

**Mr MP Mapulane**

Chairperson: Portfolio Committee: Higher Education, Science and Technology  
Parliament

10 June 2020

Dear Mr Mapulane

## **WRITTEN RESPONSE: FORENSIC REPORTS**

Following the W&RSETA's presentation to the Portfolio Committee on 26 May 2020 and the Committee's request, the W&RSETA herewith provides a written response on the action/consequence management taken against employees implicated in the various forensic reports.

Whilst the presentation delivered to the Portfolio Committee on 26 May 2020 gives the Board decision on the matter, this written response seeks to give some pertinent historical background on various actions which were taken or not taken from March 2017 when the first final forensic report was issued. The Board took the decision not to institute further actions because of various sanctions already taken against employees at various stages of the forensic reports.

We believe that this background will enable the Committee to better clarify the decision of the Board which inherited all these forensic reports. Should the Committee still feel that such decision needs to be reviewed, Management will inform the new Board accordingly.

### **1. Introduction**

The W&RSETA has conducted various forensic investigations and as such, needed to be advised on the recommendations contained in the various forensic investigation reports namely:

- 1.1 Ligwa Advisory Services Final Forensic Report, March 2017 (the Ligwa Report);
- 1.2 Webber Wentzel Final Report, 23 March 2018 (the Webbers Report);
- 1.3 Nexus Forensic Services Final Forensic Report, 28 February 2018 (the Nexus Report);

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

- 1.4 Sedupe & Metja Forensic Investigation Report, undated (the Sedupe & Metja Report 1); and
- 1.5 Sedupe & Metja Forensic Investigation Report, undated (the Sedupe & Metja Report 2)
- 1.6 Bowmans Report: Consolidation of findings and recommendations made in the W&RSETA forensic reports, 14 May 2018.

The former Board of the SETA established an Ad-hoc Committee to evaluate and determine the legal standing of the forensic audit reports, consider each case on its merits and demerits to determine the suitable cause of action in ensuring that the institution stabilises.

The Committee was comprised of members of the Board holding various skills and competencies such as Finance, Supply Chain Management, Human Resource, Legal and other skills the Board considered necessary to fulfil the role of Committee.

As per the mandate of the Board, the Committee was tasked with the following roles and responsibilities:

- i. Evaluate and determine the legal standing of the Forensic Audit Reports
- ii. Review the forensic audit reports
- iii. Identify recommendations and corrective actions that should be implemented
- iv. Identify cases of possible financial misconduct that may result to unauthorised, irregular and or fruitless expenditure and recommend actions that should be taken
- v. Identify cases of possible violation of the Labour Relations Act and or Human Resources Policy and provide recommended actions
- vi. Recommend to the Board action to be taken against the officials that have been found to be in contravention of the rules, regulations and procedures that govern the W&RSETA
- vii. Recommend and outline the time frames within which implementation of corrective actions should be implemented and their implications
- viii. Indicate the cost benefit, both financially and organisationally, to be derived in pursuing legal and other recommendations

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

## 2. Executive Summary

The report below details the nature, process and outcomes of the Ad-hoc Committee of the Board in relation to Forensic Investigations conducted at the W&RSETA and concluded in November 2019.

### 2.1 Legal standing of the reports

- 2.1.1 Legal advice was received from SML Attorneys confirming that the Forensic Reports remain valid provided that the Forensic Investigators had the requisite qualifications to conduct the investigations
- 2.1.2 Despite supply chain irregularities in procuring the forensic investigating companies, that produced some of the Forensic reports, the validity of all the reports was confirmed by the legal advice and that the contents thereof are of force and effect

### 2.2 Forensic Matters – Employees

- 2.2.1 The below table illustrates the total number of cited employees, in all the reports.

Categories of cited employees	
Currently employed	52
Exited	26
<b>Total</b>	<b>78</b>

Out of 78 employees mentioned in the Ad-hoc Committee of the Board’s report, there are a total number of 38 employees that were to be subjected to disciplinary process, (16 of the cases were implicated adversely by Nexus, 16 cases were implicated adversely by Ligwa, and 6 cases were cited in both reports, only 3 employees were implicated adversely however the disciplinary action was supposed to be instituted against one employee on the Sedupe & Metja Reports). Employees that are currently in the employ of the organisation is 25 and 13 had exited the organisation. The rest of the 40 employees were not implicated adversely for disciplinary process in any of the Reports.

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

#	Sanctions recommended by the organisation	Currently employed	Employees had exited
1	Total number of 38 employees were implicated in the forensic reports	25	13
2	No action was taken based on the risks indicated in the Bowmans Report.	18	6
3	Was suspended and issued with a warning.	5	2
4	Was suspended but the process was never concluded as per the investigation report recommendations	2	2
5	Was suspended and resigned during the suspension period	0	1
6	Was suspended, subjected to disciplinary process, reached a settlement and exited	0	1
7	Was issued with a warning and the matter was referred to SAPS	0	1

### 2.2.2 Types of transgressions

Violation of PFMA

Violation of internal supply chain policy and processes

Violation of Delegation of Authority

Violation of the internal HR Policy

Violation of the internal Finance processes and procedure

Violation of the internal Travel Policy

## 3 Background

The Committee was guided by the following over-arching principles as advised by the Board:

- Consider matters of significant financial losses and reputational risk to the organisation

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

- Consider matters of criminality in particular matters relating to fraud and corruption
- Consider corrective versus punitive measures on labour related matters
- Take cognisance of the cost benefit of all matters of financial loss to the institution and recovery of such losses
- Consider implications of staff morale and workplace harmony
- Consider the time lapsed since the reports were concluded
- Consider impact of past metered sanctions against employees implicated

#### **4 Recommendations to the Board**

##### **4.1 Labour Relations matters**

- 4.1.1 Investigate feasibility of recovery of financial losses associated with staff members who have exited the institution
- 4.1.2 Institution of criminal proceedings against implicated existing and exited employees for financial misconduct that arose out of negligence, fraud and undue financial benefit
- 4.1.3 Consider various factors with regard to sanctions that could be mitted out to staff members who were mentioned in the reports

##### **4.2 Strengthen internal control deficiencies**

- 4.2.1 Clearer articulation of delegations of authority
- 4.2.2 Review and strengthen supply chain management policy and governance framework
- 4.2.3 Establish and resource Financial Misconduct Committee
- 4.2.4 Appointment of risk officer
- 4.2.5 Develop comprehensive declaration of conflict policy and implementation framework
- 4.2.6 Develop fully descriptive declaration of interest policy and implementation framework
- 4.2.7 Unbundle current HR Policy and ensure stand-alone policies
- 4.2.8 Ensure clarity of claims framework in travel policy
- 4.2.9 Improve performance management system

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

4.2.10 Strengthen policy environment of the SETA – version control, dated and signed and workshopped to all stakeholders

### **4.3 Capacity building of staff**

4.3.1 Training of all staff on internal policies and procedure:

4.3.2 Code of ethics

4.3.3 Code of conduct

4.3.4 Delegation of Authority

4.3.5 Projects policy

4.3.6 Finance policy

4.3.7 Contracts management policy

4.3.8 Internal controls

4.3.9 Supply chain management

4.3.10 Standard Operating Procedures

4.3.11 Prevention of fraud and corruption

### **4.4 Training of all staff on legislation and external regulations**

4.4.1 Public Finance Management Act

4.4.2 National Treasury regulations

4.4.3 Skills Development Act

4.4.4 Skills Development Levies Act

4.4.5 Skills Development Regulations

4.4.6 Public Service Supply Chain Management Policy

4.4.7 Preferential Procurement Policy Framework Act

4.4.8 Promotion of Administrative Justice

4.4.9 Whistle Blowers Act

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

## **4.5 Projects delivery capacity**

- 4.5.1 Improved planning and approval processes, allowing for timeous contracting prior to delivery
- 4.5.2 Improve efficiencies regarding contract conclusions and control of submissions - between SETA and stakeholders
- 4.5.3 Automate and strengthen contracts management process and systems
- 4.5.4 Ensure that contracts meet all legislative requirements
- 4.5.5 Articulation of contract expiry dates
- 4.5.6 Ensure reconciliation of project expenditure versus project phases
- 4.5.7 Monitoring of contracts register and contract closures
- 4.5.8 Strengthen capacity and expertise of contract management system and unit
- 4.5.9 Ensure adherence to SETA Grant Regulations Policy relating to Learner stipends and third party payments
- 4.5.10 Project Management Office to adhere to Delegations of Authority in respect of allocation of project funds
- 4.5.11 Ensure integrated Monitoring and Evaluation of all projects, including review of current Job Descriptions

## **5. Ad-hoc Committee Conclusion**

The Ad-hoc Committee identified numerous gaps in financial controls, supply chain management processes, contract management and leadership and governance weaknesses. These have led to financial losses, reputational damage, poor staff morale and organisational instability over the years. The Committee notes the skills deficiency and a skill mismatch within the SETA and strongly recommends a skills audit and prudent financial management. The Committee also identified policy gaps, uncertainty and inconsistent application which are an indication of failure of governance, monitoring and evaluation processes within the organisation. The Accounting Authority needs to carefully consider the role of Human Resources in the implementation of the recommendations of this Committee. It is noted that Human Resources is a critical business partner required to support the

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

execution of the recommendations. The failures within the organisation were exacerbated by an ineffective Human Resource Department.

The Committee recommends that the Accounting Authority exercise its fiduciary responsibilities in addressing the challenges identified above.

## 6. Board Considerations

Whilst the Board deliberated on the Adhoc Committee recommendations the Board also relied on the legal recommendations from the Bowmans Report. In the overview of the Bowmans report, one can note the following:

- 6.1 That the Ligwa Report was commissioned by the Accounting Authority prior to its suspension by the Minister of Higher Education and Training on 3 October 2016 and that the final report was furnished to the Administrator during the course of March 2017, prior to the Accounting Authority's reinstatement to the W&RSETA by order of the Constitutional Court on 16 August 2017.
- 6.2 The key findings and recommendations in respect of the implicated Employees was that while all of the implicated Employees' conduct was identified as being irregular, the Ligwa Report did not consistently recommend that all of the implicated Employees be disciplined. This is the case even where the irregular conduct is of the same or a substantially similar nature, as amongst the Employees.
- 6.3 That the Webbers Report was commissioned by the Accounting Authority following its reinstatement by order of the Constitutional Court on 16 August 2017. The scope of the Webbers Report pertains to, among others, disciplinary proceedings which were instituted against 8 (eight) Employees who were implicated in the Ligwa Report. The disciplinary proceedings were instituted against the foresaid Employees prior to the Accounting Authority's suspension, and the erstwhile Administrator finalised the proceedings during his tenure.

**Board:** Reggie Sibiyi (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

- 6.4 The verbal warnings that were issued to 6 employees were inappropriate and that the final written warnings ought to have been issued to the foresaid employees for the irregular conduct identified in the Ligwa Report. The Webbers Report analyses the risks of replacing the verbal warnings with final written warnings as well as the Double Jeopardy Rule, and proceeds to recommend that the final written warnings should nonetheless be issued.
- 6.5 That the Nexus Report was commissioned by the Accounting Authority on or about 6 November 2017, following its reinstatement by order of the Constitutional Court on 16 August 2017, in order to investigate alleged economic crime and maladministration of the W&RSETA's funds during the period in which the W&RSETA was under administration (i.e. October 2016 to August 2017).
- 6.6 The Sedupe & Metja Report 1 and 2 were commissioned by the erstwhile Administrator during his tenure at the W&R SETA. The sanctions on 2 employees implicated by the Administrator were uplifted by the suspended Board on their return and were never implemented. Both sanctions were of a dismissal nature

Bowmans, after consideration of all cases, highlights some legal considerations for the institution of disciplinary actions emanating from all the reports as follows:

## **6.7 CONSISTENT APPLICATION OF DISCIPLINE**

- 6.7.1 In terms of South African employment law, disciplinary action against employees must be applied consistently as between employees who commit the same or similar transgressions in the workplace. The purpose behind the principle is to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike.
- 6.7.2 The law recognises two types of inconsistent application of discipline:
- 6.7.2.1 **Historical inconsistency** – occurs where an employer applies a different disciplinary sanction to those that were applied to employees who committed the same or similar misconduct in the past.

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

- 6.7.2.2 **Contemporaneous inconsistency** – this occurs where employees who commit the same misconduct are subjected to different disciplinary action/sanction without a justifiable reason for doing so.
- 6.7.3 Where an employer is able to justify differentiating between employees who have committed similar misconduct on the basis of, inter alia, differences in personal circumstances, the severity of the misconduct, or on the basis of other material facts, an inconsistency challenge will fail.
- 6.7.3.1 Having considered the Reports, it would appear that there were inconsistent applications of discipline. In considering the Ligwa Report, Bowmans noted that the disciplinary action is only recommended against some of the Employees for the irregular conduct identified in the Ligwa Report whereas, in respect of other employees who are also adversely implicated in the same or similar irregular conduct, no recommendation for disciplinary action is made.
- 6.8 DELAY IN INSTITUTING DISCIPLINARY ACTION
- 6.8.1 The law requires an employer to institute disciplinary action as soon as possible after the infraction has been committed or brought to its attention.
- 6.8.2 The Bowmans report noted with concern that in respect of the irregular conduct/misconduct identified in the Ligwa Report and the Sedupe & Metja Reports 1 and 2, there has been a significant delay by the W&RSETA in taking disciplinary action against the employees that have been adversely implicated.
- 6.8.3 As a consequence of the above, the W&RSETA would need to provide a justification as to why the disciplinary proceedings have been delayed. In the Bowman’s report there was a view that such justification would largely be informed by the disruption which has been caused to the W&RSETA since 2016 as a result of the period of administration, the various litigation proceedings which were launched pursuant to the W&RSETA being placed under administration, the fact that when the Accounting Authority was reinstated by order of the Constitutional Court on 16 August 2017 it had to familiarise itself with the events that took place during the period of

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

administration and, finally, the fact that a new Accounting Authority has recently been appointed to the W&RSETA.

## 6.9 BREAKDOWN IN THE TRUST RELATIONSHIP

6.9.1 Generally speaking, in order to justify a sanction of dismissal the W&RSETA would need to establish that the trust relationship between it and the employee has irretrievably broken down. In the event that there is a period of delay between the employer finding out about the alleged misconduct, the finding of guilt for misconduct, and the imposition of the disciplinary sanction (particularly where the employee in question has continued to render services to the W&RSETA), it becomes increasingly difficult to allege that the trust relationship has been irretrievably damaged.

6.9.2 In the light of the above, and especially if the W&RSETA seeks dismissal of certain of the Employees in respect of the misconduct identified in the Reports, it should act expeditiously in finalising the disciplinary processes and implementing the disciplinary sanctions. (The Board in its decision noted that this should have happened at the time the Bowmans' report was issued but it never happened)

Bowmans further gives some practical steps to be taken pursuant to the misconduct identified in the various reports but also highlights the risks to the W&R SETA.

6.10 The foresaid Employees should be informed that the W&RSETA is of the view that the verbal warnings given to them by the erstwhile Administrator were wholly inappropriate given the nature of the transgressions and that, as such, the W&RSETA is considering replacing the verbal warnings with final written warnings.

6.11 That some Employees do not appear to have been disciplined for the irregular conduct identified in the Ligwa Report and, as such, the W&RSETA should consider issuing them with final written warnings for the misconduct and for purposes of consistently applying discipline for the same or similar misconduct.

6.12 While the advice was to continue with the process as indicated, the W&RSETA was cautioned of risks associated with this approach, as highlighted in the Webbers Report,

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

and the fact that the Employees to whom the final written warnings are issued may seek to refer an unfair labour practice dispute to the CCMA. If they were to do so, the CCMA may find that the issuing of the final written warning/s was unfair, in which case it may elect to set the final written warnings aside, and/or grant compensation to a maximum of 12 months' remuneration to the Employees concerned. This is a business and operational risk which the W&RSETA will need to take as a business decision, being mindful of the risks as a result of the delay in taking disciplinary action and the need for consistent application of discipline.

- 6.13 The W&RSETA was further advised in the Bowman report that in order to avoid future problems arising from historical inconsistency, it was recommended that the W&RSETA draws a line in the sand and makes it clear that future misconduct of the same or similar nature will not be tolerated going forward and that the Employees who are already on final written warnings for similar transgressions (as identified in the Ligwa and/or Nexus Reports) may face dismissal should they commit the same or similar misconduct in the future. This will mitigate against the risk of setting a precedent within the workplace that employees who are on final written warnings for a certain type of misconduct may argue that they are entitled to be issued with a further final written warning for the same or similar misconduct before a sanction of dismissal may be imposed. It should also be made clear that going forward, misconduct of such nature will warrant a final written warning for a first offence (this to address any misconception created by the Administrator's issuing verbal warnings as referred to above).
- 6.14 While neither the Ligwa Report nor the Nexus Report make recommendations in respect of the Corruption Act, the W&RSETA should consider whether any of the current and/or former Employees' misconduct identified in the foresaid Reports gives rise to any reporting obligations on the part of the W&RSETA in terms of the Corruption Act.43
- 6.15 Similarly, in so far as the Ligwa Report does not make recommendations on the institution of proceedings against the Employees in terms of the PFMA, the W&RSETA should consider whether any of the misconduct identified in the foresaid Report amounts to a

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse

breach of the PFMA and, if so, whether this gives rise to reporting duties, and/or criminal and/or civil liability in terms of the PFMA and its accompanying regulations.

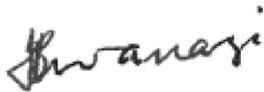
## 7. Board Decision

As indicated in the Bowman report the Board instituted criminal and/or civil liability in terms of the PFMA and its accompanying regulations as indicated in the presentation on 26 May 2020.

The Board took into consideration various factors with regard to sanctions that could be mitted out to staff members who were mentioned in the reports. It considered the time lapse from when the incidents occurred and the action taken by the W&RSETA. The manner in which some of the cases were dealt with was not equitable, some staff members underwent disciplinary action and some did not. Some of the employees have left the organisation. The Board noted the internal control deficiencies and the non-adherence to governance processes.

In the interest of time and priority to bring stability to the organisation which has been through various challenges and leadership vacuum and in trying to finalise this matter taking into account that various disciplinary measures that were instituted amidst the inconsistencies, the Board decided that a standard circular to the entire organisation should be written, stating what had happened and the decision that the Board has taken, which does not condone any wrong doing and that acts of criminality will be reported to relevant authorities. The meeting further recommended that the CEO should solicit services of SML Matsaung Attorney to write the communique and ensure that it is legally sound.

Yours sincerely,



**Tom Mkhwanazi**

Chief Executive Officer

**Board:** Reggie Sibiya (Chairperson), Sibusiso Busane, Thandeka Ntshangase, Themba Mthembu, Mzimaseki Silimandlela, Lerato Mokhitli, David Makua, Lucas Ramatlhodi, Ross Rayners, Margaret Bango, Zinhle Tyikwe, Nonkululeko Bogopa, Zibele Sokabo, Sebe Rasebitse