
Allegations of undue delay to pay for services rendered and maladministration relating to improper termination of contract

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY TO PAY FOR SERVICES RENDERED AND MALADMINISTRATION BY THE NORTH-WEST PROVINCIAL GOVERNMENT RELATING TO THE IMPROPER TERMINATION OF A CONTRACT WITH RR TRAVEL JV TSHEPI INVESTMENT
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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 published in terms section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates my findings and the remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of undue delay to pay for services rendered and maladministration by the North-West Provincial Government (NWPG) relating to the improper termination of a contract with RR Travel JV Tshepi Investment (the Company).

(iii) I received a complaint from Mr T C Kgomo (Complainant) on behalf of and in his capacity as the Director of the Company on 25 March 2015. In essence, the Complainant alleged that on or about September 2013, the Company was awarded a transversal contract for the provision of specialised travel and hotel accommodation services to the NWPG. The duration of the contract was a period of two years dating from 15 April 2014 to 31 March 2016. The aforementioned service included advising the NWPG on the best possible travelling arrangements, offering advice on destinations, arranging reservations, car rental and weather conditions for both local and international travelling, types of accommodations, routes, schedules and rates. The parties entered into a contract in terms of the National Treasury General Conditions of Contract (GCC). On 03 April 2014, a Service Level Agreement (SLA) was signed between the Company and the NWPG, duly represented by the North-West Department of Finance (the Department).

(iv) As early as May 2014, the Company experienced problems with receiving payments from the ordering departments for services rendered, the problem persisted until 18 October 2014, when the Company received communication from the NWPG giving notice that the contract will be terminated as per the SLA, however no reasons were provided. Upon enquiry into the reason(s) for termination, none were provided to him. In addition to the alleged improper
termination, the Complainant alleged that the NWPG owed the company outstanding payments in the amount of **R10 997 982.74** for services rendered between April 2014 and August 2014. Furthermore, the NWPG also owed the Company interest that accrued as a result of some of the late payments received for services rendered.

(v) The main allegations were that the NWPG unduly delayed to pay the Company for services rendered and improperly terminated the contract with the Company.

(vi) On analysis of the complaint, the following issues were identified and investigated:

a) Whether the North-West Provincial Government unduly delayed to pay the Company for services rendered.

b) Whether the North-West Provincial Government improperly terminated the contract with the Company;

c) Whether the North-West Provincial Government unduly delayed or failed to pay the Company interest accrued due to late payment for services rendered; and

d) Whether the conduct of the North-West Provincial Government improperly prejudiced the Company and if so, what it would take to place Company as close as possible to where it could have been had the North-West Provincial Government acted properly:

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

a) **Regarding whether the North West Provincial Government unduly delayed to pay the Company for services rendered**
aa) The allegation that the North West Provincial Government unduly delayed to pay the Company for services rendered is substantiated.

bb) Upon receipt of the above-mentioned compliant, I determined, in accordance with section 7(1(b)(i) of the Public Protector Act, to resolve the dispute through mediation, conciliation or negotiation, in terms of 6(4)(b)(i) of the Public Protector Act;

cc) This conduct for undue delay to pay the Company for services rendered was successfully resolved by mediation in terms of section 6(4)(b)(i) of the Public Protector Act and the Company was paid the full outstanding amount of R10 997 982.74.

b) Regarding whether the North-West Provincial Government improperly terminated the contract to the Company

aa) The allegation herein is unsubstantiated.

bb) The NWPG duly exercised its right to terminate the contract as afforded by clause 13 of the SLA. Furthermore the Company was provided with the 30 day written notice period as required by clause 13 of the SLA. Clause 27 of the GCC provide for the dispute process which need to be followed and includes attempting to resolve the dispute by mutual consultation and mediation if the dispute is not resolved after 30 days. The Company should have objected to the termination and followed the dispute resolution processes in accordance with clause 27 of the General Condition of Contract (GCC).

cc) The dispute resolution processes would have invoked the provisions of Clause 27.5 of the GCC provides that notwithstanding mediation and/or court proceedings the parties shall continue to perform their respective obligations under the contract unless they otherwise agree.
dd) The NWPG’s conduct in this regard does not amount to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act 6(4)(a)(i); abuse of power as envisage in section 6(4)(a)(ii) of the Public Protector Act.

c) **Regarding whether the North-West Provincial Government unduly delayed or failed to pay Company interest accrued due to late payment for services rendered:**

aa) Based on my finding that North West Provincial Government unduly delayed to pay the Company for services rendered, there is *prima facie* evidence that indeed there may be some interest which is due and payable to the Company on those invoices which were not paid on due date.

bb) None of the parties provided me with evidence that confirmed the date on which invoices and all supporting documents were submitted to the North-West Provincial Government. As a result of the above, I am therefore unable to assess and determine the amount of interest due and payable to the Company.

d) **Regarding whether the North-West Provincial Government improperly prejudiced the Company and if so, what it would take to place Company as close as possible to where he could have been had the North-West Provincial Government acted properly:**

aa) The allegation that the NWPG improperly prejudiced the Company due to the undue delay to pay for services rendered is substantiated.

bb) The Company suffered prejudice as a result of undue delay in payment of its invoices, which resulted in the Company not being able to pay its service providers.
cc) However, the evidence presented by the Complainant to support the financial prejudice by the Company in the form of invoices and correspondence between the Complainant and his attorneys does not provide full details that enable me to make a determination on whether the invoices and court papers can be related to the improper conduct of the NWPG. In the absence of this evidence, I cannot make a determination on whether the alleged legal costs were indeed incurred as a result of the undue delay to pay the Company.

(viii) The appropriate remedial actions I am taking in terms of section 182(1)(c) of the Constitution are the following:

aa) The Director General of the NWPG must within 30 days from the date of this report apologise to the Complainant for the undue delay to pay him for services rendered;

bb) The Director General of the NWPG must, within thirty (30) days of issuing this report, appoint an Audit company to audit all the invoices and supporting documents to independently determine the interest payable to the Company;

cc) The Director General of the NWPG must submit the audit report to the Public Protector within thirty (30) days of receiving the audit report;

dd) The Director General of the NWPG must pay the Company interest on all invoices that has been determined by the Audit in (aa) above as not paid within thirty (30) days of receipt of the invoice. Such payment must be made to the Company within thirty (30) days of receipt of the audit report at the prescribed rate of interest applicable on the date on which payment was due.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY TO PAY FOR SERVICES RENDERED AND MALADMINISTRATION BY THE NORTH-WEST PROVINCIAL GOVERNMENT RELATING TO THE IMPROPER TERMINATION OF A TENDER AWARDED TO RR TRAVEL JV TSHEPI INVESTMENT AND THE ALLEGED FAILURE TO PAY INTEREST ON LATE PAYMENTS, RESULTING IN PREJUDICE TO COMPLAINANT

1. INTRODUCTION

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

1.2. This report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of this investigation:

   1.2.1 The Premier of the North West Province Mr J Mokgoro for noting;

   1.2.2 The Director - General of the North-West Provincial Government (NWPG), Ms L K Sebego;

   1.2.3 The Head of the Department of Finance Mr Ndlela Kunene.

1.3 A copy of the report is also provided to the Complainant, to inform him about the outcome of this investigation.

1.4 The report relates to an investigation into allegations of maladministration by the NWPG relating to the improper termination of a tender awarded to RR Travel JV Tshepi Investment (the Company) and the alleged failure to pay interest on late payments, resulting in prejudice to Complainant.
2. **THE COMPLAINT**

2.1 The complaint was lodged by Mr T C Kgomo (Complainant) on behalf of and in his capacity as the Director of the Company on 25 March 2015.

2.2 In essence, the Complainant made the following allegations:

2.2.1 On or about September 2013, the Company was awarded a transversal contract for the provision of specialised travel and hotel accommodation services to the NWPG. The duration of the contract was a period of two years dating from 15 April 2014 to 31 March 2016. The aforementioned service included advising the NWPG on the best possible travelling arrangements, offering advice on destinations, arranging reservations, car rental and weather conditions for both local and international travelling, types of accommodations, routes, schedules and rates.

2.2.2 The parties entered into a contract in terms of the GCC. On 03 April 2014, a SLA was signed between the Company and the NWPG, duly represented by the North-West Department of Finance (the Department). In terms of the SLA, the Company would for purposes of payment of services rendered, be expected to submit invoices and supporting documents to the relevant ordering department. In turn and if all the relevant information was received, the ordering department would be expected to effect payment by no later than thirty (30) days after the submission of invoices by the Company.

2.2.3 As early as May 2014, the Company experienced problems with receiving payments from the ordering departments for services rendered, which problem persisted until August 2014. The Company raised the matter with both the NWPG and the Department, however no action was taken. Accordingly, the Company through the Complainant communicated to both the NWPG and the Department that the company was not in a position to fulfil its contractual obligations due to non-payment for services rendered by
the respective ordering departments. No feedback was received to this communication either.

2.2.4 With regard to termination, the parties agreed that either party may terminate the contract by giving one (01) months' notice to the other party. The General Conditions of Contract (GCC) further indicates liquidation, default and reasonable standards acceptable as the basis for termination. The GCC further stipulates that in the event of default, the NWPG would issue a written notice of default to the Company in pursuance of termination.

2.2.5 On 18 October 2014, the Complainant received a letter from the NWPG informing him that the correspondence serves as a notice by the Department to terminate the contract with the Company as per clause 13.1 of the SLA. The letter further indicated that the effective date of termination shall be the 30th November 2014, which is 15 days more than the required 30 days' notice period.

2.2.6 The Complainant indicated that no reasons were provided and upon enquiry into the reason(s) for termination, none were provided.

2.2.7 In addition to the alleged improper termination, the Complainant alleged that the NWPG owed the Company outstanding payments in the amount of R10 997 982.74 for services rendered between April 2014 and August 2014. Furthermore, the NWPG also owed the Company interest that accrued as a result of some of the late payments.

2.2.8 The Complainant later approached the Public Protector alleging that as a result of the undue delay to pay the Company and the termination of the contract by the NWPG the Company incurred legal costs to defend litigation initiated by the creditors of the Company. The Complainant submitted a statement of account and letters from the Company's legal representatives Norton Rose Inc. and PJD Inc.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

3.2. Section 182(1) of the Constitution provides that:

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

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

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

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

3.5. In the constitutional court, (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* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016), Chief Justice Mogoeng stated the following, when confirming the powers 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 endeavor to address complaints as 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 The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, and 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.”

3.7 The NWPG is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector’s mandate to investigate.

3.8 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was initially not disputed by any of the parties, however the NWPG in response to the notice issued in terms of section 7(9) of the Public Protector Act (s7 (9) notice) indicated that the issues investigated are matters which are governed by other spheres of the law wherein parties have more than adequate remedies available to them.
3.9 The NWPG further contended that it has always been the approach of the office of the Public Protector not to entertain matters/complaints in circumstances whereby the parties have failed to exhaust other available legal remedies or in instances where the matters are pending before a court of law and where parties are ventilating those rights and seeking available recourse from the courts.

4. THE INVESTIGATION PROCESS

4.2. Methodology

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

4.2.2. 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.

4.2.3. The investigation process commenced with a preliminary investigation which included interviews and meetings with the Complainant, the NWPG, correspondence with the Company and the NWPG, analysis of the relevant documentation, conducted research; and the consideration and application of the relevant laws, regulatory framework and jurisprudence.

4.2.4. During the investigation process, the Public Protector served a notice in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notice) to the Director General of the NWPG on 18 September 2017 to afford the NWPG an opportunity to respond to the Public Protector's provisional findings and intended remedial action. The Public Protector received a response through a letter dated 21 September 2017 and the NWPG's submission contained therein were factored in this report.
4.3. Approach to the investigation

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

4.3.1.1 What happened?

4.3.1.2 What should have happened?

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

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

4.3.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether the NWPG unduly delayed to pay the Company for services rendered, improperly terminated the contract with the Company and unduly delayed or failed to pay the Company interest accrued due to late payment for services rendered and whether such conduct caused improper prejudice to the Company as envisaged in section 6(4) (a) (v) of the Public Protector Act.

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

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

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

a) Whether the North West Provincial Government unduly delayed to pay the Company for services rendered;

b) Whether the North West Provincial Government improperly terminated the contract with the Company;

c) Whether the North-West Provincial Government unduly delayed or failed to pay the Company interest accrued due to late payment for services rendered; and

d) Whether the conduct of the North-West Provincial Government improperly prejudiced the Company and if so, what it would take to place Complainant as close as possible to where it could have been had the North-West Provincial Government acted properly.

4.5. The Key Sources of Information

4.5.1 Documentation

4.5.1.1. Complaint received from Complainant on 7 April 2015;

4.5.1.2. NWPG Bid Specifications for Provision of Travel and Hotel Accommodation Management Services for the Provincial Departments in the North West Province for a period of two years;

4.5.1.3. Government Procurement: General Conditions of Contract issued by National Treasury dated July 2010;
4.5.1.4. Service Level Agreement entered into between NWPG’s Finance Department and the Company and accompanying addendum dated 8 July 2014;

4.5.1.5. Notice of termination from the NWPG dated 18 October 2014;

4.5.1.6. Urgent Application brought by Ernst Lodewikus Kleinhans, Rustenburg Kloof CC and others against the Company dated 11 November 2011 with case number M481/14;

4.5.1.7. Combined Summons issued against the Company by Recreation Africa Leisure Industries (Pty) Ltd dated 13 November 2013 with case number: 41602/14;

4.5.1.8. Letter of demand sent by Orion Hotel and Resorts (Pty) Ltd to the Company dated 29 October 2014;

4.5.1.9. Combined Summons issued against the Company by Kedar Country Retreat (Pty) Ltd dated 13 November 2014 with case number: 41602/14;

4.5.1.10. Warrant of Execution issued against the Company by Garden View Lodge CC dated 14 November 2014 with case number: 1357/2014;

4.5.1.11. Notice of Third Party Appointment from the South African Revenue Services sent to the Company dated 13 January 2015;

4.5.1.12. Letter of Demand from Tlhago-Natures Travellers CC sent to the Company dated 10 February 2015;

4.5.1.13. Letter from the Company’s attorneys to NWPG dated 10 April 2015;

4.5.1.14. Combined Summons issued against the Company by Peermont Global (Pty) Ltd t/a Rio Hotel Casino and Convention Resort dated 15 April 2015 with case number 552/2015;

4.5.1.15. A letter from NWPG to the Company dated 28 April 2015;
4.5.1.16. Attendance Register for Alternative Dispute Resolution session held at the Public Protector's Office on 11 May 2015;

4.5.1.17. Transversal Contract for travel and hotel accommodation, progress report dated 28 May 2015;

4.5.1.18. Breakdown of Attorney's fees which are due sent by Nortons Inc. to the Company dated 31 July 2015;

4.5.1.19. Report on payments to the Company dated 17 August 2015;

4.5.1.20. Attendance Register for Alternative Dispute Resolution session held at the Public Protector's Office on 18 August 2015;

4.5.1.21. Writ of Execution issued against the Company by Garden View Lodge CC dated 14 November 2015 with case number 1357/2014;

4.5.1.22. Notice in terms of s 129 of the National Credit Act, 34 of 2005, sent to the Company by Peermont Global (Pty) Ltd t/a Rio Hotel Casino and Convention Resort dated 6 April 2016;

4.5.1.23. NWPG's Report to the Public Protector on Expediting of Payments: NWP 070/13 – Transversal Contractor Hotel and Accommodation dated 12 April 2016;

4.5.1.24. Report on 30 Day Payment/Interest for the Company in respect of services rendered to NWPG as of July 2016;

4.5.1.25. Notice of Set-down in the matter between Orion Hotels & Resorts (Pty) Ltd and the Company dated 29 August 2016;

4.5.1.26. Letter from PJD Incorporated Attorneys on various matters regarding the Company dated 27 November 2015;

4.5.1.27. Filing Notice- in a matter between Permanent Global and the Company with a car number 1026/2015 dated 06 April 2016;
4.5.1.28. Letter from PJD Incorporated Attorneys on various matters concerning the Company dated 11 April 2016;

4.5.1.29. Warrant of Execution against Property in the matter between JB Developments/Getaway Guest Lodge and the Company with case no. 4389/2014;

4.5.2 Interviews, Meetings and Inspections in loco

4.5.2.1 Minutes of meeting held between Public Protector, Complainant and NWPG dated 12 April 2016.

4.5.3 Legislation and other prescripts

4.5.3.1 The Constitution of the Republic of South Africa, 1996 (the Constitution)

4.5.3.2 Public Protector Act, 23 of 1994 (PPA);

4.5.3.3 Public Finance Management Act, 1 of 1999;

4.5.3.4 Treasury Regulations for departments, constitutional institutions and public entities: Issued in terms of Public Finance Management Act, 1999—National Treasury—April 2001;

4.5.3.5 Prescribed Rate of Interest Rate Act, 1975

4.5.4 Case Law

4.5.4.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)

4.5.4.2 Trident Steel (Pty) Ltd v AH Pilman and Sons 1984 (1) SA 433 (W)

4.5.4.3 Putco Ltd v TV & Radio Guarantee (Pty) Ltd 1985 (4) SA 809 (A)
5. **THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS**

5.1 Regarding whether the North West Provincial Government unduly delayed to pay the Company for services rendered

*Common cause facts*

5.1.1 It is not in dispute that the Company was awarded a transversal contract for Travel and Hotel Accommodation Management services for a period of two years commencing on 14 April 2014 to 31 March 2016 by the North West Provincial Government. The contract price was fixed at 12% commission subject to all the requirements and conditions contained in the bid.

5.1.2 The relationship between the parties was regulated by the GCC and the SLA signed by the parties.

*Issues in dispute*

5.1.3 The Complainant alleged that the Company rendered services to the NWPG and was not paid for services rendered and was owed an amount of **R10 997 982.74** for services rendered to the various departments.

5.1.4 The NWPG disputed that there was undue delay to pay the Company for services rendered and stated that the Company did not attach copies of order forms and certified copies of hotel vouchers as stipulated in the Service Level Agreement to the invoices in question.

5.1.5 Since both parties acknowledged that the Company was not paid for all services rendered to the NWPG, I determined in accordance with the provisions of section 7(1)(b)(i) the Public Protector Act, to resolve the dispute
by mediation, conciliation or negotiation in terms of section 6(4) (b) (i) of the Public Protector Act.

5.1.6 The conduct of undue delay to pay the Company for services rendered was successfully resolved by mediation and both parties confirmed during a meeting held on 12 April 2016 that the Company was paid in full an amount of R10 997 982.74 for services rendered to the NWPG.

5.2 Regarding whether the North-West Provincial Government improperly terminated the contract with the Company:

Common cause facts

5.2.1 The Company was awarded a transversal contract for Travel and Hotel Accommodation Management services for a period of two years commencing on 14 April 2014 to 31 March 2016 by the North West Government. The relationship between the parties is regulated by the GCC and the SLA signed by the parties.

5.2.2 Clause 23 of the GCC provides as follows:

"23(1) The purchaser, without prejudice to any other remedy for breach of contract by written notice of default sent to the supplier may terminate this contract in whole or in part:

(a) If the supplier fails to deliver any or all of the goods within the period(s) specified in the contract, or within any extension thereof granted by the purchaser pursuant to GCC clause 21.2;
(b) If the supplier fails to perform any other obligations under the contract, or
(c) If the supplier, in the judgement of the purchase, has engaged in corrupt or fraudulent practices in competing for or in executing the contract

5.2.3 Clause 27 of the GCC relating to settlement of disputes provides as follows:
“27.1 If any dispute or difference of any kind whatsoever arises between the purchaser and the supplier in connection with or arising out of the contract, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.

27.2 If, after thirty (30) days, the parties have failed to resolve their dispute of difference by such mutual consultation, then either the purchaser or the supplier may give notice to the other party to commence with mediation. No mediation in respect of this matter may be commenced with unless such notice is given to the other party.

27.3 Should it not be possible to settle a dispute by mediation, it may be settled in a court of law.

27.5 Notwithstanding any reference to mediation and/or court proceedings herein,

a) the parties shall continue to perform their respective obligations under the contract unless they otherwise agree; and

b) the purchaser shall pay the supplier any monies due the supplier for goods delivered and / or services rendered according to the prescriptions of the contract.

5.2.4 Clause 13 of the SLA provides for termination reading as follows:

"Notwithstanding anything to the contrary herein and to the General Condition of Contract, either party may terminate this agreement on notice of one month to the other party”

5.2.5 In terms of the SLA, the notice period for termination is one month and either party to the SLA can terminate same. In this case the contract was terminated by the NWPG in terms of clause 13.1 of the SLA effectively from 30 November 2014, as per the notice to terminate dated 18 October 2014; duly signed by Mr Kunene, the Head of the Department of Finance in the North
West Province. It is further common cause that the termination notice provided by the NWPG was per the required one month notice period.

Issues in dispute

5.2.6 The sequence of events and evidence is common cause and has not been disputed by any of the parties, what is in dispute is whether the NWPG improperly terminated the contract with the Company and whether such termination improperly prejudiced the Company. During the investigation, an issue arose whether the SLA provisions overrode those of the GCC.

5.2.7 In its submission dated 12 April 2016, the NWPG indicated that the Company was served with a notice of intention to terminate the contract in terms of clause 13 of the SLA on 18 October 2014 and accordingly invited the Company to respond thereto.

5.2.8 The NWPG further indicated that no reasons for termination were provided to the Company as none were requested and there was no corresponding duty to provide any and further denying any arbitrary termination:

"The Department did not have any pressure from the service provider to provide reason which the department on the other hand was not obliged to provide same out of free will. The notice of intention to terminate was sufficiently addressing the service provider in the event there is anything he would like to address with the employer. The Department denies any allegation of arbitrary termination of the contract." [sic]

5.2.9 The Complainant on the other hand indicated that the Company requested reasons for termination and none were provided, however Complainant did not submit documentary evidence to confirm this.

5.2.10 An Alternative Dispute Resolution (ADR) session was held at the Public Protector office on 12 April 2016, whereby the matter was mediated between the NWPG and the Company. The NWPG was accordingly
afforded an opportunity to reconsider the matter herein and provide a final response which it did in a letter dated 20 April 2016.

5.2.11 In its submission the NWPG pointed to the inclusion of the SLA termination clause; which clause was invoked by the NWPG and formed the basis for termination herein, as a process which followed consultation and agreement between the parties for the inclusion of such clause.

5.2.12 The NWPG further stated that the SLA was a supplementary agreement, which over and above the terms and conditions of the GCC, provided for the desires of the parties; and that the SLA prevails over the GCC in the event of conflict, citing that “The GCC is but a tender contract bearing general conditions...” To this end, the NWPG made reference to the reading of the GCC, which provides that the parties may agree to special conditions of contract (SCC); which the NWPG held to be in the form of the SLA. The NWPG however held that there was no inconsistency between the GCC and the SLA.

5.2.13 The NWPG also stated that the termination of the contract was based on the ordinary law of contract; which entailed terms and conditions agreed to between the parties. Furthermore, that termination of a contract does not constitute administrative action. To this end, the NWPG stated as follows:

“It is further our submission that the said right to cancel was a simple right exercised by a party entitled to, and therefore we are advised that, it cannot be argued to be an administrative decision, in terms of Section 3 of PAJA, and we further submit that the said termination cannot also be interpreted to be an administrative decision in terms of Section 33 of the Constitution. There is no application of the said provision in this regard.

We are further advised that, there is a difference between administrative action in respect of procurement process, evaluation and awarding of a state tender contract and the conclusion of a contract, the former is said
to be an administrative action which can be taken on judicial review, and
the latter is not an administrative action and therefore cannot be taken on
judicial review"

5.2.14 The NWPG further indicated that it exercised its right to terminate the
contract expressed in clause 13 of the SLA and indicated that

"the department is at large to provoke the provisions of clause 13.1 order
to terminate the contract between the parties provided that it
complies with the notice period or affords the other party sufficient
reasonable notice".

5.2.15 The NWPG further indicated that it followed the procedure prescribed in the
SLA and invited comments or objections or reasons and when same were
not requested by the Company, the NWPG went ahead to terminate the
contract. The NWPG relied on decision in Trident Steel (Pty) Ltd v AH
Pilman and Sons 1984 (1) SA 433 (W) and Putco Ltd v TV & Radio
Guarantee (Pty) Ltd 1985 (4) SA 809 (A) where the court held that an
indefinite contract was terminable on reasonable notice.

5.2.16 Furthermore the NWPG indicated that the principle of fairness is applied
during the subsistence of the contract when the other party can raise
concern and in this instance the Company did not raise his concern about
the unfairness of the NWPG's decision to terminate the contract when he
was served with a notice of termination and only raised it as an afterthought
when he realised he was entangled in a mess. The NWPG further indicated
that the Company was given an extra 15 days of notice period and in their
view this satisfies the principle of fairness.

5.2.17 The final stance by the NWPG in respect of the issue herein was that if
either party to the contract was of the view that clause 13.1 of SLA was
improper, that same could only have been rectified during the existence of
the contract and that it could not revive the contract due to the lapsing of
time. Furthermore, the NWPG proposed to the Public Protector’s office that the issue herein be “laid to rest” and further indicated that the views of the Public Protector’s office regarding the inclusion of the clause would in future be “avoided”.

5.2.18 The issue whether or not the NWPG improperly terminated the contract with the Company will be determined by the application of law hereunder.

Applicable law

5.2.19 The Constitution of the Republic of South Africa, 1996 (the Constitution) is the highest hierarchical governing framework within which government procurement operates. The basic constitutional requirements for public procurement are founded in section 217 of the Constitution; which requires that organs of state contract for goods or services following a system which is fair, equitable, transparent and cost effective.

5.2.20 In addition to the above, the Constitution further expounds on the conduct expected of government under section 195, wherein it details the basic values and principles governing public administration.

5.2.21 Clause 27 of the GCC provide for the dispute process which need to be followed in the event of a dispute between the parties. Clause 27.1 of the GCC obliges the parties to make every effort to resolve amicably such dispute or difference by mutual consultation. If the dispute is not resolved after thirty (30) days, then either the party may give notice to commence with mediation.

5.2.22 Clause 27.3 specifically provides that should it not be possible to settle a dispute by mediation, it may be settled in a court of law.

Conclusion

5.2.23 My view is that once the procurement process was completed and the tender was awarded to the Company, the relationship between the parties
became a contractual relationship that in this case was governed by both the GCC and the SLA.

5.2.24 Since the relationship was governed by the GCC and the SLA, The Company should have objected to the termination and followed the dispute resolution processes in accordance with clause 27 of the GCC by attempting to resolve the dispute by mutual consultation. If the dispute remain unresolved, the Company had the option to invoke to give notice of mediation in terms of clause 27 of the GCC.

5.2.25 I have evidence that the Company was legally represented at the time and the Company's legal representatives should have advised the Company to follow the dispute resolution processes in the GCC. This would have afforded the Company an opportunity to invoke the provisions of clause 27.5 that would have ensured the continuity of the contract.

5.2.26 Furthermore the SLA being the last document that the parties signed was in my view entered into on the basis that the parties negotiated on equal footing as the tender was already awarded to the Company, and affords both parties the right to terminate the agreement with one months' written notice to the other party. I did not come across any evidence that points towards the Complainant being unduly coerced to the sign the SLA.

5.2.27 As regards the argument that the provisions of clause 13 of the SLA were inconsistent with the provisions of clause 23 of the GCC and that a service level agreement cannot override the provisions of the main contract, my view is that the two clauses are not contradictory. Clause 13 offers both parties a clear right to terminate the agreement for convenience, whereas clause 23 provides a further right of termination to the NWPG for specific events such as failure to perform in terms of the contract, engaging in fraudulent or corrupt practices, liquidation etc. These clauses are therefore not contradicting to one another but are rather complimentary and are meant to be read together.
5.2.28 It is therefore my considered view that the NWPG duly exercised its right to terminate the contract as afforded by clause 13 of the SLA.

5.3 **Regarding whether the North-West Provincial Government unduly delayed or failed to pay Company interest accrued due to late payment for services rendered:**

*Common cause issues*

5.3.1 It is common cause that in terms of the GCC, the NWPG was to make payment to the company either promptly but no later than thirty (30) days after submission of an invoice or claim from the company.

5.3.2 It is not disputed that the NWPG failed to make some of the payments within the prescribed 30 days period; which therefore resulted in late payments; and that where other claims are concerned, the Company failed to lodge complete required documentation to enable the ordering departments to effect payment due.

*Issues in dispute*

5.3.3 It is in dispute whether the NWPG is liable for payment of penalty interest for all payments made outside the prescribed thirty (30) days payment period.

5.3.4 The issue that the Public Protector had to determine was whether or not the NWPG was liable to pay the interest accrued due to late payments made and if so, whether the NWPG unduly delayed or failed to make such payment.

5.3.5 The Company alleged that since the agreement was reached to reconcile invoices made against payments made by the NWPG, to establish which payments were made outside 30 days and the interest payable in this regard in April 2016, it has not reverted regarding the issue of interest.
5.3.6 Subsequent to the ADR session held on 12 April 2016, the NWPG made submissions wherein it indicated that consensus had been reached between itself and the Company that all payments had been paid in full. Furthermore, an agreement was reached that the Company would identify all invoices paid outside thirty (30) days by the respective ordering departments.

5.3.7 The above process took place and the respective ordering departments responded thereto. To this end, the only ordering department that conceded to payments made outside the thirty (30) days period was the Department of Culture, Arts and Traditional Affairs; which concession was to the amount of R 503 020.60.

5.3.8 In conclusion, the NWPG indicated that the reconciliation of invoices received and payments made was ongoing and that feedback would be provided to the Public Protector’s Office once a resolution was reached. To date, the Public Protector’s Office did not receive further feedback.

5.3.9 The Public Protector observed the following as per the respective ordering department’s reconciliatory evidence:
<table>
<thead>
<tr>
<th>No</th>
<th>Ordering Department</th>
<th>NWPG's comments</th>
<th>Public Protector's comments:</th>
<th>Amount calculated as paid after 30 days from evaluation of evidence:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Local Government &amp; Human Settlements</td>
<td>Amount indicated as Nil and that the Department is disputing payment made outside 30 days</td>
<td>The Department has indicated instances where payment made within 30 days and where it raised disputes. Where the Department failed to dispute amount as being paid within 30 days, the Public Protector accepted that the Department failed to pay the amount within 30 days</td>
<td>R55 689.00</td>
</tr>
<tr>
<td>2</td>
<td>Culture, Arts &amp; Traditional Affairs</td>
<td>Amount indicated made outside 30 days as R 503 020.60</td>
<td>Amount noted.</td>
<td>R 503 020.60</td>
</tr>
<tr>
<td>3</td>
<td>Office of the Premier</td>
<td>Amount indicated as Nil and that the Office of the Premier is disputing payment outside 30 days.</td>
<td>Office of the Premier disputes late payment citing late lodgement of invoices. However, when the Public Protector considered the dates on which the Office of the Premier received the invoices (aside from the invoice dates), payments were still made way outside 30 days.</td>
<td>R1 380 243.00</td>
</tr>
<tr>
<td>4</td>
<td>Social Development</td>
<td>Amount indicated as Nil and that the Department is disputing payment outside 30 days.</td>
<td>The Department is not disputing payment outside 30 days but merely indicates to have identified 6 invoices paid after 30 days amounting to R 26 422.47</td>
<td>R 26 422.27</td>
</tr>
<tr>
<td>5</td>
<td>Tourism</td>
<td>Amount indicated as nil and that the Department is disputing payment outside 30 days.</td>
<td>The Department did not submit a reconciliation report. The Public Protector thus relied on the information provided by the Company; which information the NWPG has not refuted.</td>
<td>R 29 22.00</td>
</tr>
<tr>
<td>No</td>
<td>Ordering Department</td>
<td>NWPG's comments</td>
<td>Public Protector's comments:</td>
<td>Amount calculated as paid after 30 days from evaluation of evidence:</td>
</tr>
<tr>
<td>----</td>
<td>-------------------------------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------</td>
</tr>
<tr>
<td>6</td>
<td>Education, Sports &amp; Development</td>
<td>Amount indicated as Nil and that the Department is disputing payment outside 30 days.</td>
<td>The Department indicated that reconciliation of transactions took place with the company. The Department further cited on spreadsheet entailing payment details, that some of the late payments were as a result of merging of departments (&quot;delay due to the merging of the department&quot;), which amount totalled approximately R 3 091 098.</td>
<td>R 3 091 098.00</td>
</tr>
<tr>
<td>7</td>
<td>Health</td>
<td>Amount indicated as Nil and that the Department is disputing payment outside 30 days.</td>
<td>The Department did not dispute late payment but rather that payment verification was incomplete.</td>
<td>R 1 365 090.00</td>
</tr>
<tr>
<td>8</td>
<td>Community Safety &amp; Transport</td>
<td>Amount indicated as Nil and that the Department is disputing payment outside 30 days.</td>
<td>The Department alluded to the correctness of the payment dates list provided thereto by Company, which list reflects late payments. The Department further cited that the reason for late payments was due to the reconciliation of claims made by the Company by use of the lodge card. The Department stated that payments were made to the company per &quot;the best possible time based on challenges known to both parties&quot;.</td>
<td>R788 547.00</td>
</tr>
<tr>
<td>9</td>
<td>Economy &amp; Enterprise Development</td>
<td>Amount indicated as Nil and that the Department is disputing payment outside 30 days.</td>
<td>The Department did not submit a reconciliation report. The Public Protector thus relied on the information provided by the Company; which information the NWPG has not refuted.</td>
<td>R 291 940.00</td>
</tr>
<tr>
<td>No</td>
<td>Ordering Department</td>
<td>NWPG’s comments</td>
<td>Public Protector’s comments: Approximate amount calculated as paid after 30 days from evaluation of evidence:</td>
<td></td>
</tr>
<tr>
<td>----</td>
<td>---------------------</td>
<td>-----------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Public Works &amp; Roads</td>
<td>Amount indicated as Nil and that the Department is disputing payment outside 30 days.</td>
<td>The Department did not dispute late payment but rather that amount was being verified by auditors. The Public Protector also noted a vast difference on the dates invoices received as provided by the Company and as cited by the Department. The Public Protector is unable to evaluate the amounts herein outside of completion of reconciliation/verification.</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Rural Development, Environmental &amp; Agricultural Development</td>
<td>Amount indicated as Nil and that the Department is disputing payment outside 30 days.</td>
<td>The Department did not dispute late payment but indicated that the Company had provided incorrect information, citing wrong invoice numbers as an example. The Public Protector also noted that the Department highlighted only two payments; which payments the Public Protector notes to have been paid within 30 days. The rest of the claims which are not highlighted indicate payments made after 30 days. R 774 394.00</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Finance</td>
<td>Amount indicated as Nil and that Finance is disputing payment outside 30 days.</td>
<td>Finance indicated that invoices for the month of June and July 2014 were paid within 30 days. Finance further indicated that the company swiped an amount of R991 202.00 during the month of July 2014; and that the Department had to await the reconciliation of invoices submitted, which reconciliation took place in December 2014 and an outstanding amount of R162 955.06 was paid within 30 days. The Department further stated that invoices for the month of January to March 2015 were also paid within 30 days. Nil</td>
<td></td>
</tr>
</tbody>
</table>
5.3.10 The reconciliation reports point to most payments being made way after the thirty (30) days period by the respective Departments, with some payments being made up to one year and later from date of receipt of invoice. The Departments that effected payment as per the aforementioned are; Culture, Arts and Traditional Affairs; Office of the Premier; Education and Sports Development; Health; and Rural, Environmental and Agricultural Development. The Department with the highest amount paid after thirty (30) days is Education and Sports Development.

5.3.11 In response to the s7 (9) notice, the NWPG indicated that the departments are disputing all late payments made outside the 30 days period, The NWPG further denied that it contributed to the undue delay to pay and indicated the delay was caused by the Company’s failure to submit correct invoices and put the onus on the Company to prove the undue delay.

5.3.12 The issue whether or not the NWPG unduly delayed to pay the Company interest accrued due to late payment for services rendered will be determined by the application of law hereunder.

Application of the relevant legal framework

5.3.13 Section 195 of the Constitution requires public administration to promote and maintain a high standard of professional ethics and services to be provided impartially, fairly, equitably and without bias. It further requires public administration to be accountable and transparent.

5.3.14 The Public Finance Management Act, Act 1 of 1999 (PFMA) sets the standard for financial management, including financial controls; and has great implications in the regulation aspect of state procurement. Of key consideration are provisions relating to fiscal discipline or prudence and duties imposed on accounting officers and authorities.
5.3.15 Section 38 of the PFMA provides that the accounting officer of a state institution must settle all contractual obligations and pay all money owing within the prescribed or agreed period. The prescribed period of payment is regulated by Treasury Regulation 8.2.3 that provides that all payments due must be settled within 30 days from receipt of an invoice.

5.3.16 Further section 1 of the Prescribed Rate of Interest Rate Act, 1975 (Prescribed Rate of Interest Rate Act) prescribed a debt bears interest at a rate of 15,5% per annum, until 18 July 2014. From 04 March 2016 and under GG 397895, the prescribed rate of interest was determined at a rate of 10, 25% per annum and effective of 01 March 2016.

Conclusion

5.3.17 The evidence above indicates that some of the invoices were paid outside the 30 day period prescribed by section 38 of PFMA and Treasury Regulation 8.2.3. Where a state institution fails to meet its financial obligation timeously; and the payment of interest thereupon is neither indicated nor exempted, then same shall apply as per the Prescribed Rate of Interest Act; where the claim concerned is for a liquidated amount.

5.3.18 Even though it was agreed at the meeting held with the Deputy Public Protector on 12 April 2016 that the NWPG and the Company will identify all invoices that were paid outside the thirty (30) days and individual departments engaged with a view to agree on whether interest is payable. The parties identified invoices paid outside thirty (30) days but did not agree on whether interest is payable. The NWPG indicated that the various departments indicated that the Company did not submit all the supporting documents, whilst the Complainant maintained that all the supporting documents were submitted on behalf of the Company.
5.3.19 None of the parties provided me with evidence that confirmed the date on which invoices and all supporting documents were submitted to the NWPG. As a result of the above, I am therefore unable to assess and determine the amount of interest due and payable to the Company.

5.3.20 Based on the fact that the NWPG unduly delayed to pay the Company for services rendered, there is a *prima facie* evidence that indeed there may be some interest which is due and payable to the Company on those invoices which were not paid on due date.

5.4 Regarding whether the conduct of the North-West Provincial Government improperly prejudiced the Company and if so, what it would take to place Company as close as possible to where he could have been had the North-West Provincial Government acted properly:

5.4.1 The Complainant alleged that the Company was improperly prejudiced by the undue delay to pay the company, the NWPG started paying the company after the complaint was lodged with the Public Protector. The alleged failure by the NWPG to timeously pay the company allegedly resulted in a disastrous *domino* effect, which has placed the company and Complainant in a dire financial position. This position was perpetuated further in that the Company was unable to pay its respective service providers timeously, who instituted legal proceedings against the Company; and had to defend same and thus incur further legal costs.

5.4.2 The Complainant alleged that in December 2014, the company incurred a debt with the South African Revenue Service (SARS) by way of Third Party appointment in favour of Orion Hotel & Resorts (Pty) Ltd, in the amount of **R 4 621 348.18**; over which period the company was contracted to the NWPG.

5.4.3 The Complainant also submitted evidence pointing to high legal costs incurred in pursuing outstanding payments due to the company and as a result of cancellation
of the contract by the NWPG. The statements from the relevant attorneys reflect fees owing by the Company for services rendered for the period from 26 January 2015 to 27 February 2015, in the total amount of R 248 734.89.

5.4.4 In addition, Complainant alleged that various institutions took legal action against the company and legal costs were incurred defending the various cases. The Complainant submitted the copies of invoice from PJD Attorneys for the total amount of R118 434.20 and letters dated 27 November 2015 and 11 April 2016 outlining the various cases initiated against the Company and the Complainant. A brief summary of the cases is provided hereunder:

5.4.4.1 **Ndalo Hotel & Conferencing v RR Travel (Pty) Ltd** ("The Pty") the letter dated 11 April 2016 indicates that Ndalo has withdrawn its action and there is a possibility, however, that it may launch fresh action in Mafikeng or Ermelo. The Complainant also submitted a taxed bill of cost of Du Toit Smuts & M Phosa in the amount of R6926.49.

5.4.4.2 **Orion Hotels & Resorts (Pty) Ltd v RR Travel JV Tshepi Investments** ("RRTI") and others. The letter indicates that Orion has made a settlement proposal that RRTI should consent to judgment to the R3 770 527 which was covered by the SARS agency appointment and that the balance of R853 536 be referred to trial. The Complainant also provided a copy of the draft court order requesting the court to grant judgement against the company in the amount of R 6 658 650.00 representing the capital amount and interest thereon. The draft court order dated **05 December 2016** is not signed and does not have a court stamp so the Public Protector cannot ascertain if the order was granted.

The Complainant also forwarded an email dated 03 October 2016 from his attorneys PJD Incorporated in terms of which the attorneys inform him that the Orion matter has been set down for the 05th and 06th December 2016. The attorney once again advises the Company to avoid paying the creditors' by considering possible assets shedding such as transferring all immovable assets to other companies owned by
family members. It should be noted that the above court order was obtained in October 2016 after the Complainant had confirmed in April 2016 after the NWPG had paid the outstanding amount in full.

5.4.4.3 Kedar Country Retreat v RRT and Tshepi Investments CC summons claiming an amount R191 820.42 dated 13 November 2014.

5.4.4.4 Recreation Africa & Kedar Country Retreat v RRT and Tshepi Investments CC summons claiming an R402 540.50 issued on 13 November 2014.

5.4.4.5 RRTI v S Mashiya the letter indicated that Mr Mashiya undertook to pay the debt in instalments. The evidence indicates that Mashiya is a creditor of the company.

5.4.4.6 South African Airways v RRT, the letter do not provide details on this matter.

5.4.4.7 Graceland v RR Travel (Pty) Ltd, the letter indicates that the matter is dormant

5.4.4.8 Emperor's Palace v RR Travel (Pty) Ltd the letter indicates that the matter has had no developments since a Notice of intention to defend has been filed.

5.4.4.9 It is noted that in conclusion both the 2015 and 2016 letter from PJD Attorneys refers to what is termed General Asset shedding and requests the Complainant to "provide detailed financial statements of the RRTI, the Pty, and the CC in order to formulate a plan for the asset-shedding to take place in a safe, orderly, and unsuspicious manner. The Attorneys also indicate that they require information regarding whether any assets may be shed to your spouses (if you are married out of community of property) or trustworthy friends in order to set up a structure that would impoverish the businesses but not the individuals behind them".
5.4.4.10 Kleinhans and Others v RR Travel (PTY) LTD and others is an urgent application lodged on 11 November 2014 by the applicants who requested the court to interdict the company and the Complainant from making any withdrawals from the company's bank accounts pending the institution and finalisation claim of the amount of R7 773 440.00 owing to the applicants and broken down as follows:

a) Bridging finance provided to the Company in the amount R2 998 000.00 that should have been once off when capital was received, however the Complainant was not honoring the agreement and was paying small amounts as and when he wanted and the company still owed R1 573 000.00 of the bridging finance;

b) R6 100 000.00 that was owed to the 2\textsuperscript{nd} and 3\textsuperscript{rd} applicants who are Rustenburg Kloof and Thulane Trust t/a Omaramba resort;

5.4.4.11 The court order was granted on 11 November 2014 freezing the company accounts Peermont Global (Southern Highveld) v RR Travel (Proprietary) Limited, the Complainant only submitted a copy of the Defendant's plea that disputes that it is indebted to Peermont Global. The amount claimed could not be ascertained.

5.4.4.12 In response to the s7 (9) notice the NWPG indicated that they are not aware of any legal action that was initiated against the Complainant. The only legal proceedings that the NWPG is aware of is a letter of demand and a one or two letters issued by Norton Rose Inc.

Applicable legal framework

5.4.5. Section 182(1) (c) of the Constitution gives the Public Protector the power to take appropriate remedial action. The determination of appropriateness is a factual enquiry informed by the impact of the maladministration on the Complainant and the circumstances under which the maladministration (if any) occurred.
5.4.6. As in the adjudication of delictual claims by the courts, the conduct of the Complainant must also be considered and if it can be established that the Complainant played a role in inviting misfortune or failed to mitigate her/his loss, some responsibility must be apportioned to him/her as well. We refer to this as the "Clean hands principle" in terms of which appropriate remedial action must come with clean hands.

Conclusion

5.4.7. It has been confirmed that there was undue delay to pay the Company for services rendered, however it is important to determine if the undue delay to pay had the domino effect that led to the Company incurring legal costs. The evidence presented by the Complainant is copies of invoices and correspondence between the Company and its attorneys and does not provide full details that enables me to make a determination on whether the invoices and court papers can be related to the conduct of the NWPG.

5.4.8. In the absence of this evidence I cannot make a determination on whether the alleged legal costs were indeed incurred as a result of the undue delay to pay the Company. What is concerning is that the Company's attorneys has in the letters requested the Company to submit financial information in order to formulate an asset shedding plan.

6. FINDINGS

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

6.1 Regarding whether the North West Provincial Government unduly delayed to pay the Company for services rendered
6.1.1. The allegation that the NWPG unduly delayed to pay the Company for services rendered is substantiated.

6.1.2. Upon receipt of the above-mentioned compliant, I determined, in accordance with section 7(1)(b)(i) of the Public Protector Act, to resolve the dispute through mediation, conciliation or negotiation, in terms of 6(4)(b)(i) of the Public Protector Act;

6.1.3. This conduct for undue delay to pay the Company for services rendered was successfully resolved by mediation in terms of section 6(4)(b)(i) of the Public Protector Act and the Company was paid the full outstanding amount of R10 997 982.74.

6.2 Regarding whether the North-West Provincial Government improperly terminated the tender awarded to the Company

6.2.1 The allegation herein is unsubstantiated.

6.2.2 The NWPG duly exercised its right to terminate the contract as afforded by clause 13 of the SLA. Furthermore the Company was provided with the 30 day written notice period as required by clause 13 of the SLA. Clause 27 of the GCC provide for the dispute process which need to be followed and includes attempting to resolve the dispute by mutual consultation and mediation if the dispute is not resolved after 30 days. The Company should have objected to the termination and followed the dispute resolution processes in accordance with clause 27 of the General Condition of Contract (GCC).

6.2.3 The dispute resolution processes would have invoked the provisions of Clause 27.5 of the GCC that provides that notwithstanding mediation and/or court proceedings the parties shall continue to perform their respective obligations under the contract unless they otherwise agree.
6.2.4 The NWPG’s conduct in this regard does not amount to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act 6(4)(a)(i); abuse of power as envisage in section 6(4)(a)(ii) of the Public Protector Act.

6.3 Regarding whether the North-West Provincial Government unduly delayed or failed to pay Company interest accrued due to late payment for services rendered:

6.3.1 Based on my finding that NWPG unduly delayed to pay the Company for services rendered, there is *prima facie* evidence that indeed there may be some interest which is due and payable to the Company on those invoices which were not paid on due date.

6.3.2 None of the parties provided me with evidence that confirmed the date on which invoices and all supporting documents were submitted to the NWPG. As a result of the above, I am therefore unable to assess and determine the amount of interest due and payable to the Company.

6.4 Regarding whether the North-West Provincial Government improperly prejudiced the Company and if so, what it would take to place Company as close as possible to where he could have been had the North-West Provincial Government acted properly:

6.4.1 The allegation that the NWPG improperly prejudiced the Company due to the undue delay to pay for services rendered is substantiated.

6.4.2 The Company suffered prejudice as a result of undue delay in payment of its invoices, which resulted in the Company not being able to pay its service providers.

6.4.3 However, the evidence presented by the Complainant to support the financial prejudice by the Company in the form of invoices and correspondence between
the Complainant and his attorneys does not provide full details that enable me to make a determination on whether the invoices and court papers can be related to the improper conduct of the NWPG. In the absence of this evidence, I cannot make a determination on whether the alleged legal costs were indeed incurred as a result of the undue delay to pay the Company.

7. REMEDIAL ACTION

In the light of the above, the appropriate remedial actions I am taking in terms of section 182(1) (c) of the Constitution are the following:

7.1 The Director General of the NWPG must within 30 days from the date of this report apologise to the Complainant for the undue delay to pay him for services rendered;

7.2 The Director General of the NWPG must, within thirty (30) days of issuing this report, appoint an Audit company to audit all the invoices and supporting documents to independently determine the interest payable to the Company;

7.3 The Director General of the NWPG must submit the audit report to the Public Protector within thirty (30) days of receiving the audit report;

7.4 The Director General of the NWPG must pay the Company interest on all invoices that has been determined by the Audit in (aa) above as not paid within thirty (30) days of receipt of the invoice. Such payment must be made to the Company within thirty (30) days of receipt of the audit report at the prescribed rate of interest applicable on the date on which payment was due.

8. MONITORING AND IMPLEMENTATION OF THE REMEDIAL ACTIONS

8.1 The Director General of the NWPG must, within 30 days of the date on which this report is issued, submit an implementation plan with timelines to the Public
Protector indicating how the remedial action referred to in paragraph 7.1 above will be implemented.

8.2 Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied with within the stated period.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 04/09/20/18