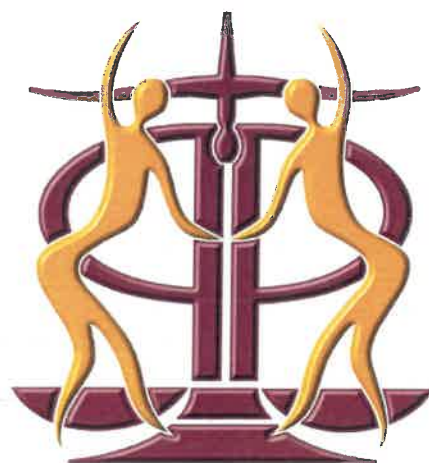


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)
OF THE PUBLIC PROTECTOR ACT, 23 OF 1994.**



**PUBLIC PROTECTOR
SOUTH AFRICA**

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF PROCUREMENT
IRREGULARITIES AND MALADMINISTRATION REGARDING THE IRREGULAR
TERMINATION OF AIRCHEFS TENDER NUMBER GSM 025/2013 BY THE SAA
AFTER ITS AWARD TO MANTELLI'S**



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LIST OF ACRONYMS

SAA	South African Airways Limited
CEO	Chief Executive Officer
ACEO	Acting Chief Executive Officer
SLA	Service Level Agreement
AirChefs	Air Chefs (SOC) Ltd
NT	National Treasury
E-mail	Electronic Mail
CIRO	Cori Beverages Solutions
Indyebo	Indyebo Consulting
TENDER/BID	GSM 025/2013
PFMA	Public Finance Management Act, 1 of 1999
Public Protector Act	The Public Protector Act, 23 of 1994
PAJA	Promotion of Administrative Justice Act, 3 of 2000
Constitution	The Constitution of the Republic of South Africa, 1996
Treasury Regulations	The Treasury Regulations and instructions for departments, trading entities, constitutional institutions and public entities, issued in terms of the Public Finance Management, 1999



Executive Summary

- (i) This is my report issued in terms of section 182(1) (b) of the Constitution and section 8(1) of the Public Protector Act.
- (ii) This report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of procurement irregularities and maladministration regarding the irregular termination of AirChefs Tender Number GSM 025/2013 by the SAA after its award to Mantellis Biscuit Factory (Mantelli's) . The complaint was lodged by Mr Simon Mantell (the Complainant), on behalf of Mantelli's on 25 March 2014 and registered by the Public Protector on 07 April 2014.
- (iii) In the main, he alleged the following:
 - (a) That a tender was awarded to Mantelli's Biscuit Factory by AirChefs/SAA, an online catering company which supplies on-board meals to South African Airways (SAA), SA Express and Mango.
 - (b) That the said tender number GSM 025/2013 was advertised in the Sunday Times on 07 April 2013, for a request to bid for the "*Dry snacks*" which included a wide range of products from biltong, chips, chocolate and savoury crackers. The closing date for the Bid was on 29 April 2013 at 11h00.
 - (c) That AirChefs had indicated that volumes consumed/purchased were 365 000 units per month (costing over R4 Million per annum) which is a significant volume. On 25 April 2013, Complainant personally delivered Mantelli's tender documents into SAA tender box at Airways Park in Kempton Park, bidding for a tender to supply for one item being the "*3 in 1 cracker snacks*".



- (d) That on 28 May 2013, the Complainant received a letter from Mr Risben Khoza of AirChefs confirming receipt of the tender documents from Mantelli's.
- (e) That on 14 June 2013, he further received another E-mail from Mr Risben Khoza requesting samples of the product that Mantelli's had tendered for (which in this case was the crackers), the delivery was requested by 20 June 2013. Another request for samples was made on 4 December 2013, for evaluation by SAA required by 9 December 2013.
- (f) That on 21 February 2014, an E-mail from Mr Prishaan Grounder, AirChefs with an attached letter dated 17 February 2014, and signed on the 18 February 2014, by the Acting CEO of AirChefs, Mr Martin Kemp (ACEO) was received. The letter states: *"with reference to the above Request for Bid, AirChefs would like to congratulate Mantelli's on being awarded the tender for dry snacks."*
- (g) That on 21 February 2014, the Complainant sent an E-mail to Mr Prishaan Grounder, of AirChefs, wherein he acknowledged receipt thereof.
- (h) That on 24 February 2014, the Complainant phoned Mr Indir Naryan to discuss finalisation of the agreement and to establish when the handover would take place. During this telephone conversation he was informed that it was not actually a tender award; because Mantelli's would now be a preferred supplier for all biscuits; implying that AirChefs will now only present Mantelli's product to its airline clients when requested; Wheatworth would remain the supplier of crackers for SAA; and that Mantelli's crackers may be presented to smaller clients like SA Express.
- (i) That he then lodged an objection with the AirChefs as he was unhappy for now being considered part of a panel of suppliers whereas he had submitted



a bid as a single supplier. This culminated into a long serious dispute with AirChefs and the SAA which eventually led to his complaint to my office.

(iv) Based on an analysis of the allegations, the following issues were identified to inform and focus the investigation:

- (a) Whether the decision by AirChefs to revise the letter of award of tender GSM 025/2013 and re-issue the Complainant with a letter of award to a panel of suppliers to supply dry snacks to AirChefs was irregular and thus constitutes improper conduct and/or maladministration in terms of section 6(5)(a) of the Public Protector Act.
- (b) Whether the Complainant was improperly prejudiced by the conduct of the AirChefs/SAA in the circumstances as envisaged in section 6(5)(d) of the Public Protector Act.
- (v) The investigation was conducted through correspondence, meetings and interviews with the Complainant, AirChefs and SAA.
- (vi) Key laws and policies taken into account to help me determine if there had been improper conduct by the AirChefs and/or SAA were the following:
 - (a) Section 217 of the Constitution with regard to procurement, including section 33 read with section 1 of PAJA. I also applied section 237 of the Constitution together with section 3 of PAJA.
 - (b) Section 182 of the Constitution which bestows upon the Public Protector, the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action.



- (c) Section 6(4) of the Public Protector Act which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.
- (vii) In addition, several case law was considered and applied for the purpose of this investigation:
- (viii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, including the response to the section 7(9) Notice, I make the following findings:
 - (a) **Regarding whether the decision by AirChefs to revise the letter of award of tender GSM 025/2013 and re-issue the Complainant with a letter of award to a panel of suppliers to supply dry snacks to AirChefs was irregular and thus constitutes improper conduct and/or maladministration in terms of section 6(5)(a) of the Public Protector Act.**
 - (aa) The allegation that AirChefs revised the letter of award of tender GSM 025/2013 and re-issued the Complainant with a letter of award as part of a panel of suppliers to supply dry snacks to AirChefs was irregular, is substantiated.
 - (bb) AirChefs tender GSM 025/2013 was a tender to provide services and not invitation to become one of the panellist of service providers.
 - (cc) The process of withdrawal of the letter of award issued to the Complainant through a letter approved by the ACEO of AirChefs on 18 February 2014, and the re-issuing of the letter by the ACEO through a letter on 11 March 2014, is irregular



- (dd) AirChefs in issuing a letter of award to the Complainant became *functus officio* and could not withdraw and/or amend the aforesaid letter without a Court Order as enunciated on Vox Orion case.
 - (ee) The withdrawal and/or amending of the letter of award issued to the Complainant on the basis that it was incorrectly worded was inconsistent with section 217(1) and 195(1)(g) of the Constitution in that it violated the principle of transparency.
 - (ff) Therefore the conduct of the ACEO of AirChefs referred to above constitutes improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.
 - (gg) The SAA's non-implementation and delay to provide the Complainant with the Indyebo report, including non-implementation of the National Treasury investigation report scuppered the Complainant's efforts and rights to a just administrative action thus preventing him to comply with section 7(1) of PAJA which provides that any proceedings for judicial review, should comply with section 6(1) of the same legislation.
 - (hh) Therefore the SAA's conduct amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.
- (b) **Regarding whether the Complainant was improperly prejudiced by the conduct of the AirChefs in the circumstances as envisaged in section 6(5)(d) of the Public Protector Act.**
- (aa) The allegation that the Complainant was improperly prejudiced by the conduct of the AirChefs in the circumstances as envisaged in section 6(5)(d) of the Public Protector Act, is substantiated.



- (bb) The withdrawal by AirChefs of the letter of award of the tender dated 17 February 2014 and the subsequent failure by the AirChefs to sign the SLA with the Complainant prejudiced him.
- (cc) The Complainant suffered prejudice in a form of financial loss or expenses incurred in preparing and submitting the bid documents as well as other expenses relating to meetings, travelling, accommodation, exchange of correspondence with the SAA, seeking legal opinion and representation in his longstanding dispute with SAA which can be regarded as *out-of-pocket* expenses. However, the *quantum* of such financial loss can best be assessed and calculated through the submission of actual invoices by the Complainant as proof thereof.
- (dd) Therefore, the conduct of AirChefs in this regard amounts to improper prejudice as envisaged by section 6(5)(a) of the Public Protector Act.
- (ix) The appropriate remedial action taken as contemplated in section 182(1)(c) of the Constitution, with a view of remedying the impropriety referred to in this report is the following:
 - (a) **THE CHAIRPERSON OF THE SAA BOARD**
 - (aa) To take cognizance of the findings relating to the improper conduct and maladministration by the AirChefs concerning the irregularities mentioned in the report;
 - (bb) To ensure that the Complainant is provided with a letter of apology within **ten (10) working days** of issuing of this report for subjecting him to unnecessary litigation attributable to AirChefs and SAA's continued wrongdoing;



- (cc) Ensure that the Complainant is reimbursed for all proven *out-of-pocket* expenses relating to meetings, travelling, accommodation, exchange of correspondence with the SAA, seeking legal opinion and representation in his longstanding dispute with SAA, within **thirty (30) working days** from the date of issuing of a letter of apology to him;
- (dd) Ensure that the CEOs of AirChefs/SAA consider the report in so far as it relates to the gaps identified in the NT and Indyabo reports respectively, and to address such through introduction of and compliance with stringent policies, prescripts and practices which are in line with section 217 of the Constitution, the PFMA, National Treasury Regulations; and
- (ee) Ensure that the CEOs consider the acts of maladministration and improper conduct referred to in this report and take appropriate disciplinary action against any official of the AirChefs/SAA in respect of their conduct referred to therein.

(b) THE CEOs OF AIRCHEFS/SAA

- (aa) To consider the report in so far as it relates to the gaps identified in the NT and Indyabo reports respectively, and to address such through introduction of and compliance with stringent policies, prescripts and practices which are in line with section 217 of the Constitution, the PFMA, National Treasury Regulations; and
- (bb) To consider the acts of maladministration and improper conduct referred to in this report and take appropriate disciplinary action against any official of the AirChefs/SAA in respect of their improper conduct referred to therein.



REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF PROCUREMENT IRREGULARITIES AND MALADMINISTRATION REGARDING THE IRREGULAR TERMINATION OF AIRCHEFS TENDER NUMBER GSM 025/2013 BY THE SAA AFTER ITS AWARD TO MANTELLI'S

1. INTRODUCTION

- 1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (Public Protector Act).
- 1.2 This report, specifically the findings therein, are submitted, in terms of section 8 of the Public Protector Act, to the following people:
 - 1.2.1 The Minister of Public Enterprises, Mr Pravin Gordhan, MP;
 - 1.2.2 The CEO of SAA, Ms Zukisa Ramasia;
 - 1.2.3 The CEO of AirChefs, Mr Martin Kemp;
 - 1.2.4 The Chairperson of the SAA Board, Ms Thandeka Mgoduso; and
 - 1.2.5 The Complainant, Mr Simon Mantell.
- 1.3 The report relates to an investigation into allegations of procurement irregularities and maladministration regarding the irregular termination of AirChefs Tender Number GSM 025/2013 by the SAA after its award to Mantelli's



2 THE COMPLAINT

- 2.1 The complaint was lodged by Mr. Simon Mantell (the Complainant), on behalf of Mantelli's Biscuit Factory on 25 March 2014. The complaint was received by the Public Protector on 07 April 2014.
- 2.2 In his complaint, the Complainant alleged the following:
- 2.2.1 That a tender was awarded to Mantelli's Biscuit Factory by AirChefs, an online catering company which supplies on-board meals to South African Airways (SAA), SA Express and Mango.
- 2.2.2 That AirChefs is 100% owned by SAA and is a state owned enterprise.
- 2.2.3 That for the last 20 to 30 years, Wheat-worth (a brand owned by AVI) has held the contract of supplying SAA with crackers.
- 2.2.4 That tender number GSM 025/2013 was advertised in the Sunday Times on 07 April 2013, for a request to bid for the "*Dry snacks*" which included a wide range of products from biltong, chips, chocolate and savoury crackers.
- 2.2.5 That the closing date for the Bid was on 29 April 2013 at 11:00 am.
- 2.2.6 That AirChefs had indicated that volumes consumed/purchased were 365 000 units per month (costing over R4 Million per annum) which is a significant volume. On 25 April 2013, Complainant personally delivered Mantelli's tender documents into SAA tender box at Airways Park in Kempton Park, bidding for a tender to supply for one item being the "*3 in 1 cracker snacks*".
- 2.2.7 That on 28 May 2013, the Complainant received a letter from Mr Risben Khoza of AirChefs confirming receipt of the tender documents from Mantelli's.



- 2.2.8 That on 14 June 2013, he further received another E-mail from Mr Risben Khoza requesting samples of the product that Mantelli's had tendered for (which in this case was the crackers), the delivery was requested at least by 20 June 2013. Another request for samples was made on 4 December 2013, for evaluation by SAA to be conducted by 9 December 2013.
- 2.2.9 That on 21 February 2014, an E-mail from Mr Prishaan Grounder, AirChefs with an attached letter dated 17 February 2014, and signed on the 18 February 2014, by the Acting CEO of AirChefs, Mr Martin Kemp (ACEO) was received. The letter states: *"with reference to the above Request for Bid, AirChefs would like to congratulate Mantelli's on being awarded the tender for dry snacks."*
- 2.2.10 That on 21 February 2014, the Complainant e-mailed Mr Prishaan Grounder of AirChefs wherein he acknowledged receipt of the said E-mail.
- 2.2.11 That on 24 February 2014, the Complainant phoned Mr Indir Naryan to discuss finalisation of the agreement and to establish when the handover would take place. During this telephone conversation, the Complainant submitted that he was informed that award is not actually a for a tender; Mantelli's is now part of a panel of preferred suppliers for all biscuits; implying that AirChefs will now only present Mantelli's product to its airline clients when requested; Wheatworth will remain the supplier of crackers for SAA; and that Mantelli's crackers may be presented to smaller clients like SA Express.
- 2.2.12 That he then lodged an objection with the Airchefs as he was unhappy for now being considered part of a panel of suppliers whereas he had submitted a bid as a single supplier. This culminated into a serious dispute with Airchefs and the SAA which eventually led to his complaint to my office.



2.3 Based on analysis of the allegations, I identified the following issues to inform and focus this investigation:

2.3.1 Whether the decision by AirChefs to revise the letter of award of tender GSM 025/2013 and re-issue the Complainant with a letter of award to a panel of suppliers to supply dry snacks to AirChefs was irregular and thus constitutes improper conduct and/or maladministration in terms of section 6(5)(a) of the Public Protector Act.

2.3.2 Whether the Complainant was improperly prejudiced by the conduct of the AirChefs in the circumstances as envisaged in section 6(5)(d) of the Public Protector Act.

3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

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

"The Public Protector has power as regulated by national legislation –

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

(b) **to report** on that conduct ; and

(c) **to take appropriate remedial action**".

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



- 3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5 In the constitutional court, in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)*, Chief Justice Mogoeng stated the following with own emphasis, when confirming the powers of the Public Protector:
- 3.5.1 The remedial action taken by the Public Protector has a binding effect, *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences” (para 73);*
- 3.5.2 Complaints are lodged with the Public Protector **to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles** (para 65);
- 3.5.3 An appropriate remedy must mean **an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced** (para 67);
- 3.5.4 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-



reaching the implications of her report and findings, **she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);**

- 3.5.5 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their **nature, context and language**, to determine what course to follow (para 69) ;
- 3.5.6 Every complaint requires **a practical or effective remedy** that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);
- 3.5.7 The Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the **subject-matter of investigation** and the **type of findings made** (para 71);
- 3.5.8 Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that **she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence** (para 71(c));
- 3.5.9 **She has the power to determine the appropriate remedy and prescribe the manner of its implementation** (para 71(d));



- 3.5.10 “Appropriate” means nothing less than effective, suitable, proper or **fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption**, in a particular case (para 71(e));
- 3.6 In the matter of the ***President of the Republic of South Africa v Office of the Public Protector and Others, Case no 91139/2016 (13 December 2017)[2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 all SA 800 GP; 2018 (5) BCLR 609 (GP) (13 December 2017)***, the court held as follows:
- 3.6.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (para 79);
- 3.6.2 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers (para 100 and 101):
- 3.6.2.1 Conduct an investigation;
 - 3.6.2.2 Report on that conduct; and
 - 3.6.2.3 To take remedial action.
- 3.6.3 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (para 104);
- 3.6.4 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (para 105).
- 3.6.5 The fact that there are no firm findings on the wrong doing, this does not prohibit the Public Protector from taking remedial action. The Public Protector’s observations constitute *prima facie* findings that point to serious misconduct (para 107 and 108); and



3.6.6 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (para 112);

3.7 The SAA is one major entity listed in terms of schedule 2 of the Public Finance Management Act No 1 of 1999 (PFMA). AirChefs is a subsidiary of SAA therefore its conduct amounts to conduct in state affairs, as a result the complaint falls within the ambit of the Public Protector's mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

4 THE INVESTIGATION

4.1 Methodology

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

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

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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



- 4.2.1.4 In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where he would have been but for the maladministration or improper conduct?
- 4.2.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the AirChefs/SAA and other functionaries acted in the manner alleged by the Complainant.
- 4.2.1.6 The sources of evidence principally included institutional documents such as bid documents, memoranda, minutes and copies of correspondence. *Viva voce* evidence was also received from selected witnesses, mainly the Complainant, the CEO of AirChefs and the CEO of SAA, including management, and the SAA Board. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.
- 4.2.1.7 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by AirChefs/SAA to prevent maladministration and prejudice. The investigation focused on compliance with the law and prescripts regarding the awarding of tenders.
- 4.2.1.8 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where the Complainant has suffered prejudice, the idea is to place him as close as possible to where he would have been had the institution concerned complied with the regulatory framework setting the applicable standards for good administration.
- 4.2.1.9 Due to the lack of resources and other challenges, there were unforeseen and unavoidable delays in the completion of this investigation.



4.3 The Key Sources of information

4.3.1 Documents

- 4.3.1.1 A Public Protector complaint form with a stamp dated 25 March 2014;
- 4.3.1.2 Copies of submissions approved by the CEO prior to the tender advert dated 21 February 2013;
- 4.3.1.3 Copy of a tender/Bid advertisement with the closing of 29 April 2013, published by the Business Times dated April 2013;
- 4.3.1.4 Copies of Bids documents submitted;
- 4.3.1.5 A Copy of the signed register stamped 30 April 2013;
- 4.3.1.6 Copies of Approval prior to the appointment dated 21 October 2013;
- 4.3.1.7 Copies of all letters to successful bidders signed on 18 February 2014;
- 4.3.1.8 Copies of SLA signed with successful bidders dated 18 November 2014;
- 4.3.1.9 A copy of a communique dated 6 April 2015 from Mr Nico Bezuidenhout to the Complainant;
- 4.3.1.10 Copies of the minutes of the BSC and BEC dated 4 June 2013;
- 4.3.1.11 A copy of a communique dated 13 August 2018 from Mpati Qofa to the Complainant;



- 4.3.1.12 A copy of a communique dated 3 August 2018 from the Complainant to Mpati Qofa ;
- 4.3.1.13 A copy of a letter dated 30 July 2018, from SAA, interim Chief Legal to the Complainant;
- 4.3.1.14 A copy of a letter dated 1 July 2015, from National Treasury Chief Director, Mr Solly Tshitangano to SAA Acting Chief Executive Officer, Mr N Bezuidenhout;
- 4.3.1.15 A copy of a letter dated 7 July 2015, from SAA to National Treasury Chief Director, Mr Solly Tshitangano;
- 4.3.1.16 A copy of a communique dated 4 December 2013 from Risben Khoza to the Complainant;
- 4.3.1.17 A copy of a communique dated 18 October 2019 from NT to the Public Protector;
- 4.3.1.18 A copy of a letter of award as a panel reissued to the Complainant dated 11 March 2014;
- 4.3.1.19 A copy of a letter dated 24 May 2016 from AirChefs to the Public Protector;
- 4.3.1.20 A copy of a final report by Indybebo Consulting dated 8 August 2014;
- 4.3.1.21 Copies of a submission by the Complainant on loss of profit dated 2 October 2015;and
- 4.3.1.22 A copy of the National Treasury Report dated 21 May 2015.



4.3.2 Interviews and meetings conducted:

- 4.3.2.1 Interviews with the Complainant on 7 July 2016;
- 4.3.2.2 Interviews with the Complainant on 19 August 2016;
- 4.3.2.3 Meeting with the Complainant on 25 September 2019;
- 4.3.2.4 Meeting with SAA legal team on 27 May 2019; and
- 4.3.2.5 Subpoenas meeting with the CEOs of AirChefs and SAA on 22 August 2019.

4.3.3 Correspondence sent and received

- 4.3.3.1 A letter dated 10 November 2014 ,from the Public Protector to the Acting Executive Officer of AirChefs, Mr Martin Kemp;
- 4.3.3.2 A letter dated 1 July 2014 ,from the Public Protector to the Acting Executive Officer of AirChefs, Mr Martin Kemp; and
- 4.3.3.3 A letter dated 14 July 2014, from the Acting Executive Officer of AirChefs, Mr Martin Kemp to the Public Protector.

4.3.4 Notice issued in terms of 7(9) of the Public Protector Act, 1994

- 4.3.4.1 Notice issued to AirChefs CEO, Mr Martin Kamp dated 15 November 2019;
- 4.3.4.2 Notice issued to the Chairperson of the Board AirChefs, Ms Swazi Tshabalala dated 15 November 2019; and
- 4.3.4.3 Notice issued to SAA CEO, Ms Zukisa Ramashia dated 15 November 2019.



4.3.5 A Response to the notice in terms of section 7(9)(a) of the Public Protector Act, 1994 from:

4.3.5.1 Response from AirChefs/ SAA dated 20 December 2019.

4.4 Legislation and other prescripts.

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

4.4.2 The Public Protector Act, 23 of 1994;

4.4.3 Promotion of Administrative Justice Act, 3 of 2000

4.5 Case law

4.5.1 ***Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*** (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016);

4.5.2 ***President of the Republic of South Africa v Office of the Public Protector and Others***, Case no 91139/2016 (13 December 2017)[2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 all SA 800 GP; 2018 (5) BCLR 609 (GP) (13 December 2017);

4.5.3 ***Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others*** 2004 (6) SA 222 (SCA);

4.5.4 ***The MEC for Health, Eastern Cape v Kirland Investments*** 2014 (3) SA 481 (CC);



- 4.5.5 **Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others 2008 (2) SA;**
 - 4.5.6 ***Home Talk v Ekurhuleni Metropolitan Municipality (225/2016) [2017] ZASCA 77 (2 June 2017);***
 - 4.5.7 ***Steenkamp NO v Provincial Tender Board, Eastern Cape [2006] JOL 18364 (CC);***
 - 4.5.8 ***Darson Construction (Pty) Ltd v City of Cape Town & Another 2007 (4) SA 488 (c);***
 - 4.5.9 **Transnet Ltd v Goodman Brothers (Pty) Ltd 2001 1 SA 853 (SCA) 867; and**
 - 4.5.10 **Vox Orion (Pty) Ltd v State Information Technology Agency (SOC) Ltd (49425/2013) [2013] ZAGPPHC 444 (6 December 2013).**
- 5 THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.**
- 5.1 Whether the decision by AirChefs to revise the letter of award of tender GSM 025/2013 and re-issue the Complainant with a letter of award to a panel of suppliers to supply dry snacks to AirChefs was irregular and thus constitutes improper conduct and/or maladministration in terms of section 6(5)(a) of the Public Protector Act.**

Common cause issues

It is not disputed that:



- 5.1.1 On 25 April 2013, the Complainant submitted a tender to AirChefs for the supply of one item, the 3 in 1 cracker snacks.
- 5.1.2 The Complainant was issued with a letter of award dated 17 February 2014, approved by the ACEO on 18 February 2014 which read that “*AirChefs (SOC) Ltd would like to congratulate Mantelli’s Pty Ltd on being awarded the tender for dry snacks*”. It is not in dispute that other successful bidders were issued with the aforesaid letter of award.
- 5.1.3 On 11 March 2014 the Complainant was re-issued with a revised letter of award which referenced “*AirChefs (SOC) Ltd would like to congratulate Mantelli’s Pty Ltd on being selected as one of a panel of suppliers to supply dry snacks to AirChefs*”. However, this letter of appointment as a panel was only given to the Complainant and not the other bidders.
- 5.1.4 The issue before me for determination is whether or not AirChefs irregularly terminated the Complainant’s award of tender GSM 025/2013.

Issues in dispute

- 5.1.5 Bid number: RFP-GSM 25/2013 was advertised on Sunday Times newspaper with a closing date of 29 April 2013 at 11:00. The contents of the advertisement stated that “*REQUEST FOR BID (RFP) Reference: GSM025/2013, REQUEST FOR BID: SAA is inviting suppliers to Bid for the supply of the following:*
1. *GSM025/2013-Purchase of various types of dry snacks*”.
- 5.1.6 An advertisement in the Sunday Times newspaper dated 7 April 2013 was calling for suppliers to submit a bid for various types of snacks. Nine (9) bidders responded and submitted their bids. The Complainant and CIRO are the only

bidders that tendered for crackers. All other bidders submitted bids which included other variety of dry snacks while the Complainant tendered for one only.

5.1.7 The bid evaluation criteria was as projected in the table below:

Evaluation criteria					
Bidders	Look and feel- Visual appeal	Ingredient list of raw materials for final product	Certified laboratory testing	Product manufactured locally	Total
Weight	10	10	10	10	100
Simba	8	10	10	-	84
Takis	8	10	10	10	89.33
Mantellis	8	10	10	10	88.8
Empire	7	10	10	-	81.33
CIRO	8	10	10	-	83.33

5.1.8 On 4 December 2013, Mr Risben Khosa, Strategic Buyer requested the Complainant through an E-mail to provide samples of the tender items, he stated that *"they are requested by the BAC from SAA Group to do the final testing evaluation before the award of the tender."*

5.1.9 The Bid Adjudication Committee meeting recommended the appointment of Empire-state Trading (Pty), Cori Beverages Solutions (CIRO), Mantelli's, Simba (Pty) Ltd and Takis Biltong to supply dry snacks to AirChefs.

5.1.10 The award to Empire-state Trading (Pty), CIRO, Mantellis s, Simba (Pty) Ltd and Quickstep (Pty) Ltd/Takis Biltong dated 17 February 2014 was approved by the ACEO on 18 February 2014.



- 5.1.11 The Complainant lodged a complaint with SAA on 24 March 2014 alleging irregular awarding of the tender for dry snacks by AirChefs. SAA assured the Complainant that external investigators will be sourced to conduct a thorough investigation.
- 5.1.12 SAA commissioned *Indyebo Consulting (Indyebo)* on 16 May 2014, to conduct an investigation into the alleged irregularities and on 8 August 2014, Indyebo issued a report to SAA with the findings and recommendations in favour of the Complainant.
- 5.1.13 However, the Complainant submitted that on the release of the report, SAA requested to meet with him and his attorneys on 8 October 2014, to discuss the findings and recommendations. However, during the meeting Mr Sikhosana, SAA Legal and Mr Soga (former SAA employee), refused to share the *Indyebo report* with him.
- 5.1.14 The Complainant further submitted that seeing that there was refusal to provide the aforesaid report, he approached the SAA Board and they committed to conducting further investigation relating to this matter, but it took another 10 months for them to do so. Subsequently the Board further commissioned ENS to conduct further investigation on the same matter.
- 5.1.15 I have also obtained a report from the NT dated 21 May 2015, which conducted verification of compliance with Treasury norms and standard during the bidding process of Bid No: RFP-GSM 25/2013 AirChefs Pty Ltd.
- 5.1.16 The NT's findings were as follows:
- 5.1.16.1 *"The bid specifications were poorly developed and failed to indicate the allocation criteria to be used to award the tender to more than one supplier;*



- 5.1.16.2 *The summary of the scores submitted to the Bid Adjudication Committee does not correspond with individual score sheets provided;*
- 5.1.16.3 *Simba (Pty)Ltd was not disqualified for submitting a late proof of payment dated 04 June 2013 whereas the tender closed on 29 April 2013;*
- 5.1.16.4 *The Bid Adjudication Committee failed to ensure that the scoring has been fair, consistent, correctly calculated and applied;*
- 5.1.16.5 *The Accounting officer signed letters of award which did not specify the type of dry snacks to be supplied by the individual preferred bidder;*
- 5.1.16.6 *The changing of Mantelli's Biscuits' letter of award to be a panel member of suppliers caused confusion;*
- 5.1.16.7 *The service level agreement was not signed between AirChefs (Pty) Ltd and Mantelli's Biscuits because of the dispute."*
- 5.1.17 The recommendations emanating from this report were that the Accounting Officer should ensure that:
 - 5.1.17.1 Tenders are evaluated and adjudicated in accordance with their requirements and conditions;
 - 5.1.17.2 Suppliers who do not comply with the requirements and conditions of the bid are disqualified without considering their capacity to deliver;
 - 5.1.17.3 Proper specifications are developed and approved before advertising any bid; and



- 5.1.17.4 Certain categories of biscuits should be allocated to Mantelli's Biscuits and a service level agreement signed with them.
- 5.1.18 Accordingly, during my investigation team's meeting held on 19 September 2019, SAA and AirChefs acceded that the findings and recommendations of the aforesaid investigation reports commissioned by SAA were not implemented.
- 5.1.19 AirChefs provided me with evidence of an undated letter which included reasons provided to the Complainant as their explanation for them having had to re-issue the award letter now as a "panel" instead of a "tender", addressed to the Complainant's attorneys, providing reasons as indicated in the letter below:





manner in which they engage certain clients. Air Chefs is a catering company servicing a variety of clients. The resulting effect is that Air Chefs' procurement of certain goods for their clients is entirely dependent on its client's requirements and business demand. It goes without saying therefore that the envisaged panel of suppliers and engagements thereof, facilitates our business processes by making the provision of our services more effective and efficient.

Notwithstanding the general reservation of our rights in terms of this subject matter tender as contained in the RFB and/or the LOA, your attention is drawn to the Request RFB Terms of Reference, which clearly note that "...the purpose of this request for a proposal is to identify and select one or more parties to provide all different various types of dry snacks to Air Chefs...". It is hereby noted that your client, after the evaluation process was concluded, was chosen as one of the parties who will supply Air Chefs with one or more types of dry snacks (as tendered for by your client).

We hereby note further that the Agreement which your client refers to in his correspondence with Messrs. Naryan and Kemp and which you refer to in your letter, is a general service level agreement which all suppliers on Air Chefs' panel of suppliers conclude with Air Chefs. Typically this Agreement sets out the terms and conditions applicable to the panel and forms the underlying contractual relationship between Air Chefs and its suppliers.

Your assertion and interpretation of the condition relating to the conclusion and signature of the Agreement within 30 (thirty) days is factually without merit. In the email correspondence between your client and our Messrs. Naryan and Kemp, your client was advised and enquired if this tender Agreement can be sent to him and which no response was received.

It is with disappointment that your client has undertaken this direction whereas from the outset Air Chefs noted its bona fide errors in respect of the initial LOA, however, please note that should your client still be interested in the above subject matter tender, the following requirements should be met –

- Please kindly contact our Mr Naryan and send through the signed and accepted updated LOA; and
- Once the updated LOA is received, to kindly arrange with our Mr Naryan that the panel of suppliers agreement be sent, negotiated and concluded between the parties, within 30 (thirty) days of returning the signed and updated LOA.

Failure to respond immediately, by act or omission, would have the effect of nullify any LOA (updated or otherwise)

Yours Sincerely

- 5.1.20 The Complainant indicated that on March 2014, the ACEO of AirChefs personally decides to withdraw the tender award in favour of the Complainant, and placed Mantelli's on a panel of service providers and confirmed that the cracker business stays with CIRO, whilst other categories were to remain as successful bidders.
- 5.1.21 The Complainant submitted that on April 2014, the erstwhile CEO of SAA sent an E-mail to him and confirmed in writing that *"an external forensic investigation will be appointed (to be managed by the SAA Chief Audit Executive) and that the findings and recommendations will be shared to restore the Complainant's confidence in SAA procurement processes"*.
- 5.1.22 Subsequently, AirChefs signed a contract with CIRO on 18 November 2014 for the supply of various types of dry snack products to AirChefs under bid number GSM 025/2013.



- 5.1.23 The supplier's obligation in terms of the contract, was to submit its price list for the supply and delivery of the products to AirChefs which was to be negotiated and agreed with AirChefs as attached in accordance to Annexure A of the SLA.
- 5.1.24 Annexure A provides that *"the product to be supplied by the supplier to AirChefs in terms of the contract and which AirChefs will purchase from the supplier as and when AirChefs requires... products will be purchased from CIRO as per AirChefs requirements as and when required without obligation to do so on the part of AirChefs"*.
- 5.1.25 In its submission dated 24 May 2016, AirChefs indicated that the Complainant refused to sign the revised letter of award; hence AirChefs did not get to a stage of signing the Service Level Agreement (SLA) with him.
- 5.1.26 It further submitted that the Complainant wanted to be a sole supplier of crackers and wanted SAA business which he anticipated to be much higher than R200 000.
- 5.1.27 AirChefs maintained that it would not be possible for the Complainant to be a sole supplier due to the AirChefs business model, which was explained in the document titled, *"AirChefs Business Model"* below:

AIRCHEFS BUSINESS MODEL

Airchefs buys various types of foods, from their panel of suppliers, for their customers. For the sake of simplicity, I will speak about Dry Snacks only.

Airchefs is a subsidiary of SAA, but it is an independent legal entity and makes its day-to-day business decisions independently from SAA. SAA is one of many customers Airchefs have. On a daily basis, Airchefs look for new customers and do everything to keep the existing customers. The Airchefs customers also buy food "as and when required". Airchefs do not have fixed volume contracts with any of its customers.

In addition to customers who have SLA's with Airchefs, there are lots of adhoc customers who buy anything they need at a point in time. For example, British Airways will sometimes phone in the morning seeking to buy Coca Cola and Simba Chips, Lays Chips or Willards Chips. Such customers want specific brands, not just any chips or drink. Airchefs have to ensure they are able to deliver Coca Cola, Not Pepsi or Cream Soda, as and when they are required. This goes for any other product.

It also happens that a certain airline will invite Airchefs to bid. In this industry, a bidder must have as much variety as possible, when bidding. For example, Airchefs will present different types of Dry Snacks to a potential customer. The customer will "evaluate" each Dry Snack and choose what they like. To be competitive and able to win business, Airchefs need to have the widest variety of Dry Snacks. Airchefs then go on tender to get as many suppliers as possible into their database/panel. When they go on tender, it does not mean there is a guaranteed customer somewhere. The panel is refreshed or improved on a regular basis just to ensure that Airchefs is ready as and when (1) an existing customer wants a certain brand of a product, (2) adhoc customer wants a certain product immediately, (3) when an existing customer wants to change its menu, etc.

SA is indeed the biggest customer of Airchefs. But Airchefs does not and cannot impose the various products they have on SAA. SAA has its own Food and Beverages section that decide what should be in or out of SAA menu's. For example, SAA is serving Wheatworth Crackers to its passengers. On a regular basis SAA conducts surveys to determine whether or not passengers are still happy with the menu's. Based on SAA Food and Beverages section, there was no reason for SAA to change to another Cracker as the passengers were happy with Wheatworth Crackers. When Airchefs decided to refresh the panel of Crackers suppliers, that had nothing to do with SAA. If and when Airchefs add new suppliers in their suppliers panel, they would go to SAA afterwards and present the new Crackers on offer. SAA would "evaluate" the new Crackers and decide to buy or not to buy. It all depends on what the passengers and SAA want. This will be the case with all other airchefs customers. Airchefs can therefore never go out on tender to refresh its panel of suppliers and state in the tender that there is a guaranteed customer which is SAA.

Airchefs also never enter into fixed volume contracts with its customers. This is because customers change their menu's regularly and they buy as and when required. The estimates are however given based on previous trends. For example, Airchefs will sometimes share the SAA buying trends with bidders; that however does not mean the bidder should then expect the same orders from SAA. Actually SAA never deal with Dry Snacks suppliers directly; SAA buys from Airchefs. It therefore cannot be right that any customer can demand SAA to buy their product. Furthermore, SAA cannot be expected to be locked into some fixed bulk purchases. Customers' demands and taste change regularly. For example, SAA decided to significantly scale down on what is served in our domestic flights. This is part of our cost cutting measures. As a result of SAA cost cutting measures, even that Wheatworth Crackers is no longer served in our domestic flights. Can Ciro Beverages, or even Mantell's, then sue SAA or Airchefs just because the volumes of crackers that are bought have significantly reduced?



The above is, roughly, a business model of Airchefs. Unless this business model is changed, facts are:

- Airchefs need to have a panel of suppliers for different and similar products.
- Airchefs refresh its panel of suppliers regularly. When this is done, that does not and cannot mean there is a guaranteed customer somewhere.
- Airchefs buy from its suppliers as and when required, based on the requirements from customers.
- The Airchefs customers sometimes want specific brands of products and Airchefs have to supply. Airchefs cannot impose the brands they have in their panel on any customer; the customers decide what they want. It is Airchefs responsibility to ensure they have willing and able suppliers in their panel.
- Airchefs customers change their buying patterns regularly; hence there is no guarantee that Airchefs customers will buy fixed volumes.
- It is possible for supplier to be in the Airchefs panel and never receive any orders. Airchefs will do everything in their power to present the suppliers product(s) to potential customers. If customers are not selecting or buying the suppliers product, Airchefs will keep on trying with different customers. Airchefs cannot buy and keep something in stock while there is no customer.

Based on the above, a recommendation that Airchefs SHOULD/MUST buy from Mantelli's or SAA SHOULD/MUST buy from Mantelli's is not feasible. All what Airchefs could do is to appoint them into the panel, which Airchefs did.

5.1.28 Moreover, it submitted that the revised letter was not sent to other four bidders as it was not going to make any difference due to the reasons provided below:

5.1.28.1 *"The other bidders did not raise the question of whether or not they were single suppliers or in a panel."*

5.1.28.2 *The other bidders, excluding CIRO, were the only suppliers of the products they bidded for."*

5.1.29 SAA further commissioned ENS Africa to conduct an investigation on the same matter relating to the Complainant's tender dispute. However, the Complainant submitted that the report was never completed in that the investigation was never finalised in this regard.



Application of the relevant law

5.1.30 Section 217(1) of the Constitution is the basis upon which all procurement practices within the public sector are developed. The Constitution demands that when procuring entities contracts for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness.

5.1.31 Section 217(3) of the Constitution makes provision for the enactment of legislation to provide a framework for such use.

5.1.32 The courts have held that the soliciting, evaluation and award of public tenders amounts to an “*administrative action*” within the meaning of section 33 of the Constitution and PAJA¹

5.1.33 Section 33 of the Constitution states that:

“(1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

(2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*

(3) *National legislation must be enacted to give effect to these rights, and must-*

(a) *Provide for the review of administration action by a court or, where appropriate, an independent and impartial tribunal;*

¹ See *inter alia* Transnet Ltd v Goodman Brothers (Pty)Ltd 2001 1 SA 853 (SCA) 867 para 38, 871 para 9



(b) *Impose a duty on the state to give effect to the rights in subsection (1) and (2); and*

(c) *Promote an efficient administration.*”

5.1.34 The definition of ‘administrative action’ in section 1 (i) is instructive in PAJA. It thus reads:

“(1) ‘**administrative action**’ means any decision taken, or any failure to take a decision, by –

(a) *an organ of state, when –*

(i) *exercising a power in terms of the Constitution or a provincial constitution; or*

(ii) *exercising a public power or performing a public function in terms of any legislation; ...”*

5.1.35 The amendment of the letter of award to Mantellis AirChefs amounts to administrative action.

5.1.36 Section 3 of PAJA read thus:

(1) *“Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*

(2) (a) *A fair administrative procedure depends on the circumstances of each case.*



(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection(1)—

- (a) adequate notice of the nature and purpose of the proposed administrative action;*
- (b) a reasonable opportunity to make representations;*
- (c) a clear statement of the administrative action;*
- (d) adequate notice of any right of review or internal appeal, where applicable; and*
- (e) adequate notice of the right to request reasons in terms of section 5".*

5.1.37 AirChefs did not give Mantelli's any notice regarding the amendment of the tender and even an opportunity to make representations in that regard. The conduct of AirChefs in amending the tender was inconsistent with section 3 of PAJA and therefore procedurally flawed.

Application of the relevant case law

5.1.38 With the advent of PAJA², the Supreme Court of Appeal (SCA) has confirmed that the awarding of a tender constitutes an administrative action and consequently that the provisions of PAJA apply to the tender process³.

5.1.39 In the celebrated **Ouderkraal Estates**⁴ decision, the SCA authoritatively ruled that until an administrative decision is set aside by a Court in proceedings for judicial review, it exists in fact and it has legal consequences that cannot simply be overlooked.

² No 3 of 2000

³ Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & Others 2008 (2) SA 481 (SCA) at para 4

⁴ Ouderkraal Estates (Pty) Ltd v City of Cape Town & Others 2004 (6) SA 222 (SCA) at para 26



- 5.1.40 The principle enunciated in **Ouderkraal** was confirmed by the Constitutional Court in **The MEC for Health, Eastern Cape v Kirland Investments**.⁵ In this instance, the Court was called upon to reconsider the correctness of the principle in **Ouderkraal**.⁶ The Court rejected this invitation and found that *“if public officials or administrators can, without recourse to legal proceedings, be allowed to disregard administrative actions by their peers, subordinates or superiors if they consider them mistaken, this would be a license to self-help. It would be inviting officials to take the law into their own hands by ignoring administrative conduct they consider incorrect. The Court found that this would spawn confusion and conflict to the detriment of the administration and the public and that it would undermine the Court’s supervision of the administration.”*⁷
- 5.1.41 In light of the foregoing, it is clear that it is not open for the AirChefs to arbitrarily withdraw and revise the award of a tender with immediate effect, without consideration of the legal implications and effects this would have on the bidders. A proper review application has to be brought to the court, firstly to review the decision to award the tenders to the successful suppliers and secondly to declare the contracts void *ab initio*.
- 5.1.42 The alteration of the letter of award has caused confusion to the Complainant, causing him not to be able to conclude the SLA, as the changes affected the terms and conditions of the contract of not having a business delivery guarantee. This has also manifested into conflicts to the detriment of the administration and the public funds in that AirChefs had to conduct several investigations utilizing public funds and compromising the reputation of AirChefs and SAA in the process, as was highlighted in the aforesaid **Ouderkraal** case.

⁵ 2014 (3) SA 481 (CC)

⁶ At para 87

⁷ At para 89



- 5.1.43 Section 7(1) of PAJA provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than **180 days** after the person has become aware of the administrative action and its reasons or after completion of the applicable internal remedies. Relying on its earlier decision,⁸ the Constitutional Court confirmed in **Kirland** that litigants, including public functionaries are bound by statutory and the common law timeframes and may not circumvent them using procedural tricks.⁹
- 5.1.44 The process of investigations commissioned by AirChefs and SAA through the *Indyebo investigation report* and *ENS investigation* as well as the *Treasury Investigation* put the Complainant under the impression that SAA will restore his rights that would have ensued from the tender being awarded to him after completion of these investigations. Consequently, this unreasonably delayed the Complainant from instituting proceedings for judicial review by the Court.
- 5.1.45 Its failure to timeously share the *Indyebo investigation report* and its failure to implement the findings and recommendations of the investigation reports which were all in favour of the Complainant, seemed to have been calculated steps to scupper the Complainant's efforts and rights to a just administrative action as provided for in the aforesaid **Kirland case**.
- 5.1.46 The evidence discussed above indicates that AirChefs did advertise a tender under reference number: *RFP-GSM 25/2013-“Purchase of various types of dry snacks”*, which the Complainant responded on 25 April 2013, when he submitted a bid to supply for one item being the 3 in 1 cracker snacks to AirChefs.

⁸ Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC)

⁹ At para 83



- 5.1.47 Accordingly, AirChefs appointed the Complainant through a letter of award dated 17 February 2014, approved by the ACEO on 18 February 2014, which referenced that *"AirChefs (SOC) Ltd would like to congratulate Mantellis Pty Ltd on being awarded the tender for dry snacks",* equally to other similar bidders who were also successful.
- 5.1.48 However, AirChefs on 11 March 2014 re-issued the Complainant with a revised letter of award which stipulated that he was being selected as one of a panel of suppliers to supply dry snacks to AirChefs, this correspondence was issued to the Complainant only and not to its competitor which was CIRO in this respect.
- 5.1.49 Moreover, if the intention was to appoint successful bidders into the panel of suppliers, AirChefs would not have omitted to inform CIRO in writing that it was appointed into a panel of suppliers just like Mantelli's.
- 5.1.50 In consideration of the evidence submitted by AirChefs about the contract that was signed with CIRO on 18 November 2014 which stipulated that *"the product to be supplied by the supplier to AirChefs in terms of the contract and which AirChefs will purchase from the supplier as and when AirChefs requires... products will be purchased from CIRO as per AirChefs requirements as and when required without obligation to do so on the part of AirChefs"*.
- 5.1.51 The aforesaid narrative supports the evidence submitted by AirChefs to me illustrating the model of business for AirChefs. However, I am unable to dismiss the submission that AirChefs had for several years, been sourcing Wheatsworth crackers and/or dry snacks from CIRO as required and preferred by SAA, a customer to AirChefs, but this has a potential to create a monopolistic business environment.



5.1.52 According, to the E-mail of 4 December 2013 from Risben Khoza to the Complainant, it shows that there was involvement of the SAA in the procurement process of AirChefs as the BAC from SAA Group were involved in the final testing and evaluation of the Complainant's "3 in 1 cracker snacks" before the award of the tender.

Conclusion

5.1.53 Based on the advertisement and the initial letter of award by the ACEO of Airchefs to Mantelli's, it can be safely concluded that this was a tender for suppliers to bid for the supply of various snacks and not a selection/panel of suppliers to be on the list of preferred and/or panel of suppliers.

5.2 Whether the Complainant was improperly prejudiced by the conduct of the AirChefs in the circumstances as envisaged in section 6(5)(d) of the Public Protector Act.

Common cause issues

It is not disputed that:

5.2.1 The Complainant was issued with a letter of award dated 17 February 2014, approved by the ACEO on 18 February 2014, which referenced that "AirChefs (SOC) Ltd would like to congratulate Mantellis Pty Ltd on being awarded the tender for dry snacks". And that on 11 March 2014 the Complainant was re-issued with a revised letter of award which referenced "AirChefs (SOC) Ltd would like to congratulate Mantellis Pty Ltd on being selected as one of a panel of suppliers to supply dry snacks to AirChefs".



- 5.2.2 The issue for my determination is whether or not the Complainant was improperly prejudiced by the conduct of the AirChefs in the circumstances referred to above, as envisaged in section 6(5)(d) of the Public Protector Act.

Issues in dispute

- 5.2.3 In its submission dated 24 May 2016, AirChefs indicated that the Complainant refused to sign the revised letter of award; hence AirChefs did not get to a stage of signing the Service Level Agreement (SLA) with him.
- 5.2.4 The Complainant submitted that he was prejudiced in that CIRO was unfairly awarded a tender that was supposed to have been awarded to him.
- 5.2.5 Further that due to the communique of the ACEO of AirChefs submitted to the Complainant in March 2014, indicating that the ACEO personally decided to withdraw the tender award in favour of Mantelli's and placed the company on a panel of suppliers, confirmed to the Complainant that the cracker business was meant to remain with CIRO whilst other categories were to remain as successful bidders.
- 5.2.6 According to the Complainant, the withdrawal of the tender award, resulted in his loss of profit for a period of two (2) years.
- 5.2.7 The Complainant's submission to my office concerning the apparent prejudice suffered included the following:
- 5.2.7.1 *The loss of profit being R 5 298 783-84 excluding vat;*
- 5.2.7.2 *Interest at prevailing average rate on loss of profits over the period;*



- 5.2.7.3 *Legal costs – R 600 000-00 excluding vat - to date the Complainant indicated that he paid legal costs to his attorney in the amount of R 350 000-00 and believe that there is probably another R 250 000-00 in outstanding legal fees;*
- 5.2.7.4 *Reputational and brand damage – the “food service” channel which includes airlines is a small market and he had to fight all the way to get justice which can be interpreted negatively in the market by potential customers unless the truth is available for all to see; and*
- 5.2.7.5 *Time – he submitted that he had spent thousands of hours getting to the truth – and has been blocked at every turn by SAA as well as Air Chefs and their legal advisors including ENS Forensics and as a responsible citizen. .*

Application of the relevant law

- 5.2.8 In terms of section 237 of the Constitution, “*all constitutional obligations must be performed diligently...*”
- 5.2.9 Section 3(1) of PAJA provides that “*administration action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair*”.

Application of the relevant case law

- 5.2.10 The court on *Home Talk v Ekurhuleni Metropolitan Municipality* (225/2016) [2017] ZASCA 77 (2 June 2017), held that generally, delictual liability will not be imposed for breach of administrative law unless there are convincing policy considerations that warrant such imposition.



- 5.2.11 In instances where a tender was negligently awarded contrary to the principles of administrative justice and where such tender is subsequently set aside after a successful tenderer has incurred significant expenses in attempting to comply with its contractual obligations, the position remains that policy considerations preclude a disappointed tenderer from recovering delictual damages that were purely economical in nature. This was confirmed in *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] JOL 18364 (CC), where the court found that neither the statute under which tender was issued, nor the common law imposed a legal duty on the tender board to compensate for damages where it had *bona fides* but negligently failed to comply with the requirements of administrative justice.
- 5.2.12 Similarly, and in addition, it follows that a claim against an administrative body will lie only if it is established that the award of the contract to a rival tenderer was brought about by dishonest or fraudulent conduct on the part of one or more of the officials for whose conduct the appellant was vicariously liable, but for which the contract would have been awarded to the complainant.¹⁰
- 5.2.13 The quantification of “review compensation” was considered in *Darson Construction (Pty) Ltd v City of Cape Town & Another*¹¹. In this case compensation was awarded to an unsuccessful tenderer in terms of section 8(1)(c)(ii)(bb)¹². The Court noted, however, that it would not be just and equitable to award the applicant its alleged loss of profit. Instead, finding that the applicant was entitled to some compensation for the manner in which the administrator had

¹⁰ *South African Post Office v De Lacy and another* [2009] 3 All SA 437 (SCA)

¹¹ 2007 (4) SA 488 (c).

¹² 8(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

...
(c) setting aside the administrative action and –

...
(ii) in exceptional cases –

...
(bb) directing the administrator or any other party to the proceedings to pay compensation.'



breached the applicant's right to administrative justice. It held that such compensation was to be computed with reference to the applicant's *out-of-pocket expenses* in connection with the unsuccessful tender. Whilst the limitation is not legislated, the courts have limited their awards for "review compensation" to *out-of-pocket expenses*.¹³

5.2.14 The evidence discussed above indicates that AirChefs withdrew the letter of award of the tender dated 17 February 2014 and did not sign the SLA with the Complainant, instead they appointed CIRO and signed an SLA with them.

5.2.15 The awarding of the tender to the Complainant through a letter of award approved by the ACEO of AirChefs on 18 February 2014 created legitimate expectation that the tender was awarded to him as provided for in terms of section 3(1) of PAJA.

5.2.16 As a result of the withdrawal of the tender award by AirChefs, the Complainant suffered financial prejudice.

5.2.17 Every improper performance of an administrative function implicates the Constitution as provided for in section 237 which demands that, "*all constitutional obligation must be performed diligently...*" and entitles the aggrieved party to appropriate relief.

Conclusion

5.2.18 In the circumstances alluded to above, it is apparent that the Complainant suffered financial prejudice which accrued as a result of *out-of-pocket expenses* as described above and confirmed in the aforesaid **Darson case** wherein the courts noted that it would not be just and equitable to award the applicant its alleged loss of profit. Instead, finding that the applicant was entitled to some

¹³ At para 26 in *De Jong and Others v The Trustees of the Simcha Trust and Another* 2015 (4) SA 229 (SCA)



compensation for the manner in which the administrator had breached the applicant's right to administrative justice, the court held that such compensation was to be computed with reference to the applicant's *out-of-pocket* expenses and similarly in **Steenkamp case**.

5.3 Response from AirChefs and SAA dated 20 December 2019 to my section 7(9) notice issued to AirChefs and SAA on 19 November 2019.

5.3.1 A section 7(9) notice (Notice) in terms of the Public Protector Act, was issued on 19 November 2019 to the CEOs of AirChefs, and the SAA as well as the Chairperson of the SAA Board thus affording them an opportunity to respond and/or to contradict and/or to rebut my preliminary findings.

5.3.2 For ease of reference, I have decided to scan and attach the response of the AirChefs/SAA to this report in order to deal with the issues raised by AirChefs in *seriatim* and not *piecemeal*.

5.3.3 In their response dated 20 December 2019, to the Notice issued the AirChefs/SAA responded as follows:



REPRESENTATIONS ON BEHALF OF AIR CHEFS SOC LIMITED (AIR CHEFS) AND SOUTH AFRICAN AIRWAYS SOC LIMITED ("SAA") TO THE PUBLIC PROTECTOR'S INVESTIGATION INTO ALLEGATIONS OF IRREGULAR TERMINATION OF AIR CHEFS TENDER NO. GSM 025/2013 DATED 15 NOVEMBER 2019 ("the Interim Report")

TO: THE OFFICE OF THE PUBLIC PROTECTOR
E-mail: PfunzoM@pprotect.org
Ref. No: 7/2-007461/14

INTRODUCTION

1. On 19 November 2019, the Chairperson of the Air Chefs Board SOC Limited ("Air Chefs") received a report signed by the Public Protector dated 15 November 2019. The report indicated that the Public Protector was about to conclude her investigation into the irregular termination of Air Chefs' tender no. GSM 025/2013, which termination relates to Simon Mantelli t/a Mantelli Biscuits ("Mantelli").
2. In terms of this report, the Office of the Public Protector -
 - 2.1. was in a position to make findings after coming across evidence indicating wrongdoing on the part of Air Chefs;



- 2.2. sought further evidence that refutes the evidence in the Public Protector's possession to be directed to the Public Protector as she was likely to make adverse findings against Air Chefs and SAA; and
 - 2.3. the adverse findings that would be made may lead to remedial action that the Public Protector deems fit.
3. The report indicated that Air Chefs and SAA were afforded 14 days to respond to the report or engage with the investigating team on the report for purposes of giving further evidence that contradicts the evidence in the Public Protector's possession. The time frame was upon request by SAA and Air Chefs extended by the office of the Public Protector to the 20th of December 2019.
4. This document therefore seeks to provide further evidence that was not placed before the Public Protector prior to the finalisation of the preliminary report. It will show that there were further processes that were embarked upon by Air Chefs and SAA to regularise the procurement of the dry snack products that Mantelli had been appointed to provide as part of a panel.



5. The evidence annexed hereto demonstrates that the finding pertaining to maladministration on the part of Air Chefs and SAA is ill-conceived and cannot be sustained.
6. Further, the plethora of investigations that both Air Chefs and SAA had to subject themselves to and comply with pursuant to the impugned letters of Award, forced the Supply Chain Management processes of Air Chefs to be reconsidered to an extent that they have received a Treasury exemption. This will be further outlined hereinunder.
7. The tender for dry snacks was re-advertised and Mantelli was invited to and it participated in the bidding process for dry snacks. Unfortunately the latter bid had to be cancelled for reasons further expanded on hereinbelow.

THE MEETING HELD WITH THE PUBLIC PROTECTOR'S INVESTIGATORS AND ERSTWHILE CHIEF OPERATING OFFICER

8. It is common cause that both the CEO of SAA and the CEO of Air Chefs were subpoenaed to appear before the Public Protector in terms of section 7(4)(a) of the Public Protector Act. They were required to appear in person at Public Protector House, Hillcrest Office Park, 175 Lennon Road,



Pretoria on 22 August 2019 at 10:30. Both CEO's complied and presented themselves together with the documents identified in the subpoena. At the meeting they subjected themselves to the investigation in the form of answering questions that were posed to them by the erstwhile COO of the office of the Public Protector.

9. The nature of the engagement on the day in question left a lot to be desired. The record of the meeting which will be requested in due course, will show that the proceedings of the investigatory meeting on the said day were adversarial and biased against SAA and Air Chfs.
10. SAA and Air Chfs were not given an opportunity to explain themselves and refer or present some of the evidence that is annexed to this document. In fact, it appeared as if the conclusion by the Public Protector that SAA and Air Chfs were guilty of maladministration was as at that meeting a *fait accompli*.



11. The conduct of the officials that presided over the meeting was unfair as it demonstrated partiality which the Office of the Public Protector, as a Chapter 9 Institution, should loathe. As the record will show, the proceedings and particularly the chair of the meeting was belligerent.
12. The proceedings of the meeting are significant, they will demonstrate that the meeting went against the fundamental tenets of the country's Constitution and the widely recognised *Audi alteram partem* principle. Institutions such as the Public Protector are required to follow processes that are administratively fair and inculcate the principle of procedural rationality. This was not adhered to.

THE FURTHER EVIDENCE

The 2016 Tender Process

13. Having received the various reports investigating the procurement process that led to the impugned letters, SAA and Air Chefs embarked upon a procurement process for the appointment of a panel of service providers. These service providers would be used to supply and deliver various baked



dry snack products to Air Chefs under bid number RFP GSM 088/2015.

14. The tender process followed the—

14.1. Indyebo investigation report which was concluded on 8 August 2014;

14.2. the National Treasury investigation which was concluded on 21 May 2015;

14.3. opinions from ENS dated 27 July 2015 and 30 October 2015;and,

14.4. an opinion dated 22 October 2015 from Adams & Adams.

15. Having received legal advice from the opinions listed hereinabove the bidding process was then embarked upon. The closing date for the bid was 1 March 2016 and various bidders submitted their bids in response to the Request for Bids.

16. Mantelli, being the complainant before the Public Protector also submitted its own bid pursuant to the advertisement. This



time the bid was unequivocal, it invited bids for purposes of a panel that would provide the service advertised in the bid, being the dry snacks.

17. Notwithstanding the complaint that had been lodged with the Public Protector in 2014, Mantelli was prepared to subject itself to being a part of the Panel instead of being the only successful bidder.
18. Unfortunately however, the bid expired as the Evaluation and Adjudication Committees of Air Chefs and SAA could not sit to evaluate and adjudicate the bids prior to the 180-days specified in the bid documents. The bid document is annexed as REP1.
19. Mantelli's participation in the bid process was a clear indication that it had accepted the operational model of the Air Chefs business. It operates on a panel basis and not on an individual appointment basis.
20. Due to the expiry of the 180 days and having obtained legal advice, Air Chefs cancelled the 2016 bid and no award was made.



The 2017 Tender Process

21. Mantelli also participated in a further tender advertised in 2017 and, it is respectfully submitted that Mantelli's conduct constitutes a peremption of its rights, as it reflects an intention to participate in various procurement processes that Air Chefs embarked on thus an acceptance of the clarification letter issued in March 2014.
22. Had Mantelli participated and successfully won in the 2016 or 2017 bid processes, Mantelli would not have wanted that bid process to be disturbed by a review application seeking to restore the *status quo ante* February 2014.
23. Whilst it is accepted that administrative decisions do not enjoy the same status as judgments or remedial action ordered by the Public Protector, these administrative action stand until set aside.
24. The bid document is annexed as REP2 and was similarly for the appointment of a panel of service providers to be used to supply and deliver various baked dry snack products to Air



Chefs. I annex the Request for Bids, marked REP3, which closed on 25 April 2017.

25. In *Dabner v South African Railways & Harbours*,¹ dealing with the peremption principle, stated as follows:

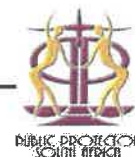
"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessary to the conclusion that it does not intend to attack the judgment, is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that provision is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven."

26. In *Gentiruco AG v Firestone SA (Pty) Ltd*², Trollip J said:

"The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be pre-empted if he, by unequivocal conduct inconsistent with an intention to appeal shows that he acquiesces in the judgment or order."

¹ 1920 AD 583 at 594.

² 1972 (1) SA 589 (A) at 600A-B.



27. In the matter of the President of the Republic of South Africa v the Public Protector and Others,³ the Full Court said the following when dealing with the right of peremption:

"[179]. ... As we understand the argument, what is in fact contended for is that the remedial action is not to be equated with a judgment or order of a Court and, therefore, the doctrine of peremption is not applicable.

[180] We do not agree with that submission. The Public Protector's remedial action has all the attributes of a judgment. It is binding and has the force of law and its legal consequences must be complied with or acted upon. Compliance therewith is not optional and it has binding effect until properly set aside by a Court of law."

28. Whilst it is accepted that the Mantelli matter has not been to Court, the conduct of Mantelli in acquiescing to the tender processes, in revealing of its intention to comply with the Air Chefs procurement framework.

29. I annex, marked REP4, the letter sent to Mantelli advising it of the cancellation of the bid and advising Mantelli that a new tender would be reissued in due course.

³ 2018 (2) SA 100 (GP) at para [179]-[180]



30. The bid, due to non-responsiveness could also similarly not be finalised and it was cancelled.

DEVIATION REQUESTS FROM NATIONAL TREASURY

31. Pursuant to twice failing to get the requisite bidders to bid for the dry snack goods and having received complaints from Air Chefs' service providers that the tender process was too administrative, Air Chefs applied to National Treasury to deviate from complying with the procurement processes. This request was made after the history of attempts to procure openly had been explained and proved unsuccessful. The background to Air Chefs' operational processes which require Air Chefs to be able to provide its clientele with any products they require was similarly explained.
32. The submission to National Treasury, making a case for the deviation is annexed marked REP5, and the approval is also annexed, marked REP6.
33. Whilst the latter documents are not directly linked to the investigation and Mantelli matter, they are generically linked to the business operations of Air Chefs. They lucidly eliminate



the possibility of Mantelli ever been awarded a tender as the sole successful party, they had to be part of the panel of service providers. As Air Chefs had attempted to get Mantelli to do in 2014.

MANTELLI'S REMEDIES

34. Paragraphs 9.1.5 and 9.1.6 are misplaced, as the complainant is not a man of straw lost in a sea of litigation. Mantelli has had attorneys involved with this matter from its infancy. In fact, through a letter from attorneys Francis Thompson & Aspden dated 14 December 2015, a copy of which is annexed marked **REP7**, Mantelli instructed them to state:

"1. After careful consideration of this matter with other members of our client's legal (i.e. advocate Paul Hoffman SC) and forensic team we have come to the conclusion and by reference to numerous correspondence / documentations in this matter that all prospects of it being resolved to our client's satisfaction by means other than judicial intervention are nil."



35. This was a threat of legal action thus Mantelli knew all its rights and could have brought a review application. It was not an entity that was merely sitting and watching Air Chefs and SAA scupper its remedies.

THE PUBLIC PROTECTOR'S PRELIMINARY FINDINGS

36. The Public Protector, before making the findings, identified the issues relevant to the complaint. The two issues relevant to the complaint were that -

36.1. The reissue of a Letter of Award to a panel of suppliers who supplied dry snacks to Air Chefs was irregular, thus constituting improper conduct in terms of section 65(a) of the Public Protector Act, 23 of 1994 ('the Public Protector Act').

36.2. Secondly, whether Mantelli was improperly prejudiced by the conduct of Air Chefs in a manner envisaged in section 6(5)(d) of the Public Protector Act.

37. Having considered what was termed common cause issues, including:



- the advertisement of the bid;
- the bid evaluation and adjudication criteria;
- the Indyabo Consulting report from National Treasury dated 21 May 2015;
- various correspondence exchanged between Mantelli and SAA / Air Chefs.

the report then makes the following preliminary findings:

- 37.1. That it can be safely concluded that the tender under bid GSM 025/2013, being the source of the complaint, was a tender for the supply of bidders to bid for the supply of various snacks and not a selection of suppliers to be on the list of preferred and/or panel of suppliers.
- 37.2. That Air Chefs withdrew the tender award letter dated 17 February 2014 that had been issued to Mantelli; and did not sign a Service Level Agreement ("SLA") with Mantelli.



37.2.1. Instead it appointed Ciro and signed a SLA with Ciro.

37.3. That the awarding of the tender to Mantelli through the letter of award dated 17 February 2014 created a legitimate expectation that a tender had been awarded to Mantelli as provided for in terms of section 3.1 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

37.4. That Mantelli suffered financial prejudice.

38. The report then indicates that there is a likelihood of adverse findings being made against Air Chefs which include that:

"9.1.2 The process of withdrawal of the letter of award issued to the complainant through a letter approved by the ACEO of Air Chefs on 18 February 2014 and the re-issuing of the letter by the AECO through a letter on 11 March 2014, is irregular and thus constitutes improper conduct.

9.1.3 Therefore the conduct of the ACEO of Air Chefs referred to above constitute improper conduct in terms of section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.



9.1.4 The involvement of SAA in the procurement process of Air Chefs through the e-mail dated 4 December 2013, before the tender was awarded to the complainant was irregular and thus undermined the key principles as envisaged by section 217 of the Constitution. "

39. As it relates to the prejudice that Mantelli suffered, the report finds that the withdrawal of the Letter of Award dated 17 February 2014 and the failure to sign a SLA with Mantelli prejudiced Mantelli. Mantelli suffered prejudice in the form of financial loss which emanated from incurring expenses, and preparing and submitting the bid documents as well as other expenses relating to meetings, travelling, exchange of correspondence with SAA, seeking legal opinion and representation in the long-standing dispute with Air Chefs / SAA.
40. The report then finds that the quantum of such financial loss can be assessed and calculated through the submission of invoices by the complainant.
41. Air Chefs and SAA disputes all these findings on the basis of the evidence annexed hereto which can be summarised as follows—



- 41.1. The letter of the 11 of March 2014 was not a re-issue but a clarification letter. It is common cause Mantelli was through the 2016 Tender process prepared to be a part of a panel.
- 41.2. There was no maladministration committed by Air Chefs as they waited for investigations to be concluded.
- 41.3. Air Chefs does not have its own Bid Adjudication committee and invariably uses the Bid Adjudication of SAA and there is no conflict of interest. The "buying" department of SAA does not get involved thus the process is not tainted.

THE TREASURY REPORT

- 42. As indicated, the subject matter of the Public Protector's report received, *inter alia*, the attention of the National Treasury which compiled a report forwarded to SAA through a letter dated 21 May 2015 ("The Treasury report"). This report was from the Chief Director: SM Governance, Monitoring and Compliance.



43. The Treasury report made various recommendations having reviewed not only the bid as it related to Mantelli, but the entire bid process. National Treasury concluded that –

43.1. the bid specification was poorly developed and failed to indicate the allocation criteria to be used to award the tender to more than one supplier;

43.2. a summary of the scores submitted to the bid adjudication committee did not correspond with the individual score sheets provided;

43.3. Simba (Pty) Limited was not disqualified for submitting a late proof of payment dated 4 June 2013, whereas the tender closed on 29 April 2013;

43.4. the bid adjudication committee failed to ensure that the scoring had been fair, consistent, correctly calculated and applied;

43.5. the accounting officer signed the Letters of Award which did not specify the type of dry snacks to be supplied by the individual preferred bidder;



- 43.6. the change of Mantelli's award to be a panel member of suppliers caused confusion;
 - 43.7. the Service Level Agreement was not signed between Air Chefs and Mantelli because of the dispute.
44. Therefore National Treasury's recommendations were that –
- 44.1. the accounting officer should ensure that tenders are evaluated and adjudicated in accordance with the requirements and conditions;
 - 44.2. suppliers who do not comply with the requirements and conditions of the bid should be disqualified without considering their capacity to deliver;
 - 44.3. proper specifications be developed and approved before advertising any bid and that certain category of biscuits should be allocated to Mantelli and a Service Level Agreement signed with them.
45. The implications of the Treasury report were that the entire procurement process advertised under the bid was flawed. Treasury therefore sought the re-advertisement and/or re-



evaluation, re-application and adjudication of the bid to ensure that those bidders who were meant to be disqualified would be disqualified.

46. This was done through the 2016 and the 2017 tender processes, to which the former Mantelli participated in. Thus Air Chefs and/or SAA complied with the National Treasury recommendations.
47. SAA and Air Chefs agree with paragraph 8.1.38 the second sentence (the first sentence is refuted) of the preliminary report as it relates to, stating that an application to review and set aside the award of tenders to the successful suppliers and declare that the contracts (where such had been concluded) are void *ab initio*, would have been the appropriate step to take.
48. This step was not taken as there were further bidding processes embarked upon in 2016 and 2017 that Mantelli participated in. Thus a review application became academic. Air Chefs was no longer *functus officio* due to the conduct of Mantelli which participated the bidding process for the establishment of a panel.



49. Since the process commenced *de novo* through the advertisement of a new bid, SAA and Air Chefs therefore complied with the findings and recommendations of National Treasury.

The investigation

50. Further, due to conflicting opinions and reports obtained by SAA and Air Chefs, the review application could not, even if it could be launched, instituted. The review application could, more fundamentally, also not be lodged as a result of the pending investigation with the Public Protector's Office.
51. The delays in the Mantelli matter were not designed to scupper Mantelli's rights or remedies. It was meant to ensure that SAA followed due process and complied with the investigation that has been before the Public Protector's Office since 01 July 2014.
52. Unfortunately, the investigation became protracted and was postponed at various intervals at the instance of the Office of the Public Protector.



53. The foregoing therefore establishes that the investigative reports, which were interlocutory in respect of the Public Protector's investigation, were not an attempt to delay proceedings to the extent that Mantelli could not institute a review application impugning the award and retraction of the tender. It was meant to respect the Public Protector's Office and ensure that SAA did not have separate processes parallel to the Public Protector's investigation. However the investigation got protracted and got overtaken by certain events which rendered it academic.

CONCLUSION

54. In the circumstances, it is submitted that the 2016 and 2017 tender process indicates that SAA and/or Air Chefs were not driven by malice when tender GSM 025/2013 was investigated internally.
55. The Public Protector is implored to take into account Air Chefs and SAA's attempt to regularise tender GSM 025/2013 through the 2016 and 2017 processes.



56. Finally, the Treasury deviation albeit belated vindicated the clarification letter of the 11th of March 2014. The Air Chefs procurement process is complex and required a special dispensation. Mantelli could not have been appointed as the sole provider of the crackers as this is dependent on the demand from Air Chefs' clients.

57. Thus, the 11 March 2014 letter was not a revision or withdrawal but a clarification of the Air Chefs operational model which is generally applicable to all service providers and was accepted by Mantelli.

SIGNED AT Airways Park ON 20 DAY OF DECEMBER 2019

A handwritten signature in black ink, appearing to be "Zuks Ramasia", written over a horizontal line.

ZUKS RAMASIA

CHIEF EXECUTIVE OFFICER OF SAA

SIGNED AT J&P ON 20 DAY OF DECEMBER 2019

A handwritten signature in black ink, appearing to be "Martin Kemp", written over a horizontal line.

MARTIN KEMP

CHIEF EXECUTIVE OFFICER OF AIRCHEFS



5.4 Public Protector's analysis of a response to section 7(9) notice by AirChefs/SAA.

At paragraph 1 – 12 of the response

- 5.4.1 I have considered the above submission made by the AirChefs/SAA with regards to a meeting held with my investigation team on 22 August 2019 in terms of a subpoena dated 24 July 2019. The proceedings in the subpoena hearing session are still part of an investigation and therefore an incisive fact-finding process aimed at obtaining more and relevant information relating to what transpired in the awarding of the tender, and the subsequent investigations which were conducted by NT and Indyebo Consulting relating to this matter.
- 5.4.2 This is evident from the recording of the aforesaid subpoena meeting wherein my team engaged AirChefs and SAA, and the proceedings were based on the principle of natural justice which included the *audi alteram partem* meaning **hearing the other side**. (Emphasis added)
- 5.4.3 In the *Mail and Guardian* case, the Supreme Court of Appeal (SCA) held that “***the Public Protector should not be bound or be limited to the issues raised for consideration and determination by the parties but should, investigate further and discover the truth and also inspire confidence that the truth has been discovered***”. (Own emphasis).
- 5.4.4 Similarly the powers of the Public Protector to investigate matters before her/him are accentuated in the SCA judgement of ***Minister of Home Affairs v The Public Protector of South Africa (308/217) [2018] ZASCA 15 (15 March 2018)*** (*Minister of Home Affairs* case) as follows: “*the office of the Public Protector is a unique institution designed to strengthen constitutional democracy. It doesn't fit into the institutions of public administration but stands apart from them. It is a purpose-built watch-dog that is independent.... Its function is not to administer*



*but to investigate, report on and remedy maladministration. **The Public Protector is given broad discretionary powers how to investigate and what remedial action to order** – as close as one can get to a free hand to fulfil the mandate of the Constitution”.(Own emphasis)*

- 5.4.5 It is therefore without doubt that the Public Protector’s investigation process should be incisive, elucidating, probing in seeking to uncover the truth without merely accepting the version that is provided to her/him by the responding parties, no matter how uncomfortable sometimes this may be to some.

At paragraph 13 – 20 of the response

- 5.4.6 The AirChefs/SAA’s submission and contention that the Complainant subsequently participated under Bid number RFP GSM 088/2015 and even in another 2017 bid, and that therefore it was a clear indication that he had accepted the operational model of the AirChefs business, through which it operates business on the bases of a panel and not on individual service provider appointments, is misguided and without merit.
- 5.4.7 I wish to emphasise that there was nothing in law that precluded the Complainant from participating in the bidding process since he is an entrepreneur, particularly that the Bid number RFP GSM 088/2015 was based on recruitment of panel members, and therefore not similar to the contentious tender number GSM 025/2013 which only related to the appointment of a single successful bidder.
- 5.4.8 The Airchefs and SAA’s request that I should take into account their attempts to regularise tender GSM 025/2013 through the 2016 and 2017 processes though mindboggling, is equally an acknowledgement of their wrongdoing in the GSM 025/2013 tender process.



At paragraph 21 – 30 of the response

- 5.4.9 The AirChefs/SAA's submission that the Complainant's subsequent participation in various procurement processes that AirChefs embarked on constitutes an acceptance of the clarification letter issued in March 2014, which provided for the amendment of the appointment letter of tender number GSM 025/2013 to be revised from being an appointment of a single service provider to that of a panel member, is baseless.
- 5.4.10 In terms of the advertised specifications of tender number GSM 025/2013, the requirements were for a tender to be awarded to a single successful bidder, while the advertised specification of a Bid number RFP GSM 088/2015, the requirements were for an appointment of a panel of service providers to supply and deliver various baked dry snack products.
- 5.4.11 It is clearly evident from the two (2) bid advertisements below for 2013 and 2015, that AirChefs aimed at procuring different service providers under the latter Bid Request as compared to the former Bid Request:

REF 3

AIRCHEFS

Air Chefs SOC Ltd (Reg. No 1990/006277/30)
20 Jones Road, Boksburg, Republic of South Africa
Hereinafter referred to as "Air Chefs"

REQUEST FOR

APPOINTMENT OF A PANEL OF SERVICE PROVIDERS TO BE USED TO SUPPLY AND DELIVER VARIOUS DATED DRY SNACKS TO AIRCHEFS

In pursuit of and to comply with BBBEE imperatives, the development and support of businesses from Exempted Micro Enterprises and Qualifying Small Enterprises, that are 51% Black Owned, or at least 30% Black Women Owned and who are SMMEs. Ref: GSM 088/2015

Documents to be completed will be available on the SAA Web site to view and download www.flysea.com. Please email: MandyCoetzer@flysea.com

Alternatively, a hard copy of the document can be requested from Air Chefs office, 20 Jones Road, Jet Park.

Risben Khoza: RisbenKhoza@airchefs.co.za Portia Ngema: PortiaNgema@airchefs.co.za

A non-refundable fee of R1 000.00 is required per Bid Document. Only cash, EFT or bank guaranteed cheques will be accepted and no post-dated cheques will be accepted. Bidders who tendered in 2016 for the same tender, are exempted from the tender fee.

The submission for the above bid closes on the 25th April 2017 at 11h00.

Response documents must be DEPOSITED IN THE BID (TENDER) BOX SITUATED AT: SOUTH AFRICAN AIRWAYS, AIRWAYS PARK, 1 JONES ROAD, BOKSBURG.

All questions regarding this request should be addressed to the below email addresses by no later than 15th April 2017:
Risben Khoza: RisbenKhoza@airchefs.co.za Portia Ngema: PortiaNgema@airchefs.co.za

Note: It is compulsory that all potential suppliers e-mail all questions and clarifications to all e-mail addresses stated above.

NO LATE SUBMISSIONS WILL BE CONSIDERED.

AIRCHEFS

Air Chefs Pty Ltd
(Reg. No. 1990/006277/30)
20 Jones Road, Boksburg, Republic of South Africa
(Hereinafter referred to as "Air Chefs")

REQUEST FOR BID (RFB)
Reference: GSM025 /2013
REQUEST FOR BID:

SAA is inviting suppliers to Bid for the supply of the following:
1. GSM025 /2013 - Purchase of various types of dry meals

Documents will be available SAA Web site to view and download www.flysea.com
Please email: MandyCoetzer@flysea.com
Air Chefs office 20 Jones road Jet Park to collect a hard copy of the Bid document
Indira Naryan: IndiraNaryan@airchefs.co.za

A Non-refundable fee of R1 000.00 is required per Bid Document. Only cash, EFT or bank guaranteed cheques will be accepted and No post-dated cheques will be accepted.

The submission for the above bid closes on the 25 April 2013 at 11h00. Bid response documents must be DEPOSITED IN THE BID (TENDER) BOX SITUATED AT: SOUTH AFRICAN AIRWAYS, AIRWAYS PARK JONES ROAD.

NO LATE SUBMISSIONS WILL BE CONSIDERED.

Bidders are allowed and encouraged to send their questions and clarifications raised to the Bid document in writing to:
Indira Naryan
E – Mail: IndiraNaryan@airchefs.co.za

Note: It is compulsory that bidders e-mail all questions and clarifications to all e-mail addresses stated above.



- 5.4.12 Based on the above bids, it is apparent that in terms of Bid number GSM 025/2013, AirChefs invited suppliers to bid for the purchase of dry snacks, whereas Bid number RFP GSM 088/2015 provided for a request for the appointment of a panel of service providers to be used to supply and deliver various baked dry snacks to AirChefs.
- 5.4.13 Therefore the Complainant participated in Bid number RFP GSM 088/2015 which was not necessarily a re-advertisement of Bid number GSM 025/2013 as purported by Airchefs, but as a completely new Bid which he was aware of because the contents of the advertisements were different.
- 5.4.14 The contents of the advertisement of the request to bid for the above mentioned bids as it can be seen above are misleading. Both advertisement were aimed at requesting bidders to apply for the supply and delivery of various baked dry snacks.
- 5.4.15 The only difference about the aforesaid advertisements is that on Bid number RFP GSM 088/2015 AirChefs advertised for the appointment of a **panel of service providers** whereas on Bid number GSM 025/2013 it aimed at inviting **suppliers** to bid,
- 5.4.16 In an effort to accentuate their submission, the AirChefs/SAA cited the **doctrine of peremption** as the one which precludes the Complainant from pursuing any further claim relating to Bid number GSM 025/2013 as he had in a way, acquiesced to the situation through his participation in the subsequent bids of 2015 and 2017.
- 5.4.17 The specifications of the above bids as reflected in the advertisements are completely different and as such AirChefs/SAA cannot rely on the **doctrine of peremption** since the bids were not similar. By mere participation in Bid number RFP GSM 088/2015, the Complainant does not to waive his right to challenge the



withdrawal and ultimate cancellation of Bid number GSM 025/2013 by AirChefs. In this regard reliance on the ***doctrine of peremption*** is disingenuous and cannot be invoked in the circumstances.

5.4.18 The AirChefs/SAA's submission that it informed the Complainant of the cancellation of Bid number RFP GSM 088/2015, and that a new tender would be re-issued in due course, does not have any bearing on his legal recourse relating to Bid number GSM 025/2013.

5.4.19 It should also be noted that, Bid number GSM 025/2013 was awarded to CIRO and the Complainant on 18 February 2014 as individual service providers and not a panel. Although the Complainant did not sign a contract, CIRO signed a contract on 18 November 2014 for the supply of various types of dry snack products to AirChefs under the same bid.

5.4.20 In the case of **Vox Orion (Pty) Ltd v State Information Technology Agency (SOC) Ltd** (49425/2013) [2013] ZAGPPHC 444 (6 December 2013) (Vox Orion case), at paragraph 94, Nkosi AJ remarked that:

"After notifying the applicant of the award of the tender as aforesaid, the respondent became "functus officio" and was not competent to revoke the award of the tender without a Court Order. For this reason, the respondent was not empowered to revoke the award and its decision to do so stands to be reviewed and set aside. However, if the decision to award the tender to the applicant is reviewed and set aside, the revocation of that decision by the respondent itself will become academic"

5.4.21 I have noted that in this case AirChefs also became *functus officio* after issuing the letter of award to the Complainant therefore it could not withdraw and or amend the aforementioned letter without a Court Order.



At paragraph 31 – 33 of the response

- 5.4.22 I could not find any relevance of AirChefs/SAA's submission to my office of their letter dated 18 April 2019 addressed to NT, entitled "***Request approval for deviation from the normal Bid process for food category***" and the approval dated 2 May 2019 from NT, since the aforesaid process was embarked upon five (5) years and five (5) months after the letter of award for Bid number GSM 025/2013 was issued by the ACEO of AirChefs to the Complainant.

At paragraph 34 – 41 of the response

- 5.4.23 I have conceded the fact that the Complainant was acquainted with the legal relief he was entitled to since it is apparent that his legal representative was in constant engagement with AirChefs/SAA prior 14 December 2015 and thereafter. However, this does not exonerate AirChefs/SAA from issuing the Complainant with the reports within a reasonable timeframe and in compliance with the requirements of section 195(g) of the Constitution which requires transparency to be fostered by providing the public with timely, accessible and accurate information.
- 5.4.24 The AirChefs/SAA proceeded to refer me to my preliminary findings and disputed the contents thereof. However, it did not provide me with evidence which would persuade me to arrive at a different conclusion.

At paragraph 42 – 49 of the response

- 5.4.25 I have noted the AirChefs/SAA's submission concerning the findings and recommendations contained in the NT's investigation report dated 21 May 2015, which is in my possession and I do not agree with it. This submission is not a true reflection of what is contained in the original report. The NT report provided *inter*



alia in paragraph 4 that: certain categories of biscuits should be allocated to Mantellis Biscuits and a service level agreement signed with them.

- 5.4.26 This was supported by a letter dated 1 July 2015, obtained by me from NT on 18 October 2019, wherein the NT wrote to the erstwhile ACEO of SAA, Mr Nico Bezuidenhout, informing him of its engagements with the Complainant to provide him with clarity in connection with the period in dispute and his view on its recommendations which were similar to that of the NT.
- 5.4.27 I further received a letter dated 7 July 2015, addressed by the SAA's Chief Procurement Officer, Dr Masimba Dahwa, to the Chief Director of NT, Mr Solly Tshitangano, in response to the above-mentioned letter, herein below is a copy thereof.



The Chief Director
National Treasury: SCM Governance, Monitoring and Compliance
 Private Bag X115
 Pretoria
 0001

Attention: Mr. Solly Tshitangano
 Per Email: nozibele.maku@treasury.gov.za

South African Airways
 Room 402, Block A
 Airways Park, Jones Road
 Kensington Park

Private Bag X13
 O.R. Tambo International Airport
 Republic of South Africa, 1627
 Tel: 27 11 378-1722
 Fax: 27 11 378-6204
 Email: mahimbadahwa@saa.com

07 July 2015

Dear Sir,

REPORT ON THE VERIFICATION OF COMPLIANCE WITH TREASURY NORMS AND STANDARDS DURING THE BIDDING PROCESS OF BID NO: RFP-GSM 25/2013 AIR CHEFS SOC LTD

1. The above subject matter and your letter dated 1 July 2015 refers.
2. Pursuant to your discussion and meeting with Mr Mantell, as recorded in your letter, Air Chéfs once again reiterates that Mr Mantell's company is currently on the Air Chéfs panel of suppliers - in respect of the Dry Snacks products. Accordingly, Air Chéfs undertakes to present the products to its clients in future meal presentations.
3. As previously advised, Air Chéfs' end-user customers retain the right to select the food products sourced from Air Chéfs, through their panel of suppliers. Consequently, Air Chéfs does not have the ability or the right to procure specific volumes (or specific products) on behalf of its end-user customers. The sourcing of specific products and volumes from Air Chéfs is entirely dependent on the end-user customer requirements.
4. However, Air Chéfs again confirms that it will be undertaking a new procurement process for the Dry Snacks products panel of suppliers within the next 2 months, and it would be prudent to advise Mr Mantell that he is entitled to respond under this process to be appointed onto the new panel of suppliers.

Directors:
 "DC Myeni" (Chairperson), WH Meyer (Chief Financial Officer), Y Kwaana*, JE Tambo (Sierra Leonean), AD Dizon*
***Non-Executive Director**
Company Secretary – Ruth Kibuka
 South African Airways SOC Ltd

Reg. No: 1997/022444/30

A STAR ALLIANCE MEMBER

Yours faithfully,

For and Behalf of South African Airways

Name: Dr. Masimba Dahwa
Title: SAA Chief Procurement Officer

- 5.4.28 The response received by NT from SAA clearly indicated that SAA disregarded the above-mentioned recommendation from the NT's investigation report and the aforesaid letter dated 1 July 2015.



At paragraph 50 – 57 of the response

5.4.29 There is no legislation that precludes Complainants and organs of state including SAA to approach a court of law and or follow any due processes once the complaint is brought before me for investigation.

5.4.30 The court in the case of ***Minister of Home Affairs and Another v Public Protector of the Republic of South Africa*** (308/2017) [2018] ZASCA 15; [2018] 2 All SA 311 (SCA); 2018 (3) SA 380 (SCA) (15 March 2018), held at paragraph 40 that:

“The Public Protector is not a court, does not exercise judicial power and cannot be equated with a court. Her role is completely different to that of a court and the jurisdictional arrangements of the courts are entirely irrelevant to a determination of the Public Protector’s jurisdiction. It is necessary to look to s 182 of the Constitution and the Public Protector Act to ascertain the bounds of the Public Protector’s jurisdiction.

5.4.31 Therefore AirChefs/SAA could have proceeded with the review application without awaiting the finalisation of my investigation.

5.4.32 The issue relating to the AirChef/SAA attempting to regularise tender GSM 025/2013 through the 2016/2017 processes have been dealt with above and need not be rehashed here.

5.4.33 The AirChefs/SAA’s submission that it could not have appointed the Complainant as a sole provider of the crackers as this is dependent on the demand from its client is ludicrous in that AirChefs would not have advertised a Bid that requires them to appoint a sole provider and issue a letter of award for Bid number GSM 025/2013 to the Complainant if its intention was to procure for the service of panel members.



5.4.34 The submission by AirChefs/SAA relating to the issue of acceptance by the Complainant have been dealt with above and need not be rehashed here.

6 FINDINGS

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

- 6.1 **Regarding whether the decision by AirChefs to revise the letter of award of tender GSM 025/2013 and re-issue the Complainant with a letter of award to a panel of suppliers to supply dry snacks to AirChefs was irregular and thus constitutes improper conduct and/or maladministration in terms of section 6(5)(a) of the Public Protector Act.**
- 6.1.1 The allegation that AirChefs revised the letter of award of tender GSM 025/2013 and re-issued the Complainant with a letter of award as part of a panel of suppliers to supply dry snacks to AirChefs was irregular, is substantiated.
- 6.1.2 AirChefs tender GSM 025/2013 was a tender to provide services and not invitation to become one of the panellist of service providers.
- 6.1.3 The process of withdrawal of the letter of award issued to the Complainant through a letter approved by the ACEO of AirChefs on 18 February 2014, and the re-issuing of the letter by the ACEO through a letter on 11 March 2014, is irregular
- 6.1.4 AirChefs in issuing a letter of award to the Complainant became *functus officio* and could not withdraw and/or amend the aforesaid letter without a Court Order as enunciated on Vox Orion case.



- 6.1.5 The withdrawal and/or amending of the letter of award issued to the Complainant on the basis that it was incorrectly worded was inconsistent with section 217(1) and 195(1)(g) of the Constitution in that it violated the principle of transparency.
- 6.1.6 Therefore the conduct of the ACEO of AirChefs referred to above constitutes improper conduct in terms of section 182(1)(a) of the of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.
- 6.1.7 The SAA's non-implementation and delay to provide the Complainant with the Indyebo report, including non-implementation of the National Treasury investigation report scuppered the Complainant's efforts and rights to a just administrative action thus preventing him to comply with section 7(1) of PAJA which provides that any proceedings for judicial review, should comply with section 6(1) of the same legislation.
- 6.1.8 Therefore the SAA's conduct amounts to improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(5)(a) of the Public Protector Act.
- 6.2 **Regarding whether the Complainant was improperly prejudiced by the conduct of the AirChefs in the circumstances as envisaged in section 6(5)(d) of the Public Protector Act.**
- 6.2.1 The allegation that the Complainant was improperly prejudiced by the conduct of the AirChefs in the circumstances as envisaged in section 6(5)(d) of the Public Protector Act, is substantiated.
- 6.2.2 The withdrawal by AirChefs of the letter of award of the tender dated 17 February 2014 and the subsequent failure by the AirChefs to sign the SLA with the Complainant prejudiced him.



6.2.3. The Complainant suffered prejudice in a form of financial loss or expenses incurred in preparing and submitting the bid documents as well as other expenses relating to meetings, travelling, accommodation, exchange of correspondence with the SAA, seeking legal opinion and representation in his longstanding dispute with SAA which can be regarded as *out-of-pocket* expenses. However, the *quantum* of such financial loss can best be assessed and calculated through the submission of actual invoices by the Complainant as proof thereof.

6.2.4. Therefore, the conduct of AirChefs in this regard amounted to improper prejudice as envisaged by section 6(5)(a) of the Public Protector Act.

7. REMEDIAL ACTION

The appropriate remedial action that I am taking as contemplated in section 182(1)(c) of the Constitution, with a view to remedying the improper conduct and maladministration referred to in this report, is the following:

7.1. THE CHAIRPERSON OF THE SAA BOARD

- 7.1.1. To take cognizance of the findings regarding the conduct and maladministration by the AirChefs relating to the irregularities mentioned in the report;
- 7.1.2. To ensure that the Complainant is provided with a letter of apology within **ten (10) working days** of issuing of this report for subjecting him to unnecessary litigation attributable to AirChefs and SAA's continued wrongdoing;



- 7.1.3 Ensure that the Complainant should be reimbursed for all proven out-of-pocket expenses relating to meetings, travelling, accommodation, exchange of correspondence with the SAA, seeking legal opinion and representation in his longstanding dispute with SAA, within **thirty (30) working days** from the date of issuing of a letter of apology to him;
- 7.1.4 Ensure that the CEOs of AirChefs/SAA consider the report in so far as it relates to the gaps identified in the NT and Indyabo reports respectively, and to address such through introduction of and compliance with stringent policies, prescripts and practices which are in line with section 217 of the Constitution, the PFMA, National Treasury Regulations; and
- 7.1.5 Ensure that the CEOs consider the acts of maladministration and improper conduct referred to in this report and take appropriate disciplinary action against any official of the AirChefs/SAA in respect of their conduct referred to therein.

7.2 THE CEOs OF AIRCHEFS/SAA

- 7.2.1 To consider the report in so far as it relates to the gaps identified in the NT and Indyabo reports respectively, and to address such through introduction of and compliance with stringent policies, prescripts and practices which are in line with section 217 of the Constitution, the PFMA, National Treasury Regulations; and
- 7.2.2 To consider the acts of maladministration and improper conduct referred to in this report and take appropriate disciplinary action against any official of the AirChefs/SAA in respect of their improper conduct referred to therein.



8. MONITORING

- 8.1. The Chairperson of the Board of SAA to submit an Implementation plan, within **thirty (30) working days** of issuing this Report, indicating how the remedial actions referred to in paragraph 7.1 will be implemented.
- 8.2. The CEOs of AirChefs/SAA to submit an Implementation plan, within **thirty (30) working days** of issuing of this Report indicating how the remedial actions referred to in paragraph 7.2 will be implemented.
- 8.3. The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within a period of **six (6) months** of the issuing of my Report.

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

DATE: 31 / 01 / 2020