

**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**



**PUBLIC PROTECTOR
SOUTH AFRICA**

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF TENDER
IRREGULARITIES AT LEGAL AID SOUTH AFRICA (LEGAL AID SA)**

INDEX

1. EXECUTIVE SUMMARY.....	3
2. INTRODUCTION.....	9
3. THE COMPLAINT.....	10
4. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR.....	11
5. THE INVESTIGATION.....	14
6. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS.....	23
7. FINDINGS.....	55
8. REMEDIAL ACTION.....	59
9. MONITORING.....	60

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 (Constitution), and published in terms of 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 tender irregularities with regard to a security tender number 07/2013 at Legal Aid SA.
- (iii) The complaint was lodged with my office on 8 September 2014 by an anonymous complainant (Complainant).
- (iv) **In the main, the Complainant alleged as follows:**
 - (aa) That in February 2014, Mr T Mtati, the Corporate Services Executive at the Legal Aid SA, instructed the Legal Aid SA's Bid Evaluation Committee (BEC) to prepare a report requesting a rescission of a decision of the BAC taken on 6 December 2013, which approved the appointment of Khumbulani and Sons Protection Services, and recommended that Ulwazi Protection Services be appointed instead.
 - (bb) 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) of the Public Protector Act, which regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level. . 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.¹ 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.”*²

- (vi) **On analysis of the complaint, the following issues were identified and investigated:**
- (a) Whether the Legal Aid SA irregularly rescinded a decision of the Bid Adjudication Committee in approving the appointment of Khumbulani and Sons Protection Services as the successful bidder for tender 07/2013; and
 - (b) Whether the Legal Aid SA’s decision to rescind the appointment of a successful bidder resulted in improper prejudice to the Legal Aid SA and Khumbulani and Sons Protection Services in the circumstances.
- (vii) The investigation process included an exchange of correspondence and analysis of all relevant documents and application of all relevant laws, policies and related prescripts and interviews were also conducted with the complainant and relevant officials of the Legal Aid SA.
- (viii) Key laws and policies taken into account to determine if there had been tender irregularities at Legal Aid SA and prejudice to the Complainant, Legal Aid SA and Khumbulani and Sons Protection Services were principally those imposing administrative standards that should have been complied with by the Legal Aid SA. Those are the following:

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

² *Supra* at para [73].

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- (a) The relevant provisions of the Constitution of the Republic of South Africa, 1996 (the Constitution);
 - (b) The Public Protector Act, 23 of 1994 (the PPA);
 - (c) Public Finance Management Act 1 of 1999 (PFMA);
 - (d) The National Treasury Regulations of 2005 ;
 - (e) The National Treasury's Code of Conduct for Bid Adjudication Committees, 2006;
 - (f) Legal Aid SA Supply Chain Management Policy of 2017; and
 - (g) The Promotion of Administrative Justice Act of 2000 (PAJA).
- (ix) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings against the Legal Aid SA:
- (a) **Regarding whether the Legal Aid SA irregularly rescinded the decision of the Bid Adjudication Committee in approving the appointment of Khumbulani and Sons Protection Services as the successful bidder for tender 07/2013.**
 - (aa) The allegation that Legal Aid SA irregularly rescinded the decision of the BAC in approving the appointment of Khumbulani and Sons Protection Services as the successful bidder for tender 07/2013 is substantiated.

- (bb) The Legal Aid SA and in particular members of the BEC, BAC, Mr Mtati: the Corporate Services Executive and Ms Vedalankar: the Chief Executive Officer, failed to adhere to the constitutional demands of procedural fairness, transparency lawfulness and reasonableness as envisaged in terms of section 217 and section 33 of the Constitution when dealing with the bid of Khumbulani and Sons Protection Services by incorrectly concluding that Khumbulani and Sons Protection Services had previously rendered security services to the Legal Aid SA, that its employees were implicated in burglaries of Legal Aid SA building, when in fact that was not the case, such act was grossly unfair and improper to Khumbulani and Sons Protection Services.
- (cc) Disqualifying Khumbulani and Sons Protection Services on the basis of mistaken identity was also grossly unfair as it was later established that they never provided security services to the Legal Aid SA before and it was mistakenly identified as Khumbulani Golden Ndlovu. The pleading of ignorance of the true information by Legal Aid SA after the investigation about Khumbulani and Sons Protection Services was provided to them, could not be justified as mistaken identity (*error in persona*) as claimed.
- (dd) By not informing and affording Khumbulani and Sons an opportunity to make a representation within fourteen (14) days as to why their tender/bid should be disqualified for not submitting a Police Clearance, such was at odds with the provisions of clause 5(11) of the Legal Aid SA's Supply Chain Management Policy, which requires that bidders/tenderers be given such an opportunity.
- (ee) The Legal Aid SA also failed to notify the Auditor-General, and the National Treasury of the reasons for the rescission or deviation from such recommendations as made by its BEC and as approved by its BAC, as required by Schedule 3A and C of the PFMA, Code of Conduct for Bid Adjudication Committees Regulation 2(6); Section 38(1)(c) of the PFMA which

states amongst other things that the accounting officer for an institution must prevent, irregular expenditure.

- (ff) The award of tender to Ulwazi Protection Services was therefore irregular since it was made after an unlawful rescission of the BAC decision. Any subsequent payment for such security services as may have been rendered by Ulwazi Protection Services to Legal Aid SA amounted to an irregular expenditure prohibited by sections 38 and 45 of PFMA.
- (gg) Such failure 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 Legal Aid SA's decision to rescind the appointment of a successful bidder resulted in improper prejudice to the Legal Aid SA and Khumbulani and Sons Protection Services in the circumstances:**
 - (aa) The allegation that the Legal Aid SA's decision to rescind the appointment of a successful bidder resulted in improper prejudice to the Legal Aid SA and Khumbulani and Sons Protection Services in the circumstances is substantiated.
 - (bb) Such prejudice takes the form of unfair treatment, unfair discrimination, irregular expenditure and loss of business and trade opportunity. Legal Aid SA's conduct is also at odds with section 195(1)(d) of the Constitution which requires that services must be provided impartially, fairly, equitably and without bias. All the expenses incurred as a result of payments made to Ulwazi Protection Services, as a security service provider to Legal Aid SA, amount to irregular expenditure by Legal Aid SA and by corollary to a violation of sections

- 38 and 45 of PFMA since its award of the tender was done in contravention of applicable legal prescripts and to the unfair discrimination of Khumbulani and Sons Protection Services.
- (cc) Due to the unlawful rescission of the BAC's decision to award Khumbulani and Sons Protection Services by the Legal Aid SA, Khumbulani and Sons Protection Services unfairly lost out on financial business and trade opportunity to the value of R3 021 497.76.
- (dd) Such conduct and violations 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.
- (x) **The appropriate remedial actions that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:**

The appropriate remedial actions that I am taking in terms of section 182(1) (c) of the Constitution, with view of placing Khumbulani and Sons Protection Services as close as possible to where he would have been had the tender irregularities at Legal Aid SA not occurred, are the following:

The Chairperson of the Board of the Legal Aid SA must take appropriate steps to ensure that:

- (a) The Legal Aid SA takes appropriate disciplinary action against implicated employees who are still in the employ of the Legal Aid SA within thirty (30) working days of the issue of this report.
- (b) Any irregular and/or fruitless expenditure incurred by the Legal Aid SA, from any person who is liable in law, is recovered in accordance with the process

prescribed in the National Treasury updated guidelines on irregular and/or fruitless expenditure within sixty (60) working days of the issue of this report.

- (c) All Legal Aid SA officials who are involved in the Supply Chain Management processes including all senior management in the Supply Chain Management, attend a workshop on the Procurement Policy and related legal prescripts within thirty (30) working days of the issue of this report.

The CEO of the Legal Aid SA must take appropriate steps to ensure that:

- (d) The Legal Aid SA must within thirty (30) working days from the date of the report, write a formal letter of apology to the Manager of Khumbulani and Sons Protection Services, for the prejudice suffered as a result of this tender.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF TENDER IRREGULARITIES AT LEGAL AID SA

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 published in terms of section 8(1) of the Public Protector Act 23 of 1994 (Public Protector Act).
- 1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following people to note the outcome of my investigation and implement remedial actions:
 - 1.2.1 The Minister of Justice and Correctional Services: Mr R Lamola;

- 1.2.2 The Director General of the Department of Justice and Correctional Services :
Mr Vusi Madonsela ;
- 1.2.3 The Chairperson of the Board of the Legal Aid SA: Judge Motsamai Makume;
- 1.2.4 The Chief Executive Officer of Legal Aid SA: Ms V Vedalankar;
- 1.2.5 A copy of the report is also provided to the Complainant to inform him/her about
the outcome of the investigation.

2. THE COMPLAINT

- 2.1 The complaint was lodged with my office by an Anonymous complainant
(Complainant) on 08 September 2014.
- 2.2 Complainant alleged *inter alia* that:
 - 2.2.1 In February 2014, Mr T Mtati, the Corporate Services Executive at the Legal
Aid SA, instructed the Legal Aid SA's Bid Evaluation Committee (BEC) to
prepare a report requesting a rescission of a decision of the BAC taken on 06
December 2013, which approved the appointment of Khumbulani and Sons
Protection Services, and to recommend that Ulwazi Protection Services be
appointed instead.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

- 3.2** Section 182(1) of the Constitution provides that: *“The Public Protector has the power as regulated by national legislation:*
- (a) To investigate any conduct in state affairs, or in the Public Administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
 - (b) To report on that conduct; and*
 - (c) To take appropriate remedial action”.*
- 3.3** Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.
- 3.4** The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given the power to resolve disputes through mediation, conciliation, negotiation or any other appropriate alternative dispute resolution mechanism.
- 3.5** In the *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. 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** 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).

- 3.7** 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).
- 3.8** 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).
- 3.9** 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).
- 3.10** 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)).
- 3.11** She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 71(d)).

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- 3.12** “*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)).
- 3.13** The remedial action taken by the Public Protector has a binding effect (para 76). 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* (para 73).
- 3.14** The Legal Aid SA is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls squarely within the ambit of the Public Protector’s mandate.
- 3.15** The jurisdiction of the Public Protector was not disputed by Legal Aid SA in this matter.
- 3.16** Regarding the exercise of my discretion in terms of section (9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘*special circumstances*’, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, include 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

Constitution; whether my remedial action will redress the imbalance of the past. What constitute '*special circumstances*' depends on the merits of the each case.

4 THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of sections 182(1)(a), (b) and (c) of the Constitution which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action; and in terms of section 6(5) of the Public Protector Act, regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of public entities.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration 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 Appeal³ (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.
- 4.2.3 In this particular case, the factual enquiry primarily focused on whether or not there are tender irregularities at Legal Aid SA.
- 4.2.4 The enquiry regarding what should have happened, focuses on the applicable legal prescripts that regulate the standard that should have been met by the Legal Aid SA to prevent improper conduct and/or maladministration as well as prejudice. In this case, key laws and policies taken into account to determine if there had been tender irregularities at Legal Aid SA and prejudice to Khumbulani and Sons Protection Services were principally those imposing administrative standards that should have been complied with by the Legal Aid SA or its officials.
- 4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of tender irregularities and improper conduct. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the Legal Aid SA

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 this matter, 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.

4.2.7 The substantive scope of the investigation focused on compliance with the law and prescripts regarding the complaint and allegations.

4.3 On analysis of the complaint, the following issues were identified to inform and focus the investigation:

4.3.1 Whether the Legal Aid SA irregularly rescinded a decision of the Bid Adjudication Committee in approving the appointment of Khumbulani and Sons Protection Services as the successful bidder for tender 07/2013; and

4.3.2 Whether the Legal Aid SA's decision to rescind the appointment of a successful bidder resulted in improper prejudice to the Legal Aid SA and Khumbulani and Sons Protection Services in the circumstances.

4.4 The Key Sources of information

Correspondence between the Public Protector and Legal Aid SA

4.4.1 Investigation Report: Theft of Laptop and Desktop dated 28 May 2010 from Mr Aubrey Moeng, Corporate Administration Manager of Legal Aid SA;

- 4.4.2 A copy of an Advertisement of Tender Number 07/2013 for the provision of Security Services for a period of three (3) years by Legal Aid SA in the City Press newspaper dated 22 September 2013;
- 4.4.3 A copy of the BEC report presented to the BAC on 13 December 2013 recommending that the contract for the provision of Security Services for a period of three (3) years be awarded to the highest scoring bidder, Khumbulani and Sons Protection Services for an amount of R3 021 497.64, was received from Mr Patrick Hundermark on 06 March 2018;
- 4.4.4 Copies of eleven (11) bid proposals that were received by Legal Aid SA with regard to the above tender was received from Mr Patrick Hundermark, Chief Legal Executive of Legal Aid SA on 30 November 2017;
- 4.4.5 A copy of the Government Tender Bulletin dated 24 January 2014, indicating that Khumbulani and Sons Protection Services were awarded Tender no. 07/2013 on 02 December 2013 for provision of security services for the amount of R3 021 497.64;
- 4.4.6 A copy of the Minutes of the BAC meeting dated 03 February 2014, which was held on 06 December 2013 where the BAC approved the awarding of a contract in respect of the provision of Security Services to the Legal Aid SA to Khumbulani and Sons Protection Services for a period of three (3) years;
- 4.4.7 A copy of the Minutes of the Corporate Services Management meeting held on 04 February 2014, where a resolution was made to recommend the second highest bidder, as concern was expressed regarding the poor services offered by Khumbulani and Sons Protection Service in the past;
- 4.4.8 An email dated 06 February 2014 from Mr Solly Sekgota, Legal Aid SA Corporate Legal Manager, to his colleagues stating among others, that he

confirms that Mr Dumisani Hlatshwayo: Corporate Admin Manager will inform Ms Lina Sedibeng: Procurement Manager: to remove the advert of security from the successful bidders immediately;

- 4.4.9 An undated report on the appointment of a service provider in relation to the Security Tender Number:07/2013 from the Legal Aid SA's BEC, seeking approval from its BAC to rescind the decision of the BAC for approving the appointment of Khumbulani and Sons Protection Services as the preferred bidder and to recommend the appointment of Ulwazi Protection Service as the service provider that had scored the highest point;
- 4.4.10 A copy of certification of BAC approval of Security Services to Khumbulani and Sons Protection Services dated 17 March 2014, signed by both Ms Joyce Mputla, BAC Secretary and Mr Thembile Mtati, Acting BAC Chairperson;
- 4.4.11 Letter dated 02 April 2014 from Khumbulani and Sons Protection Services legal representative, Mr Sandile Mabaso (Mabaso Attorneys) to Ms Vidhu Vedalankar asking her when Khumbulani and Sons Protection Services is required to commence providing services as it has been appointed to provide security services in terms of Tender 07/2013;
- 4.4.12 Letter dated 09 April 2014 from Mr Solly Sekgota (Attorney for Legal Aid SA), responding to the above letter from Mabaso Attorneys;
- 4.4.13 A completed complaint form from the complainant on 08 September 2014;
- 4.4.14 Allegations letter dated 05 May 2015 from Public Protector addressed to the CEO of Legal Aid SA, Ms Vidhu Vedalankar;
- 4.4.15 Acknowledgement of receipt letter dated 12 May 2015 from Ms Vidhu Vedalankar;

- 4.4.16 Response letter dated 18 May 2015 from the Acting Chief Executive Officer of Legal Aid SA, Mr Brian Nair;
- 4.4.17 Letter of response dated 5 August 2015 from Acting Chief Executive Officer of Legal Aid SA, Ms Rebecca Hlabatau to Mr Kabelo Sedupane of Corruption Watch;
- 4.4.18 An email correspondence dated 9 November 2015 from the Public Protector addressed to Ms Vidhu Vedalankar, requesting further information;
- 4.4.19 Response letter dated 25 November 2015 from Mr Jerry Makokoane, Chief Operations Officer of Legal Aid SA to the Public Protector;
- 4.4.20 Response letter dated 29 May 2017 from Mr Patrick Hundermark, Chief Legal Executive of Legal Aid SA, submitting that notwithstanding the mistaken identity of Khumbulani and Sons Protection Services, they should at any rate, not have been awarded the tender since they did not provide a police clearance certificate as required by the tender and the Private Industry Regulation Act 56 of 2001. Further that on that basis alone they should not have progressed to the evaluation stage of the tender;
- 4.4.21 A copy of the evaluation document indicating that Khumbulani and Sons Protection Services did not provide a police clearance certificate as per tender specification;
- 4.4.22 A copy of the Legal Aid SA Supply Chain Management Policy dated 27 May 2017;
- 4.4.23 A response letter dated 5 July 2017 from Mr Patrick Hundermark, Chief Legal Executive of Legal Aid SA, stating that it is not clear in the minutes of the Corporate Services management meeting held on 4 February 2014, who made

the statement that Khumbulani and Sons Protection Services rendered poor services to Legal Aid SA in the past. He further states that the decision to disregard the bid should have been taken by the Accounting Officer, which in Legal Aid SA's instance is the CEO not BAC, and lastly that it also appears that National Treasury was not informed of this cancellation;

- 4.4.24 An mail correspondence dated 6 February 2018 from Public Protector addressed to Mr Patrick Hundermark, Chief Legal Executive of Legal Aid SA, requesting all tender documents;
- 4.4.25 An email correspondence dated 14 February 2018 from Public Protector addressed to Mr Patrick Hundermark, Chief Legal Executive of Legal Aid SA, requesting a response to the above email;
- 4.4.26 An acknowledgement of receipt email dated 22 February 2018 from the Public Protector to Mr Patrick Hundermark;
- 4.4.27 An email correspondence dated 7 May 2018 from Public Protector to Mr Patrick Hundermark, seeking clarity on how Legal Aid SA established that Khumbulani and Sons Security Services never provided any services to them and when was the investigation conducted;
- 4.4.28 An email response dated 22 May 2018 from Mr Patrick Hundermark to the Public Protector, stating that the investigation was conducted after they received a letter from Mabaso Attorneys who demanded the re-instatement of Khumbulani and Sons Protection Services that is when Legal Aid SA established the mistaken identity;

4.5 Legislation and other legal prescripts

- 4.5.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);

- 4.5.2 The Public Protector Act, 23 of 1994 (the PPA);
- 4.5.3 Public Finance Management Act 1 of 1999 (PFMA);
- 4.5.4 The National Treasury Regulations of 2005 ;
- 4.5.5 The National Treasury's Code of Conduct for Bid Adjudication Committees, 2006;
- 4.5.6 Legal Aid SA Supply Chain Management Policy of 2017;
- 4.5.7 The Promotion of Administrative Justice Act of 2000 (PAJA).

4.6 Case law

- 4.6.1 *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);
- 4.6.2 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 1999 (4) SA 788 (T);
- 4.6.3 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665;
- 4.6.4 *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC); and
- 4.6.5 *Cf S v Manelis* 1965 (1) SA 748 (A);
- 4.6.6 *Gamede MA vs The Public Protector* (992646/2015) [2018] ZAGPPHC 865; 2019(1) SA 491(GP);
- 4.6.7 *Millennium Waste Management v Chairperson Tender Board* [2007] SCA 165 (RSA).

4.7 Interviews/Meetings conducted

- 4.7.1 Several telephonic interviews with the Complainant, from 14 July 2015 throughout the investigation;
- 4.7.2 Telephonic interview with Mr Thembile Mtati on 14 April 2016.
- 4.7.3 Telephonic interviews with Mr Patrick Hundermark throughout the investigation;
- 4.7.4 Consultation conducted with the complainant on 13 March 2019.

4.8 Notices issued in terms of section 7(9) of the Public Protector Act

- 4.8.1 A notice was issued to the CEO Ms Vidhu Vedalankar, on 1 July May 2019;
- 4.8.2 A notice was issued to Ms Rebecca Hlabatau, on 1 July 2019;
- 4.8.3 A notice was issued to Ms Avie Naidoo, on 1 July 2019;
- 4.8.4 A notice was issued to Mr Solly Sekgota, on 1 July 2019
- 4.8.5 A notice was issued to the Minister of Justice and Correctional Services Honorable Ronald Lamola, on 2 July 2019;
- 4.8.6 A notice was issued to Ms Sholly Mohale, on 3 July 2019;
- 4.8.7 A notice was issued to Ms Lina Sedibeng, on 3 July 2019;

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- 4.8.8 A notice was issued to Mr Thembile Mtati , on 03 July 2019;
- 4.8.9 A notice was issued to Mr Andrew Montane, on 10 July 2019;
- 5 The determination of issues in relation to the evidence obtained and conclusions made with regard to applicable law and prescripts.**
- 5.1 Regarding whether the Legal Aid SA irregularly rescinded a decision of the Bid Adjudication Committee in approving the appointment of Khumbulani and Sons Protection Services as the successful bidder for tender no. 07/2013.**

Common cause issues

- 5.1.1 The Legal Aid SA placed a request for proposals as per bid number 07/2013 for security services to Legal Aid SA for a period of three (3) years in the Government Gazette Tender Bulletin and in *The Star* newspaper on 20 September 2013.
- 5.1.2 The advertisement was also placed in the *Sunday Times* newspaper on 23 September 2013. The closing date of the invitation to bid was 23 October 2013 at 11h00.
- 5.1.3 The Legal Aid SA Bid Specification Committee was appointed on 13 September 2013 and the bid specification was finalised on 17 September 2013. The approved budget of the service was R3 610 515.00 inclusive of Value Added Tax (VAT).
- 5.1.4 On 25 September 2013, a compulsory briefing session was held at the LASA House, 7th Floor, 29 De Beer Street in Braamfontein.

- 5.1.5 On 06 December 2013 the BEC recommended Khumbulani and Sons Protection Services and the BAC approved it on the same date as the preferred service provider for the duration of three (3) years at a cost of R3 021 497.64.

Issues in dispute

- 5.1.6 The Complainant argued that in February 2014, Mr Mtati instructed the BEC to prepare a report requesting a rescission of the decision of the BAC taken on 6 December 2013 which approved the appointment of Khumbulani and Sons Protection Services and to recommend that Ulwazi Protection Services be appointed instead.
- 5.1.7 Accordingly, the BEC then submitted the report which sought to rescind the award made to Khumbulani and Sons Protection Services and to recommend Ulwazi Protection Services as the successful bidder, at the instruction of Mr Mtati.
- 5.1.8 The Complainant contended that the BEC re-evaluated the application of Khumbulani and Sons Protection Services and disqualified it on the aspect of functionality. The major issues considered by the BEC, *inter alia*, included the following allegations:
- (a) Khumbulani and Sons Protection Services were previously contracted to the Legal Aid SA and rendered unsatisfactory service;
 - (b) The employment of illegal foreign nationals with forged and fraudulent security clearance certificates; and
 - (c) Burglary and theft by security personnel and one of the former security personnel was subsequently arrested and convicted⁴.

⁴ Reported as per Hillbrow CAS 620/06/2012

- 5.1.9 It was further disputed by the Complainant that Khumbulani and Sons Protection Services did any work for the Legal Aid SA and none of its employees were ever charged with breaking into any Legal Aid SA's building. The Legal Aid SA was merely confusing Khumbulani and Sons Protection Services with another security service provider that was previously contracted to the Legal Aid SA⁵.
- 5.1.10 The Complainant further asserted that the Legal Aid SA was made aware that it was Khumbulani Golden Ndlovu (KGN) Security Services which previously provided unsatisfactory Security Services to the Legal Aid SA and not Khumbulani and Sons Protection Services.
- 5.1.11 My office raised the matter with the Legal Aid SA's Chief Executive Officer, Ms Vidhu Vedalankar, as per a letter dated 5 May 2015.
- 5.1.12 The Legal Aid SA responded to my office as per a letter dated 18 May 2015, through the then Acting Chief Executive Officer, Mr Brian Nair, and indicated that subsequent to the recommendation and approval of Khumbulani and Sons Protection Services, one of the Legal Aid SA's employees verbally brought some critical information that the recommended bidder had rendered security services to Legal Aid SA which was not satisfactory. There is no evidence of who brought the above information as the Complainant alleged that it was brought by Mr Mtati and he also alleged that it was brought by the Complainant and vice versa.
- 5.1.13 The above mentioned information related to the fact that more than one burglary into the Legal Aid SA's building took place where the personnel of Khumbulani and Sons Protection Services were allegedly involved. A criminal

⁵ KGN (Khumbulani Golden Ndlovu) Security.

case⁶ was also opened against one of the offenders. Further, it was also pointed out that Khumbulani and Sons Protection Services used foreign nationals as security guards without appropriate security and/or police clearance certificates as required in the private security industry and in the bid specifications.

- 5.1.14 As a result of the advice and/or information, Mr Mtati, after consultation with the Chief Operations Officer, had no option, but to ask for re-evaluation of the three bids and include the information which has been brought to his attention.
- 5.1.15 The BEC re-evaluated the application of Khumbulani and Sons Protection Services and disqualified them on the aspect of functionality considering the above mentioned issues and/or information.
- 5.1.16 On 4 February 2014, during the Corporate Services management meeting it was resolved that the second highest bidder should be recommended.
- 5.1.17 On 17 March 2014, the BAC approved the awarding of the Security Services tender to Ulwazi Protection Services for a period of three (3) years at the cost of R3 921, 644.16. The approved budget for security was R3 610 515.00 of which R311 329.16 was recorded as the shortfall.
- 5.1.18 It was further argued by the Legal Aid SA's Chief Operating Officer: Mr Jerry Makokoane as per the letter dated 25 November 2015 that beside the mistaken identity of Khumbulani and Sons Protection Services, mistaken identity was not the only reason why they were not awarded the tender. Another reason, advanced by the Legal Aid SA's Chief Legal Executive: Mr Patrick Hundermark (Mr Hundermark) as per the response letter dated 29 May 2017, was that Khumbulani and Sons Protection Services did not provide the Legal Aid SA

⁶ Reported as per Hillbrow CAS 620/06/2012

with its Police Clearance Certificate which was a requirement for the tender and therefore should not have progressed to the next stage of the tender.

- 5.1.19 The Legal Aid SA, further clarified through Mr Hundermark, as per a letter dated 6 March 2018 that on closure of the tender, the BEC was appointed by the Chief Financial Officer in terms of paragraph 5.8.4 of the Legal Aid SA's Supply Chain Management Policy on the recommendation of the Head of Department to which the security function falls, namely Mr Mtati.
- 5.1.20 The BEC consisted of five members, namely Mr Dumisani Hlatshwayo (Chairperson of the Committee and Corporate Admin Manager); Mr Solly Sekgota (Corporate Legal Manager); Ms Lina Sedibeng (Procurement Manager); Ms Buhle Zulu (Procurement Supervisor) and Mr Andrew Montane (Infrastructure Supervisor).
- 5.1.21 The Legal Aid SA received 11 bids from the bidders listed below:

No.	Company name	Quoted amount
1.	Indlangamandla Security Protection	R1 307 480.80
2.	Mathepu Trading	R9 500 000.00
3.	Dumisa Protection Services	R5 225 868.00
4.	Tshedza Protective Services	R2 661 794.48
5.	SJR Security Cleaning Services	R5 610 628.88
6.	Kefilwe Security Enterprise (PTY) Ltd	R7 165 304.45
7.	Khumbulani and Sons Protection Services	R3 021 497.76
8.	Baphephile Security and Cleaning Services	R4 058 985.50
9.	Ulwazi Protection Services	R3 921 644.16
10.	Sphandile Security Services	R1 278 016.56
11.	Pholile Business	R5 400 393.66

5.1.22 On 23 October 2013, the completeness of administrative documents was documented and the BEC met on 28 October 2013. It agreed that proposals would be scored on functionality, reference checks obtained to confirm the functionality scores and security clearance certificates would be required before contracts were awarded.

5.1.23 Functionality scores were discussed on 18 November 2013 and finalised on 20 November 2013. The BEC found that referees did not provide reports in all cases. It was agreed that referees should confirm reports of recommended bidders.

5.1.24 According to the bid, the evaluation criteria was divided into three categories:

Administrative Compliance Criteria:

- a) Bidders must ensure that the SBD 4 form is fully completed and signed;
- b) Bidders must furnish the Legal Aid SA with a Valid Tax Clearance Certificate which should reflect that the tax matters of the bidder are in order;
- c) Bidders must ensure that the SBD 8 form is fully completed and signed;
- d) Bidders must ensure that the SBD 9 form is fully completed and signed;
- e) Bidders must provide three contactable references with contact names telephone numbers and email addresses;
- f) Bidders must be in position to assume duty after acceptance of the Bid;
- g) The contract will be for a period of three years from the date of award of the Bid;
- h) Prospective Bidders must visit the site in order to ascertain the extent of the service to be rendered; and

- i) The enclosed site inspection certificate must be completed and signed by the Legal Aid SA representative in respect of such site inspection conducted.

Other information which formed part of administrative compliance criteria included:

- a) The head office must be registered in South Africa;
- b) References;
- c) Full banking details;
- d) Experience;
- e) Security clearance certificate ;
- f) List of references;
- g) Additional personnel;
- h) Compensation Commissioner and Unemployment Fund;
- i) Security Personnel Required;
- j) Supervisor;
- k) Compliance with rules and regulations;
- l) Public Liability Insurance;
- m) Terms and conditions of contract;
- n) Services Required;
- o) No Guns are allowed in the premises;
- p) Training;

- q) Service Equipment;
- r) Records for inspection relating to qualification, registration and security clearance of its personnel;
- s) Capacity to deliver; and
- t) Transitional arrangements.

Functionality Criteria:

No	Criterion Details	Points	Score
1.	Provision and utilisation of resources (staff and tools).	30	90
2.	Demonstration of how the area and occupants will be kept safe for 24 hrs. Patrolling, manning of key areas and monitoring of CCTV's.	30	90
3.	Capacity to deliver: Experience in the industry, financial, human and technical capacity.	20	90
4.	Ensuring that there are no disruptions in the rendering of security services and provision of insurance.	20	90

Price & B-BBEE Preference Criteria:

Price points	Preference points	Total points
90	10	100

- 5.1.25 In terms of the second criteria, any bidder who failed to score 90 points or more was not considered for further evaluation on price and Broad Based Black Economic Empowerment (BBBEE).
- 5.1.26 The BEC noted and marked on the disqualification criteria sheet during assessment that Khumbulani and Sons Protection Services did not provide

police clearance certificate which was compulsory as part of the specification and vital for consideration of proposals in the security sector.

- 5.1.27 Three bidders, namely Khumbulani and Sons Protection Services, Pholile Business and Ulwazi Protection Services were further evaluated on price and BEE.
- 5.1.28 Khumbulani and Sons Protection Services scored the highest on functionality.
- 5.1.29 On 6 December 2013, the BEC recommended Khumbulani and Sons Protection Services and the BAC approved it on the same date as the preferred service provider for the duration of three (3) years at a cost of R3 021 497.64, notwithstanding the fact that they did not provide a police clearance certificate.
- 5.1.30 Immediately after the decision of the BAC which was taken on 6 December 2013, the Legal Aid SA Procurement Department published on its Legal Aid SA's website on 24 January 2014 that the security tender was awarded to Khumbulani and Sons Protection Services. However, there was no offer and acceptance yet.
- 5.1.31 On 24 January 2014, a Government Tender Bulletin was also issued which stated that Khumbulani and Sons Protection Services had been awarded the tender on 2 December 2013.
- 5.1.32 In a bizarre twist of events, Legal Aid SA later confirmed and admitted through the Acting Chief Operations Officer: Ms Rebecca Hlabatau on 5 August 2015 by a letter addressed to Corruption Watch, that Khumbulani and Sons Protection Services was never appointed to render security services to the Legal Aid SA previously, as claimed.
- 5.1.33 Despite a request to Mr Hundermark, my office was not provided with the actual copy of the appointment letter of Ulwazi Protection Services in order to

determine who approved the awarding of the tender. Instead, on 19 February 2018, my office was provided with the BAC's approval letter which was signed by Mr Mtati on 17 March 2014.

Application of the relevant legal prescripts

- 5.1.34 Section 217(1) of the Constitution⁷ provides that; *“when an organ of the 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”*.
- 5.1.35 It was expected therefore of the Legal Aid SA to adhere to the constitutional requirement of fairness as envisaged in terms of section 217 of the Constitution in dealing with the bid of Khumbulani and Sons Protection Services. By incorrectly concluding that Khumbulani and Sons Protection Services had previously rendered security services to the Legal Aid SA and its employees were implicated in burglaries would by all accounts manifestly be unfair.
- 5.1.36 Section 3(1)(a) of the Public Finance Management Act⁸ (PFMA) provides that the Act applies to public entities and Legal Aid SA is one such entity contemplated herein.
- 5.1.37 Section 2 of the Legal Aid SA Act, 2014 establishes the Legal Aid SA as a national public entity which has a Board and Chief Executive Officer as its accounting officer. The financial management of the Legal Aid SA, being a public national entity, is subject to the provisions of the PFMA. Ms Vedalankar

⁷ 1996 Constitution of the Republic of South Africa.

⁹ Act 01 of 1999.

¹⁰ Act 01 of 1999.

was the CEO of Legal Aid SA at the time of this matter and as such she was the accounting officer contemplated above.

5.1.38 Section 38(1)(a) of the PFMA provides that the accounting officer for a department, constitutional institution or trading entity must have and maintain effective, efficient and transparent systems of financial and risk management and internal control.

5.1.39 The Legal Aid SA developed and adopted its Supply Chain Management Policy (SCM Policy) as a guideline to the management and staff of Legal Aid SA about procurement of goods and services. Standards, norms or guidelines for procurement are spelt out in this policy for all the Legal Aid SA officials.

5.1.40 Section 38(1)(c) of the PFMA states that the accounting officer for an institution must prevent unauthorised, irregular, fruitless and wasteful expenditure or losses resulting from criminal conduct. It was expected of Ms Vidhu Vedalankar as an accounting officer of Legal Aid SA to put measures in place to prevent such irregular expenditure or losses.

5.1.41 Regulation 9 which deals with unauthorised, irregular, fruitless and wasteful expenditure of the National Treasury Regulations: March 2005 [Sections 38(1)(g) and 76(2)(e) of the PFMA] (National Treasury Regulations) issued in terms of PFMA provides that:

“The accounting officer of an institution must exercise all reasonable care to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure, and must for this purpose implement effective, efficient and transparent processes of financial and risk management”.

5.1.42 When an official of an institution discovers unauthorised, irregular or fruitless and wasteful expenditure, that official must immediately report such

expenditure to the accounting officer. In the case of a department, such expenditure must also be reported in the monthly report, as required by section 38(1)(g) of the PFMA. Irregular expenditure incurred by a department in contravention of tender procedures must also be brought to the notice of the relevant tender board or procurement authority, treasury whichever applicable."

5.1.43 Section 1 of the PFMA defines an *irregular expenditure* as follows:

"Expenditure other than unauthorised expenditure that is incurred in contravention of or that is not in accordance with a requirement of any applicable legislation..."

5.1.44 Section 36(1) of PFMA provides that:

- (1) "Every department and every constitutional institution must have an accounting officer.*
- (2) Subject to subsection (3)—*
 - (a) the head of a department must be the accounting officer for the department; and*
 - (b) the chief executive officer of a constitutional institution must be the accounting officer for that institution".*

5.1.45 In terms of Schedule 3A and C of the National Treasury's Code of Conduct for Bid Adjudication Committees Regulation 2(5):

"The Bid Adjudication Committee must ensure that:

- i. all necessary bid documents have been submitted;*

- ii. *disqualifications are justified and that valid and accountable reasons/ motivations furnished for passing over of bids;*
- iii. *scoring has been fair, consistent and correctly calculated and applied; and*
- iv. *bidders' declarations of interest have been taken cognisance of."*

5.1.46 In terms of schedule 3A and C of the National Treasury's Code of Conduct for Bid Adjudication Committees Regulation 2(6);

"if a bid other than the one recommended by the BEC is approved by the BAC; the accounting officer must be notified and after consideration of the reasons for deviation, ratify or reject the decision of the BAC. If the decision of the BAC to approve a bid other than the one recommended by the BEC is ratified, the Auditor-General, the relevant Provincial treasury and the National Treasury must be notified of the reasons for deviation from such recommendation".

5.1.47 In terms of the legislative provisions traversed above, it was expected of the Legal Aid SA to notify its Board, the Auditor-General, the National Treasury of the reasons for rescission or deviation or rejection from such recommendations as made by the BEC and approved by its BAC. Failure to do that by the Legal Aid SA would be flouting the above legal provisions.

5.1.48 In terms of Clause 5(11) of Legal Aid SA Supply Chain Management Policy;

"Upon detecting that a tenderer submitted false information regarding its B-BBEE status level of contributor, local production and content, or any other matter which will affect or has affected the evaluation of a tender, or where a

tenderer has failed to declare any subcontracting arrangements, the following must be done:-

- (a) the tenderer must be informed accordingly;*
- (b) the tenderer must be given an opportunity to make representations within 14 days as to why:
 - i. the tender submitted should not be disqualified, or, if the tender has been awarded to the tenderer, the contract should not be terminated in part or whole;*
 - ii. if the successful tenderer subcontracted a portion of the tender to another party without disclosing it, the tenderer should be penalised up to 10% of the contract value; and*
 - iii. the tenderer should not be restricted by the National Treasury from conducting business for a period not exceeding 10 years with any organ of state.**
- (c) If, after considering representations, it is found that the tenderer did submit false information, the tender should be disqualified or the contract should be terminated in whole or part.*
- (d) If, it is found that the successful tenderer subcontracted a portion of the tender without disclosing it, the tenderer should be penalised up to 10% of the contract value.*
- (e) All such cases, including action taken, must be reported to National Treasury. Submissions must also state whether the tenderer should be restricted from conducting business with all organs of state”.*

5.1.49 By not informing and affording Khumbulani and Sons Protection Services an opportunity to make representations within fourteen (14) days why its tender should be disqualified for not submitting a Police Clearance was at odds with the provisions of clause 5(11) of Legal Aid SA's Supply Chain Management Policy.

- 5.1.50 The use of the words ***“any other matter which will affect or has affected the evaluation of a tender”*** in clause 5(11) of Legal Aid SA's Supply Chain Management Policy shows that the section is to be given a wider meaning when processing tender documents and that the authors had intended for the bidder to be given an opportunity to make representations before a final determination on their bid is made.

Response to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994

- 5.1.51 On 27 June 2019, I signed off and subsequently issued all implicated Legal Aid SA officials including other parties with direct interest on this matter with a notice in terms of section 7(9)(a) of the Public Protector Act, with a view to afford them an opportunity to respond to the allegations against them, particularly in relation to the role they played in this matter. Section 7(9)(a) of the Public Protector Act provides that: -

“If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances”.

- 5.1.52 I now turn to consider the responses submitted regarding the section 7(9) notices (hereinafter referred to as notice/s). I have however, not dealt with each and every aspect raised in the responses but that should not be misconstrued as an admission of any kind of the averments contained therein.

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- 5.1.53 A response was received by my office on 15 July 2019 on behalf of Messrs Thembile Mtati, Solly Sekgota, Rebecca Hlabatau, Avie Naidoo, Vela Mdaka and Buhle Sesiko from Ms Vidhu Vedalankar (Ms Vedalankar): CEO of Legal Aid SA.
- 5.1.54 Ms Vedalankar argued that I have not afforded them an opportunity to test the veracity of the evidence presented by the anonymous complainant and any other witness, therefore my conclusions are not in accordance with the law.
- 5.1.55 The above submission by Ms Vedalankar stands to be rejected on the basis that this notice served to afford Legal Aid SA the very same opportunity to confirm or rebut evidence on which my provisional findings are premised. Moreover, this matter was reported anonymously as a protected disclosure, and as such there is a reasonable risk that access to documents in my file would lead to the disclosure of the identity of the whistle blower which I have a legal duty to protect.
- 5.1.56 Replying to my notice, Ms Vedalankar further contended that Mr Mtati did not instruct the BEC to prepare the report but instead requested the BEC in his capacity as the Chairperson of the BAC to review the evaluation of the bidders based on the information that was disclosed by Mr Hlatshwayo to Mr Mtati. It had been reported that the approved service provider Khumbulani and Sons Protection Services is the same Service Provider which previously rendered poor service to Legal Aid SA.
- 5.1.57 Ms Vedalankar further submitted, when replying to my notice that, it was not an instruction from Mr Mtati to include the information which was brought to his attention but to investigate and confirm the veracity of the said information in re-evaluating the bids.

- 5.1.58 However, it is to be noted that besides the outcome of the said investigation which revealed that Khumbulani and Sons Protection Services never provided any Security Services to Legal Aid SA before, the BEC as requested by Mr Mtati prepared a report which sought approval of the BAC to rescind the decision of the BAC taken on 6 December 2013 approving the appointment of Khumbulani and Sons Protection Services as the preferred bidder for the tender Number 07/2013 and to recommend the appointment of Ulwazi Protection Services as the service provider that scored the highest points.
- 5.1.59 The above mentioned BEC report which is in my possession, states that the major issues considered by the BEC in the re-evaluation are the poor incidents which, included amongst others:
- (1) Employment of illegal foreign nationals with forged and fraudulent security clearance certificates;
 - (2) Breakage and theft in the building by the employed security personnel and one of the former security personnel was subsequently arrested and convicted.
- 5.1.60 Noteworthy is that paragraph 16A9.2 (a)(i),(ii)(iii) and 16A9.2(b) of the National Treasury Regulations issued in March 2005 in terms of the Public Finance Management Act, 1999 states that the Accounting Officer or Accounting Authority- may disregard the bid of any bidder, or any of its directors who among others, have failed to perform on any previous contract. It further states that, the Accounting Officer must inform the relevant Treasury of any action taken in terms of paragraph (a).

- 5.1.61 Mr Patrick Hundermark (Mr Hundermark), Chief Legal Executive of the Legal Aid SA advocated my contention in his response letter to my office dated 5 July 2017, by stating that, the above Regulations specifically delegate the Accounting Officer, to disregard the bid of any bidder who has failed to perform on any previous occasion. In this instance, the decision to disregard the bid should have therefore been taken by the CEO as the accounting officer and not BAC. Mr Hundermark further conceded that it also appears that the National Treasury was not informed of this cancellation by Legal Aid SA.
- 5.1.62 It further warrants noting that the issue of not providing a police clearance certificate by Khumbulani and Sons Protection Services as repeatedly mentioned by Ms Vedalankar in her response is never mentioned in the report which is the basis of rescinding the decision of the BAC taken on 6 December 2013 approving the appointment of Khumbulani and Sons Protection Services as the preferred bidder for the tender Number 07/2013 and to recommend the appointment of Ulwazi Protection Services as the service provider that had scored the highest points.
- 5.1.63 Moreover, Ms Rebecca Hlabatau, the Acting Chief Operations Officer of Legal Aid SA in her response letter to Corruption Watch dated 5 August 2015, submitted that Legal Aid SA confirms that through their internal investigations, they have established that Khumbulani and Sons Protection Services is not the same entity as Khumbulani Golden Ndlovu. She further submitted that it was a mistaken identity (*error in persona*) since the previous company which rendered sub-standard services to Legal Aid SA was commonly referred to as Khumbulani. Mr Hundermark corroborated the above statement by Ms Hlabatau in his response email to my Office dated 22 May 2018, stating that an investigation was conducted establishing that there was mistaken identity.

- 5.1.64 A response was received by my office on the 19 July 2019 from Mr Andrew Montane: former Infrastructure Supervisor of Legal Aid SA.
- 5.1.65 Mr Andrew Montane, the former Infrastructure Supervisor of Legal Aid SA who was a member of the BEC for this tender in question, submitted in his response to my notice that, Cipro search was done hence the report detected that the service provider that rendered unsatisfactory work to Legal Aid SA was not Khumbulani and Sons Protection Services. However, the instruction from the BAC remained constant that the BEC should revise the functionality score of Khumbulani and Sons Protection Services. He further submitted that the first report that was submitted for approval to the BAC for consideration was in favour of Khumbulani and Sons Protection Services and it was approved and the award was published on the Legal Aid SA Website.
- 5.1.66 Based on the *prima facie* evidence traversed above, I am persuaded to agree with the Complainant's submission that on February 2014 the Head of the Department, Mr Mtati instructed the BEC to change the winning bidder, Khumbulani and Sons Protection Services, as he does not want it as a service provider. I further agree with Complainant's submission that the BEC and the BAC was made aware that Khumbulani and Sons Protection Services never provided security services to the Legal Aid SA and none of its employees were ever charged for breaking into Legal Aid SA building, therefore, the basis for disqualifying Khumbulani and Sons Protection Services were factually incorrect.
- 5.1.67 It can be submitted therefore that the information used to rescind the decision of the BAC taken on 6 December 2013 approving the appointment of Khumbulani and Sons Protection Services as the preferred bidder for tender Number 07/2013 and to recommend the appointment of Ulwazi Protection Services as the service provider that had scored the highest points, was wrong

and possibly known to be wrong by Mr Mtati and other BAC and BEC members. Further that the decision to rescind the bid was taken by the person (Mr Mtati) who had no legal authority to do so. I further submit that the pleading of ignorance of the true information by Legal Aid SA after the investigation about Khumbulani and Sons Protection Services was provided to them, could not be justified as mistaken identity (*error in persona*) as claimed.

5.1.68 Ms Vedalankar further submitted, in response to my notice that there is evidence which my Office has not considered, namely the letter from Khumbulani Golden Ndlovu Trading Services, CK 2006/015213/23 supporting the tender proposal of Khumbulani and Sons Protection Services for tender 07/2013. The letter states that-*“Khumbulani and Sons Protection Services is taking its employees from the above mentioned trading centre, KGN Trading Centre, PSIRA Registration, 1358512/T1377”*. The same company which previously deployed security personnel who failed to prevent theft from within the premises of Legal Aid SA.

5.1.69 I submit that the above mentioned letter was never provided to my Office by Legal Aid SA during my investigation and it was only provided for the first time together with a response to my notice. However, it does not follow automatically from the above letter that Khumbulani and Sons Protection Services is the same company as Khumbulani Golden Ndlovu Trading Services. It would be unfair to generalise and conclude merely on the basis that because Khumbulani and Sons Protection Services train or source its employees from Khumbulani Golden Ndlovu Trading Services, that all its security guards are involved in crime. At the end, these are two separate and independent entities and Legal Aid SA knew that reality.

Conclusion

5.1.70 Based on the exposition of the evidence gathered, it can be concluded that the Legal Aid SA did not conduct itself in compliance with the applicable legal prescripts namely, the Constitution, the PFMA and its Supply Chain Management Policy during this process.

5.2 Regarding whether the Legal Aid SA's decision to rescind the appointment of a successful bidder resulted in improper prejudice to the Legal Aid SA and Khumbulani and Sons Protection Services in the circumstances.

Common cause issues

5.2.1 In February 2014, Mr Mtati instructed the BEC to prepare a report requesting a rescission of the decision of the BAC taken on 6 December 2013, approving the appointment of Khumbulani and Sons Protection Services and recommended that Ulwazi Protection Services be appointed instead.

5.2.2 The BEC subsequently submitted the report which sought to firstly, rescind the award made to Khumbulani and Sons Protection Services and secondly, recommending Ulwazi Protection Services as the successful bidder.

5.2.3 On 17 March 2014, the BAC approved the awarding of the Security tender to Ulwazi Protection Services for a period of three (3) years at the cost of R3 921, 644.16.

Issues in dispute

- 5.2.4 The Complainant and Khumbulani and Sons Protection Services argued that Khumbulani and Sons Protection Services suffered improper prejudice as a result of Legal Aid SA's unlawful elimination of its bid. Such prejudice takes the form of unfair treatment, unfair discrimination, and loss of business and trade opportunity.
- 5.2.5 The Director of Khumbulani and Sons Protection Services, Mr SK Maphosa, handed in to my team a summary of the financial costs dated 15 December 2018 which he incurred in preparation of this tender. The costs included security guards uniform, security equipment and legal costs to the value of **R262 800.00**. However, Mr Maphosa did not furnish my office with the actual invoices for the costs claimed, instead he indicated that invoices were lost when he changed offices some time ago. My office is evidence based and in the absence of invoices showing the actual expenditure, I am unable to place any weight on this figure claimed by Mr Maphosa.
- 5.2.6 Had the decision to award Khumbulani and Sons Protection Services the tender as recommended by the BAC not been rescinded, it would have given Khumbulani and Sons Protection Services a three (3) year contract with a financial value of **R3 021 497.76** as per its quote.
- 5.2.7 However, due to the unlawful rescission of the BAC's decision to award Khumbulani and Sons Protection Services by Legal Aid SA, this service

provider unfairly lost out on financial business and trade opportunity to the value of R3 021 497.76.

Application of the relevant legal prescripts

5.2.8 Section 2 of the Constitution⁹ lays the foundation for the control of public power. It provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

5.2.9 Section 33 of the Constitution provides, that:

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

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

5.2.10 The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law¹⁰. It has been revealed by this investigation as already shown above that the Legal Aid SA did not comply with the above constitutional injunctions by failing to give Khumbulani and Sons Protection Services written reasons for their decision or administrative action. If regard is made to the nature and subject matter of the

⁹ Constitution of the Republic of South Africa, 1996.

¹⁰ Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 1999 (4) SA 788 (T) at paragraph 20.

power exercised by Legal Aid SA in this matter, it would not be wrong to characterise the Legal Aid SA's decision to disqualify and or rescind its BEC and BAC's approval of Khumbulani and Sons Protection Services bid as administrative action within the meaning in terms of Section 33 of the Constitution. It was, however, the exercise of public power which had to be carried out lawfully and consistently within the provisions of the Constitution in so far as they may be applicable to the exercise of such power.

5.2.11 Mr Mtati did not bother to investigate whether Khumbulani and Sons Protection Services has indeed previously rendered unsatisfactory Security Services to the Legal Aid SA before he instructed or requested the BEC and BAC to rescind the decision to appoint Khumbulani and Sons Protection Services as the successful bidder. He merely acted upon the mere *ipse dixit* of the volunteered information. His action was therefore unreasonable, irrational and procedurally unfair as it was later discovered through Legal Aid SA's internal investigations that Khumbulani and Sons Protection Services never rendered any services to the Legal Aid SA.

5.2.12 In *S v Makwanyane*,¹¹ Ackermann J characterised the new constitutional order in the following terms:

"We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order".

¹¹ *S v Makwanyane and another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665 at paragraph 156.

5.2.13 Similarly, in *Prinsloo v Van Der Linde*¹² and *Another*, the Court held that:

“The constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state”.

5.2.14 Section 3 of Promotion of Administrative Justice Act ¹³(PAJA) provides for a procedurally fair administrative action affecting any person as follows:

- (1) *“Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*
- (2)(a) *A fair administrative procedure depends on the circumstances of each case.*
- (b) *In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –*
 - (i) *adequate notice of the nature and purpose of the proposed administrative action;*
 - (ii) *a reasonable opportunity to make representations;*
 - (iii) *a clear statement of the administrative action;*
 - (iv) *adequate notice of any right of review or internal appeal, where applicable; and*
 - (v) *adequate notice of the right to request reasons in terms of section 5”.*

¹² *Prinsloo v Van Der Linde and another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 25.

¹³Act 3 of 2000.

- 5.2.15 The PFMA was enacted to regulate financial management in all spheres of government ; to ensure that all revenue, expenditure, assets and liabilities are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management; and to provide for matters connected therewith. The PFMA is the national legislation envisaged in section 216 of the Constitution¹⁴ and seeks to give effect to, amongst others, the values underpinning sections 217¹⁵ and 195 of the Constitution¹⁶.
- 5.2.16 In broad strokes, each of these constitutional and legal provisions assigns the role of financial accountability to a functionary within the state organ concerned fleshes out the powers and duties of such a functionary; and enjoins all other officials within the state organ to ensure financial regularity and discipline.
- 5.2.17 Section 45 of PFMA which regulates the responsibilities of other officials and provides as follows—
- “An official in a department, trading entity or constitutional institution—*
- (a) ...
- (b) ...
- must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due”.*
- 5.2.18 All the expenses incurred as a result of payments made to Ulwazi Protection Services, as a security service provider to Legal Aid SA, amount to irregular expenditure by Legal Aid SA and by corollary to infringement of sections 38

and 45 of PFMA since its award of a tender was done in contravention of applicable legal prescripts as defined above.

5.2.19 Section 6(1) of PAJA provides for a judicial review of administrative action as follows:

“(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it –

(i)...

(ii)...

or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken –

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

- (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
- (v) *in bad faith; or*
- (vi) *arbitrarily or capriciously;*
- (f) *the action itself –*
 - (i) *contravenes a law or is not authorised by the empowering provision; or*
 - (ii) *is not rationally connected to –*
 - (aa) *the purpose for which it was taken;*
 - (bb) *the purpose of the empowering provision;*
 - (cc) *the information before the administrator; or*
 - (dd) *the reasons given for it by the administrator;*
- (g) *the action concerned consists of a failure to take a decision;*
- (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the power or performed the function; or*
- (i) *the action is otherwise unconstitutional or unlawful”.*

5.2.20 Powers are not conferred in the abstract. They are intended to serve a particular purpose. That purpose can be discerned from the legislation that is

the source of the power and this ordinarily places limits upon the manner in which it is to be exercised by the executive officials¹⁷.

5.2.21 From all the foregoing legal prescripts, it is apparent that the disqualification of Khumbulani and Sons Protection Services was premised upon material errors of facts, law and fundamentally flawed reasoning. Although it may have been sensible for the Legal Aid SA to disqualify Khumbulani and Sons Protection Services due to failure to file Police Clearance, section 3(2)(b) of PAJA demands that the administrator must give them a notice and an adequate opportunity to make representations. In contradistinction to the dictates of the said provisions, the Legal Aid SA did not afford Khumbulani and Sons Protection Services such an opportunity to make representations.

5.2.22 Similarly, it is also gleaned from the cursory reading of section 6(1)(2) of PAJA that a court or tribunal has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias; a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; the action was procedurally unfair; the action was materially influenced by an error of law etc. In the Container Logistics case¹⁸ the court said that:

“No doubt administrative action which is not in accordance with the behests of the empowering legislation is unlawful and therefore unconstitutional, and action which does not meet the requirements of

¹⁷ Cf S v Manelis 1965 (1) SA 748 (A) at paragraph 755 H.

natural justice is procedurally unfair and therefore equally unconstitutional”.

5.2.23 In this matter, it is manifestly clear that Legal Aid SA failed to comply with the above legal and constitutional provisions, in dealing with the bid of Khumbulani and Sons Protection Services.

5.2.24 In my view, the decision and procedure to eliminate Khumbulani and Sons Protection Services was materially premised upon manifest errors of law and facts. Khumbulani and Sons Protection Services was not given notice and an opportunity to make representations as required by the PAJA and Legal Aid SA SCM Policy. In the same breath, it was factually incorrect for the Legal Aid SA to disqualify Khumbulani and Sons Protection Services on the wrong premise that it had previously rendered unsatisfactory services to the Legal Aid SA when in fact, it did not.

Response to the Notice in terms of the provisions of section 7(9)(a) of the Public Protector Act, 1994

5.2.25 A response was received by my office on 15 July 2019 on behalf of Messrs Thembile Mtati, Solly Sekgota, Rebecca Hlabatau, Avie Naidoo, Vela Mdaka and Buhle Sesiko from Ms Vidhu Vedalankar (Ms Vedalankar): CEO of Legal Aid SA.

5.2.26 Replying to my notice, Ms Vedalankar argued that the statement that Legal Aid SA failed to provide written reasons is factually incorrect. Legal Aid SA received the letter from Mabaso Attorneys dated 02 April 2014, who represented Khumbulani and Sons Protection Services. Legal Aid SA replied and provided the reasons relating to the failure to meet the Police Clearance

requirements. Further it was the role of the BEC, led by its Chairperson to investigate the correctness of the information and to correctly convey information to BAC. This information should have been scrutinised by BAC for correctness and it was not the duty of an individual member of the BAC.

- 5.2.27 The letter from Legal Aid SA to Mabaso Attorneys could not be seen as the written reasons contemplated in section 33 of the Constitution and in section 5 of PAJA. This letter from Legal Aid SA was only provided to Khumbulani and Sons Protection Services once Mabaso Attorneys demanded clarity in writing from Legal Aid SA. In this letter and in response to the demand by Mabaso Attorneys, Legal Aid SA only advanced lack of Police Clearance as the reason for disqualifying Khumbulani and Sons Protection Services. As argued above, this cannot be a sound or valid reason to disqualify a bidder since Legal Aid SA had a legal duty by law to provide the bidder a reasonable opportunity to make representation with regard to any document that was outstanding.
- 5.2.28 Over and above, Legal Aid SA did not volunteer to give reasons to Khumbulani and Sons Protection Services as required by law. Instead, a reason was given a year later after Khumbulani and Sons Protection Services requested such reasons through Mabaso Attorneys.
- 5.2.29 I therefore, submit that Khumbulani and Sons Protection Services was prejudiced in a sense that Legal Aid SA did not give Khumbulani and Sons Protection Services a reasonable opportunity to make a representation as required in terms both Clause 5(11) of Legal Aid SA Supply Chain Management Policy and Section 3(2) (b)(ii) of PAJA, as non-submission of police clearance certificate affected the evaluation of this tender.

- 5.2.30 A response was received by my office on 12 July 2019 from Ms Lina Sedibeng (Ms Sedibeng) former Procurement Manager: of Legal Aid SA.
- 5.2.31 Replying to my notice, Ms Sedibeng submitted that she served as a procurement manager during the period of evaluation of the tender for security services and her duty was to advise the BAC on compliance with the PFMA in awarding the tender. During the period of the evaluation of the security tender, she compiled a report to the BAC, wherein she advised the Committee that the award of the tender to Khumbulani and Sons Protection Services would be fair, equitable, transparent, cost effective and competitive. The BAC approved the report and awarded the tender to Khumbulani and Sons Protection Services that was during December 2013. This was done in the presence of a representative from the Internal Audit Department which had audited the proceedings. She then advertised the award of the security tender to Khumbulani and Sons Protection Services on the Legal Aid SA website.
- 5.2.32 Ms Sedibeng submitted that, at the beginning of 2014, she was told by the Corporate Services Manager: Mr Solly Sekgota that the COO, Mr Jerry Makokoane would not like to work with Khumbulani and Sons as they worked for the organisation before and performed poorly. A letter to rescind the decision of the BAC was compiled and the second highest scoring bidder (Ulwazi Protection Services) was awarded the tender.
- 5.2.33 Ms Sedibeng submitted further in her response that just like Khumbulani and Sons Protection Services, Ulwazi Protection Services did not have the police clearance certificate on file, but the Corporate Service Manager Mr Solly Sekgota requested the certificate telephonically. The awarding of the tender to Ulwazi Protection Services did not comply with the provisions of the PFMA,

and no due diligence was performed before rescinding the decision to award the tender to Khumbulani and Sons Protection Services.

5.2.34 I am persuaded to accept Ms Sedibeng's submission that due diligence was not done. If it was indeed done, it should have revealed whether Khumbulani and Sons Protection Services and its directors, trustees or shareholders are listed on the Register for Tender Defaulters and the List of Restricted Suppliers. Further that Khumbulani and Sons Protection Services should have been afforded an opportunity to submit a police clearance certificate as it was a case with Ulwazi Protection Services. It is therefore apparent that the Legal Aid SA's decision to rescind the appointment of a successful bidder was biased and resulted in improper prejudice to Khumbulani and Sons Protection Services.

5.2.35 Ms Vedalankar further argued that, the conclusion that Khumbulani and Sons Protection Services had lost out financial business and trade opportunity amounting to R3 021 497.76 cannot be correct. There is no evidence of the alleged damages suffered by Khumbulani and Sons Protection Services. Khumbulani and Sons Protection Services would have to prove the financial or delictual damages allegedly suffered by them as a result of revocation of the awarding of the tender. It is furthermore submitted that it is not within the Public Protector's mandate to determine or ascertain alleged contractual damages suffered.

Conclusion

5.2.36 It follows therefore as shown in the evidence discussed above, that the decision of Legal Aid SA to rescind the initial decision of the BAC to appoint Khumbulani and Sons Protection Services as the successful bidder was

riddled and compounded with bias, material errors of law and facts as well as contravention of Constitution and the PFMA.

- 5.2.37 Khumbulani and Sons Protection Services lost out on business and trade opportunity amounting to **R3 021 497.76** and was therefore grossly prejudiced by disqualifying of its bid by Legal Aid SA which was unlawful and based on material errors of facts and palpable bias.

6. FINDINGS

Having regard to the evidence, and the regulatory framework setting the standard that should have been upheld by the Legal Aid SA and the impact on the complainant, I am likely to make the following adverse findings against the Legal Aid SA:

- 6.1 **Regarding whether the Legal Aid SA irregularly rescinded the decision of the Bid Adjudication Committee in approving the appointment of Khumbulani and Sons Protection Services as the successful bidder for tender 07/2013.**
- 6.1.1 The allegation that Legal Aid SA irregularly rescinded the decision of the BAC in approving the appointment of Khumbulani and Sons Protection Services as the successful bidder for tender 07/2013 is substantiated.
- 6.1.2 The Legal Aid SA and in particular members of the BEC, BAC, Mr Mtati, Ms Vedalankar, failed to adhere to the constitutional demands of procedural fairness, transparency, lawfulness and reasonableness as envisaged in

terms of sections 217 and Section 33 of the Constitution when dealing with the bid of Khumbulani and Sons Protection Services.

- 6.1.3 By incorrectly concluding that Khumbulani and Sons Protection Services had previously rendered security services to the Legal Aid SA that was not satisfactory, that its employees were implicated in burglaries of Legal Aid SA building, when in fact that was not the case, such act was grossly unfair to Khumbulani and Sons Protection Services.
- 6.1.4 Disqualifying Khumbulani and Sons Protection Services on the basis of mistaken identity was also grossly unfair, as it was later established that they never provided security services to the Legal Aid SA before and it was mistakenly identified as Khumbulani Golden Ndlovu.
- 6.1.5 By not informing and affording Khumbulani and Sons and opportunity to make a representation within fourteen (14) days as to why their submitted tender/bid should be disqualified for not submitting a Police Clearance, such was at odds with the provisions of clause 5(11) of the Legal Aid SA's Supply Chain Management Policy, which requires that bidders/tenderers be given such an opportunity.
- 6.1.6 The Legal Aid SA also failed to notify the Auditor-General, and the National Treasury of the reasons for rescission or deviation from such recommendations as made by its BEC and as approved by its BAC, as required by Schedule 3A and C of the PFMA, Code of Conduct for Bid Adjudication Committees Regulation 2(6); and Section 38(1)(c) of the PFMA which states amongst other things that the accounting officer for an institution must prevent, irregular expenditure.

- 6.1.7 The awarding of the tender to Ulwazi Protection Services was therefore irregular since it was made after an unlawful rescission of the BAC decision. Any subsequent financial payment for such security services as may have been rendered by Ulwazi Protection Services to Legal Aid SA amounted to an irregular expenditure which is prohibited by sections 38 and 45 of PFMA.
- 6.1.8 Such failure constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 6.2 **Regarding whether the Legal Aid SA's decision to rescind the appointment of a successful bidder resulted in improper prejudice to the Legal Aid SA and Khumbulani and Sons Protection Services in the circumstances.**
- 6.2.1 The allegation that the Legal Aid SA's decision to rescind the appointment of a successful bidder resulted in improper prejudice to the Legal Aid SA and Khumbulani and Sons Protection Services in the circumstances is substantiated.
- 6.2.2 Such prejudice takes the form of unfair treatment, unfair discrimination, irregular expenditure and loss of business and trade opportunity. Legal Aid SA's conduct is also at odds with section 195(1)(d) of the Constitution which requires that services must be provided impartially, fairly, equitably and without bias. All the expenses incurred as a result of payments made to Ulwazi Protection Services, as a security service provider to Legal Aid SA, amount to irregular expenditure by Legal Aid SA and by corollary to a violation

of sections 38 and 45 of PFMA since its award of the tender was done in contravention of applicable legal prescripts and to the unfair discrimination of Khumbulani and Sons Protection Services.

6.2.3 Due to the unlawful rescission of the BAC's decision to award Khumbulani and Sons Protection Services by the Legal Aid SA, Khumbulani and Sons Protection Services unfairly lost out on financial business and trade opportunity to the tune of R3 021 497.76. However, it is not the duty or within the purview of the Public Protector to ascertain or pronounce on contractual damages save to indicate that such conduct by Legal Aid SA amounts to maladministration or improper conduct.

6.2.4 Accordingly I hold that such conduct and violations by Legal Aid SA 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.

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

7.1 The appropriate remedial actions that I am taking in terms of section 182(1)(c) of the Constitution, with a view of placing the Khumbulani and Sons Protection Services as close as possible to where he would have been had the tender irregularities at Legal Aid SA not occurred, are the following:

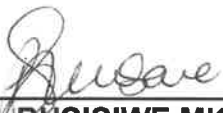
The Chairperson of the Board of the Legal Aid SA must take appropriate steps to ensure that:

- 7.2 The Legal Aid SA takes appropriate disciplinary steps against those implicated employees who are still in the employ of the Legal Aid SA within 30 working days of the issue of this report.
- 7.3 Any irregular and/or fruitless expenditure incurred by the Legal Aid SA, from any person who is liable in law, is recovered in accordance with the process prescribed in the National Treasury updated guidelines on irregular and/or fruitless expenditure within 60 working days of the issue of this report.
- 7.4 All Legal Aid SA officials who are involved in the Supply Chain Management processes including all the senior management in the Supply Chain Management, attend a workshop on the Procurement Policy and related legal prescripts within 30 working days of the issue of this report.
- The CEO of the Legal Aid SA must take appropriate steps to ensure that:**
- 7.5 The Legal Aid SA must within thirty (30) working days from the date of the report, write a formal letter of apology to the Manager of Khumbulani and Sons Protection Services, for the prejudice suffered as a result of this tender.

8. MONITORING

- 8.1 The Chairperson of the Board of the Legal Aid SA must, submit an Implementation Plan to my office within thirty (30) working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above will be implemented.
- 8.2 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 actions prescribed in this Report are legally binding on the CEO of Legal Aid SA, unless she obtains an *Interim Interdict* or *Court Order* directing otherwise.


ADV. BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 18/09/2019