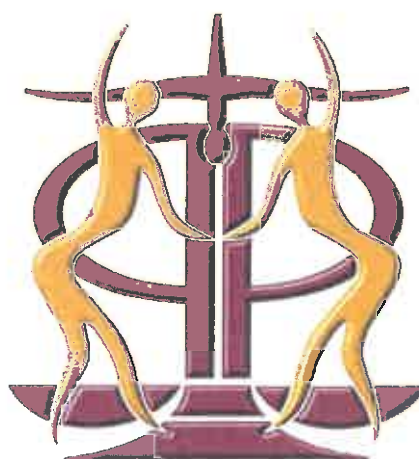


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF
THE PUBLIC PROTECTOR ACT, 1994**



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NO: 31 of 2017/18

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***“Allegations of maladministration against the Free State Department of Agriculture –
Vrede Integrated Dairy Project”***

**REPORT ON AN INVESTIGATION INTO COMPLAINTS OF MALADMINISTRATION
AGAINST THE FREE STATE DEPARTMENT OF AGRICULTURE IN RESPECT OF NON-
ADHERENCE TO TREASURY PRESCRIPTS AND LACK OF FINANCIAL CONTROL IN
THE ADMINISTRATION OF THE VREDE INTEGRATED DAIRY PROJECT**

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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, 1994.
- (ii) The report relates to an investigation into the alleged maladministration by the Free State Department of Agriculture and Rural Development (the Department) in that it did not adhere to treasury prescripts and lack of financial control in the administration of the Vrede Dairy Project (the Project).
- (iii) The Complainant is Mr R Jankielsohn (the Complainant) a member of the Free State Provincial Legislature representing the Democratic Alliance. Mr Jankielsohn submitted a complaint alleging maladministration after visiting the Vrede Dairy Farm and received answers to questions posed in the Free State Legislature which were not satisfactorily answered according to him.
- (iv) In the main, the complaint dated 12 September 2013 provides:
 - (a) That the Portfolio Committee on Agriculture and Rural Development in the Free State Legislature, around September 2013, heard from the Head of Department, Mr M P Thabete, that an agreement between the province and the private sector partners ESTINA/PARAS in the Vrede Dairy Project was subject to a confidentiality clause;
 - (b) That in terms of the agreement the Indian company "PARAS" and their South African Partner "ESTINA" would receive a 49% share with a R228 million investment in the R570 million project, while the 100 local beneficiaries would jointly receive 51% shares through a government investment of R342 million. This implied that ESTINA/PARAS would obtain a 49% share with an investment of only 40% of the projected cost of the project. Government would thus be

- investing R144 million more in the project than their private sector partners without the beneficiaries receiving the proportionate number of shares;
- (c) The project planned to milk 500 cows and produce 40 000 litres of milk per day that would be processed by a factory built by ESTINA/PARAS. The Department had invested R30 million in the project the previous year on designs, an Environmental Impact Assessment, planting of fodder, etc. On the year the complaint was lodged, an amount of R84 million was to be invested in the infrastructure, machinery and cattle. The Department had indicated that 400 pregnant cattle had already been purchased for the project; and
 - (d) That the Public Protector had to investigate the issues in an attempt to ensure transparency in the project as well as an equitable share in the project for the local 100 beneficiaries based on the government investment.
- (v) On 28 March 2014, the Public Protector received a further complaint from the Complainant on the Project. The Complainant made the same allegations as those received on 12 September 2013. The second complaint was:
- (a) That it had come to light that ESTINA would only contribute if necessary and that they were also benefiting from the supply of goods and services from the contributions from the provincial government;
 - (b) That the R342 million was also subject to hugely inflated costs, some of which included among others the construction of a silage bunker for R5 000 000.00; a 2km gravel access road for R1 200 000.00; a security gate and guard house for R2 6000 000.00; a cattle feed pant for R7 350 000.00; a milking parlour and mild processing plant for R30 050 000.00; tools such as spanners, shovels, grinders, air compressors, etc. for R2 513 000.00; administrative, legal, accounting and other consulting fees for R12 000 000.00; irrigation equipment, pasteurizer and dairy equipment for R37 779 613.00 and 351 dairy cows for R6 212 000.00;

- (c) That the Free State government had paid R2 838 000.00 more for the 351 dairy cows than was necessary. There also appeared to be no official record of such transactions within the breed society that kept stud books of such cattle. Even though the value of the cattle bought was questionable, the DA had made enquiries about the best possible market prices for stud cattle with the Free State Friesland Breed Society. The market prices for prime cattle were indicated in the following table:

Types of Heifers Purchased	Number Purchased	Market price of Friesland/Holstein Stud Heifers	Total Costs
Pregnant Heifers	62	R15 000 per heifer	R930 000
Breeding Cows	57	R16 000 per cow	R912 000
Calves 12 months +	70	R8 000 per heifer	R560 000
Heifers 9-12 months	77	R6 000 per heifer	R462 000
Heifers 6-9 months	85	R4 000 to R6 000 per heifer	R510 000 (maximum)
TOTAL			R3 374 000

- (d) That at the time, the national Department of Agriculture had supplied the provincial government with R40 466 231 worth of equipment that included tractors and most of the other related equipment for planting and maintaining crops. Purchasing additional tractors and equipment for the project wasn't necessary and jointly cost the project an additional R5 867 494.00;
- (e) That the top range rotary milking machines with electronic sensors cost about R55 000.00 per point. The machines for the 82 points should not have cost more than about R4.5 million. They were included as part of the R30 050 000.00 price tag that included the milk processing plant;

- (f) That it appeared the payments for goods and services were in some, if not all, instances highly inflated. It was also not known who the suppliers of the various goods and services were, and whether the suppliers, implementing agents, or officials were responsible for the inflated prices;
 - (g) That the agreement with ESTINA included a clause that the service provider would be “responsible to ensure that they comply with environmental requirements” had already been breached since complaints of indiscriminate ploughing of natural fields and wetlands had been received. This could not be done without the necessary environmental procedures being followed; and
 - (h) That various reports indicated that up to between 50 and 100 cattle had died since being purchased. There was obviously a serious problem with these cattle and this was costing taxpayers a great deal of money. It was not known what the cause of the deaths was, or what the costs of this was. Furthermore that some carcasses had also been dumped next to a stream that ran into the catchment area for water for the town of Vrede/Ezenzeleni. These had just been covered with gravel and still posed a risk when it rained.
- (vi) On 10 May 2016, after the issues in the investigation were identified by the Public Protector, the Complainant further submitted the following:
- (a) That the appointment of ESTINA as partner in the project did not follow the necessary state procurement processes;
 - (b) ESTINA misrepresented itself as being in partnership with a large dairy company in India, namely PARAS, by marketing itself in presentations as “Estina/Paras. This could not have been overlooked by those who approved the project since logic dictates that Paras would be part of such a presentation or at least be requested to commit in writing to being part of the project;

- (c) The contract was approved by the legal department in the Office of the Premier, as confirmed by the CFO in interviews. The contract clearly benefits ESTINA at the cost of the state, taxpayers, and beneficiaries;
- (d) The fact that ESTINA was both a partner and implementing agent was highly irregular. ESTINA subsequently received up to R183 million for the construction of infrastructure and purchasing of cattle for the project. It appeared that costs of some of the items were inflated and that the processing plant that was paid for was dysfunctional;
- (e) The fact that ESTINA would receive 49% share in the project with only a 40% contribution was irregular and robs the taxpayers and beneficiaries of a 9% share;
- (f) ESTINA was allowed to abscond from the project without any accountability. The FDC have taken over their management role in this project;
- (g) The Mahoma Mobung part of the project, including bank accounts in this name, was unclear and appeared to be irregular;
- (h) The fact that the 80 beneficiaries had been sidelined, while they in fact should own 51% of the project, implied that they were used as pawns to justify the project after the DA requested the names from them. A meeting with some of them indicated that they were merely names on a piece of paper with no further information or involvement. They had a right to claim their 51% share;
- (i) The National Treasury investigation had revealed various irregularities with recommendations of disciplinary procedures against both the HoD and CFO, which had been ignored by the provincial government and the Premier. The recommendations had to be implemented;
- (j) Questions in the Portfolio Committee on Economic Affairs that included agriculture in the Free State Legislature relating to the Vrede Dairy Project had

been ignored. In fact the Chairperson of the committee would not allow any questions to the Department of Agriculture on the issue by the members of the legislature. The former MEC for the Agriculture and Rural Development, Mamiki Qabathe, refused to answer questions relating to the project in the committee;

- (k) While the FDC had taken over the management of the project, the Department of Agriculture and Rural Development continued to make monthly payments for running costs such as food into the project.”
- (vii) On analysis of the complaint received in 2013 and 2014, the following issues were identified and investigated:
 - (a) Whether the Department improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy Project;
 - (b) Whether the Department failed to manage and monitor implementation of the terms of the agreement in relation to budget evaluation, expenditure control and performance by ESTINA;
 - (c) Whether or not prices for goods and services procured were inflated, specifically alleged expenses in respect of construction, processing equipment, procurement of cows and administration costs; and
- (viii) **The following issues were not investigated due to capacity and financial constraints experienced by the Office of the Public Protector:**
 - (a) The cause of the alleged deaths of the cattle. The photographs submitted in respect of the alleged deaths of the cattle indicated that the deaths did not occur recently. The Minister of Water Affairs intervened and issued instructions on the removal of the dead cows.

- (b) Issues emanating from the complaint sent on 10 May 2016 as the issues pertaining to the investigation were already identified and an investigation was at an advance stage.
- (c) The issue of value for money obtained by the Government in terms of the agreement was investigated by National Treasury: Accountant General.
- (d) The recent newspaper articles on the emails reported, relating to the Gupta family, that surfaced around June 2017, referring to the Project were noted but do not form part of the scope of this investigation.
- (e) How the money transferred to ESTINA were spent by ESTINA, as the Directorate for Priority Crime is dealing with the issue.
- (f) The matter relating to beneficiaries who were intended to benefit from the project due to lack of information.
- (ix) The investigation process was conducted through meetings and interviews with the Complainant and relevant officials of the Department as well as inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts.
- (x) Key laws and policies taken into account to determine if there had been maladministration by the Department and prejudice to the Complainant or South African Citizens were principally those imposing administrative standards that should have been complied with by the Department or its officials. Those are the following:
 - (a) Sections 195 and 217 of the Constitution create the basis for a public procurement framework aimed at ensuring equity, good governance and administration, fair dealing in the administrative context, enhancing protection

of the individual against abuse of state power, promoting public participation in decision-making, and strengthening the notion that public officials are answerable and accountable to the public they are meant to serve.¹

- (b) There are certain requirements before a government can successfully use Public-Private-Partnerships (PPP) to procure public services infrastructure or services. A detailed legislative framework is in place through the Public Finance Management Act, 1 of 1999 (PFMA) and PFMA regulation 16 of the Treasury Regulation (Regulations).
 - (c) Sections 38, 39 and 40 of the PFMA require Accounting Officers of departments to ensure that effective, efficient and transparent financial and risk management systems are in place.
- (xi) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
- (a) **Regarding whether the Department of Agriculture improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy Project:**
 - (aa) The allegation that the Department improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy project is not substantiated.
 - (bb) The Department did not enter into a PPP with ESTINA in the context of Treasury Regulation requirements.

¹ Devenish, Govender and Hulme *Administrative Law* 14-16

Observations

(cc) The Public Protector in concurrence with the Accountant General's investigation observed the following procurement irregularities:-

- (1) That the HoD of the department did not follow the normal procurement process, as prescribed by the Constitution, PFMA and National Treasury Regulations;
- (2) That the payments to Estina were also not line with Treasury prescripts;
- (3) That the agreement between the Department and Estina seems to be invalid, due to non -compliance with the procurement process;
- (4) That despite the Accountant General's report, the department failed to comply with section 81 and 86 of the PFMA, which prescribed the process to be followed when there is allegations of financial misconduct;

(dd) The prescripts in respect of the procurement of the agreement were not adhered to.

(ee) The Accounting Officer of the Department proceeded after the recommendation of the Accountant General to pay a further R143, 950 million to ESTINA in respect of the Project.

(b) **Regarding whether the Department failed to manage and monitor implementation of the terms of the agreement in relation to budget evaluation, expenditure control and performance by ESTINA:**

(aa) The allegation that the Department failed to manage and monitor implementation of the terms of agreement is substantiated.

- (bb) No documents and/or policies or measures were provided by the Department that proper financial control and risk management of the Project were in place. The Public Protector could find no evidence or indication that the Accounting Officer invoked the provisions of the agreement in respect of the control over the Project and this raises a serious concern. This concern was supported by the report of the Accountant General and the lack of effective, efficient and transparent systems of financial and risk management and internal control amounts to gross negligence and maladministration.
 - (cc) No supporting evidence in the form of actual invoices/receipts was submitted to substantiate the expenditure as claimed in the financial statements submitted, except for nine (9) invoices for procurement of cattle.
 - (dd) The evidence outlined earlier points to gross irregularities in ensuring the effective and efficient performance of the agreement and resulted in maladministration.
 - (ee) From the above it is clear that this amounts to gross negligence and also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.
- (c) **Whether the prices for goods and services procured were inflated, specifically alleged expenses in respect of construction, processing equipment, procurement of cows and administration costs:**
- (aa) The allegation that the prices for goods and services procured were inflated, specifically expenses in respect of construction, processing equipment,

procurement of cows and administration costs is difficult to determine. This is due to the following:

1. ESTINA did not follow public procurement processes when procuring the services of the service providers in the project;
2. Due to the lack of resources and financial constraints, the Public Protector was unable to conduct a comprehensive investigation in order to determine the fair market value for good and services procured; and
3. The Public Protector was not provided with all the invoices and proof of payments for the goods and services procured by Estina on behalf of the Department.

(xi) REMEDIAL ACTION

The appropriate remedial action the Public Protector takes in pursuit of section 182(1)(c) of the Constitution, with the view of addressing systemic procurement management deficiencies in the Department and the irregular expenditure incurred, is the following:

(a) The Premier of the Free State Province must

- (aa) Initiate and institute disciplinary action against all implicated officials involved in the Vrede Dairy Farm project.
- (bb) Submit the report regarding the remedial action in (aa) to the Public Protector after conclusion of the disciplinary action processes.
- (cc) Ensure that that he conducts a reconciliation of the number of cows initially procured and found during April 2017 as per his undertaking in the response to the section 7(9) notice.

- (dd) Ensure that he submit an implementation plan within 30 days of the issuing of this report.

(b) The Head of the Free State Department of Agriculture must:

- (aa) Ensure that the officials in the Supply Chain Management Division and the Management of the Department are trained on the prescripts of the National and Provincial Treasuries in respect of procurement and specifically in respect of deviations;
- (bb) Take corrective measures to prevent a recurrence of the failure in the management process referred to in this report;
- (cc) Ensure that all Departmental staff involved in the implementation and execution of Projects are properly trained and capacitated to manage Projects assigned to them, for future projects; and
- (dd) Develop and revise current policies for the implementation of internal control measures in line with Treasury prescripts and regulations.

REPORT ON A SYSTEMIC INVESTIGATION INTO COMPLAINTS OF MALADMINISTRATION AGAINST THE Free State DEPARTMENT OF AGRICULTURE IN RESPECT OF NON-ADHERENCE TO TREASURY PRESCRIPTS AND LACK OF FINANCIAL CONTROL IN THE ADMINISTRATION OF THE VREDE INTEGRATED DAIRY PROJECT

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(3) of the Public Protector Act to the following people to note the outcome of my investigation:
 - 1.2.1. The Premier of the Free State Province, Mr ES Magashule;
 - 1.2.2. The Head of the Free State Department of Agriculture and Rural Development, Mr MP Thabethe;
 - 1.2.3. The Auditor General of South Africa;
 - 1.2.4. The Head of Directorate for Priority Crime Investigation; and
 - 1.2.5. The National Director of Public Prosecutions.
- 1.3. A copy of the report is also provided to Mr R Jankielsohn, Free State Provincial Legislature, Democratic Alliance (Complainant) and The Member of the Executive Council for the Free State Department of Agriculture and Rural Development, Mr O Khoabane to inform them about the outcome of my investigation.

- 1.4. The report relates an investigation into the alleged maladministration by the Free State Department of Agriculture and Rural Development (the Department) in that the Department did not adhere to Treasury Prescripts when the Vrede Integrated Dairy Project (Project) was implemented and the lack of financial control in the administration of the Project.

2. THE COMPLAINT

- 2.1. The Complainant submitted a complaint on 12 September 2013 with the following allegations of maladministration in respect of project:

- 2.1.1. That the Portfolio Committee on Agriculture and Rural Development in the Free State Legislature, around September 2013, heard from the Head of Department, Mr M P Thabete, that an agreement between the province and the private sector partners ESTINA/PARAS in the Vrede Dairy Project is subject to a confidentiality clause;
- 2.1.2. That in terms of the agreement the Indian company "ESTINA" and their South African Partner "PARAS" will receive a 49% share with a R228 million investment in the R570 million project, while the 100 local beneficiaries will jointly receive 51% shares through a government investment of R342 million. This implies that ESTINA/PARAS will obtain a 49% share with an investment of only 40% of the projected cost of the project. Government will thus be investigating R144 million more in the project than their private sector partners without the beneficiaries receiving the proportionate number of shares;
- 2.1.3. That the project plans to milk 500 cows and produced 40 000 litres of milk per day that will be processed by a factory built by ESTINA/PARAS. The Department invested R30 million in the project last year on designs, an Environmental Impact Assessment, planting of fodder, etc. This year an amount of R84 million is to be invested in the infrastructure, machinery and cattle. The Department indicated that 400 pregnant cattle had already been purchased for the project; and

- 2.1.4. That the Public Protector investigate the issues in an attempt to ensure transparency in the project as well as an equitable share in the project for the local 100 beneficiaries based on the government investment.
- 2.2. On 28 March 2014, the Public Protector received a further complaint from the Complainant on the Project. The Complainant made the same allegations as the allegations received on 12 September 2013. The second complaint was:
- 2.2.1. That it has come to light that ESTINA would only contribute if necessary and that they are also benefiting from the supply of goods and services from the contributions from the provincial government;
- 2.2.2. That the R342 million is also subject to hugely inflated costs, some of these include among others including construction of a silage bunker for R5 000 000.00; a 2km gravel access road for R1 200 000.00; a security gate and guard house for R2 6000 000.00; a cattle feed pant for R7 350 000.00; a milking parlour and mild processing plant for R30 050 000.00; tools such as spanners, shovels, grinders, air compressors, etc. for R2 513 000.00; administrative, legal accounting and other consulting fees for R12 000 000.00; irrigation equipment, pasteurizer and dairy equipment for R37 779 613.00 and 351 dairy cows for R6 212 000.00;
- 2.2.3. That the Free State government paid R2 838 000.00 more for the 351 dairy cows than was necessary. There also appears to be no official record of such transactions within the breed society that keep stud books of such cattle. Even though the value of the cattle bought is questionable, the DA made enquiries about the best possible market prices for stud cattle with the Free State Friesland Breed Society. The market prices for prime cattle are indicated in the following table:

Report of the Public Protector February 2018

Types of Heifers Purchased	Number Purchased	Market price of Friesland/Holstein Stud Heifers	Total Costs
Pregnant Heifers	62	R15 000 per heifer	R930 000
Breeding Cows	57	R16 000 per cow	R912 000
Calves 12 months +	70	R8 000 per heifer	R560 000
Heifers 9-12 months	77	R6 000 per heifer	R462 000
Heifers 6-9 months	85	R4 000 to R6 000 per heifer	R510 000 (maximum)
TOTAL			R3 374 000

- 2.2.4. That recently the national Department of Agriculture supplied the provincial government with R40 466 231 worth of equipment that included tractors and most of the other related equipment for planting and maintaining crops. Purchasing additional tractors and equipment for this project wasn't necessary and jointly cost the project an additional R5 867 494.00;
- 2.2.5. That the top range rotary milking machines with electronic sensors cost about R55 000.00 per point. The machines for the 82 points should not have cost more than about R4.5 million. They are included as part of the R30 050 000.00 price tag that includes the milk processing plant;
- 2.2.6. That it appears that the payments for goods and services are in some, if not all, instances highly inflated. It is also not known who the suppliers of the various goods and services are, and whether the suppliers, implementing agents, or officials are responsible for the inflated prices;
- 2.2.7. That the agreement with ESTINA includes a clause that the service provider will be "responsible to ensure that they comply with environmental requirements" has already been breached since complaints have been received of indiscriminate

ploughing of natural fields and wetlands. This cannot be done without the necessary environmental procedures being followed; and

- 2.2.8. That various reports indicate that up to between 50 and 100 cattle have died since being purchased. There is obviously a serious problem with these cattle and this is costing taxpayers a great deal of money. It is not known what the causes of the deaths are, or what the costs is of this. Furthermore that some carcasses have also been dumped next to a stream that runs into the catchment area for water for the town of Vrede/Ezenzeleni. These have just been covered with gravel and still pose a risk when it rains.

- 2.3. On 10 May 2016, after the issues in the investigation were identified by the Public Protector and investigation was at an advance stages, the Complainant further submitted the following:

- 2.3.1. That the appointment of ESTINA as partner in the project did not follow the necessary state procurement processes;
- 2.3.2. ESTINA misrepresented itself as being in partnership with a large dairy company in India, namely PARAS, by marketing itself in presentations as "ESTINA/PARAS. This could not have been overlooked by those who approved the project since logic dictates that Paras would be part of such a presentation or at least be requested to commit in writing to being part of the project;
- 2.3.3. The contract was approved by the legal department in the Office of the Premier, as confirmed by the CFO in interviews. The contract clearly benefits ESTINA at the cost of the state, taxpayers, and beneficiaries;
- 2.3.4. The fact that ESTINA was both a partner and implementing agent is highly irregular. ESTINA subsequently received up to R183 million for the construction of infrastructure and purchasing of cattle for the project. It appears that costs of

some of the items were inflated and that the processing plant that was paid for is dysfunctional;

- 2.3.5. The fact that ESTINA would receive 49% share in the project with only a 40% contribution is irregular and robs the taxpayers and beneficiaries of a 9% share;
- 2.3.6. ESTINA was allowed to abscond from the project without any accountability. The FDC have taken over their management role in this project;
- 2.3.7. The Mahoma Mobung part of the project, including bank accounts in this name, is unclear and appears to be irregular;
- 2.3.8. The fact that the 80 beneficiaries have been sidelined, while they in fact should own 51% of the project, implies that they were used as pawns to justify the project after the DA requested the names from them. A meeting with some of them indicates that they are merely names on a piece of paper with no further information or involvement. They have a right to claim their 51% share;
- 2.3.9. The National Treasury investigation has revealed various irregularities with recommendations of disciplinary procedures against both the HoD and CFO, which has been ignored by the provincial government and the Premier. The recommendations should be implemented;
- 2.3.10. That questions in the Portfolio Committee on Economic Affairs, which includes agriculture in the Free State Legislature relating to the Vrede Dairy Project have been ignored. In fact the Chairperson of the committee will not allow any questions to the Department of Agriculture on the issue by the members of the legislature. The former MEC for the Agriculture and Rural Development, Mamiki Qabathe, refused to answer questions relating to the project in the committee; and

- 2.3.11. That while the FDC have taken over the management of the project, the Department of Agriculture and Rural Development continue to make monthly payments for running costs such as food into the project.”

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.² 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*

² [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

*without any legal consequences.*³. the Chief Justice Mogoeng stated the following, when confirming the powers the public protector:

- 3.3.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
- 3.3.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. (para 67);
- 3.3.3 Taking appropriate remedial action is much more significant than making a mere endeavor 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);
- 3.3.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69) ;

³ *Supra* at para [73].

- 3.3.5 Every complaint requires a **practical or effective remedy** that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);
- 3.3.6 the Public Protector's power to take appropriate remedial action is **wide** but certainly not unfettered. What remedial action to take in a particular case, will be informed by the **subject-matter of investigation** and the **type of findings made**. (para 71);
- 3.3.7 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that **she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence**; (para 71(a));
- 3.3.8 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (para 71(d));
- 3.3.9 "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));

3.4 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)***, the Court held as follows:

- 3.4.1 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);
- 3.4.2 The Public Protector, in appropriate circumstances, have 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. (paragraph 85 and 152 of the judgment)
- 3.4.3 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 (paragraph 91 and 92 of the judgment)
- 3.4.4 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers(paragraph 100 and 101 of the judgment):
 - 3.4.4.1 Conduct an investigation;
 - 3.4.4.2 Report on that conduct; and
 - 3.4.4.3 To take remedial action.
- 3.4.5 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (paragraph 104 of the judgment);

- 3.4.6 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Paragraph 105 of the report). This was a finding on NEF judgment as well;
- 3.4.7 The fact that there is 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 (paragraph 107 and 108 of the Judgment);
- 3.4.8 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment);
- 3.5 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.
- 3.6 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 mechanism.
- 3.7 Free State Department of Agriculture and Rural Development is an organ of state within the meaning of section 239 of the Constitution and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.
- 3.8 ESTINA (Pty) Ltd was appointed as an Implementing Agent of the Department and therefore performing public function and the department had a majority or controlling shares in the project.

3.9 The agreement, which is the subject matter, between the Department and ESTINA (Pty) Ltd, was entered into in July 2012 and the complaint was lodged with the Office of the Public Protector on 12 September 2013.

3.10 The Public Protector has the necessary power and jurisdiction to investigate this matter

4. THE INVESTIGATION

4.1. Methodology

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

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

4.2. 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 Department acted improperly in relation to adherence to Treasury Prescripts in respect of the implementation of the Project and whether adequate control was exercised over the Project in terms of legislative prescripts.
- 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 Department or organ of state to prevent maladministration and prejudice.
- 4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the Department or organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.3. **On analysis of the complaint, the following were issues considered and investigated:**
- 4.3.1. Whether the Department improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy Project;
- 4.3.2. Whether the Department failed to manage and monitor implementation of the terms of the agreement in relation to budget evaluation, expenditure control and performance by ESTINA;
- 4.3.3. Whether the prices for goods and services procured were inflated, specifically alleged expenses in respect of construction, processing equipment, procurement of cows and administration costs; and

4.3.5 The following issues were not investigated:

- 4.3.5.1 The cause of the alleged deaths of the cattle. The photographs submitted in respect of the alleged death of the cattle indicated that the deaths did not occur recently. The Minister of Water Affairs intervened and issued instructions on the removal of the dead cows.
- 4.3.5.2 Issues emanating from the complaint sent on 10 May 2016 as the issues pertaining to the investigation were already identified.
- 4.3.5.3 The issue of value for money obtained by the Government in terms of the agreement was investigated by National Treasury: Accountant General.
- 4.3.5.3 The recent newspaper articles on the emails reported, relating to the Gupta family, that surfaced around June 2017, referring to the Project were noted but do not form part of the scope of this investigation.
- 4.3.5.4 How the money transferred to ESTINA were spent by ESTINA, as the Directorate for Priority Crime is dealing with the issue.
- 4.3.5.5 The matter relating to beneficiaries who were intended to benefit from the project due was also not investigated due to lack of information.

4.4 The Key Sources of information

4.4.1 Documents

- 4.4.1.1 Undated – Vrede Integrated Dairy Agribusiness Project Proposal – Free State Department of Agriculture and Rural Development, PARAS and ESTINA;

- 4.4.1.2 Undated – Beneficiary List for AGRI-BEE that contains 78 names of beneficiaries. ID number for 15 beneficiaries was not on the list and 62 copies of ID's of beneficiaries were submitted for verification;
- 4.4.1.3 Undated - Beneficiary Agreement signed by one beneficiary on behalf of the 78 beneficiaries;
- 4.4.1.4 22 March 2012 - Budget Vote Speech of the Free State Department of Agriculture and Rural Development tabled by the Honourable MJ Zwane, Member of the Executive Council for Free State Agriculture and Rural Development;
- 4.4.1.5 5 July 2012 – Agreement entered into and between The Free State Department of Agriculture and ESTINA (Pty) Ltd;
- 4.4.1.6 October 2012 - Vrede Dairy Project: Feasibility Study;
- 4.4.1.7 January 2013 - Report on the investigation into the Vrede Integrated Dairy Farm Project, National Treasury;
- 4.4.1.8 18 January 2013 - Notarial Lease Nr K000000024/201 - Lease for the farm Krynaauwslust Lust, 275 district Vrede, Free State (4439,5122 Hectares) Phumelela Municipality and Department of Rural Development and Agriculture: Cession and assignment signed on 14 December 2012 in terms that Municipality ceded and assigned all rights, title, interest and obligations to Department;
- 4.4.1.9 21 February 2013 - State of the Province Address by Honourable E.S. Magashule Premier of the Free State Province;

- 4.4.1.10 12 May 2013 - Authorisation register number of DETEA EMB/4,11(iii)(iv)(xi),22,23(ii)/12/65, Activity Location: Establishment of Dairy Farm near the town of Vrede in the Free State;
- 4.4.1.11 30 June 2013 – Submission by ESTiNA to Free State Department of Agriculture on the timelines and milestones for phases 2 and 3 of the Project;
- 4.4.1.12 10 July 2013 - Report on Vrede Integrated Dairy Project dated 10 July 2013, drafter Member of the Executive Council, Free State Department of Agriculture and Rural Development addressed to the Chairperson, Portfolio Committee on Agriculture and Rural Development;
- 4.4.1.13 29 July to 02 August 2013 - Report of the Portfolio Committee on Agriculture, Forestry and Fisheries on the Oversight Visit to the Free State Province;
- 4.4.1.14 13 August 2013 - Free State and KwaZulu-Natal on 2012/13 budget performance: briefing by National and Provincial Treasuries: South African Parliament;
- 4.4.1.15 8 October 2013 - Auditor-General on Key Challenges in Agriculture Department's Audit Report 2013: South African Parliament;
- 4.4.1.16 13 November 2013 - Written response of Member of the Executive Council of Agriculture to Question in Free State Provincial Legislature;
- 4.4.1.17 11 February 2014 - Third quarter 2013/14 expenditure: National Treasury, Provincial Treasuries of Gauteng & Free State briefings: South African Parliament;
- 4.4.1.18 4 March 2014 - Department of Water Affairs: Letter addressed to ESTiNA-approval and registration of the water use;

- 4.4.1.19 1 April 2014 - ESKOM electricity agreement with ESTINA;
- 4.4.1.20 25 April 2014 - Letter of demand from ESTINA to the Free State Department of Agriculture referring to a letter dated 24 April 2014 cancelling agreement in terms of clause 15.3 of the Agreement. Clause 15.3 indicates that ESTINA shall be entitled to payment in full for the services delivered. The letter demands payment of R136, 252, 652.00;
- 4.4.1.21 19 May 2014 – Submission to the Free State Executive Council to transfer the Vrede Integrated Dairy Project to the Free State Development Corporation by the Member of the Executive Council of the Free State Department of Agriculture and Rural Development;
- 4.4.1.22 22 May 2014 – Letter from the Head of the Free State Department of Agriculture to the Chief Executive Officer of the Free State Development Corporation referring to Executive Council resolution 62/2012 dated 13 June 2012 to implement Project. The letter submits that after Executive Council revisited Project it was decided on 16 April 2014 that the Project must be transferred to the Free State Development Corporation;
- 4.4.1.23 27 May 2014 - Free State Development Corporation Board Meeting minutes, Item 01/2014/80. The Board approves the take-over. The Company Secretary and Acting Chief Financial Officer instructed to conduct a high-level due diligence of the Project and table a report at the next Board meeting. The Board will then decide on an appropriate Project business model;
- 4.4.1.24. April 2014 – Feasibility Study and Business Plan for ESTINA (Pty) Ltd for the farm Krynaauwslust;
- 4.4.1.25 Monthly Financial reports submitted by ESTINA to the Free State Department of Agriculture for the months of July 2012 up to and including February 2013, April

- 2013 up to and including July 2013, September 2013 up to and including December 2013;
- 4.4.1.26 Cash Flow Projection of ESTINA for the Project – For the period August 2012 to September 2013;
- 4.4.1.27 Quarterly progress reports of the Project submitted by ESTINA to the Free State Department of Agriculture for the periods March 2013, June 2013 and September 2013;
- 4.4.1.28 26 November 2014 - General Report on the Audit outcomes of the Free State: PFMA 2013-14;
- 4.4.1.29 26 November 2014 – Media release by Auditor General – Free State PFMA 2013-14 audit outcome highlights;
- 4.4.1.30 23 April 2013 to 10 August 2014 – 9 invoices for the procurement of cattle from different suppliers obtained from the Department;
- 4.4.1.31 29 April 2013 and 22 August 2014 – Tax invoices from DeLaval for the procurement of 70 point milk machine with cooling tanks and 10 point milking machine and cooling tanks;
- 4.4.1.32 23 April 2013 and 6 June 2013 - Contracts for the equipment in 4.3.1.31 for Vrede Dairy Project between DeLaval and Vargafield (Pty) Ltd represented by Mr. Sanjay Grover in his capacity as Director of Vargafield;
- 4.4.1.33 9 May 2014 and 14 August 2014 – After sales service reports of DeLaval visits to Vrede Dairy Farm;
- 4.4.1.34 10 April 2017 – List of Employees at Vrede Dairy Project;

- 4.4.1.35 10 April 2017 – Milking records for the Vrede Dairy Farm from 1 April 2016 to 31 March 2017;
- 4.4.1.36 19 April 2017 – Financial Statement for the Vrede Dairy Farm for the years September 2014 to March 2015, April 2015 to March 2016 and April 2016 to March 2017;
- 4.4.1.37 20 April 2017 – Company Report from CIPC on Vargafield (Pty) Ltd; and
- 4.4.1.38 12 August 2014 – Handover of Assets of the Vrede Dairy Project to the Free State Development Corporation.
- 4.4.2 Interviews conducted**
- 4.4.2.1 Meeting with Manager in the Head of the Free State Department of Agriculture and Rural Development on 17 September 2013;
- 4.4.2.2 Meeting with the Chief Executive Corporate Services: Free State Development Corporation on 30 September 2014;
- 4.4.2.3 Meeting with the Manager: Studbook, SA Holstein Breeders Association, March 2013;
- 4.4.2.4 Meeting with Dr Masiteng: Free State Department of Agriculture on 13 April 2017;
- 4.4.2.5 Meeting with the Manager: Studbook, SA Holstein Breeders Association on 19 April 2017; and
- 4.4.2.6 Meeting with Mr S Moyo, Chief Financial Officer, Free State Development Corporation on 19 April 2017.

4.4.3 Correspondence sent and received

- 4.4.3.1 26 September 2013 – Email to Head of the Free State Department of Agriculture;
- 4.4.3.2 1 March 2014 – Response from the Member of the Executive Council of the Free State Department of Agriculture and Rural Development;
- 4.4.3.3 24 April 2014 – Email from National Treasury: Accountant General: Head of the Specialized Audit Services on the Accountant General report;
- 4.4.3.4 6 June 2014 – Letter to the Head of the Free State Department of Agriculture;
- 4.4.3.5 11 July 2014 - Letter to the Head of the Free State Department of Agriculture – submission of documents requested;
- 4.4.3.6 7 June 2017 – Notice in terms of section 7(9)(a) of the Public Protector Act, 1994 to the Premier of the Free State Province, the Member for the Executive Council: Free State Department of Agriculture and Rural Development and the Head of the Free State Department of Agriculture and Rural Development;
- 4.4.3.7 13 July 2017 – Response to notice in terms of section 7(9)(a) of the Public Protector Act, 1994 from the Member for the Executive Council: Free State Department of Agriculture and Rural Development;
- 4.4.3.8 14 July 2017 - Response to notice in terms of section 7(9)(a) of the Public Protector Act, 1994 from the Head of the Free State Department of Agriculture and Rural Development; and
- 4.4.3.9 14 July 2017 - Response to notice in terms of section 7(9)(a) of the Public Protector Act, 1994 from the Premier of the Free State Province.

4.4.4 Inspections *in loco* conducted

4.4.4.1 September 2014 – visit to the Vrede Dairy Project – access denied; and

4.4.4.2 10 April 2017 - visit to the Vrede Dairy Project with Free State Development Corporation and Free State Department of Agriculture.

4.4.5 Websites consulted/ electronic sources

4.4.5.1 www.cipc.co.za/: 16 April 2014 CIPC search on Company Mohoma Mabung Dairy Project and 20 April 2017 on Vargafield (Pty) Ltd;

4.4.5.2 www.gov.za/ 25 March 2014: Budget Votes Free State Department of Agriculture and Rural Development 2012/2013 and State of the Province Address by the Free State Premier on 21 February 2013;

4.4.5.3 http://archive-za.com/page/1678019/2013-03-20/http://www.ard.fs.gov.za/?page_id=1256: 25 March 2014 - Mohoma Mobung;

4.4.5.4 <http://www.saholstein.co.za/Shows-Results.htm>: 25 March 2014 – Sale prices of Holstein Breed Heifers;

4.4.5.5 <http://www.ppp.gov.za/Pages/Projectlist.aspx>: 25 March 2014 - PPP Projects approved, finalised and in preparation, registered in terms of Treasury Regulations; and

4.4.5.6 <http://www.agsa.co.za/Documents/Auditreports.aspx>: 27 November 2014 General Report on the Audit outcomes of the Free State: PFMA 2013-14.

4.4.6 Legislation and other prescripts

4.4.6.1 The Constitution of the Republic of South Africa, 1996;

4.4.6.2 The Public Finance Management Act, 1 of 1999;

4.4.6.3 Regulations in terms of the Public Finance Management Act, 2005;

4.4.6.4 National Treasury PPP Practice Note Nr 02 of 2004;

- 4.4.6.5 National Treasury Practice Note Nr 11 of 2008/2009;
- 4.4.6.6 National Treasury Practice Note No 08 of 2007/08;
- 4.4.6.7 National Treasury: Departmental Guide Agency/Principal Activities, 2012/13; and
- 4.4.6.8 Government of the Republic of South Africa, General Procurement Guidelines, undated.

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 improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy Project in violation of treasury prescripts:

Common Cause

- 5.1.1 The Free State Department of Agriculture entered into an agreement with ESTINA (Pty) Ltd on 05 July 2012. It is alleged that the agreement was entered into for the benefit of beneficiaries to be identified by the Department. In terms of the agreement ESTINA was required to inject a capital investment of R228 million. The money payable by the Department in terms of the agreement shall not exceed the amount of R342 million including VAT over the period of 3 years.
- 5.1.2 In terms of the agreement, ESTINA was to ensure that the beneficiaries own 51% in the proposed AGRI-BEE company (Mohoma Mobung Dairy Project (Pty) Ltd) and the remaining 49% shares to belong to ESTINA.
- 5.1.3 The agreement was entered into without following any procurement procedure as the Accountant General found that Mr Thabethe (the Accounting Officer) did not follow any supply chain management processes. The Accounting Officer signed an authorization to deviate from the prescribed legislation contrary to national treasury prescripts. The

Accounting General's investigation was triggered by an article published by the Mail & Guardian newspaper on 14 June 2013.

- 5.1.4 Mr Thabethe was clear in his interviews with the Accounting General, that he did not follow any supply chain management process. He signed an authorization to deviate from the prescribed procurement process because, in his opinion, he is authorized to deviate from the procurement process when he deems it appropriate. He signed the authority to deviate without believing it was necessary or relevant or required in this instance. Mr Thabethe was also not clear on the grounds that justified him deviating from the prescribed process, in his opinion it was sufficient that he had decided that a deviation from the prescribed process was appropriate.

Issues in dispute

- 5.1.5 The issues to be determined are whether the Department entered into a PPP agreement with ESTINA.
- 5.1.6 The initial impression created was that the agreement between the Department and ESTINA was a public private partnership. This impression was further amplified during the 2012 Budget Vote Speech of the Free State Department of Agriculture and Rural Development tabled by the Honourable MJ Zwane, MEC for Agriculture and Rural Development in which it was reported that:

*"In line with the value adding approach, the Free State Provincial Government introduced Mohoma Mobung as the Provincial Growth and Development Strategy for the agriculture and rural development sector. It is a multi-year **mega Public and Private Partnership** business concept that deals with income generation through farming in the rural area of the province, the creation of on- and off-farm agri-business, value chain enterprises and Black Economic Empowerment. This overarching strategic intent is underscored by a dedication to make the long term more urgent. To give effect to our strategic intent as encapsulated in Mohoma*

Mobung for the financial year 2012/13 we allocated R131.8 million to Projects. With this investment we want to break the back of unemployment, poverty and food insecurity.

Honourable Speaker, the department has identified Thabo Mofutsanyane as a dairy hub and an amount of R17.0 million is allocated for this development. Vrede, QwaQwa and Ficksburg towns will benefit from this initiative. Production and processing plants will be established, and this will create 150 jobs within the value chain.”⁴

- 5.1.7 During the 2013 State of the Province Address by Honourable E.S. Magashule Premier of the Free State province: 21 Feb 2013 the Premier remarked on the Project as follows:

“Vrede Dairy Project: The Department of Agriculture is establishing an Integrated Dairy Project at Vrede in the Eastern Free State under the Mohoma-Mobung initiative in partnership with the private sector.

The Project is unfolding in phases. This state of the art certified facility will be constructed with the initial processing capacity of 100,000 litres per day and an initial targeted milk intake of 40,000 litres per day. Products to be produced at the Vrede Dairy Project will include liquid milk, UHT milk, cheese and other products.”⁵

- 5.1.8 Furthermore, on 20 June 2013 National Treasury addressed a letter to the Department raising concerns regarding the nature of the arrangement between the Department and ESTINA as having characteristics of a PPP, it appeared to be a PPP and therefore had to comply with Treasury Regulations.

⁴ 22 Mar 2012
⁵ 21 February 2013

- 5.1.9 The Premier, the MEC and the HOD for the Department individually on 14 July 2017 submitted responses to the section 7(9) notices issued by the Public Protector on 7 June 2017.
- 5.1.10 The HOD responded that *"I am informed that the Premier in his response to the Notice dealt with the factual and legal issues contained in the Notice, and I consequently do not also wish to do so."*
- 5.1.11 The MEC responded that in terms of section 12(1)(b) of the Public Service Act *"the appointment and other career incidents of a Provincial Head of the Department shall be dealt with by the Premier...The Premier has not delegated the authority to initiate disciplinary processes to the MEC's."* The MEC further submitted that the disciplinary action against the Chief Financial Officer recommended by the Accountant General falls within the authority of the Head of the Department in terms of section 7(3)(b) of the Public Service Act.
- 5.1.12 The MEC further submitted that the report of the Accountant General has been noted and the only the first two and last recommendation relate to the Free State Provincial Government.
- 5.1.13 The Premier responded that the report of the Accountant General was submitted to his office on 24 February 2014.
- 5.1.14 The Premier submitted that *"the Executive Council of the Free State Provincial Government resolved on 3 March 2014 that the project should be taken over by the FDC in close collaboration with the Department of Agriculture & Rural Development and the Provincial Treasury. This resolution was confirmed by the Executive Council on 16 April 2014."*
- 5.1.15 The Premier further submitted that *"At the time when the Report was received and considered, we were already aware of the complaints which were lodged with*

your office and we were of the view that it would be premature to consider any disciplinary action before the findings and recommended remedial action, following your investigation, were known. "

- 5.1.16 In respect of the Public Private Partnership (PPP) the Premier submits that it is incorrect that the Department improperly entered into a PPP. The Premier stated:

"If the provisions of the Contracts concluded between the Department and Estina are considered, it is abundantly clear that it does not remotely suggest that a PPP was established. The Agreement concluded on 5 June 2012 records on page 3 of 16 that the Department requires the provision of certain services and that Estina will perform these services as Implementing Agent. This is also confirmed by what is contained in paragraph 2 on page 5 of this Agreement. Apart from this, a partnership is specifically excluded in paragraph 13.2 on page 10. If the provisions of the Agreement concluded on 5 July 2012 are considered, paragraph 4 on page 6 evenly makes it clear that it is not a PPP and paragraph 19.13 also expressly excludes a partnership.....If the definition of a PPP in Treasury Regulation 16.1 is considered against the relationship between the Department and Estina, it is also quite clear that a PPP as defined in the Treasury Regulations was not established."

- 5.1.17 Paragraph 13.2 on page 11 of the Agreement submitted by the Department refers to payments. Paragraph 19.13 states:

"Nothing in this Agreement shall be construed as creating a partnership or a contract of employment between Estina and the Department. Save as expressly provided for in this Agreement, Estina will not be, or deemed to be, an agent of the Department and Estina shall not hold itself out as having authority or power to bind the Department in anyway."

- 5.1.18 The Premier further submitted that the conclusion of the Accountant General that no Supply Chain Management (SCM) processes were followed is incorrect. The Premier submits that:

"The Report (of the Accountant General) indicates that an Accounting Officer may deviate from the prescribed process in only (our emphasis) three circumstances and then indicates at the first bullet that the first circumstance is when it is impractical to invite competitive bids because there is an emergency or urgent matter that needs to be resolved and secondly, that the service provider is a sole service provider. Thirdly, in instances of exceptional cases which is not relevant to this reply.

What is actually contained in paragraph 3.5.1 of the SCM Policy is significantly different. It provides that

'If in a specific case it is impractical to invite competitive bids e.g. in urgent or emergency cases or in case of a sole supplier, the goods or service may be procured in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the Accounting Officer.'

It is consequently clear that urgent or emergency cases or sole suppliers are mentioned as examples and not as exclusive instances when deviation may be considered."

- 5.1.19 The Accountant General states:

"The investigation has revealed that the Vrede project is neither a PPP nor a sole provider arrangement. Mr Thabethe was clear in his interviews that he did not follow any supply chain management process. He signed an authorisation to deviate from the prescribed procurement process because, in his opinion, he is

authorised to deviate from the procurement process when he deems it appropriate. He signed the authority to deviate without believing it was necessary or relevant or required in this instance. Mr Thabethe was also not clear on the grounds that justified him deviating from the prescribed process, in his opinion it was sufficient that he had decided that a deviation from the prescribed process was appropriate."

- 5.1.20. The Public Protector is persuaded by the Accountant General's finding that the arrangement was neither a PPP nor a sole provider agreement.

Application of the relevant law

- 5.1.21 Section 217 of the Constitution provides that organs of state must procure for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
- 5.1.22 The Department was obliged to procure the services of ESTINA in accordance to a system that is fair, equitable, transparent, competitive and cost-effective.
- 5.1.23 Section 38(a) (i) of the PFMA provide that the accounting officer for a department must ensure that that department has and maintains effective, efficient and transparent systems of financial and risk management and internal control;
- 5.1.24 Section 38(a) (ii) and (iv) of the PFMA provides that the accounting officer for a department must ensure that that department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
- 5.1.25 Section 38(a)(iv) of the PFMA provides that the accounting officer for a department must ensure that that department has and maintains a system for properly evaluating all major capital projects prior to a final decision on the project;

- 5.1.26 Section 38(1)(b) place an obligation on the accounting officer for a Department to ensure the effective, efficient, economical and transparent use of the resources of the department.
- 5.1.27 Section 81(1)(a) of the PFMA provides that an accounting officer for a department commits an act of financial misconduct if that accounting officer wilfully or negligently fails to comply with a requirement of section 38 of the PFMA.
- 5.1.28 In terms of section 86 of the PFMA, an accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38 of the PFMA.
- 5.1.29 Treasury Regulation 16A6.4 determines that institutions procuring goods or services by means other than through competitive bids and where reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.
- 5.1.30 Furthermore, Practice Note 8 of the Treasury Regulations states that the accounting officer or authority must report and give reasons for the deviation to the relevant Treasury and the Auditor General all cases where goods and services above the value of R1million VAT inclusive were procured in terms of Regulation 16A6.4 within ten working days.
- 5.1.31 A PPP is defined in the PFMA Regulation 16 of the Treasury Regulation (Regulations) as a contract between a government institution and private party⁶, where:

⁶ Trevor A. Manuel, MP Minister of Finance October 2007

- 5.1.31.1 The private party performs an institutional function and/or uses state property in terms of output specifications;
- 5.1.31.2 Substantial project risk (financial, technical, and operational) is transferred to the private party; and
- 5.1.31.3 The private party benefits through: unitary payments from government budgets and/or user fees.
- 5.1.31.4 Although at face value the contract between the Department and ESTINA meet the definitional requirements of a PPP, there are other inherent requirements which must be met. For instance, a PPP must be registered as such with the relevant treasury as per Regulations 16.3.1.a.
- 5.1.31.5 Only an Accounting Officer may enter into a PPP agreement on behalf of a department, and only with the prior written approval of the National Treasury. The Accounting Officer must prepare a feasibility analysis to determine whether a proposed PPP agreement is in the best interests of a department. It should, among other things, explain the strategic and operational benefits of the PPP agreement and assess how the agreement will assist in meeting the department's strategic objectives. The details of the processes to be followed are specified in regulation 16 of the Regulations.
- 5.1.32 National Treasury PPP Practice Note Nr 02 (Practice Note 2) states that the way a PPP is defined in the Regulations makes it clear that a PPP is not a simple outsourcing of functions where substantial financial, technical and operational risk is retained by the institution or a donation by a private party for a public good or the privatisation or divesture of state assets and/or liabilities. PPP's may involve a degree of capital contribution by the institution to the initial costs of the Project.

- 5.1.33 Practice Note 2 further states that the regulation sets out the PPP procurement steps that must be followed by institutions, and prescribes distinct treasury approvals that must be obtained in each phase.
- 5.1.34 In order for a PPP to be valid, the Accounting Officer must obtain prior approval from the relevant Treasury. In this case the accounting officer did not obtain prior approval from the relevant treasury.
- 5.1.35 Despite the fact that the arrangement entered to between the Department and ESTINA has elements of a PPP, the Public Protector is persuaded by the Accountant General's finding that the arrangement was not a PPP.

Conclusion

- 5.1.36. It is clear from the evidence that the arrangement between the Department and ESTINA was not a PPP as does not meet the requirements outlined above.
- 5.2 Whether the Department failed to manage and monitor implementation of the terms of the agreement in relation to budget evaluation, expenditure control and performance by ESTINA:**

Common Cause

- 5.2.1 Clause 6 & 7 of the agreement deals with the obligation of the Department and ESTINA. In terms of clause 6.3 & 6.4 ESTINA is responsible for establishment of the AGRI-BEE Company and to ensure that the beneficiaries will own 51% thereof. ESTINA was further required to produce a capital injection of R228 000 000. The Department was required by Clause 7 to ensure that *inter alia* they make payment and to identify beneficiaries who will be members of the AGRI-BEE company.

- 5.2.2 The AGRI-BEE Company was registered originally as Zayna Investments Pty Ltd (CIPC Registration Number 2012/037526/07) with Mr. Frans Oupa Mokoena as custodian of 51% shareholding. The name was later changed in to Mohoma Mobung Dairy Project (Pty) Ltd. (CIPC Registration Number 2013/189418/07) which was only incorporated on 11 October 2013; the only director registered in the entity was Mr. Vasram, who is the director of ESTINA (Pty) Ltd. None of the current beneficiaries are listed as directors of the AGRIBEE entity.
- 5.2.3 The Department submitted an undated list of 78 names of beneficiaries. The beneficiaries are members of the communities residing within the area of Vrede, Warden and neighboring farms. The list contains names, identity numbers (15 beneficiaries' identity numbers were not filled in on the list) and addresses for the beneficiaries. Only 62 copies of the beneficiary's identity documents were attached to the list.
- 5.2.4 In terms of clause 12 of the agreement between the Department and ESTINA, the agreement is subject to the provisions of the PFMA.
- 5.2.5 The Department was requested to submit documents relating to the implementation of appropriate monitoring and management procedures. The Department did not submit any documents to substantiate whether or not the measures were in place to monitor and manage the project. The Department submitted monthly financial statements drafted and submitted by ESTINA for the periods of August 2012 to February 2013, April to July 2013 and September to December 2013. The Department further submitted quarterly financial statements drafted and submitted by ESTINA for the periods of July 2012, March 2013 and September 2013 as well as a Cash flow report for August to September 2013. No supporting documentation was submitted to verify the correctness of the financial statements. Only two invoices were submitted as proof of payment in relation to the services rendered, relating to the Dairy Plant and the purchase of cattle. The actual proof of payments for goods and services procured was not submitted by the department.

- 5.2.6 The Accountant General's report supported the finding of the Free State Auditor General that the Accounting Officer of the Department did not maintain appropriate measures to ensure that funds transferred to entities are utilized for their intended purposes. The Accountant General was not able to ascertain whether or not ESTINA has made any financial contribution towards this Project.

Issues in dispute

- 5.2.7 The Complainant submitted that in terms of the Proposal and Agreement, the department has no guarantees that ESTINA will meet its obligations to invest R228 million in addition to the R342 million allocated by the provincial government.
- 5.2.8 The Complainant further submitted that the contract indicates that ESTINA will only invest their money if necessary and that the whole project will be transferred to a private company registered as Mohoma Mobung Dairy Project with Mr. Kamal Vasram who has a background in IT as the sole director. The provincial government will receive no benefit from this.
- 5.2.9 The Complainant submitted that ESTINA was implementing the Project is using public money and profiting from government's R342 million contributions. In the 2012/2013 financial year alone, R114 million was given to ESTINA.
- 5.2.10 The Complainant submitted that ESTINA is acting as the partner, implementing agent, and supplier in this Project.
- 5.2.11 The Complainant submitted that the current private sector partner in the Project, ESTINA, appears to have no background in the dairy industry. When this project was initiated, it was indicated that an Indian company with experience in this industry, namely PARAS, would partner with ESTINA.

5.2.12 The Department was requested to submit documents in respect of the capital injection by ESTINA as per clause 6.2 of the agreement that stated R228 million as its obligation. The Department did not submit any documents to substantiate whether or not the agreement was adhered to.

5.2.13 The Department was requested to indicate the measures in place to ensure adherence to the clause in the agreement.

5.2.14 The financial statements submitted were analysed. No supporting documentation were submitted in the form of bank statements to verify the correctness of the financial statements. However from the financial statements the analysis of the statements indicated that ESTINA made the following investments:

Date of Transaction	Investment/ Withdrawal
September 2012	250,000.00
October 2012	3,750,000.00
November 2012	850,000.00
December 2012	250,000.00
January 2013	650,000.00
February 2013	223,0000.00
April 2013	4,650,000.00
May 2013	2,000,000.00
June 2013	875,000.00
July 2013	5,444,000.00
August 2013	3,513,300.00
September 2013	7,698,000.00
October 2013	4,500,000.00
November 2013	5,704,999.00
TOTAL	42,365,999.00
December 2013 (Withdrawal ESTINA)	(21,200,000)

TOTAL	21,165,999
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- 5.2.15 The Department was requested to submit copies of all invoices submitted by ESTINA to the Department with reports in line with the project plan and payment documentation for the invoices paid. The Department submitted documentation on 6 bulk payments made to ESTINA. The substantiating documentation attached to the payment authorisation included only the project proposal and agreement signed between ESTINA and the Department. The following payments by the Department to ESTINA were made:

Nr	Authorisation Date	Payment Date	Amount
1	11 June 2012	11 June 2012	R30 000 000.00
2	16 April 2013	16 April 2013	R34 950 000.00
3	25 April 2013	25 April 2013	R30 000 000.00
4	29 April 2013	29 April 2013	R19 050 000.00
5	10 December 2013	10 December 2013	R29 950 000.00
6	21 July 2014	21 July 2014	R30 000 000.00
	TOTAL		R173 950 000.00

- 5.2.16 During the visit by the Public Protector's investigation team at the Vrede Dairy Project on 10 April 2017, the investigation team was informed by Mr Edmore Mapfumo, the farm Manager, that there were 540 cows which included 2 Bulls. On further inspection of the farm, the investigation team observed a milk tank which according to Mr Mapfumo has a capacity to hold 18 000 litres of milk. The investigation team further observed a milking parlour including a structure which allegedly cost around R33 million when it was installed.
- 5.2.17 Subsequent to this visit, the Department submitted invoices for the procurement of cattle. A total number of 627 cows and 2 bulls were procured additional to the 351 initially mentioned by the MEC in her response to the Public Protector. The Free State Development Corporation submitted the handover report between them and ESTINA indicating that only 791 cows were on the farm during the hand over in August 2014. This would include the two bulls procured

thus a total of 789 cows (heifers and calves included) were on the farm during the hand over despite a total 978 cows being bought.

- 5.2.18 The agreement states that ESTINA must carry out its obligations in line with the Department's policies, procedures, protocols and directives. The Department was requested to submit proof of measures in place and executed to ensure adherence to the agreement as well as adherence to the Treasury requirement of value for money during procurement of state assets. No supporting evidence in any form was submitted by the Department.
- 5.2.19 The Premier, on 14 July 2017 responded to the section 7(9) notices issued by the Public Protector on 7 June 2017. The Premier indicated *"...A reconciliation of the number of cows initially procured and found during April 2017 will be performed. The apparent lack of effective, efficient and transparent financial- and risk management systems as well as the alleged lack of systems and controls to manage and monitor implementation, will be investigated in order to determine possible financial misconduct."*
- 5.2.20 From the above an inference can be drawn that no management and monitoring of the project in relation to budget, expenditure control and performance by the Department before the project was handed over to the FDC.

Application of the relevant law

- 5.2.21 Section 195 of the Constitution provides that the public administration must be governed by principles, which include a high standard of professional ethics, efficient, economic and effective use of resources, and the impartial provision of services.
- 5.2.22 Section 195 refers to elements of the principle of integrity which require that public officials should take cognisance of the values of society and its communities and

not substitute their own value choices for those of the society; in other words, they should in all respects be publicly accountable for their actions.

- 5.2.23 Section 38(1)(a) and (b) of the Public Finance Management Act (PFMA) requires Accounting Officers of departments to ensure that effective, efficient and transparent financial and risk management systems are in place. Sections 38(1)(c)(iii) of the PFMA requires Accounting Officers to take appropriate steps to efficiently manage a department's capital.
- 5.2.24 Section 39 of the PFMA requires an Accounting Officer to ensure that expenditure of a department is in accordance with the vote of the department and the main divisions within the vote. Section 40(1)(a) requires that an Accounting Officer for a department must keep full and proper records of the financial affairs of the department.
- 5.2.25 In terms of section 81 of the PFMA an Accounting Officer of a Department commits an act of misconduct if he/she willfully or negligently fails to comply with sections 38, 39 and 40 of the PFMA. Section 86 of the PFMA determines that an offence is committed if an Accounting Officer willfully or in a grossly negligent way fails to comply with these provisions.
- 5.2.26 Treasury prescripts clearly require effective monitoring and actual reviewing of performance. No such documents and/or correspondence could be provided and the Public Protector could find no evidence or indication that a proper monitoring system was in place to evaluate the performance of the Project.

Conclusion

- 5.2.27 No supporting evidence in the form of actual invoices/receipts was submitted to substantiate the disbursements as claimed on the invoices submitted.

- 5.2.28 The Financial Statements as submitted by the Department were analysed and converted to Accounting statements. It should be noted that the figures could not be verified as no documentation in respect of expenses were submitted. As indicated the payment vouchers of the Department did not contain any supporting documentation such as invoices, proof of purchase, etc.
- 5.2.29 No explanation from the Department was advanced regarding the disparities in the number of actual cows bought as well as those that were found on the farm during the handover to the Free State Development Corporation.
- 5.2.30 It is clear from the evidence provided that the Department failed to properly manage and monitor the implementation of the agreement in relation to budget evaluation, expenditure control and performance by ESTINA.
- 5.2.31 It is also clear that since the project was handed over to the FDC, the Public Protector has observed that there is a marked improvement in the management of the project.
- 5.2.32 Therefore the conduct of the Department was inconsistent with section 195 of the Constitution, and sections 38, 39, 40, 51 and 81 of the PFMA.
- 5.3 **Whether the prices for goods and services procured were inflated, specifically alleged expenses in respect of construction, processing equipment, procurement of cows and administration costs:**

Common Cause

- 5.3.1. ESTINA did not follow any procurement procedures when it acquires goods and services during the implementation of Vrede Dairy farm project.

5.3.2 The Department submitted the following expenditure in terms of the Project agreement:

Expenditure	Submitted by MEC Written response to questions in Free State Legislature
Planting input	319,290.00
Labour Cost	1,309,097.00
Silage Bunker	5,000,000.00
Gravel Road	1,200,000.00
Cattle Shed	500,000.00
Security Gate and House	2,600,000.00
Veterinary Laboratory	300,000.00
Cattle Feed Plant	7,350,000.00
Milking Parlour: 72 point rotary including processing plant for 20,000 litres per day	30,050,000.00
Purchase of Farm Equipment	8,380,494.00
Dairy Cows (351 animals consisting of 57 Breeding cows, 62 pregnant heifers, 70 heifers 12 months+, 77 heifers 9-12 months, 85 heifers 6-9 months	6,212,000.00
Dairy Equipment, Pasteurizer, Irrigation Equipment	37,779,613.00
Land Surveyor, Agriculturists, Accountant Fees, Office Equipment, Insurance, Salaries and Wages	12,000,000.00
TOTAL	113,000,494.00

5.3.3 In his initial complaint, the Complainant relied on the aforementioned expenditure submitted by the MEC and submitted that funds allocated by the provincial government for various goods and services indicate that prices have been hugely inflated. Some of these include, among others construction of a silage bunker for R5 million, 2km gravel

access road for R1,2 million, security gate and guard house for R2,6 million, cattle feed plant for R7,350 million, milking parlour and milk processing plant for R30,050 million and 351 dairy cows for R6,212 million.

Issues in dispute

5.3.4 The Complainant further indicated that an amount of roughly R12 million was spent on administrative, legal, account and other consulting fees.

5.3.5 The Complainant further submitted that the following cattle were purchased and indicated alleged prices according to market prices of the Holstein Friesland stud association:

Types of Heifers Purchased	Number Purchased	Market price of Friesland/Holstein Stud Heifers	Total Cost
Pregnant Heifers	62	R15,000 per heifer	930,000
Breeding Cows	57	R16,000 per cow	912,000
Calves 12 months+	70	R8,000 per heifer	560,000
Heifers 9 – 12 months	77	R6,000 per heifer	462,000
Heifers 6 – 9 months	85	R4000 – R6000 per heifer	510,000 (max)
TOTAL			R3,374,000

5.3.6 The Department was requested to submit documentation on measures in place to ensure acquisitions are in line with treasury prescripts relating to value for money but no documentation to substantiate any measures were submitted.

5.3.7 An analysis of the financial statements submitted by the Department reveals that the following consultancy fees were paid. No explanations were submitted for the services delivered.

Date	Professional	Agriculture	Surveyor	Legal
September 2012				1,500.00

October 2012	100,000.00	36,480.00	94,711.20	3,780.00
November 2012	130,000.00	72,960.00	48,080.00	46,590.00
December 2012	70,000.00	36,480.00		
January 2013	170,171.00			
February 2013	95,122.27	32,745.36	22,386.38	
April 2013	33,386.10	63,745.00		
May 2013	227,320.00	33,858.00		
June 2013		48,800.54	57,000.00	
July 2013	100,000.00			
August 2013	210,854.41	54,042.00		
September 2013		45,000.00	13,680.00	
October 2013	60,000.00			
November 2013	60,664.62			
December 2013	65,000.00			
TOTAL	1,322,518.40	424,110.90	235,857.58	51,870.00

5.3.8 An analysis of the financial statements submitted by the Department reveals that the following assets were acquired:

Date	Tractors	Equipments	Vehicles
October 2012	2,359,800.00	51,3000.00	
November 2012		42,846.79	
December 2012		471,007.40	
January 2013		1,558,352.51	
February 2013	411,540.00		
April 2013		663,952.28	
May 2013		113,430.00	538,537.00
June 2013		35,883.47	172,436.11
July 2013		3,599.89	
August 2013	112,860.00	16,847.77	

September 2013		694,959.63	
October 2013		436,745.87	
November 2013			
December 2013	17,978.29		
TOTAL	2,902,178.29	4,550,625.61	710,973.11

- 5.3.9 According to the SA Holstein Breeders Association the prices of heifers older than 12 months average at R8000 per heifer, heifers between 9 and 12 months average at R6000 per heifer and heifers between 6 and 9 months average at R5000 per heifer.
- 5.3.10 The SA Holstein Breeders association indicated that currently the price for a breeding cow from the top 10% of the gene pool is approximately R18, 000.00 per cow.
- 5.3.11 According to the SA Holstein Breeders Association the pricing for milking parlours are calculated per milking point at a maximum of R100, 000.00 per milking-point at current value. A 72 point milking parlour should be a maximum price of R7, 2 million.
- 5.3.12 Invoices obtained from the Department on the additional purchase of animals were the following:

RECEIVED FROM DR MASITENG (FS AGRIC) AT GLEN ON 13 APRIL 2017

BOUGHT FROM	BUYER	Number	Type	PER UNIT	TOTAL
MN Hermann, PO Box 668 HEILBRON	Vargafield (Pty) Ltd PO Box 349 VREDE	40	Heifers	5000	228000
MK-Investments PO Box 345 WINTERTON	Vargafield (Pty) Ltd PO Box 349 VREDE	30	Cows in milk	15250	521550
		57	Heifers	13250	
Ellerslie Holsteins PO Box 111 WINTERTON (REGISTERED WITH STUDBOOK)	Vargafield (Pty) Ltd PO Box 349 VREDE	47	Pregnant Heifers	12500	2634255
		31	Eight Month Heifer	12000	
		27	Eight Month Heifer	11500	
		25	6 Month Heifer	11000	

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		2	9+ Heifer	9000	
LEZMIN 1997 CC JHE Barry PO Box 111 WINTERTON (REGISTERED WITH STUDBOOK)	Vargafield (Pty) Ltd PO Box 349 VREDE	14	3-5 Month Heifer	3500	612180
		29	5-7 Month Heifer	5000	
		49	7-10 Month Heifer	7000	
		70	Cows in milk	15250	
MK-Investments PO Box 345 WINTERTON	Vargafield (Pty) Ltd PO Box 349 VREDE	6	Cows to calf 6 days	15250	1668960
		3	Heifers to calf 10 days	15250	
		11	Pregnant Cows (4-8 W)	15250	
		6	Pregnant Heifers(4-8 W)	15250	
MN Hermann, PO Box 668 HEILBRON Mmabalane Trust PO Box 706 VREDE	Vargafield (Pty) Ltd PO Box 349 VREDE Estina (Pty) Ltd PO Box 349 VREDE	20	Heifer	9350	213180
		2	Holstein Friesland Bulls	20000	45600
MK-Investments PO Box 345 WINTERTON	Vargafield (Pty) Ltd PO Box 349 VREDE	60	Cows in milk	15250	1043100
		30	Cows 1st Lactation Mooirivier	15250	
MK-Investments PO Box 345 WINTERTON	Vargafield (Pty) Ltd PO Box 349 VREDE	50	Cows Himeville	15250	1738500
		20	Heifers to calf 10 days	15250	
		TOTAL NR		629	

5.3.13 The Holstein Studbook during a meeting on 19 April 2017 indicated that Ellerslie Holsteins and LEZMIN 1997 CC JHE Barry are registered breeders and that these are the only animals not overpriced. All the other sellers are unknown to the Studbook. It is further noted that the Buyer in all cases except one are Vargafield (Pty) Ltd.

5.3.14. The silage bunkers consist of four bunkers with diameters of 32m x 9m x 3m at the highest point. The Department reported that the cost to construct this was R5m.

5.3.15 The Department reported that the entrance gate and guard house consisting of two double walls approximately 13 meters long, a manual iron gate approximately 17 meters long and the guardhouse of 9 square meters cost R2.6m.

- 5.3.16 The Department reported that the Milking Parlour: 72 (should be 70) point rotary including processing plant for 20,000 litres per day were bought at a cost of R30,050m. A further approximately R37, 7m was spent on dairy equipment, pasteurizer, and irrigation equipment.
- 5.3.17 The original contracts and invoices were obtained from the supplier DeLaval. DeLaval informed the Public Protector that initially they negotiated with ESTINA. During the negotiations ESTINA informed them that their company's name was changed to Vargafield (Pty) Ltd.
- 5.3.18 A search done on the CIPC website indicated that both companies are still registered separately with the sole Director for ESTINA being Vasram Kama! and the sole Director for Vargafield being Sanjay Grover.
- 5.3.19 The invoices and contracts between DeLaval and Vargafield indicate the following:
- 5.3.19.1 A contract was concluded for the sale and installation of a 70 point milking system including a 6000lt cooling tank, an 18000lt tank and other equipment needed for the system to be fully operational. The total cost including VAT was R5,885,156.56. This included transport and the installation of the system. The contract was concluded with Vargafield on 23 April 2014 for the Project; and
- 5.3.19.2 A contract was also concluded on 6 June 2013 between DeLaval and Vargafield for the Project for procurement and installation of a 10pt stationary milking machine with a 6000lt cooling tank. The total cost including VAT was R1,035,078.37. This included transport and the installation of the system.

5.3.20 The Premier, on 14 July 2017 responded to the section 7(9) notices issued by the Public Protector on 7 June 2017 as follows:

"We are, however, advised that, except from what is mentioned in paragraph 8.2.3.1 of the Notice regarding the cost of the milking parlour: 72-point rotary including processing plant for 2000 liters per day, the following items are included in the cost of this item, namely:

- (1) 70 point milking system including a 18000 liter tank*
- (2) the pasteurizing plant building*
- (3) heifer pens*
- (4) calving-and calf rearing pens*
- (5) the 10 point milking system*
- (6) a 6000 liter cooling tank*
- (7) an electrical power substation*
- (8) the dairy database software.*

Apart from the 70-point rotary parlour and 18000 liter tank mentioned above, the following were also included in the DeLaval milking system:

- (1) the usher gate to a DCC cell counter*
- (2) AFB auto food bath*
- (3) calf feeders*
- (4) calf pen mats.*

We are also advised that a Guesthouse, which was procured in the town of Vrede to accommodate individuals responsible for the implementation of the project, is included in the amount of R2, 6 million. It was necessary to buy this property, given the fact that there were no facilities in existence on the land in question at the commencement of the project. " The Premier further committed to an

assessment of value for money to be performed by the Free State Provincial Treasury.

- 5.3.21 It is clear from the above that there were inflated prices in regard to acquisition of goods and services.

Application of the relevant law

- 5.3.22 In section 38(1)(a) and (b) of the Public Finance Management Act (PFMA) requires Accounting Officers of departments to ensure that effective, efficient and transparent financial and risk management systems are in place. Sections 38(1)(c)(iii) and 51(b)(iii) of the PFMA requires Accounting Officers to take appropriate steps to efficiently manage a department's capital.
- 5.3.23 Section 39 of the PFMA requires an Accounting Officer to ensure that expenditure of a department is in accordance with the vote of the department and the main divisions within the vote. Section 40(1)(a) requires that an Accounting Officer for a department must keep full and proper records of the financial affairs of the department.
- 5.3.24 In terms of section 81 of the PFMA an Accounting Officer of a department commits an act of misconduct if he/she wilfully or negligently fails to comply with sections 38, 39 and 40 of the PFMA. Section 86 of the PFMA determines that an offence is committed if an Accounting Officer wilfully or in a grossly negligent way fails to comply with these provisions.
- 5.3.25 The expenses for administration and professional fees were paid from the amounts paid by the Department to ESTINA despite the explanation from the Department that ESTINA received 9% more shares in relating to the contribution to be made due to the fact that they will supply the administration and professional services.

Conclusion

- 5.3.26 Although we have evaluated the information regarding the expenditure incurred by ESTINA during the implementation of the project it was difficult for the Public Protector to make or draw an inference that prices of goods and services were inflated, due to the fact that there was no procurement process followed and the Public Protector could not test the markets to determine market value of goods and services procured without the necessary documents which proof the actual price for the goods and services procured.

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 whether the Department of Agriculture improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy Project:

6.1.1 The allegation that the Department improperly entered into a Public Private Partnership agreement for the implementation of the Vrede Dairy project is not substantiated.

6.1.2 The Department did not enter into a PPP with ESTINA in the context of Treasury Regulation requirements.

6.1.3 Observations

6.1.4 The Public Protector in concurrence with the Accountant General's investigation observed the following procurement irregularities:-

- 6.1.4.1 That the HoD of the department did not follow the normal procurement process, as prescribed by the Constitution, PFMA and National Treasury Regulations;
- 6.1.4.2 That the payments to Estina were also not line with Treasury prescripts;
- 6.1.4.3 That the agreement between the Department and Estina seems to be invalid, due to non -compliance with the procurement processes;
- 6.1.4.4 That despite the Accountant General's report, the department failed to comply with section 81 and 86 of the PFMA, which prescribed the process to be followed when there is allegations of financial misconduct;
- 6.1.5 The prescripts in respect of the procurement of the agreement were not adhered to;
- 6.1.6 The Accounting Officer of the Department proceeded after the recommendation of the Accountant General to pay a further R143, 950 million to ESTINA in respect of the Project.
- 6.2 **Regarding whether the Department failed to manage and monitor implementation of the terms of the agreement in relation to budget evaluation, expenditure control and performance by ESTINA:**
 - 6.2.1. The allegation that the Department failed to manage and monitor implementation of the terms of agreement is substantiated.
 - 6.2.2. No documents and/or policies or measures were provided by the Department that proper financial control and risk management of the Project were in place. The Public Protector could find no evidence or indication that the Accounting Officer invoked the provisions of the agreement in respect of the control over the Project and this raises serious concern. This concern was supported by the report of the Accountant General and the lack of effective, efficient and transparent systems

of financial and risk management and internal control amounts to gross negligence and maladministration.

6.2.3 No supporting evidence in the form of actual invoices/receipts was submitted to substantiate the expenditure as claimed in the financial statements submitted except for 9 invoices for procurement of cattle.

6.2.4 The evidence outlined earlier points to gross irregularities in ensuring the effective and efficient performance of the agreement and resulted in maladministration.

6.2.5 From the above it is clear that this amounts to gross negligence and also constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.

6.3 Whether the prices for goods and services procured were inflated, specifically alleged expenses in respect of construction, processing equipment, procurement of cows and administration costs:

6.3.1 The allegation that the prices for goods and services procured were inflated, specifically expenses in respect of construction, processing equipment, procurement of cows and administration costs is difficult to determine. This is due to the following:

6.3.1.1. ESTINA did not follow public procurement processes when procuring the services of the service providers in the project;

6.3.1.2. Due to the lack of resources and financial constraints, the Public Protector was unable to conduct a comprehensive investigation in order to determine the fair market value for good and services procured; and

- 6.3.1.3. The Public Protector was not provided with all the invoices and proof of payments for the goods and services procured by Estina on behalf of the Department.

7. REMEDIAL ACTION

The appropriate remedial action the Public Protector takes in pursuit of section 182(1)(c) of the Constitution, with the view of addressing systemic procurement management deficiencies in the Department and the irregular expenditure incurred, is the following:

7.1 The Premier of the Free State Province must

- 7.1.1. Initiate and institute disciplinary action against all implicated officials involved in the Vrede Dairy Farm project;
- 7.1.2. Submit the report regarding the remedial action in 7.1.1. to the Public Protector after conclusion of the disciplinary action processes;
- 7.1.3. Ensure that he conducts a reconciliation of the number of cows initially procured and found during April 2017 as per his undertaking in the response to section 7(9) notice; and
- 7.1.4. Ensure that he submits an implementation plan within 30 days of the issuing of this report.

7.2 The Head of the Free State Department of Agriculture must:

- 7.2.1. Ensure that the officials of the Supply Chain Management Division and Management of the Department are trained on the prescripts of the National and Provincial Treasuries in respect of procurement and specifically in respect of deviations;

7.2.2. Take corrective measures to prevent a recurrence of the failure in the management process referred to in this report;

7.2.3 Ensure that all Departmental staff involved in the implementation and execution of Projects are properly trained and capacitated to manage Projects assigned to them, for future projects; and

7.2.4. Develop and revise current policies for the implementation of internal control measures in line with Treasury prescripts and regulations.

8. MONITORING

8.1.1 The Premier and Head of the Department are required to acknowledge receipt of the Public Protector's report within 14 days of receipt thereof and take remedial action.

8.1.2 The Premier and Head of the Department must present an action plan on the implementation of the Public Protector's report within 30 days of receipt thereof,



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 08/02/2018

Assisted by: Free State Provincial Office, PII