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

PUBLIC PROTECTOR
SOUTH AFRICA

REPORT No. 63 of 2019/20
ISBN: 978-1-928507-24-6

“Allegations of undue failure and undue delay in the matter between Mr
Moletlanyi Moses Mokwena and the North West Provincial Government”

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF REFUSAL AND/OR
UNDUE DELAY BY THE NORTH WEST PROVINCIAL GOVERNMENT TO PAY
FOR SERVICES RENDERED BY MR MOLETLANYI MOSES MOKWENA
# TABLE OF CONTENTS

Executive Summary 3

1. INTRODUCTION 9

2. THE COMPLAINT 10

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR 11

4. THE INVESTIGATION 15

5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS 20

6. FINDINGS 40

7. REMEDIAL ACTION 42

8. MONITORING 42
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 section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1) (c) of the Constitution following an investigation into the alleged refusal and/or undue delay by the North West Provincial Government (the NWPG) to pay for services allegedly rendered between April 2010 and August 2010 by Mr Moletlanyi Mokwena (the Complainant).

(iii) The Complainant alleged that between April and August 2010 he rendered services on three different occasions, to the NWPG to the total value of R1 225 109.70. The services rendered involved the provision of Direction and advertising Blimps, Mobile Advertising Billboards, Removal Banners and Exhibition Boards.

(iv) The alleged services were rendered on 27 April 2010 during the Freedom Day Celebration held at Plet Plessis at a cost of R 319 999.60; 9 May 2010 at the Mmabatho Stadium during the ZCC Mass Prayer at a cost of R 626 838.87 and on 9 August 2010 during the Woman’s Day Celebration held at Maquassi Hills at a cost of R 278 271.23. The Complainant submitted that he has, from 2010 until 2018, been engaging officials of the NWPG, including the former Premier, Ms Thandi Modise, as well as the current Premier, Professor Jacob Mokgoro, for resolution on this matter to no avail. He had also approached the North-West High Court, The Public Service Commission, The Presidency, SCOPA, even the North-West Provincial Commissioner of Police in an attempt to find assistance and still the NWPG remain obdurate to effect payment.

(v) In the main, the Complainant submitted that the North West Provincial Government has unduly failed to timeously effect payment of R1 225 109.70 for the services he rendered between April 2010 and August 2010.

(vi) The NWPG disputed that it owed the Complainant any payment.
(vii) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the NWPG unduly failed to pay Mr Moletlanyi Moses Mokwena an amount of R1 225 109.70 for services rendered between April 2010 and August 2010; and

(b) Whether the conduct of the NWPG caused the Complainant to suffer any improper prejudice.

(viii) The investigation process was conducted through meetings and interviews with the Complainant and relevant officials of the NWPG as well as perusal of all relevant documents and analysis and application of relevant laws.

(ix) Key laws taken into account to determine if there had been maladministration by the NWPG and prejudice to the Complainants were principally those imposing administrative standards that should have been complied with by the NWPG or its officials when assessing the Complainants’ claim. Those are the following:

(a) The Constitution of the Republic of South Africa, 1996 (the Constitution). Section 195(1) of the Constitution imposes principles and standards that the state must adhere to when dispensing services to citizens and were relied on to affirm the obligations of the NWPG towards the Complainant.

(b) Section 33(1) of the Constitution which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) of the Constitution provides for the enactment of national legislation to give effect to the rights provided for in section 33. That legislation is the Promotion of Administrative Justice Act, 2000 (PAJA).

(c) Section 237 of the Constitution which provides that: “All constitutional obligations must be performed diligently and without delay” was also relied upon to determine whether the NWPG conducted itself as required by law.
(d) Section 3 of PAJA which provides that administrative action which materially and adversely affects the rights of any person must be procedurally fair. In terms of section 3 of PAJA, the NWPG was required to inform the Complainant of its decision not to effect payment of his claims, to give him reasonable opportunity to make representations regarding its decision and to provide him adequate notice of any right of review or internal appeal in that regard where applicable.

(e) The case law considered, included *Dirk Hermanus Crous v The Blue Crane Route Municipality and the Cape Joint Retirement Fund*¹, *Sokhela & Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & Others*²; *Khumalo and Another v MEC for Education KwaZulu-Natal*³, *Njogi v Member of the Executive Council, Department of Welfare, Eastern Cape*⁴ where the Constitutional Court reiterated the submissions made in *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another*⁵ by the Supreme Court of Appeal

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

(a) Whether the NWPG unduly failed to pay Mr Moletlanyi Moses Mokwena an amount of R1 225 109.70 for services rendered between April 2010 and August 2010.

(aa) The allegation that the NWPG failed to pay Mr Moletlanyi Mokwena for services rendered between April 2010 and August 2010 is partially substantiated.

¹ Case number 1399/2008
² 2010 (5) SA 574 (KZP)
³ CCT 10/13 [2013] ZACC 49
⁴ (CCT 37/07) [2008] ZACC 4; 2008 (6) BCLR 571 (CC); 2008 (4) SA 237 (CC) (28 March 2008) [at para 20]
⁵ 2001 (2) SA 609 (E); 2000 (12) BCLR 1322 (E)
(bb) The amount that the NWPG unduly failed to pay is not R1 225 109.70 but rather R905 110.10. This finding is based on the fact that the allegation regarding non-payment for services rendered on 27 April 2010, during the Freedom Day celebration held at Piet Plessis, to the value of R 319 999.60 is unfounded. The amount of R 905 110.10 comprises of R 626 838.87 for the services rendered during the ZCC Mass Prayer event held on 9 May 2010 and R 278 271.23 for the Women’s Day celebration at Maquassi Hills held on 9 August 2010.

(cc) The NWPG did not take resolute action to deal with the Complainant’s enquiry and to provide him with proper and fair treatment. The NWPG did not adhere to the constitutional and statutory duty to observe the provisions of just administrative action, as encapsulated in section 33 of the Constitution and section 3 of the PAJA, to provide the Complainant with proper and fair procedure once it had made a decision not to pay him.

(dd) The Complainant’s claim has never been properly assessed by the NWPG. The lack of interest shown by the NWPG to consider and respond to the complaint raised by the Complainant in respect of non-payment for services rendered, in a meaningful way, reflect a total lack of accountability as envisaged in section 195(1)(f) of the Constitution.

(ee) The NWPG unduly failed to pay the Complainant’s claim for services rendered. The conduct of the NWPG caused the Complainant to suffer improper prejudice. The NWPG’s action of refusing to effect payment for services rendered by the Complainant, is in violation of section 195(1) of the Constitution and constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
(ff) The NWPG failed to perform its Constitutional obligations as provided for in sections 195 and 33 of the Constitution diligently and without delay in contravention of section 237 of the Constitution. The failure by the NWPG to timeously deal with this matter has resulted in some of the important documents and evidence being mislaid due to lapse of time.

(b) **Whether the conduct of the NWPG in the circumstances caused the Complainant to suffer any improper prejudice.**

(aa) The allegation that the actions of the NWPG in the circumstances caused the Complainant to suffer prejudice is substantiated.

(bb) The Complainant was prejudiced by the conduct of the NWPG, not only by failing to pay him for services rendered, but also denying him the opportunity to sustain his business to carry over any benefits from the services rendered to future endeavours that could have assisted in his growth as a developing SMME and generate income from this mode of business.

(cc) The conduct of the NWPG, in the circumstances, caused the Complainant to suffer prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act.

(xi) In the light of the above findings, I am taking the following remedial action as contemplated in section 182(1)(c) of the Constitution:

(a) The Administrator should write a letter of apology to the Complainant for the prejudice caused to him and his family within thirty (30) days from the date of issuing of this report;

(b) The Administrator must, within sixty (60) days from the date of issuing of this report, ensure that the Complainant receive payment of an amount of
R 905 110.10 with interest calculated in terms of the Prescribed Rate Interest Act 55 of 1976 from the dates of the last invoices submitted by the Complainant.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF REFUSAL AND/OR UNDUE DELAY BY THE NORTH WEST PROVINCIAL GOVERNMENT TO PAY FOR SERVICES RENDERED BY MR MOLETANYI MOSES MOKEWENA

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, 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8 of the Public Protector Act to the previous and current Premier of the North West Province and officials to inform them about the outcome of my investigation and implementation of the remedial action:

1.2.1 The Premier of the North West Provincial Government: Professor Tebogo Job Mokgoro;

1.2.2 The Former Premier of the North West Provincial Government: Honourable Thandi Modise;

1.2.3 The Director-General of the North West Province; and

1.2.4 The Administrator of the North West Provincial Government: Mr Sibusiso Mpanza;

1.3 A copy of the report is also submitted to Mr Moletanyi Moses Mokwen (the Complainant) to inform him of the outcome of the investigation.

1.4 The report deals with the outcomes of an investigation into the alleged refusal and/or undue delay by the North West Provincial Government (the NWPG) to
pay for services rendered between April 2010 and August 2010 by Mr Moletlanyi Mokwena (the Complainant).

2. THE COMPLAINT

2.1 The complaint was lodged on 12 November 2018 by Mr Moletlanyi Mokwena, alleging refusal and/or undue delay by the North West Provincial Government to effect payment of R1 225 109.70 for services rendered by his companies between April 2010 and August 2010. The Complainant alleged that:

2.1.1 During the year 2010, he rendered services on three different occasions, to the NWPG to the total value of R1 225 109.70. The claims comprise of the following:

<table>
<thead>
<tr>
<th>DATE</th>
<th>EVENT</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>27 April 2010</td>
<td>Freedom Day Celebration at Piet Plessis</td>
<td>R 319 999.60</td>
</tr>
<tr>
<td>9 May 2010</td>
<td>ZCC Mass Prayer</td>
<td>R 626 838.87</td>
</tr>
<tr>
<td>9 August 2010</td>
<td>Women’s Day Celebration at Maquassi Hills</td>
<td>R 278 271.23</td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>R1 225 109.70</td>
</tr>
</tbody>
</table>

2.1.2 The services rendered involved the provision of Direction and advertising Blimps, Mobile Advertising Billboards, Removal Banners and Exhibition Boards;

2.1.3 Regarding the claim associated with the Women’s Day Celebration held at Maquassi Hills, the Complainant submitted that he was paid an amount of R189 000.00, which was claimed for the Exhibition Boards provided by his Company. However, an additional amount of R278 271.23 was quoted at the late request of the NWPG for the provision of Mobile Advertising Billboards (Trailers) as well as the provision of sponsorship in the form of T-Shirts and Caps used on the day of the event;
2.1.4 The Complainant submitted that he has, from 2010 until 2018, been engaging officials of the NWPG including the former Premier, the Honourable Thandi Modise, as well as the current Premier, Professor Job Mokgoro, for resolution on this matter to no avail;

2.1.5 He had also approached the North West High Court, The Public Service Commission, The Presidency, SCOPA, even the North West Provincial Commissioner of Police in an attempt to find assistance and still the NWPG remain obdurate to effect payment.

2.1.6 In the main, the Complainant submitted that the North West Provincial Government has unduly failed to timeously effect payment of R1 225 109.70 for the services he rendered between April 2010 and August 2010.

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) of the Constitution states that the Public Protector has additional powers and functions prescribed by national legislation.
3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5. 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, 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.”

3.6. 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:

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

3.6.2 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. (paragraph 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour 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 (paragraph 68);

3.6.4 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. (paragraph 69);

3.6.5 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. (paragraph 70);

3.6.6 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. (paragraph 71);

3.6.7 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; (paragraph 71(a);

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

3.6.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropiety, unlawful enrichment or corruption, in a particular case (paragraph 71(e));
3.6.10 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:

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

3.6.10.2 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);

3.6.10.3 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 (paragraphs 100 and 101 of the judgment):

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

3.6.10.4 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);

3.6.10.5 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 judgment);

3.6.10.6 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector form taking remedial action. The Public
Protector’s observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108 of the Judgment); and

3.6.10.7 *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 NWPG is an organ of state and its conduct and the conduct of its officials constitute conduct in state affairs, as a result this matter falls within the ambit of the Public Protector’s mandate.

3.8 The power and jurisdiction of the Public Protector to investigate and take appropriate remedial action were not disputed by any of the parties.

3.9 Section 6(9) of the Public Protector Act grants me discretionary powers to accept complaints which are lodged more than two years after the occurrence of the incident. Some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation.

3.10 Admittedly, in terms of section 6(9) of the Public Protector Act, I am barred from entertaining complaints reported after two years of the date of an incident unless special circumstances exist. However, the mere fact that the incident occurred more than two years before being reported to my office does not, in itself, bar this me from investigating. Instead, it is mainly the interests of justice that dictate whether I should investigate the matter or not. It is evident that I have to identify special circumstances using my discretion should I decide to entertain such a complaint.
3.11 In terms of the PFMA, accounting officers are required to settle all contractual obligations and effect payment within thirty (30) days. In this case, I submit that there is a huge public interest in ensuring that government supports small businesses and complies with the prescribed rules.

4. THE INVESTIGATION

4.1 Methodology

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

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

4.1.3 The process involved sourcing and analysing documents, correspondence, interviews and examination of regulatory prescripts, including constitutional provisions, legislation, regulations, relevant court decisions and applicable previous Public Protector's decisions or Touchstones.

4.1.4 Mention needs be made that before I conclude any investigation I am required by the Public Protector Act, specifically section 7(9)(a) read with rule 24(2)(d) of the Rules Relating to the Investigations of the Public Protector and matters Incidental thereto, 2018, Government Gazette No.41903 of 14 September 2018, to afford any person being implicated in the matter being investigated, an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

4.1.5 On 2 July 2019, I issued notices in terms of section 7(9)(a) of the Public Protector Act to the Administrator of the NWPG, Mr Sibusiso Mpanza, The former Premier of the NWPG, Ms Thandi Modise and the Premier of the NWPG, Professor Job Mokgoro, to respond to the notices within ten (10)
working days to enable me to conclude my investigation. No responses were received from any of these parties.

4.1.6 It is also important to make mention of the fact that on 9 July 2019, I issued reminders to the above officials indicating that the due date for responses was 16 July 2019. No responses were received. Wherefore I resolved to conclude my investigation based on the information at my disposal.

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

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

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the NWPG to prevent improper conduct and/or maladministration as well as prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of the improprity and/or maladministration. Where the Complainants have suffered prejudice the idea is to place them as
close as possible to where they would have been had the state institution complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the NWPG unduly failed to pay Mr Moletlanyi Moses Mokwena an amount of R1 225 109.70 for services rendered between April 2010 and August 2010, and

4.3.2 Whether the conduct of the NWPG in the circumstances caused the Complainant to suffer any improper prejudice.

4.4 **Key sources of information**

4.4.1 **Documents:**

4.4.1.1 A statement giving full particulars of the complaint and chronology of events, dated 13 October 2018;

4.4.1.2 Quotation for services requested at Piet Plessis during the Freedom Day Celebration, dated 21 April 2010;

4.4.1.3 Invoice No. 002 for services rendered at Piet Plessis during the Freedom Day Celebration, dated 30 April 2010;

4.4.1.4 Requisition Order no. 269/06/10, dated 11 June 2019;

4.4.1.5 BAS Report on payment effected;

4.4.1.6 Unsigned letter allegedly issued by the former Chief Finance Officer, Mr Phillip Gumede addressed to The Manager of FNB, dated 24 May 2010;

4.4.1.7 Invoice no. 5, dated 9 December 2010, bearing an amount of R626 838.87;

4.4.1.8 Quotation no. 6 for services requested at Maquassi Hills during the Women’s Day Celebrations, dated 3 August 2010;

4.4.1.9 Invoice No. 5 for services requested at Maquassi Hills during the Women’s Day Celebrations dated 13 January 2011, for an amount of R189 000.00;
4.4.1.10  BAS report indicating payment of R189 000.00;
4.4.1.11  An invoice of R278 271.23, for services requested at Maquassi Hills during the Women's Day Celebrations, dated 9 December 2010;
4.4.1.12  An internal Memorandum dated 3 August 2010 with the subject "Publicity – 2010 Women’s Day, 9th August", from the then Director: Media Relations, Mr Ebenezer Cobblah, addressed to the Head: Provincial Communication, Mr Khotso Khumalo for the approval of the then CEO, Mr Philip Gumede;
4.4.1.13  An internal memorandum dated 6 August 2010 from the Communication Chief Directorate addressed to the Procurement section of the NWPG;
4.4.1.14  A letter, dated 21 December 2010, from the then Acting Deputy Director-General: Corporate Support, Adv. OY Dibetso-Bodibe;
4.4.1.15  A letter addressed to the then Premier, Ms Thandi Modise, dated 22 November 2012;
4.4.1.16  A letter to the Public Protector, dated 22 November 2012;
4.4.1.17  A letter to the Public Service Commission, dated 5 August 2018;
4.4.1.18  A referral letter by the Public Service Commission to the Premier, Prof. TL Mokgoro, dated 10 August 2018;
4.4.1.19  A letter, dated 11 March 2011, addressed to the then North-West Provincial Commissioner of Police, Lieutenant General MNZ Mbombo;
4.4.1.20  A letter, dated 22 January 2017, written to the then Regional Head of Special Investigating Unit (SIU), Mr Mike Koya;
4.4.1.21  Letters dated 25 July 2018 and 24 August 2018 addressed to the officials of the NWPG;
4.4.1.22  Notice in terms of Rule 35(14) of the High Court Rules by the NWPG’s Attorney (the State Attorney)

4.4.2  Correspondence sent and received

4.4.2.1  My enquiry letter to the Administrator, Mr Sibusiso Mpanza, dated 19 December 2018;
4.4.2.2  A response letter from Mr Sibusiso Mpanza, dated 23 January 2019;
4.4.2.3 A letter, dated 27 March 2019, confirming discussions and resolutions during the meeting held between my investigation team and Mr Sibusiso Mpanza on 26 March 2019;

4.4.2.4 Notices to the Former Premier, Ms Thandi Modise; the Administrator: NWPG, Mr Sibusiso Mpanza; The Premier: NWPG, Prof. Job Mokgoro; issued in terms of section 7(9)(a) of the Public Protector Act; dated 02 July 2019;

4.4.3 Meetings and Interviews

4.4.3.1 A meeting held with the Complainant on 8 February 2019; and
4.4.3.2 A meeting held between my investigation team and Mr Sibusiso Mpanza on 26 March 2019.

4.4.4 Legal and Regulatory Framework

4.4.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
4.4.4.2 The Public Protector Act, 1994; and
4.4.4.3 The Promotion of Administrative Justice Act, 2000 (the PAJA),

4.4.5 Case Law

4.4.5.1 Dirk Hermanus Crous v The Blue Crane Route NWPG and the Cape Joint Retirement Fund Case number 1399/2008;
4.4.5.2 Sokhela & Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & Others 2010 (5) SA 574 (KZP);
4.4.5.3 Khumalo and Another v MEC for Education Kwazulu Natal CCT 10/13 [2013] ZACC 49;
4.4.5.4 Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape(CCT 37/07) [2008] ZACC 4; 2008 (6) BCLR 571 (CC); 2008 (4) SA 237 (CC) (28 March 2008);
4.4.5.5 Nguuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another 2001 (2) SA 609 (E); 2000 (12) BCLR 1322 (E).
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 Whether the NWPG unduly failed to pay Mr Moletlanyi Moses Mokwena an amount of R1 225 109.70 for services rendered between April 2010 and August 2010

Common cause facts

5.1.1 It is common cause that the Complainant is known by the NWPG and rendered services which involved the provision of Direction and advertising Blimps, Mobile Advertising Billboards, Removal Banners and Exhibition Boards between the years 2009 and 2010.

5.1.2 Significantly, during April 2010, the Complainant rendered services to the NWPG during the Freedom Day Celebration held at Piet Plessis and claimed an amount of R319 999.60.

5.1.3 During 9 August 2010, the Complainant rendered services to the NWPG during the Women’s Day Celebration at Maquassi Hills. An amount of R189 000.00 was paid by the NWPG having received a quotation and invoice for the same amount from the Complainant.

5.1.4 The Complainant approached the NWPG alleging non-payment of an amount of R1 225 109.70 for services rendered between April 2010 and August 2010 constituted as follows:

<table>
<thead>
<tr>
<th>DATE</th>
<th>EVENT</th>
<th>AMOUNT</th>
</tr>
</thead>
<tbody>
<tr>
<td>27 April 2010</td>
<td>Freedom Day Celebration at Piet Plessis</td>
<td>R 319 999.60</td>
</tr>
<tr>
<td>9 May 2010</td>
<td>ZCC Mass Prayer</td>
<td>R 626 838.87</td>
</tr>
</tbody>
</table>
9 August 2010 Women’s Day Celebration at Maquassi Hills R 278 271.23

TOTAL R1 225 109.70

Issues in dispute

5.1.5 In his submission to my investigation team, per letter dated 23 January 2019, responding to my enquiry, per letter dated 19 December 2018, on allegations of non-payment for services rendered by the Complainant, the Administrator in the Office of the Premier, Mr Sibusiso Mpanza indicated that the NWPG has been dealing with the enquiry for the non-payment for the services allegedly provided by the Complainant.

5.1.6 The response tendered by the Administrator, in essence, echoed a difference of opinion regarding submissions made by the Complainant to the effect that he rendered services and that he did not receive payment for same.

(a) Regarding Services rendered on 27 April 2010, during Freedom Day celebration held at Piet Plessis, to the value of R 319 999.60

(i) The Administrator confirmed that the Complainant rendered services for the event and that he claimed an amount of R319 999.60 which was subsequently paid on 21 June 2010.

(ii) The Administrator provided documentary evidence in the form of an invoice and quotation received, certificate on the availability of funds, requisition, order no. 269/06/10, as well as BAS report. The documents bear the Provincial Treasury stamp certifying that payment was effected.

(iii) Based on the information provided, there is no doubt that indeed payment for these services was effected. The claim required no further probe. The Complainant confirmed receipt of payment after meticulous perusal of his records.
(b) **Regarding services rendered on 9 May 2010, during the ZCC Mass Prayer held at Mmabatho Stadium, to the value of R626 838.87**

(i) The Administrator submitted to my investigation team that the Complainant is unable to provide documentary evidence in support of this claim. However, he indicated that the Complainant was able to provide a copy of the unsigned letter allegedly issued by the former Chief Financial Officer, Mr Phillip Gumede. The said letter was directed to First National Bank.

(ii) Of importance to note from the aforementioned letter, dated 24 May 2010, is that the letter acknowledges both the events of 27 April 2010 held at Piet Plessis as well as the Mass Prayer Service held on 9 May 2010.

(iii) The reasons for issuing such a letter are not specified in the correspondence however it states, amongst other things that: "payment for these services has been delayed as a result of the migration from our Walker System to Basic Accounting Systems (BAS), We hope to pay all our service Providers as soon as we have dealt with the problems confronting us. The amount owed to the said company is: R889, 799.60." [sic]

(iv) The Administrator provided an invoice dated 9 December 2010 bearing an amount of R626 838.87 regarding this claim as part of the documents received by the NWPG from the Complainant at the time the claims were probed by the NWPG.

(c) **Regarding services rendered on 9 August 2010, during the Women’s Day Celebration held at Macquassi Hills, to the value of R 278 271.23**

(i) The Administrator indicated to my investigation team that according to the submissions received from the Complainant, he
(Complainant) rendered services around August 2010 for the Women's Day Event. He allegedly claimed an amount of R467 271.23 but was only paid R189 000.00. The BAS report also indicates that only R189 000.00 was paid on 14 January 2011, to Friendly Hands Trading. The remaining balance of R278 721.23 is still outstanding.

(ii) The Administrator contended that only R189 000.00 was claimed by the Complainant, which was paid by the NWPG. In addition, the Administrator indicated that nowhere in the quotation submitted and in the invoice used to process the payment, is reflected that R189 000.00 was part payment and that there was an outstanding amount.

(iii) However, the Administrator conceded to the fact that the NWPG did not probe the remaining amount of R278 721.23. The motivation advanced for not probing the claimed amount is that the Complainant does not want an investigation and there were no documents supporting the alleged remaining amount.

(iv) In his submission, the Complainant indicated that the amount of R278 271.23 was quoted at the late request by the NWPG for the provision of Mobile Advertising Billboards (Trailers) as well as the provision of sponsorship in the form of T-Shirts and Caps used on the day of the event and that he submitted an invoice to the NWPG having accepted the request to render the services and provide sponsorship.

(v) In the batch of documents, annexed to the Administrator’s response letter, is an invoice of R278 271.23, dated 9 December 2010, indicating the following description of items/service: Mobile Advertising Billboards, Direction and advertising Blimp and exhibition Boards. On the other hand, the quotation and invoice on
the claim of R189 000.00 which was
description of items/service: Exhibition

paid indicates the following
Boards.

(vi) An internal Memorandum dated 3 August 2010 with the subject
"Publicity – 2010 Women’s Day, 9th August", from the then Director: Media Relations, Mr Ebenezer Cobla, addressed to the Head: Provincial Communication, Mr Khotso Khumalo for the approval of the then CEO, Mr Philip Gumede, is also annexed to the batch of documents received by my Office from the Administrator. Of importance to note from the contents of the letter is the following:

"...

PURPOSE/DISCUSSION:

To request that we amplify this important occasion through publicity and advertorials in the form of mobile trailers to be installed at least by Thursday 5th of August, 2010. I am also requesting sponsorship from the company that will provide this service. These should be in the form of promotional items such as T-Shirts and Caps to be used on 9th August, 2010".

(vii) Notably from the above quoted contents of the internal memorandum, is that this request was made on 3 August 2010 for the event that was to be staged on 9 August 2010 and services to be rendered 5 days prior to the event.

(viii) In an internal memorandum dated 6 August 2010, from the Communication Chief Directorate addressed to the Procurement section of the NWPG the following is recorded:
"This memo serves to explain the late submission of the requisitions of the Women’s Day Celebration held at Wolmaranstad in Maquassi Hills District Municipality on 9th August 2010.

The preparatory committee submitted quotations very late and some were approved by the Chief Director late afternoon. It was very late to submit them at the Procurement Section for the generation of the order form because we are also situated at Mafikeng which is far away.

In the light of the above, the Procurement Section is requested to process order forms as per the attached quotations." [sic]

(ix) Also annexed to the batch of documents received by my Office from the Administrator is a letter, dated 21 December 2010, from the then Acting Deputy Director-General: Corporate Support, Adv. OY Dibetso-Bodibe, wherein the following were relayed by the latter:

"...

RE: DELAY IN EFFECTING PAYMENT

Kindly be advised that the Acting Deputy Director General, Advocate OY Dibetso-Bodibe, had requested the Misconduct Unit to embark on a verification process of whether services were indeed towards the Women’s day celebrations event held on the 09th August 2010. The request was occasioned by the fact all the service providers who supposedly rendered services did so without a government order, which is contrary to government prescripts. Hence the delay in effecting payment to Friendly Hand Trading and Projects.
The verification process revealed that the services were indeed rendered and it would be prudent to effect payment.

"..." [sic]

(x) The above letter as well as the internal memo from the Chief Directorate: Communication, in essence, provide a difference of opinion contrary to the findings of the NWPG’s probe on the Complainants claim as contained in the Administrator’s response letter to my enquiry wherein the Administrator made the following submission:

"The Complainant is unable to provide the Office with the documents i.e. purchase orders, commitment letters etc. which are necessary to prove that he was requested to provide goods and services on behalf of the Office. Such documents would serve as a portfolio of documentary evidence to support any payments if such are due..." [sic]

5.1.7 It is important to comprehend the fact that I am required to make a determination whether the NWPG unduly failed to pay the Complainant an amount of R1 225 109.70 for services rendered between April 2010 and August 2010, and in so doing, it is also important for me to consider the corresponding issue to the one under discussion and that being whether there were services rendered to that effect.

5.1.8 It then becomes important to make mention of the fact that the Administrator alerted my investigation team that: "In June 2011, the Complainant filed papers at the North-West High Court (Case 946/11) to recover R905 110.11. That the total amount claimed is made up of R626 838.87 (ZCC Mass Prayer Event) and R278 271.23 (the balance of the Women’s Day Event) in respect of the goods and services provided to the Office of the Premier."
5.1.9 Noticeably there is no doubting that on 27 April 2010 during Freedom Day celebrations held at Piet Plessis the Complainant rendered services to the value of R 319 999.60. This is confirmed by the payment which was effected by the NWPG in favour of the Complainant. The version the Administrator provided in this regard, bears favourable weight as opposed to the Complainant’s submissions.

5.1.10 The rendering of services on 9 August 2010, during the Women’s Day Celebration event held at Maquassi Hills is not by any means disputed. Howbeit, the amount claimed by the Complainant appeared to be the one in dispute.

5.1.11 It is, however, my considered view, on a balance of probabilities, that the amount alleged by the Complainant to be owed is indeed due and payable. This is in consideration of the abovementioned internal Memorandum dated 3 August 2010 with the subject “Publicity – 2010 Women’s Day, 9th August”, from the then Director: Media Relations, Mr Ebenezer Cobblah as well as the submissions made by the then Acting Deputy Director General: Corporate Support, Adv. OY Dibetso-Bodibe per letter, dated 21 December 2010, wherein it is confirmed that services were rendered by the Complainant although this was so done without proper procurement processes being observed.

5.1.12 Equally, in regard to the 9 May 2010 event held at the Mmabatho Stadium, the Administrator did not clearly indicate the basis on which this claim is disputed.

5.1.13 What struck me is a question on the exertions by the Complainant to pursue these claims. Had he not provided the services would he have approached the North-West High Court under Case No. 946/11, which was never pursued further due to financial constraints; the former Premier of the North-West Province, Ms Thandi Modise (per letter dated 22 November 2012); the Public Protector (per letter dated 22 November 2012); The Public Service Commission (per letters dated 18 February 2013 and 26 March 2013);
Chairperson of SCOPA (per letter dated 18 February 2013 and 26 March 2013); even the Provincial Commissioner of Police (per letter dated 11 March 2011); the Special Investigating Unit (per letter dated 22 January 2017) and, again, the Office of the Premier (per letters dated 25 July 2018 and 24 August 2018)?

5.1.14 The Complainant’s version appears as most probable when compared to the version that the Administrator have propounded.

Application of the relevant law

Duty imposed by the Constitution of the Republic of South Africa, 1996

5.1.15 The Constitution is the highest law in the country and all authority, both in the public and private sphere, is derived from the Constitution. In essence, the rules by which government must function are contained, primarily, within the Constitution. The powers that government may exercise are limited to those provided for in the Constitution and all spheres of government are bound by the provisions thereof. Of significance is that there are two particular provisions of the Constitution that have an impact on good administrative conduct and these are section 33 and section 195.

5.1.16 Section 195(1) of the Constitution provides for principles of good administration in all spheres of government. The NWPG’s conduct thus needs to be tested against these administrative principles. The following are, amongst others, provisions of section 195(1):

(1) Public administration must be governed by democratic values and principles enshrined in the Constitution, including the following principles:
   (a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public Administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People’s needs must be responded to, ...
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation”

5.1.17 The NWPG was in this regard expected to maintain a high standard of professional ethics when it dealt with the Complainant’s alleged non-payment for services rendered.

5.1.18 In re Dirk Hermanus Crous v The Blue Crane Route Municipality and the Cape Joint Retirement Fund⁶ the court made the following ‘comments on the conduct of the state organ and the treatment that it meted out to the applicant in contravention of section 195 of the Constitution:

“[57] The higher duty that is imposed on organs of state by the Constitution means that they are not free to litigate as they please.[5] The Constitution has subordinated them – ….. In short, it is expected of organs of state that they behave honourably. Their decisions and their conduct must be ‘informed by the values of our Constitution’.”

5.1.19 The Constitutional Court, in Khumalo and Another v MEC for Education KwaZulu-Natal⁷ emphasised the compelling basis for the founding of a duty on the functionary to investigate as follows:

"[35] Section 195 provides for a number of important values to guide decision makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a)". [Emphasis added]

5.1.20 Section 33 of the Constitution provides that everyone has a right to administrative action that is lawful, reasonable and procedurally fair. Section 33(3) of the Constitution provides for the enactment of legislation to give effect to the rights provided for in section 33. That legislation is the Promotion of Administrative Justice Act (PAJA).

Duty imposed by the Promotion of Administrative Justice Act, 2000 (No. 3 of 2000)

5.1.21 In order to qualify the usage of the PAJA in this case it is important to firstly make a determination as to whether the actions of the NWPG constitute administrative actions. The PAJA governs the way administrators carry out their duties and perform their functions. Of significance is that Administrative action is defined in section 1 of the PAJA, inter alia, as follows:

"Administrative action" means any decision taken, or any failure to take a decision, by –

⁷ (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC)
(a) an organ of state, when –
    (i) exercising a power in terms of the Constitution or a provincial
    constitution; or
    (ii) exercising a public power or performing a public function in terms
    of any legislation; ...

(b) ........,

(c) which adversely affects the rights of any person."

5.1.22 In making a determination of an “administrative action”, Wallis J in Sokhela & Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & Others\(^8\) held:

“[60]... 

There are seven requirements, namely that there must be (i) a decision, (ii) by an organ of State, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone’s rights, (vi) which has a direct, external, legal effect, and (vii) that does not fall under any of the exclusions listed in s 1 of PAJA."

5.1.23 A decision taken and/or not taken in this case was not to effect payment to the Complainant after submission of invoices, the NWPG is an organ of State empowered to exercise public power in terms of the Constitution. Since 2010 the Complainant has been frequenting the offices of the NWPG demanding payment and to date, he has not received same. My analysis is that a decision has been taken not to pay, alternatively that the NWPG has failed to take such a decision. I need not over-emphasise the interpretation of section 195 by the court in the Khumalo\(^9\) case, i.e. the compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues.

\(^8\) 2010 (5) SA 574 (KZP) paras 60-61
\(^9\) See para 5.1.19 supra
5.1.24 The requirement for administrative action that is lawful, reasonable and procedurally fair is emphasised in section 3(2)(b) of the PAJA which imposed a duty upon the NWPG to have informed the Complainant of its decision not to effect payment of his claims, to give him reasonable opportunity to make representations regarding its decision and to provide him adequate notice of any right of review or internal appeal in that regard where applicable.

5.1.25 The NWPG never provided the Complainant with a formal response to his correspondences, per letters dated 22 November 2012, 25 July 2018 and 24 August 2018, respectively and this denied him a reasonable opportunity to make representations regarding non-payment for services rendered.

5.1.26 It was expected of the NWPG to ensure that it responded to the Complainant’s correspondence when he enquired about progress in his matter. Transparency, as envisaged by subsection 195(1)(g) of the Constitution would be have been fostered if the NWPG had responded promptly to the Complainant’s correspondence.

Conclusion

5.1.27 I am unable to find a reasonable basis for the contention that the Complainant failed to provide the NWPG with the documents i.e. purchase orders, commitment letters etc. which are necessary to prove that he was requested to provide goods and services on behalf of the NWPG and that such documents would serve as a portfolio of documentary evidence to support any payments if such are due. The reality is that the Complainant has little or no control over the NWPG procurement processes that is, ensuring that purchase orders are in place.

5.1.28 The fact that since 2010 the Complainant has been frequenting the offices of the NWPG demanding payment and to date, he has not received same, is clearly an indication that a decision has been taken not to pay, alternatively that the NWPG has failed to take such a decision.
5.1.29 The NWPG had a constitutional and statutory duty to observe the provisions of just administrative action, as encapsulated in section 33 of the Constitution and section 3 of the PAJA, to provide the Complainant with proper and fair process once it had made a decision not to pay him.

5.1.30 There is no logical reason why the Complainant would have approached the various institutions without a valid claim. It is my plausible submission that without a probable version disputing the Complainant’s claims with due regard to the available evidence, the Complainant’s version appears to me more credible.

5.1.31 The bundle of discovered documents is brimming with documentary evidence supporting the Complainant’s version that he rendered services to the NWPG for which he was subsequently not paid. The evidence comprised of internal correspondence, exchanges between the officials of the NWPG, correspondence by the Complainant to the NWPG and to various state institutions dating as far back as 2011 to 2018 some of which were brought to my attention by the Administrator. I did not deal with each of those documents on the issue under discussion, specifically correspondences to various institutions whereat the Complainant sought intervention. I am, however, satisfied that such evidence supports the interpretation that services were rendered by the Complainant.

5.2 Regarding whether the conduct of the NWPG in the circumstances caused the Complainant to suffer any improper prejudice

5.2.1 In his quest to encourage the NWPG to do what he believed was appropriate, the Complainant approached various institutions for aid. In a letter dated 11 March 2011 addressed to the then North-West Provincial Commissioner of Police, Lieutenant General MNZ Mbombo, the Complainant wrote, amongst other things that:
"... I am humbly requesting your resolution to our long outstanding Provincial Government.
...
... Where is the government's comm
...
... For an SMME, such amounts are we rendered through loans and save and empower others. Alas, it seems especially coming from government.
...
With no choice and the frustrations of NWPG, we consulted the services of route was our last resort, but it seem financially straining 19 months of no 
...
... when government fails us as such, adequately
...
" [emphasis added]

5.2.2 The Complainant proceeded with cons with the latter instituted legal proceedings. The proceedings were, however, not resources on the part of the Complainant. Notice in terms of Rule 35(14) of the Attorney (the State Attorney) for the dis of inter alia copies of, the purchase order with regard to the alleged services rendered as well as the written terms and conditions for services rendered and goods sold.

5.2.3 I find this unsettling as it appears that the non-payment for services rendered by Comm
"... I am humbly requesting your intervention and hoping that it will bring resolution to our long outstanding issue of non-payment by the North-West Provincial Government.

... Where is the government's commitment to 30 days payment?

... For an SMME, such amounts are crucial to our operations for services that we rendered through loans and sacrifice in hope of making a profit to grow and empower others. Alas, it seems in vain when faced with such problems, especially coming from government.

...

With no choice and the frustrations of operating on loans and no progress from NWPG, we consulted the services of DC Kruger Attorneys. Taking this legal route was our last resort, but it seemed necessary, especially after the financially straining 19 months of no progress.

...

... when government fails us as such, it adversely affects our operations.

..." [emphasis added]

5.2.2 The Complainant proceeded with consultation with DC Kruger Attorneys and the latter instituted legal proceedings against the NWPG, per case no. 946/11. The proceedings were, however, never pursued due to lack of financial resources on the part of the Complainant. What I found disturbing during perusal of the court documents in respect of the failed lawsuit, is a request per Notice in terms of Rule 35(14) of the High Court Rules by the NWPG's Attorney (the State Attorney) for the discovery of documents which included \textit{inter alia} copies of, the purchase order(s) issued on behalf of the Defendant with regard to the alleged services rendered and goods sold and delivered as well as the written terms and conditions applicable to the alleged agreement for services rendered and goods sold and delivered.

5.2.3 I find this unsettling as it appears that it is the submission of the NWPG that the non-payment for services rendered by the Complainant is justified by the
fact that the Complainant is unable to produce the purchase orders, commitment letters etc.

5.2.4 Unmistakably, the NWPG was aware that it did not issue purchase orders as the services of the Complainant were invited at the last hour. The attitude of the NWPG appear to be ironic and self-exonerating.

5.2.5 This attitude is illustrated in the Administrator’s response to my enquiry as shown during the discussion of the first issue,\(^\text{10}\) where the Administrator further recommended in his response that I advise the Complainant to pursue the litigation case against the NWPG and submitted that this is one avenue which will provide a platform for matters under dispute to be ventilated and concluded.

5.2.6 In a letter dated 22 November 2012 addressed to my Office, the Complainant submitted the following:

"...

Briefly, Boyz Men as a company has rendered services to the Office of the Premier. The services were to facilitate the Zion Christian Church Mass Prayer, for the 2010 World Cup in the North-West Province; the event took place on the 09 May 2010. We also facilitated the women day event which was held on the 09th August 2010. The event was held at Makwassie Hills (Wolmaranstadt). (sic)

On both occasions, our company Boyz Men sponsored the Office of the Premier with Moobile Trailers, Billboards and Merchandise: Jackets, Golf Shirts and Golf Caps.

\(^{10}\) Supra at para 5.1.8
Exactly 13 months ago, I had a meeting with Premier Thandi Modise in October 2011, whereby she committed herself to come back to me in a week or two. Up to now, she has not yet responded.

As an up and coming black-owned company, I am struggling to survive under these circumstances, hence I appeal for your intervention.

..." [Emphasis added]

5.2.7 In the same letter\(^{11}\) the Complainant illustrated the effects of the non-payment as follows:

"The stated facts above have caused me to lose a family, a house, cars, I owe banks, SARS, suppliers, Municipality rates, licence for my cars and advertising trailers. In fact I have lost everything that I had, a sad loss and painful experience one wish not to go through again. The reputation built in many years is now compromised by this unfair practise" [sic]

5.2.8 The failure by the NWPG to properly attend to the Complainant's claim has over the years manifested itself into frustration and destitute on the part of the Complainant. This is evident as demonstrated in the letter, dated 22 January 2017, written to the then Regional Head of Special Investigating Unit (SIU), Mr Mike Koya, wherein the Complainant wrote the following:

"...
In the event that the ANC led government is unable to resolve this matter I will start to burn government vehicle. I will do exactly what we have been taught by individual members of the ANC. If you are not happy about something, because our leaders do not have ears toyi toyi and burn whatever you see, for me to get attention I must do what we were taught give them their own medicine.

..." [sic]

\(^{11}\) *Supra* at para 5.2.6
5.2.9 This conduct by the Complainant is known by the NWPG as contained in the Administrator’s response letter:

"The officials of the Office of the Premier submit that they have been threatened by Mr. Mokwena [the complainant]. It is alleged that at one stage he apart from the threats, refused to allow Mr. Dince to leave the venue of the meeting where he met him."

Application of the relevant laws

5.2.10 We remind ourselves that the Constitution in its preamble, Section 1(a) of the Constitution, looks to the improvement of the quality of life of all citizens and that the foundational values of our Constitution revolve around "human dignity, the achievement of equality and the advancement of human rights and freedoms."

5.2.11 Section 10 of the Constitution states that "Everyone has inherent dignity and the right to have their dignity respected and protected."

5.2.12 In the case of Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape12 the Constitutional Court reiterated the submissions made in Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another13 by the Supreme Court of Appeal wherein the following was cited:

"But when an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province’s approach to these

12 CCT 37/07 [2008] ZACC 4; 2008 (6) BCLR 571 (CC); 2008 (4) SA 237 (CC) (28 March 2008) [at para 20]
13 2001 (2) SA 609 (E); 2000 (12) BCLR 1322 (E)
proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case as though it were at war with its own citizens…"

5.2.13 In magnifying the importance of the duty imposed on organs of the State Section 237 of the Constitution provides that: "All Constitutional obligations must be performed diligently and without delay." [Emphasis added]

Conclusion

5.2.14 Had the NWPG complied with its Constitutional obligations it could have eschewed improper conduct towards the Complainant. The Complainant in this regard could have received proper and better treatment.

5.2.15 The NWPG should have timeously and with diligence, attended to the Complainant’s claims in compliance with section 237 of the Constitution to avoid uncertainty with regard to factual issues arising thereto. The NWPG seem to be punishing the Complainant for its own failures to properly plan for its own events and to properly address its own failures to timeously verify his claims.

5.2.16 Compliance with the provisions of section 237 would be a further advancement of sub-sections 195(1)(a), (b), (c), (e) and (g) which, respectively, put accent on the promotion and maintenance of high level of professional ethics, effective use of resources must be promoted and maintained, public administration which must be development-oriented, people’s needs being responded to, accountability in the Public Administration and transparency being fostered by providing the public with timely, accessible and accurate information.

5.2.17 Although the failure and/or refusal to pay the Complainant is triggered by the fact that proper procurement process were not adhered to, i.e. rendering services without government purchase order, this cannot in its entirety justify a decision and/or failure to take decisive action regarding the Complainant’s
claims. Such a decision will manifest in injustice and unfairness towards the Complainant. The Complainant cannot be punished for improper planning on the part of the NWPG and its failures to adhere to its constitutional obligations.

5.2.18 Based on the evidence gathered, I can conclude that the Complainant suffered prejudice due to the Municipality's conduct.

6. FINDINGS

6.1 Whether the NWPG unduly failed to pay Mr Moletlanyi Moses Mokwena an amount of R1 225 109.70 for services rendered between April 2010 and August 2010

6.1.1 The allegation that the NWPG failed to pay Mr Moletlanyi Moses Mokwena for services rendered between April 2010 and August 2010 is substantiated.

6.1.2 The amount that the NWPG unduly failed to pay is not R1 225 109.70 but rather R905 110.10. This finding is based on the fact that the allegations regarding non-payment for services rendered on 27 April 2010, during Freedom Day celebration held at Piet Plessis, to the value of R 319 999.60 were unfounded. The amount of R 905 110.10 comprises of R 626 838.87 for the services rendered during the ZCC Mass Prayer event held on 9 May 2010 and R 278 271.23 for the Women's Day celebration at Maquassi Hills held on 9 August 2010.

6.1.3 The NWPG did not take resolute action to deal with the Complainant's enquiry and to provide him with proper and fair treatment. The NWPG did not adhere to the constitutional and statutory duty to observe the provisions of just administrative action, as encapsulated in section 33 of the Constitution and section 3 of the PAJA, to provide the Complainant with proper and fair procedure once it had made a decision not to pay him.
6.1.4 The Complainant’s claim has never been properly assessed by the NWPG. The lack of interest shown by the NWPG to consider and respond to the complaint raised by the Complainant in respect of non-payment for services rendered, in a meaningful way, reflected a total lack of accountability as envisaged in section 195(1)(f) and (g) of the Constitution.

6.1.5 The NWPG unduly failed to pay the Complainant’s claim for services provided without properly assessing such claim. The NWPG’s action to refuse to effect payment for services rendered by the Complainant, in violation of sections 33 and 195(1) of the Constitution constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.1.6 The NWPG failed to perform its Constitutional obligations diligently and without delay, in contravention to section 237 of the Constitution. The failure by the NWPG to timeously deal with this matter has had the effect of having the clarity and accuracy of decision-makers’ memories to be bound to declination with time, documents and evidence mislaid.

6.1.7 The NWPG did not dispute this finding as contained in the Notice I issued in terms of section 7(9)(a) of the Public Protector Act.

6.2 Regarding whether the conduct of the NWPG in the circumstances caused the Complainant to suffer any improper prejudice

6.2.1 The allegation that the actions of the NWPG in the circumstances caused the Complainant to suffer prejudice is substantiated.

6.2.2 The Complainant was prejudiced by the action of the NWPG, not only by failing to pay him for services rendered, but also denying him the opportunity to sustain his business to carry over any benefits from the services rendered to future endeavours that could have assisted in his growth as a developing SMME and generate income from this mode of business.
6.2.3 The denial of a right to dignity need not be reiterated in the circumstances of a man who lost a family, a house, cars, owing banks, SARS, suppliers, Municipality rates, licence for cars and advertising trailers.

6.2.4 The actions of the NWPG, in the circumstances, caused the Complainant to suffer prejudice as envisaged in section 6(4) (a)(v) of the Public Protector Act.

6.2.5 The NWPG did not dispute this finding as contained in the Notice I issued in terms of section 7(9)(a) of the Public Protector Act.

7. REMEDIAL ACTION

In light of the above findings, I am taking the following remedial action as contemplated in section 182(1)(c) of the Constitution:

7.1 The Administrator must write a letter of apology to the Complainant for the prejudice caused to him and his family within thirty (30) days from the date of issuing of this report.

7.2 The Administrator must, within sixty (60) days from the date of issuing of this report, ensure that the Complainant receive payment of an amount of R 905 110.10 with interest calculated in terms of the Prescribed Rate Interest Act 55 of 1976 from the dates of the last invoices submitted by the Complainant

8. MONITORING

8.1 The Administrator must, within fourteen (14) days of the issuing of this report, submit an action plan indicating how the remedial action will be implemented.

8.2 The Administrator must submit a report, within forty (40) days as of the date of the report, to my office on the progress made in respect of the implementation of the remedial action.
8.3 In line with the Constitutional Court decision 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, and in order to ensure the effectiveness of the office of the Public Protector, the remedial action prescribed in this Report is legally binding on the Administrator of the North-west Province, unless a court order directs otherwise.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 12/11/2019

Assisted by:
Mr Sechele Keebine (NW: Provincial Representative); and
Adv. Odireleng Sebogodi (NW: Investigator - Administrative Justice and Service delivery Unit)