acquire these services from SITA in accordance with business and service level agreements. Should SITA indicate in writing that it is unable to provide the service itself, SITA will act as the procurement agent to acquire such services on behalf of departments.

5.1.93 Accounting officers are, however, required to take note in that in terms of Treasury Regulation 17.3, departments and constitutional institutions may not amend existing or institute new computerised systems that will affect financial administration without the prior written approval of the National Treasury.
Applicable relevant Case Law

5.1.94 The case of Minister of Transport v Prodiba (Pty) Ltd (20028/2014) [2015] ZASCA 38 (25 March 2015), which deals inter alia with the award of a single tender in 1997 to one service provider, the court found that it was incumbent on the Accounting Officer of the Department, “to have regard to Constitutional principles, the provisions of the sub-section set out above and other statutory prescripts. The high court erred by not having sufficient regard to constitutional norms and statutory requirements and concluding that the decision to produce the new licenses in-house could only have been facilitated by an extension of Prodiba’s contract and that a competitive bid would not have been viable where the supply of services would have been for a very limited duration. The high court ignored the very extensive period during which Prodiba enjoyed a monopoly and did not properly appreciate that the five year extension period was not of very limited duration. More importantly, the agreement was one in respect of which Prodiba was required to provide a new service dealing with new technology in respect of which potential competitors were not engaged.”

Conclusion

5.1.95 The evidence before me indicates that in December 2015 the Department renewed the SAP licenses with SAP SA for unlimited user framework for a period of three (3) years.

5.1.96 The Department further renewed SAP licenses with SAP SA for unlimited user framework for a period of five (5) years for itself and the Water Boards. The Department and Ms Mathe argued that this move was necessitated by an Auditor-General’s statement that utilisation of funds transferred to the Water Boards by the NWRI were not being adequately monitored.

5.1.97 Evidence before me indicates that Ms Mathe, as the end user of the project, did not conduct a needs analysis with the Department and relevant Water Boards to determine their existing IT infrastructure and software licensing needs, in accordance with the responsibilities entrusted to her in terms of section 45 of the PFMA. Despite the concerns raised by IT and Legal Services,
Ms Mathe, in her capacity as the DDG NWRI, fervently pursued the approval of the project.

5.1.98 Her contention that the Acting DG was the "real end-user" cannot be accepted. The evidence indicates that she initiated the submissions for the project which were submitted directly to the DBAC.

5.1.99 Her further contention that the five (5) year contract was a consolidation of the three (3) year contracts is misleading. The five (5) year contract included more modules and additional scope of work including procurement SAP for WTE, Main Account, Water Boards and subsidiaries.

5.1.100 Ms Mathe could not justify the statements made in the submissions regarding the breakdown of costs, the supposed savings to the Department or verify the reasons for the inclusion of the module description of the software that were contained within the submission, as the SAP Consultant had provided information in the submissions.

5.1.101 Therefore her use of SAP SA consultant in preparing internal documents in the form of submissions that required approval of decisions related to this project undermines the Constitutional principles of procurement to ensure that a fair, equitable, transparent, competitive and cost effective process was undertaken.

5.1.102 Her submission that Ms Magubane was the person who had used the SAP consultant to prepare the internal submission and that she did not instruct Ms Magubane to do so, is inconsistent to her initial statements that she allowed Ms Magubane to work with the SAP Consultant. As the DDG she should have been keenly aware that Ms Magubane would not have knowledge and insights as to the information on the submissions. Ms Mathe herself even stated during her interview that SAP SA had provided the information on the submission as "...I am too old to prepare submission, the Director in my office prepares submissions, I gave her an instruction, this is what is going to happen, but ask SAP to help you. ... SAP, especially the technical information they were working with the Accounts Executive, 'SAP Consultant' that whole analysis
that we procure from Water Boards came from SAP, and all those modules, I don’t know those modules”.

5.1.103 Ms Mathe’s submission that SAP SA was the sole provider of the service cannot be justified, as factors such as cost-effectiveness and competiveness could not be confirmed since the IT division and SITA were never engaged on the project. Although SAP SA was the sole provider of SAP licenses, there is no evidence that indicates that the Department thoroughly satisfied itself that their needs could only be met with the products and services offered by SAP SA, as no competitive process was undertaken to determine if other service providers could have offered the products and services required.

5.1.104 Ms Mathe requested the approval for the purchase of SAP licenses on behalf of the Water Boards, despite the Department not having a budget for such a project. The project was also not included in the Department’s Demand Plan. Her request in November 2016 to the Acting DG to include the project in the demand plan, was pointless, as the Department had by then approved the project and had already made a substantial payment to SAP SA.

5.1.105 Ms Mathe’s submission that she had complied with the Department’s SCM Policy in ensuring amongst others, that the budget was approved cannot be accepted. The evidence before me indicates that the CFO WTE, made a submission to the former DG bringing to his attention inter alia that there was no budget allocated to the Muratho Project in the financial year 2016/2017 and that the funds for the SAP licenses were not available. The other concerns raised by the CFO, WTE are indicated in paragraph 5.1.32 above.

5.1.106 The evidence before me further indicates that despite several objections from the ITC on the appointment of SAP SA, the advice from SITA and the Department’s Legal services pertaining to the contract, Mr Mkhize, the then Acting DG proceeded to approve of the project and enter into the contract with SAP SA.
5.1.107 Furthermore, the contentions by Mr Mkhize that the objections raised by the ITC during the DBAC had been dealt with accordingly is not corroborated by the evidence before me. Prior to his appointment as the Acting DG he was fully aware of the concerns raised by the ITC and the non-compliance thereof by the end-user. It was upon him as the Accounting Officer to verify that all concerns relating to the project were attended to.

5.1.108 The agreement entered into with SAP SA and the Department was improper and it is a contravention of Section 217 of the Constitution and Regulation 16A3. 29(a) of the National Treasury Regulations, as it was for a completely new service that was to be used by different entities and entailed the purchasing of licenses with additional modules with major cost implications, whereby competitors were not engaged.

5.1.109 The improper procurement of the SAP licences resulted in irregular expenditure being incurred by the Department as the process was not in accordance with the requirements of the Constitution, PFMA, Regulations National Treasury Regulations and the SITAct.

5.1.110 The payment of R285,000,000.00 made to SAP SA amounts irregular expenditure as well as fruitless and wasteful expenditure as the Department did not receive any services from SAP SA at the time payment was made.

5.1.111 I am also aware that the SIU has been instructed by the President of the Republic of South Africa to conduct an investigation into the purchasing of SAP licenses and the payment of R35 million in kickbacks.

5.1.112 According to information from the SIU, the SIU has found evidence thus far that indicated that the contract value was approximately R950 million consisting of R450 million for the licenses plus maintenance over a period of five (5) years. There was no needs analysis conducted and there was no budget for the purchase of the SAP licenses. No virement or approval of the payments was made to SAP and a total of R285 million was paid to SAP thus far. The State Technology Information Agency (SITA) was not consulted as
was required for such purchases, and in fact SITA advised the DWS against proceeding with this contract.

**Regarding the allegations relating to Mr Luvo Makasi**

5.1.113 There is no evidence to unquestionably support the allegation that Mr Luvo Makasi who is not an employee of the Department, had been influential in facilitating the deal of the SAP licenses.

6. **FINDINGS**

Having considered the evidence received during the investigation, the regulatory framework determining the standard that should have been complied with, I make the following findings:

6.1 **Regarding Whether the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, and if so whether such conduct resulted in the department incurring irregular and/or fruitless and wasteful expenditure as described in section 1 of the PFMA, maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994**

6.1.1 The allegation that the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, is substantiated.

6.1.2 Mr Mkhize and Ms Mathe failed to ensure that the procurement of the SAP licenses followed a process that is transparent, equitable and fair in line with Section 217 of the Constitution and National Treasury Regulation 16A3.2(d) and their conduct amount to maladministration and improper conduct as envisaged in section 6(4) of the Public Protector Act, 1994.

6.1.3 Mr Mkhize and Ms Mathe further failed to comply with section 38 and 45 of the PFMA which provide for their respective responsibilities.
6.1.4 Furthermore the Department failed to comply with the National Treasury Regulations 8.1, 8.2 and Practice Note 5 of the National Treasury Regulation when it entered a contract with SAP SA.

6.1.5 The expenditure incurred as a result of the irregular extension amounts to irregular expenditure and fruitless and wasteful expenditure as defined in section 1 of the PFMA, 1999.

7. **REMEDIAL ACTION**

In light of the above, and having taken into account evidence before me, the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution are the following:

7.1 **Regarding whether the Department irregularly procured the SAP licenses for itself and on behalf of the Water Boards, and if so whether such conduct resulted in the department incurring irregular and/or fruitless and wasteful expenditure as described in section 1 of the PFMA, maladministration and improper conduct in terms of section 6(4) of the Public Protector Act, 1994**

**The Director General, DWS**

7.1.1 To take note of my findings in respect of the above issue, and ensure that going forward, any ICT procurement is aligned with the requirements of the Constitution, the State Information Technology Act, the relevant Treasury regulations and Departmental policies;

7.1.2 To take appropriate disciplinary action against Ms Mathe for the irregular and fruitless and wasteful expenditure incurred in the procurement of the SAP licences.

7.1.3 To continue to support the SIU in the civil litigation process and/or any other process currently under way by the SIU.
The Directorate of Priority Crime Investigation

7.1.4 Consider this report and establish if any acts of impropriety identified herein amount to acts of a criminal conduct in terms of the Prevention and Combating of Corrupt Activities Act, 2004 and if so, pursue criminal investigations against the perpetrators.

8. MONITORING

8.1 The HOD must, within thirty (30) working days from the date of the issuing of this Report and for approval by the Public Protector, submit the implementation plan to the Public Protector indicating how the remedial action referred to in paragraphs 7.1, 7.2 and 7.3 of this Report will be implemented.

8.2 In line with the Constitutional Court judgment in the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, and in order to ensure the effectiveness of Office of the Public Protector, the remedial actions prescribed in this Report are legally binding, unless set aside by a Court order.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF SOUTH AFRICA
DATE: 03/02/2020