
PUBLIC PROTECTOR
SOUTH AFRICA

"Allegations of maladministration in the awarding of the Smart prepaid meters by the City of Tshwane

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REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE IRREGULAR AWARDING OF THE SMART METER CONTRACT AND IMPROPER CONDUCT COMMITTED BY THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY
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Executive Summary

(i) This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and published in terms section 8(1) of the Public Protector Act, 1994.

(ii) The report relates to an investigation into allegations of maladministration and irregular awarding of the Smart Prepaid Meter Contract (the Contract) by the City of Tshwane Metropolitan Municipality (the CoT) and the subsequent cancellation thereof.

(iii) The first complaint was received from Mr Richard Botha (the Complainant) and Mr Derrick Kissooduth (Mr Kissooduth) on behalf of Kusasa Healthcare who had approached the Public Protector in January 2013 alleging that on or about the year 2011, the CoT was faced with the problem of recovering income as a result of bad debts by electricity consumers. CoT then had to take steps to improve its security of revenue and resorted to transitioning from post-paid meters, to pre-paid meters.

(iv) The Complainant further alleged that he conducted research with his business partner and came up with the concept of smart pre-paid electricity meters (smart meters). They presented this concept to the CoT and after several presentations; the Council approved a pilot project that was conducted by the Complainant at some areas in Pretoria East. The Complainant further alleged that after conducting the pilot project; he was hoping to get a go ahead from CoT to implement the project. However, while Complainants were still awaiting the CoT’s outcome in this regard they learnt that Peu Capital Partners (PTY) LTD (hereinafter referred to as Peu Capital Partners) was awarded a tender by CoT to install smart meters.

(v) The second complaint was received from Adv. A Alberts: Member of Parliament and Gauteng leader of the Freedom Front Plus (FF Plus) in July 2015 requesting the Public Protector to investigate the following issues and/or questions arising from the acceptance, granting and now cancellation of the tender favour of Peu Capital Partners:
a) The procedures followed in granting the tender to Peu Capital Partners by City of Tshwane Metropolitan Municipality with regards to the installation of the smart metering system;

b) Whether Peu Capital Partners complied with all the requirements in order for the tender to be granted;

c) Non-compliance by Peu Capital Partners with the contract, as well as the reason for its failure to do so, therefore causing the cancellation of the tender contract;

d) Why did Tshwane Metropolitan Municipality initially accept the tender for such a high amount, where the same service could have been provided at a much lesser cost;

e) Why has Tshwane Metropolitan Municipality cancelled the tender/contract and what is the agreement with regards to the funds already paid? Has there been an overpayment in relation to the services delivered;

f) Who is responsible for the tender / contract being cancelled and who will accept the consequences of the cancellation? Was there as a result maladministration a wastage of funds; and

(g) The agreement reached between the two parties with regard to the outstanding amount that still needs to be paid to Peu Capital Partners in respect of the tender, taking into account the cancellation thereof.

(vi) The complaint received before the high court matter was concluded in the Afrisake NPC and Others v City of Tshwane Metropolitan Municipality (Gauteng High Court Case number 74192/13). I am precluded from investigating courts decisions by section 182(3) of the Constitution and since the court order was issued on 31 October 2018 the focus of the investigation was changed.

(vii) I have noted some aspects of the first complaint may have been addressed by the court and have deferred the determination of the first complaint until the full judgement in the
Afrisake NPC and Others v City of Tshwane Metropolitan Municipality has been issued by the North Gauteng high court.

(viii) On analysis of the complaint, the following issues were identified and investigated:

a) Whether or not there any irregularities and improprieties in the awarding or implementation of Tender CB 364/2011 (for the appointment of a panel of financial and legal advisors to assist with funding opportunities) to Peu Capital Partners; and if so; whether such constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

b) Whether or not the CoT followed a due and proper process in awarding the Smart Meter contract to Peu Capital Partners; and if so; whether such award constitutes improper conduct as envisaged in section 182(1) and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

c) Whether or not the former City Manager in the awarding and termination of the Smart prepaid meters contract failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT;

(ix) The investigation into the complaints received and the allegations made was conducted in terms of the provisions of section 182 of the Constitution of the Republic of South Africa, 1996 (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 remedial action, as well as the provisions of section 6(4) of the Public Protector Act, 1994, that regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at all levels.
(x) Key laws and policies taken into account to help me determine if there had been maladministration by the CoT and prejudice were principally the Constitution of the Republic of South Africa, 1996; the City of Tshwane’s Policy Framework for Consideration of Unsolicited Bids/Proposals; the Municipal Finance Management Act, 2003; the National Treasury Practice Note No 11 of 2008/2009; the Municipal Supply Chain Management Regulation 30 May 2005; the Supply Chain Management: A guide for accounting officers of Municipalities October 2005; the Local Government: Municipal Systems Act no 32 of 2000; the Supply Chain Management: A guide for accounting officers of Municipalities October 2005.

(xi) Having considered the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by the CoT, my findings are the following:

(a) Regarding whether or not there any irregularities and improprieties in the awarding or implementation of Tender CB 364/2011 (for the appointment of a panel of financial and legal advisors to assist with funding opportunities) to Peu Capital Partners; and if so; whether such constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

(aa) The allegation that there are irregularities and improprieties in the awarding or implementation of Tender CB 364/2011 for the appointment of a panel of financial and legal advisors to assist with funding opportunities to Peu Capital Partners are substantiated;

(bb) The CoT did not conduct due diligence and therefore awarded the tender to a company that was technically insolvent and did not have any assets required to ensure that they have the capacity and ability to execute the contract;

(cc) The CoT also failed to conduct the necessary verification as envisaged in clause 38(1) of the CoT Supply Chain Management Policy to ensure that the tender is not
awarded to a company whose directors has wilfully neglected, reneged on or failed to comply with any government, municipal or other public sector contract during the past five years. CoT should have established that the majority of directors were also directors in Masana Technologies which is a company that was liquidated whilst doing work for CoJ, which resulted in projects being abandoned;

(dd) CoT awarded the contract to Peu Capital Partners even though it did not comply with the requirements of the bid, that required the company to be registered with the Financial Services Board;

(ee) The CoT also failed to take action against Peu Capital Partners for not complying with a condition of the tender that required them within fourteen (14) days to register as a vendor on the CoT's database from the time that they were appointed in and around March 2012. According to the CoT, Peu Capital Partners has still not been registered on the CoT database.

(ff) The conduct of the CoT was in violation of the CoT Supply Chain Management Policy as well as of Section 195(1) (b) and (f) of the Constitution, which provides that efficient, economic and effective use of resources must be promoted and public administration must be accountable.

(gg) The CoT's conduct in this regard constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether the CoT followed due and proper process in awarding the Smart Meter Project to Peu Capital Partners; and if so; whether such award constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act. The Public Protector finds that:

(aa) The allegation that the CoT did not follow a due and proper process in awarding the Smart Meter contract to Peu Capital Partners is substantiated;
(bb) The court in the case of of *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality* (Case 74192/2013) confirmed that the Memorandum of Agreement and the Master Services Agreement entered into between the CoT and Peu Capital Partners dated 02 October 2012 is unlawful and constitutionally invalid;

(cc) The conduct of the CoT was in violation of Section 217 (1) of the Constitution, which provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

(dd) The CoT's conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(c) **Regarding whether or not the former City Manager in the awarding and termination of the Smart prepaid meters contract failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT:**

(aa) The allegation that the former City Manager in the awarding and termination of the Smart prepaid meters contract failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT is substantiated;

(bb) The Council approved the Master Service Agreement with Peu Capital Partners based on the report that was presented by the former City Manager to a Council meeting of 30 May 2013 wherein it was confirmed that due process was followed and the Legal Department was satisfied that the final agreement that Council is requested to approve for signature is a good balance of taking the interests of
citizens and the CoT’s needs into account, as well as the required bankability of the transaction for Peu Capital Partners in relation to its funders.

(cc) The former City Manager did not comply with the provisions of section 61 of the MFMA that requires him to act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs and seek and to prevent any prejudice to the financial interests of the municipality.

(dd) The former City Manager also did not comply with the provisions of section 62 of the MFMA that requires him as the accounting officer of a municipality to take all reasonable steps to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;

(ee) The former Municipal Manager failed to comply with his duties in terms of sections 61 and 62 of the MFMA by failing to managing its financial affairs diligently and fidelity, honesty, integrity and in the best interests of the municipality, thus constituting financial misconduct as envisaged in section 171(1)(a), (b), and (c) of the MFMA.

(ff) The conduct of the former City Manager therefore constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(xii) In light of the above findings, I am taking the following appropriate remedial actions, as contemplated in section 182(1)(c) of the Constitution.

(a) The current accounting officer of the CoT must take appropriate action in terms of section 62(1)(e) of the MFMA against the officials implicated in any irregularities in the award of the tender for the installation of pre-paid meters, including where appropriate, pursue criminal charges against any official or former officials of the municipality who might be implicated in committed an act of financial misconduct or an offence in terms of section 171(1) of the MFMA
(b) The Speaker of the Municipal Council of the CoT must take appropriate steps to ensure that the Council report the conduct of the former Municipal Manager and officials implicated in the tender irregularities in this matter, to the South African Police Service and the Directorate for Priority Crime Investigation (Hawks) in terms of Regulation 10 (1) of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, 2014, issued in terms of the Local Government: Municipal Finance Management Act, 2003
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF THE IRREGULAR AWARDING OF THE SMART METER CONTRACT AND IMPROPER CONDUCT COMMITTED BY THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY

1. INTRODUCTION

1.1. This is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and published in terms section 8(1) of the Public Protector Act, 1994.

1.2. The report is published in terms of section 8(2A)(a) of the Public Protector Act and submitted, in terms of section 8(3) of the Public Protector Act, to the following persons:

1.2.1. The Executive Mayor of the City of Tshwane Metropolitan Municipality, the Honourable Mr Solly Msimanga.

1.2.2. The City Manager of the City of Tshwane Metropolitan Municipality, Mr Mooketsi Mosola;

1.2.3. The former City Manager of the City of Tshwane Metropolitan Municipality, Mr Jason Ngobeni

1.3. A copy of the report is also submitted to the following Complainants:

1.3.1. Adv Richard Botha and Mr Derrick Kissoonduth (for information)

1.3.2. Adv Alberts of the Freedom Front Plus

1.4. The report relates to an investigation into allegations of maladministration and irregular awarding of the Smart Prepaid Meter Contract (the Contract) by the City of Tshwane Metropolitan Municipality (the CoT) and the subsequent cancellation thereof.
2. THE COMPLAINT

2.1 Complaint 1

2.1.1 The first complaint was received from Mr Richard Botha (the Complainant) and Mr Derrick Kissoonduth (Mr Kissoonduth) on behalf of Kusasa Healthcare who had approached the Public Protector in January 2013 alleging that on or about the year 2011, the CoT was faced with the problem of recovering income as a result of bad debts by electricity consumers. CoT then had to take steps to improve its security of revenue and resorted to transitioning from post-paid meters, to pre-paid meters.

2.1.2 The Complainant further alleged that he conducted research with his business partner and came up with the concept of smart pre-paid electricity meters (smart meters). They presented this concept to the CoT and after several presentations; the Council approved a pilot project that was conducted by the Complainant at some areas in Pretoria East. The Complainant further alleged that after conducting the pilot project; he was hoping to get a go ahead from CoT to implement the project. However, while Complainants were still awaiting the CoT’s outcome in this regard they learnt that PEU Capital Partners (PTY) LTD (hereinafter referred to as Peu Capital Partners) was awarded a tender by CoT to install smart meters.

2.2 Complaint 2

2.2.1 In July 2015 another complaint was received from Adv. A Alberts: Member of Parliament and Gauteng leader of the Freedom Front Plus (FF Plus) requesting the Public Protector to investigate the following issues and/or questions arising from the acceptance, granting and now cancellation of the tender favour of Peu Capital Partners:
h) The procedures followed in granting the tender to Peu Capital Partners by City of Tshwane Metropolitan Municipality with regards to the installation of the smart metering system;

i) Whether Peu Capital Partners complied with all the requirements in order for the tender to be granted;

j) Non-compliance by Peu Capital Partners with the contract, as well as the reason for its failure to do so, therefore causing the cancellation of the tender contract;

k) Why did CoT initially accept the tender for such a high amount, where the same service could have been provided at a much lesser cost;

l) Why has CoT cancelled the tender/contract and what is the agreement with regards to the funds already paid? has there been an overpayment in relation to the services delivered;

m) Who is responsible for the tender / contract being cancelled and who will accept the consequences of the cancellation? Was there as a result maladministration a wastage of funds; and

n) The agreement reached between the two parties with regard to the outstanding amount that still needs to be paid to Peu Capital Partners in respect of the tender, taking into account the cancellation thereof.

2.3 The two Complaints were received before the high court matter in the case of Afrisake NPC and Others v City of Tshwane Metropolitan Municipality (Gauteng High Court Case number 74192/13). I am precluded from investigating courts decisions by section 182(3) of the Constitution and since the court order was issued on 31 October 2018 the focus of the investigation was changed as the major aspects of this complaint were dealt with in the high court case and the court made the following orders:
2.3.1 Court order dated 12 October 2017

2.3.1.1 The Memorandum of Agreement entered into between the first respondent and Peu Capital Partners dated 02 October 2012 is constitutionally invalid;
2.3.1.2 The Master Services Agreement concluded between the first respondent and the Peu Capital Partners dated 6 June 2013 is constitutionally invalid;
2.3.1.3 The decision of the CoT that resulted in the conclusion of the Master Services Agreement is unlawful;
2.3.1.4 The Termination Agreement entered into between the CoT and Tshwane Utility Management Services (TUMS) on 15 August 2015 is constitutionally invalid;
2.3.1.5 The Interim Services Termination Agreement entered into between CoT and TUMS dated 20 August 2015 is constitutionally invalid;
2.3.1.6 All monies that have been accumulated in the dedicated account in terms of the Interim Services Termination Agreement is released and paid to the CoT.
2.3.1.7 The court further ordered the parties to address the court by affidavit on what a just and equitable remedy should be.

2.3.2 Court order dated 23 October 2018

2.3.2.1 The Memorandum of Agreement dated 2 October 2012 is set aside;
2.3.2.2 The Master Services Agreement of 6 June 2013 is set aside;
2.3.2.3 The Termination Agreement of 13 August 2013 is set aside;
2.3.2.4 The Interim Service Termination Agreement of 20 August 2015 is set aside; however this is suspended until completion of the transition period;
2.3.2.5 The second and third complaint entails investigating the awarding of the smart prepaid meters contract to Peu Capital Partners that was concluded in terms of the Memorandum of Agreement of 02 October 2012 and the Master Services Agreement of 6 June 2013, the termination of this contract as per Termination Agreement dated 13 August 2013 and the subsequent Interim service termination Agreement of 201 August 2015. All these agreements were set aside by the above high court order in the case of Afrisake NPC and Others v City of Tshwane Metropolitan Municipality (Case 74192/2013) and in terms of section 182(3) of the Constitution provides that the Public Protector may not investigate court decisions and I am therefore precluded from investigating these matters. It should be noted that the court order does not deal with the maladministration and the improper conduct of the CoT and its officials of involved in this matter, which is the subject of my investigation and this report.

2.3.2.6 I have noted some aspects of the first complaint may have been addressed by the court and have deferred the determination of the first complaint until the full judgement in the Afrisake NPC and Others v City of Tshwane Metropolitan Municipality has been issued by the North Gauteng high court.

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 the power as regulated by national legislation –

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

(b) to report on that conduct; and
(c) *to take appropriate remedial action.*

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

3.4. The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution 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, when confirming the powers the public protector:

3.5.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.5.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. (para 67);

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavor to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, *she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint* (para 68);
3.5.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow. (para 69);

3.5.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to. (para 70);

3.5.6 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made. (para 71);

3.5.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence; (para 71(a));

3.5.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.5.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.6 The Constitutional Court further held that the remedial action taken by the Public Protector has a binding effect, “When remedial action is binding, compliance is not optional, and whatever reservations the affected party might have about its fairness,
appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."

3.7 In the matter of President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December 2017), the full court held as follows regarding the powers of the Public Protector:-

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71 of the judgment)

3.7.2 The Public Protector has power to take remedial action, which include instructing the President to exercise powers entrusted on them under the constitution if that is required to remedy the harm in question. (paragraph 82 of the judgment);

3.7.3 The Public Protector, in appropriate circumstances, have the power to direct the president to appoint a commission of enquiry and to direct the manner of its implementation. Any contrary interpretation will be unconstitutional as it will render the power to take remedial action meaningless or ineffective. (paragraph 85 and 152 of the judgment)

3.7.4 There is nothing in the Public Protector act or Ethics Act that prohibit the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4) (c) (ii) of the Public Protector Act (paragraph 91 and 92 of the judgment)

3.7.5 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers(paragraph 100 and 101 of the judgment):

3.7.5.1 Conduct an investigation;
3.7.5.2 Report on that conduct; and
3.7.5.3 To take remedial action.
3.7.6 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (paragraph 104 of the judgment)

3.7.7 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court. (Paragraph 105 of the report). This was a finding on NEF judgment as well.

3.7.8 The fact that there is no firm findings on the wrong doing, this does not prohibit the public protector form taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (paragraph 107 and 108 of the Judgment).

3.7.9 Prima facie evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).

3.8 CoT is an organ of state and its conduct amounts to conduct in state affairs, and, as a result the matter falls within the Public Protector's mandate to investigate.

3.9 The jurisdiction and power to investigate was not disputed by any of the parties.

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.
Section 6(4) of the Public Protector Act gives the Public Protector the authority to investigate complaints received.

4.2. **Approach to the investigation**

4.2.1. Like every Public Protector’s 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 maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the CoT had acted improperly in the awarding of the Contract to Peu Capital Partners?

4.2.3. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the CoT or organ of state to prevent maladministration and prejudice.

4.2.4. The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the CoT or organ of state complied with the regulatory framework setting the applicable standards for good administration.
4.3 On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Whether or not there any irregularities and improprieties in the awarding or implementation of Tender CB 364/2011 for the appointment of a panel of financial and legal advisors to assist with funding opportunities to Peu Capital Partners; and if so; whether such constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

4.3.2 Whether or not the the CoT followed a due and proper process in awarding the Smart Meter contract to Peu Capital Partners; and if so; whether such award constitutes improper conduct as envisaged in section 182(1) and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

4.3.3 Whether or not the former City Manager in the awarding and termination of the Smart prepaid meters contract failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT;

4.4 The Key Sources of information

4.4.1 Documents

4.4.1.1 Report dated 3 November 2003 signed by Mr J Masonganye: City Manager with reference 05/010/2009.

4.4.1.2 Mayoral Committee report dated 17 August 2011.

4.4.1.3 Letter dated 4 May 2012 from Mr Andile Dyakala: Chief Financial Officer (CFO) to Ms Busi Tshili of Peu Capital Partners.
4.4.1.4 Letter dated 25 May 2012 from the CFO to Peu Capital Partners.

4.4.1.5 Peu Capital Partners proposal dated 8 June 2012 PeU submitted to the CoT detailing the smart meter project.

4.4.1.6 Peu Capital Partners proposal to the CoT in regard to the Security of Revenue dated 5 November 2012.

4.4.1.7 Letter dated 18 March 2013 from CoT to Peu Capital Partners.

4.4.1.8 Letter dated 29 May 2013 from Peu Capital Partners to CoT. The letter was drafted by ENS attorneys and dealt with the Public Private Partnership.

4.4.1.9 The Master Services Agreement (hereinafter referred to as the MSA signed between Peu Capital Partners and the CoT dated 6 June 2013.

4.4.1.10 Letter dated 13 August 2015 from CoT to TUMS.

4.4.1.11 Letter dated 7 October 2013 from Ms Tshili to Mr Jason Ngobeni: City Manager: CoT (hereinafter referred to as Mr Ngobeni).

4.4.1.12 Letter dated 8 October 2013 (A) from Mr Ngobeni to Ms Tshili.

4.4.1.13 Second letter dated 8 October 2013 (B) from Mr Ngobeni to Ms Tshili.

4.4.1.14 Indicative valuation report of smart meter infrastructure dated 30 June 2015 compiled by SNG.

4.4.1.15 Letter dated 12 May 2015 from Mr Ngobeni to Ms Tshili. The letter in summary stated that CoT wished to terminate the MSA concluded by the parties on 6 June 2013.

4.4.1.16 Copy of the Interim Services and Transfer Agreement dated 13 and 20 August 2015 signed between the Mr Ngobeni and Ms Busi Tshili.

4.4.1.17 Letter dated 29 January 2016 to the Public Protector received from Mr Ngobeni.
4.4.1.18 Letter dated 12 February 2016, from the CoT addressed to the Public Protector.

4.4.1.19 Letter dated 16 February 2016 received from Mr James Masonganye: Deputy Director: Technical Services: Electronic Systems Management: CoT.

4.4.1.20 Letter dated 18 July 2016 issued to the CoT by the Public Protector.

4.4.1.21 Written submission dated 21 January 2016 from Peu submitted to this office.

4.4.2 Interviews/ Meetings conducted

4.4.2.1. Meeting held on 9 December 2015 with Mr Dayalan Pillay: Executive Director of Revenue in the City of Tshwane.

4.4.2.2. Meeting held 9 December 2015 with Mr Andile Dyakala: former CFO for CoT.

4.4.2.3. Meeting held on 22 January 2016 with Councilor Ramokgopa: Former Mayor of CoT.

4.4.2.4. Meeting held on 22 January 2016 with the Peu Capital Partners:

4.4.2.5. Meeting held on 22 January 2016 with Mr Bruno Seabela: Strategic Executive Director of Legal Services: CoT.

4.4.2.6. Meeting with the City Manager, Mr Ngobeni held on 22 January 2016.

4.4.2.7. Meeting held on 6 March 2017 with Mr Phuti Mabotja: Chief Engineer, who was the Project Manager.

4.4.2.8. Meeting held on 6 March 2017 with Mr Philip Sebada: Executive Director: Electricity Supply.

4.4.2.9. Meeting held on 7 March 2017 with Mr Geston Rennie: Deputy Director: Secretariat.

4.4.2.10. Meeting held on 7 March 2017 with Mrs Antionette van Zyl, a member of the BEC.
4.4.2.11. Meeting held on 8 March 2017 with Ms Bertha Maleke, a member of the BEC;

4.4.2.12. Meeting held on 8 March 2017 with Mr Tom Mutshidza, a member of the Technical Steering Committee;

4.4.3 Notices sent out in terms of section 7(9) of the Public Protector Act;

4.4.3.1 A notice issued to the City Manager of the CoT dated 26 November 2018;
4.4.3.2 A notice issued to the former City Manager of the CoT dated 26 November 2018;
4.4.3.3 A response to the notice issued in terms of section 7(9) of the Public Protector Act received from the former City Manager of the CoT.

4.4.4 Legislation and other prescripts

4.4.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
4.4.4.2 Municipal Finance Management Act, 2003 (MFMA);
4.4.4.3 City of Tshwane’s Supply Chain Management;
4.4.4.4 Municipal Supply Chain Management Regulation 30 May 2005;
4.4.4.5 Local Government: Municipal Systems Act (MSA) no 32 of 2000

4.4.5 Case Law

4.4.5.1 *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)*

4.4.5.2 *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality (North Gauteng Case No 74192/2013)*
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 or not there any irregularities and improprieties in the awarding or implementation of Tender CB 364/2011 (for the appointment of a panel of financial and legal advisors to assist with funding opportunities) to Peu Capital Partners; and if so; whether such constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

Common Cause:

5.1.1 In November 2011 the CoT initiated a procurement process for the appointment of a panel of financial and legal advisors to assist with funding opportunities for a three (3) year period with effect from the 2011/12 financial year. The notice that was published under tender reference number CB364/2011 was accompanied by a request for proposals which was available to the public electronically online (free of charge) and in hard copy format for collection. The three(3) panels were as follows:

5.1.1.1 On Balance sheet funding (Panel 1);
5.1.1.2 Off Balance sheet funding (Panel 2); and
5.1.1.3 Legal advice (Panel 3).

5.1.2. The criteria associated with Panel 2, included the ability to provide advice in relation to a number of specified matters as well as the ability to:

5.1.2.1. Undertake a capital plan analysis;
5.1.2.2. Prioritize and select projects that are feasible and are viable having regard to their returns;
5.1.2.3. Assist the CoT to optimise revenue; and
5.1.2.4. The development of ring-fenced solutions that could result in the arranging of finance in the commercial market based on project viability

5.1.3. The closing date for the RFP was 12 December 2011, Peu Capital Partners prepared and submitted a tender response to the CoT on 9 December 2011. A letter dated 23 February 2012 from CoT confirmed that Peu Capital Partner’s tender dated 9 December 2011 was accepted by the CoT. According to the tender document the hourly rate to which Peu Capital Partners was supposed to charge was R 2 150-00 over a three (3) year period.

5.1.4. Following the appointment of Peu Capital Partners on 23 February 2012, the CoT by letter dated 4 May 2012 requested Peu Capital Partners to provide a proposal advising the CoT regarding optimizing revenue for the funding of game changers through off balance sheet with specific reference to the “Security of Revenue” project. The due date for the proposal was 11 May 2012.

5.1.5. Peu Capital Partners submitted a proposal dated 11 May 2012 that inter alia included the following:

5.1.5.1 Roll-out of infrastructure

a) Roll out of smart meters in high, middle income and commercial areas;

b) Technical experts to be appointed to project manage the roll out of assets to secure investment;

c) Job creation opportunities (skilled and unskilled)

d) At the end of the service period, CoT will have the option to renew the operating lease at a market related fee;

5.1.5.2 Highlights of the proposal

a) Peu Capital Partners and its funding partners will make available for use by CoT over five (5) billion rand worth of assets through a self-funding unsecured operating
lease facility to CoT. At 60% of those assets are to comprise of advance smart metering infrastructure;

b) The solution redirects and utilizes 60% of existing losses and expenses arising from providing credit, to pay for the operating lease effectively losses to an investment.

c) Repayment of lease of a maximum of 19.5 cents of every one rand (R1) electricity revenue at electricity sale to reduce risk for investors.

d) One of the key success factors of the system was the installation of very advanced metering infrastructure

5.1.6. Notwithstanding the contract being for a period of three (3) years, the above proposal was the only one that COT requested from Peu Capital Partners and further both CoT and Peu Capital Partners confirmed that CoT was not billed for services rendered by Peu Capital Partners even though the contract provided that Peu Capital Partners will render services to the CoT at the rate of R2 150.00

**Issues in dispute**

5.1.7. The issue for my determination is whether or not there were irregularities and improprieties in the awarding or implementation of the Tender CB 364/2011.

5.1.8. The Complainants alleged that even though Peu Capital Partners was appointed following a competitive bidding process, there were some improprieties and irregularities in the awarding of the tender CB 364/2011 that *inter alia* included the following:

5.1.8.1 Peu Capital Partners did not have a valid Tax clearance certificate

5.1.8.1.1 It was alleged that Peu Capital Partners relied on a SARS tax clearance certificate in respect of a company by the name of Klaprops 140 (Proprietary) Limited (hereinafter referred to as Klaprops) (Registration Number 2003/007909/07);
5.1.8.2 Financial resources

5.1.8.2.1 It was alleged that Peu Capital Partners was technically insolvent and had no assets and COT failed to conduct due diligence on Peu Capital Partners.

5.1.8.3 Registration with the Financial Services Board

5.1.8.3.1 The tender documents stated that bidders should have relevant previous experience and be registered with the Financial Services Board (FSB). Peu Capital Partners was a new company, had no track record, was not registered with the FSB and should not have been considered for tender CB 364/2011.

5.1.8.4 Registration as a Vendor

5.1.8.4.1 Peu Capital Partners had fourteen (14) days to register as a vendor on the CoT’s database from the time that they were appointed in and around March 2012 and they did not comply with this requirement.

5.1.9 The CoT responded by letter dated 29 January 2016 from the former City Manager, Jason Ngobeni that confirmed that CoT issued a tender CB 364/2011 for 3 panels: on balance sheet panel, off balance sheet panel and Legal panel. Peu Capital Partners was appointed for both the on- and off balance sheet panels (2 of the 3 panels). The appointment of panelists to the panel for CB 364/2011 duly complied with all legislated processes to the best of the CoT’s knowledge. As regards due diligence, the checks required by the prevailing legislation were complied with. He further stated that Peu Capital Partners did have a valid Tax clearance certificate at the time, if they did not, they would have been disqualified in terms of the processes.

5.1.10 Furthermore the former City Manager contended that Peu Capital Partners was not a new company as alleged, it is one company in a host of companies within a group.
As long as the company was able to comply with the specifications of the panel appointment, nothing in law prevents the company from being appointed to the panel, and nothing in law would be able to justify its exclusion. The legislative requirements for tender appointments require experience to play a factor in appointments, but provide that price and BEE point allocations be the determining factor for tender appointments.

5.1.11 As regards the allegation that Peu Capital Partners did not have sufficient resources to fund a multi-billion rand tender, the former City Manager stated that this allegation would be correct, but would be applicable to any bidder that offered such a solution. In projects of this scale, it is in the normal course for funding to be raised. Peu Capital Partners was able to raise the funding to commence the roll out of smart meters through equity. Its debt funding, which would usually be the bulk of funding mix, was however placed on hold by funders because of the filing of court papers.

Conclusion

5.1.12 As regards the allegation that Peu Capital Partners did not have a valid Tax clearance certificate, the following information was noted from the response of Peu Capital Partners to tender CB 364/2011 and an analysis of the information obtained Registrar of Companies and Close Corporations (CIPC):

a) The cover page of the proposal had the company names of Klaprops and Peu Capital Partners and it was stated Peu Capital Partners is in the process of being changed from Klaprops 140 and is a company formed as an affiliate of Peu Group (Proprietary) Limited (hereinafter referred as the Peu Group).

b) The company registration number of both Peu Capital Partners and Klaprops 140 is 2003/007909/07 and the Directors of Klaprops were the same as the Directors of Peu Capital Partners and were listed as follows:
   a) Peu Group (Pty) Limited ;
   b) Mangalani Peter Malungani;
   c) Christina Busisiwe Tshili;
d) Duarte Miquel De Quintal

c) Peu Capital Partners submitted a SARS tax clearance certificate in respect of a company by the name of Klaprops (Registration Number 2003/007909/07). An analysis of the CIPC records revealed that both Peu Capital Partners and Klaprops have the same company registration number and the company was in the process of changing its name.

5.1.13 As regards the allegation that Peu Capital Partners did not have the financial resources, it was noted from the annual financial statements of Klaprops audited by KPMG for the year ended 2011 that was attached to the tender documents, that Klaprops was described as an investment holding company, wholly owned subsidiary of Peu Group (Pty) Limited. According to the statement of financial position, the total assets of Klaprops was R 49-00 and paragraph 8 of the financial notes the company was technically insolvent, and had a liability of R 24 079-00. The audited financial statements confirmed that Klaprops 140 as later changed to Peu Capital Partners was indeed technically insolvent.

5.1.14 As regards registration with the Financial Services Board Peu Capital Partners acknowledged in the proposal that the company is in the process of completing its registration with the Financial Services Board as a Category II Financial Services provider. This was also confirmed in the scoring of the Bid Evaluation Committee where all panel members scored Peu Capital Partners as being non-compliant;

5.1.15 As regards registration as a Vendor with CoT, the letter appointment of Peu Capital Partners dated 23 February 2013 stated that the tender of Peu Capital Partners was accepted subject to “successful registration as a vendor with the City of Tshwane within 14 days”. The CoT has not submitted evidence to confirm that Peu Capital Partners complied with the above condition of their appointment and was registered as a vendor within 14 days of being awarded the tender.
5.1.16 As regards conducting due diligence, Peu Capital Partners acknowledged that some of the directors had been involved in a company called Masana Technologies, a company that was appointed to assist the City of Johannesburg with billing challenges. According to Peu Capital Partners’ submission “Masana’s operations were terminated in 2009 due to liquidity issues”.

5.1.17 According to the Mail and Guardian article dated 04 February 2011¹ Masana Technologies was linked as a service provider to the City of Johannesburg (CoJ) which was responsible for the billing crisis at CoJ. In summary the article stated that a R208 million tender was awarded to an inexperienced company Masana Technologies in 2005. The contract price subsequently ballooned to R496 million and was cancelled in September 2009 with R 156 million of the work still unfinished when Masana Technologies went into liquidation. The information regarding the above irregularities is information that was easily available and there is no evidence that the CoT considered these irregularities or analysed the legal implications of some of the information that was disclosed by Peu Capital Partners in their proposal.

The Applicable law

5.1.18 The Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution):

5.1.18.1 Section 195 of the Constitution enjoins the CoT to ensure efficiency and effectiveness in its administration as a public entity. It specifically provides that public administration must be governed by democratic values and principles enshrined in the Constitution, including the following principles:

(a) a high standard of professional ethics must be promoted and maintained;
(b) efficient, economic and effective use of resources must be promoted;
(c) …
(d) service must be provided impartially, fairly, equitable and without bias;

¹ The connections that disconnected Joburg -https://mg.co.za/article/2011-02-04
5.1.19 When conducting its business, CoT is in terms of section 217 of the Constitution expected to ensure that contracts for goods and services are entered into in accordance with a system that is fair, equitable, transparent, competitive and cost effective and to promote and maintain a high standard of professionalism ethics and its administration is also expected to be efficient, economic and is must to promote the effective use of its resources.

5.1.20 **Local Government: Municipal Finance Management Act, 2003 (MFMA):**

5.1.20.1 The MFMA regulates municipalities and municipal entities and aims to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local government sphere. Section 111 of the MFMA, read with Section 112, gives effect to the Procurement Clause principles. In terms of section 112(1) of the MFMA the supply chain management policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management.

5.1.21 **CoT’s Supply Chain Management Policy**

5.1.21.1 Clause 38(1) of the CoT’s Supply Chain Management Policy approved by Council on 28 July 2005 provides that the Accounting officer must reject the bid of any bidder if the bidder or any of its directors has wilfully neglected, reneged on or failed to comply with any government, municipal or other public sector contract during the past five years.

5.1.21.2 Clause 43(1) of the Policy provides that the accounting officer must ensure that irrespective of the procurement process followed, no award above R15 000 is given
to a person whose tax matters have not been declared by the South African Revenue Service to be in order.

**Conclusions based on the application of the law to the facts:**

5.1.22 Based on the information and evidence obtained during the investigation as well as the legal framework that is applicable to the facts of this matter, it can be concluded that there were improprieties and irregularities in the awarding of tender CB 364/2011 for the appointment of a panel of financial and legal advisors to assist with funding opportunities.

5.1.23 The CoT also did not conduct due diligence and therefore awarded the tender to a company that was technically insolvent and did not have any assets required to ensure that it had the necessary capacity and ability to execute the contract.

5.1.24 The CoT also failed to conduct the necessary verification as envisaged in clause 38(1) of the Cot Supply Chain Management Policy to ensure that the tender is not awarded to a company whose directors has wilfully neglected, reneged on or failed to comply with any government, municipal or other public sector contract during the past five years. CoT should have established that the majority of directors were also directors in Masana Technologies which is a company that was liquidated whilst doing work for CoJ, which resulted in projects being abandoned.

5.1.25 CoT awarded the contract to Peu Capital Partners even though it did not comply with the requirements of the bid that required the company to be registered with the Financial Services Board.

5.1.26 The CoT also failed to take action against Peu Capital Partners for not complying with a condition of the tender that required them within fourteen (14) days to register as a vendor on the CoT’s database from the time that they were appointed in and around March 2012.
5.2. Whether or not the CoT followed a due and proper process in awarding the Smart Meter contract to Peu Capital Partners; and if so; whether such award constitutes improper conduct as envisaged in section 182(1) and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

*Common Cause:*

5.2.1 It is common cause that the CoT appointed Peu Capital Partners on 23 February 2012 as a panel to render professional financial and legal services and to assist with funding opportunities as and when required over a period of three years. Following this appointment the CoT by letter dated 4 May 2012 requested Peu Capital Partners to provide a proposal advising the CoT regarding optimizing revenue for the funding of game changers through off balance sheet with specific reference to the "Security of Revenue" project. The due date for the proposal was 11 May 2012.

5.2.2 Peu Capital Partners submitted a proposal dated 11 May 2012 that inter alia included the following:

**Roll-out of infrastructure**

a) Roll out of smart meters in high, middle income and commercial areas;
b) Technical experts to be appointed to project manage the roll out of assets to secure investment;
c) Job creation opportunities (skilled and unskilled)
d) At the end of the service period, CoT will have the option to renew the operating lease at a market related fee;

**Highlights of the proposal**

a) Peu Capital Partners and its funding partners will make available for use by CoT over five (5) billion rand worth of assets through a self-funding unsecured
operating lease facility to CoT. At 60% of those assets are to comprise of advance smart metering infrastructure;

b) The solution redirects and utilizes 60% of existing losses and expenses arising from providing credit, to pay for the operating lease effectively losses to an investment

c) Repayment of lease of a maximum of 19.5 cents of every one rand (R1) electricity revenue at electricity sale to reduce risk for investors

d) One of the key success factors of the system was the installation of very advanced metering infrastructure

5.2.3 In a letter dated 25 May 2012 from the then Chief Financial Officer (CFO) Mr Andile Dyakala, Peu Capital Partners was advised that their proposal dated 11 May 2012 was considered and approved by the Executive Acquisition Committee on 25 May 2012. Peu Capital Partners was further requested to make a detailed presentation to the Executive Acquisition Committee outlining their proposal. The presentation to the Executive Acquisitions Committee was made on 08 June 2012.

5.2.4 The CoT and Peu Capital Partners concluded a Memorandum of Agreement on 02 October 2012 that provided a basis for further negotiations to conclude the Master Services Agreement. It was envisaged that the agreement between the parties would be for a period of ten (10) years and following the signing of Memorandum of Agreement, the CoT embarked on a process to comply with the provisions of section 33 of MFMA. Section 33 of the MFMA requires the Municipal Manager in cases where the municipality intends to enter into a contract that imposes financial obligations beyond three (3) financial years to make public the draft contracts and to invite local communities, other interested persons to submit to the municipality comments or representations in respect of the proposed contract and has solicited the views and recommendations of National Treasury or the relevant Provincial Treasury.

5.2.5 The COT submitted evidence of media coverage during the week of 01-11 April 2012 as evidence to support that local communities were consulted and given an opportunity to comment of proposed contract with Peu Capital Partners.
5.2.6 As regards consultation with National Treasury it is common cause that a meeting was held with National Treasury on 16 January 2013 with a view to comply with the provisions of section 33(1) (b) (iv) of the MFMA. CoT further wrote a letter to National Treasury dated 12 April 2013.

5.2.7 Further on 17 May 2013 Ms M Ngqaleni: Acting Deputy Director-General: Intergovernmental Relations: National Treasury wrote to CoT raising concern about a newspaper article published in the Pretoria Newspaper dated 13 May 2013 wherein a notice appeared sponsored by an organisation referred to in the article as the Tshwane utility Management Services (TUMS), tendering for the "supply, installation and maintenance of prepaid smart meter assets. The concern was that CoT was not mentioned in the newspaper article and the following information was requested from CoT:

5.2.7.1 A copy of any feasibility study or business case assessing the appropriateness of proceeding with the project undertaken in terms of MSA section 78 or Municipal Finance Management Act section 120 together with an identification of the person or persons that prepared such feasibility study or business case;

5.2.7.2 The report that served before Council in terms of Section 33(b)(iii) and (iv) of the MFMA, incorporating the comment of the National Treasury;

5.2.7.3 Any legal opinion in the hands of your office or any other City official regarding the legality of proceeding with the project as it has been undertaken to date, including but not limited to:

a) A legal opinion that all monies collected by the private party in implementing the project may be deposited in the private party's bank account instead of the City's primary bank account;

b) A legal opinion as to whether such process (i.e., where the funds paid to the private party service provider are deposited in the private party's bank
account) violates any terms and conditions of any outstanding indebtedness of the City to its current lenders including the DBSA and relevant Commercial Banks. Details of any process followed to mitigate the possible impact on the current lenders to the City of Tshwane;

c) A legal opinion that the provision of the services contemplated in the Service Level Agreement do not constitute the provision of a municipal service as defined by the MSA;

d) A legal opinion as to the propriety of the City agreeing to a service contract where the terms provide that the said contract may be extended by the private party at its sole discretion;

e) A legal opinion as to whether the proposed term of the services agreement, as extended, is in violation of section 33 of the Municipal Finance Management Act in the absence of the processes described therein having been taken prior to any extension thereof;

f) A legal opinion as to the appropriateness of any "deemed approval" by the City in terms of the various provisions so stating in the Service Level Agreement;

g) A legal opinion as to whether the City can warrant that the provisions of the Service Level Agreement do not come within the ambit of Chapter 11 of the Municipal Finance Management Act;

h) A legal opinion as to the appropriateness of the City agreeing that the private party may pledge the assets procured for the project for any debt incurred by the private party;

i) A legal opinion as to the legality of the City agreeing that all project asset replacement is for the City's account, yet title thereto vest in the private party;
j) A legal opinion that any variation to the Service Level Agreement be undertaken via mediation rather than via the processes set forth in the MFMA and the Municipal Public Private Partnership regulations; and

k) A legal opinion that suggests the publication of the tender for the supply, installation and maintenance of prepaid smart meter assets was properly issued by a subsidiary of Peu Capital Partners (Pty) Ltd and the City's purported "advisor" to the project.

5.2.8 The former City Manager Mr Jason Ngobeni responded by a letter dated 23 May 2013 stating that the CoT wished to assure the National Treasury that the process for the appointment of the service provider in question was not designed to sidestep, circumvent or flout the legislation provisions relating to the municipal procurement. He further indicated that as regards a two stage bidding process, the CoT is confident that the process followed can be legally defended.

5.2.9 As regards feasibility study the CoT stated the CoT is of the opinion that Section 76 and Section 78 (3) of the MSAdoes not apply to this transaction, for much the same reason this transaction is not a Public Private Partnership, i.e.: this transaction does not amount to the outsourcing of a municipal service or a municipal function and electricity reticulation will still be undertaken by the CoT, even after the Service Level Agreement with the service provider is concluded.

5.2.10 The Master Services agreement between Peu Capital Partners and CoT was approved by Council on 30 May 2013 and the agreement was signed by the former City Manager on behalf of the CoT and Ms Busi Tshili on behalf of Peu Capital Partners. The report presented to Council highlighted the following:

a) The Master Services Agreement envisaged a total contract period of 10 years which was to comprise a 2 year initial roll-out phase and 8 year second roll-out phase;

b) During the initial roll out phase 429 474 smart pre-paid meters will be rolled out;
c) Over the entire contract period the total number shall amount to a maximum total of 800 000 smart pre-paid meters;

d) The project bank account is a CoT bank account as required by the requirements of the MFMA;

e) The CoT has performed a feasibility study and the cost of the service is expected to be funded from the cost saving arising from not having to manage a large debtor's book anymore;

f) The contract does make provision for penalties to be paid in the case of non-performance of the service provider. In the case of a material breach the City is capable of terminating the contract with the service provider;

g) The Legal Department was satisfied that the final agreement that Council is requested to approve for signature is a good balance of taking the interests of citizens and the CoT's needs into account, as well as the required bankability of the transaction for Peu Capital Partners in relation to its funders. The Legal Department of the CoT supports the approval of the MSA.

5.2.11 According to the Roll out Principles (Annexure to the Master Services Agreement, the following key roll out principles shall be taken into consideration:

a) Initially the roll out would focus on larger consumers of electricity;

b) Thereafter roll out will focus on small power users with consumption above a predetermined level;

c) The number of meters in the roll out phase will be limited to 438 000 meters;

d) Installations subsequent to the roll out phase will be limited to 370 526 meters. A maximum of 3860 meters will be available for roll out per month during the contract period;

5.2.12 A day after signing the Master Services Agreement, National Treasury through the Chief Procurement Officer, Mr Kenneth Brown wrote another dated 7 June 2013 to the former City Manager. The letter stated that National Treasury remains of the view that the revenue collection services are a municipal service in terms of all existing legislative frameworks contrary to the view of CoT. The appointment of Peu Capital
Partners as a preferred bidder to undertake the revenue collection services constitutes a conflict of interest in terms of the supply chain management prescripts. A firm which has been engaged to provide consulting services for the preparation or implementation of a project and any of its affiliates is prohibited from subsequently providing goods or works or services related to the initial assignment for the same project. To this end, the CoT was advised to put the project on hold and seek the necessary guidance on how to proceed with this project from the National Treasury.

5.2.13 A follow up letter dated 29 August 2013 was sent the former City Manager stating from the financial analysis it appeared that the procurement model adopted by the CoT was not the most cost-effective model. Further that the costs over the lifespan of the project was exorbitant and the risks associated with the project were biased against the CoT. National Treasury reiterated the view that the CoT must follow the supply chain management prescripts and recommended that the CoT should terminate the contract with Peu Capital Partners and undertake a proper feasibility study and follow a procurement process that is in line with the legislation and prescripts.

5.2.14 The then Minster of Finance Hon Pravin Gordhan also wrote a letter dated 13 September 2013 to the Executive Mayor Cllr K Ramokgopa stating that he was advised during June 2013 that a Master Service Agreement was entered between Peu Capital Partner and the CoT and pointed out the contract was entered into without complying with applicable legislation in that the contract:

a) Was concluded without following a fair, equitable, transparent, competitive and cost effective procurement process as prescribed by section 217 of the Constitution;

b) Does not comply with section 33 of the MFMA in that the view of the National Treasury were not solicited prior to its conclusion as required by the aforementioned section;
c) Was concluded pursuant to a receipt of an unsolicited bid without following the process prescribed for unsolicited bids set out in Regulation 37 of the MFMA regulations;

d) Has been concluded with a party that should have been disqualified from providing the services as prescribed by clause 5.4.1 of the Supply Chain Management: a guide for Accounting Officers of Municipalities and Municipal Entities; and

e) Falls within the ambit of Public-private Partnerships as defined in Municipal Public-Private Partnership Regulations but was not concluded in accordance with the regulatory framework set out in the aforementioned Regulations.

5.2.15 The Minister further stated that the contract does not offer value for money for the CoT in that *inter alia*:

a) The CoT would be required to buy back the infrastructure when the contract comes to an end;

b) In National Treasury’s assessment the price of 19, 5 cents for every rand of electricity purchased is exorbitant. According to the National Treasury sources, this cost should be between five and seven cents; and

c) There is no benefit to the CoT in that any increase in revenue collected would be absorbed by the increasing fee payable to Peu Capital Partners.

5.2.16 The CoT went ahead with the agreement and in letter dated 7 October 2013 from Peu Capital Partners requested a meeting with the CoT to discuss the revision of the initial roll-out plan and the associated undertaking by Peu Capital Partners of an interim phased roll out plan beginning with 300 meters over the next 8 weeks. Peu Capital Partners indicated that they would likely proceed with the 23 000 Siemens meters in the interim whilst the CoT is finalising the legal due diligence process. They will submit and agree with CoT, a catch up plan on the delays.
5.2.17 The City Manager responded by letter dated 08 October 2013 and advised *inter alia* that he confirmed the meeting that was held between the parties. The agreements made in the meeting were recorded as follows:

a) Due to certain delays in Peu Capital Partners finalising its funding, the CoT agrees that the initial roll-out plan be revised and that an interim phased roll out plan beginning with 300 meters over the next 8 weeks be implemented;
b) The parties agree to meet to finalize the details of the actions required by the agreement and will in due course agree to a catch-up plan for expedited roll out once funding arrangements are unconditional in place.

5.2.18 In a second letter dated 8 October 2013 (B) addressed to Ms Tshili, the former City Manager stated *inter alia* that it was agreed that Peu Capital Partners continue with a revised rollout on 23 000 meters, with 300 LPU’s rolled out by December 2013.

5.2.19 In May 2015 the CoT terminated the MSA after two years from signing the initial agreement. TUMS had installed 12 978 out of the agreed 438 000 meters that should have be installed in the initial roll out phase within two years. **50% of those installations were LPU’s which make up 50% of the total electricity revenue for CoT.** It seems that the large users were targeted first for the high revenue that they bring it. From the 12 978 meters, 6 606 of these were related to LPUs.

5.2.20 It is further common cause that High court case of *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality (Case 74192/2013)* made the orders summarised hereunder:

**Court order dated 12 October 2017**

a) The Memorandum of Agreement entered into between the first respondent and Peu Capital Partners dated 02 October 2012 is constitutionally invalid;
b) The Master Services Agreement concluded between the first respondent and the Peu Capital Partners dated 6 June 2013 is constitutionally invalid;
The decision of the CoT that resulted in the conclusion of the Master Services Agreement is unlawful;

The Termination Agreement entered into between the CoT and Tshwane Utility Management Services (TUMS) on 15 August 2015 is constitutionally invalid;

The Interim Services Termination Agreement entered into between CoT and TUMS dated 20 August 2015 is constitutionally invalid;

All monies that have been accumulated in the dedicated account in terms of the Interim Services Termination Agreement is released and paid to the CoT.

Court order dated 23 October 2018

The Memorandum of Agreement dated 2 October 2012 is set aside;

The Master Services Agreement of 6 June 2013 is set aside;

The Termination Agreement of 13 August 2013 is set aside;

The Interim Service Termination Agreement of 20 August 2015 is set aside; however this is suspended until completion of the transition period;

Issues in dispute:

5.2.21 The issue for my determination is whether the CoT followed a process which is fair, equitable, transparent, competitive and cost effective in appointing Peu Capital Partners to roll out smart prepaid meters. Further whether the CoT complied with the relevant legislation and its own Supply Chain Management policy.

5.2.22 The Complainants alleged that the CoT violated the provisions of section 217 of the Constitution in that Peu Capital Partners was appointed without following a competitive bidding process. Further that the CoT did comply with the provisions of section 33 of the MFMA in that the recommendations of National Treasury was ignored by the CoT and a feasibility study was not conducted prior to concluding the contract with Peu Capital Partners.

5.2.23 The former City Manager on the one hand initially contended that the CoT considered all legal prescripts including section 217 of the Constitution and was a competitive as
a two stage bidding process was followed, to this end he stated as follows in a letter dated 29 January 2016:

The process was competitive because the market had been tested in establishing the CB 364/2011 panels. The CB 364/2011 tender clearly called for bidders with the capacity to advise and assist the City, with assistance being envisaged especially in relation to the optimization of revenue. …

Three Panels were established through Tender CB364/2011. PEU Capital Partners and other Bidders were appointed on 23 February 2012 through this process. Subsequent to Mayors’ address on 13 March 2012, the panelists were invited to a briefing session where they were briefed on various initiatives and requested to submit proposals.

Yes, a two stage process was adopted, but not in the way the legislation anticipates a two stage bidding process. The two distinct stages in our process was the appointment of various panels and then closed project appointments from the closed list of panelists…

… There may have been errors in some communication from our Legal Department as regards the interpretation and the application of two stage bid and communication in some correspondence, but this is simply an error.

5.2.24 The former City Manager also confirmed that a feasibility study was conducted by the City, internally, before accepting the proposal and making an award. Financial modelling was prepared by the Finance department.

5.2.25 The former City Manager was of the view that it was their understanding that Section 33 of the MFMA does not require National Treasury’s approval, but required consultation only. Further that the concept of Peu Capital Partners was a turkey solution which included a smart prepaid meter, funding, operation, maintenance and management of the full system. The CoT would not have to fund the roll out of the
infrastructure on its balance sheet to loan or other debt funding. The service provider would fund, roll out and manage the entire project for the CoT against the payment of a service fee. The previous prepaid meters rolled out by the CoT were dumb prepaid meters and not smart prepaid meters. They also had to be purchased, operated and maintained by CoT, and funded through the CoT annual budget.

5.2.26 The former City Manager further stated the cost of collection of electricity prior 2012 The possibility of the CoT having to pay 19.5 cents to the service provider, while it attended to the remedy of any perceived breach, was unaffordable to the CoT.

*Application of the relevant law:*


5.2.27 The Constitution enjoins the CoT and all other organs of state to ensure that contracts for goods and services are entered into in accordance with a system that is fair, equitable, transparent, competitive and cost effective. Section 217 of the Constitution provides:

"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."

5.2.28 When procuring contracts with service providers, CoT as an organ of state is required to follow a procedure that is fair, reasonable, competitive and cost effective.

5.2.29 Section 195 also enjoins COT to ensure efficiency and effectiveness in its administration as a public entity. It specifically provides that public administration must be governed by democratic values and principles enshrined in the Constitution that *a high standard of professional ethic must be promoted and maintained, service
must be provided impartially, fairly, equitable and without bias and public administration must be accountable.

5.2.30 When conducting its business, CoT is expected to promote and maintain a high standard of professionalism ethics and its administration is also expected to be efficient, economic and must to promote the effective use of its resources.

Local Government: Municipal Finance Management Act, 2003 (MFMA):

5.2.31 The MFMA regulates municipalities and municipal entities and aims to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local government sphere. Section 111 of the MFMA, read with Section 112, gives effect to the Procurement Clause principles.

5.2.32 Section 111 of the MFMA which deals with Supply Chain policy instructs that each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of Chapter 11. Section 112(1) of the MFMA also stipulates that the supply chain policy of a municipality or municipal entity must be fair, equitable, transparent, competitive and cost-effective and comply with a prescribed regulatory framework for municipal supply chain management.

5.2.33 Section 113 of the MFMA states as follows on unsolicited bids:

1. A municipality or municipal entity is not obliged to consider an unsolicited bid received outside its normal bidding process.

2. If a municipality or municipal entity decides to consider an unsolicited bid received outside a normal bidding process, it may do so only in accordance with a prescribed framework.

3. The framework must strictly regulate and limit the power of municipalities and municipal entities to approve unsolicited bids received outside their normal tendering or other bidding processes.
Local Government: Municipal System Act 32 of 2000

5.2.34 Section 33 of the MFMA which deals with contracts having future budgetary implications states that but if a contract will impose financial obligations on the municipality beyond the three years covered in the annual budget for that financial year, it may do so only if the Municipal Manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved has, in accordance with section 21A of the MSA-

a) made public the draft contract and an information statement summarizing the municipality’s obligations in terms of the proposed contract; and invited the local community and other interested persons to submit to the municipality comments or representations in respect of the proposed contract;

b) has solicited the views and recommendations of the National Treasury, the relevant provincial treasury, the national department responsible for local government;

c) The municipal council has taken into account the municipality’s projected financial obligations in terms of the proposed contract for each financial year covered by the contract; the impact of those financial obligations on the municipality’s future municipal tariffs and revenue; any comments or representations on the proposed contract received from the local community and other interested persons; and any written views and recommendations on the proposed contract by the National Treasury, the relevant provincial treasury, the national department responsible for local government and any national department referred to in paragraph (a)(ii)(cc); and

d) The municipal council has adopted a resolution in which it determines that the municipality will secure a significant capital investment or will derive a significant financial economic or financial benefit from the contract; it approves the entire
contract exactly as it is to be executed; and it authorizes the municipal manager to sign the contract on behalf of the municipality.

5.2.35 Section 116(2) of the MFMA which deals with Contracts and Contracts Management provides that the Municipal Manager as the accounting officer of a municipality or municipal entity must take all reasonable steps to ensure that a contract or agreement procured through the supply chain management policy of the municipality or municipal entity is properly enforced.

City of Tshwane Supply Chain Management Policy approved by Council:

5.2.36 Clause 8.3 of the CoT Policy states that tenders above R10 million must be procured through a competitive bidding process that was advertised for at least 30(thirty) days on notice boards website of Council and advertised for (30) days in newspapers commonly circulating locally but not limited to and allocation in accordance with the preferential points system.

The Conclusions made based on the application of the law to the facts

5.2.37 Based on the information and evidence obtained during the investigation, the legal framework that is applicable to the facts of this matter and the high court order in the case of Afrisake NPC and Others v City of Tshwane Metropolitan Municipality (Case 74192/2013), it can be concluded that the CoT did not follow a system which is fair, equitable, transparent, competitive and cost effective to roll out the smart prepaid meters.

5.2.38 Furthermore, as stated by the court, Termination Agreement entered into between the CoT and Tshwane Utility Management Services (TUMS) on 15 August 2015 is constitutionally invalid
5.3 Whether or not the former City Manager in the awarding and termination of the Smart prepaid meters contract failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT;

Common cause

5.3.1 Mr Jason Ngobeni was appointed as a City Manager for CoT as from 01 September 2011 and in terms of section 60 of the MFMA, the City Manager is the accounting officer of the municipality and must exercise the functions and powers assigned to an accounting officer in terms of the MFMA. Furthermore the Accounting officer must provide guidance and advice to the municipality on compliance with MFMA.

5.3.2 The fiduciary responsibilities of the accounting officer is to provide advice and guidance on compliance with the MFMA to the political structures, political office-bearers and officials of the municipality and *inter alia* include acting with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs and preventing any prejudice to the financial interests of the municipality. The Accounting officer must also take all reasonable steps to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented.

5.3.3 Mr Jason Ngobeni in his capacity as the City Manager of the CoT presented a report to Council on 30 May 2013 that highlighted the following:

a) The Master Services Agreement envisaged a total contract period of 10 years which was to comprise a 2 year initial roll-out phase and 8 year second roll-out phase;

b) During the initial roll out phase 429 474 smart pre-paid meters will be rolled out;

c) Over the entire contract period the total number shall amount to a maximum total of 800 000 smart pre-paid meters;

d) The project bank account is a CoT bank account as required by the requirements of the MFMA;
e) The CoT has performed a feasibility study and the cost of the service is expected to be funded from the cost saving arising from not having to manage a large debtor’s book anymore;

f) The contract does make provision for penalties to be paid in the case of non-performance of the service provider. In the case of a material breach the City is capable of terminating the contract with the service provider;

g) The Legal Department was satisfied that the final agreement that Council is requested to approve for signature is a good balance of taking the interests of citizens and the CoT’s needs into account, as well as the required bankability of the transaction for Peu Capital Partners in relation to its funders. The Legal Department of the CoT supports the approval of the Master Service Agreement.

5.3.4 Following the presentation of the above report, the Council of the CoT approved the Master Service Agreement with Peu Capital Partners and it was signed on 06 June 2013.

5.3.5 National Treasury through various officials and the then Minister of Finance, Honourable Pravin Gordhan raised the concerns about the contract with Peu Capital Partners. A day after signing the Master Services Agreement, National Treasury through the Chief Procurement Officer Mr Kenneth Brown wrote a letter dated 7 June 2013 to the former City Manager stating as follows;

a) National Treasury remains of the view that the revenue collection services are a municipal service in terms of all existing legislative frameworks contrary to the view of CoT;

b) The appointment of Peu Capital Partners as a preferred bidder to undertake the revenue collection services constitutes a conflict of interest in terms of the supply chain management prescripts;

A firm which has been engaged to provide consulting services for the preparation or implementation of a project and any of its affiliates is prohibited from subsequently providing goods or works or services related to the initial assignment for the same project;
d) The CoT was advised to put the project on hold and seek the necessary guidance on how to proceed with this project from the National Treasury.

5.3.6 A follow up letter dated 29 August 2013 was sent the former City Manager stating from the financial analysis it appeared that the procurement model adopted by the CoT was not the most cost-effective model. Further that the costs over the lifespan of the project was exorbitant and the risks associated with the project were biased against the CoT. National Treasury reiterated the view that the CoT must follow the supply chain management prescripts and recommended that the CoT should terminate the contract with Peu Capital Partners and undertake a proper feasibility study and follow a procurement process that is in line with the legislation and prescripts.

5.3.7 The then Minster of Finance Hon Pravin Gordhan also wrote a letter dated 13 September 2013 to the Executive Mayor Cllr K Ramokgopa stating that he was advised during June 2013 that a Master Service Agreement was entered between Peu Capital Partner and the CoT and pointed out the contract was entered into without complying with applicable legislation in that the contract:

a) Was concluded without following a fair, equitable, transparent, competitive and cost effective procurement process as prescribed by section 217 of the Constitution;
b) Does not comply with section 33 of the MFMA in that the view of the National Treasury were not solicited prior to its conclusion as required by the aforementioned section;
c) Was concluded pursuant to a receipt of an unsolicited bid without following the process prescribed for unsolicited bids set out in Regulation 37 of the MFMA regulations;
d) Has been concluded with a party that should have been disqualified from providing the services as prescribed by clause 5.4.1 of the Supply Chain Management: a guide for Accounting Officers of Municipalities and Municipal Entities; and
e) Falls within the ambit of Public-private Partnerships as defined in Municipal Public-Private Partnership Regulations but was not concluded in accordance with the regulatory framework set out in the aforementioned Regulations.
5.3.8 The Minister further stated that the contract does not offer value for money for the CoT in that *inter alia*:

a) The CoT would be required to buy back the infrastructure when the contract comes to an end;

b) In National Treasury’s assessment the price of 19,5 cents for every rand of electricity purchased is exorbitant. According to the National Treasury sources, this cost should be between five and seven cents; and

c) There is no benefit to the CoT in that any increase in revenue collected would be absorbed by the increasing fee payable to Peu Capital Partners.

5.3.9 The CoT went ahead with the agreement and in a letter dated 7 October 2013 Peu Capital Partners requested a meeting with the CoT to discuss the revision of the initial roll-out plan and the associated undertaking by Peu Capital Partners of an interim phased roll out plan beginning with 300 meters over the next 8 weeks. Peu Capital Partners indicated that they would likely proceed with the 23 000 Siemens meters in the interim whilst the CoT is finalising the legal due diligence process.

5.3.10 In May 2015 the CoT terminated the MSA after two years from signing the initial agreement. TUMS had installed 12 978 out of the agreed 438 000 meters that should have been installed in the initial roll out phase within two years. 50% of those installations were LPU’s which make up 50% of the total electricity revenue for CoT. It seems that the large users were targeted first for the high revenue that they bring it. From the 12 978 meters, 6 606 of these were related to LPUs

5.3.11 The High court in the case of *Afrisake NPC v City of Tshwane* set aside all the agreements with Peu Capital Partners as unlawful and constitutionally invalid;
5.3.12 The issue for my determination is whether or not the former City Manager in the awarding and termination of the Smart prepaid meters contract failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT.

5.3.13 Mr Ngobeni provided a response by letter dated 29 January 2016 stating that the CoT complied with all legal prescripts. The letter particularly stated as follows:

“Yes, as the City we considered all legal prescripts, particularly Section 217 of the Constitution. It must be noted that the proposal made by PEU to the City was the first of its kind (unique – in the structuring of the funding and operations in particular). The proposal also sufficiently and adequately addressed existing problems of the City (for example, the growing debtor's book).”

5.3.14 In response to the notice issued in terms of section 7(9) of the Public Protector Act, Mr Ngobeni responded that the complaint was lodged about four (4) years ago and he had little faith that the matter can be fairly finalised after so much time has lapsed and that the complaint was politically motivated and based on “conjecture and baseless accusations”. He also alleged that he was never informed of the complaint from Parliament, (i.e complaint from Adv Alberts)

5.3.15 Mr Ngobeni further stated that “any finding by the office of the Public Protector at this stage could be viewed as moot, especially since the courts have already ruled on the matters which the complainants raise”. Further that it is alarming that the Public Protector is raising preliminary findings against him as it was his understanding that the complainants were attacking the processes undertaken by the CoT in awarding the smart prepaid meters project and not the City Manager, or any impropriety on his part. At no stage was any complaint raised against him and it appears that the investigation seems targeted at him and he cannot understand why he is singled out and the preliminary findings against him are improper, unfair and unfounded.
5.3.16 Further that the finding that he acted without integrity and dishonesty, against the best interests of the CoT is inexplicable to him and has no basis in law or on the facts. Furthermore, the project was not run from his office as the City Manager neither was he the initiator of the project. According the project was a CoT project and went through several procurement committees before it was implemented and the court was unable to make any rulings on impropriety and to his knowledge, the courts ruled that the process undertaken was incorrect and this point to procedural failures, not malicious, dishonest or improper intent.

5.3.17 As regards the substantive content of the notice, Mr Ngobeni alleged that the complaint of the Freedom Front Plus was not presented to him or canvassed with him before, nor was he interviewed in relation to this complaint. Mr Ngobeni indicated that he cannot confirm or deny the contents of the findings against him because of the following reasons:

5.3.17.1 Much time has passed between the lodging of the complaints and the PEU awards complained of and he cannot reasonably rely on my memory to respond to those paragraphs;

5.3.17.2 He does not have access to any of the documentation referred to in the notice and for this reason he is prejudiced in defending his legal interests;

5.3.17.3 He has not been privy to the details of the court processes referred to, expect that which has been reported in the media to date, as he was not in the employ of the COT when the orders referred to were made. In truth, when I left the employ of the COT, the replacement City Manager would not have defended the matter in court the way he would have since the City Manager was installed by the Democratic Alliance, which party was vociferous opponent of the project in question before they came to power.

5.3.18 The City Manager further contends that he is not privy to the court order in the Afrisake case and the section 7(9) notice of the Public Protector does not help him to understand what exactly in the facts or the law and the Afrisake case leads the Public
Protector to conclude that he “failed to manage the financial administration of the CoT and execute his duties with fidelity and in the best interests of the CoT”.

5.3.19 The former City Manager concluded that he does not accept the preliminary findings of the Public Protector against him and request them to be reviewed.

5.3.20 Mr Ngobeni’s contention that the second complaint was never raised with him is disingenuous, both complaints were raised with him and he responded to the allegations through a letter dated 29 January 2016. The said letter is signed by Mr Ngobeni and starts by referring to letters sent by my office dated 18 December 2015 and 25 January 2016 thus acknowledging that the complaint was raised with him.

5.3.21 It should also be noted that Mr Ngobeni was interviewed under oath on 22 January 2016 and the transcribed record of the meeting confirms that the Deputy Public Protector Adv Malunga presented the second complaint to Mr Ngobeni.

The applicable law

Section 61 of the MFMA provides as follows:

(1) The accounting officer of a municipality must—
(a) act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs;
(b) disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable, and which in any way might influence the decisions or actions of the council or the mayor; and
(c) seek, within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interests of the municipality.

(2) An accounting officer may not—
(a) act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of this Act; or
(b) use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person that the accounting officer of a municipality must act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs and seek, within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interests of the municipality.

5.3.22 Section 62 provides as follows:

62. (1) The accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure—

(a) that the resources of the municipality are used effectively, efficiently and economically;
(b) that full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards;
(c) that the municipality has and maintains effective, efficient and transparent systems—
   (i) of financial and risk management and internal control; and
   (ii) of internal audit operating in accordance with any prescribed norms and standards;
(d) that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;
(e) that disciplinary or, when appropriate, criminal proceedings are instituted against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15;

The Conclusions that could be made based on the application of the law to the facts

5.3.23 The Council approved the Master Service Agreement with Peu Capital Partners based on the report that was presented by the former City Manager to a Council meeting of 30 May 2013 wherein it was confirmed that due process was followed and the Legal Department was satisfied that the final agreement that Council is requested
to approve for signature is a good balance of taking the interests of citizens and the CoT’s needs into account, as well as the required bankability of the transaction for Peu Capital Partners in relation to its funders.

5.3.24 Based on the information and evidence obtained during the investigation, the legal framework that is applicable to the facts of this matter as well as the high court order in the Afrisake NPC case, it can be concluded that the former City Manager failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT in the awarding of the Smart meter contract to Peu Capital Partners.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I made the following findings

6.1 Whether or not there any irregularities and improprieties in the awarding or implementation of Tender CB 364/2011 (for the appointment of a panel of financial and legal advisors to assist with funding opportunities) to Peu Capital Partners; and if so; whether such constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act;

6.1.1 The allegation that there are irregularities and improprieties in the awarding or implementation of Tender CB 364/2011 for the appointment of a panel of financial and legal advisors to assist with funding opportunities to Peu Capital Partners are substantiated;

6.1.2 The CoT did not conduct due diligence and therefore awarded the tender to a company that was technically insolvent and did not have any assets;

6.1.3 The CoT also failed to conduct the necessary verification as envisaged in clause 38(1) of the Cot Supply Chain Management Policy to ensure that the tender is not
awarded to a company whose directors has wilfully neglected, reneged on or failed to comply with any government, municipal or other public sector contract during the past five years. CoT should have established that the majority of directors were also directors in Masana Technologies which is a company that was liquidated whilst doing work for CoJ, which resulted in projects being abandoned;

6.1.4 CoT awarded the contract to Peu Capital Partners even though it did not comply with the requirements of the bid, that required the company to be registered with the Financial Services Board;

6.1.5 The CoT also failed to take action against Peu Capital Partners for not complying with a condition of the tender that required them within fourteen (14) days to register as a vendor on the CoT’s database from the time that they were appointed in and around March 2012. According to the CoT, Peu Capital Partners has still not been registered on the CoT database.

6.1.6 The conduct of the CoT was in violation of Section 195(1) (b) and (f) of the Constitution, which provides that efficient, economic and effective use of resources must be promoted and public administration must be accountable.

6.1.7 The CoT’s conduct in this regard constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Whether the CoT followed due and proper process in awarding the Smart Meter Project to Peu Capital Partners; and if so; whether such award constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act. The Public Protector finds that:

6.2.1 The allegation that the CoT did not follow a due and proper process in awarding the Smart Meter contract to Peu Capital Partners is substantiated;
6.2.2 The court in the case of Afrisake NPC and Others v City of Tshwane Metropolitan Municipality (Case 74192/2013) confirmed that the Memorandum of Agreement and the Master Services Agreement entered into between the CoT and Peu Capital Partners dated 02 October 2012 is unlawful and constitutionally invalid;

6.2.3 The conduct of the CoT was in violation of Section 217 (1) of the Constitution, which provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

6.2.4 The CoT’s conduct constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3 Whether or not the former City Manager in the awarding and termination of the Smart prepaid meters contract failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT:

6.3.1 The allegation that the former City Manager in the awarding and termination of the Smart prepaid meters contract failed to manage the financial administration of the CoT and execute his fiduciary duties as Accounting Officer with fidelity, honesty and in the best interests of the CoT is substantiated;

6.3.2 The Council approved the Master Service Agreement with Peu Capital Partners based on the report that was presented by the former City Manager to a Council meeting of 30 May 2013 wherein it was confirmed that due process was followed and the Legal Department was satisfied that the final agreement that Council is requested to approve for signature is a good balance of taking the interests of citizens and the CoT’s needs into account, as well as the required bankability of the transaction for Peu Capital Partners in relation to its funders.
6.3.3 It means that as the responsible accounting officer, the former City Manager did not comply with the provisions of section 61 of the MFMA that requires him to act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs and seek and to prevent any prejudice to the financial interests of the municipality.

6.3.4 The former City Manager also did not comply with the provisions of section 62 of the MFMA that requires him as the accounting officer of a municipality to take all reasonable steps to ensure that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented;

6.3.5 The former Municipal Manager failed to comply with his duties in terms of sections 61 and 62 of the MFMA by failing to managing its financial affairs diligently and fidelity, honesty, integrity and in the best interests of the municipality, thus constituting financial misconduct as envisaged in section 171(1)(a), (b), and (c) of the MFMA.

6.3.6 The conduct of the former City Manager therefore constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7 REMEDIAL ACTION

7.1 The remedial action to be taken, as envisaged by section 182(1)(c) of the Constitution, 1996, is as follows:

7.1.1 The current accounting officer of the Cot must take appropriate action in terms of section 62(1)(e) of the MFMA against the officials implicated in any irregularities in the award of the tender for the installation of pre-paid meters, including where appropriate, pursue criminal charges against any official or former officials of the
municipality who might be implicated in committed an act of financial misconduct or an offence in terms of section 171(1) of the MFMA.

7.1.2 The Speaker of the Municipal Council of the CoT must take appropriate steps to ensure that the Council report the conduct of the former Municipal Manager and officials implicated in the tender irregularities in this matter, to the South African Police Service and the Directorate for Priority Crime Investigation (Hawks) in terms of Regulation 10 (1) of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, 2014, issued in terms of the Local Government: Municipal Finance Management Act, 2003

8 MONITORING

8.1 The City Manager of Tshwane must within 30 days of receipt of this report provide me with an action plan, indicating timelines, in respect of the abovementioned recommendation.

8.2 The Public Protector will monitor the remedial action in terms of this report within 1 month of its signature, and thereafter, every three months.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 19/12/2018

Assisted by: Advocate Jeno Singh (CFE)