

**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**



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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF ALLEGED  
MALADMINISTRATION; TENDER IRREGULARITIES; AND IRREGULAR  
APPOINTMENTS BY THE EKURHULENI METROPOLITAN MUNICIPALITY**

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## Executive Summary

- (i) This is my report as the Public Protector 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 (the Public Protector Act).
- (ii) The report communicates my findings and appropriate remedial action that I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of maladministration; tender irregularities; and irregular appointments by the Ekurhuleni Metropolitan Municipality
- (iii) The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.
- (iv) **Based on an analysis of the complaint, the following issues were identified to inform and focus the investigation:**
  - (aa) Whether the Municipality irregularly awarded tender number A-IS (WS) 21/2010 to Lesira Teq (Pty) Ltd amounting to R109 million, in that the erstwhile City Manager, Mr Ngema, improperly delegated his powers to award the tender to the Municipality's Chief Financial Officer (CFO).
  - (bb) Whether the Municipality irregularly awarded tender number A-IS (WS) 21/2011 under contract number C-F10-2011(T), in that Mr Ngema improperly delegated his powers to Ms Linda Mthenjane, an external contractor, to approve the final awarding of the tender to implement an Institutional Review Process at the Municipality.
  - (cc) Whether the Municipality irregularly made payment of R38 945 042.52 to Lesira Teq before delivery of the goods.

- (dd) Whether the Municipality irregularly appointed Mr Khaya Ngema as the City Manager from September 2009 until August 2016, without a written contract of employment.
- (ee) Whether the Municipality irregularly appointed private attorneys, Messrs. Puke Maserumule; Lavery Modise; and Hogan Lovells and Advocates Notshe and Mokhari to represent the Municipality in internal disciplinary hearings and at court; and
- (ff) Whether the Complainant and taxpayers suffered prejudice as a result of the conduct of the Municipality in the circumstances.
- (v) Key laws and policies taken into account to determine if there had been maladministration by the Municipality and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the Municipality or its officials when awarding tenders, appointing legal representatives and instituting disciplinary proceedings. Those are the following:
- (a) The Constitution of the Republic of South Africa, 1996 (the Constitution);
  - (b) The Municipal Finance Management Act, 56 of 2003 (MFMA);
  - (c) The Municipal Systems Act, 32 of 2000 (MSA);
  - (d) Regulation 32 of the Municipal Supply Chain Management Policy, 2005 (MSCM Policy); and
  - (e) Clause 3(1)(a) of the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings of the MFMA.
- (vi) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, the complaint received as against the concomitant responses received from the Municipality, I make the following findings:

- (a) **Regarding whether the Municipality irregularly awarded tender number A-IS (WS) 21/2010 to Lesira Teq (Pty) Ltd amounting to R109 million, in that erstwhile City Manager, Mr Ngema, improperly delegated his powers to award the tender to the Chief Financial Officer (CFO).**
- (aa) The allegation that the Municipality irregularly awarded tender number A-IS (WS) 21/2010 to Lesira Teq (Pty) Ltd amounting to R109 million, is substantiated. However, the allegation that this happened because Mr Ngema improperly delegated his powers to the Municipal's CFO to award the tender, is not substantiated.
- (bb) Evidence in my possession established that Mr Ngema did not at any stage delegate his powers to award tender number A- IS (WS) 21/2010 to the CFO. Rather the CFO on his own and outside the scope of his powers awarded the tender amounting to R109 million to Lesira Teq (Pty) Ltd, which was above the legal threshold in terms of clause 5(2)(a) of the Municipal SCM Policy. By so doing the CFO clearly violated the stated SCM policy.
- (cc) The High Court also declared the awarding of the tender as unlawful and thus null and void.
- (dd) The conduct of the CFO, Mr Zakes Myeza, 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 Municipality irregularly awarded tender number A- IS (WS) 21/2011 under contract number C-F 10-2011(T), in that Mr Ngema improperly delegated his powers to Ms Linda Mthenjane, an external contractor, to approve the final awarding of**

**the tender to implement the Institutional Review Process at the Municipality.**

- (aa) The allegation that the Municipality irregularly awarded tender number A-IS (WS) 21/2011 under contract number C-F 10-2011(T), in that Mr Ngema delegated his powers to Ms Linda Mthenjane, an external contractor, to approve the final awarding of the tender to implement the Institutional Review Process to QBIT (Pty) Ltd, is not substantiated.
- (bb) Mr Ngema did not delegate his powers to award tender number A- IS (WS) 21/2011 under contract number C-F 10-2011(T) to Ms Mthenjane.
- (cc) The memorandum dated 25 July 2011 which was a request by Ms Mthenjane to Mr Ngema for deviation from the normal procurement process, was approved by Mr Ngema on 15 August 2011.
- (dd) Mr Ngema did not contravene section 59(1) of the MSA as he did not delegate his powers to award tender no A- IS (WS) 21/2011 under contract number C-F 10-2011(T) to Ms Mthenjane.
- (ee) Such conduct by the Municipality and in particular Mr Ngema is not in violation of section 59(1) of the MSA.
- (ff) The conduct Mr Ngema does not constitute 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 the Municipality irregularly made payment of R38 945 042.52 to Lesira Teq before delivery of goods:**
  - (aa) The allegation whether the Municipality made an irregular payment of R38 945 042.52 before delivery of the goods, is substantiated.

- (bb) On 31 May and 31 July 2011 respectively, the CFO approved payment of R38 945 042.52 to Lesira Teq for the supply, delivery and installation of Intelligent Water Meters before the delivery of the goods. The delivery of the said goods was done on 23 September and November 2011 respectively, which was almost two months after payment. The conduct of the Municipality is in violation of section 65 (2 ) of the MFMA.
- (cc) Accordingly, the conduct of the Municipality and in particular the CFO 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.
- (d) **Regarding whether the Municipality irregularly appointed Mr Khaya Ngema as the City Manager from September 2009 until August 2016, without a written contract of employment:**
- (aa) The allegation that the Municipality irregularly appointed Mr Ngema as the City Manager from September 2009 until August 2016 without a written contract of employment, is substantiated.
- (bb) Evidence at my disposal confirmed beyond doubt that Mr Ngema worked as the City Manager without a valid employment contract. Cllr Masina also conceded that Mr Ngema did not have a valid contract of employment but that the Municipality had a gentlemen's agreement of employment with Mr Ngema for the said period in question.
- (cc) Such conduct by Municipality and in particular the Municipal Council is in contravention of sections 57(1)(a) and (6)(a) of the MSA.
- (dd) The conduct of the Municipality and in particular the Municipal Council 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.

- (e) **Regarding whether the Municipality irregularly appointed private attorneys, Messrs. Puke Maserumule; Lavery Modise; Hogan Lovells; Advocate Notshe and Advocate Mokhari to represent the Municipality in the internal disciplinary hearings and court cases.**
- (aa) The allegation that the Municipality irregularly appointed private Attorneys, Messrs. Puke Maserumule; Lavery Modise; Hogan Lovells; as well as Advocate Notshe and Advocate Mokhari to represent the Municipality in the internal disciplinary hearings and court cases, is substantiated.
- (bb) The evidence in my possession indicates that the Municipality appointed the said legal practitioners notwithstanding the fact that they were not in the Municipal database of service providers. The Municipality was required to appoint services providers that are on their database. The Municipality failed to provide me with evidence to show that the service and skills that were required from the appointed Legal Practitioners could not be acquired from the list of the Legal Practitioners in the Municipal database.
- (cc) The conduct of the Municipality and in particular Mr Ngema is in violation of clause 11(1)(a) and (b) and clause 14(1)(a) and (2) of the Municipal SCM Policy.
- (dd) Accordingly, the conduct of the Municipality and in particular Mr Ngema amounts to 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.
- (f) **Regarding whether the Complainant and taxpayers suffered prejudice as a result of the conduct of the Municipality in the circumstances.**



- (aa) The allegation that the conduct of Mr Ngema resulted in prejudice to the Complainant in the circumstances, is substantiated.
- (bb) The taxpayers of the Municipality did not suffer any prejudice because of the awarding of tender number A- IS (WS) 21/2010 to Lesira Teq.
- (cc) The taxpayers of the Municipality did not suffer any prejudice in the awarding of the tender to QBIT.
- (dd) The taxpayers of the Municipality suffered prejudice as a result of irregular appointments and payment of service providers who handled the disciplinary and court cases on behalf of the Municipality and Mr Ngema. The amount of the total cost incurred by the Municipality could not be determined or quantified due non response from the Municipality to submit the total costs incurred.
- (g) **The appropriate Remedial Action that I am taking in pursuit of section 182(1) (c) of the Constitution is that:**

It should be noted that Messrs. Khaya Ngema and Mondli Gungubele are currently not in the employ of the Municipality. Therefore the remedial action is aimed at addressing the non-recurrence of the allegations in the future.

**The City Manager: Ekurhuleni Metropolitan Municipality must:**

- (a) Within thirty (30) working days of the issuing of this report, table a copy thereof before the Municipal Council. The Municipal Council to discuss and adopt the report and pass a resolution thereon.

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- (b) Within sixty (60) working days of the issuing of this report, institute disciplinary action against Mr Zakes Myeza, the Chief Financial Officer, on the basis that he acted without due authority and as such contravened the Municipal SCM policy.
  - (c) Within sixty (60) working days of the issuing of this report, institute an internal audit proceedings to determine the total amount of money paid towards Messrs. Puke Maserumule; Lavery Modise; Hogan Lovells; Advocate Notshe and Advocate Mokhari by the Municipality. The Audit Report must thereafter be presented to the Municipal Council for discussion and adoption.
  - (d) Within sixty (60) working days of the issuing of the report by the internal audit, consider recovering any amounts which were paid in excess of agreed rates of attorneys on municipal data base OR the Municipality should establish a panel of attorneys to avoid a recurrence of this irregular expenditure or avoid the violation of section 217 of the Constitution.
  - (e) Within sixty (60) working days of the issuing of this report, ensure that all the relevant staff of the Municipality receives regular training on its Supply Chain Management Policy, MFMA, on relevant Treasury Regulations and on Procurement Legal Prescripts in order to ensure consistency and compliance during the handling of bid documents.

**The Executive Mayor and the Speaker of Council: Ekurhuleni Metropolitan Municipality must:**

- (a) Within thirty (30) working days of the issuing of this report, ensure that a copy thereof is tabled before the Municipal Council. The Municipal Council to discuss and adopt the report and pass a Council Resolution thereon.

## **REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF ALLEGED MALADMINISTRATION, TENDER IRREGULARITIES; AND THE IRREGULAR APPOINTMENTS BY THE METROPOLITAN MUNICIPALITY**

### **1. INTRODUCTION**

- 1.1 This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act).
- 1.2 The report is submitted in terms of section 8(1) and 8(3) of the Public Protector Act to the following people to note the outcome of the investigation and the implementation of the remedial action:
- 1.2.1 The Premier of the Gauteng Provincial Government: Mr David Makhura;
- 1.2.2 The Member of the Executive Council for Cooperative Governance and Traditional Affairs: Mr Lebogang Maile;
- 1.2.3 The Head of Department of Cooperative Governance and Traditional Affairs: Ms Thandeka Mbassa;
- 1.2.4 The Speaker of the Municipal Council: Ms Patricia Khumalo;
- 1.2.5 The Mayor of the Ekurhuleni Metropolitan Municipality: Mr Mzwandile Masina
- 1.2.6 The City Manager of the Ekurhuleni Metropolitan Municipality: Dr Imogen Mashazi; and
- 1.2.7 Ms Linda Mthenjane (a private person).

1.3 A copy of the report is also provided to Mr Mesuli Mlandu, who is the Complainant in this matter to inform him about the outcome of the investigation.

1.4 The report relates to an investigation into allegations of maladministration; tender irregularities; irregular appointment of Mr Khaya Ngema and the irregular appointment of private attorneys by the Ekurhuleni Metropolitan Municipality.

## **2. THE COMPLAINT**

2.1 The complaint was lodged with my office by Mr Mlandu (the Complainant), a former employee of the Municipality on 23 November 2013.

2.2 In essence, the Complainant alleged that:

2.2.1 The Municipality irregularly awarded tender number A- IS (WS) 21/2010, for the supply, delivery and installation of Intelligent Water Meters to Lesira Teq (Pty) Ltd (Lesira Teq) amounting to R109 million in contravention of clause 5 sub-paragraph 2(a) of the Ekurhuleni Municipal Supply Chain Management Policy (the Municipal SCM Policy) read with clause 4 of the same Policy, and section 79 of the Municipal Finance Management Act 56 of 2003 (MFMA), in that Mr Khaya Ngema, the former City Manager (Mr Ngema ), delegated his powers to Mr Zakes Myeza, the Municipal's Chief Financial Officer (the CFO), to award the said tender;

2.2.2 The Municipality irregularly awarded tender number A-IS (WS) 21/2011 under contract number C-F10-2011(T) for the implementation of the Institutional Review Process, in that Mr Ngema delegated his powers to Ms Linda Mthenjane, an external contractor, to approve the final awarding of the said tender in contravention of clause 5 subparagraph 2(a) of the

Municipal SCM Policy read with clause 4 of the same Policy and section 79 of the MFMA;

- 2.2.3 Mr Ngema unjustifiably exercised his powers, intimidated and victimised the Complainant for making a protected disclosure by instituting a disciplinary hearing against him, without following the Municipal Disciplinary Code and Procedure. He further refused and/or failed to refer the dispute to the Municipal Council and that his action was in contravention of the Protected Disclosures Act, 2000 (PDA); This Complaint was not investigated as it resolved by a settlement agreement between the Complainant and the Municipality, which was made an order of the court
- 2.2.4 The Municipality irregularly paid an amount of R38 945 042.52 to Lesira Teq in contravention of the Municipal SCM Policy, in that the payment was effected before delivery of the goods;
- 2.2.5 The Municipality irregularly appointed Mr Ngema as the City Manager from June 2012 to August 2016 in contravention of the Municipal Systems Act, 2000 (MSA) in that he did not have a written contract of employment with the Municipality; and
- 2.2.6 The Municipality contravened the Municipal SCM Policy and committed unauthorised, fruitless, wasteful and/or irregular expenditure during the appointment of private attorneys Messrs. Puke Maserumule, Lavery Modise and Hogan Lovells and Advocates Notshe and Mokhari who represented the Municipality in internal disciplinary hearings and court cases.

### 3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 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.

3.2 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 prescribed in legislation.

3.4 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 on the Public Protector to resolve 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.

3.5 In *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.<sup>1</sup> 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”*.

- 3.6 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);
- 3.7 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);
- 3.8 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);
- 3.9 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) ;
- 3.10 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

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<sup>1</sup> [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].

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);

- 3.11 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);
- 3.12 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));
- 3.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));
- 3.14 "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));
- 3.15 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:



- 3.15.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the constitution (paragraph 71);
- 3.15.2 The Public Protector has the 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);
- 3.15.3 The Public Protector, in appropriate circumstances, has 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 of the judgment);
- 3.15.4 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);
- 3.15.5 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) affords the Public Protector with the following three separate powers ( paragraphs 100 and 101):
  - 3.15.5.1 Conduct an investigation;
  - 3.15.5.2 Report on that conduct; and
  - 3.15.5.3 To take remedial action.
- 3.15.6 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or *prima facie* findings (paragraph 104);

- 3.15.7 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);
- 3.15.8 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); and
- 3.15.9 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public Protector to take remedial action (paragraph 112);
- 3.15.10 However, the Public Protector would like to emphasise that adjudicative functions and pure litigation which relates to a claim for special or general damages are lawsuits which are judicial in nature<sup>2</sup>. A court of law is best suited to hear and adjudicate on such matters. Accordingly, the Public Protector is not inclined to recommend remedial action ordering payment of civil damages or sorry money given its adjudicative and judicial nature. The office of the Public Protector 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 prejudice.<sup>3</sup> It is therefore trite that the decisions of the Public Protector are administrative actions<sup>4</sup>.
- 3.15.11 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.

<sup>2</sup> *Sudumo et al v Rustenburg Platinum Mines Limited et al* 2008(2) SA 24 (CC) at 235.

<sup>3</sup> *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.

<sup>4</sup> *Minister of Home Affairs et al v Public Protector et al* 2017(2) SA 597 (GP)

3.15.12 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitutes “special circumstances”, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint, and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and / or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the Complainant persists; whether my refusal to investigate perpetuates the violation of section 195 of the Constitution; whether my remedial action will redress the imbalances of the past. What constitutes “special circumstances” depends on the merits of each case.

#### **4. THE INVESTIGATION**

##### **4.1. Methodology**

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

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

##### **4.2. Approach to the investigation**

4.2.1. The investigation was approached using an enquiry process that seeks to find out:

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- 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 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.
  - 4.2.1.5. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.
  - 4.2.1.6. The Supreme Court of Appeal<sup>5</sup> (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.
  - 4.2.1.7. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by the government institutions that were under investigation to prevent maladministration and prejudice. In this case, key reliance was placed on the Municipalities' SCM Policy in addition to national laws, policies and guidelines.
  - 4.2.1.8. 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.

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<sup>5</sup> *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA)*,

### **4.3. The Investigation Process**

- 4.3.1. The investigation process commenced with a preliminary investigation in terms of section 7(1) of the Public Protector Act and also included interviews and meetings with the Complainant, analysis of the relevant documentation; research conducted; consideration and application of the relevant laws, regulatory framework and jurisprudence; evidence and information gathered.

### **4.4. Based on analysis of the complaint, the following issues were identified to inform and focus the investigation:**

- 4.4.1. Whether the Municipality irregularly awarded tender number A-IS (WS) 21/2010 to Lesira Teq (Pty) Ltd amounting to R109 million, in that the erstwhile City Manager, Mr Ngema, improperly delegated his powers to award the tender to the Municipality's Chief Financial Officer;
- 4.4.2. Whether the Municipality irregularly awarded tender number A-IS (WS) 21/2011 under contract number C-F10-2011(T), in that Mr Ngema improperly delegated his powers to Ms Linda Mthenjane, an external contractor, to approve the final awarding of the tender to implement the Institutional Review Process at the Municipality;
- 4.4.3. Whether Mr Ngema unjustifiably exercised his powers, and intimidated and victimised the Complainant for making a protected disclosure in terms of the Protected Disclosures Act, 2000, in that Mr Ngema instituted a disciplinary hearing against him without following the Municipal Disciplinary Code and Procedure;
- 4.4.4. Whether the Municipality irregularly made payment of R 38 945 042.52 to Lesira Teq before the delivery of the goods;

- 4.4.5. Whether the Municipality irregularly appointed Mr Khaya Ngema as the City Manager from September 2009 until August 2016, without a written contract of employment;
- 4.4.6. Whether the Municipality irregularly appointed private attorneys, Messrs. Puke Maserumule; Lavery Modise; and Hogan Lovells and Advocates Notshe and Mokhari to represent the Municipality in the internal disciplinary hearings and court cases; and
- 4.4.7. Whether the Complainant and the taxpayers suffered prejudice as a result of the conduct of the Municipality in the circumstances.

#### **4.5. Key Sources of Information**

##### **4.5.1. Correspondence exchanged**

##### ***Correspondence exchanged between the Public Protector & Ekurhuleni Municipality Officials:***

- 4.5.1.1. An allegations letter dated 24 March 2014 from my investigation team addressed to the City Manager.
- 4.5.1.2. A letter dated 25 April 2014 from Mr Kemi Behari, the Divisional Head: Municipal By-law Enforcement and Compliance purporting to respond to the allegations letter.
- 4.5.1.3. A second allegations letter dated 6 August 2014, containing additional allegations from my investigation team addressed to the City Manager.
- 4.5.1.4. Emails dated 18 and 19 September 2014, respectively, from Mr Behari to my investigation team and a response from my team to him.

- 4.5.1.5. Email dated 20 March 2015 from Mr Behari to my investigation team and a response from my team to him.
- 4.5.1.6. An email dated 11 August 2015 from my investigation team addressed to the City Manager.
- 4.5.1.7. A notice of conciliation dated 28 August 2015 sent to the Executive Mayor.
- 4.5.1.8. A subpoena dated 3 February 2016 sent to the City Manager.
- 4.5.1.9. Emails dated 25 January 2016 from my investigation team to Advocate Quinton Kuhn, the Director: Legal Services: Gauteng Department Cooperative Governance and Traditional Affairs and a response from the latter to my team.
- 4.5.1.10. Emails dated 10 May 2016 from Mr Behari to my investigation team and a response from my team to him.
- 4.5.1.11. Emails dated 3 and 4 July 2017 from Mr Behari to my investigation team and a response from my team to him.
- 4.5.1.12. A memorandum dated 26 July 2017 from Mr Behari to Advocate M Motsapi, the Head of Department: Corporate Legal Services Ekurhuleni Municipality.
- 4.5.1.13. Emails dated 8 and 10 August 2017 from Mr Behari to my investigation team and a response from my team to him.
- 4.5.1.14. Emails dated 11, 12 and 18 September 2018 from Mr Behari to Mr Toekie Tieghi: Manager Tender Office in the Municipality and from the latter to Mr Behari.
- 4.5.1.15. A subpoena dated 27 November 2017 sent to Dr Imogen Mashazi, the Acting City Manager and received by her on 29 November 2017.
- 4.5.1.16. A subpoena dated 27 November 2017 sent to Councillor (Cllr) Mzwandile Masina, the Executive Mayor as received by him on 29 November 2017.

- 4.5.1.17. Section 7(4) notice dated 9 February 2018 sent to Mr Ngema and received by him on 16 February 2018.
- 4.5.1.18. Section 7(4) notice dated 9 February 2018 sent to Mr Mondli Gungubele and received by him on 21 February 2018.
- 4.5.1.19. Letter dated 23 February 2018 from Thabiso Maseko Incorporated, the legal representative of Messrs Ngema and Gungubele, sent to my investigation team.
- 4.5.1.20. Letter dated 26 February 2018 from Thabiso Maseko Incorporated sent to my team.
- 4.5.1.21. Emails dated 18 and 19 February 2019 from my investigation team to Advocate Kuhn and a response from the latter to my team.
- 4.5.1.22. An acknowledgement of receipt of Section 7(9) notice to Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager delivered on 31 May 2019 and to Gauteng Premier Makhura delivered on 3 June 2019.

#### **4.5.2 Legislation and other legal prescripts**

- 4.5.2.1 The Constitution of the Republic of South Africa, 1996.
- 4.5.2.2 The Public Protector Act No 23 of 1994.
- 4.5.2.3 The Protected Disclosure Act No 26 of 2000.
- 4.5.2.4 The Municipal Finance Management Act, No 56 of 2003.
- 4.5.2.5 The Municipal Systems Act No 32 of 2000.
- 4.5.2.6 The National Treasury General Conditions of Contract (NT GCC), July 2010.
- 4.5.2.7 The Municipal Supply Chain Management Regulations.
- 4.5.2.8 The Municipal Supply Chain Management Policy.
- 4.5.2.9 The Local Government: Disciplinary Regulations for Senior Managers, 2010.



- 4.5.2.10 The Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings of the MFMA.
- 4.5.2.11 The Municipal's Code of Conduct for Staff.

#### **4.5.3 Case Law**

- 4.5.3.1 *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).
- 4.5.3.2 *President of the Republic of South Africa v Office of the Public Protector and Others* Case no 91139/2016 [2017] ZAGPPHC 747.
- 4.5.3.3 *Sidumo et al v Rustenburg Platinum Mines Limited et al* 2008(2) SA 24 (CC) at 235.
- 4.5.3.4 *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.
- 4.5.3.5 *Public Protector v Mail and Guardian* 2011(4) SA 420 (SCA).
- 4.5.3.6 *Minister of Home Affairs et al v Public Protector et al* 2017(2) SA 597 (GP).

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

- 5.1 **Regarding whether the Municipality irregularly awarded tender number A-IS (WS) 21/2010 to Lesira Teq (Pty) Ltd amounting to R109 million, in that the erstwhile City Manager, Mr Ngema improperly delegated his powers to award the tender to the Municipality's Chief Financial Officer.**

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Common cause issues

- 5.1.1. Lesira Teq was appointed by the Municipality to supply, deliver and install intelligent water meters at a cost of R109 million from 18 April 2011 until 30 June 2013.
- 5.1.2. Mr Myeza, who is the Municipality's CFO, signed and awarded the tender to Lesira Teq as per a letter dated 19 April 2011.
- 5.1.3. It is also uncontested that Mr Ngema made an application to the South Gauteng High Court<sup>6</sup> on behalf of the Municipality to request the Court to review and set aside the Lesira Teq contract/tender.

Issues in dispute

- 5.1.4. The Complainant argued that Mr Ngema improperly delegated his powers to the CFO as per a memorandum dated 8 February 2011, which was approved by Mr Ngema on 1 May 2011.
- 5.1.5. The Complainant further argued that the Municipality deviated from the normal procurement processes and relied on Regulation 32 of the Supply Chain Management (SCM) Policy in order to secure the services of Lesira Teq. However, Lesira Teq was not contracted for a similar service to any municipality at the time of the awarding of the tender.
- 5.1.6. Mr Ngema disputed that he delegated his powers to the CFO to award the tender. He argued that the CFO did not have the necessary delegation to award the tender in question. He submitted that in an effort to address the irregularity surrounding the awarding of the tender by the CFO, the

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<sup>6</sup> Case No 34176/13

Municipality subsequently approached the South Gauteng High Court in order to review and set aside the said tender award or contract. According to Mr Ngema, the CFO and the Complainant were subsequently charged with allegations of awarding the tender which, in terms of the Municipal SCM Policy, was supposed to have been awarded by Mr Ngema.

- 5.1.7. The Municipality argued that it has a system of delegation that maximizes administrative and operational efficiency and provides adequate checks and balances in its financial administration. According to the said system, a delegation is made to a member of the Municipality's top management or any official of the Municipality as prescribed by Legislation and the Municipal SCM Policy.
- 5.1.8. In a court order dated 26 April 2018 from the South Gauteng High Court, the Acting Judge, (AJ) M Sello, granted the application as requested by Mr Ngema and held that the Bid Adjudication Committee (BAC) which was chaired by the CFO could not exercise the powers vested with the City Manager and further ruled that such exercise of powers by the Committee was unlawful and devoid of validity.
- 5.1.9. However, the memorandum upon which the Complainant relied on as being a delegation of power document approved by Mr Ngema was not what the Complainant alleged it to be. The memorandum was merely a request seeking approval for the supply, installation and maintenance of the intelligent metering system in terms of Regulation 32 of the Municipal SCM Policy.
- 5.1.10. A Section 7(9) notice was served on Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager on 31 May 2019 and to Gauteng Premier Makhura delivered on 03 June 2019. However the parties failed to respond to the Section 7(9) notice.

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Application of the relevant legal framework

- 5.1.11. 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.
- 5.1.12. In promoting good governance and the spirit of the Constitution, the Municipality had a constitutional obligation to ensure that goods and services were procured in a manner which was fair, transparent, competitive and cost-effective. The Municipal SCM Policy regulates the Municipality's procurement process in compliance with section 217.
- 5.1.13. Regulation 32 of the Municipal SCM Policy stipulates that *"the Municipality can procure a service from a service provider provided that the following, amongst others, are met:*
- 1) *the Service Provider is contracted to other Government Institutions;*
  - 2) *the aforementioned Institution must be approached;*
  - 3) *the Service Provider must be approached; and*
  - 4) *the services procured are the same."*
- 5.1.14. Notwithstanding the constitutional provisions relating to normal procurement process entailed above, the Municipality deviated from the normal procurement process and relied on Regulation 32 of the SCM Policy in order to secure the services of Lesira Teq. As can be seen from the peremptory phrasing of Regulation 32 above, the procurement of goods or services is not automatically unlawful as long as it fully complies with the procedural grounds laid down above.
- 5.1.15. Section 79(1) of the MFMA provides that an accounting officer of a municipality must, for the proper application of the Act in the administration, develop an appropriate system of delegation that will

maximise administrative and operational efficiency and provide adequate checks and balances in the Municipality's financial administration, and may, in accordance with that system, delegate to a member of the Municipality's top management or any official of the Municipality."

5.1.16. Section 59(1) of the MSA provides as follows:

*"A municipal council must develop a system of delegation that will maximise administrative and operational efficiency and provide for adequate checks and balances, and, in accordance with that system, may—*

*(a) delegate appropriate powers, excluding a power mentioned in section 160(2) of the Constitution and the power to set tariffs, to decide to enter into a service delivery agreement in terms of section 76(b) and to approve or amend the municipality's integrated development plan, to any of the municipality's other political structures, political office bearers, councillors, or staff members:*

*(b) instruct any such political structure, Political office bearer, councillor, or staff member to perform any of the municipality's duties: and*

*(c) withdraw any delegation or instruction.*

*(2) A delegation or instruction in terms of subsection (1)—*

*(a) must not conflict with the Constitution, this Act or the Municipal Structures Act;*

*(c) must be in writing;*

*(d) is subject to any limitations, conditions and directions the municipal council may impose;*

*(e) may include the power to sub-delegate a delegated power;*

*and does not divest the council of the responsibility concerning the exercise of power or the performance of the duty”.*

5.1.17. Section 106 of the MFMA provides as follows:

- “(1) the accounting officer of a municipal entity—*
  - (a) may delegate to an official of that entity—*
    - (i) any of the powers or duties assigned or delegated to the accounting officer in terms of this Act; or*
    - (ii) any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting office to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of this Act; and*
  - (b) must regularly review delegations issued in terms of paragraph (a) and, if necessary, amend or withdraw any of those delegations.*
- (2) A delegation in terms of subsection (1)—*
  - (a) must be in writing;*
  - (b) is subject to any limitations and conditions the accounting officer may impose;*
  - (c) may be either to a specific individual or to the holder of a specific post in the municipal entity; and*
  - (d) does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.*
- (3) An accounting officer may confirm, vary or revoke any decision taken by an official in consequence of a delegation in terms of subsection (1), but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.”*

5.1.18. The above legislative injunctions empowers the Accounting Authority to delegate in writing, his powers to any official in the Municipality to ensure the achievement of the aims of a specific provision of this Act, but the delegation is subject to certain limitations. In this instance, there is no evidence at my disposal substantiating that Mr Ngema delegated to the CFO, his powers to award the tender. As a result, Mr Ngema approached the South Gauteng High Court in order to review and set aside the said tender award or contract.

5.1.19. Clause 5 of the Municipal SCM Policy provides that:

*(dd) "The accounting officer may in terms of section 79 of the Act sub-delegate any supply chain management powers and duties, including those delegated to the accounting officer in terms of this policy, but any such sub-delegation must be consistent with subparagraph (2) and paragraph 4 of this policy.*

*(ee) The power to make a final award –*

*(a) above R10 million (VAT included) may not be sub-delegated by the accounting officer;"*

5.1.20. Evidence at my disposal, as stated above, indicates that Mr Ngema did not award nor delegated his powers to award the tender amounting to R109 million which is above the legal threshold in terms of the above cited clause. Instead, evidence revealed that the CFO irregularly exercised the powers of the City Manager and irregularly awarded the tender above the legal threshold.

### Conclusion

5.1.21. Based on the evidence traversed above, it can be concluded that Mr Ngema did not delegate his powers to the CFO to award the tender to Lesira Teq. The memorandum which the Complainant submitted and claimed to be a delegation of powers to the CFO was for deviation and not delegations of powers.

**5.2. Whether the Municipality irregularly awarded tender number A-IS (WS) 21/2011 under contract number C-F10-2011(T) in that Mr Ngema improperly delegated his powers to Ms Linda Mthenjane, an external contractor, to approve the final awarding of the tender to implement the Institutional Review Process at the Municipality.**

Common cause issues

5.2.1. Ms Mthenjane was not a permanent employee of the Municipality, but an external contractor who was appointed by the Municipality to manage the Municipality's Institutional Review Process.

5.2.2. In terms of a letter dated 27 October 2011, Ms Mthenjane wrote to Systemic Business Solutions (Pty), trading as QBIT (Pty) Ltd, and advised them of their acceptance and approval to assist the Municipality with the implementation of the macro structure with a negotiated amount of R31 101 680.00 excluding VAT. The Municipality subsequently awarded tender number A-IS (WS) 21/2011 under contract number C-F10-2011(T) in line with the above mentioned letter.

Issues in dispute

5.2.3. The Complainant contended that Mr Ngema irregularly delegated his powers to award the Municipality's Institutional Review Process to Ms Mthenjane as per the letters dated 25 July and 27 October 2011,



respectively. The Complainant also stated that Ms Mthenjane was not even an employee or a staff member of the Municipality.

- 5.2.4. In support of the above contention, the Complainant furnished me with a memorandum dated 25 July 2011, which was approved by Mr Ngema on 15 August 2011, which he claimed to be a delegation of powers to Ms Mthenjane.
- 5.2.5. On 7 December 2017, during the *subpoena* hearing, the Municipality failed to respond to the allegations that Mr Ngema delegated his powers to Ms Mthenjane. However, it was conceded that Ms Mthenjane was not an employee of the Municipality.
- 5.2.6. It is noted that the memorandum dated 25 July 2011 was a request by Ms Mthenjane to Mr Ngema for deviation<sup>7</sup> from the normal procurement processes. The same request brought by Ms Mthenjane was approved by Mr Ngema on 15 August 2011, despite the fact that Ms Mthenjane was not a Municipal employee. The Municipality could not provide reasons for the request to be prepared by a non-employee of the Municipality.
- 5.2.7. Furthermore, in a letter dated 30 September 2011 from Mr Andile Sihlahla, the then acting Municipal Executive Director: Corporate and Legal Services, he advised Ms Thandi Khumalo, the Municipal's Executive Director: Human Resources, against the awarding of the tender without following section 217 of the Constitution and Municipal SCM Policy.
- 5.2.8. Mr Ngema indicated, during a meeting with my investigation team held on 28 February 2019, that he could not recall the facts around this issue and needed to get documentation from the Municipality to refresh his memory.

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<sup>7</sup> MFMA SCM reg 36(1)(a).

- 5.2.9. A section 7(9) notice was served on Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager on 31 May 2019 and to Gauteng Premier Makhura delivered on 03 June 2019. However the parties failed to respond to the Section 7(9) notice.

*Application of the relevant legal framework*

- 5.2.10. 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.

- 5.2.11. Section 106 of the MFMA provides as follows:

*“(1) the accounting officer of a municipal entity—*

- (a) may delegate to an official of that entity—*
- (i) any of the powers or duties assigned or delegated to the accounting officer in terms of this Act; or*
- (ii) any powers or duties reasonably necessary to assist the accounting officer in complying with a duty which requires the accounting office to take reasonable or appropriate steps to ensure the achievement of the aims of a specific provision of this Act; and*
- (b) must regularly review delegations issued in terms of paragraph (a) and, if necessary, amend or withdraw any of those delegations.*

*(2) A delegation in terms of subsection (1)—*

- (a) must be in writing;*
- (b) is subject to any limitations and conditions the accounting officer may impose;*

- (c) may be either to a specific individual or to the holder of a specific post in the municipal entity; and*
- (d) does not divest the accounting officer of the responsibility concerning the exercise of the delegated power or the performance of the delegated duty.*
- (3) An accounting officer may confirm, vary or revoke any decision taken by an official in consequence of a delegation in terms of subsection (1), but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision."*

5.2.12. The above cited statutory provision makes it clear that only the Municipality's employees may be delegated to.

5.2.13. The memorandum submitted by Ms Mthenjane and approved by Mr Ngema could not be said to be a delegation. It is clear from the above provisions that Mr Ngema did not delegate Ms Mthenjane to award the tender to Qbit.

#### Conclusion

5.2.14. Based on the evidence canvassed above, a conclusion can be made that there was no delegation of power by Mr Ngema to Ms Mthenjane. Ms Mthenjane as the Project Manager only submitted a request for deviation and Mr Ngema approved it.

**5.3. Regarding whether the Municipality irregularly made payment of R38 945 042.52 to Lesira Teq before delivery of goods.**

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Common cause issues

5.3.1. According to the Municipal's internal audit report, a letter of instruction for the supply, installation and maintenance of intelligent metering systems was issued to Lesira Teq on 13 May 2011. The goods delivered by Lesira Teq were for the value of R32 544 000.00 as follows:

- a) 16 500 Water smart Meter Readers;
- b) User Tags; and
- c) Two Meter Management system.

5.3.2. During November 2011, the Special Investigating Unit (SIU) visited the Municipality's Finance office and reviewed invoices and delivery notes issued to Lesira Teq. The SIU established that an amount of R8 945 042.52 was paid to Lesira Teq for the above goods that were delivered to the Municipal management consultant stores, NetGroup and Tsekema.

5.3.3. The payment was made on 31 May and 31 July 2011 whilst Lesira Teq only delivered the goods on 23 September 2011 and November 2011 respectively.

Issues in dispute

5.3.4. The Complainant submitted that payment for the delivery of intelligent smart meter water readers delivered by Lesira Teq was made prior to the delivery of the goods, and therefore irregular.

5.3.5. The Municipality did not deny that the payment was made before the delivery of the goods. During the subpoena hearing held on 7 December 2017, Cllr Masina submitted proof of payment to Lesira Teq effected on

31 May and 31 July 2011 respectively, and a delivery note dated 23 September 2011.

- 5.3.6. Mr Ngema indicated during a meeting with my investigation team on 28 February that he could not recall the facts around this issue and that he needed to obtain documentation from the Municipality to refresh his memory.
- 5.3.7. I received an acknowledgement of receipt of my section 7(9) notice to Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager delivered on 31 May 2019 and to Gauteng Premier Makhura delivered on 3 June 2019. No further responses were received on my section 7(9) notices.
- 5.3.8. Section 7(9) notice was served on Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager on 31 May 2019 and to Gauteng Premier Makhura delivered on 03 June 2019. However the parties failed to respond to the Section 7(9) notice.

Application of the relevant legal framework

- 5.3.9. In terms of Section 65 of the MFMA
- (2) *The accounting officer must for the purpose of subsection (1) take all reasonable steps to ensure—*
- (a) *that the municipality has and maintains an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds;*

- (b) *that the municipality has and maintains a management, accounting and information system which—*
  - (i) *recognises expenditure when it is incurred;*
  - (ii) *..... and*
  - (iii) *accounts for payments made by the municipality;*
  - (c) *.....*
  - (d) *that payments by the municipality are made—directly to the person to whom it is due unless agreed otherwise for reasons as may be prescribed;*

5.3.10. The provisions above requires the Municipality maintain an effective system of expenditure control, including procedures for the approval, authorisation, withdrawal and payment of funds. The legislation further dictates that for payment to be made, it should be due unless otherwise agreed to.

5.3.11. In this instance, the Municipality effected payment to Lesira Teq in May and July 2011 respectively whilst delivery was not yet made but was only effected in September 2011.

#### Conclusion

5.3.11 Based on evidence gathered, it can be concluded that the Municipality violated the provisions of MFMA in effecting payment to Lesira Teq before the delivery of goods.

**5.4. Regarding whether the Municipality irregularly appointed Mr Khaya Ngema as the City Manager from September 2009 until August 2016, without a written contract of employment:**

#### Common Cause

5.4.1 Mr Ngema worked as the City Manager from August 2009 to August 2016. The validity of his employment was challenged in the South Gauteng High Court by Mr Lucas Modumise Oupa Modikoane (First Applicant) and Mr Khumo YA Khumotso Construction CC (Second Applicant).

5.4.2 The South Gauteng High Court, in *Lucas Modumise Oupa Modikoane (First Applicant), Khumo Ya Khumotso Construction cc (Second Applicant) v Khaya Ngema (First Respondent); Ekurhuleni Metropolitan Municipality (Second Respondent); Municipal Council of Ekurhuleni Metropolitan Municipality (Third Respondent); Member of the Executive Committee For Local Government and Housing (Fourth Respondent) and Executive Mayor of the Ekurhuleni Metropolitan Municipality (Fifth Respondent)*, under case number 2014/ 19895 (unreported case), before Honourable Judge Lamont, held on 12 August 2015 that:

- 1) *"The First Respondent's employment as Municipal Manager of the Ekurhuleni Metropolitan Municipality terminated on 17 May 2012.*
- 2) *The Third Respondent purported to extend the employment relationship between the First Respondent and the Ekurhuleni Metropolitan Municipality on 27 September 2012.*
- 3) *The said extension without compliance with section 54A (4) of the Local Government: Municipal Systems Act 32 of 2000.*
- 4) *The Fourth Respondent is directed to decide, within 14 days of receipt from the Second Respondent of the information contained in this order, whether or not he will take steps to enforce compliance by the Third Respondent with the provisions of section 54A of the Local Government: Municipal Systems Act 32 of 2000 and, if no compliance is made by the Third Respondent, whether or not he will take steps to approach the Court for a declaratory order on the*

*validity of the First Respondent's appointment as municipal manager in terms of section 54A (8).*

- 5) *The Fourth Respondent is afforded an opportunity to apply to set aside this order, upon notice to all parties, within 7 days of service of this order upon it."*

*Issues in dispute*

- 5.4.3 The Complainant alleged that Mr Ngema worked as the City Manager without a valid employment contract from 2009 to 2016.
- 5.4.4 Cllr Masina acknowledged during the subpoena hearing on 7 December 2017 that Mr Ngema and the Municipality did not have a written agreement, but had a '*gentleman's agreement*' in relation to his employment.
- 5.4.5 It is observed from the above Court judgment that the former MEC for Co-operative Governance and Traditional Affairs, Gauteng Province, Mr J Mamabolo, was ordered by the Court to ensure that the Municipality complied with the provisions of section 54A of the MSA and, if there was no compliance, the MEC was ordered to approach the Court for a declaratory order on the validity of Mr Ngema's appointment as the Municipal Manager in terms of section 54 A (8).
- 5.4.6 The former Municipal Executive Mayor, Cllr Gungubele, wrote to former MEC Mamabolo on 22 October 2015 requesting that Mr Ngema's contract of employment not be terminated as per the court order, but he be allowed to terminate after the expiry of the contract ending in August 2016. Former Cllr Gungubele did not reply to this allegation despite a letter written to him on 18 February 2019.



- 5.4.7 The response received from Advocate Kuhn indicated that Ms S Manitshana from the State Attorney's Office wrote to former Cllr Gungubele on 3 November 2015 advising the Municipal Council that the MEC instructed the State Attorney to bring an application "*for a declaratory order on the validity of the First Respondent's appointment as Municipal Manager in terms of section 55A(8)*".
- 5.4.8 A Notice of Motion was filed by the MEC on 4 December 2015, requesting the Court to declare that:
- "the decision by the Municipality taken during September 2012, to extend Mr Khaya Ngema's appointment as the Municipal Manager is invalid"*.
- 5.4.9 However, according to evidence at my disposal, the case was abandoned by the MEC on the basis that Mr Ngema resigned in July 2018. No reasons were given why the application was not finalised before Mr Ngema's resignation.
- 5.4.10 It should be noted that a request was made to Dr Mashazi, the City Manager for the submission of the total salary and benefits paid to Mr Ngema during the period of June 2012 to August 2016 while he was appointed as the City Manager. Dr Mashazi did not provide my office with the salary payments made to Mr Ngema during the period that he worked without a written contract of employment and relied on the Protection of Information Act 4 of 2013 (POPI Act).
- 5.4.11 I received an acknowledgement of receipt of Section 7(9) notice to Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager delivered on 31 May 2019 and to Gauteng Premier Makhura delivered on 3 June 2019. No further responses were received on my section 7(9) Notice.

- 5.4.12 Section 7(9) notice was served on Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager on 31 May 2019 and to Gauteng Premier Makhura delivered on 03 June 2019. However the parties failed to respond to the Section 7(9) notice.

Application of the relevant legal framework

- 5.4.13 Section 57(1)(a) of the MSA states that:

*"A person to be appointed as the municipal manager of a municipality may be appointed to that position only in terms of a written contract."*

- 5.4.14 Section 57(3) states that:

*"The employment contract referred to in subsection 1 (a) must be signed by both parties before the commencement of service".*

- 5.4.15 Section 57(6) states that the employment contract for a municipal manager must:

- a) *"Be for a fixed term of employment up to a maximum of five years, not exceeding a period ending one year after the election of the next council of the municipality."*

- 5.4.16 There is no doubt that in terms of the above legal provisions an employment contract is a statutory requirement before commencement of a term of office by a Municipal Manager. In this case, no written employment contract existed between Mr Ngema and the Municipality from 2009 until 2016. By his own words, Cllr Masina conceded during the

subpoena hearing that there was only a “*gentlemen’s agreement*” between the Municipality and Mr Ngema as far as his employment was concerned.

### Conclusion

5.4.17 Based on the available evidence, it is clear that the Municipality did not comply with the provisions of section 57 of the MSA. The Municipal Council was directed by the Court to implement the court order, failing which the MEC was directed to approach the court for a declaratory order to terminate Mr Ngema’s contract of employment.

5.4.18 On realization that the Municipal Council did not comply with the court order, the MEC approached the Court for an application of a declaratory order, however the matter was never finalised due to Mr Ngema’s resignation.

**5.5 Regarding whether the Municipality irregularly appointed private attorneys, Messrs. Puke Maserumule; Lavery Modise; and Hogan Lovells and Advocates Notshe and Mokhari to represent the Municipality in internal disciplinary hearings and court cases.**

### Common cause issues

5.5.1 The following service providers rendered legal services to the Municipality as can be observed from the disciplinary hearing documents as well as court documents in my possession:

- a) Attorney Puke Maserumule;
- b) Attorney Lavery Modise;
- c) Attorney Hogan Lovells;
- d) Advocate Notshe; and
- e) Advocate Mokhari.

5.5.2 The charge sheet that was issued to the Complainant dated 21 September 2012 was signed by Advocate Mokhari.

5.5.3 Mr Puke Maserumule acted as a Prosecutor and Mr Lavery Modise acted as the Chairperson during the disciplinary hearing held against the Complainant on 2 December 2013.

5.5.4 Advocate Notshe and Attorney Hogan Lovells represented the Municipality in the court cases.

Issues in dispute

5.5.5 The Complainant argued that the process followed in the procurement of the service providers as mentioned above was irregular in that they were all not on the Municipal database.

5.5.6 During the subpoena hearing held on 7 December 2017, Mr Kemi Behari from the Municipality contended that its Human Resource Department had its own database of service providers on legal and labour relations matters. The Municipality explained that the list of service providers that dealt with labour relations matters was kept by its Human Resource Department and such service providers were procured by the said Department and not the SCM Department.

5.5.7 However, as at 21 September 2012, the Municipality's SCM Database for Service Providers did not reflect the names of the above mentioned service providers from the document provided by the Complainant to my investigation team.

5.5.8 Mr Ngema indicated, during a meeting with my investigation team held on 28 February 2019, that he could not recall the facts around the issue and

needed to obtain the relevant documents from the Municipality to refresh his memory.

- 5.5.9 In her response to my allegations letter dated 23 May 2015, Dr Mashazi, failed to clearly respond with regard to the total costs paid towards the appointment of private attorneys, Puke Maserumule; Lavery Modise; and Hogan Lovells and Advocates Notshe and Mokhari to represent the Municipality in the internal disciplinary hearings and court cases.
- 5.5.10 An acknowledgement of receipt of Section 7(9) notice to Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager delivered on 31 May 2019 and to Gauteng Premier Makhura delivered on 3 June 2019.
- 5.5.11 A section 7(9) notice was served on Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager on 31 May 2019 and to Gauteng Premier Makhura delivered on 03 June 2019. However the parties failed to respond to the Section 7(9) notice.

*Application of the relevant legal framework*

- 5.5.12 Section 217 of the Constitution 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 or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective".*

- 5.5.13 Clause 14(1) (a) of the Municipal SCM Policy states that :

*"The accounting officer must keep a list of accredited prospective providers of goods and services that must be used for the procurement requirement through formal written price quotations."*

5.5.14 Clause 14(2) states that:

*"The list must be updated at least quarterly to include any additional prospective providers and any new commodities or type of services. Providers must be allowed to submit applications or listing at any time"*

5.5.15 Clause 14(3) states that:

*"The list must be compiled per commodity and per type of service".*

5.5.16 Clause 11(1) states that:

*"Through operational procedures, an effective system of acquisition management is established in Part 2 of the Policy in order to ensure –*

- a) that goods and services are procured by the Municipality in accordance with the authorised processes only".*
- b)*
- c)*
- d)*
- e) that any Treasury guideline on acquisition management are properly taken into account."*

5.5.17 In the circumstances, it is shown by available evidence that the Municipality did not engage in a competitive, transparent and fair procurement process in securing the services of the above listed legal practitioners. Similarly, the procured service providers were not amongst

the available listed names of service providers already in the municipal database.

### Conclusion

5.5.18 Based on the evidence gathered, I conclude that the procurement of the services of attorneys and advocates in the Municipal disciplinary hearings and court cases did not comply with the relevant legal prescripts and procurement processes.

**5.6 Regarding whether the Complainant and the taxpayers suffered prejudice as a result of the conduct of the Municipality in the circumstances.**

### Common cause issues

5.6.1 The CFO signed and awarded the tender to Lesira Teq to supply, deliver and install intelligent water meters at a cost of R109 million for the period 18 April 2011 until 30 June 2013.

5.6.2 Ms Mthenjane was an external contractor who was appointed by the Municipality to manage the Municipality's Institutional Review Process, not an employee.

5.6.3 In terms of a letter dated 27 October 2011, Ms Mthenjane wrote to Systemic Business Solutions (Pty) trading as QBIT (Pty) Ltd and advised them of their acceptance and approval to assist the Municipality with the implementation of macro structure with the negotiated amount of R31 101 680.00 excluding VAT.

5.6.4 Mr Ngema was employed as the City Manager from August 2009 to August 2016. From June 2012 to August 2016, he was irregularly employed as the City Manager without a written contract and he rendered a service to the Municipality.

5.6.5 The following Service Providers rendered legal services to the Municipality and got paid for the said services:

- a) Attorney Puke Maserumule;
- b) Attorney Lavery Modise;
- c) Attorney Hogan Lovells;
- d) Advocate Notshe; and
- e) Advocate Mokhari.

Issues in dispute

5.6.6 It was also lamented by the Complainant that all the salaries paid to Mr Ngema after the court had invalidated his appointment from May 2012, were irregular and amounted to financial prejudice to the Municipality.

5.6.7 The Complainant argued that the Municipality paid the Legal Practitioners for services rendered to the Municipality even though they were not on the database of the Municipality.

5.6.8 It was also argued by the Complainant that an amount of R38 945 042.52 paid to Lesira Teq before delivery of goods was irregular.

5.6.9 Section 7(9) notice was served on Cllr Masina, the Executive Mayor, Ms Patricia Khumalo, the Council Speaker, Dr Mashazi, the City Manager MEC Maile of COGTA and Mr Ngema, the former City Manager on 31 May 2019 and to Gauteng Premier Makhura delivered on 03 June 2019. However the parties failed to respond to the Section 7(9) notice.



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Application of the relevant legal framework

5.4.1. In terms of Section 65 of the MFMA

(2) *The accounting officer must for the purpose of subsection (1) take all reasonable steps to ensure—*

(c) *that payments by the municipality are made—directly to the person to whom it is due unless agreed otherwise for reasons as may be prescribed;*

5.6.10 The process followed by the Municipality in effecting payment to Lesita Teq before delivery of goods was in violation of the MFMA in that it was not yet due however delivery was subsequently made thereby circumventing any prejudice to the Municipality.

5.6.11 Clause 14(1) (a) of the Municipal SCM Policy states that :

*“The accounting officer must keep a list of accredited prospective providers of goods and services that must be used for the procurement requirement through formal written price quotations.”*

5.6.12 The Municipality contracted and made payments to Legal Practitioners that were not on the database of the Municipality thereby prejudicing service providers that are already on the database of the Municipality who have the same skill and expertise.

5.6.13 Section 171(1) of the MFMA provides that *“the accounting officer of a municipality commits an act of financial misconduct if that accounting officer deliberately or negligently—*

- (a) *contravenes a provision of this Act;*
- (b) *fails to comply with a duty imposed by a provision of this Act on the accounting officer of a municipality."*

### Conclusion

5.6.14 It was also established that the irregular appointment of Mr Ngema resulted into prejudice to other possible candidates that might have applied for the position. The appointment of the Legal Practitioners and the payment of Lesira Teq before delivery of good is in violation of the MFMA and the SCM policy.

## **6 FINDINGS**

- b) **Regarding whether the Municipality irregularly awarded tender number A-IS (WS) 21/2010 to Lesira Teq (Pty) Ltd amounting to R109 million, in that erstwhile City Manager, Mr Ngema, improperly delegated his powers to award the tender to the Chief Financial Officer (CFO).**
- (aa) The allegation that the Municipality irregularly awarded tender number A-IS (WS) 21/2010 to Lesira Teq (Pty) Ltd amounting to R109 million, is substantiated. However, the allegation that this happened because Mr Ngema improperly delegated his powers to the Municipal's CFO to award the tender, is not substantiated.
- (bb) Evidence in my possession established that Mr Ngema did not at any stage delegate his powers to award tender number A- IS (WS) 21/2010 to the CFO. Rather the CFO on his own and outside the scope of his powers awarded the tender amounting to R109 million to Lesira Teq (Pty) Ltd, which was above the legal threshold in terms of clause 5(2)(a) of the

Municipal SCM Policy. By so doing the CFO clearly violated the stated SCM policy.

- (cc) The High Court also declared the awarding of the tender as unlawful and thus null and void.
- (dd) The conduct of the CFO, Mr Zakes Myeza, 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 the Municipality irregularly awarded tender number A- IS (WS) 21/2011 under contract number C-F 10-2011(T), in that Mr Ngema improperly delegated his powers to Ms Linda Mthenjane, an external contractor, to approve the final awarding of the tender to implement the Institutional Review Process at the Municipality.**
- (aa) The allegation that the Municipality irregularly awarded tender number A- IS (WS) 21/2011 under contract number C-F 10-2011(T), in that Mr Ngema delegated his powers to Ms Linda Mthenjane, an external contractor, to approve the final awarding of the tender to implement the Institutional Review Process to QBIT (Pty) Ltd, is not substantiated.
- (bb) Mr Ngema did not delegate his powers to award tender number A- IS (WS) 21/2011 under contract number C-F 10-2011(T) to Ms Mthenjane.
- (cc) The memorandum dated 25 July 2011 which was a request by Ms Mthenjane to Mr Ngema for deviation from the normal procurement process, was approved by Mr Ngema on 15 August 2011.

- (dd) Mr Ngema did not contravene section 59(1) of the MSA as he did not delegate his powers to award tender no A- IS (WS) 21/2011 under contract number C-F 10-2011(T) to Ms Mthenjane.
  - (ee) Such conduct by the Municipality and in particular Mr Ngema is not in violation of section 59(1) of the MSA.
  - (ff) The conduct Mr Ngema does not constitute 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.
- d) **Regarding whether the Municipality irregularly made payment of R38 945 042.52 to Lesira Teq before delivery of goods:**
- (aa) The allegation whether the Municipality made an irregular payment of R38 945 042.52 before delivery of the goods, is substantiated.
  - (bb) On 31 May and 31 July 2011 respectively, the CFO approved payment of R38 945 042.52 to Lesira Teq for the supply, delivery and installation of Intelligent Water Meters before the delivery of the goods. The delivery of the said goods was done on 23 September and November 2011 respectively, which was almost two months after payment. The conduct of the Municipality is in direct violation of section 65 (2 )of the MFMA.
  - (cc) Accordingly, the conduct of the Municipality and in particular the CFO 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.

- e) **Regarding whether the Municipality irregularly appointed Mr Khaya Ngema as the City Manager from September 2009 until August 2016, without a written contract of employment:**
- (aa) The allegation that the Municipality irregularly appointed Mr Ngema as the City Manager from September 2009 until August 2016 without a written contract of employment, is substantiated.
- (bb) Evidence at my disposal confirmed beyond doubt that Mr Ngema worked as the City Manager without a valid employment contract. Cllr Masina also conceded that Mr Ngema did not have a valid contract of employment but that the Municipality had a gentlemen's agreement of employment with Mr Ngema for the said period in question.
- (cc) Such conduct by Municipality and in particular the Municipal Council is in contravention of sections 57(1)(a) and (6)(a) of the MSA.
- (dd) The conduct of the Municipality and in particular the Municipal Council 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.
- f) **Regarding whether the Municipality irregularly appointed private attorneys, Messrs. Puke Maserumule; Lavery Modise; Hogan Lovells; Advocate Notshe and Advocate Mokhari to represent the Municipality in the internal disciplinary hearings and court cases.**
- (aa) The allegation that the Municipality irregularly appointed Private Attorneys, Puke Maserumule; Lavery Modise; Hogan Lovells; Advocate Notshe and Advocate Mokhari to represent the Municipality in the internal disciplinary hearings and court cases, is substantiated.

- (bb) The evidence in my possession indicates that the Municipality appointed the said Attorneys notwithstanding the fact that they were not in the Municipal database of service providers. The Municipality was required to appoint services providers that are on their database. The Municipality failed to provide me with evidence to show that the service and skill that were required from the appointed Legal Practitioners could not be acquired from the list of the Legal Practitioners in the Municipal database
- (cc) The conduct of the Municipality and in particular Mr Ngema is in violation of clause 11(1)(a) and (b) and clause 14(1)(a) and (2) of the Municipal SCM Policy.
- (dd) Accordingly, the conduct of the Municipality and in particular Mr Ngema amounts to 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.
- g) **Regarding whether the Complainant and taxpayers suffered prejudice as a result of the conduct of the Municipality in the circumstances.**
- (aa) The allegation that the conduct of Mr Ngema resulted in prejudice to the Complainant in the circumstances, is substantiated.
- (bb) The taxpayers of the Municipality did not suffer any prejudice because of the awarding of tender number A- IS (WS) 21/2010 to Lesira Teq.
- (cc) The taxpayers of the Municipality did not suffer any prejudice in the awarding of the tender to QBIT.
- (dd) The taxpayers of the Municipality suffered prejudice as a result of irregular appointments and payment of service providers who handled the

disciplinary and court cases on behalf of the Municipality and Mr Ngema. The amount of the total cost incurred by the Municipality could not be determined or quantified due non response from the Municipality to submit the total costs incurred.

## **7 REMEDIAL ACTION**

**The appropriate remedial that I am taking in terms of section 182(1)(c) of the Constitution is the following:**

It should be noted that Messrs Khaya Ngema and Mondli Gungubele are currently not in the employ of the Municipality. Therefore the remedial action is aimed at addressing the non-recurrence of the allegations in the future.

**The City Manager: Ekurhuleni Metropolitan Municipality must:**

- (b) Within thirty (30) working days of the issuing of this report, table a copy thereof before the Municipal Council. The Municipal Council to discuss and adopt the report and pass a resolution thereon.
- (c) Within sixty (60) working days of the issuing of this report, institute disciplinary action against Mr Zakes Myeza, the Chief Financial Officer, on the basis that he acted without due authority and as such contravened the Municipal SCM policy.
- (d) Within sixty (60) working days of the issuing of this report, institute an internal audit proceedings to determine the total amount of money paid towards Messrs. Puke Maserumule; Lavery Modise; Hogan Lovells; Advocate Notshe and Advocate Mokhari by the Municipality. The Audit

Report must thereafter be presented to the Municipal Council for discussion and adoption.

- (e) Within sixty (60) working days of the issuing of the report by the internal audit, consider recovering any amounts which were paid in excess of agreed rates of attorneys on municipal data base OR the Municipality should establish a panel of attorneys to avoid a recurrence of this irregular expenditure or avoid the violation of section 217 of the Constitution.
- (f) Within sixty (60) working days of the issuing of this report, ensure that all the relevant staff of the Municipality receives regular training on its Supply Chain Management Policy, MFMA, on relevant Treasury Regulations and on Procurement Legal Prescripts in order to ensure consistency and compliance during the handling of bid documents.

**The Executive Mayor and the Speaker of Council: Ekurhuleni Metropolitan Municipality must:**

- (a) Within thirty (30) working days of the issuing of this report, ensure that a copy thereof is tabled before the Municipal Council. The Municipal Council to discuss and adopt the report and pass a Council Resolution thereon.

## **8 MONITORING**

- a) The City Manager, the Speaker and the Executive Mayor of the Municipality must submit an Implementation Plan to the Public Protector within sixty (60) working days from the date of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.



- b) I wish to bring to your attention that in line with the Constitutional Court Judgement in the matter of ***Economic Freedom fighters v Speaker of the National Assembly and other; Democratic Alliance v Speaker of the National Assembly and others [2016] ZACC 11***, and in order to ensure the effectiveness of the Office of the Public Protector, the remedial action prescribed in this Report are legally binding unless a Court order directing otherwise is obtained.

Kind regards



ADV. BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA  
DATE: 05/09/2019