



PUBLIC PROTECTOR  
SOUTH AFRICA

## ***AGAINST THE RULES***

*Report No. 33 of 2010/11*

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**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994 ON AN INVESTIGATION INTO COMPLAINTS AND ALLEGATIONS OF MALADMINISTRATION, IMPROPER AND UNLAWFUL CONDUCT BY THE DEPARTMENT OF PUBLIC WORKS AND THE SOUTH AFRICAN POLICE SERVICE RELATING TO THE LEASING OF OFFICE ACCOMODATION IN PRETORIA**

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## ACRONYMS

<b>BBBEE</b>	<b>Broad Based Black Economic Empowerment</b>
<b>C-AMP</b>	<b>Custodian Asset Management Plan</b>
<b>CBD</b>	<b>Central Business District</b>
<b>CFO</b>	<b>Chief Financial Officer</b>
<b>CIDB</b>	<b>Construction Industry Development Board</b>
<b>DG</b>	<b>Director-General</b>
<b>DPW</b>	<b>National Department of Public Works</b>
<b>FWC</b>	<b>FIFA World Cup</b>
<b>GIAMA</b>	<b>Government Immovable Asset Management Act, 2007</b>
<b>HDI</b>	<b>Historically Disadvantaged Individuals</b>
<b>MTEF</b>	<b>Medium Term Expenditure Framework</b>
<b>PFMA</b>	<b>Public Finance Management Act, 1999</b>
<b>NBAC</b>	<b>National Bid Adjudication Committee (DPW)</b>
<b>PPP</b>	<b>Public Private Partnership</b>
<b>RAG</b>	<b>Resource Allocation Guide</b>
<b>RPF</b>	<b>Roux Property Fund (Pty) Ltd</b>
<b>SAPS</b>	<b>South African Police Service</b>
<b>SCM</b>	<b>Supply Chain Management</b>
<b>SCM Guide</b>	<b>Supply Chain Management: A Guide for Accounting Officers/Authorities</b>
<b>Shabangu</b>	<b>Roux Shabangu</b>
<b>SIU</b>	<b>Special Investigating Unit</b>
<b>SIU Act</b>	<b>Special Investigating Units and Special Tribunals Act, 1996</b>
<b>SNBAC</b>	<b>Special National Bid Adjudication Committee (DPW)</b>

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## EXECUTIVE SUMMARY

- (i) *AGAINST THE RULES* is the report of the Public Protector in response to complaints that were lodged with her office on 2 August 2010 in connection with the alleged improper procurement of the lease of office accommodation for the SAPS in the Sanlam Middestad building in the Pretoria Central Business District. These complaints originated from a newspaper article published on 1 August 2010 alleging improper conduct and maladministration by the National Commissioner of the South African Police Service (SAPS) and the Department of Public Works (DPW).
- (ii) Primarily the complaints related to the alleged non-compliance with the requirements of section 217 of the Constitution of the Republic of South Africa, 1996 (the Constitution) by the SAPS and the DPW, and the alleged improper involvement the National Commissioner of the SAPS in the procurement of two buildings in Pretoria and Durban for office accommodation for the SAPS. The need for a second building to accommodate the SAPS Head Office in Pretoria was also questioned. Questions were also raised regarding the SAPS's relationship with the preferred service provider and the cost effectiveness of the transaction.
- (iii) The Public Protector investigated the complaints with the cooperation of the Special Investigating Unit.
- (iv) On 3 August 2010, the Public Protector requested the National Commissioner of the SAPS and the Director-General (DG) of the DPW not to proceed with the implementation of the lease, pending the finalisation of the investigation.
- (v) On 10 August both parties responded with an undertaking not to proceed with the implementation of the said lease agreements until the investigation was completed. The DPW further indicated that the various role-players involved in the procurement process had been advised that "*the implementation of the lease agreement shall be suspended pending the outcome of the aforementioned investigations.*" (Referring to the internal DPW investigation and the investigation of the Public Protector)
- (vi) On 11 and 19 October 2010, the DG of the DPW informed the National Commissioner of the SAPS, on the basis of the findings of an internal inquiry and independent legal advice obtained, that the lease agreement between the DPW and

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Roux Property Fund (RPF) in respect of the Sanlam Middestad building, was invalid and that a new procurement process had to be initiated.

- (vii) On 25 October 2010, the Public Protector issued a preliminary report on the investigation and informed the National Commissioner of the SAPS of her concurrence with the decision of the DPW to commence with an entirely new procurement process. The preliminary report was presented to the Executive Authorities and the accounting officers of the SAPS and the DPW.
- (viii) The former Minister of Public Works, Mr G Doidge, was replaced by Ms Gwen Mahlangu-Nkabinde on 31 October 2010.
- (ix) Shortly after Ms Mahlangu-Nkabinde's appointment, her office obtained informal advice from the Office of the State Attorney. The State Attorney's letter to the Minister's Special Advisor indicated that the lease agreement was enforceable. This advice was, however, given subject to a further legal opinion, to be obtained from senior counsel, at the request of the Minister's office.
- (x) The opinion of senior counsel, dated 22 November 2010, concluded that the contract between the DPW and RPF was unlawful and the lease agreement therefore invalid. It supported the legal advice previously obtained by the DPW, also from senior counsel, that the High Court should be approached with an application seeking judicial review and setting aside of its decision to enter into the lease agreement, and for an order declaring that the lease agreement was invalid.
- (xi) On 22 November 2010 the DPW advised Nedbank, the financiers of RPF, that it was continuing with the lease.
- (xii) Minister Mahlangu-Nkabinde publicly announced on 7 December 2010, that the DPW was continuing with the implementation of the lease agreement. On the same day, the DG of the DPW was suspended.
- (xiii) The investigation of the Public Protector was conducted over a period of five months and included interviews with officials of the SAPS, including the National Commissioner, officials of the DPW and Mr R Shabangu of RPF. Voluminous documentation relating to the procurement was perused and the relevant provisions

of the Constitution, the Public Finance Management Act, 1999 (PFMA), Treasury Regulations and other procurement prescripts considered and applied.

(xiv) A copy of the draft report of the Public Protector on the investigation was distributed to the relevant parties. The National Commissioner, the Minister of Finance, the Minister of Public Works and one of the complainants subsequently submitted their responses thereto, on 23, 21, 4 and 7 January 2011, respectively, which were considered for purposes of the final report.

**(xv) The general findings of the Public Protector made from the investigation are the following:**

(a) The need for the office accommodation relevant to the investigation was not contained in the SAPS Immovable Asset Plan, as is required by directions issued by the National Treasury.

(b) By negotiating with a single supplier (RPF) and excluding the DPW, the SAPS proceeded beyond the demand management phase of the supply chain management process and in so doing infringed on the functional area of the DPW.

(c) The SAPS adjusted the need for accommodation not according to its real requirements at the time, but to fit the specifications of a single supplier, RPF, in respect of the Sanlam Middestad building.

(d) The procurement of the lease was not in accordance with a system that is cost effective, as is required by the Constitution.

(e) The urgency claimed by the SAPS in respect of the procurement of the lease, which resulted in a deviation from an open tender process, only related to a small part of the accommodation need. The entire Sanlam Middestad building was therefore not urgently required.

(f) The DPW failed to record the reasons for deviating from a competitive tender process, as is required by the SCM prescripts;

(g) The SAPS had more than sufficient time (6 years) to plan and structure its operations pertaining to the FIFA World Cup (FWC). It furthermore had no

reasonable prospect, at the time when the process for the procurement of the lease commenced, of preparing and fitting the required two floors of the Sanlam Middestad building for occupation by the Communications Services in time for the FWC. The reliance on urgency was not justified and it was not impractical to adhere to a competitive bidding process in respect of the needs of the SAPS for office accommodation.

- (h) It appears from the very nature of the procurement process followed, namely, by entering into a negotiated contract instead of a competitive bidding process, that the constitutional requirements of fairness, equitability and transparency were not complied with.
- (i) The terms of the first lease agreement entered into between the DPW and RPF were not approved by the Special National Bid Adjudication Committee of the DPW. There were material discrepancies between the acceptance of RPF's offer and the terms of the lease agreement that was signed.
- (j) The procurement of the lease was done in a manner that did not comply with the validity requirements of the Constitution, other applicable legislation and the Treasury Regulations and instructions for procurement by organs of state. The lease agreements entered into by the DPW and the RPF are therefore invalid.
- (k) The DPW's decision to proceed with an invalid lease, despite legal advice from two senior counsel obtained at its own request and the undertaking given to the Public Protector that it would not do so, pending the finalisation of the investigation, was improper and unlawful.
- (l) The conduct of the accounting officers of the DPW and the SAPS, who were responsible for compliance with the relevant provisions of the Constitution and other procurement legislation and prescripts in respect of the procurement of the lease, was improper and unlawful.

**(xvi) The Public Protector's specific findings in relation to the conduct of the SAPS are that:**

- (a) The lease agreements were signed between RPF and the DPW and not by the National Commissioner of the SAPS, as was alleged. However, the National Commissioner signed a memorandum, dated 10 May 2010, authorising funding for

the Sanlam Middestad building lease. He also signed the final SAPS needs analysis, dated 19 July 2010 for 25 301.54m<sup>2</sup>.

- (b) Although the SAPS did not sign the lease agreement, its involvement in the procurement process was improper, as it proceeded beyond the demand management phase and it further failed to implement proper controls, as required by the PFMA and relevant procurement prescripts.
- (c) The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.
- (d) The conduct of the accounting officer of the SAPS was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.
- (e) On the evidence available it could not be found that an improper relationship between the preferred service provider (RPF) and the SAPS motivated the deviation from required tender procedures.

**(xvii) The Public Protector's specific findings in relation to the conduct of the DPW are that:**

- (a) The procurement by the DPW of the lease was not in accordance with a system that is cost effective and competitive, as is required by section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.
- (b) The conduct of the accounting officer of the DPW was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require from an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and

cost effective. This conduct was improper, unlawful and amounted to maladministration.

- (c) The process that led to the conclusion by the DPW of the lease agreements with RPF was fatally flawed in various respects, including non-compliance with prescribed procurement procedures such as ensuring a competitive bid process or justifying the deviations in the prescribed manner. This rendered the process unlawful and further constituted improper conduct and maladministration.
- (d) The lease agreement should not have been entered into as it did not comply with the validity requirements of the Constitution, applicable legislation and prescripts. The lease agreements entered into by the DPW and RPF are therefore invalid.
- (e) The decision of the DPW to proceed with the implementation of the lease agreement in the face of considered legal advice from two senior counsel to the contrary, particularly the opinion procured on 22 November 2010 under the leadership of the current Minister of Public Works, was in breach of its fiduciary duties and the requirements of good governance in terms of the PFMA, and amounted to maladministration.
- (f) The reckless manner in which the DPW dealt with public funds in this case, particularly:
- the failure to subject the lease agreement to judicial review, as advised by senior counsel and by implementing the lease agreement despite further legal advice from separate senior counsel to the contrary; and
  - reneging on the undertaking given to the Public Protector not to implement the lease until the investigation was complete,

was improper and fell short of the requirements of good administration.

**(xviii) The Public Protector concluded that the appropriate remedial action that is to be taken, as envisaged in section 182(1)(c) of the Constitution, is the following:**

- (a) The National Treasury should urgently review the purported lease agreement between the DPW and RPF in order to determine if the contract can be terminated forthwith.

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- (b) The National Treasury must determine whether any irregular or fruitless and wasteful expenditure was incurred by the SAPS and/or the DPW in respect of the procurement process and other matters related thereto and take appropriate action, where applicable.
- (c) The Cabinet must at its first meeting convened after the date of publication of this report request an explanation from the Minister of Public Works on:
- The reasons for the decision to implement the lease agreement with RPF, despite the DPW being provided with a legal opinion of independent senior counsel, soon after her appointment, advising to the contrary;
  - The justification for proceeding with the implementation of the disputed lease, prior to the finalisation of the investigation by the Public Protector, and despite senior counsel opinions and the DPW's previous undertakings to the contrary.
- (d) The Secretary of Cabinet must advise the Public Protector of the outcome of the deliberations referred to in paragraph (c) above and the resolutions taken within 10 days from the date of the Cabinet meeting.
- (e) The Minister of Public Works with the assistance of the National Treasury should take urgent steps to ensure that the appropriate action is instituted against the relevant DPW officials that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in this report.
- (f) The DPW must ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.
- (g) The Minister of Police should, with the assistance of the National Treasury, take urgent steps to ensure that the appropriate action is instituted against the appropriate SAPS officials that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in this report.
- (h) The SAPS must ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.
- (i) The National Treasury should develop and introduce measures that will prevent a recurrence of a situation where client departments of the DPW infringe on the functional areas of the DPW in respect of the procurement of leased accommodation.

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- (xix) The National Treasury, the Ministers of Public Works and Police, the DPW and the SAPS must submit action plans and progress reports to the Public Protector in respect of the implementation of the remedial action referred to above.**

## INTRODUCTION

- 1.1 This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 The report is submitted to:
  - 1.2.1 The President of the Republic of South Africa;
  - 1.2.2 The Speaker of the National Assembly;
  - 1.2.3 The Minister of Police;
  - 1.2.4 The Minister of Public Works; and
  - 1.2.5 The Minister of Finance;
- 1.3 Copies of the report are also circulated to:
  - 1.3.1 The Chairperson of the National Council of Provinces;
  - 1.3.2 Adv P Hoffman SC, the Director of the Institute for Accountability in Southern Africa and Mr P J Groenewald MP, the complainants in the matter that was investigated;
  - 1.3.3 The Secretary to the Cabinet;
  - 1.3.4 The Chairpersons of the Parliamentary Portfolio Committees on Police and Public Works;
  - 1.3.5 The National Commissioner of the South African Police Service;
  - 1.3.6 The Acting Director-General of the Department of Public Works;
  - 1.3.7 The Head of the Special Investigating Unit; and
  - 1.3.8 Mr R Shabangu of RPF.
- 1.4 The report relates to an investigation conducted by the Public Protector into complaints and allegations of maladministration, improper and unlawful conduct by the Department of Public Works (DPW) and the South African Police Service (SAPS), in connection with the leasing of office accommodation in Pretoria.

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## THE COMPLAINTS LODGED WITH THE PUBLIC PROTECTOR

2.1 The report presents the outcome of an investigation by the Public Protector following complaints lodged on 2 August 2010 by Adv P Hoffman SC, the Director of the Institute for Accountability in Southern Africa and Mr P J Groenewald MP, against the National Commissioner of the SAPS and the DPW. The complaints were based on allegations contained in an article published by the *Sunday Times* the previous day, under the heading: “*Bheki Cele’s R500m police rental deal.*” In the article, it was stated, *inter alia*, that:

*“The Sunday Times can reveal that Cele signed the deal to move S A Police Service top brass-including Minister of Police, Nathi Mthethwa, his deputy, Fikile Mbalula, and administrative staff-to Roux Shabangu’s building almost two months before he bought it.*

*The deal never went out on tender, violating Treasury regulations that all contracts over R500 000 must go through a competitive bid process. After three days of queries from the Sunday Times, the Department of Public Works could not explain why it had flouted Treasury rules.”*

2.2 The said article further stated that the National Commissioner had “*also signed a deal to move police in Durban to another building Shabangu is negotiating to buy.*”

2.3 The gist of the complaints were the alleged non-compliance with the requirements of section 217 of the Constitution in respect of procurement by the SAPS and the DPW, and the alleged improper involvement the National Commissioner of the SAPS in the procurement of two buildings in Pretoria and Durban for office accommodation for the SAPS. The need for a second building to accommodate the SAPS Head Office in Pretoria was also questioned.

2.4 The complaints were lodged in terms of section 182 of the Constitution and the Public Protector Act.

2.5 The allegations pertaining to the procurement of a lease for office accommodation for the SAPS in Durban is the subject of a separate investigation conducted by the Public Protector.

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## **COOPERATION WITH THE SPECIAL INVESTIGATING UNIT**

- 3.1 The President, by virtue of Proclamations R.38 and R.42 of 2010 published in the Government Gazette on 30 July 2010 and 10 August 2010 respectively, referred certain matters regarding the DPW and the SAPS to the Special Investigating Unit (SIU) for investigation. These matters included issues pertaining to the procurement of leased accommodation.
- 3.2 The subject matter of the complaints lodged with the Public Protector, referred to above, also formed part of the investigation to be conducted by the SIU, in terms of the said Proclamations. The Public Protector therefore requested the SIU, in terms of section 7(3)(a) of the Public Protector Act, to cooperate with the investigation into the alleged improprieties relating to the procurement of the lease of the Sanlam Middestad building and matters incidental thereto.
- 3.3 As is referred to in more detail in paragraph 6.2 below, the cooperation of the SIU with the investigation was consistent with the powers of the Public Protector to request assistance in investigations.

## **DELIBERATIONS BY THE PARLIAMENTARY PORTFOLIO COMMITTEE ON POLICE**

- 4.1 From May 2010 the Portfolio Committee on Police (the Committee) deliberated on issues pertaining to Supply Chain and Property Management within the SAPS. Following media reports regarding the lease agreement in question, the Committee interacted with the National Commissioner of the SAPS and the Director-General (DG) of the DPW. On 3 September 2010, the Committee decided to suspend certain aspects of its inquiry into the matter, pending the finalisation of the investigation by the Public Protector and requested a report on completion of the investigation.

## **IMMEDIATE ACTION TAKEN BY THE PUBLIC PROTECTOR**

- 5.1 The Public Protector approached the DPW and the National Commissioner of the SAPS in writing on 3 August 2010, in connection with the complaints lodged, and requested that the implementation of the lease agreements referred to in the said newspaper article (in respect of buildings in Pretoria and Durban) be suspended, pending the outcome of the investigation.

- 5.2 The National Commissioner of the SAPS responded to the above letter on 10 August 2010, denying that the SAPS had entered into a lease agreement in respect of the Sanlam Middestad building, as was alleged. He explained that due to the overcrowding of the current Headquarters of the SAPS, a need for additional office accommodation was submitted to the DPW, who is responsible for the procurement of accommodation. At the time of his response, the National Commissioner was not aware of whether a lease agreement had been signed between the DPW and the owner of the Sanlam Middestad building.
- 5.3 The National Commissioner also undertook not to move personnel of the SAPS into the Sanlam Middestad building and the building in Durban, as requested by the Public Protector. This undertaking was again confirmed by the National Commissioner in letters addressed to the DPW and the Public Protector on 16 and 18 February 2011 respectively.
- 5.4 The DG of the DPW responded on 10 August 2010, agreed not to implement the lease agreement and confirmed that the implementation of the lease agreement of the Sanlam Middestad building in Pretoria had been suspended, pending the outcome of investigations, including its own internal investigation into compliance with its supply chain management prescripts and requirements.
- 5.5 On 25 October 2010, the Public Protector issued a preliminary report on the investigation, which was presented to the SAPS and the DPW. The preliminary report referred to the fact that the DG of the DPW had informed the National Commissioner on 11 and 19 October 2010, that:
- 5.5.1 The internal investigation of the DPW had been concluded (on 13 September 2010);
- 5.5.2 The DPW had obtained an independent legal opinion which advised that the lease agreement with RPF was not concluded in accordance with legal requirements and that it was therefore invalid; and
- 5.5.3 That an entirely new procurement process had to be conducted.
- 5.6 In the covering letter that accompanied the preliminary report, addressed to the National Commissioner, dated 25 October 2010, the Public Protector stated, *inter alia*, that:
- “On the basis of the information and evidence obtained and considered to date, I concur with the views expressed by the Director-General of the Department of*

*Public Works in his letters addressed to you on 11 and 19 October 2010, that an entirely new procurement process has to be conducted in respect of the leasing of accommodation for the SAPS headquarters in Pretoria and the offices of the Kwazulu-Natal Provincial Commissioner in Durban, which will be subject to the submission of revised needs analyses and the availability of funding.*

- 5.7 The only response received from the National Commissioner of the SAPS was a letter, dated 3 November 2010, to which a copy of a letter addressed to the DG of the DPW on 27 October 2010 was attached. In his letter to the DG of the DPW, the National Commissioner stated:

*“It will be assumed that, given the fact that no reasons are given for your decision, the question of validity or otherwise of the lease can be ascribed to processes within your Department. It would nevertheless be appreciated that this office be given such reasons.”*

- 5.8 The DPW did not oppose the approach taken in the preliminary report and the covering letter.

## **THE POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINTS LODGED AGAINST THE DPW AND THE SAPS**

### **Mandate of the Public Protector**

- 6.1.1 The Public Protector is an independent institution, established in terms of Chapter 9 of the Constitution. In terms of section 182(1) of the Constitution, the Public Protector has the power:
- 6.1.1.1 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;
  - 6.1.1.2 To report on that conduct; and
  - 6.1.1.3 To take appropriate remedial action.
- 6.1.2 In terms of section 182(2) of the Constitution, the Public Protector has the additional powers and functions prescribed by national legislation.

- 6.1.2.1 Section 6(4) of the Public Protector Act provides that the Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, *inter alia*, any alleged maladministration in connection with the affairs of government at any level and any alleged receipt of an improper advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level.
- 6.1.2.2 In terms of section 6(4), the Public Protector can also investigate any alleged improper conduct by a person performing a public function.
- 6.1.3 The Public Protector may, in terms of section 8(1) of the Public Protector Act, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.
- 6.1.4 In terms of the mandate given to the Public Protector it is therefore expected of her/him to conduct an enquiry that transcends lawfulness and focuses on good administration. Such enquiry has three components:
- what happened;
  - what should have happened; and
  - Is there as a discrepancy between the two and does this constitute improper conduct as envisaged in section 182(1) of the Constitution, or maladministration, or abuse of power, improper enrichment and conduct resulting in unlawful or improper prejudice to any person, as envisaged in the Public Protector Act.
- 6.1.5 In determining whether conduct was improper or constituted maladministration or any of the violations envisaged in the Public Protector Act, the Public Protector compares the conduct of government entities and officials complained of against the relevant legislation and other prescripts, to determine whether such conduct complied with the constitutional requirements of fairness, reasonableness, and transparency and local and international best practices. The mandate of the Public Protector is not limited to the investigation of complaints, but he/she can also investigate suspicions or allegations of improper conduct on own initiative.
- 6.1.6 The complaints lodged and the allegations made against the DPW and the SAPS fall within the jurisdiction and powers of the Public Protector.

## **The powers of the Public Protector to collaborate with the SIU in the investigation**

6.2.1 In his response to the draft report of the Public Protector, referred to in paragraph 14.4 below, the National Commissioner of the SAPS questioned the legality of the collaboration of the Public Protector and the SIU in the investigation.

6.2.2 Section 7(3)(a) of the Public Protector Act provides that:

*"The Public Protector may, at any time prior to or during an investigation, request any person-*

- (i) At any level of government, subject to any law governing the terms and conditions of employment of such person;*
- (ii) Performing a public function, subject to the law governing the terms and conditions of the appointment of such person; or*
- (iii) Otherwise subject to the jurisdiction of the Public Protector to assist him or her, under his or her supervision and control, in the performance of his or her functions with regard to a particular investigation or investigations in general."*

6.2.3 The SIU is established by Proclamation by the President, in terms of the provisions of the Special Investigating Units and Special Tribunals Act, 1996 to investigate, *inter alia*:

6.2.3.1 serious maladministration in connection with the affairs of any State institution;

6.2.3.2 improper or unlawful conduct by employees of any State institution;

6.2.3.3 unlawful appropriation or expenditure of public money or property; or

6.2.3.4 unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

6.2.4 The SIU performs a public function and therefore falls under the jurisdiction of the Public Protector, as contemplated by section 7(3)(a)(iii) of the Public Protector Act.

6.2.5 The investigations of the SIU mandated by the Proclamations of the President, referred to in paragraph 3.1 above, also include the subject matter of the investigation of the Public Protector referred to in this report.

6.2.6 Under the circumstances, the Public Protector acted within her powers under the Constitution and the law by collaborating with SIU in the investigation.

## **The format and procedure of investigations conducted by the Public Protector and the disclosure of information**

- 6.3.1 The National Commissioner of the SAPS also questioned legality of the investigation process followed by the Public Protector and the decision not to provide him with copies of all the documents that were perused and of the transcripts of interviews that were conducted (See paragraph 14.4 below).
- 6.3.2 The format and the procedure in conducting any investigation is, in terms of section 7(1)(b)(i) of the Public Protector Act, determined by the Public Protector with due regard to the circumstances of each case.
- 6.3.3 Section 7(2) of the Act provides that:

*“Notwithstanding anything to the contrary contained in any law no person shall disclose to any other person the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, the Deputy Public Protector or a person contemplated in subsection (3)(b) during an investigation, unless the Public Protector determines otherwise.”*

In compliance with due process the National Commissioner was provided with electronic recording of his interview with the Public Protector. SAPS was subsequently provided with a list of key documents relied on and persons interviewed during the course of the investigation.

## **The obligation of the Public Protector to follow due process**

- 6.4.1 If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall, in terms of section 7(9)(a) of the Public Protector Act, afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

## **THE INVESTIGATION**

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

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## **Scope of the investigation**

- 7.1.1 The scope of the investigation was restricted to the period 1 August 2009 to 4 February 2011. As indicated above, the allegations relating to the procurement of a lease for office accommodation for the SAPS in Durban is the subject of a separate investigation being conducted by the Public Protector.

## **METHOD OF GATHERING EVIDENCE**

The following methods of gathering and analysing information were employed:

### **Interviews conducted**

Interviews were conducted with:

- 8.1.1 Eight senior officials and former employees of the Division: Supply Chain Management of the SAPS;
- 8.1.2 The National Commissioner of the SAPS;
- 8.1.3 The Chief Financial Officer of the SAPS;
- 8.1.4. Two DPW officials involved in the procurement process of the Sanlam Middestad building lease;
- 8.1.5 The Special Advisor to the Minister of Public Works, accompanied by the Chief Director Legal Services;
- 8.1.6 The former owner of the Sanlam Middestad building and his legal representative; and
- 8.1.7 Mr R Shabangu, representing RPF, the current owner of the Sanlam Middestad building and a signatory to the alleged lease agreements.

### **Analysis of documentation and/or information**

The following were analysed and perused:

#### **8.2.1 Documentation**

- 8.2.1.1 Voluminous documentation obtained from the SAPS and the DPW, including:
- Correspondence between the Public Protector, the National Commissioner of the SAPS and the DG of the DPW

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- Correspondence between the DPW and the SAPS
  - Internal SAPS information notes and memoranda
  - SAPS resource allocation guides
  - SAPS needs analyses
  - Lease agreements
  - Correspondence between DPW and external parties

8.2.1.2 A report on an internal investigation conducted for the DPW by an external service provider, dated 13 September 2010;

8.2.1.3 An independent legal opinion obtained by the DPW from Adv I Jamie, SC and Adv R Paschke, dated 1 September 2010;

8.2.1.4 A letter from the Office of the State Attorney addressed to the DPW, in connection with the validity of the lease agreement dated 11 November 2010; and

8.1.2.4 An independent legal opinion obtained by the DPW, through the Office of the State Attorney, from Adv P Ellis SC, dated 22 November 2010.

### **Correspondence**

8.3.1 Correspondence between the Public Protector and:

- The National Commissioner of the SAPS
- The Divisional Commissioner: Supply Chain Management of the SAPS
- The Chief Financial Officer of the SAPS
- The Director-General of the DPW
- The Minister of Public Works
- The former owner of the Sanlam Middestad building
- Mr R Shabangu of RPF, the current owner of the Sanlam Middestad building
- Advocate P Hoffman SC and Mr P Groenewald MP, the complainants in this matter

### **Legislation and other prescripts**

8.4.1 The relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:

- The Constitution
- The Public Protector Act
- The Special Investigating Units and Special Tribunals Act, 1996
- The Public Finance Management Act, 1999
- The Treasury Regulations and instructions for departments, trading entities, constitutional institutions and public entities, issued in terms of the Public Finance Management, 1999.
- Government Immovable Asset Management Act, 2007
- The Prevention and Combating of Corrupt Activities Act, 2004
- The Preferential Procurement Policy Framework Act, 2000 and Regulations issued in terms of the section 5 thereof.

### **Responses to the preliminary report of the Public Protector, dated 25 October 2010**

8.5.1 Responses to the preliminary report of the Public Protector received from the National Commissioner of the SAPS and the Minister of Police were considered.

### **Responses to the draft report of the Public Protector, dated 15 December 2010**

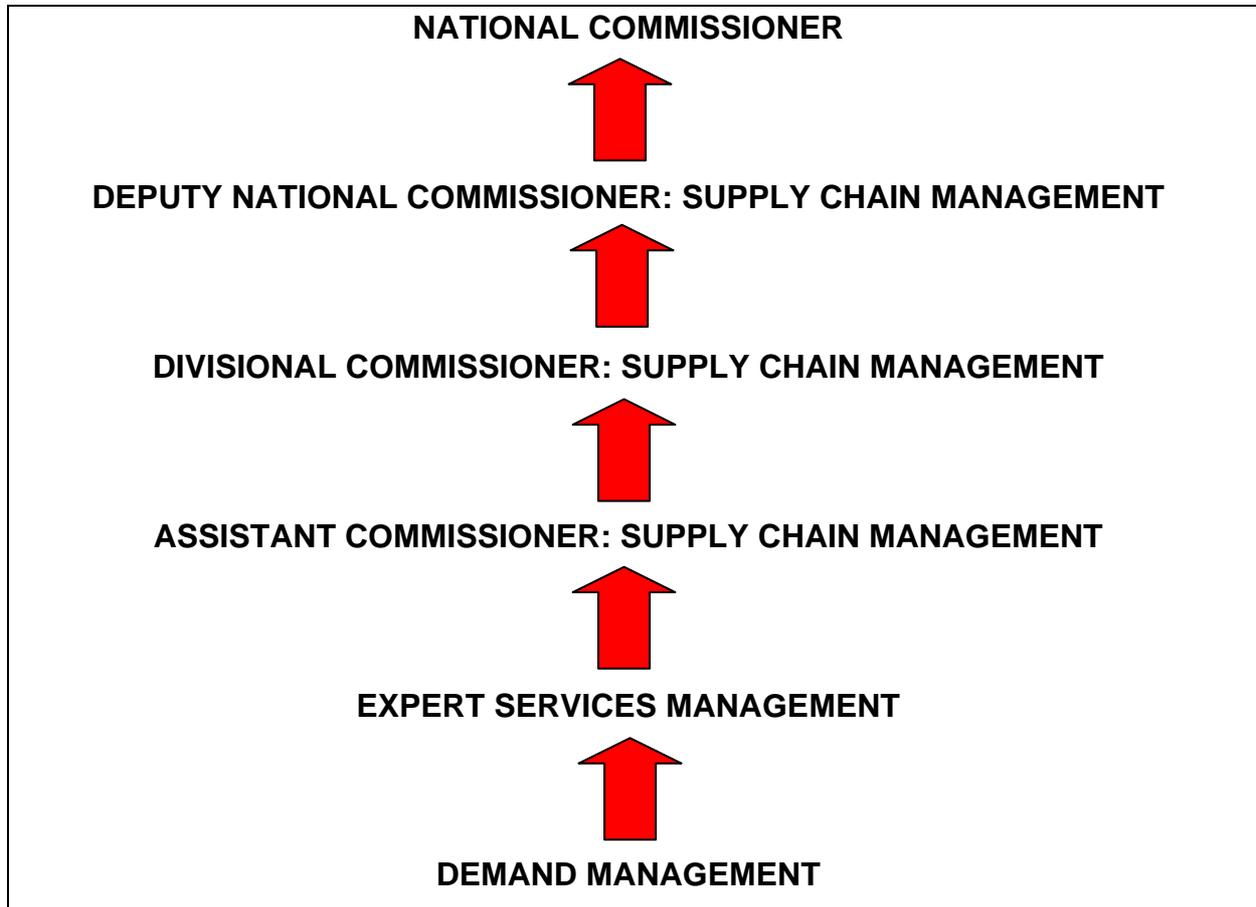
8.6.1 Responses to the draft report of the Public Protector received from the following persons were considered and evaluated:

- The National Commissioner of the SAPS, dated 23 January 2011;
- The Minister of Public Works, dated 4 January 2011;
- The Minister of Finance; dated 21 January 2011 and
- Adv P Hoffman SC, one of the complainants, dated 7 January 2011.

## SAPS CHAIN OF COMMAND APPLICABLE TO INVESTIGATION

At all material times during the course of the period under investigation the chain of command of the SAPS, as applicable, is reflected in the diagram below:

*Diagram: Chain of Command of the SAPS applicable to issues investigated*



## LEGISLATIVE FRAMEWORK

### Introduction

10.1.1 In evaluating the role of the SAPS and the DPW during the procurement of the Sanlam Middestad building lease, it is prudent to establish the legislative framework that governs the role of, and relationship between the two parties.

10.1.2 The SAPS and the DPW are national departments and as such fall within the dictates of the PFMA and the Regulations and Treasury Instructions issued by the National Treasury in terms of section 76 of the PFMA (Treasury Regulations).

- 10.1.3 The procurement of leased accommodation on behalf of the SAPS falls within the purview of the DPW. In terms of the Schedule to the Appropriation Act, 2010 the aim of the DPW is to **“provide and manage the accommodation, housing, land and infrastructure needs of National Departments ....”**.(emphasis added)
- 10.1.4 The devolution of custodial functions from the DPW to the SAPS with regard to property management started in December 2005, but has not yet been concluded. A Memorandum of Understanding was signed by the SAPS and the DPW on 31 January 2006, and covered 4 areas including: maintenance and property rates, payment of municipal services, property leases, and capital works. On 3 December 2008, the National Treasury approved *“SAPS’ State of Readiness on the Devolution of Custodial Responsibilities from NDPW to SAPS”*. Currently, neither property leases, nor the payment of municipal services have been devolved and therefore remains the responsibility of DPW.
- 10.1.5 In keeping with its mandate the DPW has put into place business processes which manage the procurement of goods and services from the stage that a need is identified and communicated to it.

## **General Procurement Legislation**

- 10.2.1 Section 217 of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when an organ of state contracts for goods and services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.
- 10.2.2 The key instrument regulating procurement is the PFMA the purpose of which is set out in the preamble to the Act, which reads as follows:
- “To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.”*
- 10.2.3 In terms of section 76(4)(c) of the PFMA, the National Treasury may make regulations or issue instructions applicable to all institutions to which the PFMA applies concerning, *inter alia*, the determination of a framework for an appropriate procurement

and provisioning system which is in keeping with the dictates of Section 217(1) of the Constitution (supply chain management {SCM} framework).

10.2.4 The SCM framework is set out in Regulation 16A of the Treasury Regulations. The Treasury Regulations are applicable to all departments in national and provincial governments (see Regulation 16A2.1 (a)).

10.2.5 The Treasury Regulations set out the areas that form the SCM framework and this is to be found in Regulation 16A.3.2 which reads as follows:

*“16A 3.2 A supply chain management system referred to in paragraph 16A.3.1 must –*

*(a) be fair, equitable, transparent, competitive and cost effective;*

*(b) be consistent with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000);*

*(c) be consistent with the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*

*(d) provide for at least the following: –*

*(i) demand management;*

*(ii) acquisition management;*

*(iii) logistics management;*

*(iv) disposal management;*

*(v) risk management; and*

*(vi) regular assessment of supply chain performance.”*

10.2.6 The procurement of leased accommodation is unique in the sense that the procurement functions are spread over many departments. The legislative mandate of the DPW makes it the responsibility of the department to procure leased accommodation (acquisition management component), whilst the demand management component (establishing the need) is the prerogative of the end user, in this case the SAPS.

10.2.7 Regulation 11(a) of the Regulations issued in terms of the Preferential Procurement Policy Framework Act, 2000, provides that an organ of state must, prior to making an invitation for tenders properly plan for, and, as far as possible, accurately estimate the costs of the provision of services or goods for which an invitation for tenders is to be made.

### 10.3 Supply Chain Management

10.3.1 In February 2004, the National Treasury, issued a document entitled “*Supply Chain Management: A Guide for Accounting Officers/Authorities*” (**SCM Guide**). The purpose of the SCM Guide was to give guidance to Accounting Officers in fulfilling their roles within the SCM framework

10.3.2 Paragraph 3 of the SCM Guide sets out guidelines in regard to demand management and reads as follows:

*“Demand management*

#### *3.1 Introduction*

*3.1.1 Demand management is the first phase of SCM. The objective is to ensure that the resources required to fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs. As part of this element of SCM, a total needs assessment should be undertaken. This analysis should be included as part of the strategic planning process of the institution and hence will incorporate the future needs.*

*3.1.2 It is vital for managers to understand and utilise sound techniques to assist them in their planning, implementation and control activities. As part of the strategic plan of the institution, resources required for the fulfilment of its obligations should be clearly analysed. This includes a detailed analysis of the goods, works and services required, such as how much can be accomplished, how quickly and with what materials, equipment, etc.”*

10.3.3 This document is applicable to all accounting officers and contains the following principles:

- a) The identification of a need is the initiating trigger to a procurement process.

- b) The fulfilment of the need should form part of the strategic objectives of the department and a needs analysis should therefore be part of the strategic planning process.
- c) Sound techniques should be utilised in conducting the needs analysis.
- d) The need should be linked to the budget.

10.3.4 Paragraph 1.3.2.2 of the SCM Guide states that Demand Management is the beginning of the supply chain where:

- a needs assessment is done to ensure that goods or services are acquired in order to deliver the agreed service;
- specifications are precisely determined;
- requirements are linked to the budget; and
- the supplying industry has been analysed.

10.3.5 Planning therefore plays an integral part in supply chain management. The above principles are legislatively enshrined in the Government Immovable Asset Management Act, 2007 (GIAMA). The purpose of this Act is to provide a framework for the management of immovable assets held by a national or provincial department and to provide minimum standards in respect of immovable asset management. In terms of GIAMA immovable assets **acquired in terms of a lease** are deemed to be subject to the dictates of this Act. Section 5 of the Act sets out the principles of asset management and reads as follows:

*“5. Principles of immovable asset management.—(1) The following are principles of immovable asset management:*

*(a) **an immovable asset must be used efficiently** and becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level;*

*(b) to minimise the demand for immovable assets, alternative service delivery methods that do not require immovable assets must be identified and considered;*

*(c) in relation to an acquisition, it must be considered whether—*

- (i) a non-immovable asset solution is viable;
- (ii) an immovable asset currently used by the state is adequate to meet a change in its service delivery objectives; and
- (iii) **the cost of the immovable asset as well as operational and maintenance cost throughout its life cycle justifies its acquisition in relation to the cost of the service;**
- (d) immovable assets that are currently used must be kept operational to function in a manner that supports efficient service delivery;
- (e) **when an immovable asset is acquired or disposed of best value for money must be realised;. . .”** (emphasis added)

10.3.6 The effect of GIAMA is, *inter alia*, to enforce optimal use of immovable property. GIAMA, through section 21, creates a criminal offence should an accounting officer wilfully or negligently contravene or fail to comply with any provision of this act.

10.3.7 In terms of GIAMA, the DPW must annually prepare a custodian asset management plan (C-AMP). A comprehensive C-AMP will include an acquisition plan, refurbishment plan, maintenance & repairs, and disposal plan. In the interim, the needs for built environment, professional services, construction, building and contracting services, land, buildings and facilities will have to be estimated based on the annual budget and the business plan of the units involved in the acquisition of construction related services.

## 10.4 Budget

10.4.1 The DPW business processes require a client department to confirm availability of funding prior to the procurement process being embarked upon. Although the DPW is involved in the actual acquisition of the property, the costs of leasing are still borne by the client department.

10.4.2 The DPW, upon receiving a request to satisfy a need, embarks upon a process of estimating the costs to the client department over the period of the lease based on market analysis. This document allows the client department to estimate the costs it would possibly incur and allows the department to assess its budget and to plan for future budgets.

10.4.3 As stated earlier, the National Treasury guidelines expect a need to be linked to a budget. Each department is expected to have a strategic plan in place that identifies the aims of the department and provides a budget towards achieving the said aims.

10.4.4 Regulation 5.1 of the Treasury Regulations makes it mandatory for the accounting officer of an institution to prepare a strategic plan for the forthcoming Medium Term Expenditure Framework (MTEF) cycle.

10.4.5 Regulation 5.2.2 requires that the strategic plan include the following:

*“5.2.2 The strategic plan must –*

- (a) cover a period of three years and be consistent with the institution’s published medium term expenditure estimates;*
- (b) include specific Constitutional and other legislative, functional and policy mandates that indicate the output deliverables for which the institution is responsible;*
- (c) include policy developments and legislative changes that influence programme spending plans over the three-year period;*
- (d) include the measurable objectives, expected outcomes, programme outputs, indicators (measures) and targets of the institution’s programmes ;*
- (e) include details of proposed acquisitions of fixed or movable capital assets, planned capital investments and rehabilitation and maintenance of physical assets;***
- (f) include details of proposed acquisitions of financial assets or capital transfers and plans for the management of financial assets and liabilities;*
- (g) include multi-year projections of income and projected receipts from the sale of assets;*
- (h) include details of the Service Delivery Improvement Programme;*
- (i) include details of proposed information technology acquisition or expansion in reference to an information technology plan; and*

(j) for departments, include the requirements of Chapter 1, Part III B of the Public Service Regulations, 2001.” (emphasis added)

10.4.6 The PFMA, together with the Treasury Regulations and guidelines, ensure that proper planning is in place when setting out a budget and as a consequence, needs are prioritised and budgeted for. The ideal scenario being that a need is identified, analysed, and included in the strategic planning and therefore budgeted for.

10.4.7 The Medium Term Expenditure Frame Work (MTEF) issued by the National Treasury in 2007, which covers the period under review in this Report, emphasises this point and the following is contained in the document –

*“The link between strategic planning, budgeting and spending plans is important in compiling a credible budget, as inadequate planning could lead to budgets which do not give effect to strategic priorities”.*

10.4.8 Section 38(2) of the PFMA reinforces this principle of proper planning. This section reads as follows:

*“(2) An accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not been appropriated.”*

10.4.9 Expenditure must be in accordance with the vote of the department and the main divisions within the vote. This requirement is encapsulated in section 39 of the PFMA. Read with section 38(2), the principle of proper planning is once again highlighted.

10.4.10 The PFMA, however, recognises situations where a need is not linked to a budget. In these instances four options are available to a department to fund such needs.

10.4.11 The first option deals with a situation where no funding has been appropriated, but due to an emergency, funds are required for the purposes of procurement. Section 16 of the PFMA allows the Minister of Finance to authorise the use of funds from the National Revenue Fund to defray expenditure provided that:

- a) the expenditure is of an exceptional nature;
- b) expenditure is not currently provided for; and

- c) the expenditure cannot be postponed to a future appropriation cycle without serious prejudice to the public interest.

10.4.12 The second option is in the form of section 43 of the PFMA which allows an accounting officer to utilise a saving in an amount appropriated under a main division within a vote towards the defrayment of excess expenditure under another main division within the same vote. This virement of funds is, however, limited to 8% of the amount appropriated under that main division and a report concerning the utilisation of the savings must be presented to the Executive Authority (Minister) and the relevant treasury.

10.4.13 The third option open to departments is to request further funds from the National Treasury. This is, however, limited in its application and would only be applicable to situations where:

- a) a department inherited new functions; or
- b) where due to policy decisions new needs arise.

10.4.14 The fourth option is to re-prioritise expenditure within a main division of a vote to accommodate the need.

## 10.5 Acquisition process

10.5.1 According to the SCM Policy of the DPW the purpose of acquisition management is to ensure that acquisition delegations are in place in the organisation, the market is assessed and a sourcing (procurement) strategy is determined, bid documents are compiled, bids are solicited, responses are received, responses are evaluated, and assessed and awarded by the bid adjudication committees.

10.5.2 For the purposes of this policy the process has been divided into 5 steps:

- Initiation;
- Preparation of bid documents;
- Solicitation;
- Evaluation;
- Assess and award by the bid adjudication committees.

10.5.3 The policy requires that:

*“the department must comply with the principles of fair, equitable, transparent, competitive and cost effective processes throughout acquisitions.”*

10.5.4 In implementing the policy, the DPW must:

- a. Ensure that bid documentation and the general conditions of a contract are in accordance with –
  - i) The instructions of the National Treasury; or
  - ii) The prescripts of the CIDB, in the case of a bid relating to the construction industry
- b. Determine an acquisition strategy for quotes (where applicable) and for bids, which promotes competition
- c. Determine scoring models and the ratios to be used for the combination of price and functionality which will be determined and approved by the Bid Adjudication Committee process, and must be communicated to suppliers in all the advertisement and bid documents
- d. Advertise bids in at least the Government Tender Bulletin for at least 30 days before closure, except in urgent cases where bids may be advertised for a shorter period on approval of the Bid Adjudication Committee

10.5.5 All bids must be evaluated by a Bid Evaluation Committee prior to submission to the Bid Adjudication Committee for approval of bids. A Bid Evaluation Committee must consist of at least four people, one of which must be an SCM specialist. Bid Adjudication Committees are established in terms of Regulation 16A to the PFMA to provide a control function to assess and award bids. The responsibility of the Bid Adjudication Committee is to ensure that the process of soliciting and evaluating bids is fair, equitable, transparent, competitive and cost effective.

10.5.6 The SCM Policy takes its guidance on empowerment in property related acquisitions from the document: *“Property Management Strategy on Black Economic Empowerment (BEE), Job Creation and Poverty Alleviation”*. The document places emphasis on the following empowerment aspects related to property acquisitions:

### 10.5.6.1 Property leases

The DPW will promote empowerment by offering long term leases to companies that are contributing the most to empowerment. The thresholds to determine lease periods per empowerment contribution are articulated in this document.

### 10.5.6.2 Lease to specification

The DPW will foster empowerment by entering into long-term leases with Historically Disadvantaged Individuals (HDI) landlords to manage and or construct buildings that government will lease from them, with an option for the DPW to own those properties upon expiry of those leases. Such leases will be governed by Regulation 16 of the PFMA Regulations on Public Private Partnerships.

### 10.5.6.3 Tenant installation

When government leases new properties, or renew the leases of existing properties, there is often a need to refurbish such properties. The DPW will promote the objectives of the Extended Public Works Programme and National Youth Service by specifying participation goals based on the goals of these two programmes.

## 10.6 Urgency

10.6.1 The PFMA and Treasury Regulations require that the default position in regard to procurement is that a competitive bid procedure be embarked upon.

10.6.2 The legislation, however, recognises that in certain cases it is impractical to invite competitive bids and as such it is permissible to procure goods or services by other means, provided that reasons for the deviation are recorded and approved by the accounting officer (Regulation 16A6.4).

10.6.3 The National Treasury issued Practice Note 8 of 2007/08 wherein, *inter alia*, urgent, emergency or sole supplier cases were further regulated. Paragraph 3.4.3 thereof provides as follows:

*“Should it be impractical to invite competitive bids for specific procurement ,e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his/her delegate. Accounting*

*officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.”*

10.6.4 The SCM Guide at paragraph 4.7.5.1, notes that in urgent and emergency cases, an institution may dispense with the competitive bidding process but must act in a manner that is in the best interest of the State.

10.6.5 The SCM Guide defines an “emergency case” as -

***“a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery.”*** (emphasis added)

10.6.6 An “urgent case” is defined as *“a case where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical.”* This definition is, however, subject to the qualification that ***“A lack of proper planning should not be constituted as an urgent case.”*** (emphasis added)

10.6.7 The following principles can be gleaned from this definition of urgency:

- a) The early delivery is the key requirement which would decide the success or failure of the project.
- b) The time period available for the acquisition makes it impractical or impossible to pursue a competitive bid process.
- c) The urgency was not foreseeable or the result of dilatory conduct.

10.6.8 For a situation to be classified as urgent all three requirements must be met.

## **10.7 The responsibilities of accounting officers in respect of SCM**

10.7.1 Section 38(1)(a)(iii) of the PFMA prescribes that the accounting officer for a department must ensure and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective.

10.7.2 In terms of section 38(1)(c)(ii) of the PFMA, an accounting officer must take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure. It is expected of the accounting officer to take effective and appropriate disciplinary steps against any official in the service of the department who makes or permits an unauthorised, irregular and fruitless and wasteful expenditure. Irregular, unauthorised or fruitless and wasteful expenditure is regarded as an act of financial misconduct in terms of section 38(1)(h)(iii) of the PFMA.

10.7.3 An accounting officer is, in terms of section 86(1) of the PFMA guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, if he or she wilfully or in a grossly negligent way fails to comply with a provision of, *inter alia*, section 38, referred to above.

## **10.8 The powers of the National Treasury**

10.8.1 Section 6(2) of the PFMA provides that the National Treasury must intervene by taking appropriate steps to address the serious material breach of the Act by a department and may do anything further that is necessary to fulfil its responsibilities effectively.

## **10.9 Schematic Illustration of the SCM process as it pertains to leases and relevant areas of responsibility**

10.9.1 A schematic illustration is provided below as a summary of the SCM process as it pertains to the procurement of leased accommodation. This schematic further highlights the areas of responsibility relating to the DPW and the SAPS as the client department in the matter investigated.

**Schematic: Procurement Steps and areas of responsibility in respect of leased accommodation**

	PROCUREMENT STEPS	RESPONSIBLE DEPARTMENT
Preparation & Demand Management	<b>INCEPTION / NEEDS ANALYSIS</b> <ol style="list-style-type: none"> <li>1. Identify the need for accommodation</li> <li>2. Compile needs assessment based on actual requirements</li> <li>3. Determine nature and extent of the accommodation required</li> <li>4. Ensure that all current departmental accommodations is adequately utilised in terms of GIAMA</li> </ol>	<b>SAPS</b> Relevant SCM division within SAPS
	<b>FINANCIAL PLANNING</b> <ol style="list-style-type: none"> <li>1. Ensure need / requirements are linked to budget plans</li> <li>2. Determine if need is in line with the strategic Objectives of the department</li> <li>3. Confirm availability of funding</li> <li>4. Ensure funding allocation complies with relevant provisions of the PFMA</li> <li>5. Submit needs analysis and funding confirmation to DPW in order to initiate the procurement process</li> </ol>	<b>SAPS</b> Relevant SCM and Finance divisions within SAPS
Acquisition management	<b>PROCUREMENT PROCESS</b> <ol style="list-style-type: none"> <li>1. Fully assess client's need, including nature and extent of accommodation required</li> <li>2. Determine urgency and other factors based on client Department's submissions</li> <li>3. Assess the relevant supply industry and conduct market research</li> </ol>	<b>DPW</b> Key Account Management division (KAM)
	<b>Procurement Strategy</b> <ol style="list-style-type: none"> <li>1. Obtain approval of suitable procurement strategy:                             <ol style="list-style-type: none"> <li>1.1 Bid process – open tender</li> <li>1.2 Negotiated process – single service provider</li> </ol> </li> <li>2. Issue procurement instruction (PI) and initiate procurement Process</li> </ol>	Special National Bid Adjudication Committee (SNBAC) Key Account Management division (KAM)
Evaluation	<b>EVALUATION OF BIDS</b> <ol style="list-style-type: none"> <li>1. Evaluation of Bids                             <ul style="list-style-type: none"> <li>• Method - Price and Preference</li> <li>• Method - Price, Functionality and Preference</li> </ul> </li> <li>2. Recommend preferred bid or single service provider</li> </ol>	<b>DPW</b> Bid Evaluation Committee (BEC)
Award	<b>AWARD AND CONTRACT MANAGEMENT</b> <ol style="list-style-type: none"> <li>1. Adjudication and/ or award</li> <li>2. Draft and sign contract with successful bidder in terms of the exact specifications of the bid awarded</li> <li>3. Monitor and evaluate performance in respect of the terms and conditions of the contract</li> </ol>	<b>DPW</b> SNBAC (All leases with net value above R5m must be approved by the SNBAC and not the DG (DPW SCM circular no.10 of 2010) DPW Project Manager

## **ANALYSIS OF INFORMATION OBTAINED DURING THE INVESTIGATION**

The following is an analysis of reliable evidence and information, as supported by the relevant official documents, obtained from the SAPS and the DPW.

### **Public Private Partnership Project (SAPS/Treasury) - 2005**

- 11.1.1 During 2005 the need to accommodate all the SAPS divisions in Pretoria at a common venue was identified. This approach was in accordance with a Cabinet decision to house all national departments within the Pretoria Central Business District (CBD). Furthermore, the SAPS had outgrown Wachthuis (the existing SAPS Head Office) and alternative accommodation had to be considered.
- 11.1.2 Pursuant to this, a Private Public Partnership (PPP) was registered with the National Treasury to investigate the feasibility of a common SAPS venue within the Pretoria CBD. In terms of the PPP, the National Treasury would have contributed towards the funding of the project.
- 11.1.3 The current National Commissioner has to date not approved the implementation of the project as he was of the opinion that money would be better spent on building more police stations and the PPP was therefore deregistered.

### **Renewal of Wachthuis Lease – 28 July 2009**

- 11.2.1 When the current National Commissioner took office on 1 August 2009, the SAPS was occupying the Wachthuis office complex as its Head Office.
- 11.2.2 On 28 July 2009, three days before the National Commissioner took office, the lease for Wachthuis was extended for a further 9 years and 11 months at a cost of R609 million, subject to a number of refurbishments and upgrades. The renewal of the Wachthuis lease was facilitated by the DPW, which in terms of their Broad Based Black Economic Empowerment (BBBEE) strategy favours entering into longer term leases. Therefore, although the SAPS only requested a renewal of the lease for a five

year period, the DPW nevertheless extended the lease for nine years, eleven months in line with their BBBEE strategy.

11.2.3 Despite the refurbishments and upgrades referred to above, the National Commissioner, in a letter addressed to the Public Protector, dated 5 August 2010, emphasised that the SAPS, due to its expansion over the last few years, had identified a need for additional office accommodation for the office of the National Commissioner, as well as other units identified for restructuring at the SAPS. Wachthuis did not cater for this expansion. According to the National Commissioner, Wachthuis made provision for approximately 3000 personnel whereas it currently accommodates over 6000, thereby implying that the building is 100% overcrowded. However, during an interview conducted with the National Commissioner on 7 December 2010, he indicated that Wachthuis is approximately only 40% overcrowded.

### **Appointment of the National Commissioner on 1 August 2009 and a directive issued on 30 September 2009**

11.3.1 The National Commissioner took office with effect from 1 August 2009. On 30 September 2009, he issued a directive in terms of which all procurement of goods and services by the SAPS in excess of R500 000, had to be approved by him. This directive effectively withdrew all existing delegations, as the National Commissioner was of the opinion that he, as the accounting officer of the SAPS, needed to address the persistent problems experienced within the SAPS supply chain management. As of 30 September 2009, the final approval for the procurement of all goods and services in excess of R 500 000 by the SAPS was brought under the direct authority of the National Commissioner.

### **Sanlam Middestad Building**

11.4.1 The Sanlam Middestad building is situated at 252 Andries Street, Pretoria – diagonally across the street from Wachthuis.

11.4.2 According to the former owners, the building consists of 17 floors, totalling approximately 36 000 m<sup>2</sup> of gross lettable area, which includes:

- Two retail floors of 13 550m<sup>2</sup>
- Office floor space of 21 933m<sup>2</sup>
- 232 basement parking bays.

## **Interest in acquiring the Sanlam Middestad building – late March 2010**

- 11.5.1 Several approaches to acquire the building were received by the former owners in the past three years. In October 2009, a prospective purchaser was referred to the SAPS by the DPW after enquiring whether any government department was interested in leasing the building.
- 11.5.2 The SAPS confirmed to the prospective purchaser that it (the SAPS) indeed needed such a building, and in particular, that it required the equivalent of two floors of the Sanlam Middestad building, before the commencement of the 2010 FIFA World Cup (FWC).
- 11.5.3 In view of the aforesaid, the prospective purchaser submitted a formal proposal to the SAPS to lease the entire Sanlam Middestad building at R85/m<sup>2</sup>, including operational costs. However, the SAPS declined the proposal resulting in no further dealings between the parties.
- 11.5.4 In January 2010, Mr Roux Shabangu (Shabangu), representing RPF, offered to purchase the building from the owners.
- 11.5.5 On 26 March 2010, senior officials of the SAPS and Shabangu attended a site meeting at the Sanlam Middestad building, which related to the relocation of a number of the SAPS components to the building.

## **Instruction to the SAPS Facilities Management Division to compile a needs analysis – 30 March 2010**

- 11.6.1 On 30 March 2010 the SAPS Facilities Management Division were instructed by the Deputy National Commissioner, Lt Gen Hlela to compile a needs analysis for the relocation of the components identified. Lt Gen H Hlela, further instructed the Divisional Commissioner and Assistant Commissioner: Supply Chain Management to obtain two floors immediately for the Communication Section. He claimed that the National Commissioner wanted the Communication Section to be relocated before the commencement of the FWC.

11.6.2 In addition to the above, the Deputy National Commissioner arranged for RPF, represented by Shabangu, to give a presentation to members of the SAPS Supply Chain Management and Facilities Management Divisions on 31 March 2010.

11.6.3 According to the Deputy National Commissioner, the purpose of the presentation was to appraise the SAPS members present of what the National Commissioner envisaged and what RPF had to offer, as all members were not present at the first site meeting on 26 March 2010.

11.6.4 During the presentation Shabangu advised as follows insofar as available floor space and occupation were concerned:

- One floor would be available on 1 July 2010
- 80% of the remaining floors would be available in August 2010
- The 17<sup>th</sup> and 18<sup>th</sup> floors would be available in November 2010

11.6.5 Possible renovations to the building were also discussed. After the presentation the Deputy National Commissioner instructed the SAPS members present to take the process forward and advise him of progress.

11.6.6 There was no indication that officials of the DPW attended the presentations referred to above.

11.6.7 When interviewed during the course of the investigation, the Deputy National Commissioner explained that the process after the presentation was for the Demand Management and Facilities Management divisions to complete a needs analysis. This would entail approaching the components to be relocated in order to do a head count and to establish the number of personnel, equipment etc to be moved. The needs analysis would then indicate the total floor space required, which had to be communicated to the DPW to initiate the procurement process.

### **The first needs analysis, dated 6 April 2010**

11.7.1 It was established that a SAPS needs analysis is compiled in accordance with a Resource Allocation Guide (RAG). The RAG recommends a floor space allocation to rank and seniority of the members of the SAPS to be accommodated. The total floor space required by all personnel to be accommodated represents the need that is

submitted to the DPW for consideration. The first SAPS needs analysis was compiled on 6 April 2010 and certified on 10 April 2010.

11.7.2 The components to be moved and the corresponding floor space required are reflected on the needs analysis as follows:

Ministry	1 908.72m <sup>2</sup>
National Commissioner	1 746.36m <sup>2</sup>
Communications	5 126.22m <sup>2</sup>
Efficiency Services	2 607.66m <sup>2</sup>
Internal Audit	2 275.02m <sup>2</sup>
Financial and Admin	144.54m <sup>2</sup>
<b>Total</b>	<b><u>13 808.52m<sup>2</sup></u></b>

11.7.3 On 7 April 2010 the Divisional Commissioner: Supply Chain Management addressed an information note (internal memorandum) to the National Commissioner, through the office of the Deputy National Commissioner, providing him with the requested needs analysis. The Divisional Commissioner further requested the Deputy National Commissioner to confirm if the needs analysis represented all personnel that had to be relocated.

11.7.4 The information note also emphasised that the relocation referred to above had not been budgeted for, and thus no funds were available for it in the lease budget. Confirmation was therefore sought that funding would be made available.

11.7.5 No response to the above information note could be located.

### **“Purchase” of the Sanlam Middestad building by RPF – 23 April 2010**

11.8.1 On 23 April 2010 RPF entered into an agreement with the owners in terms of which RPF would become the owner of the building. The agreement was subject to RPF obtaining the necessary finance. This agreement subsequently lapsed due to RPF failing to deliver bank guarantees within the prescribed period.

11.8.2 RPF again approached the owners on the basis that it had raised finance and a second agreement was concluded on 11 June 2010. Nedbank, however, offered RPF

finance on more competitive terms subject to the terms of the agreement being structured differently, which was eventually concluded on 6 July 2010. (It was subsequently established that ownership of the building was only transferred to RPF during January 2011)

### **Letter from Roux Property Development Africa to the SAPS (for attention, Deputy National Commissioner) dated 22 April 2010**

11.9.1 A meeting was held on 22 April 2010 between Shabangu and the SAPS, during which Shabangu indicated that five floors for the Communications Services were available.

11.9.2 A letter, dated 22 April 2010, from Roux Property Development Africa<sup>1</sup> addressed to the SAPS, for the attention of the Deputy National Commissioner contains the following information:

- Confirmation of the meeting held on 22 April 2010.
- There is an urgent need to accommodate the Communication Services of the SAPS before the FWC. The estimated space requirement for this division is approximately 5 600m<sup>2</sup>.
- There is accommodation in the building and that it will be made **immediately available subject to the following conditions:**
  - RPF receives immediate written confirmation of commitment from the SAPS **to lease the entire building** comprising approximately 21 000m<sup>2</sup> from August 2010 (taking into account that 5 600m<sup>2</sup> for the Communication Services will already be occupied by then).
  - That the reason for this “clause” is that the SAPS does not share office space with other tenants due to *“inherent security risks, especially for senior managers and the Ministry.”*
  - The internal fittings of the building would be custom-made to suit the needs of the SAPS.

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<sup>1</sup> RPF is a subsidiary company of Roux Property Development Africa

- If need be, the consolidation of other divisions within the SAPS could be accommodated within the same building.
- The lease period was to be confirmed in writing for a period of 9 years and 11 months.
- The rental amount was to be confirmed in writing as R110/m<sup>2</sup>, excluding operational costs.
- The ground floor would be changed into a reception and waiting area and will form part of the gross lettable area (GLA).
- The access to the office space (excluding the retail area) would be controlled exclusively by the SAPS

11.9.3 In closing the letter stipulates the following:

***“Please note that our company has to give written notice to the existing tenants in the building. We would like to emphasise that the 5 600m<sup>2</sup> is immediately available subject to written confirmation from the SAPS on the above-mentioned matters.”*** (emphasis added)

11.9.4 The above letter was signed by Shabangu in his capacity as managing director.

11.9.5 The response letter from the SAPS was requested, but no indication of its existence could be found. (Shabangu claimed in his interview that he never received such letter)

### **The SAPS approach the DPW for the first time on 3 May 2010**

11.10.1 On 3 May 2010, the SAPS Divisional Commissioner: Supply Chain Management addressed a letter to the DG of the DPW, advising, *inter alia*, the following:

*“Please note that the National Commissioner of the S A Police Force has identified the Sanlam City Centre building on the corners of Andries and Schoeman Streets for the relocation of the following components:*

*Minister and personnel*

*Deputy Minister and personnel*

*National Commissioner and Deputy National Commissioners with personnel*

*Communication Services*

*Internal Audit*

### Efficiency Services

CFO.

*It is essential that Communication Services is relocated to the identified building prior to the commencement of the World Cup 2010 in order to enhance service delivery by the S A Police Force during the tournament and beyond."*

11.10.2 The above mentioned letter represented the first official approach of the SAPS to the DPW in respect of the procurement of office accommodation in the Sanlam Middestad building.

11.10.3 The DPW responded on 4 May 2010 to the above SAPS letter and further requested confirmation of funding from the SAPS in order to issue a procurement instruction to initiate the procurement process.

### Two needs analyses certified on 10 May 2010

11.11.1 Two sets of needs analyses were certified on 10 May 2010, one by the Divisional Commissioner: Supply Chain Management and the other by the Head: Demand Management. The difference between the two needs analyses are reflected in Table 1 below:

**Table 1: Differences in the two needs analysis certified on 10 May 2010**

No	Unit Accommodated	Needs Analysis: Div Com: SCM	Needs Analysis: Acting Head: Demand Management
1	Ministry of Police	1 908.72	2 126.52
2	National Commissioner	1 746.36	1 910.70
3	Communication Services	5 126.22	5 815.18
4	Efficiency Services	2 607.66	2 970.00
5	Internal Audit	2 275.02	2 653.20
6	Finance and Administration	144.54	158.40
7	Diplomatic Policing Unit	0.00	855.36
8	Serious Economic Offences Unit	0.00	3 431.14
9	Ops / War Room		1 100.00
	<b>Total</b>	<b>13 808.52m<sup>2</sup></b>	<b>21 020.50m<sup>2</sup></b>

11.11.2 The increase in the required floor space from 13 808.52m<sup>2</sup> to 21 020.50m<sup>2</sup> corresponds with the offer of 21 000m<sup>2</sup> made by Shabangu, as reflected in the above letter of 22 April 2010.

11.11.3 The Head: Demand Management of the SAPS indicated that she was not actively involved in the demand management phase of the procurement process. She only became aware of the SAPS's intention to lease a total of 21 000m<sup>2</sup> of the building, at an advanced stage of the process, when presented with the needs analysis on 10 May 2010, reflecting the same amount of required floor space.

11.11.4 The Head: Demand Management further indicated that in signing the needs analysis, she relied on information provided to her by senior members of her division and that she had not seen the letter of 22 April 2010 (referred to in paragraph 11.9.2 above), prior to it being presented to her in an interview conducted during the investigation.

### **The SAPS internal memorandum signed by the National Commissioner, on 10 May 2010**

11.12.1 This internal memo was prepared by the Divisional Commissioner: Supply Chain Management and forwarded to the National Commissioner.

11.12.2 The document is titled: *"SOUTH AFRICAN POLICE SERVICE HEAD OFFICE: PRETORIA: NEW LEASE ACCOMODATION: SANLAM MIDCITY CENTRE"*

11.12.3 The purpose of the document was *"to provide feedback on the proposal of requiring new lease accommodation for The Ministry and Top Management of the South African Police Service."*

11.12.4 According to the document, a meeting was held between the Deputy National Commissioner and Roux Property Development Africa on 1 April 2010 and a site inspection conducted on 9 April 2010. No reference is made to any representative of the DPW being present at the meeting or the site inspection.

11.12.5 It was further stated that:

- Alternative lease accommodation for the following components was being investigated:
  - Minister and Deputy Minister
  - National Commissioner and Deputy National Commissioners
  - Communication Services
  - Internal Audit

- Efficiency Services
- Chief Financial Officer (CFO)
- Serious Economic Crimes
- Operational Room
- The Sanlam Middestad building is situated on the corners of Andries and Schoeman Streets and consists of 17 floors, of which one floor is available immediately.
- Most floors would be available for tenant installations from the 1st of August 2010. The current tenants will be moving out of the building at the end of July 2010.
- Some tenants such as First National Bank on the 15th floor would need to be given notice before they could move out.
- The expected cost to lease the building of 21 000m<sup>2</sup> would amount to approximately R2 797 047.00 per month, including parking, but excluding operational and municipal costs. Municipal costs would be approximately R559 409.00 per month.
- *“Funds for the relocation of all of the above-mentioned components were not budgeted for and no funding are (sic) thus available on the current lease budget. Additional funding will have to be sourced for this purpose in order to facilitate the process further.”*(emphasis added)
- *“All lease contracts are administered by the Department of Public Works (DPW). The Department of Public Works will have to invite tenders due to the extent of the office accommodation required. A shortened tender process (six weeks for advertisement, evaluation and approval) could be followed once confirmation of funding for this purpose was received.”*(emphasis added)

11.12.6 The document reflects that the National Commissioner approved and signed the memorandum on the same day. It was further noted that the needs analysis (21 000m<sup>2</sup>) certified by the Head: Demand Management on 10 May 2010 was attached to this memorandum.

### **The SAPS confirm funding on 11 May 2010**

11.13.1 In a letter from the Deputy National Commissioner addressed to the DG of the DPW on 11 May 2010, it was confirmed that funding for the lease of the Sanlam Middestad building was approved. The letter further requested the DPW to “*kindly continue with the immediate procurement of two (2) floors at the Sanlam Midcity Centre for SAPS Communication Services during the FIFA World Cup as a matter of urgency, bearing in mind that data lines need to be installed in the said two floors.*”

### **SAPS / DPW Meeting of 14 May 2010**

11.14.1 At a meeting initiated by the SAPS, held on 14 May 2010, between the then Acting DG of the DPW, the Deputy National Commissioner and two Generals responsible for supply chain management, the Deputy National Commissioner hand delivered the letter referred to in paragraph 11.13 above.

11.14.2 During the meeting the contents of the letter were discussed and the SAPS motivated the need for a negotiated process to procure the lease on the basis of urgency pertaining to the forthcoming FWC.

11.14.3 The Acting DG of the DPW was satisfied that the procurement of the Sanlam Middestad building for the SAPS was sufficiently urgent so as to justify a negotiated procurement strategy as opposed to an open tender. It was on that basis that he made a handwritten notation at the foot of the letter of 11 May 2010, which reads:

*“This serves as acknowledgement of receipt of the needs assessment from SAPS which will be managed on a negotiated basis due to the urgency of the office space.”*

11.14.4 The above meeting culminated in the DPW issuing a procurement instruction to proceed with the procurement of the Sanlam Middestad building lease in terms of a negotiated process.

### **Acceptance of offer made by RPF on 4 June 2010**

11.15.1 The Special Bid Adjudication Committee (SNBAC) of the DPW finally approved the offer of RPF for the lease of the Sanlam Middestad building on 4 June 2010. A letter of acceptance was addressed to RPF on the same date.

11.15.2 The salient features of the letter of acceptance included the following:

- The total floor space approved was 21 000m<sup>2</sup> of office accommodation at R102.60 per m<sup>2</sup>, totalling R2 154 600.00 per month, VAT included
- 230 parking bays @ R627 per bay, totalling R144 210.00 per month, VAT included
- The monthly rental amount payable per month including VAT, was R2 777 610.00
- Approval of the lease agreement was subject to an annual escalation of 9.5% p.a. and a lease period of 9 years 11 months – commencing on 1 October 2010.

11.15.3 The acceptance was made subject to certain conditions, including that the property is registered in the name of RPF and that the conditions and terms embodied in the DPW's standard lease agreement would apply. The letter of acceptance further states that RPF would be provided with a copy of the standard lease agreement for their consideration and signature.

### **The opening of the FIFA World Cup on 11 June 2010**

11.16.1 On 11 June 2010 the opening match of the FWC was played. The tournament ended with the final match on 11 July 2010.

### **Appointment of the new DG of the DPW on 1 July 2010**

11.17.1 On 1 July 2010 a new DG of the DPW took office.

### **The presentation by RPF to the SAPS on 5 July 2010**

11.18.1 The National Commissioner held a meeting on 5 July 2010, attended by representatives of the SAPS Supply Chain Management and Facilities Management divisions, where a presentation on the Sanlam Middestad building was made by Shabangu on behalf of RPF.

11.18.2 There is no indication that representatives of the DPW were invited to and/or attended the meeting.

11.18.3 During the meeting, Shabangu made a presentation on all the remaining lettable floor space still available in the building to the SAPS, including retail space on the ground level of the building.

## The final needs analysis verified on 19 July 2010

11.19.1 A fourth needs analysis incorporating the additions as finalised during the meeting on 5 July 2010 was prepared and submitted to the National Commissioner for approval on 13 July 2010. In terms of this needs analysis the total floor space required amounted to 25 301.54m<sup>2</sup>. The National Commissioner certified the needs analysis on 19 July 2010. Table 2 below reflects the increase in the floor space required by the SAPS, as contained in the needs analyses over the period 6 April 2010 to 19 July 2010.

**Table 2: Increase in needs analysis from 6 April 2010 to 19 July 2010**

No	Unit Accommodated	Needs Analysis: 6 April 2010	Needs Analysis: 10 May 2010	Needs Analysis: 19 July 2010
1	Ministry of Police	1 908.72	2 126.52	2 166.12
2	National Commissioner	1 746.36	1 910.70	1 926.54
3	Communication Services	5 126.22	5 815.18	5 815.18
4	Efficiency Services	2 607.66	2 970.00	3 072.96
5	Internal Audit	2 275.02	2 653.20	2 653.20
6	Finance and Administration	144.54	158.40	158.40
7	Diplomatic Policing Unit	0.00	855.36	855.36
8	Serious Economic Offences Unit	0.00	3 431.14	0.00
9	Strategic Management	0.00	0.00	1 924.56
10	Corporate Services	0.00	0.00	3 072.96
11	Gym, spinning area & Cafeteria	0.00	0.00	2 556.26
12	Ops / War Room	0.00	1100.00	1 100.00
	<b>Total</b>	<b>13 808.52</b>	<b>21 020.50</b>	<b>25 301.54</b>

11.19.2 There is no evidence to indicate that the additional 4 281m<sup>2</sup> as reflected in the final needs analysis, dated 19 July 2010, was referred back to the DPW SNBAC for consideration and approval before the lease agreement referred to below was signed by the DPW on 20 July 2010.

## The first lease agreement signed on 13 and 20 July 2010 by the parties involved

11.20.1 According to the DPW Legislative Drafting and Contract Administration division, Shabangu of RPF prepared a departmental lease agreement, including the schedules thereto, in respect of the Sanlam Middestad building, which he signed and submitted

to the DPW on 13 July 2010, the same day on which the final needs analysis was submitted to the National Commissioner, who subsequently approved it on 19 July 2010. Schedule 1 to the lease agreement reflects the following:

- The total leased floor space amounted to 25 145m<sup>2</sup>. (*This appears to be consistent with the final needs analysis compiled by SAPS on 13 July 2010, which was, however, only submitted to DPW on 26 July 2010*)
- The number of parking bays are reflected as 215
- The commencement date was 1 November 2010 and the lease period is 9 years, 11 months
- The total monthly rental amount commenced at R3 287 988.00 per month.

11.20.2 It was noted that the lease agreement contained a number of handwritten amendments, which amendments were not initialled by all the signatories.

11.20.3 A special condition of the agreement was that ownership of the property is transferred to RPF within four months of the last party signing. (It was subsequently established that ownership of the building was only transferred to RPF in January 2011)

11.20.4 The content of the lease agreement differs materially from the acceptance of the offer of RPF, dated 4 June 2010, and no verification of the information contained in the agreement with the acceptance of the offer of RPF was conducted prior to the DPW signing the lease agreement on 20 July 2010.

### **RPF advised of discrepancies with the lease agreement on 22 July 2010**

11.21.1 On 22 July 2010, the Deputy Director: Legislative Drafting and Contract Administration of the DPW addressed a letter to RPF pertaining to the lease agreement advising the following:

- After the lease agreement was signed it was discovered that there were discrepancies between the lease and the acceptance of offer as per the Bid Committee approval, dated 4 June 2010.
- The approved square metres were 21 000m<sup>2</sup>, and the lease provided for 25 145m<sup>2</sup>. The approved parking bays in terms of the offer amounted to 230, whereas the lease agreement provided for 215 parking bays.

- There was no meeting of the minds of both parties, therefore there was no consensus as to the subject matter of the lease agreement.
- In order to address the above concerns it was suggested that the parties to the agreement meet and agree on all issues raised.
- RPF was further advised to submit a lease agreement that is in line with the acceptance.

### **Submission of the final SAPS needs analysis to DPW on 26 July 2010**

11.22.1 On 26 July 2010, the SAPS submitted the fourth needs analysis to the DPW indicating that the previous needs analysis had to be revised due to an “*increase in office requirements.*”

### **Subsequent lease agreement signed by RPF on 26 July 2010**

11.23.1 A subsequent lease agreement signed by Shabangu on behalf of RPF on 26 July 2010 was forwarded to the DPW. The contents of this document are essentially the same as the first lease agreement, however, handwritten alterations on the first lease agreement were incorporated into the new document. It should be noted that neither the floor space (25 145m<sup>2</sup>), parking bays (215) nor the commencement rental amount (R3 287 988.00) were in accordance with the letter of acceptance of 4 June 2010.

11.23.2 According to Shabangu, the second lease agreement was also signed by the DPW. However, the Public Protector has not been provided with a copy of the signed lease.

### **The letter addressed to Nedbank on 26 July 2010**

11.24.1 The DPW addressed a letter to Nedbank on 26 July 2010, in which the following is stated:

*“This letter serves to confirm that the Department of Public Works (the Department) has complied with all the internal processes in respect of the lease agreement, including, but not limited to the approval by the National Bid Special Adjudication Committee for the procurement of office in the Building. Furthermore, this procurement and the execution of the Lease Agreement on behalf of the Department complies with the Departmental BEE strategy, the Public Finance*

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*Management Act, No 1 of 1999, the Treasury Regulations thereto and the Supply Chain Management Policy.*

*It is further confirmed that Ms Sue Mosegomi, who signed the Lease Agreement on behalf of the Department in her capacity as Acting Regional Manager, had delegated authority to bind the Department as reflected in the document attached hereto as Appendix 1.”*

11.24.2 The above letter was signed by the Acting Regional Manager and the DG of the DPW.

### **Suspension of the procurement of the Sanlam Middestad building lease in early August 2010**

11.25.1 Following various media reports alleging irregularities in the procurement process, published from 1 August 2010, the (now suspended) DG of the DPW instituted an internal inquiry into the process followed.

11.25.2 The procurement of the lease was suspended following a request of the Public Protector conveyed to the DPW and the SAPS on 03 August 2010.<sup>2</sup>

11.25.3 The inquiry concluded in its final report, dated 13 September 2010, that there were instances of gross irregularities and maladministration within the procurement process followed by the DPW.

11.25.4 On the basis of the evidence and information obtained during the internal inquiry into the compliance of the procurement process followed by the DPW with the relevant supply chain management prescripts an independent legal opinion in regard to the matter was obtained. Extracts from the concluding paragraphs of the legal opinion of Adv I Jamie SC and Adv R Paschke, dated 1 September 2010, read as follows:

*“We are of the view that there are reasonable prospects of persuading a court that the lease agreement is invalid.*

*At this stage, we advise that there are two sound bases upon which to ask a court to declare that the lease agreement is invalid, namely:*

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<sup>2</sup> Refer to paragraph 5 above

*the various irregularities in the procurement process; and*

*the fact that the lease agreement is vague and was not finalised when it was signed.*

*In the circumstances we advise the Department to institute an urgent High Court application seeking ... judicial review and setting aside of its decision to enter into the lease agreement and for an order declaring that the lease agreement is invalid.”*

Copies of the report of the internal inquiry and the legal opinion were provided to the Public Protector during the investigation

11.25.5 The DG of the DPW informed the National Commissioner of the SAPS, on 11 and 19 October 2010, that there exists no valid or legally enforceable lease between the Department and RPF:

*“Please be advised that subsequent to the Department having concluded its investigation into the Sanlam Middestad lease with Roux Property Fund (Pty) Ltd, the Department is satisfied that there exists no valid or legally enforceable lease between the Department and the said Roux Property Fund. The Department has advised attorneys for the Roux Property Fund of the above position and has furthermore advised of the **Department’s intention to conduct an entirely new procurement process in due course in respect of the national headquarters of the South African Police Service.***

*In this regard, we would be pleased if your office could favour us with a revised needs assessment in respect of the premises to be sourced, together with the relevant SAPS funding certificates in order that **we may begin the procurement process without delay.**” (emphasis added)*

11.25.6 The DG confirmed to the Public Protector on 11 October 2010 that the DPW had accepted the findings and recommendations of the internal inquiry and the legal advice obtained in respect of the validity of the lease agreement.

### **The preliminary report of the Public Protector**

11.26.1 On 25 October 2010, the Public Protector issued a preliminary report on the investigation and informed the National Commissioner of her concurrence with the

decision of the DPW to commence with an entirely new procurement process, as referred to in paragraphs 5.5 and 5.6 above.

## **EVENTS SUBSEQUENT TO THE INTERNAL ENQUIRY OF THE DPW AND THE SUSPENSION ON THE LEASE**

### **Cabinet re-shuffle: Mr Geoff Doidge is replaced by Ms Gwen Mahlangu-Nkabinde on 31 October 2010**

12.1.1 On 31 October 2010, the Presidency announced a Cabinet re-shuffle, resulting in Mr Geoff Doidge being replaced by Ms Gwen Mahlangu-Nkabinde as the Minister of Public Works.

### **The DPW seeks legal opinion from the State Attorney on the validity of the Sanlam Middestad building lease**

12.2.1 Shortly after the appointment of the new Minister of Public Works, the Office of the State Attorney was approached in connection with the validity of the lease. The response of the Office of the State Attorney, dated 11 November reads as follows:

*“RE: LEASE IN RESPECT OF SANLAM MIDDESTAD CENTRE BUILDING, 252 ANDRIES STREET, PRETORIA*

*The meeting between officials of your establishment and Me Mosidi, Mr Chowe and myself refers.*

***Based on the information provided and the documents submitted, we are of the opinion that a binding, valid and enforceable lease had been concluded between the Department and Roux Property Fund (Pty) Ltd on 20 July 2010.***

*It is further confirmed that **you have requested that we in any event obtain the opinion of counsel** as soon as possible and we will provide you with the opinion as soon as possible.”* (emphasis added)

12.2.2 Instructions were given to the State Attorney by the Director: Legal Services and Litigation of the DPW to brief counsel on 12 November 2010.

### **Special Advisor to the Minister of the DPW meets with the Public Protector on 15 November 2010**

12.3.1 On 15 November 2010, the Special Advisor to the newly appointed Minister of Public Works met with the Public Protector, accompanied by the DPW Director: Legal Services and Litigation. During the meeting the Public Protector was informed that the DPW was in the process of seeking an opinion on the legality of the contract with RPF. The Public Protector was provided with, what the DPW indicated was a preliminary opinion, and informed that the State Attorney had been instructed to obtain a legal opinion from senior counsel. The Public Protector reiterated that she stood by her interim report and letters sent to the SAPS in which she indicated that her preliminary view was that the process was irregular and the lease invalid.

12.3.2 The DPW undertook to share the legal opinion as soon as it was obtained from senior counsel.

*(It should be noted that the legal opinion was only obtained by the Public Protector on 9 December 2010, after having to request it in writing from the Special Advisor.)*

### **Legal opinion of senior counsel submitted to the DPW on the validity of the lease agreement**

12.4.1 The legal opinion of Adv P Ellis SC, dated 22 November 2010, was obtained by the DPW. The concluding paragraph of this opinion reads as follows:

*“I therefore come to the conclusion that the contract concluded with Roux Property Developers CC (sic) is unlawful and therefore invalid and recommend to the Department that the letter addressed to Nedbank on 26 July 2010 be withdrawn with immediate effect in order to limit the possibility of a claim for damages against the Department.”*

### **Nedbank advised that the DPW intends continuing with the lease**

12.5.1 The DPW advised Nedbank on 22 November 2010 that it was continuing with the lease.

### **The Public Protector and Head of the SIU interview with the National Commissioner of the SAPS**

12.6.1 On 7 December 2010 the Public Protector and the Head of the SIU interviewed the National Commissioner of the SAPS. During the interview, the National Commissioner conceded the following:

- 12.6.1.1 The urgent need of the SAPS was to secure alternative accommodation for part of the Communication Services in time for the commencement of the FWC. The overall consolidation of the accommodation of the Communication Services was not directly linked to the FWC, but the event provided the SAPS with an opportunity to expedite the process.
- 12.6.1.2 Only the need to accommodate the section of the Communication Services relevant to the FWC was urgent and the remaining sections could be relocated thereafter.
- 12.6.1.3 In the normal course of events a needs analysis should be conducted first to determine the exact nature and extent of the SAPS's requirements.
- 12.6.1.4 Had the DPW gone out on tender, the entire process would have been compromised in that Shabangu, as a prospective bidder, would have been privy to crucial information, due to negotiations between him and the SAPS, prior to the tender being advertised. Shabangu would therefore have obtained a significant competitive advantage over other prospective bidders.
- 12.6.1.5 It appeared that the needs analysis of 10 May 2010 was tailored to suit the offer made by RPF on 22 April 2010.

### **Media Statement by the Minister of Public Works**

- 12.7.1 On 7 December 2010 (the same day that the National Commissioner of the SAPS was interviewed) *The Star* reported that the Minister of Public Works had decided to honour the lease agreement between the DPW and RPF. She reportedly stated that the agreement was signed by the DG of the DPW, Mr S Dongwana and that:

*"We looked at whether there was a contract or not and discovered there is one between the landlord (Shabangu) and the department. The agreement between the SAPS and Shabangu is different and separate. We discovered that there is a binding contract between the department and Shabangu that was signed by the DG. The department even wrote a letter to a bank confirming the same. We then took advice from State attorneys (sic) and realised that we had to honour this legal agreement or else we would be sued for the same amount and more in the courts."* (emphasis added)

### **Minister of Police indicates that the National Commissioner is vindicated**

12.8.1 On 7 December 2010 it was also reported in the media that the Minister of Police stated that the decision of the DPW to honour the lease agreement of the Sanlam Middestad building meant that the National Commissioner of the SAPS followed the correct procedures and that he was therefore “*vindicated*.”

### **The DG of the DPW is suspended**

12.9.1 The DG of the DPW was suspended by the Minister of Public Works (also) on 7 December 2010.

### **The Acting DG of the DPW confirms to the Public Protector that the DPW is proceeding with the suspended lease**

12.10.1 In a letter addressed to the Public Protector, dated 8 December 2010, the Acting DG of the DPW confirmed that the DPW was proceeding with the lease agreement between the DPW and RPF. The letter stated as follows:

*“INVESTIGATION OF THE LEASE OF THE SOUTH AFRICAN POLICE SERVICES OF THE SANLAM MIDDESTAD BUILDING*

*We refer to your letter dated 07 December 2010, addressed to Adv B. Khutsoane.*

*In response to your said letter, we advised that indeed an opinion from Adv Ellis SC was obtained by the State Attorney. In the normal course, and in practice the State Attorneys briefs Council (sic) on the instruction of our Legal Services Unit. Accordingly, a letter authorising the appointment of Adv Ellis SC was sent by our Legal Services Unit to the Office of the State Attorney.*

*We therefore enclose for your perusal, the following copies:*

- 1. A file containing the internal processes followed by the department, copies of which were submitted to the Office of the State Attorney,*
- 2. The Cliffe Dekker report,*
- 3. Opinion from Adv Ishmael Jamie SC*
- 4. Letter to the State Attorney authorising the appointment of Counsel,*
- 5. Brief opinion from the State Attorney*
- 6. Opinion from Adv Pat Ellis SC*

Currently, the department has proceeded to implement the lease agreement.

*We trust that the documents availed to you, will enable you to finalise your investigation and await the outcome thereof in due course.” (emphasis added)*

### **The Public Protector requests reasons for the decision of the DPW to continue with the implementation of the lease agreement**

12.11.1 On 9 December 2010, the Public Protector requested the Acting DG of the DPW for an explanation regarding the decision of the DPW to proceed with the implementation of the contested lease agreement, despite having been provided with legal advice to the contrary by two independent senior counsel, briefed at the request of the DPW. No response was received to this request of the Public Protector to date.

### **THE INTERNAL INQUIRY CONDUCTED BY THE DPW**

13.1 As indicated above, the DPW mandated an external service provider to conduct an investigation into the DPW processes followed to procure the lease of the Sanlam Middestad building. The report, which included findings of irregularities and maladministration, was presented on 13 September 2010 to the DG of the DPW.

13.2 The DG of the DPW confirmed to the Public Protector, on 11 October 2010 that the Department accepted the findings of the inquiry and that it was in the process of implementing the recommendations made. This confirmation of the DG has to date not been retracted by the DPW.

### **THE RESPONSES TO THE DRAFT REPORT OF THE PUBLIC PROTECTOR**

#### **Distribution of the draft report**

14.1.1 The draft report on the investigation was provided to the following main role players and interested parties in the matters under investigation on 15 December 2010:

14.1.1.1 The Minister of Public Works;

14.1.1.2 The Minister of Police;

14.1.1.3 The Minister of Finance;

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14.1.1.4 The National Commissioner of Police; and

14.1.1.5 The complainants, Adv P Hoffman SC and Mr P Groenewald MP.

14.1.2 The purpose of providing the role players and interested parties with the draft report was to invite comments and additional information that could be of assistance to the Public Protector in finalising the investigation and the report on the matter.

14.1.3 The National Commissioner and the Minister of Public Works, were also advised of the provisions of section 7(9)(a) of the Public Protector Act<sup>3</sup>.

14.1.4 In the covering letter addressed to the Minister of Public Works on 15 December 2010, the Public Protector stated, *inter alia*, that:

*“You will note from the contents of the draft report and especially the preliminary findings contained in paragraphs 8 and 9, as well as the remedial action dealt with in paragraph 10, that I may have to make an adverse finding against you for the actions performed and/or the decisions taken in your capacity as the Minister of Public Works, in my final report.*

*In the premises, you are hereby afforded an opportunity to respond in writing to the contents of my preliminary report and specifically in respect of where you are implicated, as is required by law.”*

14.1.5 The National Commissioner was likewise informed in the covering letter addressed to him on 15 December 2010:

*“You will note from the contents of the preliminary report and especially the preliminary findings contained in paragraphs 8 and 9, that I may have to make an adverse finding against you for the actions performed and/or the decisions taken in your capacity as the accounting officer of the South African Police Service and/or in respect of which you are accountable by law, in my final report.*

*In the premises, you are hereby afforded an opportunity to respond in writing to the contents of my preliminary report and specifically in respect of where you are implicated, as is required by law.”*

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<sup>3</sup> See paragraph 6.4.1 above

## The response of the Minister of Finance

14.2.1 The response of the Minister of Finance to the draft report, dated 21 January 2011, made it patently clear that the National Treasury is viewing the matters investigated in a very serious light.

14.2.2 Minister Gordhan stated, *inter alia*, the following:

- *“The National Treasury supports the further review of the lease agreement as a matter of urgency. This may include, if necessary, the initiation of criminal prosecution;*
- *In terms of the mentioned Treasury Regulations, it is prescribed in Treasury Regulation 9.1.5 that all unauthorised, irregular, fruitless and wasteful expenditure must be disclosed as a note to the annual financial statements of the institution. According to the National Treasury Practice Note 4 of 2008/2009, Accounting Officers/Authorities have the prerogative to apply to the National Treasury to condone irregular expenditure. Proper motivation should be provided for the request for such condonation.*
- *The National Treasury holds the view that the lease agreement between the State and RPF should not have been concluded prior the RPF actually having owned the said property.*
- *Given the circumstances as outlined in your draft report, the National Treasury will not be in a position to condone any irregular expenditure resulting from the contract concluded by the Department of Public Works with RPF.*

*To emphasize the seriousness in which Government views fraud and corruption it is proposed that adherence to the letter and spirit of the PFMA will be enforced.”*

## The response of the Minister of Public Works

The salient features of the response of the Minister of Public Works, dated 4 January 2011, were the following:

14.3.1 The DPW was of the view that *“the situation created by the world cup was urgent enough to justify the deviation from normal procurement processes.”*

- 14.3.2 “The Department is also of the view that it was impractical to obtain a building that contained the features needed for the communication unit”. No detail is provided in the response as to the reasons considered by the DPW in this regard.
- 14.3.3 The DPW went out on tender for the Departments of Public Service and Administration and Statistics SA in March and May 2010. “The market however indicated that the vacancy rate in the targeted Pretoria area is zero”.
- 14.3.4 The DPW was satisfied to follow a negotiated process in the matter concerned “as in any event, going on (sic) open tender would not have made the Department to arrive at a different conclusion.”
- 14.3.5 It is conceded that the DPW did not report the deviation from the normal prescribed procurement process to the National Treasury and the Auditor-General, as required.
- 14.3.6 The DPW accepted that the urgency related to 2 floors in the building. The view was held that it would not be cost effective to go out on open tender “for the same building because the Department would not have arrived at a different conclusion as the market dictated that this was the only available building.”
- 14.3.7 It would not have been practical for the various components of the SAPS to be housed in different buildings and the leasing of a multi-tenanted building “would have the possibility of compromising their security.”
- 14.3.8 “At all material times both parties intended to enter into the lease agreement in terms of the Bid Approvals. However, after realising the inconsistencies in the agreement, a letter was written to Roux Property Fund for the parties to correct the inconsistencies for the agreement to properly reflect the agreement between the parties.”
- 14.3.9 The procurement processes that were followed to secure the lease were in line with the DPW’s “procurement regime” which is informed by the relevant prescripts governing procurement.
- 14.3.10 No response was provided to a specific finding contained in the draft report that the decision of the DPW to proceed with the implementation of the lease agreement despite having been advised by two independent senior counsel to the contrary was, in the absence of any reasonable explanation, in breach of its fiduciary duties and the requirements of good governance in terms of the PFMA and amounted to maladministration.

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## The response of the National Commissioner

14.4.1 The National Commissioner was assisted in preparing his response to the draft report by Bowman Gilfillan Attorneys. The response was submitted both in his capacity as the National Commissioner and on behalf of the SAPS.

14.4.2 The salient features of the response were the following:

14.4.2.1 The National Commissioner claimed that he was materially prejudiced in preparing the response as he was not provided with;

- A copy of the complaint lodged against him and the SAPS;
- Access to the documents, witness statements and any other evidence relied upon for the findings and conclusions made in the draft report;
- The identity of *“the people making accusations against me and/or the SAPS”*; and
- A reasonable opportunity to peruse the draft report.

14.4.2.2 It was further stated that the National Commissioner was not aware that he was entitled to be legally represented when he was interviewed by the Public Protector on 7 December 2010.

14.4.2.3 The legality of the Public Protector’s investigative process, the assistance and participation of the SIU were also challenged.

14.4.2.4 The National Commissioner emphasised his functions, powers and responsibilities in terms of the South African Police Service Act, 1995. However no reference was made to his responsibilities as the accounting officer of the SAPS, in terms of the PFMA.

14.4.2.5 In explaining the nature of the position of National Commissioner, the response stated that:

*“I respectfully submit that the position of National Commissioner does not necessarily require expert knowledge of the legal and regulatory environment applicable at all departments at national level. Experts and other functionaries provide the necessary support to the National Commissioner.”*

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*In order to discharge my functions, it is inevitable that I rely on other functionaries and subject matter experts both within the SAPS and other government departments. Such reliance, I venture to suggest, is an inherent attribute of the job.”*

14.4.2.6 The National Commissioner concluded the above explanation by stating the following:

- *“I am appointed primarily to be responsible for policing and matters incidental thereto;*
- *It is impossible to discharge my functions without assistance from other functionaries within and outside the SAPS; and*
- *Such assistance may be secured through delegation and assignment of functions to other officials.”*

Again no reference was made to the responsibilities of the National Commissioner as the accounting officer of the SAPS, as contemplated by section 38 of the PFMA.

14.4.2.7 In terms of the finding made in the draft report that the need for additional leased accommodation was not dealt with in the SAPS Immovable Asset Plan, the National Commissioner referred to the 2011/12 User Asset Management Plan. This document acknowledged that the SAPS immovable asset portfolio was previously significantly underestimated and immovable asset planning was not always done in a strategic manner. It is further stated that there is now a clear commitment to address this issue. The need for the lease is therefore dealt with in the User Asset Management Plan of the SAPS 2010/11.

14.4.2.8 With reference to the procurement process, the National Commissioner stated that he was of the belief that a tender process would be followed and in this regard he referred to paragraph 4.5 of the 10 May 2010 memorandum<sup>4</sup> to support his statement. He further stated that:

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<sup>4</sup> See paragraph 11.12.5 above

*“It is apparent from this letter that I was kept under the impression that an open, competitive tender process was being followed. In particular I was not informed that any deviations were being sought or contemplated.”*

14.4.2.9 With reference to urgency and the prescribed procurement process, the National Commissioner stated that in his view the need for additional office accommodation was urgent. He further emphasised that:

*“However, the fact that the need was urgent did not mean that Lieutenant-General Hlela should not follow the correct procedures which were entirely within his expert knowledge and fell within his areas of responsibility.”* (emphasis added)

14.4.2.10 The National Commissioner acknowledged that the provisions of the PFMA and the Constitution ought to be followed in the procurement of leases. However, he did not believe that it was reasonable for a department not to play any role in the process of identifying suitable accommodation. *“The responsibility for concluding the lease however remains with the DPW”*

14.4.2.11 The National Commissioner denied that the reason for adjusting the needs assessments was to suit the specifications of a single supplier as found in the draft report. In this regard he further stated that:

*“I am informed that the primary reason for the adjustments was the legitimate desire by the SAPS, for security reasons, not to share office space above the ground floor.”*

14.4.2.12 With reference to a previous offer that was made to the SAPS in respect of accommodation in the Sanlam Middestad building, the National Commissioner stated that he had no personal knowledge thereof. He was, however, informed that the reason for rejecting the offer, at a lower rental rate, was the high cost of installing the necessary information technology infrastructure for the specific component for which the accommodation was intended.

### **The response of Adv P Hoffman SC**

14.5.1 In his response to the draft report, Adv Hoffman indicated his support for the view that the conclusion of the lease agreement was unconstitutional, and therefore invalid, as the procurement thereof did not comply with the provisions of section 217 of the Constitution.

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## THE INTERVIEW CONDUCTED WITH MR R SHABANGU OF RPF

- 15.1 The Public Protector conducted an interview with Shabangu of RPF on 4 February 2011.
- 15.2 According to Shabangu's version of the events that culminated in the signing of the lease agreement with the DPW, the following transpired:
- 15.2.1 RPF was approached by a third party in connection with the purchasing of the Sanlam Middestad building early in 2010.
- 15.2.2 RPF expressed interest in the building, but wanted to secure a tenant for the building first in order to obtain finance.
- 15.2.3 Shabangu approached the DPW to enquire as to whether any government department was in need of office accommodation in the Pretoria CBD. He was advised to approach the SAPS.
- 15.2.4 During or about March 2010, Shabangu approached Lt Gen Hlela and enquired whether the SAPS were in need of office accommodation in the Pretoria CBD. Lt Gen Hlela indicated that the SAPS indeed required approximately 25 000m<sup>2</sup>. However, the SAPS had not taken a decision as to whether they would lease or construct their own building to meet their specific requirements and that Shabangu would be advised accordingly by the DPW.
- 15.2.5 Approximately a month later, the DPW contacted Shabangu telephonically and informed him that the SAPS required leased accommodation of 25 000m<sup>2</sup> and that he should also submit an offer to the DPW.
- 15.2.6 The DPW further informed Shabangu that they made enquiries with estate agents and that the Sanlam Middestad building was the only one available that could accommodate the SAPS. He was then requested to make a presentation to the DPW on the building.
- 15.2.7 Subsequent to the DPW presentation, Shabangu was requested to make a similar presentation to the SAPS. His presentation related to 21 000m<sup>2</sup> only, as he was still negotiating with tenants in the building at the time.
- 15.2.8 The SAPS required the building to be ready by the end of May 2010.
- 15.2.9 The DPW never attended the SAPS presentations.

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- 15.2.10 The meeting of 22 April 2010<sup>5</sup> was initiated by the DPW. The conditions referred to in the letter that he addressed to Lt Gen Hlela later the same day, were not discussed at the meeting. However, he was requested by the SAPS to prepare the letter containing such conditions to enable the SAPS to convince the DPW of their needs and to fast track the process. He never received the requested response from the SAPS.
- 15.2.11 The SAPS never expressed a need for 25 000m<sup>2</sup> specifically in writing.
- 15.2.12 Shabangu was then requested by the DPW to submit all documents relating to the building, which he did. At the time only 21 000m<sup>2</sup> was available in the building. He regarded his submission to the DPW as an offer, which they had to counter.
- 15.2.13 On 5 July 2010, Shabangu made a further presentation to the SAPS. According to him that was after the lease agreement was signed. The only reason for the presentation was to deal with operational issues. The DPW was also not present at the presentation.
- 15.2.14 Shabangu was called by the DPW to their offices to sign a standard lease agreement prepared by them.
- 15.2.15 He was not aware whether or not the SNBAC of the DPW had approved the leasing of 25 000m<sup>2</sup> i.e. including the additional 4 000m<sup>2</sup> and that the National Commissioner only approved the needs analysis amounting to 25 000m<sup>2</sup> after Shabangu signed the lease agreement for the total amount.
- 15.2.16 The second lease agreement signed on 26 July 2010 was prepared at the insistence of Nedbank, his financiers, due to a number of errors contained in the first lease agreement. Shabangu further denied ever receiving the letter addressed to him by the DPW on 22 July 2010<sup>6</sup> informing him of the discrepancies between the first lease agreement and the letter of acceptance of offer, particularly with regard to the lettable floor space of 21 000m<sup>2</sup> that was approved by the SNBAC.
- 15.2.17 Shabangu claimed that the second lease agreement that he signed on 26 July 2010 was also signed by the DPW and that he has a copy in his possession. No such
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<sup>5</sup> See paragraph 11.9.1 above

<sup>6</sup> See paragraph 11.21 above

document was however submitted by the DPW or Shabangu, despite the latter's undertaking to do so.

15.2.18 Ownership of the building was only transferred to RPF on 21 January 2011.

15.2.19 According to Shabangu the lease agreement between RPF and the DPW is proceeding.

15.3 Shabangu undertook to provide the Public Protector with a number of documents to support his version, including correspondence with the DPW and the signed lease agreement that was implemented, but has to date failed to do so, despite a follow up request in writing.

## **EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

### **The SAPS**

16.1.1 The information provided and evidence submitted by the officials (with the exception of the National Commissioner) and former officials of the SAPS are generally consistent with the relevant documentation that was reviewed and considered during the investigation.

16.1.2 Although the evidence of the National Commissioner was not consistent with that of other officials of the SAPS and the relevant documentation in all respects, he conceded that the procurement process was compromised as a result of the SAPS's early negotiations with Shabangu.

### **The DPW**

16.2.1 The findings made in the report of the internal inquiry, commissioned by the DPW, were based on the evidence and information that was obtained from officials of the Department. As indicated above<sup>7</sup>, the DPW confirmed that they had accepted the findings made in the report and that they were implementing the recommendations contained therein.

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<sup>7</sup> See paragraph 13.2

16.2.2 To date, no information has been forthcoming from the DPW to indicate that the report or the information and evidence contained therein have since been rejected.

16.2.3 The three DPW officials who were interviewed during the investigation, confirmed that the evidence that they submitted to the internal inquiry was accurate and correct.

### **Mr R Shabangu**

16.3.1 The evidence submitted by Shabangu during the investigation was inconsistent with the information and evidence obtained, during the investigation and the internal DPW inquiry, from officials involved in the procurement process.

16.3.2 The sequence of events pertaining to the procurement of the lease of the Sanlam Middestad building and the procurement process as described by Shabangu, could not be substantiated by the relevant documentation and the evidence of the officials directly involved in the procurement process.

## **EVALUATION OF THE RESPONSES TO THE DRAFT REPORT**

### **The Minister of Finance**

17.1.1 The response of the Minister of Finance was based on a proper interpretation of the PFMA and the Treasury Regulations as pertained to the procurement of the lease of the Sanlam Middestad building.

### **The Minister of Public Works**

17.2.1 The response of the Minister of Public Works was inconsistent with the findings of the internal DPW inquiry and the legal opinions obtained by the DPW from two independent senior counsel with regard to the validity of the procurement process followed by the DPW.

17.2.2 The Minister's response on the validity of the procurement process could further not be substantiated by the evidence submitted and the information obtained during the investigation and the internal DPW inquiry.

17.2.3 The Minister's contention that the DPW went out on tender for two other government departments in March and May 2010, complied with the requirements of a market survey for accommodation for the SAPS and therefore justified a deviation from the prescribed tender process, was not consistent with the information and evidence

obtained during the investigation. In any event the fact that the DPW unsuccessfully went out on tender for two other government departments, does not mean that it would have been “impractical” for them to go out on tender for the specific requirements of the SAPS, as contemplated by the relevant prescripts. In any event, the basis for the deviation from SCM prescripts, according to the evidence and information obtained during the course of the investigation was “urgency” in respect of the FWC.

17.2.4 The inconsistencies in the first lease agreement, referred to by the Minister, related to the differences in the approved lettable floor space as reflected in the decision of the SNBAC of the DPW, when compared against the contents of the lease agreement. The Minister’s response in this regard is also inconsistent with the letter addressed to RPF by the DPW on 22 July 2010.<sup>8</sup>

### **The response of the SAPS and the National Commissioner**

17.3.1 The legal arguments raised in the response regarding the legality of the investigation process followed by the Public Protector and the assistance provided by the SIU in the investigation are not substantiated by a proper interpretation of the relevant provisions of the Public Protector Act.<sup>9</sup>

17.3.2 The claim by the National Commissioner that he was materially prejudiced in preparing the response was based on a misinterpretation of the provisions of the Public Protector Act in terms of which the draft report was submitted to him and the SAPS. The purpose of submitting the draft report to the SAPS was to afford them the opportunity to comment on its contents. The National Commissioner was also afforded an opportunity to respond to information and evidence contained in the draft report that may have implicated him in improper conduct, in his capacity as the accounting officer of the SAPS. The SAPS and the National Commissioner were given ample information in the draft report and sufficient time to prepare a response (almost six weeks).

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<sup>8</sup> See paragraph 11.21

<sup>9</sup> See paragraph 6 above

- 17.3.2 At his first informal interview with the Public Protector on 6 December 2010, the National Commissioner was accompanied by the Executive Legal Officer of the SAPS. The contention that he was not aware that he was entitled to be legally represented when he was formally interviewed on 7 December 2010 is therefore clearly, taking also into account the position that the National Commissioner occupies, without merit.
- 17.3.3 The response of the SAPS and the National Commissioner in respect of the findings made in the draft report relating to compliance with the relevant SCM prescripts appeared to be more of an attempt to rationalise the involvement and conduct of the SAPS in the procurement process, and therefore had no significant impact on the draft report. The National Commissioner also did not dispute the findings of maladministration made in the draft report of the Public Protector, but sought to exonerate him from any wrongdoing.
- 17.3.4 The findings in paragraph 19 below deal in more detail with the procurement issues raised by the National Commissioner and the SAPS in their response.

## **PERTINENT ISSUES ARISING DURING THE INVESTIGATION**

The following pertinent issues arose during the course of the investigation:

### **The procurement process**

#### **The SAPS:**

- 18.1.1 From the information obtained during the investigation, it was apparent that the process embarked upon by the SAPS in negotiating the lease was viewed as extraordinary in nature in that it overlapped with legislative mandate and objectives of the DPW. By the time the SAPS approached the DPW, the negotiations in respect of the lease were already at an advanced stage.

#### **The DPW:**

- 18.1.2. The internal inquiry concluded that in terms of the DPW's SCM policy, the negotiated process *"is the least desirable of acquisition procedures and Bid Adjudication Committees may approve this procedure as the last resort."*
- 18.1.3 It was further concluded that there was no basis for justifying the deviation from the tender process and to follow a negotiated process.

18.1.4 The overarching finding of the inquiry was that the process which led to the procurement of the lease agreement was highly truncated and outside of normal operating procedures within the DPW in relation to supply chain management.

### **The Need**

#### **The SAPS:**

18.2.1 In this instance, the process followed by the SAPS was extraordinary in that a building was identified and thereafter the need adjusted to retrofit the specifications of the building, as emphasised in the preparation by the SAPS of four different needs analyses reflecting a constant increase in the floor space required. Officials interviewed expressed their reservations about the manner in which the SAPS justified the demand of the building.

### **Budget**

#### **The SAPS:**

18.3.1 From the information obtained during the investigation the Sanlam Middestad building lease was not budgeted for in the lease or capital works budgets of the current MTEF cycle. The SAPS's immovable asset portfolio requirements were previously significantly underestimated and immovable asset planning was not always done in a strategic manner.

18.3.2 It was further ascertained that at the time the procurement of the lease was initiated, both the SAPS lease and capital works budgets were significantly overextended. A reprioritisation of the SAPS budget was therefore required in order to make the necessary funds available, which had to be reallocated from other cost centres within the SAPS.

### **Urgency**

#### **The SAPS:**

18.4.1 It was generally accepted by relevant officials interviewed and documentation reviewed during the investigation that the SAPS identified the Sanlam Middestad building and an instruction given for the procurement of the lease to be concluded on an urgent basis.

18.4.2 The urgency expressed at the time of the initiation of the procurement process (March 2010) was based on the unrealistic expectation that certain components could be effectively relocated prior to the commencement of the FWC, or soon thereafter.

18.4.3 Furthermore, the information gathered indicated that the SAPS were approached regarding the possible leasing of the same building, or part thereof, at a significantly reduced rate (R85/m<sup>2</sup>) during October 2009, also for the purposes of the FWC. The approach was not accepted by the SAPS, the reason being the high cost of the information technology that had to be installed in the building. The costs would, however, also currently be applicable.

#### **The DPW:**

18.4.4 The internal inquiry concluded that even if there was urgency, the deviation from a competitive bidding process could only be justified if two other requirements were met, namely;

- If a competitive bidding process or another acquisition procedure was impractical; and
- The circumstances giving rise to the urgency were neither foreseeable by the users nor the result of dilatory conduct on their part.

18.4.5 The inquiry further found that:

*“Any urgency which may have existed (we do not agree that urgency existed) would not have passed muster on the basis that such urgency – allegedly only due to the FIFA World Cup – was reasonably foreseeable, the World Cup having been awarded to South Africa some six years ago. On this basis alone, any reliance on the so called “urgency” by the SAPS would negate the following of a negotiated process.”*

#### **The culture of the SAPS**

18.5.1 It was evident throughout the investigation that a number of the officials interviewed expressed their reservations with the process followed by the SAPS to procure the lease. However, they were reluctant to raise their concerns with their superiors due to the culture of the SAPS in terms of which instructions are followed and not questioned. This point was amplified by the Deputy National Commissioner (at the

time) who stressed that he was unwilling to question the decisions and instructions of the National Commissioner.

- 18.5.2 The response of the National Commissioner of the SAPS to the draft report of the Public Protector appeared to have disputed this observation. However, no evidence was provided in this regard or to show that the situation has changed.

## GENERAL FINDINGS

### Findings relating to the procurement process

#### 19.1.1 Finding 1: The need was not dealt with in the SAPS Immovable Asset Plan

- 19.1.1.1 The SCM guide requires that as part of the strategic plan of a department, the resources required for the fulfilment of its obligations should be clearly analysed. This includes a detailed needs analysis of the goods, works and services required.

- 19.1.1.2 In his response to the draft report of the Public Protector, the National Commissioner of the SAPS contended that the SCM guide should not be regarded as obligatory. However, the guide remains a directive of the National Treasury that has to be complied with by accounting officers and cannot be ignored.

- 19.1.1.2 The emphasis is thus on first determining the full nature and extent of the need required prior to initiating the procurement process. The specifications of goods required must be determined through a comprehensive needs analysis, taking into account aspects such as budget and the strategic objectives of the institution concerned.

- 19.1.1.3 The SAPS Strategic Plan 2010 to 2014 provided as follows:

*“The need for the **improving of infrastructure** through a structured capital works programme within the SAPS, with specific reference to police stations **and other office and specialized accommodation in the SAPS**, is substantial. Budgetary constraints, however, impact on what can realistically be achieved. The building of new police stations, the renovation (refurbishing) of existing ones **and the provision of accommodation in accordance with the determined need, will be prioritized** in line with the operational priorities and objectives of the SAPS. It will, however, be important that the improvement of*

*infrastructure is conducted in a coordinated fashion, that available budgets are fully utilized and that contracting and subsequent service delivery are done in accordance with relevant legislation. The management of existing assets will be guided by the development of an Immovable Asset Management Plan to comply with the Government Immovable Asset Management Act, 2007*  
(emphasis added)

- 19.1.1.4 There is no indication that an Immovable Asset Management Plan, dealing specifically with the accommodation requirements and needs at Head Office, was compiled for 2010/11. The Long-term Infrastructure and Capital Asset Plan included in the SAPS 2010 – 2014 Strategic Plan only provided details on the construction of police stations and refurbishments planned over the medium-term, but did not refer to any accommodation requirements at Head Office.

**19.1.2 Finding 2: The involvement of the SAPS proceeded beyond the demand management phase of the SCM process**

- 19.1.2.1 As indicated above, the procurement of leased accommodation on behalf of the SAPS falls within the purview of the DPW. In keeping with its mandate the DPW procurement processes are initiated from the stage that a need is identified and communicated to it by one of its client departments. This process therefore requires that once the element of Demand Management has been satisfied by the client department, i.e. the need identified and the specifications properly determined, the DPW then becomes responsible for the procurement process, without interference from the client department.
- 19.1.2.2 In the case of the Sanlam Middestad building, however, the SAPS, by entering into negotiations with a prospective bidder (RPF) clearly went beyond the demand management phase of the procurement process, even going so far as to negotiate on price, thereby infringing on the functional area of the DPW, i.e. the acquisition phase.

19.1.2.3 It is clear that the SAPS were fully aware that the procurement of leased accommodation was a DPW function, as was evidenced in a number of internal documents and correspondence.

19.1.2.4 The contents of the 10 May 2010 memorandum<sup>10</sup> approved by the National Commissioner clearly indicate that he was made aware of the fact that the SAPS had been negotiating with a single supplier, i.e. RPF. In his evidence submitted during the investigation, the National Commissioner conceded that that the entire procurement process was thus compromised from the point at which SAPS entered into negotiations with RPF, to the exclusion of the DPW and other prospective bidders.

### **19.1.3 Finding 3: The SAPS adjusted the need to fit the specifications of a single supplier**

19.1.3.1 In this instance the need ultimately determined by the SAPS was based on the total lettable floor space available in the Sanlam Middestad building, as opposed to the actual additional space requirements of the SAPS at the time. Simply put, the building itself influenced the need of the SAPS, resulting in the SAPS constantly adjusting the need in order to meet the specifications of the building.

## **Cost Effectiveness**

### **19.2.1 Finding 4: The procurement of the lease was not in accordance with a system that is cost effective**

19.2.2.1 It is important to note that even those instances where a situation does not warrant the use of tender procedures, this does not mean that an organ of state may do away with a competitive procurement process altogether. Organs of state are still required in order to ensure compliance with the principles of competitiveness and cost effectiveness in section 217(1) of the Constitution, to procure goods or services on the best possible terms.

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<sup>10</sup> Refer to paragraph 11.12 above

19.2.2.2 The need ultimately determined by the SAPS, as reflected in Table 3 below, was not based on the actual spatial requirements of the SAPS, but rather on the specifications of the building. According to the evidence and information considered during the investigation, the issue of security, as raised by the National Commissioner in his response to the draft report, was never communicated as such to the division who compiled the needs assessments or to the DPW.

19.2.2.3 Table 3 below illustrates the approximate in costs proportionate to the increase in the need of SAPS.

<b>Table 3: Increase in approximate costs proportionate to the increase in the needs of the SAPS</b>				
<b>No</b>	<b>Unit Accommodated</b>	<b>Need 6 April 2010 (13 808.52m<sup>2</sup>)</b>	<b>Need 10 May 2010 (21 020.50m<sup>2</sup>)</b>	<b>Need 19 July 2010 (25 201m<sup>2</sup>)</b>
1	Ministry of Police	R 239 353.49	R 266 665.61	R 271 631.45
2	National Commissioner	R 218 993.54	R 239 601.78	R 241 588.12
3	Communication Services	R 642 827.99	R 729 223.57	R 729 223.57
4	Efficiency Services	R 327 000.56	R 372 438.00	R 385 349.18
5	Internal Audit	R 285 287.51	R 332 711.28	R 332 711.28
6	Finance and Administration	R 18 125.32	R 19 863.36	R 19 863.36
7	Diplomatic Policing Unit	R 0.00	R 107 262.14	R 107 262.14
8	Serious Economic Offences Unit	R 0.00	R 430 264.96	R 0.00
9	Strategic Management	R 0.00	R 0.00	R 241 339.82
10	Corporate Support Services	R 0.00	R 0.00	R 385 349.18
11	Gym, Spinning area & Cafeteria	R 0.00	R 0.00	R 320 555.00
12	Ops / War Room	R 0.00	R 137 940.00	R 137 940.00
	<b>Total</b>	<b>R 1 731 588.41</b>	<b>R 2 635 970.70</b>	<b>R 3 172 813.12</b>

19.2.2.4. The contract amount of the lease purportedly entered into was calculated at R125.40/m<sup>2</sup> per month including operational costs. Five months earlier the same building had been offered to the SAPS at R85/m<sup>2</sup> also including operational costs, which offer the SAPS declined. The difference between the two proposals amounts to R1 015 858 per month or R12.2 million per year (for the first year). This is a further indication that the procurement of the lease was not cost-effective.

19.2.2.5 Due to the fact that the need increased proportionate to the floor space made available by RPF in the building, and was not based on the actual requirements of the SAPS, the manner in which the ultimate need was determined by the SAPS indicates that the procurement of the lease of the building was not in accordance with a system which was cost-effective. It is therefore indicative of maladministration

having occurred in the needs assessment process thereby tainting the entire procurement process.

## **Competitiveness and Urgency**

### **19.3.1 Finding 5: The urgency related only to a small part of the need**

19.3.1.1 Organs of state should, where urgency dictates a deviation from procurement procedures, carefully consider the value and lengths of contracts concluded in order to address only the immediate urgency. In this way ongoing needs and requirements must as far as possible and where appropriate be met by way of public tender procedures.

19.3.1.2 Regulation 16A6.4 of the Treasury Regulations provides that if in a specific case it is impractical to invite competitive bids, the accounting officer may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer.

19.3.1.3 The reason for deviating from a competitive bidding process put forward by the SAPS is that it urgently required two floors of the building for accommodating Communication Services for and after the FWC. However, the entire building was not urgently required for the purposes of the FWC and there was no intention to occupy the entire building on an urgent basis. It should further be emphasised that although this submission was made by the SAPS, the DPW is responsible for the procurement process and is thus ultimately responsible for any deviation there from.

### **19.3.2 Finding 6: The DPW did not record the reasons for deviating from a competitive process as required by prescripts**

19.3.2.1 In addition to the above, National Treasury Practice Note No 8 of 2007/08, which came into effect on 1 December 2007 prescribes the following in paragraph 3.4 regarding any transaction which exceeds R500 000. (Vat included):

*“3.4.3 Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. **The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting***

***officer / authority or his / her delegate. Accounting officers /authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process. (emphasis added)***

19.3.2.2 From the available evidence it is apparent that the DPW did not properly record the deviation from the bid process, nor did it meet its reporting obligations, as required above. This was conceded by the Minister of the DPW in her response to the draft report.

**19.3.3 Finding 7: The deviation procurement process did not comply with the urgency requirement**

19.3.3.1 It appears from the available evidence that the SAPS had no reasonable prospects of preparing and fitting the required two floors of the building for occupation of the Communication Services in time for the FWC competition.

19.3.3.2 The SAPS had more than sufficient time to plan and structure their operations pertaining to the FWC. On the available evidence the earliest date on which the “urgent” need for accommodating the Communication Services in a single building for the purposes of the FWC arose was during March 2010, less than three months before commencement of the event. This indicates dilatoriness on the part of the SAPS in that it failed to identify the need in time for a competitive bidding process to be followed.

19.3.3.3 Furthermore, only one floor would have become available on 1 July 2010 when the FWC would have been far advanced, and further floors would only have become available in August 2010. By that time the FWC would already have been concluded. Therefore, it was not possible to accommodate the Communication Services in the building in time for the FWC. Despite having deviated from a competitive bidding process on the basis of urgency, the SAPS has to this day not occupied any part of the building. These facts seem to refute any contention that there were objective reasons for the alleged urgency.

19.3.3.4 The above-mentioned considerations lead to the unavoidable inference that a reliance on urgency was not justified and that it was not impractical to adhere to a competitive bidding process. It follows that the provisions of Regulation 16A6.4 read with Practice Note 8 of 2007/08 could not be relied upon by either the SAPS or the DPW, and that the DPW was, therefore, obliged to follow a competitive bidding process. The failure to do so was an infringement of the Constitutional requirement that the procurement has to be competitive.

19.3.3.5 The approval of the lease agreement for 21 000m<sup>2</sup> did not fall within the ambit of Regulation 16A6.4 on the basis of urgency and the reasons for deviating from inviting of competitive bids were not properly recorded, approved and reported by the accounting officer or accounting authority as required by Practice Note 8 of 2007/08. Therefore, the accounting officer or accounting authority was not entitled to procure the relevant lease by means other than a competitive bidding process.

#### **19.3.4 Finding 8: The procurement process did not comply with the requirement of fairness, equitability and transparency**

19.3.4.1 In opting for the negotiated process there is no indication in the available evidence that the impact on fairness, equitability and transparency were considered at any time during the procurement process by the SAPS or the DPW. Any deviation from the prescribed tender process must be met with strict adherence to the above SCM prescripts in order to mitigate the risks such deviation may have on the validity of the entire procurement process.

19.3.4.2 It appears from the very nature of the process followed, namely, by entering into a negotiated contract instead of a competitive bidding process, the constitutional requirements of fairness, equitability and transparency were also not complied with.

#### **Discrepancies between the acceptance of offer and the first lease agreement**

#### **19.4.1 Finding 9: The terms of the first lease agreement were not approved by the SNBAC of the DPW**

19.4.1.1 The terms of the first lease agreement entered into by the DPW and RPF differed in material respects from that approved by the DPW SNBAC. The letter of acceptance addressed to RPF on 4 June 2010 stated that the total floor space approved was

21 000m<sup>2</sup> of office accommodation at R102.60/m<sup>2</sup>, totalling R2 298 810 per month, including parking. However, the lease agreement reflects a total leased floor space of 25 145m<sup>2</sup> with a total monthly rental amount of R3 287 988, including parking. Due to the discrepancies, it would appear that the person who signed the lease on behalf of the DPW was not authorised to do so.

## **Validity of the lease**

### **19.5.1 Finding 10: The lease agreement entered into by the DPW and the RPF are invalid**

19.5.1.1 The procurement of the lease was done in a manner that did not comply with the validity requirements of the Constitution, the PFMA and the Treasury Regulations and instructions for procurement by organs of state. Furthermore, the entering into of the lease was unauthorised.

19.5.1.2 Section 2 of the Constitution provides that conduct that is inconsistent with it is invalid and that the obligations imposed by it must be fulfilled.

19.5.1.3 The conclusion of the lease agreements under the circumstances referred to above was therefore invalid.

### **19.5.2 Finding 11: The DPW's decision to proceed with an invalid lease agreement was improper and unlawful**

19.5.2.1 The DPW's decision to proceed with the lease, as publicly announced by the Minister, was based only on a letter received from the State Attorney, dated 11 November 2010. The letter advised in a single paragraph that, in the State Attorney's opinion, a binding, valid and enforceable lease had been concluded between the DPW and RPF. No reasons were given in the letter for this opinion. The letter confirmed that the DPW had requested the State Attorney to nevertheless obtain the opinion of counsel.

19.5.2.2 The opinion subsequently obtained from senior counsel is dated 22 November 2010 and comprises 19 pages of a considered written argument. Senior counsel's opinion conforms to that of another written opinion, dated 1 September 2010, obtained by the DPW from senior and junior counsel. Both these opinions conflict with the State Attorney's unsubstantiated view.

19.5.2.3 In the face of considered legal advice from senior counsel to the contrary, the DPW's decision to proceed with the implementation of the lease agreement was improper and unlawful, and any expenditure incurred to date, or to be incurred as a result of the implementation of the lease would amount to irregular expenditure.

**19.5.3 Finding 12: The conduct of the accounting officers of the SAPS and the DPW in respect of the procurement of the lease was improper and unlawful**

19.5.3.1 The accountability for budgetary control and the procurement of goods and services within all government departments lies with the accounting officer, who at all material times were the National Commissioner of the SAPS and the DG of the DPW, or the person who acted in that capacity.

19.5.3.2 The National Commissioner, as the accounting officer of the SAPS acted in breach of those duties and obligations incumbent upon him in terms of the Constitution and the PFMA. Section 217 of the Constitution, read with the provisions of the PFMA and the Treasury Regulations require from an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

19.5.3.3 Section 237 of the Constitution provides that all constitutional obligations must be performed diligently.

19.5.3.4 All conduct that is inconsistent with the Constitution is, in terms of section 2 thereof invalid.

19.5.3.5 The National Commissioner withdrew all delegations in respect of procurement of goods and services over an amount of R500 000 with effect from 30 September 2009. He was therefore solely responsible to ensure that the procurement of the lease, for as far as the involvement of the SAPS was concerned, complied with the said legal prescripts.

19.5.3.6 The failure to ensure that the procurement process complied with the said legal requirements and prescripts, as indicated in the findings above, resulted in the invalid conclusion of a lease agreement, to the detriment of the State.

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19.5.3.7 As far as the official who acted in the capacity of the DG of the DPW at the time when the procurement process took place is concerned, the internal enquiry found as follows:

*“We are of the view, prima facie, that by directing the Department to follow a negotiated process as a procurement strategy in terms of the lease agreement, Mr Vukela was acting in breach of those duties and obligations incumbent upon him in terms of the PFMA.”*

19.5.3.8 The internal inquiry recommended that disciplinary action should be taken against the said official.

19.5.3.9 A schematic illustration is provided below comparing the above findings against the relevant phases of the procurement process, as it pertains to leased accommodation. This schematic further highlights the areas of responsibility relating to the DPW, and the SAPS as the client department in the matter investigated.

**Schematic: Findings in respect of the procurement process of the Sanlam Middestad building**

	INVESTIGATION FINDING	AREA OF RESPONSIBILITY
Preparation & Demand Management	INCEPTION / NEEDS ANALYSIS	
	1. SAPS identified the Sanlam Middestad building in March 2010 for the accommodation of certain HO components	DPW
	2. The need was adjusted to fit the lettable floor space of the building as follows: <ul style="list-style-type: none"> <li>- 1<sup>st</sup> needs analysis, dated 6 April 2010, for 13 808 m<sup>2</sup></li> <li>- 2<sup>nd</sup> needs analysis, dated 10 May 2010, for 21 020 m<sup>2</sup></li> <li>- 3<sup>rd</sup> needs analysis, dated 26 July 2010, for 25 301 m<sup>2</sup></li> </ul>	SAPS
	FINANCIAL PLANNING	
	1. Need was not reflected in the SAPS Immovable Asset Plan	SAPS
	2. The existing lease budget was under severe pressure and the new lease was not planned for	SAPS
Acquisition management	3. Funds had to be reprioritised from elsewhere in the SAPS budget in order to fund the new lease	SAPS
	PROCUREMENT PROCESS	
	1. The SAPS proceeded beyond the demand management phase of the SCM process	DPW
	4. The urgency related to a small part of the need ( 2 floors) and did not comply with the urgency requirements of the SCM prescripts	SAPS & DPW
	Procurement Strategy	
3. The SAPS engaged a single service provider, to the exclusion of the DPW which compromised the entire procurement process	DPW	
4. The reasons for deviating from a competitive process were not recorded as required by SCM prescripts	DPW	
Evaluation	EVALUATION PROCESS	
	1. The procurement process did not comply with the requirement of fairness, equitability and transparency, and the deviation from a competitive bid process was improper	SAPS & DPW
Award	AWARD AND CONTRACT MANAGEMENT	
	1. The first lease agreement exceeded the lettable floor space approved by the NBAC	DPW
	2. The lease agreements entered in by DPW and RPF are invalid	DPW
	3. The decision to proceed with an invalid lease was improper and unlawful	DPW

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## **SPECIFIC FINDINGS**

### **20.1 The Public Protector's specific findings in relation to the conduct of the SAPS are that:**

20.1.1 The lease agreements were signed between RPF and the DPW and not by the National Commissioner of the SAPS, as was alleged. However, the National Commissioner signed a memorandum, dated 10 May 2010, authorising funding for the Sanlam Middelstad building lease. He also signed the final SAPS needs analysis, dated 19 July 2010 for 25 301.54m<sup>2</sup>.

20.1.2 Although the SAPS did not sign the lease agreement, its involvement in the procurement process was improper, as it proceeded beyond the demand management phase and it further failed to implement proper controls, as required by the PFMA and relevant procurement prescripts.

20.1.3 The SAPS failed to comply with section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.

20.1.4 The conduct of the accounting officer of the SAPS was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.

20.1.5 On the evidence available it could not be found that an improper relationship between the preferred service provider (RPF) and the SAPS motivated the deviation from required tender procedures.

### **20.2 The Public Protector's specific findings in relation to the conduct of the DPW are that:**

20.2.1 The procurement by the DPW of the lease was not in accordance with a system that is cost effective and competitive, as is required by section 217 of the Constitution, the relevant provisions of the PFMA, Treasury Regulations and supply chain management rules and policies. This failure amounted to improper conduct and maladministration.

20.2.2 The conduct of the accounting officer of the DPW was in breach of those duties and obligations incumbent upon him in terms of section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations. These provisions require from an accounting officer to ensure that goods and services are procured in accordance with a system that is fair, equitable, transparent, competitive and cost effective. This conduct was improper, unlawful and amounted to maladministration.

20.2.3 The process that led to the conclusion by the DPW of the lease agreements with RPF was fatally flawed in various respects, including non-compliance with prescribed procurement procedures such as ensuring a competitive bid process or justifying the deviations in the prescribed manner. This rendered the process unlawful and further constituted improper conduct and maladministration.

20.2.4 The lease agreement should not have been entered into as it did not comply with the validity requirements of the Constitution, applicable legislation and prescripts. The lease agreements entered into by the DPW and RPF are therefore invalid.

20.2.5 The decision of the DPW to proceed with the implementation of the lease agreement in the face of considered legal advice from two senior counsel to the contrary, particularly the opinion procured on 22 November 2010 under the leadership of the current Minister of Public Works, was in breach of its fiduciary duties and the requirements of good governance in terms of the PFMA, and amounted to maladministration.

20.2.6 The reckless manner in which the DPW dealt with public funds in this case, particularly:

- the failure to subject the lease agreement to judicial review, as advised by senior counsel and by implementing the lease agreement despite further legal advice from separate senior counsel to the contrary; and
- renegeing on the undertaking given to the Public Protector not to implement the lease until the investigation was complete,

was improper and fell short of the requirements of good administration.

## 21 REMEDIAL ACTION

The remedial action that is to be taken, as envisaged in section 182(1)(c) of the Constitution is the following:

- 
- 21.1 The National Treasury should urgently review the current lease agreement between the DPW and RPF in order to determine if the contract can be terminated forthwith.
- 21.2 The National Treasury must determine whether any irregular or fruitless and wasteful expenditure was incurred by the SAPS and/or the DPW in respect of the procurement process and other matters related thereto, and take appropriate action where applicable.
- 21.3 The Cabinet must at its first meeting convened after the date of publication of this report request an explanation from the Minister of Public Works on:
- 21.3.1 The reasons for the decision to implement the lease agreement with RPF despite DPW being provided with a legal opinion of independent senior counsel advising to the contrary;
- 21.3.2 The justification for proceeding with the implementation of the disputed lease, prior to the finalisation of the investigation by the Public Protector, and despite senior counsel opinions and the DPW's previous undertakings to the contrary.
- 21.4 The Secretary of Cabinet must advise the Public Protector of the outcome of the deliberations referred to in paragraph 21.3 above and the resolutions taken within 10 days from the date of the Cabinet meeting.
- 21.5 The Minister of Public Works should, with the assistance of the National Treasury, take urgent steps to ensure that the appropriate action is instituted against the relevant DPW officials that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in this report.
- 21.6 The DPW must ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.
- 21.7 The Minister of Police should, with the assistance of the National Treasury, take urgent steps to ensure that the appropriate action is instituted against the National Commissioner and other officials of the SAPS that acted in contravention of the law, policy and other prescripts in respect of the procurement processes referred to in this report.
- 21.8 The SAPS must ensure that appropriate measures are implemented to prevent a recurrence of contraventions of the relevant procurement legislation and prescripts.

- 21.9 The National Treasury should develop and introduce measures that will prevent a recurrence of a situation where client departments of the DPW infringe on the functional areas of the DPW in respect of the procurement of leased accommodation.

## **MONITORING**

- 22.1 The National Treasury, the DPW and the SAPS must submit action plans in respect of the implementation of the remedial action referred to in paragraphs 21.1 and 21.2 above to the Public Protector within 30 days of the date of this report.
- 22.2 The National Treasury, the Minister of Public Works, the Minister of Police, the SAPS and the DPW must submit quarterly reports to the Public Protector on the progress made with the implementation of the remedial action referred to in paragraph 21 above.

## **ACKNOWLEDGEMENTS**

- 23.1 The Public Protector would like to thank the Head and members of the SIU for its assistance in the investigation of this matter.



**ADV T N MADONSELA**  
**PUBLIC PROTECTOR OF THE**  
**REPUBLIC OF SOUTH AFRICA**

**Assisted by:**

**Adv S Fourie: Executive Manager: Good Governance and Integrity**