

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



REPORT NO 9 OF 2018/19

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“Allegations of maladministration relating to Johannesburg Roads Agency’s failure to follow proper procurement processes and its alleged collusion with a prospective service provider”.

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE
SUFFERED BY SEBENZANI TRADING 639 CLOSE CORPORATION AS A RESULT OF
ALLEGED MALADMINISTRATION, FAILURE TO FOLLOW PROPER PROCUREMENT
PROCESSES AND COLLUSION WITH A PROSPECTIVE SERVICE PROVIDER BY THE
JOHANNESBURG ROADS AGENCY**

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Executive Summary

- (i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act 1994 (Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of improper prejudice suffered by Sebenzani Trading 639 CC (Sebenzani) as a result of alleged maladministration, failure to follow proper procurement processes and collusion with a prospective service provider by the Johannesburg Roads Agency (JRA).
- (iii) The complaint was lodged with my office by Mr Andrew Mgaga (Complainant) on 04 April 2011, in his capacity as a shareholder of Sebenzani.
- (iv) The Complainant alleged that:
 - (a) In November 2009, he approached the JRA and introduced a Jetpatcher technology machine that repairs potholes. In December 2009 the JRA invited the Complainant to a presentation meeting on the machine. The meeting was chaired by Mr Thulani Makhubela, the JRA General Executive Manager: Business Planning and Development;
 - (b) Impressed with the Jetpatcher presentation, Mr Makhubela arranged a demonstration on the Jetpatcher machine in January 2010 which was attended by all JRA depot Managers under the leadership of Mr Jimmy Oliver, the JRA Project Manager in Ivory Park, Midrand. Mr Oliver was also impressed by the efficient method of fixing potholes and encouraged the Complainant to submit a proposal as the project would cost over R1 million;
 - (c) Subsequent to the presentation, Request for Proposal (RFP) no: 056/2010 was issued by the JRA and the Complainant duly submitted his proposal. He paid

R114.00 for his bid document and was further issued with receipt number 3402 by the JRA on 23 February 2010. After about two weeks, the Complainant enquired from Mr Oliver about the delay in responding to the RFP. Mr Oliver responded that the JRA did not have sufficient funds to pay for the service. The Complainant suggested that he could secure funding for the service from interested private sector businesses through brand advertising provided the JRA granted him a letter of intent that would allow him to render services on the roads within its jurisdictional area. Mr Oliver promised to come back to him on the issue;

- (d) In March 2010, whilst waiting for the letter of intent from the JRA, Mr William Stander, the JRA Assistant Manager: Operations, informed the Complainant that Ms Bronwen Del Paggio from a company known as Trafficare wanted to assist the Complainant to secure a sponsor for the services to be rendered to the JRA. The Complainant indicated that he had sponsors already lined up, such as Transcor (Pty) Ltd, but would still welcome any further assistance in that regard. Mr Stander then gave Ms Del Paggio the name of the Complainant and his contact details;
- (e) The Complainant was contacted by Ms Del Paggio who wanted to know where he sourced the Jetpatcher machine as she also intended doing a similar business with the JRA. The Complainant found this question strange and was upset as this contradicted what Mr Stander had told him regarding Mrs Del Paggio's role. He refused to divulge where he sourced the machine and immediately contacted Messrs Stander and Oliver about Ms Del Paggio's enquiry and he was informed not to worry as the JRA would provide him with a letter of intent to run a pilot project of servicing potholes within the JRA's jurisdiction;
- (f) The letter of intent was not delivered and he enquired from Mr Oliver who requested that he present another demonstration as the Jetpatcher machine had failed to impress during the first demonstration because the potholes repaired by the Jetpatcher had apparently opened up overnight. He found this strange as the potholes were monitored and found to be intact by the Jetpatcher agent in South Africa, Mr Chris Hooman, together with the Complainant. He invited the Depot

Manager, Mr France Ledwaba, to verify the site at which the potholes were alleged to have opened overnight, but Mr Ledwaba did not honour the invite;

- (g) It was then arranged that another demonstration be performed around Soweto under Depot Manager, Ms Phindiwe Silatsha. Months went by and when the Complainant enquired about a new demonstration date in Soweto, the JRA failed to respond;
- (h) In September 2010, the Complainant learned that the letter of intent which had been promised to him had been given to Trafficare, a company owned by Ms Del Paggio, the person who had been referred to the Complainant by Mr Stander. Trafficare was already running a pilot project using the very same Jetpatcher machine that he had introduced, presented and demonstrated to the JRA. He approached Messrs Oliver and Stander who claimed lack of knowledge on how Trafficare secured a contract with the JRA;
- (i) He informed Mr Stander that he would lodge a complaint with the then JRA Managing Director, Ms Dudu Maseko. Mr Stander advised him to refer the letter to him. The letter was sent to Mr Stander, but weeks passed without feedback. The Complainant enquired from Mr Sizwe Mdluli, the Personal Assistant to the then Managing Director, who informed the Complainant that she had not received such a letter. He approached the then Managing Director directly and she referred him to Mr Matodzi Tshidzumba in the Procurement office. Mr Tshidzumba wrote a letter to the Complainant stating that he would investigate his concerns and report back to him within sixty days;
- (j) Sixty days passed without feedback and the Complainant approached the then Managing Director again and was referred to Mr Thulani Makhubela, the person leading the internal investigation on the matter. Mr Makhubela had a conflict of interest in the matter as he had been responsible for signing the partnership agreement between the JRA and Trafficare;

- (k) The Complainant had two meetings with Mr Makhubela about the matter. In their last meeting Mr Makhubela invited Messrs Oliver and Stander, where a determination was made that the JRA could not be found to have awarded the pilot project to Trafficare irregularly. He raised the issue of unfair business practice and Mr Stander admitted to have referred Ms Del Paggio to the Complainant in order to find out where he had sourced the Jetpatcher machine; and
- (l) The Complainant further stated that Trafficare was registered on 09 September 2010, long after the Complainant had started demonstration on the JRA roads using the same Jetpatcher machine and the concept of a sponsor for his business initiative. Trafficare later used the same Jetpatcher machine and secured a sponsor from Dial-Direct, an insurance company, at a rate of R500.00 per pothole. It is estimated that Trafficare covered more than 18 000 potholes at a cost of R1.2 million a month before paying for expenses. Suddenly the once rejected Jetpatcher machine became the JRA's mighty pothole solution under Trafficare.
- (v) The investigation was conducted in terms of section 182(1)(a) of the Constitution which gives me the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(4)(a) of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in state affairs, or in the public administration in any sphere of government.
- (vi) In response to my section 7(9)(a) Notice¹ (Notice), the JRA confirmed in a letter delivered to my office on 22 February 2018 that the JRA would give Sebenzani an opportunity to run a pilot project for a reasonable period. It further confirmed that Sebenzani should source its own funding with no financial implications to the JRA.

¹ Notice of the Public Protector issued to JRA on 31 January 2017 to enable it to comment on her preliminary findings.

(vii) Based on analysis of the complaint, the following issues were identified to inform and focus on the investigation:

- (aa) Whether the JRA improperly failed to follow its procurement process on its Request for Proposal (RFP) 056/2010 relating to the repairing of potholes in its area of jurisdiction
 - (bb) Whether the JRA improperly referred Ms Bronwyn Del Paggio of Trafficare to Sebenzani in order to improperly acquire Sebenzani's commercial and trading information
 - (cc) Whether Sebenzani was prejudiced by the conduct of the JRA in the circumstances
- (viii) Key laws and policies taken into account to determine if there had been maladministration by the JRA and prejudice to Sebenzani were principally those imposing administrative standards that should have been complied with by the JRA or its officials when processing this complaint. These are the following:
- (a) Section 217(1) of the Constitution which requires an organ of state, when contracting for goods and services, to make use of a system that is fair, equitable, transparent, competitive, and cost-effective;
 - (b) Section 113 of the Municipal Finance Management Act, 2003 (MFMA) regulates unsolicited bids;
 - (c) Section 112 (1) of the MFMA provides that 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;

- (d) Clause 38 of the JRA Supply Chain Management Policy dated 15 September 2009 stipulates that unsolicited bids should be addressed in accordance with section 113 of the MFMA;
- (e) Clause 46(4) of the Municipal Supply Chain Management Regulations provides that a supply chain management policy must take into account the National Treasury's code of conduct for supply chain management practitioners and other role players involved in supply chain management;
- (f) Clause 46(5) of the Municipal Supply Chain Management Regulations provides that a municipality or municipal entity may adopt the National Treasury's code of conduct for supply chain management practitioners and other role players involved in supply chain management. When adopted, such code of conduct becomes binding on all officials and other role players involved in the implementation of the supply chain management policy of the municipality or municipal entity; and
- (g) Clause 5(1) of the National Treasury's Code of Conduct for Supply Chain Management Practitioners and other role players provides that *"any information that is the property of the municipality/municipal entity or its providers should be protected at all times. No information regarding any bid/contract/bidder/contractor may be revealed if such an action will infringe on the relevant bidder's /contractor's personal rights."*
- (ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(a) Regarding whether the JRA improperly failed to follow its procurement process on its Request for Proposal (RFP) 056/2010 relating to the repairing of potholes in its area of jurisdiction:

- (aa) The allegation that the JRA failed to follow proper procurement processes on its RFP 056/2010 relating to the repairing of potholes in its area of jurisdiction is substantiated.
- (bb) The decision to disqualify Sebenzani's proposal on the basis of allegedly including pricing was taken capriciously and arbitrarily by the JRA because pricing was not part of the RFP specifications and Sebenzani's proposal did not include pricing, but it included its investment into the project.
- (cc) The JRA contravened section 217(1) of the Constitution, read with section 112(1) of the MFMA, by following a process that is not fair and transparent and clause 21(b) of JRA Supply Chain Management Policy dated 15 September 2009. The JRA's rejection of Sebenzani's proposal was procedurally unfair and therefore unlawful.
- (dd) The JRA's conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution, maladministration and abuse or unjustifiable exercise of power as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act respectively.

(b) Regarding whether the JRA improperly referred Ms Bronwyn Del Paggio of Trafficare to Sebenzani in order to improperly acquire Sebenzani's commercial and trading information:

- (aa) The allegation whether the JRA improperly referred Ms Del Paggio of Trafficare to Sebenzani in order to improperly acquire Sebenzani's commercial and trading information is substantiated.

- (bb) The JRA, particularly Mr Stander, improperly disregarded the National Treasury Code of Conduct for Supply Chain Practitioners by placing Ms Del Paggio and her company at an advantageous position over Sebenzani when it provided her with Sebenzani's trade information. Mr William Stander improperly referred Ms Del Paggio to Sebenzani to enquire about its commercial and trading information.
 - (cc) The JRA's Accounting Officer was obliged, in terms of clause 5(1) of the National Treasury's Code of Conduct for Supply Chain Management Practitioners and other role players, to ensure that the JRA did not divulge any of the confidential or proprietary data in any unsolicited proposal. Accordingly, the JRA failed to protect Sebenzani's information when it shared it with Ms Del Paggio of Trafficare.
 - (dd) The conduct of the JRA in the circumstances constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution, and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (c) Regarding whether Sebenzani suffered prejudice as a result of the conduct of the Johannesburg Roads Agency in the circumstances:**
- (aa) The allegation that Sebenzani suffered prejudice as a result of the conduct of the JRA is substantiated.
 - (bb) The improper disqualification of Sebenzani denied it an opportunity to operate a pilot project of repairing potholes within the JRA's area of jurisdiction. The JRA has undertaken to remedy the improper conduct identified in this report.
 - (cc) Sebenzani was further prejudiced in that the JRA, specifically Mr Stander, improperly and unlawfully disclosed its confidential information to a competitor, Trafficare.
 - (dd) Mr Stander has since resigned from his position at the JRA with effect from 03 September 2015.

(ee) The conduct of the JRA, specifically of Mr Stander, constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and the maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(x) The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is that:

The JRA Managing Director must ensure that:

- (aa) Within 60 working days of this report, the JRA negotiates any form of compensatory settlement with Sebenzani as a result of the JRA's improper disqualification of Sebenzani in the JRA's RFP number: 056/2010 and unlawful disclosure of Sebenzani's information to a competitor, Trafficare
- (bb) Should the negotiations, referred to in paragraph (x)(aa) above, fail, the matter must be referred to arbitration to be chaired by a senior counsel or senior attorney with at least more than 15 years post admission experience. The referral to arbitration must be done by either party, within 30 working days of failure of the negotiations. The JRA shall, irrespective of the outcome of the arbitration, be liable for all legal costs of arbitration, including that of Sebenzani;
- (dd) The JRA considers initiating a civil claim against implicated officials to recoup the compensatory settlement to the benefit of the State; and
- (cc) Within 60 working days of this report, all the JRA's relevant staff undergo training on its Supply Chain Management Policy (especially regarding unsolicited bid), MFMA, Treasury Regulations and Procurement legal prescripts to ensure that the improper and unlawful conduct identified herein is not repeated in future.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED BY SEBENZANI TRADING 639 CLOSE CORPORATION AS A RESULT OF ALLEGED MALADMINISTRATION, FAILURE TO FOLLOW PROPER PROCUREMENT PROCESSES AND COLLUSION WITH A PROSPECTIVE SERVICE PROVIDER BY JOHANNESBURG ROADS AGENCY

1. INTRODUCTION

- 1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).
- 1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following officials:
 - 1.2.1 The Chairperson of the Johannesburg Roads Agency Board, Mr S Tshabalala;
 - 1.2.2 The Johannesburg Roads Agency Acting Managing Director, Mr G Mbatha; and
 - 1.2.3 The Mayor of the City of Johannesburg Metropolitan Municipality, Councillor (Cllr) H Mashaba.
- 1.3 A copy of the report is submitted to Mr Andrew Mgaga, shareholder in Sebenzani Trading 639 Close Corporation to inform him of the outcome of my investigation.
- 1.4 The Johannesburg Roads Agency SOC LTD (Reg. No.2000/028993/07) (JRA) commenced its business on 01 January 2001 with the City of Johannesburg (CoJ) being the sole shareholder. The JRA's core business and mandate are the planning, design, construction, operation, control, rehabilitation and maintenance of the roads and storm water infrastructure in the CoJ. The main responsibilities include the construction and maintenance of bridges, culverts, traffic signals, traffic signal systems, footways, road signage and road markings.

2. THE COMPLAINT

- 2.1 The complaint was lodged with my office by Mr Andrew Mgaga (Complainant) in his capacity as a shareholder of Sebenzani Trading 639 CC (Sebenzani) on 04 April 2011.
- 2.2. In essence, the Complainant alleged that:
- 2.2.1 In November 2009, he approached the JRA and introduced a Jetpatcher technology machine that repairs potholes. In December 2009 the JRA invited the Complainant to a presentation meeting on the machine. The meeting was chaired by Mr Thulani Makhubela, the JRA General Executive Manager: Business Planning and Development;
- 2.2.2 Impressed with the Jetpatcher presentation, Mr Makhubela arranged a demonstration of the Jetpatcher machine in January 2010 which was attended by all JRA depot Managers under the leadership of Mr Jimmy Oliver, the JRA Project Manager in Ivory Park, Midrand. Mr Oliver was also impressed by the efficient method of repairing potholes and encouraged the Complainant to submit a proposal as the project would cost over R1 million;
- 2.2.3 A Request for Proposal (RFP) no: 056/2010 was issued by the JRA and the Complainant duly submitted his proposal. He paid R114.00 for his bid document and he was further issued with receipt number 3402 by the JRA on 23 February 2010. After about two weeks, the Complainant enquired from Mr Oliver about the delay in responding to the application. Mr Oliver responded that the JRA did not have sufficient funds to pay for the service. The Complainant suggested that he could secure funding for the service from interested private sector businesses through brand advertising provided the JRA granted him a letter of intent that would allow him to render services on the roads within its jurisdictional area. Mr Oliver promised to come back to him on the issue;

- 2.2.4 In March 2010, whilst waiting for the letter of intent from the JRA, Mr William Stander, the JRA Assistant Manager: Operations, informed the Complainant that Ms Bronwen Del Paggio from a company known as Trafficare wanted to assist the Complainant to secure a sponsor for the services to be rendered to the JRA. The Complainant indicated that he had sponsors already lined up, such as Transcor (Pty) Ltd, but would still welcome any further assistance in that regard. Mr Stander then gave Ms Del Paggio the name of the Complainant and his contact details;
- 2.2.5 The Complainant was contacted by Ms Del Paggio who wanted to know where he sourced the Jetpatcher machine as she also intended doing a similar business with the JRA. The Complainant found this question strange and got upset as this contradicted what Mr Stander had told him with regard to Ms Del Paggio's role. He refused to divulge where he sourced the machine and immediately contacted Messrs Stander and Oliver about Ms Del Paggio's enquiry and he was informed not to worry as the JRA would provide him with a letter of intent to run a pilot project for servicing potholes within the JRA's jurisdiction;
- 2.2.6 The letter of intent was not delivered and the Complainant enquired from Mr Oliver as to the reasons thereof. Mr Oliver requested him to present another demonstration as the Jetpatcher machine had failed to impress during the first demonstration because the repaired potholes had opened up overnight. He found this strange as the potholes were found to be intact when monitored by the Jetpatcher agent in South Africa, Mr Chris Hooman, together with the Complainant. He invited the Depot Manager, Mr France Ledwaba, to verify the site at which the potholes were alleged to have opened overnight, but Mr Ledwaba did not honor the invite;
- 2.2.7 It was then arranged that another demonstration be performed around Soweto under Depot Manager, Ms Phindiwe Silatsha. Months went by and when the Complainant enquired about a new demonstration date in Soweto, the JRA failed to respond;

- 2.2.8 In September 2010, the Complainant learned that the letter of intent which was promised to him had been given to Trafficare, a company owned by Ms Del Paggio, the very same person who was referred to the Complainant by Mr Stander. Trafficare was already running a pilot project using the very same Jetpatcher machine that he introduced, presented and demonstrated to the JRA, but was rejected. He approached Messrs Oliver and Stander who claimed lack of knowledge on how Trafficare secured the contract with the JRA;
- 2.2.9 He informed Mr Stander that he would lodge a complaint with the JRA Managing Director, Ms Dudu Maseko. Mr Stander advised him to refer the letter to him. The letter was sent to Mr Stander, but weeks passed without feedback. The Complainant enquired from Mr Sizwe Mdluli, the Personal Assistant to the Managing Director, who informed the Complainant that the Managing Director did not receive such a letter. He approached the Managing Director directly and she referred him to Mr Matodzi Tshidzumba in the Procurement office. Mr Tshidzumba wrote a letter to the Complainant stating that he would investigate his concerns and report back to him within sixty days;
- 2.2.10 Sixty days came and went without feedback and the Complainant approached the Managing Director again and was referred to Mr Thulani Makhubela, the person leading the internal investigation on the matter. Mr Makhubela had a conflict of interest in the matter as he was responsible for signing the partnership agreement between the JRA and Trafficare;
- 2.2.11 The Complainant held two meetings with Mr Makhubela regarding the matter. In their last meeting Mr Makhubela invited Oliver and Stander, where a determination was made that the JRA could not be found to have awarded the pilot project to Trafficare irregularly. He raised the issue of unfair business practice and Mr Stander admitted to have referred Ms Del Paggio to him in order to find out where the Complainant sourced the new Jetpatcher machine; and
- 2.2.12 He stated that Trafficare was registered on 09 September 2010, long after the Complainant had started demonstration on the JRA roads using the same

Jetpatcher machine and the concept of a sponsor as his business initiative. Trafficare later used the same Jetpatcher machine and secured a sponsor from Dial-Direct, an insurance company, at a rate of R500.00 per pothole. It is estimated that Trafficare covered more than 18 000 potholes at the cost of R1.2 million a month before paying for expenses. Suddenly the once rejected Jetpatcher machine became the JRA's mighty pothole solution under Trafficare.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 Mandate of the Public Protector

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

3.1.2 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".

3.1.3 Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.

3.1.4 The Public Protector's powers are regulated and amplified by the Public Protector Act, which states, among others, that the Public Protector has the power to

investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as subpoena persons and information from any person in the Republic for the purpose of an investigation.

3.1.5 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* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect.² The Constitutional Court further held that: “When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”³ The Court further confirmed the Public Protector’s powers as follows:

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

- a) 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. (paragraph 67);
- b) Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (paragraph 68);

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

³ *Supra* at para [73].

- c) 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. (paragraph 69);
- d) 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. (paragraph 70);
- e) 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. (paragraph 71);
- f) 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; (paragraph 71(a));
- g) She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)); and
- h) "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 (paragraph 71(e)).

3.1.6 In the matter of the *President of the Republic of South Africa v Office of the Public Protector and Others*, Case no 91139/2016 (13 December 2017), the Court held as follows:

- a) *"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. (paragraphs 85 and 152)*
- b) *There is nothing in the Public Protector Act that prohibits 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 (paragraphs 91 and 92)*
- c) *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 (paragraphs 100 and 101):*
 - I. Conduct an investigation;*
 - II. Report on that conduct; and*
 - III. To take remedial action.*
- d) *The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings. (paragraph 104);*
- e) *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).*
- f) *The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations*

constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108);

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

3.1.7 However I would like to emphasise that adjudicative functions and pure litigation which relate to a claim for special or general damages are lawsuits which are judicial in nature⁴. A court of law is best suited to hear and adjudicate on such matters. Accordingly, I am not inclined to recommend remedial action ordering payment of civil damages given its adjudicative and judicial nature. My office is an office modelled on an institution of an ombudsman whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption, maladministration and prejudice⁵. It is therefore trite that the decisions of the Public Protector are administrative actions⁶.

3.1.8 My jurisdiction was not disputed by any of the parties in this matter.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of section 182(1)(a) of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2 ⁵ The investigation process commenced with a preliminary investigation which included interviews and meetings with the Complainant, analysis of the relevant documentation; conducted research; consideration and application of the relevant laws, regulatory framework and jurisprudence, an Alternative Dispute

⁴ *Sudumo et al vs Rustenburg Platinum Mines Limited et al* 2008(2) SA 24 (CC) at 235.

⁵ *Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa* 1996(4) SA 744 (CC) at 161.

⁶ *Minister of Home Affairs et al vs Public Protector et al* 2017(2) SA 597 (GP)

Resolution (ADR) with the JRA, in which the JRA was represented by an Assistant Manager: Legal Advisor, Mr Benedict Moshoeshe and Sebenzani was represented by the Complainant and Mr Mnguni; evidence and information gathered to launch a formal investigation.

- 4.1.3 My investigation team conducted further interviews with Dr Sean Phillips, the former JRA Managing Director and Mr Dumisani Dube, the JRA's Supply Chain Management Manager.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?

4.2.1.4 In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said 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. Evidence was evaluated and a determination made on what happened based on a balance of probabilities. The Supreme Court of Appeal⁷ (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.

⁷ *Public Protector vs Mail and Guardian*, 2011(4) SA 420 (SCA).

- 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 or complied with by the government institutions that were under investigation to prevent maladministration and prejudice. In this case, key reliance was placed on institutions' comprehensive Supply Chain Management policy in addition to national laws, policies and guidelines.
- 4.2.4 My office's own institutional touchstones, being principles from previous reports were also taken into account.
- 4.2.5 The enquiry regarding remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. 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 organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.2.6 In the case of conduct failure as was the case in the complaint investigated, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.
- 4.3 On analysis of the complaint, the following issues were identified to inform and focus on the investigation:**
- 4.3.1 Whether the JRA improperly failed to follow its procurement process on its Request for Proposal (RFP) 056/2010 relating to the repairing of potholes in its area of jurisdiction
- 4.3.2 Whether the JRA improperly referred Ms Bronwyn Del Paggio of Trafficare to Sebenzani in order to improperly acquire Sebenzani's commercial and trading information

4.3.3 Whether Sebenzani was prejudiced by the conduct of the JRA in the circumstances.

4.4 Key Sources of information

4.4.1 Correspondence exchanged

Correspondence exchanged between my office and the JRA's officials:

- 4.4.1.1 A copy of the letter containing the allegations dated 24 June 2011 from my office addressed to the JRA Managing Director
- 4.4.1.2 A copy of the letter dated 21 July 2011 from my office addressed to the JRA Managing Director requesting a response to the letter containing the allegations
- 4.4.1.3 A copy of the letter dated 18 September 2011 from Ms Linky Mamoepa, the JRA Manager Legal Service Unit, Ms Duduzile Maseko, the then Managing Director, Adv Thembi Bokako, the JRA Company Secretary; and Mr Andre Geen, the JRA Acting General Manager Finance addressed to my office responding to the initial letter containing the allegations
- 4.4.1.4 A copy of the letter dated 24 February 2013 from my office addressed to Mr Moshoeshoe, notifying the JRA of new allegations in respect of the matter
- 4.4.1.5 A copy of the letter dated 15 March 2013 from Mr Moshoeshoe to my office denying the allegation that the JRA had a contract with Trafficare
- 4.4.1.6 A copy of the notice of conciliation in terms of section 6(4) of Public Protector Act, dated 28 September 2016 from my office addressed to Dr Sean Phillips, the former JRA Managing Director

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- 4.4.1.7 A copy of the attendance register confirming the ADR session held on 17 November 2016
- 4.4.1.8 A copy of the letter dated 18 April 2017 from my office addressed to Dr Sean Phillips requesting him to avail himself, Mr Dube and Mr Mbongiseni Zondo of Supply Chain Management Unit for an interview in respect of the matter
- 4.4.1.9 An email dated 29 August 2017 from my office addressed to Mr Moshoeshoe confirming receipt of documents
- 4.4.1.10 An email dated 30 August 2017, from Mr Moshoeshoe to my office confirming that outstanding documents could not be found by the JRA
- 4.4.1.11 A copy of the letter dated 18 December 2017 from Mr Dube addressed to my office providing details regarding the tender process relating to bid 056/2010
- 4.4.1.12 A copy of the letter dated 16 August 2017 from Transcor indicating that Sebenzani had a project sponsor
- 4.4.1.13 Copies of section 7(9)(a) notices (Notice) dated 30 January 2018 that were sent to the JRA officials and Trafficare
- 4.4.1.14 An acknowledgement of receipt of a Notice to Cllr Herman Mashaba delivered on 01 February 2018 and received by Donald Rikhotso
- 4.4.1.15 An acknowledgement of receipt of a Notice to Mr Goodwill Mbatha, the JRA's Acting Managing Director, delivered on 31 January 2018 and received by Mr Moshoeshoe
- 4.4.1.16 A copy of the letter from Mr Mbatha delivered on 22 February 2018 addressed to my office responding to the Notice

4.4.2 Legislation and other legal prescripts

- 4.4.2.1 The Constitution
- 4.4.2.2 The Public Protector Act
- 4.4.2.3 The JRA Supply Chain Management Policy
- 4.4.2.4 Municipal Finance Management Act, 2003 (MFMA)
- 4.4.2.5 Municipal Supply Chain Management Regulations
- 4.4.2.6 National Treasury Code of Conduct for Supply Chain Management Practitioners
- 4.4.2.7 Collins Dictionary of Law © W.J. Stewart, 2006

4.4.3 Case Law

- 4.4.3.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC)
- 4.4.3.2 *President of the Republic of South Africa v Office of the Public Protector and Others*, Case no 91139/2016 [2017] ZAGPPHC 747
- 4.4.3.3 *Sudumo et al vs Rustenburg Platinum Mines Limited et al*, 2008(2) SA 24 (CC) at 235.
- 4.4.3.4 *Ex Parte Chairperson of the Constitutional Assembly; In re: Certification of the Constitution of the Republic of South Africa* 1996(4) SA744 (CC) at 161.
- 4.4.3.5 *Public Protector v Mail and Guardian* 2011(4) SA 420 (SCA)
- 4.4.3.6 *Minister of Home Affairs et al vs Public Protector et al* 2017(2) SA 597 (GP)

5 THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO APPLICABLE LAW AND PRESCRIPTS

5.4 Regarding whether JRA improperly failed to follow its procurement process on its Request for Proposal (RFP) 056/2010 relating to the repairing of potholes in its area of jurisdiction:

Common cause issues

- 5.4.1 In November 2009, the Complainant approached the JRA with a proposal for an innovative Jetpatcher technology machine that repairs potholes. This was an unsolicited bid by the Complainant to the JRA.
- 5.4.2 In January 2010, the Complainant presented and demonstrated the new Jetpatcher technology machine to the JRA on the basis of an unsolicited bid. Photograph A below depicts Sebenzani doing a demonstration at a site at Ivory Park, showing the JRA delegation how the Jetpatcher machine repairs potholes:



Photograph A

- 5.4.3 The JRA advised the Complainant that the potholes he fixed using the new Jetpatcher technology machine at Ivory Park resurfaced after the demonstration and that he should participate in the RFP.
- 5.4.4 The JRA subsequently advertised in four national newspapers, namely, *The Star*, *Die Beeld*, and *Sowetan and Citizen* inviting RFP for road related services (RFP 056/2010) on 12 February 2010, with the submission deadline of 28 February 2010. The Complainant personally collected a copy of the advertisement from the JRA.
- 5.4.5 A total number of 64 bids were received and Sebenzani also submitted a proposal on 23 February 2010 which was marked as bidder number 32. These bids were evaluated to conduct a pilot project within the CoJ, but none of the bidders was accepted by the JRA. Sebenzani was disqualified in respect of bid RFP 056/2010 due to the allegation that it expected the JRA to fund the pilot project.

- 5.4.6 It was confirmed by Mr Moshoeshoe in an email dated 22 February 2017 and further corroborated by a letter dated 18 December 2017 from Mr Dube addressed to my office that according to the JRA's records, there were no other bids such as bid RFP 056/2009 or 064/2010 that were received from Sebenzani.
- 5.4.7 Mr Dube further clarified in the same letter that RFP 056/2009 was a template error in the case of the bid that Sebenzani applied for. The correct RFP was 056/2010 for which Sebenzani applied on 23 February 2010. Sebenzani's bid was assessed and disqualified due to financial implications to the JRA. No other Supply Chain Management processes were conducted by the JRA in respect of Sebenzani other than RFP 056/2010.
- 5.4.8 The second RFP 064/2010 was issued, as a re-advertisement of 056/2010, in May 2010 and closed on 10 June 2010. The JRA received 10 responses and the other bids were disqualified for not offering innovative ideas. The Complainant and Mr Mnguni of Sebenzani confirmed in a meeting held on 15 December 2017 with my office that they did not bid for RFP 064/2010. The Bid Evaluation Committee (BEC) agreed to award the pilot projects to the following bidders:
- (a) Carbon Cor and Rekhuditse JV and Sanyati Civil Engineering and Construction- to supply carbon cold asphalt and EZ Street;
 - (b) Shisa Langa Construction (Pty) Ltd for supply of Dura Patcher machine;
 - (c) Vulindlela Consortium to introduce a Parking Bay Levy within the CoJ; and
 - (d) Trafficare to give solutions to pothole patching within the CoJ at no cost to the JRA. Dialdirect was its sponsor.
- 5.4.9 The bidders that were given pilot projects were the ones that were willing to perform the services at no cost to the JRA. All other bidders were disqualified as they were trying to make a profit out of the JRA.

5.4.10 In response to my Notice⁸, Mr Mbatha agreed in an undated letter delivered to my office on 22 February 2018 that the JRA would give Sebenzani an opportunity to run a pilot project for a reasonable period. The letter provides, amongst others, that:

"Clause 11.2

We herewith also confirm that the JRA, Regional Operations team will give Sebenzani Trading 639 cc. an opportunity to run a pilot project (to be determined as per the current scope of Sebenzani's work) for a reasonable period and Sebenzani will source their own funding with no financial implications to the JRA. The JRA will only give them space to work on and supervision [sic].

The JRA places on record that prior to the commencement of the pilot project, Sebenzani Trading 639cc would be required to sign a non-disclosure and or [sic] confidentiality agreement."

Issues in dispute

5.4.11 The Complainant contended that Mr Oliver promised him a letter of intent to repair potholes on the JRA roads after the demonstration of the Jetpatcher machine was conducted at Ivory Park site, but such promise was never fulfilled.

5.4.12 The counter argument by the JRA was that the potholes that were fixed resurfaced overnight after Sebenzani had conducted a demonstration at Ivory Park and as a result the JRA could not have promised the Complainant a letter of intent.

5.4.13 Evidence at my disposal further indicated that the JRA arranged a meeting with the Complainant on 11 March 2011 in response to the allegations of the letter of intent by the JRA. The outcome of the meeting was confirmed as per email

⁸ Notice of the Public Protector issued to the JRA on 31 January 2017 to enable it to comment on her preliminary findings.

communication from Mr Makhubela to the Complainant on 11 March 2011 as follows:

"We apologize for not finalizing the matter earlier;

We have not found any validity to the allegations that undertakings of an award of a contract were made to you and your company;

We are not in a position to deviate from our procurement policy and the supply chain management regulations. Accordingly, we are in no position to award you a contract as per your proposed solution to your grievance. Accordingly we consider the matter resolved".

5.4.14 Replying to my Notice on 05 June 2018, Mr Oliver disputed that he had promised the Complainant a letter of intent. He argued that the demonstration by Sebenzani was not successful as the patches did not hold as expected in terms of the JRA's standards. Mr Oliver also indicated that that it has never been within his jurisdiction to appoint suppliers in terms of the JRA's Supply Chain Management policies and procedures. According to him, such letters of appointment are done by Supply Chain Management and approved by the JRA Managing Director.

5.4.15 Mr Makhubela also replied to my Notice in an email dated 05 June 2018. He refuted any suggestion that the JRA was impressed by the Complainant's machine. He further indicated that the JRA, like many other institutions, receive a lot of unsolicited bids from various companies and institutions regarding innovative ways of doing construction and/or maintenance of the road infrastructure. According to Mr Makhubela, the JRA would allow these companies to do demonstrations of their products or equipment.

5.4.16 Mr Makhubela further submitted to my office that he never led any investigation into the complaint of Sebenzani, but was requested to bring the parties together and to chair the meeting. According to him, he did not make any conclusions on the fairness or otherwise of any business practices. His brief was to bring the parties together and not to make any rulings or findings.

- 5.4.17 The Complainant was unable to furnish my office with evidence to substantiate his allegation that the JRA made an undertaking to issue him with a letter of intent. He only made a verbal claim that the JRA made such a promise.
- 5.4.18 The JRA further submitted a letter of regret dated 16 March 2011 addressed to Sebenzani in respect of RFP 056/2010 in which it was informed that its proposal was unsuccessful. The letter further stipulated that there would be another proposal call for companies that had innovative products and services that would be advertised and that without making any promises, Sebenzani was encouraged to apply.
- 5.4.19 During an ADR session, facilitated by my office, held on 22 February 2017 between the JRA and the Complainant, the JRA argued that Sebenzani was disqualified solely for including pricing in its proposal. The Complainant argued that the Sebenzani's proposal did not include any pricing as alleged by the JRA. He indicated that Sebenzani's bid document reflected the description of the proposed service, including its scope and costs in compliance with the JRA's RFP requirements. The Sebenzani's bid document reflected its budgeted amount of the project to be R 2, 5 million. This was done to show how much financial costs would be borne by Sebenzani's own personal sponsor during the project. The Complainant provided my office with a copy of Sebenzani's proposal.
- 5.4.20 The Complainant argued further that the issue of pricing on the bid should not have been used to disqualify Sebenzani as he had explained to the JRA that he already had a sponsor in the form of Transcor (Pty) Ltd which was ready to fund the project once the letter of intent was issued. The Complainant furnished my office with a letter dated 17 August 2017 confirming that Sebenzani had a sponsorship from Transcor (Pty) Ltd. According to the Complainant, even the idea of bringing along a private sponsor to fund the project was his own idea to the JRA.

Application of the relevant legal framework

5.4.21 Section 217(1) of the Constitution requires an organ of state, when contracting for goods and services, to make use of a system that is fair, equitable, transparent, competitive, and cost-effective.

5.4.22 Section 112 (1) of the MFMA provides that

“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, which must cover at least the following:

- (a) the range of supply chain management processes that municipalities and municipal entities may use, including tenders, quotations, auctions and other types of competitive bidding;*
- (b) when a municipality or municipal entity may or must use a particular type of process;*
- (c) procedures and mechanisms for each type of process;*
- (d) procedures and mechanisms for more flexible processes where the value of a contract is below a prescribed amount;*
- (e) open and transparent pre-qualification processes for tenders or bids;*
- (f) competitive bidding processes in which only pre-qualified persons may participate;*
- (g) bid documentation, advertising of and invitations for contracts;*
- (i) ...”*

5.4.23 Section 113 of the MFMA provides that:

“

- 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 as stated in subparagraph 3 herein below.*
- 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."*

5.4.24 The JRA Supply Chain Management Policy dated 15 September 2009 regulates the JRA's procurement processes and procedures.

5.4.25 Clause 38 of the JRA Supply Chain Management Policy stipulates that unsolicited bids should be addressed in accordance with section 113 of the MFMA. "Unsolicited bid" is defined in clause 13 of the definitions in the JRA Supply Chain Management Policy as "*bids that are preemptively submitted by the prospective supplier(s) to JRA without any requirements being made.*"

5.4.26 The JRA issued RFP 056/2010 and its purpose and objective were as follows:

2. PURPOSE

Johannesburg Road Agency (JRA) requests proposals from institutions, companies, consortium or individuals who are interested in investing or making in kind contribution to upgrading and maintaining infrastructure related to JRA scope of work.

3. OBJECTIVES

Interested companies and entities are invited to submit proposals to be implemented in partnership with JRA in its provision of various services to its constituency.

The scope of work which shall require the proposals from interested parties shall be the upgrading and maintenance of the following:

- (a) Road Infrastructure
 - Pothole maintenance
 - Patching
 - Resurfacing
 - Footways Upgrade Programme

JRA is currently inundated with a backlog of roads requiring maintenance and is evident in a number of defects throughout the city which are left for a lengthy period before repairs are implemented. This results in a number of claims from affected citizens due to damages caused by potholes to their motor vehicles. Below is a picture of a typical pothole on one of the JRA roads.

5.4.27 The RFP 056/2010 requirements in the advertisement were that the interested parties' proposals must include, but may not be limited to the following:

5. REQUIREMENTS FROM INTERESTED PARTIES

Proposal must include but may not be limited to the following:

Organization profile

- Short background of the Company or individuals
- Type of industry/profession

Offered Services

- Description of the proposed services with scope and costs
- Type of contribution: financial or in kind
- If in kind, detailed Project implementation plan with service providers proposed

The proposals must be limited to the Scope of JRA as described in section 3 of this RFP.

Socio economic benefits

- Extent of benefits by the community from the proposal

Financial Requirement

- JRA will review the financial part of the proposal and will advise accordingly
- Provide the company's audited financial statement
- Financial implication for Johannesburg Roads Agency if any.

BBBEE requirements

- Preference shall be given to companies with 70% or more BBBEE status where relevant.
- JRA shall use its discretion to determine the relevance of the BBBEE status on the merits and demerits of each case.

Vendor registration forms


- A vendor registration form is attached to Annexure A and is to be completed by all interested parties.



5.4.28 The Complainant submitted the Sebenzani's proposal in line with the above requirements. The Complainant's proposal specified the budget amount for rendering the services as required by the RFP. The Complainant did not indicate any financial implication to the JRA, yet Sebenzani was disqualified for allegedly including the pricing in its proposal. Below is a copy of the RFP form which the Complainant completed:

PROPOSAL FORMAT

1. Company details

Company Name	SEBENZANI TRADING 639			
Industry	Road Maintenance & Construction			
Registration number	2005/083444/23			
Number of employees	2			
Annual turnover	R2.5m only on 4 months project with JRA			
Previously experience with JRA or other Municipal Entities	None a pot hole filling demonstration for JRA. Currently involved in revenue project for JRA.			
Type of investment under this proposal				
Budgeted amount for project	Project cost R2.5m			
In kind contribution	design	Other consultancy	materials	equipment
			R900,000	R1.6m
Combination of both	R2.5m.			
We understand that JRA will be the owner of the investment and that the works will be implemented in accordance with JRA legal policy framework and their supervision	For the Company: 			

5.4.29 It is very clear from the above completed form that the budget amount of R2.5 million was Sebenzani's investment to the project.

Conclusion

5.4.30 Based on the evidence gathered, it can be concluded that the JRA contravened its RFP 056/2010 requirements to disqualify Sebenzani for allegedly including pricing in its proposal because pricing was not a requirement and the Sebenzani's proposal documents neither indicated any pricing nor any financial implication to the JRA, but it included a description of the proposed services with scope and costs.

5.5 Regarding whether the JRA improperly referred Ms Bronwyn Del Paggio of Trafficare to Sebenzani in order to improperly acquire Sebenzani's commercial and trading information:

Common cause issues

- 5.5.1 The Complainant was contacted by Mr Stander in March 2010 indicating that Ms Del Paggio wanted to talk to him about raising funds for the pilot project that Sebenzani would be doing for the JRA.
- 5.5.2 Ms Del Paggio subsequently contacted the Complainant (on an unspecified date) and wanted to find out where Sebenzani had sourced the Jetpatcher machine.
- 5.5.3 **Photographs B and C** depict Trafficare doing its own on-site demonstration and the subsequent signing of a Memorandum of Understanding (MoU) as well as the Public Private Partnership between it, the JRA, and the project sponsor (Dialdirect) in August 2010.

Photograph B



Photograph C



Issues in dispute

- 5.5.4 The Complainant argued that the JRA referred Ms Del Paggio in order to improperly acquire its commercial and trading information so that it could use it to contract with the JRA. It was fiercely argued by the Complainant that they were the ones who first introduced the Jetpatcher machine concept to the JRA and it was rejected, however the same concept was accepted when it was later presented by Trafficare.
- 5.5.5 It was further contended by the Complainant that for the JRA to enable Trafficare to acquire their commercial and trading information as a competitor was improper conduct which unfairly disadvantaged and prejudiced their business opportunities within the JRA.
- 5.5.6 The JRA disputed the allegations that it referred Ms Del Paggio to the Complainant for her to improperly acquire their commercial and trading

information. It said that it referred her to assist Sebenzani to secure funding for the pilot project for pothole fixing.

5.5.7 In response to my Notice⁹, the JRA indicated that Mr Stander left its employ on 03 September 2015. My team was also furnished with a copy of the resignation letter purportedly signed by Mr Stander.

5.5.8 My Notice was then served on Mr Stander to enable him to reply to the interim findings as they relate to him in connection with this matter.

5.5.9 In response to my Notice, Mr Stander indicated in a letter dated 06 May 2018 that this case occurred 9 years ago and that he was dealing with numerous contractors and cannot recall all the details. He further indicated to my team that his memory was failing due to ill-health. However, in the same letter, he confirmed that the JRA was a leader in uplifting small black emerging contractors and as such the JRA may have tried to get a larger contractor sponsor for small business enterprises. Mr Stander refuted the allegations that the JRA intended to sabotage Sebenzani and indicated that all contractors were treated equally.

5.5.10 He further stated that contractors in any case would have gained information from the JRA's procurement briefing sessions "*sign-on-registers*" and that the contractors themselves usually exchange credentials at these briefings since they work in the same industry.

5.5.11 Ms Del Paggio indicated in a letter dated 06 June 2018 that she asked Mr Oliver and Stander of the JRA if there was any technology available that would make pothole repairing easier. She further revealed that Mr Stander gave her the Complainant's name and contact number. No trade secrets were discussed.

5.5.12 Ms Del Paggio agreed that she did call the Complainant to enquire about the concept/technology. However, the Complainant became very pushy and demanded a letter of intent. Ms Del Paggio submitted that she later established

⁹ Supra

through her own research that the Complainant did not own the Jetpatcher technology and her research subsequently led her to Mr Hooman of Jetpatcher South Africa.

5.5.13 According to Ms Del Paggio, the Complainant did not own the Jetpatcher machine technology that he claimed was his but had borrowed it from Jetpatcher SA and that is why she went straight to the source of the machine, which is Jetpatcher South Africa.

5.5.14 She argued that she had always been researching on Google about technology machines such as Jetpatcher and Prophalt that fixes potholes. She further indicated that RFP 064/2010 was issued in May 2010 requesting proposals with innovative ideas and own funding. Trafficare applied and Sebenzani was not present at the compulsory briefing. According to her, RFP 056/2010 which was issued earlier had nothing to do with RFP 064/2010 which Trafficare applied for later and for which it was the successful bidder in a fair process.

5.5.15 My team also conducted a telephonic interview with Mr Hooman of Jetpatcher South Africa on 07 June 2018 to enquire about the source of the technology. Mr Hooman explained that the Jetpatcher machine is the property of Jetpatcher South Africa. He indicated that in 2010, the technology was still new and he was still trying to get it into the market by doing on-site demonstrations for various client companies, free of charge. He indicated that the Complainant was one of the few people he did on-site demonstrations for. According to him, he had no contract or agreement with the Complainant whatsoever that gave him exclusive rights to the machine.

Application of the relevant legal framework

5.5.16 In terms of clause 46(4) of the Municipal Supply Chain Management Regulations issued under the MFMA a supply chain management policy must take into account the National Treasury's code of conduct for supply chain management practitioners and other role players involved in supply chain management.

5.5.17 Clause 46(5) of the Municipal Supply Chain Management Regulations issued under the MFMA provides that a municipality or municipal entity may adopt the National Treasury's code of conduct for supply chain management practitioners and other role players involved in supply chain management. When adopted, such code of conduct becomes binding on all officials and other role players involved in the implementation of the supply chain management policy of the municipality or municipal entity.

5.5.18 Clause 5(1) of the National Treasury's Code of Conduct for Supply Chain Management Practitioners and other role players provides that *"any information that is the property of the municipality/municipal entity or its providers should be protected at all times. No information regarding any bid/contract/bidder/contractor may be revealed if such an action will infringe on the relevant bidder's /contractor's personal rights."*

5.5.19 The JRA did not dispute the allegation that its former employee, Mr Stander referred Ms Del Paggio to Sebenzani. The JRA instead alleged that the reasons for the referral was to assist Sebenzani with the sourcing of a sponsor.

Conclusion

5.5.20 In the circumstances, it can be concluded that the JRA contravened the National Treasury Code of Conduct for Supply Chain Practitioners and other role players.

5.6 Regarding whether Sebenzani was prejudiced by the conduct of the JRA in the circumstances:

Issues in dispute

5.6.1 The Complainant argued that Sebenzani suffered prejudice after it was irregularly disqualified from the RFP 056/2010 by the JRA. He was denied an opportunity to operate a pilot project of repairing potholes within the JRA's area of jurisdiction at his own cost.

- 5.6.2 He further argued that Sebenzani suffered prejudice as a result of the JRAs unlawful disclosure of its information to Ms Del Paggio.
- 5.6.3 Mr Dube argued in a letter dated 18 December 2017 that Sebenzani's bid was assessed and disqualified due to inclusion of pricing in the Sebenzani's proposal. However, evidence in my possession indicted that the Sebenzani's proposal submitted to the JRA reflected no pricing. The proposal indicated information in response to the RFP 056/2010 requirements.
- 5.6.4 With reference to the disclosure of Sebenzani's information, Mr Stander argued that he only referred Ms Del Paggio to the Complainant for her to assist Sebenzani with the sourcing of a sponsor for the pilot project and not to improperly enable her to acquire Sebenzani's trading and commercial information.

Application of the relevant legal framework

- 5.6.5 Clause 5(1) of the National Treasury's Code of Conduct for Supply Chain Management Practitioners and other role players provides that *"any information that is the property of the municipality/municipal entity or its providers should be protected at all times. No information regarding any bid/contract/bidder/contractor may be revealed if such an action will infringe on the relevant bidder's /contractor's personal rights."*
- 5.6.6 The above provision reveal that the JRA had a legal obligation not to divulge 'any information' regarding any bid/contract/bidder/contractor which if revealed such an action would infringe on the relevant bidder's/contractor's personal rights.

Conclusion

- 5.6.7 Based on the evidence gathered, it can be concluded that the JRA contravened its RFP 056/2010 requirements when it disqualified Sebenzani's proposal.

- 5.6.8 It can also be concluded that the JRA contravened the National Treasury's Code of Conduct for Supply Chain Management Practitioners and other role players relating to the protection of confidential information when its employee unlawfully disclosed Sebenzan's information to a competitor.

6 FINDINGS

6.1 Regarding whether JRA improperly failed to follow its procurement process on its Request for Proposal (RFP) 056/2010 relating to the repairing of potholes in its area of jurisdiction:

- 6.1.1 The allegation that the JRA failed to follow proper procurement processes on its RFP 056/2010 relating to the repairing of potholes in its area of jurisdiction is substantiated.
- 6.1.2 The decision to disqualify Sebenzani's proposal on the basis of allegedly including pricing was taken capriciously and arbitrarily by the JRA because pricing was not part of the RFP specifications and Sebenzani's proposal did not include pricing, but it included its investment into the project.
- 6.1.3 The JRA contravened section 217(1) of the Constitution, read with section 112(1) of the MFMA, by following a process that is not fair and transparent and clause 21(b) of JRA Supply Chain Management Policy dated 15 September 2009. The JRA's rejection of Sebenzani's proposal was procedurally unfair and therefore unlawful.
- 6.1.4 The JRA's conduct constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution, maladministration and abuse or unjustifiable exercise of power as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act respectively.

6.2 Regarding whether the JRA improperly referred Ms Bronwyn Del Paggio of Trafficare to Sebenzani in order to improperly acquire Sebenzani's commercial and trading information:

6.2.1 The allegation whether the JRA improperly referred Ms Del Paggio of Trafficare to Sebenzani in order to improperly acquire Sebenzani's commercial and trading information is substantiated.

6.2.2 The JRA, particularly Mr Stander, improperly disregarded the National Treasury Code of Conduct for Supply Chain Practitioners by placing Ms Del Paggio and her company at an advantageous position over Sebenzani when it provided her with Sebenzani's trade information. Mr William Stander improperly referred Ms Del Paggio to Sebenzani to enquire about its commercial and trading information.

6.2.3 The JRA's Accounting Officer was obliged, in terms of clause 5(1) of the National Treasury's Code of Conduct for Supply Chain Management Practitioners and other role players, to ensure that the JRA did not divulge any of the confidential or proprietary data in any unsolicited proposal. Accordingly, the JRA failed to protect Sebenzani's information when it shared it with Ms Del Paggio, of Trafficare.

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

6.3 Regarding whether Sebenzani suffered prejudice as a result of the conduct of the Johannesburg Roads Agency in the circumstances:

6.3.1 The allegation that Sebenzani suffered prejudice as a result of the conduct of the JRA is substantiated.

6.3.2 The improper disqualification of Sebenzani denied it an opportunity to operate a pilot project of repairing potholes within the JRA's area of jurisdiction. The JRA has undertaken to remedy the improper conduct identified in this report.

- 6.3.3 Sebenzani was further prejudiced in that the JRA, specifically Mr Stander, improperly and unlawfully disclosed its confidential information to a competitor, Trafficare.
- 6.3.4 Mr Stander has since resigned from his position at the JRA with effect from 03 September 2015.
- 6.3.5 The conduct of the JRA, specifically of Mr Stander, constitutes improper conduct as envisaged in section 182(1)(a) of the Constitution and the maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

7 REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Sebenzani as close as possible to where it would have been had the improper conduct or maladministration not occurred, also having taken into account the JRA's undertaking to remedy the improper conduct, is the following:

7.1 The JRA Managing Director must ensure that:

- 7.1.1 Within 60 working days of this report, the JRA negotiates any form of compensatory settlement with Sebenzani as a result of the JRA's improper disqualification of Sebenzani in the JRA's RFP number: 056/2010 and unlawful disclosure of Sebenzani's information to a competitor, Trafficare;
- 7.1.2 Should the negotiations, referred to in paragraph 7.1.1 above, fail, the matter must be referred to arbitration to be chaired by a senior counsel or senior attorney with at least more than 15 years post admission experience. The referral to arbitration must be done by either party, within 30 working days of failure of the negotiations. The JRA shall, irrespective of the outcome of the arbitration, be liable for all legal costs of arbitration, including that of Sebenzani;

7.1.3 The JRA considers initiating a civil claim against implicated officials to recoup the compensatory settlement to the benefit of the State; and

7.1.4 Within 60 working days of this report, all the JRA's relevant staff undergo training on its Supply Chain Management Policy (especially regarding unsolicited bid), MFMA, Treasury Regulations and Procurement legal prescripts to ensure that the improper and unlawful conduct identified herein is not repeated in future.

8. MONITORING

8.1 The JRA Managing Director must submit an Implementation Plan to my office within 30 working days from the date of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.

8.2 The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order, be complied with within the period prescribed in my report to avoid being in contempt of the Public Protector.



ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 25/7/2018

Assisted by: Vusumuzi Xolani Dlamini

Gauteng Provincial Office: Good Governance and Integrity Unit