

**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 MALADMINISTRATION  
AND IRREGULAR APPOINTMENT OF THE DIVISIONAL HEAD: MAINTENANCE AND  
THE IRREGULAR AWARDED OF TENDERS BY THE EKURHULENI  
METROPOLITAN MUNICIPALITY**

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## EXECUTIVE SUMMARY

- (i) This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution), and section 8(1) of the Public Protector Act, 1994 (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 and the irregular appointment of Mr Anthony Mulder, Divisional Head: Maintenance and the irregular awarding of tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012 by the Ekurhuleni Metropolitan Municipality (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 and investigated:**
  - (a) Whether the Municipality irregularly appointed Mr Mulder to the position of Divisional Head: Maintenance, without following its recruitment and selection policy;
  - (b) Whether the Municipality irregularly awarded tender number A-IS (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure;
  - (c) Whether there was an irregular escalation of the tender amount for tender number A-IS-(RW) 05-2012, without the approval of the former Municipal

Manager, Mr Ngema, and without following the Municipal Finance Management Act prescripts; and

- (d) Whether the appointment of Mr Mulder, and the issuing of tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012, prejudiced the taxpayers and residents of the Municipality, the Complainant, or any other party.
- (v) The investigation process included an exchange of correspondence and analysis of all relevant documents and application of all relevant laws, policies and related prescripts.
- (vi) Key laws and policies taken into account to determine if there has been maladministration by the Municipality and improper prejudice caused by its conduct, were principally those imposing administrative standards that should have been upheld by the Municipality in managing the appointment as well as the tender processes. Those are the following:
  - (a) The Constitution of the Republic of South Africa, Act 108 of 1996;
  - (b) The Public Protector Act, 23 of 1994;
  - (c) Municipal Finance Management Act, 56 of 2003;
  - (d) Municipal Systems Act, 32 of 2000;
  - (e) Construction Industry Development Board Act, 38 of 2000;
  - (f) Promotion of Administrative Justice Act, 3 of 2000
  - (g) Ekurhuleni Metropolitan Recruitment and Selection Policy, dated 14 September 2009;
  - (h) Ekurhuleni Metropolitan Supply Chain Management Policy;

- (i) Municipal Systems Act Regulation dated 7 March 2013 ; and
  - (j) The Ekurhuleni Metropolitan Municipality Code of Conduct.
- (vii) Having considered the submissions made and evidence uncovered during the investigation against the relevant regulatory framework, the complaint received as against the concomitant responses by the Municipality, I make the following findings:
- (a) **Regarding whether the Municipality irregularly appointed Mr Mulder to the position of Divisional Head: Maintenance, without following its recruitment and selection policy.**
  - (aa) The allegation that proper recruitment processes were not followed in the appointment of Mr Anthony Mulder as the Divisional Head: Maintenance, in that the shortlisting and interview panel members namely, Ms Gumbi, Ms Mbali Makara and Dr Imogen Mashazi shortlisted Mr Mulder even though he did not meet the requirements and allowed Mr Mulder to be interviewed eight months after the position was advertised, is substantiated.
  - (bb) The former Municipal Manager, Mr Ngema, approved the appointment of Mr Mulder notwithstanding the fact that Mr Mulder was not registered with the Engineering Council of South Africa (ECSA), as required in the advertisement. Such conduct was not in line with the dictates of section 56 of the Municipal Systems Act, and Paragraphs 1, 3, 5 and 7.1 of the Municipality's Recruitment and Selection Policy.
  - (cc) All the applications received and considered for the vacant position of Divisional Head: Maintenance were not submitted on the prescribed official application form. Such conduct by the Municipality was at odds with the

provisions of Clause 12 of the Municipal Systems Regulations, which provides that *"applications for a vacant post must be submitted on an official application form as set out in Annexure A and that any application not made on the official form shall not be considered"*.

- (dd) Accordingly, the appointment of Mr Mulder was irregular and amounts to improper conduct in terms 182(1)(a) 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 (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure.**
  - (aa) The allegation that the Municipality irregularly awarded tender number A-IS (RW) 03-2012, for the upgrading and construction of roads and storm water infrastructure, is substantiated.
  - (bb) The former Municipal Manager, Mr Ngema, and the Chairperson of the Bid Adjudication Committee, Mr Myeza, who had the delegated authority to make the final award of the tender, failed to ensure that the goods and services procured in relation to tender number A-IS (RW) 03-2012 were acquired in a fair, transparent, competitive and cost-effective manner, in that there were instances where service providers were issued Instructions to Perform Work(IPWs) without taking heed of instances where capacity to perform services was above the competency of appointed service providers. Such conduct amounted to the violation of section 217(1) of the Constitution and section 111 of the Local Government: Municipal Finance Management Act.

- (cc) Mr Ngema and Mr Myeza failed to execute their responsibilities diligently, as the management of tender number A-IS (RW) 03-2012 was not efficient or effective in that there was an over expenditure on the contract which resulted in an approval of a ratification regarding costs incurred due to continued work as from 1 July 2013 to 13 November 2013. It follows that such conduct was contrary to the provisions of section 217(1) of the Constitution.
- (dd) Accordingly, the conduct of Mr Ngema and Mr Myeza amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (c) **Regarding whether there was an irregular escalation of the amount for tender number A-IS-(RW) 05-2012 without the approval of the former Municipal Manager, Mr Ngema, and without following the Municipal Finance Management Act.**
- (aa) The allegation that there was an irregular escalation of the tender amount for tender number A-IS-(RW) 05-2012, without the approval of Mr Ngema who, as the Municipal Manager, was authorised to issue the final award of the tender and without following section 62 of the Municipal Finance Management Act, is substantiated, as payments were made to contractors even though they had not been given any instructions to perform work.
- (bb) The increment of the tender estimate amount from R 8 million to a total amount of R10 million without the authorisation of Mr Ngema as the accounting officer of the Municipality, was unlawful. Mr Ngema failed to ensure that there was re-advertisement of tender number A-IS (RW) 05-2012. Such conduct was not in line with the dictates of section 217(1) of the Constitution which demands 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.

- (cc) Mr Ngema did not ensure that appointed contractors complied with the Construction Industry Development Board Act (CIDB Act) grading and that they qualified for the tender if the monetary cap of the contract value was R 13 000 000.00. This conduct was not in keeping with Regulation 21 (1) (a) (iii) of the SCM policy and section 18 (1) of the CIDB Act, 38 of 2000.
- (dd) Mr Ngema failed to ensure that a verification process was conducted in respect of the bidders in order to ensure that their rating was properly conducted. Such conduct was not consistent with section 16 of the CIDB Act.
- (ee) Mr Ngema failed to ensure that the appointed contractors had the capacity to handle the scope of work in respect of the tender contract. Such conduct is irreconcilable with section 16(2) of the CIDB Act.
- (ff) The payments made to Opal Projects which exceeded R10 million by Mr Mulder, Mr van der Merwe, Mr Mohlabi and Mr Strydom, who were all deployed in the Department of Roads and Stormwater, was not justifiable and such conduct violated section 15 of the Municipal Systems Act.
- (gg) The failure by Mr Ngema as the accounting officer of the Municipality, and Mr Myeza, who was appointed as the Chief Executive Officer and acted as the Chairperson of the Bid Adjudication Committee, and Mr Rautenbach who was an employee in the Finance Department deployed in the Department of Roads and Stormwater, to ensure that the appointed contractors submitted their financial annual statements in respect of the tender amount that was R10 million, was in violation of clause 21 (1)(d) of the SCM policy.



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- (hh) Accordingly, the conduct by Mr Ngema, Mr van der Merwe: Acting Regional Director: Department of Roads and Storm Water, Mr Mohlabi: Divisional Head: Department of Roads and Storm Water, Mr Strydom: Regional Director: Department of Roads and Storm Water, Mr Myeza and Mr Rautenbach who were deployed in the Department of Roads and Stormwater, amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act
- (d) **Regarding whether the appointment of Mr Mulder and the issuing of tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012 prejudiced the Complainant, the taxpayers and residents of the Municipality or any other party.**
- (aa) Mr Ngema failed to conduct his duties as an accounting officer diligently when he approved the appointment of Mr Mulder even though he did not qualify for the position; he did not apply and was also not registered with ECSA as per the job advertisement.
- (bb) The decision by Mr Ngema to appoint Mr Mulder irregularly exposed the Complainant and other applicants to improper prejudice in that they were excluded from a fair opportunity to compete for the vacant position and or provide their skills and experience to the Municipality.
- (cc) Mr Ngema failed to re-advertise tender number A-IS (RW) 05-2012, when there was an increase in the total tender amount, as a result the Municipality could not ensure that there was adequate management of its finances in a manner that was cost effective and efficient when tender number A-IS (RW) 03-2012 and A-IS (RW) 05-2012 were awarded to appointed contractors. The conduct of the Municipality in the circumstances resulted in violation of section 195 of the

Constitution, sections 62, 78, and 173 of MFMA. Mr Ngema has since left and is no longer in the employ of the Municipality.

- (dd) Based on the above, the conduct of Mr Ngema, Mr van der Merwe, Mr Mohlabi, Mr Strydom, Mr Myeza and Mr Rautenbach, amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- (viii) **The appropriate remedial action that I am taking in pursuit of section 182(1)(c) of the Constitution is the following:**
  - (a) **The Municipal Manager, Dr Imogen Mashazi must ensure that:**
    - (aa) Within sixty (60) working days from the date of this report, disclose the all irregular expenditure to the Council, Treasury and Auditor General incurred by Municipality in connection with the irregular appointment of Mr Mulder to the position of a Divisional Head Maintenance.
    - (bb) Within 60 working days from the date of this report ensure that the Recruitment and Selection Policy of the Municipality is amended to provide for clarity and clear policy direction on the head-hunting process within the Municipality.
    - (cc) Disciplinary processes are instituted against Ms Lerato Gumbi and Ms Mbali Makara within 60 working days from the date of this report, as envisaged in section 67 (1) (h) of schedule 2 of the Code of conduct of municipal staff members for allowing Mr Mulder to be interviewed after a period of eight months without adhering to proper recruitment and selection processes of the Municipality. However, Dr Mashazi should not be part of the disciplinary proceedings herself since she was a panel member of the interview herself.

- (dd) Within sixty (60) working days from the date of this report, she initiates a judicial review process as prescribed in terms of sections 6 and 7 of the PAJA to set aside the appointment of Mr Mulder on the basis that he was irregularly appointed on the position which he did not meet the inherent requirements of the position as per the job advertisement.

**The Speaker of Council: Cllr Patricia Khumalo must ensure that:**

- (dd) Disciplinary processes as envisaged in section 67 (1) (h) of schedule 2 of the Code of conduct of municipal staff members are instituted against Dr I Mashazi within 60 working days from the date of this report for allowing Mr Mulder to be interviewed after a period of eight months without adhering to proper recruitment and selection processes of the Municipality. According to the schedule 2 of the Code of conduct of municipal staff members, Dr I Mashazi acted contrary to section 2 (d) as she failed to act in the best interest of the Municipality during the appointment of Mr Mulder and such conduct compromised the credibility and integrity of the Municipality. Mr Ngema is no longer in the employ of the Municipality.
- (ee) Disciplinary processes as envisaged in section 67 (1) (h) of schedule 2 of the Code of conduct of municipal staff members, are instituted against Mr Myeza for the final award of tender number A-IS (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure, without adhering to procurement processes as provided for in the MFMA.
- (ff) Disciplinary processes as envisaged in section 67 (1) (h) of schedule 2 of the Code of conduct of municipal staff members, are instituted against Mr Mulder, Mr van der Merwe, Mr Mohlabi, Mr Strydom, Mr Myeza and Mr Rautenbach for issuing appointment letters and making payments to contractors regarding



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tender number A-IS (RW) 05-2012 which was not approved by the former Municipal Manager: Mr Ngema.

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**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF  
MALADMINISTRATION AND IRREGULAR APPOINTMENT OF THE  
DIVISIONAL HEAD: MAINTENANCE AND THE IRREGULAR AWARDING  
OF TENDERS BY THE EKURHULENI 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 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:
- 1.2.1 The Premier of Gauteng Province, Mr D Makhura;
- 1.2.2 The Executive Mayor, Cllr Mzwandile Masina;
- 1.2.3 The Speaker, Cllr Patricia Khumalo;
- 1.2.4 The Municipal Manager, Dr Imogen Mashazi;
- 1.3 A copy of the report is also provided to the Complainant, Mr I Berg, to inform him about the outcome of the investigation.
- 1.4 The report relates to an investigation into allegations of maladministration and irregular appointment of Mr Anthony Mulder, Divisional Head: Maintenance

and irregular awarding of tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012 by the Ekurhuleni Metropolitan Municipality (the Municipality).

## **2. THE COMPLAINT**

2.1 The complaint was lodged with my office on 10 September 2014, by Mr I Berg (the Complainant) regarding alleged maladministration and irregular appointment of Mr Anthony Mulder, the Divisional Head: Maintenance and the irregular awarding of tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012 by the Municipality.

### **2.2 The Complainant alleged that:**

- 2.2.1 The Municipality advertised a vacant position of Divisional Head Maintenance: Roads and Storm-water;
- 2.2.2 Mr Mulder was appointed as the successful candidate even though he did not submit an application for the vacant position, and was not shortlisted;
- 2.2.3 Mr Mulder was apparently promised the position by T Qokoyi as per an instruction from the African National Congress (the ANC);
- 2.2.4 There was maladministration and tender irregularities by the Municipality in the award of tender number A-IS (RW) 03-2012, for the upgrading and construction of roads and storm water infrastructure;
- 2.2.5 The tender for road construction was used for repair, maintenance and rehabilitation of roads with a variation order of eighty (80) items at an additional cost of sixty percent (60%) compared to the market price; and

- 2.2.6 There was maladministration and tender irregularities by the Municipality in the award of tender number A-IS (RW) 05-2012, for the repair of road surfaces and replacement of failed foundation layers of surfaced roads. The purpose of the tender was for road patching and not road marking.

### 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. <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".*<sup>[2]</sup>
- 3.6 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (paragraph 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 (paragraph 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 (paragraph 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 (paragraph 69).

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<sup>[2]</sup> *Supra* at para [73].



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- 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 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).
- 3.11 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 (paragraph 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, (paragraph 71(a)).
- 3.13 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (paragraph 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 (paragraph 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:

- (a) *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).*
- (b) *There is nothing in the Public Protector Act that prohibits the Public Protector from instructing another entity to conduct further investigation, as she is empowered by section 6(4)(c)(ii) of the Public Protector Act (paragraphs 91 and 92).*
- (c) *Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraphs 100 and 101).*
  - (i) *Conduct an investigation.*
  - (ii) *Report on that conduct; and*
  - (iii) *To take remedial action.*
- (d) *The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (paragraph 104).*
- (e) *The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (paragraph 105).*
- (f) *The fact that there is no firm findings on the wrong doing, does not prohibit the Public Protector from taking remedial action. The Public Protector's observations constitute prima facie findings that point to serious misconduct (paragraphs 107 and 108).*

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

- 3.16 The Ekurhuleni Metropolitan Municipality is an organ of state and its conduct amounts to conduct in state affairs, as a result of this, the matter falls within the ambit of the Public Protector's mandate.
- 3.17 The jurisdiction of the Public Protector was not disputed by any of the parties in this matter.
- 3.18 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 constitute '*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 Constitution; whether my remedial action will redress the imbalance of the past. What constitute '*special circumstances*' depends on the merits of each case.

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## **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 During the investigation process, notices in terms of section 7(9)(a) of the Public Protector Act (section 7(9) notices), dated 3 July 2019 were served on Mr Kemi Behari, Divisional Head: Municipal Courts, By-law Enforcement, Prosecutions and Compliance on behalf of Cllr Patricia Khumalo, Cllr. Mzwandile Masina, Mr Khaya Ngema, Dr. Imogen Mashazi and Ms Phumla Sekhonyane, the Chief of Staff on behalf of the Premier, to afford them an opportunity to respond to my provisional findings.

4.1.3 An acknowledgment of receipt of the section 7(9) notices dated 3 July 2019 was submitted to my office by Mr Behari.

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

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

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

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- 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 Appeal<sup>1</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.
- 4.2.3 In this particular case, the factual enquiry primarily focused on whether or not there was maladministration and irregular appointment of Mr Tony Mulder, Divisional Head: Maintenance and irregular awarding of tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012 by the Municipality.
- 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 Municipality 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 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 it appointed Mr Tony Mulder, Divisional Head: Maintenance and awarded tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012.

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<sup>1</sup> *Public Protector versus Mail and Guardian*, 2011(4) SA 420 (SCA),

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- 4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where he or she would have been had the Municipality or organ of state complied with the regulatory framework setting the applicable standards for good administration.
- 4.2.6 In the case of conduct failure as was the case in 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 **Based on an analysis of the complaint, the following issues were identified and investigated:**
- 4.3.1 Whether the Municipality irregularly appointed Mr T Mulder to the position of Divisional Head: Maintenance, without following its recruitment and selection policy;
- 4.3.2 Whether the Municipality irregularly awarded tender number A-IS (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure;
- 4.3.3 Whether there was an irregular escalation of the amount for tender number A-IS-(RW) 05-2012, without the approval of the former Municipal Manager, Mr Ngema; and

4.3.4 Whether the conduct of the Ekurhuleni Metropolitan Municipality prejudiced the taxpayers and residents of the Municipality, Complainant and any other party in the circumstances.

#### 4.4 **The Key Sources of information**

##### 4.4.1 **Correspondence sent and received**

4.4.1.1 Allegations letter submitted to the Municipality by the Public Protector dated 4 November 2014;

4.4.1.2 Request for outstanding information by the Public Protector addressed to Mr Kemi Behari, Divisional Head: Municipal Courts, By-Law Enforcement and Compliance, dated 5 January 2015;

4.4.1.3 Reminder emails regarding the outstanding responses forwarded to Mr Thabo Phetoane, Senior Legal Advisor: Ekurhuleni Metropolitan Municipality, dated 13 July 2015 and 17 August 2015, respectively;

4.4.1.4 Correspondence dated 5 August 2015 from the Deputy Public Protector, Mr Kevin Malunga, addressed to Mr Ngema, the City Manager, regarding the non-cooperation of the Municipality with investigations conducted by the Office of the Public Protector;

4.4.1.5 Email reminder dated 17 September 2015 addressed to Mr Phetoane, regarding the outstanding information;

4.4.1.6 Email reminder dated 4 November 2015 addressed to Mr Phetoane and Mr Behari, regarding the outstanding information;

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- 4.4.1.7 Email reminder dated 19 November 2015 addressed to Mr Phetoane, regarding the outstanding information on the tender irregularity complaint;
  - 4.4.1.8 Email reminder dated 3 March 2016 addressed to Mr Phetoane and Mr Behari, regarding the outstanding information;
  - 4.4.1.9 Email reminder dated 28 April 2016 addressed to Mr Phetoane and Mr Behari, regarding the outstanding information;
  - 4.4.1.10 Correspondence dated 13 July 2016 addressed to Mr Behari requesting documents still outstanding;
  - 4.4.1.11 Email reminder dated 30 August 2016 addressed to Mr Phetoane and Mr Behari, regarding the outstanding information;
  - 4.4.1.12 Email reminder dated 22 September 2016 addressed to Mr Phetoane and Mr Behari, regarding documents identified as outstanding after analysis of the information received;
  - 4.4.1.13 Email reminder dated 18 November 2016 addressed to Mr Phetoane and Mr Behari, regarding documents identified as outstanding after analysis of the information received;
  - 4.4.1.14 Email reminder dated 30 January 2017 addressed to Mr Phetoane and Mr Behari, regarding documents identified as outstanding after analysis of the information received;
  - 4.4.1.15 Email to the Municipality dated 7 February 2017 granting extension for submission of documents.



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4.4.1.16 A response from the Municipality dated 19 February 2013.

**4.4.2 Supporting documentation submitted by the Municipality with the response letter:**

4.4.2.1.1 A copy of the advertisement for the Divisional Head: Maintenance;

4.4.2.1.2 A report for the approval of the shortlist and interview panel;

4.4.2.1.3 A report for the approval of the appointment of the Divisional Head: Maintenance;

4.4.2.1.4 A copy of the application of Mr Anthony Mulder submitted via email;

4.4.2.1.5 A copy of the appointment letter of Mr Anthony Mulder;

4.4.2.1.6 A copy of qualifications of Mr Anthony Mulder;

4.4.2.1.7 A report of the assessment of Mr Anthony Mulder;

4.4.2.1.8 The Recruitment and Selection Policy of the Ekurhuleni Metropolitan Municipality;

4.4.2.1.9 Copies of the tender number A-IS(RW) 05-2012;

4.4.2.1.10 A copy of the tender advertisement: tender number A-IS(RW) 05-2012;

4.4.2.1.11 Copies of the appointment letters of the appointed service providers;

4.4.2.1.12 Minutes of the Bid Evaluation Committee;

4.4.2.1.13 Minutes of the Bid Adjudication Committee;

4.4.2.1.14 A copy of the tender specifications;

4.4.2.1.15 Copies of tender number A-IS(RW) 03-2012;

4.4.2.1.16 A copy of the Bid Specification Resolution;

4.4.2.1.17 A copy of the Bid Specification;

4.4.2.1.18 A copy of the tender advert: tender number A-IS(RW) 03-2012;

4.4.2.1.19 A copy of the briefing session attendance register and minutes;

4.4.2.1.20 A copy of the Bid Evaluation Committee minutes dated 9 February 2012;

4.4.2.1.21 A copy of the Bid Evaluation Committee minutes dated 1 March 2012;

4.4.2.1.22 A copy of the Bid Evaluation Committee minutes dated 17 July 2014 for ratification;

4.4.2.1.23 A copy of the Bid Adjudication Committee minutes dated 5 March 2012;

4.4.2.1.24 A copy of the Bid Adjudication Committee minutes dated 26 March 2012; and

4.4.2.1.25 A copy of the Bid Evaluation Committee minutes dated 19 January 2012.

#### **4.4.3 Legislation and other legal prescripts**

4.4.3.1 The Constitution of the Republic of South Africa, 1996;

4.4.3.2 The Public Protector Act 23 of 1994;

4.4.3.3 Municipal Finance Management Act 56 of 2003;

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- 4.4.3.4      Municipal Systems Act 32 of 2000;
  - 4.4.3.5      Construction Industry Development Board Act 38 of 2000;
  - 4.4.3.6      Promotion of Administrative Justice Act 3 of 2000;
  - 4.4.3.7      Ekurhuleni Metropolitan Recruitment and Selection Policy dated 14 September 2009;
  - 4.4.3.8      Ekurhuleni Metropolitan Supply Chain Management Policy; and
  - 4.4.3.9      Municipal Systems Act Regulation dated 07 March 2013.

#### **4.4.4      Case Law**

- 4.4.4.1      *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC);
- 4.4.4.2      *President of the Republic of South Africa v Office of the Public Protector and Others*, Case no 91139/2016 [2017] ZAGPPHC 747; and
- 4.4.4.3      *Public Protector v Mail and Guardian*, 2011(4) SA 420 (SCA);

## **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 Ekurhuleni Metropolitan Municipality irregularly appointed Mr Mulder to the position of Divisional Head: Maintenance without following its recruitment and selection policy**

#### *Common cause issues*

5.1.1 The Municipality issued an advert internally and externally in the *Sunday Times* newspaper for the vacant position of Divisional Head: Maintenance with reference number RS/ Main, during November 2012 with a closing date of 23 November 2012.

5.1.2 The job requirements for the vacant position comprised of the following:

- “(a) Degree in Civil Engineering (BEng/BTech or equivalent);*
- (b) Registered with ECSA as a Professional Engineer or Professional Technologist (Civil Engineering);*
- (c) Eight (8) years relevant management experience of which at least four (4) years must have been at Senior Management level;*
- (d) Strategic capability and leadership skills;*
- (e) Operation financial management competency;*
- (f) Strong stakeholder relationship skills;*
- (g) Programme and project management skills; and*
- (h) Sound understanding of road and storm-water infrastructure planning and management”.*

5.1.3 A copy of an undated consolidated list submitted to my office in response to the allegations letter dated 4 November 2014 reflected that the Municipality received a total number of thirty (30) applications for the vacant position.

5.1.4 The details of the applicants who applied for the vacant position are reflected on the consolidated list as follows:

Candidate No.	Surname	Initials	Category
1.	Chabeli	L	Not Recommended
2.	Dlamini	M L	Not Recommended
3.	<b>Du Plessis</b>	<b>P N</b>	<b>Recommended</b>
4.	Du Plooy	C	Possible
5.	Dudumashe	F	Not Recommended
6.	Hlabangwane	W S	Not Recommended
7.	Madula	E	Not Recommended
8.	Mahlaba	T S	Possible
9.	Manyatshe	F	Not Recommended
10.	Mathebula	P	Not Recommended
11.	Mawila	F B	Not Recommended
12.	Modiba	S L	Not Recommended
13.	Mogodi-Baloyi	G M	Not Recommended
14.	Motloding	M S	Not Recommended
15.	Mphelo	I E S M	Not Recommended
16.	Mphosi	I V	Not Recommended
17.	Msolo	N	Not Recommended
18.	Mudzuli	M L	Not Recommended
19.	Ndawo	M N	Not Recommended
20.	<b>Ngozwana</b>	<b>T A</b>	<b>Recommended</b>

21.	Njana	T D	Not Recommended
22.	Nyambeni	L N	Not Recommended
23.	Okonta	F N	Not Recommended
24.	Ramonyadiwa	M D	Not Recommended
25.	Shivambu	M T	Not Recommended
26.	<b>Strydom</b>	<b>G J</b>	<b>Recommended</b>
27.	Sulaiman	F	Not Recommended
28.	Tembe	D I	Not Recommended
29.	Thekiso	R	Not Recommended
30.	Tshabalala	D P	Not Recommended

#### Issues in dispute

- 5.1.5 The Complainant submitted that Mr Mulder was appointed by the Municipality without following proper recruitment processes, in that he did not submit an application for the vacant post and his name was not on the consolidated list of applicants.
- 5.1.6 Correspondence dated 19 February 2013 from Ms Gumbi, the Head of Department: Human Resources within the Municipality, addressed to Mr Ngema, was submitted to my office during the investigation, and it comprised of a report regarding a requisition for approval of the proposed shortlist and interviewing panel for the vacant post.
- 5.1.7 Based on the above mentioned requisition, it was indicated that only four (4) applicants met the core requirements as per the job profile for the position and their details were reflected as follows:

No	Applicant	Internal/External	Qualification	Experience
1.	Thabo Steven Mahlaba	External	<ul style="list-style-type: none"> <li>• Grade 12 -1993</li> <li>• National Diploma: Civil Engineering-1996</li> <li>• BTech: Construction Management(Civil Engineering)- 2002</li> <li>• Registered as a Professional Engineering Technologist</li> </ul>	<ul style="list-style-type: none"> <li>• 2012 to date : contracts Manager(Mokgotsi Construction JV)</li> <li>• 2007-2012: Regional Manager Operations(Ekurhuleni Metro Municipality)</li> <li>• 2004-2007: Depot Manager Ekurhuleni Metro Municipality (Ekurhuleni Metro Municipality)</li> <li>• 2000-2003: Senior Engineering Technician: Roads &amp; Storm water(Brakpan Town Council)</li> <li>• 1997-1999: Engineering Technician(Protekon Construction)</li> </ul>
2.	Thabiso Ambrose Ngozwana	External	<ul style="list-style-type: none"> <li>• BSc: Civil Engineering-1983</li> <li>• Master of Engineering Science: Civil Engineering-1991</li> </ul>	<ul style="list-style-type: none"> <li>• 2012 to date: Civil Engineering Expert(O &amp; M-Development Bank of Southern Africa)</li> <li>• 2010-2012: Technical Training Specialist(Development Bank of Southern Africa)</li> <li>• 2010: Resident Engineer(NML Consulting Engineers)</li> <li>• 2007-2010: General Manager: Infrastructure(Matatiele Local Municipality)</li> <li>• 2007: Executive Director: Infrastructure</li> </ul>

				<p>(Matjhabeng Local Municipality)</p> <ul style="list-style-type: none"> <li>• 1996-2006- Director(Roads Infrastructure)</li> <li>• 1997-1999: Project Manager(RB Project Management (Pty) Ltd)</li> <li>• 1996-1997: Project Manager(RB Project Management (Pty) Ltd)</li> <li>• 1996:Project Engineer (RB Project Management (Pty) Ltd)</li> <li>• 1992-1995: Senior Roads Engineer(Botswana Roads Department)</li> <li>• 1991-1992: Senior Roads Engineer (Lesotho Roads Department)</li> <li>• 1987-1989: Roads Engineer: Design (Lesotho Roads Department)</li> <li>• 1985-1987: Assistant Roads Engineer(Lesotho Roads Department)</li> </ul>
3.	Anthony Shane Mulder	Internal	<ul style="list-style-type: none"> <li>• Matric Certificate</li> <li>• National Higher Diploma for Technicians (Civil Engineering )</li> <li>• Masters Diploma in Technology( B Tech equivalent)</li> </ul>	<ul style="list-style-type: none"> <li>• Jan 2013-to date: Acting Head of Department(Ekurhuleni Metropolitan Municipality)</li> <li>• 2009-2013: Acting Regional Director: Eastern Region-Roads Transport &amp; Civil Works(Ekurhuleni Metropolitan Municipality)</li> <li>• 2003-2009: Regional Executive Manager: Operations Divisions-Eastern region – Infrastructure</li> </ul>



				<p>Services Department (Ekurhuleni Metropolitan Municipality)</p> <ul style="list-style-type: none"> <li>• 1996-2003: Deputy City Engineer-City Engineers Department(Greater Benoni City Council)</li> <li>• 1991-1996: Senior Technologist-City Engineers Department(Greater Benoni City Council)</li> <li>• 1982-1991: Technologist-City Engineers Department(Greater Benoni City Council)</li> <li>• 1981-1982: Site Agent-Civil Engineering Contractors (Basil Read (Pty) Ltd)</li> <li>• 1979-1981: Engineering Technician-City Engineers Department(Benoni City Council)</li> <li>• 1976-1979: Civil Engineering Technician-Basil Read (Pty) Ltd</li> <li>• 1973-1976: Learner Technician-Basil Read (Pty) Ltd</li> </ul>
4.	Phillip Niel Du Plessis	Internal	<ul style="list-style-type: none"> <li>• BSc Eng. Civil</li> <li>• B Eng.(Hons )-Transportation</li> <li>• Develop and Promote Labour Intensive Construction Strategies –NQF 7</li> <li>• Advanced Project Management Engineers for</li> <li>• Infrastructure Asset Management Engineers for</li> </ul>	<ul style="list-style-type: none"> <li>• Nov 2003 to date: Regional Director: Roads, Transport &amp; Civil Works(Northern Region-Ekurhuleni Metropolitan Municipality)</li> <li>• June 1995-Oct 2003: City Engineer/Director: Civil Engineering and Urban</li> </ul>

			<ul style="list-style-type: none"> <li>• Road Traffic Signs- Design and Implementation (SARF)</li> </ul>	Planning (Springs City Council) <ul style="list-style-type: none"> <li>• May 1994-May 1995: Deputy Town Engineer-Building and Planning (Springs Civil Council)</li> <li>• Aug 1990-Apr 1994: Assistant Town Engineer: Forward Planning(Spring s Civil Council)</li> <li>• Jan 1978-Jul 1990: Engineer in Training/ Engineer/ Senior Engineer(Gaute ng Department of Roads &amp; Transport)</li> </ul>
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5.1.8 The requisition letter from Ms Gumbi also recommended that the interviewing panel members to be appointed must comprise of the following representatives in the Municipality:

- (a) Chief Operations Officer;
- (b) Head of Department: Enterprise Project Management Office; and
- (c) Head of Department: Human Resources: Ms Lerato Gumbi.

5.1.9 The requisition for the proposed shortlist and interview panel, for Divisional Head: Maintenance, was approved by Mr Ngema on 20 February 2013.

5.1.10 The Municipality appointed Mr Anthony Mulder as the Divisional Head of Maintenance.

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- 5.1.11 A letter of appointment dated 14 August 2013 was issued to Mr Anthony Mulder on a fixed-term contract with effect from 1 October 2013 until 30 September 2018.
- 5.1.12 Mr Anthony Mulder submitted a signed acceptance form dated 16 August 2013 to the Municipality.
- 5.1.13 Furthermore, there was a contract of employment that was concluded between the Municipality and Mr Mulder, which was signed by Mr Ngema on behalf of the Municipality on 23 October 2013 and the successful applicant signed on 1 October 2013.
- 5.1.14 In a response letter dated 18 November 2015 from Ms Manzana Mokoena, Divisional Head: Workforce Capacity Management, she indicated that Mr Mulder submitted his application to the Municipality for the vacant position of Divisional Head: Maintenance.
- 5.1.15 She further argued that Mr Mulder met the requirements for the position as per the job profile and that his appointment was made in accordance with all the relevant regulations and recruitment policies, despite the fact that there was no indication of him being registered with the Engineering Council of South Africa (ECSA) as a Professional Engineer or Professional Technologist (Civil Engineering).
- 5.1.16 In the correspondence dated 20 February 2017 from Ms Manzana Mokoena, further information was submitted to my office in response relating to the allegations letter initially sent to the Municipality dated 4 November 2014. It was indicated that the shortlisting and the appointment of Mr Mulder was done in accordance with the Municipality's Recruitment Policy dated 14 September 2009 (the Recruitment Policy).
- 5.1.17 The Municipality contended that Mr Mulder submitted an application for the vacant position and as a result, he was shortlisted to be interviewed.

- 5.1.18 During the period of 2017 and 2018, my office solicited further responses and supporting documentation regarding the allegations but the information was not provided by the Municipality.
- 5.1.19 As per correspondence dated 12 March 2019 from the Municipality in response to a further information request letter dated 18 February 2019, Mr Kemi Behari, Divisional Head: Municipal Courts, By-law Enforcement, Prosecution and Compliance, indicated that the reason Mr Mulder was only interviewed after a period of eight months and his details were not in the consolidated list of shortlisted candidates might have been as a result of the Municipality having used a headhunting process which was managed by a service provider. However, the Municipality did not have that information at its disposal.
- 5.1.20 He further indicated that where the service provider would run a headhunting process, the agents would be permitted to source a Curriculum Vitae in order to present it to the client.
- 5.1.21 Based on the Interview Time Schedule of the Municipality, the following short listed applicants were interviewed on 7 March 2013 and 13 August 2013, respectively:

No.	Candidate Name	Time	Date
1.	Mr Phillip Du Plessis	09h30-10h15	7 March 2013
2.	Mr Thando Mahlaba	10h15-11h00	7 March 2013
3.	Mr Anthony Mulder	15h00-15h45	13 August 2013

5.1.22 During the interviews held on 7 March 2013, the interview panel allocated the following scores to the applicants, respectively:

**(a) Mr Phillip Du Plessis**

Date	Panel Members	Candidate	Score
7 March 2013	Dr Imogen Mashazi	Mr Phillip Du Plessis	24
	Dr Bethuel Sehlapelo		23
	Ms Lerato Gumbi		
	Mrs Mbali Makara (Human Communications Observer)		Score not awarded to Candidate
	<b>Total: 47</b>		

**(b) Mr Thabo Mahlaba**

Date	Panel Members	Candidate	Score
7 March 2013	Dr Imogen Mashazi	Mr Thabo Mahlaba	23
	Dr Bethuel Sehlapelo		27
	Ms Lerato Gumbi		
	Mrs Mbali Makara (Human Communications Observer)		Score not awarded to Candidate
	<b>Total: 50</b>		

- 5.1.23 During the interview session that was conducted on 13 August 2013, the interview panel awarded the applicant the following scores:

**(c) Mr Anthony Mulder**

Date	Panel Members	Candidate	Score
13 August 2013	Dr Imogen Mashazi	Mr Anthony Mulder	31
	Dr Bethuel Sehlapelo		37
	Ms Lerato Gumbi		
	Mr Andrew Christie(Human Communications Observer)		32
	<b>Total: 100</b>		

- 5.1.24 Correspondence dated 27 August 2013 from Ms Gumbi addressed to the former Municipal Manager indicated that the interviewing panel made recommendations based on the interview scores allocated to the applicants and their individual competencies.
- 5.1.25 The panel recommended that Mr Mulder should be appointed as Divisional Head: Maintenance, as he scored very well during the interviews and his psychometric assessment indicated that he was a good match for the position as further indicated in the table below:

No.	Candidate	Reasons for recommendations	Decision of the Panel
1.	Mr Anthony Mulder	<ul style="list-style-type: none"> <li>The candidate had strong experience within the Roads and Storm Water environment</li> <li>Responded adequately to the questions posed by the interview panel and was able to link same with practical experiences</li> </ul>	Highly recommended for the position

2.	Mr Thabo Mahlaba	<ul style="list-style-type: none"> <li>The candidate came across as strategically strong but might need mentorship</li> <li>Appeared to possess the requisite capacity</li> </ul>	Recommended for the position based on assessment results
3.	Mr Phillip Du Plessis	<ul style="list-style-type: none"> <li>Although the candidate possessed the necessary capability, he did not measure up to the required competencies for the position</li> </ul>	The candidate was not recommended for the position

- 5.1.26 The recommendations of the interview panel as reflected in the above letter was approved by Mr Ngema on 27 August 2013.
- 5.1.27 The Municipality affirmed that Mr Anthony Mulder was issued with an appointment letter as Divisional Head: Maintenance in the Roads and Stormwater Department dated 14 August 2013 and also submitted to my office a signed acceptance form by Mr Mulder dated 12 August 2013 and 16 August 2013, respectively.
- 5.1.28 The appointment letter issued by the former Municipal Manager indicated that the appointee was appointed by Council to the position of Divisional Head: Maintenance in the Roads and Stormwater Department in terms of section 56 of the Systems Act for a period of five (5) years with effect from 1 October 2013 until 30 September 2018.
- 5.1.29 The salary package amounting to R 1 040 497 per annum, was offered to Mr Mulder on total cost to Council as agreed by the Remuneration Committee to be structured in accordance with the guidelines of the South African Revenue Services (SARS) and he accepted the offer of appointment to be the Divisional Head: Maintenance on 16 August 2013.

- 5.1.30 It should be noted that during the investigation, the application documents of the successful candidate revealed that Mr Mulder was not registered with ECSA.

**Response to section 7(9) notice from the Municipal Manager, Mr Ayanda Makhanya.**

- 5.1.31 On 2 July 2019, I issued a section 7(9) notice to the Municipality notifying them of my intended findings on this matter.
- 5.1.32 My office received an acknowledgment of receipt on the section 7 (9) notice from Mr Behari (Divisional Head: Municipal Courts, By-law Enforcement, Prosecutions and Compliance), and on 30 July 2019 the Divisional Head: Governance and Compliance, Mr Moshe Maphoru, submitted a response on behalf of the Head of Department: Roads and Stormwater, Mr Sizwe Cele (Mr Cele).
- 5.1.33 Mr Cele submitted that the allegations in relation to the irregular appointment of Mr Mulder as the Divisional Head: Maintenance without following the Recruitment and Selection Policy would not be responded into as it falls outside the mandate of the Department of the Roads and Stormwater.

**Application of the relevant legal framework**

- 5.1.34 Section 56 the Municipal Systems Act No 32 of 2000 provides that:

“(a) ...;

(b) *A person appointed as a manager in terms of paragraph (a), must have the relevant skills and expertise to perform the duties associated with the*



*post in question, taking into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination”.*

5.1.35 According to a report dated 19 February 2013 addressed to Mr Ngema, Mr Mulder possessed the relevant skills and expertise to perform the duties required for the position of Divisional Head: Maintenance and had the requisite skills and expertise for the vacant position. The evidence obtained regarding the application document of Mr Mulder however showed that he was not registered with ECSA as per the requirements of the job profile in the advertisement. Therefore, the Municipality did not consider all the requirements of the advert when shortlisting and appointing Mr Mulder.

5.1.36 Clause 12 of the Local Government: Municipal Systems Act<sup>2</sup> Regulations No 36223<sup>3</sup> provides that:

*“(1) Applications for a vacant post must be submitted on an official application form as set out in Annexure A;*

*(2) Any application not made on the official form shall not be considered”.*

5.1.37 Based on the evidence in my possession, it was noted that the Municipality did not have the prescribed official application form as required by the Municipal Systems Regulation.

5.1.38 Accordingly the Municipality was required to uphold the purpose and spirit of the abovementioned regulation during the recruitment process for the vacant post of Divisional Head: Maintenance.

<sup>2</sup> No 32 of 2000

<sup>3</sup> dated 07 March 2013

- 5.1.39 The preamble to the Ekurhuleni Metropolitan Municipality Recruitment Policy dated 14 September 2009 (hereinafter referred to as Recruitment Policy) as entailed in Paragraph 1 stipulates that:

*“The Ekurhuleni Metropolitan Municipality is committed to fair and transparent recruitment, selection and placement practices”.*

- 5.1.40 The selection process followed by the Municipality in the appointment of Mr Mulder was contrary to the recruitment and placement practices in the Recruitment Policy, in that he was shortlisted and appointed in the vacant post even though his details were not on the consolidated list comprising of all the prospective applicants, who had an interest in the post. It was noted that the successful candidate was only interviewed eight months after other prospective applicants had been interviewed by the Municipality.

- 5.1.41 Paragraph 3 of the Recruitment policy stipulates the purpose of the policy as:

*“to recruit, appoint and retain the suitably qualified candidates, to form a demographically balanced workforce, with the intention of providing effective service delivery to the community”.*

- 5.1.42 Paragraph 5 of the Recruitment Policy provides the following:

*“(a) ...;*

*(b) ...;*

*(c) ...;*

*(d) Shortlisting will be done on the basis of minimum approved qualifications, experience and skill in terms of the approved Job Description”.*

5.1.43 Based on the evidence in my possession, Mr Mulder had the required educational qualifications, but was not registered with ECSA and therefore did not comply with all the requirements as per the advertisement and the Recruitment Policy.

5.1.44 Paragraph 7.1 of the Recruitment Policy provides that:

*“Applicants on the shortlist have to be invited at least five (5) working days prior to the interview”.*

5.1.45 According to evidence submitted to my office by the Municipality, it was noted that interviews for Divisional Head: Maintenance post were held on two occasions, 7 March 2013 and 13 August 2013, respectively.

5.1.46 Mr Mulder was only interviewed by the Municipality eight months after the initial interviews were held for no apparent reason.

#### Conclusion

5.1.47 Based on the consolidated list obtained from the Municipality, it is clear that a total number of thirty (30) applications from prospective applicants were received for the vacant post of Divisional Head: Maintenance in the Roads and Stormwater Department. It is also evident that Mr Mulder’s name was not included in the consolidated list of the thirty (30) applications.

5.1.48 However, the Municipality shortlisted four (4) candidates which included Mr Mulder.

5.1.49 It is clear that Mr Mulder was interviewed by the Municipality on 13 August 2013, which was eight months after other candidates had been interviewed.

5.1.50 Therefore it is clear that the Municipality failed to adhere to the legal provisions as entailed in the Regulations of the Municipal Systems Act and its Recruitment Policy when Mr Mulder was appointed as Divisional Head: Maintenance.

**5.2 Regarding whether the Ekurhuleni Metropolitan Municipality irregularly awarded tender number A-IS (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure.**

Common cause issues

5.2.1 On 12 August 2011 the Municipality issued tender number A-IS (RW) 03-2012 with reference number PRN 06/2011 for the upgrading and construction of roads and storm water infrastructure.

5.2.2 The tender was advertised in the *Sowetan* and *Star* newspapers with a closing date of 13 September 2011, the service was on an “*as and when required basis*” with effect from the date of the award until 31 December 2013.

5.2.3 The abovementioned tender was awarded by the Municipality to a total number of twelve (12) contractors, namely:

No	Contractor/s
1.	Motaung Creations CC
2.	African Moon Trading 52 CC
3.	Boitshoko Road Surfacing & Civil Works CC
4.	Mebila Civil(Pty) Ltd
5.	Khumo ya Kgomotso

6.	Seletje Construction and Management CC
7.	Nyoni Projects (Pty) Ltd
8.	Asatiko Civil and Construction (Pty) Ltd
9.	Superway Construction (Pty) Ltd
10.	White Hazy Building Construction CC
11.	Gorogang Plant Hire
12.	Moseme Road Construction (Pty) Ltd

- 5.2.4 The estimated total value of the proposed contract was R792 347 497.42 (excluding vat & escalations).

Issues in dispute

- 5.2.5 The Complainant submitted that there was maladministration and irregularities on the part of the Municipality in the awarding of the tender.
- 5.2.6 The Complainant also argued that the tender was aimed at repairing, maintaining and rehabilitation of roads with a variation order of tariffs or quotes comprising of eighty (80) unspecified items at an additional cost of sixty percent (60%), compared to the market related prices without justifiable reason.
- 5.2.7 He further submitted that for instance tariffs for milling of existing tar on resurfacing tender was R50/m<sup>3</sup> and the variation order tariff was R412/m<sup>3</sup> which was eight hundred percent (800%) more.
- 5.2.8 A memorandum dated 13 December 2017 from Mr Anthony Mulder, the Municipal's Divisional Head: Roads and Storm water, in response to my office as per allegations letter dated 4 November 2014, disputed that there was any maladministration and irregularities in the awarding of the tender.

- 5.2.9 In the abovementioned memorandum it was also submitted that there were no variation orders nor Instruction to Perform Work ("IPW") issued under that contract.
- 5.2.10 A copy of the unsigned Bid Specification Committee Resolution minutes dated 5 August 2011 reflected that it was resolved that the bid would be advertised on 12 August 2011 with a closing date of 13 September 2011.
- 5.2.11 The abovementioned minutes from the Municipality indicated that the Bid Specification Committee also resolved that Mr D Sadiki, Head of Roads: Kempton Park Head Quarters, would be the responsible Project Manager and that the contract be awarded to 9-12 contractors on "*an as and when required basis*".
- 5.2.12 An undated copy of the scope of work marked as "Annexure C" reflected that the major items of work to be carried out under contract number A-IS(RW) 03-2012 were as follows:

No.	Service/s	Scope
1	General	1. Confirmation of identified roads 2. Liaising with relevant stakeholders 3. Establishing camp and plant on site 4. Accommodation of supervisor staff 5. Discovery, exposing and demarcation of existing services to be protected and or relocated 6. Setting out of the works
2	Drainage	1. Storm water pipes and culverts including all manholes, catch pits, junction boxes, channels, kerbs etc. 2. Concrete lined open channel
3	Road works	1. Opening and closing of borrow pits 2. Clearing and grubbing 3. Excavation for roads, roadbed compaction and construction of pavement layers, as directed by the Engineer 4. Dump rock/gravel fill as required

		5. The application of prime and tack coats 6. Premix surfacing 7. Road surface marking and road signs 8. Cleaning site as work progresses 9. Final finishing and tidying
4	Services	1. Provision of ducts for existing and future services, as directed by the Engineer 2. Relocation of existing services, as directed by the Engineer 3. Protection of existing services 4. Identification and location of known and unknown services
5	Correction of defects in the Works in accordance with the requirements specified in the contract documents	

- 5.2.13 On the undated copy of the scope of work document submitted by the Municipality, it was indicated that the location of works would be in the Municipality boundaries.
- 5.2.14 On 24 August 2011, a compulsory briefing session was chaired by Mr Mulder as Chairperson of the Bid Specification Committee with the assistance of Mr P Du Plessis, Region Director: Northern Region and Mr David Sadiki, Head of Roads Head Quarters, Kempton Park.
- 5.2.15 There were a total of twelve hundred and twelve (212) attendees during the briefing session for the tender.
- 5.2.16 The overview of the works comprised of roads and storm water systems in the Municipality, which related to construction of roads, with kerbing on both sides and associated storm water drains and appurtenant structures.

- 5.2.17 Based on the undated copy of the scope of work marked as “Annexure C”, the Municipality anticipated that a total number of nine (9) contractors would be appointed for the tender.
- 5.2.18 The Municipality submitted that a total number of seventy-five (75) bids were received for the tender, and the Bid Evaluation Committee met on 26 January 2012 with the objective of soliciting approval of awarding the tender to successful bidders.
- 5.2.19 The Bid Evaluation Committee recommended that the awarding of contract A-IS(RW) 03-2012 should be issued to the following contractors:

No	Contractor/s	Bid No.	Amount
1.	Motaung Creations CC	44	R 61 318,397.50
2.	African Moon Trading 52 CC	49	R 62 745, 188.50
3.	Boitshoko Road Surfacing & Civil Works CC	20	R 65 443,512.88
4.	Mebila Civil(Pty) Ltd	21	R 65 862,623.10
5.	Khumo ya Kgomotso	69	R 67 985,731.04
6.	Seletje Construction and Management CC	32	R 67 985,731.04
7.	Nyoni Projects (Pty) Ltd	22	R 67 985,731.04
8.	Asatiko Civil and Construction (Pty) Ltd	31	R 67 985,731.04
9.	Superway Construction (Pty) Ltd	5	R 67 985,731.04
10.	White Hazy Building Construction CC	12	R 67 985,731.04
11.	Gorogang Plant Hire	11	R 67 985,731.04
12.	Moseme Road Construction (Pty) Ltd	24	R 67 985,731.04

- 5.2.20 On the Bid Evaluation Committee minutes dated 1 March 2012, the estimated total value for the proposed contract was an amount of R792 347 497.42 (Excluding Vat & Escalations).
- 5.2.21 According to the minutes of the Bid Evaluation Committee, the contract was deemed to be above R10 million (Vat included) and the above contractors were issued with contracts on 7 March 2012.



- 5.2.22 Mr Myeza, Chairperson of the Bid Adjudication Committee, was thus authorised by a delegation of authority to make the final award for the tender in terms of section 5(2) (a) of the Supply Chain Management Policy (the SCM Policy) and to regularise the process.
- 5.2.23 The Municipality contended that the contractors were appointed based on estimated quantities.
- 5.2.24 During the Bid Evaluation Committee Meeting held on 7 July 2014, correspondence dated 21 July 2014 prepared by Mr Mkhonza was addressed to the former Municipal Manager.
- 5.2.25 The correspondence entailed a requisition to ratify the specification in terms of clause 36(1)(b) of the SCM Policy regarding the action of the Head of Department of Roads and Storm water for exceeding the expenditure on the instruction to perform work (IPW's) issued and payment of the outstanding invoices, which were as follows:

No	Contractor/s	BAC Estimated Approval Amount(Excluding VAT & Escalation)	BAC Estimated Total IPW's issued	Expenditure to date( Including VAT & Retention)	Expenditure to date from other Departments Including VAT	Outstanding Invoices to date
1	Motaung Creations CC	R 61 318,397.50	R 96 221 000	R 96 221 000	R 6 647 868	-
2	African Moon Trading 52 CC	R 62 745, 188.50	R 68 870 000	R 68 870 000	R7 794 609	R 10 592 339.96
3	Boitshoko Road Surfacing & Civil Works CC	R 65 443,512.88	R 107 008 600	R 107 008 600	R 7 458 867	-
4	Mebila Civil(Pty) Ltd	R 65 862,623.10	R 88 840 000	R 88 840 000	-	R 5 136 108.59
5	Seletje Construction and Management CC	R 67 985,731.04	R 118 800 000	R 118 800 000	R 2 800 981	R 3 340 905.96

6	Nyoni Projects (Pty) Ltd	R 67 985,731.04	R 119 775 000	R 119 775 000	R 200 000	R 3 218 440.29
7	Asatiko Civil and Construction (Pty) Ltd	R 67 985,731.04	R 82 160 000	R 82 160 000	R 635 370	-
8	Superway Construction (Pty) Ltd	R 67 985,731.04	R 181 035 000	R 181 035 000	R 4 350 066	-
9	White Hazy Building Construction CC	R 67 985,731.04	R 104 000 000	R 104 000 000	R 13 634 665	-
10	Gorogang Plant Hire	R 67 985,731.04	R 126 640 000	R 126 640 000	R 2356 439	R 2 334 192.95
11	Moseme Road Construction (Pty) Ltd	R 67 985,731.04	R 139 000 000	R 139 000 000	R 8 247 546	R 2 109 742.75

5.2.26 The abovementioned requisition submitted to Mr Ngema to rectify payments of the outstanding invoices was approved on 21 July 2014 and it indicated that the strategic priority would be in relation to the following:

No.	Yes / No	Strategic Priority
1.	Yes	Good governance
2.	Yes	LED/ Poverty Alleviation / Job Creation
3.	Yes	Urban Renewal
4.	Yes	Safety and Security
5.	No	HIV/ AIDS
6.	Yes	Skills Development
5.	Yes	Infrastructure and Maintenance Backlogs

5.2.27 Further, that there were approved variation orders made by suppliers for the tender in question and that all the relevant documentation was provided to Mr Davey Frank, appointed Legal Representative of the Municipality, as he was in a process of initiating litigation.

5.2.28 It ought to be noted that as from 2014 to 2016 there was undue delay to provide my office with the requisite documentation and responses requested as per the

allegations letter. As a result of continuous engagements with the Municipality, correspondence dated 5 March 2016 from the Divisional Head: Municipal Courts, By-Laws Enforcement & Compliance, Mr Behari addressed to my office comprised of the following variation orders dated 16 October 2013 submitted to the Municipality by Seletje Construction and Management CC:

- 5.2.28.1 Sealing team;
  - 5.2.28.2 Slurry team;
  - 5.2.28.3 Diluted emulsion team;
  - 5.2.28.4 Deep milling machine and team ;
  - 5.2.28.5 Crack seal unit;
  - 5.2.28.6 Moving plant and equipment (as approved by the Engineer);
  - 5.2.28.7 Seal (chip and spray) & asphalt teams;
  - 5.2.28.8 Clearing and cleaning of existing surfaced roads(manual labour, 6 meter tipper truck);
  - 5.2.28.9 Pruning of trees and removal of cutting;
  - 5.2.28.10 Breaking up existing pavement layer;
  - 5.2.28.11 Patching and repairing edge breaks;
  - 5.2.28.12 Asphalt base and surfacing(Backfilling of excavations for patching and potholes);
  - 5.2.28.13 Treatment of existing surfaces exhibiting certain defects;
  - 5.2.28.14 Asphalt surfacing;
  - 5.2.28.15 Binder variations ;
  - 5.2.28.16 Repairing edge breaks in surfacing ;
  - 5.2.28.17 Cleaning cracks with compressed air and filling of cracks; and
  - 5.2.28.18 Installing humps on newly constructed roads (including signage, road marking and traffic accommodation)
- 5.2.29 The Bid Evaluation Committee member, Mr Jabulani Mkhonza, who was an Administration Officer with the Office of the Council Secretary forwarded a

requisition for ratification to the Municipal Manager, wherein it was submitted that on 7 March 2012 contract: A-IS (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure was awarded with the intention that four contractors per service delivery area and initial IPW's issued would be of equal value for all the contractors.

- 5.2.30 That the contractors were appointed based on estimated quantities.
- 5.2.31 The motivation for the requisition was based on the fact that the IPW's approved by the Bid Adjudication Committee were between R60 million - R67 million, respectively and all were issued before the contract expired.
- 5.2.32 Mr Mkhonza indicated that as the contractors were performing satisfactorily and constructed roads and storm water services at competitive rates, the Department took a resolution that the 2013/2014 financial year budget would be committed in order to address the backlogs.
- 5.2.33 That the Department could not afford to lag behind on departmental targets for the year, as a result the Department kept on issuing IPW's and did not take cognizance that the works issued were above the service providers' appointment.
- 5.2.34 Mr Mkhonza advised that in some instances, the Department did not provide the service providers with written instructions to contractors but issued Job cards instead.
- 5.2.35 On the motivation for the requisition for ratification, it was also indicated that a contributing factor to the over expenditure of the contract was that other departments were using the contract of the Department of Roads and Storm water and the irregularity was only discovered by the Department of Finance in February 2014.

- 5.2.36 Furthermore, Mr Mkhonza indicated on the abovementioned requisition that the Department had incurred costs due to continued work from 1 July 2013 until 13 November 2013, but that during 2014 submitted invoices were paid by the Municipality for settlement on capital and operating projects.

**Response to section 7(9) notice from the Municipal Manager, Dr Imogen Mashazi:**

- 5.2.37 On 2 July 2019, I issued a section 7(9) notice to the Municipality notifying them of my intended findings on this matter.
- 5.2.38 My office received an acknowledgment of receipt of the section 7(9) notice from Mr Behari, Divisional Head: Municipal Courts, By-law Enforcement Prosecutions and Compliance, and on 30 July 2019 the Divisional Head: Governance and Compliance, Mr Moshe Maphoru submitted a response on behalf of the Head of Department: Roads and Stormwater, Mr Sizwe Cele.

**Mr Sizwe Cele**

- 5.2.39 Mr Cele indicated that by their nature, the procurement of construction works are completely different from the normal procurement of professional services and goods, as goods or services procured may be exactly as per the rates offered by the bidder.
- 5.2.40 In construction services procurement, it is standard pricing practice to have the averaged estimated contract amounts of quantity rates and that is done with the sole purpose of giving room for unforeseeable circumstances which may either result with the actual expenditure at the end of the contract being more or less than the average estimated tendered rates.

5.2.41 He submitted that according to Regulation 36 (1)(a)(v) and (b) of the Municipal Finance Management Act (MFMA Regulations), provision is made for the Supply Chain Management Policy (Policy) to allow the accounting officer to dispense with the official procurement processes established by the Policy and to procure any required goods or services through any convenient process which may include direct negotiations, but only-

(i) ....;

(ii) ....;

(iii) .....

(iv) .....

(v) *In any other exceptional cases where it is impractical or impossible to follow the official procurement processes; and*

(b) *To ratify any minor breaches of the procurement process by an official or committee acting in terms of delegated powers or duties which are purely of a technical nature."*

5.2.42 Mr Cele indicated that in regard to contract number A-IS (RW) 03-2012, the Municipality was interdicted by Khumo ya Kgomotso (Khumo) for a longer period of time following a decision by the Bid Adjudication Committee (BAC) to unbundle the appointment to various contractors instead of Khumo alone.

5.2.43 He affirmed that a variation order was then prepared by the Department in order to enable the Municipality to continue with its mandate of providing services relating to the upgrading and construction of roads and storm water infrastructure pending the court decision.

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- 5.2.44 Mr Cele asserted that the deviations or variations approved by the Municipal Manager in terms of the regulation were acceptable, legal and in compliance with the MFMA: Municipal SCM Regulations.
- 5.2.45 Mr Cele submitted that the department disputes the submission of Mr Jabulani Mkhonza that there was no causal link between the expenditure incurred and work done by the contractors.
- 5.2.46 The department also disagreed that there were instances where contractors were given job cards without written instructions. Mr Cele indicated that job cards are only issued in repair and maintenance works and not the upgrading and construction of roads and storm water.
- 5.2.47 In so far as the upgrading and construction of roads and storm water, the department would issue a portion of the work to each contractor in the form of Instructions to Perform Works (IPW).
- 5.2.48 Mr Cele submitted that the IPW process was an internal control management mechanism aimed at mitigating the possible risks that may be associated with issuing of works equated to the entire appointment amount, and in this case he indicated that it would be difficult to withdraw the works to contractors performing poorly as the process of contract termination includes:
- (a) Giving the contractor notice to remedy the default within a specified time;
  - (b) Termination of contract if default is not remedied within the given time period, normally 14 days;
  - (c) Withdrawal of the issued IPW;
  - (d) Informing the SCM department about the termination; and

(e) Writing letters informing the contractor of the Municipality's intention to put its name on the National Treasury list of defaulters and allowing the contractor a time frame to respond as to why it should not be listed, etc.

5.2.49 Mr Cele further indicated that Mr Mkhonza had refuted having engaged with the Public Protector on any matter.

5.2.50 It was indicated that the department disagrees that the Municipality failed to ensure that there was compliance with the Constitution, MFMA and the SCM Policy in regards to the award of tender number A-IS (RW) 03-2012 for the repair, maintenance and rehabilitation of roads in Ekurhuleni.

5.2.51 Mr Cele submitted that the contract itself was for the upgrading and construction of roads and storm water infrastructure not for the repair, maintenance and rehabilitation of roads in Ekurhuleni.

5.2.52 He indicated that contract A-IS (RW) 03-2012 went through a competitive bidding process of three procurement committee approvals, recommendations and award by the municipal manager.

5.2.53 The competitive bidding process was aimed at ensuring that the construction work services were procured in a fair, transparent, competitive and cost effective manner.

5.2.54 The fact that tender adverts were placed in the Sowetan and Star newspapers, respectively, with a total number of seventy-five (75) bids received during the tender opening, going through the Bid Evaluation Committee (BEC) process and recommendations thereof, and subsequently the BAC recommendations and award/approval by the municipal manager proved that the Municipality complied with the appropriate applicable legal scripts.



- 5.2.55 Mr Cele further submitted that there was value for money in respect of contract A-IS (RW) 03-2012 as there were more construction works performed to the value of money spent.

Application of the relevant legal framework

- 5.2.56 Section 151(3) of the Constitution<sup>4</sup> provides that:

*“A municipality has a right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution”.*

- 5.2.57 The Municipality had an obligation to administer the contractual agreement for the repairing, maintaining and rehabilitating of roads in the Ekurhuleni area in a manner that showed initiative but which was in line with the national and provincial legislation as provided for by the Constitution.

- 5.2.58 Section 215 (1) of the Constitution provides that:

*“National, provincial and municipal budgets and budgetary processes must promote transparency, accountability and effective financial management of the economy, debt and public sector”.*

- 5.2.59 It is clear that under the circumstances, the Municipality failed to uphold its obligation in the promotion of accountability and effective management of the municipal budgets, in the manner that the total tender price was varied by way of obtaining tender tariffs which were outside the scope of the original tender.

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<sup>4</sup> The Constitution of the Republic of South Africa, 1996

5.2.60 Section 217(1) of the Constitution read section 111 of the Local Government: Municipal Finance Management<sup>5</sup> Act provides that:

*“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in the 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.”*

5.2.61 The contractual amounts for the awarded tender was not cost-effective in that the variation order with eighty (80) unspecified items at an additional cost of 60% amounted to over expenditure by the Municipality as other departments within the Municipality used the roads and storm water contracts, i.e. the variation order submitted by Seletje Construction and Management CC. It must be noted that IPW's were continuously issued despite the fact they were above the service providers' appointments and the Municipality continued to incur costs due to continued work from 1 July 2013 until 13 November 2013.

5.2.62 Section 62 of the Municipal Finance Management Act provides that the accounting officer of the municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure:

- “(1) (a) that the resources of the municipality are used effectively, efficiently and economically;*
- (b) ...;*
- (c) ...;*
- (d) that unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented.”*

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<sup>5</sup> Act 56 of 2003

- 5.2.63 Based on the above mentioned provision, it is clear that the Municipal Manager had an obligation to ensure that the resources of the Municipality were utilised effectively and that payments made to the contractors were not irregular in nature. The conduct of the Municipal Manager was contrary to the above provision that the Municipality allowed contractors to work without the requisite work instructions and IPW's were constantly issued to them.
- 5.2.64 Section 65(2) of the Municipal Financial Management Act provides that the accounting officer must for purposes 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) ...;*
  - (c) ...;*
  - (d) ...;*
  - (e) ...;*
  - (f) ...;*
  - (g) ...;*
  - (h) that the Municipality's available working capital is managed effectively and economically in terms of the prescribed cash management and investment framework; and*
  - (i) that the municipality's supply chain management policy referred to in section 111 is implemented in a way that is fair, equitable transparent, competitive and cost-effective...”*

- 5.2.65 The Municipality was obliged to ensure that there was an efficient and effective maintenance of an expenditure control system in regards to the awarded tender. That the management of the expenditure relating to the tender was economically viable in that the variations order exceeded the estimated budget.
- 5.2.66 Clause 22.20.2 of the SCM Policy provides that subject to subsection (2), the Municipality on its own initiative or upon receipt of an application from a person, body, organisation or corporation supplying goods or services to the Municipality in terms of this policy, may resolve to extend or vary a contract:

*“(2) The municipality may not extend or vary a contract:-*

*(a) ...;*

*(b) ...; or*

*(c) for an amount exceeding twenty [20] percent of the original bid value.”*

### Conclusion

- 5.2.67 Under the circumstances, it is clear that the Municipality failed to adhere to the prescripts entailed in its own SCM Policy in that the unspecified variation orders regarding to the IPW's were excessive and they resulted to the Municipality overspending. The Municipality varied the contract for the upgrading and construction of roads and storm water exceeding twenty percent (20%) of the original bid value.
- 5.2.68 It can be concluded that the Municipality varied the contract in excess of the prescribed twenty percent (20%), as there was over expenditure as a result of constant issuing of IPW's above the service providers' appointments. There was no causal link between the expenditure incurred and work done by the contractors as

per the submission of Mr Mkhonza that there were instances where contractors were given job cards without written instructions.

- 5.2.69 The Municipality failed to ensure that there was compliance with the Constitution, MFMA, and the SCM Policy in regards to the award of tender number A-IS (RW) 03-2012 for the repair, maintenance and rehabilitation of roads in Ekurhuleni.
- 5.2.70 The Municipality failed to ensure that the services procured under the awarded tender were cost-effective in nature as the expenditure which was ultimately incurred by the Municipality was exorbitant.
- 5.3 **Regarding whether there was an irregular escalation of the amount for tender number A-IS-(RW) 05-2012 without the approval of the former Municipal Manager, Mr Ngema.**

Common cause issues

- 5.3.1 On 29 July 2011 the Municipality issued tender number A-IS (RW) 05-2012 with notice or reference number PRN 04/2011 for repairing surfaces and the replacing of failed foundation layers of surfaced roads.
- 5.3.2 The tender was advertised in the Sowetan and the Star newspapers, respectively, and the closing date for submission of bids was 16 August 2011, which was on an "as and when" required basis with effect from the date of award until 30 June 2014.
- 5.3.3 According to the Bid Specification Committee meeting minutes dated 15 July 2011, it was resolved that the total estimated value of the contract is R 8 000 000.00 (including VAT) and will be awarded to one or more bidders per depot area.

5.3.4 According to the Bid Adjudication Committee meeting minutes dated 18 June 2012, it was indicated that all the bids that were submitted to the Municipality were submitted timeously before the closing date.

5.3.5 The tender was awarded by the Municipality to a total number of seven (7) contractors, namely:

No	Company
1.	Opal Project and Management CC
2.	Motha & Zondo Civil and Mining Construction CC
3.	GT Masilela Trading CC
4.	Puledi Engineering & Construction CC
5.	Matshelane Reboetswe JV
6.	Makgari Civil Projects CC
7.	Mokgotsi Construction CC

5.3.6 The estimated total value of the proposed contract was R 65 833 917.00 (excluding vat & escalations).

#### Issues in Dispute

5.3.7 The Complainant submitted that there was maladministration and tender irregularities by the Municipality in the awarding of tender number A-IS (RW) 05-2012 for repairing surfaces and the replacing of failed foundation layers on surfaced roads.

5.3.8 That the maximum tender value was R10 million and it was awarded without the approval of the former Municipal Manager, and the contractors were awarded more than R10 million.

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- 5.3.9 The Complainant also alleged that the contractors were awarded work which was more than the CIDB rating, for instance where the amount was a maximum R2 million it was increased to an amount of R14 million.
- 5.3.10 Further that Opal Projects rendered road marking services to the Municipality despite the fact that the scope of the tender excluded road marking services.
- 5.3.11 As per correspondence dated 17 May 2016 from Toekie Tieghl, Manager: Tender Office, the Municipality argued that there was no maladministration and tender irregularities in the awarding of tender number A-IS (RW) 05-2012.
- 5.3.12 Mr Tieghl submitted that the tender was procured via an open tender process and the companies were awarded the tender as per the Bid Adjudication Committee resolution and minutes dated 18 June 2012.
- 5.3.13 It was submitted by Mr Tieghl that all the successful bidders met the tender requirements as per the specifications set out in the tender document.
- 5.3.14 The briefing session minutes submitted by Mr Hanekom from the Roads and Storm water Department indicated that a compulsory information session was held by the Municipality on 11 August 2011, where potential bidders were informed about the exact nature of the work and the requirements for completing the bid documentation.

Mr Hanekom submitted an attendance register dated 24 August 2011 when a briefing session was held by the Municipality with the interested bidders at Kempton Park Civic Centre and it was chaired by Mr Mulder (Acting Regional Director: Roads and Storm water- Eastern Region) assisted by Mr P Du Plessis (Region Director: Northern Region) and Mr David Sadiki (Head of Roads: Kempton Park Head Quarters).

5.3.15 The minutes of the meeting dated 7 June 2012 held by the Bid Evaluation Committee indicated that it was resolved that Mr Ngema should make the final award in terms of paragraph 5(2)(a) of the Supply Chain Management Policy because the contract was deemed to be above R 10 million (VAT included).

5.3.16 Based on the recommendations of the Bid Evaluation Committee made on 7 June 2012, correspondence dated 19 June 2012 was forwarded to successful bidders who had obtained the highest procurement points and they were:

No.	Company	Estimated amount
1.	Opal Project and Management CC	R 14 736,250.00
2.	Motha & Zondo Civil and Mining Construction CC	R 14 770,150.00
3.	GT Masilela Trading CC	R 14 014,050.00
4.	Puledi Engineering & Construction CC	R 15 435,850.00
5.	Matshelane Reboetswe JV	R 15 432,404.00
6.	Makgari Civil Projects CC	R 15 270, 837.00
7.	Mokgotsi Construction CC	R 15 432,500.00
<b>Total</b>		<b>R 165 833, 017.00</b>

5.3.17 According to the Municipality, the recommendations of the Bid Evaluation Committee were to be submitted to Mr Ngema for approval of the award of the bid for contract A-IS (RW) 05-2012 as per the minutes dated 8 June 2012.

5.3.18 According the minutes of the Bid Adjudication Committee dated 18 June 2012, it was noted that the Municipality received a total number of forty-nine (49) bids for contract A-IS (RW) 05-2012.



5.3.19 The services to be rendered within the Municipality were for the following depot areas:

5.3.19.1 Kempton Park;

5.3.19.2 Tembisa;

5.3.19.3 Benoni;

5.3.19.4 Germiston;

5.3.19.5 Alberton;

5.3.19.6 Boksburg;

5.3.19.7 Vosloorus;

5.3.19.8 Springs;

5.3.19.9 Brakpan;

5.3.19.10 Edenvale; and

5.3.19.11 Nigel.

5.3.20 An undated document submitted by the Municipality to my office revealed that the scope of work for the tender included traffic accommodation, pothole repairs, handwork asphalt patching, handwork slurry seals and repair of edge breaks on roads for which the Municipality was responsible to service.

5.3.21 The undated document reflected the scope of work for the tender regarding the extent of works for pothole repairs included the following:

5.3.21.1 Cutting and shaping the edge of the pothole using jack hammers or picks;

5.3.21.2 Removal of spoil of the cut material;

5.3.21.3 Compacting the floor of the pothole;

5.3.21.4 Applying tack to the floor and sides of the pothole; and

- 5.3.21.5 Back filling with hot mix asphalt or, in the case of emergency repairs (or where specified by the depot manager), an approved cold mix asphalt and compacting specified.
- 5.3.22 The undated document reflected that in respect of the extent of works for the asphalt patching, the scope of work included the following:
  - 5.3.22.1 Cutting and breaking up the surface of the demarcated patch area using jack hammers or picks;
  - 5.3.22.2 Excavating the patch area by hand to the specified depth and removing of spoil;
  - 5.3.22.3 Cleaning and compacting the floor of the patch;
  - 5.3.22.4 Applying tack to the floor and viaseal water block or similar approved to the edges of the patch;
  - 5.3.22.5 Backfilling the patch;
  - 5.3.22.6 Painting the joints of the viaseal water block or similar approved product; and
  - 5.3.22.7 Special deep failure repairs.
- 5.3.23 The undated document entailing the scope of works reflected that there would be miscellaneous works with regards to the tender which would include the following:
  - 5.3.23.1 Construction of speed bumps;
  - 5.3.23.2 Installation of pre-fabricated rumble strips;
  - 5.3.23.3 Repair of edge breaks;
  - 5.3.23.4 Crack sealing as and where specified; and
  - 5.3.23.5 Road marking.
- 5.3.24 A report dated 27 January 2014 from the Bid Adjudication Committee was forwarded to Mr Ngema, wherein he was requested to ratify in terms of section 36(1) (b) of the Supply Chain Management Policy, the actions of Mr Mark Wilson, the Acting Head of Department: Roads and Storm water to retain the services of the contractors for contract A-IS (RW) 05-2012.
- 5.3.25 The following contractors were appointed by the Municipality and the expenditure incurred until 30 July 2013 were as follows:

No.	Company	Estimated Appointed amount (Excluding Vat)	Expenditure to date (Including VAT)	Depot
1.	Opal Project and Management CC	R 14 736,250.00	R 13 971 088.94	Kempton Park
2.	Motha & Zondo Civil and Mining Construction CC	R 14 770,150.00	R 9 163 950.85	Tembisa
	Motha & Zondo Civil and Mining Construction CC	R 14 770 150.00	R 10 000 000.00	Benoni
3.	GT Masilela Trading CC	R 14 014,050.00	R 8 767 495.84	Alberton
	GT Masilela Trading CC	R 15 088 300.00	R 8 756 790.06	Germiston
4.	Puledi Engineering & Construction CC	R 15 435,850.00	R 10 000 000.00	Brakpan
	Puledi Engineering & Construction CC	R 15 435,850.00	R 9 923 944.94	Springs
5.	Matshelane Reboetswe JV	R 15 447 040.00	R 9 938 559.44	Vosloorus
	Matshelane Reboetswe JV	R 15 432 040.00	R 8 769 046.79	Boksburg
6.	Mokgotsi Construction CC	R 15 432 500.00	R 9 926 542.86	Nigel
7.	Makgari Civil Projects CC	R 15 270 837.00	<b>Declined</b>	Edenvale

- 5.3.26 It was indicated in the memorandum for ratification that the intention of the Department of Roads and Storm water was to appoint local SMME's per depot as part of job creation initiative. That the seven contractors were appointed based on estimated quantities, however, Makgari Civil Projects CC declined the offer which left the Edenvale Depot without a contractor.
- 5.3.27 On the above mentioned memorandum, it was also indicated that at the time, the estimated value of the contract as submitted by the Department of Roads and Storm water to the Bid Specification Committee was R9.6 million (including VAT).
- 5.3.28 Due to an increase in the workload, non-award of the roads rehabilitation tender and the dire need for road maintenance, the Department of Roads and Storm water took a decision to cap the contract value to R 10 million per contractor.

- 5.3.29 According to the Bid Adjudication Committee minutes dated 27 January 2014, a meeting was convened with all the service providers whereby the monetary value of R10 million was conveyed and it was agreed that once all the contractors reached the set monetary cap, the contract would be stopped notwithstanding the fact that all contractors were appointed for an amount of more than R 10 million.
- 5.3.30 During May 2013, the Department of Roads and Storm water in the Municipality submitted a report to the Bid Specification Committee with the intention to advertise a new patching tender, but the Committee advised the department that cancellation of the existing contract might open the Municipality to litigation.
- 5.3.31 The request for ratification was approved by Mr Ngema on 4 February 2014, with the resolution that the award to Makgari Civil Construction CC be withdrawn with immediate effect as per the request contained in the above report.
- 5.3.32 Mr Ngema also approved the awarding of the contract to White Hazy Building Construction CC as it scored the seventh highest procurement points for contract A-IS(RW) 05-2012 at an average estimate contract amount of R 15 092 000.00 (excluding vat and escalation)
- 5.3.33 It should be noted that Ms Lindiwe Hleza: Head of Department: Internal Audit, submitted a report dated 12 November 2014 to Mr Ngema. The said report showed that there had been irregularities in all the major stages of contract number A-IS(RW) 05-2012 as follows:
- 5.3.34 The planning stage of the contract was irregular in that the Project Manager, Mr David Sadiki had estimated the contract cost for the eleven (11) depots to be R8 000 000.00, as he signed off the bid initiation application form which was approved by the then Acting Executive Director of the Department of Roads and Storm water, Mr Moses Maliba, on 23 June 2011;

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- 5.3.35 In the project management file of Mr Sadiki, two reports for the same contracts were discovered and one report was had the estimated value of the contract as R 100 000 000.00 (100 million rands) but there was no evidence that the report had been submitted to the Bid Specification Committee.
- 5.3.36 That the other report was also not submitted to the Bid Specification Committee and it had an estimated value of the contract as R 200 000 000. 00 (200 million rands).
- 5.3.37 The contract advertisement invited contractors with the CIDB ratings minimum of 2 CEPE, which is the second level of certification from the CIDB relating to contractors with limited or no relevant experience. As a result, such contractors would not be expected to be awarded contracts of this magnitude, judging from the CIDB grading, all seven (7) contractors should not have been awarded the contract;
- 5.3.38 The final award of the contracts to the contractors were not approved by Mr Ngema as was required by regulation 5(2)(a) of the Supply Chain Policy and the contractors were informed of their awards by letters from the tender office that were approved by former employees of the Department of Finance, Mr M Myeza and Mr I A Rautenbach;
- 5.3.39 Until the introduction of the new controls at the beginning of February 2014, the contract was not efficiently managed as there were no measures in place to control and plan for costs incurred or cost forecasting. It was noted that same would have impacted on the budget and vote spending management;
- 5.3.40 The following officials approved payments certificates where vote numbers that were not approved for the contract were used: Mr Callie Van der Merwe (Acting Regional Director), Mr Anthony Mulder (Divisional Head), Mr Ghume Strydom (Regional Director) and Mr Moeketsi Mohlabi (Regional Head);

- 5.3.41 The Municipality made payments for road markings to two contractors in the northern region for a total amount of R 1 519 500 85, even though the contract did not provide for road marking. The contractors also submitted claims for work performed on roads, despite the fact that the relative supporting documents for the claims were not reliable as street names were repeated and road markings were practically not verifiable;
- 5.3.42 The contractor's invoices exceeded their awarded contract value by a total amount of R 3 806 306.00, for instance it was noted that Opal Project and Management CC (Opal Project) was paid an amount of R 13 971 088.94 and its claims exceeded the contract amount by R3 806, 306.08 (R 20 605 31.08- R 16 799,325.00 including VAT) and payments made to the contractor by the Municipality were as follows:

Payment Certificate	Invoice No	Amount	Comments
1.	001N	R 1 067 081.07	Verified
1.	1	R 466 674.09	Verified
2.	2	R 1 368 005.62	Verified
3.	3	R 435 275.05	Verified
4.	4	R 501 682.92	Verified
5.	5	R 1 190 853.89	Verified
6.	006N	R 856 936.68	Verified
7.	007N	R 815 873.91	Verified
8.	008N	R 1 573 062.40	Verified
9.	009N	R 7 537 264.38	Verified
10.	010N	R 818 064.31	Verified
11.	011N	R 1 068 723.69	Verified
12.	012N	R 2 749 802. 85	Verified
13.	013N	R 156 330.22	Verified
<b>Total</b>		<b>R 20 605 631.08</b>	

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- 5.3.43 The Municipality had no control over the allocation of work and there was no verification on the accuracy and correctness of the work as documents only reached the depots after the work was done;
- 5.3.44 The setting of the estimated value of the contract at R8 000 000.00 by Mr Sadiki amounted to a misrepresentation of facts to the Municipality, in that he made it seem as if the contract would not be of significant value, whilst he knew that the value of the contract would have increased;
- 5.3.45 The BEC was negligent to recommend the awarding of the bid prices as they were, since there was an understanding that the contractors were not going to be permitted to spend the amounts on their bids. Therefore, the BEC resolution should have incorporated a disclaimer on the actual amounts being recommended for awarding;
- 5.3.46 The BAC failed to make amendments to Mr Sadiki's submission, in that it did not raise the issue of awarding enormous contracts to contractors with low CIDB grading, the vote numbers and budgets versus the bid prices;
- 5.3.47 The conduct of the BAC and the BEC exposed the Municipality to irregular expenditure, as a result it was recommended that the committees needed to be provided with regular training on aspects of regulatory framework governing evaluation and adjudication of bids; and
- 5.3.48 Further that there should be disciplinary action taken by the Municipality against all the officials who contravened the SCM Policy.
- 5.3.49 As per a letter from Mr Anthony Mulder dated 13 December 2017, the Municipality indicated that there were no variation orders for Instructions to Perform Works (IPW) issued under contract A-IS(RW) 05-2012.

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**Response to section 7(9) notice from the Municipal Manager, Mr Ayanda Makhanya:**

- 5.3.50 On 2 July 2019, I issued a section 7(9) notice to the Municipality notifying them of my intended findings on this matter.
- 5.3.51 My office received an acknowledgment of receipt of the section 7 (9) notice from Mr Behari (Divisional Head: Municipal Courts, By-law Enforcement Prosecutions and Compliance), and on 30 July 2019 the Divisional Head: Governance and Compliance, Mr Moshe Maphoru submitted a response on behalf of the Head of Department: Roads and Stormwater, Mr Sizwe Cele.

**Mr Sizwe Cele**

- 5.3.52 Mr Cele indicated that the department was reluctant to comment on the findings of the Head of Department: Internal Audit, Ms Lindiwe Hleza as per report dated 12 November 2014, in that the findings which affected the rights of employees alleged to have been involved in the maladministration were now subjected to the twin principles of natural justice, i.e. the rule against bias and the right to a fair hearing/hear the other side (*audi alteram partem*).
- 5.3.53 Mr Cele submitted that the department did not have any employee by the name of Mr Hanekom in all of its offices including the regions and the depots, as a result any of his submissions were illegitimate and cannot be relied on.
- 5.3.54 It was argued that a ratification was made in regards to contract A-IS (RW) 05-2012 by the Municipal Manager for a deviation or variation in terms of Regulation 36 of the MFMA: Municipal SCM Regulations. Therefore, the deviations from the



recommended BAC resolutions are legal and acceptable as long as they are ratified by the Municipal Manager.

- 5.3.55 Mr Cele indicated that it was incorrect that the Municipality was not in a position to rate the appointed contractors as they were not registered with the Construction Industry Development Board (CIDB), as it is a standard requirement on all roads and storm water construction and maintenance projects for the contractors to be registered with the CIDB and becomes part of the disqualifying criteria for appointment should the contractor fail to submit during the tender stage.
- 5.3.56 Mr Cele indicated that the two tenders A-IS(RW)03 -2012 and A-IS(RW)05-2012 were not interlinked as the former was for the upgrading and construction of roads and stormwater infrastructure and the latter was for the repairing of surface and replacing of failed foundation.
- 5.3.57 He submitted that the ratification item increasing the capping was made by the Municipal Manager and also affirmed that there was a variation order.
- 5.3.58 Mr Cele denied that Mr Ngema's authorisation for the increment of the tender estimates amount from R8 million to R10 million and above constituted improper conduct as envisaged in section 217 (1) of the Constitution. He indicated that the estimated contract amounts of quantity rates are a standard pricing practice in the construction services and they are done with the purpose of giving room for unforeseeable circumstances which may either result in actual expenditure at the end of the contract being more or less than the average estimated tendered rates.
- 5.3.59 He also highlighted that often, the average estimated tendered amount rates exclude VAT and Escalations, which might have a significant impact on the actual expenditure at the completion of the project(s).

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- 5.3.60 Mr Cele submitted that the variation of order in regards to tender A-IS(RW)05-2012 was not the departments' volition but an advice received from the Bid Specification Committee (BSC) with the aim of avoiding possible court litigation against the Municipality.
- 5.3.61 Mr Cele indicated that it was a standard requirement on all roads and storm water construction and maintenance projects for the contractors to be registered with the CIDB when tendering for the CIDB grading. That the CIDB grading increases every year and as and when the registered contractor do work and the tender was deliberately intended for a development programme to upgrade the emerging SMME contractors.
- 5.3.62 Mr Cele contended that the allegations that there was failure by the Municipality to conduct CIDB grading verification process and consequently ensure that the appointed contractors had capacity to handle the scope of work was unfounded and rebutted to the fact that there was improper conduct in terms of sections 16 and 16 (2) of the CIDB Act.
- 5.3.63 The actions of Messrs Mulder, van der Merwe, Mohlabi and Strydom in relation to Opal Project payments exceeding the amount of R10 million were made in line with the ratified deviation acceptable in terms of Regulation 36 of the MFMA: SCM Regulations. Therefore it was argued that the conduct of the officials were in compliance with the MFMA and did not constitute improper conduct in terms of section 15 of the Municipal Systems Act.
- 5.3.64 Furthermore, it was Mr Cele's contention that annual financial statements together with all the other required documentation (including the revised CIDB grading) pertaining to a contract of R 10 million and above were submitted during ratification.

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Application of the relevant legal framework

- 5.3.65 Section 217 of the Constitution read together with section 111 of the Local Government: Municipal Finance Management Act provides that:

*“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in the 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”.*

- 5.3.66 Accordingly, the Municipality had the onus of ensuring that the contract for services relating to contract A-IS (RW) 05-2012 was awarded in accordance to a system which is fair, equitable, transparent, competitive and cost effective. Therefore the escalation of the contract estimates to an amount of R10 million was not cost-effective under the circumstances.

- 5.3.67 Regulation 21(1) (a) (iii) of the Supply Chain Management Policy of the Municipality stipulates that:

*“the requirements of the CIDB should be considered when dealing with bids that involve construction.”*

- 5.3.68 The Municipality failed to comply with its Supply Chain Management policy, in that according to the CIDB requirements registration of contractors was not considered when it dealt with the bids even though the contract was in respect to construction.

- 5.3.69 Section 18 (1) of the Construction Industry Development Board Act<sup>6</sup> (CIDB Act)states that:

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<sup>6</sup> Act No. 38 of 2000

*“A contractor may not undertake, carry out or complete any construction works or portion thereof for public sector contracts, awarded in terms of competitive tender or quotation, unless he or she is registered with the Board and holds a valid registration certificate issued by the Board”.*

5.3.70 According to the above mentioned provision entailed in the CIDB Act, it is mandatory that contractors who are awarded a tender by the Municipality should be registered with the CIDB in order to be rated, but based on the internal report compiled by Ms Hleza all of the appointed contractors should not have been awarded the contract as the highest of the 7 contractors could have only been awarded a contract amount up to R 13 000 000.00.

5.3.71 The evidence obtained showed that the successful bidders for the tender were not registered with the CIDB, thus as a result the Municipality could not rate the contractors.

5.3.72 Section 16 of the Construction Industry Development Board Act <sup>7</sup>(CIDB Act) provides that:

*“(1) The Board must, within the first three years of its establishment, establish a national register of contractors, which categorises contractors in a manner that facilitates public sector procurement and promotes contractor development.”*

5.3.73 Based on the provision entailed in subsection 1 of CIDB Act the Municipality had an obligation to verify information of the elected contractors for the tender versus the database of the register that would be in the possession of the Board in order to

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<sup>7</sup> Construction Industry Development Board Act 38 of 2000

ensure that there was facilitation of public sector procurement and promotion of contractor development.

5.3.74 Section 16(2) of the CIDB Act stipulates that the register of contractors must—

- “a) indicate the size and distribution of contractors operating within the construction industry;*
- b) indicate the volume, nature and performance of contractors and target groups; and*
- c) enable access by the private sector and thus facilitate private sector 5 procurement.”*

5.3.75 The failure by the Municipality to adhere to the principles entailed in the CIDB Act resulted in the Municipality failing to ensure that the contract was awarded to service providers who were capable to handle the capacity of work required for the job in relation to the scope of work.

5.3.76 Section 15 of the Municipal Finance Management Act provides that the Municipality may, except where otherwise provided in this Act, incur expenditure only\_

*“(a) in terms of the approved budget; and*

*(b) within the limits of the amount appropriated from the different votes in an approved budget.”*

5.3.77 In this case the Municipality did not ensure that Mr Van Der Merwe, Mr Anthony Mulder, Mr Mohlabi and Mr Strydom who were in its employ did not incur expenditure within the reasonable limitations of the approved budget of R10

million as Opal Construction CC was paid an amount of R 13 971 088.94 for services rendered.

5.3.78 Therefore the Municipality did not adhere to the regulation of the Supply Chain Management Policy as it omitted to ensure that the registration levels of the CIDB were taken into consideration during the evaluation process.

5.3.79 Clause 21(1) (d) of the Supply Chain Management Policy states that:

*“where bid prices are above R10 000 000 (ten million rands) the bidders should submit annual financial statements and among other documentations, particulars of contracts from other state organs in the last past five years.”*

5.3.80 It follows that in this case the Municipality did not comply with the provision entailed in the Supply Chain Management Policy as such documentation was not solicited from the bidders despite the fact that the contract amount was above R10 000 000.00.

#### Conclusion

5.3.81 The Municipality escalated the initial tender value amount of R10 million when Opal Project and Management CC was paid a total amount R 13 971 088.94 for services rendered at Kempton Park depot which was contrary to the BAC resolution that each depot would be entitled to a payment amount of R8 000 000.00 (including VAT).

5.3.82 The Municipality was not in the position to rate the appointed contractors as they were not registered with the CIDB.

- 5.3.83 Inference can be drawn that there was a discrepancy in tender number A-IS (RW) 03 -2012 and A-IS (RW) 05-2012 for the construction and maintenance as the scope of work was interlinked.
- 5.3.84 A further inference could be drawn that there was an increase in the total amount of the tender number A-IS (RW) 05-2012 because the total amount paid by the Municipality for services rendered by Opal Construction CC was exorbitant as the payments made amounted to R 13 971 088.94.
- 5.4 **Regarding whether the conduct of the the Ekurhuleni Metropolitan Municipality prejudiced the ratepayers of the Municipality, Complainant and any other party in the circumstances**

5.4.1 **Regarding the appointment of Mr Anthony Mulder**

Common cause issues

- 5.4.1.1 During November 2012 the Municipality issued an internal and external advertisement for the vacant post of Divisional Head: Maintenance, Roads and Storm water Department in the Sunday Times newspaper.
- 5.4.1.2 Mr Anthony Mulder was appointed by the Municipality as the successful candidate despite the fact that he was not registered with ECSA as per the advertisement.

Issues in Dispute

- 5.4.1.3 The Complainant submitted that the appointment of Mr Mulder by the Municipality resulted into prejudice to other applicants as he did not meet all the requirements of the job as per the advertisement in that he was not registered with ECSA.

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- 5.4.1.4 It was also argued that the Municipality offered the successful candidate the job despite the fact that he had not applied for the vacant position.
- 5.4.1.5 The Municipality submitted that the appointment of Mr Mulder did not result into prejudice to other applicants as proper recruitment processes and procedures were adhered to during the appointment of the successful candidate.
- 5.4.1.6 The Municipality indicated that Mr Mulder was interviewed eight months later after the other candidates were interviewed as it was a headhunting process which was managed by an agency.
- 5.4.1.7 The Municipality argued that it was common practice that during headhunting an agency would request a prospective applicant to submit his or her Curriculum Vitae.
- 5.4.1.8 Evidence submitted to my office showed that the Municipality only received the CV of Mr Mulder on 12 July 2013 whilst the closing date on the advertisement was 23 November 2012.

**Response to section 7(9) notice from the Municipal Manager, Mr Ayanda Makhanya:**

- 5.4.1.9 On 2 July 2019, I issued a section 7(9) notice to the Municipality notifying them of my intended findings on this matter.
- 5.4.1.10 My office received an acknowledgment of receipt of the section 7 (9) notice from Mr Behari, Divisional Head: Municipal Courts, By-law Enforcement Prosecutions and Compliance, and on 30 July 2019 the Divisional Head: Governance and Compliance, Mr Moshe Maphoru submitted a response on behalf of the Head of Department: Roads and Storm water, Mr Sizwe Cele.



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**Mr Sizwe Cele**

- 5.4.1.11 Mr Cele submitted that contract number A-IS (RW)05-2012 was initially meant for contract development aimed at capacitating the local SMME's, however, the backlog grew as a result of the road rehabilitation tender non-award.
- 5.4.1.12 Mr Cele indicated that due to a massive backlog and an advice from the BSC to avoid exposing the Municipality to a risk of court litigations, the Department obtained a ratification from the accounting officer to use the SMME contractors as their CIDB grading kept on increasing as and when they were doing construction works for the Municipality.
- 5.4.1.13 Mr Cele asserted that the approval of the Municipal Manager could not be equated to improper conduct in terms of section 2 of the Constitution, sections 62, 78 (1) and 173 (3) of the MFMA.
- 5.4.1.14 Furthermore, he submitted that in terms of the MFMA, three independent procurement committees are aimed at ensuring accountability to the National Treasury on the financial management of the Municipality, therefore the contractors were appointed in an open tender bidding process that was fair, transparent, competitive and cost-effective in so far as the estimated quantity rates or prices were concerned.
- 5.4.1.15 All the work done was verified and confirmed during payments and as such rebutted the issue of cost effectiveness on municipal finances.

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Applicable legislative framework

5.4.1.16 Section 195(1) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- “(a) A high standard of professional ethics must be promoted and maintained;*
- (b) .....;*
- (c) .....;*
- (d) .....;*
- (e) .....;*
- (f) Public administration must be accountable;*
- (g) .....;*
- (h) Good human resource management and career development practices, to maximize human potential, must be cultivated.*
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectiveness, fairness, and the need to redress the imbalances of the past to achieve broad representation.”*

5.4.1.17 Based on the abovementioned provision it follows that there was a responsibility on the Municipality to ensure that the recruitment and selection process for the Divisional Head for Roads and Storm water was conducted in a manner that showed that there was good human resource management which aimed at career development practices to maximise human potential was reached.

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- 5.4.1.18 The fact that the Municipality appointed Mr Mulder was contrary to the spirit and purport of the abovementioned provision in that he was shortlisted, interviewed and offered a position by the Municipality despite the fact that his name was not on the consolidated list of prospective applicants.
- 5.4.1.19 Therefore the Municipality did not have any legitimate reason to shortlist Mr Mulder for the vacant position and as a result, it failed to ensure that its administration was accountable and that a high standard of professional ethics was promoted and maintained.
- 5.4.1.20 The appointment of Mr Mulder by the Municipality was flawed in that he was only interviewed eight months after the other job applicants were interviewed. It is clear that the shortlisted and interviewed applicants had a legitimate expectation that the decision to grant employment by the Municipality to any of the candidates would be procedurally fair.
- 5.4.1.21 The Municipality did not provide any evidence indicating why they could not appoint any of the applicants who were interviewed during the initial selection process. The Municipality further did not substantiate the need for “headhunting”, which resulted in Mr Mulder’s appointment, eight months after the other candidates were interviewed.
- 5.4.1.22 Therefore the conduct of the Municipality resulted in the prejudice to the other applicants who had been interviewed eight months earlier as indicated in the above provision, Mr Mulder was not invited for an interview at least five working days before or at least around the same time as the other applicants.
- 5.4.1.23 Paragraph 8.3 of the Recruitment Policy provides that:

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*“A person shall be appointed in the council’s service if he/she complies with the qualification and proficiency requirements as per the job description”.*

5.4.1.24 The appointment of Mr Mulder was contrary to the Municipality's Recruitment Policy in that his application was considered by the shortlisting panel despite the fact that he was not included on the consolidated list of applicants who applied for the post thereby resulting in the prejudice of the other applicants who had responded to the advert on time.

5.4.1.25 The Municipal Finance Management Act (MFMA)<sup>8</sup> has in section 2 the object to secure sound and sustainable management of the fiscal and financial affairs of municipalities, standards and other requirements for:

*“(a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities.”*

5.4.1.26 It follows that the employment benefits like the remuneration that was afforded to Mr Mulder when he was appointed as the Divisional Head: Roads and Storm water, may have been contrary to section 2 of the MFMA as it resulted in the Municipality suffering prejudice financially due to the failure to secure a sound and sustainable management of its fiscal and financial affairs.

5.4.1.27 Section 65 (1) of the MFMA provides that :

*“the accounting officer of a municipality is responsible for the management of expenditure of the municipality.”*

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<sup>8</sup> Act 56 of 2003.

5.4.1.28 It is therefore evident from the above provision that the Municipal Manager had the responsibility to ensure that a suitable candidate was appointed by the Municipality as any employment benefits including the salary would be an expenditure of the Municipality.

5.4.1.29 Section 65 (2) of the MFMA also provides that the accounting officer must for purpose of subsection (1) take reasonable steps to ensure :

- “(a) ....;
- (b) ....;
- (c) ....;
- (d) *that payments by the municipality are made-*
- (i) *directly to the person to whom is due unless agreed otherwise for reasons as may be prescribed”.*

5.4.1.30 Section 62 (1) of the MFMA provides that the accounting officer is responsible for managing the financial administration of the municipality and must for this purpose take all reasonable steps to ensure-

- “(a) ....;
- (b) ....;
- (c) ....;
- (d) *that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented; and*
- (e) *that disciplinary or, when appropriate , criminal proceedings against any official of the municipality who has allegedly committed an act of financial misconduct or an offence in terms of Chapter 15.”*

5.4.1.31 It follows from the above that the Municipal Manager had the responsibility to ensure that the correct and suitable candidate was appointed in terms of the prescribed Municipal and MFMA processes.

#### Conclusion

5.4.1.32 Based on the information extrapolated it was established that the appointment of Mr Mulder by the Municipality resulted in prejudice to other applicants in that qualifying candidates were not given a fair opportunity to be considered for appointment. The Municipality could not advance any compelling reasons why Mr Mulder was deemed the best suitable candidate for appointment even though he did meet the minimum requirement for the position i.e. registration with ECSA.

5.4.1.33 The Municipal Manager had the responsibility to ensure that the correct and suitable candidate was appointed in terms of the prescribed Municipal and MFMA provisions.

5.4.2 **Regarding the awarding of tender numbers A-IS (RW) 03- 2012 and 05-2012:**

#### Common Cause issues

5.4.2.1 On 29 July 2011 and 12 August 2011, respectively, the Municipality issued tenders with contract numbers A-IS (RW) 05-2012 and 03-2012 in the Sowetan and the Star newspapers, respectively.

5.4.2.2 Tender number A-IS (RW) 03-2012 was for the upgrading and constructions of roads and storm water infrastructure on an as and when basis, with effect from the date of the award until 31 December 2013.

- 5.4.2.3 Tender number A-IS (RW) 05-2012 was for repairing surfaces and the replacing of failed foundation layers of surfaced roads on an as and when required basis with effect from the date of award until 30 June 2014.
- 5.4.2.4 The Municipality awarded tender number 03-2012 to twelve (12) contractors for the upgrading and construction of roads and storm water infrastructure.
- 5.4.2.5 The Municipality awarded tender number 05-2012 to seven (7) contractors for repairing surfaces and the replacing of failed foundation layers on surfaced roads.

Issues in dispute

- 5.4.2.6 The Complainant submitted that the awarding of tender numbers A-IS(RW)03-2012 and A-IS(RW)05-2015 resulted in the prejudice to other bidders and the Municipality as a result of variations orders, and excessive increment of the total tender amounts to a maximum of R10 million.
- 5.4.2.7 The Municipality argued that as there was no maladministration and tender irregularities in the award of the tenders, there was no prejudice that was suffered by other bidders and the Municipality.

Applicable legislative framework

- 5.4.2.8 Section 217 (1) 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 the national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent and cost effective”.*

5.4.2.9 In as much as the Municipality decided not to re-advertise tender number A-IS(RW)05-2012 with the objective of averting litigation, the fact that it was not re-advertised due to the increment in the tender amount resulted in the prejudice to prospective bidders who would have had the capacity and the interest to bid.

5.4.2.10 The scope of the work for the tender number A-IS(RW) 03 -2012 and A-IS(RW) 05-2012 were more or less similar in nature therefore the tenders were neither fair or cost effective in nature as prescribed by section 217 of the Constitution.

5.4.2.11 Section 2 of the Constitution stipulates 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”.*

5.4.2.12 Under the circumstances, it is clear during the awards of tender number A-IS (RW) 03-2012 and A-IS (RW) 05-2012 respectively, the Municipality’s conduct was inconsistent with the prescripts of the Constitution as it failed to ensure that obligations placed upon it with regards to adequate management of the financial aspects in the Municipality were effective and efficient.

5.4.2.13 As a result, the award of the tenders to the appointed contractors was irregular in that there were excessive amounts paid for services rendered. The contractors did not have the capacity to carry out the scope of work allocated to them as per the CIDB grading and the Municipality could not rate the contractors as they were not registered with the CIDB.

5.4.2.14 It is clear that the variation orders that were ratified by the Municipality exposed it to financial prejudice as there were no mitigating factors taken into account.



5.4.2.15 Section 62 (1) of the MFMA maps out guidelines with regard to the municipality's financial management functions and provides that the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps:

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

5.4.2.16 The Municipality failed to maintain the Municipality's financial management functions by way of effective, efficient and transparent systems that would have mitigated the financial and risk losses incurred therein by awarding tenders to contractors who were not registered with the CIDB, variation of orders and the escalation of the total tender amount in regards to tender number A-IS (RW) 03-2012 and A-IS (RW) 05-2012.

5.4.2.17 Section 78 (1) of the MFMA provides amongst other things that each senior manager of a municipality and each official of a municipality exercising financial management

responsibilities must take all reasonable steps within their respective areas of responsibility:

- “(a) that the system of financial management and internal control established for the municipality is carried out diligently;*
- (b) that the financial and other resources of the municipality are utilised effectively, efficiently, economically and transparently;*
- (c) that any unauthorised, irregular or fruitless and wasteful expenditure and any other losses are prevented”.*

5.4.2.18 In this case, it is evident that the senior managers who were involved in the awarding of tender number A-IS (RW) 03-2012 and A-IS (RW) 05-2012 had a responsibility to take all the reasonable steps within their respective areas of responsibility to ensure that the Municipality's financial and other resources were utilised effectively, efficiently and economically. Therefore their involvement in the recommendation and award of the abovementioned tenders subjected the taxpayers of the Municipality to suffer prejudice in that there was irregular or fruitless and wasteful expenditure as a result of the variation order and the increment in the total tender amount.

5.4.2.19 Section 173 (3) of the MFMA provides that-

*“A senior manager or other official of a municipality or municipal entity exercising financial management responsibilities and to whom a power or duty was delegated in terms of section 79 or 106, is guilty of an offence if that senior manager or official, deliberately or in a grossly negligent way contravenes or fails to comply with a condition of the delegation”.*

5.4.2.20 As evidenced in section 62(d) of the MFMA, accounting officers and officials of the municipality are required to take effective and appropriate steps to prevent any

irregular or wasteful expenditure, amongst others. Irregular expenditure in relation to a municipality means expenditure incurred by a municipality or municipal entity in contravention of, or that is not in accordance with the requirements of the MFMA and MSA respectively. Therefore it is clear that the expenditure incurred herein by the Municipality was not condoned by the legislative framework above mentioned.

### Conclusion

- 5.4.2.21 It was also established that the award of tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012 resulted in prejudice to other bidders as the tender processes were not adhered to the letter in that the procedure utilised was not cost effective or fair as expected in sections 62 (1), section 78 (1), section 173 (3) of the Municipal Finance Management Act and section 217 of the Constitution.

## **6 FINDINGS**

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I now make the following findings:

- 6.1. Regarding whether the Municipality irregularly appointed Mr Mulder to a position of Divisional Head: Maintenance without following its recruitment and selection policy**
- 6.1.1. The allegation that proper recruitment processes were not followed in the appointment of Mr Anthony Mulder as the Divisional Head: Maintenance in that the shortlisting and interview panel members namely, Ms Gumbi, Ms Mbali Makara and Dr Imogen Mashazi shortlisted Mr Mulder even though he did not meet the requirements and allowed Mr Mulder to be interviewed eight months after the initial interviews were held, is substantiated.

- 6.1.2. The former Municipal Manager, Mr Ngema, approved the appointment of Mr Mulder notwithstanding fact that Mr Mulder was not registered with the Engineering Council of South Africa (ECSA) as required by the job advertisement. Such conduct was not in line with the dictates of section 56 of the Municipal Systems Act, Paragraphs 1, 3, 5 and 7.1 of the Municipality's Recruitment and Selection Policy.
- 6.1.3. All the applications received and considered for the vacant position of Divisional Head: Maintenance were not submitted on the prescribed official application form. Such conduct by the Municipality was at odds with the provisions of Clause 12 of the Municipal Systems Regulations, which provides that *applications for a vacant post must be submitted on an official application form as set out in Annexure A and that any application not made on the official form shall not be considered*".
- 6.1.4. Accordingly, the appointment of Mr Mulder was irregular and amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.
- 6.2. Regarding whether the Municipality irregularly awarded tender number A-IS (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure**
- 6.2.1. The allegation that the Municipality irregularly awarded tender number A-IS (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure, is substantiated.
- 6.2.2. The former Municipal Manager, Mr Ngema, and the Chairperson of the Bid Adjudication Committee, Mr Myeza, who had the delegated authority to make the final award of the tender, failed to ensure that the goods and services procured in

relation to tender number A-IS (RW) 03-2012 were acquired in a fair, transparent, competitive and cost-effective manner, in that there were instances where service providers were issued Instructions to Perform Work (IPWs) without taking heed of instances where capacity to perform services was above the competency of appointed service providers. Such conduct amounted to the violation of section 217(1) of the Constitution and section 111 of the Local Government: Municipal Finance Management Act.

6.2.3. Mr Ngema and Mr Myeza failed to execute their responsibilities diligently, as the management of tender number A-IS (RW) 03-2012 was not efficient or effective in that there was an over expenditure on the contract and that resulted in an approval of a ratification regarding costs incurred due to continued work as from 1 July 2013 to 13 November 2013. It follows that such conduct was contrary to the provisions of section 217(1) of the Constitution.

6.2.4. Accordingly, the conduct of Mr Ngema and Mr Myeza amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.3. **Regarding whether there was an irregular escalation of the amount for tender number A-IS-(RW) 05-2012 without the approval of the former Municipal Manager, Mr Ngema, and without following the Municipal Finance Management Act prescripts**

6.3.1. The allegation that there was an irregular escalation of the tender amount for tender number A-IS-(RW) 05-2012 without the approval of Mr Ngema, who (as the Municipal Manager) was authorised to issue the final award of the tender and without following section 62 of the Municipal Finance Management Act perform work, is substantiated, as payments were made to contractors to perform work even though they had not been given any instructions to do so.

- 6.3.2. The increment of the tender estimate amount from R8 million to a total amount of R10 million without the authorisation of Mr Ngema as the accounting officer of the Municipality was unlawful. Mr Ngema failed to ensure that there was re-advertisement of tender number A-IS (RW) 05-2012. Such conduct was not in line with the dictates of section 217(1) of the Constitution which demands 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.
- 6.3.3. Mr Ngema did not ensure that appointed contractors complied with the Construction Industry Development Board Act (CIDB Act ) grading and that they qualified for the tender if the monetary cap of the contract value was R 13 000 000.00. This conduct was not in keeping with Regulation 21 (1) (a) (iii) of the SCM policy and section 18 (1) of the CIDB Act, 38 of 2000.
- 6.3.4. Mr Ngema failed to ensure that a verification process was conducted in respect of the bidders in order to ensure that their rating was properly conducted. Such conduct was clearly not consistent with section 16 of the CIDB Act.
- 6.3.5. Mr Ngema failed to ensure that the appointed contractors had the capacity to handle the scope of work in respect of the tender contract. Such conduct is irreconcilable with section 16(2) of the CIDB Act.
- 6.3.6. The payments made to Opal Project which exceeded the amount of R10 million by Mr Mulder, Mr van der Merwe, Mr Mohlabi and Mr Strydom who were all deployed in the Department of Roads and Storm water, was not justifiable and such conduct, violated section 15 of the Municipal Systems Act.
- 6.3.7. The failure by Mr Ngema as the accounting officer of the Municipality, Mr Myeza: who was appointed as the Chief Executive Officer and acted as the Chairperson

of the Bid Adjudication Committee and Mr Rautenbach who was an employee in the Finance Department and was deployed in the Department of Roads and Storm water, to ensure that the appointed contractors submitted their financial annual statements in respect of the tender amount that was R10 million, was in violation of clause 21 (1)(d) of the SCM policy.

6.3.8. Accordingly, the conduct of Mr Ngema, Mr van der Merwe: Acting Regional Director: Department of Roads and Storm Water, Mr Mohlabi: Divisional Head: Department of Roads and Storm Water, Mr Strydom: Regional Director: Department of Roads and Storm Water, Mr Myeza and Mr Rautenbach who were deployed in the Department of Roads and Storm water, amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act

**6.4. Regarding whether the appointment of Mr Mulder and the issuing of the tender numbers A-IS (RW) 03-2012 and A-IS (RW) 05-2012 prejudiced the Complainant, and the taxpayers of the Municipality or any other party.**

6.4.1. Mr Ngema failed to conduct his duties as an accounting officer diligently when he approved the appointment of Mr Mulder even though he did not qualify for the position, he did not apply and was also not registered with ECSA as per the job advertisement.

6.4.2. The decision by Mr Ngema to appoint Mr Mulder and afford him all the employee benefits was unjustifiable in that such conduct exposed the complainant and other applicants to prejudice in that they were excluded from a fair opportunity to compete for the vacant position and or provide their skills and experience to the Municipality.

- 6.4.3. Mr Ngema failed to re-advertise tender number A-IS (RW) 05-2012 when there was an increase in the total tender amount, as a result the Municipality could not ensure that there was adequate management of its finances in a manner that was cost effective and efficient when tender number A-IS (RW) 03-2012 and A-IS (RW) 05-2012 were awarded to appointed contractors. The conduct of the Municipality in the circumstances resulted in violation of the section 195 of Constitution, sections 62, 78, and 173 of MFMA. Mr Ngema has since left and is no longer in the employ of the Municipality.
- 6.4.4. Based on the above, the conduct by Mr Ngema, Mr van der Merwe, Mr Mohlabi, Mr Strydom, Mr Myeza and Mr Rautenbach amounts to improper conduct in terms 182(1)(a) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

## **7. REMEDIAL ACTION**

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

**The Municipal Manager, Dr Imogen Mashazi must ensure that:**

- 7.1 Within sixty (60) working days from the date of this report, disclose the all irregular expenditure to the Council, Treasury and Auditor General incurred by Municipality in connection with the irregular appointment of Mr Mulder to the position of a Divisional Head Maintenance.
- 7.2. Within 60 working days from the date of this report ensure that the Recruitment and Selection Policy of the Municipality is amended to provide for clarity and clear policy direction on the head-hunting process within the Municipality.



- 7.3. Disciplinary processes are instituted against Ms Lerato Gumbi and Ms Mbali Makara within 60 working days from the date of this report, as envisaged in section 67 (1) (h) of schedule 2 of the Code of conduct of municipal staff members for allowing Mr Mulder to be interviewed after a period of eight months without adhering to proper recruitment and selection processes of the Municipality. However, Dr Mashazi should not be part of the disciplinary proceedings herself since she was a panel member of the interview herself.
- 7.4. Within sixty (60) working days from the date of this report, She initiates a judicial review process as prescribed in terms of sections 6 and 7 of the PAJA to set aside the appointment of Mr Mulder on the basis that he was irregularly appointed on the position which he did not meet the inherent requirements of the position as per the job advertisement.

**The Speaker of Council: Cllr Patricia Khumalo must ensure that:**

- 7.5. Disciplinary processes as envisaged in section 67 (1) (h) of schedule 2 of the Code of conduct of municipal staff members are instituted against Dr I Mashazi within 60 working days from the date of this report for allowing Mr Mulder to be interviewed after a period of eight months without adhering to proper recruitment and selection processes of the Municipality. According to the schedule 2 of the Code of conduct of municipal staff members, Dr I Mashazi acted contrary to section 2 (d) as she failed to act in the best interest of the Municipality during the appointment of Mr Mulder and such conduct compromised the credibility and integrity of the Municipality.
- 7.6. Disciplinary processes as envisaged in section 67 (1) (h) of schedule 2 of the Code of conduct of municipal staff members, are instituted against Mr Myeza

for the final award of tender number A-IS (RW) 03-2012 for the upgrading and construction of roads and storm water infrastructure, without adhering to procurement processes as provided for in the MFMA.

- 7.7. Disciplinary processes as envisaged in section 67 (1) (h) of schedule 2 of the Code of conduct of municipal staff members, are instituted against Mr Mulder, Mr van der Merwe, Mr Mohlabi, Mr Strydom, Mr Myeza and Mr Rautenbach for issuing appointment letters and making payments to contractors regarding tender number A-IS (RW) 05-2012 which was not approved by the former Municipal Manager: Mr Ngema.

## **8. MONITORING**

- 8.1 The Municipal Manager must submit a progress report comprising of the enforcement of the abovementioned remedial actions to my office within 30 working days from the date of receipt of this report indicating how the remedial action referred to in paragraph 7 above were 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 Head of the Department, unless they obtain an *Interim Interdict* or *Court Order* directing otherwise.

  
ADV. BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA  
DATE: 16/09/2019