

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



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**Report No: 33 of 2020/21**

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**CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE IRREGULAR  
AWARDING OF A LEASE AGREEMENT / TENDER BY THE DEPARTMENT OF PUBLIC  
WORKS AND INFRASTRUCTURE TO TISO BLACKSTAR GROUP SE**

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## 1. INTRODUCTION

- 1.1. This is my closing report 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. This report relates to an investigation against the Department of Public Works and Infrastructure (the DPWI) into allegations of the irregular awarding of a lease agreement / tender to Tiso Blackstar Group SE (Tiso Blackstar).

## 2. THE COMPLAINT

- 2.1. On 12 November 2018, Mr. Tebogo Anthony Kaulela (the Complainant) approached my Provincial Office in the Northern Cape and lodged a complaint on the following allegations:
- 2.1.1 That the DPWI awarded a lease agreement to Tiso Blackstar, a privately owned company from England without following due process and contrary to Supply Chain Management processes encapsulated in the Public Finance Management Act, 1 of 1999 (the PFMA);
- 2.1.2 That Tiso Blackstar is not regarded as a historically disadvantaged enterprise nor owned by the historically disadvantaged individuals, thus not complying with the prescribed prescripts;
- 2.1.3 The lease agreement that was entered into was relating to the following property:  
  
Hillside House, 17 Empire Road, Parktown in Johannesburg; and

2.1.4 That the building in question was at that time housing the commission of inquiry into state capture that is chaired by Deputy Chief Justice Zondo.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

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

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

*“The Public Protector has power as regulated by national legislation:*

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

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

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

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- 3.5. In the matter of Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016, the Constitutional Court per Chief Justice Mogoeng stated the following when confirming the powers of the Public Protector:
- 3.5.1 The remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences” (para 73);
- 3.5.2 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
- 3.5.3 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);
- 3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
- 3.5.5 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);

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- 3.5.6 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);
- 3.5.7 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);
- 3.5.8 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence (para 71(c));
- 3.5.9 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));
- 3.5.10 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));
- 3.6. In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017), [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 all SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the Court held as follows, when confirming the powers of the Public protector:

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- 3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (para 79);
- 3.6.2 The Public Protector has power to take remedial action, which include instructing the Members of the Executive including the President to exercise powers entrusted on them under the constitution where that is required to remedy the harm in question (para 82);
- 3.6.3 The Public Protector, in appropriate circumstances, has the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective (para 85 and 152);
- 3.6.4 There is nothing in the Public Protector Act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (para 91 and 92);
- 3.6.5 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 and 101):
- (a) Conduct an investigation;
  - (b) Report on that conduct; and
  - (c) To take remedial action.
- 3.6.6 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (para 104);

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- 3.6.7 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para105).
- 3.6.8 The fact that there are no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (para 107 and 108);
- 3.6.9 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action ( para 112);
- 3.7 The DPWI is an organ of state and its conduct amounts to conduct in state affairs, as a result the complaint falls within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.
- 3.8 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties in this investigation.

#### **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 me the sole discretion to determine how to resolve a dispute of improper conduct and/or maladministration.

4.1.3. This complaint was classified as an Good Governance and Integrity complaint for resolution by way of a formal investigation in line with sections 6(4) and (5) of the Public Protector Act.

## 4.2. Approach to the investigation

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

- a) What happened?
- b) What should have happened?
- c) Is there a discrepancy between what happened and what should have happened and does that deviation amounts to improper conduct and/or maladministration?
- d) In the event of improper conduct and/or maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where she would have been had the improper conduct and/or maladministration not taken place?

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 the DPWI irregularly awarded a lease agreement / tender to Tiso Blackstar without following proper process.

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 DPWI or an organ of state to prevent maladministration.

4.3. **On analysis of the complaint, the following issue was considered and investigated:**



4.3.1. Whether the Department of Public Works and Infrastructure improperly awarded a lease agreement / tender to Tiso Blackstar without following proper process?

#### **4.4. The Key Sources of Information:**

##### **4.4.1. Documentation and correspondence sent and received:-**

- 4.4.1.1. Document request letter to the Director General dated 19 July 2019;
- 4.4.1.2. Copy of Proclamation No. 3 of 2018 signed by the President of the Republic of South Africa dated 23 January 2018;
- 4.4.1.3. Letter from the Director General of the DPWI to PPSA dated 19 August 2019;
- 4.4.1.4. Letter from the Department of Justice and Constitutional Development to the Secretary of Gauteng Provincial Legislature dated 07 February 2018;
- 4.4.1.5. Letter from the Department of Justice and Constitutional Development to the Executive Mayor of City of Johannesburg dated 07 February 2018;
- 4.4.1.6. Letter from the Department of Justice and Constitutional Development to The Director General of the Department of Public Works dated 08 March 2018;
- 4.4.1.7. Copy of the Progress Report by the Department of Justice and Constitutional Development dated 16 February 2018;
- 4.4.1.8. Copies of the Request for approval of a deviation in terms of National Treasury Regulation Note 3 of 2016/2017 dated 8 and 13 March 2018;
- 4.4.1.9. Approval letter by the National Treasury dated 23 March 2018;

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- 4.4.1.10. Copy of the Request for Expansion of the 15 June 2018;
  - 4.4.1.11. Approval letter by the National Treasury dated 28 June 2018;
  - 4.4.1.12. Copy of the Acceptance Letter by Tiso Blackstar Group (Pty) Ltd dated 24 April 2018;
  - 4.4.1.13. Copy of the Acceptance Letter by Micawber 185 (Pty) Ltd dated 24 April 2018;
  - 4.4.1.14. Copies of the Standard Lease Agreements for Office and Functional Accommodation ;
  - 4.4.1.15. Copies of all the minutes of the Bid Evaluation Committee, Internal Memorandums and submissions;
  - 4.4.1.16. Copies of the Declaration of interest by the members of the Bid Adjudication Committee and the minutes thereof dated 09 March 2018, 19 April 2018, 24 April 2018, 20 July 2018 and 11 May 2018; and
  - 4.4.1.17. Registration papers for Abland (Pty) Ltd, Tiso Blackstar (Pty) Ltd and Micawber 185 (Pty) Ltd).

#### **4.4.3 Legislation and other prescripts**

- 4.4.3.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
- 4.4.3.2 Public Protector Act, 23 of 1994 (Public Protector Act);
- 4.4.3.3 Public Finance Management Act, 1999;
- 4.4.3.4 National Treasury Instruction 3 of 2016/2017; and
- 4.4.3.5 Supply Chain Practice Note 32 of 2011.

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

**5.1 Regarding whether the Department of Public Works and Infrastructure improperly awarded a lease agreement / tender to Tiso Blackstar without following proper process:**

*Common cause facts*

5.1.1 It is common cause that the DPWI entered into a lease agreement with Tiso Blackstar for a property that is situated at 17 Empire Road, Hillside House, Parktown in Johannesburg.

5.1.2 It is also not in dispute that at the time when the complaint was lodged with my office (i.e. 12 November 2018), the building in question was housing the commission of inquiry into state capture chaired by Deputy Chief Justice Zondo.

*Issues in dispute*

5.1.3 The issue for my determination is whether the DPWI improperly awarded a lease agreement / tender to Tiso Blackstar without following proper process.

5.1.4 The Complainant alleged that the DPWI awarded a lease agreement to Tiso Blackstar, a privately owned company from England without following due process and contrary to Supply Chain Management processes and not in line with the Public Finance Management Act, 1 of 1999 (the PFMA).

5.1.5 The DPWI, through a correspondence dated 19 August 2019 signed by Adv. Sam Vukela, submitted that on 23 January 2018, the President of the Republic of South

Africa proclaimed the Judicial Commission of Inquiry to investigate the allegations of state capture, corruption, fraud in the public sector, including organs of state in terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996. The proclamation was published in the Government Gazette Volume 631 dated 25 January 2018.

- 5.1.6 The Judicial Commission was appointed as a result of the Public Protector's state of capture report no 6 of 2016/2017 dated 14 October 2016.
- 5.1.7 In light of the above, the Department of Justice and Constitutional Development (DOJ) was tasked to facilitate the provisioning of proper and safe accommodation for the Commission.
- 5.1.8 An engagement was made between DOJ, DPWI, Provincial Department of Infrastructure Development, office of the Gauteng Provincial Legislature and three (3) Municipalities, i.e Tshwane, Ekurhuleni and City of Johannesburg, with a view to acquire state owned building that could accommodate the Commission.
- 5.1.9 The feedback received was that there was no vacant state owned buildings within Gauteng which the Commission could use for purposes of carrying out its function. The available buildings were either dilapidated or in state of disrepair.
- 5.1.10 Due to immense pressure and the tight timeframes for the Commission to commence with its function, it was noted that it will be difficult to procure office accommodation through the usual tender processes required for the procurement of private property through the DPWI.
- 5.1.11 The DOJ and the DPWI assessed four (4) privately owned buildings that might have the potential to accommodate the Commission. Evidence to that effect was submitted to my office.

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- 5.1.12 Subsequent to that on 08 March 2018, the DOJ approached the DPWI for urgent assistance with the procurement of accommodation for the Commission, through emergency procurement process using negotiated strategy other than the usual tender processes required for the procurement of private property.
- 5.1.13 The request also made reference to the site visits that were conducted on 21 and 22 February 2018 by the DOJ, DPWI and City of Johannesburg, and a recommendation was made for Hillside House building for administration purposes and Hill on Empire for hearing purposes / auditorium and executive offices.
- 5.1.14 A market scan was conducted in the Johannesburg area on four (4) buildings offices as mentioned above.
- 5.1.14.1 Two (2) of the assessed buildings were found to be unsuitable to house the Commission due to the size, location and security issues.
- 5.1.14.2 And the remaining two (2) buildings were found to be suitable to house the Commission as follows:
- 5.1.14.2.1 Hillside House for office accommodation; and
- 5.1.14.2.2 Hill on Empire for the hearing and accommodation.
- 5.1.15 The DPWI made a submissions and/or requests to National Treasury dated 08 March 2018 and 13 March 2018 for approval in order to deviate from the competitive bidding process to negotiated procedure with the owners of the identified buildings, in line with clause 8 of the National Treasury Regulation Instruction Note 3 of 2016/2017.
- 5.1.16 The reasons provided by the DPWI for deviation was *“due to the tight time frame and in compliance with the recommendations made by the Public Protector, the*

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*Department of Public Works is unable to utilise the open tender procedure and is compelled to use the negotiated procurement methodology.*

*The Department together with the Department of Justice has engaged the Provincial Department of Infrastructure Development and the Municipalities with a view to acquire state owned building that could accommodate the Judicial Commission of Inquiry into allegations of State Capture.*

*In view of not being able to procure any state owned facility, the Department had to procure privately owned facilities”.*

- 5.1.17 An approval dated 23 March 2018 was received from the National Treasury with the following conditions:
- 5.1.17.1 That all potential buildings within the 5km radius should be physically inspected;
  - 5.1.17.2 The period of the lease should be confirmed by the Presidency; and
  - 5.1.17.3 Financial proposals and the outcome of the market scan should be considered by the bid committees.
- 5.1.18 Upon receipt of the approval from National Treasury, the Bid Evaluation Committee (BEC) sat on several occasions and also conducted site inspections on the identified buildings and made recommendations for consideration by the Bid Adjudication Committee (BAC). Copies of minutes, attendance registers and all other evidence relevant for these processes were furnished to the investigation team.
- 5.1.19 On 24 April 2018, DPWI issued three (3) acceptance letters to the owners of the identified buildings. Copies of the acceptance letters were also furnished to the investigation team. It must be noted that one of the identified building is linked to

two (2) different companies, hence three (3) acceptance letters were issued by the DPWI.

5.1.20 On 25 April 2018, one of the company rejected the offer due to the relationship it had with Tiso Blackstar.

5.1.21 Subsequent to the issuing of the acceptance letters by the DPWI for three (3) companies, on 21 June 2018, the DPWI submitted a request for approval to National Treasury for expansion of more than 15% for the acquisition of additional accommodation for the Commission.

5.1.22 The request made reference to a letter that was received from DOJ dated 22 May 2018, requesting for additional office space due to the following reasons:

5.1.22.1 *“The Commission has increased the number of investigators from 20 to 40;*

5.1.22.2 *The legal team will expand from 10 to approximately 20 members;*

5.1.22.3 *The establishment of a call centre to enable the public to submit information to the Commission;*

5.1.22.4 *The Commission has identified the need for witness rooms to enable legal and investigative teams to interact with numerous witnesses who have come forward since the publication of the Commission’s public notice no. 1; and*

5.1.22.5 *The need to increase the capacity for storage”.*

5.1.23 In terms of Supply Chain Practice note 32 of 2011, it dictates that contracts may be expanded or varied by not more than 20% for construction related goods, work and/or services and 15% for all other goods and/or services of the original value of the contract, whichever is the lower amount.

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- 5.1.24 Further, the required space was identified in the same buildings already identified by the DPWI.
- 5.1.25 An approval for the acquisition of additional accommodation was received from National Treasury dated 28 June 2018.
- 5.1.26 The process of the BEC and BAC was followed by the DPWI with regard to the acquisition of additional accommodation for the Commission.
- 5.1.26.1 As a result, lease agreements were entered into by the DPWI with two (2) different companies including Tiso Blackstar.
- 5.1.27 The lease agreement entered into between the DPWI and Tiso Blackstar was signed with the following special terms and conditions:
- 5.1.27.1 That *“this agreement is a sub-lease agreement and is subject to the lessor obtaining consent from “the Landlord” from which the lessor leases the premises) on or before the 13 July 2018 to sub-let the premises on the terms and conditions contained in this agreement”*.
- 5.1.28 On 25 May 2020, the investigation team sent a discretionary letter to the Complainant detailing the outcome of the intended findings on the investigation that was underway and also giving him ten (10) days to respond to the discretionary letter. The Complainant did not respond to the discretionary letter.

*Application of the relevant law & evaluation of evidence*

- 5.1.29 Section 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution demands that when an organ of state contracts for goods and/or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.



5.1.30 Section 38(1)(iii) of the Public Finance Management Act, 1999 (PFMA) prescribes that the Accounting Officer of the department to ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

5.1.31 Clause 8 of the National Treasury Regulation Instruction Note 3 of 2016/2017 dealing with the deviations from normal bidding process provides that:

*“An accounting Officer must only deviate from inviting competitive bids in cases of emergency and sole supplier status.*

*An emergency procurement may occur when there is serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls for an agency to action and there is insufficient time to invite competitive bids.*

*Any other deviation will be allowed in exceptional case subject to the prior written approval from the relevant treasury”*

*Evaluation and conclusion*

5.1.32 From the evidence above, it can be concluded that the DPWI did not improperly award a lease agreement / tender to Tiso Blackstar in that the process that was followed was in line with the prescribed National Treasury Regulation Instruction Note 3 of 2016/2017 in that:

5.1.32.1 The National Treasury Regulation allows the DPWI to deviate from the competitive process and use negotiated process in cases of emergency.

5.1.32.2 In this matter, on 23 January 2018, the President of the Republic of South Africa proclaimed the Judicial Commission of Inquiry and that due to the tight time frame,

the DPWI could not procure office accommodation through the usual tender (the competitive bidding process) required for the procurement of private owned property. As a result, the DPWI had to use the negotiated strategy / process.

- 5.1.32.3 From the evidence at my disposal, the DPWI together with the team from other state departments and the Municipalities have tried to acquire state owned building(s) that could accommodate the Commission but there was no state owned building that was vacant and or in good condition in Gauteng that was secured in order to house the Commission.
- 5.1.32.4 Further, the deviation was approved by the National Treasury as a justifiable reason for deviation in line with the prescribed Regulation.
- 5.1.32.5 My observation in this regard is that the deviation from the competitive procurement procedures was indeed reasonable and justifiable, and the process was procedurally fair. Taking into account that the President took time after the issuing of Report No. 6 of 2016/2017 dated 24 October 2016 by my predecessor “to appoint a commission of enquiry” taking into account that the Report gave the President only 30 days from the date of the report and accordingly, there was already a delay in complying with the remedial actions and as such there was an urgent need for accommodation to house the appointed Commission.
- 5.1.32.6 Had the DPWI followed the competitive bidding process, the process would have taken long to be finalised meanwhile the building was acquired as a matter of urgency.
- 5.1.33 I am also in possession of the evidence, wherein one (1) company rejected the offer after when an acceptance letter was issued by the DPWI dated 24 April 2018 due to the relationship it has with Tiso Blackstar. Accordingly, Tiso Blackstar signed a sub-lease agreement with the DPWI after seeking / obtaining consent from the other company as the Landlord on the property concern.

## 6. FINDINGS

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

### 6.1 Regarding whether the Department of Public Works and Infrastructure improperly awarded a lease agreement / tender to Tiso Blackstar without following proper process:

6.1.1 The allegation that the DPWI improperly awarded a lease agreement / tender to Tiso Blackstar without following proper process is not substantiated.

6.1.2 Based on the evidence at my disposal, the DPWI did not follow the competitive bid process when procuring accommodation for the Judicial Commission but followed the negotiated procurement process. The process that was followed by the DPWI was in line with Treasury Regulation 3 of 2016/2017 and the deviation in that regard together with the reasons provided for the deviation was approved by Treasury as justifiable and in line with the prescribed Regulation.

6.1.3 The conduct of the DPWI in these regards does not constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(ii) of the Public Protector Act.

## 7. REASON FOR CLOSURE

7.1 In conclusion, with specific reference to the matter that was under investigation as per this report, I could not make any findings against the DPWI based on all the allegations raised by the Complainant. In light of the above, I am now taking a decision to close this matter.

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7.2 Kindly note that I am now *functus officio* in the matter and cannot take the matter any further. Should you wish to challenge this decision you are at liberty to approach a court of law and lodge an application for a judicial review of the matter.



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**ADV KHOLEKA GCALEKA**  
**ACTING PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**  
**DATE:** 02 February 2021

*Assisted by: Ms A Sombhani & Adv J Raubenheimer: Investigations Head Office.*