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 No. 23 of 1994

PUBLIC PROTECTOR
SOUTH AFRICA

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“Allegations of maladministration in the Bapo ba Mogale Administration”

REPORT ON AN INVESTIGATION INTO ALLEGED IMPROPER PREJUDICE
SUFFERED BY BAPO BA MOGALE COMMUNITY AS A RESULT OF
MALADMINISTRATION BY THE FORMER BAPO BA MOGALE ADMINISTRATION
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Executive Summary

(i) This is a report of the Public Protector 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 No. 23 of 1994.

(ii) The report communicates the Public Protector’s findings and remedial action taken in pursuit of an investigation into the alleged improper prejudice suffered by Bapo ba Mogale community as a result of maladministration by the former Bapo ba Mogale Administration and the North West Department of Local government and Traditional Affairs (the Department) in the management of Bapo ba Mogale D-Account. The complaint was lodged with the Public Protector on 26 March 2012.

(iii) The Complainants are Mr Freddy Mogale, Ms Itumeleng Moerane, Members of the Royal Six and Mr A Mafate a member of the Community.

(iv) In the main, the complaint alleged that: the former Bapo ba Mogale Administration and the then North West Department of Local Government and Traditional Affairs improperly caused Bapo ba Mogale Community to suffer prejudice as a result of maladministration in the management of Bapo ba Mogale D-account.

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

(a) Whether there was alleged failure on the part of the Head of the Department of the North West Department of Local Government and Traditional Affairs and the Bapo Administration in the management of the Bapo ba Mogale D-Account and if so, whether such failure constitutes maladministration; and
(b) Whether the Bapo ba Mogale community suffered prejudice as a result of the failure to manage the Bapo ba Mogale D-Account by the Department and the Bapo Administration.

(vi) The investigation was conducted in terms of section 182 of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4) of the Public Protector Act, 1994, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level. The investigation process consisted of interviews and meetings; correspondence with the Bapo ba Mogale Administration, Forensic Auditors, Quantity Surveyors and the Department; analysis of all relevant documentation; and consideration of and application of all relevant laws, policies and related prescripts.

(vii) Key laws and policies taken into account to determine if there had been maladministration by the Bapo Administration and the Department were principally those imposing administrative standards, governance, procurement and fiscal discipline that should have been complied with by the Bapo Administration, Administrators and the Department in the administration and management of Bapo ba Mogale D-Account. Those are the following:

a. Section 195(1)(a) and (f) of the Constitution which provides for a public administration that must be governed by the democratic values and principles enshrined in the Constitution which include, inter alia, the promotion and maintenance of a high standard of professional ethics and an accountable public administration. These principles enjoin the Bapo Administration and the Department to exercise a high level of professionalism and ethics including accountability in the performance of their duties.
b. Section 4 of the Traditional Leadership and Governance Framework Act No. 41 of 2003 which requires Traditional Councils are expected to keep proper records and their books must be audited and further that they must account annually to their constituencies.

c. Section 9 of the North West Traditional Leadership and Governance Act which deals with Traditional Council’s functions i.e amongst others, to administer the affairs of the traditional community in accordance with customs and tradition, consistent with statutory law and the Constitution, administer the finances of the traditional community and assist, support and guide traditional leaders in the performance of their functions;

d. Section 10 (3) of the North West Traditional Leadership and Governance Act which provides for the appointment of Administrators in cases where a traditional council is unable to perform the functions assigned to it in terms of the Act and unable to act in an efficient and effective manner or in manner which is conducive to good governance and administration.

e. Section 30 of the North West Traditional Leadership and Governance Act which imposes a duty to Traditional Councils to submit estimates of their income and expenditure to the Premier for approval and that they must use the funds as per such approval read with section 4 above;

f. Section 217(1) of the Constitution which provides for principles that enjoins the Bapo Administration and the Department to contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective in the performance of their duties.

g. Section 38 of Public Finance Management Act No. 1 of 1999 which directs Accounting Officers to take steps to prevent unauthorised, irregular, fruitless and wasteful expenditure and to manage the working capital efficiently and economically
(viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding the alleged failure on the part of the Head of Department of the North West Department of Local Government and Traditional Affairs and the Bapo Administration in the management of the Bapo ba Mogale D-Account and if so, whether such failure constitutes maladministration:

(aa) The allegation that the Head of Department for the Provincial Department of Local Government and Traditional Affairs, North West and Bapo Administration failed in the management of Bapo ba Mogale D-Account is substantiated;

(bb) The process of the procurement in the construction of the palace was done without going out on tender or calling for quotations. Accordingly it was irregular to have proceeded with the construction without going on tender because the Bapo Administration would have received and considered other competitive bidders who would have provided value for money. This was contrary to section 38 of PFMA.

(cc) The total construction work of the palace complex amounted to R115,088,916.57 well above the budgeted amount of R29.8 million. There was gross misuse of funds by the Department to have exceeded the budget by approximately R85 million and no reasons were advanced for such a huge increase.

(dd) There were no municipal approved building plans at the commencement of the construction of the palace complex. Despite the negative report or remedial work to be done on the palace, no action was taken against the main contractor, Nhluvuko Civil Works. It was improper for the Department to have allowed the construction of the palace without having obtained the relevant approvals. This is contrary to section 38 of PFMA.
(ee) Administrators are expected to perform their functions and responsibilities in terms of statutory law and the Constitution which include diligent administration, advancing the well-being of the members of the traditional community, proper administration of finances, act in efficient and effective manner and conducive to good governance and administration. It is evident in the circumstances that the Bapo Administration and the Department failed in the abovementioned fiduciary duties and obligation in terms of sections 9 and 10 of the North West Traditional Leadership and Governance Act.

(ff) Further, the Traditional Councils are expected to perform their functions in good faith, diligently, efficiently, honestly and in a transparent manner. The performance of the functions were not adhered to in terms of paragraph 2 of the schedule to the Act.

(gg) The Bapo Administration and the Department had an obligation to exercise a high level of professionalism and ethics including accountability in the performance of their duties. These principles are enshrined in section 195 of the Constitution.

(hh) Failure by Department and Bapo Administration to ensure that the Multi-purpose Centre, Wonderkop Community Hall and are Segwaelane Community Centre utilised for the purpose for which it was built constituted fruitless and wasteful expenditure contrary to the provisions of section 38 of PFMA and the community has benefitted nothing out of the project.

(ii) The HoD should have ensured that the Bapo Administration develop a sound policy or framework governing the awarding of bursaries and a detailed register of beneficiaries to obviate and lack of controls and systems. Such policy would have guided them in the allocation of bursaries to deserving students and be accountable to the community at large. If such controls and systems were in place the issue relating to overspending by R6 million by the Administrator could have been avoided.
(jj) The Administrators were paid exorbitant amounts by Bapo Administration and the Department and such payments should be investigated further to determine whether such payments were justified or not. It was improper, in one instance, for Mr Moloto to have approved his own invoice amounting to R719,534.00. Such payment should have been done by the next Senior Authority and not the Administrator himself.

(kk) The payments for professional and legal fees were exorbitant because of instability within the royal family and parties were suing one another. The Bapo Administration should have kept records of parties who lost and ordered to pay costs. It is not clear whether such costs ever recovered, if any, or whether the Bapo Administration was responsible to pay such costs. If the Administration paid such costs for losing parties they should be recovered from the relevant such parties.

(ll) The payment of personnel costs increased by seventy three percent and the Bapo Administration and the Department have to explain and provide justification of such huge increases. Proper records should have been kept safely by the then Bapo Administration.

(mm) There was payment of allowances to the value of R12.7 million where there is no policy governing the payment of allowances. Mr R Mabale was paid an allowance of R297 290.00 for participating in the land claim committee. The Bapo Administration and the Department must explain such huge increases and payments to Mr Mabale. Proper payment records should have been kept safely by the then Bapo Administration.

(nn) The investigation into the Poverty Alleviation programme revealed that the financial controls around this project were appalling because there are allegations that staff was carrying hard cash in the range of more than a million rands in their cars to pay members of the community. There was also lack of controls in monitoring the budget as evidenced by the expenditure of about R38 million in the 2011/2012
financial year during Mr Lerofolo's tenure. The investigation revealed that the professional fees increased over the years and there were no controls in place. The Department represented by various Administrators failed to put controls and systems in place that would have guided them in the allocation and management of budgets and be accountable to the community at large. If such controls and systems were in place the issue relating to overspending and lack of accountability by the Administrator could have been avoided.

(oo) The security costs increased sharply in 2011/2012 to about R3.2 million and went as high as R8.9 million in the 2013/2014 financial year. Adequate justification was not provided for such huge increases.

(pp) The investigation revealed that cemeteries, halls and Multi-Purpose Centres have been vandalised and grass and bushes are growing on the paved roads due to lack of maintenance. It was incumbent upon Department to maintain the facilities at the cemeteries and failure to do so may lead to having to incur unnecessary costs to replace vandalised property. This falls short of the Batho Pele principles.

(qq) The Department failed to safeguard the funds held in the Bapo ba Mogale D-Account and for that reason, certain amounts cannot be accounted for as and in some instances there is over expenditure as well as fruitless and wasteful expenditure contrary to the applicable legislative prescripts.

(rr) The Department failed to submit the Bapo Administration books and accounts for auditing by the Auditor General who would have provided opinions and guidelines on how the funds in the Bapo ba Mogale D-Account should have been managed and made certain findings and recommendations.

(ss) The Administrators appointed by the Department either did not understand their mandate or they just used the funds of Bapo Administration without taking into account the interests of the community at large, did not perform their duties in good
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faith, diligently, honestly, efficiently and did not comply in most cases with applicable legislative prescripts under which they were appointed.

(tt) In respect of Trunk Roads roads, the matter requires further investigation to ascertain the maladministration that was committed in the circumstances.

(uu) The conduct of the Department and the Bapo ba Mogale Administration in the circumstances constitutes maladministration in terms of section 6(4)(a) of the Public Protector Act and improper conduct as envisaged in terms of section 182(1) of the Constitution.

(b) Regarding whether the Bapo ba Mogale Community suffered prejudice as a result the failure to manage the Bapo ba Mogale D-Account by the Department and the Bapo Administration:

(aa) The allegation that failure by the Department and Bapo Administration to properly manage the D-Account led to the Community suffering prejudice is substantiated.

(bb) As a result of the failure by the Department to properly manage the D-Account millions of rand cannot be accounted for.

(cc) Furthermore, the conduct of the Department deprived, the community of the financial resources which would have been used for the community’s benefit with regards to additional decent housing, proper health care facilities, food, water and social security, employment opportunities, more bursaries to deserving students, infrastructure, employment projects; poverty alleviation; etc.

(dd) As a result of poor workmanship and vandalism on the multi-purpose Centre and other halls the community is unable to use them for meetings and recreational purposes.
(ee) The actions of the Department and the Bapo Administration is contrary to the ethos laid out in the Batho Pele principles.

(ff) In the circumstances the conduct of the Department and the Bapo Administration amounts to maladministration and improper conduct as envisaged in section 182(a) of the Constitution and section 6(4) of the Public Protector Act.

(ix) In the light of the above findings the Public Protector is directing the following remedial action as contemplated in section 182(1)(c) of the Constitution:

1. The Premier of the North West Province to:

1.1.1. Approach the SIU with a view in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996 to:

1.1.1.1. Initiate a process to ascertain the irregular amounts paid as listed hereunder and determine which amounts may be recovered through a civil process and further provide the Public Protector with a report on steps taken in that regard within a period of sixty (60) days from the date of the issuing of the final report:-

a. The irregular payment of an amount of R 78 863 670.73 million paid to Nhluvuko Civil Works on the construction of the Palace complex;

b. The payment of an amount of R 21 570 011.99 million paid to Ndzalama Interiors on the construction of the Palace complex;

c. The payment of an amount of R 8 705 233.85 million paid to ProjexConsult on the construction of the Palace complex;
d. The payment of an amount of **R 20 243 146.85 million** paid to Nkambule and Associates on the construction of the construction of trunk roads in Wonderkop and Greater Bapong areas;

e. The payments of an amount of **R8 123 949.08 million** and **R4 125 670.38** to Mr Abel Dlamini and Junius Moloto respectively during their tenure as Administrators, as well as Mr Moloto's payment to himself of an amount of **R719 534**;

f. The payments of an amount of **R3.7 million** from Madisa and Associates CC who were contracted to provide marketing and communication services. Included in these services was the drafting of strategies and plans, design and lay-out of the annual report. No proof of such work was produced;

g. The payments of an amount of **R5.1 million** from Mosiamise Business Consulting for its consulting work which included among others the review of mining activities and consultants. No tangible output on these services could be provided;

h. The payments of an amount of **R36.3 million** from Matlapa Construction Consulting (Pty) when it was evident there was no value for money in running the project;

i. The payments of an amount of **R 4 052 328.72 million** paid to Dire Accounting Practice CC for failing to deliver on the implementation of the Enterprise Resource Planning System;

j. The payments of an amount of **R8 098 313.81 million** from Thaba Consulting who were Project Managers for the construction of the Multipurpose Centre for poor workmanship;
k. The payments of an amount of **R13 million** from Queens Building Construction CC who were Project Managers for the construction of the Multipurpose Centre for poor workmanship;

l. The payments of an amount of **R5.2 million** from Thaba Consulting Engineers (Pty) who was the consultant during the construction of the Multipurpose Centre which the investigation revealed to be of poor workmanship;

m. The payments of an amount of **R7 180 409.69 million** from Kgatelopele Consulting Engineers who was the consultant during the construction of the Segwaelane Community Centre which the investigation revealed to be of poor workmanship;

n. The payments of an amount of **R7 863 052.52 million** from Kgatelopele Consulting Engineers who were appointed to constructed Segwaelane Community Centre for poor workmanship;

o. The payments of an amount of **R7 014 990.59 million** from Kgatelopele Consulting Engineers who was the consultant during the construction of the Wonderkop Community Hall Centre which the investigation revealed to be of poor workmanship; and

p. The payments of an amount of **R8 098 313.81 million** from the Service Provider who constructed Wonderkop Community Hall for poor workmanship.

1.1.1.2. The Premier must approach the SIU with a view in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996 to conduct a forensic investigation on the following:

a. Serious maladministration, unlawful appropriation and expenditure of public money by the Administrators and Directors of companies (service providers) who were awarded tenders with the view of the recovery of losses suffered by the State and
institute criminal charges in terms of Section 86 of the Public Finance Management Act;

b. The role played by the then Administrator, Mr Abel Dlamini, in the appointment of Nhluvuko Civil Works (Pty) Ltd, to build the palace without going out on tender or calling for quotations;

c. Administrators who might have benefitted improperly in their capacities as Bapo Administrators and to recover monies lost by Bapo Administration during their tenure;

d. The circumstances leading to the establishment of BBMI and to investigate but not limited to the following:

(aa) To establish whether before the establishment of BBMI there was a Community/Tribal resolution taken at a community meeting for its establishment and to determine whether other legal prescripts and were followed;

(bb) To investigate who are the owners of BBMI, equity deal between BBMI and Lonmin shareholding agreements, share certificates and the processes followed in the appointment of Directors and members of the Executive Committee;

(cc) To investigate whether or not board members, Executive members, Royal members, Traditional Committee members have a financial relationship and whether they benefit financially from BBMI and whether there is a conflict of interest in their dealings with BBMI; and

e. Serious maladministration in connection with all the D-Accounts in the Republic of South Africa to ascertain whether all mines entrusted with payment of royalties, in
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North West and other Provinces, are indeed paying royalties to the correct recipients, including management of royalty payments to communities

1.2. The Director General of the Province to:

1.2.1. The Director-General must ensure that the Bapo Administration must within a period of 60 days from the issuing of the report provide the necessary maintenance and security to guard the cemeteries, halls and Multi-Purpose Centres; they must also make sure that the necessary repairs are effected so that these facilities are used for the benefit of the community at large.

1.2.2. The Director-General must ensure that the Bapo Administration must within a period of 60 days from the issuing of the report develop, adopt and implement Policies relating to effective, efficient, economic and transparent system of financial risk and internal control, financial controls, allowances and bursaries, appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective; They must also develop systems that would curb and prevent unauthorised, irregular, fruitless and wasteful expenditure;

1.2.3. The Director-General must within a period of 60 days from the issuing of the report follow up on cases that were opened at Brits Police Station relating to allegations of enrichment by certain individuals who were involved in the Poverty Alleviation project;

1.2.4. The Director-General must further conduct an investigation to establish whether the conduct of Mr Lerefole, the then Administrator, who is still in the employment of the North West Provincial Department of CATA contravened the Public Service Act and the Regulations thereof.
1.2.5. The Director-General must refer aspects of legal costs incurred by the Bapo Administration to the Law Society of South Africa to assess and verify the fairness of the legal costs incurred.

1.3. The Public Protector refers the matter to the Auditor General in terms of section 6(4)(c)(ii) to audit the D-Account of the Bapo Ba Mogale Administration.

1.4. The Public Protector, in terms of section 6(4)(c)(i) of the Public Protector Act, brings to the notice of the National Prosecuting Authority and the DPCI those matters identified in this report where it appears crimes have been committed.
REPORT ON AN INVESTIGATION INTO ALLEGED IMPROPER PREJUDICE SUFFERED BY BAPO BA MOGALE COMMUNITY AS A RESULT OF MALADMINISTRATION BY THE FORMER BAPO BA MOGALE ADMINISTRATION AND THE DEPARTMENT OF LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS IN THE MANAGEMENT OF BAPO BA MOGALE D-ACCOUNT

1. INTRODUCTION

1.1. This is a report of the Public Protector 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, 1994 (the Public Protector Act).

1.2. The report is submitted in terms of section 8(1) of the Public Protector Act to the following people to note the outcome of my investigation:

1.2.1. The North West Premier: Hon SOR Mahumapele;

1.2.2. The North West Director General: Dr L Sebego;

1.2.3. The MEC for Department of Culture Arts and Traditional Affairs: Ms OR Motshware;

1.2.4. The Head of Department of Culture Arts and Traditional Affairs: Mrs SR Bapela;

1.2.5. The Head of the Special Investigating Unit: Adv. JL Mothibi; and

1.2.6. Kgosi Rangwane Radikobonyane Mogale and Bafo ba Mogale Traditional Council.
1.3. A copy of the report is also provided to Mr Freddy Mogale, A Mafate and Ms Itumeleng Moerane, the Complainants to inform them about the outcome of my investigation in terms of section 8(3) of the Public Protector Act.

1.4. The report relates to an investigation into the alleged mismanagement and improper prejudice suffered by Bapo ba Mogale Community as a result of maladministration by the former Bapo ba Mogale Administration, Department of Local Government and Traditional Affairs in the management of Bapo ba Mogale D-account.

2. THE COMPLAINT

2.1. The complaint was lodged by Mr Freddy Mogale and Ms. Itumeleng Moerane, Secretary to the Royal Working Committee or the Royal Six (the Complainants) on 26 March 2012.

2.2. The Complainants in essence alleged that:

2.2.1. The Bapo Ba Mogale Traditional Council (the Council) was constituted in terms of the Bophuthatswana Traditional Authority Act No. 23 of 1978 and later by section 6 of the North West Traditional Leadership and Governance Act No. 2 of 2005;

2.2.2. The Bapo ba Mogale tribe in the North West Province are located in the West of Brits and North East of Rustenburg and are in the mineral rich Bapo area. The tribe was under the leadership of Kgosi Edward Bob Mogale assisted by Radikobonyane E. Mogale, popularly known as Rangwane who is the chairperson of the Council;
2.2.3. The Bapo Ba Mogale Traditional Community comprises of approximately 40,000 people, predominantly rural South Africans in the North West Province near Brits with an estimated unemployment rate of 30%.

2.2.4. It is an association of persons forming an indigenous tribe under Kgosi Bob Edward Mogale and deemed to be a Traditional Community in terms of section 2 of the Traditional Leadership and Governance Framework Act No. 41 of 2003.

2.2.5. The current legally and democratically constituted Council, as outlined in both the National Act and the North West Act, is responsible for the administration of the affairs of the traditional community. Sixty (60) percent of the Council was elected by the community and the remaining forty (40) percent was selected by the Royal Family. The members were published in the Extraordinary Provincial Gazette volume 257 Number 7325, dated 8 August 2014.

2.2.6. The Bapo traditional kingdom comprises of Buffelsfontein, Modderspruit, Boschfontein, Wolhuterskop, Kafferskraal, Wonderkop, Marikana and Uitvalgrond areas or portions. Currently, Lonmin, Skychrome and Samancor Chrome are operating mining activities on Bapo land which commenced in 1969.

2.2.7. The main source of revenue for this tribe since around 1991 has been royalties from mining companies doing business in Bapo lands. These royalties are deposited directly to the D-Account held at the North West Provincial Department of Finance. At the beginning of 1 April 1991 the balance of Bapo ba Mogale D-Account was R693,773.63.

2.2.8. The D-Account was formed by the former Bophuthatswana Government to manage the funds of all tribes in Bophuthatswana for developmental purposes, hence the name D-Account. The account was taken over by the
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North West Provincial Government in 1994 due to change of administration;

2.2.9. The Complainants alleged that there were serious mismanagement and maladministration issues relating to Bapo ba Mogale D-Account at Bapong Village;

2.2.10. The specific allegations made by the Complainants are the following:

a. There were misuse of funds from the D-Account, its current status and auditing report thereof;

b. There was improper conduct and misappropriation of funds in the building of the Royal Palace near Mooifontein built for R62 million whilst it was worth R29 million;

c. There are issues relating to disputed Bogosi and Traditional leadership. A report by Professor Khunou has not been made public;

d. The Complainants requested an appointment of an interim structure and non-recognition of the Royal House;

e. They requested reports and terms of reference of the previous Administrators and the Department did not avail same to them;

f. The North West Government must stop appointing Administrators instead it must resolve the issue of the disputed Bogosi as this has created a vacuum. It has instead appointed an acting Kgosi who was not recognised by the Office of the Premier. They are sceptical of the mediation processes by the Office of the Premier because it was sowing divisions. As the Royal Family they were able to manage their own affairs without
any interference. One of the Administrators was paid an amount of R18 million in one year;

g. Proper procurement processes were not followed in the appointment of service providers;

h. They were not provided with information relating to Mining Lease Agreements and their stake as a community;

i. Lonmin Mine is paying millions in royalties and they do not know what happens to the monies paid to the tribal coffers (D Account). They are of the view that agreements with Lonmin must be terminated;

j. Investigations conducted by Sekela Consulting Forensic, SAPS, Hawks and other Agencies have since stalled;

k. They queried the Bapo Mining and Hugh Eiser’s involvement whilst being interdicted by the High Court in Mafikeng; and

l. The Community members during engagements with the Public Protector raised issues that the Bapo ba Mogale Traditional Authority and various Administrators appointed by the Department failed to provide bursaries to deserving students.
3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

3.2 Section 182(1) of the Constitution provides:

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

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3 In 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.¹ 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."²

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

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¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
² Supra at para [73].
3.5 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, it further includes the power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.6 The Department and the Bapo ba Mogale Administration are organs of state and their conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector’s mandate.

3.7 The Public Protector’s power and jurisdiction to investigate and take appropriate remedial action was never disputed by any of the parties.

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 sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 7 of the Public Protector Act gives the Public Protector the authority to, on his or her own initiative, or receipt of a complaint or an allegation, or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6 to conduct an investigation.
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4.2. Approach to the investigation

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

4.2.1.1. What happened?

4.2.1.2. What should have happened?

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

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

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. In this particular case, the factual enquiry principally focused on whether or not the Bapo Administration and the Department acted improperly and/or irregular in the administration and the management of Bapo ba Mogale D-Account.

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 Bapo Administration and the Department to prevent the maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration.
4.3. On analysis of the complaint, the following were issues considered and investigated:

4.3.1. Whether there was alleged failure on the part of the Head of the Department for the North West Department of Local Government and Traditional Affairs and the Bapo Administration in the management of Bapo ba Mogale D-Account and if so, whether such failure constitutes maladministration; and

4.3.2. Whether the Bapo ba Mogale community suffered prejudice as a result of the failure to manage the Bapo ba Mogale D-Account by the Department and the Bapo Administration.

4.4 The Key Sources of Information

4.4.1 Documents

4.4.1.1. A copy entitled Bapo ba Mogale Investments NPC – Information Pack dated 15 August 2015 received from Mr Mashala on 13 October 2015;

4.4.1.2. A copy of a report from Delta Built Environment Consultants report received by the Public Protector on 31 January 2017;

4.4.1.3. A copy of a report from FIMCOP to the Public Protector dated March 2017;

4.4.1.4. A copy of a Section 7(9) Notice addressed to Kgosi Mogale and Bapo ba Mogale Traditional Council dated 13 April 2017; and
4.4.1.5. Copies of Section 7(9) Notices addressed to NW Premier, Director General, MEC-CATA, HoD-CATA and Mr Lerefolo dated 13 May 2017.

4.4.2 Interviews conducted

4.4.2.1. Meeting on 03 August 2012 between the Public Protector, the Investigation team and Premier Thandi Modise;

4.4.2.2. Community meeting between the Public Protector, Bapo ba Mogale Traditional Council, Officials from the Department of Traditional Affairs and the community held on 12 September 2012 at Bapong;

4.4.2.3. Community meeting between the Public Protector, Bapo ba Mogale Traditional Council, Officials from the Department of Traditional Affairs and the community held on 19 October 2012 at Bapong;

4.4.2.4. Community meeting between the Public Protector, Bapo ba Mogale Traditional Council, Officials from the Department of Traditional Affairs and the community held on 01 February 2013 at Bapong;

4.4.2.5. Meeting on 26 July 2016 between the Public Protector and Mrs Nono Bapela, Head of Department (the HoD) of CATA, Mr Ndlela Kunene, and an HoD for Finance, Investigation team and other government Officials;

4.4.2.6. Community meeting between the Public Protector, Bapo ba Mogale Traditional Council, Officials from the Department of Traditional Affairs and the community held on 08 October 2016 at Bapong; and
4.4.2.7. Community meeting between the Public Protector, Bapo ba Mogale Traditional Council, Officials from the Department of Traditional Affairs and the community held on 22 March 2017 at Bapong.

4.4.3 Correspondence sent and received

4.3.3.1. A copy of a letter dated 24 February 2012, from the Bapo ba Mogale Royal Family and addressed to the Public Protector;

4.3.3.2. A copy of a letter dated 26 March 2012, from the Bapo ba Mogale Royal Family and addressed to the Public Protector;

4.3.3.3. A copy of a letter dated 03 July 2012, from the Bapo ba Mogale Royal Family addressed to the Office of the Premier and copied to the Public Protector;

4.3.3.4. A copy of a letter dated 21 October 2012, from the Bapo ba Mogale Royal Family and copied to the Public Protector;

4.3.3.5. A copy of an email dated 02 November 2012, from Ms Itumeleng Moerane of the Bapo ba Mogale Royal Family and addressed to the Public Protector;

4.3.3.6. A copy of a letter dated 22 October 2012, from the Public Protector Provincial Office in the North West to Honourable MEC China Dodovu, the former MEC for Local Government and Traditional Affairs;
4.3.3.7. A copy of a letter dated 15 November 2012, from the former MEC China Dodovu to the Public Protector Provincial Office;

4.3.3.8. A copy of a letter dated December 2012 the then Director: Traditional Affairs, Mr S A Ruthoane, in the Department of Local Government and Traditional Affairs to the Public Protector Provincial Office;

4.3.3.9. A copy of a letter dated 29 August 2013, from the Public Protector to the former Honourable Premier T Modise;

4.3.3.10. A copy of a letter dated 21 July 2016 from the Public Protector to the Premier of the North West, Honourable Supra Mahumapelo;

4.3.3.11. A copy of a letter dated 25 July 2016 the Public Protector received a letter from MEC OR Mochware- CATA;

4.3.3.12. A copy of a progress Report to Bapo ba Mogale signed by the Public Protector on 14 October 2016;

4.3.3.13. A copy of a letter dated 24 April 2017 to the Public Protector received from HOD- CATA;

4.3.3.14. A copy of a response letter to the Section 7(9) Notice from Bapo ba Mogale dated 08 May 2017;
4.3.3.14. A copy of a response letter to the Section 7(9) Notice from the HoD-CATA dated 24 May 2017;

4.3.3.15. A copy of a response letter to the Section 7(9) Notice from the HoD-CATA dated 24 May 2017; and

4.3.3.16. A copy of a response letter to the Section 7(9) Notice from the Mr Lerefole dated 24 May 2017.

4.4.4 Legislation and other prescripts

4.4.4.1 Constitution of the Republic of South Africa, 1996;

4.4.4.2 North West Traditional Leadership and Governance Act No. 2 of 2005;

4.4.4.3 Traditional Leadership and Governance Framework Act No. 41 of 2003;

4.4.4.4 Public Finance Management Act No. 1 of 1999; and

4.4.4.5 Batho Pele White Paper of 1997.
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 the alleged failure on the part of the Head of Department of the North West Department of Local Government and Traditional Affairs and the Bapo Administration in the management of the Bapo ba Mogale D-Account and if so, whether such failure constitutes maladministration:

*Common cause issues*

5.1.1. The investigation commenced in 2012. However the Public Protector had a number of challenges mostly relating to cooperation from officials of the North West Provincial Administration.

5.1.2. On 22 October 2012, the Public Protector Provincial Office in the North West (the Office) directed correspondence to Honourable MEC China Dodovu, the former MEC for Local Government and Traditional Affairs (the former MEC) after a Community meeting at Bapong.

5.1.3. The former MEC was requested, amongst others, to provide the Public Protector with financial statements, payments to various service providers, audited statements, approvals and tribal resolutions, terms of reference and reports of various Administrators of Bapo ba Mogale relating to the D-Account since the Bophuthatswana era.

5.1.4. On 15 November 2012, the former MEC responded that the D-Account was never audited since its inception and was unable to provide audited financial statements. The Department was in the process of appointing a service provider to conduct some investigations about the origin and regulations governing the management
of the D-Account and it was an involved process to provide information dating back to the Bophuthatswana era.

5.1.5. He responded further that the Department was advised by Mr Lerefolo, one of the Administrators, who was seconded from the Department that during his tenure he had appointed Sizwe Ntsaluba and Gobodo to conduct an internal audit as the Auditor-General was not in a position to conduct an audit due to legislative framework.

5.1.6. It was further confirmed by the then Director: Traditional Affairs, Mr S A Ruthoane, in the Department of Local Government and Traditional Affairs that in December 2012 the Department appointed Emang Basadi Consortium to determine the scope of the forensic audit of the D-Account. Later on the former Premier, Honourable T Modise, appointed OMC Chartered Accountants to conduct a forensic investigative audit on all financial records relating to the Tribal Authority accounts.

5.1.7. The Public Protector has to date not received a single report of the above-mentioned forensic investigations.

5.1.8. On 29 August 2013, the Public Protector directed a letter to the former Honourable Premier T Modise raising the Public Protector’s frustrations about the failure by the North West Administration to provide bank statements for the whole D-Account. In the same letter, the Public Protector indicated to the Premier that embezzlement on the aspects of the D-Account was continuing, and the people’s despair is rapidly increasing.

5.1.9. The Public Protector further reminded the former Premier about the contents of her letter dated 25 July 2013 wherein the Public Protector suggested the suspension of the capital expenditure in order to stop the continuing depleting of funds to which no response was received.
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5.1.10. On 21 July 2016, the Public Protector directed correspondence to the Premier of the North West, Honourable Supra Mahumapelo, to discuss issues relating to the D-Account. The Premier responded promptly and the MEC for Culture, Arts and Traditional Affairs (CATA) was assigned to attend the meeting with the Public Protector and the Investigation team on 26 July 2016.

5.1.11. On 25 July 2016, the Public Protector received a letter from MEC OR Mochware from CATA which stated:

5.1.11.1. According to Departmental records since 1991 the amount in the D-Account was R721 055.05 which was verified by the Auditor-General;

5.1.11.2. The amount paid into the D-Account, Account number 2600 post 1994 was made up as follows as per the breakdown provided by the Department below:

| 5.1.11.2.1. Deposits                  | R 392 474 793.40 |
| 5.1.11.2.2. Interest                  | R 224 810 445.12 |
| 5.1.11.2.3. Total                     | R 617 285 238.52 |

5.1.11.2.4. The entire amount in the D-Account as at 30 June 2016 was R495 655.91

5.1.12. In its letter dated 25 July 2016, the Department confirmed that the following were the signatories to the accounts of traditional councils in Mdlbeng, including Bapo ba Mogale:

5.1.12.1. Manye MJ from June 2006 to 01 February 2011;

5.1.12.2. Manne DS from November 2006 to date;
5.1.12.3. Mohajane RS from November 2006 to date; and

5.1.12.4. Mogotsi MNK from May 2011 to date.

5.1.13. On 26 July 2016, the Public Protector had a meeting with Ms OR Motshware, MEC for Department of Arts Culture and Traditional Affairs (CATA); Mrs Nono Bapela, Head of Department (the HoD) of CATA; Mr Ndlela Kunene, an HoD for Finance; the Investigation team and other government Officials. The figures provided in the breakdown were confirmed as correct. The MEC-CATA promised that they would provide the necessary assistance in this investigation.

5.1.14 Construction of the Palace Complex

5.1.14.1. In terms of the evidence obtained the Administrator, Mr Abel Dlamini (Mr Dlamini), appointed a contractor, Nhluvuko Civil Works (Pty) Ltd (Nhluvuko Civil Works), to build the palace without going out on tender or calling for quotations on 18 November 2009 for an amount of R29.8 million. Nhluvuko Civil Works commenced with the construction and issued its first invoice of R 9 861 000.00 dated 3 December 2009 and approved on 04 December 2009 by Mr Dlamini.

5.1.14.2. The sub-projects undertaken here were the Royal Palace; Administration Building; Council Chambers; Guard Houses (Main Gate and Royal Palace Gate); Sundry External Works; Upgrading of existing farmhouse and Interior Decorating, inclusive of escalation and professional fees. Bill of Quantities were drawn up by 3DQS, site development plans with complete set of drawings, applications for water supply and sanitation were submitted to Madibeng Local Municipality (MLM) and application for electricity connection was submitted to ESKOM. Way-leave application were submitted to the Department of Public Works.
5.1.14.3. Payments were made from the D-Account to ProjexConsult who in turn made payments to suppliers; labour; contractors; sub-contractors and consultants. Although this was a means of ensuring that the project is completed, the correct procedures were not followed and there was no approval from the Council or the MLM to make these payments as no cession had been signed by appropriate parties. All payments were signed and approved by ProjexConsult; MLM and the Council.

5.1.14.4. The original contract for the Construction of the Royal Complex, which included the Residence; Executive Offices; Council Chambers; Guard Houses; Boundary Wall and Fence; Driveway and Parking; Landscaping and Irrigation; Staff Quarters; Bulk Services (Sewer, Electrical, Water and Storm-Water); Security Infrastructure and Professional Services was entered into between the Tribal Council, through Administrator Mr Abel Dlamini and Nhluvuko Civil Works on 18 November 2009.

5.1.14.5. On 06 October 2010, Mr Wayne Mahnecke from ProjexConsult was appointed by Administrator Mr Junius Moloto on behalf of the Council to complete the whole project. No reasons were given why the original consultants did not complete the work or what fees had been paid to them.

5.1.14.6. On appointment, ProjexConsult raised various concerns which included the following:

5.1.14.6.1. Variances between progress on site, the amount certified and paid to the contractor. Progress was about 55% complete but monies certified and paid were about 96%. No site development plan had been submitted to MLM. No Environmental Impact Assessment Study and any specific rights to build were done or applied for;
5.1.14.6.2. No application to ESKOM for electricity connection could be found; Neither could an application to MLM for water supply and sanitation connection could be found; No Traffic Impact Study was found to have been submitted to the Provincial Department of Public Works, Roads and Transport;

5.1.14.6.3. Builders work quality was, in places not according to building standards, e.g. fire escape and staircases. Previous consultants approved unacceptable workmanship which in turn could cause serious damage to the properties. This unacceptable work was also approved and certified for payments. Only 5 payments totalling 90% of the budget were certified and paid despite the fact that only 55% of the project had been completed.

5.1.14.7. On 22 February 2011, the Project Managers report indicated that at the time of reporting there were no municipal approved building plans. Despite the negative report or remedial work to be done at the palace, no action was taken against the main contractor, Nhluvuko Civil Works.

5.1.14.8. The total construction work amounted to R115 088 916. 57 million comprising R78 863 670 73 million paid to Nhluvuko Civil Works for construction, R8 705 233.85 million to ProjexConsult for project management, R21 570 011.99 million to Ndzalama Interiors for interior decorations and R5 950 000.00 million for land costs. It is concluded that there was gross misuse of funds by the Department to have exceeded the budget for the construction of the Palace by approximately R85 million and there are no reasons advanced for such a huge increase.

5.1.14.9. It was improper for the Department to have proceeded with the construction of the palace without going on tender because they would have received and considered other competitive bidders who would have provided value for money.
Furthermore it was improper for Mr Dlamini, the then Accounting Officer of Bapo Administration, failed to put the construction of the Palace complex on tender or calling for quotations.

The Department should not have allowed the construction of the palace without having obtained the relevant approvals.

It was improper failure by Mr Dlamini, the then Accounting Officer of the Bapo Administration, not to consult the Community in order for them to take a Community/Tribal resolution for the construction of the Palace Complex.

A further forensic audit investigation on the issue of why the costs for the construction of the Palace escalated from the budgeted amount of R29.8 million to R115.0 million resulting in the over expenditure of approximately R85 million is warranted.

5. 1.15. Payment of bursaries

Payment of bursaries started in 2009/2010 up to the 2014/2015 financial year at an amount of R40.8 million, with a total of about 1507 beneficiaries. The Public Protector noted that there was no documented policy or framework governing the awarding of bursaries and a detailed register of beneficiaries. Accordingly the Bapo Administration and the Department represented by various Administrators should have developed a policy or framework that would have guided them in the allocation of bursaries to deserving students and to be accountable to the community at large.

Evidence obtained shows lack of controls and systems, resulted in a number of allegations and a disgruntled community members. It was further noted that during 2011/2012, Mr Lerefolo’s tenure as Administrator, the total amount spent on bursaries was about R9 million against a budget of R3
million. The Bapo Administration and the Department represented by various Administrators should have put controls and systems in place that would have guided them in the allocation of bursaries to deserving students and be accountable to the community at large. If such controls and systems were in place the issue relating to overspending by R 6 million by the Administrator could have been avoided.

5.1.15.3. It was improper for Bapo Administration to have the over-expenditure of R6 million in relation to the payments of bursaries.

5.1.16. Appointment of Administrators

5.1.16.1. The North West Provincial Government appointed five administrators for the Tribal Authority of Bapo Ba Mogale during the period December 2008 to March 2014, they are: Mr Abel Dlamini, Mr Junius Moloto, Mr Thabo Lerefolo, Dr I S Monamodi and Mr E M Mdaka.

5.1.16.2. The following terms of reference were prescribed in terms of section 10(3) read with provisions of section 9(3), of the North West Traditional Leadership Act No. 2 of 2005:

“1. To assume with effect from date of commencement hereof all administrative responsibilities and powers of a Traditional Council as prescribed by section 9, as per annexure “A”.
Particularly, the Administrator shall:

1.1 Manage all court litigation process for and against the Community.
1.2 Implement the Community and Traditional Council resolutions.
1.3 Create a harmonious relationship between internal and external stakeholders.
1.4 Resuscitate or improve on Administrative System of the Traditional Council and the Community.

1.5 Manage and/or oversee all the commercial activities, including the mining interests of the Community, by ensuring that the interests of the Community are protected.

1.6 Support any process or initiative that can bring peace and stability within Community.

1.7 Manage financial Administration of the Community affairs, including:

1.8 Improving budgeting process of the Community.

1.9 Promote service delivery by implementing approved budget.

1.10 Strengthen internal control system within the Administration.

1.11 Commission external auditors to perform auditing of the books of the community.

2. Initiate a process that will capacitate the Incoming Traditional Council

2.1 Develop policies and systems for the Traditional Council.

2.2 Provide training on the Act.

2.3 Define powers of the Traditional Council, Administration, Royal family and Kgosi.

3. To investigate all mining contracts entered between mining houses and the community.

3.1 Investigate fairness of royalty agreements, including the provision of the Community’s interests in respect of contracts.

4. To investigate all land claims initiated by the Community.

4.1 Safeguard land of the Community by compiling a land register.

5. Provide monthly progress reports to the department."
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5.1.16.3. It has been established that Mr Dlamini and Mr Junius Moloto were paid R8 123 949.08 and R4 125 670.38 respectively during their tenure. It was noted that approval of these payment was done by the Finance Manager. In one instance, Mr Moloto approved his own invoice of R719 534.00. No Community/Tribal resolution was produced reflection the condoning or approving such payments.

5.1.16.4. Mr Lerefolo, Dr Monamodi and Mr Mdaka were seconded from the Provincial Government and as such no payment was made to them from the D-Account of Bapo.

5.1.16.5. It was improper of Mr Moloto to have approved his own invoice amounting to R719 534.00. Such payment should have been done by a more Senior Authority. Such payment should also be scrutinized in a further forensic audit.

5.1.17. Legal Fees

5.1.17.1. In terms of the evidence obtained various service providers were engaged during the 2004/2005 to 2013/2014 financial years at a total cost of R30.5 million. This was in the main due to the instability in the Royal Family and disagreement in the recognition of who the lawful leader is.

5.1.17.2. The services that were rendered in disputes between the Bapo ba Mogale Tribal Authority and the Community represented by Bell Dewar Attorneys and Eiser and Kantor Attorneys amongst others. The services ranged from legal advice on contracts with mining companies and labour disputes including other matters. The legal costs for all services were paid by the Tribal Authority.
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5.1.17.3. The amount above appears to be exorbitant. It further evident that no legal costs were ever recovered, if any, in some of the matters.

5.1.18. Employee Costs

5.1.18.1. In terms of the evidence the total employee costs for the period from April 1991 to March 2015 was R44.2 million. The costs were low in the early years and only reached a million in 2004/2005. The costs escalated in 2008/2009 financial year from R2.3 million to R3.1 million in the 2009/2010 financial year representing a thirty four percent increase.

5.1.18.2. According to the evidence, an increase of seventy three percent is seen in 2010/2011 financial year when the total bill was R5.4 million. During 2011/2012 the costs stood at R8 million before going down to R5.2 million in 2012/2013 financial year.

5.1.18.3. No reasons were provided for these increases or tangible output commensurate with the costs of employees. The administrative structure has since changed as a result of corporatisation.

5.1.18.4. An intensive forensic investigation should be further conducted to look into huge increment in employee costs of seventy three percent. The fact that the administrative structure has changed is not a sufficient reason for failing to provide reasons as the employee records should have been kept safely by the then Bapo Administration.

5.1.19. Payment of Allowances

5.1.19.1. In terms of the evidence obtained, the Tribal Authority is paying allowances to a number of community structures ranging from R800.00 to about R36
000.00. The total allowance payment from 2007/2008 to 2014/2015 financial year was about R24.7 million.

5.1.19.2. Evidence suggests that there was an increase from R1.5 million in 2010/2011 to R12.7 million in 2011/2012. It appears that there is no policy governing the payment of allowances and this has put the Council at risk. For instance, evidence obtained indicates that Mr R Mabale was paid an allowance of R297 290.00 for participating in the land claim committee and no report on the work of the land claim committee was provided.

5.1.19.3. The increase in the administrative structure is not a sufficient reason for failure to have controls, as the allowance payment records should have been kept safely by the then Bapo Administration. The aspect requires further forensic audit.

5.1.19.4. The Department should have developed a payment of allowances policy or framework which could have regulated the payment of allowances to various individuals.

5.1.20. Poverty Alleviation

5.1.20.1. The Poverty Alleviation project was discussed for implementation within the framework of the 10 Year Development Plan at a community meeting on the 29th November 2009. However, there is no formal approval of the plan nor minutes of the said community meeting.

5.1.20.2. This project was initially planned for seven months at a cost of about R9 865 274.00 million, which was to create 704 job opportunities within the community of Bapo. However, it ran for more than four years from 2009 to 2014 at a total cost of about R61.8 million.
5.1.20.3. According to the evidence obtained, the financial controls around this project were appalling with staff having to carry hard cash in the range of more than a million in their cars to pay community members. There is no concrete evidence that recipients of these monies have indeed received the money or worked for the money received.

5.1.20.4. There was lack of controls in monitoring the budget as evidenced by the expenditure of about R38 million in the 2011/2012 financial year during Mr Lerefolo’s tenure. During this period, Matlapa Construction Consulting (Pty) was paid R36.3 million when it was evident in their report that there was no value for money in running the project.

5.1.20.5. The evidence shows that some payments were made to the supervisors who in turn cashed the cheques and paid all other participants. This system lacked controls and could have been abused. The Public Protector was also informed that certain individuals were found to have enriched themselves within the project and cases of fraud were opened against such individuals.

5.1.20.6. It would be proper for a forensic investigation to be conducted further on why the project that was meant to take 7 months ended up running for a period of 4 years. In addition to establish why there were no proper financial controls and processes in order to disburse funds for the Poverty Alleviation project.

5.1.20.7. Further probing has to ensure that people who enriched themselves are dealt with, and followed up on or criminal cases are opened against such individuals.
5.1.20.8. A forensic investigation has to be conducted to establish on why Bapo Administration failed to put proper financial controls in place which led to the misuse of R61.8 million which cannot be accounted for.

5.1.21. Consulting and Professional Fees

5.1.21.1. Consulting and professional fees that were paid to various service providers from the 2001/2002 to 2014/2015 financial years amounted to about R36.9 million. These expenses increased during the period of the Administrators from R559 279.00 in 2008/2009 to about R4.1 million in 2009/2010. The figure went up in 2011/2012 to R13.9 million during Mr Lerelofo’s tenure.

5.1.21.2. According to the evidence Mr Lerelofo appointed Dire Accounting Practice CC to provide financial administration assistance by implementing an Enterprise Resource Planning System; review financial reporting policies and procedures; prepare the Annual Financial Statement for the year ended 31 March 2011 and implement the asset management system.

5.1.21.3. Evidence suggests, Dire Accounting Practice was paid a total of R4 052 328.72 as a result of the above appointment. The Public Protector’s enquiry to the Chief Financial Officer, Mr Kolobe Mashala, revealed that Bapo Ba Mogale Tribal Authority has no policies as indicated in the invoices of Dire Accounting Practice and further no financial system and Annual Financial Statements.

5.1.21.4. In addition, according to the evidence, Basis Points Capital (Pty) Ltd were paid about R5.7 million during the period 2009/2010 to 2012/2013 for capital raising and financial advisory services. The largest portion (R4.6m) of the R5.7 million was paid during Mr Moloto’s tenure.
5.1.21.5. The evidence indicates that Madisa and Associates CC were appointed to provide marketing and communication services for a total amount of R3.7 million. Included in this service was the drafting of strategies and plans, design and lay-out of the annual report. According to the evidence no such documents could be found.

5.1.21.6. The evidence indicates that Mosiamise Business Consulting was paid about R5.1 million during 2011/12 for its consulting work which included, among others, the review of mining activities and consultants. This is not clear as such proof could not be furnished with tangible output on these services.

5.1.21.7. According to the evidence, Thaba Consulting Engineers (Pty) Ltd were paid about R4.2 million during 2011/2012 financial year for consulting work and about R1 million in 2005/2006 on the Bapo Multi-purpose Community Centre. This amount was authorised by the Council resolution of 12 September 2006. The Multi-purpose Community Centre is currently vandalised and cannot be used which amounts to fruitless and wasteful expenditure.

5.1.21.8. The view of the Public Protector is that it would be proper for a forensic investigation to be conducted further into this aspect.

5.1.21.9. The Department represented by various Administrators should have put controls and systems in place that would have guided them in the allocation and management of budgets and be accountable to the community at large. If such controls and systems were in place the issue relating to overspending and lack of accountability by the Administrator could have been avoided.
5.1.22. Security Costs

5.1.22.1. Payments were made to various service providers from the 2000/2001 to 2014/2015 financial years amounting to R23.7 million. Security costs increased from R65, 309.00 in 2008/2009 to R1.1 million in 2009/2010.

5.1.22.2. The evidence indicates that there was a sharp increase in 2011/2012 to about R3.2 million which then went up to R8.9 million in the 2013/2014 financial year. No reasonable explanation was advanced to justify the increment. The Department should have put a policy in place that could have regulated their security.

5.1.22.3. The view of the Public Protector is that it would be proper for a forensic investigation to be conducted to establish on why Bapo Administration paid an amount of R8.9 million in the 2013/2014 financial year and R23.7 million paid to various security service providers in 2014/2015 financial year.

5.1.23. Construction of Trunk Roads in Greater Bapong

5.1.23.1. A total cost of R35, 968,016.78 was incurred towards the construction of trunk roads in Wonderkop and Greater Bapong area under tender BMC TC 02/12 and BBMTC RD01/11 respectively by King Civil/Masiana JV and Nkambule & Associates using labour intensive methods. However, it is the view of the Public Protector that the role of Nkambule & Associates in projects within Bapo needs further scrutiny by a Forensic Auditor after being paid an amount of R20 243 146.85 million.

5.1.23.2. This matter should also be subjected to a financial audit investigation.
5.1.24. Cemeteries

5.1.24.1. According to the evidence various service providers were used to improve the state of cemeteries around Bapo at a cost of about R10.2 million. Services include erecting palisade fences and paving roads with lights. Guard houses were also built including ablutions facilities.

5.1.24.2. During the visits to these facilities it was noted that most of these facilities have been vandalised, grass and bushes are growing on the paved roads due to lack of maintenance. The facilities at the cemeteries should be maintained and failure to do so may lead to unnecessary costs having to be incurred in order to replace vandalised property. Necessary security to guard the cemeteries must be provided.

5.1.25. Multipurpose Centre

5.1.25.1. The construction of the Multi-purpose Centre commenced in February 2006 under tender number BBMTA11/2/11/12 awarded to Queen’s Building Construction cc. No drawings, documentation or contract were available for perusal in respect of this project. The project was managed by Thaba Consulting Engineers CC and the total cost of the project was about R13 million. Evidence indicates that the centre is totally vandalised with one contractor manufacturing paving bricks in the yard. This is clear wasteful expenditure. The value of the project is within the budgeted amount at R13 152 747.21 although it has been noted that the quality of the work and the material used was below standard and due to lack of maintenance, the building is damaged and dilapidated.
5.1.26. Wonderkop Community Hall including parking and earthworks

5.1.26.1. According to evidence, no drawings, documentation or contract were available for perusal in respect of this project. The value of the project is within the budgeted amount at R8 098 313.81 although it has been noted that the quality of the work and the material used were below standard and due to lack of maintenance, the building is damaged and dilapidated.

5.1.27. Segwaelane Community Centre

5.1.27.1. No drawings and documentation or contract were available for perusal in respect of this project. However the consultants identified as Kgateloole Consulting Engineers were supposedly appointed to manage the project. The cost of the project was R7 180 409.69. The value of the project is within the budgeted amount at R7 863 052.52 although it has been noted that quality of the work and the material used were below standard and due to lack of maintenance, the building is damaged and dilapidated.

5.1.27.2. The facilities should be maintained, and failure to do so may lead to the incurring unnecessary costs to replace vandalised property.

5.1.28. According to the evidence records of transactions are initiated at the Tribal Authority and approved by the Council or Administrator in the absence of the Council, forwarded to the Regional Coordinator of the Department based at Brits and then to the Department of Finance which maintains account balances of the various Tribes in Mahikeng.

5.1.29. However, until 2006 records kept at the Department of Finance were not reconciled with those being kept at the Tribal Authority to identify errors in recording. Over the years these discrepancies became significant, and in some cases they became sources of disputes between the Province and
some Tribal Authorities. Since 2006, steps were taken to reconcile both records and now these records are reconciled on a monthly basis.

5.1.30. The financial systems in place for the Tribal Authorities were set up a long time ago when the Authorities' activities were not as sophisticated and complex as they are nowadays. These systems do not incorporate the provisions of Public Finance Management Act (PFMA) or Municipal Finance Management Act (MFMA), which seek to enforce accountability by those charged with governance. This system is old and is set up in a way that results in duplication of tasks and records, which does not improve accuracy or controls. The system is inadequate in ensuring the completeness of income and to maintain accurate records of assets.

5.1.31. Bapo ba Mogale Investments NPC

5.1.31.1. In 2014, Bapo ba Mogale established Bapo ba Mogale Investments NPC (BBMI) which is a non-profit company with limited liability and registered under number 2014/129372/08. The sole object is to utilise its income and dividends received for the development and uplifting of Bapo community.

5.1.31.2. BBMI's mission is amongst others to provide social, health and educational resources, opportunities and services which will contribute to the greater good of the community. Furthermore, to develop the economy through the identification, development and collaboration of business ventures that will create job opportunities, develop skills and create wealth in Bapo ba Mogale areas. BBMI has subsidiary companies like Bapo ba Mogale Holdings (Pty) Ltd, Bapo ba Mogale Investment Holdings (Pty) Ltd and other small entities under its wing.

5.1.31.3. In 2014 Bapo and Lonmin concluded a Broad Based Socio-Economic Empowerment deal in terms of which Bapo swapped future Lonmin royalties
for 13 million shares in Lonmin Plc. which are held in Business Ventures No.1836 (Pty) Ltd 2014/106920/07.

5.1.31.4. This meant Lonmin would pay about R20 million a year to BBMI over a five (5) year deal on behalf of the community. In addition to that, Lonmin has set up a Local Economic Development Trust and makes an annual contribution to the trust in the event that Lonmin does not declare dividends in a particular year. BBMI has been granted preferential status to supply goods and services to Lonmin to a maximum of R200 million within 18 months of the transaction date.

5.1.31.5. The Lonmin Board is made up of Mr Chris Molefe (Chairperson) Ms Prudence Mbebe, Mr Churchill Madumo, Mr Jae Pretorius, Mr Adam Mogale, and Mr Reuben Phiri. The Executive is comprised of Mr Lehlohonolo Nthonto (CEO), Mr Oupa Mothibi (COO), Mr Kolobe Mashala (CFO) and Ms Dimakatso Lekhutlile, Company Secretary

5.1.31.6. As a result of the establishment of BBMI all monies that are received by Bapo Administration are no longer deposited into the D-Account but in the account of BBMI.

**Issues in dispute**

5.1.32. The Public Protector South Africa issued a Section 7(9) Notice to Kgosi Mogale and Bapo ba Mogale Traditional Council on 19 April 2017. The Bapo Administration responded as follows as per letter dated 08 May 2017:

"As you correctly set you in this paragraph, all the Administration in Bapo Ba Mogale were appointed in terms of Section 10 of the North West Traditional Leadership and Governance Act 2 of 2005 ("the Act"). In terms
of this section, the Premier may appoint any person to assist the Traditional Council in the management of their affairs, on recommendations of the Royal Family, and if the Premier is satisfied that the Traditional Council is unable to perform their functions in an efficient and effective or in a manner that is conducive of good governance and administration. Section 10(3) specifically provides" that... appoint any person to assist the traditional council concerned to perform the functions assigned to such traditional council".

It is important to note that the law requires such appointed administrator to assist the Traditional Council" in managing their affairs. We believe that the MEC exceeded their powers under this section as in 2008, they "placed the Traditional Council on leave instead of "assisting" them while they were in office. In essence, the MEC removed and replaced the Traditional Council with administrators. It is important to note that that Traditional Council never, resumed office to this day. This is critical in determining the extent of liability of Government in this matter and also clarify the term "Bapo Administration" used in the report.

Even if the MEC relied on section 10(3(b), which confers on the appointed administrator the competency to exercise conferred or imposed by law upon any such Traditional Council, and deems any such power or authority to have been exercised by the Traditional Council, such powers and authority can only be exercised while assisting the Traditional not in their absence. The latter cannot be held responsible as they were placed on “permanent leave” and could therefore not have acted with the administrators.

Therefore, we believe that any and all over expenditure, maladministration etc. ... during the tenure of administrators should be solely attributed to the then Government. We therefore believe that the findings as well as the
recommendations relating to this period be revised accordingly and the term "Bapo Administration" clarified.

Bapo Ba Mogale Traditional Council should therefore be able to claim any amounts lost as result of the maladministration, during the tenure of administrators, directly from the North West Government and the latter can then pursue action against all individuals implicated in the report.

The Premier has established a Commission of enquiry (Maluleke Commission) on the issues of Bogosi. The hearings at this Commission are underway and are held in the Rustenburg Civil Centre Bapo Ba Mogale are due to be heard during the Month of May 2017.

A list of cases is attached as well a list parties against whom cost orders were granted. To our knowledge, costs were not recovered.

It is important to note further that the total legal fees incurred are not only related to litigation by members of the Royal Family. For example:

Mr Hugh Elser did a lot of Legal work covering the following, in addition to litigation:

Bapo Ba Mogale Community assets and issues covering:
Lonmin PLC royalties,
Pandora JV increase of shares,
Inowala challenge,
Sky Chrome swop of shares and royalties into shares in IFM,
Samancor increase of partial free ride from 26% to 50%,
Neil Brothers shareholding,
Turffontein exploitation of ore body,
Land claims,
Conversion to Traditional Council.
Mr Eiser is currently suing the Traditional Council for approximately R6 million in legal fees, yet there can be no tangible results of work done. This claim is consolidated under case number 11/33111 in the South Gauteng High Court.

Mr Dewar, did for the Lonmin BEE deal for which they are still owed approximately R1 million and have been grated summary judgement against Bapo for the non-payment of outstanding legal fees on 3 February in the High Court, Pretoria.

Kgaka Attorneys represented Bapo at the Marikana Commission and they have a writ of execution against Bapo assets for outstanding legal fees of approximately R1.6 million.

Khanyisa Mogale Inc. also did some work at the Marikana Commission and has put a claim of R4.9 million against the Premier for unpaid legal fees to be paid from the D account. Bapo are respondents in the mater as well.

A copy of the minutes of the said Community meeting of 29 November 2009 is attached.

We have in our possession progress reports from Basis Points Capital (Pty) Ltd for work done between March 2010 until January 2011. We also have a valuation report issued by Basis Points and Nedbank regarding a valuation of the financial interests of Bapo Ba Mogale in some of Lonmin’s operations (“Project Dinatia”). Copies hereof can be submitted to the Public Protector. Due to the volumes, it would be difficult to send these via e-mail. Nedbank has instituted a claim against Bapo for this work amounting to R4.6 million.”

5.1.33. On 10 May 2017 the Public Protector issued further Section 7(9) Notices to North West Premier Hon SOR Mahumapelo, North West Director General, Dr L Sebego, MEC of Culture Arts and Traditional Affairs(CATA), Hon Ms OR Motshware, HoD
of CATA Mrs SR Bapela and former Bapo ba Mogale Administrator, Mr T Lerefolo. All the Section 7(9) Notices were hand delivered to respective Offices on 12 May 2017. The Offices of the Premier, the MEC and the Director General did not respond.

5.1.34. On 25 May 2017 the HoD of CATA, Mrs SR Bapela responded to the Section 7(9) and indicated that the Department responded on providing copies of appointment letters of: Mr M. E. Mdaka, Mr Junius Moloto and T. S. Lerefolo. The Department is still following up on appointment letters of the other Administrators. The identified Administrators will be given notice to provide the financial reports on financial transactions on the Bapo D- Account during their tenure.

5.1.35. The HoD stated further that the Department commits to assisting and cooperating with the Special Investigating Unit on the investigations and process of civil recovery of the monies of transactions listed in the remedial action of the Public Protector. An introductory engagement will be held with the Special Investigating Unit by 9 June 2017.

5.1.36. The HoD confirmed that a meeting will be scheduled with the Bapo Administration by 2 June 2017 to communicate the directives as per the remedial action of the Public Protector. In the meantime a letter has been written to the Provincial Police Commissioner Baile Motswenyane to assist with a report on the matter.

5.1.37. The Public Protector to note that Mr Lerefolo is not in the employment of Department of CATA but the Department of Local Government and Human Settlements. A request has been sent to Forensic Unit in the Office of the Premier for the investigation to establish whether the conduct of Mr Lerefolo contravened the Public Service Act and the Regulations.

5.1.38. On 25 May 2017 the Provincial Office received a response to the Section 7(9) Notice from Mr T Lerefolo the former Bapo ba Mogale Administrator who was at the time employed by the then Department of Local Government and Traditional
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Affairs as an Assistant Director, Legal Services. It was his understanding at that time that the Department intended to save costs of payments to Administrators.

5.1.39. During the period of his appointment as an Administrator, the Department also identified Colleagues in the Department from different directorates, like but not limited to the following: Communications, Finance and Human Resource with the intention to have an impact on the administration of Bapo. Regrettably, on the first day that he reported at Bapo with the team and whilst in the offices boardroom with the staff of the latter, with the intention to introduce the team, the unemployed youth of Bapo entered the boardroom and physically took all of them out of the premises except Bapo staff. As a result thereof he had to work without the assistance of the team.

5.1.40. During his tenure as an Administrator he had challenges relating to the Royal Family’s infighting leading to litigations, divided community structures, interference by the Royal Family Executive and structure known as the Task Team in the administratıve affairs, unemployment structure having tendencies of locking offices and resorting to chaotic protests, Staff that operated under threats and intimidation from both Royal Family and the Community, reliance on service providers, no internal controls and policies, negative relations between the mining houses and the community, lack of support from the Department, volatile environment incapacitated staff.

5.1.41. It was not convenient to come with the long terms strategic interventions on the basis that he was alone and everyday had to attend to complaints from the structures and individuals on their alleged outstanding issues which were not resolved. He did not have the capacity to deal with all challenges facing the administration, more especially mining transactions of the community and financial systems and as such placed reliance on service providers, like then Bell De Wall, Mosiamise Business Consultants and Nitha Dire which were already appointed when he assumed his responsibilities. He also had meetings with mining houses to discuss issues of the unemployed Bapo community and the
potential violence which might arise. Lonmin managed to at least employ a reasonable number though after serious community unrest which was on media.

5.1.42. He held frequent meetings with the Royal Family and the Task Team on his activities. He took steps to implement the Ten Year Development Plan by focusing on the Bapo Ba Mogale Master Plan, leading to the appointment of Nkambule and Associates. He also made progress on Corporatization, so as to allow Bapo to have the Bapo Ba Mogale Holding with its Board of Directors and its subsidiaries, which will be made out of community structures like Youth, Women, and Sports amongst others. The matter could not be finalized as he had returned back to the Department. However, Bell De Wall law firm was helping on the matter.

5.1.43. On the 1st May 2012, he convened a community meeting, with Kgosi and Royal Family members present with the sole purpose to report on what he had done since his appointment. Copies of the reports were availed to the community structures leadership. He is not in possession of any documents or records of Bapo Ba Mogale as he left everything at Bapo for filing. The documents can only be found at Bapo Offices or Madibeng Office and some information can be obtained from Service Providers.

5.1.44. Mr Lerefolo indicated that it is correct that in certain instances procurement process were not followed as there was no policy in place. There were no bid committees and some services were necessary to be procured. It was mainly on professional service that processes were not followed.

5.1.45. Payment of Bursaries

The Bursary Policy had loopholes but despite that, he requested the Educators of Bapo Ba Mogale to assist them with interviewing the applicants and making recommendations. The bursaries were awarded on the basis of the above mentioned process. It is admitted that the bursaries awarded exceeded the budget. The reason for that was that the area was volatile, dominated by unemployed youth protesting and to mitigate the situation, awarding bursaries
was one of the options given the situation at that time. It was going to result in more instability to award others bursaries and deny the others when they were all Bapo residents.

5.1.46. Mr Lerefole stated that there was a bursary policy but it had loopholes and Nitha Dire was tasked by the Administrator’s office to remedy the loopholes but it was not finalized until he returned back to the Department. He went further to state that it is admitted that there were no systems in place in awarding bursaries. However, as earlier alluded, the situation was volatile and there was not internal capacity to control the situation. The lack of controls was not in bad faith but an attempt to send Bapo residents to school to mitigate violence and protests. The figures indicated in the letter cannot be admitted or denied as he did not verify nor do he intend to do so as he has confidence in the investigations relating thereto.

5.1.47. Mr Lerefole indicated further that it is indeed correct that he approached the Auditor-General to conduct an audit and in their meeting at their offices in Rustenburg, they indicated that they cannot do that due to the absence of audit framework for Traditional Communities and the provincial government was aware about that challenge. He then appointed Sizwe Ntsaluba and Gobodo to conduct an audit though the A-G said they will not comment on its findings but thought that it will assist them in improving the Bapo Administration systems. Sizwe Ntsaluba and Gobodo went on site and installed mobile offices and conducted an audit but did not get a report as he had returned back to the Department.

5.1.48. **Payment to Administrators**

Mr Lerefole indicated that during his tenure as an Administrator he wrote a letter to the then Acting Director-General, Mr. A. Tlaletsi, demanding that Bapo be reimbursed for the payments made to Messrs Moloto and Diamini. He gave same documents to the OMC investigators. According to Mr Lerefole there was no response to the letter.
5.1.49. Payment of allowances

Mr Lerefolo stated further that on his arrival he saw a resolution to the effect that each community structure’s committee must be paid a sitting allowance and that was even paid to the complainants as members of the Royal Six. However, during the community meeting, he informed the community of his decision to stop with the payments of such allowances and accordingly wrote letters to such structures. The reason was that it was not financially sustainable on the grounds that the majority of such people were unemployed and they will sit every day without even seeking approval from the Administrator’s office. His decision made such structures unhappy but he had the community support on that issue. Indeed it is true that there was no allowance policy.

5.1.50. Poverty Alleviation Project

Mr Lerefolo indicated further that the decision to have the poverty alleviation project was a result of the demand by the community for a labour intensive project. The demand was characterized by protests and intimidation and locking of offices. Literally speaking, Bapo was burning and the MEC had to come and address them and one of their demands was a project. It was however, decided that it will be for the middle aged women. Mr Lerefolo cannot remember the numbers and payments, as he relied on Mphoreng Motlana, as an employee of Bapo as Project Manager. In ensuring fairness, Mr Lerefolo decided that the Royal Family and Task Team members should form a committee, as the CFO of Bapo Ba Mogale was administering that process and recommended to him.

5.1.51. The project was initially for six months but towards the end of the last month, there was a demand by the unemployed and middle aged women for an extension. Mr Lerefolo indicated to them in a community hall, that he could not accede to that. The unemployed and middle aged women became violent and Mr Lerefolo succumbed to the pressure as the situation had the potential of being violent. He cannot recall the period of extension but it was not more than three months.
5.1.52. Mr Lerefolo does not have the knowledge of the project running for 4 years. According to his knowledge, the beneficiaries of the project were made to open bank accounts and payments were effected in their bank accounts. He has no knowledge of cash carried in bags. Mr Lerefolo does not deny the fact that the project might not have been managed properly and he relied on Mr. Mphoreng Motlana and Mr. T. Tsatsimpe for payments as he was the CFO. It should however be mentioned that the Department of Labour was involved at the planning stage to ensure compliance with the Safety issues. In addition, the list of beneficiaries was provided by the representatives of the unemployed youth and middle-aged women per all the villages of Bapo.

5.1.53. **Appointment of Service Providers**

Mr A. Diamini had a team that he worked with as an Administrator but he was alone. The nature of the terms of reference were such that some of the issues needed experts to assist him. Bapo Ba Mogale had a Ten Year Development Plan, which included a master plan on sewer, water, roads and electrical for development purposes. Nkambule and Associates were appointed to develop such. According to Mr Lerefolo their reports are with Bapo Offices.

5.1.54 They were also tasked to assist with the construction of the road in Wonderkop as consultants and project managers. They were also responsible for the same regarding the cemeteries. The project was meant to benefit emerging contractors at Bapo as an empowerment project, wherein they were provided with skills. The tenders were advertised for Bapo contractors only.

5.1.55. Mr Lerefolo indicated that when he assumed his duties, Nitha Dire was also appointed and assisting Bapo with financial issues. Mr Lerefolo needed a system, similar to what is like BAS or Persal in Government, to improve financial accountability, which had HR, Financial and asset management. The ERP system was the responsibility of Dire Accounting Practice and what he knows is that the
training was conducted to the staff on the system. He does not have knowledge of the implementation of the system and the Annual Financial Statements when he returned back to the Department.

5.1.56. **Security**
Mr Lerefolo stated further that the Security companies on his arrival did not have valid contracts and did not render satisfactory services in that they did not post security and there were damage and theft to community properties. In addition to the volatile situation, there was a need to improve the security system on the community buildings. At some stage it was violent that he had to urgently have armed security. The security costs had to increase also due to the Royal Palace site.

5.1.57. According to Mr Lerefolo Nkambule and Associates was appointed to implement master plan, professional and project management services on the construction of the roads and cemeteries. It was unfortunate that Bapo did not have an Engineer to can verify and quality assure the work done except relying on Mr. M. Mphoreng which was the project manager employed by Bapo ba Mogale Administration.

5.1.58. **Payment of allowances**
Bapo ba Mogale had a structure called the Land Claims Committee just like other community structures. Their existence was known to the community on his arrival. It was not only Mr. R. Mabale who was paid as a member. Since their existence, there were payments outstanding from the time of Mr. Dlamini. The committee submitted a report which accompanied the request for payments. Mr Lerefolo cannot confirm or deny the amounts mentioned except to say that he paid the members of the land claims committee and not only R. Mabale.
Application of the relevant law

Purely Procurement issues

5.1.59. The procurement issues are regulated by section 217(1) of the Constitution and section 38(1) of the PFMA.

5.1.60. Section 217(1) of the Constitution provides:

"When an organ of state in the national, provincial or local sphere of government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective."

5.1.61. Section 38 of the PFMA provides that:

"The Accounting Officer for a department, trading entity or constitutional institution-

(a) must ensure that the department, trading entity or constitutional institution has and maintains-

(i) effective, efficient and transparent systems of financial and risk management and internal control;

(ii) ......

(iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective;

(iv) ......

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(b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;

(a) must take effective and appropriate steps to-

(i) ............

(ii) Prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and

(iii) Manage available working capital efficiently and economically;"

5.1.62. The principles articulated above, enjoins the Bapo Administration and the Department to contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective in the performance of their duties. The Bapo Administration and the Department should also strive to be above reproach.

5.1.63. In terms of section 217 of the Constitution read with section 38 of the PFMA it was incumbent upon the HoD to ensure that Mr A Dlamini, the then Bapo Administration Accounting Officer to have advertised the tender for the construction of the palace complex because they would have received and considered other competitive bidders who would have provided value for money. Failure to follow proper bidding processes is contrary to the provisions of section 217 of the Constitution, section 38 of the PFMA and section 9 of the North West Traditional Leadership and Governance Act.

5.1.64. If the Administrator had followed proper bidding processes during the construction of the palace complex and complied with section 217 of the Constitution he would have avoided the over expenditure. The actions of the Administrator, Mr Dlamini in allowing the costs for the construction of the Palace to escalate from the budgeted amount of R29.8 million to R115 million resulting in the over expenditure
of approximately R85 million is contrary to the spirit of section 217 of the Constitution read with section 38 of PFMA, as well as section 9 of the North West Traditional Leadership and Governance Act, 2005.

5.1.65. In order for the actions of the Administrator to have stood the test of time and complied with the provisions of section 217 of the Constitution, the intended construction of the Palace complex should have been advertised in an open tender to allow other tenderers to participate in a system that is fair, equitable, transparent, competitive and cost effective.

5.1.66. The principles articulated above, enjoins the Bapo Administration and the Department to exercise a high level of effective, efficient and transparent systems of financial and risk management and internal control. They are further expected to put in place appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

5.1.67. The Bapo Administration and the Department were also responsible to have taken steps for the effective, efficient, economical and transparent use of the resources of Bapo Community and should have taken steps to have avoided unauthorised, irregular and fruitless and wasteful expenditure and losses and to have managed available working capital efficiently and economically.

5.1.68. Furthermore in terms of section 38 of Public Finance Management Act, 1 of 1999 (PFMA) Accounting Officers must maintain effective, efficient, and transparent systems of financial and risk management and internal control. Accounting Officers must further maintain an appropriate procurement and provisioning system that is fair equitable, transparent, competitive and cost effective.
Traditional leadership governance issues

5.1.60. Section 9(1) of the North West Traditional Leadership and Governance Act No. 2 of 2005 provides:

"The traditional Council of any traditional community, shall subject to the provisions of this Act, the Constitution and/or any other law:

(a) administer the affairs of the traditional community in accordance with customs and tradition, and perform such other functions conferred by customary law and customs, consistent with statutory law and the Constitution;

(b) promote the interest, advancement and well-being of members of the traditional community;

(c) Subject to the provisions under this Act, administer the finances of the traditional community;

(d) Perform such roles and functions as may be delegated or assigned to it by or under any law."

5.1.61. Section 10 (3) of the North West Traditional Leadership and Governance Act No. 2 of 2005, provides:

(a) "On the recommendation of the Royal family the Premier may, if satisfied that a traditional council is unable to perform the functions assigned to it in terms of the Act in an efficient and effective manner or in manner which is conducive to good governance and administration, appoint any person to assist the traditional council concerned to perform the functions assigned to such traditional council."
(b) An officer appointed in terms of paragraph (a) shall be competent to exercise and perform any power, authority or function conferred or imposed by law upon any such traditional council and shall be deemed to have been exercised or performed by such traditional council."

5.1.62. Section 4 (2) applicable to the provincial legislation must regulate the performance of functions by a traditional council by at least requiring a traditional council to:

".....
(c) keep proper records;
(d) have its financial statements audited;
(e) disclose the receipt of gifts; and
(d) adhere to the code of conduct."

5.1.63 In terms of section 9 of the North West Traditional Leadership and Governance Act No. 2 of 2005, the Traditional Council's functions are amongst others, to administer the affairs of the traditional community in accordance with customs and tradition, consistent with statutory law and the Constitution, administer the finances of the traditional community and assist, support and guide traditional leaders in the performance of their functions.

5.1.64. Furthermore, in terms of section 10 of the North West Traditional Leadership and Governance Act, 2005 the Premier may on the recommendations of the Royal family, if satisfied that the Traditional Council is unable to perform their functions in an efficient and effective manner or in a manner that is conducive to good governance and administration, appoint any person to assist such Traditional Council in the management of their affairs.
5.1.65. It goes without saying that such appointed person shall be competent to exercise powers and authority conferred upon by the Traditional Council and shall be deemed to have been exercised or performed by such Traditional council. As a consequence thereof, the Administrators who were appointed by the Department/Premier to manage the affairs of Bapo Administration assumed the responsibilities conferred upon Bapo Administration in terms of sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005 which requires good governance and administration.

5.1.66. Furthermore in terms of paragraph 2 of the schedule attached to the Traditional Leadership and Governance Framework Act, 2005 Traditional Councils are expected to perform their functions in good faith, diligently, efficiently, honestly and in a transparent manner. They are also expected to comply with applicable legislation and act in the best interest of the community. It was then expected of the Administrators appointed to manage the affairs of Bapo Administration to comply with the standard set out in the Act and at all times act in the best interest of the community and no one else.

5.1.67. In terms of section 10 of the North West Traditional Leadership and Governance Act, 2005 Administrators were expected to perform their functions and responsibilities in terms of statutory law and the Constitution. In terms section 217(1) of the Constitution the Department and Bapo Administration is required to ensure that it contracts for goods and services using a system that is fair, equitable, transparent, competitive and cost effective. In terms of this section, the Department and Bapo Administration had a duty to comply with a system that was fair, equitable, transparent, competitive and cost effective.

5.1.68 The Administrator, Mr Dlamini, was appointed in terms of section 10 of the North West Traditional Leadership and Governance Act to act in a manner that is conducive to good governance and administration in the management of the Bapo
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Administration. In his capacity as the Administrator, he should have taken action against Nhluvuko Civil Works after receiving a report from Project Managers that there were no municipal approved building plans for the construction of the Palace complex. Failure by the Administrator to take action is contrary to the provisions of section 10 of the North West Traditional Leadership and Governance Act.

5.1.69. In order for the administration to run smoothly the Administrators are expected amongst others to implement the Community and Traditional Council resolutions, resuscitate or improve on administrative systems of the Traditional Council and the Community, ensure that the interests of the Community are protected and manage the financial Administration of the Community affairs, by improving budgeting process, implementing approved budget, strengthen internal control systems within the Administration and commission external auditors to perform auditing of the books of the community.

5.1.70. Furthermore section 38 of PFMA directs Accounting Officers to take steps to prevent unauthorised, irregular, fruitless and wasteful expenditure and to manage the working capital efficiently and economically. The actions of the Administrator, Mr Lerefolo by allowing the bursary vote to be exceeded by R 6 million in relation to the payments of bursaries is contrary to the requirement that the Administrator had to act and implement the approved budget as per the requirements of sections 9 and 10 of the North West Traditional Leadership and Governance Act.

5.1.71. The actions of Mr Lerefolo, in his capacity as Administrator, are contrary to the requirements of sections 9 and 10 of the North West Traditional Leadership and Governance Act as his actions did not promote efficiency, effectiveness or were exercised in a manner that is conducive to good governance and administration. In addition, Mr Lerefolo cannot be said to have managed the funds of Bapo Administration efficiently and economically as per the requirements of section 38 of PFMA.
5.1.72. The payment of amounts of R8 123 949.08 and R4 125 670.38 respectively to Mr Abel Dlamini and Junius Moloto during their tenure does not bode well to protect the interests of the Bapo community as per the prescripts of sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005. Such exorbitant payments should have been used for other service delivery issues for the benefit of the whole community. Such huge payments are contrary to the provisions of sections 9 and 10 of the Act and do not promote efficiency, effectiveness or are conducive to good governance and administration.

5.1.73. It was improper of Mr Moloto to have approved his invoice amounting to R719, 534.00 as this is contrary to proper management of the financial Administration of the Bapo Community affairs. Such approval is contrary to the provisions of sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005 relating to clean administration, accountability, efficiency, effectiveness or conducive to good governance. In this regard, the actions of Mr Moloto are contrary to the provisions of section 38 of PFMA that provides for a system that is efficient and transparent.

5.1.74. In terms of section 4(2) of Traditional Leadership and Governance Framework Act 41 of 2003 Traditional Councils are expected to keep proper records and their books must be audited and they must account annually to their constituencies. As a result, the section imposes a duty on Bapo Administration and the Department to have complied with the provisions of this Act. It has been noted that the Bapo Administration books were only audited in 1994 and no further audits took place. Failure by Bapo administration and the Department to subject their books to audit is contrary to section 4(2) Traditional Leadership and Governance Framework Act 41, 2003.
5.1.75. In terms of section 30 of the North West Traditional Leadership and Governance Act, 2005 Traditional Councils must submit estimates of income and expenditure to the Premier for approval and must use the funds as per such approval. It was incumbent upon Bapo Administration and the Department to have submitted such estimates to the Premier and used for intended purposes in terms of such approval and made sure that such misuse of funds in the D-Account did not happen.

5.1.76. Such failure by the Bapo Administration and the Department to make sure that funds in the D-Account were used properly and accounted for is contrary to section 30 of the North West Traditional Leadership and Governance Act, 2005. In addition, they failed to prevent irregular, fruitless and wasteful expenditure contrary to the provisions of section 38 of PFMA and failed to manage the funds of Bapo Administration efficiently and economically.

5.1.77. Furthermore in terms of section 4 of the Traditional Leadership and Governance Framework Act 41, 2003 and Section 31 of the North West Traditional Leadership and Governance Act, 2005 books and accounts of Traditional Councils must be audited by the Auditor General who after an audit submit a report to the Premier and the Traditional Council.

5.1.78. It was incumbent upon Bapo Administration and the Department to have submitted such books and accounts to the Auditor General for audit purposes. Their failure to do so is contrary to section 31 of the North West Traditional Leadership and Governance Act, 2005 and section 4 of the Traditional Leadership and Governance Framework Act 41, 2003.

5.1.79. The BBMI had a fiduciary duty in terms of the King Code III on Corporate Governance in terms of principle 1, 2.9 and 2.3:
5.1.79.1. Be responsible in the positive performance of the company in creating value, in so doing should appropriately consider the legitimate interests and expectations of all its stakeholders;

5.1.79.2 The board should ensure that the company complies with applicable laws and considers adherence to non-binding rules, codes and standards; and

5.1.79.3 The board should provide effective leadership based on an ethical foundation.

5.1.80. BBMI did not provide the financial statements as requested, issues related to BBMI still require further investigation.

General Public Administration

5.1.81. Section 195(1)(a) and (f) of the Constitution, provides that:

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

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted
(c) ..... 
(d) ..... 
(e) ..... 
(f) Public administration must be accountable…”

5.1.82. The Batho Pele White Paper of 1997 principles provide the following:
5.1.82.1. Principle 1 provides that citizens should be consulted about the level of quality of public services they receive and where possible be given a choice;

5.1.82.2. Principle 2 states in regard to service standards, that citizens should be told what level and quality of public services they will receive so that they are aware what to expect;

5.1.82.3. Principle 5 pertains to information, in that citizens should be given full, accurate information about the public service they are entitled to receive;

5.1.82.4. Principle 7 relates to redress and provides, if the promise standard of service is not delivered, citizens should be offered an apology, full explanation and speedy and effective remedy; and

5.1.82.5. Principle 8 deals with value for money, public services should be provided economically and efficiently in order to give citizens the best possible value for money.

5.1.83. The principles articulated above, enjoins the Bapo Administration and the Department to exercise a high level of professionalism and ethics including accountability in the performance of their duties. The Bapo Administration and the Department should also strive to be above reproach.

The payment of legal fees

5.1.84. The Bapo Administration paid various service providers exorbitant legal fees amounting to R30.5 million and this does not amount to proper management of the resources of Bapo Administration in terms of sections 9 and 10 of the North West Traditional Leadership and Governance Act. The conduct of the Bapo Administrator at amounts to contravention of the North West Traditional Leadership and Governance Act. In addition, the Administrator cannot be said to
have managed the funds of Bapo Administration efficiently and economically as per the requirements of section 38 of PFMA.

Employees’ costs and allowances

5.1.82. The total staff costs from April 1991 to March 2015 is R44.2 million with an increase of seventy three percent. The huge increase does not ensure that the interests of the Community are protected and that there is proper management of the financial administration of Bapo Administration which is contrary to sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005. In order for the Bapo administration to comply with the Act they should have used some of the millions for service delivery that would have benefitted the whole community.

5.1.83. The Bapo administration experienced an increase in payment of allowances to R12.7 million and further, Mr R Mabale was paid an allowance of R297,290.00 for participating in the land claim committee. In terms of sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005 the Administrator was expected to resuscitate or improve on administrative systems of Bapo administration.

5.1.84. The investigation revealed that there was no policy governing the payment of allowances contrary to the provisions of the North West Traditional Leadership and Governance Act, 2005. Accordingly, this may have led to unexplained payments to Mr Mabale that cannot be justified and may put the council at risk of losing money. The actions of the Administrator and the Department are contrary to the provisions of section 38 of PFMA in that they failed to put systems of financial and risk management and internal controls in place.
Poverty Alleviation

5.1.85. The Bapo administration spent a total cost of about R61.8 million for poverty alleviation which was initially budgeted for R9 865 274.00 million. In terms of sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005 it was expected of the Administrators to have implement the Community and Traditional Council resolutions of Bapo administration. It has been established that there were no records of any tribal resolution to extend the period.

5.1.86. The actions of the Administrator are contrary to the requirements of the Act. Furthermore, the actions of the Administrator and the Department are contrary to the provisions of section 38 of PFMA in that they failed to put systems of financial and risk management and internal controls in place.

Consulting and Professional Fees

5.1.87. The Consulting and Professional fees were paid to various service providers amounting to about R36.9 million up to 2014/15 financial year and the amount of R4.1 million escalated to R13.9 million in 2011/2012 during Mr Lerefolo’s tenure. In terms of sections 9 and 10 the Administrator was expected to have strengthened internal control systems within the Administration by putting in place systems that would enable him to discharge his mandate according to the North West Traditional Leadership and Governance Act, 2005. Failure to do so is contrary to the provisions of sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005. Furthermore, the actions of the Administrator and the Department are contrary to the provisions of section 38 of PFMA in that they failed to put systems of financial and risk management and internal controls in place.

5.1.88. It has been established that Dire Accounting Practice has been paid a total of R4 052 328.72 for financial administration assistance by implementing the
Enterprise Resource Planning System; review financial reporting policies and procedures. According to Bapo administration there are no records of such policies. In terms of sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005 the Administrator was expected to have resuscitated or improved on administrative systems of Bapo administration.

5.1.89. Failure by the Administrator to make sure that such policies were in place is contrary to the provisions of sections 9 and 10 of the North West Traditional Leadership and Governance Act, 2005. Furthermore, the actions of the Administrator and the Department are contrary to the provisions of section 38 of PFMA in that they failed to put systems of financial and risk management and internal controls in place. In addition, they failed to prevent irregular, fruitless and wasteful expenditure contrary to the provisions of section 38 of PFMA.

5.1.90. Mosiamise Business Consulting was paid about R5.1 million during 2011/12 for its consulting work which included, among others, the review of mining activities and consultants. It has been established that there were no deliverables but payments were made. In terms of sections 9 and 10 of the Act, the Administrator was expected to have resuscitated or improved on administrative systems of Bapo administration. Failure by the Administrator to make sure that such policies were in place is contrary to the provisions of the Act and would lead to fruitless and wasteful expenditure. In addition he failed to prevent irregular, fruitless and wasteful expenditure contrary to the provisions of section 38 of PFMA.

5.1.91. Thaba Consulting Engineers (Pty) Ltd were paid about R4.2 million during 2011/2012 financial year for consulting work and about R1 million in 2005/2006 on the Bapo Multi-purpose Community Centre. The centre is currently vandalised and is not being used. In terms of the North West Traditional leadership and Governance Act, 2005 the Administrator had to ensure that the interests of the Community were protected and that he managed the financial affairs of the
Community in terms of the North West Traditional Leadership and Governance Act, 2005.

**Fruitless and Wasteful Expenditure**

5.1.92. Section 1 of the PFMA defines “Fruitless and wasteful expenditure” as expenditure which was made in vain and would have been avoided had reasonable care been exercised.

5.1.93. It has been established in the evidence that the Multi-purpose Centre project cost R13 million but due to the quality of work and the material used which was below standard and that due to lack of maintenance, the building is damaged and dilapidated. On the other hand it has been established that the Wonderkop Community Hall was budgeted an amount of R8 098 313.81, however the hall is not being used as it is damaged and dilapidated. Similarly the Segwaelane Community Centre which was budgeted an amount of R7 863 052.52 but an amount of R7 180 409.69 spent, is also damaged and dilapidated.

5.1.94. Failure by Department to ensure that the Multi-Purpose Centre, Wonderkop Community Hall and Segwaelane Community Centre are utilised for the purpose for which they were built, constituted fruitless and wasteful expenditure contrary to the provisions of section 38 of PFMA and the community has benefitted nothing out of the project.

**Security costs**

5.1.95. Payments were made to various service providers from the 2000/2001 to 2014/2015 financial years amounting to R23.7 million for security services. There was an increase in 2011/2012 to about R3.2 million which escalated to R8.9 million in the 2013/2014 financial year. In terms of sections 9 and 10 the Administrator was expected to have strengthened internal control systems within the Bapo
Administration by putting in place systems that would enable him to discharge his mandate according to the North West Traditional Leadership and Governance Act, 2005. Failure to do so is contrary to the provisions of the Act and would lead to fruitless and wasteful expenditure. Furthermore the actions of the Administrator and the Department is contrary to the provisions of section 38 of PFMA in that they failed to put systems of financial and risk management and internal controls in place.

Construction of Trunk Roads in Greater Bapong

5.1.96. The principles articulated in section 217 of the Constitution and section 38 of the PFMA, obliges the Bapo Administration and the Department to adhere to a system which is fair, equitable, transparent, competitive and cost effective to exercise a high level of transparency, risk management and internal control.

Cemeteries

5.1.97. Various service providers were used to improve the state of cemeteries around Bapo at a cost of about R10.2 million. The centre is currently vandalised and is not being used. In terms of the North West Traditional Leadership and Governance Act, 2005 the Administrator had to ensure that the interests of the Community were protected and that he managed the financial affairs of the Community in terms of the North West Traditional Leadership and Governance Act, 2005.

5.1.98. Failure by the Department to take steps to make sure that the cemeteries were fully maintained is contrary to the provisions of the North West Traditional Leadership and Governance Act, 2005 as the Bapo administration would need additional funding that would have been avoided to effect repairs. Furthermore the actions of the Administrator and the Department are contrary to the provisions of section 38 of PFMA in that they failed to put systems of financial and risk
management and internal controls in place to avoid vandalising of cemeteries taking place.

5.2. Regarding whether the Bapo ba Mogale Community suffered prejudice as a result the failure to manage the Bapo ba Mogale D-Account by the Department and the Bapo Administration:

5.2.1. The issue as to whether the Bapo ba Mogale Community Complainants suffered prejudice as a result of the alleged failure by the Bapo Administration and the Department to properly manage the funds kept in the D-Account will be determined once the alleged maladministration has been established.

5.2.2 As a result of the actions of the Department and Bapo Administration the community lost out on additional decent housing being built, proper healthcare facilities, food, water and social security, employment opportunities, more bursaries to deserving students, infrastructure; employment projects; poverty alleviation etc. As a result of poor workmanship and vandalism on the multi-purpose centre and other halls the community is unable to use them for meetings and recreational purposes.

6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

6.1 Regarding the alleged failure on the part of the Head of Department of the North West Department of Local Government and Traditional Affairs and the Bapo Administration in the management of the Bapo ba Mogale D-Account and if so, whether such failure constitutes maladministration::

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6.1.1. The allegation that the Head of Department for the Provincial Department of Local Government and Traditional Affairs, North West and Bapo Administration failed in the management of Bapo ba Mogale D-Account is substantiated;

6.1.2. The process of the procurement in the construction of the palace was done without going out on tender or calling for quotations. Accordingly it was irregular to have proceeded with the construction without going on tender because the Bapo Administration would have received and considered other competitive bidders who would have provided value for money. This was contrary to section 38 of PFMA.

6.1.3. The total construction work of the palace complex amounted to R115,088,916.57 well above the budgeted amount of R29.8 million. There was gross misuse of funds by the Department to have exceeded the budget by approximately R85 million and no reasons were advanced for such a huge increase.

6.1.4. There were no municipal approved building plans at the commencement of the construction of the palace complex. Despite the negative report or remedial work to be done on the palace, no action was taken against the main contractor, Nhluvuko Civil Works. It was improper for the Department to have allowed the construction of the palace without having obtained the relevant approvals. This is contrary to section 38 of PFMA.

6.1.5. Administrators are expected to perform their functions and responsibilities in terms of statutory law and the Constitution which include diligent administration, advancing the well-being of the members of the traditional community, proper administration of finances, act in efficient and effective manner and conducive to good governance and administration. It is evident in the circumstances that the Bapo Administration and the Department failed in the abovementioned fiduciary duties and obligation in terms of sections 9 and 10 of the North West Traditional Leadership and Governance Act.
6.1.5. Further, the Traditional Councils are expected to perform their functions in good faith, diligently, efficiently, honestly and in a transparent manner. The performance of the functions were not adhered to in terms of paragraph 2 of the schedule to the Act.

6.1.6. The Bapo Administration and the Department had an obligation to exercise a high level of professionalism and ethics including accountability in the performance of their duties. These principles are enshrined in section 195 of the Constitution.

6.1.7 Failure by Department and Bapo Administration to ensure that the Multi-purpose Centre, Wonderkop Community Hall and are Segwaelane Community Centre utilised for the purpose for which it was built constituted fruitless and wasteful expenditure contrary to the provisions of section 38 of PFMA and the community has benefitted nothing out of the project.

6.1.8. The HoD should have ensured that the Bapo Administration develop a sound policy or framework governing the awarding of bursaries and a detailed register of beneficiaries to obviate and lack of controls and systems. Such policy would have guided them in the allocation of bursaries to deserving students and be accountable to the community at large. If such controls and systems were in place the issue relating to overspending by R6 million by the Administrator could have been avoided.

6.1.9. The Administrators were paid exorbitant amounts by Bapo Administration and the Department and such payments should be investigated further to determine whether such payments were justified or not. It was improper, in one instance, for Mr Moloto to have approved his own invoice amounting to R719, 534.00. Such payment should have been done by the next Senior Authority and not the Administrator himself.
6.1.10. The payments for professional and legal fees were exorbitant because of instability within the royal family and parties were suing one another. The Bapo Administration should have kept records of parties who lost and ordered to pay costs. It is not clear whether such costs ever recovered, if any, or whether the Bapo Administration was responsible to pay such costs. If the Administration paid such costs for losing parties they should be recovered from the relevant such parties.

6.1.11. The payment of personnel costs increased by seventy three percent and the Bapo Administration and the Department have to explain and provide justification of such huge increases. Proper records should have been kept safely by the then Bapo Administration.

6.1.12. There was payment of allowances to the value of R12.7 million where there is no policy governing the payment of allowances. Mr R Mabale was paid an allowance of R297 290.00 for participating in the land claim committee. The Bapo Administration and the Department must explain such huge increases and payments to Mr Mabale. Proper payment records should have been kept safely by the then Bapo Administration.

6.1.13. The investigation into the Poverty Alleviation programme revealed that the financial controls around this project were appalling because there are allegations that staff was carrying hard cash in the range of more than a million rands in their cars to pay members of the community. There was also lack of controls in monitoring the budget as evidenced by the expenditure of about R38 million in the 2011/2012 financial year during Mr Lerefolo’s tenure. The investigation revealed that the professional fees increased over the years and there were no controls in place. The Department represented by various Administrators failed to put controls and systems in place that would have guided them in the allocation and management of budgets and be accountable to the community at large. If such controls and systems were in place the issue relating to overspending and lack of accountability by the Administrator could have been avoided.
6.1.14. The security costs increased sharply in 2011/2012 to about R3.2 million and went as high as R8.9 million in the 2013/2014 financial year. Adequate justification was not provided for such huge increases.

6.1.15. The investigation revealed that cemeteries, halls and Multi-Purpose Centres have been vandalised and grass and bushes are growing on the paved roads due to lack of maintenance. It was incumbent upon Department to maintain the facilities at the cemeteries and failure to do so may lead to having to incur unnecessary costs to replace vandalised property. This falls short of the Batho Pele principles.

6.1.16. The Department failed to safeguard the funds held in the Bapo ba Mogale D-Account and for that reason, certain amounts cannot be accounted for as and in some instances there is over expenditure as well as fruitless and wasteful expenditure contrary to the applicable legislative prescripts.

6.1.17. The Department failed to submit the Bapo Administration books and accounts for auditing by the Auditor General who would have provided opinions and guidelines on how the funds in the Bapo ba Mogale D-Account should have been managed and made certain findings and recommendations.

6.1.18. The Administrators appointed by the Department either did not understand their mandate or they just used the funds of Bapo Administration without taking into account the interests of the community at large, did not perform their duties in good faith, diligently, honestly, efficiently and did not comply in most cases with applicable legislative prescripts under which they were appointed.

6.1.19. In respect of Trunk Roads roads, the matter requires further investigation to ascertain the maladministration that was committed in the circumstances.

6.1.20. The conduct of the Department and the Bapo ba Mogale Administration in the circumstances constitutes maladministration in terms of section 6(4)(a) of the
Public Protector Act and improper conduct as envisaged in terms of section 182(1) of the Constitution.

6.2. Regarding whether the Bapo ba Mogale Community suffered prejudice as a result the failure to manage the Bapo ba Mogale D-Account by the Department and the Bapo Administration:

6.2.1. The allegation that failure by the Department and Bapo Administration to properly manage the D-Account led to the Community suffering prejudice is substantiated.

6.2.2. As a result of the failure by the Department to properly manage the D-Account millions of rand cannot be accounted for.

6.2.3. Furthermore, the conduct of the Department deprived, the community of the financial resources which would have been used for the community's benefit with regards to additional decent housing, proper health care facilities, food, water and social security, employment opportunities, more bursaries to deserving students, infrastructure, employment projects; poverty alleviation; etc.

6.2.4. As a result of poor workmanship and vandalism on the multi-purpose Centre and other halls the community is unable to use them for meetings and recreational purposes.

6.2.5. The actions of the Department and the Bapo Administration is contrary to the ethos laid out in the Batho Pele principles.

6.2.6. In the circumstances the conduct of the Department and the Bapo Administration amounts to maladministration and improper conduct as envisaged in section 182(a) of the Constitution and section 6(4) of the Public Protector Act.
7. REMEDIAL ACTION

The appropriate remedial action that the Public Protector takes in pursuit of section 182(1)(c) is the following:

7.1. The Premier of the North West Province to:

7.1.1. Approach the SIU with a view in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996 to:

7.1.1.1. Initiate a process to ascertain the irregular amounts paid as listed hereunder and determine which amounts may be recovered through a civil process and further provide the Public Protector with a report on steps taken in that regard within a period of sixty (60) days from the date of the issuing of the final report:

a. The irregular payment of an amount of R 78 863 670.73 million paid to Nhluvuko Civil Works on the construction of the Palace complex;

b. The payment of an amount of R 21 570 011.99 million paid to Ndzalama Interiors on the construction of the Palace complex;

c. The payment of an amount of R 8 705 233.85 million paid to ProjexConsult on the construction of the Palace complex;

d. The payment of an amount of R 20 243 146.85 million paid to Nkambule and Associates on the construction of trunk roads in Wonderkop and Greater Bapong areas;

e. The payments of an amount of R 8 123 949.08 million and R 4 125 670.38 to Mr Abel Dlamini and Junius Moloto respectively during their tenure as Administrators, as well as Mr Moloto’s payment to himself of an amount of R 719 534;
f. The payments of an amount of R3.7 million from Madisa and Associates CC who were contracted to provide marketing and communication services. Included in these services was the drafting of strategies and plans, design and lay-out of the annual report. No proof of such work was produced;

g. The payments of an amount of R5.1 million from Mosiamise Business Consulting for its consulting work which included among others the review of mining activities and consultants. No tangible output on these services could be provided;

h. The payments of an amount of R38.3 million from Matlapa Construction Consulting (Pty) when it was evident there was no value for money in running the project;

i. The payments of an amount of R 4 052 328.72 million paid to Dire Accounting Practice CC for failing to deliver on the implementation of the Enterprise Resource Planning System;

j. The payments of an amount of R8 098 313-81 million from Thaba Consulting who were Project Managers for the construction of the Multipurpose Centre for poor workmanship;

k. The payments of an amount of R13 million from Queens Building Construction CC who were Project Managers for the construction of the Multipurpose Centre for poor workmanship;

l. The payments of an amount of R5.2 million from Thaba Consulting Engineers (Pty) who was the consultant during the construction of the Multipurpose Centre which the investigation revealed to be of poor workmanship;
m. The payments of an amount of R7 180 409.69 million from Kgatelopele Consulting Engineers who was the consultant during the construction of the Segwaelane Community Centre which the investigation revealed to be of poor workmanship;

n. The payments of an amount of R7 863 052.52 million from Kgatelopele Consulting Engineers who were appointed to constructed Segwaelane Community Centre for poor workmanship;

o. The payments of an amount of R7 014 990.59 million from Kgatelopele Consulting Engineers who was the consultant during the construction of the Wonderkop Community Hall Centre which the investigation revealed to be of poor workmanship; and

p. The payments of an amount of R8 098 313.81 million from the Service Provider who constructed Wonderkop Community Hall for poor workmanship.

7.1.1.2. The Premier must approach the SIU with a view in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996 to conduct a forensic investigation on the following:

a. Serious maladministration, unlawful appropriation and expenditure of public money by the Administrators and Directors of companies (service providers) who were awarded tenders with the view of the recovery of losses suffered by the State and institute criminal charges in terms of Section 86 of the Public Finance Management Act;

b. The role played by the then Administrator, Mr Abel Diamini, in the appointment of Nhluvuko Civil Works (Pty) Ltd, to build the palace without going out on tender or calling for quotations;
c. Administrators who might have benefitted improperly in their capacities as Bapo Administrators and to recover monies lost by Bapo Administration during their tenure;

d. The circumstances leading to the establishment of BBMI and to investigate but not limited to the following:

   (aa) To establish whether before the establishment of BBMI there was a Community/Tribal resolution taken at a community meeting for its establishment and to determine whether other legal prescripts and were followed;

   (bb) To investigate who are the owners of BBMI, equity deal between BBMI and Lonmin shareholding agreements, share certificates and the processes followed in the appointment of Directors and members of the Executive Committee;

   (cc) To investigate whether or not board members, Executive members, Royal members, Traditional Committee members have a financial relationship and whether they benefit financially from BBMI and whether there is a conflict of interest in their dealings with BBMI; and

e. Serious maladministration in connection with all the D- Accounts in the Republic of South Africa to ascertain whether all mines entrusted with payment of royalties, in North West and other Provinces, are indeed paying royalties to the correct recipients, including management of royalty payments to communities.

7.2. The Director-General of the Province to:

7.2.1. The Director-General must ensure that the Bapo Administration must within a period of 60 days from the issuing of the report provide the necessary maintenance
and security to guard the cemeteries, halls and Multi-Purpose Centres; they must also make sure that the necessary repairs are effected so that these facilities are used for the benefit of the community at large.

7.2.2. The Director-General must ensure that the Bapo Administration must within a period of 60 days from the issuing of the report develop, adopt and implement Policies relating to effective, efficient, economic and transparent system of financial risk and internal control, financial controls, allowances and bursaries, appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective; They must also develop systems that would curb and prevent unauthorised, irregular, fruitless and wasteful expenditure;

7.2.3. The Director-General must within a period of 60 days from the issuing of the report follow up on cases that were opened at Brits Police Station relating to allegations of enrichment by certain individuals who were involved in the Poverty Alleviation project;

7.2.4. The Director-General must further conduct an investigation to establish whether the conduct of Mr Lerefolo, the then Administrator, who is still in the employment of the North West Provincial Department of CATA contravened the Public Service Act and the Regulations thereof.

7.2.5. The Director-General must refer aspects of legal costs incurred by the Bapo Administration to the Law Society of South Africa to assess and verify the fairness of the legal costs incurred.

7.3. The Public Protector refers the matter to the Auditor General in terms of section 6(4)(c)(ii) to audit the D-Account of the Bapo Ba Mogale Administration.
7.4 The Public Protector, in terms of section 6(4)(c)(i) of the Public Protector Act, brings to the notice of the National Prosecuting Authority and the DPCI those matters identified in this report where it appears crimes have been committed.

8. MONITORING

8.1. The Public Protector requires an Implementation Report from the Premier and the MEC tabulating the steps taken and the mechanisms put in place with reference to the remedial action under paragraph 7 above, within 60 days from the date of this report.

8.2. The Public Protector will monitor the implementation of this report on a quarterly basis.

[Signature]
ADV BOISEWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 19/06/2017

Assisted by:
Mr. Sechele Keebine: Provincial Representative: PPSA: North West

Adv Ike Motshegare: Senior Investigator: PPSA: North West