

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



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Closing Report on an investigation into allegations of maladministration by government officials who benefitted from government funding by leasing state owned farms and used their relatives for fronting and as beneficiaries of these farms.

TABLE OF CONTENTS

Executive Summary	3
1. INTRODUCTION	7
2. THE COMPLAINT	7
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	9
4. THE INVESTIGATION	10
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	13
6. REASONS FOR CLOSURE	20
7. CONCLUSION	21

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION BY GOVERNMENT OFFICIALS WHO BENEFITTED FROM GOVERNMENT FUNDING BY LEASING STATE OWNED FARMS AND USED THEIR RELATIVES FOR FRONTING AND AS BENEFICIARIES OF THESE FARMS.

1. INTRODUCTION

- 1.1 This is my closing report of an investigation conducted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, (the Constitution) and section 8(1) of the Public Protector Act, 1994.
- 1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation:
 - 1.2.1 The Director General of the Department of Rural Development and Land Reform, Mr PM Shabane;
 - 1.2.2 The Chief Director of the Department of Rural Development and Land Reform, Ms Zanele Sihlangu; and
 - 1.2.3 A copy of the report is also submitted to the Complainant Mr Siphon Levey Maseko.
- 1.3 The report relates to an investigation into allegations of maladministration by government officials who are leasing state owned farms and benefitted from government funding by using their relatives for fronting and as beneficiaries of these farms.

2. THE COMPLAINT

- 2.1 The complaint was lodged with my office on 20 June 2017 by Mr Sipho Levey Maseko (the Complainant) who is one of the lessees and beneficiaries of one of the state farms.
- 2.2 The Complainant alleged that:
- 2.2.1 During February 2005, he approached Origins Estate Agents (Pty) Ltd in Barberton looking for vacant farms in order to create job opportunities for the Barberton community;
- 2.2.2 He then approached the Department of Agriculture and handed the list of farms to Mr Sithembiso Mbuyane and to the Assistant Director, Ms Mampho Malgas at the Department of Land Affairs;
- 2.2.3 He further completed application forms and handed the forms in at the Department of Land Affairs but he did not receive any feedback from the Department and he later found out that the farms had been given to other people who were not residents of Barberton community;
- 2.2.4 In October 2010, he was given a farm to lease and was also promised funding to develop the farm by Mr Xolani Mashabane and Mr Ginindza of the Department of Rural Development and Land Affairs;
- 2.2.5 In the year 2011, the funding he received amounted to R1 000 000.00 but it was insufficient to develop the farm;

- 2.2.6 Farm Quothquan Portion 2 has been leased to Mr Hlongwane who is a former Assistant Director of the Department of Agriculture. His daughter was used as a beneficiary. Mr Hlongwane received funding from the Agricultural Development Fund and from the Recapitalization and Development Programme;
- 2.2.7 Farm Quothquan Portions 3 and 5 has been leased to the Sobabili Project which is owned by Mr Sibanyoni and his wife. Ms Busi Jele who was the Personal Assistant to the former Premier was used as a beneficiary;
- 2.2.8 The Sibanyoni family who took care of Busi Jele whilst in exile hails from Swaziland and with the assistance of Mr Sithembiso Mbuyane, they managed to lease a farm from government;
- 2.2.9 Farm Ayrton has been leased by Mr & Mrs Mnisi and the former was the Head of Department of the Department of Arts & Culture and he has also received 25% funding from the Development Fund;
- 2.2.10 Farm Geluk is leased by Mr Velelo who is a manager at Mpumalanga Economic Growth Agency (MEGA) in Nelspruit. He fronted with his uncle Mr Zuko Dlabazane who comes from the Eastern Cape. Mr Velelo was also a member of the Farms Allocation Committee at the Department of Land Affairs;
- 2.2.11 Farm Hanging Stone was leased by Mr Makutulela who is a former Director in the Department of Agriculture;
- 2.2.12 Farm S.A Renaissance has been leased by Mr Andrew Nkosi who works for the Office of the Premier;
- 2.2.13 Farm Two Sisters is leased by Mr Ginindza and his family. Mr Ginindza works for the Department of Rural Development and Land Administration.

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.

3.5 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the

¹ [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

² *Supra* at para [73].

conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.6 The Department is an organ of state within the meaning of section 239 of the Constitution and its conduct amounts to conduct in state affairs, and 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 this matter and take appropriate remedial action was not disputed by the Department.

4. THE INVESTIGATION

4.1 Scope of the Investigation

4.1.1 The investigation was conducted in terms of section 182(1) of the Constitution of the Republic of South Africa, 1996 and sections 6 and 7 of the Protector Act of 1994.

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives me the authority to investigate and report my findings regarding any complaint lodged.

4.2 The investigation approach

4.2.1 The approach to the investigation commenced by analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

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

- What happened?
- What should have happened?
- Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct on the part of the said Municipality?

4.2.3 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 Department of Rural Development and Land Reform unjustifiably leased state owned farms to public servants and/or their relatives.

4.2.4 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have should be met by the Department of Rural Development and Land Reform in leasing the state owned farms to the beneficiaries.

4.3 On analysis of the complaint and the information and documentation received during preliminary enquiries, the following issue was considered and investigated:

4.3.1 Whether the Department irregularly and improperly leased out state farms to government officials and/or their family members.

4.4 KEY SOURCES OF INFORMATION

4.4.1 Applicable Legislation

- 4.4.1.1 Manual for the Implementation of the Proactive Land Acquisition Strategy of April 2007.
- 4.4.1.2 Policy: Lease Management dated 12 March 2009.
- 4.4.1.3 State Land Lease and Disposal Policy of the Department dated 25 July 2013.
- 4.4.1.4 Departmental Circular no. (Unnumbered) of 2020. Issued by the Director-General of Rural Development and Land Reform.

4.5 Documents and information sent and received

- 4.5.1 The relevant information and documents obtained and analysed, were primarily:
 - 4.5.1.1 A letter was sent to the Department raising the matter dated 26 July 2017.
 - 4.5.1.2 A follow up letter was sent to the Department dated 07 September 2017.
 - 4.5.1.3 A letter from the Department containing all the necessary documents including the Manual for the Implementation of the Proactive Land Acquisition Strategy of April 2007, dated 11 October 2017.
 - 4.5.1.4 A covering letter received from the Department containing the information on leases in question, also dated 11 October 2017.
 - 4.5.1.5 A copy of the Section 7(9) notice addressed to the Chief Director: MPSSC dated 17 April 2020.
 - 4.5.1.6 A letter from the Department in response to the Section 7(9) notice dated 13 May 2020.
- 4.6 Inspection *in loco* conducted on 06 March 2020

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

5.1 Whether the Department irregularly and improperly leased out state farms to government officials and/or their family members.

Common cause

- 5.1.1 It is common cause that Two Sisters Farm has been leased to Asikahlali Ngetandla Corporative and the lease agreement was entered into with Judith Nomfundo Ginindza.
- 5.1.2 It is not in dispute that Bellevue B519JT and Bellevue A2 520 JT farms have been leased to South African Renaissance Trust with Mr Andrew Nkosi and others being the members of the trust. However, the lease agreement is in the name of Ms Thoko Kate Shongwe.
- 5.1.3 It is also not disputed that Geluk Farm has been leased to Mr Zuko Dlabazane.
- 5.1.4 It is common cause that Portion 3 & 5 of Quothquan 596 JT has been leased to Sobabili Farming Enterprise with Ms Thembisile Gladys Hlengethwa as the representative in the lease agreement.
- 5.1.5 It is further common cause that Portion 1 of Hanging Stone 636 JT has been leased to Fundza Entfutfwaneni Vilandzini with Mr Siphon Levey Maseko, the Complainant, as the representative in the lease agreement.
- 5.1.6 It is not disputed that the remaining extent of Portion 2 Quothquan 596 JT has been leased to Mr Musa Shadrack Hlongwane.

5.1.7 It is also common cause that Farm Ayrton 597 JT has been leased to Thembumcedisi Trading and Ms Thembinkosi Margaret Mnisi is the representative of the company in the lease agreement.

Issues in dispute

5.1.8 The Department disputed the allegations made by the Complainant that public servants have benefited from leasing state funded farms and that relatives of the officials were used as beneficiaries of these farms.

5.1.9 The Department responded to the initial enquiry from my investigation team dated 26 July 2017, in a letter dated 11 October 2017, followed by the subsequent letters dated 07 September 2017 and 06 October 2017, respectively.

5.1.10 The above responses were received from the Department's Chief Director, Ms Zanele Sihlangu (Ms Sihlangu) who also provided supporting documents relating to each farm mentioned in the complaint.

5.1.11 It is in dispute that the remaining extend of portion 2 of Farm Quothquan no. 596 JT (Farm Quothquan Porting 2) has been leased to a public servant. The Complainant alleged that the said farm has been leased to Mr Hlongwane who is a former Assistant Director in the Department of Agriculture and that his daughter was used as a beneficiary.

5.1.12 In her response, Ms Sihlangu indicated that the Remaining Extent of Portion 2 of the Farm Quothquan was acquired in the 2007/2008 financial year and was leased to Ms Nshalati Hlungwane who leased the farm until 2011. On 17 January 2011 Ms Hlungwane allegedly notified the Department that she was no longer continuing with the lease because she was preparing to further her studies overseas. The new lease for the same farm was awarded to her husband, Mr Musa Hlungwane (not Hlongwane as alleged by the complainant)

after he contested with two other candidates being Mr Paul Matole and Ms Nomfundo Maseko. The lease agreement was signed on 31 January 2011 and is in Mr Hlungwane's name and not his daughter as alleged by the Complainant.

- 5.1.13 My office enquired with the Department of Agriculture to determine if Mr Hlungwane was an employee of the Department. It was established that Mr Hlungwane worked for the Department and only resigned in 2010. It can therefore be concluded that when Ms Nshalati Hlungwane was awarded the lease for farm Quothquan, Mr Hlungwane was still a public servant. However, when Mr Hlungwane leased the farm in 2011 he was no longer employed by the state.
- 5.1.14 It is disputed that Ms Busi Jele, a public servant was used as a beneficiary in the lease of Farm Quothquan no. 596 JT, Portions 3 and 5 (Farm Quothquan Portions 3 and 5). The Complainant alleged that the said farm has been leased to the Sobabili Project which is owned by Mr Sibanyoni and his wife and that they used Ms Busi Jele, who was the Personal Assistant of the former Premier, as a beneficiary.
- 5.1.15 In response to the above allegation, the Department provided my office with documents that confirm that after Portion 3 and 5 of the Farm Quothquan were purchased by the Department, a lease agreement was entered into between the Department and Sobabili Farming Enterprise, duly represented by Ms Thembinkosi Gladys Nhlengethwa. The agreement was concluded and entered into on 27 February 2009. It was further discovered through the evidence obtained that Ms Busi Jele does not appear anywhere in the leasing of the said farm.
- 5.1.16 It is the Complainant's assertion that Farm Ayrton has been leased by Mr and Mrs Mnisi. The Complainant alleged that Mr Mnisi was the Head of the Department of Arts & Culture and that he also received twenty five percent (25%) funding from the Development Fund.

- 5.1.17 The Department provided my office with a copy of the lease agreement. It is evident that the lease agreement of Farm Ayrton no. 774, JT was entered into between the Department and Mrs Thembinkosi Margaret Mnisi on 31 January 2011. It is also evident from the Companies and Intellectual Property Commission (CIPC) records, that Mrs Thembinkosi Margaret Mnisi is an active director of the Thembumcedisi Trading, a close corporation registered on 14 July 2004. It further became evident that Mrs Thembinkosi Margaret Mnisi is the wife of Mr Mnisi who is the former Head of Department (HOD) of Sports in Mpumalanga Province. My investigation team enquired with the Department of Sports and it was established that Mr SW Mnisi retired from the position of HOD in 2017.
- 5.1.18 It is further disputed that Farm Geluk no. 646 (Farm Geluk) was leased to a public official. The Complainant alleged the said farm is leased by Mr Velelo who is a manager at MEGA Nelspruit. The Complainant further alleged that he fronted with his uncle Mr Zuko Dlabazane who comes from the Eastern Cape and further that Mr Velelo was also a member of the Farms Allocation Committee at the Department of Land Affairs.
- 5.1.19 Evidence obtained from the Department revealed that the memorandum to purchase Farm Geluk was duly approved by the Deputy Director Redistribution, Mr S Nkosi on an unknown date. However, an agreement for the appointment of caretaker was entered into between the Department and Mr Zuko Lawrence Dlabazama as the caretaker on 29 June 2015. The relationship between Mr Velelo and Mr Dlabazama could not be established or confirmed.
- 5.1.20 It is also disputed that Farms Bellevue B519 JT and Bellevue A2 520 JT were leased to a public servant. The Complainant alleged that the farms have been leased by Mr Andrew Nkosi who works for the Office of the Premier.

- 5.1.21 It is evident from the documents received from the Department that Farms Bellevue B519 JT and Bellevue A2 520 JT have been leased to South African Renaissance Trust. The members of the trust are Mr Andrew Nkosi & others. Records obtained from the Department also revealed that the lease agreement was entered into between the Department and South African Renaissance Trust duly represented by Ms Thoko Kate Shongwe. The agreement was entered into on 19 July 2013.
- 5.1.22 My investigation team established that Mr Andrew Nkosi is currently employed by the Mpumalanga Office of the Premier and that he resigned from the South African Renaissance Farmers Trust in 2014. The investigation team also visited the said farm on 06 March 2020 to conduct an inspection in *loco*, however, no one at the farm was willing to speak or co-operate with the team. Further information received by the team from the Department is that Mr Andrew Nkosi was not an employee of the state when the farms were leased to the Trust.
- 5.1.23 It is also disputed that Farm Two Sisters no. 594, JT has been leased by a public servant. According to the Complainant the said farm has been leased by Mr Ginindza and his family. Mr Ginindza works for the Department of Rural Development and Land Administration. Evidence in my possession revealed that the lease agreement for Farm Two Sisters was entered into on 19 September 2011, between the Department and Asikahlalingetandla Agricultural Primary Co-operative Limited, represented by Judith Nomfundo Gininda and not Ginindza.
- 5.1.24 However, no evidence could be obtained to prove that Mr Ginindza has leased the farm or that he is related to the lessee. Mr Ginindza was interviewed by the investigation team on 09 March 2020 and he rebutted the allegation made by the Complainant. He stated that he is not related in any way with the lessees of the farm but they only share almost similar surnames which might have led the Complainant to believe that he was part of the co-operative leasing the farm.

Application of relevant law

- 5.1.25 Clause 7.4.1 of the Manual for the Implementation of the Proactive Land Acquisition Strategy, Version 2 of April 2007, makes provision for the transfer/Disposal/Lease methods of state land. It referred to section 11 of the Provision of Land and Assistance Act 126 of 1993 which then provided that the Minister may, on such terms and conditions as he or she may deem fit, for the purposes of this Act, sell, exchange, donate or lease any land designated or acquired under this Act.
- 5.1.26 Paragraph (b) of the said clause states that lease agreements with an option to purchase must be concluded with the selected beneficiaries and that lease periods must be linked to one production cycle of the enterprise that the beneficiaries are engaged in.
- 5.1.27 Neither paragraph (b) nor any other paragraph under clause 7.4.1 specifically exclude the leasing of state land to public servants.
- 5.1.28 However, according to clause 4.1.10 of the Policy: Lease Management signed on 13 March 2009 (the 2009 Policy), *“No official, including municipal councillors and political office bearers, may lease any state land”*. Officials according to clause 3.13 this policy refers to individuals who are employed by any national or provincial or any of its entities listed in terms of the PFMA.
- 5.1.29 The 2009 Policy precluded the Department from entering into lease agreements with public servants but could lease state land to the spouses of public servants.
- 5.1.30 Clause 9.8 of the 2009 Policy provides that lessees who have valid operating leases at the commencement of this Policy shall have their rental amount reviewed to 5% of the projected net income. The projected annual net income shall be determined through a business plan. According to clause 11.3 all

those lessees with expired leases would be given up to 12 months to develop and have their business plans approved.

5.1.31 These clauses (i.e. 9.8 and 11.3) meant that the Department had to ensure that lessees had business plans after three months of this Policy coming into operation, even where the lease agreements had expired. The principle of the business plan was used to renew the relationship between the Lessee and the Department.

5.1.32 Paragraph 6.4 of the State Land and Disposal Policy (the 2013 Policy) of the Department signed by the Minister on 25 July 2013 states that:

“Public Servants and their spouses shall not qualify to benefit from agricultural leases irrespective of the falling under any of the categories identified above. The lessee shall therefore sign a declaration to the effect that their spouses are not civil servants and acknowledge that any misrepresentation in this regard constitute a ground for immediate termination of the lease agreement”.

5.1.33 The Department was under an obligation as provided above to ensure that public servants and their spouses did not benefit from leases of farms and to further ensure that any misrepresentation by a lessee in this regard constitute a ground for immediate termination of the lease agreement. However, paragraph 6.4 of the policy is applicable to leases that were entered into after July 2013.

5.1.34 The Office of the Director-General issued an unnumbered Departmental Circular of 2020, dated 13 February 2020 addressing the Approval of Agricultural Leases by Provincial Technical Committees and Qualification of Spouses of Public Servants to Apply for Agricultural Leases.

5.1.35 According to paragraph 2.1 of the Circular, the Provincial Technical Committee envisaged in the State Land Lease and Disposal Policy dated 25 July 2013, is hereby empowered to approve leases in situations where farmers have been in occupation of State land prior to 25 July 2013.

5.1.36 It is indicated in paragraph 4.2 of the Circular that spouses of public servants shall, with effect from 13 February 2020 and under the revised paragraph 5.4 of the State Land Lease and Disposal Policy dated 26 March 2019, not be excluded from entering into agricultural leases.

6. REASONS FOR CLOSURE

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

6.1 Regarding whether the Department irregularly and improperly leased state owned farms to government officials and /or their families, is unsubstantiated.

6.1.1 The allegations that the Department irregularly and improperly leased state owned farms to government officials and /or their families, is unsubstantiated.

6.1.2 Evidence at my disposal, including the legal framework, conclude that no lessees of the farms the Complainant cited in his complaint were public servants or had relatives in the public service at the time they signed the lease agreements.

6.1.3 Further, even if some of the lessees were in the public service, I could not find any wrongdoing on the part of the Department in that at the time the lease agreements were signed, the applicable legal framework i.e. clause 7.4.1 of the Manual for the Implementation of the Proactive Land Acquisition Strategy, Closing Report on an investigation into allegations of leasing state owned farms to public servants and their relatives

did not make any specific provision prohibiting public servants from leasing state owned farms.

- 6.1.4 On the other hand, clause 4.1.10 of the Policy: Lease Management of 2009, only excluded public servants from entering into lease agreements with the Department but not their spouses. This clause does not apply to the leases that are the subject of this investigation since no lease was signed with any public servant.
- 6.1.5 Clause 6.4 of the State Land Lease and Disposal Policy of 2013, which specifically excludes public servants and their spouses from leasing state owned farms, does not apply to these cases since it only came into effect in July 2013, and does not apply retrospectively, whereas the lease agreements in dispute were signed in 2011.
- 6.1.6 Therefore, I cannot conclude that the conduct of the Department was in contravention of 7.4.1 of the Manual for the Implementation of the Proactive Land Acquisition Strategy of 2007, clause 4.1.10 of the Policy: Lease Management of 2009 and clause 6.4 of the State Land Lease and Disposal Policy of 2013.

7. REMEDIAL ACTION

- 7.1 In the light of the above, I am not issuing a formal report with remedial action as contemplated in section 182(1)(c) of the Constitution, since I accordingly could not find any improper conduct, or maladministration on the part of the Department in relation to the complaint.
- 7.2 Furthermore, the Director-General's Circular of 2020 (i.e. paragraph 2.1 thereof), regularised instances where farmers have been in occupation of State land for agricultural purposes prior to 25 July 2013, including public servants.

7.3 In addition, according to the Director-General's Circular of 2020 (paragraph 4.2 thereof), spouses of public servants shall no longer be excluded from entering into agricultural leases.

8. CONCLUSION

8.1 In conclusion, I have however discovered the following gaps in how the 2013 Policy was formulated:

8.1.1 The 2013 policy introduced 30 year lease agreements but it is silent on what should happen to the 5 year lease agreements that were signed prior to its promulgation, that is, whether the existing lease agreements were automatically converted into 30 year leases.

8.1.2 The policy is further not clear on how business plans would be applied to the existing and/or future leases since rental payments would be determined and paid according to the business plans (clause 9.8 of the Policy).

8.2 Although my investigation found no wrongdoing on the part of the Department in that there is no evidentiary proof that the Department entered into a lease agreement with any state official and/ or public servant whilst they were in service, there is evidence that some have directly or indirectly benefitted from the lease agreement concluded with their spouses. For example, the Department entered into a lease agreement with Mrs Hlungwane whilst her husband was still an employee of the Department of Agriculture. The lease agreement was transferred to Mr Hlungwane in 2011, when his wife indicated her intention to go and further her studies overseas.

8.3 Whilst evidence in my possession indicates that due process was followed in that Mr Hlungwane's application was considered with two other competitors and the lease agreement was signed when he was no longer a state official, the proximity of these events i.e. the resignation and conclusion of the lease

agreement, were too close, thus giving an impression that he might have influenced such a transfer.

8.4 In light of the alarming reports of corruption in the country, the Department should consider the review of the policy to exclude the spouses of public servants from entering into agricultural leases with the state. Further, the Department should consider including the cooling off period within which former state officials can be considered for such leasing of state owned land once they have left the service.

8.5 It is therefore recommended that the Department reviews the State Land Lease and Disposal Policy to avoid ambiguities.

9. The investigation in this matter is therefore closed.



ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 3 / 12 / 2020