
PUBLIC PROTECTOR
SOUTH AFRICA

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"Allegations of mismanagement of public funds by the Mopani District Municipality during the 2015/16 and 2016/17 financial years"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MISMANAGEMENT OF PUBLIC FUNDS BY THE MOPANI DISTRICT MUNICIPALITY DURING THE 2015/16 AND 2016/17 FINANCIAL YEARS
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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, (the Constitution) and section 8(1) of the Public Protector Act 23 of 1994 (the Public Protector Act).

(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 allegations of mismanagement of public funds during the 2015/16 and 2016/17 financial years by the Mopani District Municipality (the Municipality).

(iii) On 05 March 2017, I received a complaint from Councillor Marie Helm (the Complainant) who was the caucus leader of the Democratic Alliance in the Municipality.

(iv) In the main, the Complainant alleged that:

(aa) The Municipality incurred unauthorised expenditure in the amount of R10 059 501.44 described as over-expenditure on various items during the financial year 2015/16;

(bb) The Municipality incurred irregular expenditure in the amount of R34 026 461.34 in the financial years 2015/16 (R21 392 800.34) and 2016/17 (R12 633 661.00), respectively;

(cc) The Municipality incurred fruitless and wasteful expenditure in the amount of R250 559.92 over the financial years 2015/16 (R131 467.92) and 2016/17 (R119 092.00);

(dd) The Municipality spent an amount of R285 152.00 on accommodation and conference facilities for a Strategic Planning Workshop at Blyde River Canyon outside the municipal boundary and Limpopo Province, while the Municipality has many suitable facilities to host this type of function within its boundaries.
(v) On analysis of the complaint, the following issues were identified and investigated:

(aa) Whether the Municipality mismanaged public funds during the 2015/16 and 2016/17 financial years; and

(bb) Whether the taxpayers and residents of the Municipality or any other person suffered prejudice as a result of the alleged mismanagement of public funds during the 2015/2016 and 2016/2017 financial years; and

(vi) The investigation was conducted by way of correspondence and interviews with the Complainant, the Municipal officials as well as perusal of all relevant documents, analysis and application of all relevant laws, policies and related prescripts

(vii) Key laws and policies taken into account to determine if the Municipality had incurred unauthorised, irregular and fruitless and wasteful expenditure in the financial years 2015/16 and 2016/17. Those are the following:


(bb) The Municipal Finance Management Act, 56 of 2003; and


(viii) On 03 September 2019, I issued notices (Notice) in terms of section 7(9) (a) of the Public Protector Act to the Executive Mayor of Mopani District Municipality, the Speaker of the Municipal Council of Mopani District Municipality, and the Municipal Manager of the Mopani District Municipality to enable them to respond thereto within ten (10) working days of receipt thereof.

(ix) The Executive Mayor, Councillor PJ Shayi, the Municipal Manager, Mr Q Kgatia and the Speaker, Councillor W Sedibeng all failed to respond to my Notice. The Notice
was however, acknowledged by Ms Basa Mathebula, the Personal Assistant to the Municipal Manager of the Mopani District Municipality on 9 September 2019.

(x) Having considered the evidence uncovered during the investigation against the applicable laws and related prescripts, I make the following findings:

(a) Regarding whether the Municipality mismanaged public funds during the 2015/16 and 2016/17 financial years.

(aa) The allegation that the Municipality mismanaged public funds during the 2015/16 and 2016/17, is substantiated.

(bb) According to the Internal Memorandum titled "Acquisition Status Report for the Period Ending 31 March 2017, the Municipality incurred unauthorised expenditure in the amount of R10 059 501.44 described as over-expenditure on various items during the financial year 2015/16.

(cc) The Municipality further incurred irregular expenditure in the amount of R34 026 461.34 over the financial years 2015/16 (R21 392 800.34) and 2016/17 (R12 633 661.00).

(dd) The Municipality further incurred fruitless and wasteful expenditure in the amount of R250 559.92 over the financial years 2015/16 (R131 467.92) and 2016/17 (R119 092.00).

(ee) The Municipality failed to implement the recommendations of the MPAC or failed to indicate to my office how it implemented the report which recommended that the unauthorised, irregular and fruitless and wasteful expenditures must be investigated by a committee of Council as per section 32 of the MFMA and further that those found to have deliberately disregarded the processes be called to book as part of consequence management.
(ff) The conduct of the municipality was in contravention of sections 32(1) (b), (c), (d) and 32(2) (a) and (b) of the MFMA as also indicated in paragraph 5.1.1.31 below.

(gg) The conduct of the Municipality also 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.

(b) Regarding whether the taxpayers and residents of the Municipality or any other person suffered prejudice as a result of the mismanagement of public funds during the 2015/16 and 2016/17 financial years.

(aa) The allegation that the taxpayers and residents of the Municipality or any other person suffered prejudice as a result of the alleged irregular mismanagement of public funds during the 2015/2016 and 2016/17 financial years, is substantiated.

(bb) Having regard to the analysis as outlined in paragraphs 5.2.1.1 to 5.2.1.14 below, it can be inferred that the community suffered prejudice as a result of the mismanagement of funds during both the financial years.

(cc) The fruitless and wasteful expenditure resulted in funds which could have been budgeted for other services having to be re-directed from such services in order to cover the said unauthorised, irregular and fruitless and wasteful expenditures.

(dd) The conduct of the Municipality was in contravention of section 152 of the Constitution and sections 4(2) and 73 of the Municipal Systems Act and constituted maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(xi) The appropriate remedial action that I am taking in pursuit of section 182(1) (c) of the Constitution and section 6(4) (c) (ii) of the Public Protector Act, is as follows.
(aa) The Speaker of the Municipal Council must within thirty (30) working days from the
date of this report, ensure that the Municipal Council in consultation with the Municipal
Manager begin the process of instituting disciplinary action against officials currently
serving in the municipality, who had a hand in the municipality incurring irregular,
fruitless and wasteful expenditure during 2015/16 and 2016/17 financial years; and

(bb) The Municipal Council must at its next sitting, table a motion for a resolution that the
Municipal Manager must within a time frame stipulated in the said resolution, institute
civil proceedings against the former Municipal Manager and any other officials,
whether still in the employ of the Municipality or not, for the recovery of any financial
loss incurred by the Municipality as a result of the municipal funds lost through
unauthorised, irregular and fruitless and wasteful expenditures incurred during
2015/16 and 2016/17 financial years; and

/cc The Municipal Manager must, in accordance with the provisions of section 62(1)(e)
of the MFMA, take steps to ensure that criminal proceedings are instituted against
those who committed acts of financial misconduct as defined in section 171(1)(c) of
the MFMA.

(dd) The Municipal Manager must within thirty (30) working days of this report put
systems in place to monitor the municipal spending patterns and internal invoice
tracking to avoid a recurrence of unauthorised, irregular and wasteful
expenditures and overdue invoices running unnoticed

(ee) The municipality should alternatively act in accordance with the provisions of sections
32(2)(a)(ii) and 32(2)(b) of the Municipal Finance Management Act, and where
sufficient rational grounds exist, write off the expenditures as irrecoverable.

(ff) The Municipal Manager should, within sixty (60) working days from the date of this
report, submit to my office an action plan on the implementation of the remedial action
prescribed herein.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MISMANAGEMENT OF PUBLIC FUNDS BY THE MOPANI DISTRICT MUNICIPALITY DURING THE 2015/16 AND 2016/17 FINANCIAL YEARS

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 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(3) of the Public Protector Act to the following people to note the outcome of my investigation and implement the remedial action:

1.2.1 The Member of the Executive Council (MEC) for Limpopo Cooperative Governance, Human Settlements and Traditional Affairs, Mr B Makamu;

1.2.2 The Head of Department of the Limpopo Cooperative Governance, Human Settlements and Traditional Affairs Department, Ms N Dumalisile;

1.2.3 The Executive Mayor of the Mopani District Municipality, Councillor PJ Shayi;

1.2.4 The Speaker of the Municipal Council of the Mopani District Municipality, Councillor W Sedibeng;

1.2.5 The Municipal Manager of the Mopani District Municipality, Mr Q Kgatlana;

1.3 A copy of the report is also provided to the Complainant, Councillor Marie Helm, to inform him of the outcome of my investigation.
1.4 The report relates to an investigation into allegations of mismanagement of public funds by the Municipality during the 2015/16 and 2016/17 financial year periods.

2. THE COMPLAINT

2.1 The complaint was lodged with my office on 05 March 2017 by the caucus leader of the Democratic Alliance in the Mopani District Municipality, Councillor Marie Helm (the Complainant) with a request that I must intervene and investigate what she perceived as maladministration relating to the mismanagement of public funds by the Municipality during the 2015/16 and 2016/17 financial year periods.

2.2 In essence, the Complainant alleged the following:

2.2.1 The Municipality incurred unauthorised expenditure amounting to R10 059 501.44 described as over-expenditure on various items during the financial year 2015/16. The total was made up as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Vote</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over expenditure on Office of the Speaker</td>
<td>112</td>
<td>R186 267.58</td>
</tr>
<tr>
<td>Over expenditure on Middle Letaba Water Works</td>
<td>130</td>
<td>R79 761.91</td>
</tr>
<tr>
<td>Over expenditure on Modjadji Water Works</td>
<td>135</td>
<td>R249 925.00</td>
</tr>
<tr>
<td>Over expenditure on Kgapane Sewerage Works</td>
<td>137</td>
<td>R550 899.93</td>
</tr>
<tr>
<td>Over expenditure on Thapane Water Works</td>
<td>140</td>
<td>R2 754 275.06</td>
</tr>
<tr>
<td>Over expenditure on Thabina Water Works</td>
<td>141</td>
<td>R56 593.91</td>
</tr>
<tr>
<td>Over expenditure on Tours Water Works</td>
<td>142</td>
<td>R3 164.35</td>
</tr>
<tr>
<td>Over expenditure on Nkowankowa Water Works</td>
<td>144</td>
<td>R5 842 287.18</td>
</tr>
<tr>
<td>Over expenditure on Lenyenye Water Works</td>
<td>145</td>
<td>R132 403.00</td>
</tr>
<tr>
<td>Over expenditure on Sekgopo</td>
<td>156</td>
<td>R203 923.52</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>R10 059 501.44</strong></td>
</tr>
</tbody>
</table>
2.2.2 The Municipality incurred irregular expenditure in the amount of R34 026 461.00 over the financial years 2015/16 (R21 392 800.00) and 2016/17 (R12 633 661.00). The total was made up as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>2016/17</th>
<th>2015/16</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nkowankowa Sewerage Works</td>
<td>R1 149 662.89</td>
<td></td>
</tr>
<tr>
<td>Security Services</td>
<td>R4, 983, 661.00</td>
<td>R6 065, 023.90</td>
</tr>
<tr>
<td>Fleet Management</td>
<td>R7 650 000.00</td>
<td>R6 941 772.45</td>
</tr>
<tr>
<td>Legal Fees on Forensic</td>
<td></td>
<td>R7 236 341.10</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>R12 633 661.00</strong></td>
<td><strong>R21 392 800.34</strong></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>R34 026 461.34</strong></td>
</tr>
</tbody>
</table>

2.2.3 The Municipality incurred fruitless and wasteful expenditure amounting to R250 559.92 over the financial years 2015/16 (R131 467.92) and 2016/17 (R119 092.00). The total was made up as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>2016/17</th>
<th>2015/16</th>
</tr>
</thead>
<tbody>
<tr>
<td>Telkom (interest on overdue accounts)</td>
<td>R12 342.33</td>
<td></td>
</tr>
<tr>
<td>Eskom (Interest on overdue accounts)</td>
<td>R119 092.00</td>
<td>R119 125.59</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>R119 092.00</strong></td>
<td><strong>R131 467.92</strong></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td><strong>R250 559.92</strong></td>
</tr>
</tbody>
</table>

2.2.4 The Municipality spent an amount of R285 152.00 on accommodation and conference facilities for a Strategic Planning Workshop at Blyde River Canyon outside the municipal boundary and Limpopo Province, while it has many suitable facilities to host this type of function.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 **The mandate of the Public Protector**

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

3.1.2 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."

3.1.3 Section 182(2) states that “the Public Protector has the additional powers prescribed by national legislation.”

3.1.4 The Public Protector's powers are thus regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as powers to subpoena persons and information from any person in the Republic for the purposes of an investigation.
3.1.5 In the matter of the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. 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."

3.1.6. Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles;

3.1.7 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;

3.1.8 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 the effect, if it is the best attempt at curing the root cause of the complaint;

3.1.9 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;

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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)
2 Paragraph 65 at page 32
3 Paragraph 67 at page 33
4 Paragraph 68 at page 34
5 Paragraph 69 at page 35
3.1.10 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 to⁶;

3.1.11 The Public Protector’s power to take 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 made⁷;

3.1.12 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 the words suggests that she has to leave the exercise of the power to take remedial action to other institutions or that it is the power that is by its nature of no consequence⁸;

3.1.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation⁹; and

3.1.14 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case¹⁰;

3.1.15 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no. 91139/2016 (13 December 2017)¹¹, the Court held as follows:

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⁶ Paragraph 70 at page 35  
⁷ Paragraph 71 at page 35  
⁸ Paragraph 71(d) at page 36  
⁹ Paragraph 71(e) at page 36  
¹⁰ President of the Republic of South Africa v Office of the Public Protector and Others, Case no. 91139/2016 (13 December 2017)
3.1.15.1 The Public Protector, in appropriate circumstances, has the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective.\textsuperscript{12}

3.1.15.2 There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act \textsuperscript{13};

3.1.15.3 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):
(a) To conduct an investigation into conduct of state affairs;
(b) To report on that conduct; and
(c) To take remedial action.

3.1.15.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. \textsuperscript{14}

3.1.15.5 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).

3.1.16 To this end, I would like to emphasize that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of civil damages or sorry money given its

\textsuperscript{12} Paragraph 85 at page 40 and paragraph 152 at page 56
\textsuperscript{13} Paragraph 91 and paragraph 92 at page 41
\textsuperscript{14} Paragraph 104 at page 44
adjudicative and judicial nature. The Office of the Public Protector is an office modelled on an institution of an ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption, maladministration and prejudice. It is therefore trite that the decisions of the Public Protector are administrative actions.

3.1.17 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute prima facie findings that point to serious misconduct\(^{15}\);

3.1.18 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action. \(^{16}\);

3.1.19 The Mopani District Municipality is an organ of state and its conduct amounts to conduct in state affairs. This matter, falls squarely within the ambit of the Public Protector’s mandate.

3.1.20 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.

3.1.21 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favorably 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

\(^{15}\) Paragraph 107 and paragraph 108 at page 45

\(^{16}\) Paragraph 114 at page 46
Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainant persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitute ‘special circumstances’ depends on the merits of each case.

3.1.22 The management of expenditure of public funds in state organs such as local government which is tasked with the delivery of services to the communities would inordinately generate huge public interest and scrutiny. The community, would be keen to know or enquire into the just, fairness or transparency of the processes followed in incurring such expenditure and whether there was compliance with the relevant legal prescripts.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation of the complaint was conducted in terms of section 182(1)(a) of the Constitution which gives me the power 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; to report on that conduct; and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

4.1.2 The Public Protector Act confers on me the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to resolve a matter without conducting an investigation and resolve a complaint through Alternative Dispute Resolution (ADR) measures such as conciliation, mediation and negotiation.
4.1.3 The investigation was conducted by way of correspondences, meetings and interviews with the Complainant and the relevant municipal officials, analysis of the relevant documentation and consideration and application of the relevant laws, and regulatory framework.

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:

(a) What happened?
(b) What should have happened?
(c) Is there a discrepancy between what happened and what should have happened and does that discrepancy amount to maladministration or other improper conduct?
(d) In the event of maladministration or improper conduct, what would it take to remedy the wrong or to place the Complainant as close as possible to where she 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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeals (SCA) made it clear that it is the Public Protector’s duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do. In the case of The Public Protector v Mail & Guardian Ltd 17 the court stated that “The Public Protector is not a passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting. His or her mandate is an investigatory one, requiring pro-action in appropriate circumstances.”18

17 (422/10 [2011] ZASCA 108 (1 June 2011)
18 Para 9 at page 6
The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the Municipality to prevent maladministration and prejudice.

The enquiry regarding the remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had a state organ complied with the regulatory framework setting the applicable standards for good administration.

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

4.3.1 Whether the Municipality mismanaged public funds during the 2015/16 and 2016/17 financial years; and

4.3.2 Whether the taxpayers and residents of the Municipality or any other person suffered prejudice as a result of the alleged mismanagement of public funds during the 2015/2016 financial year.

4.4 The key sources of information

4.4.1 Documents

4.4.1.1 The complaint lodged by Councillor Marie Helm dated 03 May 2017;

4.4.1.2 A copy of the Mopani District Municipality Internal Memorandum (Ref: 9/1/1/2/2) dated 26 April.

4.4.1.4. A copy of the Mopani District Municipality Supply Chain Management Policy;

4.4.1.5 A copy of the Mopani District Municipality (Demarcation Code DC33) Financial Statements for the year ended 30 June 2017.

4.4.2 Correspondence sent and received

4.4.2.1 A letter of enquiry from my office to the Municipality dated 20 July 2017.
4.4.2.2 A follow up letter of enquiry from my office to the Municipality dated 14 September 2017.
4.4.2.3 A reminder letter from my office to the Municipality dated 20 September 2017.
4.4.2.4 An email from Mr J Malau dated 16 April 2018.
4.4.2.5 A response letter from the Municipality dated 16 November 2017.
4.4.2.6 A feedback letter to the Complainant dated 23 January 2018.
4.4.2.7 A follow up enquiry letter to the Municipality dated 28 March 2018.
4.4.2.8 A reminder email to the Municipality dated 28 June 2018.
4.4.2.9 A “Dear Colleague” letter to the Municipality dated 02 August 2018.
4.4.2.10 A response letter from the Municipality dated 14 September 2018.
4.4.2.11 A follow up letter to the Municipality dated 20 November 2018.
4.4.2.12 A copy of the section 7(9) Notice signed on 09 September 2019 issued to the MEC and HOD for the Department of Cooperative Governance, Human Settlements and Traditional Affairs, Executive Mayor, the Speaker and the Municipal Manager.

4.4.3 Legislation and other prescripts

4.4.3.2 The Public Protector Act 23 of 1994.
4.4.3.3 The Municipal Finance Management Act 56 of 2003.
4.4.3.4 The Municipal Systems Act 32 of 2000

4.4.4 Interviews

4.4.4.1 No interviews were conducted.

4.4.5 Case Law

4.4.5.1 Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

4.4.5.2 President of the Republic of South Africa v Office of the Public Protector and Others Case no. 91139/2016 [2017] ZAGPPHC 747.

4.4.5.3 The Public Protector v Mail & Guardian Ltd (422/10) [2011] ZASCA 108 (1 June 2011)

4.4.5.4 Mendelsohn N O and Others v Vondo and Another (18925/2015 [2016] ZAGPJHC 339 (7 December 2016)

4.4.5.5 Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)

4.4.5.6 Pietersen v S (A309/2017) [2019] ZAWCHC 93 (6 February 2019)
5 THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the Municipality mismanaged public funds during the financial years 2015/16 and 2016/17.

*Common cause issues*

5.1.1 In January 2017, the Municipal Council referred the 2015/16 draft Annual Report to the Municipal Public Accounts Committee (MPAC) for preparation of an oversight report to be presented in March 2017.

5.1.1.2 In April 2017, an internal memorandum from the Chief Financial Officer was tabled during the ordinary sitting of the Municipal Council. The subject of the memorandum was “Acquisition Status Report for the Period Ending 31st March 2017”.

5.1.1.3 Both reports entailed details of unauthorised, irregular as well as fruitless and wasteful expenditure for the financial years 2015/16 and 2016/17.

5.1.1.4 According to an annexure attached to the letter from the Municipal Manager dated 16 November 2017, the Municipality incurred unauthorised, irregular and fruitless and wasteful expenditure amounting to R95 610 632.48 during the financial years 2015/16 and 2016/17 (R57 136 378.45 for the 2016/17 financial year and R38 474 254.03 for the 2015/16 financial year).

5.1.1.5 The expenditures for the two financial years were broken down as follows:

5.1.1.5.1 Unauthorised expenditure: R49 896 234.25 (R39 836 732.81 for the 2016/17 financial year and R10 059 501.44 for the 2015/16 financial year);
5.1.1.5.2 Irregular expenditure: R45 414 065.27 (R17 118 438.27 for the 2016/17 financial year and R28 295 627.00 for the 2015/16 financial year); and

5.1.1.5.3 Fruitless and wasteful expenditure: R300 332.96 (R181 207.37 for the 2016/17 financial year and R119 125.59 for the 2015/16 financial year).

**Issues in dispute**

5.1.1.6 The Complainant contended that the Municipality incurred unauthorised, irregular and fruitless and wasteful expenditure during the financial years 2015/16 and 2016/17.

5.1.1.7 The Municipality in its response dated 16 November 2017, from the Municipal Manager to a letter from my investigation team dated 14 September 2017, admitted that the unauthorised expenditure was incurred. However, it argued that such expenditure “was caused mainly by unavoidable community needs relating to water and sanitation services”. The Municipality further went on to say that “the expenses were not incurred in vain, as there were several instances unintended that triggered the expenses indicated above”.

5.1.1.8 In response to the question relating to the fruitless and wasteful expenditure contained in a letter from the Municipality dated 16 November 2017, the Municipal Manager responded as follows: “The expenditure was caused by the weaknesses in internal controls on invoice tracking. This led to some invoices running overdue unnoticed”.

5.1.1.9 A follow up enquiry was made by my investigation team on 28 March 2018 requesting the Municipality to furnish the team with supporting documents to the responses contained in the letter of 16 November 2017.
5.1.1.10 The Municipal Manager responded in a letter dated 14 September 2018 as follows:

"The expenditure was tabled in Council and referred to the Municipal Public Accounts Committee (MPAC) for investigation. No other processes were undertaken".

5.1.1.11 MPAC conducted an investigation and made the following findings, amongst others:

5.1.1.11.1 "The Executive Mayor was not involved in the management of unauthorized, unforeseen expenditures as per section 29 of the Municipal Finance Management Act, 2003 (MFMA)";

5.1.1.11.2 "There were no investigations conducted on irregular expenditures which is in contravention to section 32 of the MFMA";

5.1.1.11.3 "There was confirmation by the executives that monitoring on spending patterns was not being done which is a sign of weak internal financial controls"; and

5.1.1.11.4 "The Audit Committee made numerous recommendations on consequence management, but these were never implemented".

5.1.1.12 MPAC then went on to make the following recommendations:

"That the executives and relevant portfolio committees monitor the Municipal spending patterns at all times for purposes of both legislative compliance and to reduce the absurd unwanted expenditures as per the Auditor-General’s findings";
“That the Municipal Council should formally assess the functionality of the audit committee as per the adopted audit charter”;

“That the unauthorised, irregular and fruitless and wasteful expenditures should be investigated by a committee of Council as per section 32 of the MFMA and that those found to be have deliberately disregarded the processes be called to book as part of consequence management”;

“That the Municipal Council should approve the 2015/16 Annual Report without reservations and should also adopt the oversight report on the 2015/16 Annual Report as tabled by MPAC”;

“That the oversight report should be submitted to the oversight bodies like Auditor General, Provincial Treasury, South African Local Government Association (SALGA) and COGHSTA”.

5.1.1.13

As part of its recommendations, MPAC recommended that the unauthorised, irregular and fruitless and wasteful expenditure must be investigated by a committee of Council as per section 32 of MFMA and further that those found to have deliberately disregarded the processes be called to book as part of consequence management.

5.1.1.14

The municipality failed to implement the recommendations of MPAC, alternatively, the municipality failed to indicate to my office that the said recommendations were implemented. The final response from the municipality to my office was given as follows: “The expenditure was tabled in Council and referred to MPAC for investigation... No other processes were undertaken.”
Application of the relevant law

5.1.1.15 Section 195 of the Constitution provides that public administration in every sphere of government must be underpinned by, amongst others, the following principles:
   a) Promotion and maintenance of high standards of ethics;
   b) Promotion of efficient, economic and effective use of resources;
   c) Accountability;
   d) Fostering of transparency;

5.1.1.16 Failure by the municipality to act as indicated in paragraph 5.1.1.14 above, does not accord with the provisions of section 195 of the Constitution as stipulated above. Lack of application of consequence management goes against the grain of the provisions of section 195, especially the requirements of ethical standards, efficiency, economy and effectiveness in the use of resources and accountability.

5.1.1.17 Section 1(1) of the Municipal Finance Management Act (MFMA) defines unauthorised expenditure as any expenditure incurred by a municipality otherwise than in accordance with section 15 or 11(3) of the MFMA and includes overspending of the total amount appropriated in the municipality’s approved budget or overspending of the total amount appropriated for a vote in the approved budget or expenditure from a vote unrelated to the department or functional area covered by the vote or expenditure of money appropriated for a specific purpose otherwise than for that specific purpose or spending of an allocation otherwise than in accordance with any condition of the allocation or a grant by the municipality otherwise than in accordance with the MFMA.

5.1.1.18 The Municipality acknowledged that it incurred unauthorised expenditure as defined above. Besides referring such expenditure to MPAC for investigation, the Municipality indicated that no further action was taken.
5.1.1.19 Sections 32(2) (a) and 32 of the MFMA stipulates how unauthorised expenditure should be dealt with to bring such expenditure in line with its provisions. In terms of section 32(2) (a), it states that such expenditure must be authorised in an adjustment budget or be certified by the Municipal Council, after investigation by a Council committee, as irrecoverable and written off by the Council.

5.1.1.20 There is no indication from the responses and information provided by the Municipality that the steps outlined in 5.1.1.19 above to deal with any unauthorised expenditure referred to herein were taken.

5.1.1.21 Section 1(1) of the MFMA defines irregular expenditure as expenditure incurred by a municipality in contravention of the requirements of the MFMA and which has not been condoned in terms of section 170 (of the MFMA) or expenditure incurred by a municipality in contravention of the requirements of the Municipal Systems Act 32 of 2000 (MSA) or expenditure incurred by a municipality in contravention of the requirements of the Supply Chain Management Policy of the municipality and has not been condoned in terms of such policy.

5.1.1.22 The Municipality acknowledged that it incurred irregular expenditure as defined above. This is confirmed in a letter from the Municipal Manager of dated 16 November 2017, wherein he admitted that several contractors have been utilized beyond their contract periods due to delays in making new appointments.

5.1.1.23 No evidence of condonation of the expenditure incurred herein either in terms of section 170 of the MFMA or in terms of the municipality’s Supply Chain Management Policy was furnished to my office.
5.1.1.24 Section 1(1) of the MFMA defines fruitless and wasteful expenditure as expenditure that was made in vain and would have been avoided had reasonable care been exercised.

5.1.1.25 The Municipality admitted that it incurred fruitless and wasteful expenditure as stated in paragraphs 2.2.3, 5.1.1.5.3 and 5.1.1.8 above. In its letter dated 16 November 2017, the Municipality stated that “the expenditure was caused by the weaknesses in internal controls on invoice tracking and that this led to some invoices running overdue unnoticed”.

5.1.1.26 Section 32 of the MFMA makes provisions for ways in which unauthorised, irregular or fruitless and wasteful expenditures, once incurred, have to be dealt with.

5.1.1.27 Section 32(2) of the MFMA provides that unless such expenditure is authorised in an adjustment budget in terms of the provisions of subsection (a) or certified as irrecoverable and written off by the Municipal Council in terms of the provisions of subsection (b), such expenditure should be recovered from the person liable for it in the following ways:

5.1.1.27.1 In respect of unauthorised expenditure, the accounting officer or political office-bearers where the accounting officer acted in line with the provisions of sections 32(1) (a) and 32(3);

5.1.1.27.2 In respect of irregular expenditure, the political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised such expenditure;

5.1.1.27.3 In respect of fruitless and wasteful expenditure, the political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised such expenditure.
5.1.1.28 The Municipality failed to either act in accordance with the provisions of section 32 of the MFMA as outlined above in paragraph 5.1.1.19 or failed to provide evidence to my office that it acted so as indicated in paragraph 5.1.1.20.

5.1.1.29 It was expected of the Municipality to either recover the unauthorised, irregular and fruitless and wasteful expenditure from the officials or political office-bearers (as the case may be) liable for those expenditures, authorise the expenditure in an adjustment budget or after investigation by MPAC, certify the expenditures as irrecoverable and write them off after an investigation by a Council committee.

5.1.1.30 In terms of a letter from the Municipal Manager dated 14 September 2018, the expenditures were only referred to MPAC for investigation and no other processes were undertaken despite the clear provisions of the MFMA as outlined above.

5.1.1.31 In the matter of Mendelsohn No and Others v Vondo and Another, the South Gauteng High Court stated obiter that “section 32(2) of the Municipal Finance Management Act imposes an obligation on a municipality to recover unauthorised, irregular or fruitless and wasteful expenditure unless they fall under certain exclusionary categories. The relevant statutory provision is peremptory and does not afford a municipality a discretion to recover such expenditure.”

Conclusion

5.1.1.31 From the evidence obtained and the MPAC report, it is evident that the Municipality failed to either recover the unauthorised, irregular and fruitless and wasteful expenditures from the officials or political office-bearer liable for

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19 Mendelsohn No and Others v Vondo and Another (18925/2016 [2016] ZAGPJHC 339 (7 December 2016)
20 At paragraph 9 on page 5
those expenditures or to authorise the expenditures in an adjustment budget or after investigation by MPAC, to certify the expenditures as irrecoverable and write them off.

5.2 Regarding whether the taxpayers and residents of the Municipality or any other person suffered prejudice as a result of the alleged mismanagement of public funds during both the financial years.

5.2.1 Common cause issues

5.2.1.1 The MPAC report stated as follows for the financial year 2015/16:

"It is worrisome when the key service delivery departments like Water and Engineering cannot meet their own set targets".

This poor management had an adverse effect on projects time, budget and quality. The affected projects had undoubtedly spent more than their original budget allocations. This must be a major concern to the executives and Council in the main”.

“There was no monitoring of spending pattern and this resulted in the municipality incurring huge unauthorized, irregular and wasteful expenditures”.

“The AG found that the municipality made payments in contravention of the Supply Chain Management requirements, resulting in irregular expenditure of R28 295 627, as the municipality did not implement and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective. There was no investigation conducted on the above expenditures which is in contravention to section 32 of MFMA”.

“The municipality had incurred fruitless expenditure to the amount of R165 834 771 due to late interest on late payment. No investigations were done on the
expenditures which could have otherwise addressed the root causes”.

5.2.1.2 None of the issues raised by MPAC report were disputed by the Municipality. In its response dated 14 September 2018, which was a response to a letter from my investigation team dated 28 March 2018, the Municipality responded that “there were no other consideration (sic) of section 32 after MPAC’s conclusion of investigations”.

5.2.1.3 In mitigation of unauthorised expenditure, the Municipality responded in its letter dated 16 November 2017 that “the expenditure was caused mainly by unavoidable community needs relating to water and sanitation services”.

**Application of the relevant law**

5.2.1.4 Section 32 of the MFMA makes provisions for ways in which unauthorised, irregular or fruitless and wasteful expenditures, once incurred, have to be dealt with.

5.2.1.5 Section 32(2) of the MFMA provides that unless such expenditure is authorised in an adjustments budget in terms of the provisions of subsection (a) or certified as irrecoverable and written off by the Municipal Council in terms of the provisions of subsection (b), such expenditure should be recovered from the person liable for it in the following ways:

5.2.1.5.1 In respect of unauthorised expenditure, the accounting officer or political office-bearers where the accounting officer acted in line with the provisions of sections 32(1) (a) and 32(3);

5.2.1.5.2 In respect of irregular expenditure, the political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised such expenditure;
5.2.1.5.3 In respect of fruitless and wasteful expenditure, the political office-bearer or official of a municipality who deliberately or negligently committed, made or authorised such expenditure.

5.2.1.6 The Municipality failed to either act in accordance with the provisions of section 32 of the MFMA as outlined above in paragraph 5.1.1.18 or failed to provide evidence to my office that it acted so as indicated in paragraph 5.1.1.20.

5.2.1.7 It was required of the Municipality to either recover the unauthorised, irregular and fruitless and wasteful expenditure from the officials or political office-bearers (as the case may be) liable for those expenditures, authorize the expenditure in an adjustment budget or after investigation by MPAC, certify the expenditure as irrecoverable and write them off after an investigation by a council committee.

5.2.1.8 In the matter of Pietersen v S\textsuperscript{21}, the court stated that "irregular procurement practises lie at the heart of the epic levels of corruption which is corroding the moral fabric of our society, not to mention the financial health of our public institutions. The importance of procurement in our constitutional democracy is evident from the fact that it is dealt with in s 217 of the Constitution, which requires that organs of state contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Strict adherence to procurement laws is vital to ensure proper service delivery and a healthy public purse."

5.2.1.9 Payments made in contravention of supply chain management requirements go against the grain of what the court emphasised in the Pietersen case. MPAC stated that "The AG found that the municipality made payments in contravention of the Supply Chain Management requirements, resulting in irregular expenditure of R28 295 627, as the municipality did not implement and maintain an appropriate

\footnote{21 (A309/2017) [2019] ZAWCHC 93 (6 February 2019) at para 125 on page 36}
procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective," Such irregular expenditure will evidently adversely affect service delivery and the health of the purse of the municipality. This will obviously be prejudicial to the recipients of services offered by the municipality.

5.2.1.10 Section 152(1) (a) and (b) of the Constitution states that the object of local government are to provide democratic and accountable government for local communities and to ensure the provision of services to communities in a sustainable manner. Section 152(2) provides that a municipality must strive, within its financial and administrative capacity, to achieve these (as set out above) and other objects.

5.2.1.11 An analysis of the MPAC report statements referred to in paragraph 5.2.1.1 in relation to the provisions of section 152 of the Constitution leads to a conclusion that the provision of services to communities in a sustainable way would be adversely affected by the findings of MPAC as indicated therein.

5.2.1.12 Section 4(2) of the MSA states that the Council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty among others, to use the resources of the municipality in the best interests of the local community, to strive to ensure that Municipal services are provided to the local community in a financially and environmentally sustainable manner and to give members of the local community equitable access to the Municipal services to which they are entitled.

5.2.1.13 Again from the analysis of the statements of the MPAC report as stated in paragraph 5.2.1.1 above, the use of financial resources by the municipality were not "in the best interests of the local community" and the municipality did not "strive to ensure that Municipal services were provided to the local community in a financially sustainable manner".

5.2.1.14 Section 73 of the MSA provides that a municipality must give effect to the provisions of the Constitution and give priority to the basic needs of the local
community, promote the development of the local community and ensure that all members of the local community have access to at least the minimum level of basic Municipal services and Municipal services must be equitable and accessible and be provided in a manner that is conducive to the prudent, economic, efficient and effective use of available resources.

5.2.1.15 It can be deduced from the facts stated above that the use of financial resources by the Municipality did not meet the standards as set out in section 73 of the MSA.

Conclusion

5.2.2 The unauthorized, irregular and fruitless and wasteful expenditure for the financial year 2015/16 impacted on service delivery and was as a result of poorly managed projects which had an adverse effect on project time, budget and quality as well as disregard of adherence to proper procurement requirements.

6. FINDINGS

6.1 Regarding whether the Municipality mismanaged public funds during the financial years 2015/16 and 2016/17.

6.1.1 The allegation that the municipality mismanaged public funds during the financial years 2015/16 and 2016/17, is substantiated.

6.1.2 The Municipality incurred unauthorised expenditure in the amount of R10 059 501.44 described as over-expenditure on various items during the financial year 2015/16.

6.1.3 The Municipality incurred irregular expenditure in the amount of R34 026 461.34 over the financial years 2015/16 (R21 392 800.34) and 2016/17 (R12 633 661.00)
6.1.4 The Municipality incurred fruitless and wasteful expenditure in the amount of R250 559.92 over the financial years 2015/16 (R131 467.92) and 2016/17 (R119 092.00).

6.1.5 The Municipality failed to implement the recommendations of the MPAC or failed to indicate to my office how it implemented the report which recommended that the unauthorised, irregular and fruitless and wasteful expenditures must be investigated by a committee of Council as per section 32 of the MFMA and further that those found to have deliberately disregarded the processes be called to book as part of consequence management.

6.1.6 The conduct of the municipality was in contravention of sections 32) (1) (b), (c), (d) and 32(2) (a) and (b) of the MFMA as also indicated in paragraph 5.1.1.31 above.

6.1.7 The conduct of the Municipality also 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.

6.2 Regarding whether the taxpayers and residents of the Municipality or any other person suffered prejudice as a result of the alleged irregular mismanagement of public funds during 2015/2016 and 2016/2017 the financial years

6.2.1 The allegation that the taxpayers and residents of the Municipality or any other person suffered prejudice as a result of the alleged irregular mismanagement of public funds during the 2015/2016 and 2016/17 financial years, is substantiated.

6.2.2 Having regard to the analysis as outlined in paragraphs 5.2.1.1 to 5.2.1.14 above, it can be inferred that the community suffered prejudice as a result of the mismanagement of funds during both the financial years.
6.2.3 The fruitless and wasteful expenditure resulted in funds which could have been budgeted for other services having to be re-directed from such services in order to cover the said unauthorised, irregular and fruitless and wasteful expenditures.

6.2.4 The conduct of the Municipality was in contravention of section 152 of the Constitution and sections 4(2) and 73 of the Municipal Systems Act and constituted maladministration as envisaged in section 6(4) (a) (i) of the Public Protector Act.

7. REMEDIAL ACTION

7.1 The appropriate remedial action that I am taking is in pursuit of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, is as follows:

7.1.1 The Speaker of the Municipal Council must ensure that within thirty (30) working days from the date of receipt of this report, the Municipal Council, in consultation with the Municipal Manager, begin the process of institution of disciplinary action against officials currently serving in the municipality, who contributed to the municipality incurring irregular, fruitless and wasteful expenditure during 2015/16 and 2016/17 financial years; and

7.1.2 The Municipal Council must, at its next sitting, table a motion for a resolution that the Municipal Manager must within a time frame stipulated in the said resolution, institute civil proceedings against the former Municipal Manager and any other officials, whether still in the employ of the Municipality or not, for the recovery of any financial loss incurred by the Municipality as a result of the municipal funds lost through unauthorised, irregular and fruitless and wasteful expenditures incurred during 2015/16 and 2016/17 financial years; and

7.1.3 The Municipal Manager must, in accordance with the provisions of section 62(1)(e) of the MFMA, take steps to ensure that criminal proceedings are instituted against those who committed acts of financial misconduct as defined in section 171(1)(c) of the MFMA.
7.1.4 The Municipal Manager must within thirty (30) working days from the date of receipt of this report put systems in place to monitor the municipal spending patterns and internal invoice tracking to avoid a recurrence of unauthorised, irregular and wasteful expenditures and overdue invoices going unnoticed.

7.1.5 The municipality should alternatively act in accordance with the provisions of sections 32(2)(a)(ii) and 32(2)(b) of the Municipal Finance Management Act, and where sufficient rational grounds exist, write off the expenditures as irrecoverable.

7.1.6 The Municipal Manager should, within sixty (60) working days from the date of receipt of this report, submit to my office an action plan on the implementation of the remedial actions prescribed herein.

8. MONITORING

8.1 I will require the Municipal Manager to submit the implementation plans to my office within twenty (20) working days from the date of this report indicating how the remedial actions referred to in paragraph 7 above will be implemented.

8.2 The submission of the Implementation Plan and the implementation of my remedial actions shall, in the absence of the court order, be complied with within the period prescribed in this report to avoid being in contempt of the Public Protector.

ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 23/10/2020